FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

EQUIFAX INC. (FORMERLY RETAIL CREDIT CO.)

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

Docket 8920. Final Order, July 7, 1978—Dismissal Order, July 14, 1981*

On remand from the U.S. Court of Appeals, Ninth Circuit, this order dismisses the March 9, 1978 complaint against a collector and seller of consumer credit information. The Commission concluded that further proceedings would not be in the public interest.

Appearances

For the Commission: *Joseph S. Brownman.*

For the respondent: *J. Wallace Adair* and *Francis A. O'Brien, Howrey & Simon,* Washington, D.C.

FINAL ORDER

This matter having been remanded to the Commission by the United States Court of Appeals for the Ninth Circuit, and the Commission having concluded that further proceedings would not be in the public interest,

It is ordered, That the complaint be dismissed.

By the Commission. Commissioner Dixon dissented.

* Complaint, Initial Decision, Opinion of the Commission and Final Order originally published at 92 F.T.C. 1.

IN THE MATTER OF

INTERNATIONAL HARVESTER COMPANY

Docket 9147. Interlocutory Order, July 15, 1981

ORDER DENYING MOTION FOR STAY

On June 25, 1981, Administrative Law Judge Mathias certified to the Commission the question whether further proceedings in this matter are in the public interest.

On June 30, 1981, Judge Mathias refused respondent International Harvester Company's ("IH") request for a stay of further proceedings pending a Commission ruling on the certified question. On July 2, 1981, IH filed a motion for a stay with the Commission pursuant to Section 3.23(c) of the Commission's Rules of Practice. Complaint counsel opposed the motion for a stay in an answer filed on July 7, 1981. On July 9, 1981, IH moved for leave to file, and submitted, a reply memorandum to complaint counsel's answer. IH's reply memorandum is accepted. Because the active pretrial schedule begins on July 13, 1981, IH asks that the Commission grant a stay at the earliest possible time in order to avoid potentially unnecessary costs of litigation.

Section 3.23(c) of the Commission's Rules of Practice provides that an application for review and appeal shall not stay proceedings unless the ALJ or the Commission shall so order. This provision presumes that proceedings will continue unless a stay is appropriate in the opinion of the ALJ or the Commission. An important purpose of this provision is to facilitate discovery and trial with a minimum of interruption due to interlocutory issues that may arise. Generally speaking, the public interest in expeditious disposition of adjudicatory matters disfavors interlocutory suspensions of proceedings except in extraordinary circumstances. In addition, responsibility for resolving procedural questions of this type in adjudicatory matters generally has been left by the Commission to the sound discretion of the administrative law judges. The Commission does not lightly disturb their rulings on the course and conduct of the proceedings over which they preside.

IH argues that Judge Mathias' order places in serious issue whether this case is any longer in the public interest. In light of this development, IH argues that it would be wasteful to incur further costs of litigation during the pendency of Judge Mathias' order before the Commission. The Commission is in no position yet to judge the validity of the real premise for IH's motion for a stay, namely, that a decision to withdraw this matter from litigation is a likely

consequence of Judge Mathias' action and that further expense of litigation thus should be avoided. Until and unless the Commission finds such a likelihood or actually decides that this matter should be withdrawn from litigation, the public interest in expeditious completion of discovery and trial requires that the case go forward.

IH argues that the cost of pretrial litigation will be substantial, heightening the need for a stay. While the Commission is sensitive to IH's alleged financial difficulties and the added stress created by this case, Motion for Stay at 6–7, the cost of litigation, even if considerable, ordinarily is insufficient to support a stay.[1]

For these reasons, and because of the broad discretion our administrative law judges have on questions of this kind, the Commission does not believe that Judge Mathias' denial of IH's motion for a stay below should be set aside.[2]

Accordingly, it is ordered that respondent IH's motion for a stay filed with the Commission is hereby denied.

Commissioner Dixon voted in the negative.

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[1] Section 3.23 of the Commission's Rules is modeled after the appeal procedure of 28 U.S.C. 1292(b), in which interlocutory appeals do not stay further proceedings unless the district or appellate court so orders. Precedents under that provision thus can be useful to the Commission in interpreting its own rule governing stays pending appeal. The Commission notes that federal courts have rejected costs of litigation as a ground for a stay pending appeal. See, e.g., *Long v. Robinson*, 432 F. 2d 977, 980 (4th Cir. 1970), *quoting Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F. 2d 921, 925, (D.C. Cir. 1958); *Reynolds Metal Co. v. Secretary of Labor*, 453 F. Supp. 4, 6–7 (W.D. Va. 1977).

[2] IH alleges that in denying a stay, Judge Mathias indicated that if the Commission felt the certified question raised a substantial issue, then the Commission was the appropriate body to issue a stay. Reply Memo at 2. To the extent IH is arguing that Judge Mathias suggested a stay is appropriate, we note that there is no recommendation for a stay in his order.

IN THE MATTER OF

SPERRY CORPORATION

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

Docket C-3068. Complaint, July 17, 1981—Decision, July 17, 1981

This consent order requires a New York City manufacturer, among other things, to cease disseminating advertisements which misrepresent that the Black Man's Shaver or any other device or commercial treatment will cure or minimize "razor bumps." Further, respondent is barred from making statements which are inconsistent with accepted medical opinion or which misrepresent the efficacy, performance or superiority of any drug or device. The order also requires that the company contact previous customers and make refunds to those eligible.

Appearances

For the Commission: *Mark Allan Heller* and *Teresa A. Hennessy.*

For the respondent: *Roger A. Clark, Rogers & Wells,* 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 Sperry Corporation, formerly the Sperry Rand Corporation, (hereinafter "Sperry"), through its former Sperry-Remington Division, (hereinafter "Remington"), hereinafter at times referred to as respondent, has violated the provisions of the 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. "Sperry" 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 1290 Avenue of the Americas, New York, New York.

PAR. 2. "Sperry" has engaged in the business of manufacturing, advertising, and offering for sale, various products, including but not limited to, Remington's Black Man's Shaver, a product advertised for treating the shaving problems of Black men, to wit pseudofolliculitis barbae (hereinafter "razor bumps"), a disease primarily induced by shaving.

PAR. 3. In connection with the manufacture and marketing of the Black Man's Shaver, respondent has disseminated, published and distributed advertisements and promotional material for the purpose of promoting the sale of the Black Man's Shaver for human use. As advertised, this product is a "device" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its said business, the respondent has disseminated and caused the dissemination of certain advertisements concerning the Black Man's Shaver 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 in magazines with national circulations and the placement of advertisements with radio and television stations with sufficient power to broadcast across state lines and into the District of Columbia for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of the Black Man's Shaver; and has disseminated and caused the dissemination of advertisements concerning the said product 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 the said product 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:

I used to have a shaving problem. Ingrown hairs that caused ugly razor bumps. Yeah, you know what that's like. But then, Remington came up with the answer. The Black Man's Shaver. The Black Man's Shaver cuts off my tough, curly whiskers to help prevent them from growing back into my skin and becoming those ugly bumps. * * * They're so sure the Black Man's Shaver will help reduce razor bumps, that they'll give you your money back if you're not completely satisfied. Man, that's a guarantee! So thanks to Remington, I said, 'so long messy depilatories. . .farewell beard. . .and bye bye bumps.' * * * The Black Man's Shaver by Remington. It's the answer to a black man's tough shaving problems.

* * * * * * *

If you're black like I am, shaving may cause problems. You know, those ugly razor bumps. You can camouflage them with a beard. Or mess with depilatories. But there's never been a real solution. Until now. Because now, Remington has created a revolutionary new shaving system called the Black Man's Shaver. * * * The Black Man's Shaver works so well, Remington guarantees it will help prevent razor bumps or they'll give you your money back. * * * The Black Man's Shaver by Remington. It's the first *real* answer to a Black man's shaving problem.

PAR. 6. Through the use of said advertisements referred to in

Paragraphs Four and Five and others, respondent represented directly or by implication that:

a. Use of the Black Man's Shaver will eliminate "razor bumps" for persons with that condition.

b. Growing a beard only camouflages "razor bumps" and has no therapeutic value in the treatment of that condition.

c. The Black Man's Shaver is the only effective means of treating "razor bumps."

d. Thirty (30) days is an adequate time period for consumers to evaluate the Black Man's Shaver's efficacy and to have a fair opportunity to take advantage of Remington's money back guarantee.

PAR. 7. In truth and in fact:

a. Use of the Black Man's Shaver will not eliminate "razor bumps" for persons with that condition.

b. Growing a beard is considered by accepted medical opinion the preferred method of treating "razor bumps", and therapeutic beards are prescribed often for the treatment of that condition.

c. Regardless of whether the Black Man's Shaver is effective for the treatment of "razor bumps", there are other methods of treating that condition which are effective.

d. Thirty (30) days is an inadequate time period for many consumers to evaluate the efficacy of the Black Man's Shaver, and many consumers are without a fair opportunity to take advantage of Remington's money back guarantee.

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 representations set forth in Paragraph Six were and are false, deceptive, or unfair.

PAR. 8. Through the use of the said advertisements referred to in Paragraphs Four and Five and others, respondent represented directly or by implication, that the Black Man's Shaver is effective in the treatment of "razor bumps."

PAR. 9. There existed at the time of the first dissemination of the representation contained in Paragraph Eight no materials that provided a reasonable basis for the making of that representation. Therefore, the making and dissemination of the said representation as alleged, constituted, and now constitutes unfair or deceptive acts or practices in commerce.

PAR. 10. In the course and conduct of its aforesaid business, and

at all times mentioned herein, respondent has been in substantial competition in or affecting commerce with corporations, firms, and individuals representing or engaged in the manufacture or marketing of shaving products, shaving accessories and health-related devices.

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 the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and 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 Rule; 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 Sperry 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 1290 Avenue of the Americas, in the City of New York, State of New York.

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

ORDER

I

It is ordered, That respondent Sperry Corporation ("Sperry"), a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of all drugs and devices as defined by Section 15 of the Federal Trade Commission Act, do forthwith cease and desist from:

A. 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:

1. Represents that the use of the Black Man's Shaver, with or without the Beard Lifter Comb, or any other device or commercial treatment will eliminate pseudofolliculitis barbae (hereinafter "razor bumps") for persons with that condition.

2. Represents that the use of the Black Man's Shaver, with or without the Beard Lifter Comb, or any other device or commercial treatment will cure "razor bumps" for persons with that condition.

3. Represents that growing a beard only camouflages "razor bumps" and has no therapeutic value in the treatment of that condition.

B. 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:

1. Represents that use of the Black Man's Shaver or any other

product by persons afflicted with "razor bumps" will reduce or minimize that condition;

2. Represents that the Black Man's Shaver or any other product is efficacious for the treatment of "razor bumps";

3. Represents that the Black Man's Shaver, with or without the Beard Lifter Comb, or any other device or commercial treatment is superior to other treatments for "razor bumps"; or

4. Represents that any time period is adequate for consumers to evaluate the Black Man's Shaver's effectiveness in the treatment of "razor bumps",

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 well-controlled clinical studies which conform to acceptable designs and protocols and are conducted by different persons independently of each other. Such persons shall be qualified by training and experience to treat "razor bumps" and to conduct the aforementioned studies.

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, in connection with the advertising, offering for sale, sale or distribution of all drugs and devices as defined in Section 15 of the Federal Trade Commission Act (excluding products not primarily advertised or promoted to consumers for personal, family or household use), which directly or indirectly:

1. Misrepresents the uniqueness of any such drug or device intended for human use.

2. Misrepresents the efficacy or performance of any such drug or device.

3. Makes representations, for the purpose of promoting the sale of any such drug or device, that are inconsistent with accepted medical opinion, *provided however,* that this provision, IC3, does not apply where statements inconsistent with accepted medical opinion are supported by a reasonable basis. Accepted medical opinion shall mean the general consensus of opinion of specialists as expressed in the medical literature, or if no such literature exists the consensus of the specialists themselves.

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II

It is ordered, That Sperry shall initiate or cause and pay the cost of (1) sending thirty (30) days after the Order is final, to all persons known to it or Remington Products, Inc., at that time, as purchasers of Sperry Remington's Black Man's Shaver, a questionnaire with a self-addressed, stamped envelope (attached hereto and incorporated as Attachment A) to determine, *inter alia,* whether a.) the 30 day period under respondent's advertised money back guarantee was too short for said purchasers to evaluate the performance of the Black Man's Shaver as a treatment for razor bumps, b.) the said purchasers were satisfied with the Black Man's Shaver, and c.) the said purchasers bought the Black Man's Shaver on or prior to February 28, 1979, and (2) sending within thirty (30) days after respondent's receipt of the completed questionnaire referred to above, to those persons who purchased the Black Man's Shaver on or prior to February 28, 1979, and who responded within thirty (30) days after the mailing of the questionnaire that they are dissatisfied with the Black Man's Shaver and that 30 days was not a sufficient time period in which to evaluate the Black Man's Shaver as a treatment for razor bumps, a notice (attached hereto and incorporated as Attachment B) which shall provide said purchasers an additional thirty (30) days from the date of receipt of the notice to request a refund under said money back guarantee. The word "refund", for purposes of this provision, shall mean the return of the requested purchase price not to exceed 30% above the distributor's price for the model of the Black Man's Shaver returned in response to this Order. Said refund shall be provided within six (6) to eight (8) weeks of receipt of purchaser's request for a refund. *Provided, however,* Sperry shall be exempt from the obligations of Part II of the Order where it has *actual knowledge* that a purchaser of its Black Man's Shaver purchased it after February 28, 1979.

III

It is further ordered, That Sperry shall forthwith distribute a copy of this Order to each of its operating divisions.

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

It is further ordered, That respondent shall, within one hundred

fifty (150) 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 its compliance with this Order.

It is further ordered, That respondent shall maintain files and records of all substantiation related to the requirements of Parts IB, and IC3 of this Order for a period of three (3) years after the dissemination of any advertisement which relates to these portions of the Order. Additionally, such material shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a demand for such material.

Attachment A

QUESTIONNAIRE

Dear Purchaser:

At this time, various aspects of the marketing of the Black Man's Shaver are being reviewed. We hope you are pleased with our product. In this regard we ask you to take a few minutes within the next thirty days and help us evaluate the Black Man's Shaver by completing the attached questionnaire and returning it to us in the attached self-addressed, stamped envelope. You may be entitled to a refund if you complete this questionnaire and return it to us within thirty (30) days of its receipt.

We at Sperry Corporation wish to thank you for your patronage and cooperation.

Sincerely,

Sperry Corporation

SURVEY

1. How long have you been using your Remington Black Man's Shaver?

3 weeks 4 weeks 5 weeks 6 weeks

7 weeks 8 weeks 9 weeks 10 weeks or longer

2. What shaving method did you use before you began using Remington?

Electric Safety razor or blade Depilatory

Other (Describe) _____

3. Before you used the Remington, how often did you get "bumps" from shaving?

Always Often Sometimes Never

4. Since using your Remington Shaver, has your problem with "bumps"

Decreased Remained the Same Increased

5. Do you feel that the beard lifter

Helps you a lot Helps a little

Does not help at all Not yet sure

How often do you use the beard lifter? _____

6. How do you rate your new Remington Black Man's Shaver compared to previous shaving methods?

Much Better Somewhat Better Equal

Somewhat Worse Much Worse

7. Based on your use so far, how satisfied are you?

Very Satisfied Somewhat Dissatisfied

Somewhat Satisfied Very Dissatisfied

8. If you were not satisfied, did you return the shaver under the 30 day money back guarantee provision?

Yes No

If you did not return the shaver, what did you do with it? _____

_____

9. Do you feel the 30 Day Trial offer allowed you sufficient time to evaluate the shaver's performance?

Yes

No. What would have been a better period of time?

_____

10. When did you purchase your Black Man's Shaver? (Check one from each column)

January/February	1977
March/April	1978
May/June	1979
July/August	1980
September/October	
November/December	

11. Will you recommend the Remington Black Man's Shaver to a friend?

Yes No

_____

_____

purchaser's name and address
(please print)

Envelope

Sperry Corporation
P.O. Box 1000
Bridgeport, Conn. 06602

Attachment B

Dear Purchaser:

Recently we sent you a survey regarding various aspects of the marketing of the Black Man's Shaver, including the 30 day money back guarantee. Inasmuch as you indicated that the original 30 day refund period did not allow you sufficient time to evaluate your shaver's performance, we are extending to you an additional thirty (30) days from the date of receipt of this letter to request a refund under the advertised money back guarantee for the Black Man's Shaver.

If you wish to take advantage of our offer, just return the shaver, postage prepaid, with your name, address and approximate purchase price, clearly and legibly written. For your convenience fill in the attached form showing your name, address and approximate purchase price and return it with your shaver to Sperry Corporation, P.O. Box 1000, Bridgeport, Connecticut 06602. You must respond within thirty (30) days from the date of receipt of this letter to receive a refund. Please allow 6–8 weeks for your check to arrive.

We at Sperry Corporation wish to thank you for your patronage and cooperation.

Sincerely,

Sperry Corporation

Enclosure

SPERRY REMINGTON BLACK MAN'S SHAVER REFUND FORM

Dear Gentlemen:

Enclosed is my Sperry Remington Black Man's Shaver which I am returning for a refund. Please mail my refund check to:

_____

(Name)

_____

(Address)

_____

(City, State and Zip Code)

The approximate price of the enclosed Black Man's Shaver is _____.

_____

(Signature)

IN THE MATTER OF

DKG ADVERTISING, INC.

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

Docket C-3069. Complaint, July 17, 1981—Decision, July 17, 1981

This consent order requires, among other things, a New York City advertising agency to cease disseminating advertisements which misrepresent that the Black Man's Shaver or any other device or commercial treatment will cure or minimize "razor bumps." Further, respondent is barred from making statements which are inconsistent with accepted medical opinion or which misrepresent the efficacy, performance or superiority of any drug or device. The order also requires the company to maintain specific records for a period of 3 years and provide its operating divisions with a copy of the order.

Appearances

For the Commission: *Mark A. Heller* and *Teresa A. Hennessy.*

For the respondent: *Steven Winston, Kantor, Davidoff, Winston & Ferber, P.C.,* 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 DKG Advertising, Inc., (hereinafter "DKG"), hereinafter at times referred to as respondent, has violated the provisions of the 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. "DKG" is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and principal place of business located at 1271 Avenue of the Americas, New York, New York.

PAR. 2. Respondent is now and for all times relevant to this complaint has been an advertising agency of Sperry-Rand Corporation (hereinafter "Sperry"), for its division Sperry-Remington (hereinafter "Remington"), and for all times relevant to this complaint has prepared and placed for publication, advertising material, including but not limited to the advertising referred to herein, to promote the sale for human use of the product Remington's Black Man's Shaver, a product advertised for treating the shaving prob-

lems of Black men, to wit pseudofolliculitis barbae (hereinafter "razor bumps"), a disease primarily induced by shaving. As advertised, this product is a "device" within the meaning of Section 12 of the Federal Trade Commission Act.

PAR. 3. In the course and conduct of its said business, the respondent has disseminated and caused the dissemination of certain advertisements concerning the Black Man's Shaver 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 in magazines with national circulations and the placement of advertisements with radio and television stations with sufficient power to broadcast across state lines and into the District of Columbia for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of the Black Man's Shaver; and has disseminated and caused the dissemination of advertisements concerning the said product 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 product in commerce.

PAR. 4. Typical of the statements and representations in said advertisements, disseminated as previously described, but not necessarily inclusive thereof, are the following:

DKG ADVERTISING, INC. AS PRODUCED 11/16/77

CLIENT REMINGTON DATE December 7, 1977
JOB # RR-3485A Rev. #1 CODE # RM-40-77-60 PRODUCT Black Man's Shaver
TITLE "Shaving Problems" Rev. 1 LENGTH :60 Radio

BROADCAST COPY

SFX UNDER: HUMMING OF AN ELECTRIC SHAVER.

BLACK MAN:

I used to have a shaving problem. Ingrown hairs that caused ugly razor bumps. Yeah, you know what that's like. But then, Remington came up with the answer. The Black Man's Shaver. The Black Man's Shaver cuts off my tough, curly whiskers to help prevent them from growing back into my skin and becoming those ugly bumps. I didn't believe it at first. But those guys at Remington are smart dudes. They're so sure the Black Man's Shaver will help reduce razor bumps, that they'll give you your money back if you're not completely satisfied. Man, that's a guarantee! So thanks to Remington, I said, "So long messy depilatories...farewell beard...and bye, bye bumps." And my woman said, "Hello, sexy."

ANNCR:

The Black Man's Shaver by Remington. It's the answer to a black man's tough shaving problems.

D.J.:

The new Black Man's Shaver is available for the first time at: STORE NAMES. Satisfaction guaranteed or return shaver and sales slip to Remington within 30 days for a full refund.

DKG INC. 11/16/77

CLIENT REMINGTON DATE November 9, 1977

JOB# RR-3485A CODE# RM-39-77-60 PRODUCT Black Man Shaver

TITLE "If You're Black" Rev #2 LENGTH :60 Radio

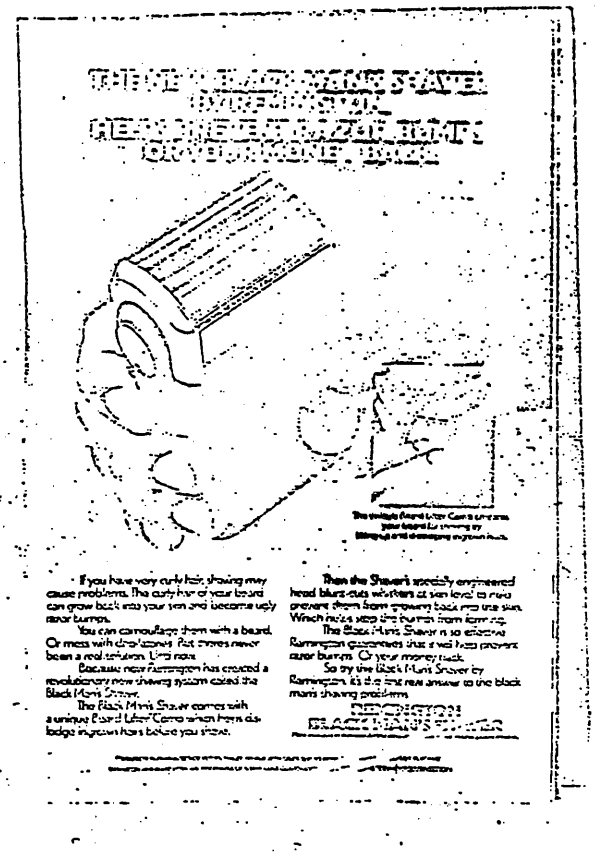
BROADCAST COPY

BLACK ANNOUNCER:

If you're black like I am, shaving may cause problems. You know, those ugly razor bumps. You can camouflage them with a beard. Or mess with depilatories. But there's never been a real solution. Until now. Because now, Remington has created a revolutionary new shaving system called The Black Man's Shaver. It comes with a unique Beard Lifter comb which helps dislodge ingrown hairs before you shave. Then the shaver's specially engineered head, blunt cuts your whiskers at skin level to help prevent them from growing back into your skin. The Black Man's Shaver works so well, Remington guarantees it will help prevent razor bumps or they'll give you your money back. Man, that's a guarantee. The Black Man's Shaver by Remington. It's the first real answer to a black man's shaving problem.

LIVE ANNCR: The new Black Man's Shaver is available for the first time at: Store names.

Satisfaction guaranteed or return shaver and sales slip to Remington within 30 days for a full refund.



If you have very curly hair, shaving may cause problems. The curly hair of your beard can grow back into your skin and become ugly razor bumps.

You can camouflage them with a beard. Or mess with dangerous depilatories. But there's never been a real solution. Until now.

Because now Remington has created a revolutionary new shaving system called the Black Mark Shaver.

The Black Mark Shaver comes with a unique Beard Lifter Comb which frees ingrown hairs before you shave.

Then the Shaver's specially engineered head blunt-cuts whiskers at skin level to help prevent them from growing back into the skin. Which helps stop the bumps from forming.

The Black Mark Shaver is so effective Remington guarantees that it will help prevent razor bumps. Or your money back.

So try the Black Mark Shaver by Remington. It's the first new answer to the black man's shaving problems.

REMINGTON

PAR. 5. Through the use of said advertisements referred to in Paragraphs Three and Four and others, respondent represented and now represents, directly or by implication that:

a. Use of the Black Man's Shaver will eliminate "razor bumps" for persons with that condition.

b. Growing a beard only camouflages "razor bumps" and has no therapeutic value in the treatment of that condition.

c. The Black Man's Shaver is the only effective means of treating "razor bumps".

d. Thirty (30) days is an adequate time period for consumers to evaluate the Black Man's Shaver's efficacy and to have a fair opportunity to take advantage of Remington's money back guarantee.

PAR. 6. In truth and in fact:

a. Use of the Black Man's Shaver will not eliminate "razor bumps" for persons with that condition.

b. Growing a beard is considered by accepted medical opinion the preferred method of treating "razor bumps", and therapeutic beards are prescribed often for the treatment of that condition.

c. Regardless of whether the Black Man's Shaver is effective for the treatment of "razor bumps", there are other methods of treating that condition which are effective.

d. Thirty (30) days is an inadequate time period for many consumers to evaluate the efficacy of the Black Man's Shaver, and many consumers are without a fair opportunity to take advantage of Remington's money back guarantee.

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

PAR. 7. Through the use of the said advertisements referred to in Paragraphs Three and Four and others, respondent represented, and now represents, directly or by implication, that the Black Man's Shaver is effective in the treatment of "razor bumps."

PAR. 8. There existed at the time of the first dissemination of the representation contained in Paragraph Seven no reasonable basis for the making of that representation. Therefore, the making and dissemination of the said representation as alleged, constituted, and now constitutes, unfair or deceptive acts or practices in commerce.

PAR. 9. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been and now is in substantial competition in or affecting commerce with other advertising agencies.

PAR. 10. 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. 11. The aforesaid acts and practices of respondent, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and 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 Rule; 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 DKG Advertising, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 1271 Avenue of the Americas, in the City of New York, State of New York.

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

ORDER

It is ordered, That respondent DKG Advertising, Inc., a corporation, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising of all devices as defined by Section 15 of the Federal Trade Commission Act, do forthwith cease and desist from:

A. 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:

1. Represents that the use of the Black Man's Shaver, with or without the Beard Lifter Comb, or any other device or commercial treatment will elminate pseudofolliculitis barbae (hereinafter "razor bumps") for persons with that condition, *provided however,* that the respondent shall have an affirmative defense to this provision if it can prove that the statements prohibited herein are in fact true.

2. Represents that the use of the Black Man's Shaver, with or without the Beard Lifter Comb, or any other device or commercial treatment will cure "razor bumps" for persons with that condition, *provided however,* that the respondent shall have an affirmative defense to this provision if it can prove that the statements prohibited herein are in fact true.

3. Represents that growing a beard only camouflages "razor bumps" and has no therapeutic value in the treatment of that condition.

4. Misrepresents the uniqueness of any device intended for human use.

B. Disseminating or causing the dissemination of any advertise-

ment 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 the Black Man's Shaver or any other product by persons afflicted with "razor bumps" will reduce or minimize that condition;
2. Represents that the Black Man's Shaver or any other product is efficacious for the treatment of "razor bumps";
3. Represents that the Black Man's Shaver, with or without the Beard Lifter Comb, or any other device or commercial treatment is superior to other treatments for "razor bumps";
4. Represents that any time period is an adequate time period for consumers to evaluate the Black Man's Shaver's effectiveness in the treatment of "razor bumps",

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 well-controlled clinical studies which conform to acceptable designs and protocols and are conducted by different persons, independently of each other. Such persons shall be qualified by training and experience to treat "razor bumps" and to conduct the aforementioned studies.

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, for the purpose of promoting the sale of a device, that are inconsistent with accepted medical opinion unless a reasonable basis exists therefor. Accepted medical opinion shall mean the general consensus of opinion of specialists as expressed in the medical literature, or if no such literature exists, the consensus of the specialists themselves.

It is further ordered, That DKG Advertising, Inc. shall forthwith distribute a copy of this order to each of its operating divisions.

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

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 its compliance with this order.

It is further ordered, That respondent shall maintain files and records of all substantiation related to the requirements of Parts B and C of this Order for a period of three (3) years after the dissemination of any advertisement which relates to these portions of the Order. Additionally, such material shall be made available to the Federal Trade Commission or its staff within fifteen (15) days of a demand for such material.

IN THE MATTER OF

YKK (U.S.A.) INC.

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-3070. Complaint, July 17, 1981—Decision, July 17, 1981

This consent order requires a New Jersey based firm engaged in the manufacture and sale of finished zippers, zipper chain and sliders, among other things, to cease discriminating in price between different customers on the same functional level, purchasing products of like grade and quality, through the use of discriminatory prices and rebates.

Appearances

For the Commission: *Randall S. Leff* and *Karen G. Bokat.*

For the respondent: *Francis Y. Sogi, Miller, Montgomery, Sogi, Brady & Taft,* New York City, *James H. Lundquist, Barnes, Richardson & Colburn,* New York City, and *Salvatore A. Romano, Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondent, subject to the jurisdiction of the Commission, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45) and of Section 2 of the Clayton Act, as amended (15 U.S.C. 13), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint, charging as follows:

PARAGRAPH 1. Respondent YKK (U.S.A.) Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 1251 Valley Brook Ave., Lyndhurst, New Jersey.

PAR. 2. Respondent is now and for many years has been engaged in the manufacture, distribution and sale of finished zippers, zipper chain and sliders.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, and the Federal Trade Commission Act, as amended, having sold or shipped its products or caused them to be transported from its principal place of business in New Jersey

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or manufacturing facility in Georgia to customers located in other States of the United States or the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent has discriminated in price between different purchasers of finished zippers of like grade and quality, zipper chain of like grade and quality, and sliders of like grade and quality in commerce through the use of discriminatory prices, discounts, rebates and deductions on sales within the United States.

PAR. 5. The effect of respondent's discriminations in price alleged in Paragraph 4 has been or may be substantially to lessen or prevent competition in the sale of finished zippers, zipper chain and sliders.

PAR. 6. The acts and practices of respondent set forth in Paragraphs 4 and 5 above violate Section 5 of the Federal Trade Commission Act, as amended, and Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein contemplated.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said 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 YKK (U.S.A.) Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its office and the principal place of business located at 1251 Valley Brook Ave., Lyndhurst, 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

Definitions

For purposes of this Order the following definitions apply:

1. *Slide Fastener Manufacturer* means an integrated manufacturer who produces finished zippers, zipper chain, and sliders.

2. *Assembler* means a customer who purchases finished zippers, zipper chain, sliders or components such as tops, bottoms, opening parts and wire from various manufacturers and assembles and sells finished zippers.

3. *Jobber* means a customer who a) purchases finished zippers of various sizes from manufacturers and assemblers for sale to users or b) purchases zipper chain and sliders for resale without assembly or finishing.

4. *User* means a customer who purchases finished zippers, zipper chain, sliders and components in order to incorporate them in products other than finished zippers that it manufactures.

I

It is ordered, That respondent YKK (U.S.A.) Inc. and its officers, representatives, agents, employees, successors, and assigns, directly, indirectly, or through any corporate or other device, in or in connection with the sale of finished zippers of like grade and quality, zipper chain of like grade and quality, or sliders of like grade and quality in or affecting commerce as "commerce" is defined in the amended Clayton Act or Federal Trade Commission Act do forthwith cease and desist from:

Discriminating directly or indirectly in the price of finished zippers of like grade and quality, zipper chain of like grade and quality, or sliders of like grade and quality as between customers on the same functional level where respondent YKK is in competition

with any slide fastener manufacturer in the sale of finished zippers, zipper chain, or sliders or with any assembler in the sale of finished zippers. For the purposes of this Order, assemblers, jobbers and users are on different functional levels.

II

It is further ordered, That respondent shall forthwith distribute a copy of this Order to each of its operating departments and divisions engaged in the offering for sale, sale, distribution, marketing, or promotion of finished zippers, zipper chain and sliders.

III

It is further ordered, That respondent shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in its corporate organization that may affect compliance obligations arising out of this Order, including but not limited to dissolution, assignment, or sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries.

IV

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

IN THE MATTER OF

MILES LABORATORIES, INC.

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

Docket C-3071. Complaint, July 17, 1981—Decision, July 17, 1981

This consent order requires an Elkhart, Indiana manufacturer and seller of various non-prescription health care products, among other things, to cease failing to make its advertising and promotional allowances available on proportionally equal terms to all customers, both direct and indirect. The order also requires the company to notify all its customers, as specified, of its advertising and promotional programs, and of the availability of usable and economically feasible alternatives. Respondent is further required to distribute a special written notice informing customers of the modification in its promotional programs and provide its sales personnel with a copy of the order.

Appearances

For the Commission: *Randall S. Leff.*

For the respondent: *Franklin Breckenridge,* in-house counsel, Elkhart, Ind. and *James M. Johnstone, Kirkland & Ellis,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondent has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 41, *et seq.*) and subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint, charging as follows:

PARAGRAPH 1. Respondent, Miles Laboratories, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 1127 Myrtle St., Elkhart, Indiana.

PAR. 2. Respondent is now and for many years has been engaged in the manufacture, sale and distribution of adult vitamins, pediatric vitamins and antacid products.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act and Federal Trade Commission Act, having sold

and shipped its products or caused them to be transported from its principal place of business in Indiana to customers located in other States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of credits or sums of money, hereinafter referred to as promotional allowances, either directly or indirectly by way of discounts, allowances, rebates or deductions, as compensation or in consideration for promotional services or facilities, including advertising in various media such as newspapers, furnished by customers in connection with the offering for sale or sale of respondent's products.

PAR. 5. Respondent's promotional allowances discriminated against particular customers or classes of customers in that they were not available, in a practical business sense, on proportionally equal terms to all customers competing in the sale and distribution of respondent's products. Respondent failed to offer alternative terms and conditions to customers for whom respondent's basic promotional allowance plan is not usable and suitable.

PAR. 6. The acts and practices of respondent set forth in Paragraphs 4 and 5 above violate Section 5 of the Federal Trade Commission Act, as amended, and Section 2 (d) of the Clayton Act, as amended by the Robinson-Patman Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein contemplated.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of Miles Laboratories, Inc., a corporation, and the respondent having been furnished thereafter with a copy of a draft of a complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Clayton and Federal Trade Commission Acts; 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 Miles 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 the principle 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 respondent, and the proceeding is in the public interest.

ORDER

I

A. *It is ordered,* That respondent, Miles Laboratories, Inc., a corporation, and its officers, directors, agents, representatives and employees, and its successors and assigns, directly or indirectly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of adult vitamins, pediatric vitamins, antacid products, topical antiseptics such as Bactine, or other nonprescription health care products, except diagnostics, environmental control products, steroid products, aluminum acetate products, acne treatment products, medicated paste bandages and colloidal bath products (hereinafter referred to as "Respondent's Covered Products") in or affecting commerce, as "commerce" is defined in the Clayton Act, as amended, or the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

Paying or contracting for the payment of anything of value to, or for the benefit of, any customer as compensation or in consideration for any advertising or promotional services or any other service or facility furnished by or through such customer in connection with the handling, sale or offering for sale of any of Respondent's Covered Products, unless (1) such payment or consideration is made available on proportionally equal terms to all customers, including customers who do not purchase directly from respondent, who compete in the distribution or resale of Respondent's Covered Products; and (2) all

customers, including customers who do not purchase directly from respondent, who compete in the distribution or resale of Respondent's Covered Products are informed, in writing, in the manner provided in Paragraph I B, of (a) the terms and conditions of the promotional program or plan under which such payments are made, including the services or facilities to be furnished and the methods by which performance will be proved; and (b) the availability of usable and economically feasible alternative services or facilities which competing customers could provide and be paid for on proportionally equal terms if the furnishing of identical services or facilities would not be economically feasible and usable in a practical business sense by all competing customers.

B. *It is further ordered,* That respondent shall inform all customers of the terms and conditions of each of its advertising or promotional programs, the methods by which performance will be proved, and the availability of alternatives, as required by Paragraph I A, in the following manner:

1. Respondent shall cause copies of deal sheets or similar materials explaining the plan or program to be presented or delivered to each direct customer of respondent in sufficient time to enable each such customer to make an informed judgment whether to participate, and

2. At or about the same time respondent shall deliver sufficient copies of deal sheets or similar materials to respondent's wholesalers for presentation or distribution to each customer of such wholesalers that purchases any of Respondent's Covered Products. Respondent shall take steps, which need not include direct mailings, to insure that its indirect purchasing customers are informed of its advertising or promotional programs.

II

It is further ordered, That respondent shall within thirty (30) days after service upon it of this order notify each retailer that purchased less than $5,000 of Respondent's Covered Products in 1979 of the availability of alternative methods of participation in respondent's advertising or promotional allowance programs by distributing a written notice in the form attached hereto as Exhibit A in the following manner:

(1) Respondent's sales representatives will hand deliver sufficient copies of such notice to respondent's wholesalers for distribu-

tion to each customer of such wholesalers that purchases any of Respondent's Covered Products;

(2) Respondent will send such notice by direct mail to each retailer that buys Respondent's Covered Products directly from respondent and purchased less than $5,000 of such products in 1979; and

(3) Respondent will notify independent pharmacies by placing such notice in PHARMALERT, a national coop mailing service for independent drug stores.

III

It is further ordered, That respondent shall deliver a copy of this order to cease and desist to all sales and sales management personnel employed on the date of service of this order in each of respondent's operating divisions that is engaged in the sale of Respondent's Covered Products within the United States.

IV

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

V

It is further orderd, That 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 the order.

Dear Retailer:

Miles has recently revised its promotional trade advertising policy to encourage greater participation in its promotions by smaller direct retailers and non-direct retailers. We are recognizing the fact that some accounts would prefer more flexibility in advertising performance requirements, and for this reason we feel our new trade advertising policy will better serve your needs. We anticipate the ultimate results will be a stronger promotional program for both you and Miles.

TRADE ADVERTISING PERFORMANCE REQUIREMENTS

To receive promotional advertising payments a qualifying performance must be rendered by a participating account employing their most used medium such as newspapers, radio, television, circulars, handbills, window/wall banners, in-store displays, feature pricing, etc.

Upon completion of the advertising performance, the retailer must submit his invoice (or paid wholesaler invoice) to Miles along with a Miles Certificate of Advertising Performance for advertising other than newspaper, radio and television. This form provides for a description of the advertising performance rendered by the account with the specific date(s) of performance. (See Attachment 1)

We look forward to your greater participation in Miles' promotions through your own creative advertising performance.

MILES LABORATORIES, INC.

ATTACHMENT 1

CERTIFICATE OF ADVERTISING PERFORMANCE
(Non-Direct Retailers)

This is to certify that advertising performance was rendered on the following Miles Laboratories, Consumer Products Division brands and package sizes:

Brand/Package Size(s)	Date(s) of Performance	Regular Price	Feature Price
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

Performance rendered on the above brands was my normal and most frequently employed form of advertising and price featuring to my customers. (Check form of advertising)

( ) Newspaper (tearsheet attached)
( ) Radio (script/affidavit attached)
( ) Television (script/affidavit attached)
( ) Home delivered Circular/Handbill (attached)
( ) Window/Wall Banner (attached)
( ) In-Store Extra Off-shelf Display (Describe)

_____

_____

( ) Other (describe) _____

_____

Attached is my original paid wholesaler invoice to verify promotional purchases of the above ad featured Miles Brands.

Retailer's Name _____

Address _____

City _____ State _____ Zip Code _____

Authorized Signature for Retailer

_____

_____
(Title)

Send to MILES LABORATORIES, INC.
Dept. "G"
P. O. Box 340
Elkhart, IN 46515

IN THE MATTER OF

ZALE CORPORATION

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

Docket C-3072. Complaint, Aug. 4, 1981—Decision, Aug. 4, 1981

This consent order requires, among other things, that a Dallas, Texas retailer cease, in connection with the extension of open end credit, failing to comply with the billing error resolution procedures required by the Fair Credit Billing Act. The firm is required to send a prescribed "Billing Complaint Form" to specified customers and upon receipt of such form, investigate each billing error claim and either refund or credit the amount in error, or provide the customer with proof that the claim was incorrect; take reasonable steps to correct any erroneous credit report; and pay all unpaid credit balances which existed after April 1, 1975, plus daily interest. The order also requires the firm to include a specified disclosure on all future periodic statements which reflect a credit balance, and pay all credit balances upon written request, or automatically after 7 months if no request has been made.

Appearances

For the Commission: *David Pender, George Zweibel* and *Rachel Garson.*

For the respondent: *Charles Stewart,* Vice-President and Associate General Counsel, Zale Corp.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and its implementing Regulation Z, duly promulgated by the Board of Governors of the Federal Reserve System, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Zale Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Regulation Z, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint:

PARAGRAPH 1. Respondent Zale Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 3000 Diamond Park Drive, Dallas, Texas.

PAR. 2. Respondent is now, and for some time last past has been, engaged directly and through its subsidiaries in the advertising,

offering for sale, sale and distribution of jewelry merchandise, footwear, drug store products, sporting goods, and related products to the public at retail.

PAR. 3. At all times relevant hereto respondent, directly and through its subsidiaries, in the ordinary course of business, did and does regularly extend, offer to extend, arrange, or offer to arrange "consumer credit" for its customers' purchases, and has been and is a "creditor" [as those terms are defined in Section 226.2(p) and (s) of Regulation Z, 12 C.F.R. 226.2(p) and (s), respectively]. The transactions involve the extension of "open end credit" [as defined in Section 226.2(x) of Regulation Z, 12 C.F.R. 226.2(x)].

PAR. 4. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices herein set forth, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

Count I

Alleging violations of the Truth in Lending Act and its implementing Regulation Z, and of the Federal Trade Commission Act, the allegations of Paragraphs One through Three are incorporated by reference herein as if fully set forth verbatim.

PAR. 5. Subsequent to October 28, 1975, pursuant to its aforesaid extensions of credit, respondent has in many instances received from customers "proper written notification of a billing error" [as defined in Section 226.2(cc) of Regulation Z, 12 C.F.R. 226.2(cc)]. In several such instances respondent has:

1. Contrary to the requirements of Section 226.14(a)(1) of Regulation Z, 12 C.F.R. 226.14(a)(1), failed to take any of the following actions within 30 days after receipt of the notification:

a. Mail or deliver to the customer a written acknowledgement thereof;

b. Make appropriate corrections in the customer's account and mail or deliver to the customer a written notice of the corrections; or

c. Mail or deliver to the customer a written explanation, after having conducted a reasonable investigation, setting forth the reasons why the billing is believed to be correct.

2. Contrary to the requirements of Section 226.14(a)(2) of Regulation Z, 12 C.F.R. 226.14(a)(2), failed to take either of the following actions within the lesser of 90 days or two complete billing cycles from the date of receipt of the notification:

a. Make appropriate corrections in the customer's account and mail or deliver to the customer a written notice of the corrections; or

b. Mail or deliver to the customer a written explanation, after having conducted a reasonable investigation, setting forth the reasons why the billing is believed to be correct.

3. Failed to retain for at least two years the written notifications of billing errors, copies of all correspondence in response thereto, and other evidence of compliance with Section 226.14(a) of Regulation Z, 12 C.F.R. 226.14(a), as required by Section 226.6(i) of Regulation Z, 12 C.F.R. 226.6(i).

PAR. 6. Pursuant to Section 103(s) of the Truth in Lending Act, 15 U.S.C. 1602(s), respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108(c) thereof, 15 U.S.C. 1607(c), respondent has engaged in unfair or deceptive acts or practices in violation of Section 5(a)(1) of the Federal Trade Commission Act, all to the prejudice and injury of the public.

Count II

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Six are incorporated by reference herein as if fully set forth verbatim.

PAR. 7. By failing in certain instances, after receipt of written notification from customers questioning or disputing billed charges, to correct erroneous billings to the affected accounts, respondent caused a substantial number of its customers to be deprived of the use of significant sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five were and are unfair and/or deceptive.

PAR. 8. The acts and practices of respondent set forth in Paragraph Seven were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Count III

Alleging violations of the Truth in Lending Act and its implementing Regulation Z, and of the Federal Trade Commission Act, the allegations of Paragraphs One through Three are incorporated by reference herein as if fully set forth verbatim.

PAR. 9. On various occasions a substantial number of individual

customers' accounts had "credit balances," representing amounts of money owed to the customers by respondent. These credit balances were the result of, among other things, overpayments by the customer or credits for returned merchandise.

PAR. 10. In several such instances respondent failed to mail or deliver to the customer, for each billing cycle at the end of which there was an outstanding credit balance in excess of $1.00 in the account, a periodic statement appropriately identifying the outstanding balance in the account at the beginning of the billing cycle, the amounts and dates of crediting to the account during the billing cycle for payments and other credits, and the credit balance on the closing date of the billing cycle, as required by Section 226.7(b)(1)(i), (iii) and (ix) of Regulation Z, 12 C.F.R. 226.7(b)(1)(i), (iii) and (ix).

PAR. 11. Subsequent to October 28, 1975, in connection with its aforesaid extensions of credit, respondent in several instances failed to mail or deliver to its customers a periodic statement setting forth an address to be used by respondent for the purpose of receiving billing inquiries from customers, as required by Section 226.7(b)(1)(x) of Regulation Z, 12 C.F.R. 226.7(b)(1)(x).

PAR. 12. The allegations of Paragraph Six are incorporated by reference herein as if fully set forth verbatim.

Count IV

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Four, Nine and Ten are incorporated by reference herein as if fully set forth verbatim.

PAR. 13. The following are additional pertinent aspects of respondent's past practices in handling charge accounts of customers who had a credit balance:

1. With the possible exception of billing cycles in which a credit balance was created or in which there occurred a transaction that increased or reduced but did not fully offset a credit balance not yet cleared from the customer's account, in certain instances respondent failed to provide to the customer a periodic statement setting forth the amount of the credit balance.

2. If the customer made further purchases on the account within a limited period of time determined by respondent, respondent applied the amount of the credit balance to reduce or eliminate the customer's obligation created by such further purchase or purchases.

3. If the customer neither requested a refund of the amount of the credit balance nor made a purchase within the aforesaid limited period of time, respondent, through bookkeeping entries, deleted the

amount of the credit balance from the customer's account. No payment was made to the customer and the deleted credit balance was not applied to any purchase subsequently made on the customer's account.

4. Respondent did not refund credit balances to customers unless a specific request therefor was made by or on behalf of the customer.

PAR. 14. By failing to notify customers whose accounts reflected credit balances that such balances existed and that they would be refunded on request; by deleting credit balances from customers' accounts without refunding such amounts; by failing to refund credit balances without request therefor; and by issuing subsequent billing statements which did not reflect such credit balances, respondent caused a substantial number of its customers to be deprived of the use of significant sums of money rightfully theirs. Therefore, the acts and practices described in Paragraphs Nine, Ten, and Thirteen above were and are unfair and/or deceptive.

PAR. 15. The acts and practices of respondent set forth in Paragraphs Thirteen and Fourteen were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 (a)(1) 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 Seattle 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 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 days, now in future 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. Proposed respondent Zale Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 3000 Diamond Park Drive, in the City of Dallas, State of Texas.

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 Zale Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of "open end credit," including "consumer credit" extended on an account by use of a "credit card," as those terms are defined in Regulation Z (12 C.F.R. 226), the implementing regulation of the Truth in Lending Act (15 U.S.C. 1601 *et seq.,* as amended), do forthwith cease and desist from:

A. Failing, within 30 days after receipt of any proper written notification of a billing error (as defined in Regulation Z), to mail or deliver a written acknowledgment thereof to the customer's current designated address, as prescribed by Section 226.14(a)(1) of Regulation Z, 12 C.F.R. 226.14(a)(1), unless:

1. the customer has agreed, within such 30-day period, that the periodic statement is correct; or

2. respondent has taken the applicable action specified in Paragraph I.B.1–3 of this Order within such 30-day period.

B. Failing, not later than two complete billing cycles (and in no event more than 90 days) from the date of receipt of any proper written notification of a billing error, to resolve the dispute by:

1. correcting the customer's account in the full amount indicated by the customer to have been erroneously billed, and mailing or delivering to the customer a written notification of correction(s) in

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the manner prescribed by Section 226.14(a)(2)(i) of Regulation Z, 12 C.F.R. 226.14(a)(2)(i); or

2. correcting the customer's account by an amount different from that indicated by the customer as being erroneously billed, and mailing or delivering to the customer a written explanation of the change(s), accompanied by copies of documentary evidence of the customer's indebtedness if such evidence is requested by the customer, in the manner prescribed by Section 226.14(a)(2)(ii) of Regulation Z, 12 C.F.R. 226.14(a)(2)(ii); or

3. mailing or delivering to the customer, after having conducted a reasonable investigation, a written explanation or clarification which sets forth the reason(s) why respondent believes the periodic statement is correct, and, if the customer requests, furnishing copies of documentary evidence of the customer's indebtedness, in the manner prescribed by Section 226.14(a)(2)(iii) of Regulation Z, 12 C.F.R. 226.14(a)(2)(iii).

Provided, however, That respondent need not perform the actions specified in this Paragraph I.B if the customer has agreed, not later than two complete billing cycles (and in no event more than 90 days) from the date of respondent's receipt of the proper written notification of a billing error, that the periodic statement is correct.

C. Taking or causing any action, prior to the time the dispute has been resolved as provided in Paragraph I.B. of this Order, to collect:

1. any portion of an amount indicated in the customer's notification as being a billing error; or

2. any finance charge, late payment charge, or other charge computed on such disputed amount.

D. Failing, in each instance where respondent has not complied with any requirement of Section 226.14 of Regulation Z, 12 C.F.R. 226.14, to forfeit the right to collect from the customer the amount indicated to be a billing error, including corresponding finance and other charges, up to $50 (the "forfeited amount"), as required by Section 226.14(f)(1) of Regulation Z, 12 C.F.R. 226.14(f)(1).

1. If the customer pays or has paid all or part of the forfeited amount, respondent shall either credit that amount to the customer's account or refund it to the customer, and shall notify the customer as to why the credit or refund has been made.

2. If the customer has not paid all or part of the forfeited amount, respondent shall act in a manner consistent with such forfeiture; for example, respondent shall not reflect such amount in periodic

statements, take any collection action, or report nonpayment to any third party. Where appropriate, respondent shall provide an explanation of action(s) it has taken.

E. Failing to comply with any requirement of Section 226.14 of Regulation Z, as amended, 12 C.F.R. 226.14, as amended.

F. Failing to mail or deliver to each customer who has an open end credit account, for each billing cycle at the end of which there is an outstanding debit or credit balance in excess of $1.00 in that account or with respect to which a finance charge is imposed, a statement which the customer may retain and which:

1. sets forth the amount of the outstanding balance in the account at the beginning and closing dates of the billing cycle, and appropriately identifies any credit balance as such, as required by Section 226.7(b)(1)(i) and (ix) of Regulation Z, 12 C.F.R. 226.7(b)(1)(i) and (ix);

2. sets forth the amounts and dates of crediting to the account during the billing cycle, as required by Section 226.7(b)(1)(iii) of Regulation Z, 12 C.F.R. 226.7(b)(1)(iii);

3. sets forth an address to be used by respondent for the purpose of receiving billing inquiries from customers, preceded by the caption "Send Inquiries To:" indicating that the address is the proper location to send such inquiries, as required by Section 226.7(b)(1)(x) of Regulation Z, 12 C.F.R. 226.7(b)(1)(x); and

4. sets forth all other items required by Section 226.7(b) of Regulation Z, 12 C.F.R. 226.7(b), in the manner prescribed by Section 226.7(c) of Regulation Z, 12 C.F.R. 226.7(c).

G. Failing to comply with any requirement of Section 226.7(a)(9), (d), (g), and (h) of Regulation Z, 12 C.F.R. 226.7(a)(9), (d), (g), and (h).

II

It is further ordered, That respondent:

A. Shall prepare a form (hereinafter referred to as Billing Complaint Form) in exactly the wording set forth in Attachment A of this Order (except that the name of the issuing entity may change as appropriate), printed clearly and conspicuously in 10-point, .075 inch computer or larger type. This form shall be mailed in duplicate, accompanied by a pre-addressed return envelope, with no additional information to the contrary or in mitigation thereof, within 120 days after service upon it of this Order:

1. to each person to whom a periodic statement is mailed or delivered at any time during either of two consecutive billing cycles within the aforesaid 120-day period;

2. to each other person whose open end credit account has been administered by or assigned to respondent's Zale Division Central Credit Offices in Seattle, Washington, and Portland, Oregon, at any time between October 28, 1975, and the date of service of this Order; provided that where an account has been maintained in the names of more than one person, respondent may send one Billing Complaint Form; and

3. to each other person who makes a written complaint, other than a proper written notification of a billing error (as defined in Regulation Z), about a billing error that occurred on or after October 28, 1975, but before the date of service of this Order upon respondent; *provided,* that if respondent receives such a written complaint more than 120 days after service upon it of this Order, respondent must mail the Billing Complaint Form within 30 days of receiving such complaint.

B. Shall send to all of respondent's retail store and credit center personnel, within 10 days from the date of publication in the *Federal Register* of the agreement containing this Order, a bulletin which instructs them that in the event they receive an oral complaint about a billing error that occurred on or after October 28, 1975, but before the date of service of this Order upon respondent, each such complainant is to be advised (1) to make the complaint in writing, and (2) to whom such complaint is to be mailed or otherwise delivered.

C. Shall, within 60 days after receipt of each Billing Complaint Form:

1. conduct and complete a reasonable investigation of the claimed billing error(s).

2. if the claimed billing error(s) is (are) incorrect, mail or deliver a written explanation to the customer setting forth the reason(s) why respondent believes the customer was mistaken, and furnish copies of all documents which support respondent's conclusion.

3. if the claimed billing error(s) is (are) correct in whole or part, or if respondent does not have documentary evidence showing that such claim(s) is (are) incorrect:

a. mail a check to the customer in the amount of the billing error(s); or

b. if an account for the customer exists, make a credit to the customer's account in the amount of the billing error(s); or

c. open an account for the customer if no account exists therefor at that time, if the customer consents in writing to an account being opened, and make a credit to that account in the amount of the billing error(s).

4. if respondent makes a payment or credit pursuant to Paragraph II.C.3 of this Order, and the customer has indicated on the Billing Complaint Form that a disputed account has been reported to any third party as delinquent, correct respondent's records to show that the account was paid as agreed, and take reasonable steps to insure that the report to any third parties is corrected, *provided* the customer submits his/her address and account number or other information to enable respondent to identify such party (parties).

5. notify the customer in writing of the action(s) taken pursuant to this Paragraph II.C. For purposes of this subparagraph, respondent may place the required writing, *inter alia,* on a check, payment voucher attached to a check, or on the front or reverse of a periodic statement.

III

It is further ordered, That respondent Zale Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in the handling of credit balances arising subsequent to service of this Order, on open end credit accounts created or maintained in connection with the sale of merchandise or services to the public, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall:

A. Include the following disclosure clearly and conspicuously in 10-point, .075 inch computer or larger type, separated from any other written matter, entirely on the front side of each periodic statement reflecting a credit balance, and accompanied by a pre-addressed return envelope:

To get your credit balance now, write "I want a refund" on this statement. Mail it back to us in the enclosed envelope.

B. Refund the full amount of each credit balance within 30 days after a customer requests a refund by mail, except to the extent that such amount has already been refunded or credited against further purchases on that account.

C. Refund the full amount of each credit balance in excess of $1.00 no later than 30 days after the end of the sixth consecutive month during which a credit balance existed. The amount to be refunded shall be the credit balance existing at the end of the sixth month.

D. Refrain from writing off, deleting or transferring any credit balance in excess of $1.00 until a refund has been made or until the customer has made a fully offsetting purchase, unless respondent has taken all applicable actions required by Parts III and V.B of this Order with respect to that account.

E. Refrain from writing off, deleting or transferring any credit balance of $1.00 or less until:

1. the customer has made a fully offsetting purchase; or
2. the credit balance has existed for seven consecutive months and the customer has been advised at least once in writing that such credit balance will be forfeited after it has existed for seven months unless a refund is requested by the customer.

F. Send to all of respondent's retail store and credit center personnel, within 10 days from the date of publication in the *Federal Register* of the agreement containing this Order, a bulletin which instructs them that in the event they receive a request for a refund of a credit balance they are to advise the person requesting such refund (1) to make the request in writing, and (2) to whom such request is to be mailed or otherwise delivered.

IV

It is further ordered, That respondent shall, with respect to each customer whose open end account had a credit balance in excess of $1.00 at any time between April 1, 1975, and the date of service of this Order (if such balance has not been refunded, no fully offsetting purchase has been made, or the attempts to locate the customer described in Part V.B of this Order have not been made):

A. Mail a check to the customer in the amount of the credit balance, including daily interest on such amount from the date of its creation, computed at an annual rate of 6 percent (simple) interest, no later than 90 days after the service of this Order.

Provided, however, That respondent need not pay interest on any credit balance for which a refund check in the amount of the credit balance was mailed by respondent to the customer prior to August 4, 1978.

B. Notify the customer in writing that the check represents a refund of the credit balance, plus interest on the credit balance (if any). This notification must be placed on the check, on the payment voucher attached to the check, or on a notice sent with the check.

C. Refrain from writing off, deleting or transferring any such credit balance until a refund has been made or the customer has made a fully offsetting purchase, unless respondent has taken all applicable actions required by Parts IV and V.B of this Order with respect to that account.

V

It is further ordered, That:

A. Each payment required by this Order shall be given to the customer in person or by mailing a check payable to the order of the customer.

B. Each check, Billing Complaint Form, disclosure, or notice required by this Order shall be sent by First Class mail in an envelope which clearly states that it is from respondent (or the entity of respondent which the customer did business with), to the customer's last address shown in respondent's records. Each check required to be sent by this Order, and each Billing Complaint Form required to be sent by Paragraphs II.A.2 and II.A.3 of this Order, shall include the notation "Address Correction Requested" on the envelope. In the event that any such check, disclosure or notice concerning a credit balance or payment in the amount of $10 or more is returned to respondent undelivered, respondent shall obtain from a credit bureau the most current address(es) available for the customer by means of an in-file report or other report on information then existing in the credit bureau's files. If a new address is obtained, respondent shall then resend such check, disclosure, or notice by First Class mail to the customer at the most current address obtained.

C. For each credit balance refund unpaid despite performance of the steps set out in Paragraph V.B of this Order, respondent:

1. shall, except as provided in Paragraph V.C.2 of this Order, make available to the customer as a credit to his/her account the full amount of the credit balance for one year from the date on which the most recent mailing was returned; and

2. shall refund the full amount of the credit balance within 30 days of any subsequent oral or written request therefor by the customer.

VI

It is further ordered, That respondent shall maintain complete business records relative to the manner and form of its continuing compliance with this Order, including but not limited to (1) the data enumerated in Paragraph VII.E of this Order; (2) the number and dollar amounts of credit balances refunded, on an annual basis; and (3) the name and address of each customer who requested a refund of a credit balance but whose request was refused, the date and amount of the request, and the date and reason(s) for the refusal. With respect to Paragraphs I.A–I.D of this Order, such records shall include every written notification of billing error respondent received, copies of all notices, corrections and correspondence mailed or delivered in response thereto, documentation of "reasonable investigations," and all other evidence of compliance. Respondent shall retain all such records and data for at least three years and shall, upon reasonable notice, make them available for examination and copying by representatives of the Federal Trade Commission.

VII

It is further ordered, That:

A. For the purposes of this Order, every reference to the Truth in Lending Act or Regulation Z are understood to mean "as amended." "As amended" includes substantive as well as nonsubstantive (such as organizational) revisions to the current Act and Regulation.

B. Respondent shall forthwith distribute a copy of this Order to each of its operating divisions, and to all present and future personnel having policy responsibilities with respect to the subject matter of this Order, including but not limited to the manager of each central credit office and the manager of each retail store which handles its own billings or receives billing complaints.

C. Respondent shall notify the Commission at least 30 days prior to:

1. any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation; and

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

D. Respondent shall file with the Commission, within 60 days

after service of this Order, a written report setting forth in detail the manner and form in which it has complied with this Order.

E. Respondent shall file with the Commission, within 180 days after service of this Order, a written report setting forth all of the following data for each of its operating divisions:

1. the number and dollar amounts of credit balances which, pursuant to Paragraph IV of this Order, were:

a. refunded;
b. offset by further purchases made on the customer's account; and
c. retained by respondent because the customer could not be located.

2. the number of Billing Complaint Forms received from customers pursuant to Part II of this Order.
3. the number and dollar amounts of payments made to customers and credits made to customers' accounts pursuant to Part II of this Order.
4. the number of Billing Complaint Forms received from customers pursuant to Part II of this Order for which no payments were made to customers and no credits were made to customers' accounts.
5. the number of Billing Complaint Forms received from customers pursuant to Part II of this Order which indicated that a disputed account has been reported to any third party as delinquent, and the names and addresses of all third parties respondent contacted pursuant to Part II of this Order.

ATTACHMENT A TO ZALE CORPORATION ORDER

IMPORTANT NOTICE

This notice deals with mistakes we may have made in your bills since October 28, 1975. If you wrote to us about possible billing errors, we may not have handled your complaint as we should have under federal law.

If there was a mistake and we have not yet corrected it, we will do so now. We may also owe you money.

Please fill in the accompanying form. Be sure to include your name, account number and address. After you fill in the form, sign it, date it and send it back to us in the attached envelope. A copy of the form is also attached for your records. Please send copies of all letters, bills and other papers dealing with any billing errors. Keep the originals.

But be sure to send us this form even if you don't have other papers. If you can't remember the exact dates or amounts, please estimate.

1. My bill of _____ contained a mistake of
month/year
$_____which was never corrected.
The mistake was _____
_____.

(If we made more than one mistake, list the others on another piece of paper and explain in detail. Be sure to put your name on each piece of paper.)

2. IF YOU THINK THIS MISTAKE HURT YOUR CREDIT RATING, we will tell the credit bureau that Zale settled the dispute in your favor.

Please provide as much of the following information as you can:

The city and state you lived in when the mistake on your bill occurred.

_____

The location of the Zale store of Zale credit office involved.

_____

The name and address of the credit bureau in that area, if you know.

_____

Signature X _____

Name: _____
(Please Print)

Address: _____

_____

_____

Account Number (if known) _____

Date: _____

IN THE MATTER OF

PALM BEACH COMPANY

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

Docket C-3073. Complaint, Aug. 4, 1981—Decision, Aug. 4, 1981

This consent order requires, among other things, a Cincinnati, Ohio manufacturer of men's apparel and accessories to cease attempting to fix the resale prices at which its products are advertised or sold, through coercion or otherwise. The order also prohibits respondent from withholding any earned advertising credit or benefit from recalcitrant dealers, and bars the firm from restricting the lawful use of its trademarks and brand names. Additionally, the firm is precluded from seeking the identity of dealers who deviate from suggested resale prices, and from disseminating suggested resale prices for a period of three years, unless such prices are accompanied by a specified disclosure statement.

Appearances

For the Commission: *David M. Newman* and *Jeffrey Klurfeld.*

For the respondent: *Walter L. Landergan, Jr.,* and *Michael T. Gengler, Rich, May, Bilodeau and Flaherty,* Boston, Mass.

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 Palm Beach Company, 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 as follows:

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

Product is defined as any item of wearing apparel or related accessory which is manufactured, offered for sale or sold by the Men's Division of respondent.

Dealer is defined as any person, partnership, corporation or firm which sells any product at retail in the course of its business.

Resale Price is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited

to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

PARAGRAPH 1. Respondent Palm Beach Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine with its offices and principal place of business located at 400 Pike St., Cincinnati, Ohio. Respondent is a wholly-owned subsidiary of Palm Beach Incorporated, which also has its office and principal place of business located at 400 Pike St., Cincinnati, Ohio.

PAR. 2. Respondent's Men's Division is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of men's wearing apparel and related accessories. Sales by respondent's Men's Division exceeded $60 million for fiscal 1979.

PAR. 3. Respondent maintains, and has maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent's Men's Division sells and distributes its products directly to more than 4,000 retail dealers located throughout the United States who in turn resell such products to the general public.

PAR. 5. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale, sale or distribution of merchandise of the same general kind and nature as merchandise manufactured, advertised, offered for sale, sold or distributed by respondent.

PAR. 6. In the course and conduct of its business as above described, respondent's Men's Division has for some time last past engaged in the following acts and practices:

(a) It has published lists of suggested retail prices and has circulated such lists to its dealers;

(b) It has adopted a policy that it will sell products only to dealers who abide by respondent's published suggested retail prices and will unilaterally refuse to deal with any dealer who sells any product at less than the published suggested retail price for such product; and

(c) It has regularly and systematically announced and communicated to all of its dealers the policy set forth in subparagraph (b) above.

PAR. 7. By means of the aforesaid acts and practices, respond-

ent's Men's Division, in agreement with certain of its dealers and with the acquiescence of others of its dealers, has established, maintained and pursued a planned course of action, the purpose and effect of which have been and are to fix, maintain, control or stabilize certain specified uniform prices at which products will be resold.

PAR. 8. The aforesaid acts and practices of respondent have had and are now having the effect of hampering and restraining competition in the resale and distribution of respondent's products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The effects of the acts and practices of respondent's Men's Division, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

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

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

The 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 Palm Beach Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Maine, with its office and principal place of business at 400 Pike St., City of Cincinnati, State of Ohio.

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 purposes of this Order, the following definitions shall apply:

Product is defined as any item of wearing apparel or related accessory which is manufactured, offered for sale or sold by the Men's Division of respondent.

Dealer is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

Resale Price is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

Sale Period is defined as any time during which any dealer offers to sell any product at resale prices lower than those in effect during the usual and ordinary course of said dealer's business; or any suggested, authorized or customary time for selling or advertising any product at prices lower than the suggested, established or customary resale prices.

It is ordered, That respondent Palm Beach Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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1. Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product, or the sale period of any dealer.

2. Requesting, requiring or coercing, directly or indirectly, any dealer to maintain, adopt or adhere to any resale price or sale period.

3. Announcing to any dealer that respondent may or will refuse to deal with any dealer who does not abide by any resale price for any product.

4. Requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price or sale period; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer.

5. Requesting or requiring that any dealer refrain from or discontinue selling or advertising any product at any resale price.

6. Hindering or precluding the lawful use by any dealer of any brand name, trade name or trademark of respondent in connection with the sale or advertising of any product at any resale price.

7. Making any payment or granting any consideration, service or benefit to any dealer because of the resale price at which any other dealer has advertised or sold any product.

8. Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold or advertised.

9. Terminating or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

10. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer, or limiting or restricting the right of any dealer to participate in any cooperative advertising program for which it would otherwise qualify, because of the resale price at which said dealer advertises or sells any product, or proposes to sell or advertise any product.

II

1. For a period of three (3) years from the date of service of this Order, orally suggesting or recommending any resale price or sale period to any dealer.

2. For a period of three (3) years from the date of service of this Order, communicating in writing any resale price or sale period to any dealer, *provided, however,* that after said three (3) year period, respondent shall not suggest any resale price or sale period on any

list, or in any advertising, book, catalogue or promotional material, unless it is clearly and conspicuously stated on each page where any suggested resale price or sale period appears, the following:

THE [RESALE PRICES OR SALE PERIODS] QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE YOUR OWN [RESALE PRICES OR SALE PERIODS].

III

It is further ordered, That respondent shall:

1. Within thirty (30) days after service of this Order, mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to each present account of its Men's Division. An affidavit shall be sworn to by an official of the respondent verifying that the attached Exhibit A was so mailed.

2. Mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to any person, partnership, corporation or firm that becomes a new account of its Men's Division within three (3) years after service of this Order.

IV

It is further ordered, That respondent shall forthwith distribute a copy of this order to its Men's Division, and to present or future personnel, agents or representatives of its Men's Division having sales, advertising or policy responsibilities with respect to the subject matter of this order, and that respondent secure from each such person a signed statement acknowledging receipt of said order.

V

It is further ordered, That 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 the order.

VI

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.

EXHIBIT A

Dear Retailer:

Without admitting any violation of the law, Palm Beach Company has agreed to the entry of an Order by the Federal Trade Commission regulating certain distribution practices of the Men's Division. In connection therewith, the Company is required to send you this letter describing the Order.

With respect to products of the Men's Division, the Order provides, among other things, as follows:

1. You can advertise and sell Palm Beach Company's Men's Division's products at any price you choose.

2. Palm Beach will not take any action against you, including termination, because of the price at which you advertise or sell Men's Division products.

3. Palm Beach will not suggest retail prices for any product until [3 years from the date of service of the Order].

4. The price at which you sell or advertise Palm Beach Men's Division products will not affect your right to use Palm Beach trademarks or other identification in your sale or advertising of products bearing Palm Beach trademarks or identification.

5. You are free to participate in any cooperative advertising program sponsored by Palm Beach for which you would otherwise qualify, and to receive any advertising credit or allowance allowed thereunder regardless of the price at which you advertise the Palm Beach Men's Division product.

6. If you feel that you have lost sales or been forced to mark down any Palm Beach Men's Division product because of the prices at which another retailer has sold those products, Palm Beach cannot offer any financial assistance to compensate you for such lost sales or markdowns.

If you have any questions regarding the Order or this letter, please call _____ .

_____

for Palm Beach Company,
Men's Division

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IN THE MATTER OF

SHERMAN A. HOPE, M.D., ET AL.

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

Docket 9144. Complaint, July 30, 1980—Decision, Aug. 5, 1981

This consent order requires, among other things, that five individual Brownfield, Tex. physicians each cease, for the ten-year duration of the order, from taking any concerted action with another person or entity which would improperly restrict, impede or otherwise interfere with a hospital's physician recruitment program or contractual arrangement with a physician.

Appearances

For the Commission: *Benjamin I. Cohen* and *Erika R. Wodinsky.*

For the respondent: *Jim Pete Hale,* Brownfield, 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 respondents Dr. Sherman A. Hope, Dr. Morris S. Knox, Dr. Carl R. Smith, Dr. Noah W. Stone, and Dr. Harlan L. Willis ("respondents") have violated and are violating Section 5 of the Federal Trade Commission Act, and that this proceeding is in the public interest, issues this complaint stating its charges in that respect as follows:

PARAGRAPH 1. During August and September 1979, respondents were the sole active members of the medical staff of the Brownfield Regional Medical Center (the "Hospital") in Brownfield, Texas and were the only physicians in full time, active practice in Brownfield.

PAR. 2. The Hospital is operated under the auspices of the Terry County Memorial Hospital District, whose Board of Directors is popularly elected pursuant to Texas law. The Hospital is the only hospital in Terry County, Texas, and serves the county's population of approximately 16,000 persons. The next nearest hospital is approximately 35 miles away.

PAR. 3. Respondents practice in the medical specialty fields of internal medicine (Dr. Smith), surgery (Dr. Willis), and family practice (Drs. Hope, Stone, and Knox). No other specialty field is represented on the current medical staff of the Hospital. In 1979, about half of the hospital admissions of residents of Terry County

were at hospitals outside Terry County; about 80 percent of the babies born in hospitals to Terry County residents in 1979 were born in hospitals outside Terry County.

PAR. 4. In February 1979 the Hospital and the respondents agreed that additional physicians were needed in the community, and the Hospital embarked on a program to bring approximately six new physicians to Brownfield.

PAR. 5. In May 1979 the Hospital succeeded in recruiting the first new physician, an obstetrician-gynecologist. The Hospital and the new physician agreed that the Hospital would guarantee him a minimum income, would allow him to use the facilities of the Hospital, and would pay his office expenses; the physician agreed to give the Hospital a percentage of his fees not to exceed the direct cost of operating his office.

PAR. 6. In late July or early August 1979 respondents entered into a conspiracy to restrain competition in the provision of health care services in Brownfield by preventing the Hospital from recruiting and entering into contracts with new physicians, regardless of their medical qualifications, where the contract contained financial or commercial terms opposed by respondents. As part of this conspiracy, respondents agreed that they would:

(A) boycott the Hospital by concertedly refusing (1) to provide emergency room services, and (2) to perform certain administrative functions, for the Hospital;

(B) boycott physicians recruited by the Hospital by concertedly refusing to deal with such physicians; and

(C) take other actions either to coerce the Hospital into abandoning its plan to recruit and to enter into contracts with new physicians or to coerce physicians not to enter into contracts with the Hospital.

PAR. 7. The activities of respondents, in furtherance of this conspiracy, form a single and unified course of conduct and consist, in part, of the following acts:

(A) the submission to the Hospital in August 1979 of a document, signed by each respondent, threatening to cease performing emergency room service at the Hospital because of the Hospital's agreement with the new physician (exhibit A attached hereto);

(B) the submission to the Hospital in August 1979 of a document, signed by each respondent, threatening to cease performing certain necessary administrative functions at the Hospital because of the

Hospital's agreement with the new physician (exhibit B attached hereto);

(C) the submission to the Hospital in August 1979 of a document, signed by each respondent, threatening to refuse to professionally support, refer patients to, or receive referrals from the new physician (exhibit C attached hereto);

(D) informing the new physician that if he were to come to Brownfield pursuant to his contract with the Hospital, he would be making a serious financial and professional mistake, he would have his position terminated if respondents succeeded in electing a new Hospital Board of Directors, and he would probably not be accepted in the local medical society; and

(E) responding to a request for information from the Texas Medical Association by stating that the area's medical needs were being met adequately although both the Hospital and the respondents were at that time seeking to attract one or more additional physicians to Brownfield because of their belief that the area's medical needs were not, in fact, being adequately met.

PAR. 8. As a direct result of the respondents' conspiratorial acts:

(A) the Hospital ceased its physician recruiting program in September 1979;

(B) the new physician informed the Hospital, in October 1979, that he would not come to Brownfield; and

(C) the Hospital's agreement with the new physician was formally terminated in February 1980.

PAR. 9. The purpose, tendency, capacity, and effects of the respondents' conspiracy are to restrain trade and hinder competition in the provision of health care services, in the following ways, among others:

(A) physicians have been excluded from providing maternity and other health care services in Terry County;

(B) residents of Terry County are forced to travel great distances, at additional expense and inconvenience, to obtain medical care;

(C) residents of Terry County are deprived of the opportunity to choose from among a larger number of physicians;

(D) physicians are prevented from practicing medicine in Terry County on terms desired by the physicians and acceptable to the Hospital; and

(E) the Hospital is prevented from recruiting physicians on terms desired by the Hospital and acceptable to the recruited physicians.

PAR. 10. The challenged acts and practices are in or affect commerce within the meaning of Section 5 of the Federal Trade Commission Act, since:

(A) both the respondent physicians and the Hospital:

(i) receive substantial revenue both from the federal government, in the form of Medicare and Medicaid payments, and from private insurance companies and other private entities that pay physicians and hospitals for services rendered to patients, which money flows across state lines;

(ii) utilize or prescribe substantial quantities of drugs, medicines, surgical supplies, equipment, and other products which are shipped in interstate commerce; and

(iii) treat a substantial number of patients who come into Texas from New Mexico for medical care;

(B) the Hospital recruited additional physicians by advertising in medical journals circulated throughout the United States, and the new physician resided outside Texas when he entered into the contract with the Hospital.

PAR. 11. The conspiracy and the acts and practices of respondents alleged in Paragraphs Six and Seven constitute unfair methods of competition and unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

EXHIBIT A

RESIGNATION FROM EMERGENCY ROOM COVERAGE

WHEREAS the active medical staff of the Brownfield Regional Medical Center has served in providing professional medical care in the emergency room without pay, compensation or supplement from the tax funds of Terry County Hospital, and

WHEREAS this coverage has been provided continually since the opening of the county hospital and the creation of the Terry County Hospital District, twenty-one (21) years ago, and

WHEREAS this service has been provided without any guarantee of revenue to the physician and the medical care has been provided for all emergencies that were presented to the hospital emergency room for treatment, irregardless of race, medical situation, economic status, or being a private doctor's patient, and

WHEREAS the Brownfield Regional Medical Center has chosen to operate an emergency room along with its other departments and facilities, and has the responsibility, for equipping and manning this service, and

WHEREAS the hospital board and administrator have unilaterally decided to use hospital revenue and tax money to subsidize or employ hospital based physicians, and whereas these physicians will be in the confines of the hospital facilities,

Therefore, let it be known to the administrator, hospital board, and general public that when the hospital uses tax money to employ or subsidize hospital based physicians that the active private medical staff will no longer furnish emergency room coverage and will return this responsibility to the administrator and his employed hospital based physicians.

S. A. Hope, M.D.

Carl R. Smith, M.D.

Morris S. Knox, M.D.

Marlan L. Wills, M.D.

EXHIBIT B

RESIGNATION FROM ASSISTING WITH ADMINISTRATIVE RECORDS

WHEREAS the active medical staff has fully cooperated with the Brownfield Regional Medical Center in assisting the administrator in the voluminous administrative paper work requested by the various government agencies, and

WHEREAS the responsibility of the physician to his patient is to make proper medical records that are a necessary part of the patient's hospital care, and since the filling out of surveys, reports, utilization reviews, "on going studies," etc.,and., only distractsfrom patient care and is primarily for administrative or financial functions, and

WHEREAS the hospital is employing part time physicians to complete some of these functions at present, and

WHEREAS the hospital is planning to use tax money and tax built facilities to subsidize and/or employ full time hospital based physicians,

Therefore, let it be resolved and known that the private physicians of the active staff of Brownfield Regional Medical Center will no longer donate their time and services to assisting the administration in completing paper work that is not directly related to patient care.

S. A. Hope, M.D.

Carl R. Smith, M.D.

Harlan L. Willis, M.D.

Morris S. Knox, M.D.

Noah W. Stone, M.D.

EXHIBIT C

DECLARATION OF MEDICAL STAFF

In as much as the hospital administration has:

1. Refused to cooperate with the local medical community in recruiting physicians and
2. Entered into private and secret negotiations without any knowledge, consent or advise of local physicians to
3. Hire and employ a foreign born, foreign trained physician whose credentials and capabilities are coopletely unknown to us and
4. Who will be subsidized by tax money, located in a tax supported institution and whose employees will be paid by the hospital, then

WE, the private physicians of Brownfield:

1. Will not support him professionally.
2. Will not work with him medically in any capacity.
3. Will not refer patients to him or take referrals or consultations from him.
4. Will not sponsor him or vote for him to be accepted on the medical staff until such time as he has proven himself medically capable and of good moral and ethical character.

Since the hospital has employed a hospital based physician who will be tax subsidized, then we relinquish those services performed for the hospital without pay or any other form of renumeration. These are:

1. Emergency room coverage.
2. Administrative paper work.
3. Various committee assignments that have no bearing on patient care.

We, as the private physicians of Brownfield, recognize that our primary responsibility is to our patients and the people of this area. We will continue to serve them to the best of our capabilities, as we are allowed to do so, under the circumstance.

We hope for a restoration of cooperation and good will between the hospital and the local medical community and will continue to work toward that end.

S. A. Hope, M.D.

Carl R. Smith, M.D.

Harlan L. Willis, M.D.

Morris S. Knox, M.D.

Noah W. Stone, M.D.

DECISION AND ORDER

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

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

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

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

1. The respondents are individuals and medical doctors with offices located in the City of Brownfield, State of Texas at the following addresses:

Sherman A. Hope, M.D., Brownfield Medical Clinic, 901 Tahoka Road, Brownfield, Texas.
Morris S. Knox, M.D., Knox-Stone-Hurd Clinic, 706 E. Felt Street, Brownfield, Texas.
Carl R. Smith, M.D., Brownfield Medical Clinic, 901 Tahoka Road, Brownfield, Texas.
Noah W. Stone, M.D., Knox-Stone-Hurd Clinic, 706 E. Felt Street, Brownfield, Texas.
Harlan L. Willis, M.D., Brownfield Medical Clinic, 901 Tahoka Road, Brownfield, Texas.

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

ORDER

I.

It is ordered, That respondents Dr. Sherman A. Hope, Dr. Morris S. Knox, Dr. Carl R. Smith, Dr. Noah W. Stone, and Dr. Harlan L. Willis shall each cease and desist from directly or indirectly, through any agent or otherwise, taking any concerted action with any person or entity with the purpose or effect of restricting, impeding, or in any way interfering with any hospital's recruitment of or contractual arrangement with any physician by any means, including but not limited to any threatened or actual concerted refusal to:

(a) provide emergency room coverage;
(b) perform administrative functions; or
(c) professionally refer patients to, or receive referrals of patients from, any physician.

The above provisions do not prohibit respondents from:

(a) commenting on bona fide quality of care considerations relating to any physician who is recruited or employed by, or associated with, any hospital;
(b) recruiting, employing, or associating with any physician for the private practice of medicine; or
(c) contacting, reporting to, or conferring with the Texas State Board of Medical Examiners, any state or federal drug enforcement agency, and/or any other governmental body concerning a violation of law by any physician.

II.

This Order will expire ten years after the date on which it is served on respondents.

III.

It is further ordered, That each respondent shall within sixty days after service upon them of this Order file with the Commission a written report setting forth the manner and form in which the respondent has complied with this Order and that additional reports shall be filed at such other times as the Commission may by written notice to each respondent require. Each compliance report shall include all information and documentation as may be required by the Commission to show compliance with this Order.

IN THE MATTER OF

HOUSEHOLD FINANCE CORPORATION

DISMISSAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE TRUTH IN LENDING ACT

Docket 9111. Complaint, June 13, 1978—Order, Aug. 6, 1981

This order dismisses the Commission's June 13, 1978 complaint charging one of the largest small-loan companies in the United States with violating the Truth in Lending Act (TILA). The Commission held that the company's practice of requiring customers to repay loans discharged in bankruptcy before receiving a new loan constituted "refinancing" under the TILA and therefore the amount of the discharged debt need not be disclosed as part of the "finance charge."

Appearances

For the Commission: *David G. Grimes, Jr., Rena Steinzor* and *Lawrence DeMille-Wagman.*

For the respondent: *J. Wallace Adair, Richard A. Kleine* and *R. Bruce Beckner, Howrey & Simon,* Washington, D.C., and *Richard P. McManus* and *Thomas M. Ryan,* in-house counsel.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.,* the Truth in Lending Act, 15 U.S.C. 1601 *et seq.,* and its implementing Regulation Z, 12 C.F.R. 226, duly promulgated by the Federal Reserve Board, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Household Finance Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and Regulation, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Household Finance Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at Prudential Plaza, Chicago, Illinois.

PAR. 2. Respondent Household Finance Corporation is now and for some time past has been engaged in the extension of consumer loans to members of the public.

PAR. 3. In the ordinary course and conduct of its business as

aforesaid, respondent regularly extends consumer credit to consumers and is a creditor as "consumer credit" and "creditor" are defined in Sections 226.2(p) and 226.2(s), respectively, of Regulation Z.

PAR. 4. Respondent, in the ordinary course of its business, extends and for some time since July 1, 1969, has extended loans to consumers, some of whom subsequently file bankruptcy petitions prior to full repayment of their debt to respondent. Such consumers are duly adjudged as bankrupts pursuant to the Bankruptcy Act, 11 U.S.C. 1 *et seq.,* and are released from any legal obligation to repay discharged debts, including debts to respondent. [These consumers are hereinafter sometimes referred to as "discharged debtors".] [2]

PAR. 5. In many instances, respondent solicits discharged debtors offering them specific extensions of new credit on the condition that the discharged debtor reaffirm his or her discharged debt to respondent. When a discharged debtor, who has been solicited by respondent or who otherwise requests a specific subsequent extension of credit from respondent, enters into a subsequent transaction, respondent requires the debtor to sign a contract which reaffirms all or part of his or her discharged debt and obligates the discharged debtor to repay that amount plus any new loan advanced. Finance charges are imposed on the sum of the reaffirmed debt and the new loan. Respondent does not extend credit in the form of new loans to such consumers without their reaffirmation of discharged debt. The amount of debt reaffirmed therefore represents a charge which is payable directly or indirectly by the borrower as an incident to or a condition of the extension of credit and constitutes a cost of credit and is a finance charge as "finance charge" is defined in Sections 226.2(w) and 226.4(a) of Regulation Z.

PAR. 6. In its disclosures required by the Truth in Lending Act and Regulation Z for the loans described in Paragraph Five above, respondent treats the reaffirmed debt as part of the credit of which the consumer will have actual use and not as a "finance charge" on the new loan transaction. Respondent includes the reaffirmed debt in its disclosure of the "amount financed" on the new loans. Respondent, in connection with these loans thereby: (1) fails to accurately compute and disclose the finance charge, as required by Section 226.8(d)(3) of Regulation Z; (2) fails to compute and disclose the annual percentage rate, as "annual percentage rate" is defined in Sections 226.2(g) and 226.5 of Regulation Z, accurately to the nearest quarter of one percent as required by Sections 226.5(b) and 226.8(b)(2) of Regulation Z; and (3) fails to accurately compute and disclose the amount financed as required by Section 226.8(d)(1) of Regulation Z.

PAR. 7. Pursuant to Section 103(s) of the Truth in Lending Act, respondent's aforesaid failure to comply with the provisions of Regulation Z constitutes a violation of that Act and, pursuant to Section 108 thereof, respondent has engaged in unfair or deceptive acts and practices in violation of the Federal Trade Commission Act, as amended.

INITIAL DECISION

BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW JUDGE

MARCH 16, 1979

Allegations of Complaint

The complaint, which was served on respondent Household Finance Corporation (Household Finance) on July 10, 1978, charged respondent with having violated the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.,* the Truth in Lending Act, 15 U.S.C. 1601, *et seq.,* and its implementing Regulation Z, 12 C.F.R. 226. According to the allegations, Household Finance has been approached for new loans by persons who have had prior debts owed to it discharged in bankruptcy. In such cases, according to the complaint, where the discharged debtor was [2]otherwise eligible for a new loan, Household Finance would grant such a loan provided the discharged debtor would sign a contract which reaffirmed all or part of the discharged debt and obligated him or her to repay to Household Finance the amount of that debt plus the amount of the new loan advanced.

The complaint charged that Household Finance improperly treated the reaffirmed debt as part of the credit granted to the borrower and of which he or she would have actual use, rather than as a "finance charge" on the new loan transaction, in the disclosures required by the Truth in Lending Act and Regulation Z, promulgated by the Federal Reserve Board to implement the Act. In other words, it was alleged that Household Finance unlawfully included the reaffirmed debt, previously discharged in bankruptcy, in the disclosure to the borrower of the "amount financed" rather than in the "finance charge."

The complaint challenged this procedure alleging that the amount of the reaffirmed debt "represents a charge which is payable directly or indirectly by the borrower as an incident to or a condition of the extension of credit and constitutes a cost of credit and is a "finance

charge" as "finance charge" is defined in Regulation Z. The complaint further charged that Household Finance, in connection with such loans, by including the amount of the reaffirmed debt in the disclosure of the "amount financed" rather than in the disclosure of the "finance charge":

> . . . (1) fails to accurately compute and disclose the finance charge, as required by Section 226.8(d)(3) of Regulation Z; (2) fails to compute and disclose the annual percentage rate, as "annual percentage rate" is defined in Sections 226.2(g) and 226.5 of Regulation Z, accurately to the nearest quarter of one percent as required by Sections 226.5(b) and 226.8(b)(2) of Regulation Z; and (3) fails to accurately compute and disclose the amount financed as required by Section 226.8(d)(1) of Regulation Z.

Procedural History

Respondent Household Finance's answer was filed August 7, 1978. A prehearing conference was scheduled for September 19 by Judge Teetor to whom this proceeding [3]was originally assigned. Judge Teetor, however, disqualified himself on September 7 and the prehearing conference of September 19 was cancelled. The undersigned was then assigned to this matter and rescheduled the conference for October 12.

At this conference an effort was made to secure from both sides a stipulation of facts inasmuch as this proceeding appeared to involve principally an issue of law relating to the application of Regulation Z and the Truth in Lending Act. The parties were directed to attempt to reach such a stipulation by November 10. In the meantime complaint counsel filed a request for admission of facts and genuineness of documents and, after receiving respondent Household Finance's response thereto, a motion that the sufficiency of such response be determined by the law judge. A second request for admission of facts and genuineness of documents was filed, but was withdrawn by complaint counsel on agreement by both sides to a "Statement of Stipulated Facts."

At a second prehearing conference held December 19 the stipulation of facts was taken up by the law judge and discussed with the parties. Neither side wishing to offer anything in evidence in addition to the stipulation, it was determined that no evidentiary hearings were required and that no further procedural steps were necessary other than the submission by both sides of proposed findings and supporting memoranda. On December 20 an order was issued based on the preceding day's conference accepting the stipulation, closing the record for the reception of evidence and establishing a briefing schedule. February 2, 1979 was established as a date for the submission of findings and briefs, and February 16,

1979, for the filing of any replies by each side to the filings of the other.

Complaint counsel and counsel for respondent Household Finance have agreed that the "Statement of Stipulated Facts" is to be the sole statement of the facts to be used by any party in this proceeding. Counsel for both sides have also agreed that nothing in the stipulation can be used or considered as an admission by respondent in any other proceeding, with the exception of a proceeding brought by the Commission pursuant to Section 19 of the Federal Trade Commission Act as a result of an administrative decision in this proceeding, Docket No. 9111, which is based on facts stated in the stipulation and found herein. Respondent, furthermore, does not agree or admit that the Commission has authority [4]to institute a proceeding under Section 19 of the Federal Trade Commission Act or otherwise obtain restitution against respondent in connection with this proceeding.

FINDINGS OF FACT

Except for a few grammatical changes, the joint "Statement of Stipulated Facts" is incorporated herein as the following "Findings of Fact," each numbered finding corresponding to the same numbered paragraph of the stipulation:

1. Respondent Household Finance Corporation is a corporation organized under the laws of the State of Delaware. Its principal office and place of business is located at 2700 Sanders Road, Prospect Heights, Illinois.

2. Respondent is now and for some time in the past has been engaged in the extension of consumer loans to members of the public.

3. In the ordinary course and conduct of its business as aforesaid, respondent regularly extends consumer credit to consumers and is a creditor as "consumer credit" and "creditor" are defined in Sections 226.2(p) and 226.2(s), respectively, of Regulation Z, 12 C.F.R. 226.

4. Since July 1, 1969, although not a substantial number of respondent's total customers, a substantial number of consumers to whom respondent has extended loans have, prior to full repayment of their indebtedness to respondent, filed petitions in bankruptcy.

5. Of those consumers who filed petitions in bankruptcy as described in Finding 4, a substantial number were subsequently adjudged bankrupts and granted discharges in bankruptcy in accordance with the provisions of the Bankruptcy Act, 11 U.S.C. 1, *et seq.*, with respect to indebtedness to respondent and others.

6. In a substantial number of cases after notification that the petition in bankruptcy had been filed, and in a substantial number of cases after a final discharge in bankruptcy had been granted, respondent has contacted consumers described in Findings 4 and 5 [5]and informed them that upon reaffirmation of a part or all of their discharged debts to respondent, and if otherwise eligible for credit, it would reestablish their credit with respondent and shortly thereafter grant them new loans.

7. In a substantial number of cases after notification that the petition in bankruptcy had been filed, and in a substantial number of cases after a discharge in bankruptcy had been granted, consumers described in Findings 4 and 5 have sought new loans from respondent.

8. During their negotiations concerning new loans, respondent and most of the consumers described in Findings 4, 5, 6 and 7 discussed one or more of the following: (a) the consumer's desire to retain property pledged as security by the consumer with respect to the indebtedness owed to the respondent; (b) the release of a co-maker's obligation to pay the consumer's indebtedness to respondent; (c) resolution of litigation pending in bankruptcy court concerning the indebtedness of the consumer; (d) reestablishment of the consumer's credit with respondent.

9. During their negotiations concerning new loans, respondent and the consumers described in Findings 4, 5, 6 and 7 discussed the reaffirmation of part or all of the consumer's debt to respondent which had either been discharged by the bankruptcy proceeding or was scheduled as a debt in the bankruptcy proceeding at the time of the negotiations.

10. In a substantial number of instances since July 1, 1969, respondent has obtained reaffirmations from the consumers described in Findings 4, 5, 6 and 7 of part or all of their indebtedness to respondent which had been discharged in bankruptcy or which was scheduled as a debt in the bankruptcy proceeding at the time of the reaffirmation. Most of those consumers have reaffirmed their debts to respondent for one or more of the following reasons: (a) to retain property pledged as security by the consumer in connection with the indebtedness owed to respondent; (b) to secure the release of a co-maker's obligation to repay the indebtedness of the consumer; (c) to settle bankruptcy court litigation concerning the indebtedness of the consumer; (d) to reestablish credit with respondent. Such consumers must reaffirm part or all of their debts to respondent before obtaining new loans from respondent. [6]

11. Since July 1, 1969, respondent's policy and usual and custom-

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ary practice has been that part of any new loan from respondent to the consumers described in Findings 4, 5, 6 and 7 must be used to repay part or all of their debts to respondent which had been discharged in bankruptcy or which were scheduled as a debt in a bankruptcy proceeding at the time of the new loan.

12. Since July 1, 1969, respondent's policy and usual and customary practice has been that during the negotiations concerning new loans and before consumers described in Findings 4, 5, 6 and 7 agree to reaffirm debts to respondent, its employees inform such consumers that such reaffirmation is necessary to reestablish their credit with respondent and that part of any new loan from respondent must be used to repay part or all of their debt to respondent which had been discharged in a bankruptcy proceeding or which was scheduled as a debt in a bankruptcy proceeding at the time of the negotiations.

13. Since July 1, 1969, whenever a consumer has agreed to pay all or a portion of a debt scheduled or discharged in a bankruptcy proceeding with part of the principal amount of the new indebtedness, respondent has imposed finance charges on those portions of the principal amount of the new indebtedness which are applied to repayment of part or all of the reaffirmed debt and the amount of new money paid to the consumer. The term "principal amount of the new indebtedness" shall mean the total amount of money the consumer agrees to pay respondent which includes (a) the amount of the new indebtedness which is applied to the payment of part or all of the reaffirmed debt; (b) the amount of new money paid to the consumer; and (c) the finance charge imposed on (a) and (b) above.

14. Since July 1, 1969, whenever a consumer has agreed to reaffirm and pay all or a portion of a debt scheduled or discharged in a bankruptcy proceeding with part of the principal amount of the new indebtedness, respondent's policy and usual and customary practice regarding the Truth in Lending disclosure statement furnished to the consumer in connection with the new indebtedness has been that: [7]

a. The amount of the reaffirmed debt paid from the principal amount of the new indebtedness is disclosed as part of the amount financed;

b. The amount of additional credit extended is disclosed as part of the amount financed;

c. The amount of the reaffirmed debt paid from the principal amount of the new indebtedness is not included in the finance charge disclosed; and

d. The annual percentage rate disclosed is computed by relating the disclosed finance charge to the disclosed amount financed.

15. With respect to the disclosure statements described in Finding 14, if the amount of the reaffirmed debt repaid from the principal amount of the new indebtedness were included in the finance charge disclosed, and removed from the amount financed disclosed, and if the annual percentage rate were recomputed on the basis of the amended finance charge and amount financed, the annual percentage rate would be increased by more than one-quarter of one percent, from what appeared in the disclosure statements described in Finding 14.

16. Prior to on or about July 1, 1977, respondent did not offer consumers the right to rescind contracts which reaffirmed debts previously discharged in bankruptcy. Respondent required those consumers to sign a loan agreement to repay the principal amount of the new indebtedness, part of which was used to settle their reaffirmed debt and part of which was new money paid to the consumers.

17. Beginning on or about July 1, 1977, to the present, respondent has, as a matter of usual and customary practice, presented consumers who reaffirmed debts previously discharged in bankruptcy and repaid them from the principal amount of the new indebtedness a *Statement of Rights, Agreement and Cancellation Notice,* a copy of which is Attachment B set out herein.

18. The two-page document set out herein as Attachment A is a true, correct copy of a genuine original memorandum which was prepared at respondent's home office on or about June 29, 1977. [8]

19. Attachment B is a true, correct copy of Form 3, referred to in Attachment A.

20. Attachments A and B were distributed by respondent to its employees identified in Attachment A as "U.S. Managers" on or about June 29, 1977.

21. Respondent's home office directed respondent's U.S. Managers, on or about June 29, 1977, that the procedures described in Attachment A were to be followed, as applicable, in dealings with consumers who had been discharged in bankruptcy from some indebtedness to respondent.

22. Respondent has not rescinded or modified Attachments A and B.

23. Since on or about June 29, 1977, as a matter of usual and customary practice, the procedures described in Attachment A have been followed, as applicable, in dealings with consumers who have

been discharged in bankruptcy from some indebtedness to respondent.

24. The policy and customary practices of respondent as set forth in Findings 4 through 7 and 11 through 15 are the policy and customary practices of many of respondent's competitors, including its competitors who are not within the jurisdiction of the Federal Trade Commission.

25. Since July 1, 1969, the policies and customary practices of respondent and its competitors, as described herein, have not been challenged by the Federal Trade Commission or the Federal Reserve Board in any formal proceeding. [9]

HOME OFFICE MEMORANDUM

To All U.S. Managers Date June 29, 1977

Subject Bankruptcy Refinancing Agreements

As a result of a recent occurrence in New York, it is desirable to more fully implement our policy with respect to bankruptcy refinancing agreements. We must make certain that all bankrupt customers fully understand and freely exercise their rights with respect to such agreements. Accordingly, a notice and cancellation procedure is established.

In the absence of a restraining order, bankrupt customers may be contacted to discuss collateral or to discuss reaffirmation. If the bankrupt asks about obtaining a new loan, this possibility may be discussed if the bankrupt is otherwise eligible for additional credit. In any discussion concerning reaffirmation or a new loan the bankrupt must be advised that there is no legal obligation to repay the bankrupt account balance, and that part of any new loan must be used to settle the discharged debt but the amount so used is negotiable.

At the closing of any loan in which part of the proceeds is used to settle a bankruptcy discharged debt, and before the loan papers are signed, the following procedures must be followed:

1. Complete Form 3 (example attached) to show the Amount Financed of the new loan, the amount applied to the discharged debt, and the amount actually disbursed, including the premium charge for any credit insurance elected;
2. Have the customer read the Form 3 and sign it;
3. Have the other loan documents signed and disburse the loan proceeds; and,
4. Give the Customer Copy of Form 3 to the borrower and retain HFC's File Copy with the legals.

DO NOT STAMP THE OLD PAPERS PAID OR CANCELLED OR RETURN THEM TO THE CUSTOMER, NOR RELEASE ANY SECURITY INTEREST AT THIS TIME.

If the discharged debt is an open account the new loan must be coded as a "NEW".

If the discharged debt is a Bad Debt account, the new loan must be coded as a "FOR". In both cases the amount applied to the discharged debt would be coded as a counter payment.

(Attachment A, page 1)

If the CANCELLATION NOTICE is not received within ten (10) calendar days plus three (3) business days after the new loan was closed, mark the previous account's papers in the normal way and return them to the customer.

If the CANCELLATION NOTICE is received within ten (10) calendar days plus three (3) business days, the amount applied to the discharged debt must be credited to the new loan as follows: Void the payment that was applied to the discharged balance and apply that amount as a counter payment to the new loan.

Retain the discharged account's documents as if the new loan had not been made. Payments on the new loan must continue to be made as scheduled, disregarding the credit to the new loan that was applied; i.e., the credit to the new loan must not be considered as paying it in advance.

Offices serving District of Columbia, Iowa, New Jersey and West Virginia must apply the special restrictions listed in Section 6-7 of the Collection GIM to bankruptcy refinancing agreements as well as reaffirmations. This instruction is sent to New York offices for information only and those branches should continue to follow the special instructions previously issued.

Section 6-7 of the Collection GIM will be expanded to include the notice and cancellation procedure at the time of its next reprinting. A supply of Form 3 will be shipped under separate cover. If you have any questions, please contact your District Manager.

W. J. D. Miller
Vice President
Administration - Operations

WJDM:/kw
Attachment

(Attachment A, page 2)

STATEMENT OF RIGHTS

1. To obtain a new loan you will be required to repay all or part of your outstanding debt to HFC that was discharged in bankruptcy.

2. Your discharge in bankruptcy has fully released you from any legal obligation to repay any part of your outstanding debt to HFC.

3. You may bargain with HFC on the amount of the new loan to be paid towards your old loan.

4. You may cancel within 10 days your agreement with HFC to apply an agreed amount to your old loan.

5. If you decide, within 10 days, to cancel your agreement with HFC to apply an agreed amount to your old loan, tear off, date, sign and mail the bottom of this notice, below the dotted line, to HFC at this branch office address.

6. If you do cancel, the amount applied to your old loan will be credited in full to your new loan, but you are required to meet your new loan payments as scheduled.

7. If you do not cancel within 10 days, the note representing your obligation under the old loan will be marked paid and cancelled and promptly returned to you by HFC.

AGREEMENT

HFC and I have agreed that HFC will:

1. Make me a new loan in the Amount Financed of $_____;

2. Apply to my old loan that was discharged in bankruptcy $_____; and,

3. Disburse to me or on my behalf from the new loan $_____.

By signing this agreement, I acknowledge that I have read and understood its terms and that I have received a copy. I understand I am under no legal obligation to enter into such an agreement.

Date _____ Signature _____

Witness, HFC Representative _____

CANCELLATION NOTICE

TO: HOUSEHOLD FINANCE CORPORATION

Address: _____

City: _____ State: _____ Zip Code: _____

I hereby cancel my agreement with HFC to apply an agreed amount to my old loan.

Date _____ Signature _____

FORM 7 CUSTOMER COPY (Attachment B)

[12]*Discussion*

The question presented in this proceeding is whether, under the stipulated facts including Attachments A and B, the amount of a reaffirmed debt previously discharged in bankruptcy is a cost of credit which must be disclosed to the borrower as part of the "finance charge" under the Truth in Lending Act and its implementing Regulation Z, rather than listed as part of the "amount financed," as has been the practice of respondent Household Finance. The Truth in Lending Act is the short title for Title 1 of the Consumer Credit Protection Act, legislated by Congress in 1968. 15 U.S.C. 1601, *et seq.* Pursuant to Section 1605(a) of the Act, as amended, the term "finance charge" is defined as "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit . . ." Section 1604 provides that the Board of Governors of the Federal Reserve System shall prescribe regulations to carry out the purposes of the Truth in Lending Act. Pursuant to this mandate the Board issued Regulation Z, effective July 1, 1969, and amended October 28, 1975.

Regulation Z defines the term "finance charge" as "the cost of credit determined in accordance with Section 226.4" of the regulation. 12 C.F.R. 226.2(w). Section 226.4 provides that:

> . . . the amount of the finance charge in connection with any transaction shall be determined as the sum of all charges, payable directly or indirectly by the customer, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit, whether paid or payable by the customer, the seller, or any other person on behalf of the customer to the creditor or to a third party . . . .

Regulation Z enumerates several types of charges which must be included by the lender within the "finance charge," as well as certain charges excludable from the "finance charge." 12 C.F.R. 226.4(a)-(b). The import of this enumeration of charges to be included or excluded from the "finance charge" in the required disclosure statement is that if the payment is required by the lender as an incident to or a condition for granting the loan it must be listed as part of the "finance charge." [13]

Where insurance, for example, is required by the lender as a condition for the loan and the borrower must pay the premium, the latter must be included within the "finance charge." 12 C.F.R. 226.4(a)(5). On the other hand, if the borrower already owns a policy of insurance which the creditor requires to be assigned to him as a condition for the loan, the insurance is not written "in connection with" the loan transaction (provided the policy was not purchased

for use with the credit transaction), and premiums for such insurance are not "finance charges." 12 C.F.R. 226.4(a)(5) n. 3. Similarly, charges in connection with a checking account which involve credit extension must be included in the "finance charge" to the extent they exceed charges that a customer is required to pay "in connection with such an account where it is not being used to extend credit." 12 C.F.R. 226.4(a)(5) n. 2.

Appendix A of Regulation Z reiterates that the "finance charge" is "the total of all costs which . . . [a] . . . customer must pay, directly or indirectly, for obtaining credit." Appendix A further notes that some costs which would be paid by the borrower in any event "if credit were not employed" may be excluded. In sum, costs payable for obtaining a loan are part of the "finance charge," and costs which the borrower would have to pay regardless of whether or not a loan were obtained are not part of the "finance charge."

The purpose of the Truth in Lending Act is to assure that every consumer who has need for credit is given meaningful information of the true cost of that credit enabling the consumer to compare better the credit terms offered from various sources and thereby avoid the uninformed use of credit. 15 U.S.C. 1601(a); *Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 363–65 (1972); *Joseph* v. *Norman's Health Club, Inc.,* 532 F.2d 86, 90 (8th Cir. 1975). This is to be accomplished by stating the cost of credit by items and in dollars in a disclosure of the "finance charge" to be provided every customer seeking consumer credit.

The discharge of a debt in bankruptcy releases a debtor from any legal compulsion to repay the debt. A discharge in bankruptcy enjoins all creditors whose credit extensions have been discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt. 11 U.S.C. 32(f). The foregoing provides: [14]

> (f) An order of discharge shall –
>
> (1) declare that any judgment theretofore or thereafter obtained in any other court is null and void as a determination of the personal liability of the bankrupt with respect to any of the following [debts] . . . and
>
> (2) enjoin all creditors whose debts are discharged from thereafter instituting or continuing any action or employing any process to collect such debts as personal liabilities of the bankrupt.

A debt discharged in bankruptcy, therefore, is uncollectable by legal process although it is not forgiven or cancelled. *Wagner* v. *United States,* 573 F.2d 447, 453 (7th Cir. 1978); *Binnick* v. *Avco Financial Services of Nebraska,* 435 F. Supp. 359, 363 (D. Neb. 1977). *Collier on*

Bankruptcy, Section 17.33 (14 Ed.), states "The general rule is that a discharge affects only the remedy of the creditor and the obligation itself is not cancelled."

Since neither forgiven nor cancelled, a discharged debt may be rendered legally enforceable again if reaffirmed by the discharged debtor. According to *Collier, supra:*

> The law in the various states governs this matter, and it is generally agreed that the bar of a discharge may be waived by the making of a new promise. In reaching this decision, the courts have employed various theories; some courts have found consideration for the new promise in the form of a past legal obligation plus a present moral obligation, while other courts have declared that no new consideration is necessary to support the waiver.

Accordingly, when a debtor reaffirms, promising to pay to Household Finance a debt discharged in bankruptcy in order to obtain a new loan, a legally enforceable obligation against him or her is created which previously did not exist. Respondent has cited many state court cases to this effect (RPF, pp. 13–16 and Appendix to RPF Table of Authorities). [15]See also *Kessler* v. *Department of Public Safety,* 369 U.S. 153, 169–70 (1962); *Zavelo* v. *Reeves,* 227 U.S. 625, 629 (1913); *Girardier* v. *Webster College,* 563 F.2d 1267, 1272 (8th Cir. 1977); *Zabella* v. *Pakel,* 242 F.2d 452, 454 (7th Cir. 1957); *In re Innis,* 140 F.2d 479, 481, (7th Cir. 1944), *cert. denied,* 322 U.S. 736 (1943); *Shepherd* v. *McDonald,* 61 F. Supp. 948, 953 (D. Ore. 1945), *rev'd on other grounds,* 157 F.2d 467, 468 (9th Cir. 1946), *cert. denied,* 329 U.S. 802 (1947). The Supreme Court, in *Kessler,* stated, 369 U.S. at 170:

> . . . a moral obligation to pay the debt survives discharge and is sufficient to permit a State to grant recovery to the creditor on the basis of a promise subsequent to discharge, even though the promise is not supported by new consideration . . .

A debtor, after reaffirmation, can thus be forced through legal process to pay money which, until reaffirmation, Household Finance could not collect through legal process. Under these circumstances, the additional legally enforceable liability of a borrower, arising from reaffirmation, to pay all or part of a previously discharged debt is clearly a "cost" of a new loan granted by Household Finance.

This "cost" of credit, furthermore, is exacted as an incident to or a condition for the grant of credit. Unless an applicant for a loan who has had a prior debt to Household Finance discharged in bankruptcy, in whole or in part, will reaffirm all or part of the prior discharged debt, Household Finance will not grant a new loan. See Finding 10. The "Statement of Rights, Agreement and Cancellation Notice" (Attachment B) leaves no doubt, telling borrowers clearly that "[t]o obtain a new loan you will be required to repay all or part

of your outstanding debt to HFC that was discharged in bankruptcy." See also Finding 11.

Although the Act itself is unambiguous on the point, it has been specifically held that a tying relationship between the imposition of a charge and the extension of credit renders the former a "finance charge." *Mondik* v. *DiSimo,* 386 F. Supp. 537 (W.D. Pa. 1974). It has been held that the assumption by a borrower of the preexisting debt of another as a condition for obtaining a loan results in a "cost" or "charge" which must be disclosed in the "finance charge." *Campbell* v. *Liberty Financial Planning, Inc.,* 422 F. Supp. 1386 (1976). No reason would seem to exist for [**16**]a different result when a borrower is required to reaffirm his own debt previously discharged in bankruptcy. In both cases the borrower is saddled with a legally enforceable monetary obligation which he or she did not previously have as a condition for being granted new credit. Further precedent can be found in cases involving other kinds of costs, for example, unearned non-rebated insurance premiums, *Ives* v. *W.T. Grant Company,* 522 F.2d 749, 760 (2nd Cir. 1975), *Welmaker* v. *W.T. Grant Company,* 365 F. Supp. 531, 538–39 (D. Ga. 1973), mandatory service contract, *Carney* v. *Worthmore Furniture, Inc.,* 561 F.2d 1100, 1103 (4th Cir. 1977), notary fees not mandatory under state law, *Buford* v. *American Finance Co.,* 333 F. Supp. 1243, 1247 (D. Ga. 1971), but see *George* v. *General Finance Corp of Louisiana,* 414 F. Supp. 33, 35 (E.D. La. 1976), delivery charges, *Mondik* v. *DiSimo, supra,* discounts on notes, *Joseph* v. *Norman's Health Club, Inc., supra.* In the opinion of the undersigned, a discharged debt reaffirmed to obtain a new loan is a cost of credit and must be disclosed as such to the borrower as part of the "finance charge."

Respondent's Contentions

Household Finance denies that the amount of a discharged debt reaffirmed by a recipient of a new loan must be disclosed as part of the "finance charge." Respondent argues that because a discharge in bankruptcy does not wipe out the debt which continues to exist, and because reaffirmation is simply an agreement to pay an existing obligation which is enforceable without further consideration, reaffirmation cannot be a "charge" paid by a consumer to obtain a new loan (RPF, pp. 11–18; RRB, pp. 11–14).* Household Finance further contends that because there is already an existing moral obligation, the agreement to reaffirm is sufficient to hold the consumer legally

* Respondent's proposed findings are abbreviated "RPF" and respondent's reply brief is abbreviated "RRB."

liable to pay the reaffirmed debt without additional consideration or any new written instrument, and thus reaffirmation is wholly "independent" of a "subsequent extension of credit," *i.e.,* a new loan, and is not "imposed" on the consumer (RPF, p. 21; RRB, pp. 21-28). Since the borrower has the right to cancel within 10 calendar days, Household Finance argues that it has not "imposed [any] requirement on the consumer to pay the amount used to settle the reaffirmation" and that, for this reason also, there [17]has been no "charge" (RPF, p. 23). Adding to the argument that nothing has been "imposed" on the customer, respondent asserts that "most" borrowers reaffirm for reasons wholly unrelated to credit extensions or simply to "reestablish credit" and, therefore, reaffirmation is neither "imposed" nor "incident to the extension of credit" (RPF, p. 24).

As stated earlier, the purpose of the Truth in Lending Act is to ensure that consumers of credit receive meaningful disclosures of the costs or charges for credit. 15 U.S.C. 1601. The Act must be given a broad, liberal construction, not a technical, narrow one. *Sellers* v. *Wollman,* 510 F.2d 119 (5th Cir. 1975); *Eby* v. *Reb Realty, Inc.,* 495 F.2d 646 (8th Cir. 1974); *Pinkett* v. *Credithrift of America, Inc.,* 430 F. Supp. 113 (D. Ga. 1977); *Gerasta* v. *Hibernia National Bank,* 411 F. Supp. 176 (D. La. 1976). The word charge means any pecuniary burden, expense or obligation. *Garza* v. *Chicago Health Clubs, Inc.,* 347 F. Supp. 955 (N.D. Ill. 1972); *Meyers* v. *Clearview Dodge Sales, Inc.,* 384 F. Supp. 722 (E.D. La. 1974). The assumption of a legally enforceable obligation to pay a discharged debt in order to secure new credit, where before such assumption there was at most a moral obligation unenforceable by legal process, is clearly a cost or charge. The borrower must now pay something which before reaffirmation he or she could not have been made to pay. Reaffirmation of a discharged debt is a cost or a charge within the meaning of the Truth in Lending Act notwithstanding the continued existence of the debt after discharge and a "moral obligation" to pay.

The fact that a borrower may have his or her own reasons for reaffirming a discharged debt does not mean that reaffirmation is not imposed by Household Finance. The statement of Household Finance to borrowers informing them that to obtain a new loan they are required to repay all or part of the debt discharged in bankruptcy refutes any contention that Household Finance does not impose reaffirmation. See Attachment B. See also Findings 10, 11 and 12. Even if, apart from Household Finance's requirement, debtors reaffirm their discharged debts to keep property pledged as security or to release co-makers, or the like, the plain fact is that they would not get a new loan if they refused to reaffirm. And, they are fully

advised of this condition by respondent when they apply for a new loan. Finding 12. The realities of the situation dictate that the prospect of a new loan must be a factor in motivating many borrowers to reaffirm discharged debts. [18]

Nor does the right of a borrower to rescind the reaffirmation of the discharged debt within 10 calendar days mean that there has been no imposition of a charge incident to the extension of credit. It should be noted, in connection with this argument, that prior to July 1, 1977, Household Finance did not offer borrowers the right to rescind an agreement to reaffirm debts previously discharged in bankruptcy. Respondent's argument on this point is not applicable to its failure to disclose the amount of the reaffirmed debt as part of the "finance charge" prior to that date. With respect to transactions subsequent to July 1, 1977, Section 1601 of the Truth in Lending Act requires that there be a full disclosure of credit terms to a borrower *before* the transaction is consummated so that there may be a comparison of the terms available from various sources and uninformed use of credit may be avoided. *White* v. *Arlen Realty & Development Corp.*, 540 F.2d 645 (4th Cir. 1974); *Johnson* v. *McCrakin-Sturman Ford, Inc.*, 527 F.2d 257 (3rd Cir. 1975); *Philbeck* v. *Timmers Chevrolet, Inc.*, 499 F.2d 911, *rehearing denied,* 502 F.2d 1167 (5th Cir. 1974). At the time a new loan is negotiated reaffirmation has taken place, a cost or charge has been placed on the borrower and the disclosures required by the Truth in Lending Act are required to have been made.

Determinations that a reaffirmed debt is principal rather than interest in actions under state usury laws do not mean that the amount of the reaffirmed debt is not a cost of credit which must be disclosed under the Truth in Lending Act as a part of the "finance charge" (RPF, pp. 17–18). The term "finance charge" under Section 1605(a) of the Act includes not only interest but many other charges for credit. *H.R. Report* No. 1050, 90th Cong. 2nd Sess. (1967); *Joseph* v. *Norman's Health Club, Inc.*, 532 F.2d at 93. In *Campbell* v. *Liberty Financial Planning, Inc.*, 422 F. Supp. at 1391, the District Court held that the debt or another assumed by the borrower, although not interest, was a charge which had to be disclosed as a "finance charge" under the Truth in Lending Act.

Respondent argues, as already mentioned, that the requirement for reaffirmation of a discharged debt by an applicant for a new loan is not "incident to the extension of credit" because the reaffirmation transaction and the grant of a new loan are "wholly independent" (RPF, pp. 21, 24–25; RRB, pp. 21–28). In the instant setting this [19] argument is little more than the kind of "semantic posturing"

referred to by the court in *Campbell* in rejecting the claim that the borrower's assumption of the balance of his mother's discharged debt was a separate transaction not incident to the grant of the borrower's own loan. The contention that reaffirmation is a transaction wholly independent of the grant of a new loan is negated by respondent's straightforward advice to borrowers tying a new loan to the repayment of all or part of the outstanding debt to HFC that was discharged in bankruptcy. Attachment B; Findings 10–12.

Respondent contends (RPF, p. 22) that reaffirmed debts do not constitute a "finance charge" because they are not similar to the types of charges enumerated in Section 1605(a) of the Truth in Lending Act. That section, however, makes no pretense of being an exhaustive listing of finance charges. Nor is there any suggestion that every finance charge must be similar in nature to those listed. Additionally, it has been held that no charge other than those specifically listed in Section 1605(d) may be excluded from "finance charge" unless the exclusion "is approved by the [Federal Reserve Board] by regulation." 15 U.S.C. 1605(d)(4). In *Buford* v. *American Finance Company,* 333 F. Supp. 1243, 1247 (N.D. Ga. 1971), the court stated that "only those charges specifically exempted from inclusion in the 'finance charge' by statute or regulation may be excluded from it."

Respondent asserts that reaffirmation of a discharged debt as an incident to the grant of a new loan is governed by Section 226.8(j) of Regulation Z which relates to "Refinancing, consolidating or increasing" an existing extension of credit.* (RPF, pp. 25–26). Section 226.8(j) states: [20]

Refinancing, consolidating, or increasing. If any existing extension of credit is refinanced, or two or more existing extensions of credit are consolidated, or an existing obligation is increased, such transaction shall be considered a new transaction subject to the requirements of this part . . . .

Reaffirmation in whole or in part of a discharged debt in order to obtain a new loan does not constitute a "refinancing" of the old, discharged debt. Nor does it constitute the "consolidating" or "increasing" of a former extension of credit. It is not a financing "again or anew" or a "reorganization" of the debtor's finances. See *Webster's New International Dictionary,* 2nd Ed. Where no new loan is involved in the arrangement between a discharged debtor and his or her creditor, whereby a discharged debt is reaffirmed, the

* As already pointed out, a debt discharged in bankruptcy cannot be collected by legal process and any judgment respecting such debt is void as a determination of the personal liability of the bankrupt. 15 U.S.C. 32(f). A discharged debt, thus, has no enforceability by legal process. Following this reasoning, it can be argued that a discharged debt is not an "existing extension of credit" within the meaning of 12 C.F.R. 226.8(j).

disclosure requirements of the Truth in Lending Act and Regulation Z are irrelevant to this proceeding (RRB, pp. 14–18). As is clear from all that has been written hitherto, this proceeding concerns the disclosure requirements applicable in connection with a *new* loan to a discharged debtor who is required to repay all or part of the outstanding debt to Household Finance that was discharged in bankruptcy.

Respondent argues that requiring the inclusion of the amount of any reaffirmed debt in the disclosure of the "finance charge" would result in consumer confusion and would make comparison shopping between respondent and its competitors more, not less, difficult, contrary to the goals of the Truth in Lending Act. To prove this argument, Household Finance presents a hypothetical situation (RPF, pp. 30–32) involving a consumer who has borrowed money from respondent by pledging his automobile as security, and has thereafter gone through bankruptcy, having his or her debts discharged including $500 owed to respondent. Subsequently, the discharged debtor wishes to keep his car upon being told by Household Finance that "it will repossess the automobile" and also desires to borrow "another $600 to pay his bankruptcy attorney" (RPF, p. 31). Respondent then depicts the disclosures under the "finance charge" and "annual percentage rate" when the consumer borrows from Household Finance a new [21]$600 to pay his lawyer and reaffirms the discharged $500 (borrowing an additional $500 to pay that also), and where the consumer borrows $1100 from a rival loan company and no reaffirmation is involved. Respondent shows that the inclusion in its "finance charge" disclosure to the borrower of $500 of discharged debt distorts the "annual percentage rate" so that the borrower appears to be receiving a better deal from Household Finance's competitor than from Household Finance, although the truth is to the contrary. This situation, of course, is only hypothetical, and may have little or no relation to reality. The fact that respondent can construct hypothetical cases where inclusion of a reaffirmed debt in the "finance charge" results in a distortion of the "annual percentage rate," when compared with an equivalent amount of a new loan by a competitor involving no reaffirmation, does not mean that the true cost of credit need not be disclosed by Household Finance as required by the Truth in Lending Act and Regulation Z. As emphasized earlier, reaffirmation of a discharged debt under the circumstances of this case is an incident to and a condition of the extension of credit. As such, the reaffirmation must be disclosed to the borrower as a cost of credit in the listing of such costs under the "finance charge."

Conclusions

By including the amount of the reaffirmed debt previously discharged in bankruptcy under the "amount financed" rather than under the "finance charge," in cases where discharged debtors apply for and are granted new loans by respondent provided that they reaffirm their discharged debts in whole or in part, Household Finance has failed to disclose accurately the "finance charge" and has thereby violated the Truth in Lending Act and Regulation Z. 15 U.S.C. 1605, 1639; 12 C.F.R. 226.4, 226.6, 226.8. Where the foregoing violation has occurred, it has resulted in other violations of the Truth in Lending Act and Regulation Z, as follows:

(1) Violation for failure to compute and disclose accurately the "annual percentage rate" on the new loan transaction to the nearest one quarter of one percent. 15 U.S.C. 1606, 1639; 12 C.F.R. 226.5(b), 226.6, 226.8. [22]

(2) Violation for failure to compute and disclose accurately the "amount financed" on the new loan transaction. 15 U.S.C. 1639; 12 C.F.R. 226.6, 226.8.

Respondent Household Finance Corporation does business nationwide (see Statement of Stipulated Facts including Attachments A and B) and its practices here involved are in or affect commerce as "commerce" is defined in the Federal Trade Commission Act and are subject to the jurisdiction of the Federal Trade Commission.

Remedy

Respondent Household Finance is a substantial firm engaged in the small loan business. The strong financial interest of Household Finance in obtaining reaffirmation of debts resulting from prior loans which have been discharged in bankruptcy is self-evident. The practice of encouraging reaffirmation of prior discharged loans, as such, is not an issue in this proceeding. But this proceeding is concerned with the right of borrowers to be adequately informed of the true cost of new loans when they do reaffirm debts discharged in bankruptcy as an incident to obtaining such new loans. Over a period of years small loan applicants who have had prior loans to Household Finance discharged in bankruptcy have been required to reaffirm such debts in whole or in part as an incident to obtaining new loans. Over such period, as stated earlier, respondent has violated the Truth in Lending Act and Regulation Z by failing to include the amount of the reaffirmed debt as part of the "finance charge," and by erroneously and improperly including it under "amount financed." Due to this practice borrowers who have reaffirmed their discharged debts to obtain new loans have not been

given the meaningful disclosure of the cost of such new loans that is required by law. Under the circumstances, an order is necessary.

The first sentence of the order issued herein prohibits Household Finance from failing to include in the disclosure of the "finance charge" the amount of any indebtedness by the borrower to Household Finance which was reaffirmed "as an incident to or condition of the extension of credit."

A basic dispute in this proceeding has been whether or not reaffirmation has been incident to or a condition for the granting of new loans to discharged debtors. [23]Household Finance has vigorously argued that reaffirmation has not been required by it as an incident to the grant of a new loan. The undersigned, however, has found the contrary to be the case. An order which simply prohibits failure to include the amount of a reaffirmed debt within the disclosure of the "finance charge" where reaffirmation is an incident to or condition of the extension of credit would be ineffective in this proceeding. The order must establish safeguards so that, where the amount of a reaffirmed debt is not listed as part of the "finance charge" disclosed in connection with a new loan, there will be a reasonable assurance that reaffirmation was not indirectly or implicitly exacted as an incident to or condition of the new loan.

Paragraph 1(a) provides that reaffirmation is not an incident to or condition of the extension of credit *only* if the reaffirmation is not required and is not a factor in the new extension of credit, the amount or the terms thereof. If the reaffirmation of a discharged debt is among the factors given consideration by Household Finance in making its decision to grant a new loan, then it is "incident to" the extension of credit as set out in Section 1605(a) of the Truth in Lending Act and Section 226.4 of Regulation Z.

Where reaffirmation is not specifically tied to a particular new loan but, rather, is allegedly required by Household Finance to restore a debtor to a "creditworthy" standing and, based on such standing, credit is later extended, reaffirmation must still be disclosed as a cost of credit under the "finance charge." Holding otherwise would open the door to evasion of the disclosure requirements of the Truth in Lending Act and Regulation Z in this case. If "fencing in" is necessary in this respect, that is within the authority of the Commission. *Federal Trade Commission* v. *National Lead Company,* 352 U.S. 419 (1957); *Federal Trade Commission* v. *Colgate Palmolive Co.,* 380 U.S. 374 (1957); *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U.S. 608 (1946).

If full compliance with the letter and intent of the Truth in Lending Act and Regulation Z is to be assured, the following must

also be provided. Before Household Finance may exclude the amount of a reaffirmed debt from the "finance charge," Household Finance must (1) make a clear and conspicuous written disclosure to the borrower of the amount of the debt to be reaffirmed, the fact that reaffirmation in whole or in part is not required by Household Finance and that reaffirmation is not a factor considered by Household Finance in granting the loan or in its terms or amount and (2) after the foregoing [24]disclosure has been made, Household Finance must receive from the borrower a separate written, signed and dated statement of the agreement to reaffirm.

Where Household Finance has excluded the amount of a reaffirmed debt from the "finance charge" in making a new credit extension, it must allow borrowers a "cooling off" period of 10 calendar days during which the reaffirmation may be rescinded by the borrower after he or she has received notification in writing of the right to rescind. Such an enforcement provision is reasonable, and is necessary to ensure that the requirements of the order herein are not evaded and that, where reaffirmation has occurred and the amount of the reaffirmed debt has not been listed under the "finance charge," reaffirmation has not been a motivating factor in the grant of the new credit. Bankrupt members of the public are likely to have a genuine need for credit and are likely to be in a poor bargaining position vis-a-vis respondent. In such cases, reaffirmation may be exacted tacitly as the price or part of the price of a new loan notwithstanding the provisions of the order. Respondent now provides a "cooling off" period of 10 calendar days to borrowers who have reaffirmed discharged debts (Attachments A and B), so no additional burden is placed upon respondent by incorporation in the instant order of the requirement for a "cooling off" period.

To reiterate, such a "cooling off" period would only apply where the amount of the reaffirmed debt has not been included in the disclosure of the "finance charge." In such cases where a borrower subsequently rescinds his or her reaffirmation, the obligations of the borrower should be no different from what they would have been had there been no reaffirmation and rescission thereof.

The purposes of Paragraphs 2, 3 and 4 of the order are self-evident. Paragraph 5 is a broad provision prohibiting Household Finance from failing to make any of the disclosures required by the Truth in Lending Act and Regulation Z. Once a violation has occurred the public should not have to undertake the high costs of investigation and adjudication to stop other and future violations. *Federal Trade Commission* v. *National Lead Co., supra; Zale Corporation,* 78 F.T.C.

1195 (1971), *aff'd Zale Corp.* v. *Federal Trade Commission,* 473 F.2d 1317 (5th Cir. 1973).

Respondent argues that the Bankruptcy Act of 1978 obviates the need for an order in this proceeding (RRB, pp. 40–42). On November 6, 1978, the foregoing became law. 15 U.S.C. 525. The new Act sharply curtails the legal enforceability of reaffirmed debts previously discharged in bankruptcy. Subsequent to [25]October 1, 1979, neither respondent nor any other consumer loan company will be able to obtain a legally enforceable claim merely by securing a written reaffirmation of a discharged debt as part of a new loan transaction. In order to enforce a reaffirmed discharged debt, specific procedures set out in the new Bankruptcy Act will have to be followed after October 1, 1979, including a hearing before the court which granted the discharge in bankruptcy. 11 U.S.C. 525(c) and (d).

However, these procedures do not render relief herein unnecessary. The new Act states that a case commenced under the prior Act shall be conducted as if the subsequent Act had not been enacted, and that the rights of the parties shall be governed by the prior Act. Complaint counsel point out that there are the following substantial categories of the public where reaffirmation would not be affected by the new Bankruptcy Act (Memorandum in Support, pp. 30–33):

(1) Members of the public who have had debts to Household Finance discharged in bankruptcy and who may seek new loans from Household Finance;

(2) Members of the public who are now presently in bankruptcy proceedings and whose debts to Household Finance will ultimately be discharged, and who may seek new loans from Household Finance;

(3) Members of the public who will file petitions in bankruptcy prior to October 1, 1979 and who will have debts to Household Finance discharged and who may seek new loans from Household Finance.

As to these categories of the public, an order is necessary to ensure that proper disclosure of the "finance charge" and the "amount financed" be made, and that there is a proper calculation and disclosure of the "annual percentage rate."

Furthermore, even after October 1, 1979, an order is necessary to ensure that Household Finance makes the proper disclosures. It may well be that substantial numbers of debtors will reaffirm debts discharged in bankruptcy after the hearing required by 11 U.S.C. 524(d). As to these debtors, disclosures of the "finance charge," "amount financed" and "annual percentage rate" must be properly

made as required by the Truth in Lending Act. The new Bankruptcy Act does not address the matter of disclosures to those obtaining credit. To ensure that the required disclosures are made, an order is required. [26]

ORDER

It is ordered, That respondent Household Finance 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 any extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (15 U.S.C. 1601, *et seq.,* as amended), do forthwith cease and desist from:

1. Failing to include and treat as part of the finance charge, as "finance charge" is defined by Sections 226.2(w) and 226.4(a) of Regulation Z, the amount of any indebtedness by the borrower to respondent, previously discharged in bankruptcy, which was reaffirmed as an incident to or a condition of the extension of credit.

In connection with this Order, a reaffirmation is not an incident to or a condition of the extension of credit *only* if:

(a) the reaffirmation is not required by respondent and is not a factor in or connected with respondent's approval of the extension of credit or its terms or the amount of credit extended; and

(b) any borrower who consummates a consumer credit transaction with respondent and who reaffirms a discharged debt to respondent, in whole or in part, executes a separately signed and dated written statement of the agreement to reaffirm after first receiving from respondent a clear and conspicuous written disclosure of (1) the amount of the reaffirmation and (2) that such reaffirmation is not required by respondent and is not a factor in or connected with respondent's approval of the extension of credit or its terms or the amount of credit extended. [27]

2. Failing to compute and disclose accurately the finance charge, as required by Sections 226.4(a) and 226.8(d)(3) of Regulation Z.

3. Failing to compute and disclose the annual percentage rate, as "annual percentage rate" is defined in Sections 226.2(g) and 226.5(b) of Regulation Z, accurately to the nearest quarter of one percent, as required by Sections 226.5(b) and 226.8(b)(2) of Regulation Z.

4. Failing to compute and disclose accurately the amount financed, as "amount financed" is defined by Sections 226.2(f) and 226.8(d)(1) of Regulation Z, as required by Section 226.8(d)(1) of Regulation Z.

5. Failing in any consumer credit transaction or advertisement, to make all the disclosures that are required by Sections 226.4, 226.5, 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z in the manner, form and amount specified therein.

6. Failing to maintain records of compliance with this Order for three years after the date of this agreement to cease and desist.

It is further ordered, That respondent shall grant to each borrower who consummates a consumer credit transaction with respondent and who reaffirms a discharged debt to respondent, in whole or in part, which is not disclosed as part of the "finance charge" on a new consumer credit transaction, 10 calendar days within which to cancel the reaffirmation by notifying the respondent in writing of the borrower's election to do so.

The foregoing period shall begin to run upon receipt by the borrower of the notices described in the next paragraph of this provision. The borrower's notification of cancellation of his or her reaffirmation, if done by mail, shall be deemed to have been made at the time mailed; if by telegram, mailgram or the like, notification shall be deemed to have been made at the time filed for transmission; and, if the writing is delivered by other means, notification shall be deemed to have been made at the time delivered to the respondent's place of business. [28]

Respondent shall mail to each such borrower the notices set forth in Attachments "1" and "2" to this Order no earlier than two (2) days and no later than fifteen (15) days following consummation of the consumer credit transaction.

If a borrower exercises his or her right to cancel the reaffirmation of a previously discharged debt, then such borrower shall not be obligated to repay the amount of the reaffirmation and any finance charges assessed thereon. Furthermore, the borrower's periodic payments on any debt to respondent remaining after cancellation of the reaffirmation shall be no larger than they were prior to the cancellation.

It is further ordered, That respondent shall forthwith deliver a copy of this Order to cease and desist to all present and future employees who are engaged in the solicitation or extension of consumer credit and shall secure from each such employee a signed

statement acknowledging receipt of this Order and stating the intention to be bound by the requirements hereof.

It is further ordered, That respondent shall notify the Commission within thirty (30) days prior to any 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 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 and file such other reports as the Commission may require.

ATTACHMENT 1

NOTICE OF RIGHT TO CANCELLATION

Name of _____
(Respondent)

Address of _____
(Respondent)

Name of _____
(Customer)

Address of _____
(Customer)

Dear Customer:

You recently took out a loan with HFC. At that time, you also agreed to repay us an old debt of $ _____ . This old debt had been discharged when you went bankrupt.

You did not have to agree to repay the discharged debt in order to get a loan. We want to be sure you understood that, so we are giving you a chance to cancel *within ten days* your agreement to repay your discharged debt. If you cancel, the $ _____ discharged debt and its finance charges will be dropped. But you will still have to repay the $ _____you actually got, plus $ _____ in finance charges. Your monthly payments will be no larger than they are now.

You have *TEN DAYS* from the day you get this letter to cancel your agreement to repay your discharged debt. *If you want to cancel,* you must *notify us in writing within ten days.* Use the enclosed notice or send a letter or telegram to the address above.

Sincerely,

ATTACHMENT 2

NOTICE OF CANCELLATION

To _____
(Name of Respondent)

_____
(Address of Respondent)

Please cancel my agreement to repay my old discharged debt of $ _____.

_____ _____
(Date) (Borrower)

_____

OPINION OF THE COMMISSION

BY PERTSCHUK, *Commissioner:*

I. INTRODUCTION

The complaint in this case charges Household Finance Corporation (HFC) with violations of the Truth in Lending Act (TILA), 15 U.S.C. 1601, *et seq.,* and its implementing Regulation Z, 12 C.F.R. 226. The complaint alleges that HFC, a consumer loan company, has been violating the TILA and Regulation Z by not including the amount of reaffirmed debts in the "finance charge" of later loans. The complaint avers that a debt discharged in bankruptcy must be reaffirmed by the debtor in order to obtain new credit from HFC, and thus is a cost of credit which under the TILA and Regulation Z must be disclosed in the "finance charge." Complaint counsel seek an order which, *inter alia,* would require HFC to include the amount of the reaffirmed debt in the finance charge and to compute and disclose accurately the finance charge, annual percentage rate, and "amount financed" (amount of credit extended to the customer).

Following issuance of the complaint on July 10, 1978, complaint counsel and respondent HFC agreed in lieu of trial to a "Statement of Stipulated Facts" to serve as the sole factual record for this proceeding. On March 16, 1979, Administrative Law Judge Hanscom found HFC to be in violation of the TILA and Regulation Z as alleged in the complaint. The ALJ's order would require HFC to disclose, as part of the finance charge, the amount of discharged debt reaffirmed in connection with subsequent grants of credit to the debtor. It also defines when reaffirmation would not be a condition [2]of credit and thus would not have to be disclosed in the finance charge; provides

for a 10-day cooling-off period following consummation of the subsequent loan transaction where the amount of the reaffirmed debt has been excluded from the finance charge; and requires compliance with all disclosure provisions of Regulation Z.

On April 5, 1979, HFC served notice of its intention to appeal the ALJ's decision. On appeal complaint counsel argue in support of the conclusions and order issued below and do not cross-appeal on any issues.

For the reasons discussed below, the Initial Decision and Order are reversed and the complaint in this matter is dismissed.

II. STATEMENT OF THE FACTS

The ALJ's Findings of Fact repeat virtually verbatim the parties' "Statement of Stipulated Facts." They establish the following.

For the past several years, many borrowers of HFC have filed petitions for bankruptcy, been adjudged bankrupt, and obtained discharges of their indebtedness to HFC. I.D.F. 4-5.[1] In many instances HFC then has notified discharged debtors that upon reaffirmation of a part or all of their discharged debts, and if they are otherwise eligible for credit, it would reestablish their credit with HFC and shortly thereafter grant them new loans. I.D.F. 6. Many discharged debtors then have sought new loans from HFC. I.D.F. 7. [3]

During negotiations for new loans, discharged debtors and HFC discussed the question of reaffirmation of part or all of the consumer's debt to HFC. I.D.F. 9. Pursuant to HFC policy and practice, consumers in these negotiations were informed by HFC employees that reaffirmation was necessary to reestablish their

[1] The following abbreviations of citations are used herein:

I.D.F.	-	Initial Decision Finding of Fact No.
I.D.	-	Initial Decision Page No.
CB	-	Complaint Counsel's Memorandum of Law in Support of Proposed Findings of Fact, Conclusions of Law, and Order
RB	-	Respondent's Memorandum of Law in Support of Proposed Findings of Fact, Conclusions of Law, and Order
CR	-	Complaint Counsel's Reply Memorandum of Law and Objections to Respondent's Proposed Findings of Fact
RR	-	Respondent's Reply to Complaint Counsel's Proposed Findings of Fact
CAB	-	Complaint Counsel's Appeal Brief Page No.
RAB	-	Respondent's Appeal Brief Page No.
RRAB	-	Respondent's Reply Appeal Brief Page No.

credit with HFC and that part of any new loan from HFC had to be used to repay part or all of their previously discharged debt to HFC. I.D.F. 12. On or around June 29, 1977, employees of HFC were instructed by a Home Office Memorandum that in any discussion of reaffirmation or a new loan, the bankrupt must be advised that there is no legal obligation to repay the discharged debt, but that part of any new loan must be used to settle the discharged debt. Attachment A (p. 1) to I.D.F.

From July 1, 1977 to the present, bankrupt consumers of HFC have received a "Statement of Rights, Agreement and Cancellation Notice" from HFC. I.D.F. 17. This Statement (Attachment B) apprises them, among other things, that they have no legal obligation to repay any part of their discharged debt to HFC but that to obtain a new loan they will be required to agree to repay all or part of their outstanding debt to HFC. The Statement also informs them that they may cancel within 10 days their agreement with HFC to use part of the new loan to repay the old but that if they do cancel, they are still required to pay off the new loan.

Discharged debtors of HFC thus know that they must reaffirm part or all of their debts to HFC before obtaining new loans. Many of them have reaffirmed and obtained new loans for one or more of the following reasons: (a) to retain collateral from the prior debt owed HFC; (b) to secure the release of a co-maker's obligation to repay the prior debt; (c) to settle bankruptcy court litigation over the prior debt; and (d) to reestablish credit with HFC. I.D.F. 10.[2]

Respondent HFC imposes a finance charge on the new loans made to reaffirming debtors. I.D.F. 13. This charge applies both to the part of the loan granted to repay the prior debt and to the part which represents new money paid to the consumer. I.D.F. 13. For these loans, HFC's truth-in-lending disclosure policy has been that the amount of the [4]reaffirmed debt to be paid from part of the new loan is disclosed in the amount financed rather than the finance charge. I.D.F. 14. It is acknowledged that if the amount of the reaffirmed debt were made part of the finance charge, the annual percentage rate for the loan would be increased. I.D.F. 15.

In addition to HFC, many of its competitors require reaffirmation before reextending credit to discharged debtors and disclose the amount of the reaffirmed debt in the amount financed rather than

[2] It should be noted that after the complaint in this case was issued, severe restrictions were placed on contractual reaffirmation of discharged debts by the Bankruptcy Reform Act of 1978, Pub. Law 95-598, 11 U.S.C. 525(c) and (d). Under this law, reaffirmation agreements are unenforceable absent approval, following a judicial hearing, by the court which granted the discharge in bankruptcy. *But see Marathon Pipeline Co. v. Northern Pipeline Construction Co.*, 49 U.S.L.W. 1173 (April 23, 1981) (jurisdictional provision of Act delegating new authority to bankruptcy court judges declared unconstitutional; order dismissing case stayed pending appeal).

the finance charge of the new loan. I.D.F. 24. Until this proceeding was initiated, neither the Commission nor the Federal Reserve Board had challenged this practice in any formal proceeding. I.D.F. 25.

III. DISCUSSION

The legal issue presented is whether a creditor must disclose in the finance charge the amount of debt reaffirmed with respect to a loan transaction in which a portion of the loan proceeds is used to pay off the reaffirmed debt. The Administrative Law Judge answered this question in the affirmative. I.D. at 21. HFC's appeal challenges the Initial Decision on the following grounds:

One, the Commission lacks jurisdiction in this case because the record fails to show that the challenged practices were in or affected interstate commerce. RAB at 7.

Two, the transactions in issue are "refinancings" under Regulation Z, in which the amount of a reaffirmed debt is disclosed in the "amount financed." RAB at 20–25.

Three, assuming the transactions in issue are found to be new loans rather than refinancings, mandatory reaffirmation is not a condition for receiving a specific loan from HFC, and thus is not a cost of credit within the definition of finance charge in the TILA and Regulation Z. RAB at 6.

Four, the order entered below is not in the public interest because it will create a result contrary to the purposes of the Truth-in-Lending Act. Id.

Five, the order entered by the ALJ exceeds the Commission's statutory authority and is overbroad. RAB at 7.

A. *Jurisdiction*

The Commission's jurisdiction in this matter rests on Section 108(c) of the TILA, 15 U.S.C. 1607, which states that violations of that Act shall also be violations of the requirements of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.* Section 108(c) specifically provides in part that: [5]

> . . . All of the functions and powers of the Federal Trade Commission Act are available to the Commission to enforce compliance by any person with the requirements imposed under this title *irrespective of whether that person is engaged in commerce or meets any other jurisdictional tests in the Federal Trade Commission Act.* (emphasis added)

By its terms, Section 108(c) does not require a showing that the

challenged practices are in or affect interstate commerce. Nevertheless, respondent HFC alleges that a relationship to interstate commerce is the test of jurisdiction here, and that the record does not permit such a finding. RAB at 24–37.[3] Respondent's jurisdictional argument is without merit. The Commission explicitly has jurisdiction in this case.

B. *The Nature of the Transaction*

The answer to the TILA disclosure question presented depends on whether the transaction in issue is a new loan subject to the finance charge disclosure requirements of Section 226.4(a) of Regulation Z, 12 C.F.R. 226.4(a),[4] or a refinancing within the meaning of Section 226.8(j) of Regulation Z, 12 C.F.R. 226.8(j).[5] The Commission [6] believes it is a refinancing in which the amount of the reaffirmed debt should be disclosed in the "amount financed."[6]

HFC's loans to bankrupt customers involve reaffirmation of an existing but discharged obligation coupled with the advancement of new money.[7] Although these "hybrid" transactions appear at first blush to be new loans, as the Commission had reason to believe when it issued the complaint and as the ALJ found, I.D. at 20, closer scrutiny, aided by the record and the arguments of the parties, reveals that they are more in the nature of refinancings.[8]

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[3] Respondent may be laboring under the false impression that this is a case brought under Section 5 of the FTC Act, which has an "in or affecting commerce" provision. Respondent may have formed this impression from the ALJ's conclusion that the alleged practices meet the "commerce" test of jurisdiction in the FTC Act. I.D. at 22. Since jurisdiction rests on Section 108(c) of the TILA, which explicitly overrides the jurisdictional requirements of the FTC Act, the ALJ need not have made this finding and the Commission need not examine the factual basis for it.

[4] Section 106(a) of the TILA, as amended, 15 U.S.C. 1605(a), and Section 226.4(a) of Regulation Z combine to define "finance charge" as the "sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to or as a condition of the extension of credit."

[5] Section 226.8(j) provides: "*Refinancing, consolidating, or increasing.* If any existing extension of credit is refinanced, or two or more existing extensions of credit are consolidated, or an existing obligation is increased, such transaction shall be considered a new transaction subject to the disclosure requirements of this Part. For the purpose of such disclosure, any unearned portion of the finance charge which is not credited to the existing obligation shall be added to the new finance charge and shall not be included in the new amount financed."

[6] In a refinancing of this type, the prior debt is included in the "amount financed" while the unearned interest from, but not credited to, the prior obligation is added to the new finance charge. *See* Section 226.8(j) of Regulation Z.

[7] Although a debt discharged in bankruptcy is unenforceable by an action *in personam* against the debtor, Section 14 of the Bankruptcy Act, as amended, 11 U.S.C. 32, it is a continuing obligation collectable by other legal means, such as a counterclaim, *Binnick* v. *Avco Financial Services of Nebraska*, 435 F. Supp. 359 (D. Neb. 1977), or retention of security, *In re Traham*, 283 F. Supp. 620, *aff'd*, 402 F. 2d 797, *cert. denied*, 394 U.S. 930 (1969). Legally, the debt survives the discharge and is neither forgiven nor cancelled. *Kessler* v. *Dept. of Public Safety*, 369 U.S. 153, 170 (1961), citing *Zavela* v. *Reeves*, 227 U.S. 625 (1913); W. Collier, 1A *Collier on Bankruptcy* Section 17.33 (14th Ed. J. Moore and L. King ed. 1971). Reaffirmation thus does not create a new debt; it simply reactivates an existing one. The ALJ's contrary assertion that a discharged debt is not an "existing extension of credit," within the meaning of Section 226.8(j) of Regulation Z, disregards the continuing nature and legal enforceability, in certain circumstances, of the obligation. See I.D. at 19.

[8] It is noteworthy, although hardly dispositive, that HFC's instructions to employees on these transactions are contained in a memo entitled "Bankruptcy Refinancing Agreements." See Attachment A.

The fundamental nature and purpose of these transactions is the satisfaction of an existing obligation. Reaffirmation is the central element of a process whereby funds become available to the bankrupt consumer to pay back an existing loan. [7]It is directly related to the satisfaction of a continuing obligation and only indirectly related to "new" extensions of credit. If anything, the simultaneous advance of additional money creating a new obligation is an "incident to" the core transaction enabling repayment of the reaffirmed loan, and does not alter its fundamental character as a refinancing. The loan does not create a new obligation in the first instance; it merely resolves an existing one by being applied, at least in part, toward repayment of the reaffirmed debt.

HFC's purpose in providing these initial loans to bankrupt consumers also supports the conclusion that they are refinancings dedicated to satisfying existing obligations. The extension of credit in connection with an existing debt is designed principally to return HFC and the borrower to the *status quo* that existed before the debt was discharged in bankruptcy. The grant of money in connection with the reaffirmation enables, in fact requires, the borrower to use at least part of the loan to pay off the debt owed before bankruptcy, to the benefit of HFC. Thus, it is reasonable to assume that HFC's immediate interest in resuming a credit relationship with a discharged debtor, subject to a requirement to reaffirm, is to recover the proceeds of the existing loan plus interest accrued on it;[9] otherwise, HFC would have little reason to require reaffirmation by discharged debtors seeking further extensions of credit.

From the borrower's standpoint, reaffirmation represents more than a price for an individual loan. It enables the consumer to reestablish credit with HFC, retain or recover collateral on the prior loan, secure the release of a co-maker's obligation to repay the earlier debt, and settle bankruptcy litigation. I.D.F. 10. Indeed, most bankrupt customers of HFC had one or more of these purposes in mind when they reaffirmed their debts. Id. Thus, while HFC's reaffirmation agreements are related to specific extensions of credit, their broader function is to ensure repayment of the earlier loan and enable HFC and the bankrupt consumer to pursue their respective interests in resolving the earlier transaction. This aspect of reaffirmation in connection with an advance of money distinguishes it from other charges, such as interest or loan fees, which are imposed and paid solely for the purpose of financing new loans. [8]

The views of the Federal Reserve Board are of course highly

[9] This assumption is reinforced by the fact that HFC had the contractual right to enforce reaffirmation agreements whether or not the related loan transaction was consummated. See Attachment A, RAB at 18–20.

relevant to the Commission's determination about the nature of the credit transactions involved in this case.[10] While no official opinion of the Board itself has directly addressed the issue in this case, the Board's staff has said formally that reaffirmations are refinancings under Section 226.8(j) of Regulation Z.[11] In FRB staff Opinion Letter No. 415, CCG ¶ 30,604 (October 29, 1970), reaffirmed in staff Opinion Letter No. 426, CCG ¶ 30,613 (November 24, 1970), the Board staff said:

> It is our view that Section 226.8(j) which requires new disclosures whenever any existing extension of credit is refinanced would apply to any reaffirmation *except* those which involve no change in the credit terms . . . if any additional amounts were advanced . . . or any other material terms of the original obligation modified, we would view it as a 'refinancing' under Section 226.8(j) requiring new disclosures. (emphasis in original)

Five years later, the FRB staff published Opinion Letter No. 966 which is relied upon by complaint counsel because it suggests, by negative implication, that where reaffirmation of an existing debt is a condition of a specific extension of credit, it should be disclosed in the [9]finance charge.[12] This opinion expressly did not deal with such a situation, however, and the Board staff has had occasion in a specific case to look closely at the true character of a transaction like the one involved in this proceeding. Further, Letter No. 966 did not repudiate or otherwise limit the staff's previously stated position that any reaffirmation involving a change in credit terms, including one in which new money is advanced, is a refinancing.

Asserting serious ambiguity in the FRB staff's position, complaint counsel filed a motion on December 3, 1979, following oral argument, urging the Commission to ask the Board to file a statement of its views in this case.[13] The Commission does not believe the Board

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[10] An important consideration in TILA matters before the Commission is the formal position of the Federal Reserve Board, which is recognized as the primary issuer of regulations and interpreter of the law in this area. Section 105 of the TILA, 15 U.S.C. 1604; *Ford Motor Credit v. Milhollin*, 100 S.Ct. 790, 794, citing *Mourning v. Family Publications Service Inc.*, 411 U.S. 356, 93 S.Ct. 1652 (1973). Indeed, good faith reliance upon a Board interpretation now constitutes a defense to any enforcement action brought by the Commission. Section 23(b) of the Federal Trade Commission Act, as amended by the FTC Improvements Act of 1980, 15 U.S.C. 57b-4.

[11] The official interpretations of the Board's staff are a reliable indicator of Board policy and are accorded substantial deference by the credit industry, Section 130(f) of TILA, 15 U.S.C. 1640(f), FRB Letter No. 444, CCG ¶ 30, 640 (March 1, 1971), the courts, see, e.g., *Ford Motor Credit v. Milhollin, supra*, at 797, and by the Commission.

[12] FRB staff Opinion Letter No. 966, CCG ¶ 31,305 (December 4, 1975). This letter states, in pertinent part: Staff believes that the amount of the reaffirmed debt should not be included in the finance charge or reflected in the annual percentage rate on any future extensions of credit to the debtor. Although the reaffirmation is a prerequisite to the bank's consideration of future credit applications by the debtor, the reaffirmation is not related to any particular credit extension; it is simply one element in the bank's decision to make its credit services in general available to the debtor. Since the reaffirmation is not a condition of a specific credit extension, the amount of the reaffirmed debt would not, in staff's view, come within the definition of a finance charge under Section 226.4(a) of the Regulation.

[13] Prior to this motion, complaint counsel also had filed a motion, dated November 21, 1979, requesting that the Commission disregard an October 18, 1979 FRB staff letter (Attachment A to the motion) on reaffirmations presented by respondent for the first time at the oral argument. Complaint counsel argue in their motion that this

(Continued)

staff's expressed views, taken together, leave significant room for dispute. Although Letter 966 may have created some ambiguity in the treatment of reaffirmations, there has been no significant modification of the Board staff's earlier opinion that reaffirmations coupled with advancements of new money are refinancings. The Commission's decision today is consistent with that position. [10]

In addition, since issuance of the complaint in this proceeding, Congress has amended the Truth-in-Lending Act[14] and the Board has revised Regulation Z.[15] The new regulation, which became effective on April 1, 1981 but does not become enforceable until March 31, 1982, significantly redefines a "refinancing."[16] In explaining the revised definition, the Board said that it "most closely resembles the events intended to be covered by refinancing disclosures." 46 *Fed. Reg.* at 20882. By its terms, the new definition seems to encompass HFC's loans to bankrupt consumers, which involve repayment of an existing obligation and assumption of a new one (through the advancement of additional money) by the same person. Furthermore, the exemption from *refinancing* disclosures for agreements, *including reaffirmations,* that arise from a judicial proceeding,[17] indicates that the Board agrees with its staff that loans involving reaffirmation are refinancings. These loans are subject to the redisclosure requirements of Section 226.20, as revised, and not to the finance charge provisions of Section 226.4(a) of the regulation (unchanged from the old).

The Commission thus does not believe the Board's position needs to be clarified. Accordingly, complaint counsels' motion for clarification is denied. [11]

C. *The Relationship of the Proposed Order to the Purposes of the TILA.*

The Commission holds today that the cost of reaffirmation should be included in the amount financed rather than the finance charge. This conclusion is corroborated not only by the position of the

letter had not been placed on the public record of this matter, was not an official interpretation of the FRB staff, and had not been made public by the Board. Complaint counsel thus contend that they had no reasonable opportunity to know about the letter or prepare a rebuttal to it. Because consideration of this letter is unessential to a proper decision of this case, complaint counsels' motion to disregard it is granted.

[14] Truth-in-Lending Simplification and Reform Act (Title VI of the Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. 96-221, 94 Stat. 132).

[15] Truth-in-Lending; Revised Regulation Z, 46 *Fed. Reg.* 20848 (April 7, 1981).

[16] Section 226.20(a) of Regulation Z, as revised, states that a refinancing occurs "when an existing obligation that was subject to this subpart is satisfied and replaced by a new obligation undertaken by the same consumer . . . . The new finance charge shall include any unearned portion of the old finance charge that is not credited to the existing obligation."

[17] See Section 226.20(a)(3) and 46 *Fed. Reg.* 20882 where the Board, amplifying upon Paragraph (a)(3), indicates that exempt agreements include reaffirmations of debts discharged in bankruptcy.

Federal Reserve Board, but by respondent's showing of the adverse effects that the proposed finance charge disclosure could have on credit comparisons.

Respondent argues that the proposed disclosure requirement would distort comparison-shopping for credit by bankrupt customers and foster the false impression that a competitor disclosing an amount equal to the prior debt in the amount financed was offering a better deal than HFC.[18] Respondent purports to show that if the amount of the reaffirmed debt has to be disclosed in the finance charge by HFC, the "annual percentage rate" could be substantially distorted, thereby misleading consumers into making erroneous comparisons and economically irrational credit purchasing decisions. This result would [12]contravene Congress' stated intention in Section 102(a) of the TILA, 15 U.S.C. 1602, to promote well-informed comparison-shopping for credit.[19]

Neither the ALJ nor complaint counsel have refuted respondent's illustration of the proposed disclosure's potential for hindering credit comparisons; in fact, both concede there would be distortion. However, the ALJ rejects respondent's showing as:

only hypothetical, and may have little or no relation to reality. The fact that respondent can construct hypothetical cases where inclusion of a reaffirmed debt in the 'finance charge' results in a distortion of the "annual percentage rate" when compared with an equivalent amount of a new loan by a competitor involving no reaffirmation, does not mean that the true cost of credit need not be disclosed by Household Finance as required by the Truth in Lending Act and Regulation Z. I.D. at 21. [13]

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[18] In respondent's hypothetical example, the "annual percentage rate" of a $1,100 loan by HFC to a reaffirming consumer would be 120% if the reaffirmed debt were treated as a finance charge, and the total obligation would be $1,320. The "annual percentage rate" for a competing loan of $1,100, which would not involve reaffirmation but would be used in part to pay the debt to HFC, would be 25%, with a total obligation of $1,375. The $55 difference results because the second lender's interest rate is 25% while HFC's is 20%. Respondent's point is that because of the "sky-high" "annual percentage rate" computed for the HFC loan using the proposed method of disclosure, the consumer may think that the other loan is the better deal, when in fact it is not. For the full example, see RAB at 32-33.

[19] Section 102 of the TILA declares that the Act is designed to assure a meaningful disclosure of credit terms so that the consumer will be able *to compare more readily* the various credit terms available to him . . . (emphasis added).

While the proposed disclosure could violate this tenet of the Act by *disabling* bankrupt customers of HFC from making well-guided comparisons of credit, complaint counsel argue that Congress intended for all imposed costs of credit to be included in the finance charge unless specifically excluded by the TILA or Regulation Z. CR at 13-16. It asserts that since reaffirmation is not specifically excluded it is, by definition, a finance charge. The legislative history and case law cited by complaint counsel, however, do not establish that Congress intended such a mechanistic application of the finance charge provisions of the Act in the face of evidence that it could hinder informed comparison-shopping for credit. The basis for the holding in *Buford v. American Finance Co.*, 333 F. Supp. 1243, 1247 (D. Ga. 1971) that only those charges explicitly exempted from inclusion in the finance charge may be excluded from it, was the intent of Congress "to establish by statute and regulation a uniform method for such determination [of finance charge] so that consumers could 'comparison shop' by looking at a single 'price tag'—the 'annual percentage rate'." In that case, the finance charge (a $1.00 notary fee) was unlikely to significantly affect total loan costs and credit comparisons. The district court was not confronting, as is the Commission here, a charge that could distort the "price tag" of the loan—the "annual percentage rate"—and induce a skewing of comparisons by consumers and economically unsound credit decisions.

The Commission agrees with respondent that this example is hypothetical only because the proposed disclosure has not yet gone into effect. RAB at 33. Moreover, the ALJ has given the Commission no reason to believe that the example will not occur in practice. In addition, respondent's position in opposition to the proposed disclosure is not inconsistent with the objectives of meaningful disclosure and credit comparisons established by the TILA and Regulation Z. If the cost of reaffirmation is included in the "amount financed," consistent with our determination that HFC's loans to bankrupt consumers are refinancings, the "annual percentage rate" for those loans will bear a much closer "relation to reality" than would the result dictated by the Initial Decision.

Complaint counsel attempt to mitigate the alleged impact of the proposed order on two grounds. First, they argue that respondent's example is not supported by any facts of record. In respondent's example, the consumer reaffirms his discharged debt to HFC in order to retain property in which HFC has a security interest. The record indicates that retention of property is one of the reasons consumers have reaffirmed their debts to HFC, I.D.F. 10, but complaint counsel point out that it does not show what portion of consumers have reaffirmed for this reason. Complaint counsel therefore argue that it is impossible to conclude from the record that respondent's example is representative of the impact the proposed order would have on actual consumer credit transactions. CR at 19.

This argument misses the mark. The proposed disclosure potentially could have the described impact whenever a bankrupt customer, *for whatever reason,* wants to pay off a discharged debt to HFC, considers HFC's terms for a loan (including the requirement to reaffirm) and then compares competing credit terms. Further, the record indicates that in many cases discharged debtors have sought loans from HFC, I.D.F. 7, subject to reaffirmation. I.D.F. 9-10. Although the number of discharged debtors who have sought loans from HFC is unknown, those who shop around for credit would be potentially exposed to the consequences of the proposed disclosure seen in respondent's example. Thus the Commission cannot agree with complaint counsel that the record provides no support for respondent's illustration, and a finding, that the proposed disclosure could adversely affect the ability of bankrupt customers of HFC to comparison-shop for credit.

Second, complaint counsel contend that similar distortions can

result from other finance charge disclosures, such as credit life insurance, which are required by the TILA or [14]Regulation Z.[20] Complaint counsel admit, however, that the difference in annual percentage rates shown in its example is of a lesser magnitude than that alleged here. CR at 20. Further, given the clear policy in opposition to lending disclosures that impede comparison-shopping for credit and thereby frustrate the purpose of the TILA, the Commission does not accept the proposition that "distortion" of credit comparisons in one context is necessarily precedent for mandating distortion in another.

Finally, an important consideration in today's decision is that the Commission fails to see how HFC's current practice of disclosing the reaffirmation in the amount financed itself misleads and harms consumers. Presumably consumers are aware from their bankruptcy proceedings of their discharged debts to HFC. They are told by HFC that reaffirmation is a precondition for receiving further credit from the company. Attachment B to I.D. Thus, consumers know they must reaffirm; they negotiate the amount that they reaffirm; and they know that a like percentage of any subsequent loan will be used to repay the amount reaffirmed. The Commission does not believe, therefore, that disclosure of the amount of reaffirmation in the finance charge would better in any significant way the bankrupt customer's understanding of the terms and requirements of the transaction.

As this opinion has stated, the Commission views HFC's loans to bankrupt consumers as refinancings under Regulation Z, and is dismissing the complaint on that ground. The reasons for this result, discussed *supra,* coupled with the apparent absence of consumer harm from the challenged practice and the possibility of adverse effects from the disclosure proposed by the ALJ, persuade the Commission that the amount of a reaffirmed debt should be included in the amount financed of the transactions in issue.

Because we are dismissing the complaint, the Commission does not reach or decide the specific remedial issues, such as the alleged overbreadth of the proposed order, presented by HFC's appeal.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of respondent from the initial decision and upon briefs and oral argument in support of and in opposition to the appeal. For the

[20] In an example of their own, complaint counsel show how the annual percentage rate would differ between a consumer loan in which the purchase of credit life insurance is required and one in which it is not. See CR at 20-21.

reasons stated in the accompanying Opinion, the Commission has determined to sustain respondent's appeal. Complaint Counsels' motions to disregard a letter presented by respondent at oral argument and to request a statement of views from the Federal Reserve Board are granted and denied, respectively. Accordingly,

It is ordered, That the complaint is dismissed.