Provided, however, That nothing contained herein shall be interpreted so as to prohibit respondent from entering into and enforcing in the manner authorized by law a "fair trade" resale price maintenance program, in accordance with the provisions of the Miller-Tydings Act and the McGuire Act.

It is further ordered, That respondent Yardley of London, Inc. furnish a copy of this order to all presently franchised retail outlets or other customers and to all employees, agents, or representatives engaged in sales activities, within ninety (90) days from the date hereof.

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

IN THE MATTER OF

CARNATION COMPANY

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

Docket C-1833. Complaint, Dec. 8, 1970—Decision, Dec. 8, 1970

Consent order requiring a major seller of food products with headquarters in Los Angeles, Calif., to cease making unwarranted nutritional claims in advertising its "Carnation Instant Breakfast."

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 Carnation Company, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public in-

terest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Carnation Company 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 5045 Wilshire Boulevard, in the city of Los Angeles, State of California.

PAR. 2. Respondent is now, and has been for more than one year last past, engaged in the advertising, offering for sale and sale of Carnation Instant Breakfast, a food product, as "food" is defined in the Federal Trade Commission Act.

PAR. 3. Respondent causes the said product, when sold, to be transported from his place of business in the State of California to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a course of trade in said product in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its business, respondent has disseminated, and caused the dissemination of, certain advertisements concerning the said product by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, advertisements inserted in newspapers, magazines and other advertising media, and by means of television and radio broadcasts transmitted by television and radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across State lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product; and has disseminated, and caused the dissemination of, advertisements concerning said preparation by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said preparation in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

Now you can have new Carnation instant breakfast—makes milk a meal that's too good to miss. Each glass delivers as much protein as two eggs, as much mineral nourishment as two strips of crisp bacon, more energy than two slices of buttered toast, and even Vitamin C—the orange juice vitamin.

Now there's a new kind of balanced breakfast from Carnation, delicious Carnation *instant* breakfast. Give your family Vitamin C—the fresh orange juice vitamin . . . much protein as two fresh eggs . . . as much mineral nourishment as two strips of crisp bacon . . . plus more energy than two slices of buttered toast . . . all in a good-tasting, satisfying breakfast you drink. It's Carnation instant breakfast . . . the mix that makes milk a balanced breakfast you always have time for. Just made for those mornings when you . . . can't sit down to a big cooked breakfast.

PAR. 6. Through the use of said advertisements, and others similar thereto not specifically set out herein, respondent has represented and is now representing, directly and by implication, that:

1. Carnation Instant Breakfast is of as much or more nutritional benefit as a breakfast comprised of two fresh eggs, two slices of bacon, two slices of buttered toast and an orange or glass of orange juice.

2. Bacon is a good dietary source for mineral nourishment.

PAR. 7. In truth and in fact:

1. Carnation Instant Breakfast does not contain as much nutritive value as a breakfast comprised of two fresh eggs, two slices of bacon, two slices of buttered toast and an orange, or glass of orange juice.

2. No food is generally recognized as a good dietary source for all minerals and bacon is not generally recognized as a good source for calcium or iron, two of the minerals most commonly recommended for dietary supplementation.

Therefore, the advertisements referred to in Paragraph Five above, were, and are, misleading in material respects and constituted, and now constitute, false advertisements, as that term is defined in the Federal Trade Commission Act.

PAR. 8. Furthermore, the statements and representations in said advertisements have the capacity and tendency to suggest, and do suggest, to persons viewing, hearing or reading such advertisements that the regular use of Carnation Instant Breakfast as a "balanced breakfast" or "meal" is a good nutritional practice. In the light of such statements and representations, said advertisements are misleading in a material respect and therefore constitute false advertisements, as that term is defined in the Federal Trade Commission Act, because they fail to reveal the material fact that for good nutrition persons should eat a variety of foods.

PAR. 9. Furthermore, the statements and representations in said advertisements have the capacity and tendency to suggest, and do suggest, to persons viewing, hearing or reading such advertisements that the nutritive values claimed for Carnation Instant Breakfast

result from those nutrients present in the product. In the light of such statements and representations said advertisements are misleading in a material respect and therefore constitute false advertisements as that term is defined in the Federal Trade Commission Act, because they fail to reveal the material fact that the nutritive values claimed for Carnation Instant Breakfast result from the nutrients contained in the liquid milk added to the product together with those present in the product itself.

PAR. 10. The dissemination by the respondents of the false advertisements, as aforesaid, constituted, and now constitutes, unfair and deceptive acts and practices in 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 of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and;

The respondent 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Carnation Company 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 5045 Wilshire Boulevard, Los Angeles, California.

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

ORDER

It is ordered, That respondent Carnation Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of Carnation Instant Breakfast, or any other product of similar composition or possessing substantially similar properties, do forthwith cease and desist from directly or indirectly:

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

(a) A packet of Carnation Instant Breakfast with milk has as much or more of any specified nutrient or nutrients as is present in, or has the nutrient value of, any breakfast or any group of foods generally recognized as constituting a breakfast when such product in combination with milk does not contain as much or more of each nutrient for which a recommended dietary allowance has been established by the National Research Council as is present in such breakfast or group of foods;

(b) The amount of any nutrient or nutrients in a packet of Carnation Instant Breakfast, taken alone or in combination with milk, is comparable to the amount of such nutrient or nutrients in any food, when such food contains any other nutrient or nutrients for which a recommended dietary allowance has been established by the National Research Council, which is not present in as great or greater amounts in Carnation Instant Breakfast unless the advertisement discloses clearly, conspicuously and prominently in close proximity thereto, that such food contains other useful nutrients not present in Carnation Instant Breakfast, or, if present, in lesser amounts than contained in such foods;

(c) The presence of any single nutrient in a packet of Carnation Instant Breakfast, either alone or in combination with milk, is comparable to the presence of such nutrient in any food unless such food is a recognized good dietary source for that nutrient;

(d) A packet of Carnation Instant Breakfast, taken either alone or in combination with milk, should be used regularly as a breakfast, lunch, supper or other meal unless the advertisement also discloses clearly, conspicuously and prominently that for good nutrition one should eat a variety of foods;

(e) A packet of Carnation Instant Breakfast in combination with milk provides nutritive value unless the advertisement also discloses clearly, conspicuously and prominently that the milk contributes much of the nutritive value and that detailed information is on the label.

2. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing or which is likely to induce directly or indirectly, the purchase of any such product, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations or misrepresentations prohibited by Paragraph 1 hereof.

3. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisements which contain statements which are inconsistent with, negate or contradict any of the affirmative disclosures required by Paragraph 1 of this order, or which in any way obscure the meaning of such disclosures.

4. Disseminating, or causing to be disseminated, by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, any such product nine months from the date of this order unless the label for the package as defined in Federal Fair Packaging and Labeling Act for such product discloses clearly, conspicuously, and prominently a nutrient tabulation by gram weight and percentage of Minimum Daily Requirement for those nutrients for which a Recommended Dietary Allowance has been established indicating the respective composition of such product alone, 8 ounces of whole milk, and such product mixed with 8 ounces of whole milk.

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

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

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

IN THE MATTER OF

PHILLIPS PETROLEUM COMPANY, ET AL.

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

Docket C-1088. Complaint, Aug. 2, 1966—Decision, Dec. 14, 1970

Order modifying the consent order issued August 2, 1966, 70 F.T.C. 456, by granting respondent's application that the date for compliance with Paragraph III of the order be extended to May 1, 1971, and denying any extension for Paragraph IX.

ORDER GRANTING IN PART, AND DENYING IN PART, APPLICATION FOR MODIFICATION OF CONSENT ORDER TO CEASE AND DESIST

Respondent Phillips Petroleum Company, by an application filed July 13, 1970, having requested that the Commission modify the consent order to cease and desist, issued August 2, 1966 [70 F.T.C. 456] by extending the dates for compliance with Paragraphs III and IX of said order to May 1, 1971, and August 1, 1976, respectively; and

The Commission, having fully considered said application and having concluded that respondent has not shown any new facts which were not reasonably known or knowable to it at the time it signed the consent order issued August 2, 1966, that warrant modification of the consent order to cease and desist, except as hereinafter provided; and

The Commission having concluded that the public interest does not require that respondent's application be granted, except as hereinafter provided:

It is ordered, That respondent's application be, and it hereby is,

granted in part, by extending the date for compliance with Paragraph III of said order issued August 2, 1966, to May 1, 1971.

It is further ordered, That in all other respects respondent's application be, and hereby is, denied.

IN THE MATTER OF

E. C. DeWITT & CO., INC.

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

Docket 8642. Complaint, Aug. 28, 1964—Decision, Dec. 15, 1970

Order modifying cease and desist order of December 16, 1966, 70 F.T.C. 1647, in accordance with the final order entered *In the Matter of American Home Products Corporation*, Docket No. 8641, 70 F.T.C. 1524, modified, 76 F.T.C. 81, and further modified, p. 726 herein, by prohibiting claims that the product "DeWitt's Stainless ManZan Pile Ointment" and other pile remedies afforded any relief from pain or itching in excess of temporary relief, and restricting the order to nonprescription drug preparations.

FINAL ORDER

The Commission having issued its original order to cease and desist in this matter on December 16, 1966, [70 F.T.C. 1647], and the respondent having appealed from the Commission's decision; and

The United States Court of Appeals for the Second Circuit having approved a stipulation providing that the cease and desist order herein should be modified in accordance with the final order entered in *American Home Products Corporation*, Docket No. 8641 [70 F.T.C. 1524]; and

The Commission having on July 15, 1969, issued its modified order in Docket 8641 [76 F.T.C. 81], and that order having been further modified by order of the United States Court of Appeals for the Sixth Circuit [p. 726 herein], and the order having become final by operation of law;

It is ordered, That the previously issued cease-and-desist order of the Commission be, and it hereby is, modified to read as follows:

ORDER

I. *It is ordered*, That respondent E. C. DeWitt & Co., Inc., a corporation, and its officers, representatives, agents and employees, di-

rectly or through any corporate or other device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, in connection with the offering for sale, sale or distribution of DeWitt's Stainless ManZan Pile Ointment, ManZan Pile Ointment, DeWitt's Stainless ManZan Suppositories, or any other non-prescription drug product offered for sale for the treatment or relief of hemorrhoids or piles or any of its symptoms, which:

A. Represents directly or by implication that the use of such product will:

(1) Reduce, shrink, or afford any relief of hemorrhoidal veins themselves: *Provided, however*, that nothing contained herein shall be construed to prohibit the dissemination of any advertisement which represents that the use of such product will help reduce swelling of hemorrhoidal tissue caused by edema, infection, or inflammation, or that the use of such product will help reduce swelling of hemorrhoidal tissue by lubricating the affected area;

(2) Avoid the need for surgery as a treatment for hemorrhoids or hemorrhoidal symptoms;

(3) Heal, cure, or remove hemorrhoids;

(4) Afford any relief from pain or itching associated with hemorrhoids in excess of affording temporary relief of pain and itching of hemorrhoidal tissue in many cases;

(5) Afford any other type of relief, or have any other effect on, hemorrhoids or hemorrhoidal symptoms.

B. Contains any reference to the words "Allantoin," "benzocaine," "anesthetic" or "vasoconstrictor," or to any other ingredient either singly or in combination, unless each such ingredient is effective in the treatment or relief of hemorrhoids or any of its symptoms and unless the specific effect thereof is expressly and truthfully set forth.

II. *It is further ordered*, That respondent and its officers, representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of DeWitt's Stainless ManZan Pile Ointment, ManZan Pile Ointment, DeWitt's Stainless ManZan Suppositories, or any other non-prescription drug product offered for sale for the treatment or relief of hemorrhoids or any of its symptoms, in commerce, as "com-

merce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph I hereof.

III. In the event that respondent at any time in the future markets any non-prescription drug preparation for the treatment or relief of hemorrhoids or any of its symptoms for which it desires to make any of the representations now prohibited under Paragraph I of this order, it may petition the Commission for a modification of the order. Such petition shall be accompanied by a showing that the representation is not false or misleading within the meaning of the Federal Trade Commission Act, and, if such has been the case, that the specific representation has been accepted as part of the labeling for such product by the Secretary of the Department of Health, Education and Welfare under the provisions of the Federal Food, Drug and Cosmetic Act as it is presently constituted or as it may hereafter be amended.

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 to cease and desist.

IN THE MATTER OF

THE MENTHOLATUM COMPANY

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

Docket 8644, Complaint, Aug. 28, 1964—Decision, Dec. 15, 1970

Order modifying cease and desist order of December 16, 1966, 70 F.T.C. 1671, in accordance with the final order entered *In the Matter of American Home Products Corporation*, Docket No. 8641, 70 F.T.C. 1524, modified, 76 F.T.C. 81, and further modified, p. 726 herein, by prohibiting claims that the product "Mentholatum M.P.O. Medicated Pile Ointment" afforded any relief from pain or itching in excess of temporary relief, and restricting the order to nonprescription drug preparations.

FINAL ORDER

The Commission having issued its original order to cease and desist in this matter on December 16, 1966 [70 F.T.C. 1671], and the respondent having appealed from the Commission's decision; and

The United States Court of Appeals for the Second Circuit having approved a stipulation providing that the cease and desist order herein should be modified in accordance with the final order entered in *American Home Products Corporation*, Docket No. 8641 [70 F.T.C. 1524]; and

The Commission having on July 15, 1969 [76 F.T.C. 81], issued its modified order in Docket 8641, and that order having been further modified by order of the United States Court of Appeals for the Sixth Circuit [p. 726 herein], and the order having become final by operation of law;

It is ordered, That the previously issued cease and desist order of the Commission be, and it hereby is, modified to read as follows:

ORDER

I. *It is ordered*, That respondent The Mentholatum Company, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, in connection with the offering for sale, sale or distribution of Mentholatum M.P.O. Medicated Pile Ointment, or any other non-prescription drug product offered for sale for the treatment or relief of hemorrhoids or piles or any of its symptoms, which:

A. Represents directly or by implication that the use of such product will:

(1) Reduce, shrink, or afford any relief of hemorrhoidal veins themselves: *Provided, however*, That nothing contained herein shall be construed to prohibit the dissemination of any advertisement which represents that the use of

such product will help reduce swelling of hemorrhoidal tissue caused by edema, infection, or inflammation, or that the use of such product will help reduce swelling of hemorrhoidal tissue by lubricating the affected area;

(2) Avoid the need for surgery as a treatment for hemorrhoids or hemorrhoidal symptoms;

(3) Heal, cure, or remove hemorrhoids, or eliminate the problem of hemorrhoids;

(4) Afford any relief from pain or itching associated with hemorrhoids in excess of affording temporary relief of pain and itching of hemorrhoidal tissue in many cases;

(5) Afford any other type of relief, or have any other effect on, hemorrhoids or hemorrhoidal symptoms.

B. Contains any reference to the words "Ephedrine Sulphate," "vaso-constrictor," "benzocaine," or "anesthetic," or to any other ingredient either singly or in combination, unless each such ingredient is effective in the treatment or relief of hemorrhoids or any of its symptoms and unless the specific effect thereof is expressly and truthfully set forth.

II. *It is further ordered*, That respondent and its officers, representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of Mentholatum M.P.O. Medicated Pile Ointment, or any other non-prescription drug product offered for sale for the treatment or relief of hemorrhoids or any of its symptoms, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph I hereof.

III. In the event that respondent at any time in the future markets any non-prescription drug preparation for the treatment or relief of hemorrhoids or any of its symptoms for which it desires to make any of the representations now prohibited under Paragraph I of this order, it may petition the Commission for a modification of the order. Such petition shall be accompanied by a showing that the representation is not false or misleading within the meaning of the Federal Trade Commission Act, and, if such has been the case, that the specific representation has been accepted as part of the labeling for such product by the Secretary of the Department of Health, Education and Welfare under the provisions of the Federal Food,

Drug and Cosmetic Act as it is presently constituted or as it may hereafter be amended.

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 to cease and desist.

IN THE MATTER OF

AAMCO AUTOMATIC TRANSMISSIONS, INC., ET AL.

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

Docket 8816. Complaint, Dec. 17, 1970—Decision, Dec. 17, 1970

Consent order requiring a major licensor of businesses specializing in the rebuilding, reconditioning and repairing of automatic transmissions used in automobiles with headquarters in Bridgeport, Pa., to cease misrepresenting other products or services to obtain leads to transmission repair, misrepresenting that all customers receive one day service and that customers will receive credit, using the term "overhaul" where service does not include replacement of worn parts, failing to give all terms of a guarantee, failing to furnish customers with an itemized bill of all parts and labor prior to removal of the transmission, furnishing others with deceptive advertising material, failing to disclose respondents' national customer service office telephone number, failing to keep records of all complaints, and failing to deliver a copy of this order to every present and future licensee.

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 AAMCO Automatic Transmissions, Inc., a corporation, and Robert Morgan, individually and as an officer of said corporation, hereinafter referred to as respondents, have, prior to June 1967, violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. AAMCO Automatic Transmissions, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 408 East Forth Street, in the city of Bridgeport, Commonwealth of Pennsylvania.

Respondent Robert Morgan is an officer of the corporate respondent. He was primarily responsible for formulating, directing and controlling the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the granting of licenses or franchises to corporations, partnerships and individuals located in various States of the United States and in the District of Columbia, to operate businesses specializing in the rebuilding, reconditioning and repairing of automatic transmissions used in automobiles and in the sale of parts, supplies and equipment for use in connection therewith. Respondents also engaged directly in the rebuilding, reconditioning and repairing of automatic transmissions through businesses owned or controlled by them prior to October 1967.

In connection with the granting of said licenses or franchises to operate AAMCO transmission shops, respondents require their franchisees-licensees (hereinafter identified as franchisees) to enter into agreements which require said franchisees to pay an initial sum of money for the privilege and a percentage of the gross monetary receipts realized by the franchisees from the operation of their businesses. Said franchisees are required to attend respondents' training course prior to commencing operation as AAMCO franchisees; to adhere to respondents advertising, sales and merchandising policies and procedures; and to recognize that they are members of a group of independent businesses operating throughout the United States, and in the District of Columbia under the AAMCO name. Respondents exercise, and at all times mentioned herein have exercised, a continuing supervision and control over the acts and practices of their franchisees.

The manner in which respondents operated such automatic transmission shops as were directly owned or controlled by respondents prior to October 1967 was similar in all material respects to the manner of operation required of respondents' franchisees.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, automatic transmission parts, shop equipment and supplies to be shipped from their place of business in the State of New Jersey or from the place or places of business of respondents' suppliers located in various other States of the United States to AAMCO transmission shops located in various other States of the United States and in the District of Columbia. In the further course and conduct of

their business as aforesaid, respondents transmit to and receive from their franchisees throughout the United States and in the District of Columbia, checks, contracts and other instruments of a commercial nature.

In the further course and conduct of their business as aforesaid, respondents prepare, or cause to be prepared, advertising copy, mats and cuts, television films and scripts for radio broadcasts. The aforesaid advertising materials are transmitted to respondents' franchisees or said franchisees' advertising agencies, located in the various States of the United States and in the District of Columbia and are thereafter disseminated by means of advertisements published in newspapers distributed through the United States mails and by other means or are disseminated over radio and television stations whose broadcasts are interstate in character.

In the course and conduct of their business as aforesaid, respondents maintain, and at all times mentioned herein have maintained, a course of trade in said products and services in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of the products and services offered by respondents and their franchisees, respondents made in advertisements inserted in newspapers and in broadcasts over radio and television stations, numerous statements and representations with respect to the price, character, type and quality of said products and services.

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

A) NEWSPAPER (prior to January, 1966 and not thereafter)

WORLD'S LARGEST
AUTOMATIC TRANSMISSION SPECIALISTS
AAMCO TRANSMISSIONS
COAST-TO-COAST IRONCLAD GUARANTEE

Only our mass purchasing power and volume sales make possible AAMCO's Top Quality work at lowest prices. Our constantly expanding network of AAMCO stations thruout the United States backs our available LIFETIME GUARANTEE.

OVERHAUL Consists of:
- Seals
- Rings
- Clutches
- Bands
- Gaskets as required

$75
Includes
OIL & LABOR

FREE:
- TOWING
- INSPECTION
- ROADTEST
- ESTIMATE

1-DAY
SERVICE
EASY TERMS

AAMCO TRANSMISSIONS
(prior to March, 1967 and not thereafter)
Take a tip from LEO DUROCHER
YOU'RE SAFE WITH AAMCO
The World's Largest TRANSMISSION SPECIALISTS
Leo Durocher SPECIAL only $23

Complete Inspection Service:
Removal, dismantling, checking.
Exclusive 19-point multi-chek.
All minor adjustments.

Free Towing
1-Day Service
Easy Terms

Open Daily 8–8
Sunday 10–2

DEALER NAME

B) TELEVISION—Leo Durocher. (prior to April, 1967 and not thereafter)

Don't tell me. It's like I tell the ump. Stop worrying. Your car's got transmission trouble, take it from me, Leo Durocher. Take it to AAMCO. Every month AAMCO specialists get 20,000 cars back on the ball. So stop worrying. To restore your car's zip and go it could be all you need is a band or linkage adjustment. At AAMCO, just $4.50. And if you need the whole treatment that's the Leo Durocher special, full price $23 and none higher. You get complete inspection service removing, dismantling, and checking all parts just $23 at AAMCO. So don't let your transmission get worse, see AAMCO where your job is backed by 200 AAMCO shops from coast to coast. Double AAMCO. There's an AAMCO shop near where you work or live. AAMCO, the world's largest transmission specialists. And tell them that Leo Durocher sent you.

Well that's me, old Leo Durocher. I'm a baseball man and I look after the Cubs. Well this fella here, he's a transmission expert. My friend from AAMCO. He looks after your car's transmission. Most cars over two years old need some transmission service. I say take your car to AAMCO where many transmission problems can be fixed with a simple adjustment of bands or linkage. At AAMCO, $4.50. If your trouble is serious, you may need AAMCO's safeguard service. That's only $13.75. Includes AAMCO's multicheck, new transmission fluid and all minor adjustments. Just $13.75 fixes any sick transmission. Fixes yours or your money back on the spot. So see the experts. AAMCO, over 200 shops from coast to coast stand behind every AAMCO job. AAMCO, the world's largest transmission specialists. There's an AAMCO shop near where you work or live. There's free towing and one-day service. So you see the nearby AAMCO man this week and tell him Leo sent you.

C) RADIO—Leo Durocher. (prior to April, 1967 and not thereafter)

I'm Leo Durocher for AAMCO Transmissions. I know the difference between big league and busher. In my book, the big leaguer always comes through. That's why he's on top, and he means to stay there. What's that have to do with your car's transmission? Well, don't trust it to a busher. Take it to AAMCO. They're the largest automatic transmission specialist in the country. Everyone at AAMCO's 200 shops across the country is "big league". Now, let me tell you big league doesn't mean big price. Your AAMCO man will tell you that many transmission problems are fixed with a simple adjustment of bands or linkage. And at AAMCO, I'm talking about $4.50—where that red, white

and blue sign says "double A (two car honks) M C O"—AAMCO. Tell them your big league friend, Leo Durocher sent you.

PAR. 5. By and through use of the above quoted statements and representations, and others of similar import and meaning but not expressly set out herein, the respondents represented directly or by implication that:

1. AAMCO transmission shops were making a bona fide offer to repair and regularly repair many automatic transmissions with a simple adjustment of bands or linkage for $4.50, or with AAMCO's safeguard service for $13.75, or with AAMCO's removal and inspection service for $23.00.

2. All AAMCO customers with disabled cars were provided free towing service.

3. AAMCO transmission shops provided one day service in every instance.

4. AAMCO transmission shops provided "easy terms" or credit for their customers.

5. Prior to January 1966, AAMCO transmission shops were making a bona fide offer to overhaul any transmission for $75.

6. Prior to December 1967, AAMCO transmission shops offered customers an unconditional "lifetime" guarantee on work done by them.

PAR. 6. In truth and in fact:

1. AAMCO transmission shops did not regularly repair many automatic transmissions with a simple adjustment of bands or linkage for $4.50, or with AAMCO's safeguard service for $13.75 or with AAMCO's removal and inspection service for $23.00. Although such services were performed from time to time, the real purpose of the offers was to induce members of the public to telephone or visit an AAMCO transmission shop in the belief and expectation that they would have their automatic transmissions repaired at the advertised prices.

2. All prospective AAMCO customers with disabled cars were not provided free towing service.

3. AAMCO transmission shops did not provide one-day service in every instance.

4. AAMCO transmission shops did not provide "easy terms" or credit to customers but referred customers to finance companies or other third parties from whom the customer was to borrow the money to pay the AAMCO shop.

5. The offer of an "overhaul" for $75 did not constitute a com-

plete overhaul and did not include the replacement of all worn parts, only gaskets and other so called "soft" parts.

6. The "lifetime" guarantee provided was not unconditional and was subject to conditions and limitations not disclosed in said advertisements.

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

PAR. 7. In the further course and conduct of their business prior to June 1967, respondents and their franchisees devised and consistently and persistently engaged in the following unfair or deceptive acts and practices as a part of the regular and established AAMCO plan or method of doing business. Respondents' franchisees were required to conduct and did conduct their businesses in the manner and by the means hereinafter set forth.

1. When a member of the public telephoned an AAMCO transmission shop and requested information regarding the repair of his automobile, he was informed that it was impossible to diagnose the trouble or quote a price over the telephone. The customer was further informed that the trouble may be minor and may be corrected by a simple adjustment. The customer was offered a free test or checkup upon bringing his automobile to the AAMCO transmission shop.

2. Upon arriving at the AAMCO transmission shop, whether induced by said advertising, telephone conversation or both, the customer's automobile was road tested and checked. In many instances the customer was advised that the problem was inside the transmission and consequently, it would be necessary to remove, dismantle and inspect the transmission. The customer was assured that no further action would be taken without his authorization. In many instances no effort was made during the road test and preliminary check to diagnose the extent or nature of the transmission problem. In those instances the sole object of this procedure was to persuade and induce the customer to transfer custody of his automobile to the AAMCO shop and to obtain authorization to remove and dismantle the transmission from the customer's automobile so that he could thereafter be subjected to efforts to sell him an "AAMCO custom rebuilt" transmission or other products or services at prices greatly in excess of the prices offered in the advertisements as set forth in Paragraphs Four and Five hereof.

3. In those instances after transferring custody of his automobile to the AAMCO transmission shop and authorizing the removal and dismantling of the transmission, the customer was subsequently ad-

vised of the results of the inspection and informed that the transmission was badly worn, damaged or contaminated. Efforts were then made to sell the customer an "AAMCO custom rebuilt" transmission with a lifetime guarantee. If those efforts were unsuccessful, efforts were then made to sell the customer an AAMCO rebuilt transmission with a six months' guarantee for a lower price. If these efforts also proved unsuccessful, the customer was then offered a repair at a still lower price with a 90 day guarantee. No disclosure was made of the availability of the lower priced products and services unless and until efforts to sell the "AAMCO custom rebuilt" transmission with a "lifetime" guarantee were unsuccessful. In some instances, when a customer refused to authorize further work on his transmission after it had been removed and dismantled, respondents' franchisees failed and refused to reassemble and replace the customer's transmission in its condition. In other instances, respondents' franchisees informed a customer who had refused to authorize the repair of his transmission that an additional charge above and beyond the advertised price of $23 would be made for reassembling and replacing the customer's transmission in its former condition. No disclosure was made to the customer at the time his authorization was obtained for the removal and dismantling of his transmission that such additional charge would be made in the event he refused to authorize the repair of his transmission.

4. Through the AAMCO plan or method of doing business in effect prior to June 1967, members of the public who transferred the custody of their automobiles to an AAMCO transmission shop and authorized the removal and dismantling of the transmissions from their automobiles were deprived of the opportunity to choose freely the products and services that they desired and in some instances were sold higher priced jobs than reasonably necessary to restore their transmissions to sound operating condition. When the AAMCO transmission shop gained custody of the customer's automobile and removed and dismantled the transmission, the customer was placed at a bargaining disadvantage.

5. Respondents and their franchisees failed or refused to provide their customers with itemized statements of the parts and labor charges included in the price of the products or services purchased by their customers. Said customers were thereby deprived of the opportunity to determine whether they had, in fact, received the products and services for which they had paid.

6. Respondents and their franchisees utilized rebuilt, reconditioned, salvaged or other used parts when repairing or rebuilding

transmissions and failed to disclose to customers whose transmissions had been repaired or rebuilt with such previously used parts, the use of such parts.

Therefore, the statements and representations as hereinabove set forth were false, misleading and deceptive.

PAR. 8. Through the granting of licenses or franchises to operate AAMCO transmission shops to corporations, partnerships and individuals using respondents' advertising materials and the AAMCO plan or method of doing business, respondents placed in the hands of others the means and instrumentalities by and through which they misled and deceived the public in the manner and as to the things hereinabove set forth.

PAR. 9. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents, directly and through their franchisees, have been, and now are, in competition, in commerce, with corporations, firms, and individuals engaged in the sale of products and services of the same general kind and nature as those sold by respondents.

PAR. 10. The use by respondents and their franchisees of the aforesaid false, misleading and deceptive statements, representations and practices had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and into the purchase of substantial quantities of the products and services offered by respondents and their franchisees by reason of said erroneous and mistaken belief and by reason of said unfair and deceptive acts and practices.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint charging respondents herein with violation of the Federal Trade Commission Act, and the respondents having been served with a copy of that complaint; and

The Commission having duly determined upon motion by respondents AAMCO Automatic Transmissions, Inc., and Robert Morgan certified to the Commission that, in the circumstances presented, the public interest would be served by waiver here of the provision of

Section 2.34(d) of its Rules that the consent order procedure shall not be available after issuance of complaint; and

Respondents AAMCO Automatic Transmissions, Inc., and Robert Morgan and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by said respondents 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 said respondents that the law has been violated as set forth in such complaint, and waivers and 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 respondents AAMCO Automatic Transmissions, Inc., and Robert Morgan have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now, in further conformity with the procedure prescribed in such Rule, the Commission hereby issues, its revised complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent AAMCO Automatic Transmissions, Inc., is a corporation organized, existing and doing business under the laws of the Commonwealth of Pennsylvania with its principal office and place of business located at 408 East Fourth Street, Bridgeport, Pennsylvania.

Respondent Robert Morgan is an individual and officer of said corporation. He formulated, directed and controlled the acts and practices of said corporation and his address is the same as that of the corporation.

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

ORDER

I

It is ordered, That these proceedings be, and hereby are, terminated as to respondent Anthony A. Martino.

II

It is ordered, That respondents AAMCO Automatic Transmissions, Inc., a corporation, and its officers and Robert Morgan, indi-

vidually and as an officer of said corporation, and respondents' agents and employees, directly or through any corporate or other device or through any agent, employee, licensee or franchisee, in connection with the advertising, offering for sale, sale, repair, servicing or distribution of automobile transmissions or any other automotive component, part or repair, or other services or products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using any advertising, sales plan or procedure involving the use of false, deceptive or misleading statements or representations which are designed to obtain leads or prospects for the sale of products or services other than those offered or advertised.

2. Representing, directly or by implication, that any product or service is offered when such offer is not a bona fide offer to sell said product or service. However, respondents' licensees or franchisees shall not be required to provide a product or service when the licensee or franchisee determines in good faith that such products or service are not applicable to the proper repair of a transmission, or other automotive components.

3. Representing, directly or by implication that all customers will receive one day service; misrepresenting, in any manner to any customer, the availability or completion time of any service for the purpose of gaining or retaining custody of the customer's automobile.

4. Misrepresenting that respondents or their licensees or franchisees furnish credit to customers; provided that nothing herein shall be deemed to prohibit respondents or their licensees or franchisees from making truthful and non-deceptive references as to the availability of credit or the arrangements that may be made for credit.

5. Using the term "overhaul" or any other word or words of similar import or meaning to refer to any transmission service which does not include the removal, disassembly, and replacement of all worn parts and the reassembly and reinstallation of the transmission in the vehicle.

6. Misrepresenting, in any manner, the nature or extent of any service or parts necessary to properly repair an automotive component.

7. Representing that any article of merchandise or service is guaranteed unless all of the terms and conditions of the guarantee, the identity of the guarantor and the manner in which the

guarantor will perform thereunder are clearly and conspicuously disclosed.

8. Misrepresenting to a customer that his transmission problem is an internal one necessitating the removal of the transmission from the automobile and its disassembly for diagnosis.

9. Removing and disassembling the customer's transmission for the purpose of misrepresenting that a serious transmission problem has been discovered requiring major repair service.

10. Refusing to disclose to a customer the specific nature of any transmission problem after proper inspection procedures have been completed.

11. Obtaining authorization from any customer to remove, or removing, the transmission or any other part from any customer's automobile without clearly and emphatically informing the customer at the time such authorization is obtained and prior to the removal of said transmission or other part, of the charge which will be made for replacement of the transmission or other part in its former nonrepaired condition in the customer's automobile if the customer refuses to authorize further work thereon, or refusing or failing to replace said transmission or other part in its former nonrepaired condition when requested to do so by the customer for the stated charge or without charge in case none was stated prior to such removal.

12. Failing to provide all customers, at the time of billing, with an itemized list of all parts and labor for which the customer is being charged in connection with the sale, service or repair of an automobile transmission or any other automotive component; and if any such parts were used or reconditioned, a clear disclosure on such list of the fact that such parts were used or reconditioned as the case may be; *Provided*, That when an automobile transmission or other automotive component has been rebuilt in the manner set forth in such trade practice rules or guides for the Rebuilt, Reconditioned and Other Used Automotive Parts Industry as may be in effect, in lieu of such itemized list, a certification may be furnished in writing to the customer that states substantially as follows:

> "This certifies that the transmission (or other automotive component) has been dismantled, reconditioned or rebuilt as necessary; all external and internal parts cleaned, all defective parts restored or replaced as needed with new, rebuilt or sound used parts and such machining or other proce-

dures performed as necessary to place your transmission (or other automotive component) in sound working condition."

This certification shall be signed by or on behalf of the licensee or franchisee responsible for the sale or installation of the transmission or other automotive component.

13. Failing to, at the time of suggesting to a customer that they repair, recondition or rebuild his transmission or other automotive component, prepare a written quotation sheet describing the costs involved in repairing, reconditioning or rebuilding the customer's transmission or other automotive component. Where alternative services are available, the quotation sheet shall set forth such alternatives. At the time of suggesting to a customer that they repair or rebuild his transmission or other automotive component, they shall orally inform the customer of the information contained in said quotation sheet. The customer, upon his request, shall be entitled to receive a copy of said written quotation sheet. Said written quotation sheet shall be kept available at the transmission shop for a period of not less than twelve months from the date it is prepared. When agreement is reached between a shop and a customer, the shop shall prepare a written work order setting forth the agreed repair or replacement work and the agreed price together with the agreed financing arrangement if it is not a cash transaction. A copy of this work order shall be furnished to the customer at the earliest practicable time, either by placing it in a conspicuous place in or upon his automobile or by delivering it to him in person when he next visits the transmission shop. In addition, the work order shall clearly disclose on its face, the following statement:

"YOU ARE ENTITLED TO RECEIVE A COPY OF OUR QUOTATION SHEET WHICH SETS FORTH THE COST OF THE SERVICE OR SERVICES WHICH WERE AVAILABLE TO YOU"

Each shop shall display in a conspicuous place a large sign which states:

"Inspection service includes written quotation sheet upon request."

14. Using any deceptive sales scheme or device to induce the sale of the products or services offered by respondents or their licensees or franchisees.

15. Placing in the hands of others advertising materials, sales manuals or any other thing for the purpose of misleading or deceiving prospective customers or customers as to any of the matters or things prohibited by this order.

16. Failing to continue to disclose clearly and conspicuously on invoices furnished by licensees or franchisees to their customers the identification, location and telephone number of respondents' national customer service office.

17. Failing to deliver by ordinary mail a copy of this order to each present and every future licensee or franchisee; and failing to obtain an agreement in writing from each present and every future licensee or franchisee to abide by the terms of this order: *Provided, however*, That as to any licensee or franchisee whose franchise agreement is in effect as of the effective date of this order, respondents' failure to obtain said agreement to abide by the terms of the order shall not be deemed a violation of this provision if, after having made a diligent effort to obtain said agreement from any such licensee or franchisee and such licensee or franchisee having failed or refused to execute such agreement, respondents inform the Commission of the identity of such licensee or franchisee.

18. Failing, after acceptance by the Commission of respondents' initial report of compliance to maintain, and have readily available, records of each and every complaint received by respondents involving the acts and practices prohibited by this order and which: (1) describe each and every complaint, including the name and address of the complaining party; (2) set forth the facts uncovered by respondents in connection with the investigation of each such complaint, and (3) state the disposition of each such complaint. Said records shall be maintained and kept readily available for at least 24 months following the month in which said records were created.

It is further ordered, That respondents and respondents' agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, repair, servicing or distribution of automobile transmissions or other automotive components, parts or services, or other products or services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Representing, or from providing any advertising or promotional materials to any licensee or franchisee which represent, that automobile transmissions or other automotive components will be inspected, serviced or repaired for any particular price, or that any other service will be provided or product sold, for any particular price unless the particular price represents the price previously and independently determined by the licensees

or franchisees participating in the advertising program or named in the advertisement. For the purposes of this paragraph, representations of price include, but are not limited to, representations that minor repairs will be made for $4.50 to $28.80, that inspections will be performed for $23.00 or that towing or any other service will be provided free of charge. Nothing herein shall be deemed to sanction price fixing.

It is further ordered, That respondents continue to maintain their program of surveillance which is designed and executed to enable respondents to reasonably determine whether any of their licensees or franchisees may be engaged in any of the acts and practices prohibited by the provisions of this order. The acts and practices of an individual licensee or franchisee which violate any provision of this order shall be determined a violation of this order by respondents, if, upon having knowledge that such act or practice has occurred, respondents do not take reasonably diligent steps to effect a discontinuance of the act or practice by the licensee or franchisee. For the purpose of this paragraph "knowledge" shall be defined as that which is obtained through respondents' program of surveillance. The receipt of individual complaints shall not, in itself, be deemed to constitute "knowledge": *Provided*, That respondents shall promptly institute a specific surveillance investigation of any licensee or franchisee who is the subject of 18 or more customer complaints in any calendar year: *And further provided*, That the foregoing shall not excuse respondents from failure to investigate any complaints which may violate this order and which are discovered in the course of its regular program of surveillance. For the purpose of this paragraph "reasonably diligent steps" shall mean that (1) the licensee or franchisee shall be instructed by registered mail to discontinue the acts or practices which violate this order, with further instructions to reply in writing within 10 days agreeing to discontinue the said acts or practices; (2) failing to receive within 10 days from the licensee or franchisee a written agreement to discontinue said acts or practices, respondents shall send a second letter, registered mail, to the licensee or franchisee with instructions that such licensee or franchisee submit within 10 days a written agreement to discontinue said acts or practices, with a warning that upon failure to do so, the Federal Trade Commission will be notified of such refusal to comply with respondents' instructions; (3) in the event the licensee or franchisee does not agree in writing to discontinue such acts or practices, or if the respondents shall have knowledge (as defined above) that such acts and practices have not been discontinued, the respondents

shall notify the Federal Trade Commission in writing, copy to licensee or franchisee, and offer its full facilities to assist the Commission in any action against said licensee or franchisee; (4) for a period of 60 days subsequent to knowledge (as defined above) that a licensee or franchisee had engaged in any of the acts or practices prohibited by the provisions of this order, respondents' surveillance department shall arrange its schedule so as to perform at least one inspection of said licensee or franchisee; and (5) if respondents shall have knowledge (as defined above) that a licensee or franchisee, for the purpose of obtaining a higher price, has knowingly misrepresented the extent of repairs necessary to properly repair customers' transmissions, or who fails to replace parts in customers' transmissions that licensee or franchisee represented as requiring replacement or is listed on customers' repair orders as having been replaced, and if the licensee or franchisee has been previously requested in writing (as covered above) to discontinue these specific acts and practices, the respondents, in addition to notifying the Federal Trade Commission of these facts, shall institute legal action for the purpose of having said licensee or franchisee's Franchise Agreement terminated.

It is further ordered, That respondents notify the Commission at least 30 days after 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 the order.

It is further ordered, That respondents furnish a copy of this order to each of their operating divisions or departments.

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

IN THE MATTER OF

MALVIN & GOLDMAN, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-1834. Complaint, Dec. 17, 1970—Decision, Dec. 17, 1970

Consent order requiring a New York City firm of fur wholesalers to cease and desist from deceptively invoicing any fur product.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Malvin & Goldman, a partnership, and Herbert Malvin and Nathan Goldman, individually and as copartners trading as Malvin & Goldman, and formerly trading as Eura Fur Co., hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PAR. 1. Respondent Malvin & Goldman is a partnership 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 150 West 30th Street, New York, New York. The partnership formerly traded as Eura Fur Co.

Respondents Herbert Malvin and Nathan Goldman are individuals and copartners trading as Malvin & Goldman and formerly trading as Eura Fur Co. Their address is the same as that of said partnership.

Respondents are wholesalers of furs.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of fur which have been shipped and received in commerce; and have introduced into commerce, sold, advertised and offered for sale in commerce, and transported and distributed in commerce, furs, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products or furs were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products or furs, but not limited thereto, were fur products or furs covered by invoices which failed:

1. To disclose that the fur contained in the fur products or furs was bleached, dyed, or otherwise artificially colored, when such was the fact.

2. To show the country of origin of imported furs or those contained in the fur products.

PAR. 4. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection, Division of Textiles and Furs proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Fur Products Labeling Act; and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the respondents have violated the said Acts, and that complaints 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commis-

sion hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Malvin & Goldman is a partnership 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 150 West 30th Street, New York, New York. The partnership formerly traded as Eura Fur Co.

Respondents Herbert Malvin and Nathan Goldman are individuals and copartners trading as Malvin & Goldman and formerly traded as Eura Fur Co. Their address is the same as that of said partnership.

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

ORDER

It is ordered, That respondents Malvin & Goldman, a partnership, and Herbert Malvin and Nathan Goldman, individually and as copartners trading as Malvin & Goldman or under any other name or names, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce; or in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce of furs, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from falsely or deceptively invoicing any fur or fur product by failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

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

Complaint

IN THE MATTER OF

S.A. PROMOTIONS, INC., ET AL.

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

Docket C-1835. Complaint, Dec. 17, 1970—Decision, Dec. 17, 1970

Consent order requiring a New York City corporation dealing in sales promotional devices and games of chance to cease representing or implying that the Federal Trade Commission has endorsed any of its programs, or that any of its programs conform to a Government standard or regulation.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that S.A. Promotions, Inc., a corporation, and Harry Wasser, individually and as an officer of S.A. Promotions, Inc., hereinafter sometimes referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent S.A. Promotions, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its business address at 217 Broadway, New York, New York.

Respondent Harry Wasser is an individual and officer of respondent S.A. Promotions, Inc. He formulates, directs, and controls the acts and practices of the corporate respondent of which he is an officer, including the acts and practices herein set forth. His address is 1955 Grand Boulevard, Schenectady, New York.

PAR. 2. Respondents S.A. Promotions, Inc., and Harry Wasser are now and for some time past have been engaged in the preparation and operation of chance promotions including a copyrighted game, "Play Square," and other sales promotional devices. S.A. Promotions, Inc., and Harry Wasser furnish various services in connection with such sales promotional devices including, but not limited to, licensing the use of copyrighted promotional devices, developing promotional programs, procuring prizes, and preparing and supplying,

for use in the program, entry cards, display materials and prize winner selection mechanisms.

PAR. 3. In order to promote the above-described business, respondents prepared and distributed certain promotional publications, which suggest that the Commission itself has examined and approved their promotion. These publications assert that one of its promotions, "Play Square," has been "cleared" by the Commission, that the promotion conforms to all Commission standards and regulations, and that the Commission "says" to use the promotion. These publications include an edited letter from the Commission staff which is purported to establish such Commission approval and endorsement.

PAR. 4. In the course and conduct of the above-described business, and at all times mentioned herein, respondents have been and now are in substantial competition with corporations, firms and individuals in the sale and distribution of their products and services.

PAR. 5. In the course and conduct of their business, respondents cause their products and services to be sold, placed and distributed throughout the United States. Respondents further engaged in commerce by distributing letters and publications promoting their products and services between New York and various other States and maintain and at all times mentioned herein have maintained a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. In the course and conduct of their business, and for the purpose of stimulating and increasing the sale and distribution of their products and services, the respondents have made or caused to be made certain statements and representations in promotional materials disseminated to potential customers. Typical and illustrative of statements and representations made in these promotional materials, but not all inclusive thereof, are the following:

1. F.T.C. says Play Square!
2. "Play Square" is F.T.C. cleared
3. ["Play Square"] conforms to all F.T.C. standards and regulations.
4. Testimony at F.T.C. hearings on games disclosed these shameful facts!; Testimony on 13 Games disclosed that on average the odds of winning any prize was 1 in 53,523 chance.
5. They [F.T.C.] were completely satisfied with Play Square's:
   Honesty and Fairness
   "Live" Television Selection of Winning Numbers
   Full Disclosure of Prizes and Odds of Winning
   Method of Distribution
   Impossibility of "Seeding" Prizes

Impossibility of Determining Winners In Advance
Advertising and Display Material

They were quite pleased with the number of prizes Play Square offers . . .

Why not be the first and only one in your area to offer a game that is beyond reproach. Not only is it honest in every way, it complies with all F.T.C. regulations . . .

6. See what F.T.C. says about "Play Square" followed by a letter from a Commission staff attorney edited so as to appear to establish the claims made throughout the material.

PAR. 7. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, respondents represented, directly or by implication that:

1. The Federal Trade Commission examined and cleared one of respondents' chance promotions; also, it endorsed the use of their chance promotions.

2. Their chance promotions conform to Federal Trade Commission standards and regulations.

3. The Commission has singled out their chance promotions from other competing chance promotions as being honest and fair, as having a generous prize structure, as being incapable of being fixed; and the Commission is "pleased" with some aspects of their promotions and "satisfied" with every aspect of their promotions; hence in these respects the Commission distinguishes their chance promotions from their competitors' chance promotions.

4. They received a letter from the Commission staff which supports all their representations as to the Commission's opinion of their promotions.

PAR. 8. In truth and in fact:

1. The Commission has never examined or issued an opinion concerning any of respondents' chance promotions; hence, it has neither cleared nor endorsed any such promotions.

2. There are no Commission standards or regulations governing respondents' chance promotions.

3. The Commission has never suggested that respondents' chance promotions were fairer, more honest, more satisfying, or more pleasing than other chance promotions, and hence, it has never suggested that it found their promotions distinguishable in these respects from those chance promotions it condemned in the "Games of Chance" proceedings cited by the respondents; further, it has never sent or directed to be sent correspondence supporting such representations.

4. The letter which is purported to support respondents' representations is a letter from a member of the Commission's staff offering

advice at the staff level only. Respondents edited that letter so as to omit certain statements in the original letter as to its limited nature and effect. It was this edited letter which respondents caused to be distributed.

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

PAR. 9. The use by respondents of the aforementioned false, misleading and deceptive statements and representations and practices has the capacity and tendency to mislead members of the business community into the erroneous and mistaken belief that said statements and representations were and are true.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the above 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commis-

sion hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondents S.A. Promotions, 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 217 Broadway, in the city of New York, State of New York.

Respondent Harry Wasser is an officer of said corporation, and his address is 1955 Grand Boulevard, in the city of Schenectady, State of New York.

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

ORDER

It is ordered, That respondents S.A. Promotions, Inc., a corporation, and its officers, and Harry Wasser, individually and as an officer of the aforesaid corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the preparation, promotion, sale, distribution or use of contests, chance promotions or any other promotional device, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. The Federal Trade Commission or its staff has approved or endorsed any promotional program offered by either, or both, respondents;

2. Any promotional program conforms to a government standard or regulation unless such standard or regulation actually exists and applies to the promotion and the promotion conforms to such standard or regulation in all respects.

It is further ordered, That respondents distribute a copy of this order to all parties which were sent material making the misrepresentation charged in the complaint.

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

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon it of this order file with the Com-

mission a report in writing setting forth in detail the manner and form in which they have complied with the order.

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

IN THE MATTER OF

LLOYD HEARING AID CORPORATION, ET AL.

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

Docket C-1836. Complaint, Dec. 28, 1970—Decision, Dec. 28, 1970

Consent order requiring a Rockford, Ill., distributor of hearing aids and parts and accessories therefor to cease misrepresenting that respondent sells "America's Largest Selection of Hearing Aids," misrepresenting the number of times a hearing aid battery can be recharged, that its hearing aids are the most powerful on the market, exaggerating the savings to customers, misrepresenting that any hearing aid it sells is a new invention, failing to disclose the nature of its guarantees, and failing to disclose that diagnosis of hearing defects by mail is inadequate.

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 Lloyd Hearing Aid Corporation, a corporation, and Lloyd D. Kling and Marvin Palmquist, individually and as officers of said corporation, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Lloyd Hearing Aid Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 905 Ninth Street, in the city of Rockford, State of Illinois.

Respondents Lloyd D. Kling and Marvin Palmquist are individuals and officers of the corporate respondent. They formulate, direct and control the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the offering for sale, sale, and distribution of hearing aids and parts and accessories therefor which come within the classification of a device as "device" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped and transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals, in the sale and distribution of hearing aid devices and parts and accessories therefor of the same general kind and nature as those sold by respondents.

PAR. 5. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning their said products by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in newspapers and magazines and other advertising media for the purpose of inducing and which were likely to induce. directly or indirectly the purchase of said products, and have disseminated and caused the dissemination of, advertisements concerning said products by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Among and typical of the statements and representations contained in said advertising used and disseminated by respondents as hereinabove set forth, are the following:

America's Largest Selection of HEARING AIDS.

DK-20 NICAD batteries . . . can be recharged from 750 to 1000 times.

2 DK-20 NICAD rechargeable batteries . . . will give 3 to 4 years battery service.

MODEL 403 are the most powerful HEARING AID TEMPLES obtainable anywhere.

Lloyd Model 008 is the most powerful BEHIND-THE-EAR Aid on the market.

Hearing Aids at ⅔ off Regular Dealer's Prices and 65% to 70% lower than regular dealer's prices.

At 65% to 70% LOWER THAN REGULAR DEALER'S PRICES.

These new miracle Lloyd Aids are available . . . .

You Get One-Year Warranty.

HEAR WELL AGAIN.

PAR. 7. By and through the use of said advertisements, and others of similar import and meaning but not expressly set out herein, the respondents have represented, and are now representing, directly or by implication that:

1. They offer for sale the largest selection of hearing aids in America.

2. Hearing aid batteries advertised can be recharged from 750 to 1000 times and that two such rechargeable batteries will give 3 to 4 years service under normal use and conditions.

3. Certain hearing aids sold by proposed respondents are the "most powerful" that can be obtained (a) "anywhere" and (b) "on the market."

4. They sell hearing aids at prices that are substantially lower than those being charged by others for the same merchandise in their trade area.

5. They merchandise a hearing aid which is a new invention or involves a new mechanical or scientific principle.

6. That hearing aids are warranted, without a clear and conspicuous disclosure of the nature and extent of the warranty, the manner in which the warrantor will perform thereunder, and the identity of the warrantor.

7. That the hearing aids advertised will be beneficial to all persons with a hearing disability.

PAR. 8. In truth and in fact:

1. Respondents do not have America's largest selection of hearing aids.

2. DK-20 NICAD batteries are not rechargeable from 750 to 1000 times, and two DK-20 NICAD batteries do not have a life span of three years.

3. The hearing aids sold by proposed respondents are not the most powerful hearing aids obtainable anywhere, or the most powerful aids on the market, and such hearing aids will not be beneficial to all persons with a hearing disability.

4. Respondent's prices are not ⅔ off regular dealer's prices and are not 65 percent to 70 percent lower than regular dealer's prices,

or otherwise substantially lower than those being charged by others for the same merchandise in their trade area.

5. The advertised aids are not new inventions and do not involve a new mechanical or scientific principle.

6. The one year warranty has certain conditions and limitations not disclosed in the advertising thereof.

7. The advertised aids will not prove beneficial to all persons with a hearing disability.

Therefore, the advertisements referred to in Paragraphs Five, Six and Seven were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and the aforesaid statements and representations as set forth in Paragraphs Five, Six and Seven herein were and are false, misleading and deceptive.

PAR. 9. In the course and conduct of their aforesaid business, respondents by and through the use of advertising invite persons with a hearing disability to complete the questionnaire furnished by respondents and return the same by mail so that respondents can select a hearing aid that is suited to the individual's loss.

Respondents represent by and through the use of the aforesaid advertising that such procedure or method, including the completion and return of the questionnaire by the purchaser or prospective purchaser, is adequate, effective and reliable to determine the hearing loss of an individual and to select the hearing aid suited to his or her hearing loss.

In truth and in fact, the aforesaid procedure or method is not adequate, effective or reliable to determine the nature or extent of the hearing loss of an individual or to select the hearing aid that is suited to the loss of the person furnishing information on the questionnaire.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive acts and practices has had and now has the capacity and tendency to mislead members of the purchasing public into the mistaken and erroneous belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' devices by reason of said mistaken and erroneous belief, and by reason of said misleading and deceptive acts and practices.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of false advertisements as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute,

unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

Decision and Order

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure described in § 2.34(b) of its Rules the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

(1) Respondent Lloyd Hearing Aid Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its principal office and place of business located at 905 9th Street, in the city of Rockford, State of Illinois.

Respondent Lloyd D. Kling is an individual and an officer of the corporation, and his address is the same as that of said corporation.

Respondent Marvin Palmquist is an individual and an officer of the corporation, and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Lloyd Hearing Aid Corporation, a corporation, and Lloyd D. Kling and Marvin Palmquist, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of any hearing aid device or any component thereof, or any device represented as aiding defective hearing, do forthwith cease and desist from directly or indirectly:

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

(1) Represents directly or indirectly that respondents offer for sale and sell "America's Largest Selection of Hearing Aids."

(2) Misrepresents in any manner the number of times a battery for use in a hearing aid can be recharged.

(3) Misrepresents in any manner the number of years, or other period of time, that a battery or combination of batteries for use in a hearing aid will perform.

(4) Represents that any hearing aid sold by the respondents is the most powerful on the market, or otherwise represents that any hearing aid has a greater general effectiveness than is the fact, or that any hearing aid will compensate for a greater degree or extent of hearing loss than is true.

(5) Uses the words "⅔ off Regular Dealer's Prices" or "65% to 70% LOWER THAN REGULAR DEALER'S PRICES," or words of similar import and meaning, to represent that by purchasing respondents' products, customers are afforded savings amounting to the difference between respondents' price and a compared price for the same merchandise in respondents' trade area, unless a substantial number of principal retail outlets in the trade area regularly sell said merchandise at the compared price or some higher price.

(6) Misrepresents, in any manner, the amount of savings available to purchasers or prospective purchasers of respondents' merchandise at retail.

(7) Misrepresents that any hearing aid is a new invention or involves a new mechanical or scientific principle

through use of the word "miracle" or in any other manner.

(8) Represents that a hearing aid is guaranteed, whether expressed in terms of "guarantee" or "warranty," unless in immediate conjunction therewith the nature and extent of the guarantee, the manner in which the guarantor will perform under the guarantee, and the identity of the guarantor, are clearly and conspicuously disclosed.

(9) Represents that any hearing aid will benefit persons suffering from any hearing disability unless in immediate conjunction with such representation a clear and conspicuous disclosure is made that in some cases of hearing loss, a hearing aid will not be beneficial.

(10) Represents, directly or by implication that respondents can determine the nature or degree of hearing loss upon written information furnished by the purchaser by mail or that the information furnished and the evaluation thereof by respondents or their agents or employees is an adequate, effective or reliable procedure or method to select a hearing aid suited to the individual's hearing loss.

B. Disseminating or causing the dissemination of, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said products in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations or misrepresentations prohibited in Paragraph "A." hereof.

It is further ordered, That respondents Lloyd Hearing Aid Corporation, a corporation, and Lloyd D. Kling and Marvin Palmquist, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with the offering for sale, sale, or distribution of any hearing aid device or any component thereof, or any device represented as aiding defective hearing, or services in connection with the offering for sale, sale or distribution of said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Failing to clearly and conspicuously disclose to purchasers and prospective purchasers prior to acceptance of an order to purchase a hearing aid that furnishing information by mail and the evaluation thereof by respondents or their agents or employees is not an adequate, effective or reliable procedure or method to determine the nature or degree of hearing loss or to select a hearing aid suited to the individual's hearing loss.

(2) Failing to clearly and conspicuously disclose on any questionnaire sent to a prospective purchaser or purchaser of a hearing aid to obtain information concerning the hearing ability or disability of any individual or regarding any hearing aid he or she has worn or is currently wearing, that furnishing such information by mail and the evaluation thereof by respondents is not an adequate, effective or reliable procedure or method to determine the nature or extent of hearing loss or to select a hearing aid suited to the individual's hearing loss.

It is further ordered, That respondents shall maintain full and adequate records which disclose the facts upon which any savings claims, including former price, retail price and comparable value claims are based and from which the validity of such claims can be determined.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to cease and desist to all subsidiaries, affiliates, offices, employees and agents which are now or hereafter created, elected, employed or appointed.

It is further ordered, That the respondents Lloyd Hearing Aid Corporation, a corporation, and Lloyd D. Kling and Marvin Palmquist, individually and as officers of said corporation shall within sixty (60) days after service upon them of this order, file with the Commission a report in writing setting forth in detail the manner and form in which they have complied with the order to cease and desist, and in addition such other reports as may thereafter be directed.

IN THE MATTER OF

HANK'S AUTO SALES, INC., ET AL.

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

Docket C-1837. Complaint, Dec. 30, 1970—Decision, Dec. 30, 1970

Consent order requiring a Cleveland, Ohio, seller of used automobiles to cease violating the Truth in Lending Act by failing to use the following terms in its customer contracts: cash price, cash downpayment, unpaid balance of cash price, amount financed, finance charge, annual percentage rate, total of payments, and deferred payment price; failing to include the premium for required credit life insurance, to disclose the method of computing any default, and to clearly identify property to which any security interest relates.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hank's Auto Sales, Inc., a corporation, and Henry E. Rellah, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Hank's Auto Sales, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 13601 Miles Avenue, Cleveland, Ohio.

Respondent Henry E. Rellah is an officer of the corporate respondent. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale and sale of used cars to the public at retail.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend, and for some time last past have regularly extended, consumer credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business, and in connection with their credit sales as "credit sale" is defined in Regulation Z, have caused and are causing customers to execute Used Car Order Contracts, hereinafter referred to as the "Order Contract," and "Retail Installment Security Agreements," hereinafter referred to as the "Security Agreement." Respondents make no disclosures to customers in connection with their credit sales, except on the order contract.

By and through the use of the order contract, respondents:

(1) Fail to use the term "cash price," as defined in § 226.2, to describe the purchase price of the automobile, as required by § 226.8(c) (1) of Regulation Z.

(2) Fail to use the term "cash downpayment" when all or part of the downpayment is in money, as required by § 226.8(c) (2) of Regulation Z.

(3) Fail to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by § 226.8(c) (3) of Regulation Z.

(4) Fail to use the term "amount financed" to describe the balance financed, as required by § 226.8(c) (7) of Regulation Z.

(5) Fail to disclose the "finance charge" and "annual percentage rate," using those terms, in credit transactions where finance charges are imposed, as required by § 226.4, § 226.5, §226.6, and § 226.8(b) of Regulation Z.

(6) Fail to use the term "total of payments" to describe the dollar amount of the sum of payments scheduled to repay the indebtedness, as required by § 226.8(b) (3) of Regulation Z.

(7) Fail to use the term "deferred payment price" to describe the sum of the cash price, all other charges individually itemized, and the finance charge, as required by § 226.8(c) (8) (ii) of Regulation Z.

(8) Fail to include the premium for required credit life insurance in the finance charge and to disclose it as part of the finance charge, as required by § 226.4 and § 226.8, respectively, of Regulation Z.

(9) Fail to disclose the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments, as required by § 226.8(b) (4) of Regulation Z.

(10) Retain a security interest in the automobile sold on consumer credit and fail to clearly identify the property to which the security interest relates, as required by § 226.8(b) (5) of Regulation Z.

PAR. 5. By the aforesaid failure to make the disclosures in the order contract, respondents have failed to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(k) of the Truth in Lending Act, respondents' aforesaid failures to comply with Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging respondents named in the caption hereof with violation of the Federal Trade Commission Act, the Truth in Lending Act and the implementing regulation promulgated thereunder, and respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, and comments thereon having been received, considered, and adopted in part by the Commission, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Proposed respondent, Hank's Auto Sales, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its principal office and place of business located at 13601 Miles Avenue, Cleveland, Ohio.

Proposed respondent, Henry E. Rellah, is the president and owner of the said corporation; he formulates, directs, and controls the policies, acts, and practices of said corporation, and his business address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Hank's Auto Sales, Inc., a corporation, and its officers, and Henry E. Rellah, individually and as an officer of said corporation, and respondents' agents, representatives, and employees directly or through any corporate or other device, in

connection with any consumer credit sale of automobiles or any other merchandise or service, as "credit sale" is defined in Regulation Z (12 CFR Part 226) of the Truth In Lending Act (Public Law 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

(1) Failing to employ the term "CASH PRICE," as defined in Regulation Z, to describe the price at which respondents offer to sell for cash the goods or services which are the subject of a con- the balance financed, as required by § 226.8(b)(7) of Regulation Z.

(2) Failing to employ the term "CASH DOWNPAYMENT" to describe any downpayment in money, as required by § 226.8(c)(2) of Regulation Z.

(3) Failing to employ the term "UNPAID BALANCE OF CASH PRICE" to describe the difference between the cash price and the total downpayment, as required by § 226.8(c)(3) of Regulation Z.

(4) Failing to employ the term "AMOUNT FINANCED" to describe the balance financed, as required by § 226.8(b)(7) of Regulation Z.

(5) Failing to disclose the "FINANCE CHARGE" and the "ANNUAL PERCENTAGE RATE," using those terms, in credit transactions where finance charges are imposed, in the manner and form required by § 226.4, § 226.5, § 226.6, and § 226.8 of Regulation Z.

(6) Failing to employ the term "TOTAL OF PAYMENTS" to describe the dollar amount of the payments scheduled to repay the indebtedness, as required by § 226.8(b)(3) of Regulation Z.

(7) Failing to employ the term "DEFERRED PAYMENT PRICE" to describe the sum of the cash price, all other charges individually itemized, and the finance charge, as required by § 226.8(b)(8)(ii) of Regulation Z.

(8) Failing to include the premium for required credit life insurance in the finance charge, and to disclose it as part of the finance charge, as required by § 226.4 and § 226.8, respectively, of Regulation Z.

(9) Failing to disclose the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments, as required by § 226.8(b)(4) of Regulation Z.

(10) Failing to make a clear identification of the property to which any SECURITY INTEREST relates, as required by § 226.8(b)(5) of Regulation Z.

(11) Failing, in any consumer credit transaction or advertisement,

to make all disclosures in the manner, form and amount required by § 226.6, § 226.8, § 226.9 and § 226.10 of Regulation Z.

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

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist contained herein.

IN THE MATTER OF

HOLLYWOOD CREDIT CLOTHING CO., INC., ET AL.

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

Docket 8796. Complaint, Aug. 5, 1969—Decision, Dec. 31, 1970

Order requiring a Washington, D.C., distributor of clothing, furniture, appliances and other merchandise to cease advertising any merchandise without disclosure of required conditions or obligations, misrepresenting that any article of merchandise is in short supply, that any article is reduced from its former price, that customers are afforded savings, failing to maintain records upon which savings claims are based, failing to furnish customers with copies of executed conditional sales contracts, and failing to comply with certain requirements of Regulation Z of the Truth in Lending Act.

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 Hollywood Credit Clothing Co., Inc., a corporation, and Barry Miller, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH. 1. Respondent Hollywood Credit Clothing Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 703 7th Street, N.W., Washington, D.C.

Respondent Barry Miller is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of clothing, furniture, appliances, linenware and other articles of merchandise to the public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise to be sold to purchasers located within the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their merchandise, respondents have made numerous statements and representations in advertisements inserted in newspapers, of which the following are typical and illustrative but not all inclusive thereof:


84 PIECES
MADE IN U.S.A.
CANNON
COLOR ENSEMBLE
Sheets, Pillowcases, Towels
Deluxe CANNON Sheets and Cases (white or colors)! Deluxe Jumbo size heavier weight Bath Towels! In Every Deluxe piece—at sensational savings. —on Easy Terms!
6
GOLD
BLUE
6
TRADE MARK
CANNON
6
81 x 99 Double Bed Size WHITE SHEETS or
6
81 x 99 Double Bed Size PASTEL COLOR SHEETS
PINK
GOLD
BLUE
OUR LOWEST PRICE EVER!
HURRY . . . LIMITED QUANTITIES
Deluxe quality you've always wanted . . . at sensational savings, with NO EXTRA COST to pay on EASY TERMS. Good sheets mean good sleep, and here is the best . . . Not just plain but famous Cannon. You get oversize luscious Cannon quality towels and EVERYTHING else just as shown including sheets and cases.
$29.95
$1.00 DOWN—$1.00 A WEEK
OPEN DAILY 8:30 A.M. TO 6:30 P.M.
12 FACE TOWELS
JUMBO Size! Extra Thick & Extra Absorbent!
Three times thicker than ordinary towels. Deluxe quality in big wrap-around size.
12 Jumbo BATH TOWELS
ONLY 1 SET TO A CUSTOMER
12 DISH TOWELS
12 DISH CLOTHS
12 POT HOLDERS
12 WASH CLOTHS
PHONE TODAY
MAIL COUPON NOW or SHOP IN PERSON!
Furniture • Clothing • Appliances • Jewelry • Toys
"ON THE EASIEST TERMS IN TOWN"
Hollywood
703-7th ST. N.W., AT G
NAtional
8-3667
8-4992
HOLLYWOOD 703-7th St., N.W.
Husband's Name
Address Phone
Employer
Address Phone
Wife's Name
Address Phone
Employer
Address Phone

PAR. 5. By and through the use of the above-reproduced statements and representations, and others of similar import and meaning but not expressly set out herein, the respondents have represented, and are now representing, directly or by implication, that:

1. Respondents will sell the advertised merchandise without the imposition of any further condition or obligation.

2. The quantity of the advertised merchandise is limited and prospective purchasers should hurry because the merchandise will be sold out and unavailable for purchase.

3. Through the use of the terms "OUR LOWEST PRICE EVER," "special sale price," and "savings," the advertised merchandise is offered at a specially reduced price of $29.95 and savings are thereby afforded purchasers from respondents' regular selling price.

PAR. 6. In truth and in fact:

1. Respondents will not sell, in every instance, the advertised merchandise without the imposition of any further condition or obligation. In a number of instances, sale has been contingent upon the assumption of obligations by the customer or conditions have been imposed upon the purchase.

2. The quantity of the advertised merchandise is not limited and prospective purchasers need not hurry, as a sufficient quantity of such merchandise is available at all times.

3. The advertised merchandise is not offered at a specially reduced price, and savings are not thereby afforded purchasers because of reductions from respondents' regular selling price. The price of $29.95 is the usual and customary price at which such merchandise is offered by respondents.

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

PAR. 7. In the course and conduct of their business, respondents induce their customers to execute conditional sale contracts. In this connection, respondents fail to furnish certain customers with a copy of such conditional sale contract at the time of the sale.

By and through such failure, respondents' customers are not adequately apprised of the amounts, terms and conditions of the sales transaction and such customers cannot know the extent of their rights and obligations under such contracts.

Therefore, such practice was and is an unfair trade practice.

PAR. 8. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and

individuals in the sale of clothing, furniture, appliances, linenware and other articles of merchandise of the same general kind and nature as those sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

Mr. Donald L. Bachman and *Mr. Edward D. Steinman* supporting the complaint.

Mr. Stanley Klavan, Klavan and Mannes, Rockville, Md., for respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

NOVEMBER 16, 1970

CONTENTS

PRELIMINARY STATEMENT

A. *Pleadings*

The Commission issued its complaint on August 5, 1969. Named as respondents therein are Hollywood Credit Clothing Co., Inc., a corporation, and Barry Miller, individually and as an officer of the

corporate respondent. The complaint alleges that the respondents have violated Section 5 of the Federal Trade Commission Act by engaging in the following acts and practices: advertising merchandise without disclosing conditions and limitations imposed on the sale of such merchandise; advertising that merchandise is in limited supply when sufficient quantity of the advertised merchandise is available to meet anticipated consumer demand; advertising that merchandise is available at a reduced price when such was not the fact; and failing to provide all customers who executed conditional sale contracts with a copy of said contracts.

On September 10, 1969, respondents denied all the substantive allegations of the complaint. Prior to the initiation of evidentiary hearings, respondents moved to dismiss the complaint on three separate occasions. Each motion to dismiss the complaint was denied.

B. *Prehearing Conferences*

Prehearing conferences were held on November 21, 1969, February 4, 1970, and July 15, 1970, in order to simplify and clarify the issues and to take up such preliminary matters as were appropriate. To further reduce and simplify the issues, complaint counsel requested and received from respondents responses to admission of facts.

C. *Hearing and Post-Hearing Procedures*

Evidentiary hearings were held in Washington, D.C., on August 26, and 27, 1970. In the presentation of their case-in-chief, complaint counsel elicited the testimony of 10 witnesses and stipulated with respondents that 11 witnesses scheduled to testify would provide testimony substantially the same as the testimony of the witnesses who testified at the hearing. (Tr. 233–235.) In addition, complaint counsel introduced numerous documents into evidence. Respondents presented the testimony of two witnesses and introduced four exhibits into evidence. On rebuttal, complaint counsel presented the testimony of two witnesses. At the close of the hearing, the examiner directed that complaint counsel submit proposed findings of facts, conclusions of law and order on or before October 5, 1970; that respondents submit their proposed findings by October 15, 1970, and that any reply submitted by complaint counsel be tendered by October 25, 1970. Respondents and complaint counsel were allowed one week extensions for filing proposed findings and reply respectively.

The hearing examiner has carefully considered the proposed findings of fact and conclusions submitted by complaint counsel and counsel for respondents and such proposed findings and conclusions

if not herein adopted, either in the form proposed or in substance are rejected as not supported by the record or as involving immaterial matters.

FINDINGS OF FACT

A. *Respondents—Generally*

1. Respondent Hollywood Credit Clothing Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business formerly located at 703 7th Street, N.W., Washington, D.C. Admitted in respondents' answer to the complaint filed on September 10, 1969 (see also answer to request for admission of fact number 2). Respondents admitted in an affidavit submitted on February 2, 1970, in support of a motion to dismiss the complaint or in the alternative to withdraw the matter from adjudication that the corporate respondent vacated its location at 703 7th Street, N.W., Washington, D.C. Although not actively in business, the corporate respondent is still a viable legal entity. (Tr. 119.)

2. Respondent Barry Miller is an officer of the corporate respondent. Prior to the corporate respondent's cessation of active business, Barry Miller formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Mr. Miller's business address was the same as the address of the corporate respondent.

B. *Respondent Miller's Participation in Hollywood Credit Business*

3. Respondent Miller began his association with the corporate respondent in 1945. From that date until the corporate respondent ceased active business in 1970, Mr. Miller was active in the day to day operations of the corporate respondent (answer to request for admission of fact numbered 9). He initially became involved in the operation of Hollywood Credit Clothing, Inc., after his marriage to the daughter of Herbert Kapiloff, then president of said corporation. (Tr. 121, 236.) All of the stock in the corporate respondent was owned by Mr. Kapiloff, and Mr. & Mrs. Miller. (Tr. 120.)

4. Prior to Mr. Kapiloff's death in 1967, Mr. Miller actively participated in the formulation of sales policies as well as their implementation on a daily basis. Mr. Miller was secretary of the corporation, one of three stockholders and a member of the corporation's board of directors. (Tr. 120–121, 237.) Mr. Miller participated in monthly board meetings where sales and advertising policies were discussed and formulated. (Tr. 121, 238.) Mr. Miller cast votes at such meetings on the selection of such policies. (Tr. 121.)

5. For several years before his death, Mr. Kapiloff's poor health caused his frequent absence from the corporate respondent. (Tr. 122–123.) During this period, respondent Miller functioned as general manager of the corporate respondent. (Tr. 123.) He occupied the office of Mr. Kapiloff and his duties as general manager included the purchase of merchandise and establishing the prices at which such merchandise was sold to the public. (Tr. 123.)

6. Upon Mr. Kapiloff's death in September 1967, Mr. Miller became president and treasurer of the corporate respondent. (Tr. 119; answers to request for admission of facts numbered 2 and 4.) Mr. Miller's elvation to president and treasurer of the corporate respondent formalized his role as the individual responsible for the daily operations of the corporate respondent. (Tr. 122; answers to request for admission of facts numbered 7 through 10 and 12.) Complaint counsel and respondents' counsel stipulated that Mrs. Miller's testimony if she were called as a witness would be substantially the same as the testimony of Mr. Miller. (Tr. 163–164.)

C. *Advertising*

7. Respondents for some time last past have been engaged in the advertising, offering for sale, sale and distribution of clothing, furniture, appliances, linenware and other articles of merchandise to the public. Admitted in answer to complaint counsel's request for admission of fact numbered 14. (See also CX 154, 155A, 160A, 370A, 392A, 405A.) Commission exhibits 131 through 142; 144 through 145 and 851–A through 875–C reflect the advertisings of the respondents during the calendar years of 1965, 1966, 1967 and 1968.

8. In the course and conduct of their business as aforesaid, respondents have caused their said merchandise to be sold to purchasers located within the District of Columbia, and have maintained a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act. Prior to the cessation of active business, respondents regularly advertised in the *Washington Daily News*. (Tr. 124; CX 131–142, 144–145, 851–A–875–C. This newspaper has circulation throughout the metropolitan Washington, D.C., area. Such advertising was utilized by respondents to attract recipients of said newspaper to the premises of the corporate respondent. (Tr. 124; answers to request for admission of facts numbered 21 and 22.) Individuals who went to respondents' place of business came from their residences located in the State of Maryland, Commonwealth of Virginia and the District of

Columbia. (Tr. 166, 194, 200, 211, 218, 221, 227; see also stipulations as to witnesses not testifying Tr. 233–234.)

9. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their merchandise, respondents have made numerous statements and representations in advertisements inserted in newspapers, of which the following are typical and illustrative but not all inclusive thereof:

(1) OUR LOWEST PRICE EVER!
(2) HURRY . . . LIMITED QUANTITIES
(3) . . . special sale price. . . .

For the above and similar representations, see Commission exhibits 131 through 142; 144–145 and 851–A through 869–C which are newspaper advertisements of items sold by the respondents. These advertisements cover the period of the calendar years 1965, 1966, 1967 and 1968. Such advertisements appeared frequently in the *Washington Daily News* which was the only paper in which respondents advertised. (Tr. 124.)

10. Respondents offered evidence to show that they changed the content and form of their advertisings through the testimony of Mr. Heller who testified that "around four years ago or longer," as an advertising agent, he changed the form and content of respondents' advertisements after he had discussed the changes with a representative from the Commission. (Tr. 295.)

Mr. Heller gave testimony to establish respondents' exhibit two as being the advertisement before the changes were made and respondents' exhibit one as being the advertisement after the changes were made. Respondents' exhibit two bears the date of September 1968 which is a considerable length of time subsequent to when the changes were allegedly made. A review of all of respondents' advertising involving linenware from the calendar years 1965 through 1968 (CX 131–142, 144–145, 851–A–875–C), reveals that the first changes made of respondents' advertisements as they appeared in 1965, were made in August 1966. (CX 858–A.) The only change that was made was the deletion of the term "REGULAR $39.95 VALUE." Otherwise, all other statements in the advertisement remained unchanged including the term "Special sale price." (Compare CX 858–A–C with CX 859–A–C.) The advertisements of respondents as reflected in respondents' exhibit one did not appear until in June 1968. (CX 870–A–C.) All of respondents' advertisements prior to that date bore representations as reflected in the above proposed finding. It is observed that these changes were in fact made a con-

siderable time after investigators of the Commission had visited respondents' business premises as late as 1967. (Tr. 181.)

D. *Conditions of Sale as Related to Advertising*

11. By and through the use of the statements and representations in the ninth finding, and other statements and representations of similar import and meaning, the respondents have represented directly or by implication, that respondents will sell the advertised merchandise without the imposition of any further condition or obligation than stated in the advertisements. The only conditions or obligations set forth in respondents' advertisements (CX 131–142, 144–145 and 851–A–869–C) are the purchase price and the statement "none sold for cash." Other than these two conditions or limitations no others appear. From a reading of respondents' advertisements, it is obvious that they represent that the purchase of the advertised items is not based upon any conditions or obligations other than these expressed in the said advertisements.

12. Respondents did not sell, in every instance, the advertised merchandise without the imposition of any further condition or obligation. In a number of instances, sales were contingent upon the assumption of obligations by customers or conditions imposed upon the purchase of the advertised merchandise. Several witnesses gave testimony that in responding to respondents' advertisements by going to the corporate respondent to purchase the advertised merchandise, they were advised by respondents that additional purchases were required in order to purchase the advertised merchandise. (Lykens, Tr. 168, Neal, Tr. 196, Wilson, Tr. 202, Anderson, Tr. 213, Butler, Tr. 223, Coleman, Tr. 229.) In addition to the testimony of witnesses given on this fact, respondents stipulated with complaint counsel that if the additional witnesses complaint counsel had subpoenaed to give testimony would testify, those witnesses would have testified substantially the same as the witnesses who did testify as to the conditions imposed upon the purchase of the respondents' advertised merchandise in question. (Tr. 234–235.)

13. The individual respondent Barry Miller testified that the advertised merchandise were "door openers" and "loss leaders" used for the purpose of attracting customers to the store. (Tr. 124–126.) This suggests that the respondents contemplated the need to effect sales in addition to those of the advertised merchandise from purchasers responding to the advertisements and that therefore they were aware of the deception at the time of advertising. In any event lack of awareness is not a defense.

E. *Advertising of Quantity Limitations*

14. By and through the use of the statements and representations set forth herein the respondents have represented, directly or by implication, that the quantity of the advertised merchandise is limited and prospective purchasers should hurry because the merchandise will be sold out and unavailable for purchase.

15. Respondents have repeatedly represented in their advertisements that prospective purchasers of linen ensembles must respond quickly to said advertisements or be unable to purchase such merchandise due to the merchandise being available only in limited quantities. (CX 131–142, 144–145, 851–A–869–C.) Such an interpretation arises from respondents' use of the following language to describe the availability of the advertised merchandise: "Hurry . . . Limited Quantities."

16. The advertised merchandise was not limited and prospective purchasers did not need to hurry since a sufficient quantity of such merchandise was available at all times.

17. Respondent Miller testified that based on his past experience selling the linen ensembles that approximately 50 sales were generated with each advertisement. (Tr. 156.) Based on the average number of sales, he would order that amount prior to insertion of the advertisement in the newspaper. (Tr. 156.) In those instances where respondents would sell more than the units on hand, respondents would still transact the sales and advise the customers when the merchandise would be available. (Tr. 158.) It would appear that such instances would occur infrequently since Mr. Miller testified that his supplier would place the merchandise "in his car and bring them to us so we would not have to tell customers to come back and get them" (Tr. 156) or Mr. Miller would "drive over to Baltimore . . . and pick them up." (Tr. 157.) In response to questions of the examiner (Tr. 157–158) and in answer to request for admission of fact numbered 28, respondents admitted having sufficient quantities of the linen ensembles in stock or having easy access to such merchandise to meet consumer demand for such merchandise.

F. *Price Representations*

18. By and through the use of the statements and representations set forth herein the respondents have represented directly or by implication through the use of the terms "OUR LOWEST PRICE EVER," "special sale price," and "savings," that the advertised merchandise is offered at a specially reduced price of $29.95 and savings are

thereby afforded purchasers from respondents' regular selling price. The terms used above convey the impression that the price at which the advertised merchandise, as reflected in CX 131–142, 144–145 and 851–A–869–C, was being offered is a reduced price and purchasers of the merchandise would obtain savings from respondents' regular selling price.

19. The advertised merchandise reflected in CX 131–142, 144–145 and 851–A–869–C was not offered at a specially reduced price, and savings were not thereby afforded purchasers because of reductions from respondents' regular selling price. The price of $29.95 was the usual and customary price at which such merchandise was offered by respondents. The individual respondent Miller, who has full knowledge of the operations of the corporate respondent, gave substantial testimony revealing; that the advertised ensembles were never sold at a price other than the price reflected in the advertisement (Tr. 148–149); that the advertised ensembles were only sold at the advertised price (Tr. 153); and that customers only bought the ensembles at the sale price. (Tr. 149.) In addition, the individual respondent testified that if the advertised ensembles were sold for the regular price, the price would have been double the sale price. (Tr. 154.) The evidence therefore suggests the items were never offered as regularly priced items but as an inducement to draw customers to purchase other items.

G. *Conditional Sales Information*

20. In the course and conduct of their business, respondents have induced their customers to execute conditional sale contracts. In such instances, respondents have failed to furnish certain customers with copies of the conditional sale contracts at the time of the sales. By and through such failure, respondents' customers were not adequately apprised of the amounts, terms and conditions of the sale transactions and such customers did not know the extent of their rights and obligations under such contracts.

Respondents regularly utilized conditional sale contracts when customers desired to finance their purchases over a period of time (answer to request for admission of fact numbered 26). In fact, respondents would utilize conditional sale contracts to consummate all sales. (Tr. 182.) After the sale was completed, respondents would only provide customers with copies of the contracts if said customers made a specific request for such documents. (Tr. 182, 246.) The majority of customers did not receive copies of their executed contracts. (Tr. 246.) Testimony from witnesses also demonstrates respondents'

obscured sales conditions in failing to provide all customers with copies of their conditional sale contracts (Tr. 171, 219; see also stipulation as to testimony of other witnesses, Tr. 233–234) so they could be knowledgeable as to their obligations.

H. *Competition and Commerce*

21. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of clothing, furniture, appliances, linenware and other articles of merchandise of the same general kind and nature as those sold by respondents. The corporate respondent has been in existence since 1937 and has been engaged in selling to the public, furniture, clothing, appliances, linenware and other articles of merchandise (respondents' answer to request for admission of facts numbers one and fourteen). In addition, respondents have advertised various merchandise for the purpose of "creating traffic in the store" in order to effect sales that would have otherwise been effected by other stores. (Tr. 124–126.)

CONCLUSIONS

Conclusions of Fact

Respondents' use of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said representations were and are true and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

Conclusions of Law

The aforesaid acts and practices of respondents, as herein found, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Inclusion of Individual Respondent Miller

There exists ample support for the inclusion of Mr. Miller in the order as an officer of the corporate respondent and as an individual. His participation in the formulation, direction and control of the policies, acts and practices of the corporate respondent is sufficient

basis for him to be bound as an individual and as an officer of the corporate respondent. *Guziak* v. *Federal Trade Commission*, 361 F.2d 700 (8th Cir. 1966), *cert. denied*, 335 U.S. 1007 (1967); *Fred Meyer, Inc.* v. *Federal Trade Commission*, 359 F. 2d 351 (9th Cir. 1966), *cert. denied*, 386 U.S. 908 (1967), *rehearing denied*, 386 U.S. 978 (1967); *Walter Dlutz* v. *Federal Trade Commission*, 406 F. 2d 227 (3rd Cir. 1969), *cert. denied*, 395 U.S. 936 (1969), *rehearing denied*, 396 U.S. 869 (1969). In view of evidence indicating the cessation of business of the corporate respondent and considering the admission by Mr. Miller that he is a manager of a retail furniture company of which he has ownership, the threat of evasion of any cease and desist order emanating from this proceeding is clearly present. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112 (1937). This further demonstrates the necessity of the order being applicable to Mr. Miller as an individual to protect the public interest from his engaging in the acts and practices shown by the record in the operation of the aforesaid business enterprise.

Discontinuance of Practices

During their defense, respondents attempted to demonstrate that certain of the challenged practices were discontinued prior to issuance of the complaint. The fact that respondents abandoned certain of the practices set forth in the complaint does not render the matter moot nor provide a basis for not issuing an appropriate cease and desist order. *Merck & Co., Inc.* v. *Federal Trade Commission*, 392 F.2d 921 (6th Cir. 1968); *Carter Products Inc., et al.* v. *Federal Trade Commission*, 323 F. 2d 523 (5th Cir. 1963).

Modification of Proposed Order Accompanying the Complaint

Complaint counsel have recommended modifications of the cease and desist order proposed by the Commission when the complaint was issued on August 5, 1969. (See the appended order.) The Commission has adopted a policy of framing an order encompassing the varied forms of price comparisons when the record demonstrates the existence of fictitious pricing, *e.g.*, the complaint and proposed order in *Diener's Inc., et al.*, Docket No. 8804, issued November 25, 1969. The modified pricing provisions of the order are apparently necessary to prohibit respondents from easily converting to trade area price comparisons which convey the same effect on consumers as former price comparisons. Such an order covering the utilization of various types of price comparisons is well within the Commission's discretion to fashion an order to prohibit repetition in any related

form of the practices established in the record. *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608 (1946).

Modifications have also been made to include a provision relating to credit disclosures required by the Consumer Credit Protection Act (Truth in Lending Act). Incorporation of such provision is necessary to enable persons utilizing credit offered by respondents to receive the full disclosure of the terms and conditions of financial arrangements arising from credit transactions with respondents. By failing to provide all customers with copies of their contracts, respondents have already evidenced a failure to provide adequate credit information to their customers. To ensure that respondents will provide the credit information required by the aforesaid statute and otherwise it appears necessary to have the cease and desist order contain those provisions of the statute relating to proper disclosure of credit information. Although the Truth in Lending Act is not applicable to this case application of the foregoing remedial concept is within the jurisdiction of the Commission. Accordingly,

ORDER

It is ordered, That respondents Hollywood Credit Clothing Co., Inc., a corporation, and its officers, and Barry Miller, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of clothing, furniture, appliances, linenware or other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Advertising any merchandise when there are any conditions or obligations imposed or attempted to be imposed, without clearly and conspicuously disclosing such conditions or obligations in the advertisement.

2. Representing, directly or by implication, that any merchandise is available in limited quantity, or that customers should hurry because the merchandise will be sold out or will be unavailable for purchase when an adequate supply is available to respondents to meet reasonably anticipated demands; or misrepresenting in any other manner the quantity or availability of merchandise.

3. Representing, directly or by implication, through the use of terms such as "OUR LOWEST PRICE EVER," "special sale price," "savings" or in any other manner, that any price is reduced

from respondents' former price; unless, respondents' business records establish and show that such price constitutes a significant reduction from the price at which such merchandise has been sold in substantial quantities or offered for sale in good faith by respondents for a reasonably substantial period of time, in the recent, regular course of their business.

4. (a) Representing, in any manner, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such merchandise has been sold or offered for sale in good faith at the former price by respondents for a reasonably substantial period of time in the recent, regular course of their business.

(b) Representing, in any manner, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise at the compared price or some higher price.

(c) Representing, in any manner, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in their trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise of like grade and quality.

5. Representing, directly or by implication, that savings are available to purchasers or prospective purchasers of respondents' merchandise unless such is the fact; or misrepresenting, in any manner, the amount of savings available to purchasers or prospective purchasers of respondents' merchandise.

6. Failing to maintain adequate records (a) which disclose the facts upon which any savings claims, including former pricing claims and comparative value claims and similar representations of the type described in paragraphs 3–5 of this order are based, and (b) from which the validity of any savings claims, including former pricing claims and comparative value claims, and

similar representations of the type described in Paragraphs 3–5 of this order can be determined.

7. Failing or refusing to furnish purchasers of respondents' merchandise with a completed copy of the executed conditional sale contract or any other agreement at the time of execution by the purchaser.

8. Engaging in any consumer credit transaction or disseminating any advertisement within the meaning of Regulation Z of the Truth in Lending Act without making all disclosures that are required by Sections 226.6, 226.7, 226.8 and 226.10 of Regulation Z in the amount, manner and form specified therein, and

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

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

Final Order

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.51 of the Commission's Rules of Practice (effective July 1, 1970), the initial decision should be adopted and issued as the decision of the Commission.

It is ordered, That the initial decision of the hearing examiner shall, on the 31st day of December, 1970, become the decision of the Commission.

It is further ordered, That Hollywood Credit Clothing Co., Inc., a corporation, and Barry Miller, individually and as an officer of said corporation, shall, within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by the respondents named in this order, setting forth in detail the manner and form of their compliance with the order to cease and desist.

Final Order

IN THE MATTER OF

HUMPHREYS MEDICINE COMPANY, INCORPORATED

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

Docket 8640. Complaint, Aug. 28, 1964—Decision, Dec. 15, 1970

Order modifying cease and desist order of December 16, 1966, 70 F.T.C. 1502, in accordance with the final order entered *In the Matter of American Home Products Corporation*, Docket No. 8641, 70 F.T.C. 1524, modified, 76 F.T.C. 81, and further modified, p. 726 herein, by prohibiting claims that the product "Humphreys Ointment" afforded any relief from pain or itching in excess of temporary relief, and restricting the order to nonprescription drug preparations.

FINAL ORDER

The Commission having issued its original order to cease and desist in this matter on December 16, 1966 [70 F.T.C. 1502], and the respondent having appealed from the Commission's decision; and

The United States Court of Appeals for the Second Circuit having approved a stipulation providing that the cease-and-desist order herein should be modified in accordance with the final order entered in *American Home Products Corporation*, Docket No. 8641 [70 F.T.C. 1524]; and

The Commission having on July 15, 1969, issued its modified order in Docket 8641 [76 F.T.C. 81], and that order having been further modified [p. 726 herein], by order of the United States Court of Appeals for the Sixth Circuit and the order having become final by operation of law;

It is ordered, That the previously issued cease-and-desist order of the Commission be, and it hereby is, modified to read as follows:

ORDER

It is ordered, That respondent Humphreys Medicine Company, Incorporated, a corporation, and its officers, representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisement by means of the United States mails or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, in connection with the offering for sale, sale or distribution of Humphreys Ointment, or any other non-prescription drug

product offered for sale for the treatment or relief of hemorrhoids or piles or any of its symptoms, which:

A. Represents directly or by implication that the use of such product will:

(1) Reduce, shrink, or afford any relief of hemorrhoidal veins themselves, *Provided, however*, That nothing contained herein shall be construed to prohibit the dissemination of any advertisement which represents that the use of such product will help reduce swelling of hemorrhoidal tissue caused by edema, infection, or inflammation, or that the use of such product will help reduce swelling of hemorrhoidal tissue by lubricating the affected area;

(2) Avoid the need for surgery as a treatment for hemorrhoids or hemorroidal symptoms;

(3) Heal, cure, or remove hemorrhoids, or eliminate the problem of hemorrhoids;

(4) Afford any relief from pain or itching associated with hemorrhoids in excess of affording temporary relief of pain and itching of hemorrhoidal tissue in many cases;

(5) Afford any other type of relief, or have any other effect on, hemorrhoids or hemorrhoidal symptoms.

B. Contains any reference to the words "astringent" or "anesthetic," or to any other ingredient either singly or in combination, unless each such ingredient is effective in the treatment or relief of hemorrhoids or any of its symptoms and unless the specific effect thereof is expressly and truthfully set forth.

It is further ordered, That respondent and its officers, representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from disseminating, or causing to be disseminated, by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of Humphreys Ointment, or any other non-prescription drug product offered for sale for the treatment or relief of hemorrhoids or any of its symptoms, in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph I hereof.

In the event that respondent at any time in the future markets any non-prescription drug preparation for the treatment or relief of hemorrhoids or any of its symptoms for which it desires to make any of the representations now prohibited under Paragraph I of this order, it may petition the Commission for a modification of the order. Such petition shall be accompanied by a showing that the representation

is not false or misleading within the meaning of the Federal Trade Commission Act, and, if such has been the case, that the specific representation has been accepted as part of the labeling for such product by the Secretary of the Department of Health, Education and Welfare under the provisions of the Federal Food, Drug and Cosmetic Act as it is presently constituted or as it may hereafter be amended.

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 to cease and desist.

467-207--73——103

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

KOPPERS COMPANY, INC.

Docket 8755. Order, Jan. 9, 1970

Order rejecting a proposed consent settlement and directing that evidentiary hearings commence on Jan. 12, 1970, as previously ordered.

ORDER REJECTING PROPOSED CONSENT SETTLEMENT AND DIRECTING THAT EVIDENTIARY HEARINGS COMMENCE ON JANUARY 12, 1970, AS PREVIOUSLY SCHEDULED

The Commission having heretofore directed that evidentiary hearings in this matter be commenced on January 12, 1970, and having heretofore denied respondent's motion to dismiss or, alternatively, to withdraw the matter from adjudication for purpose of negotiating a consent order; and

The Commission having then indicated, *inter alia*, that such latter action was not intended to preclude the submission of a concrete proposal for a consent settlement prior to December 29, 1969, it being understood, however, that negotiation of a jointly proposed settlement would not be considered as an adequate reason for delaying the commencement of hearings beyond January 12, 1970, should the Commission reject any such proposed settlement; and

Respondent and complaint counsel having filed a joint proposal of settlement in the form of an agreement containing consent order to cease and desist which the hearing examiner has certified to the Commission for consideration; and

The Commission having considered the offer of settlement and having concluded that the order contained in the agreement would be inadequate to protect the public interest were the allegations in the complaint to be supported by evidence, which circumstance can only be determined after full hearings of record;

Accordingly, the offer of settlement submitted by respondent and complaint counsel is hereby rejected by the Commission.

It is ordered, That the request of respondent and complaint counsel for cancellation of the hearings heretofore scheduled to commence on January 12, 1970, be denied, and that such hearings before the

hearing examiner commence on such date. To the extent that any issues relating to the adequacy of compliance with subpoenas may be outstanding, the hearing examiner will make the necessary disposition with respect thereto at the hearings beginning January 12, 1970.

UNITED FRUIT COMPANY, ET AL.

Docket 8795. Order, Feb. 9, 1970

Order denying respondents' motions to dismiss, for permission to file interlocutory appeal, and to instruct the Secretary that complaint counsel's letter was not properly filed.

Order Denying Motion to Dismiss

This matter is before the Commission upon the hearing examiner's certification, dated January 7, 1970, of respondents' motion to dismiss the complaint, and supplementary papers filed thereafter.[1] The examiner recommends that the relief requested be denied.

At the crux of the matter is document CXID 509, which complaint counsel intend to introduce into evidence during the course of the trial. Document CXID 509 is described by United as "an application for a complaint filed on March 23, 1967, with this Commission by United's Boston attorneys in a wholly unrelated matter." United contends that complaint counsel wrongfully divulged the document, to United's irreparable injury, warranting a dismissal of the complaint. We find United's claim that complaint counsel wrongfully divulged the document totally without merit.[2] As to the contention that complaint counsel's divulgence of the document is to United's irreparable injury, the Commission, on the basis of the record before it, is unable to evaluate that claim. Nor would it be appropriate for the Commission, at this juncture, to attempt to make that evaluation. The examiner is charged with the primary responsibility to conduct adjudicative proceedings and absent a showing of unusual circum-

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[1] On January 8, 1970, the examiner supplemented his certification by certifying complaint counsel's request for an extension of time during which to file a brief in support of complaint counsel's answer in opposition to the motion to dismiss. By Commission order of January 9, 1970, that motion was partially granted. On January 14, 1970, the examiner filed a second supplement to the certification of the motion to dismiss. On January 15, 1970, the examiner, in a third supplement to the certification of the motion to dismiss, certified co-respondent Harbor Banana Distributors, Inc.'s objections to the examiner's order dealing with confidentiality of documents and to the certification of the motion to dismiss. On January 16, 1970, complaint counsel filed their brief in support of their opposition to respondent United's motion to dismiss the complaint. On January 19, 1970, complaint counsel filed their answer to United's request for certification relative to relief with respect to a filing with the Secretary.

[2] We note, however, that co-respondent Harbor's submission of January 14, 1970, on its face suggests the possibility of violation of an examiner's order, a matter the examiner may wish to consider pursuant to Section 3.42(d) of the Commission's Rules of Practice.

stances or a clear abuse of discretion the Commission will not interfere.[3] No such showing has been made in the instant matter and for the foregoing reasons United's motion to dismiss the complaint will be denied.

Also before the Commission is United's application, dated January 16, 1970, for permission to take an interlocutory appeal and for consideration of this appeal, together with United's motion to dismiss. Since this request is grounded upon the same set of circumstances as the motion to dismiss, it will be denied for the same reasons.

Finally, the examiner, on January 14, 1970, under the title "Second Supplement To Certification Of Motion To Dismiss," certified United's motion seeking an instruction by the examiner to the Secretary of the Commission that a letter of November 19, 1969, written by complaint counsel and dealing with the document in question, was not properly filed. The examiner, to whom this motion was addressed on December 29, 1969, by order of January 8, 1970, declined to so instruct the Secretary. Since the motion is intimately connected to the motion to dismiss, the examiner certified it to the Commission, along with his recommendation that it be denied. We agree, and for the reasons outlined above that motion will also be denied. Accordingly,

It is ordered, That respondents' motion to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That respondents' request for permission to file an interlocutory appeal be, and it hereby is, denied.

It is further ordered, That respondents' motion to instruct the Secretary of the Commission that complaint counsel's letter of November 19, 1969, was not properly filed be, and it hereby is, denied.

STERLING DRUG INC.

Docket 8797. Order and Opinion, Feb. 12, 1970

Order denying permission to file an interlocutory appeal from hearing examiner's order striking two of respondent's affirmative defenses.

Opinion of the Commission

This matter is before the Commission upon respondent's application, filed January 23, 1970, for permission to file an interlocutory appeal from a ruling of the hearing examiner. This application was filed pursuant to Section 3.23(a) of the Commission's Rules of Practice for adjudicative proceedings. Respondent seeks to appeal the hearing

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[3] *Topps Chewing Gum, Inc.*, Docket 8463, 63 F.T.C. 2196 (1963).

examiner's order of January 14, 1970, in which the examiner, on his own motion, struck two "affirmative defenses" from respondent's answer and, on the basis of such action, further denied respondent's motion for the issuance of a subpoena seeking documents pertaining to the stricken defenses. Although not required by the Commission's rules, a response to respondent's application was filed by complaint counsel on January 26, 1970.

Section 3.23(a) of the Commission's Rules of Practice requires that any request for permission to file an interlocutory appeal from a ruling of a hearing examiner shall be filed within five days after notice of the ruling. Permission will not be granted except upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice.

Respondent's application fails to make the showing required by Section 3.23. The hearing examiner is responsible for framing the issues to be tried and permitting discovery based upon those issues. At present, the examiner is in the process of defining and delineating the issues prior to discovery. By striking respondent's "affirmative defenses" as separate issues, the examiner has not eliminated the substance of those alleged defenses from the hearing. Nothing in the examiner's ruling has foreclosed respondent from arguing any point he wishes to raise concerning the Commission's action in approving Miles Laboratories' acquisition of SOS.

At this juncture, respondent has not satisfied the requirements for permission to file an interlocutory appeal. Accordingly, respondent's application for permission to appeal is denied. An appropriate order accompanies this opinion.

Order Denying Application For Permission To File Interlocutory Appeal

Upon consideration of the Application for Permission to Appeal from the hearing examiner's order of January 14, 1970, filed by respondent on January 23, 1970, and for the reasons stated in the accompanying opinion,

It is ordered, That the Application for Permission to Appeal be, and it hereby is, denied, without the concurrence of Commissioner MacIntyre.

HOLLYWOOD CREDIT CLOTHING CO., INC., ET AL.

Docket 8796. Order, Feb. 24, 1970

Order denying respondents' motions to withdraw proceeding from adjudication and to direct examiner to certify two dismissal motions to the Commission.

Order Denying Motion To Withdraw From Adjudication

This matter is before the Commission upon the hearing examiner's certification, filed February 6, 1970, of respondents' motion for withdrawal of this proceeding from adjudication premised on an assurance of voluntary compliance. The examiner recommends that the motion be denied, and complaint counsel, on February 9, 1970, have filed their answer in opposition to respondents' motion.

The Commission's Rules of Practice, in Section 2.34(d), state that "in exceptional and unusual circumstances, the Commission may, upon request and for good cause shown, withdraw a matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order." The tendering of an assurance of voluntary compliance does not meet these criteria, particularly since the Commission previously rejected an assurance tendered by respondents, and the motion will therefore be denied. This does not, of course, preclude a settlement of the proceeding through the regular adjudicatory process by way of an admission answer or submission of the case to the examiner on a stipulation of facts and an agreed order.

Also before the Commission is respondents' motion, filed February 10, 1970, to direct the examiner to certify to the Commission two motions to dismiss the complaint. The motions were denied by the examiner and respondents contend that all motions to dismiss must be ruled upon by the Commission. In support of this contention respondents refer to interlocutory orders in *Suburban Propane Gas Corp.*, Docket 8672 (May 25, 1967) [71 F.T.C. 1695], and *Drug Research Corp.*, Docket 7179 (October 3, 1963) [63 F.T.C. 998]. In the instant proceeding, reliance on these two orders is misplaced. As stated in *Drug Research*, only in those instances in which the motion to dismiss raises questions of the Commission's administrative judgment or discretion does the examiner lack authority to rule on it and must certify it to the Commission. See also *The Drive-X Company, Inc.*, Docket 8615 (June 10, 1964). Such is not the case in the instant proceeding and the motion will be denied. Accordingly,

It is ordered, That respondents' motion to withdraw this proceeding from adjudication be, and it hereby is, denied.

It is further ordered, That respondents' motion to direct the examiner to certify to the Commission two motions to dismiss the complaint be, and it hereby is, denied.

KENNECOTT COPPER CORPORATION

Docket 8765. Order, March 19, 1970

Order granting *in camera* status to certain of respondent's confidential documents pending a review of examiner's order denying such status.

Order Ruling on In Camera Status of Documents

This matter having come before the Commission upon respondent's motion filed March 13, 1970, requesting the Commission to place *in camera* on an *ad interim* basis certain documents pending the filing and disposition of this proposed motion to review the hearing examiner's order denying *in camera* treatment to documents (which assertedly was filed simultaneously with the filing of the examiner's initial decision herein), respondent stating among other things that the disclosure of such documents to competitors may cause serious and irreparable injury to it; and

The Commission having determined that the documents in question physically have not as yet been placed in the public record or otherwise released to the public (apart from any use of the documents or their contents in the course of the hearing or in the initial decision) and therefore have not been in fact removed from their *in camera* status and that respondent's request should be granted:

It is ordered, That the effective date of the hearing examiner's order of March 9, 1970 removing Commission Exhibits 11, 124 A–N, 125 A–C, 154 A–Z–7, 163, 164 A–H, 196A–E, and Respondent's Exhibit 186 from *in camera* status be, and it hereby is, suspended until 15 days after the service of this order upon respondent unless within this 15-day period respondent files its motion to review such order of the examiner, in which latter case the effective date thereof shall be suspended until further order of the Commission, except that this order shall not apply to any document to the extent the contents thereof are disclosed in the hearing examiner's initial decision.

KOPPERS COMPANY, INC.

Docket 8755. Order, April 1, 1970

Order denying respondent's motion that contempt proceedings be commenced against U.S. Pipe and Foundry Co. and its employees for refusal to answer questions on cross-examination.

Order Denying Motion to Initiate Contempt Proceedings

Respondent having filed a motion requesting that contempt proceedings be initiated against United States Pipe and Foundry Company for

failing to comply with a court order requiring production of documents in response to a subpoena, and that contempt proceedings be initiated against one of the employees of that company for refusing to answer a question on cross-examination, and counsel supporting the complaint having filed an answer in opposition thereto; and

The hearing examiner having certified respondent's motion to the Commissioner with the recommendation that it be denied and having subsequently furnished the Commission with a statement of the reasons underlying his recommendation wherein he has pointed out, *inter alia*, that respondent's motion was not timely filed, that United States Pipe and Foundry Company is at most in technical violation of the court's order, and that information which respondent's counsel sought to elicit from the employee of United States Pipe and Foundry Company was not material to the allegations of the complaint; and

The Commission having considered respondent's motion in the light of the hearing examiner's statement and having concluded that respondent has failed to show that it has been prejudiced in any manner by the alleged contumacious conduct of United States Pipe and Foundry Company or its employee or that any basis exists for the initiation of contempt proceedings:

It is ordered, That respondent's motion that contempt proceedings be initiated against United States Pipe and Foundry Company and its employee be, and it hereby is, denied.

COLUMBIA BROADCASTING SYSTEM, INC., ET AL.

Docket 8512. Order, April 3, 1970

Order reopening and remanding case to hearing examiner for receiving evidence on the question of the competitive structure of the record club industry.

Order Reopening and Remanding Proceeding

The United States Court of Appeals for the Seventh Circuit having on June 26, 1969, rendered its opinion, and on July 18, 1969, entered its judgment,* reversing that part of the Commission's order to cease and desist directed against respondents' exclusive dealing arrangements, and remanding the matter to the Federal Trade Commission for further proceedings in accordance with the court's opinion, and the United States Supreme Court having on February 25, 1970, denied a petition filed by the Federal Trade Commission for a writ of certiorari * to review the judgment of the court of appeals:

It is ordered, That the matter be, and it hereby is, reopened; and

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*Reported in 414 F. 2d 974 (1969), 8 S.&D. 981. Petition for *certiorari denied*, 397 U.S. 907 (1970). For case before Commission, see 72 F.T.C. 27.

It is further ordered, That the matter be, and it hereby is, remanded to a hearing examiner to be designated by the Director of Hearing Examiners, for the purpose of receiving evidence, consistent with the opinion of the Court of Appeals, with respect to the present competitive structure of the record club market, and the extent to which record clubs have been or may be foreclosed from competing in the record club market by Columbia's practice of exclusive licensing; and

It is further ordered, That the hearings be conducted in accordance with the Commission's Rules of Practice for Adjudicative Proceedings insofar as those rules are applicable; and

It is further ordered, That the hearing examiner, upon termination of the hearings, certify the record with his recommendations to the Commission for final disposition of the matter.

Commissioners Weinberger and Elman not participating.

LESTER S. COTHERMAN, ET AL.

Docket 8723. Order and Opinion, April 10, 1970

Order denying respondents' petition to reconsider modified order of Jan. 29, 1970, p. 81 herein, on the grounds that it is not consistent with the judgment of U.S. Court of Appeals, Fifth Circuit.

Order and Opinion Denying Petition For Reconsideration

Respondents, Lester S. Cotherman and William F. Sullivan, pursuant to Section 3.55 of the Commission's Rules of Practice, although their time had expired, filed on March 20, 1970, a petition for reconsideration of the Commission's modified order to cease and desist, issued January 29, 1970.[1] The grounds stated are that, assertedly, such cease and desist order is not consistent with the judgment of the U.S. Court of Appeals for the Fifth Circuit, issued Octboer 3, 1969 [417 F.2d 589 (1969), 8 S.&D. 1008], and the language thereof is redundant and not relevant to the court's mandate. Complaint counsel filed his answer, opposing such petition, on March 30, 1970.

The modified order, issued January 29, 1970, p. 81 herein, was drafted expressly to conform to the directions and opinion of the Court of Appeals for the Fifth Circuit. We believe that it does so conform and that respondents in their petition have shown nothing to the contrary. We conclude, therefore, that the above-stated arguments do not justify the requested reconsideration of the modified order.

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[1] The Commission, by its order issued March 6, 1970, denied respondents' motion for an extension of time to file their petition.

I

Respondents Cotherman and Sullivan also petition the Commission to reconsider its modified order and determine (a) that such order is no longer necessary since the enactment into law of the Consumer Credit Protection Act (the so-called Truth in Lending Act) and (b) that the issuance thereof is not in accordance with the public interest because assertedly these respondents have abandoned the money-lending field after having sworn that they have no intention of returning.

These arguments, broadly relating to the issues of the public interest in the proceeding, were in one way or another raised before the Court of Appeals for the Fifth Circuit. We recognize that that court did not review, at least directly, the merits of the contention concerning the Truth in Lending Act; nevertheless, the court did not find the Commission had proceeded improperly and, in fact, affirmatively held that the Commission was within its authority in finding that respondents had violated Section 5 of the Federal Trade Commission Act. The argument that the respondents have promised not to enter the lending business again and that therefore the public interest does not require an order was expressly rejected by the court.

Thus, while the petitioning respondents have had ample opportunity to raise, or have raised, every issue connected with questions of the public interest in this proceeding, they are now again seeking, without any showing of change of fact or circumstance, to have such issues further reviewed. We do not believe that these contentions justify their petition for reconsideration.

II

The respondents herein further specifically pray, if the Commission determines restraints are necessary, that it allow them the opportunity to dispose of the matter on a nonadjudicatory basis pursuant to Section 2.21 of the Commission's Rules of Practice or allow the matter to be withdrawn for the purpose of negotiating a consent order pursuant to Section 2.31 of the Commission's rules. Finally, they also seek an oral hearing on their petition.

The petitioning respondents seem to misconceive the posture of this proceeding. After a full hearing before the Commission respondents appealed this matter to the Court of Appeals for the Fifth Circuit, which court reviewed the issues raised. Such court entered its judgment, rejecting respondents' arguments and affirming the Commission's finding of a violation of Section 5 of the Federal Trade Commission Act. It is untimely, therefore, for the respondents to seek, and it would be inappropriate after full adjudication for the Commission to grant, a disposition of this matter on a nonadjudicatory basis or through the Commission's consent order procedure.

In conclusion, we hold that petitioning respondents have not justified their request for reconsideration of the Commission's modified order issued herein. Accordingly,

It is ordered, That the petition of respondents, Lester S. Cotherman and William F. Sullivan, for reconsideration of the Commission's modified order herein be, and it hereby is, denied.

It is further ordered, That the request of the petitioning respondents for an oral hearing on their petition for reconsideration be, and it hereby is, denied.

AMERICAN BRANDS, INC.

Docket 8799. Order and Opinion, May 1, 1970

Order granting complaint counsel's motion to quash or limit subpoenas issued by hearing examiner to an attorney and the Secretary of the Commission.

OPINION OF THE COMMISSION

This matter is before the Commission on complaint counsel's appeal from the hearing examiner's denial of a motion to quash or limit the subpoenas *duces tecum* issued on February 18 and March 4, 1970, against Donald K. Tenney, an attorney on the Commission's staff, and Joseph W. Shea, Secretary of the Commission, respectively.

The subpoenas direct the production of documents by Messrs. Tenney and Shea and require Mr. Tenney to appear for oral deposition. The specifications of both subpoenas cover—

> All memoranda and other documents passing between the Federal Trade Commission and its staff and all memoranda and other documents reflecting oral communications between the Commission and its staff relating to the Commission's letter of October 8, 1969, to Stockton Helffrich of the National Association of Broadcasters Code Authority.

The Commission's complaint herein, filed on September 29, 1969 [79 F.T.C. 255], charges respondent with engaging in unfair, misleading and deceptive advertising with respect to the tar content of its Pall Mall brand of cigarettes. Prior to filing its formal complaint, but after informing respondent on May 20 of its intention to do so, the Commission, by letter of September 2, 1969, was contacted by the Code Authority of the National Association of Broadcasters which asked whether the Commission had formulated a policy respecting the use of such words as "low," "lower," and "reduced" in describing the tar and nicotine content of cigarettes. The Commission was further advised that the Code Authority would value any guidance the Commission could offer on the tar and nicotine question.

In response to this letter, the Commission sent a letter on October 8, 1969, to Mr. Stockton Helffrich, Director of the Code Authority, stating that the use of "low" and "less" or similar words when describing tar and nicotine content, create an imprecise picture, which, absent a full and fair disclosure, could lead to a mistaken conclusion that the advertised brand is lower in tar and nicotine than many other brands. The Commission also said that the degree of imprecision created would vary according to both the context of the representation as well as the actual tar and nicotine content of the cigarettes advertised, but that imprecision could almost always be avoided if the representation is accompanied by clear and conspicuous disclosure of the following:

1. The tar and nicotine content in milligrams of the smoke produced by the advertised cigarette;

3. The tar and nicotine content in milligrams of the lowest and highest yield domestic cigarettes; and

3. If the tar and nicotine content of the advertised cigarette is compared to any other specific cigarette, the brand name and tar and nicotine content in milligrams of the smoke produced by such other cigarette.

The Commission added a further cautionary note that care should be taken to base all representations on recent test results. Finally, the Commission told the Code Authority that because of the substantial public interest in the matter, this exchange of correspondence was to be made public.

The subpoenas, which are the subject of this appeal, have been sought in connection with two defenses respondent proposes to make on the basis of the letter to the Code Authority: *first*, that the letter shows that the Commission has prejudged issues raised by the complaint; and *second*, that the letter indicates that there may have been *ex parte* communications between the Commission and its staff in violation of the Administrative Procedures Act and the Commission's Rules of Practice.

As issued by the examiner, the subpoenas cover all internal communications passing between the Commission and its staff "relating" to the letter of October 8. Respondent concedes that it intends to use the subpoena to determine if there were any intra-agency communications on the subject of the Code Authority letter *even prior to the date complaint issued* which would bear on the alleged issue of prejudgment.[1] Respondent also proposes to pursue under this subpoena the entire process behind the formulation and promulgation of the October 8 letter including the extent and identity of staff involvement.[2]

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[1] Respondent's Answer Brief, pp. 36–38.

[2] *Id.* at 24–25.

We believe the examiner erred in issuing a subpoena of this scope.

While respondent professes not to argue the merits of the prejudgment charge at this time, respondent acknowledges that its discovery application rests on the assertion that the October 8th letter is *prima facie* evidence of prejudgment and, therefore, full discovery of all the facts relating to the letter is required.[3] We do not agree that respondent has advanced a justification for departing from the general rule prohibiting scrutiny of the reasoning, mental processes, or motivation of either judges or administrators. *United States* v *Morgan*, 313 U.S. 409 (1941).

All that respondent has shown is that the Commission told the Code Authority that the degree of imprecision in cigarette advertising would vary according to the particular advertisement and according to the actual tar and nicotine content of the cigarette. The Commission then advised the Code Authority of language which could be used to avoid whatever imprecision may exist in such advertising.

This statement by the Commission proves no more than an underlying concern for precision in advertising in an area affecting the public health. That the Commission chose to express that concern in a letter to the Code Authority creates no more of a *prima facie* showing of prejudgment than would an economic report reflecting the same viewpoint, or a statement of enforcement policy, or a legislative recommendation. Indeed, the charge of administrative misconduct would be more persuasive if the Commission had done what apparently respondent is suggesting that it should have done—remained silent when asked by the Code Authority for guidance.[4] The failure of the Commission to propose specific and clear standards adequate to the needs of advertisers, broadcasters, and the general public would be tantamount to an improper and unauthorized abrogation of one of its most positive and constructive roles. Moreover, once having made a decision to issue a complaint, the Commission is not required to restrict its role in making "explicit the unexpressed standards of fair dealing" [5]

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[3] *Id.* at 5.

[4] In *Lehigh Portland Cement Co.* v. *Federal Trade Commission*, 291 F. Supp. 628 (E.D. Va. 1968), *aff'd* 1969 Trade Cases ¶ 72,950 (4th Cir. 1969), after a complaint was filed questioning the legality of Lehigh's vertical ready-mix concrete acquisitions, the Commission did the following: (1) issued a news release respecting its concern over the increasing trend of vertical mergers in cement; (2) solicited the views of interested persons on this subject; (3) published an economic report on the subject; and (4) publicized an enforcement policy. Answering the charge of prejudgment, the court said "The Commission not only had the right but the duty to institute and conduct an industry-wide investigation re vertical acquisitions in the cement and ready-mix concrete industries. See Section 6 and other provisions of the Federal Trade Commission Act, 15 U.S.C. § 41 et seq." 291 F. Supp. at 631.

[5] *Federal Trade Commission* v. *Standard Educ. Society*, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd* on other grounds, 302 U.S. 112 (1937).

by precipitously abandoning the alternative methods of defining policy which are ordinarily available to it.[6]

Recognizing the need to preserve maximum administrative flexibility, the holdings are almost uniform that expressions of a point of view on policy issues, such as the letter sent to the Code Authority, create no presumption that the agency has irrevocably closed its mind on a particular case, and is thereby disqualified from ruling on the merits after all the facts are presented in a record. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948)[7]; Davis, Administrative Law Treatise, Section 12.01 (1958). In sum, we have been presented with no more than a bare charge of prejudgment in a situation in which the Commission's action is fully consistent with its ordinary and regular processes and does not indicate any judgment concerning any particular case before it. *Cf. Singer Sewing Machine Co.* v. *NLRB* 329 F.2d 200 (4th Cir. 1964).[8] Consequently, there is no warrant for permitting respondent to engage in a general probe of the agency to determine how it reached its decision either to issue the complaint or to send the letter to the Code Authority.

Since there is no basis for a charge that the members of the Commission have prejudged the factual issues raised by the complaint, it would be an abuse of the discovery procedures to allow this proceeding to be delayed for that purpose. However, respondent also alleges that the Commission's letter to the Code Authority dated October 8, 1969; (ten days after issuance of the complaint) indicates

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[6] Respondent has advanced no authority for the proposition that the choice of adjudication precludes the supplemental use of other more flexible powers. Such a contention would be without merit. "It is well settled that the exercise of dual functions by an administrative agency does not constitute a deprivation of due process. See *Pangburn* v. *Civil Aeronautics Board*, 311 F.2d 349 (1st Cir. 1962) and cases cited therein." *Lehigh Portland Cement Co.* v. *Federal Trade Commission*, 291 F. Supp. 628, 632 (E.D. Va. 1968). See, also, Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 1263, 1296 (1962), "Although the case-by-case method should not be abandoned even if that were possible it should be *supplemented* by greater use of two devices—*policy statements* and rulemaking. * * *" (Emphasis added).

[7] In *Cement Institute* the Commission had issued a complaint challenging the legality of a multi-basing point system. Respondent based its charge of prejudgment upon Commission reports made to Congress and the President which made it clear that long before the filing of the complaint the Commission had expressed the opinion that the operation of a multi-basing point system was the equivalent of price fixing in violation of the Sherman Act. In ruling on this charge, the court specifically said it was deciding "on the assumption that such an opinion had been formed by the entire membership of the Commission as a result of its prior official investigations." 333 U.S. at 700. Nevertheless, the court held that the Commission was not disqualified because there was no proof that the minds of the Commissioners were irrevocably closed; moreover, if the Commission were disqualified neither the Commission nor any other government agency could act upon the complaint. The court pointed out that "judges frequently try the same cases more than once and decide identical issues each time, although these issues involve issues of both law and fact" and that the Commission "cannot possibly be under stronger constitutional compulsions in this respect than a court." 333 U.S. at 703.

[8] *Singer* involved substantially more than a self-serving charge of *ex parte* communication or prejudgment. There was enough evidence of improper activities by a field examiner to make it reasonable to conclude (*i.e.*, a *prima facie* case), that there had been misconduct, and therefore discovery was permitted. The court was simply reasoning by analogy to the examination of jurors when substantial evidence of their misconduct has been uncovered. See, *e.g.*, *Clark* v. *United States*, 289 U.S. 1 (1933).

that there may have been some improper *ex parte* communication to the Commission in violation of Section 5(c) of the Administrative Procedure Act, 5 U.S.C. § 554(d) and Section 4.7 of the Commission's Rules of Practice.

Of course, the practice of the Commission, like that of other administrative agencies, in relying upon the recommendations of its staff in determining whether to issue a complaint, is clearly lawful and essential to the proper and efficient exercise of the complaint-issuing power.* "*Ex parte*" communications between the Commission and its staff in this case prior to September 29, 1969, the date of the complaint, could in no sense be improper or the subject of discovery. However, we believe that preservation of public confidence in the integrity of the Commission's proceedings will be served in this case by showing our normal procedures which were followed here.

No significance attaches to the fact that the October 8, 1969, letter was dated ten days after the complaint was issued. A draft of the letter was forwarded to the Commission by the Bureau of Deceptive Practices on September 23, 1969, six days *before* complaint issued. The Commissioner to whom the matter was assigned circulated the staff draft with a recommendation that it be approved, with certain minor revisions. No Commissioner objected, and the proposed letter was approved and dispatched in due course on October 8, 1969, by the Secretary. There were no communications, written or oral, between any staff member and any member of the Commission regarding this letter between September 23, 1969, when it was submitted to the Commission by the staff, and October 8, 1969, when it was mailed by the Secretary.

So far as post-October 8, 1969, communications are concerned, the Commission instructed the General Counsel and the Secretary to review all matters submitted to the Commission after September 29, 1969, bearing in any way on the subject of cigarette advertising. Such review has been made, and it revealed no *ex parte* communications from any employee engaged in the performance of investigative or prosecuting functions which pertained in any way to the merits of this case or to that of any factually related proceeding. There is, however, one communication dated December 1, 1969, respecting tar and nicotine advertising. Because this memorandum from the staff refers to the October 8, 1969, letter to the Code Authority, it is arguably related to the charge of improper *ex parte* communications made by respondents. While we believe that respondents are not entitled to discovery of such communication because it is clearly not forbidden by the Administrative Procedure Act or the Commission's

*It is well recognized that the Commission's practice of reviewing the recommendation of subordinate employees *prior* to the decision to initiate a complaint is clearly within the *exceptions* to Section 5(c) of the Administrative Procedure Act. *Federal Trade Commission* v. *Cinderella Career and Finishing Schools Inc., et al.*, 404 F. 2d 1308 (D.C. Cir. 1968).

rules, we are nonetheless making it public in order to allay any conceivable doubts as to the regularity of the handling of this case by the Commission and its staff. This memorandum to the Commission dated December 1, 1969, and attachments are set out in the Appendix to this opinion.*

The Commission having now made available to respondents all that they are entitled to, and more, we believe that the public interest as well as that of respondents will be well served if this matter proceeds immediately to a hearing on the merits. And appropriate order will be issued.

Commissioner MacIntyre did not participate.

ORDER GRANTING MOTION TO QUASH SUBPOENAS DUCES TECUM

The hearing examiner on February 18 and March 4, 1970, having issued subpoenas to Donald K. Tenney, a member of the staff of the Federal Trade Commission, and to Joseph W. Shea, Secretary of the Federal Trade Commission, respectively; and

Complaint counsel, having, on March 16, 1970, filed an appeal from the hearing examiner's ruling of March 4, refusing to limit or quash said subpoenas; and

Respondent, having, on March 25, 1970, filed an answer to the appeal of complaint counsel; and

The Commission having considered the matter on the pleadings before it and having made public the documents which respondent is entitled to;

It is ordered, That the motion to quash the aforesaid subpoenas be, and it hereby is, granted.

It is further ordered, That respondent's motion for leave to present oral argument is denied.

Commissioner MacIntyre did not participate.

EASTERN DETECTIVE ACADEMY, INC., ET AL.

Docket 8793. Order and Opinion, May 13, 1970

Order denying respondent's motion to dismiss complaint and re-instating the previously vacated initial decision.

ORDER AND OPINION RULING ON CERTIFICATION OF APPLICATION TO DISMISS COMPLAINT

This matter is before the Commission upon the hearing examiner's certification on May 1, 1970, of respondents' application to dismiss the

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complaint. The basis of the request for such dismissal appears to be respondents' claim that they have not received a fair hearing because of their lack of counsel due to their financial inability to pay for counsel and because of certain of the examiner's rulings relating to their request to file proposed findings and conclusions.

The Commission, by order issued April 6, 1970, vacated the initial decision herein and returned the matter to the hearing examiner with the direction, *inter alia*, that respondents be granted an additional opportunity to establish their need for the assignment of counsel and to submit their proposed findings and conclusions. The hearing examiner, on April 9, 1970, issued his order granting respondents until May 1, 1970, within which to apply for an assignment of counsel and, alternatively, if respondents elected not to request such assignment, to file their proposed findings and conclusions. The hearing examiner emphasized that respondents were not required to retain an accountant to prepare a financial statement and that if in fact no financial statement exists none need be filed. He stated, however, that respondents should attach their 1968 and 1969 Federal income tax returns to their application.

In their response filed April 27, 1970, respondents allege in part that they believe the time allowed them for the filing of proposed findings and conclusions was inadequate. They further assert that the examiner is biased against them, although the grounds for such assertion are not clear. On that the only specific detail mentioned is the claim that complaint counsel were allotted about 60 days within which to file their submissions whereas respondents were given only 17 days for filing the same documents. [1]

Respondents, in their aforementioned answer to the hearing examiner's order, make no further claim regarding the assignment of counsel, the principal purpose for the return of the proceeding to the examiner, although they were given ample opportunity to do so. Instead, they have seemed to shift their argument and now mainly charge that under Hearing Examiner Lewis they cannot receive a fair hearing because of alleged bias. They state that they see "no point or benefit gained from proceeding further with Mr. John Lewis in any activity, written or verbal, * * *" [2]

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[1] The hearing examiner states in his certification that all parties, including respondents, were originally granted a full 60 days for the filing of proposed findings and conclusions. The time which the hearing examiner recently granted to the respondents, that is, from April 9, 1970, to May 1, 1970, was in addition to all other time allowed for such purpose. Although respondents suggest this additional time was inadequate, they do not indicate that their submissions would be filed if more time were granted and, in fact, have failed to ask for any further extension. Actually, because of their bias contention, it is clear that respondents do not intend to file more documents with the examiner, whatever time he might allow. The additional time granted seems to have been adequate in any event, since respondents stated in their earlier letter of February 10, 1970, that they needed only 10 days for the preparation of their proposed findings and conclusions.

[2] See section 3.42(g) of the Commission's Rules of Practice regarding procedure where a party deems the hearing examiner for any reason to be disqualified to preside.

So far as we have been able to determine, there is no record foundation whatever for respondents' charge of bias against the examiner. Nevertheless, especially since respondents are not represented by counsel, careful consideration of this allegation is justified.

It is fair to note, to begin with, that respondents, in their letter to the hearing examiner dated January 26, 1970, which was before the filing of the initial decision, stated that the hearing examiner was "as considerate as possible in my behalf to the limits of your function as Hearing Examiner." The record affirmatively shows that the hearing examiner, aware of respondents' lack of counsel, intervened on a number of occasions to assure that respondents would not be disadvantaged by the lack of counsel.[3]

If, in fact, respondents are asserting bias or prejudice because of the examiner's views as expressed in his initial decision filed February 20, 1970, such an assertion would not be adequate ground for disqualification of the examiner. *National Labor Relations Board* v. *Donnelly Garment Co.*, 330 U.S. 219, 236–237 (1947). Moreover, there is no indication in the record of personal bias or animosity which would disqualify the examiner or invalidate his findings and conclusions. *Cf. In the Matter of Carter Products Inc.*, 52 F.T.C. 314, 319 (1955).

This matter was returned to the examiner not because there had been any showing that the respondents were deprived of a fair hearing; rather, such action was taken to remove any possible doubt, in light of respondents' claims, concerning their opportunity for an assignment of counsel and for the filing of their findings and conclusions. The examiner's order of April 9, 1970, gave respondents this additional opportunity and they declined to take advantage of it.

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[3] "While respondent Earl Leven was not an attorney, he appeared to be a reasonably intelligent man, capable of representing himself and his corporation. The examiner nevertheless made every effort to assure that respondents would have a fair trial. The answer which they had filed failed to deny a number of the allegations of the complaint. Despite the fact the Rules of Practice provide that a failure to deny allegations of the complaint constitutes an admission thereof, and over objection of complaint counsel, the examiner permitted respondents to orally amend their answer at the pretrial conference. At the examiner's direction, respondents were supplied by complaint counsel with a list of Government witnesses and with copies of proposed documentary evidence. The examiner informed respondents of their right to cross-examine Government witnesses, to interview them in advance of hearing, and to call witnesses on their own behalf. Respondents did, in fact, cross-examine Government witnesses and call their own witnesses.

"During the course of the proceeding complaint counsel served upon respondents a request for admission of certain facts. Despite the fact that the examiner had advised respondent Leven, in a telephonic inquiry from the latter, that his failure to file a proper response would constitute an admission of such facts, respondents failed to file a timely response. Nevertheless, the examiner permitted respondent Leven, during the latter phase of the hearings, to file a written response to the request for admissions, and to explain such statement in his sworn testimony. This was done over objection of complaint counsel that they had been proceeding with their evidence on the assumption that their requested factual admissions had been theretofore admitted by respondents' failure to deny * * *" (p. 2, hearing examiner's response filed March 18, 1970.)

In summary, there is no evidence supporting respondents' charge that the hearing examiner was biased against them, or their claim that they have not received a full and fair hearing. We therefore reject their arguments in these respects and their request for the dismissal of the complaint.

The hearing examiner states in his certification that he could not recommend any disposition of this proceeding other than that made in his initial decision vacated by the Commission. We believe it would be a useless act to return the matter to the examiner solely for the formal refiling of such decision, and therefore adopt the hearing examiner's suggestion that his former initial decision be reinstated. To specifically give the parties the full time permitted under the Commission's rules for the filing of appeals, notices or other briefs, if any, pursuant to Section 3.52 of the Commission's Rules of Practice, such initial decision will be considered as having been filed on the date of the completion of the service of this order upon the parties.[4] Accordingly,

It is ordered, That respondents' motion to dismiss the complaint herein be, and it hereby is, denied.

It is further ordered, That the Commission order of April 6, 1970, insofar as it vacates the initial decision of the hearing examiner, filed February 20, 1970, be, and it hereby is, vacated and set aside, and that such initial decision be, and it hereby is, reinstated and considered as having been filed on the date of the completion of the service of this order.

NATIONAL TEA CO.

Docket 7453. Order and Opinion, June 1, 1970

Order denying respondent's request that Commission's order of March 4, 1966, be modified to allow acquisition of certain grocery stores without prior Commission approval.

Opinion of the Commission

Respondents, National Tea Co., by petition filed April 3, 1970, requests modification of the final order issued in this matter on March 4,

[4] It is noted that respondents, on April 2, 1970, prior to the Commission's order vacating the hearing examiner's initial decision, filed a brief on appeal from such initial decision. Respondents, in the circumstances, may rest on that appeal brief or they may file a new or an amended brief, if they so desire, subject to the provisions of section 3.52 of the Commission's rules. Such new or amended appeal brief, if any, must be filed within thirty (30) days after the completion of the service of this order. Complaint counsel may file their answering brief within sixty (60) days after the completion of the service of this order. A reply brief may be filed by respondents as provided for in section 3.52(d). If no other appeal brief is filed by respondents, their brief filed April 2, 1970, will be considered respondents' appeal from the initial decision.

1966 [69 F.T.C. 226]. That order prohibits respondent from acquiring the whole or any part of the stock or assets of any firm, partnership or corporation engaged in the retail sale of food products for a period of ten years without the prior approval of the Commission.

Respondent had previously, on March 26, 1969, requested an order modification that would have allowed it to make acquisitions without prior Commission approval if the merger or acquisition was of grocery food stores with limited dollar volume of sales, and market shares. We denied the motion because it had been found, in the litigation of this matter, that the retail food industry was highly concentrated and was becoming more so, due in large part to the acquisitions by National Tea. We concluded that "under these circumstances, even minor increases in concentration as a result of acquisitions by this respondent should be carefully examined."

Respondent now requests that we modify the order so that the Commission's prior approval would not be required when acquisitions are made:

> of no more than two retail food stores where bankruptcy proceedings, debtor relief proceedings under the Bankruptcy Act, receivership proceedings, or out-of-court creditors' arrangements (including, but not limited to, assignments for the benefit of creditors) have been initiated with respect to the firm, partnership, or corporation which has hitherto been operating such stores; provided that in the event National Tea Co. already has a retail food store within one and one-half (1½) miles of either of the stores in question, National Tea Co. shall dispose of such older store within nine (9) months of the date of the acquisition of the applicable new store; provided, further that in no event shall National Tea Co. acquire the whole or any part of the assets of more than a total of ten (10) retail food stores in any calendar year during the remainder of the ten (10) year period of this Order; and provided, further, that in any event National Tea Co. shall report any such acquisition to the Federal Trade Commission within sixty (60) days of the effective date thereof.

Respondent contends that it is necessary to have the order modified in this fashion for the reason that if it is to successfully acquire firms through debtor proceedings, it is necessary to act quickly and to make an unconditional offer, and this is not possible when prior Commission approval is required.

With one exception, respondent has not attempted to show changed conditions of fact[1] or law, but, instead, contends that the acquisitions exempted by its proposed modification of the order cannot be anti-competitive. Respondent maintains that because the acquired firm will be in financial difficulty, and other firms may outbid it, increased

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[1] Respondent, in its Reply, maintains that "the current down-turn of the economy and of the retail food segment of the economy" constitute a relevant factual change. We fail to see how the present state of the economy bears on respondent's requested order modification except in one negative respect. A depressed economy may mean an increase in the number of bankrupt food retailers with significant market shares. The requested modified order is thus particularly objectionable at the present time.

concentration will not be possible. We are not persuaded by this reasoning. The acquisition by respondent of a failing firm may, of course, increase concentration or prevent deconcentration in the relevant market. As an example, such an acquisition by respondent may preclude another firm from gaining entry by acquisition of the failing company, or, if such other firm is already in the market, from increasing its competitive strength there. Further, it may increase respondent's market share in an already concentrated market. We are not persuaded that the proviso in the requested modified order effectively neutralizes this possibility. Under the proviso, respondent would sell any existing store it owns if the acquired firm is located within 1½ miles. We doubt that respondent would be willing to dispose of an older store unless its acquisition of the new store would increase, or would likely increase, its existing market share.

The failing company defense alluded to by respondent does not advance its contention that the acquisitions described in the modified order will have no anticompetitive effect. Whether the defense immunizes an acquisition or its only to be a factor in determining whether the acquisition is in the public interest, it clearly does not rest upon the proposition that the acquisition of a bankrupt firm cannot adversely affect competition. *U.S. Steel Corp.* v. *Federal Trade Commission*, 426 F. 2d 592 (6th Cir. 1970). Moreover, under the "present narrow scope" of that defense, there must minimally be shown not only that there is a "grave probability of a business failure," but that there is "no other prospective purchaser" and that the prospect of the acquired company emerging from a receivership or bankruptcy proceeding as a reorganized competitive unit is "dim or non-existent." *Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 137–139 (1969); *U.S. Steel Corp.* v. *Federal Trade Commission*, *supra*. The requested modified order, in addition to precluding an evaluation of any anticompetitive effects of the acquisitions, would not permit adequate examination of the failing-company-defense criteria as delineated by the courts.

Accordingly, respondent's request for modification of the order will be denied.

Order Denying Petition To Modify Final Order

This matter having come before the Commission upon respondent's petition, filed April 3, 1970, requesting modification of the final order; and

The Commission having considered said petition, the answer of the Director, Bureau of Restraint of Trade, in opposition to said peti-

tion, and the memorandum by respondent in reply to the director's opposition; and

The Commission for the reasons stated in the accompanying opinion having determined that the petition should be denied:

It is ordered, That respondent's petition requesting modification of the final order be, and it hereby is, denied.

DIENER'S, INC.

Docket 8804. Order, June 15, 1970

Order denying respondent's appeal from hearing examiner's ruling on respondent's objection to the admission of certain pricing evidence.

Order Denying Appeal

This matter is before the Commission upon an appeal by respondents, dated June 1, 1970, from rulings on objections to requests for admissions, and complaint counsel's reply thereto filed June 8, 1970. Two rulings are involved:

1. The examiner's ruling on respondents' objections to requests for admissions by complaint counsel, in which the examiner partially sustained and partially overruled respondents' objections. Respondents contend that the requests for admissions in the instant proceeding are not in accordance with the purpose of the admissions procedure. Moreover, respondents state that most of the requests seek information dealing with a period of time prior to January 1968, which, according to respondents, is irrelevant to a proceeding conducted in 1970. Finally, respondents argue that some of the requests require the review of many documents and a computation based on a study of these documents.

2. The examiner's ruling on objections by complaint counsel to requests for admission, filed by respondents, in which the examiner sustained complaint counsel's objections. By filing these requests respondents were seeking to establish that at the time of the issuance of the complaint there was no basis for the statement that the Commission had reason to believe that there were misrepresentations as to pricing.

The criteria for this appeal are contained in Section 3.35(b) of the Commission's Rules of Practices, which provides that such an appeal "will be entertained by the Commission only upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the

interests of justice." A careful review and consideration of the examiner's ruling and the appeal convince us that these criteria have not been met. The appeal will therefore be denied. Accordingly,

It is ordered, That respondents' appeal to the Commission from rulings on objections to requests for admission will be, and it hereby is, denied.

OKC CORP., ET AL.

Docket 8802. Order, June 16, 1970

Order directing General Counsel to apply to the Court of Appeals, Fifth Circuit, for injunction preventing respondent from disposing of certain assets and changing structure pending trial of this case.

ORDER

Complaint counsel on June 2, 1970, in answer to respondents' notification of intended sale of certain assets of Jahncke Service, Incorporated, renewed their motion requesting the Commission to seek injunctive relief under the All Writs Act in the above-entitled matter.

Having considered again the matter in its present posture,

It is ordered, That the General Counsel is hereby delegated, pursuant to Reorganization Plan No. 4 of 1961 (15 U.S.C. § 41 at 2620 (1964)), the authority to apply under the All Writs Act (28 U.S.C. § 1651(a)) to the United States Court of Appeals for the Fifth Circuit [8 S. & D. 1220] for injunctive relief preventing OKC Corp. from disposing of any of the assets of Jahncke Service, Incorporated, and from restructuring the corporation pending the final order of the Commission disposing of the adjudicative proceeding now pending in this matter.

Commissioner MacIntyre not participating.

ZALE CORP., ET AL.

Docket 8810, Order and Opinion, June 17, 1970

Order remanding case to hearing examiner for further consideration of his granting the motion of complaint counsel to amend complaint.

OPINION OF THE COMMISSION

This matter is before the Commission upon respondents' request, filed June 4, 1970, for permission to file an interlocutory appeal from an order of the hearing examiner, and for a stay of the proceedings pending resolution of such an appeal. Section 3.23(a) of the Com-

mission's Rules of Practice provides that permission to file an interlocutory appeal will not be granted except upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice.

The hearing examiner's order, issued on June 3, 1970, granted a motion by complaint counsel to amend the complaint in this proceeding. Respondents contend that the amendments to the complaint introduce a new and distinct issue into the proceedings and that such action is beyond the authority of the examiner. Section 3.15 of the Commission's Rules of Practice provides that a motion for amendment of a complaint may be allowed by the hearing examiner only if the amendment is reasonably within the scope of the original complaint.

It appears that the purpose of the amendments to the complaint was to clarify the complaint so as to permit the introduction of evidence which would provide a basis for an effective cease-and-desist order. It is clear, however, that evidence as to an appropriate remedy may always be received, regardless of the allegations of the complaint. The selection of an appropriate remedy, and the admissibility of evidence with regard thereto, are governed by the unlawful practices actually found to exist, and not by the allegations of the complaint. *Cf. Federal Trade Commission* v. *National Lead Co., et al.*, 352 U.S. 419, 427 (1957). An appropriate remedy is one which bears a reasonable relation to the unlawful practices found to exist. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946). Thus, the examiner need not have amended the complaint to admit evidence bearing on a remedy. Whatever the examiner's intent, the actual effect of the amendments appears to have been to enlarge the scope of the original complaint. For this reason, the examiner should reconsider the necessity for the amendments. It is possible, however, that the amendments were in fact designed to accomplish more than merely permit the introduction of evidence as to an appropriate remedy. If this be the case, the basis for such action, its intended scope, and its conformity with Section 3.15 of the Commission's Rules of Practice, should be more clearly delineated.

The Commission is, thus, unable, at this juncture, to determine whether an interlocutory appeal is warranted. This matter will be remanded to the hearing examiner for consideration of the necessity for, or a justification for, the amendments to the complaint. The hearings will not be stayed. An appropriate order has been issued and accompanies this opinion.

ORDER OF REMAND TO HEARING EXAMINER

Upon consideration of the request for permission to file an interlocutory appeal from the hearing examiner's order of June 3, 1970, filed by respondents on June 4, 1970, and for the reasons set forth in the accompanying opinion,

It is ordered, That this matter be remanded to the hearing examiner for further consideration, without a stay of the hearings.

NATIONAL BISCUIT COMPANY

Docket 5013. Order, July 30, 1970

Order directing appointment of hearing examiner to conduct public hearings on question whether the cease and desist order of February 23, 1944, was a consent order.

ORDER DIRECTING HEARINGS ON QUESTION OF WHETHER ORDER TO CEASE AND DESIST ISSUED IN 1944 WAS A CONSENT ORDER

The United States Court of Appeals for the Fifth Circuit, on August 19, 1968, [400 F.2d 270, (1968)] having issued its opinion and judgment remanding this case to the Commission with the direction to conduct evidentiary hearings upon the question of whether the Commission's original order to cease and desist issued against respondent on February 23, 1944, was a consent order; and

The Court, on June 30, 1970, having issued its order denying the Commission's petition to issue judgment on the merits adversely to the Commission;

It is ordered, That the Director of Hearing Examiners designate on examiner, other than the examiner assigned to conduct the compliance hearings, expeditiously to begin public hearings in accordance with the Court's opinion for the sole and limited purpose of receiving testimony and other evidence concerning the question as to whether the order to cease and desist issued on February 23, 1944, was a consent order. The designated examiner shall preside at and conduct such hearings with all the powers and duties provided in the Commission's Rules of Practice for Adjudicative Proceedings, except that of making and filing an initial decision; and the respondent National Biscuit Company shall have the right of due notice, cross-examination, and production of evidence in rebuttal.

It is further ordered, That upon termination of the hearings, the examiner shall within 30 days thereafter make a report containing his findings and recommendations confined to the issue hereinabove speci-

fied, and shall certify the matter to the Commission for its consideration.

It is further ordered, That the Secretary shall cause service of this order to be made upon respondent, National Biscuit Company, and its attorneys.

Commissioner MacIntyre not participating.

LEHIGH PORTLAND CEMENT COMPANY

Docket 8680. Order and Opinion, July 31, 1970

Order vacating hearing examiner's protective order of September 24, 1968, protecting material submitted against disclosure, and remanding case to hearing examiner.

Opinion of the Comission

This matter concerns the production of information pursuant to certain subpoenas *duces tecum* issued at the instance of respondent. The subpoenas were directed to several third-party cement companies and have identical specifications. Four of the cement companies refused to comply and court enforcement proceedings were instituted. A district court judgement granting enforcement was vacated on appeal and the case was remanded to the Commission for further consideration.[1]

The controversy here turns on the question of what protection against public disclosure should be given to information responsive to Specifications 2a–k of the subpoenas. The third-party cement companies contend that this information should receive the same confidential treatment as that granted to material furnished pursuant to similar specifications in third-party subpoenas issued in *Mississippi River Fuel Corporation*, Docket No. 8657 (Order Entertaining and Denying Appeals From Hearing Examiner's Denial of Motions to Quash or Limit Subpoenas, issued June 8, 1966) [69 F.T.C. 1186]. In *Mississippi* we directed that the information should be submitted to a reputable and disinterested accounting firm, which shall compile and present the material to respondent's counsel in such manner that no individual company's confidential arrangements or data will be revealed. Counsel for respondent, Lehigh, although willing to protect the confidentiality of the material in other ways, opposes the *Mississippi* method on the ground that it impairs their right to prepare adequately for cross-examination and to conduct an effective defense.

This is the third time this matter is before us. Briefly summarizing the prior proceedings, we note that initially the examiner out of defer-

[1] *Federal Trade Commission* v. *Crowther*, No. 23,924 (D.C. Cir., opinion filed June 25, 1970 [8 S. & D. 1212]).

ence to our decision in *Mississippi* did grant *Mississippi* treatment to the information supplied under Specifications 2a–k.[2] On appeal by Lehigh's counsel, we remanded because we believed that the examiner had incorrectly interpreted *Mississippi* as allowing him no discretion to make his own independent determination with respect to the form of confidential treatment that would be most appropriate under the particular facts of the case.[3] On remand, the examiner then ordered that the information be submitted without *Mississippi* treatment, but he did frame a protective order to assure that respondent's counsel will not use the subpoenaed data for an improper competitive purpose.[4] The third-party cement companies appealed from this order of the examiner, and we denied the appeal, finding that the examiner's order indicated a thoughtful and workable balancing of the conflicting interests of respondent and the third parties.[5] When the third-party cement companies still refused to comply with Specifications 2a–k of the subpoenas, court enforcement proceedings were instituted which have resulted in the present remand by the court of appeals.

The grounds for the court of appeal's remand is that the Commission has not sufficiently identified and articulated its reasons for denying the *Mississippi* method of confidential treatment to the third-party cement companies. The court stated that, "The facts have that degree of parallelism which entitles both [the third-party cement companies] and ourselves to a fuller explanation from the Commission as to why the *Mississippi* approach should be jettisoned without giving credence to the charge that similar supplicants receive dissimilar dispensations."[6] The court accordingly remanded the case for further consideration in light of the court's opinion. For the reasons hereafter noted, we are disposing of this matter by reinstating for information furnished pursuant to Specifications 2a–k, the confidential treatment ordered in the examiner's order of June 14, 1968 (*supra*, n. 2), including the provision granting *Mississippi* treatment.

It is true that this case is similar to *Mississippi* in many respects. Specifications 2a–k of the subpoenas here are virtually identical to the subpoena specifications involved in *Mississippi;* both cases are merger cases in which the Commission has challenged the acquisition by a cement manufacturer of ready-mix concrete companies; and in

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[2] Order Modifying Subpoenas *Duces Tecum*, in Respondent's Behalf, Directed Against Third Party Cement Companies (June 14, 1968). The examiner also modified the subpoenas in other respects, but these modifications are not now contested, and the subpoenas have been complied with except for the production of information pursuant to Specifications 2a–k.

[3] Order of Remand to Hearing Examiner (August 2, 1968 [74 F.T.C. 1585]).

[4] Order Directing Third-Party Cement and Ready-Mixed Concrete Manufacturers To Comply with the Examiner's Orders Modifying Subpoenas Issued in Respondent's Behalf in This Proceeding (September 24, 1968).

[5] Order Denying Interlocutory Appeals (November 22, 1968 [74 F.T.C. 1629]).

[6] *Federal Trade Commission* v. *Crowther*, *supra*, n. 1, slip op. p. 8.

both instances the respondent is demanding the information from third-party cement companies, which are competitors or potential competitors of the respondent. But, as we shall now show, there are also significant factual differences between the two cases, which are also clearly relevant to the form of protective order that should be entered.

In *Mississippi*, respondent's counsel to whom the disclosure would have been made, were employees of respondent or its subsidiary.[7] Furthermore, the protective order entered by the examiner in that case would have permitted disclosure to personnel of respondent insofar as it was necessary for respondent's counsel to consult with such personel in order to prepare for and assist in the defense of the proceeding.[8] The third-party cement companies in *Mississippi* vigorously protested revealing any of the requested information to respondent's employees, contending that respondent's real purpose was to gather highly confidential data which would be of incalculable value to respondent in competing with the third-party cement companies. Consequently, while we doubted that the information sought was of so confidential or sensitive a nature, out of an abundance of caution, and in order to avoid any possibility that the data would be improperly used, we directed that the data be submitted pursuant to the *Mississippi* method.[9]

On the other hand, in this proceeding the information is to be given only to respondent's independent counsel, who, in a written stipulation filed with the examiner, agreed that the information would not be revealed to respondent or to others, except that it would be disclosed to independent technical experts when deemed necessary for counsel's trial preparation, and documents designated as trial exhibits would be disclosed to counsel for the Federal Trade Commission. Both the first examiner assigned to this proceeding, and his successor, accepted this assurance of confidentiality by respondent's independent counsel as having been given in good faith.[10] Since there appeared to be no danger that the third-party cement companies would be harmed by disclosing the information to respondent's counsel, and since respondent's counsel was asserting that the data was needed for cross-examination and for preparing respondent's defense, we found

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[7] Respondent's counsel in *Mississippi* admitted this fact on the record. *Mississippi River Corporation*, Docket No. 8657, Prehearing Conference (February 21, 1966) pp. 695–696.

[8] *Mississippi River Fuel Corporation*, Docket No. 8657, Order for Taking of Depositions (January 27, 1966).

[9] *Mississippi River Fuel Corporation*, Docket No. 8657, Order Entertaining and Denying Appeals From Hearing Examiner's Denial of Motions To Quash or Limit Subpoenas (June 8, 1966 [69 F.T.C. 1186]).

[10] Order Modifying Subpoenas Duces Tecum, in Respondent's Behalf, Directed Against Third Party Cement Companies (June 14, 1968), p. 22; Order Directing Third-Party Cement and Ready Mixed Concrete Manufacturers To Comply With the Examiner's Orders Modifying Subpoenas Issued in Respondent's Behalf in This Proceeding (September 24, 1968), p. 2.

the order of the examiner denying *Mississippi* treatment, but protecting against disclosure to respondent's employees and to the public generally, to represent a reasonable balancing of the interests of the parties.

We have given careful consideration to what course of action we should now take to comply with the court's remand. As noted above, there are grounds for differentiating this case from *Mississippi*. The court of appeals, in its opinion, however, intimates that it would not consider such grounds acceptable for denying *Mississippi* treatment to the cement companies here, because we did not expressly refer in our opinion in either case to the presence of house counsel in the one case or independent counsel in the other, and because in *Mississippi* we found no fault with the *Mississippi* procedure as such, *Federal Trade Commission* v. *Crowther*, *supra* n. 1, slip op. pp. 9–10 [8 S. & D. 1218–9].[11] We believe, therefore, that the most appropriate way of disposing of this matter at the present posture of the case, is to reinstate the provisions of the first examiner's order granting *Mississippi* treatment, but giving respondent's counsel the right to obtain full disclosure during the hearing if they show the need therefor. We recognize that respondent's counsel assert that furnishing the information to them on an anonymous basis will prevent them from using the information for cross-examination and for preparing respondent's own case. But these fears are largely prospective at this stage, and may never materialize. It may turn out during the hearing, for example, that the compilations prepared under the *Mississippi* procedure will give respondent's counsel all the information they need. If they do not, the first hearing examiner's order expressly provides that respondent may apply for relief by way of discovery if proper showing is made. As the examiner himself recognized (Order of June 14, 1968, *supra*, n. 2 at p. 23), the examiner will be in a better position to pass on the real necessity for further disclosure, after hearing complaint counsel's proof.[12]

Accordingly, we will vacate the examiner's protective order of September 24, 1968, insofar as it applied to compliance with Specifica-

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[11] It would seem obvious, however, that even though there may be no unfairness in the *Mississippi* procedure itself in a given situation, the balance should still be struck in favor of full disclosure to counsel, if there is the possibility that this will expedite the trial and, as was true here, there is no prejudice to the subpoenaed parties.

[12] We note that in their answer to respondent's appeal from the examiner's order of June 14, 1968, counsel for the third-party cement companies argued that Lehigh's counsel would not be entitled to full disclosure at any time. This, of course, is erroneous. As we pointed out in our opinion remanding the case to the examiner, "Neither the Commission nor the courts have given recognition to an absolute trade secret privilege. The revelation of a trade secret will be compelled if it is indispensable to the proceeding." Opinion (August 2, 1968), p. 3 [74 F.T.C. 1587]. Moreover, the third-parties appear to have abandoned this argument on their later appeal from the examiner's order of September 24, 1968, see p. 14 of their memorandum in support of appeal, filed October 21, 1968.

tions 2a–k of the subpoenas, and order production of this information subject to the confidential treatment provided for such information in the examiner's order of June 14, 1968. An appropriate order will be entered.

Commissioner MacIntyre did not participate.

ORDER AFTER REMAND

The Commission on November 22, 1968 [74 F.T.C. 1629], having issued its order and opinion denying an interlocutory appeal by several third parties, including the Louisville Cement Company, Martin Marietta Corporation, General Portland Cement Company, and Medusa Portland Cement Company, from the hearing examiner's order of September 24, 1968, ordering compliance with subpoenas *duces tecum* issued in respondent's behalf; and

Proceedings for enforcement of the subpoenas having been instituted against the above-named four third-party cement companies upon their refusal to comply, and the United States Court of Appeals for the District of Columbia Circuit in said proceedings having on June 25, 1970 [8 S. & D. 1212], rendered its decision vacating the judgment of the United States District Court for the District of Columbia entered on December 1, 1969, which granted enforcement of the subpoenas, and remanding the case to the Commission for further consideration in light of the court's opinion, and

The Commission having reconsidered the appeals of the aforesaid four third-party cement companies in light of the court's opinion, and the contentions of respondent's counsel in opposition thereto, as well as the prior proceedings in this case;

Now, therefore, and for the reasons stated in the accompanying opinion;

It is ordered, That the hearing examiner's protective order of September 24, 1968, is vacated insofar as it applies to the production of material by the Louisville Cement Company, Martin Marietta Corporation, General Portland Cement Company and Medusa Portland Cement Company, in response to Specifications 2a-k of the subpoenas *duces tecum* issued on January 25, 1968, at the request of respondent.

It is further ordered, That material submitted by the aforementioned four third-party cement companies in response to Specifications 2a-k of the subpoenas, as modified by the examiner's order of June 14, 1968, shall be protected against disclosure in the manner provided therefor in the hearing examiner's order of June 14, 1968.

It is further ordered, That this matter be, and it hereby is, remanded

to the hearing examiner in order that he may set a new date for compliance with the subpoenas and for such other proceedings as may be appropriate.

Commissioner MacIntyre not participating.

MISSOURI PORTLAND CEMENT COMPANY

Docket 8783. Order, Sept. 8, 1970

Order denying respondent's appeal from a hearing examiner's denial of request for subpoena and application for disclosure of Commission documents.

Order Denying Appeal Re Examiner's Ruling on Disclosure of Commission Documents

This matter is before the Commission upon respondent's appeal, filed July 29, 1970, from the hearing examiner's order denying request for subpoena and application for disclosure of Commission documents. On August 5, 1970, complaint counsel filed their answer in opposition thereto. The documents sought by respondent form the basis for the Staff Report on Mergers and Vertical Integration in the Cement Industry, dated April 1966 (Cement Report). Two reasons are advanced by respondent: (1) the instant proceeding involves a Section 7 of the amended Clayton Act complaint challenging an acquisition in the cement industry by respondent, and the underlying material to the Cement Report is directly relevant to the proof or disproof of specific allegations in the present complaint as well as being relevant to potential defenses available to respondent; (2) the Cement Report has been relied upon in a previous Commission opinion in similar litigation upholdng a challenge to a vertical acquisiton in the cement industry.[1] These documents are sought pursuant to the provisions of Section 3.36(b) of the Rules of Practice and under the Freedom of Information Act. The appeal from the examiner's ruling denying respondent's request for disclosure of these documents is made pursuant to Section 3.36(d).

Respondent's appeal will be denied. The examiner is charged with primary responsibility of conducting adjudicative proceedings and absent unusual circumstances or a clear abuse of discretion his rulings on procedural issues will not be disturbed. No circumstances in the instant proceeding warrant our interference. We have carefully re-

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[1] By way of clarification, the opinion referred to was issued in *Marquette Cement Mfg. Company*, Docket No. 8685, January 7, 1969 [75 F.T.C. 32]. In that opinion the Cement Report was "relied" upon only in a most general way for industrial background information.

viewed the authorities cited by respondent in support of its position but find them not controlling in this instance. It is also noted that to the extent respondent's request is grounded on the supposition that the Commission, in ultimately considering the merits of this matter, will reply upon the conclusions contained in the Cement Report it is premature. At this juncture there is nothing to indicate that the Commission will rely for any of its findings upon anything other than the evidence of record in this case. For the foregoing reasons respondent's appeal will be denied. Accordingly,

It is ordered, That respondent's appeal from the hearing examiner's order denying request for subpoena and application for disclosure of Commission documents be, and it hereby is, denied.

Commissioner Elman not participating.

ASH GROVE CEMENT CO.

Docket 8785. Order and Opinion, Sept. 18, 1970

Order denying respondent's appeal from hearing examiner's order granting in part and denying in part applications for third-party subpoenas *duces tecum*.

Order and Opinion Denying Interlocutory Appeal

This matter is before the Commission upon respondent's appeal filed August 27, 1970, from the hearing examiner's order of August 19, 1970, granting in part and denying in part respondent's applications for third party subpoenas *duces tecum*. Respondent has appealed from such order to the extent that its applications were denied. Complaint counsel on September 3, 1970, filed an answer opposing the appeal.

The specifications rejected by the hearing examiner fall generally into four categories: Those calling for information relating to effects of mergers, if any, outside of the Kansas City area (rejected by the examiner for his stated reason that as to such information no proof was being offered by complaint counsel needful of a defense thereto); those requesting information dealing with certain construction products not specified in the complaint as constituting relevant lines of commerce (rejected for the examiner's reason in part that such information did not show that portland cement and ready-mix concrete were not separate relevant lines of commerce as alleged); those asking for certain statistical information submitted to the Bureau of Mines by various companies to whom subpoenas are directed (rejected for the examiner's reason in part that because, as introduced into evidence, complaint counsel's tabulations show market structure only in over-

all, general terms and contain no reference to acquisitions or their competitive impact on any geographic market area, and because the underlying information would only be partial); and finally those seeking statistical information relating to the year 1969 and parts of 1970 (rejected for the examiner's reason that specifications otherwise granted calling for data ending in 1968 were deemed amply sufficient for respondent's purposes as to any proposed presentation of post-acquisition data).

Respondent argues that the partial rejection "arbitrarily and erroneously limits the scope of Respondent's discovery" and claims that this prejudices it ability to present its defense.

Respondent has made no showing, as required by Section 3.55(b) of the Commission's Rules of Practice, that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before the conclusion of the hearing is essential to serve the interests of justice. Moreover, the disposing of applications for subpoenas in pretrial discovery proceedings is an area in which the hearing examiner has broad discretion. as we have stated many times including in an order herein,[1] the Commission will not disturb examiner's rulings in matters such as this involving the conduct of the hearing short of unusual circumstances or a clear abuse of discretion. Neither has been shown here. The record in fact shows that the hearing examiner considered the substance of respondent's requests and heard substantial arguments thereon in pretrial proceedings and his order suggests a careful weighing of the interests in the matter.

We stress that we are not deciding here on the correctness of his order one way or the other; only that he did not abuse his discretion and that the matter is not one which will be reviewed by the Commission at this stage.

It should be added that the partial rejection of respondent's applications is not necessarily a final disposition of the matter by the hearing examiner. Respondent is not foreclosed from again raising the issue at the close of complaint counsel's case-in-chief if at that time it believes in light of the evidence adduced that it has been denied needed discovery.

In the circumstances, we will deny respondent's appeal. Accordingly,

It is ordered, That respondent's appeal from the hearing examiner's order of August 19, 1970, granting in part and denying in part respondent's applications for third party subpoenas *duces tecum* be, and it hereby is, denied.

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[1] Order Denying Appeal From Examiner's Order Re Subpoena *Duces Tecum* issued July 15, 1970 [76 F.T.C. 1076] in this proceeding.

UNITED STATES STEEL CORPORATION

Docket 8655. Order, Sept. 25, 1970

Order reopening case and remanding it to hearing examiner for receipt of evidence with respect to four issues pursuant to a decision of the Court of Appeals, Sixth Circuit.

Order Reopening Proceeding and Remanding Case to Hearing Examiner

The United States Court of Appeals for the Sixth Circuit issued on May 6, 1970 [8 S. & D. 1154], is opinion and order remanding the above-entitled cause for further findings of fact and further proceeding in light of the Supreme Courts holding in *Citizen Publishing Co.* v. *United States*, 394 U.S. 131 (1969), as well as the views of the Court of Appeals set forth in its opinion.

It is therefore ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the matter be, and it hereby is, remanded to Hearing Examiner Lewis to begin hearings, in accordance with the opinion of the Court of Appeals, for the purpose of receiving evidence (including testimony of witnesses who have heretofore testified) with respect to the issues of whether

(a) as of January 1963 the financial condition and resources of Certified Industries were so dire that it faced the grave probability of a business failure,

(b) between January 1963 and April 1964 no prospective purchaser other than United States Steel Corporation was interested in acquiring Certified,

(c) "Certified's opportunity for some form of continued competitive vitality through bankruptcy or similar proceedings" was " 'dim or non-existent' " either in January 1963 or in April 1964, and

(d) the U.S. Steel-Certified vertical ties did in fact take an unlawful cast as early as January 1963.

It is further ordered, That upon termination of the hearings the hearing examiner shall on the basis of the entire record, enter his initial decision confined to the issues hereinabove specified which shall be subject to review by the Commission under Subpart F of Part 3 of the Commission's Rules of Practice.