IN THE MATTER OF

FORD MOTOR COMPANY

Docket 9105. Interlocutory Order, Dec. 4, 1978

ORDER REQUESTING FILING OF ADDITIONAL BRIEFS

By motion of November 7, 1978, complaint counsel has requested that the Commission seek a preliminary injunction compelling Ford Motor Company to disclose certain facts concerning 1974–78 model year four-cylinder vehicles which complaint counsel alleges are afflicted with a latent defect resulting in premature camshaft/rocker arm wear. Ford subsequently filed an opposition to that motion and, in a supplement thereto filed on November 29, 1978, informed the Commission of certain steps it was taking to notify affected owners of the problem. Ford alleges that this action further supports Ford's position that the proposed injunction action would not be in the public interest. Ford further described its intended notification and adjustment program in a motion filed on November 30, 1978, in which it reiterated certain concerns regarding the possible occurrence of *ex parte* communications in violation of Section 4.7 of the Commission's Rules of Practice.

Before any action is taken with respect to complaint counsel's motion, and in order to assess Ford's contention that its intended notification and adjustment program indicates that the proposed injunction action is not in the public interest, the Commission would like to receive further information regarding the precise parameters of respondent's program including the existence of any conditions attached to that program.[1] The Commission particularly requests respondent to submit the text of the letter which Ford proposes to send to vehicle owners, indicating when such letter will be mailed. Ford should describe with specificity the categories of individuals to whom the letter will be sent, indicating whether prospective purchasers of new and used vehicles from Ford dealers will be notified. If respondent's intended rocker arm/camshaft notification and adjustment program differs from the program instituted in 1977 with respect to piston scuffing, the reason for such differences should be provided. The Commission also requests a copy of any instructions sent to Ford dealers advising them of the adjustment program, in addition to the mailgram attached to respondent's filing of November 3, 1978. Accordingly,

[1] While an oral hearing before the Commission would suffice to inform the Commission of the details of Ford's program without raising *ex parte* difficulties, it is the Commission's view that the requisite information can be obtained through additional briefs and that a hearing is unwarranted at this time.

It is ordered, That respondent is requested to file a supplemental brief on or before December 11, 1978, and that complaint counsel may file a response thereto on or before three days following service of respondent's supplemental brief.

277-685 O—79——60

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Dec. 8, 1978

This order remands this matter for appointment of a substitute ALJ to preside over further proceedings; directs the filing of briefs by all parties; dismisses as moot motions for disqualification of the Chairman from participation and the motion for evidentiary hearing or oral argument; denies motion for issuance of subpoenas; and terminates a stay of proceedings entered October 20, 1978.

ORDER

At the present time, the Commission has before it respondents' motions to disqualify the administrative law judge, Kellogg's motion for an evidentiary hearing, or, alternatively, for oral argument on its disqualification motion, Kellogg's motion (joined by General Mills) for the issuance of subpoenas *duces tecum,* complaint counsel's motion seeking the appointment of a substitute administrative law judge and an order directing that the proceedings be resumed "from the point at which Administrative Law Judge Harry R. Hinkes retired," and a motion for dismissal or other alternative relief filed by General Mills.

I.

After a careful review of the submissions of the parties and the pertinent legal authorities, the Commission has concluded that Judge Hinkes became "unavailable" within the meaning of 5 U.S.C. 554(d) upon his retirement on September 8, 1978. Because his reappointment on a contractual basis was not approved by the Civil Service Commission, see 5 U.S.C. 1305 and 3105, and Civil Service Commission regulations adopted pursuant thereto, his service subsequent to September 8, 1978, once objected to by respondents, *cf. United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952), was of questionable validity. Accordingly, and in view of the Chairman's determination not to seek Civil Service Commission approval of the existing contractual arrangement or any other employment arrangement with Judge Hinkes, the matter must be remanded for the appointment of a substitute ALJ to preside over further proceedings. Therefore, respondents' motions requesting Judge Hinkes' disqualification are dismissed as moot. Kellogg's motion for an evidentiary hearing, or, in the alternative, for oral argument is also dismissed as moot.

Complaint counsel have requested the Commission to include a

directive to the substitute ALJ to proceed to the conclusion of the hearings, to base his assessment of the need for *de novo* hearings on the proposed findings and the record, and to recall witnesses if he concludes "that observation of the demeanor of the particular witnesses is likely to be of material assistance in making findings of controlling facts." The parties have addressed the legal precedents regarding the extent, if any, to which retrial may be necessary.

The Commission agrees with the parties that the ALJ should decide in the first instance the issues associated with the future conduct of these proceedings and whether portions of the record or particular witnesses, if any, will need to be reheard. To facilitate the law judge's consideration of the questions raised here, as well as ultimate Commission review, the parties are ordered to submit to the substitute ALJ, within forty-five (45) days from this order, briefs responding to the following questions, as well as any other legal or factual matters that the submitting party may deem relevant to the issue of whether retrial is required and, if so, to what extent. In addressing these matters, consideration should be given to the application of principles enunciated in recent precedents such as *Vermont Yankee Nuclear Power Corp.* v. *NRDC,* 435 U.S. 519 (1978), and *New England Coalition on Nuclear Pollution* v. *NRC,* 582 F.2d 87 (1st Cir. 1978).

1. Identify the issues in the proceeding whose resolution depends upon an evaluation of credibility and with respect to which it is important to preserve demeanor evidence.
2. With respect to the issues identified in No. 1 above, identify each witness pertinent to each issue and the location in the record where demeanor evidence would materially assist in determining credibility. Indicate why the demeanor of such witness is crucial to resolution of the issue so identified.
3. Assuming that certain witnesses should be recalled, would it be sufficient to recall them merely for the purpose of cross-examination?
4. Assuming that certain witnesses should be recalled for purposes of direct testimony and cross-examination, could such further appearances be limited to certain aspects of their testimony?

Appropriate replies, if any, shall be within the discretion of the substitute ALJ.

In ordering such briefing, we do not intend to imply that the substitute ALJ is obliged to make definitive determinations before proceeding with the hearings concerning the extent to which, if at all, the recall of any particular witness is required or desirable. As

we have noted, all such issues are matters for the ALJ to address in the first instance.

In replying to complaint counsel, Kellogg has requested the Commission "to afford respondents a reasonable length of time following the ruling (*e.g.,* 30 days) to file additional disqualification motions before the Commission * * * appoints a substitute judge * * *." To the extent that this request may be deemed an application for a stay, it is denied, and the stay of proceedings ordered by the Commission on October 20, 1978, is hereby terminated. To the extent that the motion filed by General Mills on November 29, 1978, is not disposed of by this order, it will be acted upon by the Commission subsequent to the expiration of the time for the filing of responses.

II.

By motion of September 22, 1978, Kellogg, joined by General Mills on September 27, 1978, requested the issuance of subpoenas *duces tecum* requiring the Federal Trade Commission and the Civil Service Commission to produce: "(1) documents referring or relating to the retirement of Administrative Law Judge Harry R. Hinkes and the retention of his services by the Federal Trade Commission thereafter, and (2) documents sufficient to show any rules, regulations, guidelines and policies concerning status of administrative law judges and the retention of the services of retired administrative law judges." On October 4, 1978, this motion was certified to the Commission.

In its accompanying memorandum, Kellogg asserts that a statement by Judge Hinkes announcing his retirement and retention "inevitably raise[s] serious questions as to whether the present status of the Administrative Law Judge presiding in this matter is in conformance with statutes and regulations intended to ensure the independence of administrative law judges and is consistent with the requirements of due process. * * * Their resolution requires a clear understanding of the facts concerning Judge Hinkes' change in status." Kellogg further asserts that the requested subpoenas are "clearly relevant to the resolution of the question presented." However, in light of the Commission's disposition, *supra,* of the disqualification motions, the "question" concerning which Kellogg sought the subpoenas is no longer presented. Because the necessity and relevancy requirements of Rules of Practice 3.36 and 3.37 are not satisfied, the motion is denied.

Nevertheless, to clarify the record in this proceeding, appended hereto is a statement by Chairman Pertschuk, memorializing his role in the decisionmaking process that resulted in the contract. No

other Commissioner had any involvement with, or knowledge of, that process. Also appended, in their entirety, are three memoranda to or from Chairman Pertschuk or a member of his staff concerning the continued service of Judge Hinkes in the event he retired. There are no other such memoranda involving Chairman Pertschuk or any other Commissioner.

III.

It is ordered, That (1) this matter is remanded for appointment of a substitute ALJ to preside over further proceedings;

(2) the parties are directed to file the briefs described above within forty-five days with replies to be within the discretion of the ALJ;

(3) respondents' motions seeking disqualification and Kellogg's motion for an evidentiary hearing or oral argument are dismissed as moot;

(4) Kellogg's motion for issuance of subpoenas is denied; and

(5) the stay entered on October 20, 1978, is terminated.

Commissioner Pitofsky did not participate.

SEPARATE STATEMENT OF CHAIRMAN PERTSCHUK

I think it important that I set forth for the record the role that I played in approving the contractual arrangement with Judge Hinkes that is challenged by the motions before the Commission and my reasons for initially approving the arrangement.

As is apparent from Chief ALJ Hanscom's memorandum to me dated August 16, 1978, the full text of which is released today Judge Hinkes had indicated his intention to retire effective August 31, 1978, for personal reasons including the fact that the difference between his take home salary and the amount he would receive in retirement was not, in his opinion, sufficient to justify his continuing in regular service. Chief Judge Hanscom recommended that I authorize the offering to Judge Hinkes of an arrangement whereby Judge Hinkes would be retained under contract to complete the *Kellogg* case after his retirement. After being advised that the arrangement was legally permissible and had been cleared with the Civil Service Commission, I authorized Chief Judge Hanscom to extend the offer to Judge Hinkes, as is evidenced by the memorandum dated August 21, 1978, from my attorney advisor, William J. Baer, to Chief Judge Hanscom. That authorization involved an administrative decision within my authority as Chairman pursuant to Reorganization Plan No. 8 of 1950, 64 Stat. 1264, and did not require the participation of the full Commission. *The Hearst*

Corporation, Dkt. 8832, 81 F.T.C. 1028(1972). I did not seek approval of the other Commissioners, nor to my knowledge did any other Commissioner participate in the matter.

I also wish to note for the record that after the offer had been made to Judge Hinkes, my staff informed me that Judge Hinkes had requested that I personally communicate to him my authorization of the arrangement. I telephoned Judge Hinkes and in a very brief conversation indicated only that I hoped he would accept the contractual arrangement and complete the case. Judge Hinkes responded that he would consider the request. I did not discuss with Judge Hinkes the merits of the case, the manner in which he might proceed with the case, or anything else concerning the proceeding.

I authorized extension of the offer to Judge Hinkes for the following reasons: (1) he had presided over the *Kellogg* case since the complaint had been issued in April 1972, and was therefore familiar with the extensive record of the case; (2) appointment of a substitute was likely to have resulted in a substantial loss of time required by his review of the already extensive record in the case; and (3) with a substitute ALJ issues would likely arise concerning the extent to which, if at all, the new ALJ was obliged or might wish to rehear witnesses who had testified. These are the sole factors on which my decision was based. In no way was my decision influenced by a belief that Judge Hinkes had been or would be in some manner more favorable to one side than the other. Understanding as I did that the arrangement with Judge Hinkes presented no legal problems, I concluded that the potential benefit to all concerned in having the case concluded in a manner that did not entail significant delays and burdens on the parties justified that arrangement to retain the services of Judge Hinkes.

After reviewing the briefs of the parties, however, I have come to the conclusions that Judge Hinkes became "unavailable" within the meaning of 5 U.S.C. 554(d) upon his retirement on September 8, 1978, and that because his reappointment on a contractual basis was not approved by the Civil Service Commission, his service subsequent to September 8, 1978, once objected to by respondents, was of questionable validity. In light of the substantial legal questions now raised and the fact that none of the parties desires to have Judge Hinkes continue to preside and evidently all are willing to forgo the benefits of having him continue, *i.e.,* potential savings in costs and time, I have determined not to seek Civil Service Commission approval of the existing contractual arrangement or some other employment arrangement with Judge Hinkes.

MEMORANDUM

DATE: August 16, 1978
REPLY TO
ATTN OF: Daniel H. Hanscom,
Chief Administrative Law Judge
SUBJECT: Retention of Administrative Law Judge
Harry R. Hinkes on Contract Basis
TO: Chairman Pertschuk

Judge Harry R. Hinkes has advised that he intends to retire as of August 31, 1978. His stated reason for retiring is age, length of service and to take advantage of the 4.9 percent cost-of-living bonus which will be given to employees who retire by that date. He is 68 years of age and the difference between the retirement he will receive and his present take home pay will be approximately $3,500 per year for the first one and one-half years of his retirement when his retirement income will be tax free. He does not feel justified at his age in working for the next year and one-half for this small difference in take home pay.

Judge Hinkes joined the Federal government service on February 10, 1945. Thus, he is now in his thirty-third year of service. He first joined the FTC on August 23, 1959 as a Hearing Examiner. He was transferred to the NLRB on May 22, 1965, and returned to the FTC January 23, 1972.

Judge Hinkes is the presiding judge in the *Kellogg* case. He was assigned this matter on April 26, 1972, before I became Chief Administrative Law Judge. Because of extensive requirements for discovery in this case, complaint counsel were unable to begin trial until April 28, 1976. As the case now stands, the defense is approximately one-half completed, which will probably be followed by complaint counsel's rebuttal and defense surrebuttal. Judge Hinkes estimates that the trial will be completed early next year, and he anticipates filing an initial decision by the end of 1979 or early 1980.

The trial record now exceeds 36,000 pages, with approximately 10,000 additional pages remaining to be heard. Well over one hundred witnesses have already testified, including a number of economic experts. As you are aware, this is a highly complex proceeding. I believe we have no alternative but to retain Judge Hinkes to complete this case and file an initial decision. Assignment to a new law judge at this juncture could raise serious problems.

As I see it the only way to retain Judge Hinkes is to offer him a contract to complete the *Kellogg* case. While it has been suggested that Judge Hinkes might be retained as a rehired annuitant, the pay

involved—the difference between his retirement pay and his normal salary would make no significant difference in his current "take-home" and is not sufficient to interest Judge Hinkes. Under a contract basis we would retain Judge Hinkes for $150 per day. The total cost would be between $25,000 and $30,000. We believe Judge Hinkes would continue on the *Kellogg* case on this basis. The cost, in my opinion, is warranted under the circumstances.

Accordingly, we recommend and ask authorization to offer Judge Hinkes a contract according to the foregoing terms. Approval is needed by August 27, 1978 before Judge Hinkes retires.

Respectfully submitted,

/s/ Daniel H. Hanscom
Chief Administrative Law Judge

FTC 4-3

FEDERAL TRADE COMMISSION
OFFICE OF THE CHAIRMAN

TRANSMITTAL SLIP

TO:
Judge Hanscom

FROM:
Bill Baer BB

DATE: August 21, 1978

- ☐ Please prepare reply for Chairman's Signature
- ☐ Please see me
- ☐ Approval
- ☐ Recommendation
- ☐ Information
- ☐ Necessary action
- ☐ Note and return
- ☐ File

REMARKS:

Mike says that, as usual, you recommend the most appropriate course. I thought you might want something more official for the record. Thus the attached.

August 21, 1978

MEMORANDUM

TO: Daniel Hanscom

FROM: William J. Baer

The Chairman asked that I respond to your August 16, 1978 memo with respect to Judge Hinkes. He agrees with your recommendation and hereby authorizes you to extend Judge Hinkes a contract to complete the adjudicative matter over which he currently is presiding.

cc: ✓Margery Waxman Smith
Micheal Sohn

IN THE MATTER OF

HARNISCHFEGER CORPORATION, ET AL.

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

Docket 9107. Complaint, March 10, 1978 — Decision, Dec. 8, 1978

This consent order, among other things, requires a Brookfield, Wis. manufacturer of lattice-boom cranes and the Northwest Engineering Company, a Green Bay, Wis. competitor, to provide the F.T.C. with evidence that all merger agreements between them have been terminated; and return all confidential documents exchanged during negotiations. The order prohibits respondents from acquiring any part of each other's lattice-boom business until July 31, 1981 without furnishing the Commission with 60 days' notice of such intention. Should the Commission issue a complaint challenging the transaction during this period, respondents are required to postpone the proposed merger or acquisition until administrative proceedings have been concluded. Additionally, the order limits sales between the two companies until July 31, 1981.

Appearances

For the Commission: *Peter E. Greene.*

For the respondents: *Alan I. Becker, Kirkland & Ellis,* Chicago, Ill. for Harnischfeger Corporation and *William O. Fiffield, Sidley & Austin,* Chicago, Ill. for Northwest Engineering Company.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into a merger agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b), of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITION

PARAGRAPH 1. For the purpose of this complaint, the following definition shall apply: "lattice boom cranes" means cranes mounted either on crawlers or rubber tired vehicles, powered by one or more

engines, the boom and hoist functions of which are carried out by wire rope, and which are generally operated by a conventional gear train controlled by brakes and clutches.

II. Harnischfeger Corporation

PAR. 2. Harnischfeger Corporation (P&H) is a corporation organized under the laws of the State of Delaware, with its principal place of business at 13400 Bishops Lane, Brookfield, Wisconsin.

PAR. 3. P&H manufactures and sells lattice boom cranes throughout the United States. Annual sales thereof in 1977 exceeded $25.8 million.

PAR. 4. In its fiscal year ended October 31, 1977, P&H had total net sales of approximately $466,098,000 and net income of approximately $21,850,000.

III. Northwest Engineering Company

PAR. 5. Northwest Engineering Company (NW) is a corporation organized under the laws of the State of Delaware, with its principal place of business at 201 West Walnut St., Green Bay, Wisconsin.

PAR. 6. NW manufactures and sells lattice boom cranes throughout the United States. Annual sales thereof in 1977 exceeded $21.6 million.

PAR. 7. In the twelve-month period ended October 31, 1977, NW had total net sales of approximately $43,314,000 and net income of approximately $1,091,000.

IV. Jurisdiction

PAR. 8. At all times relevant herein P&H and NW have been engaged in the manufacture and sale of lattice boom cranes in interstate commerce and are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. The Merger Agreement

PAR. 9. On or about December 22, 1977, P&H and NW entered into a merger agreement which provides, *inter alia,* for the merger of a subsidiary of P&H into NW. Upon consummation of the merger NW will become a wholly-owned subsidiary of P&H.

VI. Trade and Commerce

PAR. 10. The relevant line of commerce is the manufacture and sale of lattice boom cranes and submarkets thereof.

PAR. 11. A relevant section of the country or geographic market is the entire United States.

PAR. 12. The manufacture and sale of lattice boom cranes is highly concentrated, with the combined market share of the four largest manufacturers estimated to be approximately 70 percent.

PAR. 13. Barriers to entry into the manufacture and sale of lattice boom cranes are substantial.

VII. Actual Competition

PAR. 14. P&H and NW are and have been for many years actual competitors of each other in the manufacture and sale of lattice boom cranes and submarkets thereof and actual competitors of others engaged in the manufacture and sale of lattice boom cranes and submarkets thereof throughout the United States.

PAR. 15. In 1977, P&H accounted for approximately 12.5 percent of United States production of lattice boom cranes and Northwest accounted for approximately 6.4 percent thereof. P&H accounted for approximately 8.4 percent of 1977 United States sales of lattice boom cranes, and Northwest accounted for approximately 7.0 percent thereof.

VIII. Effects; Violations Charged

PAR. 16. The effects of the proposed acquisition may be to substantially lessen competition or tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between P&H and NW in the manufacture and sale of lattice boom cranes and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the manufacture and sale of lattice boom cranes and submarkets thereof may be lessened;

(c) NW will be eliminated as an actual substantial independent competitor in the manufacture and sale of lattice boom cranes and submarkets thereof;

(d) concentration in the manufacture and sale of lattice boom

cranes will be increased and the possibilities for eventual deconcentration may be diminished; and

(e) mergers or acquisitions between other lattice boom crane manufacturers may be fostered, thus causing a further substantial lessening of competition and tendency toward monopoly in the manufacture and sale of lattice boom cranes.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton Act, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Harnischfeger Corporation is a corporation, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 13400 Bishops Lane, Brookfield, Wisconsin.

2. Respondent Northwest Engineering Company is a corporation, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business at 201 West Walnut St., Green Bay, Wisconsin.

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

ORDER

DEFINITION

For purposes of this order the following definition shall apply:

"Lattice-boom cranes" means cranes mounted either on crawlers or rubbertired vehicles powered by one or more engines, the boom hoist of which are carried out by wire rope, and which are generally operated by a conventional gear train controlled by brakes and clutches.

I.

It is ordered, That Harnischfeger Corporation (Harnischfeger) and Northwest Engineering Company (Northwest) do forthwith provide evidence that all agreements which provided for the merger of a newly formed subsidiary of Harnischfeger into Northwest and which would result in Northwest becoming a wholly-owned subsidiary of Harnischfeger have been terminated. Harnischfeger and Northwest each shall forthwith return any confidential documents provided by the other in connection with the merger agreement, and nothing herein contained shall relieve any party from any obligations of confidentiality imposed by agreement between them or by operation of law.

II.

It is further ordered, That until July 31, 1981 neither Harnischfeger nor Northwest shall acquire either directly or indirectly any part of the lattice boom crane business of each other, whether represented by securities or assets, until sixty (60) days following receipt by the Director of the Bureau of Competition of the Federal Trade Commission of written notice of the proposed acquisition or merger, which notice shall specifically refer to this order. If within sixty (60) days of receipt by the Director of said notice the Commission issues an administrative complaint challenging the proposed acquisition or merger, such proposed acquisition or merger shall not be consummated, nor shall any steps be taken to effectuate such proposed acquisition or merger until the administrative complaint issued by the Commission is dismissed by the Commission, until a final order as defined in 15 U.S.C. 21 and 45 is entered, or until a consent order is entered and served upon the respondents in that administrative proceeding. If within the aforesaid sixty (60) days the Bureau of Competition receives any written position papers from either

Harnischfeger or Northwest and the Bureau recommends issuance of a complaint, the Bureau shall promptly forward to the Commission such papers together with the written notice submitted to the Bureau Director. In the event that within sixty (60) days of the Director's receipt of said notice the Commission issues an administrative complaint challenging the proposed acquisition or merger, the Bureau of Competition shall exert its best efforts to complete the administrative proceeding in an expedited manner.

The execution of a contract between Harnischfeger and an independent distributor or dealer who also is, or formerly was, a distributor or dealer for Northwest shall not be deemed the acquisition of any part of the lattice boom crane business of Northwest under this paragraph, and the execution of a contract between Northwest and an independent distributor or dealer who also is, or formerly was, a distributor or dealer for Harnischfeger shall not be deemed the acquisition of any part of the lattice boom crane business of Harnischfeger under this paragraph, except that Harnischfeger and Northwest shall not jointly execute a contract between them and an independent distributor or dealer.

III.

It is further ordered, That until July 31, 1981 the total sales for each quarterly period or portion thereof based on a calendar year, between Harnischfeger and Northwest shall not account, either directly or indirectly, for an amount equivalent to 4 percent or more of Northwest's total sales for the previous fiscal year. Sales as used herein means the dollar value of total product and parts shipments and shall be accounted for as of the date of shipment.

IV.

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

V.

It is further ordered, That Harnischfeger and Northwest each 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 in which it has complied with this order. Thereafter, on or

before August 15, 1979 and annually thereafter until August 15, 1981, each shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order for the immediately preceeding consecutive twelve month period ending on July 31st. The fact that any activity is not prohibited by this order shall not bar a challenge to it by the United States Government, any agency thereof or any person.

277-685 O—79——61

IN THE MATTER OF

NELSON BROTHERS FURNITURE CORP.

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

Docket C-2941. Complaint, Dec. 8, 1978 — Decision, Dec. 8, 1978

This consent order, among other things, requires a Chicago, Ill. retailer of household goods to cease misrepresenting or failing to make relevant timely disclosures regarding the cost, savings, condition and availability of advertised merchandise; employing bait and switch tactics, or any other unfair or deceptive sales technique in the advertising and sale of its products. Additionally, the order provides customers with the right to arbitration for unresolved disputes and requires the firm to maintain prescribed business records for a period of three years.

Appearances

For the Commission: *Nathan P. Owen.*
For the respondent: *Sidley & Austin,* Chicago, Ill.

COMPLAINT

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

PARAGRAPH 1. Respondent Nelson Brothers Furniture Corp. 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 2750 West Grand Ave., Chicago, Illinois.

PAR. 2. Respondent is engaged in the operation of retail stores in the States of Illinois and Wisconsin. Its volume of business is substantial. In the operation of its retail stores respondent maintains showrooms in which it offers and sells to its customers an extensive line of home furnishings, bedding, carpeting, televisions, appliances and other merchandise. Much of the said merchandise is purchased from numerous suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, respondent causes, directly or indirectly, the aforesaid merchandise to be

shipped and distributed from manufacturing plants, warehouses, or from other sources of supply to its warehouses, distribution centers, or retail stores located in various states other than the state of origination, distribution or storage of said merchandise. Respondent maintains a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid merchandise in or affecting Commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of its business, as aforesaid, respondent disseminated and caused to be disseminated certain advertisements concerning the aforesaid merchandise by various means, including but not limited to advertisements in newspapers of general and interstate circulation, in radio and television broadcasts of interstate circulation and in other advertising media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said merchandise from respondent in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. Many of the said advertisements list, describe or depicted various items of said merchandise and also contained statements and representations concerning the price or terms at which said merchandise was offered for sale and sold to the public. Many of said advertisements contain further direct and express statements and representations concerning the time periods during which the offers were in effect.

PAR. 5. In the course and conduct of its business, and for the purpose of inducing the sale of its merchandise, respondent has made numerous statements and representations in newspaper advertisements, radio and television commercials and in other advertising media and in oral statements by salesmen to prospective customers.

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

1. Warehouse Clearance Sale. . .Every price has been slashed to ribbons to bring you the savings of a life time. . . Starting today. . .3 Big Days of Super Savings "Nelson Warehouse Priced"

2. Out of Our Warehouse Must sell 3 rooms of furniture! 16 pc. living rm., 11 pc bdrm., complete dinette. $333. Terms Nelsons' 2750 W. Grand (Classified Ad)

3. Hurry. . .Time is Running Out. Get This Beautiful 10-cup 'Toastmaster' Stainless Steel Automatic Coffee Maker Absolutely Free! Its yours Free with purchase of a Speed Queen Automatic Washer or Dryer with stainless steel drum. . .

4. Warehouse Sale

* * * * * * *

Look! Here are. . . Down-To-Earth Price Reductions! Here's Your Big Chance To Save!

* * * * * * *

It's the Buying Opportunity of a Lifetime

5. Grouped to Save you Money and Beautify Your Home. Get Your Share of Savings on this Special 3-room Offer! Everything is complete. . . "From the Rugs on the Floor. . .To the Pictures on the Wall" $688

6. Count the dollars you save on furniture by the roomful at Nelson Brothers' low warehouse prices Glamorous living roomfuls of furniture. . .complete from rugs on the floor to pictures on the wall. . .You'd expect the price tag to be $500.00 . . . low warehouse priced from $288.00.

Plenty of Credit for You. . .Free Delivery Too. (During the above television audio, slides were shown of 4 living room suites with the words "$288.00" superimposed on the slides when mentioned in the audio.)

Nelson Brothers loves me, and they'll love you too! (Jingle; sung.)

PAR. 6. 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, separately and in conjunction with the oral statements and representations of respondent's salesmen to customers and prospective customers, respondent has represented that:

1. Respondent's merchandise was offered for sale at special or reduced prices, and that savings were afforded to purchasers from respondent's regular selling prices.

2. Purchasers of respondent's advertised merchandise would realize significant savings from the price at which said merchandise was offered for sale or sold at retail by respondent in its recent regular course of business.

3. Merchandise advertised for sale by respondent in room groupings for one stated price afforded special or significant savings which were not available if all of the products depicted in said room groupings were purchased as a group at times other than those during which the group was advertised as being "on sale."

4. Respondent's advertised offer was made for a limited time only.

5. The prices at which respondent offered merchandise for sale in their advertisements were the prices at which said merchandise was sold to all customers who purchased such merchandise during the effective duration of said advertised offer.

6. At least one, or more, of the room "groupings" pictured in

respondent's television advertisements were available as shown for the price or prices set forth in said advertisements.

7. Respondent was making a bona fide offer to sell the advertised merchandise at the prices and on the terms and conditions stated in the advertisements.

8. The prices shown on the hang tags attached to merchandise in respondent's showrooms and labeled as "Nelsons' Warehouse Price" were the amounts at which said merchandise was sold or offered for sale by respondent for a reasonable substantial period of time in the recent, regular course of its business.

9. All purchasers of merchandise would receive free gifts or bonuses with the purchase of said merchandise when such gifts or bonuses were mentioned in the advertised offer.

10. The prices quoted in respondent's advertisements were the full amount which a customer would have to pay to have the merchandise in working order, as pictured in the advertisment, in his home.

PAR. 7. In truth and in fact:

1. Respondent's products were not offered for sale at special or reduced prices and savings were not afforded purchasers by way of reductions from respondent's regular selling prices. The prices stated in respondent's advertisments were available to purchasers at other times, both before and after the effective period of said advertisements.

2. Purchasers of respondent's advertised merchandise did not realize significant savings from the prices at which said merchandise had been offered for sale or sold at retail in its recent, regular course of business. The prices represented in said advertisements did not constitute reductions from those at which the same merchandise was regularly offered for sale or was available for purchase from respondent in its regular course of business.

3. Merchandise advertised for sale by respondent in room "groupings" for one stated price did not afford purchasers special or significant savings from the cost of such merchandise if purchased as a group as depicted in said advertisements at times other than those during which the group was advertised as "on sale."

4. Respondent's advertised prices were often not available for a limited time only but were available to purchasers before during or after the limited time described in the advertised offer.

5. The prices at which respondent offered merchandise for sale in their advertisments were often not the prices at which said merchandise was sold to all purchasers thereof during the effective

duration of said advertised offer. The advertised prices were only available to purchasers of the advertised merchandise who specifically requested said merchandise at the advertised prices.

6. In many instances, some of the room "groupings" pictured in respondent's television advertisements were not available for purchase as shown for the price or prices set forth in said advertisements.

7. Respondent was not making a bona fide offer to sell the advertised merchandise at the prices and on the terms and conditions stated in its advertisements. Said offers were frequently made for the purpose of obtaining leads or prospects for the sale of other merchandise at higher prices.

8. The prices shown on the hang tags attached to merchandise in respondent's showrooms and labeled as "Nelsons' Warehouse Price" were not the prices at which said merchandise was sold to the public for a reasonably substantial period of time in the recent, regular course of respondents' business.

9. Purchasers of merchandise did not always receive advertised free gifts or bonuses. The gifts or bonuses mentioned in respondent's advertisements were only given to those purchasers who specifically requested them when purchasing said advertised merchandise.

10. The prices quoted in respondent's advertisements were not all costs a customer was required to pay to have that item in working condition, as pictured in the advertisement, in his home. In addition to the prices quoted, certain other charges were frequently made: such as; installation, set up or assembly, service and warranty charges.

PAR. 8. In the further course and conduct of its business respondent has caused to be advertised merchandise without disclosing in said advertising that such merchandise was used or not new or damaged or defective or was otherwise classified as "distressed." Furthermore, respondent has sold, or offered for sale or has delivered merchandise without disclosing, orally or in writing, at the time of sale that such merchandise was used or not new or damaged or defective or was otherwise classified as "distressed."

Therefore, respondent's failure to disclose in advertising to prospective customers and failure to inform prospective customers or purchasers, orally or in writing, at the time of sale, that merchandise to be sold or offered for sale was used or not new or damaged or defective or was otherwise classified as "distressed" in furtherance of their deceptive advertising and sales practices, was an unfair or

deceptive practice, in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 9. In the further course and conduct of its business, respondent has made in its advertisements, offers of specific items of merchandise for sale at certain prices during certain times at certain of their stores. During the effective period of said advertisements, respondent has failed to have:

1. Each advertised item clearly and conspicuously available for sale to the public in each and every retail showroom at which the item was advertised as available;
2. At each location where an advertised item was displayed for sale, a sign or other marking clearly disclosing the item which was "as advertised" or "on sale";
3. Each advertised item individually and clearly marked with a price which was equal to or less than the advertised price;
4. Each advertised "room grouping" clearly and conspicuously marked with a "group" price which was at or below the advertised price; and
5. Each item included in the advertised group clearly and conspicuously listed and disclosed separately from items not included within the group.

Respondent's failure to adequately identify items in its showrooms or to have advertised items available in its showrooms, encouraged its salespersons to engage in bait and switch selling practices and other deceptive, false or misleading sales tactics.

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

PAR. 11. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition, in or affecting commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by the respondent.

PAR. 12. The aforesaid acts and practices of the respondent as herein alleged, were all to the prejudice and injury of the public and the respondent's competitors and constituted unfair methods of

competition in commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

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

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

A. Proposed Respondent Nelson Brothers Furniture Corp. 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 2750 West Grand Ave., Chicago, Illinois.

B. 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

A. It is ordered that respondent, Nelson Brothers Furniture Corp., a corporation, its successors and assigns, directly or through

its officers, agents, representatives, sales persons and employees, or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, sale and distribution of home furnishings, bedding, carpeting, televisions, appliances, or any other merchandise, to the public, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Advertising or offering for sale any merchandise at a special or reduced price, unless such price constitutes a significant reduction from the price at which such merchandise has been sold or openly offered for sale by respondent for a reasonably substantial period of time in the recent, regular course of respondent's business.

2. Advertising or offering for sale any group, set, suite, or similar combination of merchandise at a group "sale" price, or price described by words of similar meaning or import, unless the "sale" price at which the merchandise is offered constitutes a bona fide and reasonably significant reduction from the most recent price at which the group was sold or openly offered for sale for a reasonably substantial period of time in the recent, regular course of respondent's business.

3. Advertising or offering for sale any merchandise which is limited as to quantity or availability unless such limitations are clearly and conspicuously disclosed in such advertising or offering in immediate conjunction with or in close proximity to the advertised merchandise so limited and the limitations are actually enforced and adhered to.

4. Failing to sell or to offer for sale advertised merchandise at the terms and conditions and at or below the price disclosed in the advertisement for the said merchandise.

Provided, however, that it shall constitute a defense to a charge under Paragraph 3 or 4 of this order if respondent maintains records sufficient to show that: a) the advertised merchandise was ordered in normally adequate time for delivery, b) the advertised merchandise was ordered in quantities sufficient to meet reasonably anticipated demands and c) the advertised merchandise was not delivered to the customer due to circumstances beyond the respondent's control.

5. Using pictorial representations of two or more items of merchandise in conjunction with a stated price or range of prices when all of the merchandise in the pictorial representations is not being offered at the stated price or range of prices, unless a clear and conspicuous disclosure is made in immediate conjunction with or inclose proximity to the stated price or range of prices identifying

merchandise which is included or is not included in the stated price or range of prices.

6. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of merchandise.

7. Advertising or offering for sale, orally or in writing, any merchandise or services when the purpose of the advertising or offer is not to sell the offered merchandise or services but to obtain leads or prospects for the sale of other merchandise or services at higher prices.

8. Discouraging or disparaging the purchase of any merchandise or services which are advertised or offered for sale.

9. Representing that any price is respondent's regular, usual, former, customary or original price, unless such price is the price at which such merchandise or service has been sold or openly offered for sale by respondent for a reasonably substantial period of time in the recent and regular course of respondent's business, and does not exist for the purpose of establishing a fictitious price upon which a deceptive comparison, or "free" or similar offer might be based.

10. Using the words "free" or "gift" or any other word or words of similar import or meaning in connection with the sale, offering for sale or distribution of respondent's merchandise or services in advertisements or other offers to the public, as descriptive of an article of merchandise or service:

(a) When all the conditions, obligations, or other prerequisites to the receipt and retention of the "free" or "gift" article of merchandise or service offered are not clearly and conspicuously disclosed in immediate conjunction with or in close proximity to the "free" or "gift" offer.

(b) When, with respect to any article of merchandise or service required to be purchased in order to obtain the "free" or "gift" article or service, the offeror either (i) increases the ordinary and usual price of such merchandise or service or (ii) reduces the quality or (iii) reduces the quantity or size thereof.

11. Failing to give "free" or "gift" merchandise to all persons who complied with the terms and conditions of the "free" or "gift" offer.

12. Using pictorial representations in advertising, unless such pictorial representations describe or show the advertised merchandise with sufficient clarity so that the advertised merchandise can be

readily identifiable by potential customers when visiting respondent's showrooms.

13. Failing to disclose in advertising, in a clear and conspicuous manner, in immediate conjunction with or in close proximity to the advertised merchandise, that such merchandise is used or not new or damaged or defective or is otherwise classified as "distressed" if such is the case.

14. Failing to inform all customers at the time of sale and to provide in writing on the face of all order forms, in close proximity to the description and price of the merchandise being sold that such merchandise is used or not new or damaged or defective or is otherwise classified as "distressed" if such is the case.

15. Failing to inform all customers at the time of sale and to provide in writing on the face of all order forms, in close proximity to the description and price of the merchandise being sold, that such merchandise will be sold "as is," or "as shown" with defects, irregularities or damage if such is the case.

16. Failing to have each customer who has agreed to purchase merchandise on an "as is" or "as shown" basis, sign at the time of sale, the following statement stamped on the face of the order form in close proximity to a description of the merchandise and written in the same language as that used in the sales presentation, with text of not less than ten-point boldface type:

> THE ABOVE DESCRIBED MERCHANDISE IS SOLD "AS IS" OR "AS SHOWN" WITH DEFECTS, IRREGULARITIES OR DAMAGE.
>
> _____
>
> CUSTOMER SIGNATURE

17. Failing to disclose in its advertising and at the time of sale that in addition to the price quoted in respondent's advertising, certain other charges, as applicable, are made for installation, assembly, delivery or for other services performed in connection with the sale or delivery of merchandise.

18. Failing to maintain and produce for inspection and copying for a period of three years from the date of service of this order, or the date of the event, whichever is later, adequate records to document:

a. Respondent's total costs for each advertisement run by them during the three years; and

b. The volume of sales made of the advertised product or service at the advertised price; and

c. The factual basis for any representations or statements as to

special or reduced prices, as to usual or customary retail prices, as to savings afforded purchasers, and as to similar representations of the type described in Paragraphs A.1. and A.2. of this order; and

d. The number of advertised items in stock as of the first day the advertisement is run, the last day the advertisement is run, and six weeks to the day after the termination of the publication of the advertisement; and

e. Copies of all advertisements, including newspapers, radio and television advertisements, direct mail and in-store solicitation literature and any other promotional material distributed to the public; and

f. The names and addresses of all customers who purchased "as is" or "as shown" merchandise.

B. *It is further ordered,* That respondent cease and desist from advertising or offering for sale any merchandise at any stated price, unless during the effective period of an advertised offer:

1. Each advertised item is clearly and conspicuously available for sale to the public at or below the advertised price in each store covered by the advertisement;

2. At each location within each store where an advertised item is displayed there is a sign or other conspicuous marking attached to or in close proximity to the item clearly disclosing that the item is "as advertised" or "on sale" or words of similar import and meaning;

3. Each advertised item is individually and clearly marked with the price which is at or below the advertised price; and

4. Each advertised "room grouping" is clearly and conspicuously marked by a "group" price which is at or below the advertised price; and

5. Each item included in the advertised group is clearly and conspicuously listed and disclosed separately from items not included within the group.

C. *It is further ordered,* That respondent shall deliver a copy of this order to cease and desist to each of its operating divisions and to each of its present and future officers, directors, and personnel engaged in any way in the offering for sale, sale or distribution of any product, in any aspect of preparation, creation or placing of any and all advertisements, and in any processing, counselling, consummation or enforcement of any extension of consumer credit, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

D. *It is further ordered,* That respondent shall provide each

present and future advertising agency utilized by respondents with a copy of this order to cease and desist.

E. *It is further ordered,* That in addition to other rights given to a customer pursuant to this order, if the respondent and a customer are unable to agree upon a settlement of any controversy which is concerned with or relates to the quality, quantity, condition, repair or replacement of furniture, appliances, or other merchandise, or the failure to replace or repair damaged or defective merchandise, or to make cancellations with refunds with respect thereto, then, at the option of the customer, such customer shall have the right to submit the issues to an impartial arbitration procedure entailing no mandatory administrative cost or filing fee to the customer, which shall be conducted in accordance with the arbitration rules and procedures of the Arbitration Program of the Better Business Bureau of Metropolitan Chicago, Inc., 35 E. Wacker Drive, Chicago, IL 60601. Customers of respondent's Wisconsin stores who elect to seek arbitration pursuant to this paragraph shall be entitled to a proceeding conducted in accordance with the arbitration rules and procedures of the Council of Better Business Bureaus, Inc., 1150 17th St., N.W., Washington, D.C. 20036 conducted by the Better Business Bureau of Greater Milwaukee, 174 W. Wisconsin Ave., Milwaukee, Wisconsin 53203.

F. *It is further ordered,* That respondent comply with and abide by any award or decision rendered pursuant to the arbitration provision hereof.

Furthermore, respondent shall not be entitled to prevent arbitration pursuant to any provision of this order by reason of having obtained a default judgment against any customer in an action for money allegedly due the respondents or their assignees.

G. *It is further ordered,* That respondent shall provide notification to customers of their right to submit such controversy to arbitration by prominently displaying the following notice in all its stores at the location where customers usually execute consumer credit instruments or other legally binding documents, such notice being written in the same language as that used in the sales presentation with text of not less than ten-point boldface type:

NOTICE TO ALL CUSTOMERS

Any controversy which is concerned with or relates to the quality, quantity, condition, repair or replacement of furniture, appliances or other merchandise, or the failure to replace or repair damaged or defective merchandise, or to make cancellations with refunds with respect thereto shall be settled, at the option of the customer, and at no cost to the customer, by arbitration.

(Illinois stores conclude:)

Such arbitration shall be conducted in accordance with the rules and procedures of the Arbitration Program of the Better Business Bureau of Metropolitan Chicago, Inc. Consumers seeking arbitration should contact the Better Business Bureau of Metropolitan Chicago, Inc., whose offices are located at 35 E. Wacker Drive, Chicago, Illinois 60601, telephone (312) 346-3313.

Under Illinois state law, arbitration, if undertaken is legally binding and final!

(Wisconsin stores conclude:)

Such arbitration shall be conducted in accordance with the rules and procedures of the Council of Better Business Bureaus, Inc., 1150 17th Street N.W., Washington, D.C. 20036 conducted by the Better Business Bureau of Greater Milwaukee. Consumers seeking arbitration should contact the Better Business Bureau of Greater Milwaukee, Wisconsin 53203, telephone (414) 273-4300.

Under Wisconsin state law, arbitration, if undertaken is legally binding and final!

Respondent is authorized and directed to change the instructions, contained in the Notice set forth above as to how to secure arbitration, if circumstances require.

H. *It is further ordered,* That respondent shall maintain full and complete records and copies of all complaint correspondence received from customers, and any internal memoranda written in connection therewith, and full and complete records of all oral complaints and requests for service or repair, for a period of three (3) years from the date of receipt thereof.

I. *It is further ordered,* That nothing contained in this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondent from complying with agreements, orders or directives of any kind obtained by any other municipal, state or federal agency, except to the extent that they are inconsistent with the terms and conditions of this order, or act as a defense to actions instituted by municipal, state or federal agencies.

Nothing in this order shall be construed to imply that any past or future conduct of respondent complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

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

K. *It is further ordered,* That respondent herein shall, within sixty (60) days after service upon it of this order, file with the

Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

LOCKHEED CORPORATION

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

Docket C-2942. Complaint, Dec. 21, 1978 — Decision, Dec. 21, 1978

This consent order, among other things, requires a Burbank, Calif. aircraft manufacturer and its subsidiaries to cease offering or making payments to influential foreign entities for the purpose of preventing competition in the sale of their aircraft abroad; and to keep adequate documentation for all payments, brokerage fees, commissions, or political campaign contributions paid to any one foreign party which total annually in excess of $100,000. Respondents are additionally required to report to the Commission, within ten days, any corporate policy change which relates to foreign sales activities.

Appearances

For the Commission: *Daniel A. Laufer* and *Jaime Taronji, Jr.*
For the respondent: *Roger Clark, Rogers & Wells,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Lockheed Corporation, a corporation under the jurisdiction of the Commission, has violated Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13(c)) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

PARAGRAPH 1. Lockheed Corporation (hereinafter "Lockheed") is a California corporation with its principal office and place of business located at 2555 Hollywood Way, Burbank, California.

PAR. 2. At all times relevant herein, Lockheed was engaged in the purchase or sale of products and services in interstate and foreign commerce and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

PAR. 3. Between 1970 and 1975, in connection with certain export sales of jet aircraft by Lockheed in competition with other domestic aircraft manufacturers, Lockheed made payments to or intended for foreign government officials or officers or employees of foreign commercial customers who were in a position to make or influence the decision whether or not to purchase the aircraft offered for sale

by Lockheed. Such payments, in some instances, effectively excluded other domestic aircraft manufacturers from selling their aircraft to the governments and airlines whose officials, officers, and employees had received the payments.

PAR. 4. The above-described acts, practices and methods of competition by Lockheed committed in a successful attempt to procure aircraft sales for itself and deny such sales to domestic competitors, constitute unfair acts or practices and unfair methods of competition in violation of Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13(c)) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

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 Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of the Federal Trade Commission Act and the Robinson-Patman 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 jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Lockheed Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business at 2555 Hollywood Way, Burbank, 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 hereby ordered, That respondent Lockheed Corporation, and its officers, agents, employees, representatives, successors and assigns, and its subsidiaries, through any corporate or other device, in its transactions in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist, in connection with its foreign sales activity, from offering to make or making payments to officers, employees, agents or representatives of commercial customers or foreign governments in any form whatsoever, directly or indirectly, where the purpose of such payments is to influence the recipient of the payment or the customer to favor respondent at the expense of one or more domestic competitors of respondent or to prevent domestic competitors from bidding, selling, or otherwise doing business in competition with respondent in the sale of aircraft, aircraft parts or related services to foreign governments or business entities. For purposes of this order, "payments" shall not include normal business expenditures for entertainment, travel or small gifts (the cost of which does not exceed $1,000 per gift) for promotion of respondent's products or services, or payments permitted under Sections 103(b) or 104(d)(2) of the Foreign Corrupt Practices Act of 1977.

It is further ordered, That respondent and its subsidiaries shall maintain adequate documentation, with respect to all payments referred to in the previous paragraph; and with respect to all brokerage fees, commissions or political campaign contributions which total in excess of $100,000 in any calendar year, paid to any one foreign public official, person, firm, corporation, or other foreign entity, and the Federal Trade Commission shall have continuing access to such documentation. Such documentation shall include, but not be limited to, all internal memoranda, all financial documents, and all correspondence with third persons, firms, corporations, or other entities regarding such payments, brokerage fees, commissions, or political campaign contributions and all correspondence with international marketing consultants regarding breaches of their consulting contracts, maintained in the ordinary course of business.

It is further ordered, That in the event there is to be any change of respondent's policy respecting payments by respondent in connection with its foreign sales activities, respondent will file with the Federal Trade Commission, within ten (10) days of the date when

such change in policy is scheduled to become effective, a report detailing the change in such policy proposed to be made.

It is further ordered, That any violation of this order shall be considered a continuing violation from the date any offer of payment or payment is made, whichever occurs first, until the date any contract procured by such offer or payment, whether or not such contract is altered, amended, or modified, is fulfilled or terminated, and each day of continuation shall be treated as a separate violation in accordance with Section 5(m)(1)(c) of the Federal Trade Commission Act. This continuing violation provision shall apply only to "payments" proscribed by this order and shall not apply to "offers" that do not result in a proscribed payment.

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

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

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

IN THE MATTER OF

THE BOEING COMPANY

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

Docket C-2943. Complaint, Dec. 21, 1978 — Decision, Dec. 21, 1978

This consent order, among other things, requires a Seattle, Wash. aircraft manufacturer and its subsidiaries to cease offering or making payments to influential foreign entities for the purpose of preventing competition in the sale of their aircraft abroad; and to keep adequate documentation for all payments, brokerage fees, commissions, or political campaign contributions paid to any one foreign party which total annually in excess of $100,000. Respondents are additionally required to report to the Commission, within ten days, any corporate policy change which relates to foreign sales activities.

Appearances

For the Commission: *Daniel A. Laufer* and *Jaime Taronji, Jr.*

For the respondent: *Harold Olsen, Perkins, Core, Stone, Olsen & Williams,* Seattle, Wash.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Boeing Company, a corporation under the jurisdiction of the Commission, has violated Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13(c)) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

PARAGRAPH 1. The Boeing Company (hereinafter "Boeing") is a Delaware corporation with its principal office and place of business located at 7755 East Marginal Way South, Seattle, Washington.

PAR. 2. At all times relevant herein, Boeing was engaged in the purchase or sale of products and services in interstate and foreign commerce and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

PAR. 3. Between 1970 and 1975, in connection with certain export sales of jet aircraft by Boeing in competition with other domestic aircraft manufacturers, Boeing made payments to or intended for foreign government officials or officers or employees of foreign commercial customers who were in a position to make or influence

the decision whether or not to purchase the aircraft offered for sale by Boeing. Such payments, in some instances, effectively excluded other domestic aircraft manufacturers from selling their aircraft to the governments and airlines whose officials, officers, and employees had received the payments.

PAR. 4. The above-described acts, practices and methods of competition by Boeing committed in a successful attempt to procure aircraft sales for itself and deny such sales to domestic competitors, constitute unfair acts or practices and unfair methods of competition in violation of Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13(c)) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

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 Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of the Federal Trade Commission Act and the Robinson-Patman 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 jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent The Boeing 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 at 7755 East Marginal Way South, Seattle, Washington.

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 hereby ordered, That respondent The Boeing Company, and its officers, agents, employees, representatives, successors and assigns, and its subsidiaries, through any corporate or other device, in its transactions in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist, in connection with its foreign sales activity, from offering to make or making payments to officers, employees, agents or representatives of commercial customers or foreign governments in any form whatsoever, directly or indirectly, where the purpose of such payments is to influence the recipient of the payment or the customer to favor respondent at the expense of one or more domestic competitors of respondent or to prevent domestic competitors from bidding, selling, or otherwise doing business in competition with respondent in the sale of aircraft, aircraft parts or related services to foreign governments or business entities. For purposes of this order, "payments" shall not include normal business expenditures for entertainment, travel or small gifts (the cost of which does not exceed $1,000 per gift) for promotion of respondent's products or services, or payments permitted under Sections 103(b) or 104(d)(2) of the Foreign Corrupt Practices Act of 1977.

It is further ordered, That respondent and its subsidiaries shall maintain adequate documentation, with respect to all payments referred to in the previous paragraph; and with respect to all brokerage fees, commissions or political campaign contributions which total in excess of $100,000 in any calendar year, paid to any one foreign public official, person, firm, corporation, or other foreign entity, and the Federal Trade Commission shall have continuing access to such documentation. Such documentation shall include, but not be limited to, all internal memoranda, all financial documents, and all correspondence with third persons, firms, corporations, or other entities regarding such payments, brokerage fees, commissions, or political campaign contributions and all correspondence with international marketing consultants regarding breaches of their consulting contracts, maintained in the ordinary course of business.

It is further ordered, That in the event there is to be any change of respondent's policy respecting payments by respondent in connection with its foreign sales activities, respondent will file with the

Federal Trade Commission, within ten (10) days of the date when such change in policy is scheduled to become effective, a report detailing the change in such policy proposed to be made.

It is further ordered, That any violation of this order shall be considered a continuing violation from the date any offer of payment or payment is made, whichever occurs first, until the date any contract procured by such offer or payment, whether or not such contract is altered, amended, or modified, is fulfilled or terminated, and each day of continuation shall be treated as a separate violation in accordance with Section 5(m)(l)(c) of the Federal Trade Commission Act. This continuing violation provision shall apply only to "payments" proscribed by this order and shall not apply to "offers" that do not result in a proscribed payment.

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

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

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

IN THE MATTER OF

McDONNELL DOUGLAS CORPORATION

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

Docket C-2944. Complaint, Dec. 21, 1978 — Decision, Dec. 21, 1978

This consent order, among other things, requires a St. Louis County, Mo. aircraft manufacturer and its subsidiaries to cease offering or making payments to influential foreign entities for the purpose of preventing competition in the sale of their aircraft abroad; and to keep adequate documentation for all payments, brokerage fees, commissions, or political campaign contributions paid to any one foreign party which total annually in excess of $100,000. Respondents are additionally required to report to the Commission, within ten days, any corporate policy change which relates to foreign sales activities.

Appearances

For the Commission: *Daniel A. Laufer* and *Jaime Taronji, Jr.*

For the respondent: *Alfred W. Cortese, Jr., Clifford, Glass, McIlwain & Finney,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that McDonnell Douglas Corporation, a corporation under the jurisdiction of the Commission, has violated Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13(c)) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

PARAGRAPH 1. McDonnell Douglas Corporation (hereinafter "MDC") is a Maryland corporation with its principal office and place of business located at Airport and Brown Roads, St. Louis County, Missouri.

PAR. 2. At all times relevant herein, MDC was engaged in the purchase or sale of products and services in interstate and foreign commerce and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

PAR. 3. Between 1970 and 1975, in connection with certain export sales of jet aircraft by MDC in competition with other domestic aircraft manufacturers, MDC made payments to or intended for foreign government officials or officers or employees of foreign

commercial customers who were in a position to make or influence the decision whether or not to purchase the aircraft offered for sale by MDC. Such payments, in some instances, effectively excluded other domestic aircraft manufacturers from selling their aircraft to the governments and airlines whose officials, officers, and employees had received the payments

PAR. 4. The above-described acts, practices and methods of competition by MDC committed in a successful attempt to procure aircraft sales for itself and deny such sales to domestic competitors, constitute unfair acts or practices and unfair methods of competition in violation of Section 2(c) of the Robinson-Patman Act (15 U.S.C. 13 (c)) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45).

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 Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with a violation of the Federal Trade Commission Act and the Robinson-Patman 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 jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent McDonnell Douglas Corporation is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Maryland, with its principal place of business at Airport and Brown Roads, St. Louis County, Missouri.

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 hereby ordered, That respondent McDonnell Douglas Corporation, and its officers, agents, employees, representatives, successors and assigns, and its subsidiaries, through any corporate or other device, in its transactions in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist, in connection with its foreign sales activity, from offering to make or making payments to officers, employees, agents or representatives of commercial customers or foreign governments in any form whatsoever, directly or indirectly, where the purpose of such payments is to influence the recipient of the payment or the customer to favor respondent at the expense of one or more domestic competitors of respondent or to prevent domestic competitors from bidding, selling, or otherwise doing business in competition with respondent in the sale of aircraft, aircraft parts or related services to foreign governments or business entities. For purposes of this order, "payments" shall not include normal business expenditures for entertainment, travel or small gifts (the cost of which does not exceed $1,000 per gift) for promotion of respondent's products or services, or payments permitted under Sections 103(b) or 104(d)(2) of the Foreign Corrupt Practices Act of 1977.

It is further ordered, That respondent and its subsidiaries shall maintain adequate documentation, with respect to all payments referred to in the previous paragraph; and with respect to all brokerage fees, commissions or political campaign contributions which total in excess of $100,000 in any calendar year, paid to any one foreign public official, person, firm, corporation, or other foreign entity, and the Federal Trade Commission shall have continuing access to such documentation. Such documentation shall include, but not be limited to, all internal memoranda, all financial documents, and all correspondence with third persons, firms, corporations, or other entities regarding such payments, brokerage fees, commissions, or political campaign contributions and all correspondence with international marketing consultants regarding breaches of their consulting contracts, maintained in the ordinary course of business.

It is further ordered, That in the event there is to be any change of

respondent's policy respecting payments by respondent in connection with its foreign sales activities, respondent will file with the Federal Trade Commission, within ten (10) days of the date when such change in policy is scheduled to become effective, a report detailing the change in such policy proposed to be made.

It is further ordered, That any violation of this order shall be considered a continuing violation from the date any offer of payment or payment is made, whichever occurs first, until the date any contract procured by such offer or payment, whether or not such contract is altered, amended, or modified, is fulfilled or terminated, and each day of continuation shall be treated as a separate violation in accordance with Section 5(m)(1)(c) of the Federal Trade Commission Act. This continuing violation provision shall apply only to "payments" proscribed by this order and shall not apply to "offers" that do not result in a proscribed payment.

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

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

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

IN THE MATTER OF

THE HERTZ CORPORATION

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

Docket C-2945. Complaint, Dec. 21, 1978 — Decision, Dec. 21, 1978

This consent order, among other things, requires a New York City car rental company to provide each charge account customer having five dollars or more as a credit balance with periodic statements reflecting that balance; notify such customers that credit balances are refundable; and automatically refund unclaimed credit balances within seven months of their occurrence. The order would additionally prohibit the company from writing off credit balances, and would require the firm to refund, upon request, any credit balance created during the past six years.

Appearances

For the Commission: *Micheal J. Vitale,* Atty. and *Irvin E. Abrams,* Investigator.

For the respondent: *Arthur K. Kahn,* Philadelphia, Pa.

COMPLAINT

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

PARAGRAPH 1. Respondent The Hertz Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 660 Madison Ave., New York, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the business of offering to rent and the renting of automobiles to the general public.

PAR. 3. In the ordinary course and conduct of its business as aforesaid, respondent rents automobiles in various States of the United States and the District of Columbia. By these and other operations respondent engages in, and at all times mentioned has been engaged in, a substantial course of business in or affecting

commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the ordinary course and conduct of its business as aforesaid, respondent permits its customers who qualify for credit to charge the rental of respondent's automobiles. Respondent bills certain of its rental customers by having the rental station at which the customer rents the automobile invoice the customer following the completion of the rental. These customers, referred to by respondent as "direct billing customers," receive no other bill. Certain other customers of respondent, referred to by respondent as "central billing customers," are billed by respondent from a central office through the use of periodic billing statements. On occasion, direct billing and central billing customers make overpayments or duplicate payments. Consequently, a customer occasionally has a "credit balance" (an amount of money owed to the customer by respondent). This credit balance is the result of a previously described overpayment or duplicate payment by the customer.

PAR. 5. Prior to May of 1976, respondent had no system for informing direct billing customers that they had a credit balance and that they were entitled to request and receive a cash refund of this balance. Furthermore, respondent did not refund credit balances to its direct billing customers unless it received a request for a refund, nor did it make cash refund of credit balances to its central billing customers unless it received a request for such a refund.

PAR. 6. By thus failing to notify certain of its customers whose accounts reflected credit balances that the credit balances existed, and that they had the right to request and receive cash payment of their credit balances, and by failing to refund without request such credit balances which existed for a substantial period of time, a number of respondent's customers were deprived of the use of substantial sums of money. Therefore, the acts and practices described in Paragraph Five above were unfair.

PAR. 7. The acts and practices of respondent as set forth in Paragraphs Five and Six above, were to the prejudice and injury of the public and constituted unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer

Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

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

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

1. Respondent The Hertz Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 660 Madison Ave., New York, New York.

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

ORDER

It is ordered, That The Hertz Corporation, a corporation, its successors and assigns and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the extension of credit incident to the business of renting of automobiles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from:

I.

A. Failing to mail to each customer having a credit balance in excess of five dollars ($5.00), created after the date of service of this order, a statement in each billing period following the creation of the

credit balance, clearly setting forth such credit balance, except that with respect to central billing customers, as "central billing customer" is defined in Paragraph Four of the complaint or other customers with accounts cumulatively billed on periodic statements, such statement shall be mailed whenever a credit balance in excess of one dollar ($1.00) is created; *provided, however,* that no statement need be sent once a credit balance is refunded or a fully offsetting purchase is made; and, *provided further,* that if the credit balance is created in connection with a direct billing customer, as "direct billing customer" is defined in Paragraph Four of the complaint, no statement need be sent if the balance is refunded within thirty (30) days following the time it was created.

B. Failing to notify each customer to whom respondent is required to send a statement under Paragraph I.A. of the customer's right to request and receive a refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each statement required by Paragraph I.A. and accompanied by a return envelope, if it is the customary practice of the division or unit to accompany billing statements with return envelopes. Such notice shall in all material respects be consistent with, but need not be identical to, the following:

NO PAYMENT REQUIRED

This Credit Balance shown on the enclosed statement represents money we owe you. You may obtain a refund by returning this statement with a request for a refund. If you do not use your account or request a refund, a check will be mailed to you within seven (7) months after you were sent the statement on which this credit was first reflected. But a credit balance of five dollars ($5.00) will not be refunded unless specifically requested.

The notice furnished in compliance with this paragraph shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the statement, or entirely on the reverse side of the statement, or entirely on one side of a separate page. In the event such notice is not on the face of the statement, then the statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see (enclosed instructions) OR (reverse side)."

C. Failing to refund to each customer with a credit balance of more than five dollars ($5.00) created after the date of service of the order the full amount of said credit balance no later than the end of the seventh (7th) consecutive month after the first statement reflecting the credit balance was sent to the customer and during which the customer neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the customer; *provided, however,* that nothing contained in this

Paragraph C. shall prevent such a refund being made by giving a credit certificate or refund letter in the full amount of the credit balance which may, at the customer's option, be applied to subsequent rental charges or returned for a cash refund. Such certificate or refund letter or an accompanying notice attached to the certificate or refund letter shall clearly and conspicuously disclose that it is redeemable for cash if the customer returns the certificate or refund letter by mail with a request for a cash refund or that it may be applied to subsequent rental charges if the customer returns the certificate or refund letter in full or partial payment for such charges.

D. Writing off, deleting or transferring any credit balance of more than one dollar ($1.00) created after the date of service of this order from a customer's account before a refund has been made or the customer has made a fully offsetting purchase, unless such credit balance is not in fact owed to the customer or unless there has been compliance with Section III. of this order.

II.

It is further ordered, That respondent shall:

A. Within one hundred and eighty (180) days after service of this order, mail or deliver to each customer having a credit balance in excess of five dollars ($5.00) created during the three (3) year period immediately preceding the date of service of this order a statement clearly setting forth such credit balance; *provided, however,* that no statement need be sent if a credit balance has been refunded or a fully offsetting purchase has been made.

B. Within one hundred eighty (180) days after service of this order, notify each customer to whom respondent is required to send a statement under Paragraph II.A. of the customer's right to request and receive a refund in the amount of such credit balance, such notice to be accompanied by a clear and conspicuous disclosure on or enclosed with the statement required by Paragraph II.A. and accompanied by a return envelope, if it is the customary practice of the division or unit to accompany billing statements with return envelopes. The first such notice shall in all material respects be consistent with, but need not be identical to, the following:

NO PAYMENT REQUIRED

The Credit Balance shown on the enclosed statement represents money we owe you. You may obtain a refund by returning this statement with a request for a refund. If you do not use your account or request a refund, a check will be mailed to you within seven (7) months.

The disclosure furnished in compliance with this paragraph shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the reverse side of the statement, or entirely on one side of a separate page. In the event such disclosure is not on the face of the statement, then the statement shall state clearly and conspicuously on its face "Credit balance. Do not pay. For refund see (enclosed instructions) OR (reverse side.)"

C. Refund to each customer with a credit balance of more than five dollars ($5.00) created during the three (3) year period preceding the date of service of this order the full amount of said credit balance no later than seven (7) months following the date the statement provided in Paragraph B. of this Section II. is sent and the customer neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the customer; *provided, however,* that nothing contained in this Paragraph C. shall prevent such a refund from being made by giving a credit certificate or refund letter in the full amount of the credit balance which may, at the customer's option, be applied to subsequent rental charges or returned for a cash refund. Such certificate(s) or refund letter or any accompanying notice attached to the certificate or refund letter shall clearly and conspicuously disclose that it is redeemable for cash if the customer returns the certificate or refund letter by mail with a request for a cash refund or that it may be applied to subsequent rental charges if the customer returns the certificate or refund letter in full or partial payment for such charges.

D. Refrain from writing off or deleting or transferring any credit balance of more than five dollars ($5.00) created during the three (3) year period immediately preceding the date of service of this order from a customer's account before a refund has been made or the customer has made a fully offsetting purchase, unless such credit balance is not in fact owed to the customer or unless there has been compliance with Section III. of this order.

III.

It is further ordered, That:

A. Each refund required or permitted to be made by this order shall be given to the customer by mailing a check payable to the order of the customer or mailing a credit certificate or a refund letter which clearly states that it may be returned for a cash refund or returned in full or partial payment of subsequent rental charges. Each statement, notice or refund sent pursuant to Paragraph I.A.,

I.B., or I.C. of this order shall be mailed to the customer at the last known billing address of the customer and each such statement, notice or refund sent pursuant to Paragraph I.A., I.B., I.C. of this order shall have the notation "Address Correction Requested" appropriately placed on the envelope. In the event that any statement, notice or refund sent pursuant to this order reflecting a credit in the amount of fifteen dollars ($15.00) or more is returned to respondent by reason of the fact that the customer to whom it was mailed is not located at the address to which it was sent, respondent shall then attempt to obtain from a credit bureau the most current address available for the customer by means of an infile report or other report on information then existing in the credit bureau's file. If a new address is obtained, respondent shall remail the check, statement, notice, refund letter or credit certificate to the customer at such address, except that in the case of credit balances created after the date of service of this order, respondent may, at its option, deduct the cost of obtaining such information from the credit bureau from the amount owing to the customer.

With respect to all customers whose credit balances were created during the three (3) year period immediately preceding the date of service of this order and who have not been located by the preceding method, respondent shall have no further obligation under this order except as stated below. For all customers whose credit balances are created after service of this order and who have not been located by the preceding method, respondent shall retain on the account the amount of the credit balance for one year from the date on which the statement, notice or refund was mailed, and respondent shall be relieved of any further obligation to send any additional statement, notice or refund with respect to the credit balance in question.

Provided, however, that, in the event any customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph III.B.

In the event that any statement, notice or refund sent pursuant to this order reflecting a credit balance in the amount of less than fifteen dollars ($15.00) is returned to respondent by reason of the fact that the customer to whom it was mailed is not located at the address to which it was sent, respondent shall have no further obligation to send any additional statement, notice or refund with respect to the credit balance in question; *provided, however,* that, in the event said customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph III.B.

B. When a customer requests by mail, a refund of a credit

balance in any amount which had been reflected at any time on such customer's account within the six (6) year period preceding such request, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with the reason(s) for refusing to refund the amount requested and supporting documentation, when requested and available, of the reason(s).

IV.

It is further ordered, That a credit balance shall be deemed to be created (1) in the case of a central billing account, at the end of the billing period in which the credit balance is first recorded on a customer's account; *provided, however,* that whenever the recorded amount of an existing credit balance is changed, the new credit balance, if any, resulting from such change shall be deemed to be created at the end of the billing period in which the change occurred, and respondent's obligations under this order with respect to the credit balance existing prior to such change shall be terminated and shall be replaced by its obligations under this order with respect to the new credit balance created by said change, and (2) in the case of a direct billing, at the time of receipt of the excess payment.

V.

It is further ordered, That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by third parties.

VI.

It is further ordered, That respondent shall maintain the following data: name and address of each customer who was sent a refund of a credit balance without request; the date the credit balance was created and the date it was refunded; and the amount of the credit balance. Respondent shall also maintain the following data: the names and addresses of all customers who requested a refund of a credit balance but whose request was refused; the date the request was made; the date a refusal was sent to the customer; the amount of the requested refund; a copy of any written explanation for the refusal sent to the customer; and, if no written explanation for the refusal was made, a statement of the reasons for the refusal.

VII.

It is further ordered, That respondent shall retain the records

required to be maintained by Paragraph VI. of this order for a period of three (3) years and, upon request, shall produce said records for the purpose of examination and copying by representatives of the Federal Trade Commission.

VIII.

It is further ordered, That in the event the Commission promulgates a trade regulation rule affecting or governing the credit practices of companies engaged in the car rental business, the requirements of which trade regulation rule are less onerous with respect to record preservation, notices, and procedures for and timing of refunds than those contained herein, respondent may elect to comply with such provisions in lieu of the corresponding provisions of this order.

IX.

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

X.

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions engaged in the receipt of payments for rental of automobiles.

XI.

It is further ordered, That respondent shall, within one hundred twenty (120) days after service of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

NORRIS INDUSTRIES, INC.

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

Docket C-2946. Complaint, Dec. 27, 1978 — Decision, Dec. 27, 1978

This consent order, among other things, requires a Long Beach, Calif. manufacturer and distributor of dishwashers and other major home appliances to cease misrepresenting, or making unsubstantiated claims regarding the qualities, performance or efficacy of its products.

Appearances

For the Commission: *Robert Barton* and *Laurence Kahn.*
For the respondent: *R. James Shaffer,* Long Beach, Calif.

COMPLAINT

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

PARAGRAPH 1. Respondent Norris Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its executive office and principal place of business located at One Golden Shore, Long Beach, California.

PAR. 2. Respondent now, and for some time last past has been, engaged in the distribution, sale and advertising of portable and undercounter dishwashers and other consumer products to the public.

PAR. 3. Respondent causes the said products to be transported from its places of business in various States of the United States to various dealers and distributors for sale to purchasers located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent at all times mentioned herein has been, and now is, in substantial competition in commerce with individuals,

firms and corporations engaged in the sale and distribution of dishwashers and other consumer products.

PAR. 5. In the course and conduct of its business, and for the purpose of inducing the sale of dishwashers and other consumer products of respondent, respondent has disseminated and caused the dissemination of advertising in national magazines distributed by mail and across state lines, and by radio and television broadcasts transmitted by radio and television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines. In addition, respondent has disseminated to dealers across state lines, product brochures and other sales literature which are available for distribution to consumers by dealers prior to and at the time of sale of the dishwashers.

PAR. 6. As used in this complaint and order, the term "advertisement" means any written or verbal statement, illustration or depiction designed to effect the sale of dishwashers or to create interest in purchasing such products, whether appearing in a radio or television broadcast; product brochure; catalog; leaflet, mailer or circular; point of purchase display; newspaper; trade publication; or magazine. The term "dishes" means plates, glasses, cups, silverware, bowls, and other items normally used in serving and in eating. The term "cookware" means pots, pans, roasters, and other items normally used in baking or cooking. The term "utensils" means "dishes," "cookware," and any other items normally and customarily placed in a dishwasher.

PAR. 7. Among the advertisements so disseminated or caused to be disseminated by respondent are those attached as Exhibits A-J of the complaint.

PAR. 8. Said Exhibits A-J and other advertisements represent, directly or by implication, that Waste King dishwashers can completely clean baked-on, cooked-on, and other food soils from roasters, pots and pans, and other cookware placed in the dishwashers.

PAR. 9. At the time respondent made the representations alleged in Paragraph Eight of the complaint, it did not possess and rely on a reasonable basis for such representations. Therefore, said advertisements are deceptive or unfair.

PAR. 10. In truth and in fact, contrary to respondent's representations in Paragraph Eight of the complaint, Waste King dishwashers will not completely clean baked-on, cooked-on, and other food soils from roasters, pots and pans, and other cookware placed in the dishwashers. Therefore, said advertisements are deceptive or unfair.

PAR. 11. Said Exhibits A-J and other advertisements represent, directly or by implication, that Waste King dishwashers can completely clean dishes, cookware, and other utensils placed in the dishwasher without prior hand-scraping, hand-scouring, or hand-rinsing.

PAR. 12. At the time respondent made the representations alleged in Paragraph Eleven of the complaint, it did not possess and rely on a reasonable basis for such representations. Therefore, said advertisements are deceptive or unfair.

PAR. 13. In truth and in fact, contrary to respondent's representations in Paragraph Eleven of the complaint, Waste King dishwashers will not completely clean dishes, cookware, and other utensils placed in the dishwasher without prior hand-scraping, hand-scouring, or hand-rinsing. Therefore, said advertisements are deceptive or unfair.

PAR. 14. Said Exhibits A-J and other advertisements represent, directly or by implication, that no hand-scraping, hand-scouring, or hand-rinsing of soft food waste on dishes, cookware or other utensils is necessary before placing the utensils in a Waste King dishwasher because the disposo-drain will remove all such soft food waste from the dishwasher.

PAR. 15. At the time respondent made the representations alleged in Paragraph Fourteen, it did not possess and rely on a reasonable basis for such representations. Therefore, said advertisements are unfair and deceptive.

PAR. 16. In truth and in fact, contrary to respondent's representations in Paragraph Fourteen, the disposo-drain on the Waste King dishwashers will not remove all soft food waste from the dishwashers. Therefore, said advertisements are unfair or deceptive.

PAR. 17. Contrary to the representations alleged in Paragraph Fourteen, the owners manuals for the Waste King dishwashers, which are customarily provided to consumers only after they purchase the dishwashers, instruct the user to scrape all food waste from dishes, pots, pans and silverware, and to pre-rinse starchy foods such as cereal or potatoes.

PAR. 18. (a) The instructions in the owners manuals are material facts in view of the representations made in the advertising as set forth in Paragraph Fourteen of the complaint. Said advertisements fail to reveal these materials facts and are therefore deceptive or unfair. (b) Said advertisements are also materially inconsistent with the instructions in the owners manuals. Therefore, the said advertisements are deceptive or unfair.

PAR. 19. Said Exhibit A-J and other advertisements, by stating that the "Sani-heat" cycle has a 165° final rinse which sterilizes

thoroughly, represents, directly or by implication, that this cycle destroys all harmful and other bacteria and microorganisms.

PAR. 20. At the time respondents made the representations alleged in Paragraph Nineteen, they did not possess and rely on a reasonable basis for such representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 21. In truth and in fact, contrary to respondents' representations in Paragraph Nineteen, the "Sani-heat" cycle does not destroy all harmful and other bacteria and microorganisms on dishes, pots and pans. Therefore, the said advertisements are deceptive or unfair.

PAR. 22. Said Exhibit H and other advertisements represent, directly or by implication, that the "Cookware Cycle" is specifically designed to wash cookware, such as pots, pans and roasters, completely clean of baked-on, cooked-on, greasy, and other types of food soil.

PAR. 23. At the time respondent made the representations alleged in Paragraph Twenty-Two of the complaint, it did not possess and rely on a reasonable basis for such representations. Therefore, said advertisements are deceptive or unfair.

PAR. 24. In truth and in fact, contrary to respondent's representations in Paragraph Twenty-Two, the Cookware Cycle was not specifically designed to wash cookware, such as pots, pans and roasters, completely clean of baked-on, cooked-on, greasy, and other types of food soil. Therefore, said advertisements are deceptive or unfair.

PAR. 25. Said Exhibits A-J and other advertisements represent, directly or by implication, that all the stainless steel parts in the Waste King dishwasher are rustproof.

PAR. 26. At the time respondent made the representations in Paragraph Twenty-Five of the complaint, it did not possess and rely on a reasonable basis for such representations. Therefore, said advertisements are deceptive or unfair.

PAR. 27. In truth and in fact, contrary to respondent's representations in Paragraph Twenty-Five, all the stainless steel parts are not rustproof. Therefore, said advertisements are deceptive or unfair.

PAR. 28. Said Exhibit F and other advertisements represent, directly or by implication, that dishes placed in the upper rack of Waste King dishwashers will get as clean as those placed in the bottom rack.

PAR. 29. At the time respondent made the representations alleged in Paragraph Twenty-Eight of the complaint, it did not posses and rely on a reasonable basis for such representations. Therefore, said representations are deceptive or unfair.

PAR. 30. Exhibits C–E and other advertisements represent, directly or by implication, that the baskets in the Waste King dishwashers can be randomly loaded and that there are no special instructions to follow when loading the dishwashers.

PAR. 31. At the time respondent made the representation alleged in Paragraph Thirty, it did not possess and rely on a reasonable basis for such representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 32. In truth and in fact, contrary to respondent's representations in Paragraph Thirty, the baskets in the Waste King dishwasher cannot be randomly loaded and there are special instructions to follow when loading. Therefore, said advertisements are deceptive or unfair.

PAR. 33. Contrary to the representations alleged in Paragraph Thirty, the owners manuals for the Waste King dishwashers, which are customarily provided to consumers only after they purchase the dishwasher, do contain special instructions for the user to follow when loading the dishwashers.

PAR. 34. (a) The instructions in the owners manuals are material facts in view of the representations made in the advertising set forth in Paragraph Thirty of the complaint. Said advertisements fail to reveal these material facts and are therefore deceptive or unfair. (b) Said advertisements are also materially inconsistent with the instructions in the owners manuals and are therefore deceptive or unfair.

PAR. 35. Said Exhibits A and G, and other advertisements, represent, directly or by implication, that all Waste King dishwashers are quiet in operation or quieter in operation than competing makes of dishwashers.

PAR. 36. At the time respondent made the representations alleged in Paragraph Thirty-Five of the complaint, it did not possess and rely on a reasonable basis for such representations.

PAR. 37. Exhibits A, C, D, E, and G, and other advertisements, represent, directly or by implication, that the features described in the advertisements apply to all Waste King dishwashers.

PAR. 38. In truth and in fact, contrary to respondent's representations in Paragraph Thirty-Seven, certain features described in the advertisements, such as the insulation, random loading, and the ability of the dishwasher to wash dishes on top as clean as those dishes on the bottom rack, do not apply to all the Waste King dishwasher models. Because the advertisements fail to disclose these material facts, said advertisements are deceptive or unfair.

PAR. 39. Said Exhibits A–J and other advertisements represent,

directly or by implication, that respondent had a reasonable basis for making, at the time they were made, the representations as alleged in Paragraphs Eight, Eleven, Fourteen, Nineteen, Twenty-Two, Twenty-Five, Twenty-Eight, Thirty, and Thirty-Two, whereas in truth and in fact respondent had no reasonable basis for such representations. Therefore, said advertisements are deceptive or unfair.

PAR. 40. The use by respondent of the aforesaid false, misleading, deceptive or unfair statements, representations, and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of dishwashers sold by respondent by reason of said erroneous and mistaken belief.

PAR. 41. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted, and now constitute, unfair methods of competition, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

EXHIBIT A

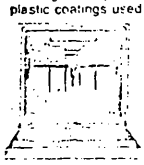
WASHES LOADS A DISHWASHER LIKE A WASTE KING

The best of everything. That's what you get with Waste King. A modern masterpiece in stainless steel, for those who want a better product, advanced features, long-lasting service.

Stainless steel is superior

It's tough. Rustproof. Sanitary. Unlike the porcelain or plastic coatings used by many manufacturers, stainless steel can't wear off, chip, peel or crack. That's why we use it where the action takes place. For the tank and inner door of the dishwasher, the wash arms that do the scrubbing and rinsing, the basket guide rails.

That's why we can guarantee all stainless steel parts for 20 years against failure due to corrosion.

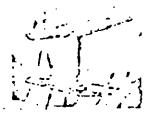


Load it the easy, random way

There are no special instructions to follow when loading a Waste King dishwasher. Both baskets pull out all the way for easy accessibility. Both take a mixed load of dishes and utensils. Bowls can go on top of other dishes. Removable dividers in the upper basket provide space for oversize serving dishes, utensils.

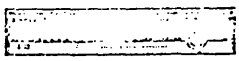
Three-way washing action

Fast-moving jets of hot, detergent-activated water from two counter-rotating wash arms reach every corner of the steel tank. This two-level, full-width cleansing system not only cleans completely, it permits random loading of each basket. The lower arm sends water up through the lower basket. The upper arm jets water up through the upper basket, as well as down through the dishes below it. (SS777 has single arm only)



Superscrub and Sani-heat

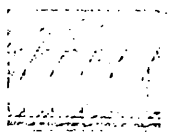
The Superscrub cycle extends wash time to get tough jobs like roasters really clean. Sani-heat, a 165-degree final rinse sterilizes thoroughly. A silent heater provides humidity-free drying.



Control Panel for SS911.

Waste King pampers the load

Waste King's big baskets provide space for almost every size and shape. The huge-capacity tank can truly hold and wash a day's dishes for a family of five. There's no need to worry about breakage. Plates are spaced by cushioned loops to prevent chipping; M-shaped supports make secure cradles for the most fragile stemware. Flatware baskets have lidded sections to hold small items.



Insulation cuts down noise

Waste King dishwashers are ultra-quiet in operation, thanks to Hush-coat, a dense acoustical material that deadens sound at the source. In addition to hush-coating, the top, sides, back and door are wrapped with a thick blanket of fiberglass.

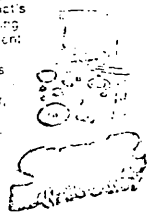
Disposo-Drain ends pre-rinsing

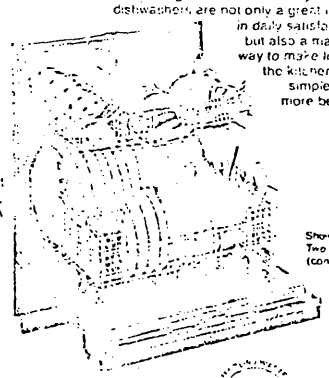
No scraping. No pre-rinsing. Just flick off bones and large food pieces. Waste King's efficient Disposo-Drain will flush away soft waste such as corn, spaghetti, potatoes, spinach. There's no screen to clean or to trap tiny food particles.

The Rinse-and-Hold cycle is a quick rinse to remove surface soil from dishes to be held for a full washing cycle later on.

We build it. We back it with a super-warranty

For more than 30 years, we have been building dishwashers to rigid standards of performance, quality and craftsmanship. We back them with a super-warranty that's the strongest in the industry. Waste King dishwashers are not only a great investment in daily satisfaction, but also a marvelous way to make life in the kitchen easier, simpler and more beautiful.





Shown: Model SS911
Two portable models (convertible) also available

Waste King
Stainless Steel Dishwashers

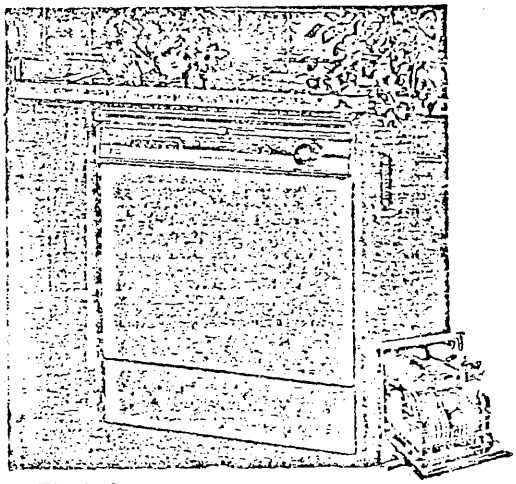
For further information and complete warranty details, see your dealer, or write Waste King, Dept. D, 5115 District Blvd., Los Angeles, Ca. 90040

EXHIBIT B

53

Waste King super-sturdy stainless steel dishwashers with the strongest warranty in the industry.

A huge capacity dishwasher with full width wash arms, one under each basket for 3-way double wash and triple rinse action. Pots and pans go in either basket, the Dualactor dryer eliminates need for hand-drying dishes. The silent heater provides economic and trouble-free drying. Waste King dishwashers have surgical steel tanks that don't chip, peel, crack or rust. Inner doors, wash arms and guide rails are also stainless steel. MODEL 911



Efficiency experts. Waste King appliances do the job quieter, easier, speedier.

For the kitchen that doesn't
it had everything ... LOOK!

Charge-Gas Grill: lets you char-broil indoors and enjoy outdoor taste. Temperature for cooking are controlled by the turn of a knob. For steaks, fish, chicken, chops, shish-ke-bo.

Waste King Disposers

Tiger rugged, panther quiet, a pussy cat to install

Grinds up bones, pits, stalks, rinds, stalks. No need to sort garbage. Waste King's patented anti-jam shredders prevent jams before they can happen.

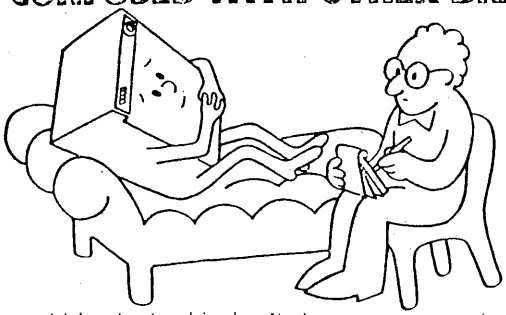
WASTE KING

8131 Dunnet Blvd. Los Angeles, Calif. 90040

Eastern Sales Office: 815 Linwood Parkway, Suite 8A • Moorestown, New Jersey 08057 • (609) 235-6400

EXHIBIT C

WASTE KING®
THE DISHWASHER THAT'S SICK OF BEING CONFUSED WITH OTHER BRANDS.



Doc, I'm a good dishwasher. I work hard. I clean. I scrub...

Yes.

But people keep confusing me with other brands.

A classic case of identity crisis.

What hurts is that it's me—Waste King—who's got the double wash arm that gets things really clean, no matter where you stack 'em.

I see.

You can load both my baskets any way you want and even grimy pots and pans come out sparkling clean.

You've got a thing about cleanliness?

Yes, I'm obsessed with it!

Very revealing.

Look, Doc, don't get me wrong. I'm no sissy. I'm tough. In fact, it's me, Waste King, who has the stainless steel interior and the strongest warranty there is.

You have great inner strength.

Yeah, but like most tough guys, I've got my gentle side

A split personality.

Yes and no. But getting back to my gentle side, I've got these cushioned loops on my baskets that protect dishes and glassware from chipping.

I notice you have removable baskets and adjustable racks.

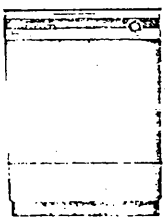
Yeah, I'm very flexible. You can adjust 'em to hold just about anything you want.

Look, you've got double wash arm, stainless steel interior, flexible baskets, cushioned loops... so what's the problem?

People don't know who I am! So please, Doc. Tell me, what should I do?

Well, Mr. King Waste, maybe you should advertise

The name's Waste King! Waste King! Waste King!



Waste King

THE STAINLESS STEEL DISHWASHERS

For complete warranty details on all Waste King products, see your Dealer or write Waste King, Dept. A, 3115 Pierce Street, Los Angeles, Ca. 91340 • Eastern Area Office: 615 Shrewsbury Parkway, Suite 6A, Mountainside, N.J. 07092 (201) 233-5422

EXHIBIT D

APRIL 13, 1976

[illegible] the quarter.

The jewelry div[illegible] which brought in 29 per cent of 1975 sales and 15 per cent of earning[illegible] a 15 per cent sales gain.

The candle div[illegible] had a 32 per cent first-quarter sales gain, Tassie said. That division contributed 12 per cent of 1975 sales and 6 per cent of its revenue.

Scotty's Finds March a Record Sales-Setter

WINTER HAVEN, [illegible] (FNS) — Scotty's, Inc., reported record sales for March, the first t[illegible] its monthly volume exceeded $8 million, and the month's gain was the [illegible]est since August of 1973, according to James W. Sweet, chairman.

Sales for the mon[illegible] jumped 31.7 per cent to $8,328,627 from $6,339,-450 for the same per[illegible] a year ago.

Volume for the [illegible] months ended March 31 rose 8.1 per cent, $61,-552,636 against $56,9[illegible] last year.

Tappan Reg[illegible]rs Dip Of 10% in Year's Sales

MANSFIELD, O[illegible] (FNS) — Sales of Tappan appliances and ranges declined 10 per cent t[illegible] 100,739,000 from $110,500,000 the company's annual report showed.

Sales of cabinet[illegible] eased ? per cent to $23,867,000 from $21,784,000. Sales of Lawson prod[illegible] (metal containers) increased 38 per cent to $15,-[illegible] from $11,981[illegible] Heating and air conditioning sales declined 25 [illegible] from $31,791,000.

[illegible] products declined to

[illegible] Sales Executive Club's weekly luncheon at the Waldorf-Astoria here, advertising promotion director E.J. Kreitz told the audience of about 300 that Kresge expects its sales volume to jump from its present $6.8 billion to $12 billion by 1980.

That nearly two-fold increase in sales, besides the massive K-Mart expansion plan, is what leads the company to believe it will move into the second place slot ahead of Penney, Kreitz said.

"I think we'll certainly overtake Penney's before the end of the decade," Kreitz said in answer to a question from the audience.

On the basis of 1975 sales volume as reported by the companies, Sears, Roebuck is the nation's leading non-food retailer ($13.5 billion), followed by Penney ($7.69 billion) and Kresge ($6.8 billion).

A spokesman for Penney's at the company's headquarters here refused to flatly contradict Kreitz's [illegible]

E.J. KREITZ: We'll be bigger than J.C. Penney "before the end of the decade."

Photo by Pierre Schermann

Many gasped audibly when Kreitz compared Kresge's pre-K-Mart 1962 volume of about $500 million to its 1975 sales of nearly $7 billion.

Among the other points touched on by Kreitz at the luncheon were:

• Internal Kresge figures which indicated the company accounts for 18 per cent of the top five general merchandisers' combined annual volume of $37.7 billion, as com-

[illegible]ly new outlets in [illegible] familiar with the name, turn a profit in under a year. K-Mart stores in new trading areas take between 18 to 24 months to turn a profit.

• K-Mart does 20 to 25 per cent of its total volume in private-label goods. Kreitz said, however, that private-label sales will probably "remain stable in the near future" and "will never get to be a major portion of the business."

• K-Mart generally concentrates on three types of new units: The "regular" size store (84,000 to 90,000 square feet); the "Group 7" store (65,000 square feet), and the "Group 9" store serving smaller markets (40,000 square feet).

Simmons Expects Net To Top the '73 Record

[illegible] noted that the proposed increase in [illegible]

5 COL X 3 IN, 540

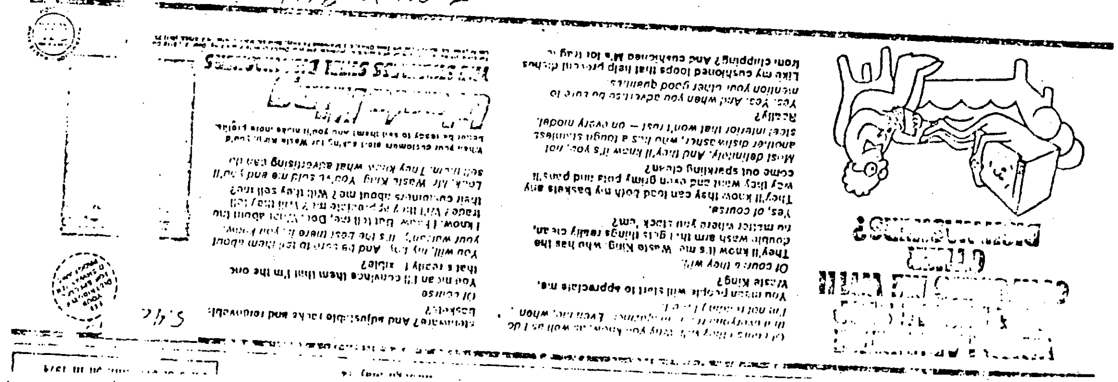
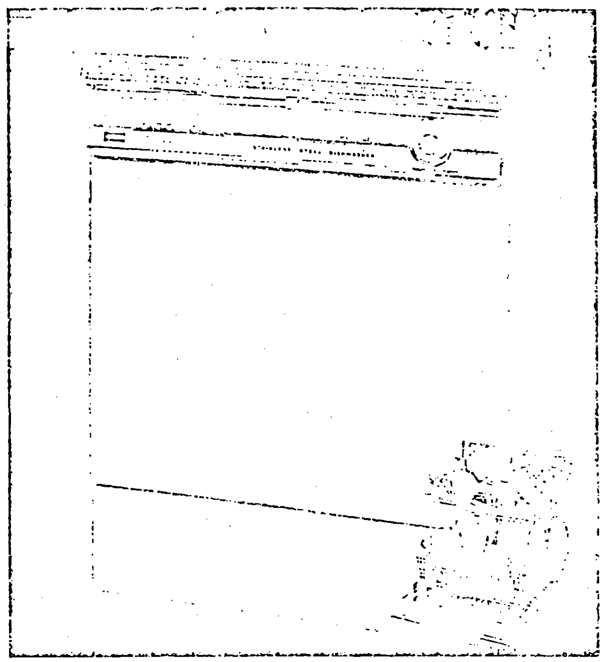
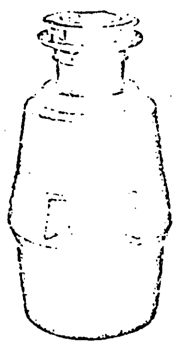


Exhibit E

more bilt-in sales features

WASTE KING: quieter, better, longer lasting





Waste King Stainless Steel Food Disposer

Grinds up the tough stuff; bones, pits, cobs, rinds and stalks. No need to sort garbage. Patented no-jam swivel impellers. MODEL SS8000

Waste King stainless steel dishwasher is backed by the strongest warranty in the Industry.

Waste King has 2 full width wash arms - one under each basket for 3-way action provides double wash, triple rinse for really clean dishes. Rugged baskets with curliques to separate dishes and prevent cracking and breaking. Large capacity with random loading is simple enough for a child. Waste King dishwashers have stainless steel tanks that don't chip, peel, crack or rust. Inner doors, wash arms and guide rails are also stainless steel. MODEL 911

THERMADOR — For complete warranty details on all Thermador products, see your Dealer or write Thermador

THERMADOR / WASTE KING DIVISION — NORRIS INDUSTRIES

WASTE KING — For complete warranty details on all Waste King products, see your Dealer or write Waste King

5123 District Blvd., Los Angeles, Ca. 90040

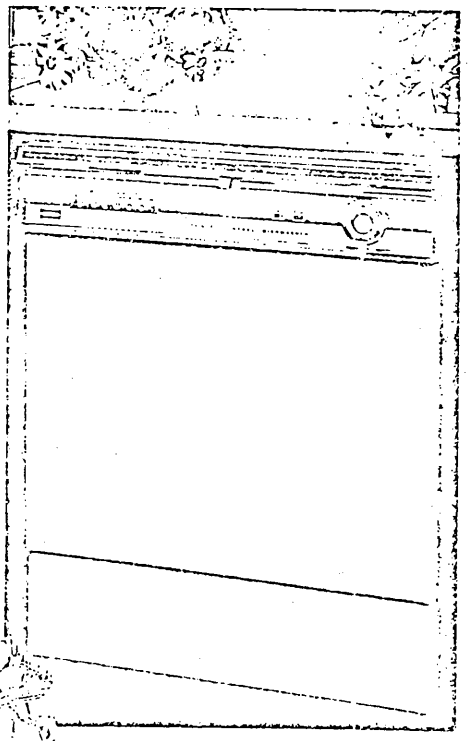
Norris Industries Booth 2438 at the NAHB Convention.

House & Home

CIRCLE ON READER SERVICE CARD

KITCHEN BUSINESS – DEPT. R EXHIBIT F 5.7

The power of stainless steel. Waste King's self-selling dishwashers.



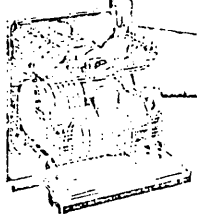
The strongest warranty in the industry, and an interior full of features make Waste King stand out as a royal sales performer

Stainless steel gives you more sales clout: it's tough, durable and withstands the rigors of hard use. Waste King's **stainless steel** tank, inner door, wash arms and guide rails won't chip, peel, crack or rust. A full-width wash arm under each basket provides three-way, double-wash and triple-rinse action. Dishes on top get as clean as those on the bottom.

The long-playing **Superscrub** cycle extends wash time for tough jobs like casseroles, pots, pans, crusty roasters. These utensils go in the same load with china and crystal. Waste King's huge tank can truly hold and wash a day's dishes for a family of five.

Sani-heat is a 165 degree final rinse that sterilizes and rinses thoroughly. A silent heater provides humidity-free drying for a cool kitchen and spot-free dishes.

Get our new profit-making promotional plans to help you sell faster and easier. See your distributor now.



Adjustable baskets extend fully; upper one has removable dividers. Plate-cushions separate dishes and prevent chipping. Stemware-cradles and wash arms permit random loading.

Waste King

The Stainless Steel Dishwashers

THERMADOR / WASTE KING DIVISION

For further information and complete warranty details see your distributor or write Waste King, 3169 Unitrol Blvd., Dept. 16, Los Angeles, Ca. 90040

DISHWASHERS
DISPOSERS
COMPACTORS
CHAR-GLO
GAS FIRED BARBECUES

6

Exhibit G

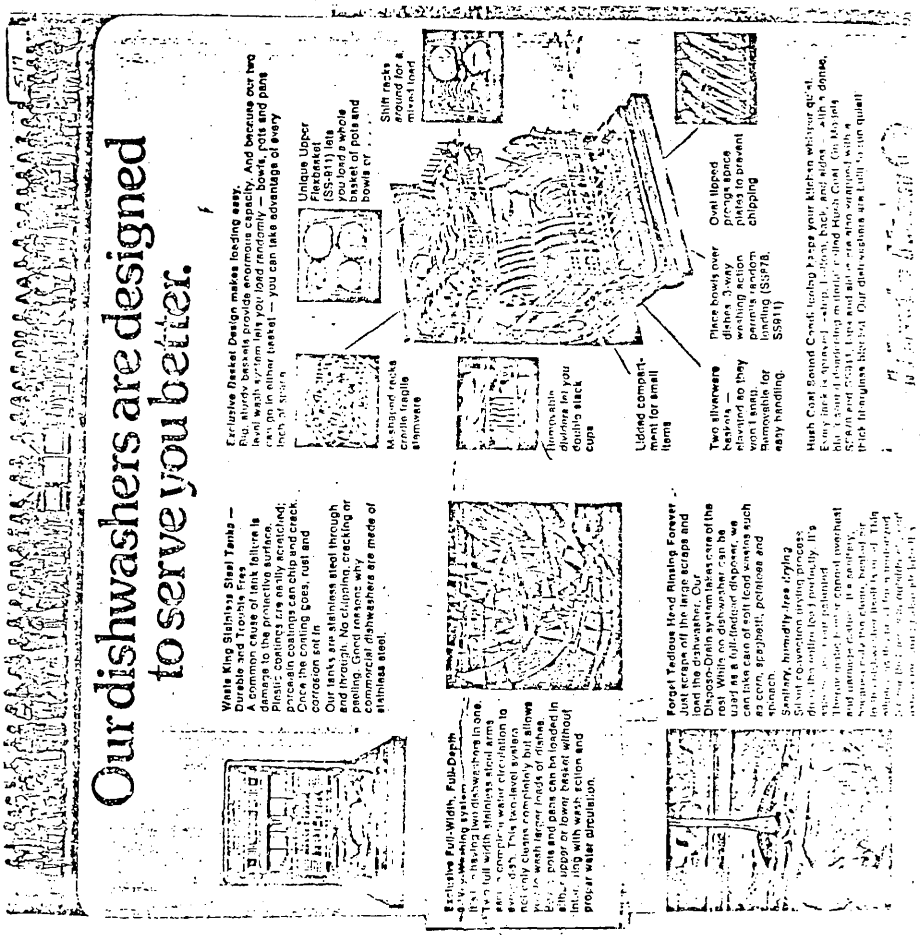
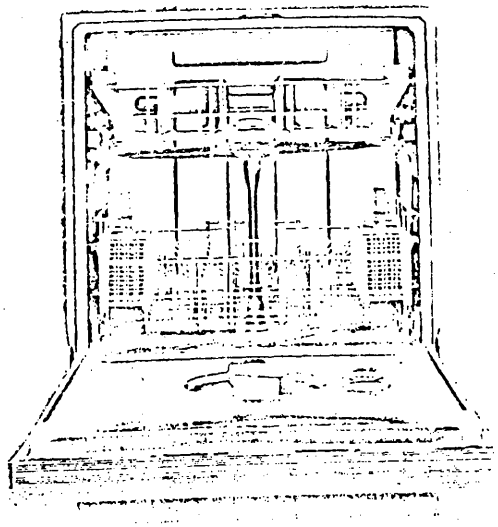

Our dishwashers are designed to serve you better.
Waste King Stainless Steel Tanks — Durable and Trouble Free
A common cause of tank failure is damage to the protective surface. Plastic coatings are easily scratched; porcelain coatings can chip and crack. Once the coating goes, rust and corrosion set in.
Our tanks are stainless steel through and through. No chipping, cracking or peeling. Good reasons why commercial dishwashers are made of stainless steel.
Exclusive Full-Width, Full-Depth
It's like having two dishwashers in one. Two full width stainless steel arms
every dish. This two-level system
you to wash larger loads of dishes.
pots and pans can be loaded in either upper or lower basket without
proper water circulation.
Forget Tedious Hand Rinsing Forever
Just scrape off the large scraps and load the dishwasher. Our Disposo-Drain system takes care of the rest. While no dishwasher can be used as a full-fledged disposer, we can take care of soft food wastes such as corn, spaghetti, potatoes and spinach.
Sanitary, humidity-free drying
Exclusive Basket Design makes loading easy.
Big, sturdy baskets provide enormous capacity. And because our two level wash system lets you load randomly — bowls, pots and pans can go in either basket — you can take advantage of every inch of space.
Unique Upper Flexbasket (SS-911) lets you load a whole basket of pots and bowls or
M-shaped racks cradle fragile stemware
Shift racks around for a mixed load
Removable dividers let you double stack cups
Lidded compartment for small items
Two silverware baskets — elevated so they won't snag. Removable for easy handling.
Place bowls over dishes. 3-way washing action permits random loading (SS878, SS911)
Oval lipped prongs space plates to prevent chipping
Hush Coat Sound Conditioning keeps your kitchen whisper quiet.

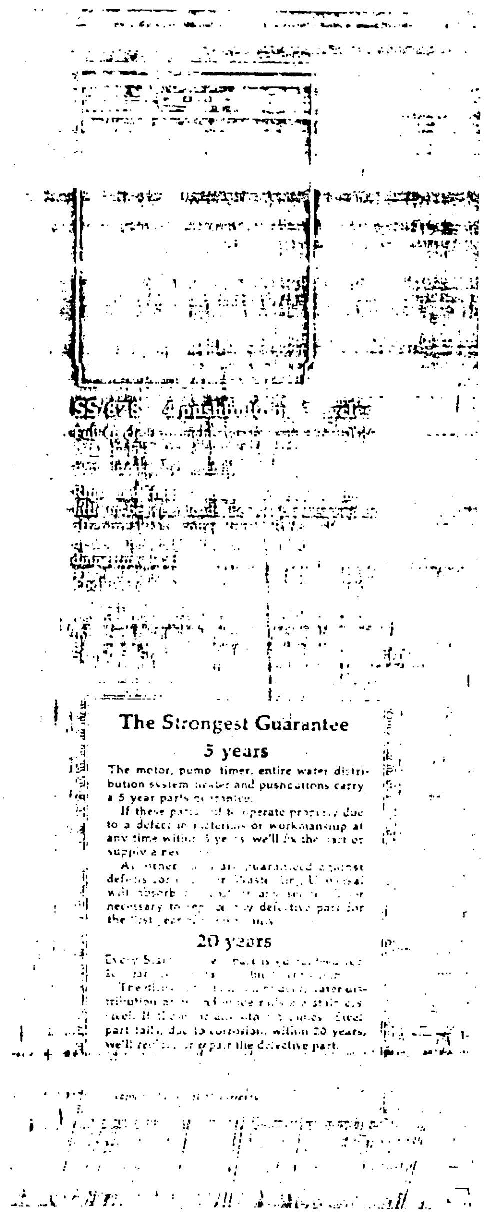
Exhibit H

(18.1)

Waste King Universal

The stainless steel dishwasher




The Strongest Guarantee
5 years
The motor, pump, timer, entire water distribution system heater and pushbuttons carry a 5 year parts guarantee.
20 years
part fails, due to corrosion, within 20 years,

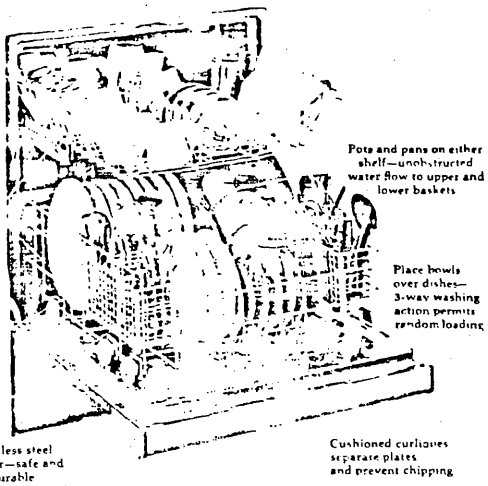
ıclusive basket design akes loading easy

ı ıtom loading provides places and ces for almost everything. "M" aped supports prevent damage to ıgile stemware. China-separating rlicues prevent chipping. Lidded compartments for small items in verware baskets.

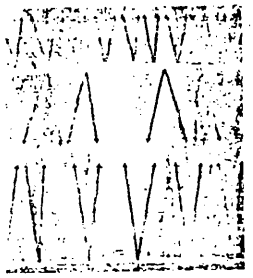
ıe upper basket rolls out completely. ach the back without reaching into washing chamber.

shaped racks dle fragile mware

Knuckled curlicues space plates to prevent chipping



ıclusive "Full Width, ıll Depth" 3-way washing ystem for a cleaner wash



ır exclusive double wash arm system ike having two dishwashers in one. vo full-width stainless steel arms ıure complete water circulation in ery nook and cranny.

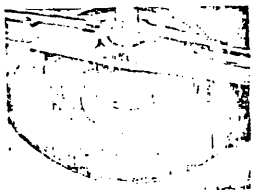
ounter-rotating distributor arms with ter jetting up and down, from ports it act like stainless steel nozzles, roughly scrub all surfaces. The upper washes the dishes in the upper d lower baskets. The lower arm ishes the dishes in the lower basket, owing total random loading of th baskets.

Stainless steel protects you from costly repairs

Porcelain or plastisol coatings frequently chalk off, chip, crack or peel. A scratch or a chip from a dropped utensil can rust all the way through in a surprisingly short time. Stainless Steel cannot chip, crack or peel, protecting you from costly repairs.

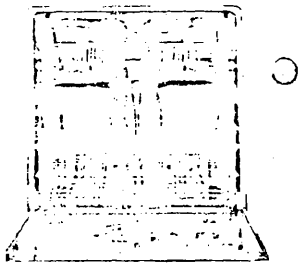
Forget tedious hand rinsing

Our Disposo-Drain eliminates tedious hand rinsing. Just scrape off the bulky stuff. Remaining wastes are automatically flushed away. There's no screen to trap tiny food particles.



Hush-Coat--whisper quiet

Hush-Coat is a dense, elastic acoustical material that deadens sound. Its thick acoustical mass muffles the sound of the washing action. It dampens vibration. We Hush-Coat all 5 sides of the dishwasher tank.



Sanitary, humidity free drying for a cool kitchen

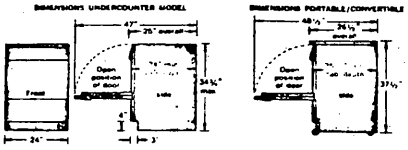
Patented ThermoMatic heater creates currents of clean, dry, heated air that rise slowly, blot up moisture, absorb it, and carry it off to the cooler stainless steel sides and door. Moisture condenses, drains into the pump basin.

This continuous heat transfer system dries without the need for motorized blowers that suck in outside air. Dries with the clean heated air within the dishwasher. Safe. Sanitary. Silent.

Other features: Tamper proof cycle indicator • Automatic rinse agent dispenser • Safety door latches • Infinitely adjustable springs for proper door balance, even with custom panels

Easie[illegible] to Install and service

A Waste King Universal Dishwasher is easily secured to the underside of the counter. No need to bolt it to the floor. Adjustable undercounter tabs affixed to the dishwasher holds the dishwasher in position. Levelling legs permit height adjustment from 34⅛" min. to 34¼" max.



*Can be adjusted from 34⅛" min. to 34¼" max.

Specifications:

		Model SS/878
Elect. (120V, 60 cyc.)	Motor Load (Amps)	7
	Total Other Load (Amps)	6
	Maximum Load (Amps)	7
Heater Element	Dry Rating	700
Motor	RPM	3450
	Frequency Phase (single)	60 cycle
	Horsepower	½
Water	Total Consumption	15
	Pressure Requirements*	20-120
Approx. Shipping Weight**		107
Approx. Net Weight**		92

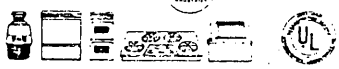
*Dynamic Pressure with water running at the sink adjacent to dishwasher.
**Add 62 lbs. for Portable/Convertible Models.

Cycle Sequence Charts

Cycle	Sequence							Cycle Length (Minutes)
Full Cycle	Pre-Wash	Rinse	Wash	Rinse	Rinse	Sparkle Rinse	Dry	60
Cook-ware	Pre-Wash	Rinse	Wash	Rinse	Rinse	Sparkle Rinse		34*
Rinse and Hold	Rinse							8*

*Plus time required for timer to advance to START: Total 60 minutes.

WASTE KING
WASTE KING
Los Angeles, California 90058
Kitchen Appliances Women Trust



Leading manufacturers of Disposers - Stainless Steel Dishwashers
Built-in Gas & Electric Ovens - Electric Self Cleaning Ovens
Char Glo® Gas Barbecue Broilers

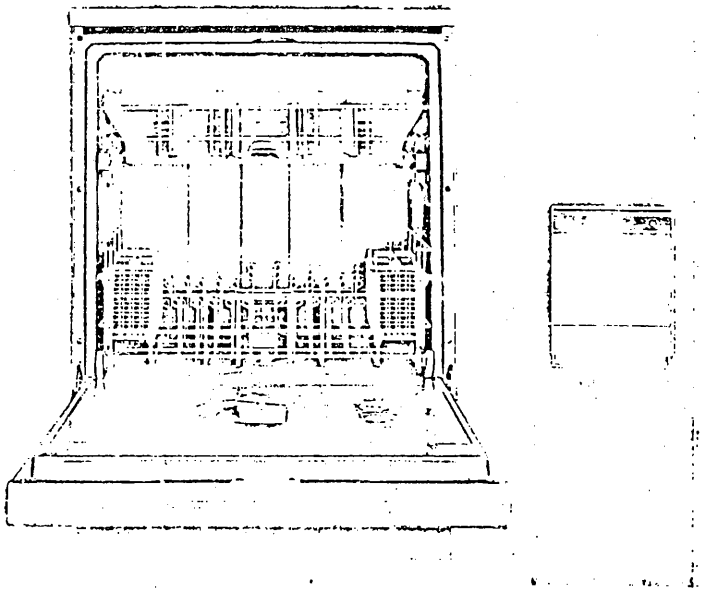
We've produced and sold over 5,500,000 food waste disposers
Over 900 factory trained service experts across the country

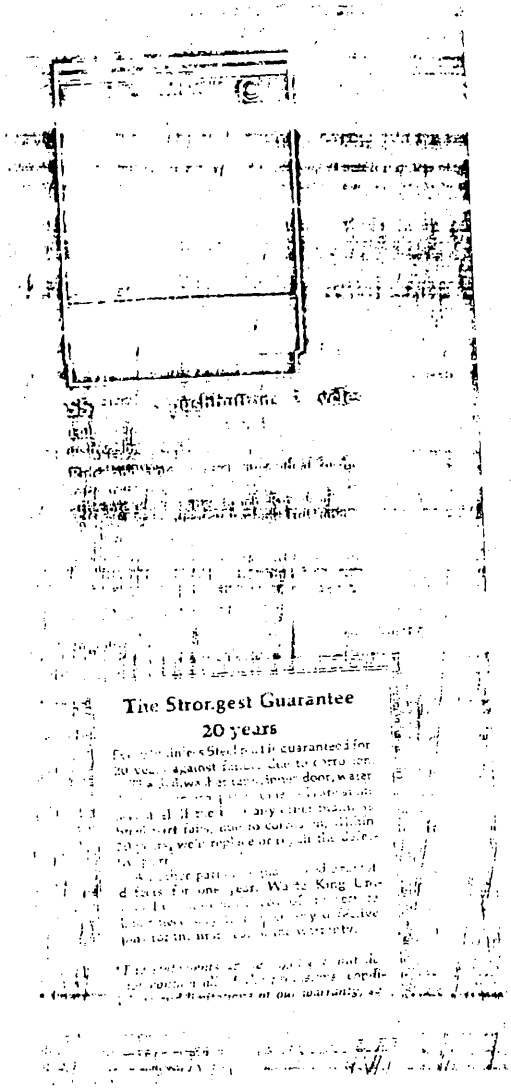
Exhibit I

V 18.31

Waste King Universal

The stainless steel dishwasher





The Strongest Guarantee

20 years

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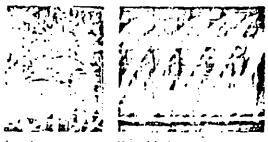

d racks
gile

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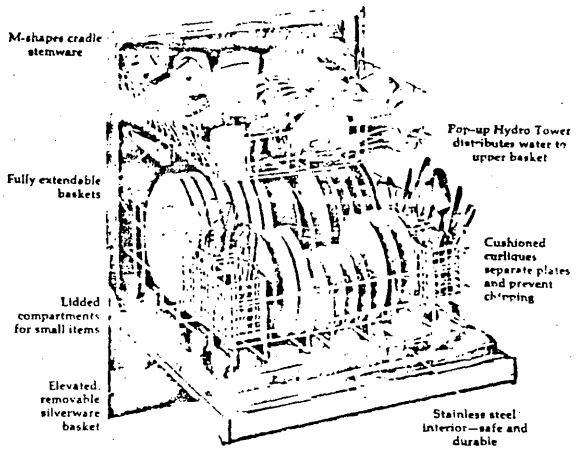
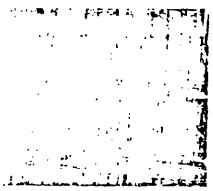


Jp-Hydro-Tower des corner-to-corner ng action



dro-Tower pops up from the stributor arm to wash dishes pper basket. Water swirls and through scientifically located the lower arm and pop-up Streams of hot water cover ther dishwashers miss, and stubborn food wastes from vice of every dish.

less steel protects you costly repairs

n or plastisol coatings frequently , chip, crack or peel. A scratch from a dropped utensil can rust ay through in a surprisingly me. Stainless Steel cannot chip, r peel, protecting you from epairs

Forget tedious hand rinsing forever!

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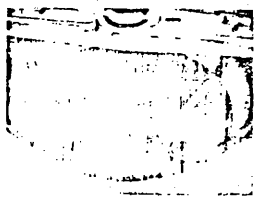

Hush-Coat--whisper quiet

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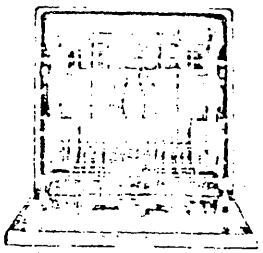


Sanitary, humidity free drying for a cool kitchen

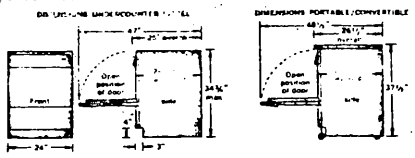
Patented ThermoMatic heater creates currents of clean, dry, heated air that rise slowly, blot up moisture, absorb it and carry it off to the cooler stainless steel sides and door. Moisture condenses, drains into the pump basin.

This continuous heat transfer system dries without the need for motorized blowers that suck in outside air. Dries with the clean heated air within the dishwasher. Safe. Sanitary. Silent.

Other features: Tamper proof cycle indicator • Automatic rinse agent dispenser • Safety door latches • Infinitely adjustable springs for proper door balance, even with custom panels.

Install and service

[illegible] reversed Dishwasher is easily secured [illegible] side of the counter. No need to bolt it to the [illegible] Instant undercounter tabs affixed to the dishwasher body fits the dishwasher in position. Levelling legs permit height adjustment from 34 1/8" min. to 34 3/4" max.



*can be adjusted from 34⅛" min. to 34¾" max.

Specifications:

Model SS/777

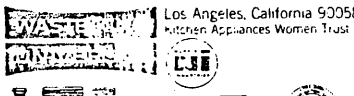
Elect. (120V, 60 cyc.)	Motor Load (Amps)	7
	Total Other Load (Amps)	6
	Maximum Load (Amps)	7
Heater Element	Dry Rating	700
Motor	RPM	3450
	Frequency Phase (single)	60 cycle
	Horsepower	½
Water	Total Consumption	15
	Pressure Requirements*	20-120 lbs.
Approx. Shipping Weight**		102
Approx. Net Weight**		87

*Dynamic Pressure with water running at the sink adjacent to dishwasher.
**Add 62 lbs. for Portable/Convertible Models

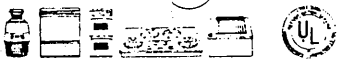
Cycle sequence charts

Cycle	Sequence								Cycle Length (Minutes)
Full Cycle	Pre-Wash	Rinse	Wash	Rinse	Rinse	Sparkle Rinse	Dry		60
Rinse and Hold	Rinse								8*

*Plus time required for timer to advance to START. Total 60 minutes.



Los Angeles, California 90058
Kitchen Appliances Women Trust



Leading manufacturer of Disposers • Stainless Steel Dishwashers
Built-in Gas & Electric Ovens • Electric Self Cleaning Ovens
Char Glo® Gas Barbecue Broilers

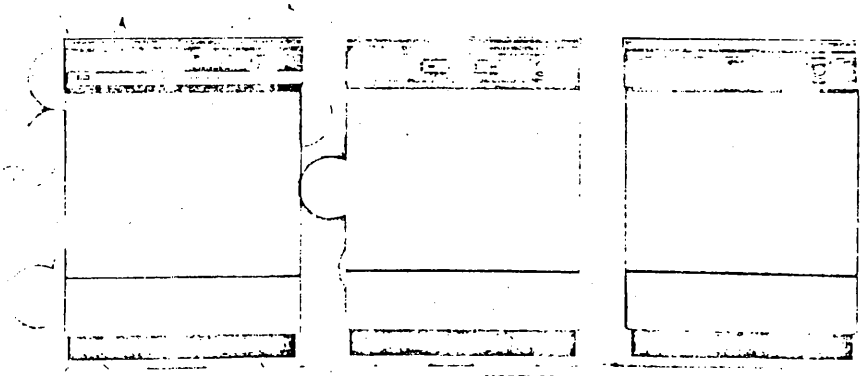
We've produced and sold over 5,000,000 food waste disposers
Over 900 factory trained service centers across the country

 SS 200 CE

Exhibit J (18.6)

WA[illegible]

the Stainless Steel Dishwashers Offer You More... Advanced Features Plus the Strongest Warranty Available



MODEL SS911

5 CYCLES: Full Cycle, Rinse & Hold, Energy-Saver, Superscrub and Sani-Heat

- Unique upper Flexbasket with removable dividers and dishrack accommodates any type of load; glassware, super large salad or punch bowls,even turkey platters.
- Other features include all those offered on Model SS878.

MODEL SS878

3 CYCLES: Full Cycle, Rinse & Hold and Energy-Saver

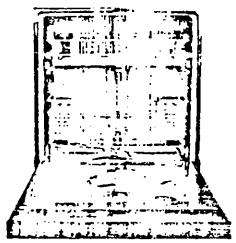
- Dual washing arms permit random loading — put pots, pans and casseroles in either basket and water circulation still works perfectly.
- Quiet Operation — Entire tank — top, sides, back and bottom are sprayed with Hush-Coat, top and sides are wrapped with a thick fiberglass blanket.
- Automatic Sparkle Rinse Dispenser for sparkling glassware and spotless china.

MODEL SS777

2 CYCLES: Full Cycle and Rinse & Hold

- Full width lower wash arm, plus Pop-Up Hydro Tower for clean dishes.
- Family-size capacity with easy, efficient loading
- Automatic Sparkle Rinse Dispenser may be added as an optional accessory.
- Quiet Operation — Entire tank — top, sides, back and bottom are sprayed with Hush-Coat.

Waste King dishwashers have a noise reduction system that keeps operating noises to a minimum. Hush-Coat is a dense, black acoustical sound deadening material. Its thick mass muffles the sound of the washing action. Hush-Coat is sprayed on the entire tank — top, sides, back and bottom. On Models SS911 and 878 the top and sides are also wrapped with a thick fiberglass blanket. Waste King dishwashers are built to run quietly!

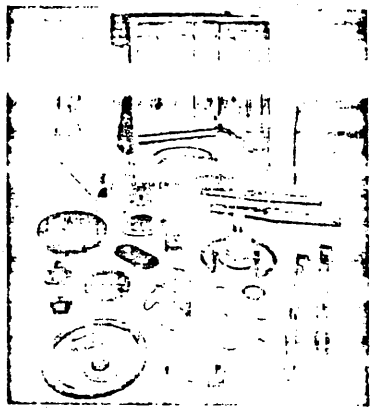


Porcelain and plastisol used by some manufacturers are protective coatings that frequently chalk off, chip, crack or peel. A scratch or a chip from a dropped utensil can rust all the way through in a surprisingly short time. Stainless Steel cannot chip, crack or peel. It is always clean, shiny and bright. Waste King's warranty assures you Waste King dishwasher tanks are the most durable ever built.

After the final rinse, Waste King's efficient heater safely dries the clean, washed dishes. Currents of dry, heated air rise slowly, blot up moisture, absorb it and carry it off to the cooler stainless sides and door where the moisture condenses and drains into the pump basin.

This continuous heat transfer drying system eliminates the need for a motor fed blower-sucking in outside air. The Waste King humidity free system dries with clean heated air within the dishwasher itself. It is safe, sanitary and silent.

STRONGEST WARRANTY AVAILABLE



HIGHLIGHTS OF WASTE KING WARRANTY

FULL ONE YEAR WARRANTY against manufacturing defects. All parts and service labor are included.

PLUS EXTENDED LIMITED WARRANTY The following parts are warranted against manufacturing defects for FOUR YEARS following the expiration of the full warranty: motor, pump, timer, heater, water distribution system, and pushbutton switch. Service labor will be the owner's responsibility. All Stainless Steel parts are warranted against failure due to corrosion for NINETEEN YEARS following the expiration of the full warranty. Service labor will be the owner's responsibility.

Contact your dealer for details or write to Waste King.

The exclusive double arm washing system (Models SS911 and 878) is like having two dishwashers in one. Two full-width stainless steel arms assure complete water circulation throughout the tank. There's one arm under each basket. Detergent activated hot water is forced through each arm by a powerful pump.

Counter-rotating distributor arms have ports that act like nozzles, jetting water up and down to scrub all surfaces thoroughly.

This two level "Full Width, Full Depth" system not only cleans completely, but it also provides total random loading of both baskets. Bowls or pots and pans may be loaded in lower basket without affecting the washing action.

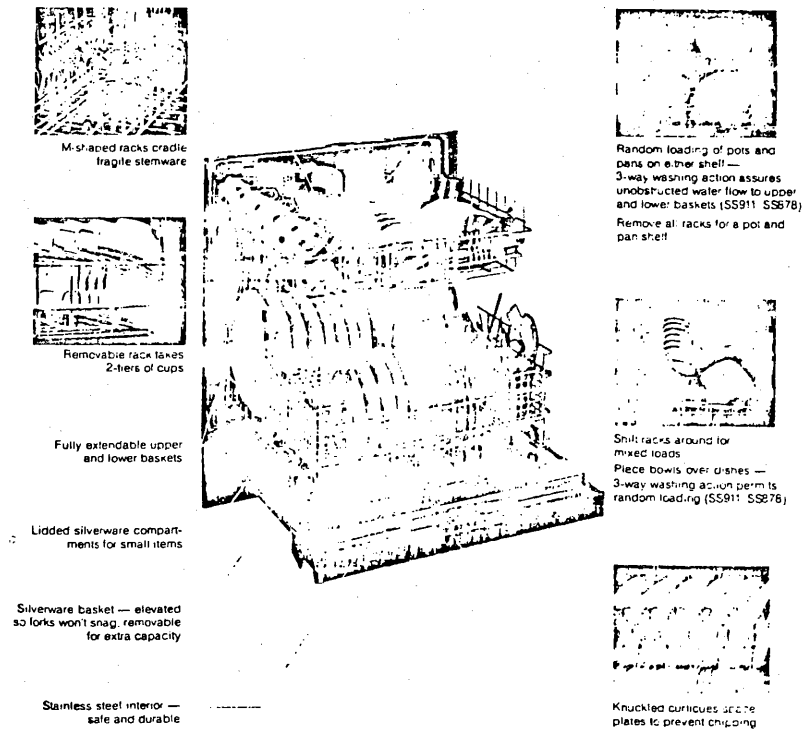
In the Model SS777 a Pop-Up Hydro Tower supplies additional washing action of the lower arm. During the wash and rinse cycles the telescoping tower is activated. It Pops-Up to provide 2 fan-shaped jets of water for upper basket.

Waste King's Disposo-Drain eliminates tedious hand rinsing. Just scrape off the bulky stuff. Remaining wastes are automatically flushed away. There is no screen to clean or to trap tiny food particles.

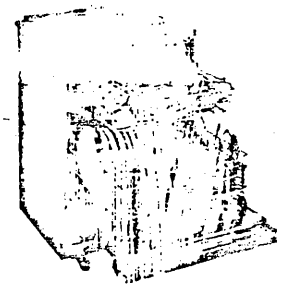
Exclusive basket design makes loading easy.

Random loading provides places and spaces for almost everything. Big, sturdy baskets provide enormous capacity. There are some differences between models, but there's a lot in common too. "M" shaped supports prevent damage to fragile stemware... china-separating curlicues to prevent chipping...lidded compartments for small items in silverware baskets. (All models).

The upper basket rolls out completely. You can reach the back without reaching into the washing chamber. Removable dividers in the SS911 upper basket provide a shelf for elaborate oversize platters, roasters and serving dishes most people use for holiday entertaining.



Stainless Steel Conver[illegible]Portable Models Also Available



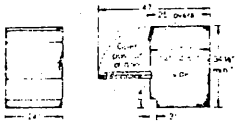
Models SS911 and SS978 are also available in Convertible Portable units. Top is handsome solid maple. Panels come in White, Coppertone, Avocado and Poppy Gold. Easy hook up. Designed as a convenient portable now and for [illegible] installation later.

(A) Fill and drain hoses connect to your sink simply and easily. A unique "hula skirt" attachment prevents water from splashing as it drains into sink.

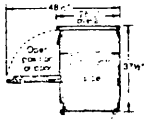
(B) Handsome hinged top covers the hose/cord compartment when the dishwasher is not in use.

For Planning Guide only. For complete installation instructions write and indicate model number.

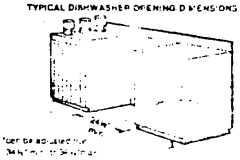
DIMENSIONS UNDERCOUNTER MODEL



DIMENSIONS PORTABLE/CONVERTIBLE



TYPICAL DISHWASHER OPENING DIMENSIONS



Cycle sequence charts:

Cycle Name	Mode	Sequence							Cycle Length (Min.)
[illegible]	[illegible]	Pre Wash	Rinse	Wash	Rinse	Rinse	Sterilize & Rinse	Dry	65
Rinse And Hold	[illegible]	Rinse							8
Energy Saver	911 SS978 only	Pre Wash	Rinse	Wash	Rinse	Rinse	Sterilize & Rinse		37
Super Scrub	911 only	Pre Wash	Rinse	Extended Wash	Rinse	Rinse	Sterilize & Rinse	Extended Dry	81
Rinse & Hold Cycle	911 only	Pre Wash	Rinse	Wash	Rinse	Rinse	Sterilize & Rinse	Dry	65

Specifications:

		Model [illegible]	Model SS911	Model SS978
Elect. 120 V 60 cy.	[illegible]	[illegible]	[illegible]	[illegible]
Heater Element	[illegible]	700 —	700 —	700 500
Motor	[illegible] Frequency, Hours	3450 6 min. each cycle	3450 6	3450 65
Water	Total Consumption Pressure Required	[illegible]	[illegible]	[illegible]
Approx. Shipping Weight	[illegible] Complete w/Heater	125 —	125 110	125 110

*Dynamic Pressure in water line required for [illegible]

CYCLE STORY — What does each cycle do...

FULL CYCLE
Designed for normal dishwashing loads. A complete operation which thoroughly washes and dries all of your dishes, glassware, silverware, pots, pans and kitchen utensils.

RINSE & HOLD
A quick rinse to remove sticky surface soil from dishes to be held for full washing cycle at a later time.

ENERGY-SAVER
[illegible] only types of wash, 65 and rinses. But eliminates the dry cycle. Electrical usage is cut in half — a saving of about ½ kilowatt hour.

SUPERSCRUB
Heavily soiled pots, pans and dishes get an extended wash time to "superscrub" them sparkling clean.

SANI-HEAT
Adds the extra protection of a 165 degree final rinse. Incoming water is heated by the patented Waste King heater to a high sanitizing final rinse.

Manufacturers of the finest Disposers, Dishwashers and Chem-Gio Systems.

WASTE KING
DIVISION OF NORRIS INDUSTRIES

NORRIS INDUSTRIES

UL

5119 District Blvd., Los Angeles, CA 90040
Phone (213) [illegible]

Form No. DW-2

Litho in U.S.A. 9/75

DECISION AND ORDER

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

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

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

1. Respondent Norris Industries, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at One Golden Shore, Long Beach, California.

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

PART I

It is ordered, That Norris Industries, Inc., [hereinafter referred to as the respondent], its successors and assigns, either jointly or individually, and its officers, representatives, and agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, distribution or sale of dishwashers in or affecting commerce, as

"commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any dishwasher manufactured or sold by respondent can sterilize or destroy all microorganisms on utensils placed in the dishwasher.

2. Representing directly, or by implication, that the stainless steel parts in any dishwasher manufactured or sold by respondent are rustproof or will not rust under normal household conditions.

3. Representing, directly or by implication, that the disposo-drain in any dishwasher manufactured or sold by respondent will remove all soft food waste from the dishwasher.

4. Representing, directly or by implication, that any dishwasher manufactured or sold by respondent can completely clean dishes, cookware, and other utensils placed in the dishwasher, without prior scraping, scouring, or rinsing.

5. Representing, directly or by implication, that any dishwasher manufactured or sold by respondent can be randomly loaded or that there are no special instructions to follow when loading.

PART II

It is further ordered, That respondent, its successors and assigns, either jointly or individually, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, distribution or sale of major home appliances in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. (a) Making any statements or representations, directly or by implication, concerning the performance of such products unless at the time that the statements or representations are made respondents possess and rely on a reasonable basis for such statements or representations, which shall consist of competent and reliable scientific test, as defined in Paragraph One (b) hereafter.

(b) For purposes of this order a "competent and reliable scientific test" is one in which one or more persons with education, knowledge, and experience in the field conduct a test and evaluate its results in an objective manner using testing, evaluation, and analysis procedures generally accepted in the profession and which best insure valid and reliable results. Moreover, the test results must either accurately predict, or be correlated with, the results that a consumer ordinarily would obtain using the product under normal household conditions.

2. Failing to make a "clear and conspicuous disclosure" (as that

term is defined in the FTC's Statement of Enforcement Policy of October 21, 1970) that product features, depicted or described in advertising for a product, are not applicable to certain models. Such disclosure shall include the model number (and name of the model if applicable) and the product features which do not apply to such model(s).

3. Making any statements or representations, directly or by implication, in connection with the advertisement of any such product which are inconsistent in any material respect with any statements or representations contained directly or by implication in post purchase material(s) supplied to the purchaser of such products.

4. For purposes of this order the term "major home appliances" means the following applicances presently manufactured or sold by the respondent: automatic dishwashers; garbage disposers; trash compactors; and microwave ovens.

PART III

It is further ordered, That respondent, its successors and assigns, either jointly or individually, and their officers, representatives, and agents and employees; directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, distribution or sale of "major home appliances" in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain the following accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) documentation in support of and on which respondent relied in making any claim included in advertising, sales promotional material, or post purchase materials, disseminated by respondents or by any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, concerning the performance characteristics of any of Respondent's major home appliances;

(b) documentation which contradicts, qualifies or calls into serious question any claim included in advertising, sales promotional material or post purchase materials disseminated by respondents or by any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, concerning the performance characteristics of any respondent's major home appliances.

Such documentation shall be retained by respondent for a period of

three years from the date such advertising, sales promotional, or post purchase materials were last disseminated.

PART IV

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

It is further ordered, That the respondent shall forthwith distribute a copy of this order to each of its officers, agents, representatives or employees of the respondent's Thermador/Waste King division who are engaged in the preparation, placement, or review of advertisements for the "major home appliances" defined in this order.

It is further ordered, That the respondent 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.

277-685 O—79——65

ADVISORY OPINIONS

Proposed course of action by gerontology research foundation does not qualify for Non-Profit Institutions Act exemption to the Robinson-Patman Act. [*File No. 783 7007, Foundation for Later Life Enrichment Fund, July 19, 1978*]

Advisory Opinion Letter

July 19, 1978

Dear Mr. Helfand:

This is in response to your letter of November 7, 1977, requesting advice concerning the exemption to the Robinson-Patman Act provided by the Non-Profit Institutions Act, 52 Stat. 446, 15 U.S.C. § 13c.

The Commission understands that the Foundation for Later Life Enrichment is a not-for-profit, non-private foundation, under Section 509(a)(2) of the Internal Revenue Code. The Foundation was created to fund gerontology research. You have advised that, in this connection, it intends to provide high quality goods and services to the aged at low cost.

Certain manufacturers reportedly have agreed to donate products; others will sell to the Foundation at wholesale prices. Your question is whether manufacturers, under the Non-Profit Institutions Act's exemption, may sell products to the Foundation for resale at prices below wholesale, making the difference in price a donation to the Foundation.

The Non-Profit Institutions Act exempts from the requirements of the Robinson-Patman Act "purchases of their supplies for their own use * * * by charitable institutions not operated for profit." Assuming, but without need to decide, that a gerontology research foundation would come within the class of institutions covered by the Non-Profit Institutions Act, the issue presented is whether the purchase and resale transactions here proposed would constitute purchases of supplies for its "own use" by the institution in question. The Commission has concluded that they would not.

In *Abbott Laboratories* v. *Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1 (1976), the Supreme Court construed the language "for their own use", when applied to hospitals, to mean "use" that is part of and promotes the intended institutional operation of the hospital in the care of persons who are its patients. The dispensation or sale of

drugs to patients under the hospital's care, or to persons essential to the hospital's function, were deemed to be for the hospital's "own use". Prescription sales by the hospital to classes of persons such as *former* patients or *walk-in* buyers, on the other hand, were deemed *not* to be within the exemption. As the Court explained:

> * * * such sales would make the commercially advantaged hospital pharmacy just another community drug store open to all comers for prescription services and devastatingly positioned with respect to commercial pharmacies. This would extend the hospital's own use concept beyond that contemplated by Congress in 13c. [425 U.S. pp. 17-18.]

The Commission does not view the purchase of products for resale to the elderly as in any manner a function integral to the operation, institutionally, of a gerontological research foundation. The question that is presented is not with respect to the status of gifts or contributions nor does it deal with the status of supplies purchased for consumption or use by the Foundation itself or its staff. Although the proposed purchase and resale activity may accrue to the Foundation's benefit and the proceeds therefrom utilized for its general purposes, that is not enough. The exemption applies only to purchases by a charitable institution not operated for profit, when such purchases are for the institution's "own use".

The Commission, in this regard, notes the statement by Justice Marshall, in his concurring opinion in *Abbott,* respecting the Congressional intent:

> * * * Congress was primarily interested in directly aiding nonprofit institutions by lowering their operating expenses, but not interested in indirectly aiding such institutions by providing them with the means of raising additional money - particularly when such resales of supplies would put the institution in competition with retail business not eligible for exemption * * *. [425 U.S. pp. 22-23.]

The Commission, accordingly, does not regard the purchase of products at prices below wholesale, by the Foundation for Later Life Enrichment, for resale at retail to the elderly, exempt from the requirements of the Robinson-Patman Act. The Non-Profit Institution's exemption is limited to purchases of supplies, by covered institutions, for their own use.

By direction of the Commission.

Letter of Request

November 7, 1977

Dear Sir:

I am serving as the Director of the Foundation for Later Life Enrichment. We were designated a non-profit, non-private founda-

tion by the Internal Revenue Service under Section 509(a)(2) of the Internal Revenue Code on January 26, 1977. In addition to funding gerontology research, we were created to provide high quality goods and services to the aged at low cost.

So far, several manufacturers have agreed to donate products to us, and a number have agreed to sell products to us at wholesale prices. However, a question has arisen about the possibility of manufacturers selling goods to us at prices below wholesale and making the difference in price a donation to the Foundation. We are not clear about whether or not this constitutes a violation of the Robinson-Pattman Act, in view of the fact that we are recognized as a non-profit foundation, and may be exempt under Section 5 of the Federal Trade Commission Regulations.

On Monday, October 31, 1977, I discussed this with David Paul and Alan Rubinstein in your New York office. They recommended I write requesting an Advisory Opinion from your office. Could you please clarify our status in regard to these apparently conflicting regulations?

Thanking you in advance for your assistance in this matter, I remain

Yours truly,
/s/ Stephen Helfand

Cigarette companies advertising, without health warning disclosure, via recorded telephonic advertising messages, provided no interstate calls are involved held illegal. [*File No. 783 7010, Fonawin Corporation, August 18, 1978*]

Advisory Opinion Letter

August 18, 1978

Dear Mr. Schaftel:

The Commission has decided that consideration of the course of action you have proposed is appropriate. Your proposal raises the question, in substance, whether cigarette companies may legally advertise, without a health warning disclosure,* via recorded telephonic advertising messages, provided no interstate calls are involved. The Commission's conclusion is that they may not.

The Commission understands that your company, Fonawin Corporation, under an exclusive contract with the Offtrack Betting Corporation of New York (OTB) operates a recorded telephone answering service (60 second recorded announcements) that provides horse racing results. The announcement service is supported by commercial advertising messages included within such recordings.

Technology reportedly exists to separate out the non-toll intrastate aspect of this service, so that no interstate calls would receive cigarette advertising messages and thus the Federal Communications Commission has advised your client that this activity is not within its jurisdiction. You advise that, for the most part, persons calling the service are "bettors." Because persons under 18 are not eligible to place bets with OTB, you urge that the proposed cigarette advertising would have little, if any exposure to children.

It is the Commission's opinion that the proposed advertising would be within the jurisdictional reach of the Federal Trade Commission Act. By advertising cigarettes to the public and failing to disclose that cigarette smoking is dangerous to health, the cigarette manufacturer-advertisers would be representing thereby, directly or by implication, that cigarettes are not dangerous to health. Although this activity is not covered by the Commission's order in *Lorillard, et al.*, 80 F.T.C. 455 (1972), the principles articulated in those orders apply here. A failure or refusal to make such disclosure in the proposed advertising would, in the Commission's view, violate

* "Warning: The Surgeon General Has Determined That Cigarette Smoking Is Dangerous To Your Health."

Section 5 of that Act which declares that unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce are unlawful.

By direction of the Commission.

Fourth Letter of Request

May 15, 1978

Dear Mr. Chairman:

More than a year ago I asked your commission for a ruling on the following subject:

I requested that cigarette companies be allowed to advertise their product without the warning disclosures on my telephone line that gives the New York race results. No one under eighteen years of age is allowed to bet by the Offtrack Betting Corporation of New York with whom I have an exclusive contract.

I have gone months without hearing from your Bureau of Consumer Protection, and then have received sporadic letters from them, the last on January 24, 1978 from Russell Hatchl stating "My superior in the Bureau of Consumer Protection determined that a formal commission opinion is inappropriate, because issues of cigarette advertising are pending in the courts."

When might I expect to get a definitive opinion from you?

Sincerely yours,
/s/ Stuart Scheftel

Fourth Staff Response

January 24, 1978

Dear Mr. Scheftel:

This is in response to your January 19, 1978 letter. You had noted receipt of my November 9, 1977 letter to you which gave my opinion on the subject of warning disclosures in cigarette advertisements included in one minute recorded telephone announcements of horse racing results. You then repeated your request for an opinion on the subject by the Commission itself.

Since my November 9 letter, my superiors in the Bureau of Consumer Protection determined that a formal Commission opinion is inappropriate because issues of cigarette advertising are pending in the courts. This decision was communicated to you in the November 21, 1977 letter from Tracy Westen, Deputy Director,

Dangerous to Your Health." This remedy was designed to insure that each time consumers were confronted with a cigarette advertisement they were warned about the grave health risks involved in smoking. While *Lorillard* by its terms does not cover your proposed activities, the Commission's power to prohibit "unfair or deceptive acts or practices in or affecting commerce" does.

Therefore, each of the cigarette advertisements which you propose to run should include the above warning statement. For the medium involved, a clear and conspicuous disclosure should, of course, be in the same language, e.g., Spanish, as the advertisement. It should be transmitted at the same apparent loudness as the advertisement. Its impact should not be diluted by competing background noises. It could appear at the end of the particular advertisement to which it applies.

Sincerely,
/s/ Russell Hatchl
Russell Hatchl
Attorney

First Staff Response

November 8, 1977

Dear Mr. Scheftel:

We owe you an apology for the delay which has occurred in handling your request for an advisory opinion for the telephone cigarette advertising your company is contemplating. Although a draft response to your inquiry was prepared by me and reviewed by our General Counsel's office back in July, the matter apparently became misplaced before the office of the Director of the Bureau of Consumer Protection reviewed it. We apologize for this.

I can assure you that this matter is now receiving the proper attention, and although I cannot promise an advisory opinion by any specific date, I am confident that the delays which occurred in the past will not recur.

Sincerely,
/s/ Russell Hatchl
Russell Hatchl
Attorney

Second Letter of Request

November 2, 1977

Dear Chairman Pertschuk:

Several months ago I wrote to you seeking a conference with your agency concerning legal requirements under the jurisdiction of your

agency applicable to possible cigarette advertising on my company's telephone announcement service. You did not reply. Rather, an FTC staff member, Dolores Montgomery, contacted me to suggest that I convert my letter into a request for Advisory Opinion. This was done, the request being filed under date of June 3, 1977 (Case No. 26718666). Hearing nothing for three months I inquired by letter to Ms. Montgomery in September. No reply.

Approximately two weeks ago I contacted Ms. Montgomery by telephone, who referred me to Murray Francis Slagel of your staff to whom I spoke on the telephone. I was assured I would receive a response to my request within the next day or two. To date, I have not received even the courtesy of a return call or letter.

It is now approximately six months since my first contact with you. I have no answer to what must surely be a rather simple question, and it now appears that I am getting a "run-around" from FTC staff.

I am sure the FTC staff thinks it is working on important public business, and after all my inquiry only affects (in however vital a way) one small private business. But surely I am entitled to some answer to my request (the agency's rules so indicated)- and within a reasonable time. As I recall, President Carter said something about bureaucratic responsiveness (or lack thereof) in his campaign.

Let me reiterate that what I seek is the advice which I was led to believe your agency is both authorized and required by law to give. While my problem may be of little moment in Washington, the present uncertainty is very damaging to my business.

Very truly yours,
FONAWIN CORPORATION
By /s/ Stuart Scheftel
Stuart Scheftel
President

Letter of Request

June 3, 1977

Dear Sir:

The purpose of this letter is to request, on behalf of Fonawin Corporation (Fonawin), an Advisory Opinion pursuant to Subpart A, Part 1, of the Commission's Procedures and Rules of Practice.

Fonawin is engaged in the business of providing one-minute

recorded announcements of horse racing results as received from tracks where New York City's Offtrack Betting Corporation (OTB) handles races.

This Corporation with which our company has an exclusive contract is controlled by the State of New York and returns approximately One hundred million dollars a year to State, City and Local funds.

It provides this service to any person calling a certain New York City telephone number (999-2121), utilizing the New York Telephone Company 9A Multi-Customer Announcement Service (which has the technical capacity to accomodate simultaneously up to 3300 incoming telephone calls on a single line). Fonawin's recorded racing information service is supported by the sale of advertising messages, which are incorporated into the recorded 60-second announcements.

Under date of July 28, 1976, the Federal Communications Commission issued a declaratory ruling concerning the applicability of Section 6 of the Public Health Cigarette Smoking Act of 1969 (15 U.S.C. § 1335) to the carriage of cigarette advertising in connection with the non-toll intrastate aspect of Fonawin's service; a copy of that ruling is attached hereto. More particularly, Fonawin advised the FCC that it had become technically feasible to separate the non-toll intrastate aspect of its service (*i.e.*, local calls made in the 212 Numbering Plan Area) from other calls, and sought guidance whether, under these circumstances, the carriage of cigarette advertising in the non-toll intrastate aspect only was prohibited. The FCC's ruling was to the effect that Section 6 of the Cigarette Smoking Act of 1969 does not preclude the carriage of cigarette advertising in the limited circumstance of the non-toll intrastate aspect of Fonawin's service.

Notwithstanding the FCC ruling, there remains a question whether any statutory or regulatory requirement within the general jurisdiction of the Federal Trade Commission would affect the carriage of such cigarette advertising. Specifically, an Advisory Opinion is sought as to whether such cigarette advertising would have to carry some form of warning to the effect that cigarette smoking may be harmful to the smoker's health.

At present, Fonawin is not carrying and has not sold any cigarette advertising and, indeed, has not separated the non-toll intrastate aspect of its service. Before pursuing such separation and before pursuing further the sale of cigarette advertising, it seeks Commission guidance with respect to the warning subject. This is because Fonawin has reason to believe that a warning requirement, if applicable, would discourage cigarette companies from advertising

on Fonawin's service (owing, apparently, to the brevity of the advertisement and its oral form). Consequently, an Advisory Opinion is sought in order that Fonawin can decide whether to proceed to separate the non-toll intrastate aspect of its service and to pursue further the sale of cigarette advertising.

So far as Fonawin is aware, the matter raised by this request for Advisory Opinion is not the subject of any current proceeding or ruling by this Commission, or any other agency or government.

There is one additional matter which may be of interest to the Commission. Fonawin is under the impression that, for the most part, persons calling its service are OTB bettors (the Fonawin number is conspicuously posted in the OTB betting parlors). Persons under 18 years of age are not eligible to place bets with OTB. Consequently, it is to be presumed that such cigarette advertising as may be carried on the non-toll intrastate aspect of Fonawin's service will have little, if any, exposure to children.

Should the Commission desire additional information with respect to Fonawin's service, or should the Commission consider a conference useful, Fonawin is prepared to cooperate fully. Contact can be made to Fonawin's President: Mr. Stuart Scheftel, 4 West 58th Street, New York, New York; telephone number (212) Plaza 9-2929.

Very truly yours,
FONAWIN CORPORATION
by /s/ Stuart Scheftel
Stuart Scheftel
President

Initial Contact Letter

April 28, 1977

Dear Chairman Pertschuk:

I am writing to request an opportunity to meet with you, or your representative, concerning a matter of importance to Fonawin Corporation, of which I am the major stockholder.

Fonawin is engaged in the business of operating a telephone announcement service in New York City. A person calling Fonawin's number receives a recorded announcement containing late horse racing results on races for which New York City's Offtrack Betting Corporation offers wagering. This service has been developed in conjunction with OTB, a corporation of the City of New York, and the Fonawin number is posted in the various OTB betting parlors.

Fonawin realizes revenues by carrying a brief advertising message as part of each recorded announcement.

In July 1976, the Federal Communications Commission issued a declaratory ruling that the carriage of cigarette advertising in connection with the non-toll, intrastate aspect of Fonawin's announcement service would not contravene Section 6 of the Public Health Cigarette Smoking Act of 1969. A copy of the FCC's ruling is attached.

While the FCC ruling has cleared the way for cigarette advertising in connection with Fonawin's purely local announcement service, it does not address the question of whether there are any related requirements in connection with such advertising which may arise from statute, rule or policy under jurisdiction of the Federal Trade Commission. Specifically, I have reference to the so-called "warning statement" to the effect that cigarette smoking may be harmful to health.

In soliciting advertising business from cigarette companies, Fonawin has noted certain uncertainty as to what your Commission would require with respect to Fonawin's carriage of cigarette advertisements. Fonawin's objective is to comply with all applicable legal requirements; at the same time, we hope to avoid having our business disrupted by uncertainty as to applicable government requirements. Accordingly, I seek a meeting in order that this matter may be clarified.

Your office may contact me at the above number with respect to a mutually convenient time for a meeting in the offices of the Commission. I shall endeavor to make myself available at your convenience.

Very truly yours,
/s/ Stuart Scheftel

P.S. Fonawin also operates the Weather Service for the entire New York Long Island and Westchester areas for the New York Telephone Company. However, this Fonawin Service does not accept advertising.

/s/ S.S.

Legality of use of mathematical model to forecast gross volume of shipments within furniture industry. [*File No. 783 7011, Business and Institutional Furniture Manufacturers Association, September 19, 1978*]

Advisory Opinion Letter

September 19, 1978

Dear Mr. Johnson:

This responds to your request for an advisory opinion on the use, by the Business and Institutional Furniture Manufacturers Association (BIFMA), of a model to forecast gross volume of shipments in the industry.

The Commission undertstands that BIFMA is a trade association with membership open to all firms in the industry upon payment of annual dues graduated according to firm size, and that current membership accounts for about 75% of industry sales. The Commission further understands that BIFMA proposes to engage an independent accounting firm to use a mathematical model, based entirely on publicly available economic indicators, attempting to forecast total quarterly office furniture shipments (*i.e.*, forecasts will not be broken down by office furniture type or product category) for the ensuing twelve-month period. There will be no exchange or disclosure whatever of individual firm data. It is proposed that access to the forecast shipment data be limited to members of BIFMA.

Shipment forecast arrangements by competitiors in particular marketing environments could raise serious antitrust concerns. On the basis of available information indicating low industry concentration and the presence of differentiated products, however, the Commission is of the view that the likelihood of anticompetitive use of the proposed forecast data is remote. The Commission cautions that the forecasts must not be used by the Association or its members so as to restrict independent business decisions by any individual firm, to secure adherence to quotas of production or sales, or to effect any other such unlawful trade restraint.

Accordingly, the Commission does not presently object to the proposed forecast of total shipments, subject to the above qualifications.

By direction of the Commission.

Letter of Request

May 10, 1977

Dear Mr. Secretary:

We are general counsel for the Business and Institutional Furniture Manufacturers' Association (BIFMA) and in that connection we are submitting this request for an advisory opinion with respect to a proposed sales forecasting program. The proposed program is not currently under investigation by or the subject of any proceedings before the Commission. The program is scheduled for implementation in June of 1977. However, we are authorized to represent to the Commission that the program will not be instituted until we have received the requested opinion.

Background

BIFMA is a Michigan nonprofit corporation which was formally organized in June of 1973. Copies of the association's Articles of Incorporation and Bylaws are enclosed as Exhibits A and B.* The association was organized for the benefit of members of the industry and the public, particularly in the areas of development and standardization of test methods and procedures, statistical compilation and reporting, and the development of material standards.

Enclosed for your information as Exhibit C* is a current copy of the membershio list of BIFMA. It is estimated that current members account for over 75% of the national sales of the office furniture industry.

Under Article II, Section 1, of the corporation's Bylaws, membership in the association is open to all manufacturers of business and institutional furniture. The association encourages manufacturers to become members and is currently campaigning to increase its membership. The annual dues for membership are graduated according to the size of the manufacturer in terms of annual sales volume, and are set forth in the following table:

Annual Sales Volume	*Annual Membership Dues*
Under $1 million	$ 540
$1 to $4.9 million	1,020
$5 to $9.9 million	1,500
$10 to $14.9 million	2,100
$15 to $24.9 million	2,700
$25 to $49.9 million	3,300
Over $50 million	4,200

* Not reproduced herein.

As an example of BIFMA's activity, the association has developed standards for office chairs which have been accepted and published by the American National Standards Institute. BIFMA is actively pursuing similar standards with respect to the manufacture of other items of office furniture.

As an additional activity, BIFMA is sponsoring the collection, compilation and periodic reporting of industry new orders, shipments, unfilled orders and inventories as well as net sales, days' accounts receivable are outstanding and inventory turnover information. Membership data is reported to Seidman & Seidman, certified public accountants, who are responsible for the compilation and reporting of the statistics. No other persons have access to the data of individual firms, and the reports contain no reference to individual firm data. Seidman & Seidman computes the arithmetic averages of the data in each category submitted by members and reports to each member that firm's individual data and the arithmetic average of data for all reporting firms and for all reporting firms by three sales size categories (A - up to $10,000,000; B - $10,000,000 to $40,000,000; and C - over $40,000,000). No individual firm receives any data of or comparison with any other individual firm.

Proposed Course of Action

We are enclosing herewith, marked as Exhibit D,* a document entitled "BIFMA Forecasting Research Program - A Consolidated Report." This document sets forth the research that has been done by BIFMA and its consultants with regard to the development of a forecasting model to forecast office furniture shipments. At page 25 of this document, the forecasting model is set forth. BIFMA proposes to engage Seidman & Seidman to utilize this forecasting model and prepare on a quarterly basis a forecast of total office furniture shipments for the next twelve month period showing projected gross shipments on a calendar quarter basis during that twelve month period.

It is proposed that Seidman & Seidman will distribute the quarterly forecasts of office furniture shipments only to members and associate members of the association. This limitation is predicated upon the fact that all manufacturers in the business and institutional furniture industry are encouraged to become members,

* Not reproduced herein.

there are no conditions of membership which would operate as a barrier to exclude any manufacturer, and upon the fact that the association has expended considerable amounts of money in developing the program and will expend considerable amounts of money in the future toward the production of the forecasts and further developments and refinements in the program which would be difficiult if not impossible to allocate on a basis which would result in a fair sharing of these costs by members and nonmembers of the association.

Request for Advisory Opinion

We respectfully request that the Commission render its advisory opinion with respect to the legality of the above proposed course of action. In order to expedite this matter, we would be happy to supply any explanation or additional information to members of your staff at their convenience. In this regard, your staff should feel free to telephone the undersigned on a collect basis at any time.

Thank you for your consideration.

Very truly yours,
VARNUM, RIDDERING, WIERENGO
& CHRISTENSON
/s/ Donald L. Johnson

Proposed advertising plan to disseminate cigarette advertisements headlining, without qualification, tar values higher than latest published FTC number disapproved. [*File No. 773 7016, Lorillard, September 26, 1978*]

Advisory Opinion Letter

September 26, 1978

Dear Mr. Gastman:

This is in response to your request for an advisory opinion as to whether Lorillard may disseminate cigarette advertisements headlining, without qualification, a tar value higher than the latest published FTC number.

The Commission understands that your request was transmitted orally to a Commission staff attorney. Although requests for advice should be submitted in writing to the Secretary of the Commission, §1.2 of the Commission's Rules of Practice, the Commission has determined to render an advisory opinion because it has sufficient information regarding the proposed course of action.

Under the agreement submitted to the Commission by Lorillard and seven other cigarette companies, dated December 17, 1970, cigarette advertisements must include tar and nicotine data from Commission test results most recently published in the Federal Register, subject to certain specified exceptions necessary to meet deadlines for submission of advertising copy. Lorillard's proposed advertisements would deviate from this industry agreement, by permitting cigarette advertisements to feature a tar number greater than the latest FTC tar number for an indeterminate length of time.

The Commission cannot give its approval to Lorillard's proposed advertising plan. In the Commission's view, it would be deceptive to advertise a tar figure which is higher than the latest applicable FTC tar figure. If the headlined tar level differs from the tar figure disclosed in accordance with the cigarette industry's voluntary disclosure agreement, consumer confusion might be generated. At the same time, the Commission could not condone the practice of utilizing a higher headlined tar figure in the voluntary disclosure and labelling the figures "By FTC Method," since the figures would not actually be the result of the FTC method.

Therefore, in the Commission's opinion, tar values which are set forth in cigarette advertisements must be consistent with the latest applicable FTC tar number.

By direction of the Commission.

When needed pharmaceuticals are unavailable or difficult to obtain, non-profit hospital may resell the needed pharmaceuticals to the general public as humanitarian gesture during emergency caused by medicaid strike. [*File No. 773 7009, St. Peter's Hospital of the City of Albany, September 27, 1978*]

*Revised Opinion Letter**

September 27, 1978

Dear Mr. Iseman:

This is in response to your letter of December 20, 1976, requesting advice concerning the exemption to the Robinson-Patman Act found in the Non-Profit Institutions Act, 52 Stat. 446, 15 U.S.C. Sec. 13c.

The Commission understands that your client, St. Peter's Hospital of the City of Albany, is a not-for-profit corporation currently receiving preferential price treatment in its purchase of pharmaceuticals as permitted by the above-cited exemption of the Robinson-Patman Act; that your client would like to resell pharmaceuticals, at the same reduced price it pays its supplier, to a neighboring, not-for-profit nursing home which currently purchases its drug needs at retail from local druggists; and that your client would like to resell pharmaceuticals to the general public during the medicaid strike, should pharmaceuticals become otherwise difficult or impossible to obtain. You seek advice on whether such resales are permissible under the Robinson-Patman Act.

The Non-Profit Institutions Act exempts from the Robinson-Patman Act "purchases of their supplies for their own use by * * * hospitals, and charitable institutions not operated for profit." The Supreme Court in *Abbott Laboratories* v. *Portland Retail Druggists Ass'n, Inc.*, 426 U.S. 1 (1976), held that the phrase "for their own use" limited the classes of individuals to whom the supplies could be resold. However, the Commission does not believe these limitations were intended to apply to resales of supplies, at cost, by one charitable institution to another that are limited, in turn, to the latter charitable institution's own use. A resale of this nature would constitute a not-for-profit transfer of supplies from one institution, eligible under the exemption, to another such institution, also eligible under the exemption. In the Commission's view, the exemption was intended to insulate from Robinson-Patman applica-

* For the original Advisory Opinion Letter and the Letter of Request, *see* 89 F.T.C. 689.

tion all purchases of supplies (for their own use) by the designated classes of institutions not operated for profit. The transactions, as above described, would not appear in conflict with such a purpose. The Commission, accordingly, would regard the resale, of pharmaceuticals by your client to the nursing home at the same reduced price that it paid its supplier as not altering its exempt status under the Non-Profit Institutions Act. Such pharmaceuticals must be acquired for the nursing home's "own use" as that language was interpreted in *Abbott Laboratories, supra,* for the exemption to apply.

The question of whether a non-profit hospital such as your client may open its pharmacy to the general public in an emergency situation was addressed specifically by the Supreme Court in the *Abbott Laboratories* case. We direct your attention to that portion of the decision which states that:

> [W]hen the hospital pharmacy is the only one available in the community to meet a particular emergency situation[,] * * * [s]o long as the hospital pharmacy holds [that] situation within bounds, and entertains it only as a humanitarian gesture, we shall not condemn the hospital and its suppliers to a Robinson-Patman violation * * *

[*Id.* at 18.]

Accordingly, the Commission is of the opinion that if needed pharmaceuticals are not available or difficult to obtain, your client may resell the needed pharmaceuticals to the general public as a humanitarian gesture during the emergency caused by the medicaid strike.

By direction of the Commission. Commissioner Pitofsky did not participate.

Proposed price reporting service for retail chain food manufacturers. [*File No. 783 7002, Mathews Research, September 29, 1978*]

Advisory Opinion Letter

September 29, 1978

Dear Dr. Mathews:

This is in response to your request for advice concerning a proposed price reporting service for retail chain food merchandisers, styled Full Range Market Monitor.

Your proposal contemplates that participating supermarket chains would furnish your firm, on a weekly basis, computer printouts listing all of the items sold in their stores together with the current selling price of each item. The prices supplied would be effective as of the date submitted but with no guarantee as to the length of time those prices would remain the same. This price information would be collated for release by your firm the third day after receipt. You have advised that the major chains in your area have indicated interest but are unwilling to provide price lists without a Commission opinion respecting possible law violation.

It is proposed, as the Commission understands, that the price survey data would be available, not only to the participating food retailers, but to anyone willing to use the service at the established rates. This would include food and grocery manufacturers and suppliers, government, public service groups and individuals. Some purchasers of this information, such as manufacturers, might only wish to purchase the retail price data pertaining to their own product group or to obtain a partial report. Such purchasers, in addition, might not need the retail price information so promptly. However, you have indicated that participating retailers will need the reports promptly enough to enable timely price adjustments or permit contemporaneous questioning of suppliers concerning why a lower priced chain was able to obtain a supplier's product for less.

You have also inquired concerning the legal effect of particular variations in the proposed service. Two involved alternative methods of identifying the participating stores, by name or letter code; two related to limiting price survey data to only the participating retail chains; and one variation proposed the purchase of price data with a sale of the collated data back to the participating chains. None of

these variations would serve to alter the Commission's basic concern with respect to the subject proposal.

Retail grocery price surveys which make available to consumers competitive price information, enabling them to better formulate purchasing decisions, are, in the Commission's view, of benefit to consumers and of benefit to retail level price competition. The Commission has no objection to such surveys. Nor would the Commission's concern here be the same if the subject survey was limited to observed prices. However, your proposal goes beyond this by providing for the exchange of current weekly pricing schedules among competing retail grocery chains. Although the prices reported are subject to change at any time, they do reflect areawide pricing decisions by each chain involved in the program. Access to such information over time might well enable a chain to anticipate the pricing patterns of its competitors and facilitate the coordination of future pricing decisions. Particularly in highly concentrated local markets (such as the Youngstown/Warren, Ohio market proposed by you as a test market) the danger that price stabilization would result is sufficiently great that the Commission is unable to approve the subject proposal as presented.

By direction of the Commission.

Second Letter of Request

January 17, 1977

Dear Ms. Cotter:

Shortly after your letter of March 11, 1976, arrived John Wilcox moved. We recently discovered that the answers to your questions were not sent to you, so that you could proceed with the advisory opinion of the Market Monitor service. The following are the details addressed in each question and numbered accordingly. (I have also enclosed a copy of your letter.)

1. Price information is to be collected weekly and is to be published weekly on the third day after the information is received by Mathews Research.

2. Prices are effective as of the date they are submitted to us by the store operator. There is no guarantee as to the length of time the prices will remain the same.

3. A sample page from the Market Monitor report is enclosed.*

4. All clients will receive the same information; it will be available to anyone willing to use the service at the established rates. Food manufacturers may only wish to purchase information that pertains to their product group, or only require a partial report.

5. The retailers participating in this project will be from the divisional (or regional) levels. Our first test is to work with the chains that have stores located in the Youngstown/Warren SMSA. The divisions are located in Youngstown; Sharon, Pennsylvania; Cleveland, Ohio; and Pittsburgh, Pennsylvania. The prices and product lists will only be reported for the Youngstown/Warren SMSA. If the test is successful we would like to expand the service to other areas.

6. If the Youngstown/Warren SMSA test is successful, Mathews Research intends to expand the service into other areas located in Ohio, Pennsylvania, Western New York, Michagan, Indiana, and Illinois. Our resources are limited, and slow growth is anticipated.

7. Each grocery division has a computer print-out of all products, sizes and prices the company stocks. Each store manager prices his stock according to this list. The computer print-outs of all products, sizes and prices each division carries will be received by Mathews Research. We have not been able to obtain copies of the print-outs but have enclosed a copy of one that has wholesale prices.

8. As far as we understand, the Youngstown/Warren SMSA is a one price zone. Consequently, we will only be furnished one price for each product.

9. The information will enable retailers to be competitive in their markets. For example, if a price in one chain is lower than another the higher price chain would question the manufacturer as to why the lower priced chain was able to obtain the product for less. Moreover, the higher priced chain would question their pricing structure and if too high might lower their prices, thus enabling slightly more competition in a market area. If the report were not timely they would not be able to adjust their prices and if a manufacturer were offering discounts within a given time period they would not be able to take advantage of the lower discount rate.

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* Not reproduced herein.

Product manufacturers would be able to use the information to analyze why a product is doing well or poorly in a market. For example, the retail price is higher in one market or not stocked in a market: this could explain why the product is not doing well in that area. It is not essential that the product manufacturers receive the Market Monitor as quickly as grocers, but to offer data more than two months old would weaken the value of our service; they could obtain this information in that length of time from their salesmen and other research services.

10. Representatives of food stores have indicated to us that the information available through the Market Monitor would be more reliable than traditional methods of collecting data, and at a lower cost to them.

11. A vice president of a food store chain indicated to us that we should propose the consolidation of pricing lists from several chains. He knows this is being done in California and those who participate are finding it useful. It gives them a complete list of store items at a lower cost.

We asked the major chains operating in this area and they have indicated their interest, and would be willing to give us their price lists. Before they proceed they want an opinion from the F.T.C. to insure they are not in violation of your regulations. Moreover, Mathews Research would not wish to provide a service that would be an embarrassment to our clients at a later date.

I certainly appreciate your interest and help in this matter. If I can provide any additional information please let me know.

Sincerely,
/s/ Donald H. Mathews
Donald H. Mathews, Ph.D.
MATHEWS RESEARCH

Staff Letter of Response

March 11, 1976

Dear Mr. Wilcox:

We are in receipt of your letter of February 16 requesting an advisory opinion relating to a proposed marketing research service, the "Full Range Market Monitor."

The matter you raise appears to satisfy the requirements of Section 1.1 of the Commission's Rules of Practice. The staff intends

to submit this matter of the Commission for issuance of an advisory opinion. However, the final decision as to whether to issue an opinion is made by the Commission in the course of its substantive consideration of the issues. I, of course, cannot inform you what action the Commission will ultimately take.

The legality of the plan is dependent on factual assessments of the market involved, the parameters of the plan and its probable effect on price competition. To respond to your inquiry, the following supplementary information is needed:

1) State how often price information will be collected (weekly, twice a month, monthly, every other month) and how often the Market Monitor reports will be published. How soon after the price information is obtained will the Market Monitor report be available?

2) Identify the effective dates of the prices reported: whether the reported prices will be effective on a specified date in the future; whether they are effective presently and will remain in effect during some or all of the reporting period; whether they are the most recently effective, current prices; or whether some other kind of price information is to be reported.

3) Submit a sample of each Market Monitor report as to which an opinion is desired.

4) For each report form provided in response to Item 3, identify all potential purchasers that have indicated an interest in purchasing such report (specifying whether retailer or product supplier) and indicate whether the report will be available to anyone willing to purchase it.

5) For each report form identified in response to Item 3, identify or describe in detail the retailers or classes of retailers that will participate or will be asked to participate, by providing price information.

6) Describe the geographical areas to be covered by the above reports.

7) Submit a sample of each type of inquiry form that will be used to collect price information from retailers, together with any explanatory material which would accompany or describe the price data to be so provided.

8) Will participating food store firms provide more than one comprehensive price list for a given report? If so, describe what will be provided.

9) Describe fully and in detail what you as marketer of this information view as the benefit(s) and/or usefulness of the reports identified in Item 3 to participating retail food stores. (In response to this item, specify the extent to which current price information is

needed and the extent to which such benefits and/or usefulness would be diminished if the price information reported were one month old or six months old.)

10) Have representatives of food stores indicated to you their views as to the benefit(s) and/or desirability of the price information which would be available through the Market Monitor? Have product suppliers so indicated their views? If so, describe separately in detail.

11) Have representatives of food store firms indicated to you various facets of this or similar programs which they like or dislike or favor or disfavor? Have product suppliers so indicated? If so, describe in each instance in detail the positions and reasons suggested.

I would anticipate that once the Commission is in receipt of the information necessary for full consideration of this matter, your inquiry would be submitted to the Commission by the staff for issuance of an advisory opinion within 60 days.

Sincerely,
Margaret A. Cotter
Attorney
Office of General Counsel

Letter of Request

February 16, 1976

Dear Sir:

It is the desire of Mathews Research that the Federal Trade Commission issue an Industry Guide in accordance with ¶ 9801 of Volume III, Trade Regulations Reports, Pages 17,562, and 17,563.

Mathews Research, a marketing research firm located in Youngstown, Ohio, desires to provide a new marketing research service, primarily to food merchandisers. The service is to be called the "Full Range Market Monitor". It is a new service which Mathews is not now providing. Furthermore, this proposed service is not the subject of a pending investigation or other proceeding by the Federal Trade Commission or any other government agency.

A complete description of the proposed "Full Range Market Monitor" is attached for your examination. The first section describes the basic reporting system. The second section deals with

several variations of the basic service. Appendix A* shows a typical layout of a report print out.

The advice Mathews seeks is: 1. Is the basic service in violation of Section I of the Sherman Act or Section 5 of the Federal Trade Commission Act? 2. Do any of the five variations noted in section 2 of our proposal change the legality of the proposed basic service?

Mathews Research would appreciate prompt notification of receipt of the request, an indication of whether or not it is the intention of the Commission to issue an advisory opinion on this matter, and an estimate as to the length of time required to process an advisory opinion. A representative of our firm is available for a conference at the pleasure of the Commission.

Very sincerely,
/s/ John P. Wilcox
John P. Wilcox
MATHEWS RESEARCH

PROPOSED NEW "FULL RANGE MARKET MONITOR"

PURPOSE: Mathews Research, an independent marketing research firm will collect, collate, publish and disseminate supermarket prices on the full line of merchandise items sold in supermarkets. The purpose of this service is to provide clients with prompt accurate market information in general and item prices in particular. Mathews Research in this service is a merchandiser of information.

DESCRIPTION OF SERVICE

Section 1. Participating supermarket (chains) management will furnish Mathews Research a list of the items sold in their stores and the current selling price of each item on a regular, schedule e.g., weekly, bi-monthly, or monthly. Mathews Research will then enter each set of items and prices into a computer data bank for future retrieval. Retrieval of data will be in several forms depending on individual clients' needs as described below.

The first and major service is providing pricing information to the supermarket chains who furnished Mathews Research with the original data. Participating chains would purchase from Mathews Research the list of items sold in the area supermarkets with each chain's prices. Reports will be published on a regular basis at the

* Not reproduced herein.

frequency desired by the client: weekly, bi-monthly or monthly. (See appendix 1)*

Other services available to supermarket chains will be lists of the highest prices for each item, the lowest price for each item, the average price for each item and after a period of time price trends per item or per chain.

The second service is to provide food and grocery manufacturers and suppliers with the itemized prices of their goods sold by each supermarket chain. Product managers and brand managers in using this service will be able to track the actual selling prices of their products.

A third service is to Government, public service groups or individuals whereby price information would be for sale on a customized basis. Here the data bank can be addressed to retrieve the information in any manner which suits the needs of the client.

Section 2. Variations which may or may not affect the legality.

What effect on the legality of the proposed service would the following variations have:

1. Chain stores are identified by name on the reports.

2. Chain stores are not identified by name but are masked by listing them as Chain or Supermarket "A", "B", "C" etc.

3. Agreement made with chain furnishing prices that Mathews Research would not sell data to a competitor unless that competitor furnishes their price list in the same manner as all other participants.

4. Agreement made with supermarkets furnishing data that no use of the data would be made other than the distribution to firms who furnished the data.

5. Price lists are purchased (rather than furnished without consideration) from participating chain stores and collated data in turn sold back to them.

* Not reproduced herein.

Compliance opinion as to whether a furniture manufacturer's proposed plan to grant special price quotations, under certain conditions, to dealers competing in bid situations would violate order issued June 30, 1967, 71 F.T.C. 1579. [*Docket No. C-1248, Herman Miller, Inc., October 11, 1978*]

*Opinion Letter (Revised)**

October 11, 1978

Dear Mr. Moran:

The Commission has considered your request for advice, pursuant to Section 3.61(d) of the Commission's rules, regarding the propriety of a proposed course of action, as set forth in your letter of May 15, 1978. That letter modified your previous two communications, dated April 27, 1977 and August 5, 1977, which were the subject of Commission action on January 6, 1978, wherein the Commission advised that it could not approve your proposal as then constituted. As modified, you seek a determination of whether a plan wherein Herman Miller would grant special price quotations to dealers competing in bid situations would violate a Commission order of June 30, 1967 in the captioned matter.

As presently constituted, the plan would grant special price quotations to dealers in bid situations only. In order to receive the special price in a specific situation, a dealer would have to certify to Herman Miller that (1) it will submit a bid on that job, and (2) that on that job it will not bid products competitive to those products for which it obtains special price quotations from Herman Miller. All dealers which carry the Herman Miller line of products will be notified of the availability of this special pricing.

This plan would operate in the context of bid solicitation by institutions. When an institution solicits a bid, it may do so either by reference to descriptive specifications or by brand name. If brand names are specified, different items may call for different brands.

It is the Commission's understanding that, under the plan as modified by your letter of May 15, 1978, without regard to whether bids are solicited by descriptive specifications or brand names, a multiple line dealer, which wishes to bid Herman Miller products for some items and competing brands for others, can receive Herman

* For background correspondence and original opinion letter, see 91 F.T.C. 1167.

Miller's special pricing on the items for which it bids Herman Miller products.

Under the circumstances, the Commission is of the opinion that the modified proposal would not contravene the Robinson-Patman Act or the outstanding order in this matter. Inasmuch as any Herman Miller dealer will have the option of receiving special pricing on any given item, the Commission believes that the proposed plan is functionally available to all dealers, and hence not discriminatory.

The Commission wishes to note, however, that this advice should not be construed as indicating approval of the condition that a dealer must agree not to bid a competitor's products on items for which Herman Miller has quoted a special price. The Commission understands that respondent has stated that in this respect respondent's proposal is equivalent to the practices of its competitors. Because an extensive investigation would be required to assess the competitive effect (apart from Robinson-Patman considerations), of such practices, the Commission expresses no opinion about that aspect of your proposal.

By direction of the Commission.

/s/ Carol M. Thomas
Secretary

Letter of Request

May 15, 1978

Dear Mr. Thomas:

We are writing on behalf of our client, Herman Miller, Inc., to request the Commission's advice with respect to the propriety of the following described proposed course of action under the Commission's outstanding order entered with the Company's consent on June 30, 1967.

We previously requested the Commission's advice regarding a similar course of action which was the subject of the Commission's response dated January 31, 1978. Based upon that response, we have consulted with the Company, and the Company has decided to modify its proposed program and resubmit the matter for the Commission's advice. Accordingly, we hereby incorporate the materials which we previously submitted for the Commission's consideration in connection with the response of January 31, 1978, and request the Commission's advice on that proposed course of action, as modified by this letter.

Under the program as originally proposed, a dealer would have been denied special pricing if the dealer proposed to bid Herman Miller products for a portion of the bid items and competing brands for other bid items in situations where the bid solicitation identified the products to be bid by descriptive specifications rather than brand names. The Company now proposes to delete that feature from its proposed program so that dealers would be entitled to mix their bids by bidding Herman Miller products for some items and competing brands for other items. In all other respects, the proposed program would remain the same as that described in our prior communications to the Commission which were the basis for the Commission's response of January 31, 1978.

Based upon our review of the Commission's prior advice and a subsequent discussion with the Commission's Staff, we believe that the program in its modified form will be acceptable, and we respectfully request the Commission's advice as whether the proposed course of action will, if pursued by the Company, constitute compliance with the Commission's outstanding Order. We are hopeful that the Commission will give this request expedited treatment in view of the fact that the request is based on a subject which was recently considered by the Commission and its Staff. Of course, we will be happy to supply any additional information or clarification as the Staff deems necessary. Thank you for your consideration.

Yours very truly,
VARNUM, RIDDERING, WIERENGO
& CHRISTENSON
/s/ J. Terry Moran

Prohibition of proposed course of action whereby automobile dealers entering into service contracts with vehicle purchasers at the time of sale seek to limit the duration of implied warranties therein. [*File No. 793 7001, Rain, Harrell, Emery, Young and Doke, November 30, 1978*] (pub 43 FR 57244, Dec. 7, 1978)

Opinion Letter

November 30, 1978

Dear Mrs. Stevenson:

This is in response to your letters of October 4th and 18th, 1978 requesting an advisory opinion as to whether Section 108 of the Magnuson-Moss Warranty Act, 15 U.S.C. 2308, would prohibit a proposed course of action for your clients. Your clients, automobile dealers who enter into service contracts with vehicle purchasers at the time of sale, propose to limit the duration of implied warranties to the duration of the service contract.

Section 108(a) of the Act flatly prohibits any modification of implied warranties by a supplier when a full warranty is offered or a service contract is entered into. This section states:

> No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

Section 108(b) of the Act creates an exception to the general rule in Section 108(a) in the following manner:

> For purposes of the title (other than section 104(a)(2)), implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

The exception in Section 108(b) does not refer, however, to service contracts or provide for the limitation of implied warranties in service contracts. In fact, the provision specifically requires that any permitted limitation of implied warranties be "prominently displayed *on the face of the warranty*" (emphasis added). Had Congress intended the exception to apply to service contracts as well, Section 108(b) would read ". . . prominently displayed on the face of the warranty or service contract." Further, there is no other section of

the Act that could be interpreted to allow the course of action you have proposed.

Section 108(b) would thus not except the proposed course of action from the general prohibition against disclaimer or limitation of implied warranties in Section 108(a) of the Act.

By direction of the Commission.

Supplemental Request Letter

October 18, 1978

Dear Mr. Thomas:

Earlier this month I submitted a request for a formal Commission Advisory Opinion under the Magnuson-Moss Warranty Act (the "Act"). The question was whether Section 108 of the Act would allow an automobile dealer to limit the duration of implied warranties when a service contract is entered into at the time the vehicle is sold.

Mr. Jeffrey Karp of your office has asked me whether our clients are offering any type of warranties in connection with the sale of the vehicle and the service contract. I did not include this information in my earlier letter since it was my understanding that the Commission believed that the sale of a service contract precluded the limitation of the duration of implied warranties regardless of what type of written warranty was offered.

Our clients inform me that the person who buys the car receives the usual manufacturer's warranty and does not receive any type of warranty, either full or limited, from the dealer selling the vehicle and service contract.

I understand that in this case the Commission feels it is "clear on the face of the statute" that no limitation may be made on the duration of an implied warranty. More specifically, the Commission states that such a limitation may be made only if the supplier offers *only* a limited warranty and does not offer a service contract as well. Although a statement to that effect does appear in the 1974 House Committee Report, there is nothing in the statute itself which even arguably supports this position. Indeed, the words "only" and "limited warranty" do not even appear in the text of Section 108 as it was finally adopted.

We again renew our request for a formal Commission Advisory Opinion on this matter.

Thank you for your consideration.

Very truly yours,
/s/ Cathleen Chandler Stevenson
(Mrs.) Cathleen Chandler Stevenson

Letter of Request

October 4, 1978

Dear Mr. Tobin:

Pursuant to the Federal Trade Commission Rules of Practice, I am writing to request a formal Commission Advisory Opinion under the Magnuson-Moss Warranty Act (the "Act").

We represent several automobile dealers who offer an extended service contract to persons purchasing new or used automobiles. These extended service contracts are purchased at the time the vehicle is sold. It is our understanding that the Commission's present interpretation of Section 108 of the Act precludes the limitation of the duration of implied warranties when a service contract is entered into at the time of the sale. Accordingly, we have so advised our clients, and they are presently not limiting the duration of implied warranties when a service contract is entered into at the time the vehicle is sold. To the best of our knowledge, none of these automobile dealers is currently the subject of any type of investigation by your office.

Our clients have inquired if they may limit the duration of implied warranties to the duration of the extended service contract. We have advised them to refrain from this course of action until we have received an Advisory Opinion from the Commission.

This question has already been the subject of several letters from the Commission Staff. Mr. Alan Rubin and Mr. Jeffrey Carp of the Bureau of Consumer Protection each drafted a response to this question when it was raised initially by the National Automobile Dealers Association (the "NASD"). An extensive brief on the issue was filed with the Commission by the NASD on April 3, 1978.

From my review of the Commission's previous letter, it is my understanding that the Commission interprets subsection (b) of Section 108 of the Act as permitting limitations on implied warranties when the only agreement offered by the supplier is a limited warranty. However, the text of subsection (b) does not specify that it applies solely in cases where the supplier offers only a limited warranty. Moreover, such interpretation would effectively read out the "except as provided in subsection (b)" exception clause in the general rule of subsection (a).

Last week I attended a seminar in Dallas and visited with Mr. Christian S. White, Assistant to the Chairman, about the procedure for requesting this Advisory Opinion. Mr. White advised me that it would not be necessary for me to file a memorandum or brief along with this request. However, please feel free to contact me if you should desire any additional information.

Thank you for your consideration.

Very truly yours,
/s/ Cathleen Chandler Stevenson
(Mrs.) Cathleen Chandler Stevenson

277-685 O—79——68

TABLE OF COMMODITIES*

DECISIONS AND ORDERS

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DECISIONS AND ORDERS

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