

Complaint

IN THE MATTER OF
UNION CARBIDE CORPORATIONCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT AND SECS. 3 AND 7 OF
THE CLAYTON ACT

Docket C-2902. Complaint, Sept. 28, 1977 — Decision, Sept. 28, 1977

This consent order, among other things, requires a New York City producer of industrial gases and gas welding apparatus, for a 20-year period, to cease using any tying arrangement, or employing any exclusive dealing contract that is not for one year or less, or which fails to provide a 90-day or less period for notice of termination. Additionally, the firm is prohibited for a ten-year period from acquiring distributors of industrial gases or gas welding equipment without prior Commission approval, except where any of the prescribed conditions exist. Further, in those instances where prior approval is not required, Union Carbide must furnish the Commission with sufficient data so as to enable it to determine whether such acquisition violates the terms of the order.

Appearances

For the Commission: *Gordon Youngwood, Roger S. Leifer and Geoffrey S. Walker.*

For the respondent: *George A. Avery, Wald, Harkrader & Ross, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Union Carbide Corporation ("Union Carbide"), respondent herein, has violated the provisions of Section 3 of the Clayton Act, as amended (15 U.S.C. 14), and Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

DEFINITIONS

1. For the purpose of construing this complaint, the following definitions will apply:

(a) "Industrial Gases" shall mean the following gases: Oxygen, Nitrogen, Argon, Acetylene, Hydrogen and Helium.

(b) "Welding Products" shall mean equipment, supplies and consumable items used to fuse or cut metals.

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(c) "Gas Welding Apparatus" shall mean the equipment used to fuse or cut metals by means of heat produced by a gas flame.

(d) "Distributor" shall mean a business firm whose primary function in the Industrial Gas and Welding Products business is the purchase of Industrial Gases and Welding Products for the purpose of resale, but shall not include any business firm whose primary function in the resale of Industrial Gases and Welding Products is the distribution of Industrial Gases and Welding Products to entities engaged in the plumbing, heating or air conditioning trade.

RESPONDENT

2. Respondent Union Carbide is a publicly owned New York corporation with its principal place of business at 270 Park Ave., New York, New York.

3. Union Carbide is engaged in the manufacture and sale of chemicals, plastics, industrial gases and related products, welding equipment, metals, carbon products and such consumer oriented products as batteries and antifreeze.

4. For 1975 Union Carbide had net sales of \$5.7 billion and a net income of \$382 million.

5. Union Carbide, the nation's leading producer of industrial gases, sells industrial gases and welding products through its Linde Division. During 1972, Union Carbide had the largest volume of domestic sales of acetylene, argon, helium, nitrogen and oxygen to distributors, and the third largest volume of domestic sales of hydrogen to distributors. During 1972, it was one of the nation's leading manufacturers of welding products.

6. At all times relevant herein Union Carbide sold and shipped its products in interstate commerce and engaged in commerce within the meaning of the Clayton Act, as amended, and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

COUNT I

TRADE AND COMMERCE

7. The relevant lines of commerce affected by the actions of Union Carbide are the sales to distributors of each of the following relevant industrial gases: acetylene, argon, helium, hydrogen, nitrogen and oxygen.

8. The relevant geographic market for each line of commerce is the United States.

9. During 1972, there were substantial sales by Union Carbide to

distributors of acetylene, argon, helium, hydrogen, nitrogen, and oxygen. Union Carbide is one of the major sellers of those six gases to distributors.

ACTS AND PRACTICES

10. In the course of interstate commerce, Union Carbide, a leading company in each relevant line of commerce alleged herein, has engaged and is engaging in acts and practices which may foreclose competition in the sale of relevant industrial gases to distributors. Among the acts and practices in which Union Carbide has engaged and is continuing to engage, in the course of interstate commerce, are the following:

(a) Requiring distributors, pursuant to a contract, agreement or understanding, to purchase from Union Carbide their total requirements of each of the relevant industrial gases;

(b) Requiring distributors to purchase their total requirements of the relevant industrial gases from Union Carbide as a condition to their purchasing any relevant industrial gas from Union Carbide;

(c) Requiring distributors to purchase their total requirements of the relevant industrial gases from Union Carbide as a condition to their purchasing welding products from Union Carbide.

(d) Leasing or otherwise making available to customers of distributors who have ceased purchasing one or more Union Carbide industrial gases, industrial gas cylinders at rates set for the purpose of destroying a competitor or eliminating competition.

EFFECTS

11. The acts and practices identified in Paragraph 10 have or may have the following effects among others:

(a) Substantially lessening competition for the sale of relevant industrial gases to distributors;

(b) Substantially lessening competition for the sale of relevant industrial gases to consumers;

(c) Increasing entry barriers into each line of commerce alleged herein;

(d) Depriving distributors of the opportunity of competing for sales of relevant industrial gases to certain classes of customers.

VIOLATIONS

12. The acts and practices alleged herein constitute tying arrangements, exclusive dealing arrangements or total requirements

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contracts in violation of Section 3 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

13. The acts and practices alleged herein constitute unfair methods of competition or unfair acts and practices by Union Carbide in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

14. The charges of Paragraphs 1 through 6 are incorporated by reference herein as if set forth verbatim.

PLAN AND PATTERN OF ACQUISITIONS

15. Since 1969, Union Carbide, pursuant to a plan or plans, has acquired an interest of 50 percent or more in at least 22 distributors. The total dollar amount expended for these acquisitions was approximately \$18 million.

16. The sales of the acquired distributors for the year prior to their acquisition ranged from \$309,000 to \$4,835,000.

17. As part of its continuing plan of acquisitions, Union Carbide expects to acquire additional distributors within the next five years.

18. At all times relevant herein, each of the acquired distributors was engaged in the purchase or sale of products in interstate commerce, was engaged in commerce as commerce is defined in the Clayton Act, as amended, and operated a business in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

TRADE AND COMMERCE

19. The manufacture and sale of gas welding apparatus constitutes a relevant line of commerce. Union Carbide accounted for a substantial share of the domestic gas welding apparatus market in 1972.

20. The manufacture and sale of each of the following relevant industrial gases: acetylene, argon, helium, hydrogen, nitrogen and oxygen, constitutes a relevant line of commerce.

21. During 1972, there were substantial sales by Union Carbide of acetylene, argon, helium, hydrogen, nitrogen and oxygen to distributors. Union Carbide is one of the major sellers of these six gases to distributors.

22. The United States and certain sections thereof constitute geographic markets or sections of the country for each relevant line of commerce.

23. Barriers to entry are high for a new distributor of relevant industrial gases and gas welding apparatus.

24. Barriers to entry are high for a new supplier of relevant industrial gases and gas welding apparatus.

25. The purchases by those distributors in which Union Carbide has acquired an interest are and have been substantial in each relevant line of commerce.

EFFECTS OF THE ACQUISITIONS AND THE PLAN AND PATTERN OF
ACQUISITIONS

26. The effect of Union Carbide's acquisitions of stock or assets of the distributors described in Paragraph 15 individually and collectively may be substantially to lessen competition or to tend to create a monopoly in the sale of relevant industrial gases to distributors and the manufacture and sale of gas welding apparatus in the United States and certain sections thereof; and the effects arising from the past and planned future acquisitions of distributors may be unreasonably to restrain trade in the sale of relevant industrial gases to distributors and the manufacture and sale of gas welding apparatus in the United States and certain sections thereof, thus constituting an unreasonable restraint of trade, an unfair method of competition and an unfair act or practice in the following ways among others:

(a) Union Carbide's competitors have been or may be foreclosed from a substantial segment of the relevant lines of commerce;

(b) The ability of nonintegrated suppliers to compete in the relevant lines of commerce has been or may be impaired;

(c) The ability of nonintegrated distributors to compete for the sale of products in the relevant lines of commerce has been or may be impaired;

(d) Barriers to entry into the sale of relevant industrial gases to distributors and the manufacture and sale of gas welding apparatus have been raised;

(e) Barriers to entry into the distribution of relevant industrial gases by potential distributors have been raised;

(f) A trend toward vertical integration between such suppliers of relevant industrial gases and gas welding apparatus and distributors of those products may be accelerated;

(g) A dangerous probability has been created that, if not curtailed, the acquisition will enable Union Carbide to enhance its position in the relevant lines of commerce;

(h) Union Carbide has been eliminated as a potential entrant through internal expansion into the retail sale of relevant industrial

gases and gas welding products in the geographic areas where it acquired an interest in distributors.

VIOLATIONS

27. Union Carbide's acquisition of at least twenty-two distributors violates Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

28. Union Carbide's plan pursuant to which it has acquired at least twenty-two distributors and will acquire more distributors violates 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 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 Clayton 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 respondents have violated the said Acts, and that complaint 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, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following findings and enters the following order:

1. Respondent Union Carbide Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business at 270 Park Ave., New York, New York.

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

ORDER

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

1. "Industrial Gases" shall mean the following gases: Oxygen, Nitrogen, Argon, Acetylene, Hydrogen and Helium.

2. "Welding Products" shall mean equipment, supplies and consumable items used to fuse or cut metals.

3. "Gas Welding Apparatus" shall mean equipment used to fuse or cut metals by means of heat produced by a gas flame.

4. "Distributor" shall mean a business firm whose primary function in the Industrial Gas and Welding Products business is the purchase of Industrial Gases and Welding Products for the purpose of resale, but shall not include any business firm whose primary function in the resale of Industrial Gases and Welding Products is the distribution of Industrial Gases and Welding Products to entities engaged in the plumbing, heating or air conditioning trade.

5. "Location" shall mean a bona fide sales and distribution facility operated by a Distributor as a receiving or distribution point for Industrial Gases, which facility ordinarily carries an inventory of Industrial Gases and Welding Products and is staffed with a bona fide sales force and operating and/or distribution personnel. Two or more facilities that are staffed by common sales and operating and/or distribution personnel shall be deemed to comprise a single Location.

6. "Requirements" of any Distributor for any Industrial Gas at any Location shall mean such Distributor's total requirements for such Industrial Gas either delivered to such Location or delivered direct by the Distributor to using customers which are generally served by sales or distribution personnel assigned to such Location.

I

It is ordered and directed, That for a period of twenty (20) years from the date of service of this Order, respondent Union Carbide Corporation (hereinafter Union Carbide), its subsidiaries, divisions, affiliates, successors, and assigns, in connection with the distribution, offering for sale, or sale of Industrial Gases or Welding Products to Distributors in which it owns less than a majority interest, shall:

A. Not offer, renew, extend or enter into any contracts or agreements, or enforce directly or indirectly those provisions of any contract or agreement, which require any Distributor:

1. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas unless (a) the initial term of such contract or agreement is one year or less, and (b) such contract or agreement may be terminated by either party effective on any anniversary date upon written notice given some minimum period in advance of such date as set forth in such contract, such minimum period to be not more than ninety (90) days; or

2. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas at one or more Locations as a condition to being permitted to purchase from Union Carbide such Industrial Gas at another Location; or

3. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas at any Location as a condition to being permitted to purchase from Union Carbide any other Industrial Gas at the same or any other Location; or

4. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas at any Location as a condition to being permitted to purchase from Union Carbide any Welding Products.

B. Not refuse to sell, subject to paragraph A1 above, Industrial Gases or Welding Products to a Union Carbide Distributor because that Distributor refuses (1) to purchase all or a designated part of its requirements of Industrial Gases from Union Carbide; or (2) to purchase from Union Carbide all or any part of its requirements of Industrial Gases at more than one of its Locations.

II

It is further ordered, That for a period of twenty (20) years from the date of service of this Order, Union Carbide shall not, either directly or indirectly through subsidiaries in which Union Carbide owns a majority interest, (i) lease or otherwise make available to customers of any Distributor who has ceased purchasing one or more Union Carbide Industrial Gases within the preceding two years, Industrial Gas cylinders at rental or demurrage rates set for the purpose of destroying a competitor or eliminating competition, or (ii) lease or otherwise make available to competitors of any Distributor who has ceased purchasing one or more Union Carbide Industrial Gases within the preceding two years, Industrial Gas cylinders at rental or demurrage rates lower than the standard rental or demurrage rate for such cylinders then in effect for Union Carbide Industrial Gas Distributors, for the purpose of destroying a competitor or eliminating competition; *provided, however,* that if either a standard cylinder

rental rate schedule to Union Carbide Industrial Gas Distributors or a standard cylinder demurrage rate schedule to such Distributors, but not both, is in effect, then, for the purpose of this Part II, one shall be deemed to be equivalent to the other on the basis of the revenue that would be generated by a single cylinder during a two-month period of continuous usage, rounded to the nearest cent; and *provided, further*, that for the purpose of this Part II, a standard cylinder rental or demurrage rate shall be a rate which is available to all Union Carbide Industrial Gas Distributors; and *provided, further*, that the purpose of destroying a competitor or eliminating competition must be established by proof of intent on the part of Union Carbide to destroy the Industrial Gas business of, or eliminate as a competitor, a Distributor who has ceased to distribute one or more Union Carbide Industrial Gases; and evidence that Union Carbide has engaged in price competition with such Distributor or that Union Carbide intends to seek or obtain the trade of particular customers then being served by such Distributor shall not, by itself, be sufficient to establish such intent; and *provided, further*, that Union Carbide may set rental or demurrage rates for customers or competitors of such Distributor lower than those in effect for Union Carbide Industrial Gas Distributors in good faith response to competitive conditions in the area served by such Distributor; and *provided still further*, that Union Carbide shall have all defenses which would be available in law, including, but not limited to, the defenses of meeting competition and cost justification.

III

A. *It is further ordered*, That for a period of ten (10) years from the date of service of this order, Union Carbide shall not without prior approval of the Commission, except as otherwise provided in paragraph B of this Part III, acquire, directly or indirectly, the whole or any part of the assets, stock, share capital of, or other equity interest in, any Distributor of Industrial Gases and/or Gas Welding Apparatus.

B. No prior approval shall be required under this order for any acquisition by Union Carbide of any assets, stock, share capital of, or other equity interest in, any Distributor of Industrial Gases or Gas Welding Apparatus if such acquisition meets any of the following standards:

1. the acquisition involves only a change in the equity interest of Union Carbide in a Distributor in which Union Carbide already holds an equity interest; or
2. except to the extent such acquisition is covered by clause 3

of this paragraph B, the consummation of the acquisition does not result in Union Carbide owning an equity interest, obtained by acquisition, in Distributors to whom, in the calendar year prior to the calendar year in which such acquisition is consummated, Union Carbide sold in excess of 16 percent of its total sales of Industrial Gases or 16 percent of its total sales of Gas Welding Apparatus sold in such year to all acquired and independent Distributors; *provided, however*, that no acquisition of a Distributor shall be exempt from prior approval under this clause 2 unless the Distributor to be acquired purchased from Union Carbide more than 50 percent of its total purchases of industrial gases in the calendar year prior to the calendar year in which such acquisition is consummated; or

3. the acquisition is not covered by clause 2 of this paragraph B, but within twelve (12) months prior to the consummation of such acquisition Union Carbide has divested absolutely and in good faith by sale or spin-off its equity interests in one or more Distributors the aggregate dollar value of whose purchases of Industrial Gases and Gas Welding Apparatus, respectively, in the calendar year in which such acquisition is consummated was equal to or in excess of the aggregate dollar value of purchases of Industrial Gases and Gas Welding Apparatus, respectively, in such prior calendar year, by the Distributor so acquired; *provided, however*, that, to the extent that any purchases by a divested Distributor are utilized by Union Carbide in a determination that an acquisition falls within the provisions of clause 2 or 3 of this paragraph B, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of this clause 3; or

4. the transaction involves only (a) the purchase of products from a Distributor in the normal course of business, or (b) the purchase of fixed assets from an independent Distributor in a transaction in which the Distributor will continue thereafter to carry on its function as an independent Distributor in which Union Carbide has no equity interest; or

5. but for the acquisition by Union Carbide, the Distributor would have ceased business operations as an Industrial Gas Distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

C. During the period that this Part III is in effect, Union Carbide shall advise the Commission, prior to consummation thereof, of each acquisition of the type described in paragraph A of this Part III as to

which prior approval is not required because of the provisions of paragraph B2 or B3 of this Part III.

D. During the period that this Part III is in effect, Union Carbide shall, within ninety (90) days from the date of each acquisition described in paragraph B5 of this Part III, provide information sufficient for the Commission to determine whether, but for the acquisition by Union Carbide, the Distributor would have ceased business operations as an Industrial Gas Distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

IV

It is further ordered. That if, during the ten (10) year period beginning on the date of service of this order, any Distributor of Industrial Gases and/or Gas Welding Apparatus in which Union Carbide holds an equity interest acquires, without the prior approval of the Commission to the extent such approval would be required under Part III of this order if such acquisition were made directly or indirectly by Union Carbide, the whole or any part of the assets, stock, or share capital of, or other equity interest in, any Distributor of Industrial Gases and/or Gas Welding Apparatus, then Union Carbide shall within six (6) months thereafter divest absolutely and in good faith by sale or spin-off its equity interests in one or more Distributors, the aggregate dollar value of whose purchases of Industrial Gases and Gas Welding Apparatus, respectively, in the prior calendar year was equal to or in excess of the aggregate dollar value of purchases of Industrial Gases and Gas Welding Apparatus, respectively, in such prior calendar year by the Distributor so acquired; *provided, however,* that to the extent that any purchases by a divested Distributor are utilized by Union Carbide in determining compliance with the divestiture provisions of this Part IV, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of Paragraph III B3 of this order.

V

It is further ordered:

A. That if the Commission does not seek against Airco, Inc., an order to cease and desist from engaging in practices set forth in paragraph 10 of the complaint here attached, similar to that provided in Parts I and II of this order, in a complaint arising out of the investigation conducted under FTC File No. 751 0010 and issued not

later than one year from the effective date of this order, then Parts I and II of this order shall be of no further force and effect after such anniversary date.

B. That if the Commission issues on or before the first anniversary of the effective date of this order a complaint against Airco, Inc. arising out of the investigation conducted under FTC File No. 751 0010 and at any time after issuance such complaint is dismissed on the motion of, or without objection by, the Commission staff, then Parts I and II of this order shall be of no further force and effect after the effective date of such dismissal.

C. That if a consent order is entered against Airco, Inc. in settlement of a proceeding arising out of the investigation conducted under FTC File No. 751 0010 which contains any provisions that differ from any provisions of Part I or II of this order, then Union Carbide may apply to the Commission for modification of, or relief from, any such different provisions in this order, and upon such application the Commission shall grant such modification or relief in the provisions covered by such application as are necessary to conform such provisions in this order with the corresponding provisions of such Airco, Inc. consent order.

VI

It is further ordered, That Union Carbide shall within twenty-one (21) days after service upon it of this order forward a copy of this order and the complaint issued herein along with a copy of the attached letter (Attachment A) on respondent's official company stationery and signed by a responsible official of Union Carbide to Distributors of Union Carbide Industrial Gases and/or Gas Welding Apparatus.

VII

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

VIII

It is further ordered, That Union Carbide 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 in which it has complied with this order, and shall file such other reports as may

from time to time be required to assure compliance with the terms and conditions of this order.

ATTACHMENT A

(Official Stationery of Union Carbide Corporation)

Dear

Date

Please be advised that Union Carbide Corporation has entered into a Consent Order with the Federal Trade Commission which obligates the company not to impose certain restrictions upon Industrial Gases* and Welding Products* Distributors* or to engage in certain other practices. A copy of the Consent Order is enclosed herewith.

Union Carbide has agreed not to enforce those provisions of any existing contract for the purchase of Industrial Gases or Welding Products which are inconsistent with Paragraph IA of this Order. Thus, you will not be required to purchase from Union Carbide any part of your requirements of any Industrial Gas at any Location* as a condition to being permitted to purchase from Union Carbide the same Industrial Gas at another Location or any other Industrial Gas at the same or any other Location or any Welding Products. Union Carbide has agreed that you may terminate any existing contract for Industrial Gases or Welding Products either in its entirety, or as to any individual Industrial Gas at any Location, upon ninety (90) days prior written notice to Union Carbide.

Union Carbide will submit to you new contracts consistent with the Consent Order discussed above no later than six (6) months from the date of service of the Order. These new contracts will replace all current contracts no later than the first anniversary of the date of service of the Order and notice of termination will be given by Union Carbide not later than ninety (90) days prior to that date. If, at any earlier date, you choose to terminate any existing contract, either in its entirety or as to a particular Industrial Gas at a particular Location, you will be offered this new contract in its place. In any event, these new contracts will replace all current contracts for Industrial Gases not later than the first anniversary of the date of service of the Order.

Please note that, pursuant to the terms of Part V of the Order, certain provisions of the Order shall no longer be effective if the Commission does not issue, or consents, on the motion of, or without objection by, the Commission staff, to the dismissal of, a complaint against Airco, Inc. Further, if the Commission consents to an order with Airco which differs from this Order, Union Carbide may obtain a corresponding modification of this Order. If any such eventualities occur, we will notify you by letter of the applicable changes.

If, in the future, you believe that any of the terms of the enclosed Consent Order have been violated, you may report the details in writing to:

Federal Trade Commission Bureau of Competition Washington, D.C. 20580

We welcome the opportunity to do business with you on terms which are in accordance with the letter and spirit of the Federal Trade Commission Order.

Very truly yours, (Name and Title of Responsible
Official) Union Carbide Corporation

Enclosure

* The terms "Industrial Gases," "Welding Products," "Distributor" and "Location" are defined in the enclosed order.

Modifying Order

90 F.T.C.

IN THE MATTER OF
SOFT SHEEN COMPANY, INC., ET AL.

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

Docket C-2786. Complaint, Jan. 27, 1976 — Modifying order, Sept. 30, 1977

This order modifies a cease and desist order issued January 27, 1976, 41 FR 7939, 87 F.T.C. 164 to conform with obligations of a consent order issued against a competitive firm, by limiting substantiation requirements for safety claims in Provision I.B., and revising the third warning, pertaining to hair relaxers, in Provision III.

Appearances

For the Commission: *Sharon S. Armstrong.*

For the respondents: *John O. Nelson, Molinair, Allegretti, Newitt & Witcoff and Rickey J. Ament, Chicago, Ill.*

ORDER MODIFYING ORDER TO CEASE AND DESIST

On October 28, 1976, respondent Soft Sheen Co., Inc. petitioned the Commission to reopen this proceeding to modify the third warning in Provision III of the consent order issued January 28, 1976 against respondents in this matter. The third warning, which is to be made in connection with the sale and distribution of respondents' hair relaxer and which is to appear on the packaging, package inserts and the labels of the product, reads, "Do not use on bleached, dyed or tinted hair. If you have previously relaxed your hair, relax only the new growth, as described in the directions." Respondent objects to the inclusion of tinted hair in the warning.

On March 18, 1976, Soft Sheen requested by letter that the order's product coverage be limited to hair relaxers. Our request is incorporated into the October 28, 1976, petition to reopen.

Complaint counsel support the petition and recommend that the warning be modified to read:

3. Do not use on bleached hair. Do not use on permanently colored hair which is breaking, splitting or otherwise damaged. For hair that has been permanently colored and shows no sign of damage, use only mild strength formula.
4. If you have previously relaxed your hair, relax only the new growth, as described in the directions.

We agree that the petition should be granted. Most if not all, of the products manufactured and sold by Soft Sheen are hair care products, and a substantial portion of the firm's revenues is derived

from the sale of hair relaxers. These latter products are generally sold directly to professional beauticians. Under these circumstances, the Commission believes that modification of the order to limit the substantiation requirements for safety claims to hair care products, and for efficacy claims to hair straighteners, will serve adequately to protect the public interest. Furthermore, additional expert information provided to the Commission after issuance of the Soft Sheen order, supports revision of the warning requirement.

Finally, after entry of its order in this matter, the Commission issued a consent order [89 F.T.C. 1] against Revlon, Inc., a competitor of Soft Sheen in the sale of hair relaxers, which includes a warning and product coverage identical to the changes recommended by complaint counsel here. For these reasons, the Commission believes that it is in the public interest to grant the modification sought by Soft Sheen.

Accordingly,

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

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting the following for the WARNING contained in Provision III of the order:

WARNING:

1. This product contains potassium hydroxide (lye). You must follow directions carefully to avoid skin and scalp burns, hair loss, and eye injury.
2. Do not use if scalp is irritated or injured.
3. Do not use on bleached hair. Do not use on permanently colored hair which is breaking, splitting, or otherwise damaged. For hair that has been permanently colored and shows no sign of damage, use only mild strength formula.
4. If you have previously relaxed your hair, relax only the new growth, as described in the directions.
5. If the relaxer causes skin or scalp irritation, rinse out immediately and neutralize with the shampoo in the kit. If irritation persists or if hair loss occurs, consult a physician.
6. If the relaxer gets into eyes, rinse immediately and consult a physician.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting the following Provision for I.B. of the order, and relettering the remaining paragraphs accordingly:

B. Representing, in any manner, directly or by implication, the efficacy of any hair straightening product or the ingredients therein, unless, at the time such representation is made, respondents have in

their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body.

C. Representing, in any manner, directly or by implication, the safety of any hair care product or the ingredients therein, unless at the time such representation is made, respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation.

IN THE MATTERS OF

BRISTOL-MYERS COMPANY, ET AL. - D. 8917

AMERICAN HOME PRODUCTS CORPORATION, ET AL. -
D. 8918

STERLING DRUG INC., ET AL. - D. 8919

Dockets 8917, 8918, 8919. Interlocutory Order, Oct. 7, 1977

Denial of complaint counsel's motion for reconsideration of August 23, 1977, order denying on procedural grounds their application for review of a discovery ruling.

ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR
RECONSIDERATION

Complaint counsel seek reconsideration of our order of August 23, 1977, which denied on procedural grounds their application for review of a discovery ruling requiring production of two memoranda of interviews with potential witnesses. The Commission's ruling is characterized as excessively rigid and formalistic, and the underlying issue as a "controlling question" within the meaning of Section 3.23(b) of our Rules.

That our August 23 ruling represented a strict application of the terms of Section 3.23 is conceded. Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of our adjudicative process. Interlocutory appeals from discovery rulings merit a particularly skeptical reception, because particularly suited for resolution by the administrative law judge on the scene and particularly conducive to repetitive delay. In the absence of close and decisive supervision by the administrative law judge, the discovery process in any but the simplest case can be productive of endless dispute, sincere or contrived, to the point that any eventual remedial order relates only to history. Further, any perception on the part of our administrative law judges that the Commission will exercise broadly its undisputed authority to review interlocutory rulings will tend toward the atrophy of their sense of responsibility for the impact of their rulings on the proceedings before them.

These considerations, as noted, apply to interlocutory review generally and to review of discovery rulings particularly. Concededly, however, the Commission has by its Rule Section 3.23(a) afforded a special status to appeals from rulings which, as here, require the disclosure of Commission records. This provision must nonetheless not be understood as a signal that such appeals are favored, but as a

recognition of the Commission's duties under its organic Act to maintain a special oversight capacity, exercisable when circumstances warrant, with regard to release of its records. See 15 U.S.C. 46(f), 50.

We find here no showing that the special concerns which Section 3.23(a) reflects are imperiled. Nor is any sufficient basis demonstrated for the invocation of Section 3.23(b) to supersede the informed discretion of the administrative law judge. If, as complaint counsel urge, the necessity for such rulings is likely to recur with some frequency as the trial progresses, we deem it all the more advisable that they be made by the officer charged with its day-to-day conduct, absent a clear showing of substantial prejudice to one of the parties.

It is therefore ordered, That the motion be, and hereby is, denied.

IN THE MATTER OF
HERBERT R. GIBSON, SR., ET AL.

Docket 9016. Interlocutory Order, Oct. 12, 1977

Denial of respondents' motion to dismiss for lack of public interest.

ORDER GRANTING RESPONDENTS' APPEAL OF ADMINISTRATIVE
LAW JUDGE'S REFUSAL TO CERTIFY MOTION TO DISMISS FOR
LACK OF PUBLIC INTEREST, AND DENYING AFORESAID MOTION

On June 10, 1977 respondents moved (1) for summary decision on Counts I and III of the complaint, (2) for removal of Count II from adjudication because they agreed to accept complaint counsel's suggested consent order as to that count, and (3) in the alternative, for certification to the Commission of their request for dismissal for lack of public interest. On the 19th and 20th of July 1977, the law judge denied all three motions.

On July 26, 1977 respondents filed an application for an interlocutory appeal from the order denying their motions for summary decision and for certification of the public interest question. On August 10, 1977, the law judge entered an order denying authorization to file an interlocutory appeal of the denial of their motion for summary decision and granting authorization to file an interlocutory appeal of the denial of their request for certification of the motion to dismiss.

The threshold question, then, is whether the motion to dismiss for asserted lack of public interest is properly before the Commission. We conclude it is because the law judge lacks authority to rule on it.¹ It is well established that an administrative law judge lacks authority to rule on and must certify motions to dismiss for lack of public interest and other motions containing questions pertaining to the Commission's exercise of administrative discretion. See *Exxon Corp.*, Dkt. 8934, CCH Trade Reg. Rep. ¶21,299 (April 19, 1977); *Amrep Corporation*, 87 F.T.C. 283 (1976); *Crush International Ltd.*, 80 F.T.C. 1023 (1972); *Philip Morris, Inc.*, 79 F.T.C. 1023 (1971); *First Buckingham Community, Inc.*, 73 F.T.C. 938 (1968); and *Suburban Propane Gas Corporation*, 71 F.T.C. 1695 (1967).²

The asserted facts as to the lack of public interest on which the motion rests are essentially the same as those that formed the basis for respondents' June 10, 1977 motion for summary decision. The

¹ Commission Rules, Section 3.22(a), provide that "[a]ny motion upon which the Administrative Law Judge has no authority to rule shall be certified by him to the Commission with his recommendation."

² Respondents were not prejudiced by the law judge's July refusal to certify their June motion to dismiss. The matter is now before the Commission for *de novo* consideration and determination. *Suburban Propane*, *supra* at 1697.

respondents argued that H. R. Gibson, Sr. had no interest in any retailer, that no monies received by the Gibson Trade Show were paid to any retailer, and that the trade show was open to any retailer. The law judge in ruling on that motion, explained that respondents' assertions involved factual issues that were in dispute, the resolution of which would require a hearing. With the proof in this posture, the motion to dismiss is no riper for decision than was the motion for summary decision. Accordingly,

It is ordered, That the aforesaid motion to dismiss for lack of public interest be, and it hereby is denied.

IN THE MATTER OF
FRANKART DISTRIBUTORS, INC., ET AL.

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

Docket C-2904. Complaint, Oct. 13, 1977 — Decision, Oct. 13, 1977

This consent order, among other things, requires a New Rochelle, N.Y. furniture dealer and its affiliates to cease using the terms "carved" or "detailed carving" or any other similar terms to describe furniture which has not been cut or carved into shape. Further, the order requires the firms to make clear and conspicuous disclosures regarding the composition or construction of their furniture, both in their advertising and on the furniture displayed in their showrooms.

Appearances

For the Commission: *Alan F. Rubinstein.*

For the respondents: *John A. Occhiogrosso, New Hyde Park, N.Y.*

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 Frankart Distributors, Inc., a corporation; Frankart Flushing, Inc., a corporation; Frankart-Fordham, Inc., a corporation; Frankart Westchester, Inc., a corporation; Frankart-New Rochelle, Inc., a corporation; Frankart Paramus, Inc., a corporation; Frankart Jamaica, Inc., a corporation; Frankart Kings, Inc., a corporation; Mallery, Inc., a corporation, doing business under that name and as Frankart-Grand Concourse, and Bernard Frankel, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Frankart Distributors, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 543 Main St., New Rochelle, New York.

Respondent Frankart Flushing, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 37-11 Main St., Flushing, New York.

Respondent Frankart-Fordham, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 18 West Fordham Road, Bronx, New York.

Respondent Frankart Westchester, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1088 Central Ave., Scarsdale, New York.

Respondent Frankart-New Rochelle, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 543 Main St., New Rochelle, New York.

Respondent Frankart Paramus, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at Route 4, Spring Valley Road, Paramus, New Jersey.

Respondent Frankart Jamaica, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 160-08 Jamaica Ave., Jamaica, New York.

Respondent Frankart Kings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1209 Kings Highway, Brooklyn, New York.

Respondent Mallery, Inc., doing business under that name and as Frankart-Grand Concourse, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 2431 Grand Concourse, Bronx, New York.

Respondent Bernard Frankel is an individual and an officer of the corporate respondents. He formulates, directs and controls the policies, acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. His business address is 543 Main St., New Rochelle, New York.

PAR. 2. Respondent Frankart Distributors, Inc. is now, and for some time last past has been, engaged in the purchasing of furniture and related products for sale and distribution to the other corporate respondents named herein.

Respondents Frankart Flushing, Inc., Frankart-Fordham, Inc., Frankart Westchester, Inc., Frankart-New Rochelle, Inc., Frankart Paramus, Inc., Frankart Jamaica, Inc., Frankart Kings, Inc. and Mallery, Inc., doing business under that name and as Frankart-Grand Concourse are now, and for some time last past have been,

engaged in the advertising, offering for sale, sale and distribution of furniture and related products at retail to the public.

PAR. 3. In the course and conduct of their business as aforesaid, and at all times mentioned herein, respondent Frankart Distributors, Inc. has purchased, and continues to purchase, furniture and other merchandise from suppliers, distributors and manufacturers in states other than New York and New Jersey for the purpose of supplying said merchandise to the other corporate respondents named herein for sale at retail.

PAR. 4. In the further course and conduct of their business as aforesaid, respondents now cause and for some time last past have caused furniture and other merchandise when sold to be shipped from their places of business within the States of New York and New Jersey, to purchasers in states other than those in which said shipments originate.

PAR. 5. In the course and conduct of their business as aforesaid, respondents have caused, and now cause, the dissemination of advertisements regarding their furniture in newspapers of interstate circulation, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of said merchandise.

PAR. 6. By virtue of the aforesaid acts and practices, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 7. In the course and conduct of their business, and for the purpose of inducing the sale of their furniture, respondents have made and are now making, certain statements and representations in newspaper advertisements with respect to the method by which certain of their furniture has been styled.

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

. . .carved. . . .detailed carving.

PAR. 8. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set forth herein, respondents have represented and are now representing, directly or by implication, that said advertised furniture has been styled by cutting or carving.

PAR. 9. In truth and in fact: the furniture referred to in Paragraph Eight above is not styled by cutting or carving, but is formed from plastic by the use of a mold.

Therefore, the statements and representations set forth in Para-

graphs Seven and Eight hereof were and are false, misleading and deceptive.

PAR. 10. A substantial quantity of the furniture advertised, displayed, offered for sale, or sold by respondents has the appearance of being composed of solid wood, but in fact, contains exposed surfaces of veneered construction. The fact of such veneered construction is not disclosed in respondents' advertising, on the furniture itself, or on tags or labels attached thereto. Thus, respondents have failed to disclose a material fact, which, if known to certain customers would likely affect their consideration of whether or not to respond to respondents' advertisements and to purchase merchandise being offered for sale by respondents.

The aforesaid failure to disclose said material fact has the capacity and tendency to mislead purchasers or prospective purchasers with respect to the composition and construction of the furniture sold by respondents.

Therefore, respondents' failure to disclose said material fact was, and is, unfair, misleading and deceptive.

PAR. 11. A substantial quantity of the furniture advertised, displayed, offered for sale, or sold by respondents contains exposed surfaces composed of plastic or other materials which have the appearance of wood. No clear and conspicuous disclosures are made in respondents' advertising, on the furniture itself, or on tags or labels attached thereto, that the exposed surfaces of the furniture are composed of plastic or other materials which simulate wood, nor are disclosures made that such surfaces are not wood. Thus, respondents have failed to disclose material facts, which, if known to certain customers would likely affect their consideration of whether or not to respond to respondents' advertisements and to purchase merchandise being offered for sale by respondents.

The aforesaid failure to disclose said material facts, separately and in connection with the representations set forth in Paragraphs Seven and Eight hereof, has the capacity and tendency to mislead purchasers or prospective purchasers with respect to the durability, composition or construction of the furniture sold by respondents.

Therefore, respondents' failure to disclose said material facts was, and is, unfair, misleading and deceptive.

PAR. 12. In the course and conduct of their business as aforesaid, and at all times mentioned herein, respondents have been, and now are, 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 sold by respondents.

PAR. 13. The use by respondents of the aforesaid false, misleading,

deceptive and unfair statements, representations, acts and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of products sold by respondents by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and 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 respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended; and

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

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

1. Respondent Frankart Distributors, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 543 Main St., New Rochelle, New York.

Respondent Frankart Flushing, Inc. is a corporation organized,

existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 37-11 Main St., Flushing, New York.

Respondent Frankart-Fordham, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 18 West Fordham Road, Bronx, New York.

Respondent Frankart Westchester, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1088 Central Ave., Scarsdale, New York.

Respondent Frankart-New Rochelle, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 543 Main St., New Rochelle, New York.

Respondent Frankart Paramus, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at Route 4, Spring Valley Road, Paramus, New Jersey.

Respondent Frankart Jamaica, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 160-08 Jamaica Ave., Jamaica, New York.

Respondent Frankart Kings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1209 Kings Highway, Brooklyn, New York.

Respondent Mallery, Inc., doing business under that name and as Frankart-Grand Concourse, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 2431 Grand Concourse, Bronx, New York.

Respondent Bernard Frankel is an individual and an officer of the corporate respondents. He formulates, directs and controls the policies, acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. His business address is 543 Main St., New Rochelle, New York.

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

ORDER

It is ordered, That respondents Frankart Distributors, Inc., Fran-

Frankart Flushing, Inc., Frankart-Fordham, Inc., Frankart Westchester, Inc., Frankart-New Rochelle, Inc., Frankart Paramus, Inc., Frankart Jamaica, Inc., Frankart Kings, Inc., corporations, Mallary, Inc., a corporation, doing business under that name and as Frankart-Grand Concourse, or under any other name or names, their successors and assigns, and their officers, and Bernard Frankel, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, displaying, offering for sale, sale and distribution of furniture, or any other products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Using the terms "carved" or "detailed carving" or any other terms of similar import and meaning, to describe any furniture or part thereof that has not been cut or carved into shape.

FOR PURPOSES OF THIS ORDER, "EXPOSED SURFACES" ARE DEFINED AS THOSE PARTS AND SURFACES EXPOSED TO VIEW WHEN FURNITURE IS PLACED IN THE GENERALLY ACCEPTED POSITION FOR USE.

2. Failing to clearly and conspicuously disclose that furniture having the appearance of solid wood, but containing exposed surfaces of veneered construction, contains such veneered construction.

3. Failing to clearly and conspicuously disclose that furniture containing exposed surfaces composed in whole or in part of plastic or other materials which have the appearance of wood, contains such plastic or other materials, or that the exposed surfaces are not wood.

4. Failing to disclose either the true composition or construction of furniture or its parts, or that material is not what it appears to be, whenever any statement, representation or depiction is used in advertising, which may otherwise be misleading as to the true composition or construction of such furniture or its parts without such disclosure. Such disclosures shall be made clearly and conspicuously and in close conjunction with any statements, representations or depictions used.

5. Failing to clearly and conspicuously disclose, on the furniture itself, or on tags or labels attached to such furniture in a manner so as not to be easily removed, either the true composition or construction of furniture or its parts, or that material is not what it appears to be, whenever the appearance of such furniture or its parts may be misleading as to its true composition or construction without such disclosure.

It is further ordered, That respondents deliver a copy of this order

to all operating divisions and to all present and future personnel of respondents responsible for any aspect of preparation, creation, or placing of advertising, and to all present and future personnel of respondents responsible for the sale or offering for sale of all products covered by this order, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered. That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

It is further ordered. That respondents shall maintain for at least a one (1) year period following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other promotional material utilized in the advertising, promotion or sale of all products covered by this order.

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

It is further ordered. That the individual respondent named herein promptly notify the Commission of each change in business or employment status, which includes discontinuance of his present business or employment and each affiliation with a new business or employment, for ten (10) years following the effective date of this order. Such notice shall include respondent's current business address and a description of the business or employment in which he is engaged as well as a description of his duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

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

IN THE MATTER OF
JETMA TECHNICAL INSTITUTE, ET AL.

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

Docket 9061. Complaint, Oct. 28, 1975 — Decision, Oct. 19, 1977

This consent order, among other things, requires a San Francisco, Calif. seller of correspondence training courses for gas turbine engine mechanics, and technical illustrators, to cease misrepresenting the need, demand, or potential earnings of their graduates; failing to furnish prospective enrollees material disclosures regarding the employment rate, drop-out rate, and financial success of recent students. Further, respondents are required to furnish prospective students with a ten-day cooling-off period within which to cancel their contracts; to maintain for a two-year period files of inquiries and complaints relating to prohibited acts and practices; and to institute a surveillance program designed to ensure that their representatives comply with the terms of the order.

Appearances

For the Commission: *John M. Porter* and *Seela Lewis*, Consumer Protection Specialist.

For the respondents: *Daniel C. Smith, Arent, Fox, Kintner, Plotkin & Kahn*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Jetma Technical Institute, a corporation, and Fred Lee, Jr. and Anna H. Lee, individually and as officers of said corporation, hereinafter sometimes referred to as "respondents," have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Jetma Technical Institute, hereinafter referred to as "Jetma," 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 located at 103 South Airport Boulevard, South San Francisco, California.

Respondents Fred Lee, Jr. and Anna H. Lee are the principal officers of Jetma. They formulate, direct and control the policies, acts and practices of the corporate respondent, including the acts and

practices hereinafter set forth. Their business address is the same as that of respondent Jetma.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of training courses purporting to prepare graduates thereof for employment as gas turbine engine mechanics or technical illustrators. Said courses, when pursued to completion, consist of a series of correspondence lessons, with an optional two-week in-residence training program for the gas turbine mechanics course.

PAR. 3. In the course and conduct of their aforesaid business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the training courses by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, commercial announcements on television transmitted across state lines, and by means of brochures, pamphlets and other promotional materials disseminated through the United States mail, for the purpose of obtaining leads or prospects for the sale of such training courses, and for the purpose or inducing the purchase of such training courses.

Respondents, from their principal place of business located in California, utilize the services of sales representatives and cause said sales representatives to visit prospective purchasers located in various other states who respond to the respondents' advertisements and commercial announcements for the purpose of inducing the purchase of such training courses by such prospective purchasers.

Respondents transmit and receive, and cause to be transmitted and received, in the course of advertising, offering for sale, sale and distribution of said training courses, advertising and promotional materials, sales contracts, invoices, billing statements, checks, monies and other business papers and documents, to and from the principal place of business operated by the respondents located as aforesaid and to prospective purchasers and purchasers thereof, located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said training courses in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, for the purpose of obtaining leads or prospects for the sale of such training courses, and for the purpose of inducing the purchase of such

training courses, respondents have made numerous statements and representations in television commercials, advertising brochures and other printed materials concerning the alleged large and growing demand for graduates of Jetma's gas turbine engine mechanics course; the high salaries available to them; the ease with which graduates are placed in positions for which they are trained; and the smog-free characteristics of the gas turbine engine.

In the further course and conduct of their business as aforesaid, respondents cause persons who respond to their advertisements and television commercials to be visited by respondents' sales representatives in the homes of such persons.

For the purpose of inducing the sale of respondents' training courses, such sales representatives make to prospective purchasers many statements and representations, directly or by implication, regarding the nature of the courses and services offered by the respondents, the job opportunities for graduates of respondents' course in gas turbine engine mechanics, and the value of the gas turbine engine as a smog-free alternative to engines which emit pollutants. Said statements and representations are made both orally by means of a formal sales manual and presentation, and by means of brochures or other printed materials displayed by the sales representatives to prospective purchasers and furnished to broadcast media.

Typical and illustrative, but not all inclusive of the representations in these advertisements and oral statements are the following:

Look into your opportunities as a turbine technician.

As the new anti-smog laws make present day noisy-smoky engines illegal—yes, illegal—in trucks, buses, industrial plants, even automobiles—the pressure is on to convert to other power plants. Already new gas turbine engines are rolling off assembly lines in pilot production and the pressure is on to train technicians to fix these engines, service them in shops and on the road. [television advertisement]

* * * * *

Do you want a challenging career with an expanding future? [television advertisement]

* * * * *

Here it is. . .the end of smog. . .the beginning for men who want to earn good money doing work they can be proud of. You've read what's happening, buses, big trucking companies getting ready to switch over. Those big, noisy engines that don't meet requirements will be obsolete ". . . That's the law"

Already the smog free turbines are rolling off the assembly lines in Detroit. Now

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the rush is on to find trained people to help build those engines, service them, and fix them in shops and on the road. [television advertisement]

We'll turn you into a high-paid technician for the engine of the future. The gas turbine.

* * * * *

The field of [Jet Engine/gas turbine maintenance] offers excellent starting pay. . . [direct mail advertisement]

* * * * *

In a few short months you can be ready to step into the future. Jetma can show you the way as it has many thousands now employed in high paying jobs. [direct mail advertisement].

PAR. 5. By the use of the above-quoted statements, and others of similar import and meaning respondents have represented or implied that:

1. There is now or soon will be a need for a substantial number of graduates of Jetma's gas turbine engine mechanics course.
2. Graduates of Jetma's gas turbine mechanics course receive high salaries as gas turbine mechanics.
3. The gas turbine engine does not emit smog-producing pollutants.

PAR. 6. In truth and in fact:

1. There is not now nor will there soon be a need for a substantial number of graduates of Jetma's gas turbine engine mechanics course.
2. Few, if any graduates of Jetma's gas turbine mechanics course receive high salaries as gas turbine mechanics.
3. The gas turbine engine does emit smog-producing pollutants.

Therefore, the statements and representations set forth in Paragraphs Four and Five were, and are, false, misleading, unfair or deceptive acts or practices.

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have offered, and are now offering, for sale training courses purporting to prepare purchasers thereof for employment as gas turbine mechanics and have made representations concerning job availability without disclosing in advertising or through their sales representatives such material facts as would indicate the possibility of securing future employment upon completion of the training courses, and the nature of such employment, including such statistics as: (1) the recent percentage of persons who have completed the training courses who were able to obtain the employment for which they were trained; (2) the employers that hired any such persons; (3) the initial salary any such

persons received; and (4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction. Thus, respondents have failed to disclose material facts which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such training courses. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 8. In the further course and conduct of their business and in the furtherance of their purpose of inducing prospective enrollees to execute enrollment contracts for their training course, respondents and their employees, sales representatives, and representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Seven, respondents or their representatives have induced prospective enrollees into executing enrollment contracts upon initial contact without affording the enrollee sufficient time to carefully consider the purchase of the training course and the consequences thereof. Thereafter, many such enrollees fail to complete the course.

PAR. 9. Respondents have been and are now failing to disclose material facts while using the aforesaid unfair, false, misleading or deceptive acts and practices, to induce persons to pay or contract to pay over to them substantial sums of money to purchase or pay for courses of instruction which were of little use or value to said persons for purposes of obtaining future employment in the jobs for which they were purportedly providing training. Respondents have received the said sums and have failed to offer refunds and have failed to refund such sums to, or to rescind such contractual obligations of, substantial numbers of enrollees and participants in such training courses who were unable to secure employment in the positions and fields for which they have been purportedly trained by respondents.

The use by respondents of the aforesaid acts and practices, their continued retention of said sums and their continued failure to rescind such contractual obligations of their customers, as aforesaid, are unfair acts or practices.

PAR. 10. By and through the use of the aforesaid acts and practices, respondents place in the hands of others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 11. In the course and conduct of their business, and at all times mentioned herein respondents have been, and are now, in

substantial competition, in or affecting commerce, with corporations, firms, and individuals engaged in the sale of training courses covering the same or similar subjects.

PAR. 12. The use by respondents of the aforesaid false, misleading, unfair or deceptive statements, representations, acts and practices and their failure to disclose the material facts as aforesaid has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and to induce a substantial number thereof to purchase respondents' training courses by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint in this proceeding on October 28, 1975, charging respondents named in the caption hereof with violations of the Federal Trade Commission Act; and

The Commission having withdrawn the matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order; and

The respondents and counsel for the Commission having executed an agreement containing a consent order, an admission by respondents of all jurisdictional facts set forth in the aforesaid complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission makes the following jurisdictional findings, and enters the following order:

1. The agreement herein, by and between Jetma Technical Institute, a corporation, by its duly authorized officers, and Fred Lee, Jr. and Anna H. Lee, individually and as officers of said corporation, respondents in a proceeding initiated by the Federal Trade Commission through the issuance of its complaint on October 28, 1975, and their attorney, and counsel for the Federal Trade Commission, is

entered into in accordance with the Commission's Rule governing consent order procedure.

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

ORDER

It is ordered, That respondent Jetma Technical Institute, a corporation, its successors and assigns, and its officers, and Fred Lee, Jr. and Anna H. Lee, individually and as officers of said corporation, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with advertising, offering for sale, sale, or distribution of courses of study, training or instruction in the field of gas turbine mechanics or any other subject, trade or vocation, or of any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing in any manner, directly or by implication, that there is or will be any need or demand for respondents' graduates in positions for which such graduates are purportedly trained, except as hereinafter provided in Paragraph 4 of this order.

2. Representing in any manner, directly or by implication, that respondents' graduates will or may earn any specified amount of money, or otherwise representing by any means the prospective earnings of such persons without clearly and conspicuously disclosing the employment salary range of respondents' graduates computed as prescribed in Paragraph 4 of the order.

3. Representing in any manner, directly or by implication, that the gas turbine engine does not emit smog-producing pollutants.

4. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective student of any course of instruction offered by respondents, the following information in the format prescribed in Appendix B with the title "IMPORTANT INFORMATION" printed in 10 point boldface type across the top of the form and for the Base Period described in Appendix A:

(1) The total number of students; the number and percentage of students who have failed to complete their course of instruction, such percentage to be computed separately for each course of instruction offered by respondents at each school, location or facility;

(2) The number and percentage of students who graduated, such percentage to be computed separately for each course of instruction;

(3) The number of graduates employed in a position for which the

course trained them and the employment placement percentages based on all students and graduates; such numbers and percentages to be computed separately for each course of instruction offered by respondents at each school, location or facility;

(4) The employment salary range of respondents' graduates as to the same graduates used to compute the placement percentage in (3) above.

Provided, however, this paragraph shall be inapplicable to any school newly established by respondents in a metropolitan area or county, whichever is larger, where they previously did not operate a school, or to any course newly introduced by respondents, until such time as the new school or course has been in operation for the base period described in Appendix A. However, during such period the following statement, and no other, shall be made in lieu of the Appendix B Disclosure Form required by this paragraph:

DISCLOSURE NOTICE

This school [or course, as the case may be] has not been in operation long enough to indicate what, if any, actual employment or salary may result upon graduation from this school [course].

5. Failing to keep adequate records, for a period of three years from the date each student discontinues training or graduates, which may be inspected by Commission staff members upon reasonable notice which substantiate the data and information required to be disclosed by Paragraph 4 of this order. Such records shall include the name, address, and telephone number of each student and, with respect to Paragraph 4 (subparagraphs 3 and 4), such records shall include:

- (i) The name, address and telephone number of the firm or employer employing each graduate;
- (ii) The name or title of the job position obtained;
- (iii) The date on which the job position was obtained;
- (iv) His/her monthly or annual salary.

6. (a) Contracting for the sale of any course of instruction in the form of a sales contract or any other agreement which does not contain in immediate proximity to the space reserved in the contract for the signature of the prospective student in boldface type of a minimum size of ten (10) points, a statement in the following form:

You, the prospective student [the buyer], may cancel this transaction at any time prior to midnight of the tenth business day after the date of this transaction. See attached notice of cancellation form for an explanation of this right.

(b) Failing to furnish each prospective student, at the time he signs the sales contract or otherwise agrees to enroll in a course of instruction offered by respondents, a complete form in duplicate, which shall be attached to the contract or agreement, and easily detachable, and which shall contain in ten (10) point boldface type the following information and statements:

NOTICE OF CANCELLATION

(enter date of transaction)

(date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN TEN (10) BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN (10) BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND

ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY, IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN TWENTY (20) DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PAYMENT OF SAID GOODS.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [name of seller], AT [address of seller's place of business] NOT LATER THAN MIDNIGHT OF (date).

I HEREBY CANCEL THIS TRANSACTION.

(Date)

(Buyer's signature)

* * * * *

(c) Failing to orally inform each prospective student of his right to cancel at the time he signs a contract or agreement for the sale of any course of instruction.

(d) Misrepresenting in any manner the prospective student's right to cancel.

(e) Failing or refusing to honor any valid notice of cancellation by a prospective student and within ten (10) business days after the receipt of such notice to: (i) refund all payments made under the contract or sale; (ii) return any materials or property traded in, in substantially as good condition as when received by respondent; (iii) cancel and return any negotiable instrument executed by the prospective enrollee in connection with the contract or sale.

(f) During the cancellation period described herein, respondents shall not initiate contacts with such contracting persons other than contacts permitted by this paragraph.

7. Making any representations of any kind whatsoever, which are not already proscribed by other provisions of this order, in connection with the advertising, promoting, offering for sale, sale or distribution of courses of study, training or instruction in the field of gas turbine mechanic's training or any other course offered to the public in any field in commerce, for which respondents have no reasonable basis prior to the making or dissemination thereof.

8. Furnishing or otherwise placing in the hands of others the means and instrumentalities by and through which the public may be misled or deceived in the manner, or by the acts and practices prohibited by the order.

9. *It is further ordered, That:*

(a) Respondents herein deliver, by hand or by registered mail, a copy of this order to each of their present and future franchisees, licensees, employees, sales representatives, agents, solicitors, brokers, independent contractors or to any other person who promotes, offers for sale, sells or distributes any course of instruction included within the scope of this order;

(b) Respondents herein provide each person or entity so described in subparagraph (a) of this paragraph with a form returnable to the respondents clearly stating his or her intention to be bound by and to conform his or her business practices to the requirements of this order; retain said statement during the period said persons or entity is so engaged; and make said statement available to the Commission's staff for inspection and copying upon request.

(c) Respondents herein inform each person or entity described in subparagraph (a) of this paragraph that the respondents will not use or engage or will terminate the use or engagement of any such party, unless such party agrees to and does file notice with the respondents that he or she will be bound by the provisions contained in this order;

(d) If such party as described in subparagraph (a) of this paragraph

will not agree to file the notice set forth in subparagraph (b) above with the respondents and be bound by the provisions of this order, the respondents shall not use or engage or continue the use or engagement of such party to promote, offer for sale, sell or distribute any course of instruction included within the scope of this order;

(e) Respondents herein inform the persons or entities described in subparagraph (a) above that the respondents are obligated by this order to discontinue dealing with or to terminate the use or engagement of persons or entities who continue on their own the deceptive acts or practices prohibited by this order;

(f) Respondents herein institute a program of continuing surveillance adequate to reveal whether the business practices of each said person or entity described in subparagraph (a) above conform to the requirements of this order;

(g) That respondents discontinue dealing with any person described in subparagraph (a) above, revealed by the aforesaid program of surveillance, who engages on his own in the acts or practices prohibited by this order; *provided, however,* that violation of any provision of this order by present or future employees of independent contractors shall not be deemed a violation of this order by respondents unless respondents, upon knowledge of such violation, fail to take, within a reasonable time, corrective action to insure that such act or practice is terminated; and *further provided,* that in the event remedial action is taken, the sole fact of such dismissal or termination shall not be admissible against respondents in any proceeding brought to recover penalties for alleged violation of any other paragraph of this order.

(h) Respondents herein maintain files containing all inquiries or complaints from any source relating to acts or practices prohibited by this order, for a period of two years after their receipt, and that such files be made available for examination by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondents' business for inspection and copying.

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

11. *It is further ordered,* That the respondent corporation shall 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 respondent corporation which may affect compliance obligations arising out of this order.

12. *It is further ordered*, That the individual respondents named herein promptly notify the Commission of the discontinuance of his or her present business or employment with respondent corporation and of his or her affiliation with a new business or employment related to the vocational training industry. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he or she is engaged as well as a description of his or her duties and responsibilities.

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

APPENDIX A

Base Period

The first *Base Period* shall be the six-month period ending three months prior to the effective date of this order, such period to commence on the first day of the first month in the *Base Period*, and end on the last day of the sixth month. Subsequent *Base Periods* shall be of six months duration commencing on the next day following the termination of the prior *Base Period*. *Base Periods* shall be numbered consecutively beginning with the first *Base Period* (i.e., *Base Period* #1) as defined above.

Monitoring Phase

The three-month period immediately following the close of a *Base Period* shall be used by respondents to monitor and compile the total number of all students, and the number of students who dropped out, at any time during the *Base Period*, and the employment success results of graduates during that *Base Period*. Respondents may include in the computation of statistics for the *Base Period* any employment statistics based upon events occurring during the three-month *Monitoring Phase*.

Dissemination Phase

On the first business day following three months after the termination of a *Base Period*, respondents shall begin dissemination of that just-terminated *Base Period's* statistics as required by this order, continuing such dissemination until the first business day following three months after the termination of the next *Base Period*, at which time dissemination of the next set of *Base Period* statistics must begin.

APPENDIX B

DISCLOSURE FORM BASE PERIOD # _____

(NAME OF SCHOOL)

DROP-OUT AND PLACEMENT RECORD OF

(NAME OF COURSE)

FOR THE PERIOD (DATE) THROUGH (DATE)

1. TOTAL NUMBER OF STUDENTS

2. STUDENTS WHO DROPPED OUT:

NUMBER.....

PERCENTAGE%

3. STUDENTS WHO GRADUATED:

NUMBER.....

PERCENTAGE%

4. TOTAL NUMBER OF GRADUATES WHO FOUND EMPLOYMENT IN A POSITION FOR WHICH THIS COURSE TRAINED THEM

THESE GRADUATES FINDING EMPLOYMENT WERE:

_____ % OF ALL STUDENTS, AND
_____ % OF ALL GRADUATES.

THESE GRADUATES WERE HIRED IN THE FOLLOWING SALARY RANGES:

	Number	% of All Students	% of Graduates
\$300-399 per month			
\$400-599 per month			
\$600-799 per month			
\$800 and over per month			

Interlocutory Order

90 F.T.C.

IN THE MATTER OF

CENTURY 21 COMMODORE PLAZA, INC., ET AL.

Docket 9088. Interlocutory Order, Oct. 19, 1977

Denial of application to review ALJ's order denying a motion to intervene.

ORDER DENYING APPLICATION TO REVIEW ORDER DENYING
MOTION TO INTERVENE

On September 19, 1977 Administrative Law Judge Lewis F. Parker denied applicant David Unterberg's motion to intervene in the above-captioned matter for the reason that he failed to present facts sufficient to support his motion.¹ Mr. Unterberg has applied to the Commission for review of that order.

Section 3.23(b) of the Commission's Rules of Practice provide that in appeals from a determination by an Administrative Law Judge the moving party is required to attach the "portions of the record on which the moving party is relying." Nothing in the papers submitted by applicant demonstrates that the ALJ erred in finding that the movant had failed to present facts that satisfied the standard for intervention.

It is ordered, That Mr. Unterberg's application for review of the order denying his motion to intervene be, and hereby is, denied.

¹ "[B]efore the Commission will allow intervention into its proceedings, it must be demonstrated that (1) the persons seeking such intervention desire to raise *substantial* issues of law or fact which would not otherwise be properly raised or argued, and (2) the issues thus raised are of sufficient importance and immediacy to warrant an additional expenditure of the Commission's limited resources on a necessarily longer more complicated proceeding in that case, when considered in light of other important matters pending before the Commission." *Firestone Tire & Rubber Co.*, 77 F.T.C. 1666, 1669 (1970).

IN THE MATTER OF
THE RAYMOND LEE ORGANIZATION, INC., ET AL.

Docket 9045. Interlocutory Order, Oct. 21, 1977

Denial of respondents' request for extension of time for filing answer to motion for leave to file amicus curiae brief.

ORDER DENYING RESPONDENT'S REQUEST FOR AN EXTENSION
OF TIME FOR FILING AN ANSWER

By motion filed October 4, 1977, Mr. Norman Axe, attorney representing various persons and non-profit entities, requests that the Commission grant leave to file a brief of an amicus curiae in the above-captioned matter. On September 30, 1977, pursuant to Commission Rules 3.52(h) and 4.4(b), Mr. Axe, sending by mail, gave notice to the interested parties.

By letter received October 18, 1977, Mr. Malcolm I. Lewin, attorney representing The Raymond Lee Organization, Inc. and Raymond Lee, requests the Commission to grant an extension of time for filing an answer to the above motion for leave to file a brief of an amicus curiae.

Assuming arguendo that under Commission Rule 3.52(h) respondent has a right to file an answer to a motion requesting leave to file a brief of an amicus curiae, the specified time within which the answer should have been forthcoming has expired.¹ Moreover, the Commission finds nothing in respondent's letter of October 18, 1977 that would justify the granting of such an extension of time. Accordingly,

It is ordered, That said motion be, and it hereby is, denied.

¹ Pursuant to Rule 4.4(c)(1), service was complete on October 7, 1977, because Mr. Malcolm I. Lewin has indicated to the Secretary's Office that the Post Office delivered Mr. Norman Axe's motion on that day. Commission Rule 3.22(c) requires that within 10 days after service of any written motion, the opposing party shall answer. In measuring this specified period, intervening Saturdays, Sundays and national holidays are counted because, as Rule 4.3(a) provides, the period within which one must answer exceeds seven days. Therefore, even if measured from this date, the specified period expired on Wednesday, October 19, 1977.

IN THE MATTER OF
GATEWAY OVERSEAS, INC., ET AL.

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

Docket 9065. Complaint, Dec. 19, 1975 — Decision, Oct. 27, 1977

This consent order, among other things, requires a New York employment agency to cease misrepresenting the availability of employment opportunities and the effectiveness of its employment services program; the availability of overseas employment in all trades, skills and professions; and the demand for American personnel by overseas employers. The order further prohibits use of a mandatory arbitration clause in contracts which commit consumers to arbitrate all disputes at a designated tribunal; and the acceptance of any fee prior to acceptance of employment, other than those fees charged for preparation or duplication of resumes. Additionally, the order requires the firm to maintain complete business records; conspicuously post prescribed disclosure statements and to include such statements in all sales contracts.

Appearances

For the Commission: *Shirley F. Sarna, Laura P. Worsinger and Ellen Zweibel.*

For the respondents: *Barry Bell, New York City.*

COMPLAINT

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

PARAGRAPH 1. Respondent Gateway Overseas, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1501 Broadway, New York, New York.

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

PAR. 2. Unless otherwise required by context, the following

definition shall apply for purposes of this complaint: the term "companies" means corporations and other legal entities of any type whatever, partnerships and individuals doing business overseas or elsewhere, and governments and governmental subdivisions, agencies and instrumentalities.

PAR. 3. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale of services and related materials to persons seeking employment, such services including but not limited to the preparation and distribution of personal resumes, letters of introduction, and names and addresses of companies thought to be prospective employers to which respondents' clients can mail the aforementioned resumes and letters of introduction when attempting to obtain employment including overseas employment. Respondents also have provided and are now providing employment research services to other similar businesses in return for a fee.

PAR. 4. In the course and conduct of their business respondents require, as a prerequisite to commencing or performing services for any individual client, that said client pay or make unconditional commitment to pay in full, in advance, respondents' non-refundable prescribed fee. Said fee has been set during the period of respondents' operation at \$245 and \$185, usually expressed as a service charge.

PAR. 5. In the course and conduct of their business respondents now cause and for some time last past have caused advertisements for the above-described employment services to appear in newspapers of general and interstate circulation. In the further course and conduct of their business respondents have caused documents and communications pertaining to said business to be transmitted across state lines by means of the United States mail and other means to and from respondents' principal office in the State of New York to offices, customers and potential customers in other States of the United States and foreign countries; and in addition, respondents cause and have caused customers and other individuals and funds to pass between the State of New York and various other States of the United States and foreign countries. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in their said business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 6. In the course and conduct of their business, and for the purpose of inducing the purchase of and payment for their services and materials, respondents have made and caused to be made, and are now making and causing to be made through advertisements published in newspapers of general and interstate circulation,

through brochures, form letters and other promotional matter, and through oral statements by respondents, their agents and representatives during personal interviews and consultations with prospective clients, numerous statements and representations with respect to the availability of jobs overseas and the salaries and other benefits incident thereto, and the nature, type and effectiveness of their employment services program.

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

1. Advertisements in various newspapers sometimes inserted in "Help Wanted" columns, stating, *inter alia*:

a. HIGH PAY - NO TAXES! Men & Women Oppor'ties OVERSEAS All Trades, Skills & Profs. We assist you. Service charge. No placement fee.

b. Have you considered the OVERSEAS areas. . .Australia, Asia, Europe? or the top U.S. areas. . .Such areas as Calif., Fla., Hawaii, Colorado, etc.?

c. Has ANYONE ever thought of looking for a good local, national or overseas job through a resume service? Take 15 minutes of your time NOW to develop the rest of your life through our unexcelled services. Call, or write, office in your area.

d. WORK OVERSEAS—HIGH PAY—BONUSES—NO TAXES—WORK OVERSEAS—and choice U.S. spots.

e. All Trades, Skills & Professions—Go with GATEWAY. First in N.Y.!

2. Form letters, promotional matter and oral representations made or disseminated by or for respondents, stating, *inter alia*:

f. Opportunities the world over. . . .We've served thousands.

g. GATEWAY OVERSEAS, INC., organized and operating under the laws of New York State is the nation's foremost Service Organization in its field.

We offer a unique approach to persons seeking lucrative and rewarding opportunities either Overseas or in the choice spots within the United States, Canada and Mexico.

Our service is individually tailored to your experience and background as well as to your geographic areas of preference.

h. A good resume and cover letter are of no value unless you have some place to send it. Here is where the all important function of our Research Department comes in. Their constant scanning of hundreds of foreign and American newspapers, trade journals, and government publications allows them to keep accurate and up-to-date information on thousands of American and Foreign companies with national and international operations. An intensive and individualized research is then conducted in which we select a minimum of 20 companies or organizations, which are in your field and are located in the geographic area of your choice. These companies are specifically matched to your qualifications and represent those which we feel will offer the best opportunities for you.

i. Any individual serious about solid career advancement should know about the Gateway Service. It is without question the most complete and professional

service of its kind in the nation. No company or individual is in a better position to help you in achieving your career goals than Gateway Overseas, Inc. At Gateway *YOUR SUCCESS IS OUR ONLY CONCERN*.

j. One of the most comprehensive and sophisticated job searches available in the United States - specifically designed to make the most immediate and efficient coordination of prospective employers and qualified individuals currently available.

k. If you are not completely satisfied with the results, we will service you until you are, regardless of the additional costs to Gateway. Although many people never request a second mailing, we will provide any additional mailings you request until you get the exact response you are seeking.

l. Through our global job research service, we know where the current and upcoming openings are from day to day.

m. YOUR OVERSEAS INCOME COULD RANGE FROM 25% TO 150% HIGHER THAN YOU WOULD MAKE AT DOMESTIC RATES OF PAY. HOWEVER, IT'S NOT POSSIBLE TO QUOTE YOU AN EXACT SALARY SINCE THESE FIGURES ARE INFLUENCED BY: (1) RATES CUSTOMARY IN THE UNITED STATES; (2) YOUR PARTICULAR QUALIFICATIONS AND OCCUPATION; (3) CURRENT NEEDS; (4) GEOGRAPHIC LOCATION OF THE PARTICULAR JOB; (5) HAZARDOUS CONDITIONS INVOLVED, IF ANY; AND (6) YOUR PRIOR FOREIGN CONTRACTS. THE SUBSISTENCE ALLOWANCE IS NON-TAXABLE; NEITHER IS YOUR INCOME AFTER 510 DAYS.

YOUR ROOM AND BOARD WILL BE FURNISHED FOR YOU OR MADE AVAILABLE TO YOU FOR A MINIMUM CHARGE. CERTAIN HIGH PRIORITY, TOP-FLIGHT PERSONNEL WILL BE FURNISHED HOUSING BY THE COMPANY.

TRANSPORTATION IS GENERALLY FURNISHED - FROM THE POINT OF HIRE AND RETURN WHEN THE CONTRACT HAS BEEN COMPLETED. SOME ORGANIZATIONS WILL ALSO PROVIDE TRANSPORTATION FOR YOUR FAMILY, IF SUITABLE LIVING QUARTERS AND ARRANGEMENTS CAN BE MADE FOR THEM ALSO.

SUBSISTENCE ALLOWANCE FROM \$250.00 to \$500.00 A MONTH IS GENERALLY PAID IN ADDITION TO YOUR BASE SALARY. THE EXACT AMOUNT OF THIS IS GOVERNED BY THE COST OF LIVING AT THE LOCATION AND THE PARTICULAR EMPLOYEE FRINGE BENEFITS FURNISHED BY THE EMPLOYER.

n. Then we circulate it (the resume) with a covering letter signed by the client and geared directly to the staff needs of about 40 companies or private institutions whom we know have job openings for which our client is qualified.

o. Anderson says about 70% of his clients get and accept satisfactory job offers with the first mailing.

p. *WHY DO YOU WANT TO WORK OVERSEAS?*

Is it because: a) Salaries generally range from 25% to 150% higher than those in the United States? b) Subsistence allowances of between \$250 and \$500 a month are normally paid? c) The majority of companies pay the roundtrip costs of you and your family?

PAR. 7. By and through the use of the aforesaid statements,

representations and advertisements, and others of similar import and meaning, but not expressly set out herein, respondents represent and have represented, directly or by implication, that:

1. Overseas jobs for Americans are plentiful in all trades, skills, and professions.
2. Overseas jobs for Americans have been and are immediately or imminently available.
3. Overseas jobs for Americans are plentiful in highly desirable areas such as Europe and Australia.
4. Respondents provide an expert and comprehensive employment service.
5. Respondents have specific or special knowledge of a substantial number of job openings or opportunities in highly desirable areas such as Australia and Europe and other locations for a significant number of clients.
6. Respondents have special, unique, exclusive or expert knowledge of the specific employment needs and hiring practices of a substantial number of companies.
7. Respondents' services include the matching or coordinating of a client's specific skills with companies which have a need for such skills.
8. Respondents' clients can expect their pay to be 25 percent - 150 percent higher than it would be in the United States for a comparable position.
9. Respondents' clients can expect their earnings overseas to be exempt from income taxes after 510 days.
10. Respondents' clients can expect subsistence allowances when working overseas and roundtrip transportation overseas to be paid for by the employer.
11. Substantially every person who becomes a client of respondents can reasonably expect to obtain employment as a result of respondents' services.

PAR. 8. In truth and in fact:

1. With the exception of a few occupations, jobs overseas for Americans have not been plentiful.
2. Jobs overseas have seldom been available immediately, imminently, or at any time to respondents' clients.
3. Overseas jobs for Americans are scarce, especially in such highly desirable areas as Europe and Australia.
4. Respondents do not have the experience or training necessary to provide an expert employment service, nor do they have the employer contacts and specific information necessary to provide a comprehensive employment service.

5. Respondents have no specific or special knowledge of any substantial number of job openings or opportunities in any part of the world, in any significant number of occupations.

6. Respondents have no special, unique, exclusive, or expert knowledge of the specific employment needs and hiring practices of a substantial number of companies. The policy of the vast majority of companies doing business overseas is to hire only local nationals, with rare exceptions for Americans with highly specialized or top management skills.

7. Respondents do not match or coordinate clients' specific skills with companies' specific needs, but identify each by broad category only.

8. A great majority of the overseas jobs for which respondents' clients are qualified do not provide high pay by American standards.

9. Overseas earnings are not exempt from income taxes after 510 days. Overseas salaries are subject to income taxation by the particular foreign state in which the client is employed.

10. Respondents' clients cannot expect subsistence allowances when working overseas nor roundtrip transportation overseas to be paid for by the employer because such benefits are only provided for a select category of personnel.

11. With the exception of a very few occupational skills, the great majority of persons who become clients of respondents cannot reasonably expect to obtain employment anywhere as a result of respondents' services. In the past, only a minute percentage of respondents' clients have obtained jobs as a result of respondents' efforts.

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

PAR. 9. By and through the use of the statements and representations described and exemplified in Paragraphs Six and Seven hereof, respondents represented and continue to represent to unemployed persons and other job seekers that they have knowledge of jobs currently available in all trades, skills and professions, and that individuals taken on as clients will in most instances obtain employment through the use of their services. In reliance on such representations of respondents' service as essentially one that will in most instances successfully lead to a satisfactory offer of employment, many of such unemployed persons and other job seekers have been induced, and continue to be induced, to their substantial hardship and detriment into becoming clients of respondents and

into paying or making unconditional commitments to pay respondents' prescribed fee in advance as required.

In fact, however, respondents' services have failed, and continue to fail, as a means of obtaining employment for the great majority of clients.

Moreover, the collecting of respondents' fee in advance of placement has diminished and tended to eliminate as to each individual client, respondents' incentive to provide and continue diligent efforts and service toward finding employment opportunities and matching clients thereto.

Therefore, it was and is an unfair trade practice for respondents to require clients to pay in advance for their services as represented and described in Paragraphs Three through Eight above.

PAR. 10. In the course and conduct of their business, as aforesaid, respondents require their clients to sign a contractual agreement for services, hereafter referred to as "the contract." On the aforesaid contract, respondents have included a provision requiring that all disputes involving the terms and obligations of the contract be referred to arbitration at a named tribunal designated by respondents. Said mandatory arbitration clause is not negotiated by and between the parties; and respondents' clients, as a result of signing this contract to utilize respondents services, are thereby bound to arbitrate all grievances regarding the contract with respondents. Respondents' clients are not afforded an opportunity to reject mandatory arbitration when signing respondents' contract.

PAR. 11. Respondents fail to disclose to prospective clients, prior to the signing of the contract, that arbitration is a binding resolution for all disputes arising under the contract nor do they disclose or explain to such clients material facts regarding the procedures, rules or fees of the named tribunal.

PAR. 12. The arbitration tribunal designated in respondents' contract requires individuals who wish to initiate an arbitration to pay an administrative filing fee of \$100. This administrative filing fee of the designated tribunal is significantly greater than the fees for some courts which could have jurisdiction of claims arising out of respondents' contracts and, in many instances said fee constitutes a substantial percentage of the amount involved in disputes arising out of respondents' contracts. Consumers are or may thereby be deterred from seeking redress through the designated arbitral forum.

PAR. 13. The arbitration tribunal designated by respondents is located in New York. Arbitration in New York is, by law, a binding award. As a result of the use of the aforesaid contract under the circumstances described herein, respondents substantially deprive

clients of a meaningful opportunity to obtain or seek redress when disputes arise in connection with respondents' contract or obligations.

PAR. 14. Therefore, respondents' use of the aforesaid arbitration clause in the circumstances described herein was and is an unfair act or practice in violation of Section 5 of the Federal Trade Commission Act.

PAR. 15. In the course and conduct of their business, and at all times mentioned herein, respondents have been and now are in substantial competition, in or affecting commerce, with corporations, firms, and individuals engaged in the sale of materials and performance of services of the same general kind and nature as those sold and performed by respondents.

PAR. 16. The use by respondents of the aforementioned false, misleading, unfair, and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are true, and into the purchase of respondents' services and the payment of respondents' fees by reason of said erroneous and mistaken belief.

PAR. 17. The aforesaid acts and practices of respondents, as herein alleged, are unethical, oppressive, exploitative and cause substantial injury to consumers, and constituted, and now constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 18. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

The Commission having withdrawn the matter from adjudication for the purpose of considering settlement by the entry of a consent order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the

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 set forth in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Gateway Overseas, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its former principal office and place of business located at 1501 Broadway, New York, New York. The corporate respondent's present address is the same as that of the individual respondent.

Respondent Michael Anderson, an individual, is an officer and director of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent and his address is 5760 N. Campbell Ave., Tuscon, Arizona.

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

ORDER

It is ordered, That respondent Gateway Overseas, Inc., a corporation, its successors and assigns, and its officers, and Michael Anderson, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device in connection with the advertising, offering for sale, or sale of job search services or materials or articles incident thereto, or similar services, materials, or articles in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

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

(1) Overseas jobs for Americans are plentiful in any trade, skill, or profession.

(2) Overseas jobs for Americans have been and are immediately or imminently available.

(3) Overseas jobs for Americans are plentiful in highly desirable areas such as Europe and Australia.

(4) Respondents provide an expert and comprehensive employment service.

(5) Respondents have specific or special knowledge of substantial numbers of job openings or opportunities in the United States or overseas for a significant number of clients.

(6) Respondents have special, unique, exclusive or expert knowledge of the specific employment needs and hiring practices of a substantial number of employers.

(7) Respondents' services include the matching or coordinating of clients' skills with employers needing said skills.

(8) Respondents' clients can expect their pay to be 25 percent - 150 percent higher than it would be in the United States for a comparable position.

(9) Respondents' clients can expect to receive subsistence allowances when working overseas.

(10) Respondents' clients can expect round trip transportation expenses to be paid by the employer.

(11) Respondents' clients can expect their earnings overseas to be exempt from income taxes after 510 days.

(12) Substantially every person who becomes a client of respondents can expect to obtain employment as a result of respondents' services.

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

(1) The demand for Americans to fill overseas positions; the availability or immediacy of any employment opportunity; or the availability of jobs for Americans in any geographic areas.

(2) The respondents' professional qualifications; the nature or character of the services provided by respondents; the respondents' knowledge of the needs and hiring practices of employers; or the respondents' knowledge of specific job opportunities.

(3) The services provided by respondents in coordinating clients' skills with employers having a need for such skills; or the likelihood of obtaining employment as a result of the utilization of respondents' services.

(4) The earnings respondents' clients can expect to receive or any other terms, conditions or compensation incident to employment; or the extent to which the earnings of respondents' clients are subject to taxation.

C. Charging or accepting any fee from a client or prospective client prior to the acceptance by the client of a firm offer of employment resulting from the utilization of respondents' services.

Provided, however, that reasonable fees may be charged for the preparation or duplication of a resume prior to the acceptance of an offer of employment, if respondents' resume service is sold independently of any other job search service.

Further provided, that the sale of resume services will not be deemed independent of other job search services unless a notice stating that respondents' services may be purchased separately is: (i) conspicuously posted in respondents' reception area; (ii) conspicuously posted in all areas where prospective clients are interviewed; and (iii) conspicuously stated in all of respondents' contracts. *Further provided,* that the notice in items (i) and (ii) above, shall be in capital block letters no less than one and one-half (1-1/2) inches high; and that the notices required by items (i), (ii) and (iii) above, shall be captioned "IMPORTANT NOTICE - PLEASE READ." Furthermore, said notices shall itemize the various services offered and the prices for each of such services.

D. Entering into any contract or agreement with a client, prior to the time a dispute arises, which requires that disputes arising in connection with the contract or agreement be submitted to arbitration for resolution.

It is further ordered, That respondents maintain at all times in the future, complete business records relative to the manner and form of their continuing compliance with the above terms and provisions of this order.

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each operating division, to all present and future franchisees and licensees, and to all of respondents' personnel now or hereafter engaged in the offering for sale, or sale of respondents' job search services or related materials or articles, or in any aspect of the preparation, creation or placing of advertising of such services, materials or articles, and that respondents secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or corporations, 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 each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from

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Decision and Order

the effective date of this order, the individual respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

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

Complaint

90 F.T.C.

IN THE MATTER OF
DAYCO CORPORATION

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

Docket C-2905. Complaint, Oct. 27, 1977 — Decision, Oct. 27, 1977

This consent order, among other things, requires a Dayton, Ohio manufacturer and importer of occupational safety products and equipment to cease misrepresenting that its products meet non-existent "government standards," or that they are approved, endorsed or required by the Occupational Safety and Health Administration (OSHA). The firm is also required to cease using, or licensing the use of the "OSHA-SPEC" trademark, and to take steps to prevent the importation of "OSHA-SPEC" branded goods. Additionally, the order prohibits the company from publishing quotations from the OSHA Act or regulations, without including all relevant portions of the quoted section.

Appearances

For the Commission: *Sharon J. Devine* and *Allan M. Huss*.

For the respondent: *Sara Jane Little*, Dayton, Ohio.

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

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

(a) "OSHA" means the Occupational Safety and Health Administration, an agency of the United States Government established pursuant to authority granted to the Secretary of Labor by the OSHA Act.

(b) "OSHA Act" includes the Williams-Steiger Occupational Safety and Health Act of 1970, 84 Stat. 1593, 29 U.S.C. 651-678 (1975), and the regulations promulgated thereunder, 29 C.F.R. 1900, *et seq.* (1976).

(c) "Hazardous condition" means a circumstance or set of circumstances against which an employer must take precaution(s) in order to comply with the OSHA Act.

PAR. 2. Respondent Dayco 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 333 West First St., in the City of Dayton, State of Ohio.

PAR. 3. Respondent is now, and for some time last past has been, engaged in the manufacturing, advertising, offering for sale, sale, and distribution to the public of general industrial products and equipment, including occupational safety products and equipment.

PAR. 4. In the course and conduct of its aforesaid business, respondent now causes, and for some time last past has caused, its said products, when sold, to be shipped from its places of business in the various states to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its aforesaid business, respondent caused to be registered by the United States Commissioner of Patents and Trademarks, a trademark consisting of the words "OSHA-SPEC." The aforesaid mark was placed upon the Principal Register and given registration number 962327 on July 3, 1973, and was registered for use upon plastic sheet goods and other goods of International Trademark Class 17.

PAR. 6. In the course and conduct of its aforesaid business, respondent, by the use of its registered trademark, "OSHA-SPEC," in connection with the manufacturing, advertising, offering for sale, and sale of its occupational safety products and equipment, represents to purchasers and prospective purchasers, directly or by implication, that:

(a) Products and equipment advertised, offered for sale, sold, or distributed in conjunction with the "OSHA-SPEC" mark are approved or endorsed by OSHA.

(b) The use of all products and equipment advertised, offered for sale, sold, or distributed in conjunction with the "OSHA-SPEC" mark constitutes compliance with the OSHA Act for protection against hazardous conditions.

(c) All products and equipment advertised, offered for sale, sold, or distributed in conjunction with the "OSHA-SPEC" mark meet the standards and requirements prescribed or referenced by the OSHA Act.

PAR. 7. In truth and in fact:

(a) OSHA does not approve or endorse any products or equipment.

(b) The use of certain products advertised, offered for sale, sold, or distributed in conjunction with the "OSHA-SPEC" mark does not

constitute compliance with the OSHA Act for protection against certain hazardous conditions.

(c) The OSHA Act does not prescribe or reference standards and requirements for certain products and equipment advertised in conjunction with the "OSHA-SPEC" mark.

Therefore, the representations, acts, and practices as set forth in Paragraphs Six and Seven hereof were and are unfair, misleading, and deceptive.

PAR. 8. In the further course and conduct of its business as aforesaid, respondent is now, and for some time last past has been, printing and distributing to the public at large a publication entitled "OSHA-SPEC Buyer's Guide", which contains descriptions and pictures of products offered for sale by respondent, together with direct or paraphrased quotations from the OSHA Act.

By and through the publication and dissemination of this publication, and certain quotations which are incomplete therein, respondent represents to purchasers and prospective purchasers that:

(a) Certain products and equipment of the type offered for sale in the "OSHA-SPEC Buyer's Guide" are required to be used by purchasers to comply with the OSHA Act.

(b) In certain instances, no other products and equipment except the type offered for sale, or no other methods of compliance are acceptable for use in situations where hazardous conditions exist.

PAR. 9. In truth and in fact:

(a) Products and equipment of the type offered for sale in the "OSHA-SPEC Buyer's Guide" are not necessarily required to be used by purchasers to comply with the OSHA Act.

(b) In certain instances, alternative methods of compliance, or the use of products and equipment other than the type featured in the "OSHA-SPEC Buyer's Guide" are allowable under the OSHA Act.

Therefore, the representations, acts, and practices as set forth in Paragraphs Eight and Nine hereof were and are unfair, misleading, and deceptive.

PAR. 10. In the conduct of its aforesaid business, at all times mentioned herein, respondent has been in substantial competition in and affecting commerce with corporations, firms, and individuals in the offering for sale, sale, and distribution of safety products and equipment of the same general kind and nature as those sold by respondent.

PAR. 11. The use by respondent of the trademark "OSHA-SPEC" and the aforesaid false, misleading, and deceptive statements, representations, acts, and practices, has had, and now has, the capacity and tendency to lead members of the purchasing public into

the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of respondent's products and equipment by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondent 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 and affecting commerce and unfair and deceptive acts and practices in and 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 Cleveland 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 the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Dayco Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 333 West First St., Dayton, Ohio.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding, and of the respondent, and the proceeding is in the public interest.

ORDER

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

(a) "OSHA" means the Occupational Safety and Health Administration, an agency of the United States Government established pursuant to authority granted to the Secretary of Labor by the OSHA Act.

(b) "OSHA Act" includes the Williams-Steiger Occupational Safety and Health Act of 1970, 84 Stat. 1593, 29 U.S.C. 651-678 (1975), and the regulations promulgated thereunder, 29 C.F.R. 1900, *et seq.* (1976).

(c) "Hazardous condition" means a circumstance or set of circumstances against which an employer must take precaution(s) in order to comply with the OSHA Act.

It is ordered. That respondent Dayco Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, advertising, offering for sale, sale, or distribution of products or equipment in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, orally or in writing, or by any other means:

(1) That any product or equipment advertised, offered for sale, sold, or distributed by respondent is approved or endorsed by OSHA or by any other governmental agency, *provided, however,* that this subparagraph shall not prohibit statements that any product or equipment is certified, approved, or endorsed by a governmental agency when, in fact, such product or equipment has been certified, approved, or endorsed by such agency.

(2) That the use of any product or equipment advertised, offered for sale, sold, or distributed by respondent constitutes compliance with the requirements of the OSHA Act:

(a) When hazardous conditions exist and the use of such product or equipment does not constitute compliance with the standards prescribed or referenced by the OSHA Act for such hazardous conditions;

(b) When the use of that product or equipment to protect against certain specific hazardous conditions is contra-indicated, unless respondent clearly and conspicuously discloses the specific conditions for which the use of the product or equipment is contra-indicated.

(3) That any product or equipment advertised, offered for sale, sold, or distributed by respondent meets the standards or requirements

prescribed or referenced by the OSHA Act when, in fact, no such standards or requirements exist.

It is further ordered, That respondent cease and desist from using the trademark "OSHA-SPEC" in conjunction with any product or equipment, or in conjunction with the advertising, offering for sale, selling, or distribution thereof; and any other title, corporate name, trade name, trademark, whether registered or not, or any other designation or device which in itself represents, directly or by implication, that respondent's occupational safety products or equipment are approved, endorsed, or accepted by, or connected or associated with, any agency or instrumentality of the United States Government. *Provided, however,* that respondent shall be allowed to disseminate, until December 31, 1977, existing stocks of its 1977 catalog as are in existence upon the date this order becomes final. Respondent shall not cause or permit the placement of any advertisement using the OSHA-SPEC mark after the date this order becomes final. The display of advertisements placed in the "Yellow Pages" prior to the date this order becomes final, which cannot be discontinued by respondent, shall not be deemed a violation of this order.

It is further ordered, That respondent cease and desist from assigning or licensing the use of the trademark "OSHA-SPEC" by any person, partnership, or corporation.

It is further ordered, That, within thirty (30) days after this order becomes final, respondent shall take such steps as are necessary to prevent importation into the United States of goods bearing, or sold in conjunction with, the "OSHA-SPEC" trademark, including the deposit of the mark with the Department of the Treasury, Bureau of Customs, pursuant to 19 U.S.C. 1526.

It is further ordered, That respondent cease and desist from reproducing the text, in whole or in part, of the OSHA Act in any advertisement, catalog, or other printed matter which is, or which is designed to be, disseminated by respondent to its customers, unless respondent clearly and conspicuously reproduces such portion of the regulatory section sufficient to disclose alternative methods of compliance, if any, or references to pertinent exceptions, if any, and underlines any portion of the section that describes or permits a method or methods of compliance which differ(s) from the primary method of providing hazard protection referred to by pertinent regulatory sections. *Provided, however,* that this paragraph shall not prohibit respondent from reproducing the section numbers and corresponding captions used in the OSHA Act to identify subject matter.

It is further ordered, That respondent shall forthwith distribute a

copy of this order to each of its operating divisions and subsidiaries and to all present and future corporate officers, field, sales, and office personnel, which manufacture or sell occupational safety products and equipment, and prominently post a copy of this order in each office affected by this order.

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

It is further ordered, That respondent shall, within sixty (60) days after service of it upon 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
EAST PROVIDENCE CREDIT UNION

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

Docket C-2906. Complaint, Oct. 27, 1977 — Decision, Oct. 27, 1977

This consent order, among other things, requires an East Providence, R.I. credit union to cease failing to provide consumers, in connection with the extension of credit, such material and disclosures as are required by Federal Reserve Board regulations.

Appearances

For the Commission: *William P. McDonough.*

For the respondent: *Albert B. West, Providence, R.I.*

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that East Providence Credit Union, a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending 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 East Providence Credit Union is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 15 Circle St., East Providence, Rhode Island.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the business of lending money to the general public.

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

PAR. 4. Subsequent to July 1, 1969, respondent, in the ordinary course of its business, as aforesaid, has caused and is causing to be

extended consumer credit, as "consumer credit" is defined in Regulation Z, and has caused and is causing customers to execute a binding promissory note secured by a first mortgage not for the purpose of acquiring a home and for second mortgages. Credit cost disclosures made in conjunction with the execution of the promissory note are contained on one side of a separate statement entitled, "Consumer Credit Cost Disclosure Statement," hereinafter referred to as "Disclosure Statement."

By and through the use of the Disclosure Statement, respondent:

1. Failed to disclose the sum of payments scheduled to repay the indebtedness, using the term "total of payments" as required by Section 226.8(b) (3) of Regulation Z.

2. Failed to disclose the total amount of the finance charge, with descriptions of each amount included, using the term "finance charge," as required by Section 226.8(d) (3) of Regulation Z.

3. Failed to disclose a description of any penalty charge that may be imposed for prepayment of the principal of the obligation with an explanation of the method of computation of such penalty and the conditions under which it may be imposed, as required by Section 226.8(b)(6) of Regulation Z.

4. Failed to use the term "amount financed" to describe the amount of credit extended, including all charges, individually itemized, which are included in the amount of credit extended but which are not part of the finance charge, as required by Section 226.8(d) (1) of Regulation Z.

PAR. 5. By and through the use of promissory notes secured by first mortgages not for the purposes of acquiring a dwelling and by second mortgages the respondent retains, creates, or acquires a security interest, as "Security Interest" is defined in Section 226.2(gg) of Regulation Z, in real property which is used or expected to be used as the principal residence of the purchaser. Retention or acquisition of these security interests gives customers who are extended consumer credit as "Consumer Credit" is defined in Section 226.2(p), of Regulation Z, the right to rescind the transaction until midnight of the third business day following the date of consummation of the transaction or the date of delivery of all disclosures required under this section and all other material disclosures required by Regulation Z, whichever is later, pursuant to Section 226.9(a) of Regulation Z.

By and through the above-described acts and practices respondent has in many instances since July 1, 1969:

1. Failed to furnish customers with two copies of a notice of the opportunity to rescind in the manner and form required by Section 226.9(b) of Regulation Z.

2. Failed to set forth the "Effect of rescission," as set forth by Section 226.9(d) of Regulation Z, in the manner and form required by Section 226.9(b) of Regulation Z.

PAR. 6. In the ordinary course of its business as aforesaid, respondent causes to be published advertisements as the term "advertisement" is defined in Regulation Z. These advertisements aid, promote or assist, directly or indirectly, extensions of consumer credit.

By and through the use of the advertisements, respondent:

States the amount of the loan, the number, amount, and period of payments scheduled to repay the indebtedness if the credit is extended, and the amount of the finance charge expressed as an annual percentage rate without also stating the following item in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

The total of payments in the loan transaction.

PAR. 7. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated 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 Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder and 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 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 Acts, and that complaint should issue stating its

charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent East Providence Credit Union is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations with its principal office and place of business located at 15 Circle St., East Providence, Rhode Island.

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

ORDER

It is ordered. That respondent East Providence Credit Union, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub. Law 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to disclose the sum of payments scheduled to repay the indebtedness, using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

2. Failing to disclose the total amount of the finance charge, with description of each amount included, using the term "finance charge," as required by Section 226.8(d)(3) of Regulation Z.

3. Failing to provide a description of any penalty charge that may be imposed for prepayment of the principal with an explanation of the method of computation of such penalty and the conditions under which it may be imposed, as required by Section 226.8(b) (6) of Regulation Z.

4. Failing in any transaction in which respondent retains or acquires a security interest in real property which is used or expected to be used as the principal residence of the customer, to provide customers with two copies of the "Notice of Opportunity to Rescind" in the manner and form required by Section 226.9 of Regulation Z.

5. Failing to use the term "amount financed" to describe the amount of credit extended, including all charges, individually

itemized, which are included in the amount of credit extended but which are not part of the finance charge, as required by Section 226.8(d) (1) of Regulation Z.

6. Representing in any advertisement, directly or by implication, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d) (2) of Regulation Z:

(a) the amount of the loan;

(b) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(c) the amount of the finance charge expressed as an annual percentage rate; and

(d) the total of payments.

7. Failing, in any consumer credit transaction or advertisement, to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8, 226.9, and 226.10 of Regulation Z.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent now or hereafter engaged in the consummation of any extension of consumer credit or in any aspect of the preparation, creation, or placing of advertising, and that respondent secure a signed statement acknowledging receipt of said order from each said person.

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

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

Complaint

90 F.T.C.

IN THE MATTER OF
PUBLIC RELATIONS SOCIETY OF AMERICA, INC.

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

Docket C-2907. Complaint, Oct. 27, 1977—Decision, Oct. 27, 1977

This consent order, among other things, requires a New York City trade association to cease promulgating rules that affect fee arrangements or business solicitations between members of the association and their clients and prospective clients.

Appearances

For the Commission: *Michele F. Crown.*

For the respondent: *Francis K. Decker, Forsyth, Decker, Murray & Hubbard, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Public Relations Society of America, Inc., a corporation subject to the jurisdiction of the Commission, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and it appearing that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

1. Respondent, Public Relations Society of America, Inc. ("PRSA"), is a not-for-profit membership corporation organized and existing under the laws of the State of New York, with its principal office located at 845 Third Ave., New York, New York.

2. PRSA is a trade association formed for the purposes, *inter alia*, of providing a forum for the interchange of ideas and information between members, to require adherence by members to certain standards of conduct, and to promote the business of public relations and those who practice it to business, professional and other groups, and to the public.

3. Respondent is a membership organization composed of approximately 8,400 persons. Many PRSA members are engaged in the business of providing public relations services for a fee. PRSA members may, and often do, upon successful completion of an examination given by respondent, receive accreditation and may, and often do, use the acronym "APR" after their name to indicate such accreditation.

4. The acts and practices of PRSA and its members are in or affect

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

5. For many years up to and including the present, PRSA and its members have engaged in a combination, conspiracy and common course of action to restrain the aforesaid interstate commerce. This combination has consisted of a continuing agreement and understanding among PRSA and its members, the substantial terms of which have been and are:

(a) That PRSA adopt, publish and disseminate a code of professional standards containing a provision that restricts the manner in which members of PRSA may set their fees, including a prohibition against proposing or entering into contingent fee arrangements with clients for the payment of services.

(b) That PRSA adopt, publish and disseminate a code of professional standards containing a provision that restricts the solicitation of clients by PRSA members including restrictions on the solicitation of clients of other members.

(c) That the members of PRSA abide by said provisions of the code of professional standards.

(d) That PRSA and its members police said provisions of the code of professional standards.

6. PRSA and its members have done those things which, as alleged in Paragraph 5(a) - (d), they agreed to do, for the purpose of effectuating the aforesaid combination, conspiracy and common course of action.

7. As a result of the acts and practices alleged in Paragraphs 5 and 6:

(a) Prices of members' services have been or have a dangerous tendency to be tampered, stabilized, fixed or otherwise interfered with;

(b) Price competition among the members of PRSA in the sale of their services has been or has a dangerous tendency to be suppressed or eliminated;

(c) Competition between public relations practitioners in the provision of such services has been or has a dangerous tendency to be hindered, restrained, foreclosed or frustrated;

(d) Barriers have been or have a dangerous tendency to be raised with respect to the entry of new public relations practitioners;

(e) Clients requiring the services offered by members of PRSA have been deprived of the benefits of free and open competition in the sale of such services.

8. The combination, conspiracy, and common course of action described above are unfair methods of competition and unfair acts or

practices that constitute violations of Section 5(a) 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 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 violation of Section 5 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 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(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent, Public Relations Society of America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 845 Third Ave., New York, New York.

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

ORDER

I

It is ordered, That respondent, respondent's officers, directors, agents, employees, successors and assigns, cease and desist from adopting, disseminating, continuing or otherwise having in effect any

code of ethics, rule, bylaw, resolution, policy statement, or interpretation thereof, which prohibits or limits in any way the manner in which members may arrange their fees with clients or prospective clients for payment of services; or which prohibits or restricts any communication to clients or prospective clients with respect to the arrangement of fees.

II

It is further ordered, That respondent, respondent's officers, directors, agents, employees, successors and assigns, cease and desist from adopting, disseminating, continuing, or otherwise having in effect any code of ethics, rule, bylaw, resolution, policy statement, or interpretation thereof, which prohibits or restricts a member from soliciting, negotiating, or entering into a business relationship with a prospective client.

III

It is further ordered, That the respondent corporation shall within 60 days from the date of service of this order, send a copy of this order to each chapter of the society in the United States, and cause the publication of this order in the *PRSA National Newsletter* and send a copy thereof to each current member of respondent.

IV

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

V

It is further ordered, That Public Relations Society of America, Inc. shall, within sixty (60) days after the effective date of this order, file with the Commission a written report showing in detail the manner and form of its compliance with each of the provisions of the order.

Complaint

90 F.T.C.

IN THE MATTER OF

ZAYRE CORP.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-2908. Complaint, Oct. 27, 1977 — Decision, Oct. 27, 1977*

This consent order, among other things, requires a Framingham, Mass. operator of a discount department store chain to cease failing to have, in each store covered by advertisements, all advertised items available for sale at or below advertised price, in reasonably sufficient quantities to meet anticipated demands; to conspicuously post advertisements and prescribed notices at store entrances and checkout counters; maintain business records for a three-year period; and institute a surveillance program to ensure that its stores' business practices conform to the terms of this order.

*Appearances*For the Commission: *Harold F. Moody.*For the respondent: *Newton A. Lane, Nathanson & Rudofsky,*
Boston, Mass.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Zayre Corp., 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 Zayre Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with an office and principal place of business located at 770 Cochituate Road, Framingham, Massachusetts.

PAR. 2. Respondent and its subsidiary corporations are now, and for some time last past have been engaged in the operation of a chain of retail discount department stores. There are presently approximately 250 department stores in respondent's chain, located throughout most states east of the Mississippi River. Its volume of business has

been and is substantial. In the operation of its retail discount department stores, respondent offers to its customers an extensive line of clothing, hard goods and other general merchandise. Many of said products offered for sale and sold are purchased from a large number of independent suppliers located throughout the United States.

PAR. 3. In the course and conduct of its business, as aforesaid, respondent now causes, and for some time last past has caused, directly or indirectly, the aforesaid clothing, hard goods and other general merchandise to be shipped and distributed from the aforesaid sources of supply either directly to its retail stores or to its distribution centers and thereafter to its retail stores, many of which are located in various states other than the state of origination, distribution or storage of said products. In the further course and conduct of its business respondent transmits contracts, business correspondence, monies and other documents from its stores, offices and divisions located in various states to others of its stores, offices and divisions located in other states. In the further course and conduct of its business respondent disseminates advertisements in newspapers of interstate circulation and in broadcast media, which broadcasts are received in states other than those of origination. Respondent maintains and at all times mentioned herein has maintained substantial business 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, respondent disseminates and causes to be disseminated certain advertisements. In said advertisements respondent makes certain statements and representations with respect to the terms and conditions under which various items of merchandise will be sold to members of the public. The terms and conditions include descriptions or depictions of items of merchandise, their prices, time periods and geographical areas.

PAR. 5. By disseminating or causing to be disseminated in various areas of the United States served by respondent's retail stores such advertisements, respondent has represented, directly or by implication, that in those stores covered by such advertisements, during the effective period of the advertised offers, the items listed or depicted in such advertisements would be readily available for sale to customers, and readily and conspicuously, available for sale at or below the advertised price; and by failing to have had, in every instance, each of the advertised items readily available for sale to customers and readily and conspicuously available for sale at or below the advertised price, said representations as referred to herein were false,

misleading and deceptive, and respondent has engaged in unfair acts and practices.

PAR. 6. In the course and conduct of its business and at all times referred to herein, respondent has been and now is in substantial competition in or affecting commerce, with corporations, partnerships, firms and individuals in the purchase, sale and distribution of clothing, hard goods and general merchandise.

PAR. 7. The use by respondent of the aforesaid unfair and false, misleading and deceptive representations, acts and practices has had the capacity and tendency to mislead members of the purchasing public, and to induce such persons to go to respondent's stores and to purchase from respondent items other than the advertised items and the advertised products at prices in excess of those advertised.

PAR. 8. The aforesaid acts and practices of respondent as herein alleged were all to the prejudice and injury of the public and of respondent's competitors and constituted unfair and deceptive acts and practices in or affecting commerce, and unfair methods of competition 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 Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the 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 the respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

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

1. Respondent Zayre Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with a principal office located at 770 Cochituate Road, Framingham, Massachusetts.

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

ORDER

It is ordered, That respondent Zayre Corp., its successors and assigns, and its officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from representing in any advertisement, by any means, that any product is available for sale to the public at its Zayre department stores at any price unless:

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

2. Each advertised item, which is usually and customarily individually marked with a price, is individually, clearly, and conspicuously marked with a price which is at or below the advertised price;

provided, however,

(a) An item shall be deemed readily available for sale to the public, although not in the selling area of each store covered by the advertisement, if a clear and conspicuous notice is posted in the area where the item is regularly displayed stating that the item is in stock or, in the case of an item which is customarily delivered, in the warehouse customarily servicing said store, and may be obtained upon request, and said item is furnished on request;

(b) An item shall not be deemed unavailable if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records as will show that: (i) the advertised items were delivered to its stores in quantities sufficient to meet reasonably anticipated demand but were "sold out," or the advertised items were advertised with a limit on the available quantity thereof in each store and said items were delivered to the stores in the advertised quantities but were "sold out," or (ii) the advertised items were ordered but not delivered

due to circumstances beyond respondent's reasonable control, and that, upon knowledge of such nondelivery, respondent acted immediately to contact the media to revise the advertisement or proposed advertisement to reflect the limited availability or unavailability of each advertised item and, if revision of the advertisement was not reasonably possible, respondent immediately offered to customers on inquiry a "rain check" for each unavailable item which entitled the holder to purchase the item in the near future at or below the advertised price. Respondent may immediately offer to a disappointed customer another item or items of equal or better value at a reduced price which is at or below the advertised price, which the customer may elect to accept in lieu of a "rain check."

Respondent shall be deemed to have shown, although not limited to such a showing, that it delivered an item to a store in quantities sufficient to meet "reasonably anticipated demand," for the purposes of this order, in a particular advertisement period if it maintains records showing that it had available that item in its stores during that advertisement period in quantities equal to or greater than the quantities of that item sold by its stores during the last preceding comparable advertisement period.

The phrase, "quantities of that item sold by its stores during the . . . advertisement period," means the sum of the number of units in the closing inventory of the stores after closing hours on the night before the first day of the advertisement period, *plus* the number of units delivered to the stores during the advertisement period, *plus* the number of "rain checks" issued for that item during the advertisement period, and *minus* the number of units in the closing inventory of the stores after closing hours on the last day of the advertisement period.

The phrase, "last preceding comparable advertisement period" means, for a particular item, the last preceding advertisement period (during which the item was advertised) that is most comparable to the particular advertisement period, considering the time of the year, the week of the month, weather conditions, the nature of the item, the amount of the price reduction, the location of the advertisement for the item with reference to the advertisement as a whole, the type size of the advertisement for the item, the availability of a coupon, the location of the product within the stores, and any other relevant factors affecting a customer's buying habits.

If respondent or any of its employees, agents or representatives are not advised of an alleged instance of unavailability through any source including the Federal Trade Commission within three months of its occurrence, it shall be presumed that the records called for by

this proviso were in the possession of respondent showing (i) or (ii), *unless* clear and convincing evidence establishes the contrary.

(c) If any advertisement includes two or more stores, a product shall not be deemed unavailable or mispriced if such advertisement contains a specific exemption with respect to said product and identifies each store in which the product is not available.

(d) If any advertised item is placed for sale in a large stack, pyramid or other special display containing a great number of such items, all of the items need not be individually marked at or below the advertised price, if the items not marked individually at or below the advertised price are so situated that it would be difficult or impossible for a customer to select an unmarked item.

(e) An advertised item which is usually and customarily individually marked with a price, need not be marked with the advertised price but may remain marked at its regular price if both (i) a conspicuous sign at the site of the display of such item clearly discloses that the item is, "as advertised" or "on sale" or words of similar import as appropriate, clearly discloses the advertised price, and clearly states that the cashiers know the sale price; and (ii) the cashiers do in fact have a written list containing such sale price, have been instructed to charge the sale price for said item, and do in fact charge the customer the sale price.

It is further ordered, That for a period of two (2) years from the date this order becomes final, during the effective period of each advertisement which represents that any product is available at respondent's department stores, respondent shall post conspicuously (a) at or near each doorway affording entrance to the public a copy of the advertisement and, (b) at or near each door affording entrance to the public and at or near the place where customers pay for merchandise, a notice stating that:

It is our policy to have all items advertised readily available for sale at or below the advertised price. If any advertised item that you wish to purchase is unavailable, except where quantity limitations are indicated in the advertisement, we will offer you a rain check which will enable you to purchase the item, or an item of comparable or better value, at or below the advertised price in the near future. We may immediately offer you a similar product of equal or better value which you may purchase at or below the advertised price, but you may choose a rain check if you wish.

If you have any questions, please speak to the store manager or customer service manager.

It is further ordered, That for a period of two (2) years from the date this order becomes final respondent shall cause the following statement to be clearly and conspicuously set forth in each written

advertisement which represents that items are available for sale at a stated price at any of its department stores.

It is our policy to have each of these advertised items readily available for sale at or below the advertised price in each Zayre store, except as specifically noted in this ad.

It is further ordered, That:

(1) Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organizations down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities as to individual department stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

(2) Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its department stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

(3) Respondent shall, for a period of three (3) years subsequent to the date of this order:

(a) Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order;

(b) Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

(c) Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives;

(4) Respondent shall, all other provisions of this order notwithstanding, on or before each of the first three (3) anniversary dates on which this order becomes final 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 preceding year.

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

It is further ordered, That the respondent herein shall within sixty

(60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

Interlocutory Order

90 F.T.C.

IN THE MATTER OF
THE RAYMOND LEE ORGANIZATION, INC., ET AL.

Docket 9045. Interlocutory Order, Oct. 31, 1977

Denial of respondents' request for reconsideration of prior denial of extension to file answer to motion for leave to file amicus brief.

ORDER DENYING RESPONDENTS' REQUEST FOR
RECONSIDERATION OF ORDER DENYING REQUEST FOR AN
EXTENSION OF TIME FOR FILING AN ANSWER

By letter received October 18, 1977, Mr. Malcolm I. Lewin, attorney representing The Raymond Lee Organization, Inc. and Raymond Lee; requested the Commission grant an extension of time for filing an answer in opposition to a motion for leave to file a brief of an amicus curiae.

The Commission, assuming arguendo that respondents had a right to file an answer under Rule 3.52(h), denied respondents' motion noting that the specified time within which the answer should have been forthcoming had expired.

Now, attorneys for respondents, by letter received October 25, 1977, request that the Commission reconsider its order denying their request for an extension of time.

Not addressing the question whether the respondents have a right to answer, the Commission finds no reason to reconsider the above order.

Moreover, the Commission, in its discretion, reading respondents' answer finds nothing therein to change its decision granting amici leave to file a brief. Respondents' major concern is that amici will introduce factual material not contained in the record of this proceeding. This fear is groundless, however, as the Commission undoubtedly would strike those portions of the brief which attempt to introduce new evidence about the case. Accordingly,

It is ordered, That said motion be, and it hereby is, denied.

IN THE MATTER OF
MINNESOTA STATE MEDICAL ASSOCIATION, ET AL.
CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-2909. Complaint, Oct. 31, 1977 — Decision, Oct. 31, 1977

This consent order, among other things, requires a St. Paul, Minn. medical association and its component societies, to cease publishing, distributing or contributing to the development of relative value scales and monetary conversion factors which tend to establish prices or otherwise influence fees for medical and surgical services. Further, respondents are required to withdraw such material which has already been published or circulated, and to send copies of the complaint and order to their member societies.

Appearances

For the Commission: *Lawrence E. Gray and Judith A. Moreland.*

For the respondents: *Dorsey, Windhorst, Hannaford, Whitney & Halladay, Minneapolis, Minn.*

COMPLAINT

Pursuant to the provision of the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et. seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the Minnesota State Medical Association and the county and district medical societies (as named in the caption hereof) which are components of the Minnesota State Medical Association have violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent, the Minnesota State Medical Association ("MSMA"), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 101 East Fifth St., St. Paul, Minnesota.

PAR. 2. The respondent county and district medical societies are chartered by MSMA and are referred to as component societies. Membership in MSMA is available only through membership in a component society, and all members of component societies are required to be members of MSMA.

PAR. 3. Respondent, Clay-Becker County Medical Society, is a corporation organized, existing and doing business under and by

virtue of the laws of the State of Minnesota, with its principal office located at 124 E. Frazee St., Detroit Lakes, Minnesota.

Respondent, The Freeborn County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 210 N. St. Mary, Albert Lea, Minnesota.

Respondent, Headwaters Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Bemidji Clinic, Ltd., Bemidji, Minnesota.

Respondent, Hennepin County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 20 S. Washington Ave., Minneapolis, Minnesota.

Respondent, McLeod County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 126 N. Franklin, Hutchinson, Minnesota.

Respondent, Minnesota Southwestern Medical Society (d/b/a Blue Earth County Medical Society), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Box 589, Lake Crystal, Minnesota.

Respondent, Ramsey County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 3220 Bellaire Ave., White Bear Lake, Minnesota.

Respondent, Scott-Carver County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Shakopee Medical Center, Shakopee, Minnesota.

Respondent, Stearns-Benton County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Doctors' Park, St. Cloud, Minnesota.

Respondent, Steele County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 920 S. Cedar, Owatonna, Minnesota.

Respondent, Upper Mississippi Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 302 3rd Ave., N.E., Little Falls, Minnesota.

Respondent, Wabasha County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Community Clinic, Wabasha, Minnesota.

Respondent, Winona County Medical Society, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Winona Clinic, Winona, Minnesota.

Respondent, Blue Earth Valley Medical Society, is an unincorporated association having its principal office at 117 W. 5th St., Blue Earth, Minnesota.

Respondent, Brown County Medical Society, is an unincorporated association having its principal office at New Ulm Medical Clinic, New Ulm, Minnesota.

Respondent, Camp Release District Medical Society, is an unincorporated association having its principal office at Dawson Clinic, Dawson, Minnesota.

Respondent, East Central Minnesota Medical Society, is an unincorporated association having its principal office at Chisago Lakes Medical Center, Chisago City, Minnesota.

Respondent, Goodhue County Medical Society, is an unincorporated association having its principal office at Interstate Clinic, Red Wing, Minnesota.

Respondent, Lyon-Lincoln County Medical Society, is an unincorporated association having its principal office at 508 E. College Drive, Marshall, Minnesota.

Respondent, Mid Minnesota Medical Society, is an unincorporated association having its principal office at Willmar Medical Center, 101 Willmar Ave., Willmar, Minnesota.

Respondent, Mower County Medical Society, is an unincorporated association having its principal office at Suite 115, 100 Building, Austin, Minnesota.

Respondent, Nicollet-Le Sueur County Medical Society, is an unincorporated association having its principal office at 622 Sunrise Drive, St. Peter, Minnesota.

Respondent, Park Region District and County Medical Society, is an unincorporated association having its principal office at 615 S. Mill, Fergus Falls, Minnesota.

Respondent, Range Medical Society, is an unincorporated association with its principal office at 429 3rd St., International Falls, Minnesota.

Respondent, Red River Valley Medical Society, is an unincorporat-

ed association with its principal office at R.R. #2, Box 72, E. Grand Forks, Minnesota.

Respondent, Rice County Medical Society, is an unincorporated association with its principal office at 924 N.E. First St., Faribault, Minnesota.

Respondent, St. Louis County Medical Society, is an unincorporated association with its principal offices at 302 Medical Arts Building, Duluth, Minnesota.

Respondent, Sibley County Medical Society, is an unincorporated association with its principal office at Arlington Clinic, Arlington, Minnesota.

Respondent, Southwestern Minnesota Medical Society, is an unincorporated association with its principal office at 215 N. Cedar, Luverne, Minnesota.

Respondent, Wakota Medical Society, is an unincorporated association having its principal office at 305 S. Greeley St., Stillwater, Minnesota.

Respondent, Waseca County Medical Society, is an unincorporated association with its principal office at 312 N. Main, Janesville, Minnesota.

Respondent, West Central Minnesota Medical Society, is an unincorporated association with its principal office at 23 Montana, Morris, Minnesota.

Respondent, Wright County Medical Society, is an unincorporated association with its principal office at 207 First St., S., Buffalo, Minnesota.

Respondent, Zumbro Valley Medical Society, is an unincorporated association with its principal office at Olmsted Medical Group, Rochester, Minnesota.

PAR. 4. MSMA and the component societies have approximately 5,000 members. Active membership in MSMA and the component societies is open to physicians licensed to practice medicine in the State of Minnesota or in any other state of the District of Columbia, persons authorized by law to act as resident physicians in the State of Minnesota, and persons engaged within the State of Minnesota in an activity allied to medicine which does not require licensure from the State of Minnesota. The membership also includes affiliate members, persons distinguished for their services in a field of science allied to medicine or in the field of public health, and honorary members. Affiliate and honorary members may not vote or hold office in MSMA.

Members of the component societies elect representatives to the MSMA House of Delegates, which constitutes the governing body of

MSMA. The House of Delegates elects councilors and officers who together constitute the Council of MSMA, which manages the affairs of MSMA between sessions of the House of Delegates.

PAR. 5. Active members are divided into the following classes:

(a) Regular active members are those members who pay full dues and assessments of MSMA;

(b) Life active members are regular active members who have reached the age of 70 years and have been members of MSMA or a component society for 40 years;

(c) Service active members are members on duty in the armed forces or the public health service of the United States or who are engaged in medical missionary work outside the United States;

(d) Associate active members have retired from the active practice of medicine or, because of disability, are unable to engage in the active practice of medicine and are not engaged in the active practice of medicine;

(e) Residency active members are engaged in an approved residency program;

(f) Intern active members are engaged in an approved internship program; and

(g) Medical student active members are studying within the State of Minnesota for the degree of Doctor of Medicine.

PAR. 6. Many members of MSMA and of the component societies are licensed physicians engaged in the private practice of medicine and surgery and derive substantial portions of their professional income from fees for medical and surgical procedures charged directly to patients or to insurers.

PAR. 7. The acts and practices of MSMA and the component societies are in or affect commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 8. Starting in 1959 and continuing through the present, MSMA prepared, published, and circulated to its members and others two editions of a document entitled "Minnesota Relative Value Index" which set forth in nonmonetary units comparative numerical values for procedures performed and services rendered by physicians and other health care practitioners. Such documents are commonly referred to as "relative value scales." Each value is convertible into a monetary fee by the application to it of a dollar conversion factor. Both editions of the Minnesota Relative Value Index have been supplemented or modified from time to time.

PAR. 9. At various times since 1961 and continuing until the present, component societies have adopted, published, circulated, suggested, or recommended to their individual members conversion

factors applicable or prospectively applicable to the Minnesota Relative Value Index or to other relative value scales.

PAR. 10. The preparation, publication, and circulation by MSMA of the Minnesota Relative Value Index have the effect of establishing, maintaining, or otherwise influencing the fees which physicians and other health care practitioners charge for their professional services, and are in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 11. The adoption, publication, circulation, suggestion, and recommendation by component societies to their individual members of conversion factors applicable or prospectively applicable to the Minnesota Relative Value Index or to other relative value scales have the effect of establishing, maintaining, or otherwise influencing the fees which physicians and other health care practitioners charge for their professional services, and are 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 respondents named in the caption hereof, and respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 5 of the Federal Trade Commission Act; and

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

The Commission having considered the agreement and having provisionally accepted same and placed it on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of the Commission's Rules, now in further conformity with the procedure provided by Section 2.34 of its Rules hereby issues its decision in disposition of the proceeding against the above-named respondents, makes the following jurisdictional findings, and enters the following findings and order:

1. Respondent, Minnesota State Medical Association ("MSMA"),

is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 101 East Fifth St., St. Paul, Minnesota.

2. The component societies as listed and further described below are corporations and unincorporated associations chartered by MSMA on a county or district basis.

Respondent, Clay-Becker County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 124 E. Frazee St., Detroit Lakes, Minnesota.

Respondent, The Freeborn County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 210 N. St. Mary, Albert Lea, Minnesota.

Respondent, Headwaters Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Bemidji Clinic, Ltd., Bemidji, Minnesota.

Respondent, Hennepin County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 20 S. Washington Ave., Minneapolis, Minnesota.

Respondent, McLeod County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 126 N. Franklin, Hutchinson, Minnesota.

Respondent, Minnesota Southwestern Medical Society (d/b/a Blue Earth County Medical Society), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Box 589, Lake Crystal, Minnesota.

Respondent, Ramsey County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 3220 Bellaire Ave., White Bear Lake, Minnesota.

Respondent, Scott-Carver County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Shakopee Medical Center, Shakopee, Minnesota.

Respondent, Stearns-Benton County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Doctors' Park, St. Cloud, Minnesota.

Respondent, Steele County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 920 S. Cedar, Owatonna, Minnesota.

Respondent, Upper Mississippi Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at 302 3rd Ave., N.E., Little Falls, Minnesota.

Respondent, Wabasha County Medical Society, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Community Clinic, Wabasha, Minnesota.

Respondent, Winona County Medical Society, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office located at Winona Clinic, Winona, Minnesota.

Respondent, Blue Earth Valley Medical Society, is an unincorporated association having its principal office at 117 W. 5th St., Blue Earth, Minnesota.

Respondent, Brown County Medical Society, is an unincorporated association having its principal office at New Ulm Medical Clinic, New Ulm, Minnesota.

Respondent, Camp Release District Medical Society, is an unincorporated association having its principal office at Dawson Clinic, Dawson, Minnesota.

Respondent, East Central Minnesota Medical Society, is an unincorporated association having its principal office at Chisago Lakes Medical Center, Chisago City, Minnesota.

Respondent, Goodhue County Medical Society, is an unincorporated association having its principal office at Interstate Clinic, Red Wing, Minnesota.

Respondent, Lyon-Lincoln County Medical Society, is an unincorporated association having its principal office at 508 E. College Drive, Marshall, Minnesota.

Respondent, Mid Minnesota Medical Society, is an unincorporated association having its principal office at Willmar Medical Center, 101 Willmar Ave., Willmar, Minnesota.

Respondent, Mower County Medical Society, is an unincorporated association having its principal office at Suite 115, 100 Building, Austin, Minnesota.

Respondent, Nicollet-Le Sueur County Medical Society, is an unincorporated association having its principal office at 622 Sunrise Drive, St. Peter, Minnesota.

Respondent, Park Region District and County Medical Society, is an unincorporated association having its principal office at 615 S. Mill, Fergus Falls, Minnesota.

Respondent, Range Medical Society, is an unincorporated association with its principal office at 429 3rd St., International Falls, Minnesota.

Respondent, Red River Valley Medical Society, is an unincorporated association with its principal office at R.R. #2, Box 72, E. Grand Forks, Minnesota.

Respondent, Rice County Medical Society, is an unincorporated association with its principal office at 924 N.E. First St., Faribault, Minnesota.

Respondent, St. Louis County Medical Society, is an unincorporated association with its principal office at 302 Medical Arts Building, Duluth, Minnesota.

Respondent, Sibley County Medical Society, is an unincorporated association with its principal office at Arlington Clinic, Arlington, Minnesota.

Respondent, Southwestern Minnesota Medical Society, is an unincorporated association with its principal office at 215 N. Cedar, Luverne, Minnesota.

Respondent, Wakota Medical Society, is an unincorporated association with its principal office at 305 S. Greeley St., Stillwater, Minnesota.

Respondent, Waseca County Medical Society, is an unincorporated association with its principal office at 312 N. Main, Janesville, Minnesota.

Respondent, West Central Minnesota Medical Society, is an unincorporated association with its principal office at 23 Montana, Morris, Minnesota.

Respondent, Wright County Medical Society, is an unincorporated association with its principal office at 207 First St., S., Buffalo, Minnesota.

Respondent, Zumbro Valley Medical Society, is an unincorporated association with its principal office at Olmsted Medical Group, Rochester, Minnesota.

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

ORDER

I

A. The term "relative value scale" means any list, compilation, or schedule which sets forth comparative numerical values for procedures performed and/or services rendered by physicians and other health care practitioners, without regard to whether those values are expressed in monetary or non-monetary terms.

B. The term "conversion factor" means any monetary value multiplier used or intended to be used to convert non-monetary values in a relative value scale to monetary fees.

C. The term "MSMA" means the Minnesota State Medical Association.

D. The term "component society" means a county or district medical society chartered by MSMA.

E. The term "effective date of this order" means the date of service of this order.

II

It is ordered, That MSMA and each of the component societies, the successors, or assigns, and the officers, agents, representatives and employees of each of them, directly or through any corporation, subsidiary, division or other device, shall:

A. Cease and desist from directly or indirectly initiating, originating, developing, publishing, or circulating the whole or any part of any proposed or existing relative value scale(s);

B. Cease and desist from directly or indirectly advising in favor of or against the use of, or contributing to the whole or any part of any proposed or existing relative value scale(s);

C. Cease and desist from directly or indirectly initiating, originating, developing, publishing, circulating, adopting, contributing to, recommending, suggesting, or advising in favor of or against the use of, any and all conversion factors applicable or prospectively applicable to the whole or any part of any existing or proposed relative value scale(s); and

D. Permanently cancel, repeal, abrogate, and withdraw any and all relative value scales and conversion factors which any of them has heretofore initiated, originated, developed, published, circulated, adopted, advised in favor of, recommended, suggested, or contributed to;

Provided, however, that nothing contained in this order shall prohibit MSMA or any component society, or any officer, agent,

representative, or employee of MSMA or any component society from furnishing testimony to any government body, committee or instrumentality, or from furnishing to any third party or government body, committee, or instrumentality such information as may be requested; to the extent, however, that such information or testimony may bear directly or indirectly on compensation levels for procedures performed and/or services rendered by physicians and other health care practitioners, it shall be limited to historical data, free of editing or interpretation, and shall be completely described as to methodology; and

Provided further, that nothing contained in this order shall prohibit MSMA or any component society from initiating, originating, developing, publishing, circulating, adopting, contributing to, recommending, suggesting, or advising in favor of or against the use of any list or compilation of standardized terminology describing procedures performed and/or services rendered by physicians and other health care practitioners, so long as such list or compilation does not directly or indirectly set forth absolute or comparative numerical values for any such procedures or services.

III

It is further ordered, That MSMA shall, within thirty (30) days after the effective date of this order, distribute by mail a copy of the Commission's complaint and order in this matter, as well as a letter, in the form shown as Appendix "A" to this order, to each of its members (except service active members and associate active members) and to each other recipient known to it of any edition or version of the Minnesota Relative Value Index, instructing such members and recipients to return to MSMA all copies of the Minnesota Relative Value Index in their possession, including all supplements, addenda, and additions thereto.

IV

It is further ordered, That, subsequent to the effective date of this order, MSMA shall not charter any component society or other medical society unless the charter of such component society or other medical society incorporates in substance the prohibitions and requirements contained in Paragraph II of this order.

V

It is further ordered, That MSMA and each component society shall notify the Commission at least thirty (30) days prior to any proposed

change in its organization which might affect compliance obligations under this order, such as, but not limited to, dissolution, the emergence of a successor corporation, association, or society, and the creation and/or dissolution of component societies.

VI

It is further ordered, That MSMA and each component society shall, within sixty (60) days after the effective date of this order, file with the Commission a written report showing in detail the manner and form of its compliance with each of the provisions of the order.

VII

Nothing in this order shall be construed to exempt MSMA or any component society from complying with the antitrust laws or the Federal Trade Commission Act. The fact that any activity is not prohibited by this order shall not bar a challenge to it under such laws.

APPENDIX A

(MSMA Letterhead)

TO: MSMA members and recipients of the Minnesota Relative Value Index

As you may be aware, the FTC has been investigating activities of MSMA and the component societies involving the development and use of the Minnesota Relative Value Index. The Council of the Association and the component societies no longer desire to continue such activities and have entered into an agreement with the Federal Trade Commission to discontinue all Relative Value Index activities.

This agreement resulted in the issuance by the Federal Trade Commission on _____ of a complaint and the entry of a consent order which requires, in essence, that MSMA and the component societies:

- (a) cease publishing and participating in the development of relative value indices;
- (b) refrain from publishing, recommending, or suggesting dollar conversion factors applicable to relative value indices;
- (c) withdraw the relative value indices and any conversion factors which have already been published or recommended;
- (d) distribute a copy of the complaint and consent order to MSMA members and to every recipient of the Minnesota Relative Value Index; and
- (e) instruct all recipients of the Minnesota Relative Value Index to return them, with all supplements, addenda, and additions thereto, to MSMA.

The complaint of the FTC alleges basically that the MSMA Relative Value Index and the adoption of uniform conversion factors have the effect of influencing fees charged by physicians. However, the consent agreement with the FTC states that it does not constitute an admission by MSMA or any component society that the law has been violated, and that it is for settlement purposes only.

In accordance with the provisions of the FTC's order, you are to cease using and are to return all copies of any edition of the Minnesota Relative Value Index in your possession.

The proper mailing address is:

Minnesota State Medical Association
101 East Fifth Street
St. Paul, Minnesota 55101

Copies of the FTC's complaint and order are enclosed.

Sincerely,

Chairman of the Council