

IN THE MATTER OF  
CREDIT BUREAU ASSOCIATES, ET AL.

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

*Docket C-2936. Complaint, Nov. 9, 1978 — Decision, Nov. 9, 1978*

This order, among other things, requires a Camden, N.J. credit reporting firm and its partners to cease failing to provide properly identified consumers with requested file information; reinvestigate disputed information; incorporate current findings in consumer files; and promptly advise such consumers of the results of the reinvestigation, without charge. Additionally, the order prohibits the firms from using consumers' phone numbers for debt collection purposes; and requires them to maintain, for a prescribed period, records regarding the manner and form of their compliance with the terms of the order.

*Appearances*

For the Commission: *Shirley F. Norris.*

For the respondents: *Richard D. DeCon, Capehart & Scatchard,*  
Camden, N.J.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Fair Credit Reporting Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that the parties named in the caption hereof, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, 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 the purposes of this complaint and the accompanying order to cease and desist, "consumer report," "consumer reporting agency" and "file" are defined as set forth in Sections 603(d), 603(f) and 603(g), respectively, of the Fair Credit Reporting Act.

PAR. 2. Respondent Credit Bureau Associates is a partnership existing and doing business under and by virtue of the laws of the State of New Jersey, with its trade name registered in Camden County, New Jersey, and its principal office and place of business

located at 817 Carpenter St., Camden, New Jersey. Said respondent is a "consumer reporting agency."

Respondent Camden Credit Association 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 817 Carpenter St., Camden, New Jersey. Said respondent is a partner in Credit Bureau Associates and is a "consumer reporting agency."

Respondent Credit Information Center, Inc., d/b/a Credit Information Center of West Chester, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 1154 West Chester Pike, West Chester, Pennsylvania. Said respondent is a partner in Credit Bureau Associates and is a "consumer reporting agency."

Respondent Norristown Credit Bureau, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 817 Carpenter St., Camden, New Jersey. Said respondent is a partner in Credit Bureau Associates and is a "consumer reporting agency."

Respondent Suburban Credit Bureau, 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 817 Carpenter St., Camden, New Jersey. Said respondent is a partner in Credit Bureau Associates and is a "consumer reporting agency."

Respondent Charles W. Swan, Jr. is an individual and an officer of Camden Credit Association. In said capacity he is responsible for that corporation's activities as a partner in Credit Bureau Associates. His business address is the same as that of said corporation.

Respondent George C. Whittam is an individual and an officer of Credit Information Center, Inc. In said capacity he is responsible for that corporation's activities as a partner in Credit Bureau Associates. His business address is 1154 West Chester Pike, West Chester, Pennsylvania.

Respondent Bernard S. Becker is an individual and an officer of Norristown Credit Bureau, Inc. In said capacity he is responsible for that corporation's activities as a partner in Credit Bureau Associates. His business address is the same as that of said corporation.

Respondents Woodrow W. French and John J. Lamplugh are individuals and officers of Suburban Credit Bureau, Inc. In said capacity they are responsible for that corporation's activities as a

partner in Credit Bureau Associates. Their business address is the same as that of said corporation.

Respondents Camden Credit Association, Credit Information Center, Inc., Norristown Credit Bureau, Inc., Suburban Credit Bureau, Inc., Charles W. Swan, Jr., George C. Whittam, Bernard S. Becker, Woodrow W. French and John J. Lamplugh thus formulate, direct and control the policies, acts and practices of respondent Credit Bureau Associates, including those hereinafter set forth.

PAR. 3. All the acts and practices alleged herein took place and are taking place in the ordinary course of respondents' business and occurred subsequent to April 25, 1971, the effective date of the Fair Credit Reporting Act.

PAR. 4. In the regular course and conduct of their business, respondents engage in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports for use by others in making a decision concerning whether to grant credit, underwrite insurance or employ the subject of such report.

PAR. 5. Respondents, in certain instances, fail, upon request and proper identification of the consumer, to clearly and accurately disclose to the consumer the nature and substance of all information (except medical information) in the file on the consumer at the time of the request.

Therefore, respondents are in violation of Section 609(a)(1) of the Fair Credit Reporting Act.

PAR. 6. When the completeness or accuracy of an item of information in his or her file is disputed by a consumer, respondents fail in certain instances to:

- (a) Reinvestigate the disputed information within a reasonable period of time;
- (b) Record, after reinvestigation, the current status of information disputed by the consumer; and
- (c) Promptly delete information which is found to be inaccurate or not verifiable after reinvestigation.

Therefore, respondents are in violation of Section 611(a) of the Fair Credit Reporting Act.

PAR. 7. After reinvestigation of disputed items of information in the file on the consumer, in certain instances where there were no reasonable grounds to believe that the dispute was frivolous or irrelevant, the respondents retained the disputed items in subsequent consumer reports by failing to delete said information, failing to clearly note the existence of a dispute and failing to enclose a brief

statement of the consumer's version of the dispute or an accurate summary thereof.

Therefore, respondents are in violation of Section 611(c) of the Fair Credit Reporting Act.

PAR. 8. In the course and conduct of their business, in certain instances, respondents have failed to provide disclosure of information without charge to consumers who contact respondents within thirty days of the consumer being notified by a user of consumer reports that credit has been denied based wholly or in part on the basis of a consumer report issued by respondents.

Therefore, respondents are in violation of Section 612 of the Fair Credit Reporting Act.

PAR. 9. In the course and conduct of their business, when consumers have appeared in person at respondents' place of business and have requested disclosure of information in the file relating to the consumer, as a condition precedent to the disclosure, respondents have demanded that the consumer reveal information in excess of that information necessary for proper identification of the consumer.

Typical and illustrative of the excessive demands for information are (1) demand for five (5) years of previous address history, (2) demand for home telephone numbers and other telephone numbers, and (3) demand for disclosure of previous employment.

Therefore, respondents have violated Section 610(b)(1) of the Fair Credit Reporting Act by placing onerous and excessive requirements on the right of consumer disclosure.

PAR. 10. The acts, practices and omissions set forth in Paragraphs Five through Nine herein are in violation of the Fair Credit Reporting Act and, pursuant to Section 621(a) of that Act, respondents have thereby violated 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 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 Fair Credit Reporting Act and 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 Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Credit Bureau Associates is a partnership existing and doing business under and by virtue of the laws of the State of New Jersey, with its trade name registered in Camden County, New Jersey, with its principal office and place of business located at 817 Carpenter St., Camden, New Jersey.

Respondent Camden Credit Association 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 817 Carpenter St., Camden, New Jersey. Camden Credit Association is a partner in Credit Bureau Associates.

Respondent Credit Information Center, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 1154 West Chester Pike, West Chester, Pennsylvania. Said corporation does business under the name Credit Information Center of West Chester. Credit Information Center, Inc. is a partner in Credit Bureau Associates.

Respondent Norristown Credit Bureau, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business located at 817 Carpenter St., Camden, New Jersey. Norristown Credit Bureau, Inc. is a partner in Credit Bureau Associates.

Respondent Suburban Credit Bureau, 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 817 Carpenter St., Camden, New Jersey. Suburban Credit Bureau, Inc. is a partner in Credit Bureau Associates.

Respondent Charles W. Swan, Jr. is an individual and an officer of Camden Credit Association. In said capacity he is responsible for that corporation's activities as a partner in Credit Bureau Associates. His business address is the same as that of said corporation.

Respondent George C. Whittam is an individual and an officer of Credit Information Center, Inc. In said capacity he is responsible for that corporation's activities as a partner in Credit Bureau Associates. His business address is 1154 West Chester Pike, West Chester, Pennsylvania.

Respondent Bernard S. Becker is an individual and an officer of Norristown Credit Bureau, Inc. In said capacity he is responsible for that corporation's activities as a partner in Credit Bureau Associates. His business address is the same as that of said corporation.

Respondents Woodrow W. French and John J. Lamplugh are individuals and officers of Suburban Credit Bureau, Inc. In said capacity they are responsible for that corporation's activities as a partner in Credit Bureau Associates. Their business address is the same as that of said corporation.

Respondents Camden Credit Association, Credit Information Center, Inc., Norristown Credit Bureau, Inc., Suburban Credit Bureau, Inc., Charles W. Swan, Jr., George C. Whittam, Bernard S. Becker, Woodrow W. French and John J. Lamplugh thus formulate, direct and control the policies, acts and practices of respondent Credit Bureau Associates.

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

#### ORDER

*It is ordered.* That respondent Credit Bureau Associates, a partnership; and Camden Credit Association, Credit Information Center, Inc., Norristown Credit Bureau, Inc. and Suburban Credit Bureau, Inc., corporations, and partners in Credit Bureau Associates, and their successors and assigns, and their officers; and Charles W. Swan, Jr., George C. Whittam, Bernard S. Becker, Woodrow W. French and John J. Lamplugh, individually and as the officers of the corporate partners of Credit Bureau Associates responsible for the operations of said partnership; and respondents' agents, representatives, employees, directly or through any corporation, subsidiary, division or any other device, in connection with the collecting, assembling, evaluating or furnishing of consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit

Reporting Act (15 U.S.C. 1681, *et seq.*) do forthwith cease and desist from:

1. Failing to disclose promptly by telephone, mail or in person, upon request and proper identification of the consumer, clearly and accurately, the nature and substance of all information (except medical information) in the file on the consumer at the time of the request.

2. Failing, when the completeness or accuracy of an item of information in the file is disputed by the consumer, unless there are reasonable grounds to believe that the dispute is frivolous or irrelevant, to (a) reinvestigate the disputed information within a reasonable period of time; (b) record, after reinvestigation, the current status of information disputed by the consumer; (c) promptly delete information which is found to be inaccurate or not verifiable after the reinvestigation; and (d) promptly include the consumer's statement of dispute if the controversy is not resolved.

3. Failing, whenever a statement of dispute has been filed, unless there are reasonable grounds to believe that the dispute is frivolous or irrelevant, to clearly note in any subsequent consumer report containing the information in question that it is disputed by the consumer, and to provide either the consumer's statement of dispute or a clear and accurate summary thereof.

4. Failing, when the consumer is granted by the Fair Credit Reporting Act the right to receive disclosure of the information in the file pertaining to that consumer without charge, to provide such information disclosure without charge.

5. Failing, when respondents reinvestigate disputed items of information, to promptly inform the consumer of the results of such reinvestigation.

6. Failing, where the consumer's file contains codes, symbols or any abbreviations, to deliver a copy of the key to such codes, symbols or abbreviations to the consumer.

*It is further ordered,* That, where respondents obtain telephone numbers from consumers, respondents shall not use such telephone numbers for any debt collection activity.

*It is further ordered,* That respondents shall, at all times, subsequent to the effective date of this order, maintain complete business records about the manner and form of their compliance with this order during the immediately preceding two year period. Such records shall include logs, journals, or other compilations of all correspondence with consumers and consumer report applicants or subscribers, policy directives, interview reports, complaints from consumers and consumer report applicants or subscribers, and other

pertinent documents. Such records shall be kept separate from the consumer files and shall be made available for inspection and photocopying by any authorized representative of the Federal Trade Commission upon reasonable notice at respondents' place of business or other properly designated location.

*It is further ordered,* That respondents deliver a copy of this order to cease and desist to all employees now or hereafter engaged in the collecting, assembling, evaluating or furnishing of consumer information to third parties and that respondents secure a signed statement acknowledging receipt of said order from each such person.

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

*It is further ordered,* That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment as described in this order and of his new affiliation with a new consumer reporting business or employment by a consumer reporting agency. In addition, for a period of ten years from the effective date of this order, each individual respondent shall promptly notify the Commission of each affiliation with a new consumer reporting business or employment by a consumer reporting agency. Each such notice shall include the individual respondent's new business address and a statement of the nature of said business or employment in which he is newly engaged as well as a description of his duties and responsibilities in connection with said business or employment. 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.

*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 or regulations of, or the statutes administered by the Federal Trade Commission.

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IN THE MATTER OF

FORD MOTOR COMPANY

*Docket 9105. Interlocutory Order, Nov. 16, 1978*ORDER DIRECTING ADMINISTRATIVE LAW JUDGE TO FILE  
RECOMMENDATION AND SETTING DATE FOR RESPONDENT'S  
ANSWER

On November 7, 1978, complaint counsel filed with the administrative law judge (ALJ) a Motion Requesting the Commission To Seek Injunctive Relief Under Section 13(b) Of The Federal Trade Commission Act. By order dated the same day, the ALJ certified the motion to the Commission because he lacked authority to rule on the request. However, the ALJ did not include the recommendation referred to in Rule 3.22(a). By motion of November 13, 1978, respondent Ford Motor Company seeks a referral of complaint counsel's motion to the ALJ or, alternatively, an extension of Ford's time to respond to the motion to and until December 1, 1978.

While recommendations have not invariably accompanied certifications in the past, and we have not insisted on receiving them, the Commission believes that the law judge in the great majority of certified motions has a unique and valuable perspective which would assist the Commission in its consideration of such motions.

In directing the ALJ to file a recommendation, we do not mean to require that he duplicate the inquiry which the Commission itself must conduct before initiating suit under Section 13(b). Rather, our intention is to afford the ALJ an opportunity to facilitate the Commission's disposition of the motion by sharing any relevant observations he might possess on the basis of the proceedings to date. Where hearings have not yet commenced, as in this case, the ALJ's assistance to the Commission may be limited to a forecast of the duration of the administrative proceeding, enabling the Commission to weigh the need for interim relief. Thus, the scope of the ALJ's consideration of the certified motion will necessarily be a function of the extent to which he is familiar with the issues and any evidence bearing upon the motion.

Because a motion for a preliminary injunction is clearly beyond the ALJ's authority we see no need for the ALJ to afford respondent an opportunity to comment on the motion to certify. However, we will extend Ford's time for filing an answer to the motion for a preliminary injunction.

*It is ordered,* That the administrative law judge file his recommen-

dition with respect to the motion for a preliminary injunction with the Commission by November 27, 1978.

*It is further ordered,* That respondent's time for filing an answer to the motion for a preliminary injunction with the Commission be extended to and until November 27, 1978.

IN THE MATTER OF  
NATIONAL COMMISSION ON EGG NUTRITION, ET AL.  
MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SECS.  
5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

*Docket 8987. Decision, July 20, 1976 — Modifying Order, Nov. 17, 1978*

This modified order to cease and desist replaces the order issued on July 20, 1976, 41 FR 34939, 88 F.T.C. 89. In accordance with the November 29, 1977 decision and judgment of the Court of Appeals for the 9th Circuit, as amended on December 6, 1977 (570 F.2d 157 (1977)), the instant order mandates disclosure of controversy among medical experts as to the relationship of dietary cholesterol, including that in eggs, to heart and circulatory disease only when NCEN chooses to make a representation regarding the state of the available evidence or information concerning the controversy.

MODIFIED ORDER TO CEASE AND DESIST

Respondents, having filed in the United States Court of Appeals for the Seventh Circuit petition for review of the Commission's cease and desist order issued herein on July 20, 1976; and the Court having rendered its decision modifying the Commission's order and, as so modified, affirming and enforcing the order; and the Supreme Court of the United States having denied on October 2, 1978, a petition for writ of certiorari filed by the National Commission on Egg Nutrition:

*Now, therefore, it is hereby ordered,* That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court of Appeals to read as follows:

*It is ordered,* That respondents National Commission on Egg Nutrition and Richard Weiner, Inc., corporations, their successors and assigns, either jointly or individually, and respondents' officers, agents, representatives, and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of eggs for human consumption do forthwith cease and desist from:

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

1. Represents that there is no scientific evidence that eating eggs increases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

2. Represents that there is scientific evidence that dietary cholesterol, including that in eggs, decreases the risk of heart

attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

3. Represents that there is scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

4. Represents that eating eggs does not increase the blood cholesterol level in a normal person;

5. Represents that the blood cholesterol level is prevented from being raised or lowered by dietary cholesterol intake;

6. Represents that the human body increases its manufacture of cholesterol in an amount equal to a decrease in dietary cholesterol intake;

7. Represents that the average human body eliminates the same amount of cholesterol as that eaten;

8. Represents that dietary cholesterol, including that in eggs is needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells; or

9. Utilizes the name "National Commission on Egg Nutrition" unless it is clearly and conspicuously disclosed in immediate conjunction with the name that the National Commission on Egg Nutrition is composed of egg producers and other individuals and organizations of, or relating to, the egg industry.

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

1. Represents that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition or

2. Makes any representation concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition

unless it is clearly and conspicuously disclosed in immediate conjunction therewith that there is a controversy among medical experts concerning the relationship of dietary cholesterol, including that in eggs, to heart disease, and that respondents are presenting their side of that controversy.

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

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1. Represents that there exists, or describes, scientific evidence which supports the theory that consumption of dietary cholesterol, including that in eggs, does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition or

2. Makes any representation concerning the state of the available evidence or information concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition

unless it is clearly and conspicuously disclosed in immediate conjunction therewith that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease.

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

1. Represents as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition, or represents that there is overwhelming scientific evidence or otherwise misrepresents the amount of scientific evidence that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition.

2. Misrepresents in any manner the physiological effects of consuming dietary cholesterol or eggs.

*It is further ordered,* That respondents shall forthwith distribute a copy of this order to each of their operating divisions, and to all current and future members of respondent National Commission on Egg Nutrition.

*It is further ordered,* That each respondent notify the Commission at least thirty (30) days prior to any proposed change in its corporate structure 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 each respondent shall, within sixty (60) days after this order becomes final, file with the Commission a report, in writing, signed by respondent, setting forth in detail the

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manner and form of its compliance with the order to cease and desist.

IN THE MATTER OF  
BLOCK DRUG COMPANY, INC., ET AL.

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

*Docket 9050. Complaint,<sup>1</sup> July 29, 1975 — Decision, Nov. 17, 1978.*

This consent order, among other things, requires Grey Advertising, Inc., a New York City advertising firm, to cease misrepresenting or making unsubstantiated claims regarding the performance or efficacy of denture adhesives and cleansers.

*Appearances*

For the Commission: *Melvin H. Orlans* and *Mark A. Heller*.

For the respondents: *Leonard Orkin* and *Stuart L. Friedel, Davis & Gilbert*, New York City.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint which charges the above-named respondents with violation of the Federal Trade Commission Act; and

Respondent Grey Advertising, Inc. ("Grey") and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent Grey of all the jurisdictional facts set forth in the aforesaid complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent Grey 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 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 makes the following jurisdictional findings, and enters the following order:

1. Respondent Grey 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 777 Third Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject

<sup>1</sup> Reported in 90 F.T.C. 893.



matter of this proceeding and of respondent Grey, and the proceeding against respondent Grey is in the public interest.

#### ORDER

*It is ordered,* That respondent Grey Advertising, Inc., and its officers, representatives, agents and employees directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of products, by the respondent in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making any statements or representations directly or by implication concerning any performance or other characteristic or attribute of any dental product, except denture cleansers, unless respondent possessed and relied upon a reasonable basis for each such statement or representation at the time it was made or respondent can establish that it neither knew nor should have known that its basis was not reasonable.

2. Making any comparative statements or representations directly or by implication concerning any performance attribute of any competing denture cleanser products unless respondent possessed and relied upon a reasonable basis for each such statement or representation at the time it was made or respondent can establish that it neither knew nor should have known that its basis was not reasonable.

3. Misrepresenting in any manner the effectiveness of any denture adhesive product.

4. Representing, directly or by implication, that:

a. Every user of denture adhesives, regardless of his or her particular denture holding problem, can eat any of a group of so-called "problem" foods (including, for example, apples, peanuts, carrots, steak, corn-on-the-cob, celery, thick sandwiches, fried chicken and caramels) without embarrassment or discomfort; and/or

b. After the use of a denture adhesive, dentures will hold in place for every denture wearer, regardless of his or her particular denture holding problem, when the wearer eats any of the aforementioned "problem" foods.

5. As referred to herein, the term reasonable basis may consist of an opinion, where appropriate, in writing signed by a person qualified by education or experience to render the opinion that a competent scientific test(s) or other objective data exist; *provided, however,* that such opinion also discloses and describes the contents of such test(s) or other objective data.

*It is further ordered,* That the respondent corporation shall

forthwith distribute a copy of this order to each of its operating divisions.

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

*It is further ordered,* That the respondent submit to the Commission, in writing, a compliance report detailing the manner and form in which it complied with this order. Such reports shall be submitted sixty (60) days after the entry of a final order and, thereafter, annually for two (2) years from the date of the first submission.

In addition, any provision of this order shall abate when inconsistent with a final Federal Trade Commission trade regulation rule if the trade regulation rule specifically authorizes any claim prohibited herein.

## Interlocutory Order

## IN THE MATTER OF

## SUNKIST GROWERS, INC.

Docket 9100. Interlocutory Order, Nov. 17, 1978

ORDER DENYING REQUEST FOR REIMBURSEMENT OF  
REPRODUCTION EXPENSES

The administrative law judge has certified to the Commission respondent's request for payment of costs incurred pursuant to reproduction of documents produced in response to a subpoena *duces tecum* issued on February 17, 1978. That subpoena called for production of certain documents in Sunkist's possession for inspection and copying by complaint counsel. Return of the subpoena was ordered to be made in Los Angeles and Sunkist apparently offered to undertake the photocopying of those documents identified by complaint counsel. There is some dispute, however, over whether or not complaint counsel offered to reimburse respondent for its efforts. Sunkist contends that complaint counsel agreed that Sunkist was to be reimbursed for the copying and that \$.10 per page was a reasonable charge.<sup>1</sup> Complaint counsel affies that he agreed only that it was reasonable for Sunkist to request reimbursement of reproduction expenses from the Commission, and that he made clear to Sunkist's counsel that only the Commission could authorize reimbursement.

The Commission Rules make no provision for payment of reproduction expenses incurred by a respondent in connection with a Commission proceeding. Moreover, service contracts involving the expenditure of agency funds must be executed by an individual possessing authority to enter into a contract on behalf of the Commission.<sup>2</sup> Thus, assuming *arguendo* that complaint counsel did enter into an otherwise proper contract with respondent's counsel, the law is clear that the Commission is not bound by the unauthorized acts of its employees.<sup>3</sup> Accordingly,

*It is ordered, That respondent's motion is denied.*

<sup>1</sup> It appears from the affidavit filed by respondent's counsel that Sunkist first suggested that the copying be done on its facilities and that complaint counsel agreed with this suggestion.

<sup>2</sup> Under Federal Procurement Regulation § 1.404-2, 41 C.F.R. 1.404-2 (1977), each agency designates its contracting officials. See *The Federal Trade Commission Procurement and Contracting Guidelines*, June, 1978.

<sup>3</sup> *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947) ("Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."); *Albrechtsen v. Andrus*, 570 F.2d 906 (10th Cir. 1978).

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## IN THE MATTER OF

16 CFR 461; CHILDREN'S ADVERTISING. 43 FR 17967  
(1978)

TRR 215-60. Interlocutory Order, Nov. 17, 1978

## ORDER DENYING PETITIONS TO RECONSIDER

The Commission has before it, upon certification by the presiding officer, three petitions<sup>1</sup> urging that it suspend proceedings in this matter and reconsider all actions previously taken by the Commission herein. A fourth petition requests that the proceedings be delayed and that the presiding officer step aside or be removed by the Commission.<sup>2</sup> The petitions have been filed in light of the decision of the District Court in *Association of National Advertisers, Inc., et al. v. Federal Trade Commission, et al.*, No. 78-1421 (November 3, 1978), ordering that Chairman Pertschuk cease further participation in this proceeding.

Except to the extent noted herein, the petitions are denied for the following reasons:

1. As a preliminary matter, we note that the District Court did not order that the Commission take the action requested by petitioners in order to eliminate the "taint" believed by the Court and petitioners to result from the Chairman's participation, nor does it appear to the Commission that the Court was of the view that action of this sort might be necessary. In ordering that the Chairman withdraw from further participation, the Court concluded that its immediate intervention was required because "continued participation of the Chairman would render the proceedings void and so irrevocably tainted that any final determinations which might flow from such proceedings would be invalid" (Opinion, p.5, emphasis added.) In resolving only to order disqualification of the Chairman, the Court had before it plaintiffs' prayer that it suspend and order reconsideration of the entire proceeding. Complaint Prayer ¶4, p.7. The Court did not grant the requested relief. Accordingly, we reject any suggestion that reconsideration of our decision or modification of

<sup>1</sup> "The Chocolate Manufacturers Association's Petition to Reconsider the Proposal and Procedures Previously Announced for this Proceeding in Light of the Disqualification of the Chairman;" "Petition for Reconsideration and Redetermination of the Decision to Commence the Children's Advertising Trade Regulation Rule Proceeding and of All Decisions Made Subsequent Thereto in Which the Chairman Participated and for Postponement of Proceedings." filed by American Association of Advertising Agencies, Association of National Advertisers, Inc., American Advertising Federation, Toy Manufacturers of America, Inc., Association of Independent Television Stations, Inc., and National Association of Broadcasters; "Kellogg Company's Petition to Rescind and Withdraw the Initial Notice of Proposed Rulemaking, and to Reconsider All Matters Which the Commission has Previously Decided in Connection with this Proceeding, in Light of the Disqualification of the Chairman."

<sup>2</sup> "GMA Motion for Extension of Deadline and Notice of Cause to Believe that Grounds Exist for Disqualification of Presiding Officer."

the proceedings in any way is necessary as a matter of law to cure any injury that may be thought to have occurred or been threatened by the Chairman's participation in this matter.

2. The foregoing notwithstanding, members of the Commission have *sua sponte* given considerable thought to the questions raised by petitioners since the District Court's ruling was issued on November 3, 1978. Having done so, it is the Commission's view that there exists no basis for modification of any of the Commission's earlier decisions in this matter, and that the public interest would best be served by continuation of this proceeding along the course previously set forth, without delay.

The determination to commence this rulemaking proceeding, and subsequent procedural determinations along the way, have all been made by the unanimous vote of the Commission, based upon the independent judgment of each Commissioner. *De novo* reconsideration of these issues has not led any of the Commissioners now participating in this matter to conclude that a different course of action should have been, or should now be taken. In particular, upon *de novo* reconsideration the Commission is of the view that the material presented by its staff indicates that certain advertising directed to children may be deceptive or unfair within the meaning of Section 5 of the Federal Trade Commission Act, and that the public interest would best be served by consideration of these possible violations of law and possible remedies thereto as set forth in detail in the Commission's Notice of Proposed Rulemaking, 43 F.R. 17967, *et seq.* To be sure, members of the Commission are not without significant reservations about portions of its staff's contentions, as were detailed in statements issued by individual Commissioners at the time this rulemaking proceeding was commenced, as well as in the questions raised in the Notice of Proposed Rulemaking. The manner in, and extent to which these reservations and other issues are addressed in the rulemaking proceeding will determine whether a rule should issue in this matter and, if one does, what its terms should be. Notwithstanding these reservations, however, it was the determination of each Commissioner in April 1978, and upon *de novo* reconsideration, it remains the determination of the Commission that a rulemaking proceeding is legally warranted and in the public interest.

The Commission has also reconsidered, and finds no reason to disturb, procedural determinations announced in the Notice of Proposed Rulemaking and subsequent to the institution of the

rulemaking proceeding.<sup>3</sup> In particular, with respect to the choice of a presiding officer, which was made by the Chairman, it should be noted that this was done with the approval of the other Commissioners. It is now the *de novo* determination of the Commission, without the participation of the Chairman, that Mr. Needelman was and is appropriately designated and is well-qualified to preside in this matter, and should continue to preside. Having reviewed the allegations of the parties and Mr. Needelman's certifications in response thereto, the Commission finds no reason whatsoever to question the impartiality or appearance thereof with which Mr. Needelman has addressed the issues presented to him, and the Commission has complete confidence that he will address issues that arise in the future in similar fashion.

For the foregoing reasons, *it is ordered*, That the petitions to reconsider are granted insofar as they request *de novo* reconsideration of the rulings previously made by the Commission in this proceeding. In all other respects the petitions are denied. Upon said *de novo* reconsideration, the previous actions of the Commission, including designation of the presiding officer, are reaffirmed and it is directed that the rulemaking proceeding shall proceed as scheduled.

Chairman Pertschuk and Commissioner Pitofsky did not participate.

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<sup>3</sup> These include:

- a. The procedures set forth in the Federal Register notice of April 27, 1978.
- b. Order Denying Chocolate Manufacturer's Petition (July 31, 1978).
- c. Order Denying Various Petitions (July 31, 1978).
- d. Approval of Investigational Resolution, Unnamed Firms Engaged in Children's Advertising, File No. 782-3055 (April 4, 1978), and the closing of the earlier investigation, File No. 762-7037 (September 12, 1978).
- e. Appointment of Morton Needelman as Presiding Officer.

IN THE MATTER OF  
SEARS, ROEBUCK AND CO., ET AL.

*Docket 9104. Interlocutory Order, Nov. 22, 1978*

ORDER REJECTING CERTIFICATION AND DENYING MOTION TO  
STAY PROCEEDING

Respondent Sears, Roebuck and Co. (Sears) on September 25, 1978 moved before the administrative law judge (ALJ) for an order certifying a consent agreement executed by Sears but not agreed to by complaint counsel. By order of November 7, 1978, the ALJ certified the consent agreement to the Commission expressing the belief that the proposed consent order should be brought to the attention of the Commission because it raised a "law enforcement policy matter beyond the province of the law judge which only the Commission can properly evaluate." Although complaint counsel asserts that this language fails to meet the mandate of Rule 3.25(b), requiring that the law judge find a likelihood of settlement before certifying such orders to the Commission, we believe that a fair reading of the certification as a whole reflects the ALJ's conclusion that resolution of the proceeding on the basis of the proffered order is likely.<sup>1</sup>

Respondent's settlement proposal differs from the notice order attached to the complaint in that it is limited in coverage to dishwashers, the performance of which was allegedly misrepresented by respondent. By contrast, the notice order applies to "major home appliances" which "includes (but is not limited to) air conditioning units (room or built-in); clothes washers; clothes dryers; disposers; dishwashers; trash compactors; refrigerators; refrigerator/freezers; freezers; ranges, stoves, and ovens, stereophonic consoles and nonportable stereophonic sound systems and components; television receivers; and room humidifiers and dehumidifiers." [Notice Order, Part II, 5.] Additionally, the proposed agreement filed by Sears requires the Commission to act on a motion to modify the consent order within certain time periods if the Commission promulgates a trade regulation rule or guide concerning the practices covered by the order and where the rule or guide is less restrictive than the order.

<sup>1</sup> We would point out, however, that the law judge is within his authority to comment on the adequacy of any proposed settlement in light of the evidence presented in the case as well as outstanding orders of a similar nature involving other respondents. The ALJ's analysis of particular order provisions in the context of a certification under Rule 3.25(d) (irrespective of whether those provisions are addressed to specific violations of record or offered as "fencing-in" provisions) is not dramatically different from the analysis which the ALJ must perform when he considers the issue of relief in the course of his initial decision.

Given the significance of effective relief, the Commission is unwilling to conclude that the circumstances of this matter, which is now in the midst of trial, warrant no relief beyond the "single product" order proposed by Sears.<sup>2</sup> While respondent, of course, has not been adjudicated in violation of Section 5, we believe it is important to reiterate the prevailing standard for relief, as noted in *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394 (1965), a case in which the Court declined to modify an "all products" order:

[t]he propriety of a broad order depends upon the circumstances of the case, but the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist. . . . Having been caught violating the Act, respondents "must expect some fencing in." (Citation omitted.)

Since this matter will not be withdrawn from adjudication, there is no need to delay conclusion of the administrative proceeding. Accordingly,

*It is ordered.* That the certification is rejected and that respondent's motion for a stay of the proceedings is denied.

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<sup>2</sup> The Commission disagrees with respondent's reading of the consent order entered in *General Electric Co.*, Dkt. 9049. Part I of that order requires respondent, *inter alia*, to have a reasonable basis with respect to certain performance representations when utilized in connection with the advertising of some twelve different categories of household products, including dishwashers. Yet, the complaint in that matter challenged these practices only in the context of advertising for color television sets. Similarly, Part II of the consent agreement accepted on October 20, 1978, in *Norris Industries*, File 782 3065, [Decision and Order, 92 F.T.C. 989] contains a "reasonable basis" requirement for representations relating to the performance of major home appliances, as defined in the order to include dishwashers, garbage disposers, trash compactors, and microwave ovens, despite the fact that the complaint recites alleged unfair and deceptive practices associated only with the advertising and sale of dishwashers.



IN THE MATTER OF  
CORNING GLASS WORKS, ET AL.

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

*Docket C-2937. Complaint, Nov. 27, 1978 — Decision, Nov. 27, 1978*

This consent order, among other things, requires a Corning, N.Y. manufacturer and distributor of disposable glass culture tubes to make a bona fide effort to identify and provide proper restitution to eligible end-user customers who had failed to receive the amount of disposable glass tubes specified on packaging.

*Appearances*

For the Commission: *David C. Cameron.*

For the respondent: *Stephen C. Taylor, Los Angeles, Calif.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Corning Glass Works, 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. Respondent Corning Glass Works 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 Houghton Park, Corning, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, distribution, and sale of disposable glass culture tubes.

PAR. 3. In the course and conduct of its business as aforesaid, respondent now maintains, and at all times mentioned herein has maintained, a substantial course of trade in its aforesaid products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its aforesaid business, and for the purpose of inducing the purchase of its aforesaid products, respondent has made, and is now making, various statements and representations on boxes, cartons, or packages containing such products and on invoices relating to the delivery or sale of such products to purchasers or prospective purchasers with respect to the

number of units of such products contained in the said boxes or other containers.

PAR. 5. By and through the use of such statements and representations, respondent has represented, directly or by implication, that each of the aforesaid boxes, cartons, or packages contain not less than one thousand (1000) useable units of the said products.

PAR. 6. In truth and in fact, certain of the aforesaid boxes, cartons, or packages contain less than one thousand (1000) useable units of the said products.

Therefore, the statements referred to in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and is now in substantial competition, in or affecting commerce, with corporations, firms, and individuals in the sale of products of the same general kind and nature as those sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices, has had the capacity and tendency to mislead purchasers and consumers (1) into the erroneous and mistaken belief that said statements and representations were and are true and (2) into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of 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 Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by

respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Corning Glass Works 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 Houghton Park, Corning, New York.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

#### ORDER

##### I

*It is ordered,* That respondent Corning Glass Works, a corporation, its successors and assigns, and its officers, agents, representatives and employees, in connection with the manufacture, distribution or sale of disposable glass culture tubes in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to:

1. Make a *bona fide* effort, with the voluntary cooperation of each of its dealers, to identify all purchases of disposable glass culture tubes manufactured by respondent in sizes 10 x 75, 12 x 75 and 13 x 100 mm, by each such dealer's end-user customers between January 1, 1974, and December 31, 1975.
2. Make a refund to each person, partnership or corporation so identified as an end-user purchaser of the said products by (a) delivering or causing to be delivered a quantity of disposable culture tubes equal to 2.5% of the total of such tubes purchased by such end-user purchaser, (b) paying an amount of money equal to 2.5% of the total price paid for such tubes by such end-user purchaser, or (c) a combination of said methods, at respondent's option.
3. At or prior to the time of making the refund under 2., above, send to each such recipient of a refund, an announcement worded

substantially as set forth in Appendix A hereto, or in such other form as may be approved by the Regional Director of the Commission's Los Angeles Regional Office.

## II

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

## III

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

## IV

*It is further ordered,* That the respondent herein shall within ninety (90) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

## APPENDIX A

Dear Customer:

(Date)

Following investigation by the Federal Trade Commission, Corning Glass Works had reason to believe that certain packages of Disposable Culture Tubes sold by us between September 1973 and the Fall of 1975 contained fewer tubes than the quantity specified. Several factors may have contributed to this situation including human error on our packing lines, slight variations in the tube diameter and our high speed manufacturing process. Fortunately, a careful audit of our Disposable Culture Tube packages, conducted by our Quality Assurance people, indicated that the potential shortages were relatively small and that such shortages were limited to only 3 sizes - 10 x 75, 12 x 75 and 13 x 100 mm. After learning of this problem and studying its causes, we took corrective action by changing to a slightly larger package in September 1975 and turning to an entirely different packaging concept early in 1976.

The above is Corning's version of the facts in this matter and has not been approved or adopted by the Commission or its staff.

We sincerely regret that this problem arose and wish to assure you that Corning Glass Works will strive to provide products of the highest quality and dependability at all times. Because of the impossibility of determining which customers may have purchased merchandise affected by this problem, we have voluntarily agreed with the Federal Trade Commission to make an across-the-board refund of 2.5% of your purchases of these tubes during the years 1974 and 1975. [Enclosed is a check for \_\_\_\_\_ representing your purchases of such products from (dealer's

*name*) during 1974 and 1975. If you purchased these sizes of tubes from more than one dealer, you may be receiving more than one separate check in the mail.]<sup>1</sup>

If you have any questions you may write directly to Edmund M. Olivier, Vice-President and General Manager, Science Products Division, Corning Glass Works; Corning, New York 14830 or call (607) 974-4126. We hope you feel we have compensated you for any shortage you may have experienced.

Very truly yours,  
R. Michael Worley  
Marketing Manager  
Disposable Glassware

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<sup>1</sup> [alternative language to that in brackets above:]

You will be receiving a shipment of tubes within the near future which represents 2.5% of your purchases from *(dealer's name)* during the years 1974 and 1975. If you purchased these sizes of tubes from more than one dealer you may receive more than one glass shipment.

Complaint

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IN THE MATTER OF

OWENS-ILLINOIS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION ACT*Docket C-2938. Complaint, Nov. 27, 1978 — Decision, Nov. 27, 1978*

This consent order, among other things, requires a Toledo, Ohio manufacturer and distributor of disposable glass culture tubes to make a bona fide effort to identify and provide proper restitution to eligible end-user customers who had failed to receive the amount of disposable glass tubes specified on packaging.

*Appearances*For the Commission: *David C. Cameron.*For the respondent: *Alan C. Boyd, Toledo, Ohio.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Owens-Illinois, Inc., a corporation trading and doing business under its own name and as Kimble Division of Owens-Illinois, Inc., 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. Respondent Owens-Illinois, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, trading and doing business under its own name and as Kimble Division of Owens-Illinois, Inc., with its principal office and place of business located at the Owens-Illinois Building, Madison Ave., Toledo, Ohio.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, distribution, and sale of disposable glass culture tubes.

PAR. 3. In the course and conduct of its business as aforesaid, respondent now maintains, and at all times mentioned herein has maintained, a substantial course of trade in its aforesaid products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its aforesaid business, and for the purpose of inducing the purchase of its aforesaid products, respondent has made, and is now making, various statements and

representations on boxes, cartons, or packages containing such products and on invoices relating to the delivery or sale of such products to purchasers or prospective purchasers with respect to the number of units of such products contained in the said boxes or other containers.

PAR. 5. By and through the use of such statements and representations, respondent has represented, directly or by implication, that each of the aforesaid boxes, cartons, or packages contain not less than one thousand (1000) useable units of the said products.

PAR. 6. In truth and in fact, certain of the aforesaid boxes, cartons, or packages contain less than one thousand (1000) useable units of the said products.

Therefore, the statements referred to in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and is now in substantial competition, in or affecting commerce, with corporations, firms, and individuals in the sale of products of the same general kind and nature as those sold by respondent.

PAR. 8. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices, has had the capacity and tendency to mislead purchasers and consumers (1) into the erroneous and mistaken belief that said statements and representations were and are true and (2) into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce, in violation of 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 Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Owens-Illinois, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, trading and doing business under its own name and as Kimble Division of Owens-Illinois, Inc., with its principal office and place of business located at the Owens-Illinois Building, Madison Ave., Toledo, 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

##### I

*It is ordered.* That respondent Owens-Illinois, Inc., a corporation trading and doing business under its own name, as Kimble Division of Owens-Illinois, Inc., or under any other name or names, its successors and assigns, and its officers, agents, representatives and employees, in connection with the manufacture, distribution or sale of disposable glass culture tubes in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to:

1. Make a *bona fide* effort, by soliciting the voluntary cooperation of each of its dealers, to identify all purchases of disposable glass culture tubes, except the 6 x 50 mm size, manufactured by respondent, by each such dealer's end-user customers between April 1, 1974, and December 31, 1975.

2. Make a refund to each person, partnership or corporation so identified as an end-user purchaser of the products referred to in 1.,



above, by (a) delivering or causing to be delivered a quantity of disposable culture tubes equal to 0.75% of the total of such tubes purchased by such end-user purchaser during such period; (b) paying an amount of money equal to 0.75% of the total price paid for such tubes by such end-user purchaser, if such price information is obtainable from the dealer (otherwise, such refund shall be based upon respondent's suggested consumer prices during such period; for this purpose a customer's purchase of tubes of a particular size for each time period shown on the records furnished by the dealer shall be deemed to be a single shipment); or (c) a combination of said methods, at respondent's option.

3. At or prior to the time of making the refund under 2., above, send to each such recipient of a refund, an announcement worded substantially as set forth in Appendix A hereto.

## II

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

## III

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

## IV

*It is further ordered,* That the respondent herein shall within ninety (90) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

## APPENDIX A

Dear Customer:

(Date)

Our Kimble disposable glass culture tubes are packaged in trays designed to hold 250 or 125 tubes each (depending on tube size), then boxed four trays to a carton. Following investigation by the Federal Trade Commission, it has been discovered that during the period from April 1, 1974, to December 31, 1975, because of our high-speed packing methods, a misalignment of the tubes could result in a count of fewer than 250, or 125, tubes, depending on size, in one or more of the four inner trays in a

## Decision and Order

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particular carton. Since such discovery was made we have taken appropriate corrective action.

The above is O-I's version of the facts in this matter and has not been approved or adopted by the Commission or its staff.

We sincerely regret that this problem arose and wish to assure you that Owens-Illinois, Inc. will strive to provide products of the highest quality and dependability at all times. Because of the impossibility of determining which customers may have purchased merchandise affected by this problem, we have voluntarily agreed with the Federal Trade Commission to make an across-the-board refund of 0.75% of your purchases of these tubes during the period from April 1, 1974, through December 31, 1975.

[Enclosed is a check for \_\_\_\_\_ representing 0.75% of your purchases of such products from *(dealer's name)* during such period. If you purchased these sizes of tubes from more than one dealer, you may be receiving more than one separate check in the mail.]<sup>1</sup>

<sup>1</sup> [alternative language to that in brackets above:]

You will be receiving a shipment of tubes within the near future which represents 0.75% of your purchases from *(dealer's name)* during such period. If you purchased these sizes of tubes from more than one dealer you may receive more than one glass shipment.

If you have any questions you may write directly to Mr. E. W. Metz, Owens-Illinois, Inc., P. O. Box 1035, Toledo, Ohio 43666 or call (419) 242-6543. We hope you feel we have compensated you for any shortage you may have experienced.

Very truly yours,

## Interlocutory and Modifying Orders

## IN THE MATTER OF

CAPAX, INC. - DOCKET D. 9058  
 TRANS-AMERICAN COLLECTIONS, INC. - DOCKET D. 8901  
 UNITED COMPUURED COLLECTIONS INC. - DOCKET C-2906  
 TRANS NATIONAL CREDIT CORPORATION - DOCKET C-2806  
 CONTINENTAL COLLECTION BUREAU OF AMERICA, INC. -  
 DOCKET C-2808  
 NORTH AMERICAN COLLECTIONS, INC. - DOCKET C-2809  
 POWER'S SERVICE, INC. - DOCKET C-2810  
 CONTINENTAL COLLECTION SERVICE - DOCKET C-2811

*Interlocutory and Modifying Orders, Nov. 28, 1978*

This order denies a petition of Capax, Inc. requesting reconsideration of its order issued on May 25, 1978, 91 F.T.C. 1048, 43 FR 27782. Additionally, the order reopens and modifies, by deleting the disclosure requirement, the order issued on September 26, 1973 in Dkt. D. 8901, 83 F.T.C. 525, 38 FR 28933; and the orders issued on March 11, 1976 in Dkt. C-2806, 87 F.T.C. 542, 40 FR 19206; C-2807, 87 F.T.C. 549, 40 FR 19205; C-2808, 87 F.T.C. 557, 40 FR 19202; C-2809, 87 F.T.C. 566, 40 FR 19203; C-2810, 87 F.T.C. 574, 40 FR 19204; and C-2811, 87 F.T.C. 582, 40 FR 19201.

ORDER DENYING PETITION FOR RECONSIDERATION OF FINAL  
 ORDER OR REOPENING OF PROCEEDING IN DOCKET NO. 9058  
 AND REOPENING AND MODIFYING FINAL ORDERS IN DOCKET  
 NOS. 8901 AND C-2806 - C-2811

On May 25, 1978, the Commission issued its final order and opinion in *Capax, Inc.* The Commission held that respondents had engaged in certain misrepresentations in the course of their service to assist creditors in the collection of alleged delinquent debts, and prohibited these misrepresentations in its final order. The Commission rejected complaint counsel's request that respondents be required to provide an affirmative disclosure<sup>1</sup> in each communication sent to alleged debtors, stating:

[W]e do not consider the affirmative disclosure sought here by complaint counsel to be necessary, under the circumstances of this case, in light of the order's ample prohibitions on misrepresentations. Moreover, we believe that the proposed disclaimer could lull recipients into a false sense of security by giving them the impression that failure to pay the claimed debt will not result in legal action or harm to their credit standing. Because creditors might pursue an alleged delinquent debt by bringing suit or could report the matter to a consumer reporting agency, debtors who

<sup>1</sup> "We are an independent company employed by your creditor solely for the purpose of reminding you of your outstanding obligation. We are not authorized to engage in typical debt collection activity, to institute suit or to take any action which may affect your credit rating."

decided not to make payment on the basis of the disclaimer could suffer harm. Therefore, our order will not include the proposed affirmative disclosure.

Previously, the Commission had ordered disclosures similar to that sought by complaint counsel in *Trans-American Collections, Inc.*, Dkt. D. 8901, 83 F.T.C. 525 (1973); *United Compured Collections, Inc.*, Dkt. C-2806, 87 F.T.C. 542 (1976); *Trans National Credit Corp.*, Dkt. C-2807, 87 F.T.C. 549 (1976); *Continental Collection Bureau of America, Inc.*, Dkt. C-2808, 87 F.T.C. 557 (1976); *North American Collections, Inc.*, Dkt. C-2809, 87 F.T.C. 566 (1976); *Power's Service, Inc.*, Dkt. C-2810, 87 F.T.C. 574 (1976); and *Continental Collection Service*, Dkt. C-2811, 87 F.T.C. 582 (1976). On the date of issuance of the final order and opinion in *Capax*, the Commission issued orders to show cause why the above-cited orders should not be modified to delete the mandated affirmative disclosures, pursuant to Commission Rule 3.72(b). In its orders to show cause, the Commission stated that the reasoning articulated in *Capax* for rejecting complaint counsel's request for an affirmative disclosure may be equally applicable to the above-cited orders and that their requirement of an affirmative disclosure should be reconsidered.<sup>2</sup>

Complaint counsel have petitioned for reconsideration of the Commission's order in *Capax* pursuant to Rule 3.55, or in the alternative, for reopening of the proceeding in order to modify the Commission's decision not to require *Capax* to use an affirmative disclosure in its communications, pursuant to Rule 3.72. In support of their petition, complaint counsel argue that (1) since the Fair Debt Collection Practices Act became effective on March 20, 1978, "many complaints have been received pointing out the inherently deceptive nature of dunning letters sent by flat rate letter writing services," (2) an affirmative disclosure requirement is necessary to avoid the deception most certain to occur in the use of dunning notices, and (3) insertion of a modified version of the affirmative disclosures proposed in complaint counsel will prevent any misleading impression.

In a separate pleading, the Bureau of Consumer Protection has filed an opposition to the modification of the orders in Dkts. D. 8901 and C-2806 - C-2811 pending determination of complaint counsel's petition in *Capax*.

Counsel for *Capax* have filed an answer opposing complaint counsel's petition for reconsideration or reopening. That petition has also been opposed by counsel for *Trans World Accounts*, another

<sup>2</sup> In its opinion in *Capax*, the Commission noted that "(t)he appropriateness of those disclosures depends upon the facts of each case, including the prescribed language and the details of the firm's operations and authority."

company which provides debt collection services and which is an appellant from a final Commission order.

Trans-American Collections and the other respondents in Dkt. D. 8901 have filed a response to the order to show cause, expressing their acceptance of the proposed modification to the order in that matter. Powers Service and Community Systems, respondents in Dkt. C-2810, have filed a motion requesting the Commission to modify the consent order in accordance with the order to show cause. None of the other respondents who received the show cause orders has filed a response.

Although the Commission does not have authority to modify the order in *Capax* at this time,<sup>3</sup> either in response to a petition for reconsideration or for reopening, we will address the substance of complaint counsel's arguments, since this issue is central to the orders to show cause which are opposed by the Bureau of Consumer Protection. The Commission finds that the pleadings do not raise material issues of fact, and therefore will decide the matters on the orders to show cause and answer thereto, in accordance with Rule 3.72(b)(3).

Complaint counsel argue that since the effective date of the Fair Debt Collection Practices Act, many complaints have been received indicating that dunning letters sent by flat rate letter debt collection services are inherently deceptive. According to complaint counsel, the majority of consumers are unaware that in most cases such services have "virtually no authority to proceed with what is commonly understood to be normal collection efforts," and an affirmative disclosure such as that proposed is necessary to avoid deception. The Commission has never found that third party collection letters are inherently deceptive, and has no basis for making any such finding now. We see no reason to depart from our determination that the prohibitions on misrepresentations contained in the *Capax* order render an affirmative disclosure unnecessary. Under the order, *Capax* is prohibited from misrepresenting (1) the urgency of any communication, (2) its authority to engage in certain kinds of debt collection activity, (3) the likelihood of legal action, (4) the effect of nonpayment upon a debtor's credit record, and (5) the imminency of any action that may or will be taken. A prohibition upon these misrepresentations will eliminate the deception found by the Commission in *Capax*. Similar prohibitions are contained in the consent orders subject to the orders to show cause.

The Fair Debt Collection Practices Act, which became effective on

<sup>3</sup> 15 U.S.C. 45(b).

March 20 of this year, is relied upon by complaint counsel as a basis for reconsideration. That Act was fully taken into account in the Commission's determination, and presents no new question. The operation of that Act provides even less reason to mandate any affirmative disclosure than before, due to the requirement imposed upon debt collectors to provide a prescribed written notice within five days after the initial communication with a consumer and the requirement to cease collection of a debt after notification by the consumer. Section 809, 15 U.S.C. 1692g.

The Commission expressed concern in *Capax* that the affirmative disclosure proposed by complaint counsel may lull consumers into a false sense of security by giving them the impression that failure to pay the claimed debt will not result in legal or other action by the creditor. To remedy this possible misimpression, complaint counsel now propose the the following sentence be added to the disclaimer: "The creditor is permitted to take whatever action is available under State law." While this modification may be helpful, we nevertheless believe that no additional disclosure is necessary.

Accordingly, *it is ordered*, That:

- 1) The petition requesting reconsideration of reopening of the proceeding in *Capax*, Dkt. D. 9058, be denied;
- 2) The final order in Dkt. D. 8901 is reopened and modified by deleting the requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

This communication is only a reminder notice. Trans-American Collections, Inc., cannot accept monies nor will it take any action, legal or otherwise, regarding this claim.

- 3) The final order in Dkt. C-2806 is reopened and modified by deleting the requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

This communication is a reminder of creditor's claim. United Compucred Collections, Inc., does not accept payment. United Compucred Collections, Inc., does not ordinarily file suit.

- 4) The final order in Dkt. C-2807 is modified by deleting the requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

This communication is a reminder of creditor's claim. Trans National Credit Corporation does not accept payment. Trans National Credit Corporation does not ordinarily file suit.

- 5) The final order in Dkt. C-2808 is modified by deleting the

## Interlocutory and Modifying Orders

requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

This communication is a reminder of creditor's claim. Continental Collection Bureau of America, Inc., does not accept payment. Continental Collection Bureau of America, Inc. does not ordinarily file suit.

6) The final order in Dkt. C-2809 is modified by deleting the requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

This communication is a reminder of creditor's claim. North American Collections, Inc., does not accept payment. North American Collection, Inc. does not ordinarily file suit.

7) The final order in Dkt. C-2810 is modified by deleting the requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

This communication is only a reminder notice. Power's Service, Inc. cannot accept payment nor will it take legal action regarding this claim.

8) The final order in Dkt. C-2811 is modified by deleting the requirement that respondents disclose in each letter, form, or notice to alleged delinquent debtors the following statement:

This communication is a reminder of creditor's claim. Continental Collection Service does not accept payment. Continental Collection Service does not ordinarily file suit.

Interlocutory Order

92 F.T.C.

IN THE MATTER OF

## ADVERTISING FOR OVER-THE-COUNTER ANTACIDS

*TRR 215-56. Interlocutory Order, Nov. 30, 1978*

## ORDER AFFIRMING THE PRESIDING OFFICER'S FINAL NOTICE

The Commission, having received pursuant to Rule 1.13(c) (2)(ii) a petition from the Proprietary Association appealing from the designation of issues in the presiding officer's final notice of proposed rulemaking, hereby affirms the decision of the presiding officer. In the final notice, 43 F.R. 38849 (August 31, 1978), the presiding officer declined to designate any issues for cross-examination pursuant to Rule 1.13(d)(1). Instead, he propounded seven questions to which the attention of all interested persons was directed.

The Commission agrees that none of the issues proposed for designation meets the standard of Rule 1.13(d)(1)(i) because they are not disputed issues of material fact that are necessary to resolve, within the meaning of 15 U.S.C. 57a(c)(1)(B). Nevertheless, as an exercise of its discretion and in an attempt to create as complete a record as possible, the Commission has directed the presiding officer to afford ample opportunity for cross-examination on the important issues raised in this proceeding.



## IN THE MATTER OF

## KELLOGG COMPANY, ET AL.

*Docket 8883. Interlocutory Order, Nov. 30, 1978*

## ORDER DENYING MOTION TO DISQUALIFY

Respondents Kellogg Company and General Mills, Inc., have moved that Chairman Pertschuk disqualify himself, or alternatively, that the Commission determine that he is disqualified from participating in any proceeding in this matter. In response, Chairman Pertschuk has filed a memorandum declining to disqualify himself from the proceedings and setting forth the reasons therefor.

Upon consideration of respondents' motions and the Chairman's memorandum, the Commission has determined that no grounds exist for granting the requested relief. Accordingly,

*It is ordered,* That respondents' motions to disqualify be, and the same hereby are, denied.

Chairman Pertschuk and Commissioner Pitofsky did not participate.

MEMORANDUM OF CHAIRMAN PERTSCHUK IN RESPONSE TO  
MOTION TO DISQUALIFY HIM FROM PARTICIPATION IN THIS  
PROCEEDING

Respondents Kellogg Company ("Kellogg") and General Mills, Inc. ("General Mills") have filed motions asking that I disqualify myself, or that the Commission determine that I am disqualified, from further participation in this proceeding. For the reasons stated below I believe my participation in this case is proper, and decline to disqualify myself.

In support of their contention that I have made statements creating the appearance of partiality and prejudgment in this matter, Kellogg and General Mills rely on a quote from the Battle Creek Enquirer and News, June 24, 1977, at B1, col.1 (Connelly Aff. ¶2; Savarese Aff. ¶3). There, in an article published under the byline of the Gannett News Service, I am reported to have said:

[W]inning the cereal case would "be an enormous help. . . It just depends how you win it, what you win, what kind of remedy you fashion."

The references to "winning the cereal case" appear outside the quotation marks,<sup>1</sup> which squares with my recollection of the interview which gave rise to the article. My recollection of the substance of the quote is that I was referring to the "big case" generically.<sup>2</sup> I recall no use of the term "winning" and was solely concerned with structuring cases to see that they were shaped for trial with a carefully fashioned remedy in mind.

Taken as a whole, the article reflects my own general attitude toward the "big case" approach to antitrust problems. My recollection is that the more accurate form of the above quote would have been "appropriately crafted structural cases can be an enormous help. . . ." I did not then, and do not now, have any opinion as to the outcome of the *Kellogg, et al.*, litigation.

In each instance in which a court has disqualified agency decisionmakers, that action has been based on comments showing what would appear to a disinterested observer as a viewpoint or prejudice concerning specific controverted factual issues, e.g., *American Cyanamid Co. v. FTC*, 363 F.2d 757, 767 (6th Cir. 1966), or the ultimate issue of liability, e.g., *Texaco Inc. v. FTC*, 336 F.2d 754, 760 (D.C. Cir. 1964); *Cinderella Career & Finishing Schools v. FTC*, 425 F.2d 583, 590 (D.C. Cir. 1970), in a pending adjudicative matter. My comments reflect no such commitment with respect to this case. See *Kennecott Copper Corp. v. FTC*, 467 F.2d 67, 80 (10th Cir. 1972). They can at most be read as reflecting an underlying philosophy or policy favoring effective enforcement of the antitrust laws, which would not be ground for disqualification. Cf. *American Cyanamid Co. v. FTC, supra*, 363 F.2d at 764.

The motions also cite numerous other statements that allegedly reflect hostility toward respondents or bias as to issues involved in this proceeding. See Connelly Aff. ¶¶3-6; Savarese Aff. ¶¶4-7. The cited statements concern the content of television commercials, their effect on children, and the effects of advertising that stimulates brand name identity and product differentiation. These remarks reflect my views on issues of law, policy, or legislative fact, which are not grounds for disqualification. See, e.g., *Laird v. Tatum*, 409 U.S. 924, 839 (1972)(memorandum of Rehnquist, J.); *FTC v. Cement Institute*, 333 U.S. 683, 700-03 (1948); *United States v. Morgan*, 313 U.S. 409, 421 (1941); 2 K. Davis, *Administrative Law*, §12.01, at 144.

<sup>1</sup> General Mills' motion erroneously creates the impression that those words were part of my quotation. Savarese Aff. ¶3. I have referred to the actual Enquirer and News article to verify the quote as it appears in this memorandum.

<sup>2</sup> In fact, the same article states that I declined to comment on specific aspects of the "cereal case."

They do not touch upon specific factual issues raised in the pleadings or the ultimate issue of liability.<sup>3</sup>

A third category of statements relied on in the motions to disqualify concern my professed irritation with the requirement that I not prejudge matters on which I must sit as judge. See Connelly Aff. ¶8; Savarese Aff. ¶8. Those statements bear no relation to this case. Moreover, I believe the statements, read in context, reflect my fidelity to the rule that I refrain from passing judgment on pending matters, no matter how frustrating I may find that rule to be.

Finally, Kellogg cites (Connelly Aff. ¶7) a statement of mine in which I described a meeting with Kellogg's President as "a frank and open exchange of views — in the words of cold war diplomacy. . . ." It should be clear to any reader of that statement that the words were used facetiously and do not reflect a personal animus toward Kellogg.

I reiterate that I have not arrived at any conclusions regarding the issues in this case, and will not do so until it is properly before me. Accordingly, I decline to disqualify myself from further participation in the proceeding.

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<sup>3</sup> See also my letter to Gilbert H. Weil, Esq., dated July 13, 1978, responding to a petition to disqualify me in the Children's Advertising Rulemaking proceeding, which discusses these issues in greater detail.

Complaint

92 F.T.C.

## IN THE MATTER OF

## VITAL-E T/A MAIL ORDER SERVICES, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF  
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9082. Complaint, May 11, 1976 — Decision, Nov. 30, 1978*

This consent order, among other things, requires a Tarzana, Calif. mail order company and its advertising agency to cease disseminating advertisements which misrepresent that any dietary drug, plan or device will cause weight loss without exercise or caloric restriction; or that any vitamin supplement, food or drug will eliminate adverse skin conditions, stop or reverse the aging process, or enhance sexual potency. The firms are further required to disclose health or cosmetic risks posed by products; offer refunds for products that pose such risks; and furnish substantiation for all claims regarding product performance, safety and efficacy. Additionally, the order prohibits the firms from misrepresenting product sources, or government association.

*Appearances*

For the Commission: *Kendall H. MacVey* and *Robert J. Enders*.  
For the respondents: *Richard M. Crane* and *Milton Linder*,  
Beverly Hills, Calif.

## 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 Vital-E, a corporation trading and doing business under its own name and as Mail Order Services; Advertising Unlimited of America, Inc., a corporation trading and doing business as Normond Linder & Associates; Milton Kalman, individually and as an officer of corporate respondent Vital-E; Sharon Kalman, also known as Sharon Fernandez and as Sharon Hoffman, individually and as an officer of corporate respondent Vital-E; and Normond Linder, individually and as an officer of corporate respondent Vital-E and as an officer of corporate respondent Advertising Unlimited of America, Inc., with all the aforementioned having done and doing business under various fictitious trade names, 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:

PAR. 1. Respondent Vital-E is a corporation organized, existing, and doing business under and by virtue of the laws of the State of

California, trading and doing business under its own name and as Mail Order Services, with its principal office and place of business located at 18588 Ventura Boulevard, Tarzana, California.

Respondent Advertising Unlimited of America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, trading and doing business as Normond Linder & Associates, with its principal office and place of business located at 12400 Santa Monica Boulevard, Los Angeles, California.

Respondents Milton Kalman, Sharon Kalman, also known as Sharon Fernandez and as Sharon Hoffman, and Normond Linder are individuals and are officers of corporate respondent Vital-E. They formulate, direct, and control the acts and practices of corporate respondent Vital-E. Respondents Milton Kalman, Sharon Kalman, and Normond Linder, individually and with each other, have also operated various other business entities under various fictitious trade names. Respondent Normond Linder is an officer of corporate respondent Advertising Unlimited of America, Inc. Respondent Normond Linder formulates, directs, and controls the acts and practices of corporate respondent Advertising Unlimited of America, Inc. The business address of respondents Milton Kalman and Sharon Kalman is 18588 Ventura Boulevard, Tarzana, California. The business address of respondent Normond Linder is 12400 Santa Monica Boulevard, Los Angeles, California.

Respondents cooperate and act together, and have cooperated and have acted together, to bring about 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 skin creams, oils and lotions, weight and body size reduction devices, physical appearance improvement devices, printed diet plans, dietary and vitamin supplements, art prints, entry blank forms for reserving the right to purchase lottery tickets or enter a lottery, and various other products, hereinafter sometimes referred to as respondents' products. Said skin creams, oils and lotions come within the classification of cosmetics as "cosmetic" is defined in the Federal Trade Commission Act. Said weight and body size reduction and physical appearance improvement devices come within the classification of devices as "device" is defined in the Federal Trade Commission Act. Said dietary and vitamin supplements come within the classification of foods or drugs as "food" and "drug" are defined in the Federal Trade Commission Act.

Respondent Advertising Unlimited of America, Inc., a corporation,

and its officer, respondent Normond Linder, are engaged in the preparation and publication of advertising material. They are now, and for some time last past have been, engaged in formulating, preparing, and placing for publication advertising copy in publications of general circulation and advertising copy for dissemination through the United States mail concerning respondents' products.

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

PAR. 4. In the course and conduct of their aforesaid businesses, respondents have disseminated and now disseminate, and have caused and now cause the dissemination of, certain advertisements concerning the said products through the United States mail and through various means in, affecting, or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to advertisements inserted in newspapers of general interstate circulation, and circulars and flyers disseminated through the United States mail, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of skin creams, oils and lotions, weight and body size reduction devices, physical appearance improvement devices, and dietary and vitamin supplements; and have disseminated and now disseminate, and have caused and now cause the dissemination of, certain advertisements concerning the said products by various means, including the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of the said products in, affecting, or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their aforesaid businesses, and at all times mentioned herein, respondents have been, and are now, in substantial competition in or affecting commerce, with corporations, firms, and individuals, in the sale of products of the same general kind and nature as those sold by respondents.

#### COUNT I

Alleging violations of Sections 5 and 12 of the Federal Trade Commission Act, the allegations of Paragraphs One through Five

above are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 6. In the course of their aforesaid businesses, and for the purpose of inducing the purchase of creams, oils, lotions, and other cosmetics, respondents, individually and with each other, have made statements and representations for the promotion and sale, through the United States mail and other means, of said products with respect to the effectiveness or therapeutic value of said products in treating adverse skin conditions.

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

Vitamin E Oil literally "feeds" oxygen to problem skin areas.

. . . Ginseng + E oil literally "feeds" oxygen to problem skin areas.

Here's why this natural Vitamin E suntan lotion works so well: Vitamin E: This on external application to the skin provides the benefit of having one of the essential vitamins soothe the epidermis and thereby makes tanning safe.

Natural Vitamin E Oil. It does wonders for: wrinkles, aging skin, rough skin, blemishes, facial lines, facial creases, surface scars, healing burns, healing wounds, stretch marks, under make-up.

[Ginseng + E oil]. . . transmits incredibly fast and beneficial effects to aging skin, wrinkles, stretch marks, blemishes, rough, dry, and other cosmetically related skin problems.

Private and medical literature also contain glowing reports as to its [Ginseng + E oil] effectiveness in the healing of burns, wounds, unsightly scars, and a host of skin problems.

. . . Vitamin E Oil rejuvenates skin and helps regain youthful, radiant looks without pills, drugs, diets, massaging, within minutes.

. . . Ginseng + E oil rejuvenates the skin and quickly helps regain a more youthful and radiant look within minutes.

Look years younger as wrinkles seem to vanish instantly. Natural Anti-Wrinkle Creme is a line smoothing natural high protein creme.

[Vitamin E Oil is] 100% safe.

Ginseng + E oil is 100% safe, non-allergenic and contains no hormones.

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

1. The topical application of respondents' "Natural Vitamin E

Oil" and "Ginseng + E oil" will transmit oxygen to problem skin areas.

2. The transmission of oxygen to problem skin areas will alleviate the adverse conditions.

3. When topically applied, Vitamin E is of significant value in making suntanning safer and more effective.

4. The topical application of respondents' "Natural Vitamin E Oil" and "Ginseng + E oil" is highly effective in treating wrinkles, aging skin, rough skin, blemishes, facial lines, facial creases, surface scars, burns, wounds, stretch marks, and other adverse skin conditions.

5. The topical application of respondents' "Natural Vitamin E Oil," "Ginseng + E oil," and "Anti-Wrinkle Creme" will eliminate wrinkles or the appearance of wrinkles and will hinder, stop or reverse the aging process of the skin.

6. The topical application of respondents' "Natural Vitamin E Oils" and "Ginseng + E oil" poses no medical or health risk.

PAR. 8. In truth and in fact:

1. The topical application of respondents' "Natural Vitamin E Oil" and "Ginseng + E oil" will not transmit oxygen to problem skin areas.

2. The transmission of oxygen to problem skin areas will not alleviate the adverse conditions.

3. When topically applied, Vitamin E is not of significant value in making suntanning safer or more effective.

4. The topical application of respondents' "Natural Vitamin E Oil" and "Ginseng + E Oil" is ineffective in treating wrinkles, aging skin, rough skin, blemishes, facial lines, facial creases, surface scars, burns, wounds, stretch marks, and other adverse skin conditions.

5. The topical application of respondents' "Natural Vitamin E Oil," "Ginseng + E oil," and "Anti-Wrinkle Creme" will not eliminate wrinkles or significantly alleviate the appearance of wrinkles or hinder, stop or reverse the aging process of the human skin.

6. The topical application of respondents' "Natural Vitamin E Oil" and "Ginseng + E oil" poses a medical or health risk in that it will result in an irritating skin rash for many users.

Therefore, the advertisements referred to in Paragraphs Six and Seven in connection with inducing the purchase of cosmetics were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and the acts and practices as set



forth in Paragraphs Six and Seven hereof were and are false, misleading, and deceptive.

PAR. 9. In the course of their aforesaid businesses, and for the purpose of inducing the purchase of weight and body size reducing and physical appearance improvement devices, respondents, individually and with each other, have made statements and representations for the promotion and sale, through the United States mail and other means, of said devices with respect to said devices' effectiveness or therapeutic value in weight or body size reducing or in contouring the chin and jowls.

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

"Reducing belt!". . . Slip into belt and slimming action starts instantly. Wear one hour a day. Some have lost 4-6 inches. No weights, no exercise, no special diet, no trouble at all!

Lose pounds & inches easily. "Sauna Suit" melts away lbs. . . . Fat will melt away when you wear the marvelous new Sauna Suit. . . Effortless way to lose weight fast. Tighten sagging tissue on lower face. "Trim-A-Chin" with special facial lube cream. Doctor designed program will help tighten sagging tissues of lower face, help muscle tone, achieve smoother chin and jowl contours to give a more youthful appearance! Slip on soft comfortable latex belt. . . See big improvement in just 14 days.

PAR. 10. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents have represented and are now representing, directly or by implication, that:

1. Wearing respondents' "Reducing Belt" will cause a reduction in size and weight for other than a temporary period of time.
2. Wearing respondents' "Sauna Suit" will cause a reduction in fat.
3. Wearing respondents' "Sauna Suit" will cause a reduction in size and weight without exercise or dieting which will be sustained for other than a temporary period of time.
4. Wearing respondents' "Trim-A-Chin" device will reduce the sagging of jowls associated with increasing age.

PAR. 11. In truth and in fact:

1. Wearing respondents' "Reducing Belt" will not cause a reduction in size or weight for other than a temporary period of time.
2. Wearing respondents' "Sauna Suit" will not cause a reduction in fat.
3. Wearing respondents' "Sauna Suit" will not cause a reduction in size and weight without exercising or dieting which will be sustained for other than a temporary period of time.
4. Wearing respondents' "Trim-A-Chin" device will not reduce

the sagging of jowls associated with increasing age except for the time that the device is worn.

Therefore, the advertisements referred to in Paragraphs Nine and Ten in connection with inducing the purchase of devices were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and the acts and practices as set forth in Paragraphs Nine and Ten hereof were and are false, misleading, and deceptive.

PAR. 12. Since approximately 1971, in the course of their aforesaid businesses, and for the purpose of inducing the purchase of diet plans, respondents, individually and with each other, have made statements and representations for the promotion and sale of said products through the United States mail and other means. These diet plans have been disseminated as aforementioned under various names, including but not limited to, the "Grapefruit Diet," consisting of a printed diet plan, and the "Vitamin E Diet," the "All-Vitamin Diet," and the "New Grapefruit Pill Diet," all consisting of a printed diet plan and tablets. These tablets fall within the classification of foods or drugs as "food" and "drug" are defined in the Federal Trade Commission Act.

In promoting and disseminating these diet plans, respondents have used substantially similar advertising copy with the major change being in the name of the diet plan. In this advertising respondents have represented directly or by implication that these diets are based upon recent revolutionary scientific discoveries and techniques which allow the user rapidly to lose large amounts of weight with minimal or no effort, exercise, restriction in caloric intake, hunger, or medical risk. Contrary to these claims, adherence to these diets poses medical risks to certain individuals and is effective, if at all, only to the extent that these diets are based upon standard dieting techniques. Respondents have also misrepresented the amount of weight that may be lost and have represented directly or by implication that weight loss will be permanent when in some instances the weight loss involves merely a loss in fluid which may be rapidly regained.

In furtherance of these claims, respondents have represented in advertising that the consumption of certain foods or drugs recommended in these diet plans, including but not limited to, grapefruit, vitamin E, and numerous vitamins, minerals, and nutrients, can or will cause weight loss or significantly curb or eliminate hunger pangs and the desire to eat. In fact, to the extent that adherence to these diet plans results in weight loss, such weight loss is due to

restriction in caloric intake. The said foods or drugs do not have the claimed effects upon hunger pangs and the desire to eat.

Respondents have bolstered some of these claims by representing in advertising that a significant number of the United States population has used and proved the effectiveness of these diet plans when such is not the case. Respondents have also bolstered some of these claims by quoting in advertising an individual represented by respondents as being a nutritionist with a world-wide reputation when in fact this individual is not a nutritionist and is not widely known, if at all, in any scientific or medical field.

PAR. 13. Typical and illustrative of the statements and representations in those advertisements described in Paragraph Twelve, disseminated as aforesaid, but not all inclusive thereof, are the following:

Lose ten pounds with Grapefruit Diet in ten days. A new scientific grapefruit diet that "really works" is sweeping the country, enabling overweight people of all walks of life to easily and quickly become slim, trim and attractive, "while still eating all they want."

The use of Vital-E tablets and foods prescribed in the plan will, through natural action, help your body use up excess fat. Recent clinical tests indicate that Vitamin E added to a diet formerly deficient in it or in protein will "Double the speed of fat utilization."

. . . [T]heir use [Grapefruit Diet Pills] with the foods prescribed in the diet plan will, through nature, act to help your body use up and burn off excess fat and body fluids. . .

New scientific discoveries have produced an "all vitamin" diet tablet that eliminates hunger pangs and prevents overeating. . . . Those who use the new all-vitamin (plus E) diet tablet report that it is so effective you will lose weight the very first day and keep on losing day after day until you reach your most attractive size—without exercise and starvation.

PAR. 14. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents have represented, and are now representing, directly or by implication, that:

1. Most individuals adhering to the "Grapefruit Diet" will lose ten pounds within ten days and such weight loss will be sustained for other than a temporary period of time.
2. Individuals adhering to the "Grapefruit Diet" can consume food without regard to caloric intake and still lose weight.
3. The consumption of grapefruit, its constituents or extracts, or vitamin E will cause weight loss in whole or in part.
4. The tablets taken in accordance with the "All-Vitamin Diet"

will have a physiological effect which will significantly eliminate or reduce hunger pangs and thereby prevent overeating.

PAR. 15. In truth and in fact:

1. Most individuals adhering to the "Grapefruit Diet" will not lose ten pounds within ten days. In those instances in which an individual does lose ten pounds within ten days the weight loss will be mostly loss of fluid which will be rapidly regained if the user does not continue to restrict his caloric intake.

2. Individuals adhering to the "Grapefruit Diet" cannot consume food without regard for caloric intake in that said plan requires the user to reduce his caloric intake in order to lose weight.

3. The consumption of grapefruit, its constituents or extracts, or vitamin E will not cause weight loss in whole or in part.

4. The tablets taken in accordance with the "All-Vitamin Diet" will not have a physiological effect which will significantly eliminate or reduce hunger pangs and thereby prevent overeating.

Therefore, the statements as set forth in Paragraphs Twelve, Thirteen, and Fourteen in connection with inducing the purchase of foods and drugs were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and the acts and practices set forth in Paragraphs Twelve, Thirteen, and Fourteen hereof were and are false, misleading, and deceptive.

PAR. 16. At the time the scientific, medical, or therapeutic representations and statements referred to and described in Paragraphs Six, Seven, Nine, Ten, Twelve, Thirteen, and Fourteen were made respondents directly or by implication represented that they had a reasonable basis for said representations and statements when in truth and in fact respondents had no competent and reliable scientific or medical evidence to support such representations and statements.

Therefore, the statements as set forth in Paragraphs Six, Seven, Nine, Ten, Twelve, Thirteen, and Fourteen in connection with inducing the purchase of foods, drugs, cosmetics, and devices were and are misleading in material respects and constituted and now constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and the acts and practices set forth in Paragraphs Six, Seven, Nine, Ten, Twelve, Thirteen and Fourteen hereof were and are false, misleading, unfair, and deceptive.

PAR. 17. In the course and conduct of their aforesaid businesses, and at all times mentioned herein, respondents have been, and are now, in substantial competition in, affecting, or having an effect upon commerce, with corporations, firms, and individuals in the sale

of products of the same general kind and nature as those sold by respondents.

PAR. 18. The use by respondents of the aforesaid false, misleading, and deceptive 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 such statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 19. 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, affecting, or having an effect upon commerce and unfair or deceptive acts and practices in, affecting, or having an effect upon commerce, in violation of Sections 5 and 12 of the Federal Trade Commission Act.

## COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Nineteen above are incorporated in Count II as if fully set forth verbatim.

PAR. 20. In the course and conduct of their aforesaid businesses, and for the purpose of inducing the purchase of art prints, respondents, individually and with each other, have made numerous statements and representations in circulars, periodicals, and other materials with respect to the nature of their business and products.

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

### PUBLIC OFFERED 1937 U.S. GOV'T ART PRINTS.

Send cash, check or money order to: U.S. Surplus, Department C, P.O. Box 605, Tarzana, Calif. 91356.

PAR. 21. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents have represented and are now representing, directly or by implication, that:

1. The United States government or any of its agencies, subdivisions, instrumentalities, or representatives or agents in their official capacities printed or caused to be printed in 1937 certain art prints sold by respondents.

2. Respondents' business engaged in the sale of art prints is a United States government agency, enterprise or entity and that

respondents' sale of said art prints is sponsored by or supported under the auspices of the United States government or any of its agencies, subdivisions, instrumentalities, or representatives or agents in their official capacities.

PAR. 22. In truth and in fact:

1. The United States government or any of its agencies, subdivisions, instrumentalities, or representatives or agents in their official capacities did not print or cause to be printed the said 1937 art prints.

2. Respondents' business engaged in the sale of art prints is not a United States government agency, enterprise or entity and respondents' sale of said art prints is not sponsored by or supported under the auspices of the United States government, or any of its agencies, subdivisions, instrumentalities, or representatives or agents in their official capacities.

Therefore, respondents' statements or representations as set forth in Paragraphs Twenty and Twenty-One hereof, were and are false, misleading, and deceptive.

PAR. 23. In the course and conduct of their aforesaid businesses, and for the purpose of inducing the purchase of entry blank forms for reserving the right to purchase lottery tickets or to enter a lottery or lotteries, respondents, individually and with each other, have made numerous statements and representations in circulars, periodicals and other materials with respect to the nature of said entry blank forms.

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

You can become a "millionaire over night" with a 50¢ per week gamble in a legalized eastern state sponsored lottery no matter where you now live.

Your chances are great! There are on an average of 20,000 WINNERS EACH WEEK ranging from \$40, \$400, \$4,000 to \$50,000. You also have a chance to win the "Millionaire" Grand Prize which is drawn once every six weeks.

Winners, who now come from all over the country, are promptly notified and automatically paid by the State Treasury through a computerized system. It's absolutely legal, State Government sponsored, certified and honest. Take a chance! You may win a fortune!

Everybody can participate no matter where you live. To get your simple entry blank and full details send \$3. . .

PAR. 24. By and through the use of the above-quoted statements and representations, and others of similar import and meaning, but not expressly set out herein, respondents have represented, directly or by implication, that:

1. Those who purchase said entry blank forms from respondents are purchasing lottery tickets or are entering a lottery or lotteries sponsored by a state government.

PAR. 25. In truth and in fact:

1. A purchaser does not purchase a lottery ticket and does not enter a lottery or lotteries. Instead, a buyer receives an application form for a lottery ticket reservation plan which requires additional payment to the State of New Jersey before the buyer may enter a lottery.

Therefore respondents' statements and representations as set forth in Paragraphs Twenty-Three and Twenty-Four hereof, were and are false, misleading, and deceptive.

PAR. 26. The use by respondents of aforesaid false, misleading, and deceptive 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 such statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 27. 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 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 on May 11, 1976, charging respondents with violation of Sections 5 and 12 of the Federal Trade Commission Act, and the respondents having been served with a copy of that complaint and the administrative law judge having issued his order on October 18, 1976, amending the said complaint in accordance with Sections 3.15(a)(1) and 3.22 of the Commission's Rules, and the respondents having been served with a copy of that order; and

The Commission having duly determined upon a joint motion of complaint counsel and respondents' counsel that in the circumstances presented, the public interest would be served by withdrawal of the matter from adjudication pursuant to Section 3.25 of the Commission's Rules; and

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

a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, as amended, 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, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Vital-E is or was a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, trading and doing business under its own name and as Mail Order Services, with its principal office and place of business located at 18588 Ventura Boulevard, Tarzana, California.

Respondent Advertising Unlimited of America, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, trading and doing business as Normond Linder & Associates, with its principal office and place of business located at 12400 Santa Monica Boulevard, Los Angeles, California.

Respondents Milton Kalman, Sharon Kalman, also known as Sharon Fernandez and as Sharon Hoffman, and Normond Linder are individuals and are or were officers of corporate respondent Vital-E. They formulate(d), direct(ed) and control(led) the acts and practices of corporate respondent Vital-E. Respondents Milton Kalman and Sharon Kalman, individually and with each other, have also operated various other business entities under various fictitious trade names. Respondent Normond Linder is an officer of corporate respondent Advertising Unlimited of America, Inc. Respondent Normond Linder formulates, directs, and controls the acts and practices of respondent Advertising Unlimited of America, Inc. The business address of respondent Milton Kalman is 18588 Ventura Boulevard, Tarzana, California. The business address of Sharon Kalman is 18584 Ventura Boulevard, Tarzana, California. The business address of respondent Normond Linder is 12400 Santa Monica Boulevard, Los Angeles, California.

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



## ORDER

## Definitions

"Capacity of an advertising agent" refers to the creation, preparation or placement of advertising by a designated respondent (or the respondent's officers, agents, representatives, and employees) on the behalf of others for the receipt of compensation which is reasonable and customary in the advertising industry.

"Food," "drug," "cosmetic," and "device," when explicitly or implicitly referring to products, shall be defined as these terms are defined in the Federal Trade Commission Act, as amended.

## I.

*It is ordered.* That respondents Vital-E, a corporation trading and doing business under its own name and as Mail Order Services; and Advertising Unlimited of America, Inc., a corporation trading and doing business as Normond Linder & Associates; and Milton Kalman, individually and as an officer of corporate respondent Vital-E; and Sharon Kalman, also known as Sharon Fernandez and as Sharon Hoffman, individually and as an officer of corporate respondent Vital-E; and Normond Linder, individually and as an officer or former officer of corporate respondent Vital-E and as an officer of corporate respondent Advertising Unlimited of America, Inc.; and each of the respondents, their successors and assigns, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of skin creams, oils and lotions; weight-reduction and body-size-reduction devices; physical-appearance-improvement devices; diet plans; dietary and vitamin supplements; any food, drug, cosmetic, or device; or any other products; do forthwith cease and desist from:

1. Disseminating, or causing to be disseminated, by means of the United States mail or by any means in, affecting, or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, any advertisement which represents, directly or by implication, that:

A. Vitamin E, vitamin E oil, or ginseng oil is effective or has value in transmitting oxygen to skin areas.

B. The transmission of oxygen to adversely affected skin areas is of therapeutic or cosmetic value.

C. Vitamin E is effective or of value in making suntanning safer or more effective.

D. Vitamin E, vitamin E oil, or ginseng oil is effective or of value in treating rough skin, blemishes, scars, stretch marks or any other adverse skin condition.

E. Any cream, oil, lotion, drug, cosmetic or any other product is effective or of value in treating or eliminating blemishes, scars, burns, wounds, stretch marks, or any other adverse skin condition, unless respondents can establish such is the fact.

F. Vitamin E, vitamin E oil, ginseng oil, or any cream, oil, lotion, cosmetic, drug or other product is effective or of value in treating or eliminating wrinkles, creases, aging skin or is effective or of value in hindering, stopping, or reversing the aging process.

G. The "Reducing Belt," "Sauna Suit," or any other device purported to be effective or of value for the purpose of weight control, weight reduction, or reduction in body size, without dieting or exercise, is effective or of value for that said purpose.

H. The "Trim-A-Chin" or any other device purported to firm, contour, or eliminate sagging jowls is effective or of value in firming, contouring, or eliminating sagging jowls.

I. Any diet plan, dietary or vitamin supplement, or any other purported weight-control, weight-reducing, or body-size-reducing product or any other product is based upon recent significant or revolutionary scientific or medical discoveries or techniques, unless respondents can establish such is the fact.

J. Vitamin E, vitamin E oil, ginseng oil, any diet plan, dietary or vitamin supplement, or any other purported weight-control, weight-reducing or body-size-reducing device, or any food, drug, cosmetic or device, or other product has any health, nutritional, cosmetic or other use, when such use poses any health or cosmetic risk known to respondents or established by competent and reliable medical or scientific evidence, without

(i) clearly and conspicuously stating in any advertisement for said product that the product may pose health or cosmetic risks to some users;

(ii) clearly and conspicuously stating on the product or its container, or in instructions accompanying the product, the extent and nature of such risks;

(iii) making to the purchaser a bona fide offer of a full refund of the price paid by the purchaser, with this refund to be paid within a reasonable period of time; and

(iv) clearly and conspicuously stating in immediate conjunction with the statement required by provision I.1.J. (ii) that the purchaser may receive a refund as described in provision I.1.J.(iii).

K. Any diet plan, dietary or vitamin supplement, or any other purported weight-control, weight-reducing or body-size-reducing product will cause any amount of weight reduction or reduction in body size, or any amount of weight reduction or reduction in body size within any particular period of time, unless respondents can establish such is the fact.

L. Any diet plan, dietary or vitamin supplement, or any other purported weight-control, weight-reducing or body-size-reducing product will cause any amount of weight reduction or reduction in body size, or any amount of weight reduction or reduction in body size within any particular period of time, when most of such reduction in weight or body size will be due to fluid loss.

M. Any diet plan, dietary or vitamin supplement, or any other purported weight-control, weight-reducing or body-size-reducing product is effective or of value for the purpose of weight control or reducing weight or body size, unless in immediate conjunction therewith it is disclosed clearly and conspicuously that any weight control or reduction in weight or body size which might result after use of said product would be by reason of exercise or restriction in caloric intake or a combination of the two.

N. Any diet plan, dietary or vitamin supplement, or any other purported weight-control, weight-reducing or body-size-reducing product will allow the user to lose weight without exercise or restriction in caloric intake.

O. The consumption of grapefruit, its constituents or extracts, vitamin E, or any other food or drug may or will cause weight loss in whole or in part.

P. The consumption of grapefruit, its constituents or extracts, vitamin E, or any other vitamins, or minerals will have a physiological effect which may or will significantly reduce or eliminate hunger or the desire to eat.

Q. The consumption of any food or drug or the use of any other product will significantly reduce or eliminate hunger or the desire to eat, unless respondents can establish such is the fact.

R. Any diet plan, food, drug, cosmetic, device or other product has been used, tested or proved effective by a significant number of individuals, unless respondents can establish such is the fact.

S. Any individual is a nutritionist or has any formal qualifications, training, credentials, scientific, medical or other kind of expert reputation, unless respondents can establish such is the fact.

T. "E-Pill" or vitamin E will restore, maintain, enhance or rejuvenate sexual potency or sexual drives.

U. Any food, drug or device, other than "E-Pill" or vitamin E,

will restore, enhance or rejuvenate sexual potency or sexual drives, unless respondents can establish such is the fact.

2. With the exception of respondents Advertising Unlimited of America, Inc. (a corporation trading and doing business as Normond Linder & Associates) and Normond Linder (individually and as an officer of corporate respondent Advertising Unlimited of America, Inc.), but only to the extent that they act in the capacity of an advertising agent—making any statement or representation, directly or by implication, in, affecting, or having an effect upon commerce, as “commerce” is defined in the Federal Trade Commission Act, as amended, concerning the safety, performance or effectiveness of any skin cream, oil, or lotion; any physical-appearance-improvement device; any diet plan, dietary or vitamin supplement or other purported weight-control, weight-reducing, or body-size-reducing product; or any food, drug, cosmetic or device; unless

A. The statement or representation is substantiated by controlled scientific tests, conducted by recognized experts on behalf of respondents or others, with these tests relied upon by respondents at the time said statement or representation is made; and

B. The results and methodology of the tests required by provision I.2.A., together with the original data collected, are maintained by respondents for so long as material containing said statement or representation is disseminated or approved for dissemination, or said statement or representation is made by respondents, and for a further period of three (3) years after respondents’ last dissemination of such material, termination of approval of dissemination of such material, or last such statement, whichever period is longest; and

C. The records described in provision I.2.B. are so organized as to refer to the said statement or representation and may be inspected by Commission staff members upon reasonable notice.

3. Excluding respondents Vital-E, Milton Kalman and Sharon Kalman, as these respondents are described in the main preamble, but including, to the extent that they act in the capacity of an advertising agent, respondents Advertising Unlimited of America, Inc. (a corporation trading and doing business as Normond Linder & Associates) and Normond Linder (individually and as an officer of corporate respondent Advertising Unlimited of America, Inc.)

A. Making any statement or representation, directly or by implication, in, affecting, or having an effect upon commerce, as “commerce” is defined in the Federal Trade Commission Act, as amended, concerning the safety, performance or effectiveness of any skin cream, oil or lotion; any physical-appearance-improvement

device; any diet plan, dietary or vitamin supplement, or other purported weight-control, weight-reducing, or body-size-reducing product; or any food, drug, cosmetic or device; unless there exists competent and reliable scientific or medical evidence to provide a reasonable basis for such statement or representation upon which respondents relied at the time such statement or representation was made.

B. Failing to keep adequate records which may be inspected by Commission staff members upon reasonable notice:

(i) which provided the basis upon which respondents relied at the time the statement or representation as described in provision I.3.A. was made; and

(ii) which shall be maintained by respondents for so long as material containing said statement or representation is disseminated or approved for dissemination, or said statement or representation is made by respondents, and for a further period of three (3) years after respondents' last dissemination of such material, termination of approval of dissemination of such material, or last such statement, whichever period is longest.

4. With the exception of respondents Advertising Unlimited of America, Inc. (a corporation trading and doing business as Normond Linder & Associates) and Normond Linder (individually and as an officer of corporate respondent Advertising Unlimited of America, Inc.), but only to the extent that they act in the capacity of an advertising agent—misrepresenting by any means or in any manner in, affecting, or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, the quality, merits, or result of use of any food, drug, cosmetic or device, or advertising, offering for sale, selling or distributing the said product or products with the effect, purpose or intent to deceive, to mislead, or to make any false or unsubstantiated claim concerning the quality, the merits, or the result of the use of the said product or products.

5. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any skin cream, oil or lotion, weight-reduction or body-size-reduction device, physical-appearance-improvement device, diet plan, dietary or vitamin supplement, or any food, drug, cosmetic, or device, in, affecting, or having an effect upon commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, any advertisement which contains any representations prohibited in provisions I.1., 2., 3., and 4. hereto.

## II.

*It is further ordered.* That respondents Vital-E, a corporation trading and doing business under its own name and as Mail Order Services; and Advertising Unlimited of America, Inc., a corporation trading and doing business as Normond Linder & Associates; and Milton Kalman, individually and as an officer of corporate respondent Vital-E; and Sharon Kalman, also known as Sharon Fernandez and as Sharon Hoffman, individually and as an officer of corporate respondent Vital-E; and Normond Linder, individually and as an officer or former officer of corporate respondent Vital-E and as an officer of corporate respondent Advertising Unlimited of America, Inc.; and each of the respondents, their successors and assigns, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of art prints, order blank forms for reserving the right to purchase lottery tickets or to enter a lottery or lotteries, or any other product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing, directly or by implication, that any businesses or enterprises are government agencies or entities, or that any businesses, enterprises, or products are supported, sponsored, endorsed by or affiliated with any government agency or entity, or are supported, sponsored, endorsed by or affiliated with any government officers, agents, representatives or employees in their official capacities, unless respondents can establish such is the fact.
2. With the exception of respondent Advertising Unlimited of America, Inc., a corporation trading and doing business as Normond Linder & Associates, misrepresenting in any manner the nature or scope of respondents' business operations or the source of any product.
3. Advertising for the sale of order blank forms to be used for reserving the right to purchase lottery tickets or to enter a lottery or lotteries without clearly and conspicuously stating therewith that the purchaser is not entering a lottery or lotteries.

## III.

*It is further ordered.* That for a period of ten (10) years from the effective date of this order the individual respondents named herein shall promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new

business or employment engaged, during the time of such employment or affiliation, in the advertising, offering for sale, sale, or distribution of diet plans; dietary and vitamin tablets; products to be applied to skin; physical-appearance-improvement devices; weight-reducing or body-size-reducing devices; foods; drugs; cosmetics; devices; art prints; or order blank forms to be used for reserving the right to purchase lottery tickets or to enter a lottery or lotteries.

*It is further ordered,* That for a period of ten (10) years from the effective date of this order the individual respondents named herein shall promptly notify the Commission of their acquisition, directly or indirectly, of 10% or more of the beneficial ownership of voting stock in any corporation, or of their disposition of such stock, whenever such disposition results in their beneficial ownership decreasing below 10%; *provided, however,* this provision shall be limited to corporations engaging or which have been engaged in the advertising, offering for sale, sale, or distribution of diet plans; dietary and vitamin tablets; products to be applied to skin; physical-appearance-improvement devices; weight-reducing or body-size-reducing devices; foods; drugs; cosmetics; devices; art prints; or order blank forms to be used for reserving the right to purchase lottery tickets or to enter a lottery or lotteries.

*It is further ordered,* That respondents, including respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, for a period of three (3) years from the effective date of this order, upon the submission of an advertisement for publication or broadcasting, shall furnish each newspaper, periodical, or other advertising medium with a written statement indicating for which respondents, as respondents are named in this order, the advertisement was created, prepared, disseminated or caused to be disseminated; *provided, however,* this provision shall be limited to the submission of advertisements pertaining to the advertising, offering for sale, sale, or distribution of diet plans; dietary and vitamin tablets; products to be applied to skin; physical-appearance-improvement devices; weight-reducing or body-size-reducing devices; foods; drugs; cosmetics; devices; art prints; or order blank forms to be used for reserving the right to purchase lottery tickets or to enter a lottery or lotteries.

*It is further ordered,* That respondents, including respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, for a period of three (3) years following an advertisement's last dissemination, shall retain and make available for inspection by Commission staff members upon reasonable notice any advertisement which respon-

dents created, prepared, disseminated or caused to be disseminated, as well as those records indicating the media, by name and address, and date of each dissemination of said advertisement; *provided, however,* this provision shall be limited to advertisements pertaining to the advertising, offering for sale, sale or distribution of diet plans; dietary and vitamin tablets; products to be applied to skin; physical-appearance-improvement devices; weight-reducing or body-size-reducing devices; foods; drugs; cosmetics; devices; art prints; or order blank forms to be used for reserving the right to purchase lottery tickets or to enter a lottery or lotteries.

*It is further ordered,* That respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions engaged in advertising or in mail order sales.

*It is further ordered,* That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a written report setting forth in detail the manner and form in which they have complied with 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, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.



## Complaint

## IN THE MATTER OF

## ALDENS, INC.

CONSENT ORDER, ECT., IN REGARD TO ALLEGED VIOLATION OF  
THE FEDERAL TRADE COMMISSION, EQUAL CREDIT OPPORTUNITY  
AND FAIR CREDIT REPORTING ACTS

*Docket C-2940. Complaint, Nov. 30, 1978 — Decision, Nov. 30, 1978*

This consent order requires a Chicago, Ill. mail order house to cease discriminating against credit applicants on basis of sex or marital status, and to cease failing to timely provide rejected applicants with the reasons for such adverse action. Further, when denial of credit is based on consumer credit reports, the firm is required to furnish affected parties with the names and addresses of reporting companies.

*Appearances*

For the Commission: *C. Lee Peeler and Sally Gold.*

For the respondent: *Lawrence F. Henneberger and Christopher Smith, Arent, Fox, Kintner, Plotkin & Kahn, Chicago, Ill.*

## COMPLAINT

Pursuant to the provisions of the Equal Credit Opportunity Act, as amended, its implementing regulation, Regulation B, the Fair Credit Reporting Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by such Acts, the Federal Trade Commission, having reason to believe that Aldens, Inc., a corporation, has violated the provisions of said Acts and regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. For the purposes of this complaint the following definitions are applicable:

1. The terms "account," "applicant," "application," "contractually liable," "credit," "creditor," "credit transaction," "discriminate against an applicant because of sex or marital status," "marital status" and "open-end credit" shall be defined as provided in Section 202.3 of Regulation B (12 C.F.R. 202.3 (1976)).
2. The terms "consumer report" and "consumer reporting agency" shall have the same meaning as provided in Sections 603(d) and 603(f), respectively, of the Fair Credit Reporting Act (15 U.S.C. 1681, 1681a(d) and (f)(1970)).
3. "Joint account" shall mean an account where the nonapplicant spouse will be contractually liable or will be an authorized user

on the account or where the applicant has relied on the spouse's income or on community property to support the extension of credit. "Separate account" shall mean an account where the nonapplicant spouse will neither be contractually liable nor an authorized user on the account and where the applicant does not rely on the spouse's income or on community property to support the extension of credit.

4. "Regulation B" shall refer to that version of Regulation B (12 C.F.R. 202) in effect from October 28, 1975 through March 22, 1977. "Amended Regulation B" shall refer to that version of Regulation B in effect on or after March 23, 1977.

PAR. 2. Respondent Aldens, Inc. (hereinafter referred to as "Aldens" or "respondent") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois with its principal office and place of business located at 5000 West Roosevelt Road, Chicago, Illinois.

PAR. 3. Respondent is engaged in the direct mail sale of consumer products in interstate commerce. In the regular course of its business, respondent finances the sale of its products by extending credit to its customers through the use of its open end credit plan (Aldens Charge Account).

#### COUNT I

Alleging violations of the Equal Credit Opportunity Act, the allegations of Paragraphs One, Two and Three heretofore are incorporated by reference into Count I as if fully set forth verbatim.

PAR. 4. As part of its procedures for evaluating applicants for Aldens Charge Accounts, respondent has formulated written instructions to its employees which set forth the criteria to be applied in selecting applicants to be granted credit. Subsequent to October 28, 1975 and pursuant to respondent's written instructions concerning the evaluation of occupational categories, respondent has automatically rejected applications from "waitresses" without any further evaluation of the applicants' qualifications. During the same period, respondent has not automatically rejected applications from "waiters" but has proceeded to evaluate such applications on the basis of the applicants' qualification.

PAR. 5. By and through use of the practices described in Paragraph Four, above, respondent has discriminated against female applicants for credit on the basis of sex. Therefore, respondent has violated Sections 205.5(f) and 202.2 of Regulation B.

PAR. 6. In a substantial number of instances subsequent to November 20, 1975 pursuant to respondent's initial screening process, respondent has automatically rejected applicants for credit

whose source of income is child support without evaluating the applicants' other qualifications.

PAR. 7. By and through the practice described in Paragraph Six, above, respondent has failed to consider child support payments as income to the extent that such payments are likely to be consistently made. Therefore, respondent has violated Sections 202.5(d)(2) and 202.2 of Regulation B.

PAR. 8. Subsequent to June 30, 1976, in the ordinary course of business, respondent has required persons who wish to obtain an Aldens Charge Account to fill out an Aldens Charge Application form. (A typical example of respondent's "Aldens Charge Application" is attached hereto as Exhibit A.) The Aldens Charge Application may be used, inter alia, by a married person to apply for a separate account or to apply for a joint account.

With respect to applications for both separate and joint accounts, the Aldens Charge Application instructs the applicant to disclose the "spouse's first name." In a substantial number of instances subsequent to June 30, 1976, married applicants who applied for separate accounts have disclosed the first name of their spouse pursuant to respondent's instructions.

PAR. 9. In a substantial number of instances subsequent to October 28, 1975, respondent has ordered and evaluated consumer reports on the spouses of married female applicants for separate accounts but has not ordered and evaluated consumer reports on the applicants. In a substantial number of these instances, respondent has denied the applications on the basis of information from a consumer report on the applicant spouse. Respondent does not, in the normal course of business, order consumer reports on the spouses of married male applicants for separate accounts.

PAR. 10. By and through the practices described in Paragraphs Eight and Nine, above, respondent has requested subsequent to June 30, 1976, information about the spouse of an applicant where the applicant was not relying on income, alimony, child support or separate maintenance payments from a spouse or former spouse or on community property to support the extension of credit and where the spouse would neither be contractually liable on the account nor an authorized user on the account. Therefore, respondent has violated Section 202.5(b)(3) of Regulation B.

PAR. 11. By and through the practices described in Paragraph Eight, above, respondent has asked the applicant's marital status where the applicant has applied for an unsecured separate account in a non-community property state except as required to comply with state law governing permissible finance charges or loan

ceilings. Therefore, respondent has violated Section 202.4(c)(1) of Regulation B.

PAR. 12. By and through the practices described in Paragraph Nine, above, respondent has used information requirements and investigatory procedures which have the effect of discriminating against married females who apply for separate accounts. Therefore, respondent has violated Section 202.2 of Regulation B.

PAR. 13. In the ordinary course of its business subsequent to October 28, 1975, respondent has ordered and considered in connection with the evaluation of Aldens Charge Applications consumer reports from "Credit Index," a subsidiary of Hooper-Homes Bureau, Inc., which consist of adverse credit information concerning persons residing at the applicant's address who have the same last name as the applicant. Pursuant to respondent's written instructions, respondent has rejected applications for separate credit where a Credit Index report contains adverse information on any person who has the same last name as the applicant at the applicant's address.

PAR. 14. By and through the practices described in Paragraph Thirteen, above, respondent has imposed information requirements and investigatory procedures which have the effect of discriminating against married applicants. Therefore, respondent has discriminated against married applicants in violation of Section 202.2 of Regulation B.

PAR. 15. Subsequent to November 30, 1975, in the ordinary course of business respondent has refused to extend joint accounts to married couples where the wife uses her birth given surname or a combined surname rather than her husband's surname.

PAR. 16. By and through the practices described in Paragraph Fifteen, above, respondent has prohibited female applicants from opening or maintaining an account in a birth given first name and surname or a birth given first name and a combined surname. Therefore, respondent has violated Section 202.4(e) of Regulation B.

PAR. 17. Subsequent to November 30, 1975, in the ordinary course of business respondent has refused to extend joint accounts to creditworthy unmarried persons on the basis of marital status.

PAR. 18. By and through the practices described in Paragraph Seventeen, above, respondent has discriminated against applicants on the basis of marital status. Therefore, respondent has violated Section 202.2 of Regulation B.

PAR. 19. In the ordinary course of its business, subsequent to November 20, 1976, respondent has failed to retain for fifteen months after the date respondent notified the applicant of action

taken on an application, the following written or recorded information used by respondent in evaluating applications for credit: (1) written consumer reports received from consumer reporting agencies, (2) worksheets on which information given orally by a consumer reporting agency concerning an applicant's credit history was recorded by respondent's employees, (3) worksheets on which information concerning the applicant derived from telephone calls to various natural persons, corporations and partnerships was recorded by respondent's employees and (4) written documents on which the points assigned to applicants' answers to various items on the Aldens Charge Application by respondent's point scoring system were recorded by respondent's employees.

PAR. 20. By and through the practices described in Paragraph Nineteen above, respondent has failed to retain as to each applicant all written and recorded information used in evaluating the applicant for the period ending fifteen months after the date respondent gave the applicant notice of action on the application. Therefore, respondent has violated Section 202.9 of Regulation B.

PAR. 21. Subsequent to January 31, 1976, a substantial number of applicants for Aldens Charge Accounts failed to satisfy respondent's standards of creditworthiness and were informed that credit was denied by means of one of respondent's form rejection letters "2102", "2103" or "2104" (see Exhibits B, C and D) stamped with the following statement:

YOUR FILE NO. \_\_\_\_\_

IF YOU HAVE ANY QUESTIONS CONCERNING OUR DECISION PLEASE RETURN THIS LETTER AND YOUR ORDER, OR REFER TO YOUR FILE NUMBER.

PAR. 22. In a substantial number of instances subsequent to January 30, 1976 Aldens responded to applicants' requests for the reasons for denial which were accompanied by the reference number, by advising such applicants that it could not provide the reason for the denial by means of the "CLTD" letter (see Exhibit E), set forth in relevant part below:

Your letter was referred to me for personal attention. We are unable to determine the exact reason your application was not approved. Records are kept by us to facilitate answering letters by our customers, but unfortunately we cannot locate any information regarding your recent application.

In fact, respondent was capable of locating the application and furnishing the reason for denial.

PAR. 23. In a substantial number of instances subsequent to January 30, 1976, when an applicant asked respondent for the

reasons for denial, respondent obtained a consumer report on the applicant.

In some instances respondent approved the application after evaluating the consumer report. In such cases, respondent did not provide the applicant with the reasons for the initial denial.

In other instances, where positive information in the consumer report did not justify reevaluation of the decision to deny the application, respondent advised the applicant by means of a "CBY", "CBX" or "CBRM" letter (see Exhibits F, G and H), set forth in relevant part below, that:

We regret very much we were unable to open a credit account for you . . . . This decision was based upon information contained in a Consumer Credit Report we requested from . . . .

In fact, respondent's initial decision to deny such applications was not based upon information derived from a consumer credit report from the consumer reporting agency named by respondent, but was based on the applicant's failure to meet respondent's initial screening requirements or on the applicant's failure to achieve a minimum qualifying score under respondent's point scoring system.

PAR. 24. On and after January 31, 1976 respondent refused to provide the reasons for a denial of an application upon the oral request of its applicants.

PAR. 25 By and through the practices described in Paragraphs Twenty-Two, Twenty-Three and Twenty-Four respondent has failed to establish and maintain suitable procedures to provide each applicant who is denied credit or whose account is terminated the reasons for denial, upon the request of the applicant. Therefore, respondent has violated Section 202.5(m)(2) of Regulation B.

PAR. 26. Pursuant to Section 702(g) of the Equal Credit Opportunity Act, respondent's aforesaid failures to comply with Regulation B as alleged in Paragraphs Five, Seven, Ten, Eleven, Twelve, Fourteen, Sixteen, Eighteen, Twenty and Twenty-Five above, constitute violations of that Act and pursuant to Section 704(c) thereof, respondent has violated Section 5(a)(1) of the Federal Trade Commission Act.

#### COUNT II

Alleging violations of the Fair Credit Reporting Act, the allegations of Paragraphs One, Two and Three heretofore are incorporated by reference into Count II as if fully set forth verbatim.

PAR. 27. Respondent in the ordinary course and conduct of its business, obtains consumer reports from consumer reporting agen-

cies. Respondent uses in whole or in part information contained in these consumer reports to deny applications for Aldens Charge Accounts.

PAR. 28. In a substantial number of instances subsequent to April 25, 1971 respondent has rejected applications for Aldens Charge Accounts based in whole or in part on information concerning the individual applicant, or other individuals at the same address with the same or similar last names, or other individuals at the same address but with different last names, obtained from consumer reports from the "Credit Index," a subsidiary of Hooper-Holmes Bureau, Inc. which is a consumer reporting agency defined by Section 603(f) of the Fair Credit Reporting Act. In other instances, respondent has rejected applicants based in whole or in part on information contained in a consumer report obtained from consumer reporting agencies other than Credit Index which varied, contradicted or failed to confirm information on the face of an application. In other instances, respondent has rejected such applications based in whole or in part on the fact that the consumer report obtained from consumer reporting agencies other than Credit Index failed to provide sufficient information regarding the applicant's creditworthiness.

In each of the instances described above, respondent notified applicants of the rejection of their application by means of either the "2102", "2103" or "2104" form rejection letters (see Exhibits B, C and D). Each of these letters provides in relevant part as follows:

We certainly appreciate . . .

Your desire to open an Aldens Credit Account and wish it were possible to do this for you at this time. Your application was reviewed and at the present time we are unable to open an account for you. Our decision was according to our usual policies and was based solely on the information you supplied to us.

PAR. 29. By and through the use of the practices described in Paragraph Twenty-Eight, above, respondent has denied consumer credit for personal, family or household purposes based in whole or in part on information contained in a consumer report without so advising the consumer and without supplying the name and address of the consumer reporting agency making the report. Therefore, respondent has violated the provisions of Section 615(a) of the Fair Credit Reporting Act.

Complaint

PLEASE DETACH AND RETAIN THIS NOTICE FOR YOUR FILES

The Federal Trade Commission... customer without regard to sex or marital status... which administers compliance with this law... the Federal Trade Commission, Washington, D.C. 20542.

OPENING NEW ALDENS CHARGE ACCOUNT (easy monthly payments or 30 day charge). ONLY ON CREDIT. SEE CREDIT TERMS ON PAGE 446. (1) Complete Charge Application below and sign - (2) Forward to reverse side. (3) Use Order Form below to place your first charge order for \$10 or more. \*We can not open an account without a minimum first charge order of \$10 or more.

PLEASE PRINT CLEARLY AND SIGN BELOW. Account holder's name, address, telephone number, spouse's information, and payment preferences.

IF YOU ARE... If you have paid-up your account within the past 6 months, please check this box. If you are now paying on an Aldens Charge Account, please check this box.

Table with columns: QTY, PRICE, TOTAL PRICE. Includes a section for 'TO NOT WRITE IN THIS SPACE' with shipping and handling information.

EXHIBIT A Aldens Charge Application



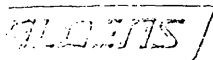


901

## Complaint

EXHIBIT B

"2102 Letter"



5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60607

We certainly appreciate . . .

your desire to open an Aldens Credit Account and wish it were possible to do this for you at this time.

Your application for credit was reviewed and at the present time we are unable to open an account for you. Our decision was according to our usual policies, and was based solely on information you supplied to us.

Since you undoubtedly want some or all of the merchandise you selected, why not send us a cash order . . . as many of our customers do . . . for everything you need now. This will enable you to take advantage of the excellent values you selected.

Thanks again for thinking of Aldens.

ALDENS, INC.

*Charles Arthur*

CHARLES ARTHUR  
New Account Manager

2102 ABP  
CA:TDA  
enc: c.o.

YOUR FILE NO. \_\_\_\_\_

If you have any questions concerning our decision, please return this letter and your order, or refer to your file number.

Complaint

92 F.T.C.

EXHIBIT C

"2103 Letter"

We certainly appreciate . . .

your desire to open an Aldens credit account and wish it were possible to do this for you at this time.

Your application for credit has been reviewed and at the present time we may not open an account for you. Our decision was according to our usual policies, and was based solely on information you supplied to us.

Meanwhile, you undoubtedly want some or all of the merchandise you selected. Why not send us a cash or C.O.D. order (25% down payment required on C.O.D. orders). . . as so many of our customers do . . . for everything you need now. This will enable you to take advantage of the excellent values you selected.

Thanks again for thinking of Aldens.

ALDENS, INC.

*Charles Arthur*

CHARLES ARTHUR  
New Account Manager

2103

CA:TD

Enc: C.O.

YOUR FILE NO. \_\_\_\_\_

If you have any questions concerning our decision, please return this letter and your order, or refer to your file number.

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

## Complaint

2104 BP

555 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60607

EXHIBIT D  
"2104 Letter"

We certainly appreciate . . .

your desire to open an Aldens credit account and wish it were possible to do this for you at this time.

Your application for credit has been reviewed and at the present time we may not open an account for you. Our decision was according to our usual policies, and was based solely on information you supplied to us.

Since we are unable to open an account for you and you undoubtedly want some or all of the merchandise you selected, we will accept a cash or a C.O.D. order (25% down payment required on C.O.D.) for everything you need now. This will enable you to take advantage of the excellent values you selected.

Thanks again for thinking of Aldens.

ALDENS, INC.

*Charles Arthur*

CHARLES ARTHUR  
New Account Manager

2104 BP

CA:TDA  
ENC: c.o.

YOUR FILE NO. \_\_\_\_\_

If you have any questions concerning our decision, please return this letter and your order, or refer to your file number.

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

## Complaint

92 F.T.C.

EXHIBIT E  
"CLEO Letter"

Your recent letter was referred to me for personal attention.

We are unable to determine the exact reason why your application was not approved. Records are kept by us to facilitate answering letters from our customers, but unfortunately, we cannot locate any information regarding your recent application.

Therefore, won't you please fill out the enclosed application, including your order and return it to us in the postage free envelope enclosed. It will be a real pleasure to process your application and order. Notification will be sent promptly with regard to disposition of your request for an account.

We would like to thank you for bringing this matter to our attention and are awaiting your reply.

ALDENS, INC.

*Charles Arthur*  
CHARLES ARTHUR  
New Account Manager

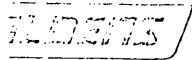
CA:CT  
CLTD

ENC: Application  
BRE

P.S. Please return this letter with your original order and application.

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT F  
"CEX Letter"



5050 WEST ROOSEVELT ROAD : CHICAGO, ILLINOIS 60647

We regret very much that we were unable to open a Credit Account for you with the enclosed order.

This decision was based upon information contained in a Consumer Credit Report we requested from:

Meanwhile, as you undoubtedly want some or all of the merchandise you selected, why not send us a cash order as so many of our customers do. This will still enable you to take advantage of our excellent values.

Your interest in Aldens is sincerely appreciated and we hope to serve you in the near future.

ALDENS, INC.

*Charles Arthur*

CHARLES ARTHUR  
New Account Manager

FILE NO. \_\_\_\_\_

CA:CEX  
ESC:CLO.  
2170  
R 90  
W 911

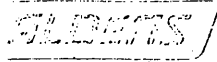
MEMBER OF THE INTERNATIONAL ASSOCIATION OF BUSINESS

Complaint

92 F.T.C.

EXHIBIT C

"CBY Letter"



5000 WEST ROOSEVELT ROAD CHICAGO, ILLINOIS 60647

We regret very much that we were unable to open a Credit Account for you with the enclosed order.

This decision was based upon information contained in a Consumer Credit Report we requested from the Western Cook County Credit Bureau - AEC, P.O. Box 2121, Oak Park, Illinois. They obtained the report from:

Meanwhile, as you undoubtedly want some or all of the merchandise you selected, why not send us a cash order as so many of our customers do. This will still enable you to take advantage of our excellent values.

Your interest in Aldens is sincerely appreciated and we hope to serve you in the near future.

ALDENS, INC.

CHARLES ARTHUR  
New Account Manager

IN FILE NO. \_\_\_\_\_

CALL BY  
OR HAVE ANY QUESTIONS  
CALL 616.6. 616. 616. 616.  
22716. 616. 616. 616.  
YOUR ORDER OR RETURN  
YOUR FILE NUMBER.

901

Complaint

## EXHIBIT E

## "CBRI Letter"

we regret very much  
 Credit Account for you with the enclosed order.

This decision was based upon information contained  
 in a Consumer Credit Report we requested from The  
 Western Cook County Credit Bureau - AMCO, P.O. Box  
 2121, Oak Park, Illinois. They obtained the report  
 from:

Meanwhile, as you undoubtedly want some or all of the  
 merchandise you selected, why not send us a cash or  
 C.O.D. order (25% down payment required on C.O.D.  
 orders) as so many of our customers do. This will  
 still enable you to take advantage of our excellent  
 values.

Your interest in Aldens is sincerely appreciated and  
 we hope to serve you in the near future.

ALDENS, INC.

*Charles Arthur*

CHARLES ARTHUR  
 New Account Manager

CA:CERN

YOUR FILE NO. \_\_\_\_\_

ENC:C.O.

2119

If you have any questions concerning our  
 decision, please return this letter and  
 your order, or refer to your file number.

## DECISION AND ORDER

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

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the facts as alleged in the complaint are true or that any law has been violated, 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its rules, now in further conformity with the procedures 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:

Proposed respondent Aldens, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 5000 West Roosevelt Road, Chicago, Illinois.

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

Definitions: For the purposes of this order the following definitions are applicable:

(a) "Regulation B" shall refer to that version of Regulation B (12 C.F.R. 202) of the Equal Credit Opportunity Act, 15 U.S.C. 1691-



1691e, as amended by Pub. Law No. 94-239, in effect on and after March 23, 1977.

(b) The terms "account," "applicant," "application," "contractually liable," "consumer credit," "creditor," "credit transaction," "discriminate against an applicant," "inadvertent error," "marital status" and "open end credit" shall be defined as provided by Section 202.2 of Regulation B.

(c) The terms "consumer report" and "consumer reporting agency" shall be defined as provided in Sections 603(d) and 603(f), respectively, of the Fair Credit Reporting Act (15 U.S.C. 1681a(d) and (f)(1970)).

#### ORDER I

*It is ordered,* That respondent Aldens, Inc., 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 every application for consumer credit do forthwith cease and desist from:

1. Discriminating against applicants for credit on the basis of sex or marital status with respect to any aspect of a credit transaction in violation of Section 202.4 of Regulation B.

2. Taking sex or marital status into account in a credit scoring system or other method of evaluating applications in violation of Section 202.6 (b)(1) of Regulation B.

3. Failing to consider child support payments, where disclosed by the applicant as income in evaluating applications, to the extent that such payments are likely to be consistently made, as required by Section 202.6(b)(5) of Regulation B.

4. Requesting, where the applicant applies for an unsecured separate account in a state other than a community property state, the name of the applicant's spouse in violation of Section 202.5(d)(1) of Regulation B.

5. Requesting or considering information concerning an applicant's spouse (or former spouse under (e) below) unless:

- (a) the spouse will be permitted to use the account; or
- (b) the spouse will be contractually liable upon the account; or
- (c) the applicant is relying in the spouse's income as a basis for repayment of the credit requested; or
- (d) the applicant resides in a community property state or property upon which an applicant is relying as a basis for repayment of the credit requested is located in such a state; or
- (e) the applicant is relying on alimony, child support or separate

maintenance payments from a spouse or former spouse as a basis of repayment of the credit requested,

in violation of Section 202.5 (c) of Regulation B.

6. Failing to preserve records including (1) written consumer reports received from consumer reporting agencies, (2) worksheets on which information given orally by a consumer reporting agency concerning the applicant's credit history was recorded by respondent's employees, (3) worksheets on which information concerning the applicant derived from telephone calls to various natural persons, corporations and partnerships was recorded by respondent's employees and (4) written documents on which the points assigned by respondent's point scoring system to applicant's answers to various items on the Aldens charge application were recorded by respondent's employees, as required by Section 202.12 of Regulation B.

7. Failing to provide applicants against whom adverse action is taken with a statement of specific reasons for the action taken, either at the time of notifying the applicant of such action or within 30 days of receiving an oral or written request for the reasons from the applicant within 60 days of notification of adverse action, as required by Section 202.9 of Regulation B.

(a) *Provided*, that if respondent cannot locate the applicant's file after good faith efforts because the applicant did not supply the file number assigned to that application, the respondent shall be deemed to be in compliance with the provisions of this paragraph only if it had clearly and conspicuously advised the applicant in the notification of adverse action of the file number and that the respondent will be unable to furnish the reason(s) for denial unless the applicant furnishes the file number with the request for reasons. Where respondent is unable to locate the applicant's file as a result of the applicant's failure to supply the file number with the request for reasons, the respondent shall so notify the applicant of that fact.

(b) Respondent shall not be deemed to have violated the requirements of this paragraph if it cannot locate the applicant's file after good faith efforts because of an inadvertent error; *provided*, that, (1) the respondent so notifies the applicant, and (2) upon discovering the error the respondent corrects it as soon as possible and commences compliance with this paragraph.

(c) *Provided further*, that where an application for credit is denied by respondent based on the failure of the applicant to obtain a sufficient number of points under a point scoring system, a

statement of the specific reasons for the action taken complies with this paragraph only if it includes:

(i) A brief explanation of respondent's point scoring system which informs the applicant that: (1) the system assigns a value to a number of different creditworthiness criteria taken from the face of the application or other sources, (2) the applicant's total score on all criteria determines whether respondent will grant or deny credit, and (3) the factor(s) disclosed are those which most significantly affected the respondent's decision (an example of an explanation that complies with this subparagraph is set forth in Appendix A; an explanation which is substantially similar to Appendix A will be considered to be in compliance with the provisions of this subparagraph to the extent to which it accurately describes respondent's scoring system); and

(ii) the criteria, not fewer than four (4), in respondent's point scoring system which most significantly affected respondent's adverse decision, except that (1) disclosure of a single criterion complies with this paragraph if that criterion would cause an adverse decision were the applicant to achieve a maximum rating on the other criteria used in evaluating applicants, and (2) respondent shall not disclose a criterion on which the applicant scored the maximum number of points even if this results in the disclosure of fewer than four criteria. For the purpose of this paragraph (7) the term "criterion" means any item of information to which the respondent assigns points, for example, "length of employment" and "no telephone at residence." The most significant criteria are to be determined by selecting the criteria which produced the greatest differential between the applicant's score and the maximum number of points obtainable for each criterion. Respondent shall not be deemed to have violated the requirements of this paragraph if it does not list the criteria which most significantly affected respondent's adverse decision because of an inadvertent error.

(d) Respondent shall notify the Commission if within ten (10) years from the effective date of this order it changes the credit scoring system in use at the time of execution of this order in a manner which would materially affect the accuracy of the reasons provided under subparagraph 7(c)(ii); *provided*, that any changes in respondent's credit scoring system (*e.g.*, addition or deletion of specific criteria, increase or reduction of the points assigned to specific criteria) which are made in good faith to adjust respondent's bad debt losses, to reduce respondent's operating expenses, or to increase the availability of credit shall be presumed not to materially affect the accuracy of reasons given under subparagraph 7(c)(ii).

(e) *Provided further*, that subsequent approval of an application which respondent initially denied shall not relieve respondent of its obligation to provide the statement of specific reasons for the initial denial as required by Section 202.9 of Regulation B and this paragraph.

8. Failing to provide a statement of the reason(s) for denial as set forth in Paragraph 7, above, to all applicants who were denied credit and requested the reason(s) for denial during the period January 31, 1976 through March 22, 1977.

(a) *Provided*, that if respondent subsequently opened an account for any applicant who was denied credit and requested the reason(s) for denial during the period from January 31, 1976 through March 22, 1977, respondent shall not be required to furnish such applicants the reason(s) for denial provided for in this paragraph if the applicant expressly accepted the account through acceptance of merchandise ordered on the account or submission of subsequent orders for merchandise.

9. Failing to review the applications of all persons employed as waitresses who were denied credit during the period October 28, 1975, through March 22, 1977, and send such applicants by first-class mail a notice in the language and form shown in Appendix B, which shall contain as an enclosure a current Aldens Charge Application. Respondent shall review the charge applications which are mailed to the company in response to the notice letter (Appendix B) according to the credit granting standards in effect at the time that the charge application is received and in effect on August 1, 1976, except that no less than two (2) points shall be awarded for occupation. Respondent shall open accounts for those applicants who qualify under either set of credit granting standards. If the applicant qualifies under both standards, the applicant shall be granted the higher of the two credit limits. Respondent shall send each such applicant a notification of action taken as required by Section 202.9 of Regulation B and a notification of the amount of the credit limit, if any, established on the account.

## ORDER II

*It is further ordered*, That respondent, Aldens, Inc., 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 application for credit that is primarily for personal, family or household purposes, and in connection with either the receipt or consideration of any consumer report, do forthwith cease and desist from:

1. Failing whenever credit for personal, family or household purposes involving the consumer is denied either wholly or partly because of information contained in a consumer report from a consumer reporting agency, to so advise the consumer against whom such adverse action has been taken and to supply the name and address of the consumer reporting agency making the report as required by section 615(a) of the Fair Credit Reporting Act.

(a) *Provided*, that respondent shall not be liable for a civil penalty for any violation of this paragraph if:

(i) respondent shows by a preponderance of the evidence that the violation was caused by inadvertent error; and

(ii) upon discovery of the violation the respondent corrects it as soon as possible by sending the notice required by this section to the consumer.

2. Failing to advise each applicant who was denied credit for personal, family or household purposes involving the consumer based in whole or in part on information contained in a consumer report from a consumer reporting agency, for a period of three (3) years prior to the date of execution of this order, of such action and to supply the name and address of the consumer reporting agency making the report as required by section 615(a) of the Fair Credit Reporting Act.

(a) *Provided*, that to the extent that respondent's records reflect that the notice required by section 615(a) of the Fair Credit Reporting Act was previously given to the applicant respondent shall be deemed in compliance with the provision as to such applicants.

(b) *Provided further*, that where the applicant was denied credit on the basis of a "Credit Index" report, respondent shall also advise the applicant that the information used may have concerned items of adverse information relating not to the applicant but to individuals residing at the applicant's address.

*It is further ordered*, That respondent shall preserve evidence of compliance with the requirements imposed under this order for a period of not less than 25 months after respondent notifies each applicant of the reasons for denial pursuant to Paragraph 8 of Order I, above, the action taken on applications for new accounts pursuant to Paragraph 9 of Order I, above, and the name and address of any consumer reporting agency pursuant to Paragraph 2 of Order II, above. Respondent shall upon request permit the Commission through its duly authorized representatives to inspect such records.

*It is further ordered*, That respondent shall deliver a copy of this order to cease and desist to all present and future supervisory

employees engaged in reviewing, evaluating or otherwise processing applications for credit.

*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, arrangement or sale resulting in the emergence of successor 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 respondent shall within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Respondent shall also within one-hundred twenty (120) days after service upon it of this order file with the Commission a supplemental written report setting forth in detail the manner and form in which it has complied with Paragraph 9 of Order I of this order.

#### APPENDIX A

In reviewing your application Aldens used a credit scoring system that is based on our experience with other applicants. This system assigns points to various items of information on your application [and, as applicable, other sources of the information scored, such as credit reports]. We scored the information which you supplied in your application [or, as applicable, other sources], totaled the points and found that you did not achieve the minimum score required for purchases in the amount requested by your order.

We have listed below the four factors which most significantly affected our decision to deny your application for credit.

#### APPENDIX B

Ms.  
[Street Address]  
[City, State]

Dear Ms. \_\_\_\_\_:

We regret that due to an oversight in our initial evaluation of your recent application for credit, we were unable to open an account for you. Aldens has now modified its credit granting standards and would appreciate the opportunity to review your application for credit again.

Should you desire to open an Aldens Credit Account, please complete and send us the enclosed charge application. We'll evaluate your application and notify you of our decision as soon as possible.

Thank you for considering Aldens.

ALDENS, INC.

CHARLES ARTHUR  
New Account Manager

Complaint

92 F.T.C.

## IN THE MATTER OF

SAMUEL E. WOMACK, ET AL. T/A NURSERY BARN,  
ETC.

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

*Docket C-2939. Complaint, Dec. 1, 1978 — Decision, Dec. 1, 1978*

This consent order, among other things, requires three McMinnville, Tenn. firms engaged in the advertising and mail order sale of viable trees and nursery stock, to cease misrepresenting or making unsubstantiated claims regarding the growth, survival and maturity of their stock; or the existence of government standards and inspections for such products. They are required to make specified disclosures in future advertising; include all conditions and qualifications attached to advertised guarantees; enclose a copy of such guarantee with each purchase; fulfill obligations under those guarantees promptly; and make full refunds to customers whose orders have not been shipped in time for the planting cycle. The order additionally requires the companies to make proper restitution to eligible customers from July 1, 1975, whose orders had never been sent or had failed to survive shipment.

*Appearances*

For the Commission: *Ronald C. Cougill.*

For the respondents: *Jack Paller, McMinnville, Tenn.*

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 S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), Morrison Nursery Advertising Company, Inc., and individuals Samuel E. Womack, as an officer of S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), and James E. Savage, as an officer of Morrison Nursery Advertising Company, Inc., and Samuel E. Womack and James E. Savage further doing business as Nursery Barn, Savage Farms Nursery, McMinnville Tree Farm, American Nursery and Seed Company, and Morrison Nursery Company, have violated provisions of said Act, and 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. Corporate respondent S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), was a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office



and place of business located on Highway 55 in McMinnville, Tennessee and was engaged exclusively in the creation, preparation and placement of advertisements for the individual respondents doing business as herebelow recited and under the exclusive control and direction of the individual respondents.

Corporate respondent Womack Nursery Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located on Highway 55 in McMinnville, Tennessee, and is engaged in the sale and offering for sale of trees and nursery stock and is under the exclusive control and direction of individual respondent Samuel E. Womack. Womack Nursery Company, Inc. is a successor corporation to S.W. Advertising Company, Inc. and McMinnville Tree Farm.

Corporate respondent Morrison Nursery Advertising Company, Inc. was a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located on Highway 55 in McMinnville, Tennessee and was engaged exclusively in the creation, preparation and placement of advertisements for the individual respondents doing business as herebelow recited and under the exclusive control and direction of the individual respondents.

Individual respondent Samuel E. Womack at relevant times in the past has been an officer of corporate respondent S. W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.). Individual respondent Samuel E. Womack is currently an officer of corporate respondent Womack Nursery Company, Inc. Individual respondent James E. Savage at relevant times in the past has been an officer of corporate respondent Morrison Nursery Advertising Company, Inc. They formulated, directed and controlled the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. Their addresses are the same as the corporate respondents. Individual respondents are and have been engaged in the advertising, offering for sale, and mail order sales and shipment of nursery stock under the trade names of Nursery Barn, Savage Farms Nursery, McMinnville Tree Farm, American Nursery and Seed Company, and Morrison Nursery Company. All of the foregoing companies were located on Highway 55 in McMinnville, Tennessee.

PAR. 2. In the course and conduct of their businesses, respondents disseminate and cause to be disseminated certain advertisements in newspapers and magazines of general and interstate circulation and by various electronic media broadcasts transmitted in several of the

States of the United States, and now cause and for some time last past have caused their products to be transmitted through the U.S. Mail and other interstate instrumentalities from their place of business in Tennessee to customers in various other states and have made substantial sales to purchasers in various other states, and maintain, and at relevant times in the past have maintained, a substantial course of trade in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 3. Typical and illustrative of the statements in said advertisements, but not all inclusive thereof, are the following:

Trees advertised in your area will grow in your area. It's guaranteed.

We will acknowledge all orders within the expected time for your order to arrive at the proper planting time in your area.

All orders will be acknowledged and shipped at the proper time.

The one tree experts agree will grow anywhere in the U.S.A.

Grows approximately 25-30 feet over a five year period.

Here is our ironclad 3 year guarantee: if by mere chance any of your trees fail to survive, all you have to do is return them to us and we will replace them absolutely free of charge for a three year period.

All items carry a COMPLETE SATISFACTION ON ARRIVAL GUARANTEE or we will REFUND or REPLACE any unsatisfactory item.

Here is our 2-way, ironclad guarantee:

1. If, upon arrival, you are not completely satisfied, then return for a full refund.
2. Free replacement, for any reason, up to three full years.

Each rose is verified by Gov't inspection to be a living plant. Each must bloom or it will be replaced free of charge.

3-way guarantee:

1. All shade trees regardless of number ordered will be 5 to 7 feet tall, and all bonus trees will be 4 to 6 feet. All shipping paid.
2. Trees advertised in your area will live in your area.
3. All trees are guaranteed to live and if by mere chance any fail to live, they will be replaced free of charge.

. . . beautiful shade tree . . . grows up to 5 and 6 feet a year. This 2 in 1 Scarlet Maple grows anywhere . . . It's guaranteed to grow . . . or money back.

Guarantee

We guarantee to any customer your organization sells to: Free replacement for 3

## Complaint

full years if by mere chance any of their trees fail to live. We will have their name in our records when your organization sends their order in.

PAR. 4. Through the use of such representations disseminated in print and electronic media in many of the several states, respondents have represented and now are representing directly or by implication that:

1. All trees and nursery stock advertised, offered for sale, or sold will grow and survive anywhere in the United States.
2. Trees such as Red Maple (*Acer rubrum*), Thornless Honey Locust (*Gleditsia triacanthos inermis*), and Weeping Willow (*Salix babylonica*) grow five to six feet per year and will be mature shade trees in five years.
3. Rosebushes shipped by respondents and received by the buyer are inspected by the government and verified through such inspection to be living plants and will bloom when planted.
4. A full and complete guaranty or warranty exists on ordered merchandise without condition or qualification.
5. Refund and replacement requests will be honored and the purchase price will be promptly refunded or a prompt replacement tendered.

PAR. 5. In truth and in fact:

1. Not all of the trees advertised are adaptable to the wide range of climatic conditions in the United States.
2. Red Maple (*Acer rubrum*), Thornless Honey Locust (*Gleditsia triacanthos inermis*) and Weeping Willow (*Salix babylonica*) trees do not average five to six feet of growth per year. In fact, under optimum conditions, the yearly growth rate for such trees is less than three feet.
3. Rosebushes are not inspected by the government to verify them to be living plants.
4. A full and complete unconditional guaranty or warranty does not exist. The buyer is obligated to return, at his own expense, the nursery stock for which a refund or replacement is requested.
5. Refund and replacement requests are not timely honored and payment of refunds in many instances is not made.

The statements and representations set forth in Paragraph Four were and are false, misleading and deceptive in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 6. In the course and conduct of their business, respondents have represented in advertisements, as hereinbefore described, the

existence of a "money back refund" and a replacement guaranty for two to three years, but have failed to:

1. Provide a copy of the guarantee or warranty with the shipment of trees and nursery stock. In many instances, purchasers are unable to exercise their rights under the offered guarantee or warranty due to lack of recollection of such terms which appeared in the advertisement some months prior to time of delivery of the ordered stock.

2. Adhere to the terms and provisions of the advertised guarantee or warranty. In certain instances, refund and replacement requests are not honored and performed by respondents and refunds and replacements are not made.

3. Disclose in a clear and conspicuous manner the necessary conditions precedent to obtaining a refund or replacement and the manner in which respondents will perform. In many cases, respondents have represented "free replacement" without disclosing in the same advertisement that return of the shipped nursery stock is an expense to the purchaser. Respondents' failure to disclose all conditions incident to and all expenses to be incurred by the purchaser is a failure to disclose material facts which, if known, would likely affect consumer decisions to purchase.

The aforesaid failures constitute unfair and deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 7. In the further course and conduct of their business and in furtherance of their marketing program, respondents in the advertising, offering for sale and mail order sales of nursery stock have engaged in the following additional unfair and deceptive acts and practices:

1. Conditioning a refund, replacement or other warranty offer to the time of product arrival. The average purchaser cannot determine the viability of dormant nursery stock and therefore is not likely to determine warranty coverage and to exercise the offered warranty provision.

2. In certain instances have labeled rosebushes incorrectly and such incorrect labeling is not discernible to the public under ordinary circumstances. Respondents do not employ and follow reasonable systems and procedures to assure the correct labeling of shipped rosebushes.

3. In certain instances have failed to ship the ordered trees and nursery stock to the purchaser within a reasonable time to insure

arrival for use in the planting and cultivation period nearest the date of the received order.

4. Have failed to provide purchasers with a notice of inability to effect timely shipment; that is, within the planting and cultivation period nearest the date of receipt of order.

5. Have failed to make prompt payment of refunds to purchasers when timely shipment is not made.

6. Have shipped and caused to be delivered trees and nursery stock which are not living or viable. As a result of having shipped or caused to be delivered trees and nursery stock which are not living or viable, respondents have failed to disclose in print and electronic media advertising information to enable the reader to realize that portions of mail order shipments of trees and nursery stock may contain trees and nursery stock which are dead or nonviable and will not survive. Such information is a material factor in the purchase decision and is material to determine the adequacy of any offered warranty.

Therefore, the acts and practices as set forth in Paragraph Seven hereof were and are unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 8. The use by respondents of the aforesaid unfair and false, misleading and deceptive statements, representations, acts and practices has the capacity and tendency to mislead members of the purchasing public into the mistaken belief that said statements and representations are true, and to induce such persons to purchase from respondents substantial quantities of advertised merchandise.

PAR. 9. In the course and conduct of the businesses, and at all times relevant herein, respondents are in substantial competition in commerce with corporations, partnerships, firms and individuals in the mail order and retail merchandising of nursery stock.

PAR. 10. The acts and practices of respondents as herein alleged, are all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair methods of competition 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 Atlanta 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;

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 to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Corporate respondent S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), was a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its principal office and place of business located on Highway 55, McMinnville, Tennessee and was engaged exclusively in the creation, preparation and placement of advertisements for the individual respondents doing business as herebelow recited and under the exclusive control and direction of the individual respondents.

Corporate respondent Womack Nursery Company, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located on Highway 55 in McMinnville, Tennessee, and is engaged in the sale and offering for sale of trees and nursery stock and is under the exclusive control and direction of individual respondent Samuel E. Womack. Womack Nursery Company, Inc. is a successor corporation to S.W. Advertising Company, Inc. and McMinnville Tree Farm.

Corporate respondent Morrison Nursery Advertising Company, Inc. was a corporation organized, existing and doing business under

and by virtue of the laws of the State of Tennessee with its principal office and place of business located on Highway 55, McMinnville, Tennessee and was engaged exclusively in the creation, preparation and placement of advertisements of the individual respondents doing business as herebelow recited and under the exclusive control and direction of the individual respondents.

Individual respondent Samuel E. Womack at relevant times in the past has been an officer of corporate respondent S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.). Individual respondent Samuel E. Womack is currently an officer of corporate respondent Womack Nursery Company, Inc. Individual respondent James E. Savage at relevant times in the past has been an officer of corporate respondent Morrison Nursery Advertising Company, Inc. They formulated, directed and controlled the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. Their addresses are the same as the corporate respondents. Individual respondents are and have been engaged in the advertising, offering for sale, and mail order sales and shipment of nursery stock under the trade names of Nursery Barn, Savage Farms Nursery, McMinnville Tree Farm, American Nursery and Seed Company, and Morrison Nursery Company. All of the foregoing companies were located on Highway 55 in McMinnville, Tennessee.

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

#### ORDER

*It is ordered*, That respondents, S.W. Advertising Company, Inc. (formerly Savage-Womack Advertising Company, Inc.), Morrison Nursery Advertising Company, Inc., and Womack Nursery Co., Inc., corporations, their successors and assigns, and their officers, and Samuel E. Womack and James E. Savage, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of trees, nursery stock or any other product in commerce, or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in writing, orally, visually or in any other manner, directly or by implication, that:

1. Advertised trees or nursery stock of any kind will grow and survive anywhere in the United States or in any specific geographic area of the United States unless respondents have a reasonable basis to conclude that such representation has a basis in fact and supported by reputable industry authority;

2. Trees, such as Red Maple (*Acer rubrum*), Thornless Honey Locust (*Gleditsia triacanthos intermis*), and Weeping Willow (*Salix babylonica*) or any other tree or nursery stock, under normal growing conditions, will grow five to six feet per year or at any other growth rate or will be mature shade trees or mature nursery stock in five years or in any other time period unless respondents have a reasonable basis to conclude that such representation has a basis in fact and is supported by reputable industry authority;

3. Rosebushes have been officially inspected for compliance with a government viability standard or that such a standard exists;

4. A prompt refund or replacement will be made unless respondents can establish the maintenance of business records sufficient to support a showing of compliance with all such representations; and

5. A full and complete guaranty or warranty without conditions or qualifications exists unless such is the fact.

B. Failing to include in each shipment of trees and nursery stock a written copy of any written guaranty or warranty advertised by respondents disclosing all terms and conditions, if any, and identity and address of guarantor.

C. Failing to promptly and fully perform all of their obligations under the terms of all warranties, whether express or implied.

D. Failing to disclose clearly and conspicuously in all advertisements representing a written guaranty or warranty, the manner in which respondents will perform and all the conditions, including the allocation of cost and expense, necessary for the prompt payment of a refund or replacement. Such disclosure shall be prominently displayed in close proximity to the representation of a guaranty or warranty and in all advertisements broadcast by radio or television, the above required disclosure shall be read at the end of the advertisement at a rate of speed at least as slow as the slowest part of the advertisement. Nothing in this order shall be construed to relieve respondents of their duty to comply with all present and future laws, regulations and rules dealing with warranties and guaranties.

E. Limiting any guaranty or offer to refund or replacement to the time of arrival of the ordered merchandise.

F. Mislabeling rosebushes and failing to employ and utilize



reasonable business systems and procedures to insure the correct labeling of the varieties of rosebushes shipped to the buyer.

G. Failing in each advertisement to disclose clearly and conspicuously the planting period appropriate for the geographic area in which the advertisement is published.

H. Failing to make shipment of viable trees and nursery stock for timely arrival; that is, in time for receipt during the current or next planting period appropriate for the geographic area in which the buyer orders shipment.

I. Failing to pay, without prior demand, and no later than twenty (20) days after the conclusion of the appropriate planting period for the ordered trees and nursery stock, a refund of all monies received from the buyer in the event timely shipment of viable trees and nursery stock is not made as referenced in Paragraph H. If partial orders are timely shipped, this paragraph shall require the refund of monies received only for the portion of the order not timely shipped.

J. Failing to include in all print (including but not limited to direct mail solicitations) and electronic media advertising wherein no express warranty or an express warranty offering other than a full refund of monies paid, is made the following verbatim notice: "WARNING: Due to the natural character of trees and nursery stock, mail order shipments may contain trees and nursery stock which are dead or non-viable and will not survive. Loss of a portion of any order of trees and nursery stock when ordered through the mail is not uncommon. Consult the warranty offered by any mail order nurseryman to determine the degree of protection afforded against such loss."

Said notice shall be prominently and conspicuously placed and in 10 point boldface print in proximity to such warranty and shall not be contradicted directly or by implication by any other statement in the advertisement.

*It is further ordered:*

A. That if respondents advertise at any time within two (2) years of the date this order becomes final in any newspaper, magazine or other printed media (exclusive of direct mail solicitations) or on radio, television or other electronic media, for the sale of trees and nursery stock, respondents shall place or cause to be placed, in a clear and conspicuous manner, in such media and in each print and electronic media where respondents advertised during the period of July 1, 1975 to the date this order becomes final, the following quoted

notice, causing said notice to appear or be broadcast in each said media on at least four (4) separate instances:

NOTICE TO PAST PURCHASERS of American Nursery and Seed Company, Nursery Barn, McMinnville Tree Farm and Morrison Nursery Company. In order to satisfy our past guarantees, we will honor and pay within thirty days of receipt all requests for refunds for purchases since July 1, 1975 if you received trees and nursery stock which did not survive or failed to receive your order. Please send proof of purchase with any request.

(Signature of applicable Individual Respondent)

B. That respondent shall pay, within thirty (30) days of receipt of request for refund, the full purchase price as evidenced by the purchaser's proof of purchase, without deduction, to all purchasers who purchased trees and nursery stock from respondents during the period July 1, 1975 to the date this order becomes final. *Provided, however,* that the total sum to be paid in restitution under this paragraph of the order shall not be greater than two hundred thousand dollars (\$200,000). Respondents shall evenly divide the refund payment responsibility for all requests for refunds for American Nursery and Seed Company, Nursery Barn, McMinnville Tree Farm and Morrison Nursery Company. Said payments of requested refunds shall be limited to those requests for refunds received within ninety (90) days of the date this order becomes final and when requests are accompanied by proof of purchase in the form of a cancelled check or money order receipt or both. *Further provided,* this obligation to refund shall be extended for each respondent beyond the date this order becomes final when that respondent begins advertising as described in Paragraph A above, and in that event, this obligation shall be limited to requests for refunds received within thirty (30) days of the last date of media advertising required in Paragraph A above, when accompanied by proof of purchase in the form of a cancelled check or money order receipt or both.

C. That respondents shall maintain and allow inspection and copying by the Federal Trade Commission records which show reasonable efforts to comply with the provisions of foregoing Paragraph A through B.

*It is further ordered,* That respondents 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 and any evidence of the results of such efforts, including all customer orders, complaints received and disposition of same,

records of all requests for refunds and replacements and disposition of same. Said records shall, upon reasonable notice, be made available to the Federal Trade Commission for inspection and copying.

B. Maintain records or other documentary proof establishing timely and accurate shipment of viable trees and nursery stock or other merchandise. Said records shall, upon reasonable notice be made available to the Federal Trade Commission for inspection and copying.

C. Maintain and furnish to the Federal Trade Commission, upon request, copies of all disseminated advertisements, along with:

1. Records disclosing the date(s) such advertisements were published;
2. Records disclosing the name and address of the newspaper, broadcast media, in which said advertisement was published; and
3. Scripts of each advertisement published.

*It is further ordered,* That respondents notify the Commission at least thirty (30) days prior to any change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries in the corporation which may affect compliance obligations arising out of this 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 (10) years from the effective date of this order, each individual respondent shall promptly notify the Commission of each affiliation with a new business or employment or use of new trade style. Each such notice shall include 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 the 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, 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.