IN THE MATTER OF

LEVI STRAUSS & CO.

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

Docket 9081. Complaint, May 5, 1976 — Decision, July 12, 1978

This consent order, among other things, requires a San Francisco, Calif. clothing manufacturer to cease establishing and enforcing resale price agreements; soliciting the identities of recalcitrant dealers; and threatening, penalizing or terminating such dealerships. Further, the firm is prohibited from unfairly restricting the use of its trademark; engaging in unlawful tie-in practices; and disseminating any materials suggesting resale prices for five years.

Appearances

For the Commission: *David M. Newman, Paul D. Hodge* and *Jeffrey A. Klurfeld.*

For the respondent: *Heller, Ehrman, White & McAuliffe,* San Francisco, Calif. and *Howrey & Simon,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (U.S.C. Title 15, Section 14, *et seq.,* as amended), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Levi Strauss & Co., a corporation, hereinafter referred to as "respondent," has violated the provisions of Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in respect thereto as follows:

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

"Product" is defined as any item of wearing apparel and any related accessory which is manufactured, offered for sale, or sold by Levi Strauss & Co.

"Dealer" is defined as any person, partnership, corporation or firm which purchases any product from Levi Strauss & Co. for resale.

"Prospective Dealer" is defined as any person, partnership, corporation or firm which may desire to purchase any product from Levi Strauss & Co. for resale but has not been accepted by Levi Strauss & Co. as a dealer.

PARAGRAPH 1. Respondent Levi Strauss & Co. 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 at 2 Embarcadero Center, San Francisco, California.

PAR. 2. Respondent is now and has been for many years engaged in the manufacture, sale and distribution of a wide variety of wearing apparel for men, women and children, including but not limited to jeans, slacks, shorts, shirts, jackets and related items. Gross sales by respondent for the 1975 fiscal year exceeded $1,000,000,000. Respondent claims to be the largest apparel manufacturer in the world.

PAR. 3. Respondent sells and distributes its products directly to more than 15,000 retail dealers located throughout the United States who in turn resell respondent's products to the general public.

PAR. 4. Respondent maintains a comprehensive and integrated manufacturing, sales and distribution system throughout the United States. Sales of respondent's products are effectuated through seven regional sales offices located in New York, New York; Atlanta, Georgia; Chicago, Illinois; Dallas, Texas; Los Angeles, California; San Francisco, California, and Seattle, Washington. More than 500 salesmen working under control of these regional sales offices sell respondent's products throughout the United States.

Respondent also maintains manufacturing plants located in the States of California, New Mexico, Texas, Tennessee, Arkansas, Mississippi, Georgia, Virginia, North Carolina, Missouri, and Louisiana. Respondent transports its products, either directly from its manufacturing plants located in the aforementioned States to dealers or from these manufacturing plants to warehouses located in California, Texas and Kentucky, and from there, distributes such products to its dealers located in every State of the United States and the District of Columbia. There is now and has been at all times mentioned in this complaint, a pattern and course of commerce in respondent's products which is in and affects interstate commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Except to the extent that competition has been hindered, frustrated, lessened and eliminated as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the manufacture, sale and distribution of wearing apparel similar to that listed and described in Paragraph Two hereinabove.

PAR. 6. In the course and conduct of its business as above described, respondent has for some time last past effectuated and pursued a policy throughout the United States, the purpose or effect of which is and has been to fix, control, establish, manipulate and maintain the resale prices at which its dealers advertise, offer for sale and sell its products.

PAR. 7. By various means and methods, respondent has effectuated and enforced the aforesaid practice and policy by which it can and does fix, control, establish, manipulate and maintain the resale prices at which its products are advertised, offered for sale and sold by its dealers. To carry out said practice or policy, respondent adopted and employed, and still employs, the following means and methods among others:

(a) It requires prospective dealers as a condition of becoming dealers, or requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent, or to give oral assurances to respondent, that they will adhere to those resale prices established or suggested by respondent for its products.

(b) It requires prospective dealers as a condition of becoming dealers, or requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent, or to give oral assurances to respondent, that they will not advertise any of respondent's first-line quality products, whether or not in conjunction with any of respondent's trademarks, at resale prices other than those respondent has established or suggested.

(c) It requires prospective dealers as a condition of becoming dealers, or requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent, or to give oral assurances to respondent, that they will not advertise any of respondent's second-line quality or irregular products as having been manufactured by respondent.

(d) It requires prospective dealers as a condition of becoming dealers, or requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent or to give oral assurances to respondent, that they will not resell respondent's products to any retailer not authorized by respondent to sell its products.

(e) It has established and employed, and still employs, a surveillance system, the purpose of which is to ascertain whether any dealer, prospective dealer, person or firm is engaged in any of the following activities:

(1) offering for sale or selling any product at a price other than that which respondent has established or suggested.

(2) advertising any first-line quality product, whether or not in conjunction with any of respondent's trademarks, at a price other than that which respondent has established or suggested.

(3) advertising any second-line quality or irregular product as having been manufactured by respondent.

(4) reselling any product to any retailer not authorized by respondent to sell its products.

(f) As part of the surveillance system as set forth in subparagraph (e) hereinabove, respondent has:

(1) Solicited and encouraged the cooperation and assistance of dealers to identify and report any dealer, prospective dealer, person or firm who engages in any of the activites set forth in subparagraph (e)(1)–(4) hereinabove.

(2) Shopped retailers not authorized by respondent to sell its products who are selling *any* product in order to ascertain from which dealer said retailers obtained said product.

(g) It warns, intimidates, harasses and uses various forms of coercion and discipline, including but not limited to delaying order shipments, restricting the availability of products, limiting the frequency of salesmen's visits, and threatening termination, against dealers engaged in, or suspected of engaging in, any of the activities set forth in subparagraph (e)(1)–(4) hereinabove.

(h) It terminates dealers engaged in, or suspected of engaging in, any of the activities set forth in subparagraph (e) (1)–(4) hereinabove.

(i) It refuses to deal with certain prospective dealers for the reason that respondent believes that such prospective dealers will engage in any of the activities set forth in subparagraph (e)(1)–(4) hereinabove.

(j) It prohibits any dealer from being reimbursed pursuant to respondent's cooperative advertising program for any advertisement offering any product at a price other than that which respondent has established or suggested.

(k) It misrepresents to dealers that its products are fair traded and that dealers must, as a matter of law, adhere to respondent's established resale prices.

The above are among the various means and methods which have been used, and are now being used, by respondent in the enforcement of its system of maintaining resale prices, all with the result that said prices have been and are generally observed and maintained by dealers handling respondent's products.

PAR. 8. The aforesaid acts and practices have had and still have the capacity, tendency and effect of hindering, suppressing or eliminating competition between or among all dealers selling respondent's products, by requiring them to resell the same at prices fixed or controlled by respondent as aforesaid; such practices prevent dealers from selling these products at prices of their own choosing; hinder and suppress price competition in the resale of such products

in the various States of the United States and the District of Columbia, thus tending to obstruct the free and natural flow of commerce and the freedom of competition in the channels of interstate commerce.

PAR. 9. In the course and conduct of its business as above described, respondent has refused to sell and continues to refuse to sell its blue denim jeans to dealers and prospective dealers desirous of purchasing said products unless said dealers and prospective dealers also purchase certain other products manufactured by the respondent.

Further, through the use of an allocation program, respondent has refused to and continues to refuse to increase the allotments of its blue denim jeans to dealers unless said dealers also purchase or increase their purchases of certain other products manufactured by respondent.

PAR. 10. The aforesaid acts and practices of the respondent have the tendency to unduly hinder competition; have injured, hindered, suppressed, lessened or eliminated actual and potential competition, and thus are to the prejudice and injury of the public; and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by an

interested person pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Levi Strauss & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Two Embarcadero Center, San Francisco, California.

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

ORDER

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

"Product" is defined as any item of wearing apparel and any related accessory which is manufactured, offered for sale or sold by Levi Strauss & Co.

"Dealer" is defined as any person, partnership, corporation, or firm authorized by Levi Strauss & Co. to sell any product.

"Prospective dealer" is defined as any person, partnership, corporation or firm which may desire to purchase any product from Levi Strauss & Co., but has not been accepted as a dealer.

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

I

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

2. Establishing, exacting any assurance to comply with, continuing, enforcing, or announcing the terms of any contract, agreement, understanding, or arrangement with any dealer or prospective dealer which fixes, establishes, maintains or enforces the price at which any product is to be sold or advertised at retail by such dealer or prospective dealer.

3. Securing or attempting to secure any promise or assurance from any dealer or prospective dealer regarding the retail price at which such dealer or prospective dealer will or may advertise or sell any product, or requiring or requesting any dealer or prospective dealer to obtain approval from respondent for any retail price at which such dealer or prospective dealer may or will advertise or sell any product.

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

5. Requiring or soliciting any dealer or prospective dealer to report the identity of any dealer, prospective dealer, person or firm because of the retail price at which such dealer, prospective dealer, person or firm is advertising, offering to sell or selling any product; or acting on any reports or information so obtained by threatening, intimidating or coercing any dealer, prospective dealer, person or firm, or by terminating any dealer.

6. Conducting any surveillance program to determine whether any dealer, prospective dealer, person or firm is advertising, offering for sale or selling any product at a retail price other than that which respondent has established or suggested, where such surveillance program is conducted to fix, maintain, control, or enforce the retail price at which any product is sold or advertised.

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

8. Terminating or taking any other action to restrict, prevent, or limit the sale of any product by any dealer because of the retail price at which said dealer has advertised, is advertising, or is suspected of advertising any product, whether or not in conjunction with any of respondent's trademarks.

9. Fixing, establishing, controlling or maintaining the retail price at which any product is advertised, promoted, offered for sale or sold, by means of any of the following:

a. Threatening or coercing any person, firm or prospective dealer because of the retail price at which said person, firm or prospective dealer, has sold, is selling or is suspected of selling any product.

b. Threatening or coercing any person, firm or prospective dealer, because of the retail price at which said person, firm or prospective dealer has advertised, is advertising or is suspected of

advertising any product, whether or not in conjuction with any of respondent's trademarks.

c. Controlling or restricting in any manner, including by termination of any dealer, any customer or class of customers to whom any dealer may sell any product, where such control or restriction is exercised because of the retail price at which the customer or class of customers to whom said product has been resold has advertised, promoted, offered for sale or sold such product.

II

Publishing, disseminating, circulating or providing by any means, any suggested retail price for a period of five (5) years after the date on which this order becomes final; *provided, however,* that, if, after said five (5) year period, respondent suggests any retail price, respondent shall:

a. Clearly and conspicuously state on any material on which such suggested price is stated that such price is suggested only.

b. Mail to all dealers a letter stating that no dealer is obligated to adhere to any suggested retail price and that such suggested retail price is advisory only.

III

1. Restricting any dealer, prospective dealer, person, or firm who purchases any product which respondent had denominated irregular or second quality from offering for sale or advertising such products as "second quality or irregular products manufactured by Levi Strauss & Co."

2. Restricting any dealer, prospective dealer, person or firm who has purchased any product which respondent had denominated "closeout" and which bears any of respondent's trademarks affixed thereto from using any trademark so affixed in the sale or advertising of such product.

3. Nothing contained in Paragraph III of this order shall affect respondent's rights in law and equity respecting the protection of respondent's trademarks in conjunction with the offer for sale or advertising of any product.

IV

It is further ordered, That respondent shall forthwith cease and desist from:

1. Engaging in any unlawful tie-in selling practice.

2. Establishing or administering an allocation program under

which a dealer's entitlement to any product which such dealer has not previously purchased, is dependent upon the volume of such dealer's purchases of a different product style or a group of different product styles.

V

It is further ordered, That respondent shall:

1. Within thirty (30) days after service of this order, mail under separate cover a copy of this order and a copy of the enclosure set forth in the attached Exhibit A to every present dealer. An affidavit of mailing shall be sworn to by an official of respondent verifying that said mailing of the order and of the enclosure in the attached Exhibit A was completed.

2. Mail under separate cover a copy of this order and a copy of the enclosure set forth in the attached Exhibit A to any person partnership, corporation or firm that within five (5) years after service of this order becomes a new dealer.

3. Within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions and subsidiaries and to all officers, sales personnel, sales representatives and advertising agencies retained by respondent and secure from each such entity or person a signed statement acknowledging receipt of said order.

VI

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

VII

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

Commissioner Pitofsky did not participate.

EXHIBIT A

Dear Levi Strauss Retailer:

Levi Strauss & Co. has consented to the entry of an Order by the Federal Trade

Commission. In connection therewith Levi Strauss & Co. has agreed to send you this letter describing the provisions contained in the Order. A copy of the Order is enclosed.

The Order provides, among other things, as follows:

1. With respect to retail prices:

a. You are free to sell and advertise products purchased from Levi Strauss & Co. at any price you choose.

b. Levi Strauss & Co. cannot take any action against you, including termination, because of the retail price at which you sell or advertise its products.

c. Levi Strauss & Co. cannot suggest retail prices for any product until [five years from date on which the Order becomes final].

d. You are free to participate in any cooperative advertising program sponsored by Levi Strauss & Co. for which you otherwise qualify and to recieve any advertising credit or allowance allowed thereunder regardless of the price at which you advertise any product from Levi Strauss & Co.

e. You may use any of Levi Strauss & Co.'s trademarks in a lawful manner in conjunction with the advertising of any first-line products at any price you choose. For example you may advertise any product bearing the "Levi's(r)" trademark as "Levi's(r)."

f. You may sell or advertise any Levi Strauss & Co. irregular or second quality merchandise as "irregular or second quality merchandise manufactured by Levi Strauss & Co." However, Levi Strauss & Co. reserves the right to restrict the use of its trademarks in connection with the sale or advertising of such merchandise.

g. In connection with the advertising or sale of Levi Strauss & Co. "close-outs," you may use, in a lawful manner, the trademarks, if any, affixed to such close-out products. You may also advertise or sell these products as "close-outs manufactured by Levi Strauss & Co."

h. Levi Strauss & Co. cannot control or restrict the customers to whom you or any other dealer may sell any product where such control or restriction is exercised because of the retail price at which the customer to whom said product has been resold is advertising or selling such product.

2. With respect to other sales practices:

a. Levi Strauss & Co. cannot engage in any unlawful tie-in selling practices.

b. If Levi Strauss & Co. places any product style on allocation, your allotment of such product style, other than a product style you have not previously purchased, will not be dependent upon the volume of your purchases of a different product style or a different group of product styles.

If you have any questions regarding the contents of this letter or the attached Order, please contact Mr. ———— at Levi Strauss & Co.

IN THE MATTER OF

TENNECO, INC.

Docket 9097. Interlocutory Order, July 12, 1978

This order sets forth specific provisions to be followed relative to the designation of certain documents as exempt from release.

ORDER REGARDING REQUEST FOR DESIGNATION OF DOCUMENTS AS EXEMPT FROM RELEASE

On March 22, 1978, Sears, Roebuck and Co. ("Sears") filed a motion to quash a third party subpoena duces tecum served upon it, claiming, *inter alia,* that the protective order issued by the administrative law judge ("ALJ") in this proceeding was insufficient to protect it from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552 (1970). The ALJ denied the motion to quash from the bench on April 25, 1978, on the assumption that the Commission would not release confidential information covered by the protective order. The transcipt of the ALJ's ruling indicates that he recognized a limitation upon his authority with respect to FOIA disclosure. Sears filed a motion for reconsideration on May 3, 1978, arguing again, *inter alia,* that the protective order was inadequate, and that the ALJ was without authority to bind the Commission with respect to disclosure under the FOIA. Alternatively, Sears asked the ALJ to certify the matter to the Commission under Rule 3.23(b). By order of May 10, 1978, the ALJ denied the motion for reconsideration and found that the matters raised by Sears did not involve a controlling question of law or policy which would justify certification of an immediate appeal under Rule 3.23(b). The ALJ did not address in his order whether the confidentiality issue was within his authority to decide or should be forwarded to the Commission under Rule 3.22(a). By motion of May 22, 1978, directly to the Commission, Sears asks that the Commission enter an order designating documents produced in response to Specifications 5 and 8[1] as confidential and not subject to future release, noting that the ALJ cannot bind the Commission with respect to release of information under the FOIA.

The chronology of actions with respect to the subpoena duces tecum served upon the J. C. Penney Company ("Penney") charts a similar sequence of events. Penney filed a motion to quash on April

[1] Specification 5 requires production of documents showing, by part number, the net purchase price paid by Sears to Maremont, its supplier, for shock absorbers in 1975 and 1976. Specification 8 requests, *inter alia,* production of Sears' Redetermination Audit for 1975 which contains a summary of the price information requested in Specification 5.

25, 1978, claiming that the protective order issued by the ALJ provided insufficient protection for documents responsive to Specifications 1–5 and 7–8 of the subpoena. By order of May 9, 1978, the ALJ denied Penney's motion for the same reasons he rejected Sears' motion to quash. Penney then moved directly before the Commission for designation of the information produced in response to Specification 5 of the subpoena[2] as confidential information exempt from release under the Freedom of Information Act and as not subject to release or disclosure by the Commission.

Normally, the Commission would not entertain an interlocutory appeal on a discovery question in the absence of a certification by the ALJ. However, it is clear in this instance that under Rule 4.10(a)(2) the ALJ does not have authority to bind the Commission with respect to the release of documents[3] and that these motions should have been certified, with the ALJ's recommendation, pursuant to Rule 3.22(a). Because remand of these motions to the ALJ would unnecessarily delay the administrative proceeding, the Commission, in its discretion, has considered both motions and issues the following order:

> Notwithstanding any of the provisions of the protective order issued by the ALJ on January 9, 1978, in the event of a Freedom of Information Act request or an official request from any Congressional committee or subcommittee or from a court pursuant to compulsory process, for disclosure of any document or portion of any document submitted by Sears in response to Specification 5 of the subpoena duces tecum or to Specification 8, to the extent such information summarizes information provided pursuant to Specification 5, and by Penney in response to Specification 5 of the subpoena duces tecum, and which is designated as "Confidential" under said protective order, authorized representatives of the Commission's Office of General Counsel may inspect such document for purposes of considering the request and, where necessary, advising the Commission on the request and defending the Commission's interests in court. Furthermore, the Commission shall provide the party which supplied such "Confidential" document or portion thereof with ten (10) days' notice prior to release of such document or portion thereof in response to such a request or otherwise. *Provided, however,* that in the case of release of such document or portion thereof, designated as "Confidential," in response to

[2] Specification 5 requires production of Penney's net cost per item of shock absorbers and exhaust system parts for 1975 and 1976.

[3] Such authority would be granted to the ALJ under the Commission's proposed confidentiality rules. 43 F.R. 3571 (January 26, 1978).

an official request from a committee or subcommittee of Congress or to a court in response to compulsory process, the Congressional committee or subcommittee or the court will be advised that the party which supplied the document considers the material to be confidential and the party will be provided ten days' prior notice where possible, and in any event as much advance notice as can reasonably be given.

It is so ordered.

IN THE MATTER OF

LUSTRASILK CORPORATION OF AMERICA, INC., ET AL.

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

Docket C-2894. Decision, Jan. 27, 1976 — Modifying Order, July 13, 1978.

This is an order which modifies a cease and desist order issued January 27, 1976, 41 FR 7744, 87 F.T.C. 145, to conform with the product coverage of a consent order issued against a competitive company, by substituting the words "hair straightening products" for the word "cosmetics" in Sections I and II of the original order, and "is " for "are" in the *It is ordered* paragraph in Section I; and by deleting the words "as 'cosmetic' is defined in the Federal Trade Commission Act" in the *It is further ordered* paragraph in Section II.

ORDER MODIFYING ORDER TO CEASE AND DESIST

ORDER*

On April 26, 1977, respondents in this matter requested by letter that the Commission order of January 27, 1976, be modified, first by limiting the product coverage of the order to "hair straightening products" which would replace the broader "cosmetics" products description, and second, by excluding the individually named respondents from the order.

Complaint counsel support the limitation on product coverage and oppose the exclusion of the individually named respondents.

We agree that the product coverage should be limited as requested. After entry of its order in this matter the Commission issued a consent order against Revlon, Inc., a competitor of Lustrasilk in the sale of hair relaxers. The Revlon order's product coverage is identical to that recommended by complaint counsel here. For this reason the Commission believes that it is in the public interest to grant the modification of product coverage sought by Lustrasilk.

We reject respondents' request that the individually named respondents be released from the order. Nothing that respondents have cited indicates a change of facts or law that would warrant the exclusion of the two individually named respondents from the reach of the order, nor does it appear that the public interest would be served by their exclusion. To the contrary, because the corporation is run as the proprietorship of the two named individuals, we find it necessary to continue to hold them responsible under the order. Accordingly,

* Reported as modified by Commission *Order Correcting Order Modifying Order to Cease and Desist* issued August 7, 1978.

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

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting the words "hair straightening products" for the word "cosmetics" in Sections I and II of the order, by substituting "is" for "are" in the *It is ordered* paragraph in Section I, and by deleting the words "as 'cosmetic' is defined in the Federal Trade Commission Act" in the *It is further ordered* paragraph in Section II.

It is further ordered That the order to cease and desist be, and it hereby is, modified by substituting "any hair straightening product" for "any such product" in Paragraph I.A.3; by deleting the words "safety or" and substituting "hair straightening product" for "cosmetic" in Paragraph I.B.; and adding a new Paragraph I.C. and renumbering subsequent paragraphs accordingly, as follows:

> "Representing, in any manner, the safety of any hair care product, or the ingredients therein, unless at the time such representation is made respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body."

Commissioner Pitofsky did not participate.

IN THE MATTER OF

MEGO INTERNATIONAL, INC., ET AL.

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

Docket C-2924. Complaint, July 14, 1978 — Decision, July 14, 1978

This consent order, among other things, requires a New York City manufacturer of a "Cher" mannequin doll and other toy products to cease employing any representation that depicts children using electrical toys or appliances near water or other fluids, without adult supervision, or which may induce children to engage in behavior that creates risk of injury.

Appearances

For the Commission: *Robert C. Goldberg.*

For the respondents: *Howard Alterman, Spivack & Lasky,* Chicago, Ill.

COMPLAINT

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

PARAGRAPH 1. Respondent Mego International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1 Madison Square Plaza, New York, New York.

PAR. 2. Respondent Mego Corporation is a corporation organized, existing and doing business under and by virtue of the place of business located at 1 Madison Square Plaza, New York, New York.

PAR. 3. Respondents are now, and for all times relevant to this complaint have been engaged in the production, distribution, and sale of a variety of toy products, including but not limited to, "Cher", a mannequin doll.

PAR. 4. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising material, including, but not limited to, the advertising referred to herein, to promote the sale of Cher.

PAR. 5. In the course and conduct of their aforesaid businesses,

respondents cause and have caused Cher in its package to be transported from its place of business to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain and at all times mentioned herein have maintained, a substantial course of trade in said product in or affecting commerce.

PAR. 6. In the course and conduct of their aforesaid businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said product by various means in or affecting commerce including, but not limited to, television advertisements broadcast by television stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product, and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including, but not limited to, the aforesaid media for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product in or affecting commerce.

PAR. 7. Typical and illustrative of the statements and representations in respondents' advertisements disseminated by means of television, but not all inclusive thereof, is the "Cher Wash N Dry" advertisement. In this advertisement, as the female narrator states, "You can wash Cher's hair, and ask mom to blow dry it with you. Her hair will be soft and fluffy," a young girl, about six or seven years of age, sits next to a bathroom sink filled with water and washes the doll's hair in the sink. As she holds the doll in her right hand, a woman (presumably her mother) enters the scene and hands the girl an electrical pistol hairdryer which the girl takes with her left hand. The mother withdraws from the scene and the girl proceeds to dry the doll's hair.

PAR. 8. The aforesaid advertisement has the tendency or capacity to influence children to engage in the following behavior with respect to the use of electrical appliances and toys.

A. Using, participating in the use of, or present at the time of the use of a small electrical appliance in close proximity to a pool or body of water or other fluid.

B. Using, participating in the use of, or present at the time of the use of an electrical personal grooming appliance without the close and watchful supervision of an adult.

Therefore, such advertisement has the tendency or capacity to

induce behavior which is harmful or involves an unreasonable risk of harm, and was and is an unfair or deceptive act or practice.

PAR. 9. 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 other corporations engaged in the manufacture and sale of toy products.

PAR. 10. The aforesaid acts or practices of respondents, as herein alleged as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair methods of competition in 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 respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) 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:

1. Respondent Mego International, Inc. is a corporation, orga-

nized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1 Madison Square Plaza, New York, New York.

2. Respondent Mego Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, and with its office and principal place of business located at 1 Madison Square Plaza, New York, New York.

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

ORDER

1. The term "children" shall mean persons who appear to be or who are in fact twelve (12) years of age or younger.

2. The term "electrical appliance" shall mean all devices and machines which are run on electricity, but shall not include electrical toys. The term "small electrical appliance" shall mean those electrical appliances which are portable. The term "electrical toys" shall mean all toys and games which are run on electricity. These terms do not include devices, machines, toys or games which are operated only by batteries.

3. Terms in the singular shall include the plural and terms in the plural shall include the singular.

I

It is ordered, That respondents Mego International, Inc., a corporation, and Mego Corporation, a corporation, their successors and assigns, and their 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 in or affecting commerce of any product, forthwith cease and desist from directly or indirectly:

A. Representing, through depictions, descriptions or in any other manner, children using, participating in the use of, or present at the time of the use of any electrical hairdryer or other electrical personal grooming appliance, including but not limited to, combs, curlers, brushes and shavers, without the close and watchful supervision of an adult.

B. Representing, through depictions, descriptions or in any other manner, children using, participating in the use of, or present at the time of the use of any electrical toy or small electrical appliance or

toy fascimile thereof in close proximity to any pool or body of water or any other fluid.

C. Representing, through depictions, descriptions, or in any other manner, children using, participating in the use of, or present at the time of use of, any electrical toy or electrical appliance when such representation has the tendency or capacity to influence children to engage in behavior which creates an unreasonable risk of injury to person or property.

It is futher ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions which engage or shall engage in the preparation or dissemination of advertising.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change 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 effect compliance obligations arising out of the 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.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

WARNER-LAMBERT COMPANY

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

Docket 8891. Final Order, Dec. 9, 1975 — Modified Order, July 20, 1978

This modified order to cease and desist is issued pursuant to a decision and judgment of the U.S. Court of Appeals for the District of Columbia, 562 F. 2d 749 (1977). The words "(c)ontrary to prior advertising" have been deleted from the disclosure statement required in Part III of the original order to cease and desist issued December 9, 1975, 41 FR 2381, 86 F.T.C. 1398.

MODIFIED ORDER TO CEASE AND DESIST

Respondent, having filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's cease and desist order issued herein on December 9, 1975; and the Court having rendered its decision and judgment on August 2, 1977, affirming and enforcing the Commission's order with modification of Part III; and the Supreme Court of the United States having denied on April 3, 1978, petitions for writs of certiorari filed by the parties:

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:

ORDER

I

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

1. Representing, directly or by implication, that any such product will cure colds or sore throats;

2. Representing, directly or by implication, that any such product will prevent colds or sore throats;

3. Representing, directly or by implication, that users of any such product will have fewer colds than non-users.

II

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

1. Representing, directly or by implication, that any such product is a treatment for, or will lessen the severity of, colds or sore throats;

2. Representing that any such product will have any significant beneficial effect on the symptoms of sore throats or any beneficial effect on symptoms of colds;

3. Representing that the ability of any such product to kill germs is of medical significance in the treatment of colds or sore throats or the symptoms of colds or sore throats.

III

It is further ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisements for the product Listerine Antiseptic unless it is clearly and conspicuously disclosed in each such advertisement in the exact language below that:

> Listerine will not help prevent colds or sore throats or lessen their severity.

In print advertisements, the disclosure shall be displayed in type size which is at least the same size as that in which the principal portion of the text of the advertisement appears and shall be separated from the text so that it can be readily noticed. In television advertisements, the disclosure shall be presented simultaneously in both the audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, shall occur. Each such disclosure shall be presented in the language, *e.g.,* English, Spanish, principally employed in the advertisement.

The aforesaid duty to disclose the corrective statement shall continue until respondent has expended on Listerine advertising a

sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972.

IV

It is further ordered, That the allegations of Paragraphs Nine and Ten of the complaint be, and they hereby are, dismissed.

V

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

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in its 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 this order.

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

Commissioner Pitofsky did not participate.

IN THE MATTER OF

AIRCO, INC.

Docket 9098. Interlocutory Order, July 20, 1978

This order grants complaint counsel's motion seeking court enforcement of a subpoena duces tecum issued to a third-party.

ORDER GRANTING COMPLAINT COUNSEL'S MOTION SEEKING COURT ENFORCEMENT OF SUBPOENA DUCES TECUM ISSUED TO AIR PRODUCTS AND CHEMICALS, INC.

The administrative law judge has certified to the Commission, pursuant to Rule 3.38(b), Complaint Counsel's Motion Seeking Court Enforcement of Subpoena Duces Tecum Issued to Air Products and Chemicals, Inc. ("Air Products"), a third party to these proceedings, on September 22, 1977. The specifications as to which there is disagreement are 1(a), (b), 2, 3(b), 3(c), and 7.[1] Air Products contends that these specifications relate to information which is so confidential that it should be made available only to respondent's outside counsel. The administrative law judge, on the other hand, has determined that in addition to outside counsel, Airco's Vice President-Law, Mr. DeWahl, should have access to the information.

The ALJ's position is based on his belief that "a firm facing serious restraint of trade charges was entitled to the assistance of its house counsel familiar with its business and operations, provided he played no role in corporate affairs other than legal counsel." Certification at 3. Moreover, Airco's Vice President-Law has submitted a signed affidavit, at the ALJ's request, which provides that his duties within Airco be limited to the giving of legal advice, and that he not, in any way, participate or make decisions in the operational area. Additionally, Mr. DeWahl would be prohibited from making any notes or copies of the confidential documents.

It is the view of the Commission that the restrictions imposed by the ALJ upon respondent's house counsel represent a reasonable exercise of the law judge's discretion and provide an adequate

[1] 1. Documents sufficient to show:

(a). total net sales for each year from January 1, 1970 to date, in dollars and in units, of each relevant industrial gas sold by your company to distributors;

(b). for each year, those sales included in the response to specification 1(a) that represent sales to company-owned distributors;

2. Documents sufficient to show total net sales for each year from January 1, 1970 to date, in dollars and in units, of medical or therapy oxygen or other medical gases sold by your company.

3. Documents sufficient to show:

(a). facility fees included in the sales figures;

(b). transportation charges not included in the sales figures;

4. Documents sufficient to show all your company's prices in effect for each relevant industrial gas and the calendar period in which such prices were in effect, stated separately, to each distributor.

safeguard against use of this data in connection with the sale or marketing of Airco's products. Although cases cited by Air Products do draw a distinction between disclosure of confidential information to house counsel as opposed to outside counsel, we find those cases inapposite here in view of the restrictions imposed upon the activities of Mr. DeWahl pursuant to his affidavit. Accordingly,

It is ordered, That Complaint Counsel's Motion Seeking Court Enforcement of Subpoena Duces Tecum Issued to Air Products and Chemicals, Inc., be, and the same hereby is, granted.

IN THE MATTER OF

GOLD BULLION INTERNATIONAL, LTD., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND HOBBY PROTECTION ACTS

Docket 9094. Complaint,[1] *Jan. 17, 1977 — Final Order, July 25, 1978*

This order, among other things, requires a Syracuse, N.Y. importer of numismatic items and its corporate officers to cease importing, manufacturing, or distributing any numismatic item that is not plainly and permanently marked "Copy", as required by federal regulations.

Appearances

For the Commission: *Justin Dingfelder* and *Ronald G. Issac.*

For the respondent: *James R. Michal, Jackson, Campbell & Parkinson,* Washington, D.C.

INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

FEBRUARY 13, 1978

I. SUMMARY OF PROCEEDINGS

On January 17, 1977, the Federal Trade Commission issued a complaint alleging that Gold Bullion International, Ltd. ("Gold Bullion") and its officers H. Kenneth Costello, [2] Walter N. Thompson, and William H. Bogart violated Section 2(b) of the Hobby Protection Act and Section 5 of the Federal Trade Commission Act. The complaint also named as respondents B.H. Mayer's Kunstprageanstalt of Pforzheim, West Germany, a corporation, and Bernhard H. Mayer, an officer of both Gold Bullion and B.H. Mayer's Kunstprageanstalt.

The complaint alleges that respondents, subsequent to November 29, 1973, imported into the United States for distribution in commerce privately minted copies of German 5, 10 and 20 Reichmark gold coins, Mexican 50 Peso gold coins, Austrian 100 Corona gold coins, and other gold coins. The complaint further alleges that the coins are imitation numismatic items as defined in Section 7 of the Hobby Protection Act and that the coins were not marked "copy" as required by Section 2(b) of the Act.

A prehearing conference was held on March 31, 1977 at the

[1] Complaint previously published at 90 F.T.C. 411.

request of Michael Stachowski, counsel for B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer. Complaint counsel and attorneys representing William H. Bogart, Bernhard H. Mayer and B.H. Mayer's Kunstprageanstalt were present and agreed to file answers to the complaint.

On April 8, 1977, respondent William H. Bogart filed his answer admitting certain allegations of the complaint, denying others and averring that the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States preclude the enforcement of the Hobby Protection Act against the respondents.

On April 12, 1977, respondents B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer filed their answer, generally denying the allegations of the complaint and averring that the Federal Trade Commission lacks both personal and subject matter jurisdiction.

On April 21, 1977, respondents Gold Bullion, H. Kenneth Costello and Walter N. Thompson filed their answers admitting certain allegations of the complaint, denying others and averring that the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States preclude the enforcement of the Hobby Protection Act against them. [3]

On April 28, 1977, complaint counsel served on respondent Gold Bullion a request for admissions of fact to which respondent replied on May 10, 1977.

On May 11, 1977, complaint counsel and counsel for respondents B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer moved to withdraw this matter from litigation with respect to these respondents for the purpose of considering an executed proposed consent agreement. On June 1, 1977, I certified the executed agreement to the Commission, which, on August 9, 1977, voted to accept the modified consent agreement and decision and order as to B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer. The Commission issued its final decision and order as to these respondents on November 1, 1977.

On June 20, 1977, a subpoena *duces tecum* was served on Gold Bullion for the production of documents relating to its activities with B.H. Mayer's Kunstprageanstalt. In response to my order of July 5, 1977, counsel for Gold Bullion delivered the subpoenaed documents to complaint counsel on August 1, 1977.

A prehearing conference was held on June 23, 1977 to discuss the dates by which lists of potential witnesses and exhibits should be submitted and the date and place of evidentiary hearings. The general round of hearings was set for October 17, 1977 thru October

28, 1977, with a special hearing to be held in August to take the testimony of complaint counsel's witness Bernhard H. Mayer.

On August 22, 1977, the Commission was served with a subpoena *duces tecum* on behalf of respondents for documents relating to Gold Bullion. Complaint counsel responded to the subpoena on August 24, 1977. At the same time complaint counsel filed a request for admissions of genuineness of documents; respondents' counsel did not respond and thereby admitted the request.

Complaint counsel furnished their lists of witnesses and documentary exhibits to respondents' counsel on August 29, 1977. A supplemental list was provided on October 14, 1977. Respondents' counsel provided complaint counsel with their description of witnesses and documentary exhibits on September 30, 1977. Two supplemental lists were received from respondents' counsel on October 5, 1977 and October 14, 1977, respectively. [4]

Hearings were held in complaint counsel's case-in-chief on August 30, 1977 and from October 17 to October 18, 1977. Respondents' hearings in defense were held from October 18 to October 19, 1977. All hearings in the case were held in Washington, D.C. The record was closed on November 1, 1977.

Complaint counsel and respondents filed their proposed findings of fact and conclusions of law on December 1, 1977 and their replies ten days later. The following findings of fact, conclusions of law and order are based upon the record in this case and the proposed findings filed by complaint counsel and respondents. Proposed findings not adopted herein verbatim or in substance are rejected as not supported by the evidence or as immaterial.

II. Findings of Fact[1]

A. DESCRIPTION OF THE CORPORATE RESPONDENT

1. Respondent Gold Bullion International, Ltd. is a corporation organized and existing under and by virtue of the laws of the State of New York (Gold Bullion Ans., ¶1), with its principal office and place of business formerly located at Suite 216-A, State Tower Building, Syracuse, New York (CX 45e(4)).

2. Gold Bullion was created and existed for the purpose of importing, selling and distributing gold bullion coins and gold bullion products to coin dealers for resale and to consumers (Tr. 17, 541).

3. Gold Bullion actually engaged in the business of importing,

[1] Abbreviations used in this decision are: Tr. - Transcript of testimony. CX - Commission exhibits. RX - Respondents' exhibits. Ans. - Answer. Adm. - Answers to complaint counsel's requests for admissions.

selling and distributing gold bullion coins from October 1974, when the corporation was formed, until [5] February 1975, when it ceased active business operations after several shipments of coins had been seized by U.S. Customs (Tr. 16, 35, 455–59, 504).

4. Gold Bullion is still in existence for purposes of a pending civil libel action (Tr. 457, 475–76).

B. DESCRIPTION OF THE INDIVIDUAL RESPONDENTS

5. Respondent H. Kenneth Costello has been president of Gold Bullion since its inception (Tr. 489). He took part in the formation of the corporation, contributed $5000 towards the intial capitalization, in exchange for which he received an initial 27 percent ownership interest (subsequently reduced), and agreed to serve as president at a salary which was never drawn (Tr. 488–90, 574–75).

6. Respondent Walter N. Thompson has been the vice-president and treasurer of Gold Bullion since its inception (Tr. 434, 462). He took part in the formation of the corporation, contributed $5000 towards the capitalization, in exchange for which he received a 15 percent ownership interest, and agreed to serve in the above-mentioned capacities (Tr. 434).

7. Respondent William H. Bogart has been secretary of and legal counsel to Gold Bullion since its inception (Tr. 542-43). He took part in the formation of the corporation, contributed $5000 towards the initial capitalization, in exchange for which he received an initial 33 percent ownership interest (subsequently reduced), and agreed to serve in the above-mentioned capacities (Tr. 541–44, 574–75).

8. Bernhard H. Mayer owns and operates B.H. Mayer's Kunstprageanstalt, a family owned mint located in Pforzheim, West Germany, which manufactures coins, medals, and other metallic pieces (Tr. 14).

9. Mr. Mayer has been the major shareholder in Gold Bullion since its inception (Tr. 16). He has also been a director and officer of this respondent since its inception (Tr. 17). [6]

10. The impetus for the formation of Gold Bullion came from Messrs. Bogart and Mayer who discussed business opportunities growing out of the legalization of gold ownership in the United States (Tr. 71–75, 539–41, 569–70). Mr. Bogart recommended Messrs. Costello and Thompson to Mr. Mayer as persons potentially interested in the marketing of gold bullion items (Tr. 542).

11. Messrs. Bogart, Costello, Thompson, and Mayer were the persons responsible for the ownership and operation of Gold Bullion (Tr. 17). There were no other officers besides these four men (Tr. 576).

12. Gold Bullion had only two employees besides its officers–a secretary and a Mr. Carroll. Mr. Carroll was employed by Gold Bullion for only a month or less (Tr. 571).

13. Although Messrs. Costello and Thompson placed orders with B.H. Mayer Kunstprageanstalt for particular gold bullion coins (Tr. 573), Mr. Mayer made the decisions as to the types of coins that Gold Bullion imported, sold and distributed into the United States and did the research regarding whether particular coins were or were not legal tender under German laws and, thus, able to be reproduced (Tr. 80–82, 437–38, 470–71, 491, 496, 502, 544, 550).

14. As legal counsel for Gold Bullion, Mr. Bogart was responsible for determining the legality of marketing gold bullion coins in the United States (Tr. 545–47). He did not actively participate in the daily business operations of Gold Bullion (Tr. 544).

15. Messrs. Costello and Thompson were responsible for the daily operation and management of Gold Bullion (Tr. 437, 572–73). At times, Mr. Thompson personally sold coins to private parties (Tr. 463).

16. After Gold Bullion ceased doing business, Mr. Mayer and the individual respondents formed B.H. Mayer's of America, an American corporation which markets numismatic items such as silver bars and commemorative medals produced by B.H. Mayer's Kunstprageanstalt (Tr. 58, 460–61). There is no evidence, however, that it markets the kinds of coins which are at issue in this case. [7]

17. Mr. Costello is presently employed as a licensed stockbroker (Tr. 487–88). He has not had any involvement with B.H. Mayer's of America (Tr. 507) and he does not intend to engage in the business of marketing and selling gold coin reproductions again (Tr. 505–06).

18. Mr. Thompson is presently employed as a licensed securities dealer (Tr. 435). He was associated with B.H. Mayer's of America from the time Gold Bullion ceased active operation until October 1976 (Tr. 460–61). He does not intend to engage in the business of marketing and selling gold coin reproductions again (Tr. 458–59).

19. Mr. Bogart is presently employed as a private attorney (Tr. 538). He served as president of B.H. Mayer's of America from late fall 1975 until summer 1976 and remained on as legal counsel and as secretary until fall 1977 (Tr. 563–64). He does not intend to engage in the business of marketing and selling gold coin reproductions again (Tr. 566).

C. THE MANUFACTURE AND IMPORTATION OF THE GOLD COIN REPRODUCTIONS

(1) *The Nature of Respondents' Business*

20. The gold coins sold and distributed by Gold Bullion were manufactured by B.H. Mayer's Kunstprageanstalt (Gold Bullion Adm., ¶4; Tr. 24).

21. B.H. Mayer's Kunstprageanstalt did not manufacture and ship coins to Gold Bullion unless they were ordered by Gold Bullion, and invoices were made out only for coins that were actually shipped (Tr. 39, 42).

22. The coins that B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion in the United States were shipped for the account of Gold Bullion International, Ltd., Suite 216–A, State Tower Building, Syracuse, New York (CXs 67a, 68a). Gold Bullion was the actual owner of these coins for Customs purposes (Tr. 342).

23. The gold coins were purchased from B.H. Mayer's Kunstprageanstalt from October 1974 to January 1975 and shipped from West Germany to the United States for sale and distribution in the United States (Gold Bullion Adm., ¶¶2 and 6). [8]

24. The coins that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were not manufactured for any government (Tr. 28, 33–34).

25. The coins that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were not original coins but so-called "restrikes"[2] (Tr. 33).

26. The original coins which B.H. Mayer's Kunstprageanstalt copied for Gold Bullion were German 5 Mark, 10 Mark, and 20 Mark gold coins, Austrian 100 Corona, 1 Ducat, and 4 Ducat gold coins, a French 10 Franc gold coin and a Mexican 50 Peso gold coin (Tr. 23–24; CXs 6, 16, 18, 19, 45e(1)–(4), 48d, 49e, 67a–c, 68a–c).

27. None of the coins that Gold Bullion ordered from B.H. Mayer's Kunstprageanstalt and imported into the United States were marked "copy" (Gold Bullion Adm., ¶8; Tr. 38, 43, 49).

28. On January 7, 1975, B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion a package of gold coin restrikes consisting of one 100 Corona, five 10 Francs, six 50 Pesos, and twenty-nine 5 Reichmarks (Tr. 57; CXs 6, 49(c)). The coins were not marked "copy" (Tr. 47). On February 5, 1975, the shipment of coins was seized by the United States Customs Service for alleged violation of the Hobby Protection Act in that they were not marked "copy" (Tr. 323–27; CX 49(b)–(e)).

[2] This term is used sometimes herein to refer to Gold Bullion's copies of original coins, although the numismatic community gives a narrower definition to that term. See Finding 72, *infra*.

29. On January 29, 1975, B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion a package containing in part ninety 5 Reichmarks and one hundred ten 10 Franc gold coin restrikes (Tr. 37–38; CX 18). On January 30, 1975, B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion 97 copies of the 50 Peso gold coin (Tr. 41; CX 19). The coins were not marked "copy" (Tr. 38). On February 18, 1975, U.S. Customs seized the January 29 and January 30 shipments for suspected violation of the Hobby Protection Act in that the coins were not marked "copy" (CX 48a–d). [9]

(2) *The Date of Manufacture of the Coins*

30. B.H. Mayer's Kunstprageanstalt does not maintain records that would disclose the date of manufacture of the coins shipped to Gold Bullion (Tr. 49, 97, 122–23). However, Mr. Mayer testified that some of the coins shipped to Gold Bullion were manufactured after November 29, 1973 (Tr. 49).[3] The difficulty is in determining precisely when each type of coin was manufactured.

31. In order to mint coins you first have to have a die for each type of coin that is to be minted (Tr. 18).

32. The only original dies that B.H. Mayer's Kunstprageanstalt possessed were the dies for the 5, 10, and 20 Reichmarks (Tr. 19, 76). The dies used to manufacture the 1 Ducat and the 10 Franc were made later on, although before the existence of Gold Bullion (Tr. 76–77, 90). The dies used to manufacture the 100 Corona, the 4 Ducat, and the 50 Peso were made especially for Gold Bullion (Tr. 77–78, 89–90, 98, 122).

33. All of the 50 Pesos and 100 Coronas that B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion were manufactured by B.H. Mayer's Kunstprageanstalt (Tr. 98).

34. Since all of the 50 Pesos, the 4 Ducats, and the 100 Coronas were minted by B.H. Mayer's Kunstprageanstalt from dies made after Gold Bullion was formed (October 1974), they had to have been manufactured after November 29, 1973.

35. The only coins that B.H. Mayer's Kunstprageanstalt had in stock at the time Gold Bullion began doing business were the 5, 10, and 20 Reichmarks, the 1 Ducat, and the 10 Franc (Tr. 96–97, 123). The number of these coins that B.H. Mayer's Kunstprageanstalt had in stock at the time it began shipping to Gold Bullion was very small and did not last more than one or two weeks. Mr. Mayer concluded that his company did not have enough of these coins in stock [10] to

[3] The date when the Hobby Protection Act was enacted. Section 8 of the Act states:

This Act shall apply only to imitation political items and imitation numismatic items manufactured after the date of enactment of this Act.

account for all the coins that were shipped to Gold Bullion (Tr. 135–36). In light of the small stock of these coins which existed in October of 1974, I conclude that at least some of these coins were manufactured and shipped to Gold Bullion after November 29, 1973.

36. On January 16, 1975, a shipment of gold was delivered to B.H. Mayer's Kunstprageanstalt from Degussa [the processor of the gold sheets from which the coins were manufactured] (Tr. 54–56, 100–01). The date of the shipment was the same as that on the invoice (Tr. 101; CX 55). The invoice indicates that the gold was to be used for the manufacture of coins for Gold Bullion (CX 55). The gold could only have been used to manufacture either 1 or 4 Ducat coins (Tr. 56). Inasmuch as the Degussa firm is located in Pforzheim, West Germany (Tr. 50), it takes only five minutes for the gold to get from Degussa to B.H. Mayer's Kunstprageanstalt (Tr. 100).

37. It normally took between one day and one week for gold received from Degussa to be minted into coins and shipped to Gold Bullion (Tr. 110, 135). About one hundred fifty 1 Ducats were struck from the gold received from Degussa on January 16, 1975 (Tr. 101–02), and on January 21, 1975, ninety-five 1 Ducats were shipped to Gold Bullion (CXs 68b, 68c)—five days later.

38. Because the gold was used only for the production of 1 or 4 Ducat coins and because 1 Ducat coins were actually manufactured and shipped to Gold Bullion shortly after receipt of the gold from Degussa, I find that some 1 Ducats were manufactured after November 29, 1973 and shipped to Gold Bullion.

(3) *The Use of the Original Gold Coins in Exchange*

39. The copies of the German 5 Mark that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1877 with the image of Wilhelm I on their face and were marked with an "A" mint mark (CXs 46a, 47b). An "A" mark indicates the Berlin Mint (Tr. 244).

40. The German Government's Berlin Mint issued a 5 Mark gold coin in 1877 (Tr. 233–34). The coin was minted with the image of Wilhelm I on its face (Tr. 234). [11]

41. B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion two different types of German 10 Mark gold coin copies. One type was dated 1888, Berlin mint mark, with the image of Wilhelm II (CXs 46b, 45e(2)); the other type was dated 1887, Berlin mint mark, with the image of Wilhelm I (Tr. 384–85; CX 71c–d).

42. The Berlin Mint did not issue a 10 Mark gold coin in 1888 with the image of Wilhelm II but it did issue a 10 Mark gold coin in 1889 with the image of Wilhelm II (Tr. 244–45; RX 43n).

43. The 1888 Wilhelm II 10 Mark gold coin manufactured by B.H. Mayer's Kunstprageanstalt and shipped to Gold Bullion differs from the 1889 Wilhelm II 10 Mark gold coin issued by the Berlin Mint with respect to the date (Tr. 305; CX 46b; RX 43n).

44. The Berlin Mint did not issue a 10 Mark gold coin in 1887 with the image of Wilhelm I, but it did issue a 10 Mark gold coin in 1888 with the image of Wilhelm I (Tr. 249; RX 43n).

45. The 1887 Wilhelm I 10 Mark gold coin manufactured by B.H. Mayer's Kunstprageanstalt and shipped to Gold Bullion differs from the 1888 Wilhelm I 10 Mark gold coin issued by the Berlin Mint with respect to the date (CX 71c–d; RX 43n).

46. Since the dates imprinted on them are different than the dates on the original coins, the two Gold Bullion 10 Mark gold coins are not copies of 10 Mark gold coins actually issued by the German government and used in exchange. Furthermore, there is no reliable evidence in the record that suggests that consumers would confuse the Gold Bullion 10 Mark coins with the originals.

47. B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion two different types of German 20 Mark gold coin copies. One type was dated 1887, Berlin mint mark, with the image of Wilhelm II (CXs 46c, 45e(2)); the other type was dated 1887, Berlin mint mark, with the image of Wilhelm I (Tr. 384–85; CX 71a–b).

48. The Berlin Mint did not issue a 20 Mark gold coin in 1887 with the image of Wilhelm II, but it did issue 20 Mark gold coins in 1888 and 1889 with the image of Wilhelm II (Tr. 245; RX 43n). [12]

49. The 1887 Wilhelm II 20 Mark gold coin manufactured by B.H. Mayer's Kunstprageanstalt and shipped to Gold Bullion differs from the 1888 and 1889 Wilhelm II 20 Mark gold coins issued by the Berlin Mint with respect to the date (Tr. 306; CX 46c; RX 43n).

50. The Berlin Mint issued a 20 Mark gold coin in 1887 with the image of Wilhelm I and the Gold Bullion 20 Mark 1887 Wilhelm I is a copy of the original (Tr. 248, 251, RX 43n).

51. However, the Gold Bullion 20 Mark gold coin bearing the portrait of Wilhelm II and dated 1887 is not a copy of the 20 Mark gold coins actually issued by the German Government and used in exchange. Aside from speculation by complaint counsel's expert witness (Tr. 312–13), there is no evidence that suggests that consumers would confuse the Gold Bullion coin with the original.

52. The copies of the Austrian 100 Corona that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1915 (CX 45e(2)).

53. The Austrian Government issued 100 Corona gold coins in 1915 (Tr. 34, 224).

54. The copies of the Austrian 1 Ducat and 4 Ducat that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1915 (CX 45e(3)).

55. The Austrian Government issued 1 Ducat and 4 Ducat gold coins in 1915 (Tr. 34, 224).

56. Mr. Harvey Stack, a partner in Stack's, America's largest and oldest coin dealer (Tr. 202), testified for complaint counsel as an expert numismatist. On direct examination, he testified that the German 5, 10 and 20 Mark and the Austrian 1 and 4 Ducat and 100 Corona coins were used in exchange or were intended to be used in exchange (Tr. 224–27, 241–42, 248–50).

57. However, on cross-examination, Mr. Stack conceded that he was not certain about the use of 100 Corona coins: [13]

Q. . . .Do you have any information or knowledge, sir, from your years of experience as a numismatist that the 1915 100 corona was ever used in exchange?
A. I really can't say.
Q. You don't know.
A. I don't know because I wouldn't want to make a false statement.
Q. That is all I am asking. You don't know?
A. I don't know. (Tr. 284–85).

58. Cross-examination also revealed Mr. Stack's uncertainty about whether the 1915 1 and 4 Ducats were actually used in exchange (Tr. 287–88, 320–21), and I find that complaint counsel have not proved that the 100 Corona and 1 and 4 Ducat coins were used in exchange.

59. According to Mr. Stack, "the original issue" 5, 10 and 20 Mark gold coins were used in exchange by the German Government (Tr. 248).

60. The copies of the French 10 Franc that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1862 (CXs 47c, 45e(3)).

61. The French Government did issue a 10 Franc gold coin in 1862 (Tr. 204; CX 61).

62. The 10 Franc issued by the French Government in 1862 was used in exchange (Tr. 33, 207).

63. The copies of the Mexican 50 Pesos that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1821–1947 (CXs 47a, 45e(3)).

64. The Mexican Government did issue a 50 Peso coin in 1947 marked 1821–1947. The date 1821 stands for the year Mexico obtained its independence. The date 1947 was the year the coin was issued (Tr. 215–16; RX 21g). [14]

65. The Mexican 50 Peso gold coin issued in 1947 can be exchanged at a bank for other currency or traded in a store for goods

or services. The exchange value is based upon the daily gold rate. Therefore, the Mexican 50 Peso gold coin is used in exchange (Tr. 218, 298–300, 532–35).

66. In conclusion, I find that B.H. Mayer's Kunstprageanstalt manufactured the following coins after November 29, 1973, and that these coins are copies of government originals or restrikes which were used in exchange:

German 5 Mark
German 20 Mark 1887 Wilhelm I
French 10 Franc
Mexican 50 Peso

67. The other coins manufactured by B.H. Mayer's Kunstprageanstalt do not come within the provisions of the Hobby Protection Act either because there was no original coin issued by a government (the Gold Bullion 10 Mark Wilhelm II 1887, 10 Mark Wilhelm II 1888 and 20 Mark Wilhelm II 1887) or because there is no evidence that the original coins were used in exchange (Austrian 1 and 4 Ducat and 100 Corona).

D. THE POSSIBILITY OF CONSUMER DECEPTION

68. The gold coin copies imported and distributed by Gold Bullion were sold and marketed for their gold value and not for their numismatic value (Tr. 87, 91, 137, 141, 440, 492, 495, 551). The selling price of these coins was predicated upon the daily closing price of gold on the London exchange as of the order date plus a small percentage markup (Tr. 440, 492). Stack's, a reputable coin dealer, sells government restrikes on the same basis (Tr. 231–32).

69. The coins sold by Gold Bullion had "fineness" markings on them. A fineness marking indicates gold content. Fineness markings do not ordinarily appear on original coins (Tr. 21, 253–56).

70. Since fineness markings are small, there is a possibility that such markings could go unnoticed by consumers (Tr. 256–57). [15]

71. Gold Bullion represented only that the coins it imported and sold were restrikes. There were no direct representations made that the coins were original coins. Gold Bullion's advertising mentioned B.H. Mayer's Kunstprageanstalt as the source of the coins, although it did not expressly state who manufactured the coins (Tr. 442–44; CX 45e(4)).

72. A restrike, as the term is used by the numismatic community, is a coin struck by a duly authorized government, generally within its own mint, using original dies or copies of dies which had once been used to strike coins of a design originally used in circulation or previously approved for issuance. The coins that Gold Bullion

imported and sold were not "restrikes" as the term is used by the numismatic community (Tr. 221, 239–40, 258–59; CX 66e).

73. While official government gold restrikes of coins are sold only on the basis of their gold value (Tr. 228, 237–38), such restrikes are still considered numismatic items. A numismatic item has no special connotation in the numismatic community; it is a monetary unit and, as such, it is part of numismatic history (Tr. 228–29, 311). Even though it is "official," a government restrike may have no more value than a private one.[4]

74. There is a possibility that coin collectors might mistakenly believe that Gold Bullion's coins were official restrikes or, even, original coins (Tr. 211, 222, 234–35). However, a coin collector could also be misled into believing that a government restrike was an original coin (Tr. 261–62).

75. Restrikes of gold coins—whether by a private mint or by a government mint—are not sold for their numismatic value but for their gold content. Reputable dealers make no claim that government restrikes have [16] some value beyond their gold content,[5] and Gold Bullion has made no such claim.

76. It is, therefore, unlikely that the average purchaser of restrikes is collecting them for any purpose other than their gold content. If that is so—and complaint counsel have presented no reliable contrary evidence—then the average consumer does not believe that the Gold Bullion restrikes have a value in excess of their gold content.

77. Of course, as I note above, it is possible that some coin collectors might believe that the Gold Bullion coins are original numismatic items with a value exceeding their gold content. However, this is simply a guess, for complaint counsel have not presented any consumer testimony which would resolve this question.[6] Therefore, I find that complaint counsel have not established that the appearance of Gold Bullion's coins would probably deceive coin collectors into believing that they have purchased original numismatic items. [17]

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[4] For example, an original Austrian 100 Corona coin is worth between $750 and $1000. The government restrikes sell only at the gold exchange rate, as does the Gold Bullion restrike (Tr. 228–29).

[5] Q. Mr. Stack, wait a minute. Why do you sell these restrikes? Do you tell the people who buy them that they are buying a restrike because it is a valuable coin to be collected because it may go up in value in the future? Or are you telling them it is a convenient way to buy gold, as far as you are concerned?

A. The Witness: As far as I am concerned, it is a convenient way of buying gold and trading gold coins. (Tr. 272).

[6] Mr. Stack stated that the similarity in design between an original coin and a Gold Bullion restrike would lead a consumer into believing that he is buying a genuine coin (Tr. 222). While his testimony is entitled to some weight, it is not sufficient, I believe, in this case of first impression to warrant a finding that Gold Bullion's coins have deceived or might deceive the average coin collector, who, if there were any doubt about the genuineness of a coin, could seek the advice of a coin dealer (Tr. 222–23).

III. Conclusions of Law

A. THE HOBBY PROTECTION ACT

Section 4(a) of the Hobby Protection Act (Pub. Law 93-167, 87 Stat. 686, 15 U.S.C. 2101, *et seq.*) provides that the Act shall be enforced by the Federal Trade Commission under the Federal Trade Commission Act (38 Stat. 717, 15 U.S.C. 41, *et seq.*). Section 4(b) of the Hobby Protection Act gives the Commission the power to prevent any person from violating the provisions of the Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act were incorporated into and made a part of the Hobby Protection Act.

Section 7(3) of the Hobby Protection Act defines "original numismatic item" as "anything which has been a part of a coinage or issue which has been used in exchange or has been used to commemorate a person or event. Such term includes coins, tokens, paper money, and commemorative medals."

Section 7(4) defines "imitation numismatic item" as "an item which purports to be, but in fact is not, an original numismatic item or which is a reproduction, copy, or counterfeit of an original numismatic item."

Section 8 provides that the Act shall apply only to imitation political items and imitation numismatic items manufactured after the date of enactment of the Act. The Act took effect on November 29, 1973.

The importation into the United States, for introduction into or distribution in commerce of any imitation numismatic item which is not marked "copy" violates Section 2(b) of the Hobby Protection Act and the Federal Trade Commission Act. There is no requirement that knowledge or intent to deceive be shown in order to prove that the Hobby Protection Act has been violated.

B. CERTAIN GOLD BULLION COINS ARE COPIES OF ORIGINAL NUMISMATIC ITEMS

Whether they are original issues or government restrikes, the German 5 Mark and 20 Mark 1887 Wilhelm I, [18] the French 10 Franc and the Mexican 50 Peso are "original numismatic items" under the Hobby Protection Act. Respondents argue, however, that because the corresponding Gold Bullion coins are stamped with a "fineness" mark, this distinguishes them from the original coins.

The average coin collector might well be aware of the distinction

between original coins or government restrikes and coins bearing a "fineness" mark and the persons who collect gold coins strictly for their gold content might not care whether they are issued by a government or a private mint.

However, Congress considered these possibilities and concluded (1) that collectors of gold coins are concerned about the origin of those coins and (2) that fineness markings do not adequately distinguish original numismatic items from copies. Concerned about potential deception in the marketing of coin reproductions, Congress explored the use of other terms besides the word "copy." The word "copy" was apparently agreed upon because it is short, compact, and easily understood by everyone. *See, Bills to Protect Certain Hobbyists and Collectors of Antique Glassware and China: Hearings on H.R. 4678, H.R. 1068, H.R. 3448, H.R. 3747, and H.R. 4551 Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce,* 93d Cong., 1st Sess. 34, 44–45 (1973). No substitutions for the word "copy" can be made without violating the Hobby Protection Act, for Congress has made it clear that this is the best way to guard against the possibility, however slight, of deception.[7]

While the record indicates that respondents' literature and its disclosures to customers should inform them that the coins they are buying are neither original coins nor restrikes issued by a government and while I find it impossible to infer, from this record, that any of Gold [19] Bullion's customers were deceived into beleiving that they were purchasing original numismatic items,[8] there is still the possibility that these coins could be represented and resold as originals by unscrupulous persons.

In any event, Congress has concluded that copies of original numismatic items which are not marked as such are inherently deceptive, and my conclusion that this record fails clearly to show deception is unimportant, for that is not a necessary element of proof under the Hobby Protection Act.

C. MEANING OF THE TERM "USED IN EXCHANGE"

Respondents argue that certain coins, such as the 1947 Mexican 50

[7] Complaint counsel also argue that the 10 Mark Wilhelm I 1887, 10 Mark Wilhelm II 1888 and the 20 Mark Wilhelm II 1887 coins are copies of original numismatic items. I disagree. The difference in date between the original coins and the Gold Bullion coins so distinguishes them that I do not believe the latter are copies of the former.

[8] Of course, proof of actual deception is not necessary in Section 5 cases. Only capacity to deceive need be shown and this may be inferred despite the lack of consumer testimony. However, this is a case of first impression and there is no backlog of experience upon which I can rely to infer deception, nor were there any statements made by respondents which contain such deceptive potential that consumer testimony would be superfluous. See *Leonard F. Porter, Inc., et al.*, 88 F.T.C. 546, 625 (1976).

Peso, were not "used in exchange" within the meaning of the Act because their exchange rate was tied to the daily price of gold rather than to the face value of the coin. Complaint counsel counter this argument by arguing that whether a coin is traded in a grocery store for a loaf of bread or taken to a bank to be exchanged for currency, it is still *"used in exchange"* if one can demand compensation for it in the form of goods or services. The use of certain of the coins, such as the Mexican 50 Peso, on a barter basis confirms that the coins were used in the normal flow of commerce. If a coin that is actively traded in the marketplace and is used as a means of payment is not considered to be "used in exchange," then that term would take on a highly technical and artificial meaning other than that which was intended. For instance, during hearings on the Hobby Protection legislation, there was testimony that silver ingots were once "circulated as [20] money or exchange" during the silver-rush days of the Old American West. Congressman Bob Eckhardt of Texas, presiding at the hearings, agreed that the ingots were "used in exchange" and I believe that this broad interpretation of the phrase should apply when deciding whether coins were "original numismatic items."

D. THE ARGUMENT THAT GOVERNMENT RESTRIKES ARE NOT "ORIGINAL NUMISMATIC ITEMS"

Respondents assert that government restrikes are issued, not for purposes of being used in exchange, but to sell gold at the best possible price. Therefore, they claim, Gold Bullion copies of such restrikes do not violate the Hobby Protection Act since the restrikes were not issued as part of the country's coinage and are not "original numismatic items."

The evidence in this record reveals that certain coins—whether original issues or restrikes—were, regardless of the intent of the government when they were issued, used in exchange. This satisfies the requirements of the Hobby Protection Act.

E. LIABILITY OF THE INDIVIDUAL AND CORPORATE RESPONDENTS

It is well settled that to promote the full effectiveness of its orders and to prevent those orders from being evaded, the Commission has the authority to name the officers, directors, and stockholders of a corporation as respondents in their individual capacities when they have played a significant role in the acts or practices giving rise to the complaint, *FTC* v. *Standard Education Society,* 302 U.S. 112, 119–20 (1937); *Rayex Corp.* v. *FTC,* 317 F.2d 290, 295 (2d Cir. 1963).

Despite respondents' argument to the contrary, it is clear that the individuals named in the complaint controlled the acts and practices of the corporate respondent or had the ability to exercise control by virtue of their ownership of the corporate respondent. It is also undisputed that an order against the individuals who controlled the activities of a defunct corporation may be appropriate, *Pati-Port, Inc.* v. *FTC,* 313 F.2d 103, 105 (4th Cir. 1963). [21]

Nevertheless, the basic purpose of an order directed to individual respondents is to "prevent recurrence of the particular violations for which named individuals have been responsible." *Peacock Buick, Inc.,* 86 F.T.C. 1532, 1565 (1975). If the individuals were not responsible for the violations, then there is little likelihood of recurrence of those violations.

The individual respondents were, in one sense, "responsible" for the violations revealed in this record, for they did import and resell copies of original numismatic items without marking them as such; however, in a more important sense, they were not "responsible," for this record does not reveal any instance of actual deception of customers by these respondents, any intent to deceive their customers or any knowledge, prior to the seizure of their coins by U.S. Customs, that they were violating the Hobby Protection Act.

The absence of proof of conscious, purposeful violations of the law coupled with testimony that all three respondents are gainfully employed in fields totally unrelated to the marketing of gold coins and have no intention to become involved in a business similar to Gold Bullion distinguish this case from those where the individual respondents were either still engaging or were likely to engage in the same unlawful behavior with the same or another company. *See, e.g., FTC* v. *Standard Education Society, supra; Dlutz* v. *FTC,* 406 F.2d 227 (3d Cir.), *cert. denied,* 395 U.S. 936 (1969), *reh. denied,* 396 U.S. 869 (1969); *Coro, Inc.* v. *FTC,* 338 F.2d 149 (1st Cir. 1964), *cert. denied,* 380 U.S. 954 (1965); *United States* v. *Bestline Products Corp.,* 412 F. Supp. 754 (N.D. Calif. 1976).

If the record revealed that respondents had acted in bad faith or were likely to again violate the same law, then they would be held accountable.

The propriety of the order to cease and desist, and the inclusion of a respondent therein, must depend on all the facts which include the attitude of respondent towards the proceedings, the sincerity of its practices and professions of desire to respect the law in the future and all other facts. Ordinarily the Commission should enter no order where none is necessary. [22] *Eugene Dietzgen Co.* v. *FTC,* 142 F.2d 321 (7th Cir. 1944), *cert. denied,* 323 U.S. 730 (1945). I conclude that it is unnecessary to enter an order against the respondents in their individual capacities.

Respondents claim that issuance of a cease and desist order would be improper because they discontinued their business activities approximately two years prior to issuance of the Commission's complaint. However, discontinuance of acts which are subsequently found to be illegal has been held not to bar the issuance of a cease and desist order, *Fedders Corp.* v. *FTC,* 529 F.2d 1398, 1403 (2d Cir. 1976), *cert. denied,* 429 U.S. 818 (1976); *Libby-Owens-Ford Glass Co.* v. *FTC,* 352 F.2d 415, 418 (D.C. Cir. 1974); *Diener's Inc.* v. *FTC,* 494 F.2d 1132, 1133 (D.C. Cir. 1974); *Eugene Dietzgen Co.* v. *FTC, supra* at 330; *Galter* v. *FTC,* 186 F.2d 810 (7th Cir.), *cert. denied,* 342 U.S. 818 (1951); *Fairyfoot Products* v. *FTC,* 80 F.2d 684, 686 (7th Cir. 1935), especially where, as here, discontinuance was not voluntary but was prompted by the U.S. Customs' seizure of their coins. *Coro, Inc.* v. *FTC, supra* at 153.

Respondents argue that if an order is entered, it should not include a provision that a notice be sent to each purchaser of a gold bullion coin purchased from respondent because there is no record evidence of actual consumer deception. That is correct, yet Congress has determined that copies, not so marked, of original numismatic items are deceptive;[9] therefore, an order provision which alerts consumers that coins which they purchased from Gold Bullion are not original numismatic items is proper. Of course the notice provision shall apply only to those coins which I have found should have been marked as copies.

F. SUMMARY

1. The Commission has jurisdiction over the acts and practices of respondents. [23]

2. Respondents imported into the United States, for sale and distribution in commerce, copies of gold coins which were manufactured after November 29, 1973, the effective date of the Hobby Protection Act.

3. The German 5 Mark and 20 Mark Wilhelm I 1887, the French 10 Franc and the Mexican 50 Peso gold coins imported by respondents into the United States for sale and distribution in commerce are copies of original coins or restrikes which were used in exchange. Section 7(2) of the Hobby Protection Act, 15 U.S.C. 2106(2).

4. The German 5 Mark and 20 Mark Wilhelm I 1887, the French 10 Franc and the Mexican 50 Peso gold coins imported by

[9] Section 2(b) of the Act states: "The manufacture. . . or the importation. . .of any imitation numismatic item which is not plainly and permanently marked 'copy' is unlawful and is an unfair or deceptive act or practice. . . ."

respondents are imitation numismatic items. Section 7(4) of the Hobby Protection Act, 15 U.S.C. 2106(4).

5. The German 5 Mark and 20 Mark Wilhelm I 1887, the French 10 Franc and the Mexican 50 Peso gold coins imported by respondents were not marked copy. Section 2(b) of the Hobby Protection Act, 15 U.S.C. 2101(b).

6. None of the other coins imported by respondents come within the provisions of the Hobby Protection Act.

7. The public interest requires that an order be entered against Gold Bullion International, Ltd., but not against the individually named respondents. The following order is therefore entered.

ORDER

It is ordered, that respondent Gold Bullion International, Ltd., a corporation, its successors and assigns, its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, importation or distribution in or affecting commerce (as [24] defined in Section 4 of the Federal Trade Commission Act; 15 U.S.C. 44) of any imitation numismatic items, as "imitation numismatic item" is defined in the Hobby Protection Act (Pub. Law 93-167, 15 U.S.C. 2101, *et seq.*), do forthwith cease and desist from:

Importing, manufacturing or distributing any imitation numismatic item that is not plainly and permanently marked "COPY" as required by Section 2(b) of the Hobby Protection Act and the regulations promulgated thereunder. The word "COPY" shall appear in conformance with 16 C.F.R. 304.6, *i.e.,* in capital letters, in the English language, incused in sans-serif letters having a vertical dimension of not less than two millimeters (2.0mm) and a minimum depth of three-tenths of one millimeter (0.3mm) or one-half (1/2) the thickness of the reproduction, whichever is the lesser. The minimum total horizontal dimension of the word "COPY" shall be six millimeters (6.0mm).

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions, and to each purchaser of its German 5 Mark and 20 Mark Wilhelm I 1887, French 10 Franc and [25] Mexican 50 Peso coins. Each purchaser of the above-listed coins shall also be advised in writing on Gold Bullion International, Ltd., stationery that the coins they have purchased are not original numismatic items and that a private right of action for damages under Section 3 of the Hobby Protection Act exists.

It is further ordered, That respondent notify the Commission at

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

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

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

This is the first case to be tried under the Hobby Protection Act, 15 U.S.C. 2101, *et seq.* (1974), which requires, *inter alia,* that imported or domestic "imitation numismatic items" manufactured after November 29, 1973, be marked with the word "Copy."

The complaint in this matter was issued on January 17, 1977, and charged respondents with violations of the Hobby Protection Act by virtue of their importation into the United States of gold coins alleged to constitute "imitation numismatic items," which did not bear the word "Copy." A brief trial before Administrative Law Judge (hereinafter "ALJ") Lewis Parker led to his initial decision, finding violations of law as to certain of the imported coins, but not as to others. Judge Parker entered an order to cease and desist against the corporate respondent Gold Bullion International, Ltd., requiring that it refrain from future violations of the Hobby Protection Act and notify past [2] purchasers of certain unmarked coins that such coins had been sold in violation of the Act and that the purchasers would have a private right of action as provided by the Act (15 U.S.C. 2102). Judge Parker omitted an order against individual respondents Costello, Thompson, and Bogart.[1] This matter is before the Commission upon cross-appeals of the parties, with respondents urging that no violations have occurred and that no order should be entered, while complaint counsel assert that more violations should have been found and the ALJ's order should extend to the individuals.

A. *The Respondents and Their Coins*

Respondent Gold Bullion International, Ltd. is a New York State Corporation, created for the purpose of importing, selling, and

[1] Two other respondents in this case, an individual B.H. Mayer, and the mint that manufactured the coins in question, B.H. Mayer's Kunstprageanstalt, were dropped from the case after they signed consent orders.

distributing gold bullion coins and gold bullion products directly to consumers and to coin dealers for resale. (I.D. 1-2)[2] Gold Bullion enjoyed a brief, but not unnoticed operating history, importing coins and bullion from October 1974, until February 1975, when it discovered that U.S. Customs had become the principal collector of its coins. The corporation remains in existence only [3] for the purpose of prosecuting certain civil litigation. Individual respondents Costello, Thompson, and Bogart were respectively the president, vice-president and treasurer, and secretary and legal counsel to Gold Bullion. Each contributed $5000 to the corporation's initial capitalization, and, along with respondent Bernard Mayer, were the corporation's sole stockholders. These four individuals were the only officers of the corporation, and were responsible for its ownership and operation. (I.D. 11) Messrs. Costello and Thompson were responsible for the daily operation and management of the company. (I.D. 15)

The coins imported by Gold Bullion were manufactured for it by B.H. Mayer's Kunstprageanstalt, a private German mint. They were not intended for the use of any government, and did not bear the word "Copy" on them. The coins manufactured by B.H. Mayer's for Gold Bullion, imported into the United States, and at issue in this appeal are:

German 5 Mark
German 10 Mark (dated 1887 with image of Kaiser Wilhelm I)
German 10 Mark (dated 1888 with image of Kaiser Wilhelm II)
German 20 Mark (dated 1887 with image of Kaiser Wilhelm I)
German 20 Mark (dated 1888 with image of Kaiser Wilhelm II)
French 10 Franc
Mexican 50 Peso[3]

B. *Date of Manufacture*

A threshold issue is whether the coins in question were manufac-

[2] The following abbreviations will be used throughout:
I.D. - Initial Decision (finding no.)
I.D. p. - Initial Decision (page no.)
Tr. - Transcript of testimony (page no.)
CX - Complaint counsel's exhibit no.
RX - Respondents' exhibit no.

[3] The complaint also alleges violations with respect to Austrian 100 Corona and 1 and 4 Ducat coins, but these were dismissed by the ALJ (I.D. 57-58; p.23) and complaint counsel have not appealed from this ruling.

tured after November 29, 1973, because the requirements of the Hobby Protection Act apply only to "imitation numismatic items manufactured after the date of enactment of this Act." (15 U.S.C. 2106) [4]

There is no dispute that all the Mexican 50 peso coins were manufactured after November 29, 1973, because the die for this coin was made specifically by B.H. Mayer's for Gold Bullion, after the latter's formation in Fall, 1974. (I.D. 32) Respondents, however, object to the ALJ's findings that at least some samples of each of the other coins in issue were made after November 29, 1973.

B.H. Mayer's Kunstprageanstalt maintained no records of the date of manufacture of its coins. Instead, the ALJ relied upon the testimony of Mr. Mayer, who indicated that he had only a small supply of marks and francs in stock at the time he began shipping to Gold Bullion (in October, 1974) and that this stock did not last more than one or two weeks. (Tr. 135–36) Assuming, therefore, *arguendo* that the small stock of coins existing in October, 1974, 11 months after the effective date of the Act, was itself manufactured before November 29, 1973, it would nevertheless be true that at least some of the coins shipped to Gold Bullion were manufactured subsequently, once the inventory on hand in 1974 ran out.

Other facts of record lend support to the ALJ's conclusion on this point. The die for the French 10 franc coin was apparently manufactured close to the effective date of the Hobby Protection Act so that Mr. Mayer could not be sure whether it was before or after. (Tr. 122) Consequently, it seems most unlikely that a significant supply of francs would have been minted before the effective date of the Act and still have been in existence when the time came, nearly one year after the Act's effective date, to ship to Gold Bullion.

With respect to the reichmarks, (the dies for which were manufactured long before the effective date of the Act, Tr. 122) B.H. Mayer's sold supplies of the coins continuously to German customers, and Mr. Mayer testified that his practice was to mint large supplies of these coins in response to specific orders, rather than in anticipation of them. (Tr. 141) Accordingly, we find it quite likely that part or all of even the small inventory existing in 1974 to which Mr. Mayer made reference (Tr. 135–36) was manufactured after the effective date of the Act, as well as other reichmarks subsequently manufactured for Gold Bullion when the inventory was depleted. [5]

Respondents' counter to the evidence cited above consists of the testimony of respondents Costello and Thompson, who indicated that when they visited the mint, in February 1975, and August 1974, respectively, they observed large inventories of reichmarks, alleged-

ly contrary to the claim of Mr. Mayer. Mr. Costello's testimony, however, seems of doubtful relevance because he visited somewhat later than the time period to which Mr. Mayer's testimony referred.[4] With respect to Mr. Thompson's testimony, the ALJ presumably concluded that greater weight and credibility was to be attached to the recollection of Mr. Mayer, the mint owner and operator, who was likely to have most familiarity with the state of his inventory. We see no reason to disturb the judge's evaluation on this issue of witness credibility.

For the foregoing reasons, we believe that a substantial and preponderant quantity of record evidence supports the view that many, if not all of the coins imported by Gold Bullion were manufactured after the effective date of the Hobby Protection Act.[5]

C. *"Original Numismatic Items"*

Respondents further contend that the original coins of which theirs are copies are not "original numismatic items" within the meaning of the Act because they have not been shown to "ha[ve] been a part of a coinage or issue which has been used in exchange." 15 U.S.C. 2106. Respondents' objections with respect to the European coins in question apparently go simply to the weight of the evidence as to these coins' usage. Their objection with respect to the Mexican 50 Peso coin involves the definition of the term "used in exchange." [6]

We believe that the law judge's interpretation of the statutory language is correct. Respondents argue, in essence, that the term "used in exchange" should be confined to "legal tender," thereby excluding coins that may have been issued principally for the purpose of disposing of governmental supplies of gold, and the value of which has fluctuated in relation to the price of gold.

Had Congress meant to confine the Act's application to once-valid "legal tender," however, we think it could and would have used that term. Instead it used statutory language that plainly denotes more than simply "legal tender." Coins or other issue may be traded for goods and services in a society notwithstanding that they were not created for that express purpose and are not recognized by a government as legal tender.[6] Coins are "used in exchange" if they

[4] Existence of large stacks of coins in February 1975 would most likely have been attributable to production undertaken for Gold Bullion itself.

[5] We do note, however, that the record lacks clear proof that more than one 20 Mark Wilhelm I (1887) was imported. Given the profusion of evidence as to other coins, we shall drop this one coin from consideration.

[6] "Legal tender" is defined by one source as "that kind of coin, money, or circulating medium which the law compels a creditor to accept in payment of his debt, when tendered by the debtor in the right amount." *Black's Law Dictionary* 1637 (Rev. 4th ed. 1968)

(Continued)

have been, as the law judge observed, "actively traded in the marketplace and . . . used as a means of payment." (I.D. p. 19)

Moreover, this most plausible facial construction of the statute finds support in the legislative history. As the ALJ observed, there was testimony before Congress that silver ingots were once "circulated as money or exchange" during the silver-rush days of the Old American West. Congressman Eckhardt, presiding at the hearings, agreed that the ingots had been "used in exchange" and it was explained, without subsequent contradiction or dissent in the legislative history, that the term "covers a waterfront." Bills to Protect Certain Hobbyists and Collectors of Antique Glassware and China. Hearings on H.R. 4678, H.R. 1068, H.R. 3668, H.R. 3747, H.R. 4551. Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 93d Cong., 1st Sess. (1973), p. 47. [7]

Respondents claim to find support in the declaration of both House and Senate that the Act was designed to fill the void in the counterfeit laws:

> The Federal counterfeit laws (18 U.S.C. Chapter 25) are sufficient to prevent the manufacture or importation of *imitations of existing currency.* However, there are no comparable provisions of Federal law which provide protection from imitation numismatic items or political items. The legislation reported by the Committee on Commerce is designed to fill this void. S. Rep. No. 98–354, p. 3; H.R. Rep. No. 93–159, p. 4 (emphasis added.)

This language, quoted at p. 12 of respondents' Appeal Brief tells us only that Congress perceived the gap in the counterfeit laws to be their failure to cover imitations of no longer "existing *currency.*" If anything, such language favors an expansive interpretation of the Hobby Protection Act, because "currency," rather than meaning simply "legal tender," generally refers to

> That which is in circulation or passes from hand to hand, as a medium of exchange, including coin, government notes, and bank notes; as, the silver *currency;* the note *currency.* The term *currency* includes as well the part circulating at its market value (for example, gold coins in the United States) as the part that owes more or less of its purchasing power to government fiat or to its representative character (as paper money, subsidiary coins, or bank notes.). . . . *Webster's New International Dictionary,* 2d ed., p. 648.[7]

"The word 'money', in its generic sense, is one of comprehensive import, and includes any lawful circulating medium of exchange. . .[a]ll legal tender is money, but not all money is legal tender." *Vick* v. *Howard,* 136 Va. 101, 108-09, 116 S.E. 465, 467-68 (1923).

[7] The same dictionary notes that "legal tender" is merely "*That currency,* or money, which the law authorizes a debtor to tender and requires a creditor to receive in payment of money obligations." Id. 1412. *Cf. Tyson* v. *United States,* 285 F.2d 19, 21 (10th Cir. 1960), distinguishing between coins that are "legal tender" and coins that are "accepted as currency in fact by circulation."

For the foregoing reasons, we conclude that the Hobby Protection Act applies to imitations of coins that at one time have been actively traded in the marketplace, and used as a means of payment. [8]

The most pertinent application of this holding is to so-called "governmental restrikes"[8] that have been used in exchange. Such restrikes are, of course, at once both copies of earlier issues as well as original issues in their own right, and they may often assume significant numismatic value. (Tr. 231) When "used in exchange" we believe that government restrikes become "original numismatic items" within the contemplation of the Act and copies of such restrikes must be appropriately marked.[9]

Applying the foregoing to the 50 Peso Mexican coin, it is clear from the testimony of experts called by both sides that this coin, although traded primarily on the basis of its gold value, and not recognized as "legal tender," has nevertheless been "used in exchange" within Mexico. (Tr. 218; 534–35)

With respect to the European coins, respondents contest the weight of the evidence indicating that they were circulated as currency within their respective countries. Here, again, we believe that the evidence preponderates in favor of complaint counsel's position. The record shows that specimens of the 1862 Napoleon III 10 franc coin copied by Gold Bullion are in the public domain, and complaint counsel's expert testified that the coin was struck for circulation. (Tr. 207). We believe such evidence was sufficient to create a *prima facie* showing that the coin had been used in exchange, and respondents submitted no evidence to contradict that showing. [9]

With respect to the German 5 Reichmark coins, the record again reflects that the originals that Gold Bullion copied were issued by the German government, (Tr. 234) and samples remain in the public domain nearly a century after issuance, as evidenced by the fact that complaint counsel's expert had examined many of them. (Tr. 234) Moreover, from our review of the record it appears that the testimony by Messrs. Mayer and Stack that the coin was "used in exchange" (Tr. 26, 85, 248) referred to the 1887 Wilhelm I, 5 Mark coin of which Gold Bullion's version was an imitation.

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[8] One expert witness stated that in his view the term "restrike" should apply only to coins minted by governments. (Tr. 221) Gold Bullion, however, used the term "restrike" to apply to reproduction by a private mint, for non-governmental purposes, of coins originally minted by or for governmental units. Although the issue was not involved in the case, it is clear that there is sufficient opportunity for deception in use of the term "restrike" to apply to private reproductions, so that any such use of the term should, at a minimum, be qualified by language in immediate proximity to it.

[9] The Commission has exempted by rule restrikes (by the United States or any foreign government) of original numismatic items, 16 C.F.R. 304.1(d), but this regulation did not become effective until after Gold Bullion had begun importing, and in any event, has no applicability to Gold Bullion's non-governmental restrikes.

Finally, as regards the 10 and 20 mark coins that are the subject of complaint counsel's appeal (part "D" *infra*) we think the judge also properly concluded that these were used in exchange (I.D. 42, 44, 46, 51). All the relevant coins were issued by the Berlin mint and complaint counsel's expert testified that they were used in exchange. (Tr. 248)[10]

D. *"Imitation Numismatic Item"*

The ALJ found that no violation had occurred with respect to Gold Bullion's 20 Mark Wilhelm II (1887), 10 Mark Wilhelm I (1887) and 10 Mark Wilhelm II (1888) coins, because coins of those precise descriptions were never circulated by the German government. Therefore, Gold Bullion's coins were presumably not "copies" of an "original numismatic item." (I.D. 46, 51; p. 18n) In reaching this conclusion we believe the ALJ misapplied the language of the Hobby Protection Act, and we reverse his conclusions on this point, and hold that violations have occurred as the result of importation of the coins in question. **[10]**

The German government never issued a 20 Mark Wilhelm II coin in 1887, doubtless out of respect for Kaiser Wilhelm I, who occupied the throne throughout that year. (Tr. 245) Germany did, however, issue a 20 Mark Wilhelm II coin dated 1888. Similarly, it issued a 10 Mark Wilhelm I in 1888, (instead of 1887 as marked on Gold Bullion's coins) and a 10 Mark Wilhelm II in 1889 (instead of 1888 as marked on Gold Bullion's coins.)

The Hobby Protection Act plainly does not require marking only of coins that are exact replicas, in every detail, of original government coinage.[11] Rather, an "imitation numismatic item" is defined as a "reproduction, copy or counterfeit of an original numismatic item." [15 U.S.C. 2106(4)] While we are left for an elucidation of the meaning of "reproduction" and "copy" to the dictionary, or cases drawn from such relatively remote areas as copy right law[12] we need not write upon a legally barren slate when construing the meaning of "counterfeit." **[11]**

[10] Although respondents contend that this testimony did not relate to the specific coins at issue here, we think it plain from the record that complaint counsel's question and Mr. Stack's answer at Tr. 248 referred to the particular mark coins as to which complaint counsel had just been questioning Mr. Stack at Tr. 243–245, which are the ones at issue here.

[11] Indeed, it is not clear that there is such a thing as an "identical copy" because no matter how competent a private mint may be, its version of an original government issue will likely deviate from the original issue in certain minor respects, for example, coloration, sharpness and detail of imagery or edge devices (Tr. 206–7). Such differences of course, would only be apparent, if at all, to the most skilled experts, and even they may be fooled. The Hobby Act was designed to guard against copies that the ordinary collector could not recognize as such. The question here, then, is whether a deviation of one year in the date is a sufficiently large deviation as to render the coin neither a "copy, imitation, or counterfeit" of the original.

[12] Complaint counsel cite cases defining "copy" as "that which ordinary observation would cause to be

(Continued)

As both parties acknowledge, and as the legislative history makes clear, the Hobby Act was in essence intended to fill in the gaps left by the criminal counterfeit laws, 18 U.S.C. 471, *et. seq.*, which forbid counterfeits of existing media of exchange but do not extend to counterfeits of coins that are no longer, but in the past "ha[ve] been used in exchange." 15 U.S.C. 2106(3). It seems quite appropriate, therefore, that in seeking to determine what constitutes a "counterfeit" of an "original numismatic item" we look first to see what Congress and the courts have concluded constitutes a "counterfeit" of currently valid items of exchange.

Courts construing the criminal counterfeit statutes have recognized that the alleged counterfeit need only be "sufficiently complete to be an imitation of and to *resemble* the genuine article." *United States* v. *Johnson,* 434 F.2d 827, 830 (9th Cir. 1970) emphasis added. The likeness or resemblance must be one such "as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care when dealing with a person supposed to be upright and honest." *United States* v. *Smith,* 318 F.2d 94 (4th Cir. 1963). It is not necessary that the similarity be so great as to deceive experts or cautious persons. *United States* v. *Weber,* 210 F. 973, 976 (W.D. Wash. 1913); *United States* v. *Sprague,* 48 F. 828 (D.C. Wis. 1882). Applying these standards, courts have recognized that a "counterfeit" coin may embody fairly significant deviations from the genuine issue it is designed to copy. For example, a photocopy of a $10 dollar bill was found to be a counterfeit, *U.S.* v. *Johnson, supra* 424 F.2d at 829, as was an instrument that resembled ten-dollar federal reserve notes although lacking two serial numbers and the treasury seal on its face. *United States* v. *Chodor,* 479 F.2d 661, 664 (1st Cir.), *cert. denied* 414 U.S. 912 (1973).

Applying these principles here,[13] we think it plain that a deviation of one digit in the date on a coin is not likely to distinguish it sufficiently from the original [12] to alert an "unsuspecting person of ordinary observation and care" whom the criminal counterfeit law protects, let alone the "ignorant, unthinking and credulous" who are not excluded from the protection of civil consumer law. *Aronberg* v. *FTC,* 132 F.2d 165 (7th Cir. 1942); *Exposition Press, Inc.* v. *FTC,* 295 F.2d 869 (2d Cir. 1962).

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recognized as having been taken from or the reproduction of another," *King Features Syndicate* v. *Fleischer,* 299 F. 533, 535 (2d Cir. 1924) and "that which comes so near to the original as to give every person seeing it the idea created by the original." *White-Smith Music Publishing Co.* v. *Apollo Co.,* 209 U.S. 1, 17 (1907); *McConnor* v. *Kaufman,* 49 F. Supp. 738, 745 (S.D.N.Y. 1943). We reach an essentially similar result here.

[13] The ALJ apparently recognized the applicability of the standard we have articulated because in finding no violations as to the marks in question he concluded that "there is no reliable evidence in the record that suggests that consumers would confuse the Gold Bullion 10 Mark coins with the originals." (I.D. 46) In fact, as we note in the text, the record contains abundant evidence to support a finding or deceptive potential.

While those who ordinarily deal in coins may well possess a degree of knowledge as to coins superior to that of an average member of the public, it is nevertheless likely that a purchaser lacking access to a manual (and one which he or she is prepared to trust) listing the precise dates of issue of the coins in question, might be fooled as to the authenticity of a coin identical in all respects but the date of the original issue. This is, moreover, not mere inference on our part.[14] Complaint counsel's expert witness, whose business it is to deal with coin collectors, and who, therefore, knows better than most people what is likely to mislead such collectors, testified that in his view slight variations in the date of a reproduction might well be insufficient to alert some collectors as to the coin's lack of authenticity. Moreover, this expert backed up his opinion by mentioning cases in which customers had taken for real, counterfeits of old American coins that differed from the real ones only in their date. (Tr. 312–13). [13]

Further confirmation that the 10 and 20 mark coins here in question were sufficiently like the original German issue as to be reasonably mistaken for them comes from respondents' own promotional material, in which all of Gold Bullion's coins were described as "*re*strikes of Gold Coins from Europe and other countries."[15] CX 45(e)(4), emphasis added. Unless respondents were deliberately misrepresenting the truth, which they strenuously deny ever having done, then we can only assume that the resemblance of their coins to the original government issues was sufficiently great as to convince these highly knowledgeable parties that they were selling a "reproduction, copy or counterfeit" (*i.e.,* a *re*strike) of "original numismatic items."

Ignoring their prior representations to consumers, respondents argue that the date of a coin is one "material factor" in its definition, citing for support excerpts from the *Standard Catalog of World Coins* (RX 43). But all that this catalog points out is that the date borne by a coin is one important factor by which one may identify the coin and verify its authenticity. (RX 43f). This does not mean that an alteration of one digit in the date on an imitation of an

[14] Such an inference, however, would not be unwarranted in the exercise of the Commission's expertise. In the typical counterfeit case the court or jury must determine for itself whether the alleged counterfeit bears sufficient resemblance to the original as to be capable of being mistaken for it. There is no necessity to demonstrate that the counterfeit has actually been successfully passed off, only that the effort has been made. By the same token, it is the Commission's proper function to infer that a coin bears sufficient resemblance to an original as to constitute a counterfeit of it under the Hobby Act, notwithstanding the absence of evidence of deception.

[15] Respondent Thompson testified that "[t]he term restrike to me means a reproduction of an existing coin," (Tr. 439), which definition he quickly expanded to include "a coin that has existed. . .[a]t one time." (Tr. 439) Having represented *all* of their coins as being reproductions of originals in their promotional materials, respondents are in a peculiarly poor position to assert before the Commission that any of their coins is not a "reproduction, copy or counterfeit" of such originals.

original renders the copy no longer a "counterfeit" capable of fooling one who does not consult the *Standard Catalog of World Coins,* just as the use of fake serial numbers or the omission of serial numbers entirely would not suffice to remove an imitation $10 note from the purview of the counterfeit laws. *United States* v. *Chodor, supra,* 479 F.2d at 664. [14]

The position of respondents seems to be that there are certain features of a coin that determine its "identity" or "essence," which are the date, and that a simulation that fails to embody in precise detail that "essence" is neither a "reproduction, copy, or counterfeit," regardless of what a purchaser might believe. This approach, however, lacks foundation in the wording of the statute or in its history and intent, and would create insuperable problems of construction.[16] [15]

For the foregoing reasons, we conclude that a coin is an "imitation numismatic item" within the meaning of the Hobby Protection Act if it is not sufficiently different from an original numismatic item as to alert an unsuspecting purchaser to the difference. Applying that principle here, we find that minor variations in dates between an original and its alleged "copy" are insufficient to deprive the latter of its status as a "reproduction, copy or counterfeit" of an "orginal numismatic item" and do not eliminate the requirement that the latter be marked with the word "Copy." Accordingly, respondents violated the law by their failure to mark "Copy" upon their 10 Mark Wilhelm I (1887), 10 Mark Wilhelm II (1888), and 20 Mark Wilhelm II (1887).

E. *Liability of Individual Respondents*

The administrative law judge determined that no order should be entered against the individual respondents in this case, although he found that they were responsible for the activities and law violations of Gold Bullion. In the law judge's view, no order is needed because of

The absence of proof of conscious, purposeful violations of the law coupled with

[16] For example, another "basic attribution consideration" of a coin is its nationality, which encompasses the symbols and figures imprinted on the coin. (RX 43) Does this mean, therefore, that a private mint can avoid the Hobby Act's requirements by placing a mustache, or 5 o'clock shadow, on the face of a Kaiser or King who was clean-shaven on the original? Unless the meaning of "reproduction, copy, or counterfeit" is made to turn upon the reasonable possibility that the coin in question could be mistaken for an original, there is no practical way to give meaning to the statutory language, or to protect it from ready evasion.

The approach we take here is not meant to read into the Hobby Protection Act a necessity to show "deception" that Congress clearly abjured. In passing the Act, Congress *presumed* that copies of original numismatic items could deceive collectors, and, therefore, required that all of them be marked. With respect to coins that are plainly copies, it is no defense under the law to argue that no collector has (yet) been deceived. The question of "capacity to deceive" arises only where, as with the 10 and 20 mark coins in this case, the alleged "imitation numismatic items" vary in certain minor respects from originals, so that there is doubt as to whether they are "reproduction, copy, or counterfeit" within the meaning of the Act.

testimony that all three respondents are gainfully employed in fields totally unrelated to the marketing of gold coins and have no intention to become involved in a business similar to Gold Bullion. . . (I.D. p. 21)

We believe that the law judge's conclusion is in error for several reasons. In the first place, respondents' present intention not to become involved again in the sale of imitation numismatic items offers very little guarantee to the public that they will not undertake such a business in the future. Nor does the fact that respondents are gainfully employed in fields unrelated to the marketing of gold coins afford such protection. Respondents were also gainfully employed outside the numismatic area prior to their formation of Gold Bullion, and there are no objective circumstances that would preclude, or minimize the likelihood of their re-entering the coin business in the future. Indeed, the expertise they have gathered in that area from their operation of Gold Bullion would seem to increase the chance that one or more of them might return to this area as a primary or secondary occupation in the future. [16]

Secondly, ignorance, or disregard of the law is no defense to entry of an order against one who has violated the law for those reasons. The evidence indicates that when respondents began the operation of Gold Bullion they were ignorant of the requirements of the Hobby Protection Act. It appears that in Gold Bullion's final days, that ignorance was remedied by respondents' receipt of a letter from Federal Trade Commission staff informing them of the law's requirements. Notwithstanding their receipt of a copy of the law, respondents halted the importation and sale of unmarked imitation numismatic items only as a result of seizure by the Customs Service of their coins, not as a result of reading and applying the law.[17]

In any event, if respondents have been capable of ignoring the law, or misconstruing its requirements in the past, there is no reason to assume they may not do so in the future. To conclude that an order should be entered against them, there need not be reason to question respondents' good faith. There is no evidence in the record that they have sought to mislead anyone, and one may presume that their violations resulted until January 10, 1975 or so from ignorance of the law, and thereafter, at most, from good faith disagreement with the views of FTC staff that they were violating it. However, one purpose of a lawsuit is to resolve such good faith disagreements, and to

[17] The record indicates that on approximately January 10, 1975, Gold Bullion received from Federal Trade Commission staff notification that their coins were suspected of violating the Hobby Protection Act, along with a copy of the Act. (Tr. 465–66; RX 12). Nevertheless, respondents imported a shipment of coins as late as January 30, 1975 (Tr. 467–68; CX 18–19), despite the availability of a telex machine (Tr. 464) that could have been used to halt the shipment from Germany, and they sold gold coin replicas in the United States as late as February 6, 1975. (Tr. 468).

ensure future adherence to the law, notwithstanding what may continue to be one side's good faith belief that it has done no wrong. Entry of an order is the customary and surest means of accomplishing this. [17] Accordingly, we believe that protection of the public interest and prevention of recurrence of violations requires that the order entered against Gold Bullion[18] also extend to the individuals who founded, operated, and controlled it, and were responsible for its practices. *Virginia Mortgage Exchange, Inc.*, 87 F.T.C. 182, 202-03; *Peacock Buick, Inc.*, 86 F.T.C. 1532, 1565 (1975), *aff'd.* 553 F.2d 97 (4th Cir. 1977).

We have, however, modified the boilerplate reporting requirement proposed by complaint counsel, so as to require only that respondents report to the Commission, for a ten year period, any affiliation by them with a business involving numismatic or political items. As a result, aside from requiring the routine filing of a compliance report in 60 days, the order we enter will impose absolutely no obligations upon respondents of any sort so long as they are not involved in occupations that would be subject to the Hobby Protection Act. [18]

F. *Notice to Consumers*

The administrative law judge ordered respondents to send letters to purchasers of those coins as to which he found that violations had occurred, notifying them of the violation and of the fact that they would have a private right of action under the law. While this is an entirely proper remedy for Hobby Protection Act violations, we have determined to omit the requirement under the precise circumstances of this case.

The record reflects that Gold Bullion's coins were sold principally for their gold value. Prices fluctuated daily based upon the value of gold. Of course, Gold Bullion's coins sold at a premium over the world spot price of bullion, the premium varying with the particular type of coin. While Gold Bullion asserts that the literature accompanying its coins was sufficient to place all purchasers on notice that its coins were no more than private mint copies, it is possible that the premiums that Gold Bullion's coins commanded were, in some measure, a function of consumers' mistaken beliefs that the coins were government issue.[19] However, even under these

[18] We reject respondent's contention that no order should enter against Gold Bullion itself. If the corporation is finally liquidated the order will be moot, but if it should continue to remain in existence it is entirely appropriate that it be placed under order to prevent recurrence of its illegal conduct.

[19] The premiums may also be due in varying measure to such factors as the services provided by Gold Bullion in obtaining, packaging, and merchandising the gold, as well as the aesthetic value of the coin. There is record evidence to indicate that government-minted coins are better vehicles for the exchange of gold than those created

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circumstances, the premium would have constituted only a small fraction of the purchase price and come to only a few dollars.

For the foregoing reasons, we suspect that whatever private rights of action might be available to the *immediate purchasers* of Gold Bullion's coins would not be substantial. Moreover, the notice in question would have considerable capacity to mislead such purchasers, both because of the generally limited value of their private right, and, also, [19] because there may be some question as to the date of manufacture of individual coins and therefore as to whether particular individual recipients of the notices would have any rights at all.[20] Weighing the opportunities for deception of consumers against the likely minimal benefits to be derived from a notice in this case, we believe that it should be omitted.

The foregoing is not to say that there have not been or may not in the future be major victims of the law violations in this case. Such victims, however, seem most likely to be those who may repurchase Gold Bullion's coins from original or subsequent purchasers, absent the accompanying disclosures of private origin that Gold Bullion itself may have made. There can be little doubt that the original government versions of the coins that Gold Bullion has copied may now have, or in the future may come to possess, numismatic value far in excess of their gold content. (Cf. Tr. 228–29) The coins that Gold Bullion has placed into the stream of commerce may, therefore, be resold for many times their true value, to the severe detriment of those who purchase them. Although respondents have repeatedly insisted that they cannot be responsible for the sharp practice of others, that is precisely their responsibility under the law. Congress, when it enacted the Hobby Protection Act, was specifically concerned with the problem of unidentified copies of originals that might be sold [20] initially with disclosure of their counterfeit status, but could then be resold without such disclosure.[21] Accordingly, it placed upon those in the best position to bear it, the obligation to

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by private mints, because governments are widely assumed to have a greater stake in preserving the integrity of their issue. (Tr. 309) Such issue is, therefore, likely to trade more freely, with less need for assay, and, as a result, to command a higher premium. In any event, the extent to which the value of a gold coin results from perceptions of its origin may vary among individual consumers.

[20] As noted, we have no doubt that most of the coins manufactured by B.H. Mayer's Kunstprageanstalt for Gold Bullion postdated November 29, 1973. However, some may not have. While this state of facts is quite sufficient to establish violation of the Hobby Protection Act, a court trying a private case might not find it sufficient to establish violation in the case of any particular coin. Then again, the court might well conclude that respondents' lack of record-keeping cannot be allowed to immunize them from liability, and rule for plaintiffs. The issue, however, is obviously one that could cloud private litigation. To avoid deception, any notice to consumers would have to be cast in sufficiently equivocal terms as to avoid misrepresenting the likelihood of success.

[21] "Many museums and similar institutions reproduce numismatic items in their collections which are sold with literature or packaging which clearly indicate that the items are reproductions. Unfortunately, the article and literature or packaging indicating that the coin is a reproduction may subsequently be separated. These coins, too, are subsequently sold or traded as originals." S. Rep. 93–345, p. 2; *See also* H.R. Rep. 93–159, pp. 3–4.

mark such counterfeits with the word "Copy." Affixation of the word "Copy" to Gold Bullion's coins would guarantee that those coins could never be passed off as originals, and it is obviously the importer or domestic manufacturer, as the law prescribes, who is in the best position to accomplish this simple task. However, the damage in this case has been done; notification of immediate purchasers is unlikely to accomplish any significant benefit; and a "recall" of the offending coins for imprinting does not appear practical. Accordingly, the notification provisions of the proposed order will be omitted.

To help guarantee that others will not violate the Hobby Protection Act in the future, however, we have, in addition to entering the appended order, also prepared a synopsis of our determinations in this case. This will facilitate application of the Commission's holdings in this case to others who may engage in the same practices as respondents have been engaged in, pursuant to the provisions of 15 U.S.C. 45(m)(1)(B), [§205 of the Magnuson-Moss Act]. That synopsis appears on the following page.[22]

ATTACHMENT

SYNOPSIS OF DETERMINATIONS FOR 15 U.S.C. 45(m)(1)(B) GOLD BULLION INTERNATIONAL, LTD., DKT. 9094

It is unlawful under the Hobby Protection Act (15 U.S.C. 2101, *et seq.*) and an unfair or deceptive act or practice under Section Five of the Federal Trade Commission Act (15 U.S.C. 45) to manufacture in the United States or import into the United States, for introduction into or distribution in commerce, any "imitation numismatic item"[1] which is not plainly and permanently marked "COPY."[2]

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[22] The Commission's decision to prepare a synopsis of its determinations in this case is undertaken in the exercise of its discretion, in order to simplify application of those determinations to other cases. Such a procedure is not required by 15 U.S.C. 45(m)(1)(B).

[1] An "imitation numismatic item" is an item which purports to be, but in fact is not, an "original numismatic item"(a) or which is a reproduction, copy or counterfeit of an "original numismatic item." Imitation numismatic items include not only those items that are exact replicas in every detail of original numismatic items, but in addition, they include items that might reasonably be mistaken for "original numismatic items" by an unsuspecting consumer exercising ordinary observation and care. For example, a coin that resembles an "original numismatic item" in all respects except for a minor variation in the date would still be an "imitation numismatic item."

> (a) An "original numismatic item" is anything that has been a part of a coinage or issue which has been used in exchange or has been used to commemorate a person or event. The term includes coins, tokens, paper money, and commemorative medals. An item has been "used in exchange" if it has been traded in the marketplace and used as a means of payment. Thus, the term applies to more than simply "legal tender."

[2] Rules issued by the Federal Trade Commission require that the word "COPY" shall be marked upon the item legibly, conspicuously and nondeceptively. The word "COPY" shall appear in capital letters, in the English language. The word "COPY" shall be marked on either the obverse or reverse surface of the item. It shall not be marked on the edge of the item. An imitation numismatic item of incusable material shall be incused with the word "COPY" in sans-serif letters having a vertical dimension of not less than two millimeters (2.0 mm) and a

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FINAL ORDER

This matter has been heard by the Commission upon the cross-appeals of complaint counsel and respondent's counsel from the initial decision and upon briefs and oral argument in support and in opposition to each appeal. The Commission, for the reasons stated in the accompanying Opinion, has granted portions of the appeals of each side. Therefore,

It is ordered, That the initial decision of the administrative law judge be adopted as the Findings of Fact and Conclusions of Law of the Commission, except for Findings 46; 51; the words "German 20 Mark 1887 Wilhelm I" in finding 66; 67; 76–77; page 18, footnote; page 19, all of footnote after word "testimony"; page 21, second paragraph, everything after semi-colon; page 21, third, fourth and fifth paragraphs; page 22, second full paragraph; page 23, findings 6 and that part of 7 following the comma; pp. 23–25 "Order."

Other findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion. [2]

It is further ordered, That the following order to cease and desist be entered:

ORDER

It is ordered That respondents Gold Bullion International, Ltd., a corporation, its successors and assigns, and its officers, and H. Kenneth Costello, Walter N. Thompson, and William H. Bogart, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, importation or distribution in or affecting commerce (as defined in Section 4 of the Federal Trade Commission Act; 15 U.S.C. 44) of any imitation numismatic item, as "imitation numismatic item" is defined in the Hobby Protection Act (Pub. Law 93–167, 15 U.S.C. 2101, *et seq.*), do forthwith cease and desist from:

> Importing, manufacturing or distributing any imitation numismatic item that is not plainly and permanently marked "COPY" as required by Section 2(b) of the Hobby Protection Act and the regulations promulgated thereunder. The word "COPY" shall appear in conformance with 16 C.F.R. §304.6, *i.e.*, in capital letters, in the English language, incused in sans-serif letters having a

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minimum depth of three-tenths of one millimeter (0.3 mm) or to one-half the thickness of the reproduction, whichever is the lesser. An imitation item composed of nonincusable material shall be imprinted with the word "COPY" in sans-serif letters having a vertical dimension of not less than two millimeters (2.0 mm). In either case, the minimum total horizontal dimension of the word "COPY" shall be six millimeters (6.0 mm).

vertical dimension of not less than two millimeters (2.0mm) and a minimum depth of three-tenths of one millimeter (0.3mm) or one half (1/2) the thickness of the reproduction, whichever is the lesser. The minimum total horizontal dimension of the word "COPY" shall be six millimeters (6.0mm).

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 respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, 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 furthered ordered, That for a period of ten years from the effective date of this order, each individual respondent named herein promptly notify the Commission of [3] any affiliation with a business or employment that involves the manufacture in the United States or importation into the United States of numismatic or political items. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business of employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

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

Commissioner Pitofsky did not participate.

IN THE MATTER OF

THE TIMES-MIRROR COMPANY

Docket 9103. Interlocutory Order, July 25, 1978

This order grants the appeal of complaint counsel for reinstatement of count II of the complaint, dismissed by order of the administrative law judge.

ORDER GRANTING COMPLAINT COUNSEL'S APPEAL FROM ORDER DISMISSING COUNT II OF THE COMPLAINT

On July 27, 1977, the Commission issued its complaint in this matter alleging violations of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act (15 U.S.C. 13(a)) in connection with respondent's sale of retail advertising in The Los Angeles Times.

This matter is now before the Commission on appeal by complaint counsel, pursuant to Section 3.23(b) of the Commission's Rules of Practice, from the order of the administrative law judge (ALJ) dismissing count II (the Robinson-Patman charge) of the complaint.[1] The ALJ ruled that newspaper advertising is not a "commodity" within the meaning of section 2(a) and, therefore, count II fails to state a claim upon which relief can be granted. For the reasons set forth below, we disagree with the ALJ's holding and reinstate count II of the complaint.

In reaching his decision, the law judge relied on court decisions holding that the term "commodities" is limited only to tangible products, not intangibles or services.[2] In addition, he looked to statements made after passage of the Robinson-Patman Act by one of its co-authors to the effect that such items as advertising, insurance and brokerage service are not commodities for purposes of the Act.[3] The judge also cited two recent district court decisions specifically holding that newspaper advertising is not a commodity within the meaning of Section 2(a) of the Robinson-Patman Act.[4] After reviewing these authorities, the ALJ concluded that, although newspapers are tangible goods, the respondent is selling "the service

[1] The allegations of count I of the complaint, relating to Section 5 of the FTC Act, are not at issue here.

[2] *E.g., Freeman* v. *Chicago Title & Trust Co.*, 505 F.2d 527 (7th Cir. 1974) (title insurance not a commodity); *Baum* v. *Investors Diversified Services, Inc.*, 409 F.2d 872 (7th Cir. 1969) (mutual fund shares not commodities); *Tri-State Broadcasting Co.* v. *United Press International, Inc.*, 369 F.2d 268 (5th Cir. 1966) (sale of news reports treated as sale of a privilege); *CBS* v. *Amana Refrigeration, Inc.*, 295 F.2d 375 (7th Cir. 1961) (sale of broadcast advertising time not a commodity).

[3] W. Patman, Complete Guide to the Robinson-Patman Act (1963) at 33.

[4] *National Tire Wholesale, Inc.* v. *Washington Post*, 441 F. Supp. 81 (D.D.C. 1977), *appeal docketed*, No. 781148 (D.C. Cir. Feb. 22, 1978); *National Auto Brokers Corp.* v. *General Motors Corp.*, 1974-2 Trade Cases ¶75,281 (S.D.N.Y. 1974).

of taking the advertiser's message into a million homes, with its own circulation list and its own means of distribution." Thus, while both a service and a product are involved, "the dominant nature of respondent's business can best be characterized as the sale of a service and not the sale of commodities . . . ."

The specific question before us has never been formally addressed by the Commission[5] and the Supreme Court has expressly reserved ruling on the issue.[6]

Section 2(a) of the Robinson-Patman Act prohibits under certain circumstances discrimination in price between different purchasers of commodities of like grade and quality. It is clear that the Robinson-Patman Act applies only if a challenged price discrimination involves the sale of commodities. Price discrimination in noncommodity transactions, such as the furnishing of services, is not actionable under the statute.[7]

Although it is clear that the Act applies only to sales of commodities, the scope of that term is more ambiguous. Neither the original Clayton Act nor the Robinson-Patman amendments provide a definition of the term "commodities." The statutes do contain other references to "goods, wares, or merchandise"[8] and Section 3 of the Clayton Act, relating to exclusive dealing contracts, includes the language "goods, wares, merchandise, machinery supplies or other commodities . . . ."[9] While helpful, such language does not unambiguously clarify the reach of the term "commodities."

Moreover, the legislative histories of these statutes do not provide specific guidance as to what the term "commodities" encompasses.[10]

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[5] Shortly after passage of the Robinson-Patman Act, the Commission closed a section 2(a) matter concerning the sale of advertising space because it did not involve the sale of a commodity. 81 Cong. Rec. App. 2336–37 (1937). However, that same year the Commission issued an uncontested order under section 2(a) prohibiting price discrimination in the sale of a Christmas club savings plan which included the sale of passbooks, account books and advertising literature. *Christmas Club,* 25 F.T.C. 1116 (1937).

[6] In oral argument in *Times Picayune Publishing Co.* v. *United States,* 345 U.S. 594 (1953), government counsel referred to the Commission action discussed in note 5 *supra.* In a footnote, the Court referred to this as an "early informal Federal Trade Commission opinion," and specifically stated that it expressed no views on the Commission's statutory interpretation. 345 U.S. at 609, n. 27.

[7] Sections 2(d) and 2(e) of the Act prohibit the furnishing of services or facilities on a discriminatory basis, but these sections are addressed to merchandising or promotional aids which are furnished by a supplier to customers in connection with a sale of products or commodities.

[8] The words, "goods, wares, or merchandise," which appear in Sections 2(a) and 2(c), were also contained in Section 2(a) of the Clayton Act.

[9] The term "commodities" in Section 3 has since been interpreted by one court as having essentially the same meaning as the words "goods, wares, or merchandise." *Baum* v. *Investors Diversified Services, Inc., supra* note 2, at 875.

[10] Congress specifically excluded labor from the coverage of the Clayton Act, 15 U.S.C. 17, but other exclusions are not delineated in the statute. Further, at least some members of Congress apparently believed that insurance would be covered by the Act except for a Supreme Court ruling that insurance contracts and policies were not in interstate commerce. *See* 51 Cong. Rec. 9390 (1914).

However, similar language is contained in many state statutes which Congress looked to in passing the Clayton Act,[11] and court decisions construing these or related state antitrust laws have not adopted a restrictive definition of commodities.[12] Although the state precedent offers no unequivocal guide to Congress' intentions, it does suggest that Congress was more concerned about the overall thrust of the statute and that primary emphasis should be placed on defining the term "commodities" within that context, rather than attempting to draw unduly fine distinctions between tangible and intangible products.

Since the word "commodities" was carried over from the Clayton Act, it is not surprising that the legislative history of the Robinson-Patman amendments sheds little additional light on the meaning of commodities. What is clear is that Congress' concern with chain store buying practices focused attention on pricing activities involving products which are unquestionably tangible in nature. That is reflected, understandably, in statements made during consideration of the legislation leading to passage of the Robinson-Patman Act.[13] In addition, the language of the statute reflects emphasis on those types of transactions concerning clearly tangible goods, such as the reference in section 2(a) to price changes allowed for perishable or obsolescent goods. Representative Patman has since stated that the word "commodity" in its broadest sense could include items of trade other than those in tangible form, but that in the Robinson-Patman Act the term is used in an ordinary commerical sense to designate any movable or tangible thing.[14] Thus, in his opinion, advertising, insurance, brokerage service, and similar items would be excluded from the Act's coverage though they might be commodities in the broader sense.

In construing the Robinson-Patman Act, the courts have adopted the tangible/intangible dichotomy and consistently taken the position that the Act applies only to transactions which have tangible characteristics.[15] Although virtually no transfer of an

[11] A list of the 19 states which had enacted anti-price discrimination laws prior to passage of the Clayton Act is set forth in H.R. Rep. No. 627, 63 Cong., 2d Sess. 9 (1914).

[12] For example, in two state cases, one decided before and the other after enactment of the Clayton Act, courts found that telephone service, *McKinley Telephone Co.* v. *Cumberland Telephone Co.*, 140 N.W. 38, 40 (Wis. 1913), and electricity, *State* v. *Interstate Power Co.*, 226 N.W. 427, 433 (Neb. 1929), were commodities for purposes of the applicable statutes. However, as respondent points out, in the only reported case addressing the commodity issue under section 2(a) of the original Clayton Act, *Fleetway, Inc.* v. *Public Service Interstate Transp. Co.*, 72 F.2d 761 (1934), the court there distinquished the *McKinley* decision on the grounds that the Wisconsin statute went beyond the federal law by proscribing restraints on the supply as well as the price of "any article or commodity." *Id.* at 764. The court, though, ultimately concluded that discriminatory bus transportation rates were not covered by Section 2(a), a decision which is not inconsistent with the result we reach here.

[13] *See* Representative Patman's remarks in connection with introduction of his bill at 79 Cong. Rec. 9079 (1935).

[14] W. Patman, *supra* note 3.

[15] *See* cases *supra* note 2.

intangible such as a service, right or privilege can be accomplished without the involvement of tangibles,[16] the courts have held that the incidental existence of a tangible item will not suffice to bring a transaction within the Act's coverage. Rather it is the dominant or essential nature of the transaction which the courts have looked to in determining if it falls within the scope of the Act.[17]

Certainly there is no doubt about the Robinson-Patman Act's application to tangible products that are clearly identifiable as such. Nor is there any doubt that the Act was not intended to reach transactions of a purely service nature, as reflected in the *Fleetway* decision, *supra* note 12. The difficult issue arises where, as here, the transaction cannot be neatly categorized as either a service or tangible product. In our view the proper course is to construe the term "commodities" in light of the fundamental purposes and structure of the statute, rather than becoming preoccupied with metaphysical considerations about what is or is not a tangible product.

From that perspective, we conclude that it is consistent with the language and spirit of the Robinson-Patman Act to treat newspaper advertising as a commodity for purposes of Section 2(a). Clearly unjustified discrimination in the pricing of newspaper advertising space can adversely impact on competition at the retail level just as surely as price discriminations associated with the purchase and resale of products by retailers in the ordinary course of their business. More specifically, the transactions at stake here are amenable to the detailed provisions of the Act. In other words, the product sold (*i.e.*, newspaper advertising space) is sufficiently fungible in nature to be susceptible to the kind of non-discriminatory pricing contemplated by the legislative scheme.

Respondent contends, however, that the wording of the Robinson-Patman Act precludes its application to the instant transactions, citing provisions permitting price differentials based upon "differences in the cost of manufacture, sale, or delivery" and changes affecting the "marketability of the goods concerned," such as "deterioration of perishable goods," and "obsolescense of seasonal goods." To be sure, it is not likely that the latter exceptions would apply to newspaper advertising, as they probably would not be

[16] *E.g., Freeman* v. *Chicago Title & Trust Co., supra* note 2, 505 F.2d at 531; *Tri-State Broadcasting Co.* v. *United Press International, supra* note 2, 369 F.2d at 270.

[17] *See, e.g., Tri-State Broadcasting Co., supra* note 2 (right to broadcast news information, although news reports in written form); *General Shale Products Corp.* v. *Struck Construction Co.*, 132 F.2d 425 (6th Cir. 1942)(construction contract at stake rather then sale of bricks used in construction). *See also CBS* v. *Amana Refrigeration, Inc., supra* note 2, 295 F.2d at 378, where the court concluded in a case brought under Section 2(a) and 3 of the Clayton Act that the sale of television advertising time involved essentially the sale of a privilege to sponsor a program and advertise.

invoked for many other tangible products. Yet, it seems equally clear that newspaper advertising space can be sold for "*use,* consumption, or resale," measured in terms of "like grade and quality" and priced in a manner that reflects differences in the cost of "manufacture, sale, or delivery." 15 U.S.C. 13(a)(emphasis added).

To put the issue differently, there is nothing inherent in the sale of newspaper advertising space that requires particularized skills or treatment for different customers which would render the application of the Robinson-Patman Act to such transactions especially difficult. Unlike the negotiation of a construction contract, the sale of investment or other professional services, or the provision of transportation, the product being sold here functionally conforms to the statutory framework.

To treat newspaper advertising as a commodity does no violence to the structure of the Act, nor does it open the floodgates for litigation concerning a host of transactions which bear little relationship to the purposes underpinning the statute. To the contrary, we believe our interpretation effectuates the purposes of the Robinson-Patman Act while recognizing the limiting features built into that legislation.[18] We conclude, therefore, that newspaper advertising, despite the attendant service aspects, is essentially a commodity within the meaning of Section 2(a).

It is ordered, That complaint counsel's appeal from the order dismissing count II of the complaint be, and it hereby is, granted.

[18] To the extent that our decision is in any way inconsistent with previous court decisions construing the meaning of the term "commodities," we respectfully decline to follow those holdings. Similarly, although we respect the contrary views expressed earlier by the co-author of the Robinson-Patman Act, we believe greater weight in this instance should be given to the history and purposes of the Act than should be accorded to Representative Patman's statements made after its passage. *See United States* v. *Philadelphia Nat'l Bank,* 374 U.S. 321, 348–49 (1963).

IN THE MATTER OF

DRIVER TRAINING INSTITUTE, INC., ET AL.

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

Docket 9060. Complaint, Oct. 3, 1975 — Decision, July 27, 1978

This consent order, among other things, requires a Brooklyn, N.Y. truck and tractor-trailer training school to cease misrepresenting job opportunities, potential earnings, and employment demands for their graduates; and the effectiveness of their job placement activities. Further, firm is required to make timely, prescribed disclosures regarding cooling-off periods, cancellation rights, and job success of former trainees. Additionally, the order requires that firm establish a $50,000 restitution fund to provide refunds to eligible former students, and maintain a surveillance program designed to ensure proper compliance with the terms of the order.

Appearances

For the Commission: *Alice T. Petizon, Jan F. Constantine* and *Shirley F. Sarna.*

For the respondents: *Spengler, Carson, Gubar, Churchill & Brodsky,* New York City and *Mirabelli & Guld,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Driver Training Institute, Inc., a corporation, Drivers Unlimited, Inc., a corporation, Ran-Lynn Rental and Service Corporation, a corporation, and Herbert Gruen, a/k/a Herbert Gruenstein, individually and as an officer of said corporations, and Sidney Spector, individually and as an officer of Driver Training Institute, Inc., hereinafter referred to as respondents, have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Driver Training Institute, Inc., Drivers Unlimited, Inc., and Ran-Lynn Rental and Service Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their principal office and place of business located at 50 Greenpoint Ave., Brooklyn,

New York. The corporate address of Ran-Lynn Rental and Service Corporation is 310 Woods Ave., Oceanside, New York.

Respondent Herbert Gruen, a/k/a Herbert Gruenstein, is an individual and an officer of the corporate respondents. Respondent Sidney Spector is an individual and an officer of Driver Training Institute, Inc. Said individual respondents formulate, direct and control the policies, acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondents.

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

PAR. 2. Respondents are now and for some time last past have been engaged in the advertising, offering for sale and sale of training courses purporting to prepare graduates thereof for employment as truck or tractor-trailer drivers. Said courses consist of a series of lessons presented during a period of in-residence training at places designated by respondents.

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

Respondents also maintain a training facility in the State of New Jersey and have at various times also maintained a sales office in that state.

Respondents transmit and receive, and cause to be transmitted and received, in the course of advertising, offering for sale, sale and distribution of such training courses, advertising and promotional materials, sales contracts, invoices, billing statements, checks, monies and other business papers and documents, to and from the several places of business operated by the respondents located as aforesaid and to prospective purchasers and purchasers thereof, located in various other States of the United States, other than the state of origination. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in

said training courses in or affectng commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their aforesaid business for the purpose of obtaining leads or prospects for the sale of such training courses, and for the purpose of inducing members of the general public to purchase such training courses, respondents have made numerous statements and representations, both specific and implied, in newspaper advertisements, television and radio commercials, brochures and other printed materials and directly to said prospective students in the sales presentations made by their sales persons and other representatives, with respect to job opportunities and wages available to students who complete respondents' training courses, the placement assistance furnished to respondents' graduates in obtaining employment, and other matters. The following are typical and illustrative of the aforesaid statements and representations but not all inclusive thereof:

A. *Billboard Advertisements*

Big Steady Money

B. *Newspaper Advertisements*

The trucking industry NEEDS YOU. . .EARN BIG MONEY.

C. *Statements from Brochures*

No matter what their age, experience or background, all who come to DTI have one vital goal in common:

THE NEED
TO MAKE MORE
MONEY

. . .the industry's demand for professionally trained drivers continues to increase.

In general, trucking is one of the most highly unionized industries in the country. This is reflected in pay scales and job security for professionally trained drivers.

At this time, tractor-trailer drivers are in demand and earn the highest pay.

Demand is high and pay and job security are generally good in other trucking categories as well.

While DTI's primary function is professional training, we do offer effective job placement assistance to our graduates.

Each of these classifications (tractor-trailer; bus operator; large truck; small and medium trucks) has its own potential for a steady job at good pay.

DTI job placement

Job placement is part of the DTI service to graduates. This includes professional job counseling for all who complete their courses.

Although DTI cannot guarantee a job, it is a fact that a high percentage of our graduates have been placed through our efforts.

This is not surprising, because DTI's recognition in the industry as a truly fine training school for professional drivers helps to bring employers and our graduates together.

In earning the coveted DTI diploma-a valuable asset-you will be providing yourself with ready recognition in the industry as a safe, efficient and professional driver.

D. *Television Advertisements*

1

How would you like to make more than a good living? It's easy as a professional tractor-trailer driver. Let Driver Training Institute, one of America's oldest and largest licensed trucking schools show you how. You can keep your present job while you train. . .No previous trucking experience or high school diploma necessary. . .You get full job security in this highly unionized industry where no machine can replace you. Let Driver Training Institute help place you in the thousands of high paying jobs now waiting for you as a tractor-trailer driver. . .

2

Drive a tractor-trailer. These men do. This man now earns $250 a week and more. This man earns over $300 a week. They both have one thing in common. . .the need to make more money. If you want to make big money too, then call Driver Training Institute now. . .Act now. While there are still hundreds of high paying union jobs open. . .

3

Trailer drivers are in demand and do earn good money. The Driving Training Institute will train you in a very short time even while you're on your present job at their New York and Central New Jersey training centers. . .

4

FRIEND: Joey! I hear it's your last day on the job.
JOEY: Yeah! I start Monday as a tractor-trailer driver. Twice the money too.
FRIEND: How'd you swing that?
JOEY: With a course at DTI. Helped me get the job. Pretty good for a high school dropout, ha?. . .
ANNCR: You can train at the Driver Training Institutes in New York and Central New Jersey training centers. Better money and a brighter future in the highly unionized teamster industry. . .

E. *Oral Statements by Sales Representatives*

(a) There are a substantial number of positions as truck and tractor-trailer drivers readily available to respondents' graduates.

(b) Respondents' graduates experience little or no difficulty in obtaining employment as truck and tractor-trailer drivers.

(c) A substantial number or percentage of respondents' graduates earn salaries of approximately $250 per week.

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

1. There is a significant or substantial need or demand for all or most of respondents' graduates in positions for which respondents train such persons.

2. Respondents had a reasonable basis from which to conclude that there is now or will be a significant or substantial need or demand for all or most of respondents' graduates in positions for which respondents train such persons.

3. Thousands of high-paying jobs as truck and tractor-trailer drivers are readily available to graduates of respondents' training courses.

4. Respondents had a reasonable basis from which to conclude that there are thousands of high paying jobs as truck and tractor-trailer drivers readily available to graduates of respondents' training courses.

5. Graduates of respondents' training courses will experience little or no difficulty in securing employment in positions for which they have been trained.

6. The types of jobs available to graduates of respondents' training courses are steady, regular or secure in nature.

7. The types of jobs available to graduates of respondents' training courses generally pay salaries of approximately $250 per week and a substantial number of the graduates of respondents' courses earn $250 per week as truck and tractor-trailer drivers.

8. Respondents had a reasonable basis from which to conclude that a substantial number of graduates of their training courses would obtain jobs that paid approximately $250 per week.

9. Respondents' placement service has been successful and effective in securing employment for all or most of their graduates as truck and tractor-trailer drivers.

10. Experience is not necessary or advantageous for graduates of respondents' courses of training to secure employment in high-paying, steady positions as truck and tractor-trailer drivers.

PAR. 6. In truth and in fact:

1. At the time it was so represented there was not a significant nor substantial need or demand for all or most of respondents' graduates in positions for which respondents train such persons.

2. Respondents had no reasonable basis from which to conclude that there is now or will be a significant or substantial need or demand for all or most of respondents' graduates in positions for which respondents train such persons.

3. Thousands of high-paying jobs as truck and tractor-trailer drivers are not readily available to graduates of respondents' training courses.

4. Respondents had no reasonable basis from which to conclude that there are thousands of high-paying jobs as truck and tractor-trailer drivers readily available to graduates of respondents' training courses.

5. Graduates of respondents' training courses have in many instances experienced substantial difficulty in securing employment in positions for which they have been trained.

6. The types of jobs available to graduates of respondents' courses are often not regular, secure nor steady in nature.

7. When jobs are available to graduates of respondents' training courses, these jobs generally pay salaries which are less than $250 per week and a substantial number of respondents' graduates do not earn salaries of $250 per week as truck and/or tractor-trailer drivers.

8. Respondents had no reasonable basis from which to conclude that a substantial number of graduates of their training courses would obtain jobs that paid approximately $250 per week.

9. In most cases, respondents' placement service has not been successful nor effective in securing employment for their graduates as truck and tractor-trailer drivers.

10. In most instances experience is necessary or advantageous for graduates of respondents' courses of training to secure employment in high-paying, steady positions as truck and tractor-trailer drivers.

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

PAR. 7. Through the use of the aforesaid advertisements, television commercials, brochures, oral representations and otherwise, respondents have represented, directly or by implication, that there is or will be a significant or substantial need or demand for all or most of respondents' graduates in positions for which respondents train them; that there are thousands of high-paying jobs as truck and tractor-trailer drivers readily available to graduates of respondents' training courses; and that a substantial number of graduates of

respondents' training courses would obtain jobs that paid approximately $250 per week. Respondents had at the time of said representations no reasonable basis adequate to support the representations. Therefore, the aforesaid acts and practices were, and are, unfair acts or practices.

PAR. 8. (a) In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have offered, and are now offering, for sale training courses purporting to prepare purchasers thereof for employment as truck drivers or tractor-trailer drivers without disclosing in advertising or through their sales representatives: (1) the recent percentage of persons who have completed the training course who were able to obtain the employment for which they were trained; (2) the employers that hired any such persons; (3) the initial salary any such persons received; and (4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction. Knowledge of such facts by prospective purchasers of respondents' training courses would indicate the possibility of securing future employment upon completion of the training courses, and the nature of such employment. Thus, respondents have failed to disclose a material fact which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such training courses. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

(b) Respondents have offered, and are now offering, for sale training courses purporting to prepare purchasers thereof for employment as truck or tractor-trailer drivers without disclosing in advertising or through their sales representatives that:

1. Many employers of truck and tractor-trailer drivers prescribe a minimum age of twenty-one years of age for drivers;

2. Many employers of truck and tractor-trailer drivers give preferential consideration in hiring to driver-applicants with actual truck or tractor-trailer driving experience. Knowledge of such facts by prospective purchasers of respondents' training courses would indicate the possibility of securing future employment upon completion of the training courses, and the nature of such employment. Thus, respondents have failed to disclose material facts which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such training courses. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive or unfair acts or practices.

PAR. 9. Through the aforesaid acts and practices, respondents have

induced persons to pay or to contract to pay to respondents substantial sums of money for courses of training which were of little use or value to said persons for the purposes of obtaining employment in the jobs for which respondents provided training. Respondents have received the said sums of money and have failed to offer refunds or to refund said sums of money or to rescind the contractual oblications of said persons.

Therefore, the aforesaid acts and practices, the receipt of and failure to offer to refund or to refund said sums of money, and the failure to rescind said contractrual obligations, were, and are, unfair or deceptive acts or practices.

PAR. 10. In the course and conduct of their business, and at all times mentioned herein respondents have been, and now are, in substantial competition, in commerce, with corporations, firms, and individuals engaged in the sale of courses covering the same or similar subjects.

PAR. 11. The use by respondents of the aforesaid false, misleading, unfair or deceptive statements, representations, acts and practices and their failure to disclose material facts as aforesaid has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and to induce a substantial number thereof to purchase respondents' training courses by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and respondents' competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

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

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

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

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

1. Respondents Drivers Unlimited, Inc., and Ran-Lynn Rental and Service Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their prinicpal office and place of business located at 50 Greenpoint Ave., Brooklyn, New York. Driver Training Institute, 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 50 Greenpoint Ave., Brooklyn, New York.

Respondent Herbert Gruen, a/k/a Herbert Gruenstein, is an individual and an officer of the corporate respondents and also does business under the firm name of Driver Training Institute. Said individual respondent formulates, directs and controls the policies, acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondents.

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

ORDER

I

It is ordered, That respondents Driver Training Institute, Inc., a corporation, Drivers Unlimited, Inc., a corporation, Ran-Lynn Rental and Service Corporation, a corporation, their successors and assigns and their officers, and Herbert Gruen, a/k/a Herbert Gruenstein, individually and as an officer of said corporate respondents and doing business under the firm name of Driver Training Institute, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, franchise or other device in connection with the advertising, promoting,

offering for sale, sale or distribution of courses of study, training or instruction in the field of truck driving or any other subject, trade or vocation in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

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

(a) There is a significant or substantial need or demand of any size or proportion for persons completing any of respondents' courses offered in the field of truck driving or any other field, or otherwise representing that opportunities for employment, or opportunities of any type or number are available to such persons, or that persons completing said courses will or may earn a specified amount of money, or otherwise representing by any means the prospective earnings of such persons, except as hereafter provided in Paragraph 5.

(b) The placement service offered by respondents has been successful in placing respondents' graduates in positions as truck and tractor-trailer drivers; or misrepresenting in any manner the effectiveness or success of respondents' placement service in obtaining employment for graduates of any course of training.

(c) Experience is not required or advantageous for employment as truck and tractor-trailer drivers; or misrepresenting in any manner the qualifications or requirements necessary to obtain employment as a truck or tractor-trailer driver.

2. Misrepresenting orally, visually, in writing or in any other manner, directly or by implication:

(a) The employment prospects of respondents' graduates or the ease with which respondents' graduates will attain employment.

(b) The types of jobs available to respondents' graduates, or that there will be job security or steady employment for respondents' graduates in positions for which respondents train such persons.

3. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any truck or tractor-trailer driver training course offered by respondents, the following information:

(a) The title "IMPORTANT INFORMATION" printed in ten (10) point boldface type across the top of the form.

(b) Paragraphs providing the following information:

(1) Many employers of truck or tractor-trailer drivers prescribe a minimum age of twenty-one (21) years of age for interstate drivers.

(2) Many employers of truck or tractor-trailer drivers give

preferential consideration in hiring to driver-applicants with actual truck or tractor-trailer driving experience.

4. Failing to keep adequate records which may be inspected by Commission staff members upon reasonable notice which substantiate the data and information required to be disclosed by Paragraph 5 of this order and prescribed in Appendix A.

5. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any course of instruction in the field of truck driving or any other subject, trade or vocation offered by respondents, the following information in the format prescribed in Appendix A and for a base period designated as described in Appendix B:

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

(2) The placement rate, ratio or percentage for enrollees and graduates, and also the numbers upon which such rates, ratios or percentages are based, such rate or percentage to be computed separately for each course of instruction offered by respondents at each school, location or facility;

(3) The salary range of respondents' graduates as to the same graduates used to compute the placement percentage in (2) above;

(4) A list of firms or employers which are currently hiring graduates of said courses in substantial numbers and in the positions for which such graduates have been trained, and the number of such graduates hired, as to the same graduates used to compute the placement percentage in (2) above.

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

DISCLOSURE NOTICE

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

6. (a) Contracting for the sale of any course of instruction in the

field of truck driving or any other subject, trade or vocation in the form of a sales contract or any other agreement which does not contain in immediate proximity to the space reserved in the contract for the signature of the prospective enrollee in boldface type of a minimum size of ten (10) points, a statement in the following form:

> You, the prospective enrollee, may cancel this transaction at any time prior to midnight of the seventh business day after the date of this transaction. See attached notice of cancellation form for an explanation of this right.

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

NOTICE OF CANCELLATION

(enter date of transaction)
(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN SEVEN (7) BUSINESS DAYS FROM THE ABOVE DATE.

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

IF YOU CANCEL THIS TRANSACTION YOU MUST RETURN, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY BOOKS OR OTHER MATERIALS PROVIDED TO YOU UNDER THIS CONTRACT OF SALE. THESE MATERIALS MUST BE MAILED OR DELIVERED BY YOU TO *(Address of Seller's place of business)* WITHIN TWENTY (20) DAYS OF THE DATE YOU CANCEL THIS TRANSACTION. IF YOU FAIL TO RETURN THESE MATERIALS, THEN YOU WILL REMAIN LIABLE FOR PAYMENT OF THEIR REASONABLE COSTS.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO *(Name of Seller),* AT *(Address of seller's place of business)* NOT LATER THAN MIDNIGHT OF *(Date).*

I HEREBY CANCEL THIS TRANSACTION.

(Buyer's signature) (Date)

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

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

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

(f) During the cancellation period described herein, respondents shall not initiate contacts with such contracting persons other than contact permitted by this paragraph, and other than contact no earlier than five (5) days following the signing of the contract by the prospective student, which contact shall be limited solely to determining whether the prospective student has obtained a learners permit.

(g) This paragraph 6 shall not apply to any course of instruction whose purpose is avocational and which does not exceed seven (7) days in duration of less than full-time training and does not cost more than $150.

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

8. In the event the Commission promulgates a final Trade Regulation Rule on Advertising, Disclosure, Cooling-Off and Refund Requirements Concerning Proprietary Vocational and Home Study Schools, then, upon the effective date of such Rule, such Trade Regulation Rule shall completely supersede and replace the provisions of this order set forth in Part I, Paragraphs 1(a), 4, 5 and 6, provided that if no provision of the Trade Regulation Rule relates in whole or in part to any matter covered by provisions of one of the aforesaid paragraphs of this order, then said provisions of said paragraph shall remain in full force and effect.

II

It is further ordered, That respondents:

(1) Deliver, or cause to be delivered, a copy of this order to all persons who now or in the future become franchisees of respondents for the operation of a vocational school program.

(2) Inform all franchisees that respondents are obligated to terminate those franchisees who continue the acts or practices prohibited by this order.

(3) Institute a program of continuing surveillance to reveal whether the business operations of each of said franchisees conform to the requirements of this order.

(4) Upon receiving actual knowledge from any source (including but not limited to respondents' program of surveillance, and representatives of the Federal Trade Commission) of facts indicating a violation of any provision of this order by any of respondents' present or future franchisees, respondents shall within 24 hours notify such franchisee by certified mail, return receipt requested, that such violation of this order has occurred ("Notice"), and that respondents will discontinue dealing with said franchisee upon receipt by respondents of actual knowledge of any further violations of this order by such franchisee. Respondents shall obtain from such franchisee written acknowledgement of receipt of such Notice which acknowledgement shall indicate the date of receipt of such "Notice." Upon receiving actual knowledge from any source (including but not limited to respondents' program of surveillance and representatives of the Federal Trade Commission) of facts indicating any violations of any provision of this order, following a franchisee's receipt of the aforesaid "Notice," respondents shall permanently terminate such franchisee.

III

It is further ordered, That:

1. For the purposes of Part III of this order, the following definitions shall apply:

(a) The term "Purchasers" shall mean those students who paid all or some portion of their own tuition to respondents and who did not have their tuition paid in full by any federal, state or local government agency or department, or any private business or other organization;

(b) The term "Relevant Time Period" shall mean the period commencing October 1, 1972 and continuing through December 31, 1976.

2. Respondents shall submit to the New York Office of the Federal Trade Commission, within five (5) days after the date this order is served on respondents (hereinafter "date of service"), a notarized affidavit, executed by respondent Herbert Gruen, to the effect that respondents have made or have caused to be made a good faith search of documents that pertain to purchasers of respondents' truck and tractor-trailer training courses of instruction, and that respondents, to the best of their knowledge, have previously or simultaneously with said affidavit submitted to the Commission the names of all such purchasers enrolled in said courses during the relevant time period.

3. Respondents or their designee shall make an inquiry in writing, on the ninetieth (90th) day after the date of service, in the language, manner and form shown in Appendices C and D, by first class mail with the envelope captioned "ADDRESS CORRECTION REQUESTED," accompanied by a self-addressed, postage prepaid envelope, to the home address of each former purchaser of respondents' truck or tractor-trailer courses whose name was submitted by respondents to the Commission. Counsel for respondents shall submit an affidavit of mailing, together with a postal certificate of mailing, to the New York Regional Office of the Federal Trade Commission within ninety-five (95) days after the date of service.

4. With respect to each purchaser whose mailed inquiry is returned undelivered, respondents or their designee shall have a duty to mail on the one hundred and thirtieth (130th) day after the date of service the same inquiry, by first class mail, to such purchaser's business address and to the address of such purchaser's nearest relatives as appear in personal information records, including but not limited to student or placement files, placement records and survey records maintained by respondents. Respondents shall submit to the New York Regional Office of the Federal Trade Commission, on or before the one hundred and thirty-fifth (135th) day after service, a notarized affidavit, executed by respondent Herbert Gruen, to the effect that respondents have made or have caused to be made, a good faith search of such personal information records as pertain to purchasers whose inquiries were returned undelivered, and that inquiries in writing, in the language, manner and form shown in Appendices C and D, were mailed to each such purchaser at his business address and the address of his nearest relative, as appear in his personal information records. Counsel for respondents shall submit an affidavit of mailing, together with a postal certificate of mailing, to the New York Regional Office of the

Federal Trade Commission within one hundred and thirty-five (135) days after the date of service.

5. Respondents shall use the information that they receive from the completed questionnaires solely for purposes of determining the eligibility of Purchasers who attended DTI during the Relevant Time Period for refunds.

6. "Eligible Class Member" means those purchasers who:

(a) Enrolled in respondents' truck and tractor-trailer training courses during the relevant time period; and

(b) (1) Completed respondents' truck and tractor-trailer courses; or

(2) Elected not to complete respondents' truck and tractor-trailer courses because of a lack of job demand or lack of employment qualifications such as minimum age or experience; and

(c) (1) Sought employment as a truck or tractor-trailer driver; or

(2) Elected not to seek employment as a truck or tractor-trailer driver because of a lack of job demand or lack of employment qualifications such as minimum age or experience; and

(d) (1) Did not attain employment as a truck or tractor-trailer driver; or

(2) Worked as a truck or tractor-trailer driver for twenty per cent (20%) of the time or less since terminating respondents' truck and tractor-trailer training courses.

7. Respondents shall make pro rata refund payments to each eligible class member based upon the proportion that total tuitions paid by or for all such eligible class members bear to the total amount available for refunds as provided in Part III of this order, except that eligible class members whose tuition was paid in part by a federal, state or local government agency or department, or by a private business or other organization, shall receive a pro rata refund based only on that amount of the eligible class members' tuition not paid by a federal, state or local government agency or department, a private business or other organization. In no event shall any eligible class member receive an amount greater than the tuition paid by such eligible class member.

8. Respondents shall ultimately provide a sum of no greater than fifty thousand dollars ($50,000) solely to provide refunds under Part III of this order. No charges against this amount shall be made for administrative costs, which shall be absorbed by the respondents.

9. Respondents shall deposit, on or before the tenth business day after the date of service, the sum of fifty thousand dollars ($50,000) into an escrow account at a banking institution to be agreed on between respondents and a member of the New York Office of the Federal Trade Commission. The principal amount of said bank

account shall be available only for the payment of refunds under the provisions of Part III of this order. Withdrawals and orders against this account shall, by agreement, be effective only when countersigned by the individual respondent, together with the Commission's representative at the New York Regional Office of the Federal Trade Commission.

10. Respondent shall submit to the New York Regional Office of the Federal Trade Commission a written request for advice as to whether their determination of who is an eligible class member complies with the terms of Part III of this order within one hundred and eighty (180) days after the date of service. Respondents shall submit simultaneously with their request all Appendix D questionnaires they have received as of the date said request for advice is filed. Respondents shall also, at this time, present any challenges to the factual accuracy of any Appendix D questionnaire, together with substantiating material, if any. The New York Regional Office of the Federal Trade Commission shall make the final determination of who is an eligible class member. The New York Regional Office of the Federal Trade Commission shall render its advice to respondents and return all Appendix D questionnaires to respondent within two hundred and five (205) days after the date of service.

11. On the two hundred and thirtieth (230th) day after the date of service, respondents or their designee shall deliver, or cause to be delivered, a refund check to each eligible class member, determined in accordance with Part III of this order. The amount of the refund check shall be derived in accordance with Part III of this order.

12. Each refund shall be accompanied by a letter in the language, manner and form shown in Appendix E; and a notice in the language, manner and form shown in Appendix F shall be sent by first class mail, with the sender's return address on the face of the envelope, to the last known home address of all persons whose returned questionnaires showed them to be ineligible for a refund pursuant to Part III of this order.

13. Respondents shall, on the two hundred and fifty-fifth (255th) day after the date of service, file with the New York Regional Office of the Federal Trade Commission a report in writing setting forth the manner and form in which they have complied with Part III of this order

14. Respondents shall maintain records and documents which demonstrate that respondents have complied with Part III of this order for two (2) years after the date of service. Respondents shall return all completed Appendix D questionnaires to the New York

Regional Office of the Federal Trade Commission at the end of the two-year period.

15. It is agreed that should any duty required to be performed on a day certain under Part III of this order fall on other than a business day, the parties hereto may perform such duties on the next following business day.

IV

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the individual respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this part shall not affect any other obligation arising under this order.

V

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

VI

It is further ordered, That the respondents shall forthwith distribute a copy of this order to each operating division and to all of respondents' personnel now or hereafter engaged in the offering for sale, or sale of respondents' courses of study, training or instruction in the field of truck driving or any other subject, trade or vocation, and that respondents secure from each such person a signed statement acknowledging receipt of said order.

VII

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment, or sale resulting in the emergence of a successor corporation or corporations, the creation or

dissolution of subsidiaries or any other change in the corporations which may affect compliance obligations arising out of the order.

VIII

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, except as otherwise provided in Part III.

APPENDIX A

(NAME OF SCHOOL)

IMPORTANT INFORMATION FOR PROSPECTIVE STUDENTS

Below is the dropout rate, job placement rate and starting salaries for students in the (name of course) between (date) and (date). Please read this page carefully before you decide whether or not to enroll in this school.

1. Total number of students: (number)
2. Students who failed to complete the course: (number) - (percent)
3. Students (whether graduating or not) who obtained employment as truck or tractor-trailer drivers: (number) - (percent)
4. Graduates who obtained employment as truck or tractor-trailer drivers: (number) - (percent)
5. Starting salaries of students who obtained employment as truck or tractor-trailer drivers
   - Less than $120 per week: (number) - (percent)
   - $120 - $160 per week: (number) - (percent)
   - $161 - $200 per week: (number) - (percent)
   - $201 - $250 per week: (number) - (percent)
   - $251 - $300 per week: (number) - (percent)
   - Over $300 per week: (number) - (percent)
6. Employers hiring graduates from the (name of course):

Names of Employers	*Number of Graduates Hired*

NOTE: In compiling the foregoing data, information was sought from all students (indicated by item 1 above) and responses were received from _____ students.

APPENDIX B

The first Base Period shall be the six (6) month period ending three (3) months prior to the effective date of this Order. Subsequent base periods shall be of six (6) months duration commencing on the next day following the termination of the prior base period. Base Periods shall be numbered consecutively beginning with the first base period (i.e. Base Period #1) as defined above.

The three (3) month period immediately following the close of a base period shall be used by respondents to record and compile the information required by Paragraph 5 and Appendix A. In addition, respondents may not include in the computation of students for the base period any person whose enrollment terminated during the three (3) month recordation period. Such persons will be included in the statistics for the subsequent base period.

On the first business day falling more than three (3) months after the termination of the base period, respondents shall begin dissemination of that base period's statistics as required by this Order. Respondents shall continue to distribute said statistics until the first business day falling three (3) months after the termination of the next base period, at which time dissemination of the next set of base period statistics must begin.

The following example describes how the six (6) month base period and three (3) month recordation period will be utilized by the respondents:

Base Period 1 will cover that period which begins six months and 90 days prior to the effective date of the Order. If the Order is effective October 1, 1977, the base period will encompass the period January 1 to June 30, 1977. Respondents will then have from July 1 to September 30, 1977 to compile the data required by the Order. Respondents will disseminate the gathered data on October 1.

Base Period 2 would begin on July 1 and end December 31. From January 1 to March 31 respondents would compile the data required by the Order. This data is to be disseminated on the first business day after April 1.

APPENDIX C

(Name)
(Address)

Re: Eligibility for partial reimbursement to certain former students of Driver Training Institute.

Dear (Name):

In settlement of a proceeding brought by the United States Federal Trade Commission, Driver Training Institute has agreed to a consent order. Under that order, some students may be eligible for a partial refund of tuition, if they meet certain requirements for eligibility.

The purpose of the enclosed questionnaire is to determine whether or not you are eligible for a partial reimbursement of tuition. Of course, you are under no obligation to send in this questionnaire, but you *must* return this questionnaire if you want to have your eligibility determined.

If you complete and return this questionnaire, the information in it will be used by Driver Training Institute and the Federal Trade Commission solely to determine your eligibility for a refund. (However, disclosure of the information may also be made to a congressman in the event a congressman inquires about the information *at your request.*

You may already have received and sent in other questionnaires to the Federal Trade Commission or Driver Training Institute. These questionnaires were used in preparation for the adjudicative proceeding. Now that this proceeding has been settled, this questionnaire seeks *different* information, information which is necessary to determine your eligibility.

DIRECTIONS: Please mark or fill in the appropriate spaces on the questionnaire enclosed, and return it in the enclosed stamped addressed envelope. It is suggested that you fill out and mail in this questionnaire as soon as possible, but in any event no

later than (date which represents the one hundred and sixtieth day from the date of service). If you should misplace the envelope provided, please mail your questionnaire to the (Name and address of party on return envelope).

You must follow the directions and should answer all questions which apply to you *completely* and *truthfully,* to the best of your knowledge. Questionnaires which are incomplete or improperly filled out could result in the loss of eligibility.

APPENDIX D

ELIGIBILITY QUESTIONNAIRE

RE: Your attendance at Driver Training Institute, Brooklyn, New York.

1. Did you enroll in a truck or tractor-trailer training course at Driver Training Institute (DTI)? (CHECK ONE) YES NO

2. Did you complete the course? (CHECK ONE) YES . (SKIP TO QUESTION 4) NO

3. Please give the *most important* reason why you did *not* complete the course. (MARK ONLY ONE BOX)

a. I took the course for advancement in my job and not for the purpose of seeking a job as a truck or tractor-trailer driver . . .

b. I decided I did not want a job driving a truck or a tractor-trailer . . .

c. I preferred a job in another field (such as a salesman or mechanic) . . .

d. I decided I would not be able to find a job as a truck or tractor-trailer driver because I did not have any truck or tractor-trailer driving experience . . .

e. I decided that I would not be able to find a job as a truck or tractor-trailer driver because of a lack of demand for drivers . . .

f. I decided I would not be able to find a job as a truck or tractor-trailer driver because I was too young . . .

g. I married, started a family or discontinued my training for other personal reasons such as illness or relocation. . .

h. I was drafted or enlisted in the military service. . .

i. I went to college or other schooling. . .

j. Other (PLEASE DESCRIBE). . .

4. Did you make any effort to seek a job as a truck or tractor-trailer driver? (CHECK ONE) YES. (SKIP TO QUESTION 6). . . NO. . .

5. Please give the *most important* reason why you did *not* seek a job as a truck or tractor-trailer driver. (MARK ONLY ONE BOX)

a. I took the course for advancement in my job and not for the purpose of seeking a job as a truck or tractor-trailer driver. . .

b. I decided I did not want a job driving a truck or a tractor-trailer. . .

c. I preferred a job in another field (such as a salesman or mechanic). . .

d. I decided I would not be able to find a job as a truck or tractor-trailer driver because I did not have any truck or tractor-trailer driving experience. . .

e. I decided that I would not be able to find a job as a truck or tractor-trailer driver because of a lack of demand for drivers. . .

f. I decided I would not be able to find a job as a truck or tractor-trailer driver because I was too young. . .

g. I married, started a family or discontinued my training for other personal reasons such as illness or relocation. . .

h. I was drafted or enlisted in the military service. . .

i. I went to college or other schooling. . .
j. Other (PLEASE DESCRIBE). . .

6. Did you ever get a job as a truck or tractor-trailer driver? (CHECK ONE) YES. . . NO. (SKIP TO QUESTION 8). . .

7. Since leaving Driver Training Institute, about how much time have you been employed as a truck or tractor-trailer driver? (CHECK ONE) 20% of the time 80% of the time 50% of the time 100% of the time

8. How much was your tuition AMOUNT $ _____How much of your tuition did you pay? AMOUNT $ _____

9. Did any federal, state or local government agency or department or any private business or other organization pay any of the tuition for the course in which you enrolled? (CHECK ONE) YES NO

10. How much of your tuition has paid by such governmental agency or private business or organization? AMOUNT $ _____

11. Have you ever received a refund of any tuition money from DTI? (CHECK ONE) YES NO

12. How much was the refund? AMOUNT $ _____

13. How old were you when you enrolled in DIT? _____

Please attach to this form copies of any documents which show that you paid an amount of money for any course of instruction offered by Driver Training Institute. If you cannot provide such documents, your eligibility to receive reimbursement will not be affected.

WARNING: It is a federal crime for anyone to knowingly and willfully make a false, fictitious or fraudulent statement or representation in any matter within the jurisdiction of any department or agency of the United States. 18 U.S.C. §1001.

_____ _____

Signature Date

_____

Print Name Here

APPENDIX E

(Name)
(Address)
Dear (Name):

Pursuant to a consent order issued by the Federal Trade Commission, Driver Training Institute has agreed to make (percentage) per cent refund of tuition payments to certain students who had enrolled in truck and tractor-trailer training courses offered by Driver Training Institute.

The order of the Commission contains the provisions identifying the class of persons eligible for refunds, and the procedures for making refunds. (You may obtain a copy of the order without charge by writing to the Federal Trade Commission, Public Reference Branch, Room 130, Washington, D.C. 20580. Refer to Driver Training Institute, Inc., Docket No. 9060.)

In accordance with the provisions of the order, it has been determined that you are entitled to a refund of $————. A check for this amount is enclosed.

DRIVER TRAINING INSTITUTE
By

Herbert Gruen

APPENDIX F

IMPORTANT NOTICE

Pursuant to an order of the Federal Trade Commission issued on July 25, 1978, Driver Training Institute agreed to make partial reimbursements of tuition to certain students who had enrolled in Driver Training Institute's truck and tractor-trailer training courses. The order of the Commission contains provisions identifying the class of persons eligible for reimbursement and the procedures for making reimbursements.

In accordance with the provisions of the order, it has been determined, based upon your responses to the "Eligibility Questionnaire," that you are not eligible for reimbursement.

The order specified that the class of students entitled to reimbursement was limited to those students who meet *all* of the following tests:

1. Enrolled in Driver Training Institute's courses during the period from October 1, 1972 to December 31, 1976; and

2. Did not have his course tuition paid in full by a federal, state or local government agency or department, or a private business or other organization; and

3. Completed the training course, or elected not to complete the course because of a lack of job demand or a lack of employment qualifications such as minimum age or experience; and

4. Sought employment as a truck or tractor-trailer driver, or elected not to seek employment because of a lack of job demand or lack of employment qualifications such as minimum age or experience; and

5. Did not get a job as a truck or tractor-trailer driver, or was employed as a truck or tractor-trailer driver for 20% or less of the time since leaving DTI.

You may obtain a copy of the order without charge by writing to the Federal Trade Commission, Public Reference Branch, Room 130, Washington, D.C. 20580. Refer to Driver Training Institute, Inc., Docket No. 9060.

IN THE MATTER OF

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

TRR No. 215-60. Interlocutory Order, July 31, 1978

This order denies the petition of Chocolate Manufacturers Association for suspension or narrowing of the instant rulemaking proceeding.

TRR NO. 215-60 ORDER DENYING CHOCOLATE MANUFACTURER'S PETITION

The Chocolate Manufacturers Association ("CMA") has petitioned to suspend the rulemaking proceeding, or, in the alternative, to delete the proposals and issues turning on the safety of sugar-containing foods. CMA contends that the issue of sugar safety is properly a matter for the FDA and that the Commission should defer action on this issue pending the outcome of an impending FDA reevaluation of the safety of sugar. This petition has been certified to the Commission by the Presiding Officer. See Order No. 5.

CMA misapprehends the thrust of the Commission's rulemaking proposal. The central issue is whether television advertising directed towards children, including the advertising of products containing sugar, is unfair or deceptive. While issues of the health effects of sugared products will be considered, there will be no attempt made to decide whether sugar, as such, is a safe food or food additive. As petitioner correctly points out, such a determination is the province of the FDA. However, the fact that sugar is currently "generally recognized as safe" ("GRAS") does not mean that it has no adverse impact on health at any level of consumption or regardless of the manner in which it is consumed. To the extent that television advertising affects the consumption pattern of sugar by children, health issues connected with such consumption are properly subject to Commission examination. Similarly, merely because a product is composed entirely of ingredients that are GRAS does not mean that the product cannot be advertised in an unfair or deceptive manner. See, *National Bakers Servs., Inc.* v. *FTC,* 329 F.2d 365 (7th Cir. 1964); *ITT Continental Baking Co.* v. *FTC,* 532 F.2d 207 (2d Cir. 1976).

The Commission clearly has jurisdiction over food advertising, both under its general mandate to prohibit "unfair or deceptive acts or practices," 15 U.S.C. 45(a)(2), and under its specific authority to prohibit false advertising of foods, drugs, and cosmetics, 15 U.S.C. 52. It is also clear that as between the Commission and the FDA, the Commission has principal responsibility over food advertising. See

Memorandum of Understanding Between Federal Trade Commission and the Food and Drug Administration, 36 F.R. 18539, ¶ III. a. (1971). The December 19, 1977, letter from Dr. Kennedy cited by petitioner clearly indicates that the FDA does not believe that the Commission should suspend its proceeding pending an FDA determination on sugar safety. See also Staff Report, p. 159 n. 257. While the Commission will certainly consider any finding that the FDA may eventually make with respect to the issue of sugar safety, it does not believe that further delay on this issue is desirable or necessary, particularly in view of the fact that the GRAS status of sugar will not be determinative of the issues in the instant proceeding.[1] As the court of appeals noted in *FTC* v. *Texaco, Inc.*, 555 F.2d 862, 881 (D.C. Cir.) (*en banc*), *cert. denied,* 431 U.S. 974 (1977), "this is an era of overlapping agency jurisdiction under different statutory mandates." Even if the Commission's rulemaking proceeding essentially overlapped with the proposed FDA evaluation of sugar (a contention that the Commission rejects), the Commission has authority to proceed. As the court noted in *Warner-Lambert Co.* v. *FTC,* 361 F. Supp. 948, 953 (D.D.C. 1973):

> In at least three cases, the courts, including this Court, have held that concurrent FDA-FTC proceedings involving the same or similar matters are proper, and that the statutory remedies of the two agencies are cumulative and not mutually exclusive.

Accordingly, the Commission declines to suspend or narrow the instant rulemaking proceeding.

These issues, along with other questions of the jurisdiction and authority of the Commission proposing the rule, were considered by the Commission in its decision to institute this rulemaking proceeding. Such issues are properly the subject of comment in this proceeding and the Commission encourages all interested persons to raise these issues in the proper forum, *i.e.,* as written or oral comments before the presiding officer. The Commission will then review all such comments before it determines what form of rule, if any, to promulgate. Rule 1.14, 16 C.F.R. 1.14.

The Commission notes that the CMA petition was inappropriately filed directly with the Commission. Section 1.13(c) of the Commission's Rules of Practice designates the presiding officer as the Commission official "responsible for the orderly conduct of the rulemaking," vests him with "all powers necessary to that end," including the power "to certify questions to the Commission for its determination." This section clearly establishes the presiding officer

[1] The decision in *Pfizer & Co.*, 66 F.T.C. 1000 (1964), cited by petitioners at p. 6 of its petition, involved a complaint brought only under 15 U.S.C 52-57, and over which the FDA has specifically asserted jurisdiction. Neither situation exists here.

as the appropriate recipient of motions, petitions, and the like filed in this proceeding and the Commission reminds all parties in this proceeding to adhere to this requirement in the future.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

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

TRR No. 215-60. Interlocutory Order, July 31, 1978

This order denies various petitions filed by interested persons in the above rulemaking proceeding. The Commission made the following determinations respecting the questions raised in these petitions and motions:

1. Notice of proposed rulemaking is proper and need not contain specific proposed rule;
2. It is unnecessary to require proponents of proposed rule to proceed first;
3. Unlimited cross-examination by interested persons at legislative hearings is not necessary;
4. Schedule of proceedings will not be reviewed at outset;
5. Notice and opportunity to comment need not be given on procedures for conducting proceeding; and
6. Paragraph D(2) of procedures established for proceeding is proper.

ORDER DENYING VARIOUS PETITIONS

By Order of May 19, 1978, the Presiding Officer in TRR No. 215-60, Children's Advertising, certified certain questions to the Commission that were made in response to separate petitions by the Association of National Advertisers, Inc. ("ANA") and the American Association of Advertising Agencies, Inc. ("AAAA"). See Presiding Officer's Order No. 3. Since that time other petitions or motions raising these questions have been filed and the Presiding Officer has similarly certified them to the Commission. See Presiding Officer's Orders Nos. 6, 7, 8, 9, 10, 12, and 13. The Commission's determinations with respect to the questions raised in these petitions and motions are set forth below. Where the issues made by the various petitioners overlap, they are addressed together.[1]

1. The Notice of Proposed Rulemaking is Proper And Need Not Contain a Specific Proposed Rule.

Petitioners argue that the notice of proposed rulemaking, 43 F.R. 17967 (1978), is deficient in that it does not contain a specific rule proposed by the Commission. The argument is made that Section 18(b)(1) of the FTC Act, 15 U.S.C. 57a(b)(l), requires that the notice contain "the proposed rule." In addition, petitioners claim that it is unfair to force them to comment on an ambiguous proposal, because

[1] The petitions of the ANA and the Toy Manufacturers Association raises all six questions that have been certified by the Presiding Officer; AAAA's petition and the Chocolate Manufacturers Association's petitions raise four of these issues (Nos. 1, 3, 5 and 6 addressed below); the Kellogg petitions raise two issues (Nos. 5 and 6); a letter from Irving Scher raises issue No. 5; and the remaining petitions or motions address themselves only to Paragraph D(2)(e) (question No. 6 below).

of the burden created by having to address themselves to each possible remedy proposed. They also claim that the proposal is so broad that it may encroach on the jurisdiction of other agencies (*i.e.*, the FCC and FDA), and that the proposals should be more specific so that any jurisdictional claims can be addressed and resolved at the outset. Finally, it is argued that the "particular" reasons for the proposed rulemaking have not been identified.

Having examined the area of advertising directed toward children and concluded that a potential problem exists that may warrant the promulgation of a trade regulation rule, the Commission has set forth in its notice the reasons for the commencement of the proceeding, listed various potential remedial approaches and identified particular issues for which public comments are invited in order to determine whether a rule in fact is necessary and, if so, what form it should take. The issue raised by the petitioners challenges the adequacy of the notice.

The rulemaking provisions of Section 18 of the FTC Act, as amended by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Act"), 15 U.S.C. 57a(b), require the Commission to follow the procedures of Section 553 of the Administrative Procedure Act (the "notice and comment rulemaking" provided for by 5 U.S.C. 553) plus certain additional procedures.[2] With respect to commencing a rulemaking proceeding, Section 18(b) provides:

> the Commission shall proceed in accordance with section 553 of title 5, United States Code (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (1) publish a notice of proposed rulemaking stating with particularity the reason for the proposed rule * * *

Combining the requirements of Sections 553(b)(3) and 18(b)(1), the notice of rulemaking must (a) include "either the terms or substance

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[2] Section 553 provides in relevant part:

> General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include-
>
> (1) a statement of the time, place, and nature of public rule making proceedings;
>
> (2) reference to the legal authority under which the rule is proposed; and
>
> (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.
>
> * * * * * * *
>
> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. [5 U.S.C. 553(b) and (c).]

of the proposed rule or a description of the subjects and issues involved," Section 553(b)(3);[3] and (b) state "with particularity the reason for the proposed rule," Section 18(b)(1). The additional requirement added by Section 18(b)(1) is that the *reason* for the proposed rulemaking must be stated in the notice.

Petitioners interpret Section 18(b)(1) to require that a detailed, specific proposed rule, must also be included in the notice. But petitioners are unable to cite any legislative history to support their argument that the type of basic change in the requirements of Section 553 claimed by them was intended by Congress. Where substantial changes from the requirements of Section 553 were imposed — *e.g.*, the requirement of an informal oral hearing with limited rights of cross-examination and the necessity of a detailed statement of basis and purpose — the extensive discussion concerning these requirements in the legislative history makes clear that such changes were intended. In contrast, the Conference Report is silent on this issue (other than merely stating the change);[4] the House Report on an earlier version of the Act commented only that "the Commission would observe the provisions of section 553 of title 5 of the United States Code and would also (1) issue an order of proposed rulemaking stating the reason for the proposed rule with particularity sufficient to allow informed comment* * *." H.R. Rep. No. 93-1107, 93rd Cong., 2d Sess. 46 (1974). Since Section 553 would be satisfied if only the "substance" of a rule is published, it is obvious that the passing use of the phrase "the proposed rule" in the report did not mean that the specific terms of a rule must be included in the notice.

Since the passage of the Act, the Commission has uniformly interpreted Section 18(b)(1), as requiring either the terms or substance of a proposed rule or a description of the subjects and issues involved be included in the notice commencing the proceeding. Rule 1.11, 16 C.F.R. 1.11, promulgated in 40 R.R. 33966 (Aug. 13, 1975), provides:

> The initial notice shall include: (a) the terms or substance of the proposed rule or a description of the subjects and issues involved; * * * (c) a statement describing with particularity the reason for the rule* * *.[5]

This interpretation is also supported by the regulations promulgated by EPA under the Toxic Substances Control Act, 15 U.S.C. 2605, a

[3] As set forth in greater detail *infra*, the case law interpreting Section 553(b)(3) clearly establishes the propriety of commencing a rulemaking proceeding without proposing a specific rule, so long as the notice adequately apprises those potentially affected of the nature and subject matter of the proceeding.

[4] See H.R. Rep. No. 1606, 93d Cong., 2d Sess. 32 (1974).

[5] On one previous occasion the Commission has initiated a rulemaking proceeding under the Act without publication of the text of a proposed rule. Advertising for Over the Counter Antacids. 43 F.R. 14534 (April 6, 1976).

statute having language identical to Section 18(b)(1) on the issue of what is required in a notice of rulemaking. Rule 750.2(b)(3) (42 F.R. 61259, December 2, 1977) provides that a notice of proposed rulemaking shall contain:

> Either the draft text of the proposed rule (which may include alternative approaches among which a final choice has not yet been made) or a description of the approaches and provisions being considered for inclusion in the rule, or some combination of the above.

The focus of both Section 553 and Section 18(b)(1) is on "informed comment." As the court stated in *Forester* v. *CPSC,* 559 F.2d 774, 787 (D.C. Cir. 1977):

> Section 553(b) does not require that interested parties be provided precise notice of each aspect of the regulations eventually adopted. Rather, notice is sufficient if it affords interested parties a reasonable opportunity to participate in the rulemaking process.[6]

The notice of proposed rulemaking published by the Commission allows for such a "reasonable opportunity to participate."

The notice of proposed rulemaking presents various alternatives for dealing with the two major concerns underlying the proceeding: (a) that television advertising of any product to young children may be unfair and deceptive because of their possible inability to comprehend and evaluate such advertising; and (b) that advertising of sugared products directed to children may be unfair and deceptive because of the possible health risks that may result from the consumption of sugar encouraged by such advertising. These two concerns are the particular reasons for the proposed rulemaking and are clearly identified. Specific remedial approaches are suggested and the Commission has invited comment on these approaches; sixteen additional issues on which the Commission desires comments are identified. The notice incorporates two outside petitions which prompted the rule as well as a detailed staff report, which is a matter of public record. Specifically, the notice stated that:

> The petitions raise, and the Report discusses, facts which suggest that the televised advertising of any product directed to young children who are too young to understand the selling purpose of, or otherwise comprehend or evaluate, commercials may be unfair and deceptive within the meaning of Section 5 of the Federal Trade Commission Act, requiring appropriate remedy. The Report also discloses facts which

[6] The proposition that Section 553(b) does not require that a precise rule be proposed in the notice commencing the proceeding is well supported by the case law. See, *e.g., Willapoint Oysters, Inc.* v. *Ewing,* 174 F.2d 676, 684 (9th Cir. 1949); *Buckeye Cablevision, Inc.* v. *FCC,* 387 F.2d 220, 226 (D.C. Cir. 1967); *cf. Ethyl Corp.* v. *EPA,* 541 F.2d 1, 48 (D.C. Cir.), *cert. denied,* 426 U.S. 941 (1976). Indeed, courts have held that even where the proposed notice was technically deficient, actual notice of the issues involved suffices. *Texaco, Inc.* v. *FEA,* 531 F.2d 1071, 1078 (T.E.C.A.), *cert. denied,* 426 U.S. 941 (1976); *Common Carrier Conf. — Irregular Route* v. *United States,* 534 F.2d 981, 982–83 (D.C. Cir. 1976).

suggest that the current televised advertising of sugared products directed to older children may be unfair and deceptive, again requiring appropriate remedy. The staff Report sets forth the facts (Part III), applies the law to the facts (Part IV), examines jurisdictional and constitutional issues (Part V), discusses the advantages and disadvantages of five possible remedies, and recommends adoption of three of the five (Part VI). The Commission has carefully and deliberately considered the staff report and recommendations. Based upon that report, the Commission believes that a comprehensive rulemaking proceeding addressing the problems posed by television advertising to children is necessary and appropriate. [43 F.R. 17969 (1978).]

The notice is sufficient to allow "informed criticism and comments." *Ethyl Corp. v. EPA*, 541 F.2d 1, 48 (D.C. Cir.) *cert. denied*, 426 U.S. 941 (1976).[7]

2. It is Unnecessary to Require Proponents of Proposed Rule to Proceed First

Petitioners claim that the proponents of the proposed rule have the burden of proof, both under Section 18(e)(3)(A), 15 U.S.C. 57a(e)(3)(A),[8] and, because they view the rule as a form of censorship, under the First Amendment. Such a burden allegedly requires a showing that the advertising to be regulated is deceptive or misleading (and thus not protected by the First Amendment) and that the remedy chosen is the least restrictive means available. Because of this asserted burden of proof, they suggest that proponents of the rule be required to make their presentation first and that opponents of the rule then present their submissions, thus allowing the opponents of the rule to focus their presentation to counter whatever proponents advance.

The argument of petitioners assumes that the rulemaking proceeding is an adversarial proceeding; indeed, the reference to Section 57a(e)(3)(A) concerns judicial review of promulgated rules which, like appeal from any final agency action, is adversarial in nature. The instant proceeding, however, is not an adversary

[7] With respect to jurisdictional issues, the Commission believes that the notice is sufficient to allow jurisdictional challenges to be raised. See, *e.g.*, May 19, 1978, petition by the Chocolate Manufacturing Association (raising claims of encroachment on the FDA's jurisdiction).

[8] Section 18(e)(3)(A) provides:

> Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of title 5, United States Code (taking due account of the rule of prejudicial error), or if-
>
> (A) the court finds that the Commission's action is not supported by substantial evidence in the rulemaking record (as defined in paragraph (1)(B) of this subsection) taken as a whole, or
>
> (B) the court finds that-
>
> (i) a Commission determination under subsection (c) that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or
>
> (ii) a Commission rule or ruling under subsection (c) limiting the petitioner's cross-examination or rebuttal submissions, has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole.
>
> The term "evidence", as used in this paragraph means any matter in the rulemaking record.

proceeding, but an attempt by the Commission to receive public comment to aid it in its decisions whether to issue a rule and, if so, what form such a rule should take. There is no "burden of proof" on any of the participants.[9]

Similarly, there is no constitutional requirement of sequential presentations. The rulemaking proceeding does not itself involve any restrictions on advertising; any restrictions will occur only if a rule is promulgated. The Commission is sensitive to the First Amendment issues involved and has explicitly sought comments thereon. See Issue No. 16, 43 F.R. 17970 (1978). Moreover, the Commission declines this invitation to transform this rulemaking proceeding into an adjudicative trial. In the Commission's view, adoption of this proposal would make neither good law nor good policy. As Professor Davis has stated:

> A good deal of experience with trial-type hearings has accumulated since 1958, and all of it seems strongly to confirm the first two sentences of § 6.06 of the Treatise: "A trial is designed for resolving issues of fact, not for determining issues of law, policy, or discretion. In rule making the method of trial has no place except when specific facts are at issue, and even then it should seldom be used when the disputed facts are legislative." *Administrative Law of the Seventies* 222 (1976).

3. Unlimited Cross-Examination by Interested Persons at the Legislative Hearings is Not Necessary.

Petitioners ask that unlimited cross-examination by interested persons be allowed during the legislative hearing in order to identify those issues of material fact that are in dispute. They claim that questioning by the presiding officer is not an adequate substitute, and suggest that a failure to grant such cross-examination is a denial of statutory rights, which may lead to reversal of any resulting rule.[10]

Section 18(c)(1)(B) requires that interested persons be given the opportunity to cross-examine only with respect to disputed issues of material fact and the determination of whether there are such issues is left to the Commission:

> [I]f the Commission determines that there are disputed issues of material fact it is necessary to resolve [an interested person is entitled] to present such rebuttal submissions and to conduct (or have conducted under paragraph (2)(B)) such cross-

[9] Significantly, while Section 556(d) of the APA places the burden of proof on the proponent of a rule in a formal rulemaking proceeding subject to Section 556, 5 U.S.C. 556(d), informal rulemaking proceedings such as the present one under Section 553 and Section 18 of the FTC Act are not subject to Section 556, and neither Section 553 nor Section 18 contains any comparable provision imposing a burden of proof.

[10] The Commission notes that the opportunity for cross-examination is not constitutionally required in rulemaking proceedings. *Compare Bi-Metallic Inv. Co.* v. *State Bd. of Equalization*, 239 U.S. 441 (1915), *with Londoner* v. *Denver*, 210 U.S. 373 (1908). See also *Vermont Yankee Nuclear Power Co.* v. *NRDC*, 98 S.Ct. 1197, 1211 n.16 (1978); *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224, 244–45 (1973).

examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues. [15 U.S.C. 57a(c)(1)(B).]

This right is further limited by the Commission's power under Sections 18(c)(2) to require "that any cross-examination to which a person may be entitled * * * be conducted by the Commission on behalf of that person in such manner as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to disputed issues of material fact, "and under Section 18(c)(3) to aggregate persons with the same or similar interests for the purpose of cross-examination. [15 U.S.C. 57a(c)(2) and (3).]

The Commission has adopted a procedure for this proceeding whereby ample opportunity is given to interested persons to identify "disputed issues of fact that are material and necessary to resolve within the meaning of Section 18 of the FTC Act." Interested persons are given the opportunity to submit written comments which may suggest such issues; this opportunity is enhanced by the provisions of Paragraph (D)(2)(d) of the procedures, which require detailed information concerning any surveys or studies that are submitted, so that they may be challenged. Oral presentation at the legislative hearing may also be used to demonstrate that such a disputed issue exists.

Although not required by the statute, the Commission has afforded interested persons the opportunity to submit questions to the Presiding Officer, a procedure that, as previously noted, is sufficient even on disputed issues of material fact, 15 U.S.C. 57a(c)(1)(B), (c)(2)(B). There is also an opportunity after the legislative hearing to submit issues to be designated as disputed issues (Paragraph #1) and to participate, with the right of cross-examination, in the adjudicative hearing. Finally, there is a rebuttal period after the disputed issues hearing (Paragraph F). The Commission believes that these procedures are sufficient to identify and resolve disputed issues of material fact, and that cross-examination by interested persons during the legislative hearing is unnecessary and would unduly delay the proceeding.

4. The Schedule of Proceedings will not be Revised at the Outset.

Petitioners suggest four areas where the schedule of proceedings should be changed.

a. Termination of the written comment period coincides with the time to file requests to appear at the legislative hearing.

They suggest that the filing of comments at the very end of the comment period may make it impossible for persons wishing to appear at the hearing to take issue with such comments to file in time.

b. The following time periods are alleged to be too short:

(1) The 30-day interval between the close of the legislative hearing and the deadline for proposing disputed issues;

(2) The 40 days for legislative hearing; and

(3) The three day period between the deadline for any oral rebuttal presentations and the start of the disputed issues hearing.

The schedule announced by the Commission was based on the Commission's experience with past proceedings and the tendency for such proceedings to be subject to a great deal of delay where strict timetables were not established and adhered to. The Commission has been criticized for such delay and the Commission has been exhorted to reduce delays. See, *e.g.*, H.R. Rep. No. 95-472, 95th Cong., 1st Sess. 5 (1977). The scheduling problems suggested by petitioners are based on the assumption that certain conduct may occur. Whether such conduct will in fact occur is a matter of speculation. For example, there may or may not be comments filed at the very end of the comment period, and these may or may not induce persons who would not otherwise be so inclined to seek to appear at the legislative hearing. Similarly, there may or may not be any designated disputed issues of material fact, or rebuttal may be limited to written submissions. Because of the speculative nature of these problems, the Commission declines to change the schedule at this time. This determination does not affect the ability of persons, during the course of the proceeding, to show that the schedule creates hardship for them and request that the schedule be changed by the Presiding Officer. The Commission declines to do so in advance, however.

5. Notice and Opportunity to Comment Need Not Be Given on the Procedures for Conducting the Proceeding

Various challenges are made to the method by which the procedures for the proceeding were adopted. Petitioners claim that the notice and comment provisions of Section 553 were required to be followed. They contend that the exceptions for "procedural" rules do not apply because of the substantial impact on substantive rights, and that the "good cause" exception is similarly inapplicable because no compelling reason for adopting these procedures without notice and comment has been demonstrated.

The procedural format for conducting the rulemaking proceeding carefully preserves all the rights that interested persons are entitled to under Section 18; the proper notice, opportunity for written comments, and the oral hearing with appropriate cross-examination for disputed issues of material fact that are necessary to resolve are all provided. The challenged procedures do not have a substantial impact on the rights of interested persons, and, apart from providing for a more expeditious proceeding, it appears that they will have little effect on the ultimate decision of whether a rule should be promulgated and, if so, the form of such a rule. Thus, the procedures are "rules of agency * * * procedure or practice" and may be issued without notice and comment. 5 U.S.C. 553(b)(A). As the court noted in *Ranger* v. *FCC,* 294 F. 2d 240, 244 (D.C. Cir. 1961): "Of course all procedural requirements may and do occasionally affect substantive rights, but this possibility does not make a procedural regulation a substantive one." See also, *Kessler* v. *FCC,* 326 F.2d 673 (D.C. Cir. 1963); *EEOC* v. *National Cash Register Co.,* 405 F. Supp. 562, 569–72 (N.D. Ga. 1975).[11]

Petitioners also claim that the Commission has failed to demonstrate "good cause" for finding that its existing procedures are "impractical, unnecessary, or contrary to the public interest" as required by Rule 1.20, 16 C.F.R. 1.20. This argument is primarily linked to the claim that Section 553 requires notice and comment and that the "good cause" exception of Section 553(b)(B) is inapplicable. Petitioners recognize that the Commission did give a "brief statement of its reasons for dispensing with any such procedures,"[12] but they take exception to the adequacy of these reasons. They claim that expeditious procedures are not necessary, citing the "ingrained" pattern of sugar consumption, the prolonged study of these issues that has already occurred, and the lengthy schedule established for the proceeding as indicating that there is no "emergency." These arguments, intertwined as they are with the Section 553 claim, fail to distinguish between Rule 1.20 and Section

[11] The procedures for conducting the instant proceeding differ significantly from the cases cited by petitioners where notice and comment were required because the "procedures" had a substantial impact on substantive rights. For example, *Pickus* v. *U.S. Bd. of Parole,* 507 F.2d 1107 (D.C. Cir. 1974), involved regulations that established criteria for parole decisions, greatly narrowed the discretionary power of the Board, and could be expected to result in different parole decisions. *Pharmaceutical Manufacturers Ass'n.* v. *Finch,* 307 F. Supp. 858 (D. Del. 1970) concerned regulations that changed the type of evidence needed to establish the effectiveness of drugs; the regulations specified a much narrower range of acceptable evidence and a large number of existing drugs might have required retesting in order to stay on the market (as drugs not meeting the new regulation were subject to seizure).

[12] This statement appears at 43 F.R. 17968:

> The Commission believes this procedural experiment, which is designed to expedite this proceeding while affording interested persons all of their statutory rights is necessary in view of need to explore expeditiously the health and other issues raised by this proceeding as well as generally to expedite the conduct of Commission rulemaking.

553(b)(B). The good cause finding in Rule 1.20 relates to whether the procedures themselves are impractical, unnecessary, or contrary to the public interest; that of Section 553 relates to the necessity of providing notice and comment. The Commission's interpretation of its own regulation is entitled to great weight. *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965); *Power Reactor Dev. Co.* v. *International Elec. Workers,* 367 U.S. 396, 400 (1961); *FCC* v. *Schreiber,* 381 U.S. 279, 290 (1965). Having found that expeditious procedures are desirable, and using its experience with its regular procedures, the Commission is fully justified in concluding that the regular procedures are impractical or contrary to the public interest.

6. Paragraph D(2)(e) of the Procedures Established for this Proceeding Is Proper.

Petitioners claim that the requirement of Paragraph D(2)(e) — that a commenter presenting surveys or studies also produce other surveys or studies relevant to that commenter's presentation and in the person's possession, custody or control — is an unconstitutional abridgement of speech, is overly broad, and imposes an unfair burden on participants, particularly organizations such as trade associations or advertising agencies, which have numerous offices and massive amounts of arguably relevant information. They also complain that the Paragraph does not take into account privileged information or provide for protective orders.

The argument that Paragraph D(2)(e) improperly limits the right of interested persons to participate in the proceeding has been amply answered by the Presiding Officer in Order No. 2:

> It is no more of a "limitation" on participation than the requirement in Notice Section D(1) that any person who appears in the legislative stage may be re-called for cross-examination. 43 Fed. Reg. 17970. To say that either the "Other Information Provision" or the prospect of cross-examination amounts to a limitation on the right to participate would be tantamount to defining participation as a license to make extravagant claims which cannot be exposed by cross-examination or contradicted by data in the possession of the very person who is making the claim. Neither the Administrative Procedure Act, nor the Magnuson-Moss Act, nor the Commission Rules (even the Commission's Rules in formal adjudications) require that an interested person be given an unfettered license to present facts only favorable to one "side" as well as an assurance that no one will discover what that person really knows. [pp. 3–4.]

The Commission notes that a similar provision is contained in FDA's regulations for formal public evidentiary hearings. 21 C.F.R. 12.85(a)(2). That rule provides that the director of the bureau responsible for the matter must submit:

All documents in his files containing factual data and information, whether favorable or unfavorable to his position, which relate to the issues involved in the hearing.

Section 12.85(b) extends this requirement to each participant in the hearing.

The issues of privileged information or protective orders have also been addressed in Order No. 2. In responding to Question No. 5 the Presiding Officer noted (p. 6) that Rule 1.18(b), 16 C.F.R. 1.18(b), provides for *in camera* treatment of documents when good cause is shown; his response to Question No. 6 (p. 7) indicates his willingness to consider questions of privilege. Rather than concluding at the outset that privileged material will be required to be produced and made public, the more appropriate course of action is for Paragraph D(2)(e) to remain in effect and for the Presiding Officer to deal with questions concerning its application as they arise. The Commission agrees with the interpretations that the Presiding Officer has made thus far and believes that he has the authority to deal with additional questions that may arise in applying Paragraph D(2)(e).

The contention that the Commission lacks authority to promulgate Paragraph D(2)(e) because Section 18(c)(2) provides authority only to prescribe such rules "as may tend to avoid unnecessary costs or delay," has been answered in the Presiding Officer's Order No. 3, pp. 2-3. The Commission is in full agreement that Paragraph (D)(2)(e) is authorized both under Section 18(c)(2) and pursuant to the Commission's inherent right to regulate its proceedings. As the Supreme Court recently noted:

[T]his Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress has confided the responsibility for substantive judgments. *Vermont Yankee Nuclear Power Corp., supra,* [98 S.Ct. at 1202.]

The Commission notes that many of the petitions which are the subject of this order were inappropriately filed directly with the Commission or the Secretary. Section 1.13(c) of the Commission's Rules of Practice designates the presiding officer as the Commission official "responsible for the orderly conduct of the rulemaking," vests him with "all powers necessary to that end," including the power "to certify questions to the Commission for its determination." This section clearly establishes the presiding officer as the appropriate recipient of motions, petitions, and the like filed in this proceeding and the Commission reminds all parties in this proceeding to adhere to this requirement in the future.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, August 1, 1978

Clarification of Commission's position in adopting after modification of ALJ's protective order.

ORDER

On January 31, 1977, the Commission adopted, with modification, Paragraph 9 of the protective order issued by the administrative law judge, which paragraph had been certified to the Commission. [89 F.T.C. 107]

It has come to the Commission's attention that certain respondents who are appealing a District Court judgment enforcing the subpoenas issued to them in this matter (*FTC* v. *Anderson,* No. 77-1032 (D.C. Cir.)) have raised on appeal an issue concerning the scope of the protective order as adopted by the Commission. The issue, which they did not raise before the Commission or before the District Court, is whether the Commission has committed itself to give ten days' notice before disclosing respondents' "confidential" documents *sua sponte* or in response to requests not explicitly named in the order, such as requests that are not made pursuant to the Freedom of Information Act.

Paragraph 9 of the administrative law judge's protective order originally provided:

> 9. Notwithstanding any of the foregoing provisions, in the event of a Freedom of Information Act request or an official request from any Congressional committee or subcommittee for disclosure of any document designated "Confidential" hereunder or any information contained therein, authorized representatives of the Commission's Office of General Counsel may inspect the document for purposes of advising the Commission on the request and defending the Commission's interests in court. Furthermore, the Commission shall provide the party which supplied a confidential document with ten (10) days' notice prior to releasing the document in response to such a request *or otherwise.* [Emphasis added.]

In modifying Paragraph 9 to provide for qualified notice in the event of certain congressional requests or judicial compulsory process, it was the Commission's intent to affirm and retain the administrative law judge's language providing an unconditional ten days' notice before disclosing documents in response to Freedom of Information

Act requests "or otherwise." In other words, in adopting the order the Commission committed itself, as it has on other occasions,[1] to provide ten days' notice before disclosing confidential documents *sua sponte* or in response to requests that do not come within the specified qualifications as to disclosure in response to congressional and judicial requests.

[1] See, *e.g.*, the protective order issued July 12, 1978, by the Commission in *Tenneco, Inc.*, Dkt. 9097, p. 181 herein.