FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

In the Matter of

AMERICAN EXPRESS COMPANY

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

Docket C-3129. Complaint, Jan. 9, 1984—Decision, Jan. 9, 1984

This order requires a New York City credit card company, among other things, to cease failing to prevent computerized collection letters from being sent to cardholders who have written the company of a billing error and who are withholding payment pending resolution of the dispute. Respondent must forfeit the amount in dispute, up to $50, should it fail to comply with the Fair Credit Billing Act's billing error resolution procedures and maintain for at least two years, records evidencing compliance with the Act's provisions. Further, respondent must resolve billing errors involving foreign merchants within the lesser of 90 days or 2 complete billing cycles from the date of receiving a billing error notice.

Appearances

For the Commission: *Ronald G. Issac, Jonathan D. Jerison* and *Arthur B. Patrizio.*

For the respondent: *Ronald J. Greene, Christopher R. Lipsett* and *Clifford B. Hendler, Wilmer, Cutler & Pickering,* Washington, D.C.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that American Express Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

For the purposes of this complaint, the terms *billing error, card-*

holder, card issuer, credit card, and *proper written notification of a billing error* shall be defined as these terms are defined in Regulation Z (12 CFR 226), the implementing regulation of the Truth in Lending Act (15 U.S.C. 1601 *et seq.*), duly promulgated by the Board of Governors of the Federal Reserve System.[1]

PARAGRAPH 1. Respondent American Express Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at American Express Plaza, New York, New York.

PAR. 2. For some time in the past before January 1, 1983, respondent had been engaged in the issuing of American Express Cards which could be used to charge the costs of travel and entertainment services and merchandise purchased from stores and other establishments that honor such Cards. Since January 1, 1983, such Cards have been issued by a wholly-owned subsidiary of respondent.

PAR. 3. In the ordinary course of its business as aforesaid, respondent was a "card issuer." Thus, pursuant to Section 226.2(s) of Regulation Z, respondent was a "creditor" for purposes of Section 226.14 of Regulation Z.

PAR. 4. In some instances, respondent's collection procedures provided for computer-generated collection letters to be sent automatically to cardholders whose accounts were delinquent. Upon receipt of proper written notification of a billing error from a cardholder who had withheld payment of a disputed amount, respondent instructed its computers to cease all collection activity for a specified period of time. In some instances, billing errors were not resolved within this specified period and respondent's employees failed to prevent the computer from resuming automated collection activity with respect to disputed amounts. As a result, in some instances respondent mailed or delivered or caused to be mailed or delivered to cardholders collection letters demanding payment of amounts alleged to be in error prior to resolving the dispute as required by Section 226.14(a)(2) of Regulation Z.

PAR. 5. In some instances, after receiving proper written notification of a billing error concerning a transaction outside the United States between a cardholder and a foreign business entity that honors respondent's Card, respondent failed to resolve the billing error within the lesser of ninety (90) days or two (2) complete billing cycles from the date of receipt of proper written notification of a billing error, as required by Section 226.14(a)(2) of Regulation Z.

PAR. 6. By and through the acts and practices alleged in Paragraphs

[1] All reference to the Truth in Lending Act and Regulation Z contained in this complaint shall refer to the Truth in Lending Act as amended to March 23, 1976 and Regulation Z as amended to March 23, 1977.

Four and Five, respondent forfeited the right to collect from the cardholder the amount indicated by the cardholder to be a billing error (whether or not such amount was in fact in error) and any finance charges, late payment charges, or other charges imposed thereon up to a maximum of $50 for each item or transaction indicated by the cardholder to be a billing error. In some of these instances, respondent failed to forfeit amounts that it should have legally forfeited, in violation of Section 226.14(f) of Regulation Z.

PAR. 7. In the ordinary course and conduct of its business, respondent retained certain correspondence and computerized, microfilmed, and other records relating to its handling of billing errors. In some instances before August 1981, respondent did not retain adequate evidence of compliance with Section 226.14 of Regulation Z for a period of two (2) years, as required by Section 226.6(i) of Regulation Z.

PAR. 8. Pursuant to Section 103(s) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of Regulation Z constituted violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder and the Federal Trade Commission Act; 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 aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed

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

1. Respondent American Express Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at American Express Plaza, in the City of New York, State of New York.

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

Order

For purposes of this Order, the terms *billing error, billing-error notice, cardholder, consumer credit, credit card,* and *state* shall be defined as these terms are defined in Regulation Z (12 CFR 226), the implementing regulation of the Truth in Lending Act (15 U.S.C. 1601 *et seq.*).[1]

It is ordered, That respondent American Express Company, a corporation, its successors and assigns in any state, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in any state, in connection with any consumer credit transaction involving the use of any credit card issued by respondent to a resident of any state, do forthwith cease and desist from:

1. Failing, following respondent's receipt of a billing-error notice from a cardholder who has withheld payment of a disputed amount, to prevent respondent's computerized collection procedures from causing collection letters to be mailed to the cardholder to collect any portion of an amount indicated in the cardholder's notice as being a billing error (or any finance charge, late payment charge, or other charge computed on such disputed amount) prior to resolving the dispute, as required by Section 226.13(d)(1) of Regulation Z.

2. Failing, following respondent's receipt of a billing-error notice from a cardholder concerning a transaction outside the United States between the cardholder and a foreign business entity that honors any credit card issued by respondent, to resolve the billing error within

[1] All reference to the Truth in Lending Act and Regulation Z contained in this Order shall refer to the Truth in Lending Act as amended to March 31, 1980 and Regulation Z as amended to April 1, 1981.

the lesser of ninety (90) days or two (2) complete billing cycles from the date of receipt of the billing-error notice, as required by Section 226.13(c)(2) of Regulation Z.

3. Failing to establish procedures which will require that, if correspondence is received from cardholders alleging, or reciting facts which on their face show, noncompliance with Sections 226.13(c) or (d)(1) of Regulation Z, such correspondence will be forwarded to personnel with authority to take appropriate action to comply with the forfeiture provision of Section 161(e) of the Truth in Lending Act.

4. Failing to keep evidence of compliance with Section 226.13 of Regulation Z for a period of two (2) years, as required by Section 226.25(a) of Regulation Z.

Provided, That respondent shall not be liable for a civil penalty for any violation of this Order if it shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error or mistake notwithstanding the maintenance of procedures reasonably adapted to avoid any such error or mistake.

It is further ordered, That respondent distribute a copy of this Order to each of respondent's present and future supervisory personnel who are responsible for operations relating to resolution of credit card billing errors, and that respondent secure a signed statement acknowledging receipt of a copy of this Order from each such person.

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

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

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION

Docket 8918. Interlocutory Order, Jan. 12, 1984

ORDER DENYING PETITION TO REOPEN AND ORDER TO SHOW CAUSE

On September 9, 1981, the Commission issued an opinion and order to cease and desist against American Home Products Corporation ("AHP") and the C.T. Clyne Co., Inc., corporate successor to AHP's advertising agency. In its opinion, the Commission held that AHP had engaged in various deceptive practices in violation of Section 5 of the FTC Act in connection with advertising for the aspirin-based pain relievers Anacin and Arthritis Pain Formula. The Commission's order contained provisions designed to secure cessation of these violations and prevent related ones. 98 F.T.C. 362.

AHP sought review of portions of the Commission's order in the United States Court of Appeals for the Third Circuit. On December 3, 1982, the court of appeals affirmed the Commission's order in all respects, save for paragraph II(D), which it ordered deleted. On December 28, 1982, the court denied AHP's petition for rehearing and suggestion of rehearing *en banc.*

On April 8, 1983, no petition for certiorari having been filed by AHP, the Commission entered its modified order to cease and desist, pursuant to the mandate of the Third Circuit. The modified order was identical to the order of September 9, 1981, save for court-ordered deletion of paragraph II(D). By separate order of April 8, 1982, the Commission stayed its modified order as to AHP until the later of September 30, 1983, or 90 days following disposition of a petition to reopen filed no later than April 15, 1983.[1]

On April 15, 1983, AHP filed a petition to reopen the modified order of April 8, 1983, asking that it be stayed until the orders in *Bristol-Myers Company,* Docket No. 8917 [102 F.T.C. 21 (1983)], and *Sterling Drug Inc.,* Docket No. 8919 [102 F.T.C. 395 (1983)], became final. In the alternative, AHP requested that paragraph I(B) of the order, the so-called "substantial question" provision, be stayed pending the outcome of the *Bristol* and *Sterling* cases, and that paragraph III, requiring disclosure that Anacin and Arthritis Pain Formula contain aspirin in advertisements that make performance claims for the products, be modified to require disclosure of aspirin content for a

[1] The Commission's stay was issued in response to AHP's letter request of March 15, 1982. In a letter of March 18, 1982 responding to that request, the Commission advised AHP that upon expiration of the time for Supreme Court review of the order, and in the event that no review had been sought, the Commission would enter a stay on the terms of that ultimately entered.

limited period of time in a specified percentage of all advertisements for Anacin and APF, and thereafter only in a smaller class of advertisements than required by the Commission's order.

By letter of August 1, 1983, AHP waived any claim that its petition for reopening be decided within the 120 day period specified by Section 5(b) of the FTC Act, 15 U.S.C. 45(b). By memorandum of October 3, 1983, AHP purported to withdraw that part of its petition for reconsideration that agreed to reformulation of an order, and instead requested only that the Commission stay the effect of the entire order against it until judicial review of the orders against Bristol-Myers Corp. and Sterling Drug, issued on July 5, 1983, was complete and the orders have become final. By memorandum of November 23, 1983, Commission staff replied to AHP's petition for reopening, recommending that it be denied, except that paragraph I(B) be modified to grant AHP the option of making comparative efficacy claims where it possessed a "reasonable basis" therefor. On December 12, 1983, AHP filed a reply reiterating its position that the order against it should be stayed.

It thus appears that the Commission now has before it a petition for reopening by American Home Products, which consists only of a request that the order, in its entirety, be stayed for the indefinite duration of the Bristol and Sterling appeals. That petition for reopening is hereby denied, and unless further modified, the Commission's final order of April 8 will, therefore, take effect 90 days from the date of this order. We will maintain our stay of paragraph I(B) of the order, however, pending resolution of the show cause proceeding initiated by this order.

There is absolutely no basis for a stay of the Commission's entire order, as AHP now seeks. The Commission found that AHP had engaged in numerous serious violations of law, involving deceptive advertising. As to some of these findings of violation and related order provisions, AHP did not even seek judicial review. As to those findings of violation of which AHP did seek review, *all* were judicially affirmed, although one order provision was deleted. There is no provision of equity or law which requires that a party found to have engaged in deceptive practices be left free of restraint to repeat them until such time as judicial proceedings against competitors are completed. To the contrary, the case law makes plain the Commission's authority to exercise prosecutorial discretion in the choice of its targets and the order in which it pursues and places them under order. *FTC* v. *Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967); *Moog Indus., Inc.* v. *FTC*, 355 U.S. 411, 413 (1958); *Encyclopedia Britannica* v. *FTC*, 605 F.2d 964, 974 (7th Cir. 1979), *cert. denied*, 445 U.S. 934 (1980); *Johnson Prods. Co.* v. *FTC*, 549 F.2d 35, 41 (7th Cir. 1977).

The Third Circuit in affirming the Commission's order in this case, observed that

> There is no contention that the Commission abused its discretion by refusing, in its denial of AHP's petition for rehearing, to stay its Order until proceedings against AHP's competitors, Sterling Drug and Bristol-Myers, have been completed.

695 F.2d at 714. The court did indicate that "it would not seem unreasonable that in the interest of fairness a stay be granted at least with respect to part I(B) of the order," *Id.*,[2] but it also cited with approval the case law holding that simultaneity of prosecution and order finality is not required, and observed that "we do not suggest that the Commission should ignore the interests of scrupulous competitors who forego misleading claims," *Id.* at n.51, to which might also be added, the interests of consumers subjected to those claims.

AHP appears to believe that a stay should be granted because the Second and Ninth Circuits, in which Bristol and Sterling respectively have sought review of their orders, might modify them in some unspecified respect, thus entitling AHP to return and seek the same modifications in its order.

Even assuming, *arguendo,* that decisions by the Second or Ninth Circuits as to *Bristol* and *Sterling* would be grounds for reopening a final order as to AHP that has been affirmed and enforced by the Third Circuit, AHP's position is overbroad, for the petitions in both *Bristol* and *Sterling* focus on limited portions of those orders, and raise not even a theoretical possibility of undermining the underpinnings of portions of the AHP order. Moreover, factual differences between the cases cast doubt on the relevance of the *Sterling* and *Bristol* decisions to AHP's. In any event, compliance with the judicially affirmed, final order entered against it would in no way prevent AHP from seeking modification of that order at some later time should it believe circumstances warrant. *See* 15 U.S.C. 45(b). That highly speculative possibility, however, is hardly grounds for AHP to escape in the interim the force of an order designed to prevent proven violations of law.

For all these reasons, AHP's suggestion that the entire order against it be held in abeyance is not well taken, and is hereby rejected. In one respect, however, the AHP order is clearly inconsistent with the *Sterling* and *Bristol* orders entered by the Commission. Complaint counsel would remedy this situation by granting AHP the option under paragraph I(B) to make comparative analgesic efficacy claims supported by a reasonable basis as articulated in the *Bristol* and

[2] The modification proposed by the Commission in the Order to Show Cause, *infra*, would obviate the Third Circuit's concern, by allowing AHP as an alternative method of compliance with paragraph I(B) the same approach as contained in the orders against Bristol and Sterling.

Sterling decisions. Under complaint counsel's proposal, AHP would have the option, when making comparative efficacy claims for analgesics, of complying with the order affirmed by the Third Circuit, or with the reasonable basis provision entered by the Commission in the *Bristol* and *Sterling* orders.

The Commission believes that complaint counsel's proposal has merit, and will order the parties to show cause within 15 days why it should not be adopted. The show cause period will also permit AHP and staff one final opportunity to discuss staff's proposal.

Therefore,

It is ordered, That respondent's petition to reopen of April 15, 1983, as subsequently modified by memorandum of October 3, 1983, be denied. Pursuant to its stay order of April 8, 1983, the Commission's modified order of April 8, 1983 shall take effect 90 days from the date of this order, except for paragraph I(B), which shall remain stayed pending proceedings on the Order to Show Cause.

It is further ordered, That the parties shall, within fifteen days from the date of this order, show cause if any there be, why the Commission's order of April 8, 1983, should not be reopened and modified to the extent of permitting AHP to comply with paragraph I(B) of the order by possessing a reasonable basis for comparative claims of efficacy made for analgesic products.

IN THE MATTER OF

THE MAICO COMPANY

ORDER TO SET ASIDE IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5822. Consent Order, May 22, 1955—Order To Set Aside, Jan. 13, 1984

On Jan. 13, 1984, the Federal Trade Commission set aside the May 22, 1955 order issued against The Maico Co. (51 F.T.C. 1197), in light of its actions in *Beltone Electronics Corp.*, Dkt. 8928 [100 F.T.C. 68 (1982)] and *Dahlberg Electronics Corp.*, Dkt. 8229 [101 F.T.C. 703 (1983)], which set aside prohibitions on the companies' use of exclusive dealing arrangements.

ORDER TO SET ASIDE ORDER TO CEASE AND DESIST

On May 22, 1955, the Federal Trade Commission issued an order against The Maico Company in Docket No. 5822 prohibiting Maico, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements upon its dealers. [51 F.T.C. 1197]

Two of Maico's larger competitors are now permitted by recent Commission actions to engage in the same exclusive dealing practices contained in the order against Maico. On July 26, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.*, Docket No. 8928 [100 F.T.C. 68], challenging, among other things, the same practices prohibited by the order against Maico. On April 11, 1983, the Commission in *Dahlberg Electronics, Inc.*, Docket No. 8929 [101 F.T.C. 703], set aside prohibitions on Dahlberg's use of exclusive dealing arrangements, which were similar to those contained in the order against Maico.

On December 7, 1983, the Commission, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued to Maico an order to show cause why the proceeding herein should not be reopened to set aside the final cease and desist order in Docket No. 5822, prohibiting Respondent's use of exclusive dealing arrangements. Respondent was provided an opportunity to object to the proposed set aside of the order against it, and having failed to do so, is now deemed to have consented to such action. In view of the Commission's actions in *Beltone* and *Dahlberg*, the Commission believes that this modification is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened and that the order herein shall be set aside as of the effective date of this order.

IN THE MATTER OF

MAICO HEARING INSTRUMENTS, INC.

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

Docket 8927. Consent Order, Aug. 4, 1976—Modifying Order, Jan. 13, 1984

The Federal Trade Commission has modified the order issued against Maico Hearing Instruments, Inc. on Aug. 4, 1976 (88 F.T.C. 214). The modified order permits the company to suggest resale prices to its dealers and impose standards on the kinds of customers and territories its dealers can serve. The modification leaves intact the prohibition against resale price maintenance.

ORDER MODIFYING ORDER TO CEASE AND DESIST

On Aug. 4, 1976, the Federal Trade Commission issued an order against Maico Hearing Instruments, Inc. in Docket No. 8927 prohibiting Maico, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements and customer and territorial restraints upon its dealers. [88 F.T.C. 214]

Two of Maico's larger competitors are now permitted by recent Commission actions to engage in the same non-price vertical restraints contained in the order against Maico. On July 26, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.,* Docket No. 8928 [100 F.T.C. 68], challenging the same practices prohibited by the order against Maico. On April 11, 1983, the Commission modified the order in *Dahlberg Electronics, Inc.,* Docket No. 8929 [101 F.T.C. 703], which is also similar to the order against Maico, to set aside prohibitions on Dahlberg's use of certain non-price vertical restraints. Further, it modified that order's ban on resale price maintenance to permit Dahlberg to suggest retail prices to its dealers.

On December 7, 1983, the Commission, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued to Maico an order to show cause why the proceeding herein should not be reopened to set aside provisions of the final cease and desist order in Docket No. 8927, prohibiting Respondent's use of exclusive dealing arrangements and customer and territorial restrictions. Respondent was provided an opportunity to object to the proposed modification of the order against it, but has instead consented to such modification. In view of the Commission's actions in *Beltone* and *Dahlberg,* the Commission believes that this modification is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened

and that Paragraphs No. 1, 2, 3, 4, 6, 7, 8 and 9 of Part I shall be set aside as of the effective date of this order.

It is further ordered, That Paragraph No. 5 of Part I be modified as of the effective date of this order by striking "5" and "or suggesting" and inserting "or" after "stabilizing,".

IN THE MATTER OF

SONOTONE CORPORATION

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

Docket C-2414. Consent Order, June 19, 1973—Modifying Order, Jan. 13, 1984

The Federal Trade Commission has modified the order issued against Sonotone Corp. on June 19, 1973 (82 F.T.C. 1802). The modified order permits the company to suggest resale prices to its dealers, and impose standards on the kinds of customers and territories its dealers can serve. The modification leaves intact the prohibition against resale price maintenance.

ORDER MODIFYING ORDER TO CEASE AND DESIST

On June 19, 1973, the Federal Trade Commission issued an order against Sonotone Corporation in Docket No. C-2414 prohibiting Sonotone, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements and customer and territorial restraints upon its dealers. [82 F.T.C. 1802]

Two of Sonotone's larger competitors are now permitted by recent Commission actions to engage in the same non-price vertical restraints contained in the order against Sonotone. On July 26, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.*, Docket No. 8928 [100 F.T.C. 68], challenging the same practices prohibited by the order against Sonotone. On April 11, 1983, the Commission modified the order in *Dahlberg Electronics, Inc.*, Docket No. 8929 [101 F.T.C. 703], which is also similar to the order against Sonotone, to set aside prohibitions on Dahlberg's use of certain non-price vertical restraints. Further, it modified that order's ban on resale price maintenance to permit Dahlberg to suggest retail prices to its dealers.

On December 7, 1983, the Commission, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued to Sonotone an order to show cause why the proceeding herein should not be reopened to set aside provisions of the final cease and desist order in Docket No. C-2414, prohibiting Respondent's use of exclusive dealing arrangements and customer and territorial restrictions. Respondent was provided an opportunity to object to the proposed modification of the order against it, and having failed to do so, is now deemed to have consented to such modification. In view of the Commission's actions in *Beltone* and *Dahlberg*, the Commission believes that this modification is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened and that Paragraphs No. 1, 2, 3, 4, 6, 7, 8 and 9 of Part I shall be set aside as of the effective date of this order.

It is further ordered, That Paragraph No. 5 of Part I be modified as of the effective date of this order by striking "5" and "or suggesting" and inserting "or" after "stabilizing,".

IN THE MATTER OF

RADIOEAR CORPORATION

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

Docket C-2419. Consent Order, June 26, 1973—Modifying Order, Jan. 13, 1984

The Federal Trade Commission has modified the order issued against Radioear Corp. on June 26, 1973 (82 F.T.C. 1830). The modified order permits the company to suggest resale prices to its dealers, and impose standards on the kinds of customers and territories its dealers can serve. The modification leaves intact the prohibition against resale price maintenance.

ORDER MODIFYING ORDER TO CEASE AND DESIST

On June 26, 1973, the Federal Trade Commission issued an order against Radioear Corporation in Docket No. C-2419 prohibiting Radioear, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements and customer and territorial restraints upon its dealers. [82 F.T.C. 1830]

Two of Radioear's larger competitors are now permitted by recent Commission actions to engage in the same non-price vertical restraints contained in the order against Radioear. On July 26, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.*, Docket No. 8928 [100 F.T.C. 68], challenging the same practices prohibited by the order against Radioear. On April 11, 1983, the Commission modified the order in *Dahlberg Electronics, Inc.*, Docket No. 8929 [101 F.T.C. 703], which is also similar to the order against Radioear, to set aside prohibitions on Dahlberg's use of certain non-price vertical restraints. Further, it modified that order's ban on resale price maintenance to permit Dahlberg to suggest retail prices to its dealers.

On December 7, 1983, the Commission, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued to Radioear an order to show cause why the proceeding herein should not be reopened to set aside provisions of the final cease and desist order in Docket No. C-2419, prohibiting Respondent's use of exclusive dealing arrangements and customer and territorial restrictions. Respondent was provided an opportunity to object to the proposed modification of the order against it, and having failed to do so, is now deemed to have consented to such modification. In view of the Commission's actions in *Beltone* and *Dahlberg*, the Commission believes that this modification is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened and that Paragraphs No. 1, 2, 3, 4, 6, 7, 8 and 9 of Part I shall be set aside as of the effective date of this order.

It is further ordered, That Paragraph No. 5 of Part I be modified as of the effective date of this order by striking "5" and "or suggesting" and inserting "or" after "stabilizing,".

IN THE MATTER OF

HUGHES TOOL COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket 9138. Complaint, June 17, 1980—Decision, Jan. 16, 1984*

This consent order prohibits respondent from having on its board of directors any person who is a board member of a competing company, whose revenues derived from the relevant product or service exceed 5 million dollars. Respondent must, among other things, institute an annual monitoring program designed to detect unlawful interlocks; permit only those persons who have submitted the information required by Paragraph III(a) of the order to serve as board members; and provide present and future directors and prospective directors, including those of its subsidiaries, with a copy of the order.

Appearances

For the Commission: *Steven E. Weart, Kristin Malmberg* and *Edward C. Johnson.*

For the respondent: *Paul L. Mueller* and *Andrew S. Hanen, Andrews & Kurth,* Houston, Tex., *Michael Butler, Andrews & Kurth,* Washington, D.C. and *J. W. Stewart,* in-house counsel, Houston, Tex.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named Respondents have been, and are, in violation of the provisions of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, issues its complaint, stating its charges as follows:

1. Respondent Hughes Tool Company (hereinafter "Hughes") is a Delaware Corporation and has its principal office at 5425 Polk Avenue, Houston, Texas. Hughes has capital, surplus, and undivided profits aggregating more than one million dollars ($1,000,000). Hughes is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is engaged in or its business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Hughes conducts its business in part through its wholly-owned and controlled

* Complaint dismissed as to respondent Ben F. Love by order of Oct. 18, 1983 (102 F.T.C. 1336).

subsidiaries BJ-Hughes Inc., Brown Oil Tools, Inc., and Regan Offshore International, Inc., and through Patso Company, Inc., which is a wholly-owned and controlled subsidiary of Brown.

2. Respondent Big Three Industries, Inc. (hereinafter "Big Three") is a Texas corporation and has its principal office at 3535 West Twelfth Street, Houston, Texas. Big Three has capital, surplus, and undivided profits aggregating more than one million dollars ($1,000,000). Big Three is engaged in commerce, as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is engaged in or its business affects commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44. Big Three conducts its business in part through its wholly-owned and controlled subsidiary Bowen Tools, Inc. and through its division NOWSCO Services.

3. Respondent Ben F. Love is an individual. His business address is 712 Main Street, Houston, Texas.

4. On or about March 7, 1975, respondent Ben F. Love was elected a director of Big Three and served in such capacity until on or about November 16, 1979. On or about January 26, 1978, respondent Ben F. Love was elected a director of Hughes and has served in such capacity until the present.

5. During all or part of the period January 26, 1978, to the present, the business of Hughes and Big Three included but was not limited to, the manufacture, sale, and distribution in commerce of blowout preventers and/or parts thereof and the sale and provision in commerce of well stimulation services. During all or part of the period September 12, 1978, to the present, the business of Hughes and Big Three included, but was not limited to, the manufacture, sale, and distribution in commerce of coiled tubed units and/or parts thereof and wireline units and/or parts thereof, and the manufacture, sale and/or rental in commerce of fishing tools.

6. By the nature of their business as hereinabove described, Hughes and Big Three were competitors, concurrent with respondent Ben F. Love's membership on the Boards of Directors of Hughes and Big Three, during all or part of the period January 26, 1978, through and including November 16, 1979, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

7. Respondent Ben F. Love's simultaneous membership on the Board of Directors of respondents Hughes and Big Three constitutes violations of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, on the part of Hughes, Big Three, and Ben F. Love.

Decision and Order

The Commission having heretofore issued its complaint charging respondent Hughes Tool Company ("Hughes") with violation of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

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

1. Respondent Hughes Tool Company 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 5425 Polk Avenue, in the City of Houston, State of Texas.

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

Order

I.

It is ordered, That the following definitions shall apply herein:

(a) *Parent* means any corporation which owns or controls, directly or indirectly, 50 percent or more of the issued and outstanding voting securities of another corporation.

(b) *Subsidiary* means any corporation of which 50 percent or more

of the issued and outstanding voting securities is owned or controlled, directly or indirectly, by another corporation.

(c) *Director* does not include any foreign national who sits on the board of directors of a Hughes Subsidiary incorporated pursuant to the laws of a foreign sovereign, *provided,* that no more than 10 percent of the annual gross revenue of such Subsidiary (including the revenues of its Subsidiaries) is represented by exports to the United States of America and *provided,* that such foreign national does not also sit on the Board of Directors of Hughes or of a Hughes Subsidiary incorporated pursuant to the laws of any state of the United States of America.

(d) *Partially-Owned Foreign Corporation* shall mean any corporation which (1) is incorporated pursuant to the laws of a foreign sovereign, (2) is not owned, directly or indirectly, by Hughes or its Subsidiaries (other than a Partially-Owned Foreign Corporation) to the extent of 70 percent or more of the issued and outstanding voting securities and (3) either (i) generates no more than 10 percent of its annual gross revenue (determined in accordance with generally accepted accounting principles) by exports to the United States of America or (ii) because required by the law of the jurisdiction where the corporation is organized, at least 50 percent of the directors of the corporation are citizens or permanent residents of that jurisdiction.

(e) *Relevant Amount* shall mean the product of $5,000,000.00 (U.S.) multiplied by a fraction, the denominator of which is 258.71 and the numerator of which is the Consumer Price Index—All Items for Wage-Earners and Clerical Employees in the United States as published by the United States Department of Labor for the month of December of the year immediately preceding the year for which the calculation is being made for purposes hereof.

(f) *Qualifying Subsidiary* shall mean any Subsidiary which had revenue (determined in accordance with generally accepted accounting principles) for its immediately preceding fiscal year of an amount at least equal to the Relevant Amount.

II.

It is further ordered, That:

(a) Hughes, its successors and assigns, shall not permit on its board of directors or on the boards of directors of its Subsidiaries (other than a Partially-Owned Foreign Corporation) any Director who also serves as a Director of any other corporation (other than Hughes or any of its Subsidiaries or a Partially-Owned Foreign Corporation) if Hughes and such other corporation are, by virtue of business and location of

operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws of the United States of America (hereinafter referred to in this Order as an "interlock"), *provided,* that no such interlock shall be prohibited hereunder unless:

(1) The annual gross revenues (determined in accordance with generally accepted accounting principles) of Hughes and its Subsidiaries (other than a Partially-Owned Foreign Corporation) derived from a product or service sold or rented by Hughes or its Subsidiaries as to which Hughes competes with such other corporation exceeds the Relevant Amount, and

(2) The annual gross revenues (determined in accordance with generally accepted accounting principles) of such other corporation (including the revenues of its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries) derived from sales or rentals of a product or service as to which it competes with such product or service sold or rented by Hughes or its Subsidiaries exceeds the Relevant Amount.

(b) For the purpose of this Order, when an interlock occurs with any other corporation, competition between Hughes or any of its Subsidiaries (other than a Partially-Owned Foreign Corporation) and such other corporation or any of its Qualifying Subsidiaries or its Parents or its Parents' Qualifying Subsidiaries will be considered to be competition between Hughes and such other corporation. In addition, a product or service sold or rented by Hughes or its Subsidiaries shall only be considered competitive with a product or service sold or rented by another corporation if such products or services are sold or rented (a) in the same geographic market and (b) at the same level of the distribution process.

III.

It is further ordered, That:

(a) Within sixty (60) days after the date of service of this Order, and annually thereafter no later than April 1 of each calendar year, Hughes shall obtain, review and retain from each of its Directors and each person who has been nominated to be its Director and from each Director and each person who has been nominated to be a Director of each Hughes Subsidiary (other than a Partially-Owned Foreign Corporation), except Directors whose terms expire prior to June 1 of such calendar year and who are not standing for reelection, the following information concerning each corporation, its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries (other than

Hughes or any of its Subsidiaries or a Partially-Owned Foreign Corporation) of which such person serves as a Director:

(1) Name and address; and

(2) A descriptive list of each product or service for which the annual gross revenue of such corporation for its most recent fiscal year (including the revenues of its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries) exceeds the Relevant Amount.

(b) Hughes shall not permit any person to serve as a Director who fails to submit to Hughes the information required by this paragraph.

(c) Hughes shall provide the information received pursuant to this paragraph to the Commission's staff upon twenty (20) days' written request.

(d) If competition (as defined in Paragraph II above) arises as to any subject product or service between Hughes (or any of its Subsidiaries, other than a Partially-Owned Foreign Corporation) and any other corporation with which there is an interlock by virtue of action taken by such other corporation subsequent to the submission to Hughes under Paragraph III(a) above of information concerning such corporation, then Hughes shall have no obligations under Paragraph II above until May 1 of the year following the year such information was submitted.

(e) Hughes shall have a period of thirty (30) days after the date of the closing of an acquisition or the date upon which Hughes or any of its Subsidiaries commences the marketing of any such product or service, as the case may be, which creates an interlock that would otherwise be in violation of the terms of Paragraph II of this Order to remedy such interlock.

IV.

It is further ordered, That within ten (10) days from the date of service of this Order, Hughes shall distribute a copy of this Order to each of is current Directors and to each of the current Directors of its Subsidiaries (other than a Partially-Owned Foreign Corporation). Thereafter, Hughes shall distribute a copy of this Order to each prospective Director of Hughes and to each prospective Director of each of its Subsidiaries (other than a Partially-Owned Foreign Corporation).

V.

It is further ordered, That Hughes shall:

(a) Within ninety (90) days after the date of service of this Order,

file with the Commission a written report setting forth in detail the manner and form in which it has complied with this Order; and

(b) File with the Commission such other reports of compliance with this Order as may be requested by the Commission.

VI.

It is further ordered, That the obligations imposed upon Hughes under the terms of this Order shall become effective upon and continue for a period of ten (10) years following the date of service of this Order.

VIII.

It is further ordered, That Hughes shall notify the Commission not more than thirty (30) days after any change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation, which may affect the compliance obligations arising out of this Order.

IN THE MATTER OF

BIG THREE INDUSTRIES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF THE CLAYTON ACT

Docket 9138. Complaint, June 17, 1980—Decision, Jan. 16, 1984*

This consent order prohibits respondent from having on its board of directors any person who is a board member of a competing company, whose revenues derived from the relevant product or service exceeds 5 million dollars. Respondent must, among other things, institute an annual monitoring program designed to detect unlawful interlocks; permit only those persons who have submitted the information required by Paragraph III(a) of the order to serve as board members; and provide present and future directors and prospective directors, including those of its subsidiaries, with a copy of the order.

Appearances

For the Commission: *Steven E. Weart, Kristin Malmberg* and *Edward C. Johnson.*

For the respondent: *Willis Witt, Liddell, Sapp, Zivley, Brown & LaBoon,* Houston, Tex.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging respondent Big Three Industries, Inc. ("Big Three") with violation of Section 8 of the Clayton Act, as amended, 15 U.S.C. 19, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondent, its attorney, 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

* Complaint previously published at 103 F.T.C. 17 (1984).

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

1. Respondent Big Three Industries, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 3535 West Twelfth Street, in the city of Houston, State of Texas.

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

Order

I.

It is ordered, That the following definitions shall apply herein:

(a) *Parent* means any corporation which owns or controls, directly or indirectly, 50 percent or more of the issued and outstanding voting securities of another corporation.

(b) *Subsidiary* means any corporation of which 50 percent or more of the issued and outstanding voting securities is owned or controlled, directly or indirectly, by another corporation.

(c) *Director* does not include any foreign national who sits on the board of directors of a Big Three Subsidiary incorporated pursuant to the laws of a foreign sovereign, *provided,* that no more than 10 percent of the annual gross revenue of such Subsidiary (including the revenues of its Subsidiaries) is represented by exports to the United States of America and *provided,* that such foreign national does not also sit on the Board of Directors of Big Three or of a Big Three Subsidiary incorporated pursuant to the laws of any state of the United States of America.

(d) *Partially-Owned Foreign Corporation* shall mean any corporation which (1) is incorporated pursuant to the laws of a foreign sovereign, (2) is not owned, directly or indirectly, by Big Three or its Subsidiaries (other than a Partially-Owned Foreign Corporation) to the extent of 70 percent or more of the issued and outstanding voting securities and (3) either (i) generates no more than 10 percent of its annual gross revenue (determined in accordance with generally accepted accounting principles) by exports to the United States of

America or (ii) because required by the law of the jurisdiction where the corporation is organized, at least 50 percent of the directors of the corporation are citizens or permanent residents of that jurisdiction.

(e) *Relevant Amount* shall mean the product of $5,000,000.00 (U.S.) multiplied by a fraction, the denominator of which is 258.71 and the numerator of which is the Consumer Price Index—All Items for Wage-Earners and Clerical Employees in the United States as published by the United States Department of Labor for the month of December of the year immediately preceding the year for which the calculation is being made for purposes hereof.

(f) *Qualifying Subsidiary* shall mean any Subsidiary which had revenue (determined in accordance with generally accepted accounting principles) for its immediately preceding fiscal year of an amount at least equal to the Relevant Amount.

II.

It is further ordered, That:

(a) Big Three, its successors and assigns, shall not permit on its board of directors or on the boards of directors of its Subsidiaries (other than a Partially-Owned Foreign Corporation) any Director who also serves as a Director of any other corporation (other than Big Three or any of its Subsidiaries or a Partially-Owned Foreign Corporation) if Big Three and such other corporation are, by virtue of business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws of the United States of America (hereinafter referred to in this Order as an "Interlock"), *provided,* that no such interlock shall be prohibited hereunder unless:

(1) The annual gross revenues (determined in accordance with generally accepted accounting principles) of Big Three and its Subsidiaries (other than a Partially-Owned Foreign Corporation) derived from a product or service sold or rented by Big Three or its Subsidiaries as to which Big Three competes with such other corporation exceeds the Relevant Amount, and

(2) The annual gross revenues (determined in accordance with generally accepted accounting principles) of such other corporation (including the revenues of its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries) derived from sales or rentals of a product or service as to which it competes with such product or service sold or rented by Big Three or its Subsidiaries exceeds the Relevant Amount.

(b) For the purpose of this Order, when an interlock occurs with any other corporation, competition between Big Three or any of its Subsidiaries (other than a Partially-Owned Foreign Corporation) and such other corporation or any of its Qualifying Subsidiaries or its Parents or its Parents' Qualifying Subsidiaries will be considered to be competition between Big Three and such other corporation. In addition, a product or service sold or rented by Big Three or its Subsidiaries shall only be considered competitive with a product or service sold or rented by another corporation if such products or services are sold or rented (a) in the same geographic market and (b) at the same level of the distribution process.

III.

It is further ordered, That:

(a) Within sixty (60) days after the date of service of this Order, and annually thereafter no later than April 1 of each calendar year, Big Three shall obtain, review and retain from each of its Directors and each person who has been nominated to be its Director and from each Director and each person who has been nominated to be a Director of each Big Three Subsidiary (other than a Partially-Owned Foreign Corporation), except Directors whose terms expire prior to June 1 of such calendar year and who are not standing for reelection, the following information concerning each corporation, its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries (other than Big Three or any of its Subsidiaries or a Partially-Owned Foreign Corporation) of which such person serves as a Director:

(1) Name and address; and

(2) A descriptive list of each product or service for which the annual gross revenue of such corporation for its most recent fiscal year (including the revenues of its Qualifying Subsidiaries, its Parents and its Parents' Qualifying Subsidiaries) exceeds the Relevant Amount.

(b) Big Three shall not permit any person to serve as a Director who fails to submit to Big Three the information required by this Paragraph.

(c) Big Three shall provide the information received pursuant to this paragraph to the Commission's staff upon twenty (20) days' written request.

(d) If competition (as defined in Paragraph II above) arises as to any subject product or service between Big Three (or any of its Subsidiaries, other than a Partially-Owned Foreign Corporation) and any other corporation with which there is an interlock by virtue of action taken by such other corporation subsequent to the submission to Big Three

under Paragraph III(a) above of information concerning such corporation, then Big Three shall have no obligations under Paragraph II above until May 1 of the year following the year such information was submitted.

(e) Big Three shall have a period of thirty (30) days after the date of the closing of an acquisition or the date upon which Big Three or any of its Subsidiaries commences the marketing of any such product or service, as the case may be, which creates an interlock that would otherwise be in violation of the terms of Paragraph II of this Order to remedy such interlock.

IV.

It is further ordered, That within (10) days from the date of service of this Order, Big Three shall distribute a copy of this Order to each of the current Directors of its Subsidiaries (other than a Partially-Owned Foreign Corporation). Thereafter, Big Three shall distribute a copy of this Order to each prospective Director of Big Three and to each prospective Director of each of its Subsidiaries (other than a Partially-Owned Foreign Corporation)

V.

It is further ordered, That Big Three shall:

(a) Within ninety (90) days after the date of service of this Order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this Order; and

(b) File with the Commission such other reports of compliance with this Order as may be requested by the Commission.

VI.

It is further ordered, That the obligations imposed upon Big Three under the terms of this Order shall become effective upon and continue for a period of ten (10) years following the date of service of this Order.

VII.

It is further ordered, That Big Three shall notify the Commission not more than thirty (30) days after any change in the corporation such as a 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 the compliance obligations arising out of this Order.

IN THE MATTER OF

DICTOGRAPH PRODUCTS, INC.

ORDER TO SET ASIDE IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 5655. Order, Sept. 24, 1953—Order To Set Aside, Jan. 17, 1984

The Federal Trade Commission has set aside the Sept. 24, 1953 order issued against Dictograph Products, Inc. (50 F.T.C. 281), in light of its actions in *Beltone Electronics Corp.*, Dkt. 8928 [100 F.T.C. 68 (1982)] and *Dahlberg Electronics Corp.*, Dkt. 8229 [101 F.T.C. 703 (1983)], which set aside prohibitions on the companies' use of exclusive dealing arrangements.

ORDER TO SET ASIDE ORDER TO CEASE AND DESIST

On September 24, 1953, the Federal Trade Commission issued an order against Dictograph Products, Inc. in Docket No. 5655 prohibiting Dictograph, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements upon its dealers. [50 F.T.C. 281]

Two of Dictograph's larger competitors are now permitted by recent Commission actions to engage in the same exclusive dealing practices contained in the order against Dictograph. On July 26, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.*, Docket No. 8928 [100 F.T.C. 68], challenging, among other things, the same practices prohibited by the order against Dictograph. On April 11, 1983, the Commission, in *Dahlberg Electronics, Inc.*, Docket No. 8929 [101 F.T.C. 703], set aside prohibitions on Dahlberg's use of exclusive dealing arrangements, which were similar to those contained in the order against Dictograph.

On December 7, 1983, the Commission, pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued an order to show cause why the proceeding herein should not be reopened to set aside the final cease and desist order in Docket No. 5655, prohibiting Respondent's use of exclusive dealing arrangements. Respondent was provided an opportunity to object to the proposed set aside of the order against it, and having failed to do so, is now deemed to have consented to such action. In view of the Commission's actions in *Beltone* and *Dahlberg*, the Commission believes that this modification is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened

and that the order herein shall be set aside as of the effective date of this order.

IN THE MATTER OF

MACY'S NEW YORK, INC.

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

Docket C-3130. Complaint, Jan. 31, 1984—Decision, Jan. 31, 1984

This consent order requires a major New York City department store, among other things, to comply with the billing error resolution procedures of the Fair Credit Billing Act (FCBA) and the provisions of Regulation Z, which implement the FCBA. This requires the company to acknowledge a customer's *written* billing error notice within 30 days; resolve the dispute or mail an explanation as to why a statement is believed correct within 2 billing cycles; and maintain for at least 2 years, records evidencing compliance with the Act's billing error resolution procedures. The order prohibits the company from attempting to collect any amount of a bill in dispute, including any finance charge computed on such amount; failing to include on its periodic statements a notice advising customers that disputed amounts need not be paid pending resolution of the dispute; failing to forfeit the right to collect the amount in dispute up to $50, should it fail to comply with the FCBA's billing error resolution procedures; and failing to timely credit payments to customers' accounts. Additionally, respondent must institute a comprehensive educational program for officers and employees who either establish the company's credit billing procedures or who respond to and resolve notifications of billing errors; conduct refresher courses annually for five years; and secure from such personnel a signed statement acknowledging that he/she has read the order, the FCBA, the provisions of Regulation Z, which implement the FCBA, and the educational materials explaining the Act and its requirements. Further, the company must timely establish a $225,000 redress fund to be apportioned equally among those customers who 1) held an open-end credit account with the store during the period (Jan. 1, 1977 through Dec. 31, 1978; and 2) who sent the store a written inquiry concerning a billing error at the address designated by it for receipt of billing error notifications.

Appearances

For the Commission: *Shirley F. Sarna.*

For the respondent: *Carl D. Lobell, Weil, Gotshal & Manges,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and its implementing Regulation Z, duly promulgated by the Board of Governors of the Federal Reserve

System,* and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Macy's New York, Inc., a corporation, (hereinafter "respondent") has violated the provisions of said Acts and Regulation Z, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint:

PARAGRAPH 1. Respondent Macy's New York, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at 151 West 34th Street, New York, New York.

PAR. 2. Respondent is now, and for some time has been, engaged in the purchasing, offering for sale, sale and distribution of general merchandise and related services to the public at retail.

PAR. 3. Respondent maintains, and has maintained at all times relevant hereto, a substantial course of business, including the acts and practices herein set forth, in or affecting commerce.

PAR. 4. At all times relevant hereto in the ordinary course and conduct of its business, respondent did and does regularly extend, offer to extend, arrange or offer to arrange *consumer credit* for its customers' purchases, and has been and is a *creditor* [as those terms are defined in Section 226.2(p) and (s) of Regulation Z, 12 C.F.R. 226.2(p) and (s), respectively]. The transactions involve the extension of *open end credit* [as defined in Section 226.2(x) of Regulation Z, 12 C.F.R. 226.2(x)].

Definitions: For the purpose of this complaint the following definitions are applicable:

a. *billing error* shall be defined as provided by Section 226.2(j) of Regulation Z, 12 C.F.R. 226.2(j).

b. *commerce* shall be defined as provided by Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

c. *consumer credit* shall be defined as provided by Section 226.2(p) of Regulation Z, 12 C.F.R. 226.2(p).

d. *creditor* shall be defined as provided by Section 226.2(s) of Regulation Z, 12 C.F.R. 226.2(s).

e. *customer* shall be defined as provided by Section 226.2(u) of Regulation Z, 12 C.F.R. 226.2(u).

f. *Fair Credit Billing Act* (hereinafter "FCBA") shall refer to Sections 161 through 171 of the Truth in Lending Act, 15 U.S.C. 1666–1666j, now in effect or as they may be amended.

g. *other charges* shall refer to late payment charges or other charges

* All reference to the Truth in Lending Act and Regulation Z contained in this complaint shall refer to the Truth in Lending Act as amended to March 23, 1976 and Regulation Z as amended to March 23, 1977.

(excluding finance charges) imposed as the result of an erroneous billing.

h. *open end credit* shall be defined as provided by Section 226.2(x) of Regulation Z, 12 C.F.R. 226.2(x).

i. *proper written notification of a billing error* shall be defined as provided by Section 226.2(cc) of Regulation Z, 12 C.F.R. 226.2(cc).

j. *Regulation Z* shall refer to that version of Regulation Z, 12 C.F.R. 226, effective July 1, 1969, the implementing regulation of the Truth in Lending Act, now in effect or as it may be amended.

k. *Truth in Lending Act* shall refer to that version of the Act, 15 U.S.C. 1601 *et seq.*, now in effect or as it may be amended.

COUNT I

Alleging violations of the Truth in Lending Act and its implementing Regulation Z, and of the Federal Trade Commission Act, the allegations of Paragraph One through Four are incorporated by reference herein as if fully set forth verbatim.

PAR. 5. Subsequent to October 28, 1975, pursuant to its extensions of consumer credit and in the ordinary course and conduct of its business, respondent has received from numerous customers proper written notification of a billing error. In a substantial number of such instances respondent, after receipt of such notification, has:

1. Contrary to and in violation of the requirements of Section 226.14(a)(1) of Regulation Z, 12 C.F.R. 226.14(a)(1), failed and does fail to take any of the following actions within 30 days after receipt of the notification:

a. Mail or deliver to the customer a written acknowledgement;

b. Make appropriate corrections in the customer's account and mail or deliver to the customer a written notice of the corrections; or

c. Mail or deliver to the customer a written explanation, after having conducted a reasonable investigation, setting forth the reasons why the billing is believed to be correct.

2. Contrary to and in violation of the requirements of Section 226.14(a)(2) of Regulation Z, 12 C.F.R. 226.14(a)(2), failed and does fail to take either of the following actions within the lesser of 90 days or two complete billing cycles from the date of receipt of the notification:

a. Make appropriate corrections in the customer's account and mail or deliver to the customer a written notice of the corrections; or

b. Mail or deliver to the customer a written explanation, after having conducted a reasonable investigation, setting forth the reasons why the billing is believed to be correct.

3. Failed and does fail to retain for at least two years the customer's

notification of billing errors, copies of all correspondence in response thereto, and other evidence of compliance with Section 226.14(a) of Regulation Z, 12 C.F.R. 226.14(a), as required by Section 226.6(i) of Regulation Z, 12 C.F.R. 226.6(i).

PAR. 6. In a substantial number of instances subsequent to October 28, 1975, respondent, after receipt of proper written notification of a billing error, and prior to resolution of the billing dispute, has mailed and does mail subsequent periodic statements which include disputed amount(s) to the customer, but has failed and does fail to indicate on the face of the statement that payment of the amount(s) in dispute is not required pending resolution of the dispute, thereby violating the provisions of Section 226.14(b)(4) of Regulation Z, 12 C.F.R. 226.14(b)(4).

PAR. 7. In a substantial number of instances subsequent to October 28, 1975, respondent after receipt of proper written notification of a billing error and prior to resolution of the billing dispute, has begun action to collect the amount(s) indicated by the customer as being a billing error, finance or other charges computed on such disputed amount(s), thereby violating the provisions of Section 226.14(a)(2) of Regulation Z, 12 C.F.R. 226.14(a)(2).

PAR. 8. In a substantial number of instances subsequent to October 28, 1975, respondent, after receipt of proper written notification of a billing error and after resolution of a billing dispute in favor of the customer, has credited and does credit the customer's account in the disputed amount but has failed and does fail to credit any finance or other charges imposed as a result of the erroneous billing, in violation of the provisions of Section 226.14(b)(2) of Regulation Z, 12 C.F.R. 226.14(b)(2).

PAR. 9. In a substantial number of instances subsequent to October 28, 1975, respondent, having failed to comply with the requirements of Section 226.14 of Regulation Z, 12 C.F.R. 226.14, subsequently has failed and does fail to forfeit the amount indicated by the customer to be a billing error, *provided,* that amount does not exceed $50 for each item or transaction indicated to be a billing error, thereby violating Section 226.14(f) of Regulation Z, 12 C.F.R. 226.14(f).

PAR. 10. In a substantial number of instances subsequent to October 28, 1975, respondent has failed and does fail:

1. to credit payments to the customer's account as of the date such payments are received resulting in the imposition of additional finance or other charges; and

2. to credit to the customer's account during the customer's next billing cycle those finance or other charges imposed by respondent's

failure to post the customer's payments in sufficient time to avoid the imposition of such charges,

thereby violating the provisions of Section 226.7(g) of Regulation Z, 12 C.F.R. 226.7(g).

PAR. 11. Pursuant to Section 103(s) of the Truth in Lending Act, 15 U.S.C. 1602(s), respondent's aforesaid failures to comply with the provisions of Regulation Z as set forth in Paragraphs Five through Ten constitute and have constituted violations of that Act and, pursuant to Section 108(c) thereof, 15 U.S.C. 1607(c), respondent has engaged and is now engaging in unfair or deceptive acts or practices in violation of Section 5(a)(1) of the Federal Trade Commission Act, all to the prejudice and injury of the public.

COUNT II

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Eleven are incorporated by reference herein as if fully set forth verbatim.

PAR. 12. By failing in certain instances, after receipt of written notification from customers questioning or disputing billed charges, to correct erroneous billings to the affected accounts, respondent caused substantial numbers of customers to be deprived of the use of their money resulting in substantial harm to consumers. Therefore, the acts and practices described in Paragraphs Five through Ten were and are unfair and/or deceptive.

PAR. 13. The acts and practices of respondent set forth in Paragraph Twelve were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

COUNT III

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Four are incorporated by reference herein as if fully set forth verbatim.

PAR. 14. In the ordinary course and conduct of its business, respondent has mailed and does mail to its customers with its periodic statements, payment envelopes addressed to a post office box number which is not the same number as the post office box indicated on the face of the periodic statement to be used for proper written notification of a billing error. Notwithstanding the fact that the envelope is addressed to an address different from the one that respondent has for correspondence regarding billing errors, underneath the space for

the customer's return address, respondent has provided a box next to the words "additional correspondence enclosed."

PAR. 15. By and through its actions as alleged in Paragraph Fourteen, respondent misleads the customer into the belief that by checking the box marked "additional correspondence enclosed", the customer could properly include a letter to respondent regarding a billing complaint or error and properly invoke the provisions of the FCBA.

Therefore, the acts and practices alleged in Paragraph Fourteen are unfair, misleading and/or deceptive.

PAR. 16. In the ordinary course and conduct of its business, respondent, in a substantial number of instances, has billed and does bill its customers for property or services significantly prior to actual delivery of the property or services to the customer. If the customer does not pay the bill promptly, respondent routinely imposes finance or other charges, which charges are not removed unless the customer properly notifies respondent that there has been a billing error.

PAR. 17. By and through its actions as alleged in Paragraph Sixteen respondent has imposed a heavy burden on the customer, forcing the customer to properly notify respondent first, that there has been a billing error, that is, that the customer has been billed before delivery of property or services, and second, that an improper finance charge has been imposed. In truth and in fact, these so-called billing "errors" are routine and systematic practices and policies of respondent and they deprive the customer of the use of his or her money.

Therefore respondents acts are unfair.

PAR. 18. In the ordinary course and conduct of its business, when respondent receives and has received notification of billing errors, in writing or orally, which do not constitute proper written notification of billing errors pursuant to the provisions of the FCBA, respondent has represented, directly or by implication, that disputes have been or will be resolved.

PAR. 19. In truth and in fact in a substantial number of instances such errors were not resolved, or were resolved only after an unreasonable period of time had elapsed. Also in such instances, respondent does not disclose, and has not disclosed to these customers, that such notifications of billing errors do not preserve their rights under the FCBA.

PAR. 20. By and through its actions as alleged in Paragraphs Eighteen and Nineteen, respondent causes customers to rely on misrepresentations that their billing disputes will be resolved and deprives customers of the use of money in those instances in which the customer is correct.

Therefore, respondent's acts and practices are unfair, misleading and/or deceptive.

PAR. 21. In the ordinary course and conduct of its business, when respondent represents, directly or by implication, that disputes have been or will be resolved outside FCBA procedures, respondent implies that it has reasonable procedures to resolve billing disputes other than through the FCBA.

PAR. 22. In truth and in fact, in a substantial number of such instances, respondent fails and has failed to take any action for several months, in many instances not until the customer has notified respondent of the dispute a second time or third time; sometimes respondent has taken no action at all. Moreover, in many instances in which respondent credits or has credited such customers' accounts after resolution of the error in the customers' favor, respondent fails and has failed to credit any finance or other charges on the credited amounts.

PAR. 23. By and through its actions as alleged in Paragraphs Twenty-One and Twenty-Two, respondent unreasonably causes the customer to expend time, money and effort to have these disputes resolved and has deprived the customer of the use of his or her money in those instances in which the customer is correct.

Therefore respondent's acts and practices are unfair, misleading and/or deceptive.

PAR. 24. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and is now, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of merchandise and services of the same general kind and nature as merchandise and services sold by respondent.

PAR. 25. The acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute unfair methods of competition and unfair or deceptive acts and practices in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act.

Commissioners Pertschuk and Bailey voted in the negative.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and

which, if issued by the Commission, would charge respondent with violations of the Truth in Lending Act and the Regulation promulgated thereunder and violations of the Federal Trade Commission Act; 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 aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent, Macy's New York, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 151 West 34th Street, New York, New York.

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

Order

Definitions: For purposes of this order* the following definitions shall apply:

a. *billing error* shall be defined as provided by Section 226.13(a) of Regulation Z, 12 C.F.R. 226.13(a).

b. *billing error notice* shall be defined as provided by Section 226.13(b) of Regulation Z, 12 C.F.R. 226.13(b).

c. *commerce* shall be defined as provided by Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

d. *consumer credit* shall be defined as provided by Section 226.2(a)(12) of Regulation Z, 12 C.F.R. 226.2(a)(12).

* All reference to the Truth in Lending Act and Regulation Z contained in this order shall refer to the Truth in Lending Act as amended to March 31, 1980 and Regulation Z as amended to April 1, 1981.

e. *credit card* shall be defined as provided by Section 226.2(a)(15) of Regulation Z, 12 C.F.R. 226.2(a)(15).

f. *customer* shall mean *cardholder* which shall be defined as provided by Section 226.2(a)(8) of Regulation Z, 12 C.F.R. 226.2(a)(8).

g. *Fair Credit Billing Act* (hereinafter "FCBA") shall refer to Sections 127(a)(7), 127(b)(10), 161, 162 and 164 of the Truth in Lending Act, 15 U.S.C. 1637(a)(8), 1637(b)(11), 1666, 1666(a) and 1666(c), now in effect or as they may be amended.

h. *open end credit* shall be defined as provided by Section 226.2(a)(20) of Regulation Z, 12 C.F.R. 226.2(a)(20).

i. *other charges* shall refer to late payment charges or other charges (excluding finance charges) imposed as the result of an erroneous billing.

j. *reasonable investigation* shall refer to that investigation required by Section 226.13(f) of Regulation Z, 12 C.F.R. 226.13(f).

k. *Regulation Z* shall refer to that version of Regulation Z, 12 C.F.R. 226, effective October 1, 1982, the implementing regulation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq.*, now in effect or as it may be amended.

l. *Truth in Lending Act* shall refer to that version of the Act, 15 U.S.C. 1601 *et seq.*, now in effect or as it may be amended.

I.

It is ordered, That respondent Macy's New York, Inc., a corporation, its successors and assigns or any other entity continuing its business, and respondent's officers, agents, representatives and employees acting as such, directly or through any corporation, subsidiary, division or other device, in connection with any extension of open end credit, including but not limited to consumer credit extended on an account by use of a credit card, shall forthwith cease and desist from:

A. Failing, within thirty (30) days after receipt of a billing error notice, to mail or deliver a written acknowledgement thereof to the customer, as required by Section 226.13(c)(1) of Regulation Z, unless:

1. the customer has agreed, within such thirty (30) day period, that the periodic statement is correct; or

2. respondent has taken the applicable action specified in Paragraph I.B.1–3 of this order within such thirty (30) day period.

B. Failing, not later than two (2) complete billing cycles and in no event more than ninety (90) days from the date of receipt of a billing error notice as required by Section 226.13(c) of Regulation Z to resolve the dispute by:

1. correcting the customer's account in the full amount indicated by

the customer to have been erroneously billed and mailing or delivering to the customer a notification of correction(s), in the manner required by Section 226.13(e) of Regulation Z; or

2. correcting the customer's account, after having conducted a reasonable investigation, by a differing amount from that indicated by the customer as being erroneously billed, and mailing or delivering to the customer an explanation of the change(s), accompanied by copies of documentary evidence of the customer's indebtedness if such evidence is requested by the customer, in the manner required by Section 226.13(f) of Regulation Z; or

3. mailing or delivering, after having conducted a reasonable investigation, a written explanation or clarification to the customer setting forth, to the extent applicable, the reason(s) why respondent believes the amount(s) was correctly shown on the periodic statement, and, if the customer so requests, furnishing copies of documentary evidence of the customer's indebtedness, in the manner required by Section 226.13(f) (1&2) of Regulation Z.

Provided, however, That respondent need not perform the actions specified in Paragraph I.B. if the customer has agreed, not later than two (2) complete billing cycles (and in no event more than ninety (90) days) from the date of receipt of the billing error notice, that the periodic statement is correct.

C. Failing to retain for at least two (2) years evidence of compliance with the provisions of the FCBA, as implemented by the applicable provisions of Regulation Z, as required by Section 226.25(a) of Regulation Z. Evidence of compliance shall include but not be limited to: a) customer billing error notices and attachments thereto; and b) copies of all respondent's correspondence in response. *Provided, however,* That respondent need not retain copies of standard form responses so long as respondent adequately identifies the forms used and the dates of mailing with respect to each customer's billing error notice.

D. Taking or causing any action, after receipt of a billing error notice, but prior to the time the dispute has been resolved as provided in Paragraph I.B. of this order, to collect:

1. any portion of an amount indicated in the customer's notification as being a billing error; or

2. any finance or other charge computed on such disputed amount,

in violation of Section 226.13(d)(1) of Regulation Z. *Provided, however,* That after receipt of a billing error notice respondent may include disputed amounts on subsequent periodic statements if respondent has provided the statement specified in Paragraph I.E. of this order.

E. Failing, after receipt of a billing error notice, and prior to resolu-

tion of the dispute, to indicate on or with the periodic statement that payment of the amount(s) in dispute pursuant to the provisions of Regulation Z is not required pending respondent's compliance with the provisions of Section 226.13 of Regulation Z, when mailing or delivering subsequent periodic statements which include disputed amount(s), as required by Section 226.13(d)(1) of Regulation Z.

F. Failing, after resolution of a billing error in favor of the customer pursuant to the provisions of Regulation Z, to credit any finance or other charges imposed as a result of the erroneous billing, as required by Section 226.13(e)(1) & (f)(3) of Regulation Z.

G. Failing to credit payments to customers' accounts as required by Section 226.10 of Regulation Z.

H. Failing to forfeit the right to collect the amount indicated by the customer to be a billing error and corresponding finance and other charges, providing that amount does not exceed $50, in instances when respondent fails to comply with the requirements of Section 226.13 of Regulation Z, as required by Section 161(e) of the Truth in Lending Act.

I. Failing to comply with any of the provisions of the Fair Credit Billing Act, as implemented by the applicable provisions of Regulation Z, 12 C.F.R. 226.6(d), 226.7(k), 226.9(a), 226.10, 226.13 and 226.25.

J. Failing to implement, within one hundred eighty (180) days after service of this order, an initial educational program, a full and complete description of which will have been received by and filed with the Commission as a supplemental report of compliance pursuant to Part VI of this order, for all of respondent's officers and employees who are responsible for establishing respondent's consumer credit billing policies and procedures, and also for those whose primary function is to respond to and resolve customers' written notifications of billing errors. The initial educational program shall consist of:

1. Furnishing to each such officer and employee a copy of this order, a copy of the FCBA and those portions of Regulation Z which implement the FCBA, and written educational materials which explain the FCBA and the provisions of Regulation Z which implement the FCBA, as they apply to respondent's credit billing and billing adjustment practices, including but not limited to Sections 226.6, 226.7, 226.9, 226.10, 226.13 and 226.25; and

2. Informing orally each such officer and employee, at a general meeting or otherwise, of the provisions of this order and of the duties of respondent and its officers and employees under the FCBA and the provisions of Regulation Z which implement the FCBA. Respondent shall submit a written agenda of its oral presentation to its employees

as part of the supplemental report of compliance filed pursuant to Part VI of this order; and

3. Securing a signed statement from each such officer that she or he has read this order, the FCBA, the provisions of Regulation Z which implement the FCBA, and the educational materials described in Paragraph J.1. and has received the instructions described in Paragraph J.2. A copy of each such statement shall be retained for at least three (3) years and shall be made available for inspection by a duly authorized representative of the Commission upon request.

K. Failing to provide the documents described in Paragraph J.1. hereof to each officer or employee who within five (5) years after the service of this order is given the responsibilities described in Paragraph J. hereof and to require each such officer to sign within twenty (20) days of the assumption of said responsibilities a statement that she or he has been so instructed. A copy of each such statement shall be retained for at least three (3) years and shall be made available upon request for inspection by a representative of the Commission.

L. Failing to conduct a refresher educational program at least once a year for five (5) years after acceptance of this order for all officers and employees having the responsibilities described in Paragraph J. hereof, for the purposes of explaining the requirements of the FCBA and the provisions of Regulation Z which implement the FCBA and explaining the responsibilities of such officers and employees in conformity with this order. Respondent shall:

1. Inform orally each such officer and employee, at a general meeting or otherwise, of the requirements of the FCBA and Regulation Z as they pertain to respondent's credit billing and billing adjustment practices.

2. If necessary to explain the requirements of, or any amendments to, the FCBA or to the provisions of Regulation Z which implement the FCBA, furnish each such officer or employee with written educational materials in additicn to those described in Paragraph J.1. Such additional written materials shall be retained for a period of three (3) years and shall be made available upon request for inspection by a Commission representative.

M. Respondent shall not have liability under Part I of this order for any act in good faith done or omitted in conformity with any rule, regulation or interpretation thereof regarding the FCBA by the Federal Reserve Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe.

II.

Definitions: For purposes of Part II of this order:

a. *eligible customer* shall mean each and every person who held an open end credit account with respondent and who, during the period January 1, 1977 through December 31, 1978, sent a written inquiry concerning a billing error to respondent at P.O. Box 1516, New York, N.Y. In each and every instance, eligibility shall be determined without reference to the validity of the underlying claim.

b. any duty which is required to be performed on a specified day and which falls upon a non-business day shall be performed on the next following business day.

It is further ordered, That respondent Macy's New York, Inc., a corporation, its successors and assigns or any other entity continuing its business, and respondent's officers, agents, representatives and employees acting as such, directly or through any corporation, subsidiary, division or other device, in connection with open end credit accounts created or maintained in connection with the sale of merchandise or services to the public, in or affecting commerce, shall:

A. Submit to the New York Regional Office of the Federal Trade Commission ("NYRO"), on or before the forty-fifth (45th) day after the date this order is served on respondent ("date of service"), a list or compilation of the names and addresses of all persons identified by respondent as eligible customers.

B. Add to its compilation of eligible customers each and every person on file with NYRO who is an eligible customer and who is not included in respondent's compilation. NYRO shall provide the names of each such eligible customer to respondent on or before the fiftieth (50th) day after the date of service.

C. Submit to NYRO, on or before the sixtieth (60th) day after the date of service, a notarized affidavit, executed by a Senior Vice President of respondent, to the effect that respondent has made or has caused to be made a good faith search of documents relating to billing error disputes in its customer service departments, including those handling the general merchandise, bill adjustments, furniture, and rugs and floor coverings departments, in order to locate the names and addresses of all eligible customers under Part II of this order.

D. Deposit, on or before the tenth (10th) day after the date of service, the sum of two hundred twenty-five thousand dollars ($225,000) into an account at a banking institution to be agreed upon between respondent and NYRO. The principal amount of said bank account shall be available only for the payment of refunds under Part II of this order. No charges against this amount shall be made for administra-

tive costs, which costs shall be paid by respondent. Respondent shall retain any interest accrued on this account, if any.

E. On or before the fifty-fifth (55th) day after the date of service, make or cause to be made a search of its active open end credit files and shall obtain the address used for mailing or delivery or periodic statements ("billing address") for each and every eligible customer who has an active open end credit account with respondent.

F. On or before the sixtieth (60th) day after the date of service, mail or cause to be mailed by first class mail to each eligible customer who does not have an active open end credit account with respondent, at his or her last known billing address, (1) a notification ("Notification") in the language, manner and form set forth in Appendix A; together with, (2) a self-addressed, postage prepaid response form in the language, manner and form set forth in Appendix B.

G. Designate a separate mailing address which shall be used solely for purposes of receiving the response forms pursuant to Paragraph II.F. of this order.

H. With respect to each Notification returned undelivered, ascertain or cause to be ascertained whether the mailing address appearing on such Notification has been accurately transcribed from respondent's records. Respondent or its designee shall thereafter, on or before the ninety-fifth (95th) day after the date of service, correct any addresses inaccurately transcribed and mail or cause to be mailed all returned Notifications in the same manner and form set forth in Paragraph II.F. of this order.

I. On or before the one hundred twentieth (120th) day after the date of service, apportion or cause to be apportioned equally the sum of two hundred twenty-five thousand dollars ($225,000) among the eligible customers for whom respondent has obtained a current mailing address pursuant to Paragraphs II.E., II.F. and II.H., and mail, or cause to be mailed by first class mail, a refund by check to each such eligible customer. Each refund shall be accompanied by a letter in the language, manner and form set forth in Appendix C.

J. With respect to each mailed refund which is returned undelivered, ascertain or cause to be ascertained whether the mailing address appearing on each such refund is accurately transcribed from the current mailing addresses obtained by respondent pursuant to Paragraphs II.E., II.F. and II.H. Respondent or its designee shall thereafter correct any addresses inaccurately transcribed and shall thereafter mail or cause to be mailed all the returned refunds in the same manner and form set forth in Paragraph II.I. of this order.

K. On or before the two hundredth (200th) day after the date of service, file with NYRO a report in writing setting forth the manner and form in which it has complied with Part II of this order.

L. Maintain for two (2) years after the date of the last act required by Order II, records and documents evidencing its compliance with Part II of this order.

III.

It is further ordered, That respondent Macy's New York, Inc., a corporation, its successors and assigns or any other entity continuing its business, and respondent's officers, agents, representatives and employees, acting as such, directly or through any corporation, subsidiary, division or other device, in connection with open end credit accounts created or maintained in connection with the sale of merchandise or services to the public, in or affecting commerce, shall forthwith cease and desist from:

A. Including the statement "additional correspondence enclosed" or a statement to that effect on preaddressed envelopes mailed or delivered to customers for the payment of the customers' bills, unless the words "Billing error notices must be mailed to (address used by respondent for receipt of billing error notices).", or substantially similar words, are included immediately adjacent to any such statement. *Provided, however,* That when only using the words "order enclosed" or "address change enclosed" or words to that effect, on such preaddressed envelopes, respondent need not set forth the notice required by this paragraph.

B. Billing its customers prior to delivery for furniture, broadloom carpeting, mattresses, or major appliances delivered from respondent's warehouse distribution center. *Provided, however,* That (1) when delivery of merchandise is deferred at the request of a customer, respondent may bill the customer at the time the merchandise is available for delivery; and (2) nothing in this paragraph shall prohibit respondent from billing customers for any deposits required by respondent and agreed to by the customer prior to delivery of the merchandise.

C. Failing to post in a prominent location in each area designated by respondent for bill adjustments in each of its stores, a sign to be displayed to the public which is not smaller in dimension than twenty-four (24) inches by thirty-six (36) inches, and which sets out, clearly and conspicuously, the information provided in Appendix D.

D. Failing, in instances in which respondent provides a telephone number on the periodic statement, to include clearly and conspicuously on that part of each periodic statement which is retained by the customer, a notice, adjacent to such telephone number, in substantially the following language: "If you telephone us with a billing inquiry,

you do not protect your rights under federal law. To do so, write to us at the address indicated on this statement or accompanying statement for billing inquiries."

IV.

It is further ordered, That, in the event that respondent Macy's New York Inc., a corporation, its successors and assigns or any other entity continuing its business, provides customer complaint resolution procedures, in addition to those specifically required by the FCBA, or causes customers to waive or forfeit their rights under the FCBA, it shall forthwith cease and desist from:

A. Representing, directly or by implication, that it will resolve disputes regarding billing errors within a reasonable period of time after receipt of written notifications of such billing errors, unless respondent in fact resolves such disputes within a reasonable period of time.

For purposes of this Part of the Order, *written notifications of billing errors* shall mean (1) written notifications of billing errors made at the area designated by respondent for bill adjustments on a form which shall be provided by respondent for that purpose; or (2) written notifications of billing errors (other than those reported to respondent through a billing error notice pursuant to the provisions of the FCBA) addressed to respondent as follows: a) address disclosed by respondent on its billing statement for receipt of payments from customers; or b) Macy's, New York, New York or Macy's at its Herald Square store.

Written notifications shall not include any written inquiries directed to any individual by name, title or position, other than chairman of the board or president or those addressed to the customer service department.

For purposes of this Part of the order the term *resolve* shall mean (1) correcting the customer's account in the amount of the error; (2) after a reasonable investigation, correcting the customer's account by a differing amount from that indicated by the customer as being erroneously billed, and mailing to the customer a written explanation of the change(s); or (3) after a reasonable investigation, setting forth to the customer, in writing, the reasons why respondent believes that the amount was correctly shown on the customer's periodic statement. *Provided, however,* That if the customer makes a billing inquiry at the area designated by respondent for bill adjustments and the billing error is resolved at that time, any explanations or notifications of correction may be conveyed orally to the customer at that time.

B. Failing to credit any finance or other charges imposed as a result of an erroneous billing in each instance in which: (1) respondent has resolved a billing error dispute in favor of the customer; and (2) notification of the billing error was in writing addressed to any of the locations specified in Paragraph IV.A of this order but not reported to respondent through a billing error notice pursuant to the provisions of the FCBA.

V.

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

VI.

It is further ordered, That respondent shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order, and within one hundred eighty (180) days after service upon it of this order, file with the Commission a written supplemental report setting forth a full and complete description of the initial educational program required by this order.

Commissioners Pertschuk and Bailey voted in the negative.

APPENDIX A

(Macy's Letterhead)

(Date)

(Name)
(Address)

Re: Refund for Eligible Macy's Credit Card Customers per Macy's/Federal Trade Commission Consent Agreement

Dear Customer:

Macy's New York, Inc. has entered into a Consent Agreement with the Federal Trade Commission regarding the Fair Credit Billing Act. As part of the Agreement, Macy's has established a fund of $225,000 which will be divided equally among customers who

wrote to our billing inquiry address during the years 1977 and 1978. Our records indicate that you are eligible for such a refund.

The purpose of this letter is to make certain that Macy's has your present mailing address. Please complete the attached address verification form and return it within twenty-five (25) days in the enclosed prepaid envelope. Only those who complete and return this response form within 25 days after the above date will receive a refund. The refund will be mailed to you within 90 days of our receipt of the response form.

Very truly yours,

MACY'S NEW YORK, INC.
BY____________________________
(Name)
Vice President

APPENDIX B

(Response form)

Please mail my refund to:
Name ____________________________

Address ____________________________
(Street)

____
(City)

____
(State) (Zip Code)

APPENDIX C

(Macy's Letterhead)

(Date)

Re: Refund for Eligible Macy's Credit Card Customers per Macy's/Federal Trade Commission Consent Agreement

Dear Customer:

Macy's New York, Inc. has entered into a Consent Agreement with the Federal Trade Commission regarding the Fair Credit Billing Act. As part of this Agreement, Macy's has established a fund of $225,000 which has been divided equally among customers who wrote to our billing inquiry address during the years 1977 and 1978.

Our records indicate that you are eligible for such a refund. Therefore, please find enclosed your check in the amount of ________.

Very truly yours,

MACY'S NEW YORK, INC.
By ____________________________
(Name)
Vice President

APPENDIX D

IF YOU HAVE A BILLING COMPLAINT

TO PROTECT YOUR RIGHTS UNDER FEDERAL LAW YOU MUST *WRITE* WITHIN 60 DAYS OF THE DATE OF THE BILL

Macy's Address
Box # ______________________
____
____

Include:

(a) your name and account number;
(b) the dollar amount of the suspected error;
(c) why you believe there is a possible mistake.

IN THE MATTER OF

THE PROCTER & GAMBLE COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-2059. Consent Order, Oct. 8, 1971—Modifying Order, Feb. 3, 1984

This order reopens the proceeding and modifies the Commission's order issued on Oct. 8, 1971 (79 F.T.C. 589), *modified* Feb. 26, 1974 (83 F.T.C. 1354), to ensure that consumers receive necessary information regarding promotions involving chance while allowing the company to publicize such promotions more effectively and efficiently. The modified order changes the disclosure requirements for broadcast and print advertising, and includes a "trigger" modeled on that in the Commission's Games of Chance Rule. The "trigger" would require certain disclosures in print advertisements which "refer in any manner to prizes or their number or availability."

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On May 2, 1983 Procter & Gamble Company, respondents in the above captioned matter, filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice to reopen the proceeding and modify the consent order entered therein. By letter dated October 21, 1983, petitioner agreed to modify its original proposal.

The order relates to alleged unfair and deceptive practices by Procter & Gamble in connection with any use of a "sweepstakes" or other similar promotional device involving chance. Paragraphs A(1) and B(1)(2)(3) and (4) of the order require petitioner to disclose in all advertising and promotional material: (1) the total number of prizes to be awarded, (2) the exact nature of the prizes, their approximate retail value, and the number of each, (3) the geographic area or states in which any such device is used, and (4) the date the device is initiated and the date the device is to end. Other provisions of the order prohibit petitioner from failing to award all of the prizes as represented, from falsely representing that prizes have already been purchased, from failing to furnish a list of winners on request, and from misrepresenting any aspect of any promotional device involving chance. Procter & Gamble seeks modification only of the disclosure requirements contained in paragraphs A(1) and B(1)(2)(3) and (4) of the order.

Petitioner requests the establishment of different disclosure requirements for broadcast and print advertising, and the lessening of the requirements for both types of ads. In place of the current broad-

cast advertising requirements petitioner requests those set out in proposed paragraph C. This paragraph would require petitioner to disclose in all advertising: (1) the geographic area or states in which the device is used *if* the advertisement would reach consumers outside that area, (2) the date the device is to end *if* the advertising would be disseminated within less than thirty days before such ending date and, (3) the date the device is to begin *if* the advertising would be disseminated prior to that beginning date. No other disclosures would be required in broadcast advertisements.

Petitioner argues that the changes in the broadcast advertising requirements of the order are justified by changes in law and fact and by the public interest. Petitioner points to nearly identical consent orders against three pesticide producers in which fewer disclosures were required in certain broadcast advertisements than were required in print advertisements. *Union Carbide,* 84 F.T.C. 591 (1974), *modified,* 86 F.T.C. 1231 (1975), *modified,* 94 F.T.C. 315 (1979); *Hercules, Inc.,* 84 F.T.C. 605 (1974), *modified,* 86 F.T.C. 1236 (1975), *modified,* 94 F.T.C. 315 (1979); *FMC Corp.,* 86 F.T.C. 897 (1975), *modified,* 94 F.T.C. 315 (1979). Petitioner also argues that the prize information disclosure requirement amounts to a virtual ban on broadcast advertising of its sweepstakes. Finally petitioner argues that at the time the order was entered into television advertising of sweepstakes promotions was virtually nonexistent, whereas today such advertising is increasingly common and petitioner's inability to place such advertisements places it at competitive disadvantages.

Petitioner also proposes that the order's print advertising disclosure requirements be modified by introducing a "trigger." Under this approach, the disclosures listed in paragraphs A and B would be required only in print advertisements which "refer in any manner to prizes or their number or availability." Print advertising which does not set off the trigger would still have to meet the disclosure requirements of paragraph C, however. Petitioner also proposes special provisos to paragraphs A, B and C. The provisos to paragraphs A and B would allow petitioner to place disclosures triggered by advertisements on package labels on material other than the labels themselves, as long as statements on those packages directed consumers to those disclosures. The proviso to paragraph C would allow petitioner to place any disclosures required by that paragraph on the side or back of packages as long as a statement on the front of the package informed consumers of the disclosures' location.

Finally, petitioner contends that the addition of the "trigger" to the order's print advertising disclosure requirements is justified by changes in law and the public interest. In support, petitioner points to the consent order in *Coca-Cola Co.,* 88 F.T.C. 656 (1976) that regu-

lates the conduct of contest promotions and includes trigger language related to the kind of disclosures required by that order.

With respect to the deletion of the obligation to disclose prize information in broadcast advertisements we note that in January 1983 we issued a temporary stay of those portions of our Trade Regulation Rule on Games of Chance in the Food Retailing and Gasoline Industries (16 C.F.R. 419) which required the disclosure of prize information in broadcast advertising.* (48 FR 1046) This stay will remain in effect pending the conclusion of proceedings to amend that rule. Thus the modification makes petitioner's obligation more consistent with that presently imposed by the rule. Moreover, in this case petitioner's advertising of prize information will remain subject to paragraph A.(5) of the order which forbids petitioner from "misrepresenting in any manner by any means any element, feature, or aspect of any 'sweepstakes,' contest, game or any similar promotional device involving chance."

Similarly, we believe that conditioning disclosure in broadcast advertising of the starting and ending dates and geographic scope of a promotion is also justified by the public interest. Paragraph C of the modified order requires these disclosures whenever they are necessary and helpful to the consumer.

Finally, adoption of a trigger modeled on that contained in our Games of Chance Rule is also in the public interest. The disclosures required in Procter & Gamble's order are similar to those required in the Games of Chance Rule. Both require disclosure of detailed prize information. This requirement is present in the order against petitioner to ensure that consumers are not deceived about the value and nature of the prizes by vague or incomplete references to prizes in advertising. Therefore, the trigger used in the Games of Chance Rule —any reference to prizes—is appropriate for use in petitioner's order. The insertion of this trigger language serves the public interest by more closely tailoring the disclosure requirements to the purposes they serve. The provisos relating to disclosures on package labels are also justified by the public interest. They allow petitioner to provide more information to consumers on package labels than would otherwise be possible under the order, while still ensuring that the required disclosures are available for consumers to view. This increased flow of information to consumers is in the public interest.

Thus, the Commission finds that the changes requested in Procter & Gamble's modified petition are in the public interest. The modified order will ensure that consumers receive necessary information re-

* This rule applies only to the food retailing and gasoline industries. It does not apply to petitioner's activities in the sweepstakes area, which are governed solely by the order.

garding promotions involving chance, while allowing petitioner to publicize such promotions more effectively and efficiently.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued October 8, 1971, as modified February 26, 1974, in Docket No. C-2059 is hereby modified to read as follows:

Order

It is ordered, That the Procter & Gamble Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the preparation, advertising, sale, distribution or use of any "sweepstakes," contest, game or any similar promotional device involving chance in commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. (1) Failing to disclose clearly and conspicuously the exact number of prizes which will be awarded, the exact nature of the prizes and the approximate retail value of each prize offered in all print advertising and printed promotional materials which refer in any manner to prizes or their number or availability. *Provided, however,* That such disclosures in any case need not be made on any package label as long as somewhere on that same package consumers are clearly and conspicuously referred to advertising or promotional material which does contain such disclosures and which may be viewed by consumers without any purchase or other monetary outlay.

(2) Failing to award and distribute all prizes of the type and value represented.

(3) Representing directly or by implication that prizes other than cash prizes have been purchased unless they have in fact been purchased at the time that the representation is made.

(4) Failing to furnish upon request to any individual a complete list of the names and states of residence of winners of major prizes, identifying the prize won by each.

(5) Misrepresenting in any manner by any means any element, feature, or aspect of any "sweepstakes," contest, game or any similar promotional device involving chance.

B. Engaging in the preparation, promotion, sale, distribution, or use of any "sweepstakes," contest, game, or similar promotional device involving chance, unless the following are disclosed clearly and conspicuously in all print advertising and printed promotional material which refer in any manner to prizes or their number or availability. *Provided, however,* That except as provided in Paragraph C of this order, such disclosures in any case need not be made on any package

label as long as somewhere on that same package consumers are clearly and conspicuously referred to advertising or promotional material which does contain such disclosures and which may be viewed by consumers without any purchase or other monetary outlay.

(1) The total number of prizes to be awarded;
(2) The exact nature of the prizes, their approximate retail value, and the number of each;
(3) The geographic area or states in which any such device is used; and
(4) The date the device is initiated and the date the device is to end.

C. Engaging in the preparation, promotion, sale, distribution, or use of any "sweepstakes," contest, game, or similar promotional device involving chance, unless the following are disclosed clearly and prominently in all advertising or promotional material concerning said devices:

(1) The geographic area or states in which any such device is used if the advertising or promotional material would reach consumers outside such geographic area or states; and
(2) The date the device is to end if the advertising or promotional material would be disseminated within less than thirty days before such ending date.
(3) The date the device is to begin if the advertising or promotional material would be disseminated prior to such beginning date.

Provided, however, That in advertising or promotional material printed on package labels it shall be sufficient if such advertising or promotional material contains the clear and conspicuous disclosure of the statement "See back/side for details" and any required information about geographic areas or states and/or ending or beginning dates is then disclosed clearly and conspicuously elsewhere on the package.

It is further ordered, That respondent Procter & Gamble Company shall;

(1) File with the Commission, within sixty (60) days after service upon it of this order, a report in writing setting forth in detail the manner and form in which it has complied with the provisions of this order;
(2) Maintain adequate records:

(a) which disclose the facts upon which any of the representations of the type described in the preceding paragraphs of this order are based, and
(b) from which the validity of the representations of the type described in the preceding paragraphs of this order can be determined;

(3) Furnish upon the request of the Federal Trade Commission:

(a) a complete list of the names and addresses of the winners of each prize, and an exact description of the prize, including its retail value;

(b) a list of the winning numbers or symbols, if utilized, for each prize;

(c) the total number of coupons or other entries distributed;

(d) the total number of participants in the promotion;

(e) the total number of prizes in each category or denomination which were made available; and

(f) the total number of prizes in each category or denomination which were awarded.

It is further ordered, That the 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 corporate form such as dissolution, assignment or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance with this order.

Commissioner Pertschuk voted in the negative.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8918. Modified Order To Cease and Desist, April 8, 1983—Modifying Order, Feb. 7, 1984

This order modifies the Commission's Modified Order to Cease and Desist issued on April 8, 1983 (101 F.T.C. 698), to permit the company to substantiate superiority or freedom-from-side-effects claims with competent and reliable scientific evidence, as is required of its competitors, Bristol-Meyers Co. and Sterling Drug Co. Previously, the company was required to substantiate such claims with two or more well-controlled clinical investigations.

ORDER MODIFYING ORDER TO CEASE AND DESIST

In response to the Commission's Order to Show Cause issued January 12, 1984, respondent American Home Products Corporation (AHP) and complaint counsel have consented to modify the Order of April 8, 1983 [101 F.T.C. 698] in this matter to allow AHP to make comparative analgesic efficacy claims under paragraph I(B) that are based on the reasonable basis standard for such claims established in the Commission's decisions in *Bristol-Myers Company,* Docket No. 8917 [102 F.T.C. 21] and *Sterling Drug, Inc.,* Docket No. 8919 [102 F.T.C. 395]. The Commission agrees that such modification should be made.

Accordingly, *it is hereby ordered* that the Order be reopened and paragraph I(B) thereof be modified by adding the word "or" to the end of paragraph I(B)(2) and adding the following new paragraph I(B)(3):

3. Respondent, at the time such representation is made, possesses a reasonable basis for making that representation. A reasonable basis for such a representation shall consist of competent and reliable scientific evidence supporting it.

It is further ordered, That with this modification, the Commission's stay of paragraph I(B) is hereby lifted and the entire Order as modified shall take effect 90 days from our January 12, 1984 order, as contemplated by our Stay order of April 8, 1983.

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

File No. 821 0159. Interlocutory Order, Feb. 7, 1984

The Commission dismissed in part and denied in part Chrysler Corporation's petition seeking release of GM, Toyota and staff documents and analyses on which the Commission based its decision to provisionally accept the consent agreement permitting the GM/Toyota joint venture to manufacture new small cars in the U.S. The Commission noted that staff documents and the GM/Toyota memorandum of understanding were already on the public record. The Commission denied a request to disclose those portions of staff documents that contained trade secrets or commercial or financial information. In denying Chrysler's request for an extension of the 60-day comment period, the Commission stated that adequate time remains for interested persons to review the staff documents and complete their comments.

ORDER DISMISSING IN PART AND DENYING IN PART PETITION BY CHRYSLER CORPORATION FOR DISCLOSURE OF CERTAIN NON-PUBLIC INFORMATION AND EXTENSION OF PUBLIC COMMENT PERIOD ON A PROPOSED CONSENT AGREEMENT

On January 10, 1984, Chrysler Corporation filed a petition in File No. 821 0159. That file concerns an agreement to a proposed consent order with General Motors Corporation and Toyota Motor Corporation that the Commission has provisionally accepted. The agreement has been placed on the public record for 60 days so that interested persons may comment on it [48 FR 57246 (Dec. 28, 1983)]. At the close of this period the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make final the proposed consent order, in accordance with its rules. 16 C.F.R. 2.34 (1983). [103 F.T.C. — (1984)]

The agreement concerns a joint venture between General Motors and Toyota which those firms proposed in a memorandum of [2] understanding dated February 17, 1983. The joint venture would manufacture small new automobiles in the United States.

Chrysler's petition requests the Commission to [1] "release the GM, Toyota and staff documents and analyses on which it acted [in provisionally accepting the agreement], and [2] provide that the 60-day comment period does not expire until 60 days after those documents have been released."

Chrysler's Contentions

The petition complains that the memorandum of understanding between General Motors and Toyota has been improperly redacted to

eliminate the formula by which the joint venture will price the vehicles to be manufactured, and that the staff analyses, including consultants' reports, have not been made available to the public at all. Without these documents, the petition contends, the comment process provided in the Commission's rules is meaningless. It asserts that there is no legal basis for deletion of any information from the memorandum of understanding or for the withholding of the other documents requested.

Specifically, Chrysler argues that Section 21(b) of the FTC Act, 15 U.S.C. 57b–2(b), is irrelevant because it applies only to material obtained by compulsory process for law enforcement purposes. It further contends that Section 7A(h) of the Hart-Scott-Rodino Antitrust Improvements Act, 15 U.S.C. 18a(h), expressly permits the Commission to disclose such information, including confidential business information, "as may be relevant to any administrative or judicial action or proceeding," and that this provision authorizes such disclosure during public comment [3] on a proposed consent order under Commission Rule 2.34. Section 6(f) of the FTC Act, 15 U.S.C. 46(f), which denies the Commission authority to make public trade secrets or commercial or financial information that is privileged or confidential, is said to be inapplicable as a matter of law. Alternatively, this restriction is said to be inapplicable because disclosure of the information sought would not cause any submitter substantial competitive injury. This information, it is argued, meets neither the test for Section 6(f), nor the standards which would justify a protective order under the Commission's rule authorizing *in camera* orders in adjudications. 16 C.F.R. 3.45(b).

As we understand its petition, Chrysler does not actually request the Commission to make disclosures to public commenters under an order providing *in camera* treatment for confidential commercial information and trade secrets. Rather, Chrysler seeks public disclosure of all information contained in the documents at issue (Pet. at 13). It disavows, nevertheless, any purpose to cause the release of information in violation of applicable statutes and rules.[1]

For the reasons set forth below, the petition is dismissed as moot insofar as it requests the release of the staff documents [4] and analyses on which the Commission acted, and portions of the GM/Toyota memorandum of understanding not initially released by the Commission. The staff documents were placed on the public record January

[1] The petition also refers to remarks allegedly made by the Commission's General Counsel during a meeting with Chrysler's counsel on December 19, 1983, supposedly stating that the GM-Toyota memorandum of understanding contains no confidential material. As the General Counsel explained in his letter to Chrysler's counsel of December 29, 1983, he was not discussing Sections 6(f) and other statutory limitations on disclosure, but Chrysler's possible discovery rights in a private antitrust suit. Moreover, the General Counsel's opinion does not bind or estop the Commission.

25, 1984. The full text of the memorandum of understanding was also placed on the public record on February 3, 1984 after it was revealed by General Motors Corporation in a public filing February 1, 1984 in Chrysler's antitrust suit challenging the proposed joint venture (D.D.C. No. 84–115). The petition is denied insofar as it seeks disclosure of material contained in the staff documents and analyses which are trade secrets or commercial or financial information that remains confidential and privileged within the meaning of Section 6(f) of the FTC Act, or which were obtained by compulsory process, or obtained in lieu thereof and designated confidential by its submitters as provided in 16 C.F.R. 4.10(d) (1983). The request for extension of the 60-day comment period is also denied on the ground that adequate time remains for interested persons to review the staff documents and complete their comments.

Our decision is based upon our evaluation of relevant policies governing the disclosure of confidential business information obtained by compulsion of law or the threat of such compulsion, and the controlling statutes and regulations. We have also considered the appropriateness of disclosing confidential information to commenters in this consent order proceeding subject to some form of protective order. [5]

1. Confidential business information is subject to an important but qualified right of privacy.

At the outset we note that the information sought concerns nontrial materials obtained from the parties to the joint venture, GM and Toyota, and numerous third parties in the automobile industry for purposes of the Commission's investigation of the transaction. These materials, moreover, were obtained under government compulsion, *i.e.,* either under the compulsion of the Hart-Scott-Rodino Act, or by virtue of subpoena or voluntarily in lieu of subpoena. To the extent that information thus furnished to the government involves trade secrets and commercial or financial information that is privileged and confidential, it implicates an important interest in privacy recognized in discovery rules (Fed. R. Civ. P. 26(c)(7)), statutes (*e.g.,* Sections 6(f) and 21(d)(1)(B) of the FTC Act and 18 U.S.C. 1905); the Freedom of Information Act, 5 U.S.C. 552(b)(4); and the common law (Restatement of Torts Section 759). It has also been held (*Tavoulareas* v. *The Washington Post Company, et al.,* D.C. Cir. No. 80–3032, decided January 6, 1984, slip op. 27–28):

> Given the long tradition of common law protection of confidential commercial information * * * and the crucial importance of such material to continuing business operations, a company's sensitive commercial documents not yet in the public domain fall within the constitution's protection of corporate privacy interests. Few categories of business

information are more analogous to individuals' constitutionally protected personal affairs than trade secrets and related commercial information.

This privilege is not absolute. It must give way to the government's lawful needs for information where necessary to [6] allow adequate policing of corporate behavior. *United States* v. *Morton Salt Co.,* 338 U.S. 632, 651–652 (1950). But the government's need to intrude upon business privacy must be balanced against the severity of the intrusion. The more severe the intrusion the more compelling must be the interests invoked to justify it. " 'Severe' intrusions include public dissemination of confidential information as opposed to disclosure of such information only to the government or other litigants." *Tavoulareas, supra,* slip op. at 27. We need not, however, undertake on this petition an *ad hoc* balancing of constitutional factors. Congress and our regulations have struck the balance for us.

2. Tentative consent agreements are non-adjudicative reports under Section 6 of the FTC Act.

We are concerned here with a demand for general public disclosure of information in aid of public comments we have invited under a non-adjudicative procedure. That procedure is not required by statute, but rather, is established only by discretionary regulations (16 C.F.R. 2.34 (1983)) that are not based on statutes authorizing release of confidential business information. *Cf. Chrysler Corp.* v. *Brown,* 441 U.S. 281, 303–312 (1979) (agency regulation insufficient to authorize disclosure absent statute).

Our procedure contrasts sharply with the adjudicative procedures Congress has authorized in the Tunney Act before an Article III *court* may enter an antitrust consent judgment agreed to by the Department of Justice. 15 U.S.C. 16(b)–(h).[2] Those procedures are necessary because the tribunal that may enter such [7] a consent judgment—a United States District Court—does not have access to the investigation conducted by the Department of Justice. When the Commission accepts a consent, however, it has full access to its staff's investigation, and acts initially on the basis of that access. The purpose of the public comment period under our regulations is not to provide new evaluations of the staff's investigation by other interested persons, but to bring forth additional facts or objections that might indicate to the Commission that a proposed consent order is not in the public interest, but that further negotiation or formal adjudication might be. *See e.g., Ford Motor Co.* v. *Federal Trade Commission,* 547 F.2d 954 (6th Cir. 1976); *Johnson Products Co.* v. *FTC,* 549 F.2d 35 (7th Cir.

[2] Under the Tunney Act, the court, in determining whether a proposed consent agreement is in the public interest, may take testimony, appoint consultants or expert witnesses, or authorize participation by interested persons as amici, intervenors or otherwise. 15 U.S.C. 16(f).

1977). Thus, a consent order proceeding under the Commission's Rules 2.31–2.34 does not provide interested persons with any of the procedural rights available in administrative adjudication, such as compulsory process against the Commission or third parties, or the right of intervention. *Bristol Myers Co.* v. *FTC,* 469 F.2d 1116, 1119–1120 (2d Cir. 1972) (Mansfield J. concurring); *Action on Safety and Health et al.* v. *FTC,* 498 F.2d 757 (D.C. Cir. 1974). [8]

To disclose publicly confidential business information obtained from GM and Toyota under the compulsion of Hart-Scott-Rodino, and from other automobile firms under threat of subpoena, would be to grant indirectly to commenters rights of discovery to which they are not directly entitled under the law. Cases like *Bristol Myers* and *Ford, supra,* confirm the informal and non-adjudicative nature of a consent order negotiation, including the public comment period.

This Commission observed nearly two decades ago that, "consent negotiations are not a stage in adjudication but a means of establishing whether adjudication can be avoided altogether. Like investigations, consent negotiations are distinct from the adjudicative process and hence not governed by the standards which control adjudicative procedure." *William H. Rorer Inc.,* 64 F.T.C. 1446, 1447 (1964). Accordingly, the Commission has expressly provided in its rules that the term "adjudicative proceedings" refers to formal proceedings required by statute to be determined on the record after an opportunity for an agency hearing, but "does not include other proceedings such as negotiations for the entry of consent orders * * *." 16 C.F.R. 3.2 (1983). The consent order procedures themselves are set forth in Part 2 of our rules, governing non-adjudicative procedures. 16 C.F.R. 2.31–2.34 (1983). And our adjudicative rules expressly provide that if a consent agreement settlement is proposed while a case is in adjudication, the matter is to be withdrawn from adjudication and treated as being in a non-adjudicative status. 16 C.F.R. 3.25(e) (1983). In the consent [9] order proceeding "there is no examination or cross examination of witnesses, no findings of fact and no conclusions of law." *Bristol Myers, supra* at 1119. Public comment serves to inform the Commission further, which is why the Commission retains the right to withdraw from its provisional agreement in light of new facts or objections brought to its attention. *Ford Motor Co.* v. *FTC, supra, Johnson Products Co.* v. *FTC, supra.* The information disclosed for purposes of public comment under Rule 2.34, therefore, is not information relevant to an adjudication, but a report to the public on the tentative results of the Commission's investigation and tentative settlement that is published under Section 6 of the FTC Act.[3] As reports

[3] In *Bristol Myers, supra,* Judge Mansfield persuasively rejected the argument that because a final consent order is an adjudicative act, the process leading to it is adjudicative as well. *Accord, Action on Safety and Health* v. *FTC, supra.*

to the public under Section 6, published documents pertaining to proposed consent agreements are limited by the provisions of Section 6(f), which denies the Commission any authority to make public in such reports trade secrets or commercial or financial information that is privileged and confidential, however obtained. *See* discussion *infra* at 13–17. *See also* Section 21(d)(1)(B) of the FTC Act, 15 U.S.C. 57b–2(d)(1)(B). Such information includes all that "would be likely to cause substantial harm to the competitive position of the person from whom the information was obtained," *National Parks and Conservation Ass'n.* v. *Morton,* 498 F.2d 765, 770 (D.C. Cir. 1974). *See* S. Rep. 96–500, 96th Cong., 1st Sess. 10–12 (1979). **[10]**

Because the comment period serves simply as a means to supplement the Commission's investigation, the Commission's consent order regulations make no provision whatever for discretionary disclosure of confidential business information obtained under legal compulsion or the threat thereof. They provide only that if an agreement is accepted, the Commission will place the order contained therein on the public record together with an explanation of its provisions and the relief it will offer, "and any other information which it deems helpful in assisting interested persons to understand the terms of the order." 16 C.F.R. 2.34, 3.25(f). After the agreement, order and explanation are published in the *Federal Register,* the Commission undertakes only to "receive and consider any comments or views concerning the order that may be filed by any interested persons." *Id.*

The Commission has historically refrained from making public in consent order proceedings any trade secrets or confidential commercial or financial information obtained from any person. Indeed, when the Commission briefly experimented with the voluntary disclosure of material pertaining to consent order settlements obtained from the investigated party, it expressly confined such disclosures to matter that was routinely available for disclosure under the Freedom of Information Act. It excepted from disclosure all material exempt, from mandatory disclosure under FOIA, particularly "documents which would reveal trade secrets or confidential commercial or financial information, or documents the disclosure of which would interfere with a related **[11]** enforcement proceeding." 42 FR 39658 (1977); 43 FR 3088 (1978).[4]

Against this background, we turn to the specific provisions of the statutes and regulations governing disclosure of confidential business information by the Commission.

[4] Even this provision for limited disclosure was withdrawn after one year's experience because the segregation of documents into exempt and nonexempt categories resulted in substantial delays in the placing of consent agreements on the public record while documents were segregated into exempt and nonexempt categories. The Commission's experience also demonstrated a lack of public interest in the material being made available. Accordingly, Rules 2.34 and 3.25 were revised to delete the disclosure requirement. 43 FR 51757 (1978).

3. The Hart-Scott-Rodino Act does not authorize the Commission to make public trade secrets and confidential business information in order to enhance the effectiveness of public comment under its consent order regulations.

The premerger notification provisions of the Hart-Scott-Rodino (H-S-R) Act requires parties proposing major transactions subject to Section 7 of the Clayton Act to submit such documentary material and information relevant to a proposed acquisition as is necessary to enable the Commission or the Antitrust Division to determine whether the acquisition, if consummated, would violate the antitrust laws. 15 U.S.C. 18a. Section 7A(h) of that Act, 15 U.S.C. 18a(h), provides that any information or documentary material so submitted "shall be exempt from disclosure [under the Freedom of Information Act], and no such information or documentary material may be made public, except as may be relevant to any administrative or judicial action or proceeding." **[12]**

On its face, this provision does not authorize the disclosure of material required by other statutes or regulations to be kept confidential. Rather, it prescribes a general prohibition against discretionary disclosure of *any* premerger data submitted under H-S-R, without regard to its possibly confidential status under other law. The statute's sweeping prohibition—and only that prohibition—is lifted by the exception clause to the extent that such data actually is used by the Commission in administrative or judicial proceedings.

The process of soliciting and considering public comment on a proposed consent agreement, while not adjudicative in nature, constitutes an administrative action or proceeding under this section. *Cf.*, Cf., 5 U.S.C. 551(13) (defining "agency action" for purposes of the Administrative Procedure Act). Thus information derived from Hart-Scott-Rodino submissions is not barred by Section 7A(h)'s prohibition from disclosure in consent order proceedings under the Commission's Rule 2.34. Nothing in the language of Section 7A(h), or its legislative history,[5] however, indicates that by creating an exception to the statute's bar to disclosure for the purpose of administrative or judicial proceedings, Congress intended to overide other legal bars to disclosure, either directly or by implication. Had Congress intended to repeal or modify existing legal bars to disclosure, or except pre-merger data from subsequently enacted protections **[13]** for confidential business information, it was well aware of how to do so.

Indeed, after the Hart-Scott-Rodino Act was enacted, Congress tightened the restrictions on disclosure of confidential information in

[5] *See* 122 Cong. Rec. H. 6294 (daily ed. Sept. 16, 1974 (Remarks of Ch. Rodino)).

the FTC Improvements Act of 1980, 94 Stat. 374, by revising Section 6(f), and by adding the confidentiality provisions now in Section 21, of the Act, 15 U.S.C. 57b-2. There is no evidence to suggest that when it did so it somehow considered pre-merger submissions or consent orders under Section 7 of the Clayton Act to be an exception to the safeguards it was enacting.

An interpretation of Section 7A(h) permitting disclosure of confidential business information in the context of merger consent orders, notwithstanding other legal barriers, would lead to a complete anomaly. Disclosures in consent order proceedings would be subject to different standards depending on whether they involved a transaction under Section 7 of the Clayton Act or under other provisions of that antitrust laws. For example, a joint venture subject only to the prohibitions in Section 5 of the Act (*e.g.* one not involving an acquisition of stock or assets) would remain subject to other legal prohibitions against disclosure, while those subject to Section 7 of the Clayton Act would not. There is no rational explanation why Congress would want to draw such a distinction or why we should adopt such a bizarre construction of Section 7A(h).[6] [[illegible]]

4. Sections 6(f), 21(d)(1)(B) and Rule 4.10(d) bar disclosure.

The principal statutory prohibitions against disclosure of confidential business information are Sections 6(f) and 21 of the FTC Act, as amended in 1980. 15 U.S.C. 46(f) and 57b–2. Section 6(f) empowers the Commission to make public information the disclosure of which it believes to be in the public interest, but expressly provides "that the Commission shall not have any authority to make public any trade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential * * *." Section 21 not only complements this prohibition, but provides in Section 21(e) that "[n]othing in this section shall supersede any statutory provision which expressly prohibits or limits particular disclosures by the Commission * * *."

Under Section 21(b), all material obtained by compulsory process must be given confidential treatment and may be publicly disclosed only with the consent of the submitter. Section 21(c) bars disclosure of material marked confidential not obtained by compulsory process in a law enforcement investigation, unless the Commission determines that the marked material does not fall within the protection of

[6] For these reasons we cannot accept the mechanical application of the maxim that when two statutes conflict, the specific prevails over the general. Since the exception to the disclosure prohibition in Section 7A(h) applies only to that prohibition, there is no conflict.

It is also significant that the Antitrust Division of the Department of Justice has never construed Section 7A(h) to authorize public disclosure of information subject to prohibitions on disclosure other than those contained in that provision.

Section 6(f), and the Commission provides the submitter 10 days' notice of its intention to disclose. Under [15] Section 21(d)(1)(B), the Commission may disclose the results of any investigation or study it has carried out or prepared, "except that no information shall be identified nor shall information be disclosed in such a manner to disclose" material protected by Section 6(f).

The disclosure of the results of a negotiation for the purpose of public comment on a proposed consent order is governed by Section 21(d)(1)(B). This is so because, as noted above, a consent order proceeding is not an adjudication, and publication of pertinent documents concerning it constitutes "making [information] public" under Section 6. This conclusion is underscored by the contrasting language in Section 21(d)(2), which provides: "any disclosure of relevant and material information *in Commission adjudicative proceedings* or in judicial proceedings to which the Commission is a party shall be governed by the rules of the Commission for adjudicative proceedings or by court rules or orders, except that the rules of the Commission shall not be amended in a manner inconsistent with the purpose of this section" (emphasis added). The legislative history of Section 21(d)(2) makes clear that this language refers to the provisions in the Commission's rules providing for the entry of protective orders in on-the-record proceedings before an administrative law judge (16 C.F.R. 3.45) or before a presiding officer conducting an on-the-record proceeding under Section 18 of the FTC Act, 15 U.S.C. 57a (16 C.F.R. 1.18(b)) *See, e.g.,* S. Rep. No. 96-500, 96th Cong., 1st Sess. 27-28 (1979). Congress' restriction of Section 21(d)(2) to "adjudicative" and [16] "judicial" proceedings, and the legislative history cited above clearly indicate that it did not authorize disclosures of confidential business information subject to Section 6(f) in nonadjudicative consent order proceedings.[7] Even in this auspicious year 1984, we cannot agree that when Congress said "adjudicative," it meant "nonadjudicative."

Also relevant to the confidentiality protection provided by Section 21 is Section 21(f), which expresses a congressional policy that material obtained in a law enforcement investigation either by compulsory process or voluntarily in place of such process is not subject to mandatory public disclosure under the Freedom of Information Act. It is within the discretion of agencies, however, to waive FOIA exemptions except to the extent that other statutes, such as Sections 6(f) and 21(b), bar such waiver. As already noted, section 21(b) of the Act provides that information obtained by compulsory process may be publicly

[7] In this connection, Chrysler purports to quote (Pet. 11-12) the Commission's explanation of its final rules under Section 21 at 46 FR 26,284 (1981). The quotation is incorrect and incomplete. It substitutes the term "administrative proceeding" for the term the Commission actually used: "adjudicative proceedings" and omits the Commission's observation that the legislative history quoted corresponds with prior Commission use of *in camera* orders in "Commission adjudications."

disclosed *only* with the consent of the submitter. Information voluntarily submitted to avoid the need for compulsory process, therefore, would have been subject to waiver of the FOIA exemption in Section 21(f) because it was not within the express statutory prohibition in Section 21(b). To encourage voluntary submissions, the Commission intentionally closed the gap between [17] Sections 21(b) and 21(f) by binding itself at 16 C.F.R. 4.10(d) not to disclose voluntary submissions otherwise subject to Section 21(f) and marked confidential, without the submitters' consent. *See* 45 FR 26,284. The Commission must adhere to this regulation while it is in effect. *See e.g., United States ex rel Accardi* v. *Shaughnessy,* 347 U.S. 260 (1954); *United States* v. *Nixon,* 418 U.S. 683, 693–696 (1974); *Pacific Molasses Co.* v. *FTC,* 356 F.2d 386, 387, 389–390 (5th Cir. 1966).

In sum, Section 21(d)(1)(b) expressly bars the disclosure of confidential information subject to Section 6(f) in consent order proceedings because requests for comments in such proceedings are reports under Section 6, not adjudicative actions. Section 21(b) bars the disclosure of material obtained by compulsory process except, per Section 21(d)(2), in Commission adjudicative proceedings under rules providing the submitter an opportunity for *in camera* protection of confidential business information. As pointed out, however, consent order proceedings are not adjudicative proceedings within the meaning of this section. Sections 21(b), 21(f) and Rule 4.10(d) together bar disclosure of material obtained in a law enforcement investigation either by compulsory process, or voluntarily in place of such process that is marked confidential, except by consent of the submitter. These provisions, particularly Rule 4.10(d), apply to almost all of the material submitted by the joint venturers and third parties in the GM-Toyota investigation. Almost all of the material obtained by the Commission from GM, Toyota and the other [18] automobile companies was so marked. It therefore cannot be disclosed.

5. Disclosure is a subject of negotiation in consent order proceedings.

It might be objected that under the above construction of Sections 6, 21 and Rule 4.10(d), the Commission is prohibited from releasing in the context of consent agreement proceedings almost all information obtained in premerger investigations, no matter how trivial, simply because it has been obtained either by compulsory process or, if marked confidential, under threat of compulsory process. This overlooks the essential nature of the consent order process. It is, as already noted, a negotiation for the purpose of avoiding adjudication. The Commission's rules call for "an explanation of the provisions of the [proposed] order and the relief to be obtained thereby, and [release]

of any information which it deems helpful in assisting interested persons to understand the terms of the order." 16 C.F.R. 2.34, 3.25(f) (1983). One of the subjects for negotiation contemplated by these rules necessarily is consent to disclosure of information which the Commission is otherwise barred from releasing by Sections 6, 21 and Rule 4.10(d). The object of such negotiations is to provide the Commission with meaningful public comment concerning the proposed consent. Such a negotiation occurred in this case. Disclosure of the memorandum of understanding and related information was a bargaining issue between the Commission's staff and the joint venturers. **[19]**

This negotiating process is what the consent order process is about. As Commissioners Dole and Dixon observed in dissenting from the Commission's experiment briefly making public nonexempt materials pertaining to consent order settlements (42 FR 39659 (1977):

> The negotiations process is by nature delicate; successful negotiations depend in large part upon good faith, give-and-take discussions. Ideas and possible order provisions are discussed by counsel often without the respondents' prior review. Some proposals are rejected and others are accepted in the process of fashioning a consent order which would serve the public interest. Staff advises that respondents' counsel often produce facts which would be hotly contested in litigation.

To impose upon respondents in such negotiations unconsented disclosure of competitively sensitive material that could put at risk the commercial success of the firms involved would place insuperable burdens on the ability of the Commission to obtain consent orders in the public interest. This is particularly important in cases raising complex and difficult competitive issues in which significant remedies can be negotiated without imposing on society the costs of prolonged litigation. The consent order procedure is expressly contemplated by the Administrative Procedure Act, 5 U.S.C. 554(d). Congress left to the agencies the power to develop informal procedures that might be used to achieve consent orders because it recognized "that the formalism of trial-type proceedings might not be conducive to successful settlement negotiations." *Bristol-Myers Co.* v. *FTC, supra,* at 1119. It is therefore hardly surprising that **[20]** disclosure of otherwise confidential material becomes a subject of negotiation.[8]

[8] The parties to a proposed transaction frequently make public information the Commission cannot initially disclose. General Motors Corporation on February 1, 1984 disclosed the full text of its memorandum of understanding with Toyota in a public filing in Chrysler's antitrust suit against it. Since this action eliminated the formerly confidential status of the redacted portions of the memorandum, we then placed the complete text on the Commission's public record. The substance of the items cited by Chrysler (Pet. 7–8) as having been disclosed in the statement by Chairman Miller and Commissioners Douglas and Calvani were reported in the press before their statement was released on December 22, 1983.

6. Protective orders are unsuited to public comment on consent agreements.

Because consent decree negotiations are not adjudicative proceedings under Section 21(d)(2) of the FTC Act, we cannot agree with Chrysler that Rule 4.10(g) sets at naught all of the safeguards for confidential information reflected in Section 6, Section 21 and Rule 4.10(d). Subsection (g) of Rule 4.10 specifies that material obtained by the Commission may be disclosed in Commission "administrative or court proceedings" subject to appropriate Commission or court protective *in camera* orders, and subject to reasonable prior notice to the submitter affording an opportunity to seek such an order. This rule implements the exception to the other prohibitions in Section 21 embodied in Section 21(d)(2) of the FTC Act. As we have noted, the language and legislative history of that provision limit disclosure under protective orders to "adjudicative proceedings." At most, this includes on-the-record proceedings in Commission adjudications and rulemakings before an administrative law judge or a presiding officer. [21]

Moreover, use of protective or *in camera* orders during public comment on consent agreements would be wholly inconsistent with the informal nature and purpose of consent order negotiations, as well as totally impractical. Either the Commission would have to devise a procedure by which each commenter seeking access to confidential information signed a pledge not to disclose it, or the Commission would have to attempt to allow disclosures on the basis of each individual commenter's "interest" in the proceeding. The latter would convert the 60-day comment period into a prolonged litigation over disclosure. The former is completely unfeasible. It would result in broadcast disclosure to an unpredictable number of commenters. Furthermore, the distinction between client and counsel which is essential to safeguard *in camera* disclosures to competitors like Chrysler, could not be maintained. Unlike *in camera* orders in litigation, which can be confined to the litigants' outside counsel, many commenters are not represented by counsel, or if they are, are represented by house counsel or management officials.

In addition, *in camera* disclosures would deter respondents from entering into consent orders, because by doing so they would be subject to an obligation to make much wider disclosure than in an adjudication. If the Commission were to initiate a formal adjudication, the *in camera* order would be limited to complaint counsel and necessary experts, and (insofar as confidential business information of third parties were concerned) to respondents' outside counsel and necessary experts. But if [22] "*in camera*" disclosures were used in consent

proceedings, then by accepting a consent order respondents would put themselves at the risk of exposing sensitive competitive information to many more persons than in an adjudication.

7. The Commission's "in camera" standard of confidentiality is inapplicable.

Chrysler urges that insofar as confidential information is concerned, the Commission should not apply the standard of Section 6(f) in consent order proceedings, but instead should utilize the criterion applicable for the entry of *in camera* orders in adjudicative proceedings. Although consent orders are not adjudicative, we think it appropriate to address this contention briefly.

In effect, Chrysler urges that under the Commission's decision in *General Foods Corp.*, 96 F.T.C. 168, 169 (1980), Section 6(f) does not bar the disclosure of business data as evidence in consent order proceedings. *General Foods,* however, addressed disclosures in adjudications, not in consent proceedings, and concerned only the standard for *in camera* orders in such cases. Even if Section 6(f) were not applicable, however, the Commission's standard for the entry of protective orders in adjudications would not permit us to make public sensitive confidential business information exacted either from the parties to the joint venture or from third party automobile companies.

The standard for *in camera* orders was originally announced in *H. P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961), in which the Commission held that good cause justifying entry of a protective [23] order "requires a showing that the public disclosure of the documentary evidence will result in a clearly defined, serious injury to the person or corporation whose records are involved." *Id.* at 1188. In later cases the Commission ruled that injury under the *Hood* standard occurs only if the documents are (1) secret and (2) material to the applicants business. *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977); *General Foods Corp.*, 95 F.T.C. 352, 355 (1980). The showing of competitive injury depends on the materials. In a subsequent order involving *General Foods,* the Commission ruled:

> We do not believe that a showing of serious injury necessarily requires a specific demonstration of the manner in which other firms would use the material to cause competitive disadvantage * * *. Instead, when certain information is found to be materially valuable and secret to a firm's competitive business activities, it is proper for the administrative law judge to infer, without a specific showing of how a competitor would use it, that the loss of the information would seriously affect the possessors' commercial position." *General Foods Corporation,* Docket No. 9085, Order Denying in Part and Remanding in Part General Foods Application for Review entered August 18, 1980 (unpublished).

Significantly, the same approach was adopted in *National Parks and Conservation Association* v. *Morton,* the judicial standard applied under Section 6(f), and in *Touvalareas* v. *The Washington Post Co., supra,* Slip Op. at 29 ("the proponent of confidentiality must show only that the disputed documents contain a given category of confidential information, and that disclosure of that kind of information will harm the proponent's competitive position"). **[24]**

Grounds for the inference of injury are obvious here, and no further showing is required. It is difficult to imagine items of business information more sensitive than the future production and marketing plans, cost and profit data,[9] trade secrets and production technology to which we have had access in our review of this matter. That data constitutes the most significant competitive information possessed by General Motors, Toyota, and the other major automobile companies from which we required information—literally the "corporate jewels" of those firms. Even assuming for argument that there is a difference between the "clearly defined, serious injury" standard of our decision in *Hood,* and the "substantial harm to the competitive position" standard of *National Parks and Conservation Association* v. *Morton,* as incorporated into Section 6(f) by the 1980 Amendments (*see* S. Rep. 96–500, *supra,* at 10–12), under either standard the pricing and other competitively sensitive information we have obtained should not be disclosed.

Conclusion

We emphasize, as we did at the outset, that we do not deal here with trial material necessary to explain an adjudicated Commission decision. Rather, we are concerned with investigatory information obtained under the compulsion of statute, process, or the threat of process that is being used in a consent negotiation **[25]** for the purpose of avoiding adjudication in the public interest. The balance tips much more strongly against disclosure of such materials than if they were used in a trial record that formed the basis for a Commission decision. We have endeavored to achieve disclosure of as much material as we can within the limits of the law. To this end, we have authorized release of our own staff analyses and consultants' reports in redacted form. We have deleted information obtained from the joint venturers and third-party firms that is competitively sensitive, and information marked confidential whose disclosure has not been consented to by the submitters. To the extent that this publication reveals the Commission's own internal deliberative material and attorney work

[9] Such cost data included the pricing formula in the memorandum of understanding that is to determine the price at which GM will purchase joint venture vehicles after the 1985 model year. That formula, however, was subsequently disclosed by GM and is therefore no longer confidential.

product ordinarily privileged from disclosure, we waive these privileges. We cannot, however, in law or fairness disclose confidential information of others that has been entrusted to us for purposes of our investigation and consent negotiations.

Commissioners Pertschuk and Bailey voted in the negative.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

I dissent from the Commission's decision to refuse to release more information to the public concerning the GM/Toyota joint venture. I also dissent from the Commission's decision to deny Chrysler's request for an extension of the comment period.

I. *The Commission's Refusal to Release More Information*

It is important for the public to understand the actual legal standard the Commission has adopted concerning release of information in a consent agreement proceeding. The standard applied in releasing some GM/Toyota materials on January 25 and the standard adopted by the majority for all future consent agreement proceedings is that we are *prohibited* from releasing *all* material "obtained in a law enforcement investigation either by compulsory process, or voluntarily in place of such process that is marked confidential, except by consent of the submitter." (Majority Statement at 17) As the majority statement points out, almost all of the material obtained by the Commission from GM, Toyota and the other automobile companies was marked confidential. Since it is typically the case that companies submitting information to the Commission mark most or all of what they submit as "confidential," the standard adopted by the Commission is sweeping indeed. The practical effect of the standard is that essentially *no* information obtained in an investigation not otherwise public can be released, no matter how trivial or how central to the Commission's decision, unless the companies agree.[1]

A good example of the breadth of the majority's standard is the expurgation of a staff discussion about *past* exchanges of information between GM and Toyota that appear highly questionable. (*See* the almost totally expurgated pages at VIII–17–19 of the BC staff memo.) While this information would be useful to the public in understanding how potentially anticompetitive exchanges of information can easily take place in a joint venture setting even if companies exercise good faith, it is inconceivable that revealing this information can cause *commercial, competitive* harm to the companies. I concede it may be

[1] This severe limitation on the FTC's discretion was not reflected in Chairman Miller's statement of January 25 when he commented on our release of materials. He stated: "The information required by law to be deleted was confined to only the *most competitively sensitive* data associated with the joint venture." (emphasis added) In fact, the staff followed the standard set out in the majority's statement, which resulted in substantially greater deletions.

embarrassing, but preventing embarrassment is not within our legal mandate.

The majority's statement attempts to explain away the problem which follows from its legal standard—that companies will control the flow of information to the public in a consent agreement proceeding—by saying that the Commission will negotiate with companies about release of information before a consent agreement is signed. In other words, we would refuse to enter into a consent agreement unless the companies agreed to release of information sufficient to "provide the Commission with meaningful public comment concerning the proposed consent." (Majority Statement at 18) But companies can still dictate limits on disclosure as indicated by what occurred when the staff negotiated the GM/Toyota consent agreement. Until shortly before the meeting to consider the proposed agreement, it was generally understood that the entire Memorandum of Understanding would be released at the time any agreement was made public. Yet when the staff negotiated the agreement, they agreed to a request by GM and Toyota to excise key aspects of the pricing formula—the contract provision most directly relevant to antitrust concerns.

As to the majority's analysis of legal constraints in releasing information, there are two principal flaws. First, even though it is conceded that the Hart-Scott-Rodino Act specifically authorizes release of H-S-R submissions in consent agreement proceedings, the majority argues that the more general prohibitions of Section 21 prohibit release. (Majority Statement at 12)[2] Thus, the majority's reliance on a more general statute nullifies the specific Congressional authorization to release information in Section 7A(h) of the Clayton Act. The second mistake is that the Commission interprets Section 21(d)(2) of the FTC Act and Rule 4.10(g) of our rules to allow release of information submitted in investigations only in adjudicatory proceedings under Part III of our rules and in rulemaking proceedings before an administrative law judge or presiding officer. (Majority Statement at 20) The Commission's past interpretation of those provisions as well as the legislative history of Section 21(d)(2) show that they allow release in consent agreement proceedings as well as adjudicatory opinions.

In order to understand the majority's analysis, it is necessary to review our confidentiality rules, which are hardly models of clarity. The majority's statement sets out the basic scheme and I will not repeat it in detail here except to note certain essential points. Section 21(b) limits release of information submitted pursuant to a subpoena. Most materials at issue here, however, were submitted pursuant to

[2] Section 7A(h) of the Clayton Act (the Hart-Scott-Rodino provision) provides for release of information "as may be relevant to any administrative . . . proceeding."

H-S-R procedures. Submissions under H-S-R procedures are treated as submitted voluntarily in lieu of subpoenas and, consequently, are exempt from release under the Freedom of Information Act under Section 21(f). Thus, Section 21(f) simply creates an exemption from the FOIA Act; it does not affect our discretionary release of material. Section 6(f) of the FTC Act bars release of "commercial or financial" information which is "privileged or confidential." Finally, the Commission has adopted Rule 4.10(d) which limits our discretion to release information which is submitted in a law enforcement investigation even if not under subpoena.

The principal question in this case is: What provision *bars* release of H-S-R material? As I have argued above, the express authorization in the Hart-Scott-Rodino Act should make the FTC Act irrelevant. But assuming *arguendo* that FTC Act provisions apply, all four provisions to which the majority point—Section 21(b), Section 21(f), Section 6(f), and Rule 4.10(d)—don't bind the Commission's hands to the extent argued by the majority.

The proper interpretation of Section 21(d)(2) and the Commission's Rules of Practice is that they authorize the disclosure of this type of information in administrative proceedings including the formulation of consent orders. Commission Rule 4.10(g) explicitly authorizes the disclosure of material obtained by the Commission in "Commission administrative ... proceedings." The use of the word "administrative" in the rule is a clear indication that the Commission interprets its own statute to permit it to disclose submitted documents in circumstances other than APA adjudications. This interpretation is consistent with the legislative intent of the confidentiality provisions of the FTC Improvements Act.

While Section 21(d)(2) authorizes disclosure in "Commission adjudicative proceedings," that phrase was not intended and should not be construed to be limited to adjudications as defined by the Administrative Procedure Act.[3] Even the General Counsel concludes that it is not so limited, arguing that it includes at least "on-the-record" rulemaking proceedings under Section 18 of the FTC Act. But there is no logical reason to include rulemaking and not consent order proceedings within the scope of Section 21(d)(2). Both are administrative proceedings.[4]

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[3] It is a familiar principle of statutory construction that the same phrase used in different statutes can have different meanings depending on the context. *See, e.g., Goland* v. *CIA*, 607 F.2d 339, 345, n.30 (D.C. Cir 1978), *cert. denied*, 445 U.S. 927 (1980). This is especially true in this case where the term in Section 21(d)(2) ("Commission adjudicative proceeding") is not the same as the term in the APA ("adjudication") and the two statutes have vastly different scopes and purposes.

[4] The General Counsel's description of Section 18 rulemaking as "on-the-record" is clearly wrong. It is informal rulemaking with additional procedural safeguards. It is not "formal" or "on-the-record" rulemaking and therefore not within the APA's definition of adjudication. *See* S. Rep. No. 93-1408, 93d Cong., 2d Sess. 32 (1974) (Conference Report on Magnuson-Moss); *see also Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

A broad construction of Section 21(d)(2) to permit disclosure in consent order proceedings is supported by the legislative history of the Improvements Act. The Senate report on the bill that became the FTC Improvements Act states that Section 21(d)(2) allows the Commission to disclose Section 21 material "in administrative or judicial proceedings." S. Rep. No. 96–500 96th Cong., 1st Sess. 27 (1979). Congressman Preyer, a conferee, also stated:

> The Commission may disclose trade secrets and confidential commercial and financial information in the following circumstances * * * relevant and material information may be disclosed in Commission administrative proceedings or in judicial proceedings, but it may be made subject to appropriate protective orders * * * 126 Cong. Rec. H3870 (May 20, 1980).

See also 126 Cong. Rec. S5678 (May 21, 1980) (Remarks of Senator Ford).

This broader interpretation of Section 21(d)(2) is the one adopted by the Commission in Section 4.10(g) of its Rules of Practice. That rule, which was issued in final form after an opportunity for comment, would be accorded deference by a court as a contemporaneous interpretation by the agency of its own organic statute. *See Udall* v. *Tallman,* 380 U.S. 1, 16 (1965). In explaining its rules, the Commission stated that "under amended Rule 4.10(g) information will not be disclosed in administrative or adjudicatory proceedings without affording the submitter an opportunity to obtain a protective or *in camera* order." 46 FR 26287 (May 12, 1981). Thus, I conclude that Section 21(d)(2) and Rule 4.10(g) both allow the Commission substantial discretion in releasing materials obtained in the course of a Commission investigation when the Commission is explaining to the public why it accepted a consent agreement.

Even though the FTC Act, the Hart-Scott-Rodino Act, and the Commission's rules give us wider discretion than the majority argues, I do not believe the Commission should release all information no matter how sensitive or how unrelated to the relevant issues in a particular proceeding. The Commission, in past cases, particularly the *Hood* [5] and *General Foods* [6] decisions, has adopted a standard which should be applied. These past decisions represent the Commission's recognition that there is some equitable standard which should limit release of information even if not specified in a statute.

[5] *H.P. Hood & Sons, Inc.,* 58 F.T.C. 1184, 1188 (1961). Requests for *in camera* treatment must show "that the public disclosure . . . will result in a clearly defined, serious injury to the person or corporation whose records are involved."

[6] *General Foods Corp.,* 95 F.T.C. 352, 355 (1980). The showing can be made by showing the documentary material is sufficiently confidential that its release would result in "serious competitive injury." Further, the degree of injury should be balanced against the "importance of the information in explaining the rationale of [Commission] decisions."

II. *Refusal to Extend the Comment Period*

The majority also rejects Chrysler's request for an extension of the 60-day comment period. I disagree for the reasons stated below.

The issue in extending a comment period is whether the public interest in receiving further comment outweighs the parties' understandable desire for the Commission to make its final decision as soon as possible.[7] Here, several factors militate in favor of extending the comment period. The transaction is probably the most significant antitrust matter we have faced during this administration. The matter is complex. Staff recommendations were not unanimous and the Commission was sharply divided on provisional acceptance. The Bureau staff took several months in preparing recommendations, but one of the companies took several months to comply with discovery requests and, in fact, has still not fully complied with the Hart-Scott-Rodino second request. The Commission placed additional material on the public record to aid public comment but not until January 25, when almost half the comment period had run. For all these reasons, I would favor extending the comment period for 30 days.

[7] The Commission not infrequently grants extension of the comment period. In the last few weeks, for example, the Commission voted to grant an extension of time for comment for an order modification provision and a request for prior approval of a merger pursuant to a Commission order. *Armstrong Cork Co.*, C-1010; *ARA Services, Inc.*, C-2360.

IN THE MATTER OF

BELTONE HEARING AID COMPANY

ORDER TO SET ASIDE IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 3 OF THE CLAYTON ACT

Docket 5825. Final Order, Feb. 16, 1956—Order To Set Aside, Feb. 10, 1984

The Final Cease and Desist Order issued against Beltone Hearing Aid Company in Docket 5825 (52 F.T.C. 830 (1956)), has been set aside in light of the Commission's dismissal of the complaint in *Beltone Electronics Corp.* (100 F.T.C. 68 (1982)), which challenged the use of the same exclusive dealing arrangements prohibited by the order in Docket 5825.

ORDER TO SET ASIDE ORDER TO CEASE AND DESIST

On February 16, 1956, the Federal Trade Commission issued an order against Beltone Hearing Aid Company (currently known as Beltone Electronics Corporation) in Docket No. 5825 prohibiting Beltone, in the sale of its own brand name hearing aids, from imposing exclusive dealing arrangements upon its dealers. [52 F.T.C. 830]

However, on July 16, 1982, the Commission dismissed the complaint in *Beltone Electronics Corp.,* Docket No. 8929 challenging, among other things, Beltone's use of the same exclusive dealing arrangements prohibited by the order in Docket No. 5825. [100 F.T.C. 68]

On December 7, 1983, the Commission pursuant to Section 3.72(b) of the Commission's Rules of Practice, 16 C.F.R. 3.72(b), issued to Beltone an order to show cause why the proceeding herein should not be reopened to set aside the final cease and desist order in Docket No. 5825, prohibiting Respondent's use of exclusive dealing arrangements. Respondent was provided an opportunity to object to the proposed set aside of the order against it, and having failed to do so, is now deemed to have consented to such action. In view of the Commission decision in *Beltone,* the Commission believes that this set aside is in the public interest.

Accordingly,

It is hereby ordered, That this matter be, and it hereby is, reopened and that the order herein shall be set aside as of the effective date of this order.

IN THE MATTER OF

SCHLUMBERGER, LTD., ET AL.

DISMISSAL ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 9164. Complaint, Jan. 28, 1983—Dismissal Order, Feb. 17, 1984

On Feb. 17, 1984, the Federal Trade Commission issued an order dismissing the complaint against Schlumberger, Ltd., citing "changed circumstances since the issuance of the Commission's complaint."

Appearances

For the Commission: *George Cary.*

For the respondents: *Werner L. Polak, Shearman & Sterling,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the acquisition by Schlumberger, Ltd. ("Schlumberger") of Accutest Corporation ("Accutest") violates Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45); and it appearing that a proceeding by the Commission in respect thereof would be in the public interest, the Commission hereby issues its Complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. *Definitions*

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

a. *Digital integrated circuit automatic test equipment (DIC/ATE)* means a computer controlled test system, the basic functions of which are to ascertain the operating characteristics of digital integrated circuits and to determine if those characteristics are within allowable limits. The uses of DIC/ATE are design engineering characterization, product engineering, incoming inspection, production testing and quality assurance of digital integrated circuits.

b. *Large scale integration and very large scale integration digital integrated circuit automatic test equipment (LSI/VLSI ATE)* means

a computer controlled test system, the basic functions of which are to ascertain the operating characteristics of large scale integration or very large scale integration digital integrated circuits designed to perform logic or microprocessor functions and to determine if those characteristics are within allowable limits. The uses of LSI/VLSI ATE are design engineering characterization, product engineering, incoming inspection, production testing, and quality assurance of large scale integration and very large scale integration digital integrated circuits designed to perform a logic or microprocessor function.

c. *Memory integrated circuit automatic test equipment (memory IC/ATE)* means a computer controlled test system, the basic functions of which are to ascertain the operating characteristics of digital integrated circuits designed to perform memory functions and to determine if those characteristics are within allowable limits. The basic uses of memory DIC/ATE are design engineering characterization, product engineering, incoming inspection, production testing, and quality assurance of digital integrated circuits designed to perform a memory function.

II. *Schlumberger, Ltd.*

2. Schlumberger is a Dutch Antilles Corporation headquartered in New York and Paris.

III. *Fairchild Camera and Instrument Corporation*

3. Fairchild is a Delaware corporation, with headquarters in Mountain View, California. In 1979, Fairchild was acquired by Schlumberger and Fairchild has been since that time and is now a wholly owned subsidiary of Schlumberger.

IV. *Accutest Corporation*

4. Accutest Corporation is a Massachusetts corporation, with its headquarters in Chelmsford, Massachusetts. In 1982, Accutest was acquired by Fairchild and Accutest has been since that time and is now a wholly-owned subsidiary of Fairchild.

V. *Jurisdiction*

5. At all times relevant herein, each of the companies named in this complaint have been engaged in or affected commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and Section 4 of the Federal Trade Commission Act as amended, 15 U.S.C. 44.

VI. *The Acquisition*

6. On October 22, 1982 Schlumberger acquired Accutest in a cash transaction and subsequently merged it into one of its own wholly-owned subsidiaries.

VII. *Trade and Commerce*

7. The relevant product markets are the following:

(a) the production or sale of DIC/ATE;
(b) the production or sale of memory IC/ATE; and
(c) the production or sale of LSI/VLSI ATE.

8. The relevant geographic markets are the United States and the world.

9. Concentration in each of the relevant product and geographic markets is high.

10. Barriers to entry into the manufacture and sale of each of the relevant products are substantial.

11. Both Fairchild and Accutest are substantial competitors in each of the relevant product markets.

VIII. *Effects of the Acquisition*

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

(a) Substantial actual competition between Fairchild and Accutest will be eliminated;

(b) Substantial potential competition between Fairchild and Accutest will be eliminated;

(c) Substantial actual competition between Accutest and other companies engaged in the production or sale of relevant products will be eliminated;

(d) Substantial potential competition between Accutest and other companies engaged in the production or sale of relevant products will be eliminated;

(e) The elimination of Accutest as a substantial technological innovator;

(f) The elimination of the potential future expansion of Accutest in the markets in which it currently competes;

(g) Fairchild, as the dominant firm in the relevant markets, will be further strengthened and entrenched at the expense of its competitors;

(h) The already high levels of industry concentration in the relevant markets will be significantly increased; and

(i) Barriers to entry in the relevant markets will be significantly raised.

IX. *Violations Charged*

The acquisition constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

Order

The respondents in this matter have moved to dismiss the complaint on the grounds of changed circumstances since the issuance of the Commission's complaint. Complaint counsel do not oppose the motion. The motion is granted and the complaint in this matter is dismissed.

It is so ordered.

Commissioner Pertschuk dissented.

DISSENTING STATEMENT OF COMMISSIONER PERTSCHUK

I agree that Schlumberger's divestiture of Accutest adequately resolves the immediate antitrust problem involved in this proceeding. However, I cannot support the Commission's decision to dismiss the complaint because it leaves unresolved the important question of the need for a prospective order subjecting future acquisitions by Schlumberger to the prior approval of the Commission.

The administrative law judge, the parties, and the Commission have decided that in light of the Accutest divestiture further litigation over the sole issue of prospective relief would be an unjustified expenditure of resources. As I understand the law, this is not the correct test for deciding whether an order is justified. That test is whether, regardless of abandonment of the alleged unlawful conduct during the course of litigation, there is a "cognizable danger of recurrence" of similarly unlawful behavior by the respondent in the future. *United States v. W. T. Grant, Co.,* 345 U.S. 629 (1953). Moreover, in deciding whether further litigation here is necessary, we must consider the value of the Commission's well-established policy favoring fencing-in orders in merger cases. In merger cases specifically, the Commission has recognized that "prophylactic relief, not merely the after-the-fact remedy of divestiture, is essential if the Congressional policy expressed in Section 7 of the Clayton Act is to be effectively carried out. . . ." *Beatrice Foods Co.,* 68 F.T.C. 1003, 1006 (1965). Such

relief deters illegal behavior not only by the respondent in the case at hand but other firms as well, thus serving broad law enforcement objectives. Until and unless the Commission can reasonably conclude on the basis of the record in this proceeding that Schlumberger is unlikely to make any similarly suspect acquisitions in the future, this case is not moot and should be continued in the public interest.

Though agreeing to Schlumberger's motion to dismiss, complaint counsel actually have made a powerful case for continuing this litigation to consider the necessity for a prospective remedy. They have argued that:

> A ten year ban is particularly appropriate in this case for three reasons. First, Schlumberger/Fairchild have a proclivity for expanding their presence in the ATE industry through acquisition, having made six acquisitions in the overall industry and four in the particular markets alleged in the Complaint. Second, in reporting the acquisition of Accutest pursuant to the Hart-Scott-Rodino Act's Premerger Notification Form, Schlumberger reported its sales of semiconductor test equipment under a standard industrial classification code number not found in Bureau of Census publications. A ten year prior approval requirement would reduce the likelihood that any future acquisitions would be consummated prior to full Commission review. Finally, even if the requirements of the H-S-R Act are adhered to, because of the extremely high technology involved in these markets, acquisitions not reportable under the Hart-Scott-Rodino Premerger Act may be competitively quite significant if they involve small firms that are technological innovators. Complaint Counsel's Assent to Respondents' Motions to Dismiss, Sept. 13, 1983, at 3.

After chronicling these cogent reasons favoring litigation over the issue of "prior approval," complaint counsel lamely recommend dismissal of the complaint because "litigation of this matter will require the expenditure of significant resources. . . ." not warranted "solely to achieve a ten year merger ban." This conclusion, adopted by the Commission, is difficult to understand. If a prior approval requirement seems "particularly appropriate" at this juncture of the case to protect the public against possible anticompetitive acquisitions by Schlumberger in the future, then the Commission is duty-bound to pursue it, even if that means more litigation.

The majority's decision to dismiss the complaint, particularly in circumstances where a prospective order may well be appropriate, is flatly inconsistent with the Commission's policy of insisting on prior approval provisions where necessary in merger cases. That policy recognizes that prior approval provisions serve both as an efficient fencing-in measure against repetitions of unlawful conduct by the same firm and as a deterrent against possibly illegal mergers by other firms. Until this case at least, prior approval had remained an important remedial tool in merger law enforcement. Indeed, past Commission merger orders have invariably had prior approval provisions.

Moreover, just last year the Commission turned down a respondent's request for the complete elimination of a prior approval provision from an outstanding order. *Damon Corp.*, C-2916 (March 29, 1983). [101 F.T.C. 689]

It is sometimes argued that the Hart-Scott-Rodino Act reporting requirements obviate the need for prior approval provisions in Commission orders. But the Hart-Scott-Rodino Act is just that, a reporting act, not an approval requirement. The Act's reporting requirements neither reach nor prevent all anticompetitive acquisitions. The reporting party can consummate the acquisition unless the Commission takes *affirmative* legal action to prevent it, and if the acquisition does go forward, expensive litigation is necessary to "unscramble" it. Further, as the H-S-R misreporting episode in this very case showed, the Act does not guarantee that the Commission will automatically uncover all anticompetitive overlaps even when an acquisition is reported. Until today, the Commission's consistent policy of including prior approval clauses in merger orders has been a clear indication that the Commission has not felt that Hart-Scott-Rodino offers perfect or even sufficient protection.

The message that today's decision sends to aggressive firms is that they can gamble fairly painlessly in entering into mergers and acquisitions of dubious legality under the Clayton and FTC Acts. If sued by the Commission—itself a rather remote prospect in the current administration—they can extricate themselves from a sticky legal situation through simple divestiture and move on, scot-free, to their next legally risky acquisition. Moreover, it would not be surprising if this decision precipitated an avalanche of petitions for relief from prior approval provisions from companies presently under FTC merger orders. The time and resources consumed by these appeals—not to mention the cost to the public—will, I suspect, end up being far greater than the relatively small expense of continuing this litigation over the question of whether to impose a prior approval requirement on Schlumberger.

IN THE MATTER OF

CENTURION INTERNATIONAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND THE MAGNUSON-MOSS WARRANTY—FEDERAL TRADE COMMISSION IMPROVEMENT ACT

Docket C-3131. Complaint, Feb. 22, 1984—Decision, Feb. 22, 1984

This consent order requires three Texas manufacturers-sellers of mobile homes and related services, among other things, to timely honor and fully satisfy valid warranty and service contract claims. The order prohibits respondents from disclaiming any implied warranties; excluding in any warranty or service contract incidental or consequential damages arising from any consumer injury without disclosing that some states do not allow for such exclusions; failing to disclose in their warranties that certain states may provide legal rights beyond those contained in the warranty; and failing to include in their warranties procedures a consumer must follow in order to obtain performance on warranty obligations. Additionally, respondents must provide consumer redress to those persons who were entitled to but did not receive performance under a warranty or service contract issued or sold by the companies, or under a warranty implied by state law.

Appearances

For the Commission: *George E. Schulman* and *Paul M. Updegrove.*

For the respondents: *A. Stephen Hut, Jr.* and *Leslie C. Seeman, Wilmer, Cutler & Pickering,* Washington, D.C. and *Frank D. Thomas, Jr.,* in-house counsel, Waco, Tex.

COMPLAINT

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

PARAGRAPH 1. Respondent Centurion International, Inc., is a corpo-

ration organized, existing and doing business under and by virtue of the laws of the State of Texas.

Respondent Centurion Homes Corporation, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas.

Respondent Centurion Homes of California, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas.

All of the above respondents have their principal offices and places of business at 901 West Loop 340, Waco, Texas.

In addition, respondents operated through two other corporations that are now defunct: Tri-Star Service Company, Inc., which was a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, and Centurion Homes Corporation of Arizona, Inc., which was a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona.

The aforementioned respondents cooperate and act, and, until February 1, 1982, the aforementioned respondents and the two defunct corporations cooperated and acted, together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, and, until February 1, 1982, respondents and the two defunct corporations were, engaged in the manufacture, offering for sale, sale and distribution of mobile homes, service contracts, and related goods and services. Respondents generally sell their products to the public through independent mobile home dealers. Said mobile homes are "consumer products" and the ultimate purchasers of said mobile homes are "consumers" as those terms are defined by Section 101 (1) and (3) of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2301 (1) and (3).

PAR. 3. Respondents provide, and have provided, written warranties with the mobile homes described in Paragraph Two, herein, as "written warranty" is defined in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2301(6). Said written warranties promise, *inter alia,* that for one year from the date of delivery of the mobile home to the original purchaser, respondents will repair, without charge, all defects in material and workmanship arising under normal use of the mobile home.

PAR. 4. Respondents and the defunct corporations have sold, for an additional fee, service contracts, as "service contract" is defined in the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2301(8). Said service contracts promise, *inter alia,* that for five years after the date of delivery of the mobile home the promisor will repair, without charge, all manufacturing defects in

material and workmanship under normal use, except as may otherwise be set forth in the service contract.

PAR. 5. Respondents maintain, and have maintained, a substantial course of business, including the acts and practices hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and are now, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the offering for sale and sale of merchandise and services of the same general kind and nature as the merchandise and services sold by respondents.

Count I - Violations of Section 5

Alleging a violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One to Six are incorporated by reference herein as if fully set forth verbatim.

PAR. 7. In the course and conduct of their business as aforesaid, and at all times material herein, respondents now represent, and have represented, directly and by implication, both to potential purchasers and to purchasers of their mobile homes, that all of the respondents and the two defunct corporations described herein are a single corporate entity. For example, they have caused advertising and promotional materials to refer to these respondents by common names such as "Centurion", "Centurion Homes", or "Centurion Homes Corporation" or by using a common logo, rather than by their correct legal names. In addition, they have caused warranties issued by the various respondents uniformly to identify the warrantor as "Centurion" or "Centurion Homes" rather than by the name of any of the particular individual corporations.

PAR. 8. In the course and conduct of their business as aforesaid, on numerous occasions, respondents and the two defunct corporations have failed to observe the corporate formalities between and among each other. For example, they have transferred assets from each other without paying fair market value for those assets and they have paid for liabilities incurred by each other.

PAR. 9. None of the respondents has ever been formally dissolved as a corporation, been adjudicated bankrupt or had its debts discharged in a bankruptcy or insolvency proceeding. The two defunct corporations surrendered their corporate charters after the occurrence of the acts and practices alleged herein.

PAR. 10. On numerous occasions, respondents and the two defunct corporations have failed to honor their obligations or have otherwise disclaimed valid claims arising under the warranties and service con-

tracts they have issued. Such occasions include, but are not limited to, the following:

a. Respondents terminated the manufacture of mobile homes at certain manufacturing facilities. For example, respondents terminated the manufacture of mobile homes at Centurion Homes of California, Inc. Thereafter, on numerous occasions, respondents failed to honor or otherwise disclaimed valid warranty claims concerning mobile homes manufactured at the terminated facilities on the grounds that the said manufacturing operations are no longer in business and without assets. On some occasions, respondents represented, directly and indirectly, to consumers with valid warranty claims, that respondents were no longer legally obligated to honor the warranties they had issued.

b. Respondents terminated all operations at Tri-Star Service Company, Inc. Tri-Star had issued service contracts which provided that for five years after the date of delivery of the mobile home the promisor would repair, without charge, all manufacturing defects in material and workmanship under normal use, except as may otherwise be set forth in the service contract. Thereafter, on numerous occasions, all prior to the time Tri-Star Service Company, Inc., became defunct, respondents failed to honor or otherwise disclaimed valid service contract claims based on service contracts sold by the Tri-Star Service Company, Inc., on the grounds that said company is no longer in business and without assets. On some occasions, respondents represented, directly and indirectly, to consumers with valid service contract claims, that respondents were no longer legally obligated to honor the service contracts they had sold.

PAR. 11. Respondents' failure to honor their warranties and service contracts was and is an unfair act or practice. Respondents' representations that they were not legally obligated to honor their warranty or service contract obligations because of the termination of certain operations was and is false, misleading, deceptive and an unfair act or practice.

PAR. 12. The use by respondents of the aforesaid false, misleading, deceptive and unfair representations, directly or by implication, has had and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that the representations were and are true and complete, and that the acts and practices were fair, and into the loss or waiver of valuable warranty and service contract rights by reason of said erroneous and mistaken belief.

PAR. 13. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair

methods of competition and unfair and deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Count II - Violations of Warranty Disclosure Rules

Alleging violation of Section 5 of the Federal Trade Commission Act by violation of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, and of the regulations promulgated thereunder, the allegations of Paragraphs One to Six are incorporated by reference herein as if fully set forth verbatim.

PAR. 14. Respondents' written warranties violate the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, 15 U.S.C. 2301 *et seq.,* by disclaiming implied warranties by stating that there are no warranties except those on the face of the written warranty. Such a disclaimer of implied warranties is a violation of Section 108(a) of the Warranty Act, 15 U.S.C. 2308(a), which provides that implied warranties may not be disclaimed for at least the period of time during which the written warranty is in effect. Therefore, pursuant to Section 110(b) of the Warranty Act, 15 U.S.C. 2310(b), respondents' disclaimer of implied warranties is a violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 15. Respondents' written warranties violate the Commission's Rule concerning Disclosure of Written Consumer Product Warranty Terms and Conditions ("Warranty Disclosure Rule"), promulgated under the Warranty Act, 16 C.F.R. 701. Examples of such violations include, but are not limited to, the following:

a. Respondents' written warranties exclude incidental and consequential damages without disclosing that some states do not allow such exclusions. The failure to provide such a disclosure is a violation of Section 701.3(a)(8) of the Warranty Disclosure Rule and, therefore, according to Section 110(b) of the Warranty Act, 15 U.S.C. 2310(b), is an unfair or deceptive act or practice and an unfair method of competition in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

b. Respondents' written warranties do not disclose that certain states also may give legal rights in addition to those provided in the written warranty. The failure to provide such a disclosure is a violation of Section 701.3(a)(9) of the Warranty Disclosure Rule and, therefore, according to Section 110(b) of the Warranty Act, 15 U.S.C. 2310(b), is an unfair or deceptive act or practice and an unfair method

of competition in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

c. Respondents' written warranties do not provide a clear and concise step-by-step procedure for the consumer to follow in order to obtain performance of any warranty obligation. For example, said warranties do not provide the name and mailing address of the warrantor and/or the name and mailing address of any employee or department of the warrantor responsible for the performance of warranty obligations, and/or a telephone number that consumers may use without charge to obtain information on warranty performance. Further, said warranties do not state what notice is required to obtain warranty service. The failure to provide a clear step-by-step procedure to obtain performance of warranty obligations is a violation of Section 701.3(a)(5) of the Warranty Disclosure Rule and, therefore, according to Section 110(b) of the Warranty Act, is an unfair or deceptive act or practice and an unfair method of competition in violation of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 16. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute, unfair methods of competition and unfair and deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act. The acts and practices of respondents will continue in the absence of the relief herein requested.

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 Commission staff proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

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

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

1. Respondent Centurion International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 901 West Loop 340, in the City of Waco, State of Texas.

Respondent Centurion Homes Corporation, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 901 West Loop 340, in the City of Waco, State of Texas.

Respondent Centurion Homes of California, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its office and principal place of business located at 901 West Loop 340, in the City of Waco, State of Texas.

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

The definitions of terms contained in Section 101 of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Warranty Act"), 15 U.S.C. 2301, and in Section 701.1 of the Commission's Rule concerning Disclosure of Written Consumer Product Warranty Terms and Conditions ("Warranty Disclosure Rule"), 16 C.F.R. 701, promulgated by the Commission under the Warranty Act, and the definition of "commerce" pursuant to Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44, shall apply to this order.

I

It is ordered, That respondents Centurion International, Inc., a corporation, Centurion Homes Corporation, Inc., a corporation, and Centurion Homes of California, Inc., a corporation, their successors and assigns, and their officers, employees, agents and representatives,

directly or through any corporation, subsidiary, division or other device, in connection with the issuance of any written warranty or service contract for any mobile home or recreational vehicle or any component part thereof in or affecting commerce, do forthwith cease and desist from failing to honor and satisfy fully, within a reasonable period of time after receiving from the consumer a request for such satisfaction, any valid claim arising under such warranty or contract, *provided* that within that period of time the consumer has allowed a reasonable number of attempts at satisfying the claim.

II

It is further ordered, That respondents Centurion International, Inc., a corporation, Centurion Homes Corporation, Inc., a corporation, and Centurion Homes of California, Inc., a corporation, their successors and assigns, and their officers, employees, agents and representatives, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale and distribution of any mobile home or recreational vehicle or any component part thereof in or affecting commerce, do forthwith cease and desist from:

A. Disclaiming or modifying in any warranty or service contract any implied warranty, except as provided by Section 108 of the Warranty Act, 15 U.S.C. 2308;

B. Excluding in any warranty or service contract any incidental or consequential damages arising from any consumer injury without clearly and conspicuously disclosing, as provided by Section 701.3(a)(8) of the Warranty Disclosure Rule, that some states do not allow for such exclusion;

C. Failing in any warranty to disclose, as provided by Section 701.3(a)(9) of the Warranty Disclosure Rule, that certain states may give the consumer legal rights in addition to those provided by the warranty;

D. Failing in any warranty to state, as provided by Section 701.3(a)(5) of the Warranty Disclosure Rule, clearly, prominently, and concisely a step-by-step explanation of the procedure that the consumer should follow in order to obtain performance of the warranty obligation; and

E. Violating any other provision of the Warranty Act, 15 U.S.C. 2301 *et seq.,* or of the Warranty Disclosure Rule, 16 C.F.R. 701.

III

It is further ordered, That respondents Centurion International, Inc., a corporation, Centurion Homes Corporation, Inc., a corporation, and Centurion Homes of California, Inc., a corporation, their successors and assigns, and their officers, employees, agents or representatives shall provide consumer redress in accordance with the provisions of this Part to those consumers who were entitled to but did not receive performance under a warranty or service contract issued or sold by respondents or under a warranty implied by state law by:

A. *Identification of Consumers*

1. Prior to the date of mailing pursuant to paragraph III(B), taking all reasonable steps to compile lists of:

a. the name and current address of every person who purchased a new mobile home manufactured by CHC of California from January 1, 1979, until the date of service of this order;

b. the name and current address of every person who purchased a new mobile home manufactured by CHC of Arizona; and

c. the name and current address of every person who ever purchased a service contract from respondents or the defunct corporations and every person who is the current owner of a service contract issued by respondents or the defunct corporations if the service contract permitted transfer of ownership;

2. Such lists to be compiled:

a. from respondents' files, including records required by the Department of Housing and Urban Development;

b. from requests to the state mobile home regulatory agencies in the states of Arizona, California, Texas and New Mexico;

c. from solicitations to the mobile home dealers who sold Centurion mobile homes and related service contracts;

d. from the records of Federal Trade Commission; and

3. If by the thirtieth day prior to the date of mailing pursuant to paragraph III(B) such lists do not contain the names and current addresses of at least 80% of said persons, including at least 70% of the original owners and 70% of the purchasers of service contracts, employing an independent commercial locater service to compile the lists prior to the date of mailing pursuant to paragraph III(B) and in that regard to provide all reasonable assistance to that locater service.

B. *Notification of Persons*

Sending, by postage-paid first class mail, within sixty days of the date of service of this order, to all persons identified pursuant to Paragraph A, above:

1. in the case of purchasers of mobile homes, a letter substantially identical to Appendix A and a claim form substantially identical to Appendix D; and/or
2. in the case of purchasers or transferees of service contracts, a letter substantially identical to Appendix B and a claim form substantially identical to Appendix E;

C. *Notification Upon Receipt of Claim Forms*

For each person who returns a claim form within forty-five days from the date of such mailing, sending within thirty days of the receipt of that claim form a notice of whether they will honor the claim and perform the work or reimburse the costs incurred by consumers as a result of respondents' failure to perform under a warranty, service contract or implied warranty.

D. *Performance of Work or Payment of Claim*

Performing the requested warranty or service contract work or paying the claim for reimbursement or diminution of value (unless the claim is denied pursuant to Paragraph E, below):

1. if, with respect to a warranty claim, the claim relates to defects in material and workmanship under normal use and service that arose within one year from the date of delivery of the mobile home and the consumer gave to respondents or their successors and assigns such notification of the defect as required by the warranty; or
2. if, with respect to a service contract claim, the claim relates to defects covered by the service contract; or
3. if, with regard to an implied warranty claim, the consumer gave to respondents or their successors and assigns such notice as is reasonably required under applicable state law.

The phrase "notification of the defect as required by the warranty" includes written or telephonic notice of any alleged defect to the respondents, the selling mobile home dealer or a state mobile home agency. If notification was not given, it is not required if the consumer submits a sworn statement that the reason for not providing notice was the actual or impending closing of the manufacturing plant. If the consumer is relying upon an implied warranty notification of the defect is required only to the extent reasonably required under applicable state law.

If a person seeks reimbursement for costs or, if the defect cannot reasonably be repaired, for diminution of value, respondents or their successors and assigns may require reasonable proof of the claim by such means as cancelled checks, paid invoices, or professional appraisals. As used herein, reimbursement of costs includes payment for diminution of value if the defect cannot reasonably be repaired. The defect cannot reasonably be repaired if, for example, the original owner no longer owns the mobile home. In such case, respondents or their successors and assigns must pay such owner for diminution of value.

Payment for diminution of value shall include the reasonable cost of any professional appraisal or estimate.

All reimbursements for costs, diminution of value and/or all repairs shall be made and completed within 60 days of the date the consumer is notified of the decision to make the repairs or within 60 days of an arbitration award ordering repairs to be made, except that:

(1) all such repairs to mobile homes located outside of the states of California, Arizona, New Mexico, or Texas; and

(2) all such repairs to mobile homes located in inaccessible locations (defined as more than half a mile from the nearest improved or unimproved road);

shall be performed within 90 days of the date that the consumer is notified pursuant to Paragraph C of this part that they will make the requested repairs or within 90 days of the date of an arbitration award ordering repairs to be made.

All such repairs to mobile homes where respondents or their successors and assigns are unable to obtain parts and materials within 60 days of the date of notification because said parts and materials are no longer in use by respondents or their successors and assigns shall be performed within 90 days of the date that the consumer is notified pursuant to Paragraph C of this part that respondents or their successors and assigns will make the requested repairs or within 90 days of the date of an arbitration award ordering repairs to be made. In such case respondents or their successors and assigns must notify the consumer of their inability to obtain the parts and the expected date the repairs will be made.

Conditions providing for excuse of the timely performance by the respondents or their successors and assigns as otherwise provided in this Part are as follows:

1. Natural disasters;
2. Acts of God or governmental authorities;
3. Strikes;

4. Public unrest;

5. Adverse weather conditions that would make it extremely difficult to repair the mobile home;

6. Inability to contact the mobile home owner to arrange repairs for the mobile home in question despite diligent efforts by respondents to make such contact where such inability is occasioned by the absence of the consumer from the mobile home; or

7. Absence of the consumer from the mobile home at the specific time agreed upon by the respondents and said purchaser for the scheduled service upon the mobile home but consumers need not agree to a time less specific than a half day time period (*i.e.*, morning or afternoon) in which to make the scheduled service.

E. *Denial of Claims*

Respondents or their successors and assigns may deny any claims (in whole or in part) for performance or reimbursement submitted pursuant to this Part if they have a reasonable, good faith belief that they are not responsible for performance or reimbursement as claimed under the applicable warranty, service contract or warranty implied under state law; or if the claimant does not submit reasonable proof of notification or of loss as set forth in the attached letters. In such case respondents or their successors and assigns shall send written notice giving the reasons for any denial to the claimant within thirty days from receipt of the claim. Such notice shall be substantially identical to the attached Appendix C and shall be sent by postage pre-paid, first class mail.

Furthermore, if respondents or their successors and assigns deny in whole or in part any request for warranty or service contract performance or reimbursement of costs they must:

1. Afford the consumer the right to submit such denial to an impartial mediation and arbitration procedure, entailing no mandatory administrative cost or filing fee to the consumer, which mediation and arbitration procedures will be conducted by the Better Business Bureau in accordance with their mediation and arbitration procedures.

2. Comply within the time periods in this Part with and abide by any negotiated agreement or arbitration award issued by the Better Business Bureau. Arbitration awards issued pursuant to this order shall not be binding on the consumer unless the consumer accepts the award in full satisfaction of his or her claim for warranty or service contract performance or reimbursement of costs.

IV

It is further ordered, That respondents Centurion International, Inc., a corporation, Centurion Homes Corporation, Inc., a corporation, and Centurion Homes of California, Inc., a corporation, their successors and assigns, and their officers, employees, agents and representatives, directly or through any corporation, subsidiary, division or other device, in connection with the manufacturing, advertising, offering for sale, sale and distribution of any mobile home or recreational vehicle or any component part thereof in or affecting commerce, shall maintain and upon reasonable request and during regular business hours make available to the Federal Trade Commission for inspection and copying a legible and completed copy of each different type or form of warranty and service contract and of each advertisement or promotional material therefor, of every claim submitted to respondents or their successors and assigns by consumers in connection therewith, and of all correspondence relating thereto, *provided, however,* that no document need be maintained for more than four years after the document was prepared or last used, whichever period is longer.

V

It is further ordered, That respondents shall distribute a copy of this order to all their operating divisions and all present or future personnel, agents, or representatives having responsibility or authority to establish company policies, including but not limited to policies concerning warranty service, and that respondents secure from each such person a signed statement acknowledging receipt of said order.

VI

It is further ordered, That respondents shall 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, the creation or dissolution of subsidiaries or any other change in the corporations that may affect compliance obligations arising out of the order.

VII

It is further ordered, That respondents shall, within nine months after service of this order, file with the Commission a report in writing

setting forth in detail the manner and form in which respondents have complied with this order.

APPENDIX A

Dear Centurion Mobile Home Owner:

You may still have certain legal rights to have defects in your mobile home repaired for free. You may also be entitled to be reimbursed for money you spent repairing your mobile home or for the decrease in value of your mobile home due to the company's failure to repair. You may be entitled to reimbursement even if you no longer own the home.

You may be eligible for such service or reimbursement if you are the original owner of a Centurion Mobile Home. You are eligible if during your first year of ownership you experienced problems that were covered by the warranty you received from Centurion and (1) you complained about the problem to the manufacturer or the dealer or the state mobile home agency or some other government agency or (2) you did not complain because you were informed that the manufacturer's plant was closed or about to be closed.

You can be reimbursed for those expenses you incurred by having to repair mobile home defects yourself, by having to hire someone else to repair the defects, by the amount of the costs to repair the home or by the diminished value of the mobile home because you are not able to repair the defects at all. Reimbursement for the amount of the costs to repair the mobile home or for the diminished value must be based on cancelled checks, receipts or a professional estimate; the cost of such estimate is also reimbursable. Please include with your claim a copy of the check, receipt or estimate on which you are relying.

If you think you may be eligible, please complete the enclosed form and mail it to Centurion at the address on the letterhead within *45 days from the date of this letter.*

Centurion will notify you within thirty days after receiving your letter whether we will honor your claim. If the company disputes any part of your claim, we will tell you why it is disputing the claim and will explain how you may appeal that dispute to an independent, free arbitrator.

For your information, we are attaching a description of what is and what is not covered by the warranty.

This letter is being written because of an agreement between Centurion and the Federal Trade Commission. If you have any comments or complaints about how well Centurion is responding to your complaint, let the Federal Trade Commission know at this address:

Federal Trade Commission
Division of Enforcement
Bureau of Consumer Protection
Washington, D.C. 20580

Very truly yours,
[Centurion Office Name]

CENTURION MOBILE HOME WARRANTY

The warranty covers: Centurion will repair or replace, free of charge, including any related installation costs, any defective part.

The warranty does not cover: The Warranty does not apply to ranges, refrigerators, radios, air conditioners, water heaters, washers, dryers, furnaces, bedding or articles of furniture or furnishings which are warranted by their respective manufacturer.

The warranty also does not apply to any defect, malfunction, failure of the mobile home or one of the appliances or furnishings therein caused by misuse, neglect, accident, improper loading during secondary moves made by the original purchaser, failure to comply with the homeowner's manual instructions, or unauthorized repairs or alterations unless such repairs or alterations were made after being unable to secure warranty service from Centurion or the mobile home dealer, or damage not resulting from defect or malfunction while the product is in the possession of purchaser, or unreasonable use including a failure to provide reasonable and necessary maintenance will void this warranty. Provided, however, that repairs or alterations made by the manufacturer of appliances or equipment under the terms of their respective warranties shall not be considered as unauthorized repairs or alterations under the terms of this warranty.

APPENDIX B

Dear Tri-Star Service Company Extended Service Contract Holder:

You may still have certain legal rights to have defects in your mobile home repaired for free under your Tri-Star Extended Service Contract. You may also be entitled to be reimbursed for money spent repairing your mobile home yourself, for having to hire someone else to repair the defects, for the costs to repair the home or for the decrease in value of your mobile home due to the company's failure to repair if the defects cannot be repaired at all. You may be entitled to reimbursement even if you no longer own the home. Reimbursement for the costs to repair the mobile home or for the diminished value must be based on a professional estimate; the cost of such estimate is also reimbursable.

You may be eligible for such service or reimbursement if you own a mobile home with a Tri-Star Extended Service Contract that is still valid or if while the service contract was valid you experienced problems covered by the extended service contract. Also, to be eligible you must have complained about the problem to either Tri-Star Service Company or the dealer or the state mobile home agency or some other government agency. You don't need to have complained if you were informed that Tri-Star was not in business or about to go out of business.

You can be reimbursed for those expenses you incurred by having to repair mobile home defects yourself, having to hire someone else to repair the defects, by the amount of the cost to repair the home or by the diminished value of the mobile home because you are not able to repair the defects at all. Reimbursement for the amount of the cost to repair the mobile home or for the diminished value must be based on cancelled checks, receipts or a professional estimate; the cost of such estimate is also reimbursable. Please include with your claim a copy of the check, receipt or estimate on which you are relying.

If you think you may be eligible, please complete the enclosed form and mail it to Centurion at the address on the letterhead *within 45 days from the date of this letter.*

Centurion will notify you within thirty days of the date of receipt of your letter whether it will honor your claim. If it disputes any part of your claim, it will tell you why it is disputing the claim and will explain how you may appeal that dispute to an independent, free arbitrator.

For your information, we are attaching a description of what is and what is not covered by your Tri-Star Service Contract.

This letter is being written because of an agreement between Centurion and the

Federal Trade Commission. Tri-Star is now defunct, but was a corporate subsidiary of Centurion. If you have any comments or complaints about how well Centurion is responding to your complaint, let the Federal Trade Commission know at this address:

Federal Trade Commission
Division of Enforcement
Bureau of Consumer Protection
Washington, D.C. 20580

Very truly yours,
[Centurion Office Name]

TRI-STAR SERVICE CONTRACT

Your Service Contract covers: Any manufacturing defect in material or workmanship.
Your Service Contract does not cover:

a. Tires, bedding, draperies, furniture and carpeting.

b. Washing machines, dryers, dishwashers and air conditioners.

c. Any defect, malfunction or failure of a covered item or appliance caused by misuse, neglect, accident, improper loading, failure to comply with the mobile home owner manual's instructions, or with any specific instructions from the respective manufacturer of any covered item, or unauthorized repairs or alterations unless such repairs or alterations were made after being unable to secure warranty service or service contract service by Centurion, Tri-Star or your mobile home dealer, or unreasonable use including a failure to provide reasonable and necessary maintenance. Provided, however, that repairs or alterations made by the manufacturer of appliances or equipment under the terms of their respective warranty obligations made by the manufacturer of appliances or equipment under the terms of their respective warranty shall not be considered as unauthorized repairs or alterations under the terms of this Plan.

d. Any consequential damages, loss of time, inconvenience, commercial loss, loss of use of the mobile home, or other incidental damages such as telephone calls or lodging expenses. However, those costs that you incurred in having to repair the mobile home yourself or for the impairment in the value of the home in the event that it cannot be adequately repaired are covered by this service contract.

e. Normal deterioration due to wear or exposure.

f. Any loss, damage or injury or to property other than the mobile home itself.

g. Any loss caused by casualty, including but not limited to fire, smoke, theft or larceny, malicious mischief, vandalism, falling objects, breakage of glass, missiles, wind storm, nuclear contamination, freezing, lightning, explosion, hail, water, flood or from any other cause whatsoever except as provided in this Plan.

h. Damage caused by improper loading, blocking, leveling or tie down operations.

i. Any loss, damage or defect resulting from defect(s) in the manufacturer's design unless the manufacturer was Centurion.

j. In the event of a replacement of any appliance, credit at a depreciated value will be given by the companies to the Plan Holder towards a new purchase.

APPENDIX C

Dear Centurion Home Owner:

We are denying all or part of your request for service work on your mobile home or for reimbursement of money spent. The work or reimbursement we are denying and our reason for denial are as follows:

If you disagree with our decision, you may, at no cost to you, ask the Better Business Bureau to resolve the dispute. Simply call or write the Better Business Bureau at the address and phone number listed below and provide them the following information:

a. Your name and address and phone number;
b. What work you asked us to do on your mobile home or reimbursement requested (you can send a copy of your claim form);
c. Why you think you are entitled to have this work done or to get reimbursed.

The Better Business Bureau will try to work things out informally between you and Centurion Homes. If the dispute cannot be resolved informally, you are entitled to a hearing before an independent arbitrator, at no cost to you, to be conducted by the Better Business Bureau at a place convenient to you. Centurion must accept the arbitrator's decision, but you do not have to accept the decision.

For consumers who own a mobile home located in New Mexico, call or write:

For consumers who own a mobile home located in Arizona, call or write:

For consumers who own a mobile home located in California, call or write:

For consumers who own a mobile home located somewhere else call or write:

[If appropriate: The remaining part of your request will be fulfilled. We will contact you soon to make the necessary arrangements.]

This letter is being written because of an agreement reached with the Federal Trade Commission. If you have any comments or complaints about how well we are responding to your complaint, let the Federal Trade Commission know at this address:

Federal Trade Commission
Division of Enforcement
Bureau of Consumer Protection
Washington, D.C. 20580

Thank you,
[Name]

APPENDIX D

WARRANTY CLAIM FORM
[Address of Respondent]

1. Name of Owner ______________________ Home Phone ( ) __________ Work Phone ( ) __________
2. Address of Owner____
Street Lot No. City State Zip
3. Serial Number of Mobile Home #______________________________
4. Address of Mobile Home ______________________________________
Street Lot No City State Zip

5. Describe in detail the problem(s) you experienced with your mobile home, and state when the problem(s) appeared. (Use reverse side if necessary). If you have an inspection report, send us a copy.

6. What did you do to notify the dealer, manufacturer or any government agency about the problem? Try to include approximate dates you called or wrote to complain, and copies of any letters you wrote. If you did not complain please state why. (Note: You may be able to get help even if you cannot remember exactly when you complained, or you do not have a copy of any letter you may have written.)

7. Please state how much (if any) you have already spent for repairs covered by the warranty or how much your mobile home has gone down in value due to the failure to repair the mobile home. If you have any sales receipts, invoices, or cancelled check stubs or a professional estimate of the cost to repair your mobile home or the decrease in value of the mobile home if it cannot be repaired, please send a copy.

ATTESTATION

Under penalty of perjury, I, ______________________ hereby affirm that
(Name of Owner)
all of the above information is true and correct to the best of my knowledge and belief.

______________________ ______________________
Signature of Owner Date

Please return this form to:
[address of respondent]
Be sure to keep a copy of this completed form for your records.

APPENDIX E

SERVICE CONTRACT CLAIM FORM
[Address of Respondent]

1. Name of Owner ______________________ Home Phone ( ) __________
Work Phone ( ) __________
2. Address of Owner______________________
Street Lot No. City State Zip
3. Serial Number of Mobile Home #______________________
4. Address of Mobile Home ______________________
Street Lot No. City State Zip
5. Date of Delivery of Mobile Home ______________________
6. Describe in detail the problem(s) you experienced with your mobile home, and state

when the problem(s) appeared. (Use reverse side if necessary). If you have an inspection report, send us a copy.

7. What did you do to notify the dealer, manufacturer or any government agency about the problem? Try to include approximate dates you called or wrote to complain, and copies of any letters you wrote. If you did not complain please state why. (Note: You may be able to get help even if you cannot remember exactly when you complained, or you do not have a copy of any letter you may have written.)

8. Please state how much (if any) you have already spent for repairs covered by the service contract or how much your mobile home has gone down in value due to the failure to repair the mobile home. If you have any sales receipts, invoices, or cancelled check stubs or a professional estimate of the cost to repair your mobile home or the decrease in value of the mobile home if it cannot be repaired, please send a copy.

ATTESTATION

Under penalty of perjury, I, ______________________ hereby affirm that all of the above information is true and correct to the best of my knowledge and belief.

______________________ ______________________

Signature of Owner Date

Please return this form to:

[address of respondent]

Be sure to keep a copy of this completed form for your records.