

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

PETROLANE, INC.

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

Docket C-2620. Complaint, Jan. 2, 1975 - Decision, Jan. 2, 1975

Consent order requiring a Long Beach, Calif., distributor of liquid petroleum gas (LP), among other things to notify customers prior to delivery of "increased price gas" that the price has increased; provide the customer with the applicable price schedule, and disclose that related information can be obtained from their district office.

Appearances

For the Commission: *David A. Middaugh.*

For the respondent: *William E. Linsenbard*, Long Beach, Calif.

COMPLAINT

The Federal Trade Commission, having reason to believe that Petrolane, Inc., a corporation (hereinafter respondent), has violated Section 5 of the Federal Trade Commission Act, and that a proceeding would be in the public interest, hereby issues its complaint:

PARAGRAPH 1. Respondent is a California corporation with its office located at P.O. Drawer 1410, 1600 E. Hill St., Long Beach, Calif.

PAR. 2. Respondent is a multinational company engaged in the business of, among other things, selling liquified petroleum gas (LP gas) in competition with other sellers of LP gas.

PAR. 3. Respondent ships, distributes and sells LP gas in interstate commerce to customers located in almost every state.

PAR. 4. Respondent sells LP gas to home owners and businesses, which use the gas for heating and other purposes. Such sales normally take place in the following manner. The customer and respondent contract that respondent will furnish the customer's LP gas needs. Respondent installs a storage tank and other related equipment on the customer's premises. Thereafter, respondent periodically makes deliveries of LP gas to the customer's storage tank. Respondent's deliveryman fills the tank and makes out the customer's bill, which states the number of gallons delivered and the total dollar amount charged. The bill is delivered to the customer, or, if the customer is not

present, the bill is left at his premises. The customer may either pay his bill immediately or await receipt of a formal bill mailed by respondent.

PAR. 5. From time to time respondent raises the price per gallon of LP gas delivered to its customers. Respondent does not notify its customers of price increases prior to delivery of the LP gas subject to the increase. Respondent does not, simultaneously with delivery, give notice to customers that its price has increased. Respondent does not, subsequent to delivery of increased price gas, inform customers of the increase. The customer thus has no way to discover a price increase except by (1) dividing the number of gallons delivered into the total amount billed and comparing the resultant price per gallon with the price per gallon similarly computed from prior bills, or (2) going to respondent's district office where the prices are posted.

PAR. 6. Knowledge of a price increase may affect the customer's decision as to whether to continue purchasing LP gas from respondent.

PAR. 7. The above-described conduct injures respondent's customers and competitors. Customers pay increased prices under the belief that prices have not increased and are deprived of the opportunity to compare respondent's prices with those of respondent's competitors. Respondent's competitors are deprived of those of respondent's customers who may change their LP gas supplier because of respondent's higher prices.

PAR. 8. The above-described conduct constitutes an unfair or deceptive act or practice and an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having

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

1. Proposed respondent Petrolane, Inc. is a California corporation with its office located at P.O. Drawer 1410, 1600 E. Hill St., Long Beach, Calif.

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

ORDER

It is ordered, That respondent, its successors and assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from delivering LP gas to any customer at a price higher than that charged by respondent to the customer for the immediately preceding delivery (or higher than the price to similar customers prior to the price increase, if there have been no prior deliveries to that customer) (hereinafter referred to as "increased price gas") unless:

1. Respondent has notified the customer prior to delivery of "increased price gas" that its price of LP gas has increased, has provided the customer with the applicable price schedule, and has disclosed that related information may be obtained by calling respondent's district office; *or*

2. (a) The bill left at the customer's premises by the deliveryman for "increased price gas" discloses on the front the number of gallons delivered, the price per gallon and the total price of the delivery; clearly and conspicuously states on the front: "Reflects price increase"; and contains a statement that the amount of the increase and related information may be obtained by calling respondent's district office; *and*

(b) All bills sent to customers, subsequent to the bill left by the deliveryman, clearly and conspicuously state: "The charges on this statement may include the effects of a price increase or decrease. For further information please refer to your field delivery invoice or call our district office."

It is further ordered, That respondent shall forthwith deliver a copy of this order to each of its employees and agents engaged directly or indirectly in the retail distribution of LP gas, and to each employee who

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becomes so engaged during a period of two years from the date this order becomes effective.

It is further ordered, That respondent shall maintain such records as will fully disclose the manner and form of its compliance with this order.

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

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

IN THE MATTER OF

REGAL APPAREL LTD.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND TEXTILE FIBER PRODUCTS
IDENTIFICATION ACTS

Docket C-2621. Complaint, Jan. 2, 1975 - Decision, Jan. 2, 1975

Consent order requiring a Los Angeles, Calif., manufacturer and importer of men's and boys' apparel, among other things to cease misbranding its textile fiber products.

Appearances

For the Commission: *Gerald E. Wright and Kerper G. Propert.*

For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by such Acts, the Federal Trade Commission, having reason to believe that Regal Apparel Ltd., a corporation, hereinafter referred to as respondent, has violated the provisions of said Acts and the rules and regulations promulgated under the Textile Fiber Products Identification Act, and it now 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 Regal Apparel Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. Their office and principal place of business is located at 124 E. Olympic Blvd., Los Angeles, Calif.

Respondent is engaged in the manufacturing, importation and sale of mens and boys wearing apparel, including, but not limited to tennis jackets.

PAR. 2. Respondent is now and for some time last past has been engaged in the introduction, delivery for introduction, manufacture for introduction, sale, offering for sale in commerce, and in the transportation or causing to be transported in commerce, and in the importation into the United States of textile fiber products; and has sold, offered for sale, delivered, transported and caused to be transported, textile fiber products, which have been offered for sale in commerce; and has sold, offered for sale, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber products" are defined in the Textile Fiber Products Identification Act.

PAR. 3. Certain of said textile fiber products were misbranded by the respondent within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified as to the name or amount of the constituent fibers contained therein.

Among such misbranded textile fiber products, but not limited thereto, were textile fiber products (tennis jackets) with labels which set forth the fiber content as "65% Cotton, 35% Polyester," whereas, in truth and in fact, the said textile fiber products contained substantially different amounts of fibers than represented.

PAR. 4. The acts and practices of respondent as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted and now constitute, unfair methods of competition and unfair and deceptive acts and practices, in commerce, under 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 San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, as amended; and

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

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

1. Respondent Regal Apparel Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with their office and principal place of business located at 124 E. Olympic Blvd., Los Angeles, Calif.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

It is ordered, That respondent Regal Apparel Ltd., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the introduction, delivery for introduction, manufacture for introduction, sale, advertising or offering for sale in commerce, or the transportation or causing to be transported in commerce, or the importation into the United States of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile product, which has been advertised or offered for sale in commerce, or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported,

after shipment in commerce of any textile product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by:

1. Falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

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

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

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

IN THE MATTER OF

HARBOR BANANA DISTRIBUTORS, INC.*

MODIFIED ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 7 OF THE CLAYTON ACT

Docket 8795. Complaint, July 28, 1969 - Modified Order, Jan. 3, 1975

Order modifying an earlier order dated Jan. 12, 1973, 38 F. R. 5160, 82 F.T.C. 53, pursuant to order of Aug. 22, 1974, of the United States Court of Appeals for the Fifth Circuit,** denying enforcement of the portion of the order under Counts I and II of the complaint alleging violations of Sections 2(a) and 2(f) of the Clayton Act, as amended, and ordering enforcement of the portion of the order under Count IV of the complaint charging a violation of Section 7 of the Act.

Appearances

For the Commission: *James T. Halverson.*

For the respondent: *Deutsch, Kerrigan & Stiles, New Orleans, La.*

* Title of case changed by Commission direction of Apr. 11, 1975, so that in the future no reference will appear in the title to any parties that have been dismissed.

** Neither party filed petition for *certiorari*.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Fifth Circuit petitions to review the order to cease and desist issued herein on Jan. 12, 1973 [82 F.T.C. 53]; and the Court, on Aug. 22, 1974 [499 F.2d 395 (1974)], having rendered its decision, denying enforcement of the portion of the order under Counts I and II of the complaint alleging violations of Sections 2(a) and 2(f) of the Clayton Act, as amended, and ordering enforcement of the portion of the order under Count IV of the complaint charging a violation of Section 7 of the Act; and the time in which to file a petition for *certiorari* having expired without either party having filed such a petition;

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

I

It is ordered, That Counts I-III of the complaint be dismissed.

II

It is further ordered, That:

1. Respondent Harbor Banana Distributors, Inc., a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors, and assigns, within six (6) months from the date of service upon it of this order, shall divest, absolutely and in good faith, subject to the approval of the Federal Trade Commission, all assets, properties, rights and privileges, tangible and intangible, including, but not limited to, all plants, equipment, and machinery acquired by Harbor Banana Distributors, Inc., as a result of its acquisition of the Charles C. McCann Company, and Tradewinds Produce, Inc., together with the goodwill created by the use of such assets, and all additions and improvements thereto, of whatever description, so as to restore that which formerly made up the Charles C. McCann Company, and Tradewinds Produce, Inc. as a viable competitive entity in the business of processing, selling and distributing bananas.

2. None of the assets, properties, rights or privileges, described in Paragraph IV, 1., of this order, shall be divested, directly or indirectly, to any person who is, at the time of the divestiture, an officer, director, employee, or agent, or under the control or direction of, respondent Harbor Banana Distributors, Inc. or any of respondent's subsidiary or affiliated corporations, or owns or controls, directly or indirectly, more

than one (1) percent of the outstanding shares of common stock of Harbor Banana Distributors, Inc.

3. Pending divestiture, respondent Harbor Banana Distributors, Inc. shall not make or permit any deterioration in any of the plants, machinery, buildings, equipment or other property or assets of the companies to be divested that may impair their present capacity or market value, unless such capacity or value is restored prior to divestiture.

III

It is further ordered, That respondent Harbor Banana Distributors, Inc. shall not, for a period of ten (10) years from the date of service of this order, acquire, directly or indirectly, through subsidiaries, joint ventures, or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, or assets of any concern engaged in the processing, sale, or distribution of bananas.

IV

It is further ordered, That respondent Harbor Banana Distributors, Inc. shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in its corporate organization, 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 that may affect compliance obligations arising out of this order.

V

It is further ordered, That Harbor Banana Distributors, Inc., shall within sixty (60) days after service on it of this order, and every sixty (60) days thereafter until it has fully complied with the provisions of this order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which it intends to comply, is complying, and/or has complied with this order. All compliance reports shall include, among other things that will be from time to time required, a summary of all contacts and negotiations with potential purchasers of the stock and/or assets to be divested under this order, the identity of all such potential purchasers, and copies of all written communications to and from such potential purchasers.

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IN THE MATTER OF

INSURANCE FINANCE PLAN CO., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS*Docket C-2622. Complaint, Jan. 6, 1975 - Decision, Jan. 6, 1975*

Consent order requiring a Central Falls, R.I., moneylender in connection with the financing of insurance premiums, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

*Appearances*For the Commission: *Lois M. Woocher.*For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing Regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Insurance Finance Plan Co., a corporation, and Maurice R. Loiselle, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Insurance Finance Plan Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 887 Dexter St., Central Falls, R.I.

Respondent Maurice R. Loiselle is an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporation, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the business of lending money to the public in connection with the financing of insurance premiums.

PAR. 3. In the ordinary course and conduct of their business as

aforesaid, respondents regularly extend consumer credit as "consumer credit" is defined in Regulation Z, the implementing Regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business as aforesaid, have caused and are causing to be extended consumer credit, as "consumer credit" is defined in Regulation Z, and have caused and are causing customers to execute a binding combination promissory note and disclosure statement, hereinafter referred to as the "statement." Respondents do not provide these customers with any other consumer credit cost disclosures.

By and through the use of the statement, respondents:

1. Failed to use the term "cash price" as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the item, as required by Section 226.8(c)(1) of Regulation Z.

2. Failed to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

3. Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

4. Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

5. Failed in some instances to furnish consumers with a duplicate of the instrument containing the required disclosures or a statement by which the required disclosures are made, as required by Section 226.8(a) of Regulation Z.

PAR. 5. Subsequent to July 1, 1969, respondents have caused to be published advertisements as "advertisement" is defined in Section 226.2(b) of Regulation Z for the purpose of aiding, promoting or assisting, directly or indirectly, the extension of consumer credit in connection with the financing of insurance premiums. By and through the use of these advertisements, the respondents have stated the period of repayment without also stating all of the following items in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

1. The cash price;
2. The amount of the downpayment required or that no downpayment is required, as applicable;

3. The number, amount, and due dates or periods of payments scheduled to repay the indebtedness if the credit is extended;

4. The amount of the finance charge expressed as an annual percentage rate; and

5. The deferred payment price.

PAR. 6. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have 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 respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder and violation of the Federal Trade Commission Act; and

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

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

1. Respondent Insurance Finance Plan Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 887 Dexter St., Central Falls, R.I.

Respondent Maurice R. Loiselle is an officer of said corporation. He

formulates, directs and controls the policies, acts and practices of the said corporation, and his principal office and place of business is located at the above-stated address.

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

ORDER

It is ordered, That respondents Insurance Finance Plan Co., a corporation, its successors or assigns, and its officers, and Maurice R. Loiselle, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq*) do forthwith cease and desist from:

1. Failing to use the term "cash price," as defined in Section 226.2(i) of Regulation Z, to describe the purchase price of the item, as required by Section 226.8(c)(1) of Regulation Z.

2. Failing to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

3. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment as required by Section 226.8(c)(3) of Regulation Z.

4. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

5. Failing to furnish the consumer with a duplicate of the instrument containing the required disclosures or a statement by which the required disclosures are made, as required by Section 226.8(a) of Regulation Z.

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

7. Stating in any advertisement the period of repayment which can be arranged in connection with a consumer credit transaction, without also stating all of the following items in terminology prescribed under

Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z.

- (i) The cash price;
- (ii) The amount of the downpayment required or that no downpayment is required, as applicable;
- (iii) The number, amount, and due dates or periods of payments scheduled to repay the indebtedness if the credit is extended;
- (iv) The amount of the finance charge expressed as an annual percentage rate; and
- (v) The deferred payment price.

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

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

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

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

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IN THE MATTER OF
INSURANCE BUDGETING, INC., ET AL.

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

Docket C-2623. Complaint, Jan. 6, 1975 - Decision, Jan. 6, 1975

Consent order requiring a Providence, R.I., insurance premium financier, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Marc A. Comras.*

For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Insurance Budgeting, Inc., a corporation, and Richard A. L'Europa, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Insurance Budgeting, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 10 Dorrance St., Providence, R.I.

Respondent Richard A. L'Europa is an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporation, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the business of lending money to the public in connection with the financing of insurance premiums.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend consumer credit, as "consumer

credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents in the ordinary course of business as aforesaid, have caused and are causing to be extended consumer credit as "consumer credit" is defined in Regulation Z, and have caused and are causing customers to execute a binding premium financing agreement, hereinafter referred to as the "agreement." Respondents do not provide these customers with any other consumer credit cost disclosures.

By and through the use of the agreement respondents:

1. Failed in some instances to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

2. Failed in some instances to disclose the annual percentage rate computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

3. Failed in some instances to disclose the annual percentage rate accurately to the nearest quarter of one percent in accordance with the provisions of Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

4. Provide additional information which misleads or confuses the customer or obscures or detracts attention from the information required to be disclosed by Regulation Z, in violation of Section 226.6(e) of Regulation Z.

5. Failed to make the disclosures required by Section 226.8 of Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have 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 respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the

Truth in Lending Act and the implementing regulation promulgated thereunder and violation of the Federal Trade Commission Act; and

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

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

1. Respondent Insurance Budgeting, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 10 Dorrance St., Providence, R.I.

Respondent Richard A. L'Europa is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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

ORDER

It is ordered, That respondents Insurance Budgeting, Inc., a corporation, its successors and assigns, and its officers, and Richard A. L'Europa, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*) do forthwith cease and desist from:

1. Failing to disclose the sum of the cash price, all charges which are

included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price" as required by Section 226.8(c)(8)(ii) of Regulation Z.

2. Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

3. Failing to disclose the annual percentage rate accurately to the nearest quarter of one percent in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

4. Stating, utilizing or placing any additional information in conjunction with the disclosures required by Regulation Z to be made, which information misleads or detracts attention from the information required by Regulation Z to be disclosed.

5. Failing to make all disclosures required by Regulation Z clearly, conspicuously, and in meaningful sequence, as required by Section 226.6(a) of Regulation Z.

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

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

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

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

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

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Order

IN THE MATTER OF

KOSCOT INTERPLANETARY, INC., ET AL.

Docket 8888. Order, Jan. 7, 1975

Order directing general counsel to take necessary and appropriate action to preserve restitutionary or any other consumer redress claim.

Appearances

For the Commission: *Quentin P. McColgin* and *David C. Keehn*.
For the respondents: *Leonard & Cohen*, Wash., D. C.

ORDER DIRECTING GENERAL COUNSEL TO TAKE NECESSARY AND
APPROPRIATE ACTION TO PRESERVE POSSIBLE RESTITUTIONARY
CLAIM

This matter is before us on the administrative law judge's order of Dec. 23, 1974, certifying complaint counsel's "Motion that the General Counsel be Directed to Take Action to Preserve the Commission's Claim Against Respondent Koscot Interplanetary, Inc.," which motion respondents have not answered. Specifically complaint counsel report that respondent Koscot Interplanetary, Inc. is in bankruptcy proceedings wherein a settlement is pending which could foreclose any claim in restitution which might arise out of this action. Such a foreclosure would be contrary to the public interest. Accordingly,

It is ordered, That the General Counsel take such action as is necessary and appropriate for the protection of the public interest in any restitutionary claim or any other claim for consumer redress which may arise out of the above-captioned proceeding.

IN THE MATTER OF

HOLIDAY MAGIC, INC., ET AL.

Docket 8834. Order, Jan. 8, 1975

Denial of respondent Olivo's motion for reconsideration and motion for modification of final order; denial without prejudice to resubmission at appropriate time, of respondent's petition to reopen proceedings concerning adequacy of funds; and denial of respondent's motion for extension of time to file briefs in support of aforementioned motions and petition.

Appearances

For the Commission: *Joseph S. Brownman* and *D. Stuart Cameron*.

Order

85 F.T.C.

For the respondents: *Shearer, Lanctot, Thomas & Knorp*, San Francisco, Calif.

ORDER DENYING RESPONDENT'S MOTION FOR RECONSIDERATION,
ET AL.

On Oct. 15, 1974 84 F.T.C. 347, the Commission issued its decision and order in this matter. Respondent Olivo has timely filed for reconsideration and modification of the order as it affects him, pursuant to Section 3.55 of the rules of practice, and has petitioned that the matter be reopened for consideration of the ability of respondent Olivo, as executor for the estate of William Penn Patrick, to make restitution as required by the order of the Commission.¹ An extension of time is also sought within which to file briefs in support of the motions for reconsideration and reopening. Complaint counsel have filed an Answer opposing the motions. For the reasons stated below, the motion for reconsideration and modification must be denied with prejudice, while the motion for reopening will be denied but without prejudice to renewal at such time as the order herein (pursuant to which the motion for reopening would appropriately be made) becomes final.

Section 3.55 requires in part that:

Any petition filed under this subsection must be confined to new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission.

Respondent's motion for reconsideration and modification entirely fails to meet the requirements of the pertinent rule, inasmuch as respondent Olivo was given ample opportunity subsequent to his substitution as a party in this case to brief the issues now raised. The withdrawal of counsel to which reference is made in the motion apparently occurred well after the time allotted for such briefing.

In addition, the Commission has fully considered in reaching its final decision the arguments raised by counsel in the motion to reconsider. The Commission does not see any conflict or inconsistency between a consent settlement which permits the estate of a wrongdoer to escape primary liability for the violation of one law, and a litigated order which requires the estate to make restitution based on violation of a different law. The reasons for differing treatment of the corporation and executor with respect to restitution are stated in the Commission's decision, and relate to the differing obligations imposed on the two by prior consent settlements. The motion for reconsideration simply confirms the propriety of the distinction that was made. Nor, we

¹ "Motion for Reconsideration and Motion for Modification of Final Order; and Petition to Reopen Proceedings Concerning Adequacy of Funds," filed Dec. 11, 1974. Respondent received an extension of seven days, beyond the 20 allowed by the rules, within which to file a motion for reconsideration, and said motion has been filed within 27 days of the date of service of the final order upon him.

believe, does the fact that the estate is subject for certain purposes to the jurisdiction of the Marin Superior Court in any way affect the authority and duty of the Commission to adjudicate the obligations of the executor under Section 5.

Those points raised by respondent concerning the difficulty of compliance with the order, and the lack of funds with which to comply, may properly be addressed at the compliance stage. Paragraph V(3)(e) of the final order provides that respondent may petition to reopen within 60 days of the effective date of the order upon a claim that respondent lacks sufficient funds to make restitution. If, as respondent implies, he lacks access to the names of distributors which the order provides shall accompany an application for reopening, that fact should be indicated clearly in the petition and this will not be a bar to the reopening. The petition to reopen this matter is at this stage, however, premature, and will therefore be rejected without prejudice to renewal at such time as the order in this matter becomes final. The motion for an extension of time within which to file briefs relating to respondent's motions and petition will also be denied as no valid reason has been given to warrant the delay. Therefore,

It is ordered, That respondent's Motion for Reconsideration and Motion for Modification of Final Order be denied, and that respondent's Petition to Reopen Proceedings Concerning Adequacy of Funds be denied without prejudice to resubmission at an appropriate time; and

It is further ordered, That respondent's Motion for Extension of Time to File Briefs in Support of Motion for Reconsideration and Motion for Modification and Petition to Reopen Proceedings Concerning Adequacy of Funds be denied.

Commissioner Nye not participating.

IN THE MATTER OF

RELIABLE MORTGAGE CORPORATION, ET AL.

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

Docket 8956. Complaint, Mar. 5, 1974 - Decision, Jan. 8, 1975

Order requiring a Los Angeles, Calif., loan company, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Complaint

85 F.T.C.

Appearances

For the Commission: *David G. Cameron* and *Kendall H. MacVey*.
For the respondents: *Alvin F. Howard*, *Horowitz*, *Howard* and *Bloom*, Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of 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 Reliable Mortgage Corporation, a corporation, and Edward Siegel, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and implementing regulation and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

PARAGRAPH 1. Respondent Reliable Mortgage Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 320 N. Vermont Ave., Los Angeles, Calif.

Respondent Edward Siegel is an individual and is the principal corporate officer of Reliable Mortgage Corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for many years have been, engaged in the business of arranging loans secured by real property for a fee.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arrange for the extension of consumer credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business as aforesaid, have caused to be published, advertisements, as "advertisement" is defined in Section 226.2 of Regulation Z, which advertisements aided, promoted, or assisted, directly or indirectly, the extension of other than open end credit. Respondents, in certain of these advertisements, have stated the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an annual percentage rate, using the term "annual percentage rate," as "annual

percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 5. By and through the acts and practices set forth above, respondents have failed to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Act, such failure to comply constitutes a violation of the Truth in Lending Act, and, pursuant to Section 108 thereof, respondents have violated the Federal Trade Commission Act.

INITIAL DECISION BY HARRY R. HINKES, ADMINISTRATIVE LAW
JUDGE

November 11, 1974

PRELIMINARY STATEMENT

In a complaint issued by the Federal Trade Commission on Mar. 5, 1974, respondents Reliable Mortgage Corporation and Edward Siegel were charged with failing to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of that act, such failure to comply constitutes a violation of the Truth in Lending Act and pursuant to Section 108 thereof respondents were charged to have violated the Federal Trade Commission Act. In their answer to the complaint respondents denied Paragraphs Four and Five of the complaint which charge a violation of law. In addition, as an affirmative defense, respondents alleged that any order issued herein would injure the consuming public and interfere with competitive conditions. Respondents, however, made no answer to Paragraphs One, Two or Three of the complaint which establish the identity of the respondents and the nature of their business. Paragraphs One, Two and Three of the complaint are, therefore, deemed to have been admitted pursuant to Section 3.12(b)(1)(ii) of the Rules of Practice of the Federal Trade Commission.

On May 13, 1974, respondents were served by complaint counsel with a request for admissions. Respondents did not respond to this request. Indeed, counsel for the respondents in a letter dated June 17, 1974, stated:

We will not reply to your request for admissions, and they will be automatically admitted under the rules.

Indeed, Section 3.31 of the Commission's Rules of Practice dealing with admissions states:

(b) The matter is admitted unless within 10 days after the service of the request . . . the party to whom the request is directed serves upon the party requesting the admission . . . a sworn written answer or objection addressed to the latter* * *.

After unsuccessful attempts at settlement, complaint counsel filed a Motion for Summary Decision on Sept. 24, 1974, alleging that there was no genuine issues as to any material fact and that a decision should be rendered as a matter of law. Counsel for the respondent then withdrew from this proceeding and, with the consent of the respondents, substituted the respondents *in propria persona*. Nevertheless, oral argument was set on complaint counsel's Motion for Summary Decision and respondents were advised of the date and place for said oral argument. By letter dated Oct. 7, 1974, respondents indicated their intention not to appear at oral argument. Oral argument was held on Oct. 15, 1974. Respondents did not appear nor were they represented.

On the basis of the complaint, respondents' answer to the complaint and complaint counsel's request for admissions which went unanswered by respondents, I make the following:

FINDINGS OF FACT

1. Respondent Reliable Mortgage Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 320 N. Vermont Ave., Los Angeles, Calif.

Respondent Edward Siegel is an individual and is the principal corporate officer of Reliable Mortgage Corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his address is the same as that of the corporate respondent. (Par. 1 of the Comp.)

2. Respondents are now, and for many years have been, engaged in the business of arranging loans secured by real property for a fee. (Par. 2 of the Comp.)

3. In the ordinary course and conduct of their business as aforesaid, respondents regularly arranged for the extension of consumer credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. (Par. 3 of the Comp.)

4. Respondents caused to be published an advertisement stating "At Reliable Mortgage your loan will cost you a lot less. Our interest rate is 8-1/2 percent." The ad does not contain the words "annual percentage rate." (Comp. Counsel's unanswered request for admissions.)

5. The above ad was published in the following newspapers on the dates indicated:

Los Angeles Times: Feb. 19, 20, 25, Mar. 4, 11, 18 and 25, 1973.

Orange County Metro Group: Feb. 19 and 20, 1973.

Santa Ana Register: Feb. 25, 26, 27, 28, Mar. 4, 11, 18 and 25, 1973.

San Gabriel Valley Tribune: Feb. 19, 20, 25, Mar. 4, 11, 18, and 25, 1973. (Comp. Counsel's unanswered request for admissions.)

6. Respondents caused to be published an advertisement stating: "A second trust deed loan for less than 10 per cent interest." The ad does not contain the words "Annual percentage rate." (Comp. Counsel's unanswered request for admissions.)

7. The above ad was published in the following newspapers on the dates indicated:

Los Angeles Times: Apr. 8, 29, May 6, 13, 20, 27, June 3 and 10, 1973.

Santa Ana Register: Apr. 22, 29, May 13 and 20, 1973.

Long Beach Independent: Apr. 8, 1973.

Los Angeles Sentinel: Apr. 12, 19, 26, May 3 and 10, 1973. (Comp. Counsel's unanswered request for admissions.)

COMMENT

Section 226.10 of Regulation Z implementing the Truth in Lending Act states:

No advertisement to aid, promote or assist, directly, or indirectly, any credit sale . . . shall state (1) the rate of a finance charge unless it states the rate of that charge expressed as an "annual percentage rate" using that term* * *.

It is clear that here respondents advertised a finance charge of 8-1/2 percent interest without specifying the annual percentage rate. Such ads were, therefore, violative of Regulation Z. *Beauty-Style Modernizers, Inc.*, Docket No. 8898, June 11, 1974 [83 F.T.C. 1759].

Some comment may be appropriate with respect to respondents' affirmative defense. In it respondents allege that they ceased the advertisements to which the Commission had made objection even though they believed the Commission's objections were unjustified and that the unfavorable publicity of this proceeding has injured the consuming public by discrediting the respondents although their interest charges were lower than others in competition with them. The Commission has held, however, that:

the fact that past unlawful practices have ceased or been suspended is no assurance that they will not be resumed at some time in the future, absent the deterrent effect of a Commission order with the possibility of heavy civil penalties for violation. (*Koppers Co., Inc.* 77 F.T.C. 1675, 1684.)

See, also *Certified Building Products, Inc.* Docket 8875, Oct. 5, 1973 [83 F.T.C. 1004], *CCH Trade Regulation Rep.* ¶20,506 and *Zale Corporation*, 78 F.T.C. 1195, 1240.

I do not agree that compelling respondents to disclose their annual percentage rate would injure the public by discrediting them. If, indeed, respondents' annual percentage rate is lower than the rate charged by their competition it would appear advantageous to the respondent to advertise such annual percentage rate so that the consuming public may be able to compare the two easily.

ORDER

It is ordered, That complaint counsel's Motion for Summary Decision be, and the same hereby is, *granted*.

It is further ordered, That respondents Reliable Mortgage Corporation, a corporation, its successors and assigns and its officers and Edward Siegel, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with any advertisement to aid, promote, or assist, directly or indirectly, any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Stating the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 of Regulation Z, as prescribed by Section 226.10(d)(1) of Regulation Z.

2. Stating or utilizing any component of the annual percentage rate, such as the rate of interest, when such component is stated or utilized more conspicuously than the annual percentage rate.

3. Failing, in any advertisement, to make all disclosures as required by Section 226.10 of Regulation Z and in the manner prescribed therein.

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

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

FINAL ORDER

The administrative law judge filed his initial decision in this matter

on Nov. 11, 1974, finding respondents to have engaged in the acts and practices as alleged in the complaint and entering a cease-and-desist order against respondents. A copy of the initial decision and order was served on the respondents on Nov. 29, 1974. No appeal was taken from the initial decision.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision should become effective as provided in Section 3.51(a) of the Commission's Rules of Practice.

It is ordered, That the initial decision and order contained therein shall become effective on Dec. 30, 1974.

It is further ordered, That Reliable Mortgage Corporation, a corporation, and Edward Siegel, individually and as an officer of said corporation, shall within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

GENERAL MOTORS CORPORATION, ET AL.

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

Docket 8907. Complaint, Dec. 11, 1972 - Decision, Jan. 10, 1975

Consent order requiring a Detroit, Mich., automobile manufacturer, among other things to cease making unsubstantiated comparative claims as to the handling characteristics of automobiles. Further, the order dismisses the allegations of the complaint relating to the "Lubed-for-life chassis" claim for the Opel automobile. The complaint is dismissed as to respondent McCann-Erickson, Inc., G.M.'s New-York-City-based advertising agent.

Consent order requiring a Detroit, Mich., advertising agency, among other things to cease making unsubstantiated comparative claims as to the handling characteristics of automobiles.

Appearances

For the Commission: *Matthew Daynard and Edward D. Steinman.*

For the respondent: *Covington & Burling and Howrey, Simon, Baker & Murchison, Washington, D.C. Edwin A. Kiernan, Jr., N.Y., N.Y. Hill, Lewis, Adams, Goodrich & Tait, Detroit, Mich.*

Complaint

85 F.T.C.

COMPLAINT*

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that General Motors Corp., Campbell-Ewald Co., and McCann-Erickson, Inc., corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent General Motors Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3044 W. Grand Blvd., Detroit, Mich.

PAR. 2. Respondent Campbell-Ewald Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3044 W. Grand Blvd., Detroit, Mich.

PAR. 3. Respondent McCann-Erickson, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 485 Lexington Avenue, New York, N.Y.

PAR. 4. Respondent General Motors Corporation is now, and for some time last past has been, engaged in the manufacture, distribution, sale, and advertising of Chevrolet Vega and Buick Opel automobiles.

PAR. 5. Campbell-Ewald Co. is now, and for some time last past has been, an advertising agency of General Motors Corp., and now and for some time last past, has prepared and placed for publication and has caused dissemination of advertising material, including, but not limited to, the advertising referred to herein, to promote the sale of Chevrolet Vega automobiles.

PAR. 6. Respondent McCann-Erickson, Inc. is now, and for some time last past has been, an advertising agency of General Motors Corporation, and now and for some time last past, has prepared and placed for publication and has caused dissemination of advertising material, including, but not limited to, the advertising referred to herein, to promote the sale of Buick Opel automobiles.

PAR. 7. Respondent General Motors Corporation causes the said products, when sold, to be transported from its places of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent General Motors Corporation, maintains, and at all times

* Complaint published as amended by administrative law judge, Feb. 26, 1973, Mar. 14, 1973 and Mar. 19, 1973.

mentioned herein has maintained, a course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 8. In the course and conduct of their businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said automobiles in commerce, as "commerce" is defined in the Federal Trade Commission Act, by means of radio broadcasts transmitted by radio stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said automobiles in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 9. Typical of the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are the following:

(a) a radio commercial prepared for use by local dealers during the period Feb. 10, 1971 to Feb. 21, 1971, and May 1, 1971 to June 5, 1971, numbered C-V-1-1262-RT-60, entitled "DRIVE A VEGA," contains the following text:

ANNCR: There's only one way, really, to find out what a Chevy Vega is all about, and that's to drive one. Road and Track Magazine drove one and wound up saying * * * "Vega is beyond a doubt the best handling passenger car ever built in the U.S." Notice they didn't say the best handling *little* car * * * or the best handling *economy* car, but simply * * * the best handling passenger car. Now if you find that a little hard to swallow, we'll understand. After all, who'd expect an economical little car like Vega to be a hero on the highway? You'd expect it to be * * * well * * * economical. And Vega is. But Vega is *more*. Actually, it handles more like a sports car than an economy car. The steering is quick and easy yet nice and firm on straightaways. Acceleration is brisk, braking is excellent, the ride is smooth and quiet. (PAUSE) Vega. The little car that does everything well.

(b) a radio commercial broadcast on the CBS radio network on Feb. 12, 1971 at 6:00 P.M. Eastern Daylight Time, entitled "DON'T BUY" contains the following text:

The new Opel 1900 * * * lubed-for-life chassis.

PAR. 10. Through the use of said advertisement, identified in Paragraph Nine(a), and others similar thereto not specifically set out herein, disseminated as aforesaid, respondents General Motors Corporation and Campbell-Ewald Co. have represented, directly and by implication, that at the time that said respondents made the claims set forth in Paragraph Nine(a), said respondents had a reasonable basis from which to conclude that the Chevrolet Vega is the best handling passenger car ever built in the United States.

PAR. 11. In truth and in fact, at the time that respondents General

Motors Corporation and Campbell-Ewald Co. made the claims set forth in Paragraph Nine(a), said respondents had no reasonable basis from which to conclude that the Chevrolet Vega is the best handling passenger car ever built in the United States.

Therefore, the statements and representations set forth in Paragraphs Nine(a) and Ten were, and are, deceptive or unfair acts or practices.

PAR. 12. Through the use of said advertisement, identified in Paragraph Nine(b), and others similar thereto not specifically set out herein, disseminated as aforesaid, respondents General Motors Corporation and McCann-Erickson, Inc. have represented, directly and by implication, that at the time that said respondents made the claim set forth in Paragraph Nine(b), said respondents had a reasonable basis from which to conclude that the chassis of the Buick Opel 1900 never needs lubrication.

PAR. 13. In truth and in fact, at the time that respondents General Motors Corporation and McCann-Erickson, Inc. made the claim set forth in Paragraph Nine(b), said respondents had no reasonable basis from which to conclude that the chassis of the Buick Opel 1900 never needs lubrication.

Therefore, the statements and representations set forth in Paragraphs Nine(b) and Twelve were, and are, deceptive or unfair acts or practices.

PAR. 14. Respondents General Motors Corporation and Campbell-Ewald Co. have represented, through the use of the aforesaid advertisement and otherwise, directly and by implication, that the Chevrolet Vega is the best handling passenger car ever built in the United States.

At the time of said representation, said respondents had no reasonable basis to support said representation pertaining to the handling qualities of Chevrolet Vega automobiles.

Therefore, the aforesaid acts and practices were, and are, deceptive or unfair.

PAR. 15. Respondents General Motors Corporation and McCann-Erickson, Inc. have represented, through the use of the aforesaid advertisement and otherwise, directly and by implication, that the chassis of the Buick Opel 1900 never needs lubrication.

At the time of said representation, said respondents had no reasonable basis to support said representation pertaining to the economy of Buick Opel automobiles.

Therefore, the aforesaid acts and practices were, and are, deceptive or unfair.

PAR. 16. In the course and conduct of its aforesaid business, and at all

times mentioned herein respondent General Motors Corporation, has been and now is in substantial competition in commerce with corporations, firms and individuals engaged in the sale and distribution of automobiles of the same general kind and nature as that sold by respondent.

PAR. 17. In the course and conduct of their aforesaid businesses, and at all times mentioned herein, respondents Campbell-Ewald Co. and McCann-Erickson, Inc., have been, and now are, in substantial competition in commerce with other advertising agencies.

PAR. 18. The use by respondents of the aforesaid unfair or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of Chevrolet Vega and Buick Opel automobiles. As a result thereof, substantial trade is being unfairly diverted to respondent from its competitors.

PAR. 19. The aforesaid acts and practices of respondents as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair or deceptive acts or practices in commerce and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER AS TO GENERAL MOTORS CORPORATION
AND MCCANN-ERICKSON, INC.

The Commission having issued its complaint on Dec. 11, 1972, charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with a copy of that complaint; and

The Commission having duly determined upon motion certified to the Commission that, in the circumstances presented, the public interest would be served by waiver here of the provision of Section 2.34(d) of its rules which provides that the consent order procedure shall not be available after issuance of complaint; and

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

The Commission having thereafter considered the aforesaid agree-

ment and having determined that it provides an adequate basis for appropriate disposition of this proceeding, and having provisionally accepted said agreement, and the agreement containing consent order having been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order in disposition of the proceeding:

1. Respondent General Motors Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3044 W. Grand Blvd., in the city of Detroit, State of Michigan.

Respondent McCann-Erickson, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 485 Lexington Ave., 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 respondents, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent General Motors Corporation, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, in any manner, including the use of any endorsement, testimonial or statement made by any individual, group or organization, that any automobile is superior in handling to any other automobile or all other automobiles, unless at the time that any such representation is first disseminated:

(a) respondent has a reasonable basis for such representation, which shall consist of a competent scientific test or tests that substantiate such representation; and

(b) respondent's agents, employees or representatives who are responsible for engineering approval of any advertisement containing such representation rely on such test or tests in approving such advertisement and provide to respondent's agents, employees or representatives who are responsible for approval of such advertise-

ment a written statement that such test or tests exist which substantiate the representation.

2. Failing to maintain and produce accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of the documentation constituting the reasonable basis required by Paragraph I.1 of this order and which demonstrate that respondent's representatives relied on such reasonable basis as required in Paragraph I.1(b) of this order; and

(b) which shall be maintained by respondent for a period of three (3) years from the date on which any advertisement containing any such representation was last disseminated.

II

It is further ordered, That for the purposes of Paragraph I of this order:

1. The word "handling" shall be defined in terms of the response of the vehicle:

(a) under conditions where rapid steering inputs in evasive or emergency maneuvers are necessary;

(b) under cornering conditions at speeds in excess of 30 miles per hour in which levels of lateral acceleration in excess of .2g are attained; and

(c) in gusty crosswinds, on rough roads and under severe steering-braking conditions.

2. A statement as to the handling characteristics of an automobile implies that the automobile is superior in handling to any other automobile or all other automobiles if the statement is phrased in the comparative or superlative degree, or if any advertising containing such statement conveys a net impression of comparative handling superiority; *Provided, however,* That any statement or statements in such advertising phrased in the comparative or superlative degree regarding any characteristic or characteristics other than handling will not, for that reason alone and without a statistically valid consumer survey, render any statement in such advertising which does relate to the handling characteristics of an automobile and which is phrased in the positive degree to be deemed a representation that the automobile is superior in handling to any other automobile or all other automobiles.

3. "Scientific test" shall be defined and construed in accordance with the Federal Trade Commission's order as stated in *Firestone Tire [Rubber Co., Docket No. 8818 [81 F.T.C. 398]*.

In our view a scientific test is one in which persons with skill and expertise in the field conduct the test and evaluate its results in a disinterested manner using testing procedures generally accepted in the profession which best insure accurate results. This

is not to say that respondent always must conduct laboratory tests. The appropriate test depends on the nature of the claim made. Thus a road or user test may be an adequate scientific test to substantiate one performance claim, whereas a laboratory test may be the proper test to substantiate another claim. Respondent's obligation is to assure that any claim it makes is adequately substantiated by the results of whatever constitutes a scientific test in those circumstances.

III

It is further ordered, That the allegations of the complaint relating to the "lubed-for-life chassis" claim for the Opel automobile be, and hereby are, dismissed and that the complaint be, and hereby is, dismissed as to respondent McCann-Erickson, Inc. Further, all information submitted to the Commission supporting the aforementioned claim shall be placed on the public record.

IV

It is further ordered, That respondent General Motors Corporation shall forthwith distribute a copy of this order to each of its officers, agents, representatives or employees who are engaged in the creation or approval of advertisements.

V

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

VI

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

DECISION AND ORDER AS TO CAMPBELL-EWALD CO.

The Commission having issued its complaint on Dec. 11, 1972, charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with a copy of that complaint; and

The Commission having duly determined upon motion certified to the Commission that, in the circumstances presented, the public interest

would be served by waiver here of the provision of Section 2.34(d) of its rules which provides that the consent order procedure shall not be available after issuance of complaint; and

The respondent and counsel for the Commission having executed an agreement containing a consent order, an admission by 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 set forth in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission having thereafter considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, and having provisionally accepted said agreement, and the agreement containing consent order having been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order in disposition of the proceeding:

1. Respondent Campbell-Ewald Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3044 W. Grand Blvd., in the city of Detroit, State of Michigan.

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

ORDER

I

It is ordered, That respondent Campbell-Ewald Co., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication, in any manner, including the use of any endorsement, testimonial or statement made by any individual, group or organization, that any automobile is superior in handling to any other automobile or all other automobiles, unless at the time that any such representation is first disseminated:

- (a) respondent or its client has a reasonable basis for such

representation which shall consist of a competent scientific test or tests that substantiate such representation; or

(b) respondent has a reasonable basis for such representation which shall consist of an opinion in writing signed by a person qualified by education and experience to render such an opinion (who, if qualified by education and experience, may be a person retained or employed by respondent's client) that a competent scientific test or tests exist to substantiate such representation, provided that any such opinion also discloses the nature of such test or tests and; *Provided further*, That respondent neither knows nor has reason to know that such test or tests do not in fact substantiate such representation or that any such opinion does not constitute a reasonable basis for such representation.

2. Failing to maintain and produce accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of the documentation constituting the reasonable basis required by Paragraph I.1 of this order or, if respondent's compliance with Paragraph I.1 is based on its clients' reasonable basis, which consist of a memorandum so indicating; and

(b) which shall be maintained by respondent for a period of three (3) years from the date on which any advertisement containing any such representation was last disseminated by respondent.

II

It is further ordered, That for the purposes of Paragraph I of this order:

1. The word "handling" shall be defined in terms of the response of the vehicle:

(a) under conditions where rapid steering inputs in evasive or emergency maneuvers are necessary;

(b) under cornering conditions at speeds in excess of 30 miles per hour in which levels of lateral acceleration in excess of .2g are attained; and

(c) in gusty crosswinds, on rough roads and under severe steering-braking conditions.

2. A statement as to the handling characteristics of an automobile implies that the automobile is superior in handling to any other automobile or all other automobiles if the statement is phrased in the comparative or superlative degree, or if any advertising containing such statement conveys a net impression of comparative handling superiority; *Provided, however*, That any statement or statements in such advertising phrased in the comparative or superlative degree regarding any characteristic or characteristics other than handling will not, for that reason alone and without a statistically valid consumer

survey, render any statement in such advertising which does relate to the handling characteristics of an automobile and which is phrased in the positive degree to be deemed a representation that the automobile is superior in handling to any other automobile or all other automobiles.

3. "Scientific test" shall be defined and construed in accordance with the Federal Trade Commission's order as stated in *Firestone Tire [Rubber Co., Docket No. 8818 [81 F.T.C. 398]*.

In our view a scientific test is one in which persons with skill and expertise in the field conduct the test and evaluate its results in a disinterested manner using testing procedures generally accepted in the profession which best insure accurate results. This is not to say that respondent always must conduct laboratory tests. The appropriate test depends on the nature of the claim made. Thus a road or user test may be an adequate scientific test to substantiate one performance claim, whereas a laboratory test may be the proper test to substantiate another claim. Respondent's obligation is to assure that any claim it makes is adequately substantiated by the results of whatever constitutes a scientific test in those circumstances.

III

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its officers, agents, representatives or employees who are engaged in the creation or approval of advertisements.

IV

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

V

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

Complaint

85 F.T.C.

IN THE MATTER OF

FEDDERS CORPORATION

ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 8932. Complaint, June 11, 1973* - Final Order, Jan. 14, 1975*

Order requiring an Edison, N.J., distributor of Fedders air conditioners, among other things to cease making false uniqueness claims and false and unsubstantiated claims as to certain performance characteristics for its product and failing to maintain accurate records.

Appearances

For the Commission: *Heidi P. Sanchez* and *Paul G. Foldes*.
For the respondent: *Sydney B. Wertheimer, Weisman, Celler, Spett, Modlin & Wertheimer*, N.Y., N.Y.

COMPLAINT

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

PARAGRAPH 1. Respondent Fedders Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Edison, N.J.

PAR. 2. Respondent Fedders Corporation is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders room air conditioners, including Fedders Model ACL20E3DX Room Air Conditioners.

PAR. 3. In the course and conduct of its aforesaid business, respondent Fedders Corporation now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various States of the United States, and in the District of Columbia. Respondent Fedders Corporation therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air

* Complaint reported as amended by Administrative Law Judge's order of January 10, 1974.

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

PAR. 4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders Corporation has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent.

PAR. 5. In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of the said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of said room air conditioners, including but not limited to, advertisements printed in newspapers located in various States of the United States and in the District of Columbia, which newspapers are disseminated across states lines.

PAR. 6. Typical of the statements and representations contained in said advertisements, but not all inclusive thereof, is the following segment of the print advertisement for Fedders room air conditioners:

RESERVE Cooling Power - - only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days.

PAR. 7. By and through the use of the aforesaid statements and representations, respondent has represented, directly or by implication, that reserve cooling power is a unique feature of Fedders room air conditioners, not found in other room air conditioners.

PAR. 8. In truth and in fact, "reserve cooling power," referring to an increased cooling capacity at high loading conditions, is not a unique feature of Fedders room air conditioners. In fact, comparable room air conditioners made by other companies provide an increase in cooling capacity at high loading conditions.

Therefore, the statements and representations referred to in Paragraphs Six and Seven were and are false, misleading, and deceptive, and the advertisements referred to in Paragraphs Five, Six, and Seven were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 9. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use.

PAR. 10. In truth and in fact, at the time the aforesaid statements and

representations were made, respondent had no reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use.

Therefore, the statements and representations referred to in Paragraphs Six, Nine, and Ten were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Five and Six were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 11. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, respondent had no reasonable basis from which to conclude that such was the fact.

Therefore, the statements and representations referred to in Paragraphs Six and Eleven were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Five and Six were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 12. The use by respondent of the aforesaid unfair or deceptive acts or practices has had, and now has, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts or 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 in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

The following is the form of order which the Commission has reason to believe should issue if the facts are found as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Fedders Corporation might be inadequate fully to protect the consuming public or the competitive conditions of the air conditioning industry, the Commission may order such other relief as it finds necessary or appropriate.

ORDER

I

It is ordered, That respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of the respective products hereinafter referred to, do forthwith cease and desist from:

1. representing, directly or by implication, that an increase in cooling capacity at high loading conditions of Fedders room air conditioners is a unique feature of such air conditioners;

2. representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any other material respect, unless such is the fact;

3. representing, directly or by implication, that Fedders room air conditioners, compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions of use, unless at the time such representation is made, respondent has a reasonable basis for such representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

4. making, directly or indirectly, any other statement or representation in any advertising or sales promotional material as to the performance characteristics of any Fedders air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

5. failing to maintain and produce accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the performance characteristics of, or the uniqueness of any feature of, any Fedders air conditioning product or system; and

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of paragraph 5 shall be in effect for a period of ten (10) years from the date this order becomes final.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

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 any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days and at the end of six (6) months after the effective date of the order served upon it, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW
JUDGE

JULY 15, 1974

PRELIMINARY STATEMENT

Respondent Fedders Corporation, a corporation, is charged with violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). The complaint issued by the Commission on June 11, 1973, alleges that respondent, in connection with the advertising, offering for sale, sale and distribution of its room air conditioners to purchasers thereof, has represented, directly or by implication, through statements and representations in advertisements placed in newspapers of interstate circulation, that "reserve cooling power" (hereinafter sometimes referred to as "RCP") is a unique feature of its room air conditioners, not found in other room air conditioners. However, in truth and in fact, the complaint alleges, RCP,

referring to an increased cooling capacity at high loading conditions, is not a unique feature of Fedders room air conditioners, but that, in fact, comparable room air conditioners made by other companies provide an increase in cooling capacity at high loading conditions.

The complaint further alleges that respondent has also represented that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that the Fedders room air conditioners, compared with other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use. In truth and in fact, the complaint alleges, at the time the said statements and representations were made, respondent had no reasonable basis for such statements and representations.

The complaint also alleges that by and through the use of the aforesaid statements and representations in respect to RCP, respondent has represented, directly or by implication, that the Fedders room air conditioners, compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, the complaint alleges, respondent had no reasonable basis from which to conclude that such was the fact.

In brief, the complaint alleges that respondent has (1) made a uniqueness claim for its room air conditioners when such is not a fact, (2) has represented that it had a reasonable basis for making a uniqueness claim for its room air conditioners when it had no reasonable basis for making such a claim, and (3) has represented that its room air conditioners, when compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use when it had no reasonable basis from which to conclude that such was the fact.

The above practices are alleged to have the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of said products by reason of such erroneous and mistaken belief. The said practices are alleged to be false, misleading and deceptive, and constitute unfair methods of competition and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Respondent's Answer, filed Aug. 14, 1973, generally admitted the practices alleged in the complaint, but denied that such conduct was unlawful. Respondent also interposed an affirmative defense, asserting that respondent, "in good faith, many months prior to the issuance of

notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to 'reserve cooling power' and has not since resumed the dissemination of any such material." Respondent's Answer also alleges "as and for mitigating circumstances * * * in framing any order" that its claim as to the uniqueness of the RCP feature of its room air conditioners is the only advertising claim of respondent alleged in the complaint to be false, misleading or deceptive, and was one of approximately ten advertising claims made by respondent as to which it was required, by Commission order of Oct. 13, 1971, to furnish supporting material. Respondent's Answer asserts that it "duly furnished such material in response to all the other advertising claims above referred to, and none of such other claims has been challenged by the Commission."

Thereafter, on Aug. 17, 1973, complaint counsel filed a Motion to Strike Affirmative Defenses on the grounds that they are without merit, do not constitute an affirmative defense, and are appropriately denials. On Aug. 24, 1973, Motion of Complaint Counsel for Summary Decision was filed.

At a prehearing conference held on Aug. 27, 1973, it was agreed that complaint counsel would file a motion to amend the complaint, and on that date Motion of Complaint Counsel to Amend Complaint and to Amend Motion for Summary Decision was filed. Thereafter, on Sept. 6, 1973, the undersigned issued an order granting an extension of time until Sept. 21, 1973 for respondent to file an answer to the amended complaint, which time to answer was subsequently extended until Nov. 12, 1973.

At a further prehearing conference held on Nov. 30, 1973, respondent's Answer to Amended Complaint filed on Nov. 12, 1973, was discussed. In its Answer, respondent generally admitted the factual allegations of the complaint (see PHC Tr. 56-60), but denied those paragraphs which allege the respondent's conduct to be unlawful. At the said prehearing conference, the complaint was further amended on the record by the undersigned as follows (PHC Tr. 74):

I think the two major points were that the complaint is concerned with all Fedders room air conditioners, and is concerned with all advertisements which made the claim that reserve cooling power was unique, and in paragraphs 9 through 12, we are reading into the complaint, "compared with all other room air conditioners." Those are the amendments, and I think making them on the record here is sufficient.

Respondent, in response to the amendments made orally at the prehearing conference, filed an Answer to Further Amended Complaint on Dec. 28, 1973. So that the public record would reflect these amendments to the complaint made at the prehearing conference, an Order Further Amending Complaint was issued by the undersigned on

Jan. 10, 1974. Respondent was given until Jan. 21, 1974 to further amend its Answer, if necessary. No further answer was filed.

The First Stipulation of the Parties was filed on Mar. 19, 1974. This Stipulation provides that the term "reserve cooling power" shall refer to the description of that term which is stated in Paragraphs 5 and 8 through 11 of respondent's Answer to Further Amended Complaint, complaint counsel thereby in effect adopting respondent's definition of RCP in lieu of the definition of that term set forth in the complaint. The Second Stipulation of the Parties, also filed on Mar. 19, 1974, is an agreement that the information contained therein is a fair and accurate description of the extent of dissemination of Fedders room air-conditioner advertising in four sample areas over a two-year period.

A further prehearing conference scheduled for Mar. 27, 1974 was cancelled and rescheduled for Mar. 29, 1974 because of the illness of counsel for respondent. Due to the continued illness of counsel for respondent, the prehearing conference scheduled for Mar. 29, 1974 was cancelled, and a formal hearing was scheduled by the undersigned for Apr. 16, 1974.

At the formal hearing held on Apr. 16, 1974, no witnesses were called; respondent's exhibits 1 A-Z-55, 2 A-B, and Joint Exhibit 1 A-I were received in evidence; complaint counsel's Motion to Strike Affirmative Defenses and Motion for Summary Decision were denied on the record; the record was closed for the reception of evidence; and, upon request of counsel for respondent, the filing of simultaneous proposed findings was postponed from May 16, 1974 to May 30, 1974, and the filing of replies thereto postponed from May 30, 1974 to June 10, 1974 (Tr. 99-101). Respondent's time in which to submit a reply was subsequently extended to June 12, 1974.

A Stipulation of the Parties, dated Apr. 10, 1974, referring to the term "reserve cooling power," was filed on Apr. 12, 1974. On Apr. 24, 1974, an Order Incorporating into the Record Stipulation of the Parties, dated Apr. 19, 1974, was issued by the undersigned. By this Stipulation, the parties accepted respondent's definition of "reserve cooling power" for all purposes of this proceeding.

The parties have submitted proposed findings, supporting memoranda, and proposed orders. Respondent has also filed a reply brief. This proceeding is therefore before the undersigned based upon the complaint, as amended, the answers filed by respondent, the stipulations of the parties, the joint exhibit of the parties, the proposed findings and memoranda submitted by the parties, and respondent's reply brief. No witnesses were called to testify, and the exhibits of record are by stipulation. Thus, the basic facts herein are undisputed.

The submissions by the parties have been given careful consideration

and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and include references to the principal supporting evidence in the record. Such references are intended to serve as convenient guides, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are set forth in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CPF - Proposed Findings of Fact, Conclusions of Fact And Law, And Order submitted by Complaint Counsel.

CM - Memorandum in Support of the Proposed Findings of Fact, Conclusions of Fact and Law, and Order submitted by Complaint Counsel.

RAFAC - Respondent's Answer to Further Amended Complaint.

RPF - Respondent's Proposed Findings of Fact and Conclusions of Law.

RB - Respondent's Brief to the Administrative Law Judge.

RO - Proposed Order submitted by Respondent.

RX - Respondent's Exhibits.

Jt. Stip. - Joint stipulation submitted by the parties. (This abbreviation will be followed by the number of the stipulation and the page number upon which the evidence being cited appears.)

Jt. Ex. - Joint Exhibit of the parties.

PHC Tr. - Transcript of the prehearing conferences, followed by the page number being referenced.

Tr. - Transcript of the formal hearing, followed by the page number being referenced.

FINDINGS OF FACT

Identity and Business of Respondent

1. Respondent Fedders Corporation, hereinafter sometimes referred to as "Fedders," 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 Edison, N.J. (Admitted, RAFAC, Par. 1).

2. Respondent Fedders is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders air conditioners, including Fedders room air conditioners (Admitted, RAFAC, Par. 1).

3. In the course and conduct of its aforesaid business, respondent

Fedders now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various States of the United States, and in the District of Columbia. Respondent Fedders therefore maintains, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted, RAFAC, Par. 1).

4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent (Admitted, RAFAC, Par. 1).

5. In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of its said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of its room air conditioners, including but not limited to, advertisements printed in newspapers located in various States of the United States and in the District of Columbia, which newspapers are disseminated across state lines (Admitted, RAFAC, Par. 1).

The Challenged Advertisements

6. Pursuant to a resolution of the Federal Trade Commission dated June 9, 1971, and amended July 7, 1971, entitled "Resolution Requiring Submission of Special Reports Relating to Advertising Claims and Disclosure Thereof by the Commission in Connection with a Public Investigation", 36 Fed. Reg. 12,058 (June 9, 1971), as amended, 36 Fed. Reg. 14,680 (July 7, 1971) (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 1, Appendix B, p. 1), on Sept. 30, 1971, the Commission ordered respondent Fedders to file a Special Report on specific advertising claims. One of the advertising claims for which the Commission requested documentation and other substantiation by Special Report was:

RESERVE Cooling Power - only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days.

The information demanded was:

All documentation and other substantiation for the claim that only the Fedders room air conditioner has extra cooling power that assures cooling on extra hot, extra humid days. (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 4.)

The specific advertisement questioned by the Commission's Special Report appeared in *The Monroe Morning World*, Monroe, Louisiana, June 10, 1971 (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 3).

7. Respondent filed its response to the Commission's Special Report on Dec. 22, 1971. In its response, Fedders admitted the lack of

substantiation for the claim that RCP was unique to Fedders. Respondent stated:

As to claim that *only* Fedders has this reserve cooling power feature, we have found that this claim is not substantiated and do not propose to include it in any further advertising copy which we may promulgate. (Motion of Complaint Counsel For Summary Decision, Appendix B, p. 3.)

8. The advertisement set forth in the Commission's Special Report was incorporated in Paragraph Six of the complaint herein and was alleged in Paragraphs Seven and Eight of the complaint to be a uniqueness claim for Fedders room air conditioners, which is false and deceptive. Respondent has admitted that this advertisement represented, directly or by implication, that RCP is a unique feature of Fedders room air conditioners. Respondent further admitted that RCP, referring to ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners and that comparable room air conditioners made by some other companies have such ability and feature (RAFAC, pp. 1-2).

The complaint in Paragraph Eight alleges that RCP refers to "an increased cooling capacity at high loading conditions." The parties have stipulated that RCP refers to the "ability to function satisfactorily under conditions of extreme heat and humidity" (First Stipulation of the Parties; RAFAC, p. 2; Stipulation of the Parties dated Apr. 19, 1974). These meanings are essentially equivalent and any distinction between the two definitions is without significance in this proceeding.

9. By and through the use of the aforesaid statements and representations, respondent has represented, directly or by implication, that RCP is a unique feature of Fedders room air conditioners, not found in other room air conditioners (Admitted, RAFAC, p. 1). In truth and in fact, RCP, referring to an ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners. In fact, comparable room air conditioners made by some other companies function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, p. 2). Therefore the statements and representations that RCP is a unique feature of Fedders room air conditioners is false, misleading and deceptive.

10. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, Par. 5). In truth and in fact, at the time the

aforesaid statements and representations were made, respondent had no reasonable basis to support the representation that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, Par. 5). Therefore, the statements and representations were and are false, misleading and deceptive.

11. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, respondent had no reasonable basis from which to conclude that such was the fact (Admitted, RAFAC, Par. 5). Therefore, the statements and representations were and are false, misleading and deceptive.

12. The use by respondent of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

Respondent's Defenses

13. In its answers filed herein, including its Answer to Further Amended Complaint, respondent, as and for an affirmative defense, alleges that it, in good faith, many months prior to the issuance of notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to RCP and has not since resumed the dissemination of any such material. Respondent further alleged, as and for mitigating circumstances if the allegations in the complaint are sustained, that the advertising claim alleged in the complaint to be false, misleading or deceptive is only one of approximately ten advertising claims made by respondent as to which it was required by the Commission to furnish supporting material. Respondent furnished such material in respect to the other advertising claims in response to the Commission's order, and none of the other claims have been challenged by the Commission (RAFAC, pp. 3-4). Respondent further affirmatively averred in its Answer to Further Amended Complaint that the challenged statements and representations of uniqueness of RCP were so infrequently made and constituted

so small a percentage of respondent's advertising expenditures that its impact upon the purchasing public was insignificant (RAFAC, pp. 1-2).

Respondent's Expenditures for RCP Advertisements

14. In view of respondent's contentions concerning the insubstantiality of advertisements claiming uniqueness for RCP, the administrative law judge suggested there should be submitted for the record the total advertising expenditures, the total number of advertisements which utilized the term "reserve cooling power," the expenditures for those advertisements, the total number of advertisements which utilized a claim of uniqueness for "reserve cooling power," the total expenditures for those advertisements, as well as sample advertisements of both types. It was further suggested by the administrative law judge that such information could be based on a sample area (PHC, Tr. 70).

15. The sample areas agreed upon by the parties for the above purposes are as follows:

(1) The Florida Area:

This area, serviced during the years involved by Cain & Bultman, as distributor, comprised the entire State of Florida (except the extreme northwest portion thereof), and the eleven southeasternmost counties of the State of Georgia.

(2) The Washington, D.C. Metropolitan Area:

This area, serviced during the years involved by American Appliance Wholesalers, as distributor, consisted of the District of Columbia, together with thirteen Virginia counties and five Maryland counties in the surrounding area.

(3) The Philadelphia Metropolitan Area:

This area, serviced during the years involved by Samuel Jacobs Distributors, Inc. and its subsidiaries and affiliates, as distributors, consisted of the city of Philadelphia and nearby counties, of which twenty-one were in the State of Pennsylvania, eight in the State of New Jersey, and two in the State of Delaware.

(4) The New York Metropolitan Area:

This area, serviced during the years involved by L & P Electric Co., Inc. and its subsidiaries and affiliates, as distributors, consisted of New York City, Long Island, the eight southernmost counties of New York adjacent to New York City, thirteen counties in eastern and northern New Jersey, six counties in western and central Connecticut, and three counties in the southernmost part of Massachusetts (respondent's Response to Commission's Motion for Summary Decision, Exhibit 1 of the Pochick Affidavit; Tr. 88-90).

16. The time period agreed upon for the sample areas was the two

fiscal years of respondent ending Aug. 31, 1970 and Aug. 31, 1971, respectively (Second Stipulation of the Parties, p. 1; RFP, p. 9).

17. The parties stipulated that Fedders' total advertising expenditures for each fiscal year in each sample area for Fedders air conditioners of all types were approximately as follows (Second Stipulation of the Parties):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	\$176,000	\$245,000
Washington, D.C.	\$35,000	\$24,000
Philadelphia	\$180,000	\$118,000
New York	\$860,000	\$846,000

Of the above total, the following represents total advertising expenditures for each year in each sample area for cooperative newspaper advertising of Fedders room air conditioners (Second Stipulation of the Parties; Tr. 90):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	\$90,036.04	\$77,857.76
Washington, D.C.	\$28,760.87	\$6,717.95
Philadelphia	\$99,810.15	\$44,388.59
New York	\$247,403.62	\$142,313.53

The parties have stipulated that the total number of insertions of cooperative newspaper advertisements in each sample area were as follows (Second Stipulation of the Parties):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	1229	920
Washington, D.C.	163	85
Philadelphia	985	309
New York	1997	1202

Further, the parties stipulated that the following represents the total number of cooperative newspaper advertisements claiming RCP and the total expenditures for such advertisements (Second Stipulation of the Parties; Stipulation of the Parties dated Apr. 19, 1974):

	Fiscal 1969-1970		Fiscal 1970-1971	
	Inser- tions	Expendi- tures	Inser- tions	Expendi- tures
Florida	252	\$29,002.72	111	\$15,067.38
Washington, D.C.	73	\$10,987.70	25	\$2,236.24
Philadelphia	291	\$29,940.69	132	\$17,409.14

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New York	1487	\$129,131.33	738 \$48,266.75

The parties have stipulated that, of the above number of cooperative newspaper advertisements, the following number claimed uniqueness to Fedders of RCP followed by the expenditure for such advertisements:

	Fiscal 1969-1970		Fiscal 1970-1971	
	Inser- tions	Expendi- tures	Inser- tions	Expendi- tures
Florida	37	\$2,899.38	35	\$5,946.05
Washington, D.C.	9	\$826.91	8	\$371.93
Philadelphia	33	\$4,876.74	9	\$896.74
New York	33	\$1,750.06	9	\$701.90

18. On the basis of the above stipulated figures, respondent's expenditures for cooperative advertisements claiming uniqueness for RCP constitute the following ratio to total advertising expenditures and to total cooperative advertising expenditures:

	Total 2-yr. Expenditures	Total 2-yr. Expenditures For Advertising Claiming Uniqueness For Reserve Cooling Power	Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power To Total Adverti- sing Expenditures
Florida	\$421,000	\$8,845.43	2.1%
Washington, D.C.	59,000	1,198.84	2.03%
Philadelphia	298,000	5,773.48	1.94%
New York	1,706,000	2,451.96	.143%
	<u>\$2,484,000</u>	<u>\$18,269.71</u>	<u>.736%</u>

	Total 2-yr. Cooperative Advertising Expenditures	Total 2-yr. Expenditures For Advertising Claiming Uniqueness For Reserve Cooling Power	Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power To Total Coop- erative Advertising Expenditures
Florida	\$167,893.80	\$8,845.43	5.27%
Washington, D.C.	\$35,478.82	1,198.84	3.38%
Philadelphia	144,198.74	5,773.48	4.04%
New York	389,717.15	2,451.96	.63%
	<u>\$737,288.51</u>	<u>\$18,269.71</u>	<u>2.47%</u>

19. On the basis of the above stipulated figures, respondent's advertisements claiming uniqueness for reserve cooling power and advertisements not claiming uniqueness for reserve cooling power, and

the expenditures therefor, constitute the following ratio to the total number of cooperative advertisements utilized by respondent and the following ratio for the expenditures for such advertisements:

	Total Number Cooperative Advertisements 1969-1971	Total Number Cooperative Advertisements 1969-1971 Claiming Reserve Cooling Power	Total Number Cooperative Advertisements Claiming Unique- ness For Reserve Cooling Power
Florida	2149	363	72
Washington, D.C.	248	98	17
Philadelphia	1294	423	42
New York	3199	2225	42
TOTAL	6890	3109	173

	Ratio Advertisements Claiming Uniqueness For Reserve Cooling Power To All Reserve Cooling Power Adver- tisements 1969-1971
All Areas	5.56%

	Total Expenditures For Advertisements Claiming Reserve Cooling Power 1969-1971	Total Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power 1969-1971
Florida	\$ 44,070.10	\$8,845.43
Washington, D.C.	13,223.94	1,198.84
Philadelphia	47,349.83	5,773.48
New York	177,398.08	2,451.96
	\$282,041.95	\$18,269.71

	Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power To All Reserve Cooling Power Advertisements 1969-1971
All Areas	7.8%

20. In the Florida subarea, the majority of the advertisements with unique RCP claims were in newspapers with circulations of less than 50,000. However, there were several advertisements placed in newspa-

pers with daily circulation figures in excess of 170,000. In the Washington, D. C. subarea, most of such insertions were in small publications, none with a circulation of over 30,000 and most under 12,000. In the Philadelphia subarea, roughly one-half of the insertions were in small town or small city publications, with circulations of under 100,000. Several advertisements appeared in the *Philadelphia Inquirer* with a daily circulation of over 450,000. In the New York City subarea, all of the insertions were in small town or small city newspapers, the largest with a circulation of 66,000. Examination of the texts of these advertisements discloses that the unique RCP claim was featured in only a minority of the advertisements (RX 1).

21. The parties hereto have further stipulated that respondent's expenditures for advertising which claimed "reserve cooling power" were, with insignificant exceptions (the cost of certain store display cards and the imprints on certain factory cartons), confined to the aforesaid cooperative advertisements (Stipulation of the Parties dated Apr. 19, 1974).

Respondent's Advertisements Not Claiming Uniqueness For Reserve Cooling Power

22. Complaint counsel contend that Fedders' advertisements, referring to RCP without claiming uniqueness, suggested the superiority of the feature with language similar to that used in the uniqueness claims. Samples of advertisements selected by complaint counsel and respondent as representative of such advertisements are contained in the record (Second Stipulation of the Parties, Attachment A). These advertisements, while not claiming uniqueness for "reserve cooling power," state the following with respect to "reserve cooling power:"

RESERVE COOLING POWER * * * it's Fedders engineering "extra" which gives maximum cooling even when sunload reaches 115 degrees* * * and other units fail!

Fedders Sound Barrier models - as close to perfect as an air conditioner can get * * * plus Reserve Cooling Power for extra cooling strength.

You get Reserve Cooling Power for extra hot, extra humid days.

PLUS RESERVE COOLING POWER, TOO (for extra hot, humid days).

And you get: Reserve Cooling Power for extra hot, humid days; * * *.

23. Complaint counsel introduced no evidence to establish consumer perception of the representations contained in respondent's advertisements, or that there were latent or implied messages in the statements. The administrative law judge must therefore exercise his own judgment as to the representations, express or implied, contained in respondent's advertisements.

24. These advertisements, which state that "reserve cooling power"

is an "extra" or is a feature designed for extra hot, humid days, or gives extra cooling strength, do not claim such feature is *unique* with Fedders room air conditioners. The only advertisement which contains a comparative claim is the first representation set forth above, which states that "reserve cooling power" is a Fedders engineering "extra" which gives maximum cooling even when sunload reaches 115 degrees, and other units fail. This is a comparative representation, but it does not compare Fedders room air conditioners with *all* other room air conditioners.

25. The complaint challenges as unlawful Fedders' statements and representations that "reserve cooling power" is "a unique feature of Fedders room air conditioners" when such was not a fact (Paragraphs Seven and Eight); that, by and through the uniqueness claim, Fedders represented, directly or by implication, that Fedders had a reasonable basis from which to conclude the Fedders room air conditioners had a significantly increased ability to function satisfactorily under conditions of extreme heat and humidity when compared with all other room air conditioners, when in fact Fedders had no reasonable basis for making such claim (Paragraphs Nine and Ten); and that, by and through the use of the uniqueness claim, Fedders also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly increased ability to function satisfactorily under conditions of extreme heat and humidity when Fedders had no reasonable basis to conclude that such was the fact (Paragraph Eleven). Thus, the unlawful representations made by Fedders, which are challenged in the complaint, arise from the "uniqueness" claim for Fedders air conditioners, as set forth in Paragraph Six of the complaint.

26. A "uniqueness" claim necessarily connotes a comparison with all other air conditioners, unless the literal wording of the complaint warrants some other interpretation (see *ITT Continental Baking Company, Inc., et al.*, Docket No. 8860, Opinion of the Commission, dated Oct. 19, 1973, Slip Op., pp. 14-15 [83 F.T.C. 947, 957]). In fact, the administrative law judge amended the complaint allegations in this matter to specifically state that the uniqueness representations of superiority were to be measured against all other room air conditioners (PHC Tr. 48-49; Order Further Amending Complaint, Jan. 10, 1974). The administrative law judge therefore concludes that the representative advertisements of Fedders room air conditioners, which utilize "reserve cooling power," but which do not claim uniqueness for this feature, are not challenged in the complaint.

27. The stipulated advertising figures in the record establish that 45.1 percent of respondent's cooperative advertisements utilize RCP

representations, and 2.51 percent of respondent's cooperative advertisements claim uniqueness for RCP. Of all advertisements claiming RCP, 5.56 percent thereof claim uniqueness. As far as expenditures are concerned, 2.47 percent of total cooperative advertising expenditures were for advertisements claiming RCP. Of expenditures for advertisements claiming RCP, 7.8 percent thereof was expended for advertisements claiming uniqueness for RCP. In view of the small percentage of advertisements claiming uniqueness for RCP and the small percentage of expenditures for advertisements claiming uniqueness for RCP in relation to respondent's total advertising program involving RCP claims, the administrative law judge concludes, in the absence of any evidence presented by either party bearing on this issue, that there was no carry-over effect on consumers from advertisements claiming uniqueness for RCP to advertisements merely claiming RCP. The record is silent as to the type of in-store display cards utilized, or the extent of their use (see Finding 21).

Respondent's Discontinuance Defense

28. When Fedders responded to the Commission's Special Report on Dec. 22, 1971, it stated as follows:

As to the claim that *only* Fedders has this reserve cooling power feature, we have found that this claim is not substantiated and do not propose to include it in any further advertising copy which we may promulgate (Motion of Complaint Counsel for Summary Decision, Appendix B, p. 3; Jt. Ex. 1).

Also, on Dec. 22, 1971, Fedders sent a bulletin to all of its distributors advising that "Old powerful selling friends like 'Reserve Cooling Power,' 'multi-room cooling,' 'cools three rooms, even a small home,' 'installs in minutes,' 'germicidal filter' are no longer." Distributors were further advised that they are not to use any of the advertisements provided in 1971 and earlier years. Distributors are requested to advise dealers that advertisements must not make any claims for the Fedders product that are not made in Fedders' supplied 1972 materials (Jt. Ex. 1 H).

This bulletin does not acknowledge that "reserve cooling power" claims were untrue, or were capable of misleading customers, or could not be proved or substantiated. Instead, the bulletin states that Fedders is "eliminating every phrase that could possibly be questioned by the FTC" (Jt. Ex. 1 H). The bulletin also indicates that "reserve cooling power," along with the other advertising representations, are being eliminated "not that they are not provable or that they are misleading, but simply because the explanation and qualifications that would have to be included in each ad would take up too much space" (Jt. Ex. 1 H).

29. An affidavit by Harold Boxer, Director of Merchandising of Fedders, which is attached to respondent's Response to Commission's

Motion for Summary Decision, stated that the Fedders advertising department in or about 1964 or 1965 coined the phrase "reserve cooling power" as an expression of the operating characteristics under extreme temperatures of Fedders room air conditioners, and the words had been featured in Fedders' advertising through 1971.

30. In an affidavit attached to respondent's Response to Commission's Motion for Summary Decision, Paul C. Anderson, Advertising Manager for room air conditioners of Fedders, stated that all references to "reserve cooling power" were completely dropped from Fedders' advertising in Dec. 1971 and that those words have not been used by Fedders in the preparation of further advertising matter.

31. Sam Muscarnera, House Counsel for Fedders, has submitted an affidavit dated Apr. 15, 1974, which has been received into the record by stipulation of counsel for the parties (Jt. Ex. 1 C-G). Mr. Muscarnera has set forth the steps taken by Fedders in order to maintain firmer control, insofar as possible, over advertising. Mr. Muscarnera also stated that "the likelihood of Fedders' repetition of the offending practices charged is exceedingly remote" (Jt. Ex. 1 G).

32. The Commission served its Order to File Special Report calling for advertising substantiation on respondent on Oct. 15, 1971; notice of a proposed adjudicative hearing was served on respondent on Oct. 12, 1972; and the formal complaint herein issued on June 11, 1973 (RPF, p. 7).

33. There is no evidence in the record indicating that any claims for "reserve cooling power" have been disseminated since Dec. 22, 1971 (Jt. Ex. 1 A-E).

34. "Climatrol" brand room air conditioners are manufactured by Fedders, and marketed through a wholly-owned subsidiary known as Mueller Climatrol Corp. An advertisement for "Climatrol" central air conditioners appeared in the Mar. 4, 1974 issue of *Newsweek* magazine which claimed, among other things, that the rotary compressor of the unit was "exclusive." This advertisement was called to Fedders' attention by complaint counsel, who questioned the use of the word "exclusive" by Climatrol in light of the fact that similar products are manufactured and marketed by Fedders under the "Fedders" brand. Fedders has maintained, in an affidavit submitted by Mr. Muscarnera, that Mueller Climatrol Corp., in contrast to the great majority of Fedders' subsidiaries and divisions, is semi-autonomous, and its sales and advertising staff operate independently of the advertising organization and personnel of Fedders. Consequently, up to the time the above advertisement appeared, Mueller Climatrol Corp., had not cleared its advertising through Fedders, as had other Fedders divisions. Mueller Climatrol had previously been advised by Fedders to

avoid the use of the word "exclusive" in any context whenever possible, and, accordingly, as early as Oct. 15, 1973, had substituted the word "exciting" for the word "exclusive" as applied to the rotary compressor (Jt. Ex. 1 F).

35. While the exclusivity of the rotary compressor in the residential central air conditioning field is not challenged in this proceeding, the use of the word "exclusive" as to "Climatrol" brand units could, from a technical standpoint, create confusion in consumers' minds unless accompanied by appropriate explanatory material (Jt. Ex. 1 F). This incident is of significance to this proceeding in view of respondent's discontinuance argument, since it clearly indicates that Fedders had not taken appropriate steps, at least as of Oct. 1973, to prevent the promulgation of false or deceptive advertisements by all its subsidiaries and divisions because Climatrol advertisements were not cleared through Fedders as of that date. In fact, it appears that as late as Mar. 1974, Fedders' divisions and subsidiaries were utilizing advertisements containing representations which had not been reviewed and cleared by responsible Fedders officials.

CONCLUSIONS

The complaint, as amended by the administrative law judge, charges that respondent represented that reserve cooling power is a unique feature of Fedders room air conditioners, not found in other room air conditioners, and that, in fact, reserve cooling power is not unique as to Fedders room air conditioners. The complaint, as amended, also charges respondent with representing that it had a reasonable basis for the claim that reserve cooling power is unique with Fedders room air conditioners and that, in fact, respondent had no such reasonable basis for such representation. The amended complaint further charges that by use of the uniqueness claim, respondent represented that its room air conditioners operated in a way superior to the functioning of other room air conditioners, and that such is not a fact.

In its Answer to Amended Complaint, respondent admitted making these representations, that it had no reasonable basis therefor, and that there was no basis in fact for the representations. Therefore, all allegations of unlawful conduct charged in the complaint have been admitted. Under the doctrine pronounced by the Commission in *Pfizer*, "* * * it is an unfair practice in violation of the Federal Trade Commission Act to make an affirmative product claim without a reasonable basis for making that claim." *Pfizer, Inc.*, Docket 8819, Opinion of the Commission, 81 F.T.C. 23, 62 (1972).

Thus, the only issues remaining after the pleadings are whether these admittedly unlawful acts and practices have the tendency and

capacity to mislead a substantial portion of the purchasing public; whether discontinuance is a defense to an order in this proceeding; and whether respondent's conduct was sufficiently serious to support an order.*

DISCONTINUANCE

It is undisputed that claims relating to reserve cooling power have been discontinued. The circumstances surrounding discontinuance, set forth hereinafter, are likewise undisputed.

The advertising campaign for reserve cooling power was of lengthy duration, beginning at least in the mid-sixties and continuing until late 1971, the date of the discontinuance. The extended usage of the claims is a strong indication of the importance of said claims to the advertising strategy followed by respondent. Respondent has referred to the reserve cooling power advertising claims as an "[O]ld powerful selling friend(s)" (Jt. Ex. 1 H).

The discontinuance of reserve cooling power claims in late 1971 cannot be considered to have been a voluntary action. The record establishes that the discontinuance occurred as a direct result of respondent's awareness of the Commission's investigation of its advertising. The record clearly demonstrates that it was only during the preparation of the response to the Commission's Special Report that respondent made the decision to discontinue the uniqueness claim, as well as the more general claim regarding reserve cooling power. It was not until the same date that respondent filed its response to the Special Report with the Commission that it warned its distributors to stop making any reserve cooling power claims. "In other words, respondent stopped violating the law when it learned that the law's hand was already on its shoulder, * * *." *Coro, Inc., et al.*, Docket 8346, Opinion of the Commission, 63 F.T.C. 1164, 1201 (1963).

"That discontinuance of an unlawful practice, of itself, does not necessarily preclude the issuance of a cease and desist order is so well settled as to preclude further argument." *Giant Food, Inc.*, Docket 7773, Opinion of the Commission, 61 F.T.C. 326, 356 (1962), citing *Marlene's Inc. v. F.T.C.*, 216 F.2d 556, 559 (7th Cir. 1954). Further, the courts have consistently recognized the propriety of a cease and desist order when, as in this case, the discontinuance was not entirely voluntary. *Galter v. F.T.C.*, 186 F.2d 810, 812, 813 (7th Cir. 1951), *cert. den.* 342 U.S. 818 (1951); *Eugene Dietzgen Co. v. F.T.C.*, 142 F.2d 321, 330 (7th Cir. 1944), *cert. den.* 323 U.S. 730 (1944). Thus, the fact that respondent's discontinuance is directly attributable to the Commis-

* In its reply brief respondent states: "The central issues are two: first, whether under all the circumstances here involved, the complaint should be dismissed by reason of Respondent's discontinuance of the offending practice, and second, if the complaint is not dismissed, whether Complaint Counsel's Proposed Order * * * is impermissibly broad" (Reply Brief, pp. 1-2).

sion's investigation must be given substantial weight when judging the merits of respondent's discontinuance.

The First Circuit in *Coro, Inc. v. F.T.C.*, 338 F.2d 149, 153 (1964), *cert. den.* 380 U.S. 954 (1965), in upholding a Commission cease and desist order based on a showing of unfair and deceptive practices used in only one percent of the business solicited by a respondent which had no prior record of violations of the Federal Trade Commission Act, found the following circumstances which it said negated the respondent's defense of discontinuance:

But Coro gave the line of business up only after the Commission had started to investigate its practices therein and only a few months before the Commission filed its complaint, and we have only the current corporate officers' expression of intention not to resume the business. Coro has not disposed of its plant. It is still in the costume jewelry business and there is nothing to suggest that it does not intend to continue in that general industry.

The facts in the present case closely resemble the circumstances found by the Court in *Coro*. Respondent continues to sell air conditioners, continues to advertise air conditioners, and could resume making deceptive advertising claims at any time in the future. The only special circumstance demonstrated by respondent is affidavits submitted by corporate officials.

The steps taken by respondent's officials to insure that future advertising violations will be avoided appear less than satisfactory. The record shows that one of respondent's subsidiaries has as recently as Mar. 1974, long after the complaint herein had issued, widely disseminated a questionable uniqueness claim for an important performance characteristic of an air conditioner. In a joint exhibit, Mr. Muscarnera, respondent's in-house counsel, stated in an affidavit that a recent advertisement in a national news weekly magazine for a central air conditioner manufactured by Fedders, but sold under the Climatrol label, made a claim of exclusivity for Climatrol's rotary compressor, when central air conditioners sold under the Fedders label also have the exact same feature. Most importantly, Mr. Muscarnera admitted that he was unaware of the dissemination of this particular advertisement until it was recently brought to his attention by complaint counsel.

The philosophy on which the Commission's Ad Substantiation Program is based, is that corporations must strive to exercise a higher level of responsibility than previously, by *assuring* themselves that *before* they disseminate an advertising claim, sufficient substantiation exists to constitute a reasonable basis as to the validity of such claim. *Pfizer, Inc., supra*. The administrative law judge is definitely in accord with the holding in *Pfizer*. Clearly, respondent's admission of dissemination of a performance claim for its room air conditioners over a

period of several years without having a reasonable basis therefor demonstrates a deficiency in the maintenance of the required standard of corporate responsibility in the past. Moreover, despite respondent's assurances of future discontinuance of this type of objectionable conduct, and recitation of precautions taken to prevent such future recurrences, the Mar. 1974 Climatrol advertisement suggests that respondent's officers have failed to exercise adequate precautions to prevent respondent's unsubstantiated advertising claims.

Therefore, the administrative law judge is of the opinion that a cease and desist order is both necessary and proper in this proceeding. Without an order, the public has no definite assurance that the unlawful practices will not be resumed at some time in the future. *Fairyfoot Products Co. v. F.T.C.*, 80 F.2d 684, 686-687 (7th Cir. 1935).

Respondent's Defense Based on Insubstantiality

Respondent argues that the impact of the offending advertising claims upon the purchasing public could not have been substantial, in light of the limited circulation of the media in which the advertisements containing such claims were placed, the relatively few insertions involved, the small expenditures involved and their insignificance in relation to respondent's total advertising effort, and the fact that in most instances such claims were not featured in the advertisements in which they appeared, but were included merely as one of a considerable number of other claims (RB, p. 8).

In the present case, respondent considered the claims for reserve cooling power as a significant selling device—an old powerful selling friend (Jt. Ex. 1 H). The representation was utilized for several years, and was discontinued only when questioned by the Commission. The advertisement represented that *only* Fedders gives assurance of cooling on extra hot, extra humid days. Such a representation is the *raison d'être* for an air conditioning unit—it is an extremely material representation. Thus, there can be no question that the challenged claims for this major feature were material.

Even when a claim is material, the Commission has at times chosen not to issue an order when it has found the violation to be so minor as to be *de minimis*. The doctrine is usually applied, however, where it appears the violation was an isolated, unintentional act, unlike the offender's usual practices. The Commission has been reluctant to invoke the *de minimis* doctrine, particularly in the case of advertising violations, and has in the past held one or a few advertisements to be sufficiently serious to justify the issuance of an order in the public interest (see *F.T.C. v. Colgate-Palmolive Co., et al.*, 380 U.S. 374, 395 (1965) (3 advertisements); *Gimbel Bros., Inc. v. F.T.C.*, 116 F.2d 578, 579

(2d Cir. 1941) (advertisements published twice); *Gimbel Bros.*, 60 F.T.C. 359 (1962) (one advertisement), *appeal dismissed*, 7 S.&D. 549 (3d Cir. 1962); and *Baldwin Bracelet Corp., et al.*, 61 F.T.C. 1345, 1363 (1962), *aff'd* 325 F.2d 1012 (D.C. Cir. 1963), *cert. den.* 377 U.S. 923 (1964).

As the following figures show, this case deals not with an isolated incident, but with many different advertisements, each containing a deceptive representation, inserted in many newspapers, presumably on a national scale. Considering only the sample areas over the designated period of two years, there were the following numbers of insertions of advertisements claiming uniqueness of reserve cooling power: 72 insertions in Florida, 17 in Washington, D.C., 42 in Philadelphia, and 42 in New York, for a total of 173 insertions.

Respondent emphasizes that only $\frac{3}{4}$ of 1 percent of its total advertising expenditures in the sample areas was spent on reserve cooling power uniqueness claims, and of that total the expenditures for cooperative advertising bearing uniqueness claims in relation to total cooperative advertising expenditures had a ratio of only $2\frac{1}{2}$ percent; and that only \$18,269 was spent on cooperative advertising utilizing uniqueness claims during the two-year period in the sample areas (RPF, pp. 8-16). Respondent would thus conclude that the offending claims did not have the tendency and capacity to mislead a substantial portion of the purchasing public (RPF, p. 16).

The record does not show what proportion of national sales or advertising the sample areas constitute. Therefore, an accurate projection of the total number of insertions of offending advertisements is impossible. The record does show that reserve cooling power claims were run over a period of several years, although the record does not show what form the advertisements took or whether uniqueness claims were utilized. However, if the two-year period examined were typical of what occurred on a national scale, which the sampling device presupposes, we can safely speculate that the total numbers of deceptive uniqueness advertisements may have run well into the thousands and expenditures therefor into the hundreds of thousands of dollars.

Respondent's argument merely establishes that the challenged advertising constituted a small portion of respondent's total advertising program; it does not establish that the false advertising claims were without impact on the public. Clearly, the violation, concerning a material claim broadly disseminated, involving hundreds, perhaps thousands of newspaper advertisements, cannot be regarded as *de minimis*. The administrative law judge finds the language of the Commission in the *Baldwin Bracelet* matter particularly appropriate: "* * * we are not prepared to say that deception is all right if practiced

in moderation.” (61 F.T.C. 1363). Nor is deception permissible if practiced in small town newspapers of limited circulation (Reply Brief, p. 17). The Act also includes within its protection residents of small towns (see *Charles Of The Ritz Dist. Corp. v. F.T.C.*, 143 F.2d 676, 679 (2d Cir. 1944)).

The administrative law judge concludes, therefore, that respondent's dissemination of uniqueness representations for reserve cooling power, which were not in fact true and substantiated, constituted a substantial practice involving a material performance claim. Accordingly, these representations had the tendency and capacity to mislead a substantial portion of the purchasing public and are of such a magnitude as to warrant a cease and desist prohibition.

THE REMEDY

It is well settled that the Commission may, and should, enter an order of sufficient breadth to insure that a respondent will not engage in future violations of the law. To this end the Commission has wide discretion in fashioning an appropriate order. See *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 611-13 (1946); *F.T.C. v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *F.T.C. v. National Lead Co.*, 352 U.S. 419, 428-30 (1957); *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). Commission orders have been consistently upheld whenever the orders are reasonably related to the unlawful practices found to exist and are clear and precise so that they may be understood by those against whom they are directed. *Jacob Siegel, supra*, at 611-13; *Ruberoid, supra*, at 473; *F.T.C. v. Cement Institute*, 333 U.S. 683, 726 (1948).

The Commission, within this framework, may reasonably ban the precise practice found to violate the Federal Trade Commission Act, and may enjoin “like and related” practices. *F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 392-393 (1959); *Niresk Industries, Inc. v. F.T.C.*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. den.* 364 U.S. 883 (1960); *Consumers Products of America, Inc., et al. v. F.T.C.*, 400 F.2d 930, 933 (3d Cir. 1968), *cert. den.* 393 U.S. 1088 (1969). Further, a respondent “caught violating the Act must expect some fencing in.” *F.T.C. v. National Lead Co., supra*, at 510. While recognizing that it would be inappropriate to narrow the scope of the order to the precise misrepresentation made (uniqueness of a single characteristic, namely, “reserve cooling power”), respondent submits that it is entirely fitting and proper for the order to be confined to unfounded claims of uniqueness of any attribute or characteristic. Respondent contends that the notice order, embracing as it does all “performance characteristics” of any Fedders air conditioners, “is completely impermissible” (RB, pp. 14-15).

The form of order served with the complaint would prohibit

uniqueness claims of any kind and misrepresentations of performance characteristics of any kind. The notice order also provides for record keeping. Complaint counsel have made minor changes in their proposed form of order from the form of order served with the complaint.

The order entered by the administrative law judge herewith prohibits respondent from making any uniqueness claims. It would also prohibit the making of any representation as to a performance characteristic of any air conditioner unless, at the time of the making of the representation, respondent had a reasonable basis for such representation. The order entered herewith also requires that records of the documentation in support of performance claims be maintained for three (3) years after such claims are made and that such records be made available to the Commission upon reasonable notice. The record-keeping provision is limited to ten (10) years from the date the order becomes final. Thus, the administrative law judge has basically adopted the proposed order served with the complaint and recommended by complaint counsel, with minor changes which are without substantial substance such as combining specific prohibitions into the broader prohibition.

Respondent has admitted disseminating a false performance claim for its room air conditioners relating to the uniqueness of the ability of its room air conditioners to function satisfactorily at conditions of extreme heat and humidity. Respondent seems to acknowledge (RB, p. 15) that the order may properly extend beyond the confines of this one misrepresentation. The administrative law judge is of the opinion the order should prohibit respondent from making *any* performance claim for its air conditioners unless it possesses adequate substantiation for the claim at the time the representation is made. The Commission has recognized the propriety of orders governing all performance characteristics. *The Firestone Tire and Rubber, Co.*, Docket 8818, 81 F.T.C. 398, 475 (1972) *aff'd* F.2d 246, 250 (6th Cir. 1973), *cert. den.* 42 U.S.L.W. 3362 (Dec. 18, 1973). This provision of the order simply states explicitly the requirement already recognized by *Pfizer*: the possession of a reasonable basis for any material claim at the time the claim is disseminated. Because this provision simply sets forth a presently-existing obligation, it imposes little additional burden upon respondent, even extending it to all air conditioners.

The recordkeeping provision requires respondent to keep, and make available to the Commission, those materials which constitute substantiation for any performance claims which may be made. These are the same materials which the Commission is presently empowered to demand in Section 6(b) Orders to File Special Reports. Consequently, the recordkeeping provision, also an existing duty, reasonably incorpo-

rates all air conditioners. The only requirement included in this provision not previously spelled out by the Commission is that respondent retain such substantiation materials for three years, and this specific time requirement is not burdensome.

The requirement of record retention is the best possible method of preventing the recurrence of unsubstantiated claims. The requirement imposes little additional burden upon a respondent, which must, according to *Pfizer*, possess the materials at the time the claim is disseminated. At the same time, the retention will expedite Commission examination of the materials as soon as it suspects an unsubstantiated claim may have been or is about to be disseminated (after reasonable notice to respondent).

The Commission, as affirmed by the Sixth Circuit Court of Appeals, recognized the usefulness of a recordretention provision in the recent case, *Firestone Tire and Rubber Co.*, *supra*, 481 F.2d at 250. In that case, the identical three-year retention provision as proposed herein, was ordered and affirmed.

Accordingly, the order entered herewith is believed to be both appropriate and necessary to prevent future violations of the law.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the respondent and this proceeding is in the public interest.

2. Respondent Fedders Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Edison, N.J.

3. Respondent Fedders Corporation is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders room air conditioners. In the course and conduct of its aforesaid business, respondent Fedders Corporation now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various States of the United States, and in the District of Columbia. Respondent Fedders Corporation therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders Corporation has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent.

5. In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of the said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of said room air conditioners, including but not limited to, advertisements printed in newspapers located in various States of the United States and in the District of Columbia, which newspapers are disseminated across state lines. Typical of the statements and representations contained in said advertisements is the following segment of the print advertisement for Fedders room air conditioners:

RESERVE Cooling Power - only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days.

6. By and through the use of the aforesaid statements and representations, respondent has represented, directly or by implication, that reserve cooling power is a unique feature of Fedders room air conditioners, not found in other room air conditioners. In truth and in fact, "reserve cooling power," referring to the ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners. In fact, comparable room air conditioners made by other companies function satisfactorily under conditions of extreme heat and humidity. Therefore, such statements and representations were and are false, misleading and deceptive.

7. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that the Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. In truth and in fact, at the time the aforesaid statements and representations were made, respondent had no reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. Therefore, the statements and representations were and are false, misleading and deceptive.

8. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. At the time said statements and representations were made, respon-

dent had no reasonable basis from which to conclude that such was the fact. Therefore, the statements and representations were and are false, misleading and deceptive.

9. The use by respondent of the aforesaid false, misleading and deceptive acts and practices have had, and now have, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

10. The aforesaid acts or practices of respondent, as herein found, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

ORDER

It is ordered, That respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of air conditioners do forthwith cease and desist from:

1. Representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any material respect, unless such is the fact;

2. Making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to the performance characteristics of any air conditioner including, but not limited to, air cooling, heating, cleaning, circulation, dehumidification or humidification, efficiency and quietness of operation, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

3. Failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising

agency engaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the performance characteristics (including but not limited to air cooling, heating, cleaning, circulation, dehumidification or humidification, efficiency and quietness of operation) of, or the uniqueness of any feature of, any of respondent's air conditioners;

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of Paragraph 3 hereof shall be in effect for a period of ten (10) years from the date this order becomes final.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

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

FINAL ORDER

JANUARY 14, 1975

This matter having been heard by the Commission upon the appeal of respondent's counsel from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having denied the appeal:

It is ordered, That the initial decision of the administrative law judge, pages 1-30 [pp. 42-65 herein], is adopted as the Findings of Fact and Conclusions of Law of the Commission, except insofar as certain comments on pages 29-30 [pp. 63-65 herein] are inconsistent with the

conclusions on pages 5-6 [pp. 73-74 herein] of the accompanying opinion, and subject to the following changes:

P. 2, line 4, [p. 43, line 2 herein] omit "that"

P. 3, line 9, [p. 43, fifth paragraph herein] word 4 "asserting"

P. 15, [p. 53 herein] substitute 6.5 percent for 7.8 percent

P. 18, line 36, [Finding No. 27, pp. 55-56 herein] substitute 6.5 percent for 7.8 percent

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order be entered:

ORDER

It is ordered, That respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of air conditioners, do forthwith cease and desist from:

1. Representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any material respect, unless such is the fact;

2. Making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to the air cooling, dehumidification, or circulation characteristics, capacity or capabilities of any air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which shall consist of competent scientific, engineering or other similar objective material or industry-wide standards based on such material;

3. Failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the air cooling, dehumidification, or circulation characteristics, capacity, or capability of, or the uniqueness of any feature of, any of respondent's air conditioners;

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of paragraph 3 hereof shall be in effect for a period of ten (10) years from the date this order becomes final.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of any proposed change in the corporate respondent such as dissolution, assignment or sale, resulting in the emergence of a successor corporation, the creation or dissolution of any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

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

OPINION OF THE COMMISSION

JANUARY 14, 1975

BY DIXON, Commissioner:

The complaint in this matter was issued on June 11, 1973, and charged respondent with dissemination of false and misleading advertisements in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). In particular the complaint alleged that respondent had represented through advertisements in newspapers of interstate circulation that (1) "reserve cooling power"¹ is a unique feature of its room air conditioners, not found in other room air conditioners; (2) Fedders' room air conditioners compared with all other room air conditioners have a significantly increased cooling capacity at high loading conditions under customary conditions of use; and (3) Fedders had a reasonable basis for concluding that its product

¹ Hereinafter sometimes "RCP," stipulated by the parties to mean "ability to function satisfactorily under conditions of extreme heat and humidity." (I.D. 8)

The following abbreviations are used herein:

I.D.-Initial Decision (Finding No.)

I.D. p.-Initial Decision (Page No.)

RB-Respondent's Appeal Brief (Page No.)

compared with all other room conditioners has said increased cooling capacity. Drawing on a brief record consisting of stipulations, joint exhibits, and a few respondent's exhibits,² the administrative law judge sustained the complaint and recommended entry of an order. On appeal respondent has taken essentially the same position as it took before the administrative law judge, conceding the falsity of, and absence of reasonable basis for, the challenged representations but raising so-called affirmative defenses of "abandonment" and "insubstantiality," and arguing in the alternative that the order should be diminished in scope. We find the affirmative defenses to be patently without merit, as did the administrative law judge, but we believe that a slight modification of the order he has proposed is appropriate.

I. Insubstantiality

Respondent argues that it should be absolved from any liability in this matter because the number of offending advertisements constituted only a small percentage of respondent's total advertising expenditures. Evidence submitted by respondent indicated that in four sample areas, New York, Philadelphia, Washington, D.C., and Florida, during the sample two-year period ending Aug. 31, 1971, the number of untruthful advertisements totaled 173 or 5.8 percent of all advertisements for reserve cooling power, and expenditures on such advertisements were \$18,269 or 6.5 percent of all expenditures for advertisements touting RCP. (I.D. 17, 18) Respondent asserts in its appeal brief that the sample area accounted for "at least 35 percent" of its total United States' sales and advertising expenditures for the sample period.³ Whatever the total number of offending advertisements may have been, it is clear to us that evidence from the sample area alone was quite sufficient to destroy whatever weight might be accorded respondent's defense of insubstantiality.

The Commission has previously issued orders in cases involving no more than one or a few deceptive advertisements. [See *Gimbel Bros.*, 60 F.T.C. 359, 368 (1962), *appeal dismissed per stipulation*, No. 14019 (3d Cir. Oct. 8, 1962) *unreported*; *Gimbel Bros., Inc. v. FTC*, 116 F.2d 578, 579 (2d Cir. 1941).] Here, in an area apparently accounting by

² In describing the record in this case, the administrative law judge neglected to make reference to certain exhibits submitted by respondent separately (I.D. p. 5, third full paragraph [p. 45, fifth paragraph]). There is no indication, however, that the administrative law judge did not actually consider these exhibits in fashioning his decision, and in any event the Commission has fully considered said exhibits in its own review of the record.

³ RB 13. The administrative law judge, noting that advertisements for RCP had been run for several years prior to the sample period, concluded that the actual number of offending advertisements may have totaled in excess of 1,000. (I.D. p. 27 [p. 62 herein]) Respondent challenged this extrapolation, though it did agree to use a sampling procedure. The parties apparently disagree as to whether the sample may be taken as representative of Fedders' advertising during the entire period in which RCP advertisements were run, or simply as representative of Fedders' advertising throughout the country for the sample two-year period. Resolution of this disagreement is not necessary for our decision.

respondent's estimate for far less than half of all its sales, 173 separate false advertisements were disseminated over a two-year period. This was 173 more than the law allows, and far more than warrant an appeal to the discretion of the Commission to omit an order in a litigated case. The fact that these advertisements constituted only a small percentage of respondent's total advertising program is wholly irrelevant. It merely demonstrates the truism that a larger advertiser inevitably has more opportunities than a smaller one to engage in deceptive practices. Similarly, we are entirely unimpressed with the fact that the offending advertisements appeared in non-urban newspapers with less circulation than metropolitan dailies. We are pleased to note, however, that respondent does not maintain that "deception is all right if practiced in moderation" nor that "deception is permissible if practiced in small town newspapers of limited circulation" (RB 13-14), though the learned administrative law judge may be excused for having received the contrary impression. (I.D. p. 27 [pp. 62-63 herein]) In all events the magnitude of the false advertising in this case cannot constitute an affirmative defense to the allegations of the complaint, nor does it give any reason to think that an order is not required to remedy the violation.

II. Abandonment

Respondent further argues that it abandoned the offending practice in late 1971. It was stipulated at trial that RCP advertising was discontinued at this time, following determination by respondent, in response to an advertising substantiation order served on it by the Commission, that claims for the uniqueness of RCP could not be substantiated. The Commission has been properly parsimonious, if not totally unyielding, in its adjudicative recognition of the defense of abandonment, and courts have been reluctant to vacate Commission orders on those grounds except in the most extreme circumstances not present here, such as where a corporate respondent had exited from the relevant line of business under circumstances in which reentry seemed improbable. *National Lead Co. v. FTC*, 227 F.2d 825, 839, *et seq.* (7th Cir. 1955), *reversed in other respects*, 352 U.S. 419 (1957). Certainly the mere discontinuance of an offending practice in the face of inquiry by a law enforcement agency can under no circumstances be argued to amount to a defense. It is undisputed that respondent did not discontinue the challenged advertising until it had received an Order to File Special Report, requesting substantiation for the false representation. The situation is in essence no different from that in *Coro, Inc.*, 63 F.T.C. 1164 (1963), *aff'd* 338 F.2d 149 (1st Cir. 1964), *cert. denied* 380 U.S. 954 (1965), upon which the administrative law judge relied. While

it is true that the mere issuance by the Commission of an advertising substantiation order is not meant to imply that the recipient is suspected of wrongdoing, it is also clear that an order to file this special report pursuant to Section 6(b) of the F.T.C. Act is an investigatory tool of the Commission, just as much as a subpoena issued pursuant to Section 9 of the Act, and having received such an order Fedders' subsequent discontinuance can hardly be viewed as being borne of spontaneous recognition of the error of its ways. Respondent disseminated plainly false advertisements for at least two years, discontinuing them only upon discovering that at long last the government would be reviewing the claims. These circumstances are not such as can breed confidence that respondent may be relied upon in the future to regulate its own advertising when the government may again not be looking over its shoulder, without the encouragement of an order. And we find without merit the contention that the circumstances of discontinuance in this case should be considered an affirmative defense to an otherwise plain violation of law.⁴

III. Order

The argument put forth most seriously by respondent concerns the scope of the order entered by the administrative law judge. Respondent objects to paragraph II of the order, which prohibits false performance claims, and to paragraph III, to the extent it requires maintenance of substantiating materials for performance claims. Respondent contends that the representation challenged in this case was not a performance claim at all, but only a uniqueness claim, and that the order should be no broader than paragraph I, which prohibits false uniqueness claims, while paragraph III should be modified to require maintenance of substantiation for uniqueness claims only.

We cannot agree that the false representations here in question dealt only with "uniqueness" and not "performance," nor do we believe that an order dealing only with uniqueness claims would be in the public interest or serve to prevent future occurrences of the sort involved here.

In claiming that only Fedders' air conditioners possessed RCP, respondent was clearly making a statement about the performance of its product, namely that this performance was unmatched. What

⁴ It is also unclear, as the initial decision points out, to what extent respondent has actually managed to eliminate false claims of the sort challenged here from its advertising. (I.D. 34-35, [pp. 57-58 herein]) It appears that in Mar. 1974, an advertisement ran in *Newsweek* claiming "exclusivity" for a feature of respondent's "Climatrol" brand room air conditioner when in fact others of respondent's air conditioners possessed the same attribute. We do not think that this circumstance is essential to our finding that the abandonment defense must fail. It is, however, an additional ground for that conclusion, and suggests that even during the pendency of these proceedings, when respondent has had an unusual interest in avoiding repetition of false claims (to demonstrate the lack of necessity for an order) it has been unable to do so.

Order

85 F.T.C.

rendered these false representations material in the eyes of consumers, and no doubt what led respondent to make them, was the message they conveyed about the relative performance of the product, and not merely the message of "uniqueness" in some disembodied sense.⁵ An order addressed only to uniqueness claims and not to performance claims would be inadequate to insure that the same species of misrepresentation as has here occurred will not happen again.

It remains then to consider the scope of the prohibition on false characterizations of performance. The administrative law judge and complaint counsel recommend a prohibition on misrepresentation of all performance characteristics. The performance characteristic in this case which was untruthfully and without reasonable basis represented to be unique involved air cooling capacity under conditions of extreme heat and humidity. In view of all the circumstances of this case, including the fact that only one performance characteristic was misrepresented, we believe that the order should be narrowed slightly to forbid only misrepresentations of performance characteristics of the general sort involved in the offending advertisements. An appropriate order is appended.

IN THE MATTER OF

MOTA-NU, INC., ET AL.

Docket C-2503. Order, Jan. 14, 1975

Denial of corporate respondent's petition to reopen proceedings.

Appearances

For the Commission: *Joseph Hickman.*

For the respondents: *James T. Blanton, Fort Worth, Tex. and Stein, Mitchell & Mezines, Wash., D.C.*

ORDER DENYING RESPONDENT'S PETITION TO REOPEN
PROCEEDINGS

After having fully considered the Petition to Reopen Proceedings filed on behalf of respondent corporation MOTA-NU, Inc., and the

⁵ Consider an advertisement for air conditioners that represented them to be unique because of being painted with red, white, and green stripes. Certainly the consumer would be left thinking that the advertised air conditioner was "unique," but the Commission might be at pains to show that such a claim was material, nor can we imagine a sane advertiser spending money to make it. Uniqueness is obviously both an attribute in itself and one facet of broader categories of product characteristics, such as price, performance, and warranty terms.

Answer filed by the Bureau of Consumer Protection, the Commission has determined that respondent's Petition should be denied.

The Commission finds no changed conditions of fact or law which would justify reopening the order under Rule 3.72(b)(2). The Commission does not find that the change in corporate ownership of MOTANU, Inc. justifies reopening at this time. The Commission also finds that the ten individuals who purchased the corporation from its former owner, the individual respondent, knew of the existence of the agreement between the corporation and the Commission's staff before they purchased the corporation. Knowing of the existence of an agreement between the corporation and the Commission's staff, an agreement whose terms the staff of the Commission was precluded, by directive of the Commission, from divulging prior to official Commission action thereon, it was incumbent upon the purchasers to determine from the seller whether those terms might in any way affect their decision to purchase. If the seller failed to disclose the terms of the agreement to the purchasers, or misrepresented them, then that is clearly a matter to be resolved between purchasers and vendor, and does not justify modification of a consent order against the corporation.

Petitioner's other arguments do not demonstrate that the public interest would be served by reopening the order. Accordingly,

It is ordered, That respondent's petition be, and it hereby is, denied.

IN THE MATTER OF

MARTIN INDUSTRIES, INC., ET AL.

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

Docket C-2624. Complaint, Jan. 16, 1975 - Decision, Jan. 16, 1975

Consent order requiring three Kansas City, Mo., affiliated sellers of a correspondence course in livestock buying, among other things to cease using deceptive sales tactics and from violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Keith Q. Hayes* and *Charles B. Wesonig*.

For the respondents: *James D. Veselich*, Kansas City, Mo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the implementing regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Martin Industries, Inc., Cattle Buyers, Inc., and Educational Finance Corp., corporations, and Daniel M. Martin, Jr., and George C. Kopp, III, individually and as officers of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and of the implementing regulations promulgated under the Truth in Lending Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Martin Industries, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at 2 E. Gregory Blvd., Kansas City, Mo.

Respondent Cattle Buyers, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri with its principal office and place of business located at 2 E. Gregory Blvd., Kansas City, Mo.

Respondent Educational Finance Corp. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Missouri with its principal office and place of business located at 2 E. Gregory Blvd., Kansas City, Mo.

Respondents Daniel M. Martin, Jr., and George C. Kopp, III, are individuals and officers of each of the corporate respondents. Together, they formulate, direct, and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their addresses are the same as those of the corporate respondents.

Respondents cooperate and act together in carrying out respondents' business as hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the formulation, development, advertising, offering for sale, sale, and distribution of course(s) of vocational instruction purported to prepare graduates thereof for employment as livestock buyers.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their course(s) of vocational instruction in livestock buying to be advertised, sold, and financed to purchasers thereof located in the various States of the United States, and maintain, and at all times mentioned herein have

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Complaint

maintained, a substantial course of trade in said livestock buying course(s), in commerce, as "commerce" is defined in the Federal Trade Commission Act.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two and Three hereof are included by reference in Count I as if fully set out.

PAR. 4. In the course and conduct of their aforementioned business, respondents, for the purpose of obtaining leads to prospective purchasers and inducing the purchase of their course(s) of instruction, related products, and services by members of the public, have made, and are now making, numerous statements and representations in advertising appearing in various newspapers of general interstate circulation. Typical and illustrative of the foregoing, but not all inclusive thereof, are the following:

MEN WANTED
CATTLE
AND
LIVESTOCK
BUYERS

We want men in this area.
Train to buy cattle, sheep
and hogs.

We will train qualified men
with some livestock experience.

For local interview,
write today with your background.
Include your full
address and phone number.

CATTLE BUYERS, INC.
4420 Madison
Kansas City, Mo. 64111

* * * * *

THE LIVESTOCK INDUSTRY

NEEDS MEN

TRAINED AS
CATTLE
AND
LIVESTOCK
BUYERS* * *

PAR. 5. By and through the use of the statements and representations as set forth in Paragraph Four and others similar thereto but not

specifically set out herein, and through statements made orally and in writing by respondents, their employees, agents, and representatives, respondents have represented, and do now represent, directly or by implication, to the purchasing public that they offer employment to persons in the field of livestock buying.

PAR. 6. In truth and in fact, respondents do not offer employment to persons in the field of livestock buying, but are seeking prospective purchasers for their course(s) of instruction in livestock buying. Those persons, who respond to respondents' ads as set out in Paragraph Four above, are contacted for the purpose of enrolling them in respondents' course(s) of instruction in livestock buying.

Therefore, statements and representations as set forth in Paragraphs Four and Five hereof, were and are false, misleading, deceptive, and unfair.

PAR. 7. Respondents have offered, and now offer for sale, course(s) of instruction intended to prepare graduates thereof for employment in the livestock buying industry, without disclosing, in advertising or through their sales representatives:

1. That most persons enrolling in respondents' course(s) of livestock buying will not be employed in the livestock buying industry during or after completion of said course(s) of instruction because livestock buying cannot be learned from a correspondence course.

2. That there is little, if any, demand for those persons who graduate from respondents' course(s) of livestock buying instruction by any industry.

3. That respondents do not provide employment or offer assistance in obtaining employment in the field of livestock buying to those persons who graduate from respondents' course(s) of livestock buying.

Knowledge of such facts would indicate the possibility of securing future employment as a result of enrolling in respondents' course(s) of livestock buying. Thus, respondents have failed to disclose a material fact which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase such course(s) of instruction.

Therefore, the aforesaid acts and practices were and are false, misleading, deceptive or unfair.

PAR. 8. (a) Respondents have been and are now using the aforesaid false, misleading, deceptive, or unfair acts and practices, which under all of the facts and circumstances, respondents should have known were false, misleading, deceptive, and unfair, to induce persons to pay or to contract to pay substantial sums of money for their course(s) of instruction which, in connection with said purchasers' future employment and careers, were, and are, virtually worthless. Respondents have

received the said sums and have failed to offer refunds, or refund such sums, or rescind such contractual obligations of a substantial number of enrollees and participants in such course(s) who were unable to secure employment in the positions and fields for which they purportedly have been trained by respondents.

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

(b) In the alternative, and separate to Paragraph Eight (a) herein, respondents, who are in substantial competition in commerce with corporations, firms, and individuals engaged in the sale of vocational courses of instruction, have been and are now using as aforesaid, false, misleading, deceptive, or unfair acts or practices to induce persons to pay substantial sums of money to purchase respondents' course(s) of instruction.

The effect of using the aforesaid acts and practices to secure substantial sums of money is, or may be, to hinder, lessen, restrain, or prevent competition between respondents and the aforementioned competitors.

Therefore, the said acts and practices constitute an unfair method of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 9. In the course and conduct of their business and at all times mentioned herein, respondents have been and are now in substantial competition in commerce with corporations, firms, and individuals engaged in the sale of courses of vocational instruction covering the same or similar subjects.

PAR. 10. The use by respondents of false, misleading, deceptive, and unfair statements, representations, acts, and practices, and their failure to disclose material facts, as aforesaid, has had and now has a capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and complete, and into the purchase of said respondents' course(s) in livestock buying, by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations of the Truth in Lending Act and the implementing regulations promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One, Two and Three hereof are incorporated by reference in COUNT II as if fully set forth verbatim.

PAR. 12. In the course and conduct of their business as aforesaid, respondents regularly extend, and for some time last past have regularly extended, consumer credit as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 13. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business and in connection with credit sales as "credit sale" is defined in Section 226.2(n) of Regulation Z, have caused and are now causing their customers to execute retail installment contracts, hereinafter referred to as the contract.

PAR. 14. By and through the use of the contract, respondents, in a number of instances, have failed to:

1. Disclose the term "Finance Charge" more conspicuously than other terminology as required by Section 226.6(a) of Regulation Z.
2. Use the term "Total of Payments" as required by Section 226.8(b)(3) of Regulation Z.
3. Use the term "Cash Price" as required by Section 226.8(c)(1) of Regulation Z.
4. Use the term "cash downpayment" as required by Section 226.8(c)(2) of Regulation Z.
5. Use the term "amount financed" as required by Section 226.8(c)(7) of Regulation Z.
6. Use the term "Deferred Payment Price" as required by Section 226.8(c)(8)(ii) of Regulation Z.

PAR. 15. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failure to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the

complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Martin Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 2 E. Gregory Blvd., Kansas City, Mo.

Respondent Cattle Buyers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 2 E. Gregory Blvd., Kansas City, Mo.

Respondent Educational Finance Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 2 E. Gregory Blvd., Kansas City, Mo.

Respondent Daniel M. Martin, Jr. is an officer of said corporations and George C. Kopp, III, was an officer of said corporations until Sept. 1, 1974. Prior to Sept. 1, 1974, respondents formulated, directed and controlled the policies, acts and practices of said corporations. Subsequent to Sept. 1, 1974, respondent Daniel M. Martin, Jr., has formulated, directed and controlled the policies, acts and practices of said corporations. Respondents' principal office and place of business prior to Sept. 1, 1974, was 2 E. Gregory Blvd., Kansas City, Mo.

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

COUNT I

It is ordered, That respondents Martin Industries, Inc., Cattle Buyers, Inc., and Educational Finance Corp., corporations, their successors and assigns, and their officers, and Daniel M. Martin, Jr., and George C. Kopp, III, individually and as officers of each of said corporations and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of courses of study, training, or instruction in the field of livestock buying or any other course of instruction, or product, or service, in any field in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

(a) Persons who enroll in any course(s) of instruction offered by respondents will be employed as buyers in the livestock industry or any other industry.

(b) Respondents offer employment in the livestock industry or any other industry.

(c) Respondents assist or are able to assist any person in securing employment as a buyer in the livestock industry or in any other position.

(d) There is a demand for persons completing the course offered by respondents in the area of cattle buying, selling, or trading.

2. Failing to disclose clearly and conspicuously, in all advertising and promotional material, that respondents are seeking prospective purchasers for their course(s) of instruction and do not offer employment or assistance in obtaining employment.

3. Failing to send by certified mail, return receipt requested, to each person who contracts for the sale of any course of instruction, a notice, in a form approved by the Commission, which shall disclose the following information and none other:

(a) The title "*IMPORTANT INFORMATION*" printed in bold face type across the top of the form.

(b) A paragraph reciting the following affirmative disclosures:

(1) A statement disclosing that most persons enrolling in respondents' course(s) of livestock buying will not be employed in the livestock buying industry during or after completion of said course(s) of instruction.

(2) A statement disclosing that respondents do not offer or assist their students in obtaining employment.

(3) A statement disclosing the total number of students who have enrolled in each course of instruction offered by respondents for each of the three (3) preceding calendar years.

(4) A statement disclosing the total number of students who have graduated from each course of instruction offered by respondents for each of the three (3) preceding calendar years.

(5) A statement disclosing the total number of students which respondents can affirmatively show have become employed as a result of completing any of respondents course(s) of instruction for each of the three (3) preceding calendar years.

(6) An explanation of the cancellation procedure provided in this order, namely, that any contract or other agreement may be cancelled within three (3) days after receipt by the customer, via the United States mails, of this notice.

(7) Said notice shall contain a detachable form which the person may use as a notice of cancellation, which indicates the proper address for accomplishing any such cancellation.

(8) The said notice shall be sent by respondents no sooner than the next day after the person shall have executed a contract for the sale of any course(s) of instruction.

4. Contracting for any sale of any course(s) of instruction in the form of a sales contract or other agreement which shall become binding prior to the end of the third business day after the day of receipt by the customer of the form of notice provided in Paragraph 3 of this order.

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

(a) Which disclose the facts upon which any placement statistics or claims or other representations of the type described in Paragraph 3(b)(3), (4) and (5) of this order are based, and

(b) From which the validity of any placement statistics described in Paragraph 3(b)(3), (4) and (5) of this order can be determined,

for so long as such statistics, claims, or other representations are disseminated, made, or authorized by respondents, or are required to be disclosed hereunder and for a period of three (3) years after respondents' termination of dissemination, use, authorization, or disclosure of such statistics, claims, or representations (whichever period is the longer).

It is further ordered, That respondents, in connection with the sale, or offering for sale of any course(s) of instruction or training:

A. Inform orally all prospective purchasers to whom solicitations are made, and provide, in writing, in all applications and contracts, in at least ten-point bold type, that the application or contract may be

cancelled for any reason by notification to respondents, in writing, within three (3) days from the date of receipt of the form of notice provided in Paragraph 3 of this order.

B. Refund immediately all monies to all purchasers who have requested cancellation of the application or contract within three (3) days from the date of receipt of the form of notice provided in Paragraph 3 of this order.

COUNT II

It is further ordered, That respondents Martin Industries, Inc., Cattle Buyers, Inc., and Educational Finance Corp., corporations, their successors and assigns, and their officers, and Daniel M. Martin, Jr., and George C. Kopp, III, individually and as officers of each of said corporations and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with any extension of consumer credit as "consumer credit" is defined in Regulation Z (12 C.F.R. § 226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to disclose the term "Finance Charge" more conspicuously than other terminology as required by Section 226.6(2) of Regulation Z.

2. Failing to use the term "Total of Payments" to describe the sum of the payments scheduled to repay the indebtedness as required by Section 226.8(b)(3) of Regulation Z.

3. Failing to use the term "Cash Price" to designate the cash price of the property or service which is the subject of the transaction as required by Section 226.8(c)(1) of Regulation Z.

4. Failing to use the term "Cash Downpayment" to designate any downpayment in money, as required by Section 226.8(c)(2) of Regulation Z.

5. Failing to use the term "amount financed" to designate the amount financed as required by Section 226.8(c)(7) of Regulation Z.

6. Failing to use the term "Deferred Payment Price" to describe the sum of the "cash price", all other charges which are included in the amount financed but which are not part of the finance charge, and the finance charge as required by Section 226.8(c)(8)(ii) of Regulation Z.

It is further ordered, That:

1. Respondents herein deliver a copy of the decision and order in this matter to each of their present and future employees, salesmen, agents, solicitors, independent contractors, or to any other person who promotes, offers for sale, sells, or distributes any course of instruction included in this order.

2. Respondents herein provide each person so described in Paragraph 1 above with a form, returnable to the respondents, clearly stating their intention to be bound by and to conform their business practices to the requirements of this order; retain said statement during the period said persons are so engaged; and make said statement available to the Commission's staff for inspection and copying purposes upon request.

3. Respondents herein inform each person so described in Paragraph 1 above that the respondents will not use or engage, or will terminate the use or employment of any such party, unless such party agrees to and does file notice with the respondents that he will be bound by provisions contained in this order.

4. If such party as described in Paragraph 1 above will not agree to so file the notice set forth in Paragraph 2 above with the respondents and be bound by the provisions of the order, the respondents will not use or employ or continue the use or employment of such party to promote, offer for sale, sell, or distribute any course of instruction included in this order.

5. Respondents herein inform the persons described in Paragraph 1 above that the respondents are obligated by this order to discontinue dealing with, or to terminate the use or employment of persons who continue on their own the deceptive acts or practices prohibited by this order.

6. Respondents herein institute a program of continuing surveillance adequate to reveal whether the business practices of each said person described in Paragraph 1 above conform to the requirements of this order.

7. Respondents herein discontinue dealing with or terminate the use or engagement of any person described in Paragraph 1 above, as revealed by the aforesaid program of surveillance, who continues on his own any act or practice prohibited by this order.

It is further ordered, That respondents shall forthwith distribute a copy of this order to each corporation, and division of such corporation, through which they transact business in conjunction with the promotion, advertisement, solicitation, and/or sale of any course(s) of instruction.

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

Complaint

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

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

IN THE MATTER OF

HATTIE CARNEGIE JEWELRY ENTERPRISES, LTD.,
ET AL.

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

Docket C-2625, Complaint, Jan. 20, 1975 - Decision, Jan. 20, 1975

Consent order requiring two New York City manufacturers and distributors of numismatic items, among other things to cease failing to make the word "copy" plainly and permanently on all imitation numismatic items manufactured by respondents.

Appearances

For the Commission: *Justin Dingfelder.*

For the respondents: *Arnold S. Jacobs, Shea, Gould, Climenko & Kramer, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Hobby Protection Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hattie Carnegie Jewelry Enterprises, Ltd., a corporation, and Gibraltar Mint, Inc., a corporation, and Lawrence Joseph and Howard N. Levine, individually and as officers of said corporations, 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. Respondents Hattie Carnegie Jewelry Enterprises, Ltd., and Gibraltar Mint, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their principal offices and places of business both located at 10 E. 38th St., New York, N.Y.

Respondents Lawrence Joseph and Howard N. Levine are officers of the corporate respondents. They formulate, direct and control the acts and practices of the corporate respondents, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for some time in the past have been, engaged in the manufacture, and in the sale and distribution of various items of merchandise, including imitation numismatic items, to dealers and others for resale to the public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause and for some time in the past have caused imitation numismatic items to be shipped from their place of business in the State of New York to retailers and others located in various other States in the United States, and respondents maintain, and at all times mentioned herein have maintained a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents have since Nov. 29, 1973, manufactured in the United States for distribution in commerce, and have distributed and sold in commerce copies of privately minted 1854 Liberty Head Twenty Dollar Gold Pieces and privately minted 1855 Liberty Head Fifty Dollar Gold Pieces. The aforesaid coins are imitation numismatic items, as defined in Section 7 of the Hobby Protection Act, and were not plainly and permanently marked "copy" as required by Section 2(b) of said Act.

PAR. 5. Respondents' aforesaid acts and practices as alleged in Paragraph Four hereof were and are a violation of Section 2(b) of the Hobby Protection Act, and such violation is an unfair and deceptive act or practice in commerce under the Federal Trade Commission Act. Pursuant to Section 4(b) of the Hobby Protection Act, the aforesaid acts and practices of respondents constituted and now constitute a violation of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption

hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Hobby Protection and Federal Trade Commission Acts; and

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

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

1. Respondents Hattie Carnegie Jewelry Enterprises, Ltd., and Gibraltar Mint, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their offices and principal places of business both located at 10 E. 38th St., N.Y., N.Y.

Respondents Lawrence Joseph and Howard N. Levine are officers of said corporations. They formulate, direct and control the policies, acts and practices of said corporations and their address is the same as that of said corporate respondents.

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

ORDER

It is ordered, That respondents Hattie Carnegie Jewelry Enterprises, Ltd., and Gibraltar Mint, Inc., corporations, their successors and assigns, and their officers, and Lawrence Joseph and Howard N. Levine, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacture and distribution of any imitation numismatic item, as

"imitation numismatic item" is defined in the Hobby Protection Act (Pub.L. 93-167, 15 U.S.C. § 2101, *et seq.*) do forthwith cease and desist from:

Failing to mark "COPY" plainly and permanently on all imitation numismatic items manufactured by respondents, as required by Section 2(b) of said Act. The word "COPY" shall appear in capital letters, in the English language, incused in sans-serif letters having a vertical dimension of not less than two millimeters (2.0 mm) and a minimum depth of three-tenths of one millimeter (0.3 mm) or to one-half (1/2) the thickness of the reproduction, whichever is the lesser. The minimum total horizontal dimension of the word "COPY" shall be six millimeters (6.0 mm).

It is further ordered, That corporate respondents shall forthwith distribute a copy of this order to each of their operating divisions.

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

It is further ordered, That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

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

Order

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IN THE MATTER OF
HOLIDAY MAGIC, INC., ET AL.

MODIFYING ORDER, ETC., IN REGARD TO ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2, OF THE
CLAYTON ACT

Docket 8834. Decision, Oct. 15, 1974 Order, Jan 21, 1975*

Order modifying Final Order issued against respondents on Oct. 15, 1974, 40 F.R. 10665, 84 F.T.C. 748, by deleting Paragraph V of the order which required corporate respondent and respondent Olivo to make restitution as provided therein.

Appearances

For the Commission: *Joseph S. Brownman* and *D. Stuart Cameron*.
For the respondents: *Alvin H. Goldstein, Jr.*, *Tuckman, Goldstein & Philips*, San Francisco, Calif.

ORDER REOPENING PROCEEDING AND MODIFYING FINAL ORDER

The Commission's final order in this matter, dated Oct. 15, 1974, provided, in Paragraph V, that respondent Olivo should make restitution as provided therein, and that corporate respondent, Holiday Magic, should also make restitution. The requirement as to Holiday Magic, however, was to be effective only in the event that the company should cease to be in compliance with a district court order also requiring that it make restitution. By order dated Jan. 8, 1975, the Commission denied a motion of respondent Olivo to reconsider its order as to him.

In its opinion, the Commission recognized that its action in ordering restitution, in particular its assertion that it possessed the authority to do so, was contrary to the holding of the Ninth Circuit Court of Appeals in the case of *Heater v. Federal Trade Commission*, No. 73-1750, Sept. 11, 1974 [503 F.2d 321 (1974)]. In footnote 11, page 23 [84 F.T.C. 1045] of its final decision, the Commission noted its disagreement with the holding in *Heater* and stated that it would seek to obtain review of the decision by the Supreme Court.

Subsequent to rendition of the Commission's final order in this matter, and rendition of its order denying the motion to reconsider, the Commission has determined that it will not seek review of the *Heater* decision by the Supreme Court. While this determination should not be construed to signify a change in the view of the Commission regarding

* Reported in 84 F.T.C. 748. Petitions for review of the Oct. 15, 1974 order to cease and desist were filed in the Court of Appeals for the Ninth Circuit. Subsequently, the appeals were dismissed pursuant to petitioners' motion.

the correctness of the *Heater* decision, it does eliminate any possibility that *Heater* will not continue to be governing law in the Ninth Circuit. Corporate respondent's principal place of business is in the Ninth Circuit; individual respondent and the estate of the deceased respondent are situated in the Ninth Circuit, and respondents have appealed this matter in that circuit. Under these circumstances the Commission does not feel that it is privileged to disregard judicial precedent of such recent and clearly dispositive vintage. Under the holding in *Heater*, at the time the Commission issued its final order in this matter it was not empowered by the F.T.C. Act to require respondent to make restitution for prior fraudulent activities. That holding not having been overruled, it would now be improper for the Commission, only a short time thereafter, to put respondent to the expense of relitigating the same issue in the same forum. This is particularly so inasmuch as the assets of the wrongdoer's estate with which the cost of such litigation would be financed are limited, and may be subject to other claims, including claims of private plaintiffs seeking repayment for the same wrongs which led the Commission to issue the original order of restitution in this case.

Pursuant to Section 3.72(a) of its rules of practice, the Commission may, "prior to the filing of the transcript of the record of a proceeding in a United States court of appeals pursuant to a petition for review" reopen the proceeding on its own motion and modify its order in said proceeding. Therefore,

It is ordered, That this matter be reopened and that the final order be modified by striking Paragraph V in its entirety, and renumbering all subsequent paragraphs.

Commissioner Nye not participating.

IN THE MATTER OF
EXXON CORPORATION, ET AL.

Docket 8934. Order, Jan. 21, 1975

Denial of application by all respondents except Texaco for review of administrative law judge's ruling denying motions to exclude issues beyond the scope of the complaint.

Appearances

For the Commission: *Peter A. White, James H. Thessin, James C. Egan, Jr. and Ira S. Nordlicht.*

For the respondents: *William Simon, J. Wallace Adair, McKean,*

Order

85 F.T.C.

Whitehead & Wilson, Donovan, Leisure, Newton & Irvine, and Steptoe & Johnson, all of Wash., D.C. *William Weitzel, Wickes, Riddell, Bloomer, Jaboci & McGuire, Vincent A. Moccio, Charles F. Rice, Benjamin T. Richards and Kaye, Scholer, Fierman, Hays & Handler*, all of New York City. *W. Bernard Fudge, Jesse P. Luton, John H. Chiles and George S. Wolbert, Jr.*, all of Houston, Tex. *M. J. Keating and Kirkland & Ellis*, Chicago, Ill. *Pillsbury, Madison & Sutro*, San Francisco, Calif. and *Donald A. Bright*, Los Angeles, Calif.

ORDER DENYING APPLICATION FOR REVIEW

By leave of the administrative law judge under Section 3.23(b) of our rules of practice, all respondents except Texaco have filed an Application for Review of Ruling (of the administrative law judge) Denying Motions of Respondents to Exclude Issues Beyond the Scope of the complaint. Specifically, respondents argue that certain allegations concerning their foreign operations and their relationships with financial institutions, which complaint counsel have stated their intention to prove, are not related to any of the charges contained in the complaint in this matter. By order of Oct. 29, 1974, the law judge denied their motions to exclude such issues for the purposes of discovery and presentation of evidence. Complaint counsel do not oppose review of this order.

The law judge's order is not appropriate for interlocutory review. The question of whether evidence on particular factual propositions is relevant to one or more allegations in a complaint is well within the area of trial management and, in the absence of a clear abuse thereof, is committed to the sound discretion of the law judge. Accordingly,

It is ordered, That the aforesaid application for review be, and it hereby is, denied.

IN THE MATTER OF

AMERICAN CYANAMID COMPANY

MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF SEC.
7 OF THE CLAYTON ACT

Docket C-2381. Decision, Apr. 16, 1973 - Order, Jan. 21, 1975

Order modifying divestiture order issued against respondent Apr. 16, 1973, 82 F.T.C. 1220, 38 F.R. 12331, by striking from Part I, the requirement that respondent divest itself of the plant located in Moosic, Pa.

Appearances

For the Commission: *James T. Halverson.*

For the respondent: *J. Wallace Adair, Howrey, Simon, Baker & Murchison, Wash., D.C.*

ORDER REOPENING PROCEEDING AND MODIFYING DIVESTITURE
ORDER

This matter is before the Commission on a petition filed by respondent American Cyanamid Company on Dec. 20, 1974, requesting that the proceeding in the above-captioned matter be reopened for the purpose of modifying the order of divestiture issued therein on Apr. 16, 1973, so as to relieve respondent of any further obligation to divest its plant located in Moosic, Pa.

In support of this request respondent alleges that the principal purpose of the divestiture provisions of the aforesaid Commission order has already been accomplished by respondent's sale of two lines of men's toiletries on Apr. 1, 1974; that the plant in question was never used to produce these two product lines; and that the plant is presently an unoccupied, nonproductive facility. The director of the Bureau of Competition has filed an answer to the petition advising that he does not oppose the granting of the relief requested.

Having considered the petition and the answer thereto, the Commission is of the opinion that in the circumstances shown to exist the public interest will be served by reopening this proceeding for the purpose of modifying the order to the limited extent requested. Accordingly,

It is ordered, That this proceeding be, and it hereby is, reopened, and that the Commission's order of Apr. 16, 1973, be, and it hereby is, modified by striking from Part I thereof the requirement that respondent divest itself of the plant located in Moosic, Pa.

IN THE MATTER OF

FUQUA INDUSTRIES, INC., ET AL.

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

Docket C-2626. Complaint, Jan. 21, 1975 - Decision, Jan. 21, 1975

Consent order requiring an Atlanta, Ga., vocational school operator and franchisor, among other things to refund up to \$1.25 million to eligible former students; and requiring a St. Petersburg, Fla., vocational school operator and franchisor,