IN THE MATTER OF

FIVE COUNTY BUILDERS AND CONTRACTORS ASSOCIATION, INC.

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

Docket C-2890. Complaint, May 24, 1977 — Decision, May 24, 1977

This consent order, among other things, requires a Fort Myers, Fla., building trade association to cease entering agreement or engaging in any action that requires members and signatories to deal exclusively with association's bid depository, and impose sanctions on those parties who fail to restrict their dealings to such depository. The order further requires respondent to immediately reinstate recalcitrant participants previously suspended.

Appearances

For the Commission: *Thomas D. Wilson, Jr.* and *Truett M. Honeycutt.*

For the respondent: *John A. Noland, Henderson, Franklin, Starnes & Holt,* Fort Myers, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party respondent named or designated in the caption hereof, and hereinafter more particularly named, designated, described and referred to as respondent, has violated the provisions of the 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 Five County Builders and Contractors Association, Inc., hereinafter referred to as respondent corporation or FCBCA, is a nonprofit corporation, organized and existing under the laws of the State of Florida, with its principal office located at 2301 Fowler St., Fort Myers, Florida.

Respondent corporation was organized for, and serves its members as, an instrumentality which promotes cooperative activity among its members, collects business data from its members and generally purports to assist them in the operation of their businesses. One of the functions of respondent corporation is the operation of a bid depository. Said respondent corporation's membership, together with the membership of the bid depository of respondent corporation,

represents a substantial, if not dominant, part of the construction industry contractors in the lower and central Gulf Coast area of the State of Florida.

The membership of said bid depository consists of electrical, plumbing, heating, ventilation and air conditioning and general contractors, who perform their respective contracting services in Lee, Collier, Charlotte, Hendry and Glades Counties in the State of Florida. Members of said bid depository are entitled to, among other things, vote for the members of the bid depository committee of said respondent corporation.

The control, direction and management of the bid depository of respondent corporation is vested in a bid depository committee elected by and from the members of the said bid depository. The directives of the bid depository committee are carried out by the executive director of the respondent corporation.

PAR. 2. In the course and conduct of its business, respondent corporation has actively operated a bid depository which has aided, abetted, guided and assisted its membership in the unlawful acts and practices herein alleged. Several companies or firms which are members of the bid depository of respondent corporation and which maintain their principal places of business in states other than the State of Florida, submit or solicit bids through said bid depository which are, or may be, used by such companies or firms to award or be awarded building construction contracts. Furthermore, a considerable amount of the materials used in the construction that is the subject of said depository bid submissions and solicitations is shipped from various States of the United States into the State of Florida. Such activity and conduct engaged in by the membership of the bid depository of respondent corporation during the time periods described herein result in a constant current of trade in or affecting commerce in said services or materials between and among the various States of the United States. Accordingly, the acts and practices of the respondent corporation, including, but not limited to, the operation of said bid depository, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 3. Since at least 1973, respondent FCBCA, members of the bid depository of respondent FCBCA, officers and directors of respondent FCBCA have conspired to engage, and have engaged, in unfair and unlawful acts, policies and practices, the result of which is, or may be, to unlawfully hinder, restrain or destroy competition in providing electrical, plumbing, heating, ventilation and air conditioning, general contracting and other services related to building construc-

tion in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

Pursuant to, and in furtherance of, said conspiracy, respondent has engaged in the following acts, policies and practices, among others:

Providing a bid depository service which purportedly assists members of the bid depository of respondent corporation in the awarding and securing of electrical, plumbing, heating, ventilation and air conditioning contracting services provided by electrical, plumbing, heating, ventilation and air conditioning contractors for the benefit of general contractors.

Pursuant to rules and regulations which govern the operation and administration of the bid depository and which rules and regulations were formulated, approved and implemented by the Board of Directors of the respondent corporation, participating members of the bid depository of said respondent corporation agree to submit bids exclusively through the aforesaid bid depository, and participating members of said bid depository agree to receive only those bids submitted through said bid depository.

Participating electrical, plumbing, heating, ventilation and air conditioning contractors who submit electrical, plumbing, heating, ventilation and airconditioning bids to general contractors not members of said bid depository of respondent corporation are subject to suspension from the use of said bid depository and fine for such conduct.

Likewise, member general contractors who receive bids from electrical, plumbing, heating, ventilation and air conditioning contractors not members of respondent corporation's bid depository are subject to suspension from the use of said bid depository and fine for such conduct.

PAR. 4. The capacity and tendency of the acts, policies and practices of the respondent as alleged in Paragraph Three have been, are or may be, to unlawfully restrict, restrain, hinder and destroy competition in providing electrical, plumbing, heating, ventilation, air conditioning and general contracting services in connection with building construction projects in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, within the intent and meaning of Section 5 of said Act.

PAR. 5. The policies, acts and practices of the respondent, as hereinbefore set forth, are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and respondent having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; 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 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 had violated the said Act and the 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 procedures prescribed in Section 2.34 of the Rules, the Commission hereby issues its complaint, making the following jurisdictional findings, and enters the following order:

1. Respondent Five County Builders and Contractors Association, Inc. is a nonprofit corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 2301 Fowler St., Fort Myers, Florida.

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

ORDER

It is ordered, That respondent Five County Builders and Contractors Association, Inc., its officers and directors, and the successors, assigns, agents, representatives and employees of said respondent, directly or indirectly, through any corporate or other device, or through any member of or signatory to its bid depository, in connection with the receipt, solicitation, use, submission or transmission of bids which are, or may be, employed in the awarding of

building construction contracts and subcontracts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from entering into, continuing, cooperating in, or carrying out, any course of action, conspiracy, undertaking or agreement:

1. Which requires or provides that any member, signatory, company, firm or individual that employs or uses the bid depository of respondent corporation shall receive or solicit bids from, or submit bids to, only those companies, firms or individuals that are also members, signatories or participants in said bid depository;

2. Which subjects any company, firm or individual that employs or uses the bid depository of respondent corporation to suspension from participation in said bid depository or fine or any other kind of sanction, or the threat thereof, for receiving or soliciting bids from, or submitting bids to, any company, firm or individual that is not a member of the bid depository of said respondent corporation or that does not employ or use said bid depository;

3. (a) To suspend from participation in said bid depository, to fine or to impose any other sanction upon any company, firm or individual for submitting bids to any company, firm or individual that is not a member of the bid depository of respondent corporation or that does not employ or use said bid depository;

(b) To suspend from participation in said bid depository, to fine or to impose any other sanction upon any company, firm or individual for awarding contracts based upon bids received from any company, firm or individual that is not a member of the bid depository of respondent corporation or that does not employ or use said bid depository.

It is further ordered, That respondent immediately reinstate any company, firm or individual suspended from participation in said bid depository, which suspension resulted from conduct engaged in by respondent which hereinafter would amount to a violation of this order.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to all present and future members, signatories, companies, firms or individuals that participate in said bid depository.

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

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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

ALBANO ENTERPRISES, INC., ET AL.

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

Docket C-2891. Complaint, May 31, 1977 — Decision, May 31, 1977

This consent order, among other things, requires a Santa Ana, Calif., manufacturer and distributor of automatic gas-saver devices to cease misrepresenting the performance or efficacy of its products; that its devices will fit all engines; that these products are patented; or that they have been tested, inspected or recommended by government agencies. Further, the firm is required to substantiate all product claims; withdraw and destroy any promotional material containing false or unsubstantiated representations; make refunds to dissatisfied customers, within one year from time of product purchase; and disclose this refund policy in all advertising material. The order additionally requires the firm to maintain prescribed records; and institute a program of continued surveillance to ensure that its distributors conform to the terms of the agreement.

Appearances

For the Commission: *John M. Porter.*
For the respondents: *Edward J. Atkinson,* Los Angeles, Calif.

COMPLAINT

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

PARAGRAPH 1. Respondent Albano Enterprises, Inc. 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 1570 E. Edinger, Santa Ana, California.

Respondent Louis Albano is an officer of the corporate respondent. Respondent Joseph Albano is the manager of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been

engaged in the manufacture and distribution of so-called automobile gas saver products, which are marketed under such trade names as "Mini-Turbo Charger," "H. P. Air Injector," "Variable Combustion Meter," "V. C. Meter," "Air Jet," "Ram Jet," "Power-on-Gas-Saver," and "Air Master." These products are designed to fit between the PCV valve (positive crankcase ventilation) of the intake manifold and the carburetor. At sufficiently high engine speed, these products are purported to introduce minute additional amounts of air into the carburetor, thus allegedly creating a significantly better fuel burn by improving (increasing) the air to fuel ratio. At lower engine speeds, these products are designed to be inactive and have no effect at all.

PAR. 3. Respondents sell their products through distributors, and supply advertising materials and other promotional materials to these distributors for their use in reselling gas savers to the general public. These advertising materials and other promotional materials are disseminated to respondents' distributors located in various States of the United States, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act. Typical, but not all inclusive thereof, of such advertisements and promotional material disseminated by respondents are the following:

A. MAKE YOUR CAR AN AIR BURNER — GET AS MUCH AS 37% MORE FUEL, MORE POWERFUL FUEL OUT OF EVERY GALLON OF GAS YOU BUY

B. WITH SUPERCHARGING you increase your horsepower dramatically up to 28% more full-time firing power.

C. GAIN 2 to 6 OR MORE MILES PER GALLON.

D. SAVE UP TO 2 GALLONS OF GAS EVERY HOUR YOU DRIVE

E. HORSEPOWER INCREASE * * * Some increases: 36%, 18.75%, 55%, 43%. Test Lab-Walton's Auto Lab., Massachusetts

F. *Better Gas Mileage* * * * test result from one of the top U.S. labs. *16.7% MORE M.P.G.* test lab: Fema Corporation, CA.

G. *Less Air Pollution* * * * Percentages of Reduction: *HC* 13.74%, *Co:* 19.96%, *NOX:* 30.85%—Test Lab: Anaheim, California.

PAR. 4. At the time respondents disseminated the representations contained in advertisements and other promotional materials as alleged in Paragraph Three, respondents did not possess and rely upon a reasonable basis for making these representations. Therefore, the said advertisements and other promotional materials were and are unfair and/or deceptive.

PAR. 5. The advertisements and other promotional materials disseminated as alleged in Paragraph Three, and others substantially similar thereto represent, directly or by implication, that respondents, at the time the advertisements and other promotional materials were disseminated, possessed and relied upon a reasonable

basis for making the representations contained in the advertisements and other promotional materials.

PAR. 6. In truth and in fact, at the time respondents made the representations contained in the advertisements and other promotional materials as alleged in Paragraph Three, respondents did not possess or rely upon a reasonable basis for making such representations. Therefore, the said advertisements and other promotional representations were and are unfair and/or deceptive.

PAR. 7. In connection with advertising materials and other promotional materials regarding product efficacy supplied by respondents to distributors as alleged in Paragraph Three, respondents supply additional advertising and promotional materials to their distributors for their use in reselling gas savers to the general public. Typical, but not all inclusive thereof, of such advertisements and promotional materials disseminated by respondents are the following:

A. will fit all cars, domestic and foreign, and any truck or boat that runs on gasoline;
B. approved by the State of California;
C. an automotive device so original it was granted U.S. Patent No. 2454480 as a *BASIC* invention

PAR. 8. Through the use of the promotional representations set forth in Paragraph Seven above, and others of similar meaning and import, respondents represent directly or indirectly that their gas saver products:

A. will fit all cars, including all imported cars, and all trucks and boats which run on gasoline;

B. are "approved" by the State of California;

C. are automotive products so original they are patented as a basic invention.

PAR. 9. In truth and in fact, respondents' gas saver products:

A. will not fit all vehicles, most notably certain foreign cars and diesel engine vehicles;

B. are not approved by the State of California and in fact California law expressly prohibits the use of the term "approved" in the advertising of such products;

C. are not protected by any U.S. patent currently in effect.

PAR. 10. The advertisements and other promotional claims, as set forth in Paragraph Seven herein, therefore contain false, misleading, and deceptive statements and representations concerning respondents' gas saver products.

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

substantial competition in or affecting commerce with corporations, firms, and individuals engaged in the sale and distribution of gas saver products of the same general kind and nature as that sold by respondents.

PAR. 12. The use by respondents of the aforesaid unfair and/or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of the aforesaid products manufactured and distributed by respondents. Further, as a result thereof, substantial trade is being unfairly diverted to respondents from their competitors.

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

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 San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

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

1. Respondent Albano Enterprises, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1570 E. Edinger, Santa Ana, California.

Respondent Louis Albano is an officer of said corporation, and respondent Joseph Albano is the manager of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their 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 Albano Enterprises, Inc., a corporation, its successors and assigns, and its officers, and Louis Albano, individually and as an officer of said corporation, and Joseph Albano, individually, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the manufacturing, advertising, offering for sale, sale, or distribution of any products promoted as capable of causing a beneficial effect in the fuel economy, emission or other performance characteristics of any internal combustion engine in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Making, directly or by implication, any statement or representation regarding the performance or effectiveness of said products unless such statement or representation is based upon and supported by prior, fully documented, adequate and well-controlled scientific studies or tests.

2. Failing to maintain copies of all documentation for the studies or tests referred to in subparagraph (1) of this paragraph.

3. Representing, directly or by implication, that respondents' products will fit all vehicles which are powered by gasoline engines.

4. Representing, directly or by implication, that the respondents' products have been approved, inspected, recommended or tested by the State of California or any other agency of government unless prior written approval is secured from the particular agency, or include in any public representation the name of any such agency without prior written authorization.

5. Representing, directly or by implication, that the respondents' products have been granted a patent unless there is in fact a current United States patent in force protecting those products.

It is further ordered, That any advertisement or other form of promotional representation respecting the efficacy or utility of respondents' products in the form of testimonials, must be based on fully documented, adequate, and well-controlled scientific studies or tests performed prior to the publishing or dissemination of said testimonials.

It is further ordered, That respondents shall forthwith cause the recall from all further use and destruction of all advertising copy, brochures and any other form of promotional representation, distributed to non-retail purchasers, which include statements or representations concerning the efficacy or utility of respondents' products that are inconsistent with any of the provisions set forth in this order.

It is further ordered, That respondents refund to each retail purchaser of the product the purchase price paid, in the event that such purchaser is dissatisfied with the product for any reason, within a period of one year from the date of purchase. Furthermore, should the product have any defect in workmanship or materials, the respondents shall replace the defective part or the product, as necessary, free of charge, within a one-year period from the date of purchase. Respondents shall clearly and conspicuously disclose their refund policy pursuant to the exact provisions of this order, in all advertising, promotional literature, package insert materials and the like, pertaining to the product.

It is further ordered, That each respondent shall forthwith

1. Deliver a copy of this order to cease and desist to all persons now engaged, or who become engaged in the advertising, offering for sale, sale, or distribution of respondents' products, as respondents' agent, salesman, franchisee, independent contractor, representative, or employee, and secure from each of said persons a signed statement acknowledging receipt of a copy thereof. For purposes of brevity, said persons shall be referred to hereinafter as "distributors."

2. Inform all distributors that the respondents are obligated by the acts or practices prohibited by this order, under the circumstances set forth in subparagraph 4 of this paragraph.

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

4. Upon receiving actual knowledge from any source (including but not limited to respondents' program of surveillance, and representatives of the Federal Trade Commission) of facts indicating a violation of any provision of this order by any distributor, or by any of such distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or

other representatives, respondents shall within 24 hours notify such distributor by certified mail, return receipt requested, that such violation of this order has occurred ("Notice"), and that respondents will discontinue dealing with said distributor upon receipt by respondents of actual knowledge of one (1) or more further violations of this order by such distributor, or by any of such distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors or other representatives, within one hundred and eighty (180) days of receipt of said Notice by such distributor. Respondents shall obtain from such distributor written acknowledgement of receipt of such Notice, which acknowledgement shall indicate the date of receipt of such Notice.

Upon receiving actual knowledge from any source (including but not limited to respondents' program of surveillance, and representatives of the Federal Trade Commission) of facts indicating one (1) or more violations of any provision of this order, within one hundred and eighty (180) days following a distributor's receipt of the aforesaid "Notice," by a distributor, or by any of such distributor's present or future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors or other representatives, respondents shall permanently discontinue dealing with such distributor.

5. Maintain complete records for a period of no less than three years from the date of the incident, of any written or oral information received which indicates the possibility of a violation of this order by any respondent or distributor, or any of such distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or other representatives; and maintain complete records of notifications of violations as required by subparagraph 4 of this paragraph, and of distributors' acknowledgements of receipt of such notifications. Any oral information received indicating the possibility of a violation of this order shall be reduced to writing, and shall include the name, address and telephone number of the informant, the name and address of the distributor involved, the date of the communication, and a brief summary of the information received. Such records shall be available upon request to representatives of the Federal Trade Commission, at normal business hours upon reasonable advance notice.

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 each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the manufacturing, advertising, offering for sale, sale, or distribution of any products promoted as capable of causing a beneficial effect in the fuel economy, emission or other performance characteristics of any internal combustion engine, or of his affiliation with a new business or employment in which his own duties and responsibilities involve the manufacturing, advertising, offering for sale, sale, or distribution of any products promoted as capable of causing a beneficial effect in the fuel economy, emission or other performance characteristics of any internal combustion engine. Such notice shall include the respondent's new business address and a statement as to the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

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

IN THE MATTER OF

ALEXANDER'S, INC.

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

Docket C-2892. Complaint, May 31, 1977 — Decision, May 31, 1977

This consent order, among other things, requires a New York City department store chain to cease failing to notify those individuals denied employment or terminated based on a consumer reporting agency report, the name and address of the reporting agency furnishing the report. Further, the firm must retroactively provide such information to those individuals denied employment or terminated because of adverse consumer reports during the two years preceeding issuance of this order.

Appearances

For the Commission: *Diana M. Kirigin* and *Ronald F. Stryshak.*

For the respondent: *Peter M. Gilman, Bartel, Engelman & Fishman,* New York City.

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting 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 Alexander's Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Alexander's, 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 500 Seventh Ave., New York, New York.

PAR. 2. Respondent, Alexander's, Inc. has been and is now operating a chain of department stores in the States of New York and New Jersey. In connection with the operation of these stores, respondent employs over 10,000 individuals.

PAR. 3. Respondent, in the course of processing applications for employment, obtains "consumer reports" from a "consumer reporting agency" as these terms are defined in Sections 603(d) and 603(f), respectively, of the Fair Credit Reporting Act.

PAR. 4. In a number of instances, subsequent to April 25, 1971,

respondent has denied consumers employment based in whole or in part on adverse information contained in consumer reports from a consumer reporting agency and has failed to so advise the job applicants against whom such action was taken and supply them with the name and address of the consumer reporting agency making the report.

PAR. 5. The acts and practices set forth in Paragraph Four above were and are in violation of Section 615(a) of the Fair Credit Reporting Act, and pursuant to Section 621(a) of that Act, respondent has thereby engaged in unfair acts or practices in or affecting commerce in violation of Section 5(a)(1) 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 New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

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

1. Respondent Alexander's, 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 500 Seventh Ave., New York, New York.

2. The Federal Trade Commission has jurisdiction of the subject

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

ORDER

It is ordered, That respondent Alexander's, Inc., a corporation, its successors or assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with denial or termination of employment wholly or partly because of information contained in a "consumer report" from a "consumer reporting agency" as these terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 (1970)), do forthwith cease and desist from failing to so advise the job applicants against whom such adverse action is taken and to supply them with the name and address of the consumer reporting agency making the report.

It is further ordered, That whenever respondent denies or terminates employment of an individual either wholly or partly because of information contained in a consumer report from a consumer reporting agency, respondent shall advise the individual in written form and shall supply him with the name and address of the consumer reporting agency which furnished the report.

It is further ordered, That respondent shall furnish the written notification referred to in the above paragraph to those individuals who were denied employment or terminated by respondent either wholly or partly because of information contained in a consumer report during the two year period preceding the date upon which this order becomes final.

It is further ordered, That respondent shall preserve evidence of compliance with the requirements imposed under this order for a period of not less than two years after the date each required disclosure is made. Respondent shall upon request permit the Commission through its duly authorized representatives to inspect such records.

It is further ordered, That respondent shall deliver a copy of this order to all present and future employees engaged in processing applications for employment.

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

It is further ordered, That 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

NATIONAL MERIDIAN SERVICES, INC., ET AL.

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

Docket 9027. Complaint, March 25, 1975 — Modifying order, June 1, 1977

Order modifying an earlier order dated March 28, 1977, 89 F.T.C. 192, by deleting the requirement that a Woodbury, N.Y. marketer of a basement waterproofing and termite control process cease failing to disclose to customers that instruments of indebtedness may be negotiable with third parties without the customer being notified of such action.

ORDER MODIFYING FINAL ORDER

Pursuant to Section 3.72(b)(2) of the Commission's Rules of Practice, and after consideration of respondents' petition of March 30, 1977 to reopen and modify Paragraph IA22 of the Final Order to Cease and Desist dated March 28, 1977, and after further consideration of the response of the Bureau of Consumer Protection in support of such petition,[1]

It is ordered, That Paragraph IA22 be altered and modified to read as follows:

> 22. Failing to disclose, orally prior to the time of sale and in writing on any trade acceptance, conditional sales contract, promissory note, or other instrument of indebtedness executed by the purchaser, with such conspicuousness and clarity as is likely to be observed and read by such purchaser, the disclosures, if any, required by Federal law or the law of the state in which the instrument is executed.

[1] The Commission hereby waives the 30-day limit under Rule 3.72(b)(2) and accepts the Bureau's answer to respondents' petition as being timely filed.

IN THE MATTER OF

ASTOR-SCOTT, INC., ET AL.

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

Docket C-2893. Complaint, June 13, 1977 — Decision, June 13, 1977

This consent order, among other things, requires a Fort Lauderdale, Fla. mail order firm to cease disseminating advertisements which misrepresent the effectiveness of Exogen Vitamin E Oil in improving, treating, relieving or preventing skin, health or obesity problems. The firm must also cease disseminating advertisements which misrepresent the composition and efficacy of Phantom Roach Powder, and other insecticides. The order prescribes the circulation of deceptive or unsubstantiated product claims and requires the firm to maintain competent advertising substantiation files.

Appearances

For the Commission: *Ronald C. Cougill.*

For the respondents: *Milton Bass, Bass, Ullman & Lustigman,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission having reason to believe that Astor-Scott, Inc., a corporation, and Nelson Torelli, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of Sections 5 and 12 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Astor-Scott, Inc. is a Florida corporation with its office and principal place of business located at 6041 N.E. 14th Ave., Fort Lauderdale, Florida. It advertises and does business under various names geared to specific products, *e.g.*, Elizabeth Astor Division for "Exogen Vitamin E Oil," Super C Division for "Super C" Grapefruit Diet Plan, and Astor-Scott, Inc., for "Phantom Roach Powder."

Respondent Nelson Torelli is an individual and officer of Astor-Scott, Inc. He formulates, directs and controls its policies, acts and practices, including those hereinafter set forth. His business address is the same as that of the corporate respondent.

COUNT I

Alleging violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended. The allegations of Paragraph One are incorporated by reference as if fully set out herein.

PAR. 2. Respondents, d/b/a Elizabeth Astor Division, have, prior to November 5, 1973, been engaged in the advertising, offering for sale and mail order sale of "Exogen Vitamin E Oil," a skin cream and cosmetic, as the term "cosmetic" is defined in Section 15 of the Federal Trade Commission Act, as amended.

PAR. 3. Respondents cause the said product, when sold, to be transported from their place of business located in the State of Florida to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in said preparations in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. The volume of business in such commerce has been, and is, substantial.

PAR. 4. In the course and conduct of their business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said product by the United States mail and by various other means in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, including, but not limited to, advertisements inserted in newspapers, magazines and other advertising media for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including, but not limited to, the aforesaid media for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of said preparations in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. Among and typical of the statements and representations contained in said advertisements disseminated as hereinabove set forth are the following:

1. Thirsty, dry skin virtually drinks up this precious beauty fluid. Exogen Vitamin E Oil penetrates the outer skin layer.

2. Doctors and scientists have spent years and [sic] labor to unlock the hidden volumes of strange, wonderful Vitamin E. Now at last some of its fantastic benefits have been revealed for mankind. For instance, scientists have discovered that Vitamin E acts as an anti-oxidant when applied to the skin. It actually helps prevent the loss of vital moisture through perspiration! In fact, it supplies life-giving oxygen to skin cells!

3. Pure, virgin Vitamin E Oil * * * the *miracle ingredient* of 20th Century Cosmetology * * *

4. Just imagine * * * 28,000 International Units to *each* ounce! * * * truly virginal! Just one ounce equals in potency 28 bottles of diluted Vitamin E lotion.

5. Apply *pure* Vitamin E Oil *direct* to wrinkles, lines, blemishes and a dry, old looking skin! Now * * * capture again that lovely, dewy, younger looking complexion of happy days past * * * or pay nothing!

REVERSE THE PROCESS that makes you look older than your real years. *Think positive!* Wake up your stagnating skin to fresh new beauty. Give it the intense, loving care of this Vitamin E treatment. Then see how this miracle ingredient REVERSES the effects of abuse and neglect * * *

6. Apply in light, *rotating* motions, right on skin faults such as: dry flaky skin, fine lines, surface scars, wind or sunburned tissues, *even stretch marks.*

In just days, this thick, rich oil rewards your complexion with new radiant glamour and beauty * * * A thrilling surprise awaits you in just 5 days.

PAR. 6. By and through the use of said advertisements, respondents have represented, directly or by implication, that:

1. Vitamin E Oil is absorbed into the skin through topical application.

2. Vitamin E, through its anti-oxidant properties, prevents moisture loss and supplies oxygen to skin cells.

3. Vitamin E is a new, different, wonder or miracle ingredient, the inclusion of which yields additional benefits to Exogen Vitamin E Oil beyond the moisturizing effect of any emollient preparation.

4. The purity and strength of the Vitamin E in Exogen Vitamin E Oil have an effect on the performance or efficacy of the product.

5. Topical application of Exogen Vitamin E Oil will make one younger looking, yield a youthful complexion, or reverse the process of aging skin.

6. Topical application of Exogen Vitamin E Oil will prevent or improve skin faults such as dry flaky skin, fine lines, surface scars, wind or sunburned tissues, stretch marks, wrinkles or blemishes.

7. Topical application of Vitamin E has a salutary effect on the skin.

PAR. 7. In truth and in fact:

1. Vitamin E is not absorbed into the skin through topical application.

2. Vitamin E, through its anti-oxidant properties, does not prevent moisture loss nor supply oxygen to skin cells.

3. Vitamin E is not a new, different, wonder or miracle ingredient. Its inclusion does not yield additional benefits to Exogen Vitamin E Oil beyond the effect of any moisturizing preparation.

4. The purity and strength of the Vitamin E in Exogen Vitamin E Oil have no effect on the performance or efficacy of the product.

5. Topical application of Exogen Vitamin E Oil will not make one younger looking, yield a youthful complexion, or reverse the process of aging skin.

6. Topical application of Exogen Vitamin E Oil will not prevent or

improve skin faults such as dry flaky skin, fine lines, surface scars, wind or sunburned tissues, stretch marks, wrinkles or blemishes.

7. Topical application of Vitamin E has no salutary effect on the skin.

Therefore, the advertisements referred to in Paragraph Six were, and are, misleading in material respects and constituted, and now constitute, "false advertisements," as that term is defined in the Federal Trade Commission Act, as amended, and the statements and representations set forth in Paragraphs Five and Six were, and are, false, misleading and deceptive.

COUNT II

Alleging violation of Section 5 of the Federal Trade Commission Act, as amended. The allegations of Paragraph One above are incorporated by reference as if fully set out herein.

PAR. 8. Respondents have, prior to February 28, 1974, engaged in the advertising, offering for sale and sale of products, including, but not limited to, "Phantom Roach Trap and Powder."

PAR. 9. Respondents cause said products, when sold, to be shipped from their place of business in the State of Florida to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 10. In the course and conduct of their business, respondents have made statements and representations in the advertising, offering for sale and sale of their products through advertisements inserted in magazines and newspapers of interstate circulation and other advertising media.

PAR. 11. Among and typical of the statements and representations contained in said advertisements are the following:

1. Wipes out all roach nests in your home fast * * * or you pay nothing!

2. Drives Roaches Crazy. All kinds of roaches go wild over Phantom. They gobble it up and stagger off to die. Then a strange chain reaction takes place. A fatal disease spreads like wildfire, striking one roach after the other until each and every roach nest and egg is killed * * *

3. * * * Its high speed CHAIN REACTION formula was originally designed for professional exterminators. Now it has been released to the general public * * *

4. Just 1 can keeps your house free from roaches *up to 5 full years.*

Giant five year treatment.

PAR. 12. Through the use of statements and representations alleged in Paragraph Eleven hereof, and others of similar import and meaning,

respondents have represented, and are now representing, directly or by implication, that:

1. Respondents' roach powder will quickly wipe out all cockroach nests in an infested household.

2. Respondents' roach powder creates a deadly chain reaction which eliminates and kills roaches and eggs.

3. Respondents' roach powder was originally conceived for use by professional roach exterminators and has only recently been released to the general public for use in homes, factories and farms.

4. Respondents' roach powder, in normal use, will keep a household roach free for five full years.

PAR. 13. In truth and in fact:

1. Respondents' roach powder will not quickly wipe out all cockroach nests in an infested household.

2. Respondents' roach powder does not create a chain reaction which eliminates and kills roaches and eggs. Each cockroach must contact the insecticide to be killed. Respondents' roach powder will not kill roach eggs.

3. Respondents' roach powder was not originally conceived for use by professional exterminators, and products containing the same active ingredient as respondents' products have been available to the public for some time.

4. In normal use, respondents' roach powder will not keep a household roach free for five years.

Therefore, the statements and representations as alleged in Paragraph Eleven were, and are, false, misleading, unfair or deceptive acts or practices.

PAR. 14. By and through the use of statements and representations, including, but not limited to, those alleged in Paragraph Eleven, respondents have represented, directly or by implication, that Phantom Roach Powder retains its killing power for five full years. At the time of the said representations, respondents had no reasonable basis adequate to support such representations. Therefore, the aforesaid acts and practices were, and are, unfair acts or practices.

PAR. 15. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices and the dissemination of the aforesaid "false advertisements" 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 respondents' products by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondents, including

the dissemination of "false advertisements," 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 and deceptive acts and practices and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

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

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

1. Respondent Astor-Scott, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 6041 N.E. 14th Ave., Fort Lauderdale, Florida.

Respondent Nelson Torelli is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

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, Astor-Scott, Inc., a corporation, its successors and assigns, and its officers, and Nelson Torelli, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of Exogen Vitamin E Oil, or any food, drug, device, or cosmetic, do forthwith cease and desist from:

A. Disseminating, or causing to be disseminated, by means of the United States mail or by any means in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, any advertisement for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of said product, which advertisement:

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

(a) Vitamin E is absorbed into the skin through topical application to the extent and degree that such absorption would result in cosmetic or rejuvenative benefit;

(b) Vitamin E, through its anti-oxidant properties, prevents moisture loss or supplies oxygen to skin cells;

(c) Vitamin E is a new, different, wonder or miracle ingredient, the inclusion of which yields additional benefits to Exogen Vitamin E Oil beyond the effect of any moisturizing preparation;

(d) The purity and strength of the Vitamin E in Exogen Vitamin E Oil will have an effect on the performance or efficacy of the product;

(e) Topical application of Exogen Vitamin E Oil will make one younger looking, yield a youthful complexion or reverse the process of aging skin;

(f) Topical application of Exogen Vitamin E Oil will prevent and improve skin faults, including, but not limited to, dry flaky skin, fine lines, surface scars, wind or sunburned tissues, stretch marks, wrinkles and blemishes;

(g) Topical application of Vitamin E will have any salutary effect on the skin.

2. Contains any representation for any drug, cosmetic, food or dietary product, as being effective in the prevention, improvement, treatment or relief of skin faults or conditions, obesity or other appearance or health problems unless such representations are supported and substantiated by competent scientific data or tests. Such scientific data or tests shall be available in written form for inspection

by authorized representatives of the Federal Trade Commission during the period of time the representation is being made and for at least three years following the final use of the representation.

B. Disseminating, or causing to be disseminated, by any means, any advertisement for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, of Exogen Vitamin E Oil or any food, drug, device or cosmetic, which advertisement contains any representation prohibited by Count I of this order.

COUNT II

It is further ordered, That respondents Astor-Scott, Inc., a corporation, its successors and assigns, and its officers, and Nelson Torelli, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Phantom Roach Powder, or any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

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

1. Product use will result in total pest extermination in an infested household unless respondents can establish that such is the fact.

2. A progressive chain reaction or other functional characteristic will occur during or after product use unless respondents can establish that such is the fact.

3. The period of time during which the use or results of use will remain effective unless respondents can establish that such is the fact.

B. Representing, orally, visually, in writing or any other manner, directly or by implication, the efficacy, results of use, quality features, performance characteristics or composition of any product or service unless they are supported and substantiated fully by competent data or tests. Such data or tests shall be available in written form for inspection by authorized representatives of the Federal Trade Commission during the period of time the representation is being made and for at least three years following the final use of the representation.

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

order. If it is demonstrably impossible to furnish such notice at least thirty (30) days prior to such event, notice shall be delivered to the Commission as soon as possible prior to consummation of any such occurrence.

It is further ordered, That the individual respondent shall notify the Commission at least thirty (30) days prior to the discontinuance of his present business and at least thirty (30) days prior to his affiliation with a new business or trade. If it is demonstrably impossible to furnish such notice at least thirty (30) days prior to such event, notice shall be delivered to the Commission as soon as possible prior to consummation of any such occurrence. Such notice shall include the respondents' 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.

IN THE MATTER OF

AMERICAN GENERAL INSURANCE CO.

Docket 8847. Interlocutory Order, June 14, 1977

Denial of respondent's motion to disqualify Commissioner Collier.

ORDER DENYING MOTION TO DISQUALIFY

Respondent has moved to disqualify Commissioner Collier from participation in the Commission's decision of the instant appeal. Respondent contends that Commissioner Collier's participation in this matter would, by virtue of his participation in prior court litigation, violate the Administrative Procedure Act[1] and the Due Process Clause.

In response to the motion, Commissioner Collier filed a memorandum stating that he declined to disqualify himself from participation and setting forth his reasons therefor. Upon consideration of respondent's motion, complaint counsel's answer and Commissioner Collier's memorandum, the Commission has determined that no grounds exist for granting the requested disqualification. The Commission does not believe that Commissioner Collier, as General Counsel, performed any investigative or prosecuting functions in this matter or that his prior participation raises a question about his ability to render a dispassionate judgment. Therefore,

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

Commissioner Collier did not participate in the Commission's determination of this matter.

MEMORANDUM OF CALVIN J. COLLIER, COMMISSIONER, IN RESPONSE TO MOTION THAT HE BE DISQUALIFIED FROM PARTICIPATION IN THIS PROCEEDING

MAY 25, 1977

On July 19, 1976, American General and Fidelity & Deposit (hereafter "American General") moved that I be disqualified from participating in this proceeding because, during my tenure as the Commission's General Counsel,[1] I was "of counsel" on a brief filed on behalf of the

[1] An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to Section 557 of this title* * *. 5 U.S.C. 554(d).

[1] From July 1973, through April 1975.

Commission in a collateral action American General brought to enjoin this proceeding.[2]

In an initial decision of March 7, 1972, which is not the subject of this appeal, an administrative law judge recommended that the complaint be dismissed because the Commission lacked subject matter jurisdiction under the McCarran-Ferguson Insurance Regulation Act ("McCarran Act"), 15 U.S.C. 1011. The Commission reversed the law judge, concluding that the McCarran Act would be no defense to this proceeding, 81 F.T.C. 1052 (1972). American General then filed its collateral action seeking to enjoin the proceeding, contending that the Commission had erred. The collateral action was dismissed, *American General Insurance Co.* v. *FTC*, 359 F.Supp. 887 (S.D. Tex. 1973), *aff'd*, 496 F.2d 197 (5th Cir. 1974).

American General's argument is that "the appearance of [my] name on the Fifth Circuit brief indicates that [I] have been an advocate of the Commission's position in this case and thus calls into question [my] ability now to render a dispassionate judgment therein."[3]

The brief American General mentions was filed on behalf of the Commission itself and not on behalf of Commission staff supporting the administrative complaint, and therefore presents no "mixture of functions" question under Section 5(c) of the Administrative Procedure Act.[4] The brief simply presented the conclusion already reached by the Commission, that the McCarran Act does not bar this proceeding. American General does not suggest that the Commission is somehow similarly disqualified for rejecting American General's McCarran Act defense. The brief did not offer an opinion as to whether, as the complaint alleges, American General has violated Section 7 of the Clayton Act, stating at one point that:

> [I]t is certainly possible that the result of the Commission proceedings against American General and F&D will be the dismissal of the Commission's complaint.

[Brief for the Appellees, at 16.]

My "of counsel" role on the Fifth Circuit brief indicates, at most, agreement with the Commission's prior decision on an issue of law and

[2] "Memorandum of Points and Authorities in Support of Respondent's Motion to Disqualify Chairman Collier" ("Memorandum") at 1.

[3] "Memorandum," *id.*, at 2.

[4] As I have previously noted, the General Counsel neither possesses nor exercises prosecutorial responsibility in the Commission's administrative actions, which is the exclusive responsibility of the Bureaus of Competition and Consumer Protection and the Regional Offices. The General Counsel does not have the kind of stake in an administrative proceeding which would inhibit a fair decision, and his participation in an adjudication therefore does not offend Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 544(d). *See* the Commission's orders and my memoranda in National Commission on Egg Nutrition, Dkt. 8987 (July 16, 1976) ["Order Denying Request to Disqualify"] 88 F.T.C. 84; and Jim Walter Corp., Dkt. 8986 (November 23, 1976) ["Order Denying Motion to Disqualify"] 88 F.T.C. 865, and the authorities there cited.

policy, *i.e.*, the application of the McCarran Act to this matter. American General would not, as a result, be denied a fair hearing in violation of Section 7(a) of the Adminstrative Procedure Act, 5 U.S.C. 556(b), as American General suggests. A fair hearing does not require the trier of fact to approach each new matter without any idea as to what the law or public policy requires.[5]

I conclude that there is no reason for me to decline to carry out my statutory duty to participate in this proceeding.

[5] *FTC* v. *Cement Institute*, 333 U.S. 683, 702-703 (1948); *American Cyanamid Co.* v. *FTC*, 363 F.2d 757, 764-765 (6th Cir. 1966); 2 Davis, Administrative Law §12.01.

IN THE MATTER OF

MENS' WEAR INTERNATIONAL, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS

Docket C-2894. Complaint, June 21, 1977 — Decision, June 21, 1977

This consent order requires a New York City importer and distributor of clothing to cease misrepresenting the wool and other fiber content of its wool blend clothing. Further, the order requires the respondent to notify all purchasers of its misbranded products that the clothing purchased had been misbranded.

Appearances

For the Commission: *John Varounis* and *Martin Gorman.*
For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mens' Wear International, Inc., a corporation, and Leon Rich and Frank Heineman, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, 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 Mens' Wear International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 350 Fifth Ave., New York, New York.

Respondents Leon Rich and Frank Heineman are officers of the corporate respondent. They formulate, direct, and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

Respondents are engaged in the importation of clothing products, including but not limited to men's and boys' CPO jackets, and the sale and distribution of said items of clothing.

PAR. 2. Respondents, now and for some time last past, have imported for introduction into commerce, introduced into commerce, transported, distributed, delivered for shipment, shipped, offered for sale, and

sold in commerce as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 3. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain men's and boys' CPO jackets stamped, tagged, labeled, or otherwise identified by respondents as "30% reprocessed wool, 22% chief value linen, and 48% unknown reclaimed fibers" whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 4. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely items of clothing with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 5. Certain of said wool products were further misbranded by the respondents in violation of the Wool Products Labeling Act of 1939 in that they were not labeled in accordance with the rules and regulations promulgated under said Act in the following respect:

Non-required information was set forth in such manner as to be false, deceptive or misleading in violation of Rule 10(b) of said rules and regulations. Among such non-required false, deceptive or misleading information was the term "chief value" used in connection with the disclosure of linen content on labels affixed to said wool products.

PAR. 6. The acts and practices of respondents as set forth above were, and are, in violation of the Wool Products Labeling Act of 1939 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, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939; and,

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

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

1. Respondent Mens' Wear International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 350 Fifth Ave., New York, New York.

Respondents Leon Rich and Frank Heineman are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their address is the same as that of said corporation.

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 Mens' Wear International, Inc., a corporation, its successors and assigns, and its officers, and Leon Rich and Frank Heineman, individually and as officers of said corporation,

and respondents' representatives, agents, and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the introduction, or manufacture for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products by:

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products.

2. Failing to securely affix to, or place on, each such product a stamp, tag, label, or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

3. Placing non-required information on stamps, tags, labels or other identification affixed to such products that is in any way false, deceptive or misleading.

It is further ordered, That respondents notify, by registered mail, each of their customers that purchased the wool products which gave rise to this complaint of the fact that government tests have shown that such products were misbranded.

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

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

IN THE MATTER OF

FRITO-LAY, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 2 OF THE CLAYTON ACT

Docket 9066. Complaint, Jan. 6, 1976 — Decision, June 24, 1977

This consent order, among other things, requires a Dallas, Texas ready-to-eat snack food producer and distributor to cease engaging in discriminatory pricing practices by selling its products to certain retailers at prices higher than those paid by a competitive establishment. Further, the order stipulates that in any enforcement action, respondent must assume the burden of proving all defenses raised.

Appearances

For the Commission: *Gordon Youngwood* and *Robert W. Rosen.*

For the respondent: *John Kirby, Mudge, Rose, Guthrie & Alexander,* New York City, *Miles J. Alexander, Emmet J. Bondurant* and *Susan A. Cahoon, Kilpatrick, Cody, Rogers, McClatchey & Regenstein,* Atlanta, Ga. and *Ronald R. Kranzow,* Dallas, Tex.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated and is now violating the provisions of subsection (a) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13), and it appearing to the Commission that a proceeding by it would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Frito-Lay, Inc., a wholly-owned division of PepsiCo, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal offices located at Frito-Lay Tower, Exchange Park, Dallas, Texas.

PAR. 2. Respondent has approximately 49 plants in 25 states which produce a varied line of snack food products, including corn chips, potato chips, tortilla chips, pretzels and several more lines.

Respondent sells its corn chips and other snack food items of like grade and quality to a large number of purchasers located throughout the States of the United States who purchase such products for use and resale therein.

PAR. 3. Respondent is now, and has been, transporting corn chips and other snack food products from the state or states where such products are manufactured or stored in anticipation of sale to purchasers located

in other States of the United States. Respondent is therefore engaged in commerce, as "commerce" is defined in the Clayton Act, as amended.

PAR. 4. In the course and conduct of its business in commerce, respondent sells its products of like grade and quality to purchasers who are in substantial competition with each other in the resale and distribution of respondent's like products.

PAR. 5. In the course and conduct of its business in commerce, respondent has been discriminating in price between different purchasers of its snack food products of like grade and quality by selling such products to some purchasers at higher and less favorable prices than the prices charged competing purchasers for such products of like grade and quality.

Illustrative of respondent's discriminatory pricing practices is the following:

Respondent has for several years had in effect a quantity discount program in the Central Division of its Great Lakes Zone whereby any account purchasing $200 up to $499.99 within a calendar month is entitled to a 3 percent discount on total purchases of respondent's products delivered at regular store-door prices; any account purchasing $500 or more within a calendar month is entitled to a 5 percent discount on total purchases of such products. Discounts earned under this policy are paid by check on a calendar quarter basis. Under said pricing program multiunit accounts are permitted to accumulate purchases of each unit in order to realize the maximum discount. The discriminations resulting from this program favor the retail stores, among others, of The Kroger Co.'s Indianapolis Division, in respondent's Great Lakes Zone. Many competitors of The Kroger Co. and other non-favored customers, were discriminated against in that they did not receive the maximum discount, although their store units purchased in greater volume than did individual units of the favored customers.

PAR. 6. The effect of the discriminations in price by respondent in the sale of its snack food products, as set forth hereinabove, has been or may be substantially to lessen competition or tend to create a monopoly in the sale of said products, or to injure, destroy or prevent competition between retailers that pay higher prices and competing retailers that pay lower prices for respondent's said products.

PAR. 7. The discriminations in price, as herein alleged, are in violation of subsection (a) of Section 2 of the Clayton Act, as amended.

DECISION AND ORDER

The Commission having issued its complaint on January 6, 1976, charging that the respondent named in the caption hereof has violated

the provisions of Section 2 of the Clayton Act, as amended, (15 U.S.C. 13); and

Respondent and complaint counsel, by joint motion filed October 26, 1976, having moved to have this matter withdrawn from adjudication for the purpose of submitting an executed consent agreement; and

The Commission, by order issued November 9, 1976, having withdrawn this matter from adjudication pursuant to Section 3.25(c) of its Rules; and

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

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

1. Respondent Frito-Lay, 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 Frito-Lay Tower, Exchange Park, Dallas, Texas.

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

ORDER

I

It is ordered, That respondent Frito-Lay, Inc., a corporation, and its officers, agents, representatives, employees, successors and assigns, directly or indirectly, through any corporate or other device, in connection with its sale of

> store-door delivered processed snack food products which are sold in a ready to eat state (that is which do not require further preparation by the purchaser before consumption) including, by way of example, rather than by limitation, potato, corn and tortilla chips; fried pork rinds; cheese puffs; pretzels; popcorn; chip dips; nut meats; peanut butter and cheese crackers; brownies; marsh-

mallow, raisin, fig and oatmeal cookies; dried meat sticks and jerky (hereinafter referred to as "products")

in commerce, as "commerce" is defined in the Clayton Act, as amended, do cease and desist from:

Discriminating in the price of such products of like grade and quality by selling to any purchaser which is a retailer and which purchases for resale in its grocery store, market or similar competitive retail establishment (hereinafter referred to as "purchaser"), at a net price which directly or indirectly is higher than the net price charged any other purchaser who competes in the resale of respondent's products with the purchaser paying the higher price.

II

It is further ordered, That nothing herein contained shall prevent price differentials which make only due allowance for differences in the cost of manufacture, sale or delivery, resulting from the differing methods or quantities in which such products are sold or delivered to such purchasers or which are made in good faith to meet an equally low price of a competitor; nor shall anything herein contained prevent price changes from time to time where made in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned; and it is further provided that all other defenses legally available to a charge of price discrimination under Section 2(a) of the amended Clayton Act are not waived by this order.

III

It is further ordered, That in any enforcement action brought to enforce the provisions of this order, respondent shall assume the burden of proving all defenses described or referenced in Part II of this order.

IV

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

V

It is further ordered, That 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 in which it has complied with this order and shall file such other reports as may, from time to time, be required to assure compliance with the terms and conditions of this order.