offering for sale of such supplier's products, where respondent solicits such promotional allowances and payments and knows or should know that such promotional allowances or payments are not being offered or otherwise made available by such supplier on proportionally equal terms to all of such supplier's other customers, including retail customers who do not purchase directly from such supplier, who compete with respondent in the offering for sale or sale of such supplier's products.

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

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

It is further ordered, That respondent 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.

Commisioner MacIntyre concurs in the result.

IN THE MATTER OF

UNIVERSE CHEMICALS, INC., ET AL.

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

Docket 8752. Complaint, December 5, 1967—Decision, May 13, 1970*

Order requiring a Chicago, Ill., distributor of water-repellent paints and coatings under the trade names "Kleer-Kote" and "Kolor-Kote" to cease misrepresenting that it is affiliated in any way with Union Carbide Company or any other well-known company or laboratory, using deceptive guarantees, exaggerating the waterproofing and rust resistant qualities of its products, misrepresenting the return privileges and earnings of its dealers, and furnishing others with means to mislead prospective purchasers.

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

*Reported as amended by hearing examiner's order of July 10, 1968, by amending subparagraph 12 of paragraph 6 and subparagraph 12 of paragraph 7.

Trade Commission, having reason to believe that Universe Chemicals, Inc., a corporation, and Raymond L. Rosen and Jordan L. Lichtenstein, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Universe Chemicals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 919 North Michigan Avenue, Chicago, Illinois.

Respondents Raymond L. Rosen and Jordan L. Lichtenstein are officers and sole stockholders of the corporate respondent and their business address is the same as that of said corporate respondent. The individual respondents formulate, direct and control the acts, policies and practices of the corporate respondent, including the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of water repellent paints and coatings to dealers for resale to the public under the trade names of "Kleer-Kote" and "Kolor-Kote."

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped and transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintain, and at all times hereinafter mentioned have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of their business and at all times mentioned herein respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by the respondents.

PAR. 5. In the course and conduct of their business, respondents have operated, and continue to operate, a sales plan to market their products by establishing dealerships under "Exclusive Dealership Agreements." These exclusive dealership agreements assign to individual dealers a particular territory within which they may operate and resell the respondents' products to the purchasing public. Salesmen, designated "regional managers," are employed and trained by the repondents to solicit and secure these dealers. The salesmen

induce the dealers to enter into the agreements with which they combine initial orders for the respondents' products. The dealers have the option of paying for the merchandise in full at the time of purchase or of paying twenty-five percent down and of paying the remainder by executing three negotiable trade acceptances payable in thirty, sixty and ninety days.

During the course of their sales presentations, the respondents' salesmen use physical demonstrations to portray the waterproof properties of their products. The equipment for these demonstrations is supplied to the salesmen by the respondents. In many cases, the products delivered to the dealers are found to lack the properties of the products used by the salesmen in their demonstrations and the dealers are unable to perform the same demonstrations for their customers as did the salesmen.

PAR. 6. In the course and conduct of their business, as described above, and for the purpose of inducing sales of their products by and through oral statements and representations of respondents or their salesmen and representatives and by means of brochures and other written and printed material, respondents represent, and have represented, directly or by implication, to prospective purchasers, that:

1. The corporate respondent, Universe Chemicals, Inc., is a subsidiary of, a division of, an exclusive licensee of, or is affiliated with the Union Carbide Company.

2. The respondents' products are manufactured, or have been developed, by the Union Carbide Company.

3. The respondents' products have been successfully tested by the Union Carbide Company, by the corporate respondent, or by an independent testing laboratory.

4. The respondents' products are unconditionally guaranteed for ten years.

5. The respondents' product, Kleer-Kote, contains fourteen percent silicones.

6. The respondents' dealers will realize various profits up to $18,000 per year from the resale of the respondents' products.

7. The supply of the respondents' products purchased by the dealer will be sold out before the trade acceptances which the dealer has given in payment on his supply become due and payable.

8. The respondents' dealers may return to the respondents any unsold quantities of the respondents' products or the respondents will transfer the unsold quantities to another dealer and a refund will be made to the dealer.

9. The respondents' products are waterproof.

10. The respondents' products prevent rust.

11. The respondents' products are suitable for both the inside and the outside of a building.

12. One coat of respondents' products will be sufficient to produce all of the results claimed for such products by respondents or by their salesmen or representatives.

PAR. 7. In truth and in fact:

1. Respondent Universe Chemicals, Inc., is not a subsidiary of, a division of, an exclusive licensee of, and is not affiliated with the Union Carbide Company.

2. The respondents' products are neither manufactured nor have they been developed by the Union Carbide Company, although one of the ingredients in their products may have been manufactured by the Union Carbide Company and is placed in combination by the respondents with other ingredients not manufactured by the said company.

3. The respondents' products have never been tested or evaluated by the Union Carbide Company, or by any independent laboratory or any other person or organization qualified to test or evaluate such products nor have such products been tested by respondents.

4. The products sold by the respondents are not unconditionally guaranteed for a period of ten years, but only guaranteed in a limited way and not unconditionally.

5. The respondents' product, Kleer-Kote, does not contain fourteen percent silicones, but a substantially lesser amount.

6. Few, if any, dealers earn $18,000 per year from the resale of respondents' products or whatever lesser amount was represented to them at the time of the purchase and in many cases make no profit at all, but sustain a substantial loss.

7. The supply of respondents' products purchased by the dealers is seldom if ever sold out before the trade acceptances which the dealer has given in payment on his supply become due and payable.

8. The respondents' dealers are not permitted to return to the respondents any unsold quantities of the respondents' products and the respondents will not transfer them to another dealer nor is any refund made to the dealer for unsold merchandise.

9. Respondents' products are not waterproof, but only water repellent to a limited extent.

10. Respondents' products do not prevent rust.

11. Respondents' products are not suitable for use on the inside of a structure.

12. One coat of respondents' products is not sufficient to produce all of the results claimed for such products by respondents or by their salesmen or representatives.

Therefore, the statements and representations as set forth in Paragraph Six hereof were, and are, false, misleading and deceptive.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the 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. 9. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of the respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Roy Pope, *Mr. Edward D. Means*, *Jr.*, and *Mr. Donald L. Bachman* supporting the complaint.

Mr. Franklin M. Lazarus, Chicago, Ill., for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

FEBRUARY 6, 1970

TABLE OF CONTENTS

PRELIMINARY STATEMENT

This matter concerns alleged unfair methods of competition and unfair and deceptive acts and practices in interstate commerce in paints and coatings, claimed to be in violation of Section 5 of the Federal Trade Commission Act.[1]

Respondents are: Universe Chemicals, Inc., an Illinois Corporation, and two of its officers and its sole stockholders: Raymond L. Rosen and Jordan L. Lichtenstein.

The Pleadings

The complaint dated December 5, 1967, after identifying respondents, states the nature of their business and the responsibilities of the individual respondents, and charges that they are engaged in commerce and have substantial competition in commerce. The complaint then charges (par. 5) that respondents have operated a sales plan which involves selling exclusive dealerships through salesmen who make demonstrations. These demonstrations according to the charge cannot be duplicated with respondents' products. The complaint further charges (par. 6 and 7) false representations in regard to the affiliations of the corporate respondent and the manufacturer of its product; the testing of its product; its guarantee; the content of the product; prospective profits; speed of sale; right of return or exchange, and specific qualities including: waterproofing, rust-proofing, inside or outside useability, and one-coat coverage.

By answer filed January 10, 1968, respondents deny the charges but admit the identity of respondents, the responsibility of the individual

[1] Sec. 5(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. (15 U.S.C. 45.)

respondents, the interstate nature of the business and the fact that there is some competition. The answer also alleges four affirmative defenses: (1) meeting competition, (2) lack of control over the persons making representations, (3) discrimination against respondents in the bringing of the proceeding before the Commission which tends to reduce competition, (4) vagueness of proposed order and, (5) interference with freedom of speech and publication.

Previous Trial

This proceeding was initially assigned to Honorable Donald R. Moore and after extensive prehearing procedures, including a request for leave to appeal to the Commission from an order for hearings in more than one location which was denied, was heard by him at four different locations during the summer of 1968. The initial decision based upon the first trial was issued September 27, 1968. Respondents appealed the initial decision and the Commission reversed and by order, dated April 2, 1969, remanded the proceedings for a trial *de novo* principally on the ground that in denying leave to appeal from the hearing examiner's order to hold hearings in several locations the Commission had violated its own rules. During the pendency of this proceeding and before the issuance of the first initial decision, the hearing examiner, by order dated July 10, 1968, amended the complaint to expand the alleged false representations of the products' characteristics beyond those originally specified.

Following the remand, counsel for respondents moved to disqualify the hearing examiner. This motion was denied, by order dated June 5, 1969; and the Commission left the matter of designating a hearing examiner to the Director.

Trial De Novo

On June 10, 1969, the undersigned was designated hearing examiner to conduct the trial *de novo*, and after conducting two prehearing conferences at Chicago, Illinois, commenced hearings there on August 4, 1969. Hearings continued until August 11, 1969. They were then suspended by the undersigned so that he might certify to the Commission the question whether or not the hearings should be suspended until respondents' motion for leave to appeal from the undersigned's ruling that a mistrial should not be ordered was decided. The matter was certified to the Commission on August 12, 1969, and the Commission on August 15, 1969, ordered hearings sus-

pended pending its decision on respondents' motion for leave to appeal. That motion was filed August 18, 1969.

On September 19, 1969, the Commission denied respondents' motion for leave to appeal and hearings were resumed on October 6, 1969, and continued to October 11, 1969.

At the hearings, counsel supporting the complaint called the individual respondents who both testified with respect to the business of respondent corporation and their respective functions. Both testified that Mr. Rosen was primarily concerned with the out-of-the-office operation and Mr. Lichtenstein concerning the office work. Administrative and instructional material and employment contracts with "independent contractors" were identified and an explanation was given concerning the answers to requests for admissions submitted.

Then followed a large number of exclusive-dealer witnesses who described the activities of respondents' so-called "independent contractors" in making representations and demonstrating respondents' products Kleer–Kote and Kolor–Kote to them through the use of visual aids purporting to establish the waterproofing qualities of the products. Such witnesses also described the execution of contracts; payment of substantial downpayments, then the witnesses' disappointment with the performance of the products and in several cases their complaints to respondent corporation and discussion with one or the other of the individual respondents. Incidents occurring subsequent to the first trial were related by some witnesses. Two so-called "independent contractor" witnesses testified with regard to employment and training, and concerning the demonstration kits furnished to aid in their sales effort. Two laboratory technicians related tests made on the product indicating a wide discrepancy between the representations of silicone content and the actual test amounts found in the product Kleer–Kote and a representative of Union Carbide denied that that company had any connection with respondents.

The two individual respondents were the only witnesses for the respondents. They claimed lack of responsibility for the representations made by the so-called "independent contractors," and for the quality of the paint manufactured for them. They claimed also that the advertising material was copied from that used by a former employer, the paint mixture was made as the former employer's was made and that the Federal Trade Commission had investigated the former employer but had brought no proceeding against him. Although complaints were made to the paint manufacturer no laboratory tests were conducted. Some of the "independent contrac-

tors" had their association terminated and the first paint manufacturer also had its contract terminated. Another manufacturer now makes the paint.

Denial of Motion to Dismiss

At the conclusion of complaint counsel's case-in-chief a motion to dismiss was made. Decision was then reversed. The motion is now denied.

Post Hearing Procedures

Due to the illness of complaint counsel the time to file proposed findings and conclusions and proposed orders and briefs was extended to January 5, 1970, and the Commission extended the hearing examiner's time to file the initial decision until February 12, 1970.

Respondents filed their proposed findings of fact, conclusions and order on January 5, 1970. In a footnote to the Introduction respondents claim that they have been denied due process of law because they were not provided by the Commission with a copy of the transcript for which they cannot afford to pay. They also claim that the nineteen persons who testified with respect to respondents' alleged misleading activities were too small a segment of its dealers to constitute substantial evidence and that there was a lack of substantial evidence to prove the allegations of the complaint by a preponderance of evidence except insofar as the guarantee of respondents' products is concerned. As exhibits to their proposals respondents filed two letters from Official Reporters Ward & Paul showing an aggregate cost of $888 for the transcript. No evidence was submitted that the individual respondents were indigent within the meaning of *Williams* v. *Oklahoma City*, 395 U.S. 458 (1969).

Complaint counsel also filed their proposed findings of fact, conclusions of law and order on January 5, 1970, accompanied by a brief in support thereof.

In each instance the proposed findings by complaint counsel were followed by reasons therefor, including transcript, admission and exhibit citations. When reference herein is made to a proposed finding such reference is intended to include the citations supplied. Complaint counsel also recommended a change in the language of the proposed order to conform with recent Commission policy and a court decision.

The hearing examiner on January 8, 1970, on his own motion offered each of the individual respondents an opportunity to file an *in forma pauperis* affidavit and to make appropriate motions on or before January 19, 1970.

Respondents declined so to do in an "Explanatory Statement Regarding Allegations by Respondents to the effect that they are being and have been denied due process of Law" dated January 19, 1970 and filed by counsel. This paper enlarged upon the claim that the Commission abused its discretion by not proceeding against respondents' competitor Hydralum Industries, Inc.

Basis For Decision

On the basis of the entire record in the trial *de novo* [2] and having considered the demeanor and credibility of the witnesses, the hearing examiner makes the following findings of fact, conclusions and order.[3] Proposed findings and conclusions not adopted in form or in substance are denied.

FINDING OF FACT

The Respondents

1. Respondent Universe Chemicals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 919 North Michigan Avenue, Chicago, Illinois, at the time of filing the answer (C.A.).[4] It subsequently moved to 1306 Sherman Avenue, Evanston, Illinois, and later to 2909 West Peterson Avenue, Chicago, Illinois. (Tr. 9, 16, 162; CX 16a-b, CX 95; RX 15.)

---

[2] The hearing examiner has not examined the record in the first trial but some of the exhibits marked in the first trial were reoffered and received and prior testimony was exhibited to a few witnesses to refresh their recollection.

[3] In compliance with Rule 3.51(b), specific page or exhibit references are made to the principal supporting items of evidence but the citation to particular items does not purport to be exhaustive. The impact of the record as a whole has been controlling. Due to the requirements of Rule 3.51(a) reliance has necessarily been placed on references made by counsel but the findings of fact are based on the recollection of and study of the evidence by the undersigned. The hearing examiner has been handicapped by the fact that counsel for respondent was not supplied by his clients with a copy of the transcript. Counsel endeavored to secure the loan of the Commission's transcript without success. Accordingly, the hearing examiner relaxed his usual rule that citations be supplied in respondents' proposed findings, and requested that references be made to statements of witnesses and dates from counsel's notes. Attached as Exhibit A is an index to testimony and exhibits. This supplies the page references to the testimony of witnesses and shows which witnesses identified the exhibits received in evidence. This index without the descriptions of the witnesses was supplied to both counsel.

[4] The following abbreviations and references will hereafter sometimes be used:

C. Complaint

A. Answer

CX. Commission Exhibit

RX. Respondent Exhibit

Tr. Transcript page. The page numbers refer to the transcript in the second trial commencing August 4, 1969.

CF. Complaint counsel's proposed findings.

RF. Respondents' proposed findings.

RA. Admissions numbered by request.

2. Respondents Raymond L. Rosen [5] and Jordan L. Lichtenstein are officers and sole stockholders of the corporate respondent and their business address is the same as that of said corporate respondent. The individual respondents formulate, direct and control the acts, policies and practices of the corporate respondent, including the acts and practices hereinafter set forth. (C., A., CF. 2, 3, Entire Record.)

Jurisdictional Findings

3. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of water-repellent paints and coatings to dealers for resale to the public under the trade names of "Kleer–Kote" and "Kolor–Kote." [5a] (C., A.) Respondents have been in substantial competition in commerce with persons, firms and corporations in the sale of products of the same general kind and nature as those sold by respondents. (Tr. 32, 33, 40–44, 117; CF 8.)

4. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped and transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintain, and at all times hereinafter mentioned have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' gross sales for the fiscal years ending January 31 have been approximately as follows:

1966	$320,000
1967	452,000
1968	398,000
1969	400,000–500,000

(C., A., CF. 5, 6; Tr. 36–44; RA 50–56.)

Method of Doing Business

5. Respondents have adopted a method of doing business that they had learned from a former employer of the individual respondents. (Tr. 121, 122, 1101.)

This method consists of (see CF 9–12):

---

[5] The name Rosen is mispelled Rosin in substantially all of the record following the August 11 recess. There is, however, no question about the identity of the person referred to [Tr. 1059]; hence, correction of the record is deemed unnecessary.

[5a] These names are sometimes misspelled in the record—*e.g.*, an initial letter C being used instead of K. Since there is again no question of identity of the product no record correction is deemed necessary.

(a) arranging with a paint manufacturer to formulate Kleer–Kote and Kolor–Kote to their specifications and to ship it directly to respondents' dealers. (Tr. 118.)

(b) selecting salesmen who sign an "independent contractor" agreement (*e.g.*, CX 19a-b) and who are trained in a method of demonstrating the product and sell merchandise to and execute exclusive-dealer agreements on behalf of respondents (*e.g.*, CX 40) with small businessmen.

(c) supporting the efforts of "independent contractors" and the "exclusive dealers" with advertising and promotional material, demonstration equipment and samples, and arranging for delivery of the Kleer–Kote and Kolor–Kote to the dealers. Respondents copied with few changes the advertising literature that they supplied to the "independent contractors" and "exclusive dealers" from material utilized by a former employer of the individual respondents (see *e.g.*, Tr. 33, 96, 121, 122, 1101). A number of the "independent contractors" had previously been engaged in selling materials for such former employer and had left that employer to join the individual respondents in the corporate-respondent enterprise. (Tr. 161, 1125, 1165.)

6. Respondent clothed the "independent contractors" with apparent authority to act for them and ratified their activity (see CF 10). For example, they supplied in some cases business cards bearing the corporate respondents' name and describing the "independent contractors" as "regional manager" (*e.g.*, Tr. 19; CX 45, 67). They supplied forms for exclusive-dealer contracts that the "independent contractors" signed on their behalf as "regional manager" and approved such contracts and they supplied promotional material (Tr. 19), samples, sales aids (CX 62), brochures and blank forms (Tr. 20), that bore the name of the corporate respondent. Respondents took no effective steps to repudiate the representations made by such "independent contractors" when complaints were made concerning the performance of the product and the "independent contractors" representations. (*e.g.*, CX 51c.)

Respondents' proposed findings suggest that respondents took prompt and effective action to admonish and indeed to terminate the relationship of independent contractors whose representations were unacceptable (RF 5, 6, par. 4). However, the testimony given by respondents on the subject is so conflicting that it cannot be credited. On complaint counsel's direct case and in the prehearing admissions, both Mr. Lichtenstein and Mr. Rosen made it clear that the relationship with independent contractors just terminated. (Tr. 116, 117.)

After complaint counsel's case was in and the testimony concerning the recent activity of salesman Shelton had been adduced from the dealers, Rosen testified that he had fired Shelton officially (Tr. 1067). However, the emphasis seemed to be on Shelton's promise to give bonuses in the form of lighters (Tr. 1061). The representation about the connection with Union Carbide appeared as an afterthought (Tr. 1062). Later Rosen "apologize[d]" for using the word "fired" (Tr. 1083). Since Lichtenstein testified that Rosen dealt with the independent contractors (Tr. 113) and that he, Lichtenstein, didn't know how a sale was made his testimony concerning the relationship between (Tr. 1139) the company and the independent contractors can be given little or no weight. Hence we find that there was no effective action by respondents to prevent the misrepresentations of respondents' product by the independent contractors. Indeed by approving the contracts presented, the respondents effectively ratified their salesmen's actions (*e.g.*, CX 54, 57, 83).

7. Individual respondent Raymond Rosen, the president of the corporate respondent, as the "outside" man for the enterprise, hired or approved the "independent contractors" who conducted the sales of the exclusive franchise to dealers and in some instances he delegated to one of the "independent contractors" the job of hiring others and training them in their duties (Tr. 15, 1078).

8. Individual respondent Jordan L. Lichtenstein was the office man with the title vice president (CX 95) and secretary of the corporate respondent. (Tr. 9.)

He handled the correspondence relating to the business, often using the pseudonym J. L. Jordan (Tr. 115), dealt with the banks and the supplier. He also supplied the promotional literature and business cards (Tr. 19, 20) to the independent contractors and handled the acceptance of contracts and telephone communications from "exclusive dealers" including some complaints regarding the performance of the product supplied. (*E.g.*, Tr. 243–45, 640.)

9. There is some conflict in the testimony about what was supplied the "independent contractors" by way of sales aids and by way of training. Respondent Lichtenstein admitted that CX 3–7 were sent to "independent contractors" and some also to "exclusive dealers." (Tr. 55–71.) But most he would say about the use to which they were put was "for what ever purpose the independent contractors want to make of it in his [sic] sales presentation, I assume." (Tr. 67.) At an earlier point he testified that he understood "90 percent of the stuff is thrown away anyway." (Tr. 63.) Contrasted with the latter statement was testimony by several exclusive dealers that the

"independent contractors" solicitor, showed brochures as part of their solicitation. (*E.g.*, Tr. 711, 716, 743, 837.) Similarly advertisements, display sheets, guarantee cards and other promotional material (CX 8-18b) were concededly supplied to "independent contractors" by respondents. (Tr. 55–113.) Some of these materials were, according to Mr. Lichtenstein, copied from his former employer Hydralum Industries Inc. (Tr. 96, 1101), and others from a booklet he claimed was put out by Union Carbide. (Tr. 98, 1099–1101; RX 16.) The regional sales manager for coatings and adhesives of the Union Carbide Company, William Emerson, had a different version. (Tr. 925–45). He denied that the booklet (CX 15) put out by respondents was supplied by Union Carbide (Tr. 827), although some of the material therein was contained in a booklet published by Union Carbide. (Tr. 927–28; RX 16a-p.) Regardless of the conflict in the testimony it is quite clear that there were representations made by respondents. Respondents intended the "independent contractors" and the "exclusive dealers" to use these representations in their sales presentations (CX 8-18b) and such representations and materials were so used (Tr. 262, 312, 711, 727).

10. There is a greater conflict in the testimony with respect to the training and demonstration aids given to "independent contractors." Respondent Lichtenstein denied that the "independent contractors" were given training as he understood the word, *i.e.*, "step by step methodical process by which to secure a sale." (Tr. 16–18.) He also testified that independent contractors were not given "demonstration kits" (Tr. 24) and that they did not use physical demonstrations to portray the waterproof properties of their products (Tr. 46). He admitted, however, that he didn't have any knowledge of how a sale (Tr. 46–7) was made nor had he discussed that subject with any "independent contractors." (Tr. 46.) Mr. Rosen dealt with the independent contractors and Mr. Lichtenstein "never questioned what the conversations were that took place between himself [Rosen] and the independent contractors." (Tr. 113.) Lichtenstein also admitted that state sales guides by Dunn & Bradstreet were supplied to "independent contractors" (Tr. 113) and that certain demonstration pieces were supplied to them, including blotters half treated with Kleer-Kote and screening material coated on one side with Kolor-Kote. (Tr. 120.) Mr. Rosen testified that he would go along with what Mr. Lichtenstein said about promotional material (Tr. 159) but later Rosen added that they used to send shingles that were half coated with Kolor-Kote (Tr. 159, 164) and still later he referred to "kits" (Tr. 165) that he said were supplied or mailed to the "independent con-

tractors" and either Jordan (*i.e.*, Lichtenstein) or the "boy" took care of it. (Tr. 165.)

11. Two "independent contractors" who testified, however, gave a much more explicit and credible description of the training they received. The first, J. J. Hall McGrew, now employed by a vending machine company in Milwaukee, Wisconsin, testified that in 1966 he met a Mr. Birnheim [6] in Denver, Colorado (Tr. 949). Bernhard Bernheim was then an "independent contractor" of respondent corporation according to the corporate records (Tr. 126) and described himself as sales manager from Universe Chemicals, Inc. (Tr. 1165), Bernheim interested McGrew and another prospective "independent contractor," Joe Wertham, in taking on that function for Universe Chemicals at a motel in Denver. (Tr. 950.) Bernheim explained the company procedures and the method of presentation. (Tr. 950.) He then had McGrew listen to his presentation in Denver (Tr. 950) and that of another salesman in Fort Collins (Tr. 950). After this, Bernheim put McGrew on his own in Kansas City. (Tr. 950.) McGrew was unsuccessful there and rejoined Bernheim in Denver for further training. (Tr. 950.)

In his training McGrew was shown the materials and the "pitch" sheet to be used in telephone solicitation (Tr. 952). In addition to watching other salesmen, McGrew used the "pitch sheet" himself to secure appointments with prospects for a salesman he could not identify and observed the latter's operation (Tr. 952). Bernheim also took McGrew to call on a number of prospects and gave him a demonstration of how he sold the products (Tr. 952). As a result of this process of education which extended over several days, McGrew was hired as salesman with the title "District Manager or Division Manager or Regional Manager" and a commission of 20 to 25 percent (Tr. 953). He was supplied with a Dunn & Bradstreet sales book (Tr. 954) which gives credit ratings and other information. Bernheim told McGrew to telephone selected new businesses with "good" credit ratings and to suggest in the telephone contact that the prospect could make between $3–$5000 or $6000, depending on the business, without extra effort. Bernheim also told McGrew how to make appointments and with what type of prospect and then call on the prospects. (Tr. 954–56.)

Bernheim further instructed McGrew how to conduct the interview with the prospect (Tr. 957) and supplied him with the following: (a) a vial of silicone powder (like CX 96; Tr. 957–58)

[6] The name Bernheim is sometimes spelled Birnheim in different parts of the record.

to demonstrate that a finger coated with silicone powder would stay dry if dipped in water. (Tr. 957–58); (b) a piece of sheet metal (like CX 97) allegedly coated with Kolor–Kote to demonstrate the quality of the paint and that it would not crack, peel or break even though the metal was flexed. (Tr. 960–62); (c) two porous pieces of brick-like material, one treated and the other untreated, to demonstrate by pouring water over them that the treated brick repelled the water (like CX 98; Tr. 962–63); (d) a piece of asbestos roofing allegedly partly coated with Kolor–Kote paint (like CX 99) to demonstrate with an infrared bulb the heat resisting qualities of the product (Tr. 964–66); and, (e) a sieve or tea strainer to be coated with a substance purporting to be Kleer-Kote to show that it would hold water (Tr. 966).

Bernheim instructed McGrew to infer that they were under a licensing program by Union Carbide to further distribute silicone products and that research had been conducted by Union Carbide (Tr. 967–68). Bernheim provided McGrew with purchase order blanks, trade acceptance forms, exclusive distributors' agreements and demonstration materials (Tr. 969).

Bernheim told McGrew that whenever he got an order he should go to the purchaser's bank and obtain a cashier's or certified check payable to respondent Universe Chemicals, Inc., and mail it to the corporation, together with the contract. That was, according to Bernheim, to prevent the purchaser from stopping payment if he got "buyer's remorse" (Tr. 971).

Although McGrew had no personal contact with Rosen, Bernheim told McGrew he was calling Rosen but did not let him hear the conversation (Tr. 973, 982–83). McGrew received a "Glad to have you aboard" letter from respondent Rosen. (Tr. 972, 985.) [7] On cross examination McGrew identified an "independent contractor" agreement signed by him and by Bernheim (RX 17; Tr. 980). Although the contract did not contain the name Universe Chemicals, Inc., the records of that respondent show payments to a J.M. McGrue [sic] of 5280 E. Highline Place, Denver, Colorado (Tr. 127), the witness' present address (Tr. 948).

The second "independent contractor," Richard A. Shaw, was attracted by an advertisement in a Boise, Idaho, newspaper which sought salesmen to earn $4,000 per month (Tr. 987). It was Shaw's recollection that this took place in February 1968 (Tr. 987). His

[7] We note here again that in the transcript (see Tr. 1058) respondent Raymond L. Rosen's name is mispelled Rosin in almost all instances after the August recess (see fn. 5).

"Independent Contractor" agreement corroborates this (RX 18). It bears two dates February 28, 1968, and March 5, 1968, and is signed both by Shaw and respondent Raymond L. Rosen (RX 18; Tr. 1041). Shaw's connection thus followed the issuance of the complaint and the filing of respondents' answer in this matter (C., A.).

Shaw's testimony, describing the activity some two years after that described by McGrew, presents much the same general pattern with respect to the recruitment and training of the "independent contractors" and the instructions and equipment supplied to them (Tr. 986–1052).

After answering an advertisement, Shaw met R. Lawrence Webb who identified himself as a representative of respondent Universe Chemicals, Inc. (Tr. 990), and as Regional Manager (Tr. 993).

The records of the company corroborate Webb's connection with it (Tr. 129). Respondent Lichtenstein also affirmed that Webb got an over-write [sic] on men he hired and that Webb's function was to take care of them (Tr. 1136). Respondent Rosen further identified Webb as Sales Manager and said he had the privilege of hiring other men (Tr. 1069).

Shaw's testimony continues that after spending several hours in general conversation, Webb told Shaw he would "give . . . the details as to what the product is." (Tr. 990.) He then demonstrated Kleer–Kote and Kolor–Kote with a practical demonstration (Tr. 990–93). Webb showed Shaw and two other prospective salesmen the finger dipped in raw silicones which became water-repellent, the sieve which, when allegedly coated with Kleer–Kote, held water, the metal alleged to be coated with Kolor–Kote (Tr. 991), and the tar-backed shingle (Tr. 991–92). He also had two added demonstrations: a Kleenex dipped in Kleer–Kote which then held water; and a blotter allegedly coated at one end with Kleer–Kote which also allgedly demonstrated water repelling by the product (Tr. 992).

Webb told Shaw and the other prospects that respondent Universe Chemicals, Inc., was opening up the Northwest territory and that he was regional manager. He explained the sales program and went through the salesbook (Tr. 993). Webb emphasized the importance of the telephone contact and instructed the group to indicate that all calls were coming from Chicago to make the appointment more important to the prospective exclusive dealer (Tr. 995–97). He also gave each a telephone presentation sheet (CX 100; Tr. 994), told them how to use the Dunn & Bradstreet salesbook and which type of business to select (Tr. 995). Webb then had the prospective salesmen make telephone contacts (Tr. 997). He in-

structed them to refer to the Union Carbide R–27 silicones and to say that they were the largest formulator of such product as that would interest the prospective dealers (Tr. 998).

Shaw was very much impressed with the product (Tr. 998) so demonstrated, and indicated his interest in working on a different scale, *i.e.*, having exclusive sales right for the States of Washington and Oregon (Tr. 998–99).

Although at first Shaw said he didn't believe he had signed a contract (Tr. 998), he later testified on cross examination that he had (RX 18; Tr. 1041).

Shaw received a sales kit from Webb consisting of a brief case, the equipment used, three cans of Kleer–Kote and one of Kolor–Kote, the visual aids, dealership agreements, contracts, trade acceptances, a copy of the telephone presentations and envelopes for submitting to Universe Chemicals, Inc., the finished contracts, including the materials used by Webb in making his demonstration (Tr. 1000).

About a week and a half after Webb told Shaw that he was acceptable (Tr. 1002), Webb called Shaw and told him he had an appointment set up with the three salesmen who had gone through the training program to meet respondent Raymond Rosen, the president of Universe Chemicals (Tr. 1002). The three trainees went down with their wives and met with Mr. Rosen. Mr. Rosen "asked us specifically how we felt, whether we thought we could get out and sell the product in such a short training program, and so on. We indicated that we did and he asked us some questions relative to how the product was presented and sold; we answered them as best we could. He asked if we knew how to sell, or rather how to fill out the dealership agreement and we indicated that we can [sic]; then he tested us to see whether or not we could do it properly and then at the end of the conversation, then he said, 'Well, it looks like you fellows can handle it. I am somewhat surprised because the training period should have taken longer but I think you can handle it.'" (Tr. 1002–3.) Thus Mr. Rosen affirmed Shaw's appointment (*id.*). Mr. Rosen testified that he had met the men at Boise and had a general discussion that lasted a couple of hours with the wives also present (Tr. 1068–69).

In connection with the typed instructions for telephone presentations (CX 100) Webb dictated to the trainees the matter contained in handwriting on the exhibit (Tr. 1004).

Shaw in his testimony gave a detailed description of the type of presentation that he was instructed to give and had given to pros-

pective dealers, and he also described the papers executed including the form contract (See CX 40) and the cash payment required and the trade acceptances secured (Tr. 1008–26). This approach was similar to the various approaches described by the prospective dealers who testified, although all the dealers did not recall in as great detail the various demonstrations (Tr. 167–776, 831–81).

12. Accordingly, on the basis of the entire record, we find that respondents' method of doing business is substantially as stated in paragraph five of the complaint and is as follows:

In the course and conduct of their business, respondents have operated, and continue to operate, a sales plan to market their products by establishing dealerships under "Exclusive Dealership Agreements." These exclusive dealership agreements assign to individual dealers a particular territory within which they may operate and resell the respondents' products to the purchasing public. Salesmen, *sometimes* designated "regional managers and *independent contractors,*" are *approved by respondents* and trained by the respondents *through other salesmen* to solicit and secure these dealers. The salesmen induce the dealers to enter into the agreements with which they combine initial orders for the respondents' products. The dealers have the option of paying for the merchandise in full at the time of purchase or of paying twenty-five percent down and of paying the remainder by executing three negotiable trade acceptances payable in thirty, sixty and ninety days.

During the course of their sales presentations, the respondents' salesmen use physical demonstrations to portray the waterproof properties of their products. *Some of* the equipment for these demonstrations is supplied to the salesmen by the respondents. In many cases, the products delivered to the dealers are found to lack the properties of the products used by the salesmen in their demonstrations and the dealers are unable to perform the same demonstrations for their customers as did the salesmen.

(Modifications from the language of the complaint are underlined; subsequent findings cite references which deal with the falsity of the representations [CF 11].)

The Specific Allegedly Misleading Representations and the Corresponding Facts

Under ensuing headings one will consider the allegations of the subparagraphs of paragraphs six and seven of the complaint, the proof offered in connection with the representations, and the performance or other facts alleged to constitute such representations false, misleading and deceptive. It is noted at the outset that the introduction to paragraph six alleges that such representations as are described in the subparagraphs were made directly or by implication. Hence, the precise language of the subparagraphs of the complaint need not be established in so many words—the implication in some cases will be the controlling factor. The first three allegations

deal with alleged misrepresentations with regard to Union Carbide Company and while they are described hereafter under separate subheadings the facts established must be considered as having cross implications.

Affiliation with Union Carbide Company

13. The complaint alleges that the following representations were made:

> The corporate respondent, Universe Chemicals, Inc., is a subsidiary of, a division of, and exclusive licensee of, or is affiliated with, the Union Carbide Company (C. par. 6, subpar. 1).

It further alleges that the true facts are:

> Respondent Universe Chemicals, Inc., is not a subsidiary of, a division of, an exclusive licensee of, and is not affiliated with, the Union Carbide Company (C. par. 7, subpar. 1).

14. Representations by salesmen varied from flat assertions that the salesman was an employee (Tr. 169) through the lesser claims that Universe Chemical was a subsidiary, an exclusive licensee, or an affiliated company (Tr. 168–69, 174, 185–86, 308, 329, 492, 508, 510–14, 529, 535, 543, 591, 685, 836; CF 13). These representations continued until February 1969 (Tr. 167). Protest against such representations was made by a representative of Union Carbide as late as October 8, 1968, to the individual respondent Lichtenstein (Tr. 929–31; CX 95). Moreover, the literature supplied by respondents was such that there was an implication of affiliation (CX 1A, 6, 8, 15A, 18B). Presumably CX 18B was changed to remove the specific reference to Union Carbide (Tr. 109). Bernheim, who was one of the salesmen who left Hydralum to join Rosen and Lichtenstein in the Universe Chemical Company (Tr. 1165), instructed McGrew in the presentation about silicones to infer that respondents were licensed by Union Carbide (Tr. 966–68). And, in respect to Shaw's statement of the suggestion that Union Carbide's name be used to appeal to the customer but you "cannot say that we are a part of Union Carbide" (Tr. 1026), Mr. Rosen said: "Well, I think you heard it with this Mr. Shaw that just left the stand. I never spoke to men who traveled for us without me telling them in a very positive fashion that he is never to imply, or intimate, that we are either a subsidiary or have any connection with Union Carbide. It is supposed to be stated in exactly that manner. Mr. Shaw repeated it exactly in the way that I tell them all." (Tr. 1062.)

15. We accordingly on the basis of the entire record find that respondents by implication represented that Universe Chemicals, Inc.,

is a subsidiary of, a division of, an exclusive licensee of, or is affiliated with the Union Carbide Company.

16. Respondents admit and we find that Universe Chemicals, Inc., is not a subsidiary, division, or exclusive licensee of Union Carbide Company (RA 76–78) and that its products are not manufactured by Union Carbide Company and none of the ingredients of its products are so manufactured except silicone R–27 (RX 80, 82). Moreover, the corporate respondent is in no way affiliated with Union Carbide Company (Tr. 929). Sales of Union Carbide silicone R–27 are made to the formulator who mixes the coatings, not to respondent Universe Chemicals, Inc. (Tr. 943).

Manufacture by Union Carbide

17. The complaint alleges that the following representations were made:

> The respondents' products are manufactured, or have been developed, by the Union Carbide Company (C. par. 6, subpar. 2).

It further alleges that the true facts are:

> The respondents' products are neither manufactured nor have they been developed by the Union Carbide Company, although one of the ingredients in their products may have been manufactured by the Union Carbide Company and is placed in combination by the respondents with other ingredients not manufactured by the said company (C. par. 7, subpar. 2).

18. Like the representations concerning affiliation with Union Carbide, there was some variation in what the salesmen told the dealers about the product. There were some flat assertions by salesmen that the paint was the product of Union Carbide and some more indirect suggestions. (Tr. 168–9, 174, 185, 209, 341, 448, 511, 836.) The printed material directly supplied by respondents although more subtle (CX 1A, 6, 8, 15A, 18B), left the impression on the prospective dealers (Tr. 260), presumably because of the emphasis on the name Union Carbide, that they were dealing with a well-known company, Union Carbide Company, and could rely on the value of the product.

19. Concededly, the respondents' products were never made by Union Carbide (Tr. 29–32, 118; RA 81, 82). They were made for respondents initially by Federated Paint Manufacturers (Tr. 30–3) and now are made by Centex, a company located in Glenview, Illinois (Tr. 30–3).

20. Accordingly, on the basis of the entire record, we adopt paragraph six, subparagraph 2 and paragraph seven, subparagraph 2 of the complaint, quoted above, as our findings.

Testing of Product

21. With further reference to the use of the name Union Carbide Company by respondents, the complaint alleges the following representation:

> The respondents' products have been successfully tested by the Union Carbide Company, by the corporate respondent, or by an independent testing laboratory (C. par. 6, subpar. 3).

It further alleges that the true facts are:

> The respondents' products have never been tested or evaluated by the Union Carbide Company, or by any independent laboratory or any other person or organization qualified to test or evaluate such products, nor have such products been tested by respondents (C. par. 7, subpar. 3).

22. Respondents' "independent contractors" used photographs and brochures provided by respondents as early as 1966 to illustrate the oral representations that the product had been tested or the product had been applied several years before (Tr. 312, 453, 492–95, 591, 690, 714–16, 837–39; CX 55). Some of the brochures provided also stated particular tests used (CX 8, 10B, 18B, 55).

23. Clearly, the claim that tests were made 3 years before on a company product when the company was only in business for a year (RA 23), is misleading. Respondent Lichtenstein at the hearings in effect conceded that the representations had been made and were authorized. Such a concession is inherent in his argument that because they were using R–27 silicones and Union Carbide Company had made representations about them, respondents were entitled to claim the tests for Universe Chemicals' products (Tr. 1096–97) although Lichtenstein denied he had made the representations to any independent contractor. Respondents concede that their products were not tested by the Union Carbide Company at the request, direction or instructions of respondent (RA 83). A witness from the Union Carbide Company testified that that company does not customarily test the resulting products after it had sold its silicones (Tr. 928) and he knew of no such tests (Tr. 929).

24. Accordingly, on the basis of the entire record, we find that respondents implied that their products had been tested by the Union Carbide Company, by the corporate respondent, or by an independent testing laboratory on its behalf. We also find that such representations were false, misleading, and deceptive.

Guarantee

25. The complaint alleges the following representation:

The respondents' products are unconditionally guaranteed for ten years (C. par. 6, subpar. 4).

It further states that the true facts are:

The products sold by the respondents are not unconditionally guaranteed for a period of ten years, but only guaranteed in a limited way and not unconditionally (C. par. 7, subpar. 4).

26. Concededly, respondents caused to be prepared for distribution to salesmen and exclusive dealers, statements in their brochures containing the following "guaranteed for 10 full years" (CX 4, 11; Tr. 80–1). Other written statements were prepared implying a guarantee (CX 1A, 2A, 4, 7, 11) and respondent Lichtenstein testified that it was a ten-year unconditional guarantee as far as he was concerned. However, Lichtenstein admitted that the guarantee was merely for replacement of the paint (Tr. 1158).

27. Oral representations concerning a guarantee were also made (Tr. 176, 181–2, 226, 263, 309, 347–48, 384, 410, 428–29, 449, 473, 491, 527–29, 590, 622–26, 665–66, 683, 714, 727, 765, 836–37, 860). Generally, these were statements that the product would be replaced if defective and there were a number of instances where replacement was made (*e.g.*, Tr. 750, 770–71). In other instances, return was refused (Tr. 457, 503, 694).

28. The guarantee, however, was clearly not unconditional and the conditions were not stated in the advertising (CX 1A, 2A, 4, 7, 11, 16a–b). It was limited to replacement of the paint (Tr. 1158). Hence, respondents' representations were false, misleading and deceptive.

Silicone Content

29. The complaint alleges that the following representation was made:

The respondents' product, Kleer Kote, contains fourteen percent silicones (C. par. 6, subpar. 5).

It further states that the true facts are:

The respondents' product, Kleer Kote, does not contain fourteen percent silicones, but a substantially lesser amount (C. par. 7, subpar. 5).

30. The representation concerning the fourteen percent silicone content is contained on the Kleer–Kote label (CX 2b; Tr. 1133). This representation, or a representation that the product had the highest silicone content of any on the market, was one of the selling points used by salesmen to obtain prospective exclusive dealers (Tr. 184–5, 226, 262, 342–43, 427, 496, 763, 870).

31. Respondent Lichtenstein justified his use of the fourteen percent figure by his statement that he had copied the label from one used by his former employer and did the same thing that the former

employer had done (Tr. 1133). That is, fourteen percent of the solution which came from Union Carbide in a 55-gallon drum was placed in an empty 55-gallon drum. The latter was then filled with solvent (Tr. 1133–35, 1158). The resulting product, however, was not fourteen percent silicone because the Union Carbide solution was not one hundred percent silicone but a thirty-three percent solution (Tr. 938; RX 16L). Hence, the result of the formulation by volume, as described was not a fourteen percent silicone solution but fourteen percent of a solution that was slightly less than ⅓ silicone resin.

32. Evaporation tests by two different well-qualified chemists on Kleer Kote established that the product was not uniform in silicone content but that the silicone content tested by weight varied from 2.3 percent (Tr. 803) to 1.89 percent (Tr. 900–2).

33. Accordingly, we find on the basis of the entire record that respondents represented that Kleer Kote contained fourteen percent silicones when, in fact, it contained much less than fourteen percent, and that such representation was false, misleading and deceptive.

Prospective Profits

34. The complaint alleges the following representation:

> The respondents' dealers will realize various profits up to $18,000 per year from the resale of the respondents' products (C. par. 6, subpar. 6).

It further states that the true facts are:

> Few, if any, dealers earn $18,000 per year from the resale of respondents' products or whatever lesser amount was represented to them at the time of the purchase and in many cases make no profit at all, but sustain a substantial loss (C. par. 7, subpar. 6).

35. The proof established that it was a regular practice for the salesmen of respondents to telephone prospects for exclusive dealerships and to attempt to interest the prospects by suggesting that they could obtain specified profits in amounts depending on the locality and the business in which the prospect was engaged (Tr. 954, 1010). The telephone presentation sheet (CX 100) was one of the sales aids given to the salesmen and this was supplemented, at least in the case of Mr. Webb's trainees, by added instructions (Tr. 1004). Blanks on the sheet are filled in to show prospective profits of $7,000-$16,000 (CX 100).

The prospective profits used to induce the prospective exclusive dealers in the Colorado area were from $3–5–6000. (Tr. 954.) In Idaho the salesmen were instructed to suggest from 7–$16,000 net profit (Tr. 1010). A number of the prospects testified that when they were approached, the salesman promised large profits with little or

no effort (Tr. 189, 234, 263, 406–7, 425, 447, 489, 592, 626, 659, 689–90, 717, 725–26, 832, 853).

36. Of the dealer witnesses who testified none indicated that they had made a profit on the transaction (Tr. 275, 608, 673, 693, 842; see CX 51a–b). Several made no sales at all (Tr. 178–80, 221, 418, 433, 459, 539–40, 720, 740, 868). Respondent Lichtenstein, moreover, testified that only about 40 percent of the 1,500 dealers reorder and those reorders were in much smaller quantities and were just to fill in (Tr. 1178–80). Mr. Lichtenstein explained that this was because the independent contractor, a commission man, was going to sell the customer as much product as he could the first time (Tr. 1179). Thus, the exclusive dealers were oversold and that fact was known to respondents.

37. Accordingly, we find on the basis of the entire record that the prospective exclusive dealers were promised large profits and that such profits never materialized and respondents had no reasonable expectation that such profits would materialize. Such representations were accordingly false, misleading, and deceptive.

Rapid Sale

38. The complaint alleges that the following representations were made:

> The supply of the respondents' products purchased by the dealer will be sold out before the trade acceptances which the dealer has given in payment on his supply become due and payable (C. par. 6, subpar. 7).

It states that the true facts are:

> The supply of respondents' products purchased by the dealers is seldom if ever sold out before the trade acceptances which the dealer has given in payment on his supply become due and payable (C. par. 7, subpar. 7).

39. As part of their sales technique the "independent contractors" told a number of the prospective dealers that they would completely sell out the product before the trade acceptances given as part of the purchase price were due (Tr. 425, 430, 460, 597, 646, 684).

40. None of the dealer witnesses testified that the product purchased was sold out before the trade acceptances were due. In fact, the amounts initially sold to the dealers were so large that there were very small quantities reordered (Tr. 1178–1180), and many dealers made no sales at all (Tr. 178–80, 221, 418, 433, 459, 539–40, 720, 740, 868).

41. Accordingly, we find on the basis of the entire record that representations were made to the prospective dealers that the supply of

Kleer-Kote and Kolor-Kote offered for sale would be sold before the trade acceptances that such dealers had given in payment became due and that such representations were false, misleading and deceptive.

Right to Return or Transfer

42. The complaint alleges that the following representations were made:

The respondents' dealers may return to the respondents any unsold quantities of the respondents' products or the respondents will transfer the unsold quantities to another dealer and a refund will be made to the dealer (C. par. 6, subpar. 8).

It states that the true facts are:

The respondents' dealers are not permitted to return to the respondents any unsold quantities of the respondents' products and the respondents will not transfer them to another dealer nor is any refund made to the dealer for unsold merchandise (C. par. 7, subpar. 8).

43. A number of the dealer witnesses testified that they were assured that if any of the products were unsold they could be transferred to another dealer or returned for a refund (Tr. 435, 454, 598, 604, 627, 694, 841, 864–5).

44. There were a few cases in which the company accepted a return of the merchandise after receiving complaints or as settlement of the refusal of the prospective dealer to pay for the product (Tr. 750, 770–1, 775). Refusal to accept a return was more characteristic (*e.g.*, Tr. 369–72, 457, 461, 503, 603–4, 694, 721) moreover, there was no explanation given by respondents and there was no evidence that the merchandise was, in fact, transferred to another dealer.

45. Hence, we find on the basis of the entire records that there were false and misleading representations concerning the right to return or to transfer the goods sold to the respondents' dealers.

Waterproofing Quality

46. The complaint alleges that the following representations were made:

The respondents' products are waterproof (C. par. 6, subpar. 9).

It further states that the true facts are:

Respondents' products are not waterproof, but only water repellent to a limited extent (C. par. 7, subpar. 9).

47. As we have heretofore pointed out in describing the demonstrations (finding No. 11) respondents supplied the "independent contractor" salesmen with materials to demonstrate the products

offered shed water. Demonstrations were given to prospective dealers that implied that the product would waterproof surfaces and that, when treated, porous surfaces would hold water. (Tr. 184, 191, 212, 252, 259, 263, 341, 383, 415, 418, 426–29, 447, 448–49, 465–68, 450, 452, 490–95, 527, 538, 589–91, 623–24, 682–83, 711, 727, 733, 762, 835, 853–54, 860; CX 55, 62.) There was some confusion in the testimony of some of the witnesses as to distinction between waterproofing or water repelling (Tr. 333, 381–82, 443; see, however, 466–68, 548, 551); some witnesses used the terms interchangeably (Tr. 538, 551, 723). There were some express representations that the product would prevent water from leaking into basements (Tr. 317, 318, 447, 450, 451–52, 690–92, 709–10, 719, 734, 767–68, 769).

48. Although one witness who coated both the inside and outside of a basement (Tr. 432) indicated that Kleer–Kote was satisfactory (Tr. 439, 445–46); many of the witnesses who testified concerning their use of the products also testified that the products did not waterproof as the representations would indicate (Tr. 175, 181, 218, 273–74, 317–18, 363–65, 415, 452, 498–99, 600, 673–74, 690–92, 767, 843; CX 51a–d).

49. Accordingly we find on the basis of the entire record that respondents represented that their products would prevent water from penetrating a surface treated with them and that such representation was false, misleading and deceptive.

Rust Prevention

50. The complaint alleges that the following representations were made:

> The respondents' products prevent rust (C. par. 6, subpar. 10).

It also states that the true facts are:

> Respondents' products do not prevent rust (C. par. 7, subpar. 10).

51. A number of express representations were made to prospective exclusive dealers by the "independent contractors." The locality and type of business in which the prospect was engaged was apparently a deciding factor on how must emphasis was placed on the alleged rust preventing qualities of the paints. In several instances this alleged quality was specifically referred to because it was a farming area and there were rusting farm implements referred to (Tr. 429, 668). In another, children's toys were mentioned (Tr. 453–54); in still another, concrete mixing trucks (Tr. 264). The representations, however, in one form or another were testified to by a number of the dealer witnesses (Tr. 188, 264, 311, 336, 344, 410, 429, 453–54,

534–35, 590–91, 598, 668, 686, 711, 735, 862) and one of the sales materials provided by respondents contained a specific reference to the rustproofing characteristics of the product (CX 9).

52. In fact, there are no special rust preventing qualities in the product (Tr. 335–36, 703) and one of the prospective dealers testified that he observed that rust appeared on implements coated with the product (Tr. 454, 481).

53. Accordingly, we find on the basis of the record as a whole that respondents made false, misleading, and deceptive representations concerning the rust-preventive qualities of their product.

Inside or Outside Use

54. The complaint alleges that the following representations were made:

The respondents' products are suitable for both the inside and the outside of a building (C. par. 6, subpar. 11).

It states that the true facts are:

Respondents' products are not suitable for use on the inside of a structure (C. par. 7, subpar. 11).

55. Respondents' labels and other literature either expressly or by implication represented that exterior and interior use of the product would be effective (CX 1A, 2A, 4, 9, 10, 15L). The independent contractors usually informed the prospective dealers that the product would work as well on the inside as on the outside (Tr. 234, 265, 311, 369, 410, 429, 461, 491, 527, 602-3, 627, 668, 686, 711-14, 735-36, 768, 836, 862); some went further and represented that the preparation placed on the inside of a cellar or basement would prevent water from seeping through (Tr. 265, 334, 449, 460-61, 482-83, 736) some of the literature also implied that seepage would be prevented (CX 18a-b). One independent contractor made it a particular selling point that the product could be used on the outside of a basement wall and later covered with soil and also on the inside of a wall after the water seeped through (Tr. 265). Another told the prospective dealer in detail about preventing basement seepage (Tr. 471-72).

56. In fact, the product would not prevent water seepage when placed on the inside walls of a cellar or on the floor of a basement or garage (Tr. 296, 317-21, 452, 480, 690-92, 719, 767-69; see RX 16p). And, it was not satisfactory on interior work (Tr. 175, 218, 273).

57. Accordingly, on the basis of the record as a whole we find that respondents made false, misleading, and deceptive representa-

tions concerning the suitability of the product for use inside basements and cellars.

One-coat Coverage

58. The complaint as amended alleges that the following representations were made:

One coat of the respondents' products will be sufficient to produce all of the results claimed for such products by respondents or by their salesmen or representatives (C. par. 6, subpar. 12).

It also states that the true facts are:

One coat of the respondents' products is not sufficient to produce all the results specified for such products by respondents or by their salesmen's representations (C. par. 7, subpar. 12).

59. The "independent contractors" made it a practice to tell the prospective dealers that one coat was adequate to cover and implied that it was adequate to create all the other protection claimed (Tr. 180, 235, 264, 311, 318, 323, 362, 410, 429, 433, 491, 535, 598, 627, 633-34, 668, 686, 768, 714, 735, 837, 862). Respondents' labels, letters and pamphlets made a similar claim (CX 1A, 2A, 3, 4, 9, 10B, C, 15L, 18a; RX 4, 5).

60. In fact good coverage could not be obtained with one coat (Tr. 175, 273, 218, 319, 323, 360-63, 385, 415, 429, 455, 535, 539, 599, 634, 673, 718, 769) and even when several coats were used the product failed to perform in the fashion represented (Tr. 433, 498; see findings 13 through 57).

Effects

61. On the basis of the entire record we find that the use by the respondents of the aforesaid false misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the 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.

62. We also find that the aforesaid acts and practices of the respondents were and are all to the prejudice and injury of the public and of the respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Facts Relating To Respondents' Affirmative Defenses

At pages 3 and 4 of their answer, respondents in five numbered paragraphs allege their affirmative defenses. The first three have a factual basis and we shall deal with these in ensuing paragraphs.[8] The last two deal with the form of order proposed and its results and will be considered under conclusions.

Meeting Competition Defense

63. Respondent Lichtenstein in his testimony stated that he and Mr. Rosen had left a former employer, Hydralum Industries, Inc. (hereinafter sometimes referred to as Hydralum), and had taken with them a number of that corporation's salesmen. No contrary testimony was offered.

Lichtenstein testified without contradiction that Hydralum was engaged in the sale of paint and that he had copied the brochures prepared by Hydralum, had copied the labels used on the paint cans, and had even copied the method of formulating the product. The salesmen who joined respondents had been trained and had been selling for Hydralum.

64. Respondent Lichtenstein on the issue of good faith testified without contradiction that a representative of the Federal Trade Commission had examined the files of Hydralum and had taken a large volume of evidence and no complaint was issued by the Federal Trade Commission against Hydralum.

Independent-Contractor Defense

65. Each of the salesmen signed an agreement entitled "Independent Contractor Agreement," under the terms of which the parties agreed that the salesmen should not be employees but independent contractors.

66. Each of the salesmen were paid on a strict commission basis and in the reporting form to the Internal Revenue Service, respondend claimed that such salesmen were not employees but independent contractors.

67. On the other hand, as previously found (findings 6-12), respondents clothe these individuals with apparent authority to act for them and supplied to them some of the means of making the representations complained of, including printed pamphlets and can labels that contained some of such representations.

---

[8] Citation to the record is deemed unnecessarily repetitious of the citations already given in preceding findings and will not be made, particularly since we regard the facts immaterial to this decision.

Alleged Discriminatory Enforcement Against Small Respondent

68. Respondent corporation has two stockholders and these stockholders (the individual respondents) are officers and directors (C.A.). Its gross income is less than a half-million dollars and its employees, as distinguished from its salesmen, numbered only three persons. Respondent corporation is thus a small one.

69. Respondent Lichtenstein, as heretofore stated in finding No. 64, testified without contradiction that an investigator of the Federal Trade Commission examined the files of Hydralum and no proceeding was thereafter brought. There has been no evidence offered concerning the state of the investigation, if any, in the Federal Trade Commission nor any statement whether or not an assurance of voluntary compliance or other assurance has been secured.

REASONS FOR DECISION [8a]

On the basis of the entire record, it is the opinion of the hearing examiner that a violation of Section 5 of the Federal Trade Commission Act has been established [8b] and that respondents' affirmative defenses are insufficient to prevent the issuance of an effective cease and desist order. From the testimony as a whole and the exhibits received, it seems quite clear to the hearing examiner that false and misleading representations were made to prospective exclusive dealers for respondents' products who were located in States other than that of respondents' domicile. Of necessity, these practices had a tendency to reduce interstate commerce in waterproof coatings. The representations were persuasive and goods had to be shipped to various States. *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F. 2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *Federal Trade Commission* v. *Brown Shoe Company, Inc.*, 384 U.S. 316 (1966).

Some of these misleading representations were on the labels of the product or contained in exhibits sent out by respondents to its "independent contractors" for use in making sales to dealers. Respondents clearly cannot avoid responsibility for these.

Other misleading representations were made orally by the "independent contractors" and respondents seek to avoid responsi-

[8a] As required by Rule 3.51(b)(1).

[8b] Respondents claim that because only a small percentage of dealers were called to testify there was no substantial evidence, might have had validity prior to the Wheeler-Lea Amendment but clearly has no validity under the present law.

bility for these salesmen's statements. Respondents, however, clothed these salesmen with apparent authority to act for them and ratified the transactions these salesmen initiated. Thus, they are responsible for the representations such salesmen made, even though such salesmen were expressly forbidden to make them. *Parke, Austin & Lipscomb, Inc.* v. *Federal Trade Commission*, 142 F. 2d 437 (2d Cir. 1944); *Steelco Stainless Steel* v. *Federal Trade Commission*, 187 F. 2d 693 (7th Cir. 1951); *Standard Distributors* v. *Federal Trade Commission*, 211 F. 2d 7 (2d Cir. 1954); *Libbey-Owens-Ford* v. *Federal Trade Commission*, 352 F. 2d 415 (6th Cir. 1965); *Goodman* v. *Federal Trade Commission*, 244 F. 2d 584 (9th Cir. 1957).

Similarly, it is no defense that the practices complained of were merely copies from someone else, *Pati-Port, Inc.* v. *Federal Trade Commission*, 313 F. 2d 103 (4th Cir. 1963), and the fact that the Federal Trade Commission has not yet brought a proceeding against a competitor is equally immaterial. The Commission possesses the discretion to determine which cases to bring. See *Federal Trade Commission* v. *Universal-Rundle Corporation*, 387 U.S. 244 (1967); *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411 (1958); *National Trade Publications Service, Inc.* v. *Federal Trade Commission*, 300 F. 2d 790 (8th Cir. 1962).

The related contention that respondents are blameless because they merely took action to meet the competition of other distributors of paint is another way of claiming that two wrongs make a right. Even where meeting competition is a statutory defense under the Robinson-Patman Act, 15 U.S.C. 13, that defense does not extend to meeting an illegal plan of competition of a competitor. *Federal Trade Commission* v. *A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *International Art Co.* v. *Federal Trade Commission*, 109 F. 2d 393 (7th Cir. 1940), *cert. denied*, 310 U.S. 632 (1940); *Dandy Products, Inc.* v. *Federal Trade Commission*, 332 F. 2d 985 (7th Cir. 1964), *cert. denied*, 379 U.S. 961; *Leeds Travelware, Inc.*, 61 F.T.C. 152, 163 (1962), Docket 8140.

The Commission's power to prevent deceptive practices is such that it may be exercised although the affected business could not successfully continue without the use of such practices. *S. Dean Slough* v. *Federal Trade Commission*, 396 F. 2d 870 (5th Cir. 1968), *cert. denied*, 393 U.S. 980 (1968). And, the Commission in preventing unfair practices is not bound to offer the same type of agreement to cease and desist to all competitors alike but has discretion in the remedy it will seek depending on the facts in each particular case.

Coro, Inc. v. *Federal Trade Commission*, 338 F. 2d 149, 152 (1st Cir. 1964); *Federal Trade Commission* v. *Jantzen, Inc.*, 383 F. 2d 981 (9th Cir. 1967); *Murray Space Shoe Corp.* v. *Federal Trade Commission*, 304 F. 2d 270 (2d Cir. 1962). Similarly the Commission's decision not to conduct an industrywide investigation before enforcing its order against a particular respondent in the absence of a clear abuse of discretion is not grounds for a court to refuse to enforce its decision even in cases where meeting competition is a statutory defense. *Federal Trade Commission* v. *Universal-Rundle Corporation*, 387 U.S. 244 (1967); *Moog Industries* v. *Federal Trade Commission*, 355 U.S. 411 (1958). No such abuse appears to exist here.

Respondents' claim that their freedom of speech would be inhibited likewise has no validity as Circuit Judge Weick of the United States Court of Appeals for the Sixth Circuit very recently stated:

> We find no violation of petitioners' First Amendment rights in the Commission's Order. They are free to advertise their product; they are prohibited only from making false and misleading statements which they have no constitutional right to disseminate.

S.S.S. Company, Inc. v. *Federal Trade Commission*, 416 F. 2d 226, 231 (6th Cir. 1969). See also *Regina Corp.* v. *Federal Trade Commission*, 322 F. 2d 765 (3rd Cir. 1963); *E. F. Drew & Co.* v. *Federal Trade Commission*, 235 F. 2d 735 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957).

The fundamental constitutional right of free speech despite its recent wide application [9] has long been held to have no application to commercial frauds or misrepresentation. *Leach* v. *Carlisle*, 258 U.S. 139, 140 (1922); *Donaldson* v. *Read Magazine*, 333 U.S. 178 (1948); *Valentine, Police Commissioner* v. *Christensen*, 316 U.S. 52 (1942); *Breard* v. *Alexandria*, 341 U.S. 622 (1951).

The courts and the Commission have consistently held that there is no constitutional right to disseminate false advertisements by mail or in commerce. *American Medicinal Products, Inc.* v. *Federal Trade Commission*, 136 F. 2d 426 (9th Cir. 1943), 36 F.T.C. 1167; *E. F. Drew & Co.* v. *Federal Trade Commission*, 235 F. 2d 735 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957); *Murray Space Shoe Corp.* v. *Federal Trade Commission*, 304 F. 2d 270 (2d Cir. 1962); *Regina Corp.* v. *Federal Trade Commission*, 322 F. 2d 765 (3rd Cir. 1963).

This lack of constitutional protection extends even to false adver-

[9] See *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), where it was held in effect that a newspaper must be motivated by malice to be held responsible for alleged libelous statements about a public official contained in an advertisement published by it. See also 83 Harv. L. Rev. 518, January 1970.

tising used to sell publications. *Hillman Periodicals, Inc.* v. *Federal Trade Commission*, 174 F. 2d 122 (2d Cir. 1949); *New American Library of W.L.* v. *Federal Trade Commission*, 213 F. 2d 143 (2d Cir. 1954), 227 F. 2d 384; *Bantam Books, Inc.* v. *Federal Trade Commission*, 275 F. 2d 680 (2d Cir. 1960), *cert. denied*, 364 U.S. 819; *Witkower Press, Inc.* 57 F.T.C. 145 (1960); *Farrar, Straus and Company, Inc.*, Docket No. 8588. (Final order dated April 9, 1964) [65 F.T.C. 253]; *Rodale Press, Inc.*, Docket No. 8619, June 28, 1967 [71 F.T.C. 1184] (remanded because of undisclosed change of theory; *Rodale Press, Inc.* v. *Federal Trade Commission*, 407 F. 2d 1252 (D.C. Cir. 1968) and thereafter dismissed as moot, December 4, 1968, by the Commission [74 F.T.C. 1429].)

This is true although the Commission has been granted no power to deal with the publications themselves because the expression of ideas is not commerce. *Scientific Manufacturing Co., Inc.* v. *Federal Trade Commission*, 124 F. 2d 640 (3d Cir. 1941); *Koch* v. *Federal Trade Commission*, 206 F. 2d 311, 317 (6th Cir. 1953).

From the foregoing it clearly appears that there is no constitutional inhibition against preventing false advertising provided the prohibitions are clearly stated.

The prohibitions contained in the order proposed by complaint counsel deal expressly with the misrepresentations established and, in addition, prohibit by a well-recognized rule of construction others of a similar character. In light of the complaint and the proof, there can be no lingering doubt that respondents' widespread misrepresentation of their product must be prevented and that the order must be sufficiently broad to prevent ingenious attempts to circumvent it. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 427 (1957); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 612. The fact that misrepresentations continued during the period after the complaint was issued and after the first trial underlines the necessity for prompt and strong relief. The easy transition from one corporation to another, as occurred here, requires that the individuals who own and control the corporate respondent be individually bound by the order.

The Commission's proposed order rather than broadly prohibiting all representations concerning the properties of their products and the earnings to be anticipated has allowed an escape clause. This decreases the respondents' burden rather than imposing one on them. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *S.S.S. Company, Inc.* v. *Federal Trade Commission*, 416

F. 2d 226 (6th Cir. 1969). Accordingly, the order should be issued as presented in the complaint with modifications suggested by complaint counsel in his proposed order. It is not deemed necessary to include the further ordered clause proposed since there has been no proof that the corporate respondent operates through divisions, but it is deemed necessary to include the sale of franchises or rights to sell products since respondents in their sales efforts cloaked the sale of their products with the purported creation of an exclusive dealership. Moreover, the first three paragraphs of the order should not apply only to the Union Carbide Company but to any other well-known company and language to that effect should be incorporated in the order. Since silicones are manufactured by several other well-known companies, the same effect on consumers could, if not prevented, be obtained by the use of one of such other companies' names.

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over respondents and the subject matter of these proceedings.

2. Respondents have engaged in false, misleading and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

3. The complaint gave respondents adequate notice of the offenses charged and the proof adduced was within the general allegations of the charges.

4. Respondents' affirmative defenses are insufficient in law.

5. The easy movement of the individual respondents from a former employer with the misrepresentations there learned to a new corporation controlled by them and practicing the same type of misrepresentation requires an order against the individual respondents.

6. The following order should issue.

ORDER

It is ordered, That respondents Universe Chemicals, Inc., a corporation, and its officers, and Raymond L. Rosen and Jordan L. Lichtenstein, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of any paint or paint products or any other articles of merchandise or rights to trade in or sell

merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that:

1. Respondents are a subsidiary of, a division of, an exclusive licensee of, or are affiliated with the Union Carbide Company or any other well-known company; or misrepresenting, in any manner, respondents' trade or business connections or affiliations.

2. Any of respondents' products were manufactured or developed by the Union Carbide Company or any other well-known company; or misrepresenting, in any manner, the company or organization which manufactured or developed any of the products sold or distributed by the respondents.

3. Respondents' products have been tested or evaluated by the Union Carbide Company, any other well-known company, or an independent laboratory or any other person or organization qualified to test or evaluate such products or that respondents have tested such products; unless respondents shall have in their files written reports clearly and accurately reflecting such test results and such tests were devised and conducted so as to constitute a suitable basis for evaluating respondents' products with respect to the properties thereof.

4. Respondents' products are guaranteed unless the nature, conditions and extent of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed in immediate conjunction with such representation and unless respondents, in fact, comply with the terms of such represented guarantee.

5. Respondents' products contain any specific percentage or amount of silicones; unless such percentage or amount is, in fact, true as represented; or misrepresenting, in any manner, the quantity or quality of the constituent elements comprising respondents' products.

6. Dealers will earn any stated or gross or net amount; or representing, in any manner, the past earnings of dealers unless, in fact, the past earnings represented are those of a substantial number of dealers and accurately reflect the average earnings of these dealers under circumstances sim-

ilar to those of the dealer to whom the representation is made.

7. Respondents' products will be sold out by the purchaser within any stated period of time; or representing, in any manner, that dealers, in the past, have sold out their supplies within any stated period of time unless the past sales represented are those of a substantial number of dealers and accurately reflect the average sales of these dealers under circumstances similar to those of the dealer to whom the representation is made.

8. Respondents' dealers may return to the respondent any unsold quantities of the respondents' products or the respondents will transfer the unsold quantities to another dealer or a refund will be made to the dealers for unsold merchandise or that the contract is other than an outright sale of the respondents' products to the dealer.

9. Respondents' products are waterproof or will cause any surface to which they are applied to become waterproof; or misrepresenting, in any manner, the performance characteristics of respondents' products.

10. Respondents' products prevent rust or will prevent or impede the rusting of any material to which they are applied.

11. Respondents' products are suitable for use on the inside of a structure; or misrepresenting, in any manner, the use characteristics of respondents' products.

12. One coat of any of the respondents' products is sufficient to cover the surface to be painted; or misrepresenting in any manner, the effectiveness of any of respondents' products.

B. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

C. Furnishing to, or otherwise placing in the hands of, others, including salesmen, retailers or dealers, the means or instrumentalities by or through which they may mislead or deceive the public in the manner or as to the things prohibited by this order.

EXHIBIT A

INDEX TO TESTIMONY AND EXHIBITS

VOL.			TR.	CX	RX
1	8/4/69	Jordan L. Lichtenstein, Respondent	1–75	1–7	
2	8/5/69	Jordan L. Lichtenstein, Respondent	76–131	8–43	
		Raymond L. Rosen, Respondent	147–167		
		Charles A. Lee, Jr., Dealer	167–205	40–41	
		Wayne M. Schexnayder, Dealer	206–231	42–43	
3	8/6/69	Wayne M. Schexnayder, Dealer	233–255		1
		George Dixon, Dealer	255–305	44	2, 3
		Howard Hurd, Dealer	305–339	45–46	
		Herman E. Christensen, Dealer	339–402	47–51	4
4	8/7/69	Carl A. Simonsen, Dealer	405–423	52	
		William L. Burkman, Dealer	424–445	53	
		Ralph L. Metzler, Dealer	446–486	54	5
		David A. Witzigreuter, Dealer	487–518	56–58	
5	8/8/69	Junior E. Sharin, Dealer	520–552	59	
6	8/11/69	John Thomas Lang, Dealer	584–617	61	6–11
		J. Cecil Alderdice, Dealer	618–657	62–66	12
		Ned C. Schaeffer, Dealer	657–677		
7	10/6/69	Travea Hopkins, Dealer	680–707	69	
		Donald Sausser, Dealer	708–723		
		Thelma Stiles, Widow of Dealer	724–757	70–72	13
8	10/7/69	Ralph B. Comfort, Dealer	760–776	73	
		Charles Neuroth, Expert	777–830	76–79	
		Hiram W. Trautman, Dealer	831–850	80–82	
9	10/8/69	Roy H. Dose, Dealer	852–881	83–86	14–15
		Charles Steiner, Expert	882–924	87–93	
		William Emerson, Union Carbide	925–946	94–95	16
10	10/9/69	J. J. Hall McGrew, Independent Contractor	948–985	96–99	17
		Richard A. Shaw, Independent Contractor	986–1052	100–102	18
		Raymond L. Rosen, Respondent	1059–1088		
		Jordan L. Lichtenstein, Respondent	1089–1131		
11	10/10/69	Jordan L. Lichtenstein, Respondent	1133–1184		

FINAL ORDER

Whereas, the hearing examiner entered an Initial Decision herein on February 10, 1970, concluding that the respondents had violated Section 5 of the Federal Trade Commission Act, and respondents through their counsel filed due notice of intent to appeal, which was thereafter withdrawn by letter from said counsel dated April 14, 1970;

Whereas, respondent Jordan L. Lichtenstein notified the Commission by letter dated April 24, 1970, that he did not have the funds to pay counsel for prosecution of an appeal, and requested that the Commission appoint one of its own attorneys to represent him in the conduct of such appeal and judicial review proceedings;

Whereas, each of the respondents have been represented continually in these proceedings by their own counsel and have expressly asserted, by statement filed by their counsel, that their financial situation did not qualify them to proceed *in forma pauperis;* and

Whereas, the Commission has concluded as to respondents Universe Chemicals, Inc. and Raymond L. Rosen, and respondent Jordan L. Lichtenstein in his capacity as officer of the corporate respondent, that the initial decision of the hearing examiner adequately disposes of the issues in this case;

Now therefore, it is ordered, That the initial decision of Hearing Examiner Walter K. Bennett entered on February 10, 1970, be, and it hereby is, adopted as the decision of the Commission, except as to Jordan L. Lichtenstein as an individual.

It is further ordered, That the motion of Jordan L. Lichtenstein as an individual for the appointment of counsel be, and it hereby is, denied for the reason that no showing has been made to support such claim;

It is further ordered, That the letter of April 24, 1970, from Jordan L. Lichtenstein as an individual being treated as a renewal of his notice of appeal and as a request for an extension of time within which to perfect said appeal beyond May 1, 1970, such request be, and it hereby is, granted, and that said respondent shall have an additional fourteen (14) days after being served with a copy of this order within which to perfect his appeal.

It is further ordered, That respondents Universe Chemicals, Inc., and Raymond L. Rosen and Jordan L. Lichtenstein shall, within sixty (60) days after service of this order upon them, file a written report with the Commission, signed by said respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist hereby adopted by the Commission.

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 under this order.

IN THE MATTER OF

KORELL CORPORATION

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

Docket 8777. Complaint, Apr. 10, 1969—Decision, May 13, 1970

Consent order requiring a Mechanicville, N.Y., manufacturer of women's dresses to cease making advertising and promotional allowances to some of its retail customers but not to the competitors of such retailers on proportionally equal terms in violation of Sec. 2(d) of the Clayton Act.

COMPLAINT

The Federal Trade Commission having reason to believe that the party named in the caption hereof, and hereinafter more particularly designated and described, has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, U.S.C. Title 15, Section 13, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent, Korell Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 18 South Main Street, Mechanicville, New York.

PAR. 2. Respondent is now and has been engaged in the manufacture, distribution and sale of women's dresses under the trade names of Korell and Patty Petite. McKettrick, a third trade name used by respondent was discontinued during 1966. Respondent sells its products to retail specialty and department stores located throughout the United States. Respondent's total annual sales have been substantial, exceeding nine million dollars for the calendar year ending December 31, 1965, and eight million dollars for the calendar year ending December 31, 1964.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from its place of business located in the State of New York, to customers located in other States of the United States and in the District of Columbia. There has been at all times mentioned herein a continuous course of trade in commerce in said products across State lines between said respondent and its customers.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of something of value to or for the benefit of some of its customers as compensation or in consideration for services or facilities furnished by or through such customers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionally equal terms to all other customers competing in the sale and distribution of respondent's products.

PAR. 5. Included among the payments alleged in Paragraph Four were credits, or sums of money, paid either directly or indirectly by way of discounts, allowances, rebates or deductions, as compensation

or in consideration for promotional services or facilities furnished by customers in connection with the offering for sale, or sale of respondent's products, including advertising in various forms, such as newspapers and catalogues.

Illustrative of such practices, but not limited thereto, respondent, during the period 1965 through 1966, made payments and allowances to various customers in various areas, including the cities of Philadelphia, Pennsylvania; Atlanta, Georgia and the surrounding areas of each, for advertising services furnished by such customers in connection with the sale or offering for sale of respondent's products as follows:

Philadelphia, Pennsylvania Area

Customer	Amount of allowance	
	1965	1966
Strawbridge & Clothier	$1,459.00	$850.00

Atlanta, Georgia Area

Customer	Amount of allowance	
	1965	1966
Rich's Inc	$668.00	$558.00

Respondent did not offer and otherwise make available such promotional allowances on proportionally equal terms to all other customers in the Philadelphia, Pennsylvania, and Atlanta, Georgia, metropolitan areas, competing with those who received such allowances.

PAR. 6. The acts and practices of respondent as alleged above are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13).

DECISION AND ORDER

The Commission having issued its complaint on April 10, 1969, charging respondent with violation of Section 2(d) of the Clayton Act, as amended, and respondent having been served with a copy of that complaint; and

The Commission having determined upon respondent's request, that the circumstances are such that the public interest would be served by waiver here of the provision of § 2.34(d) of its Rules that

the consent order procedure shall not be available after issuance of complaint; and

The hearing examiner having certified to the Commission respondent's duly executed 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 considered the aforesaid agreement and having determined that it provides an adequate basis for appropriate disposition of this proceeding, the agreement is hereby accepted, the following jurisdictional findings are made, and the following order is entered:

1. Respondent Korell Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 18 South Main Street, in the city of Mechanicville, State of New York.

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

ORDER

It is ordered, That respondent Korell Corporation, a corporation, its officers, directors, agents, representatives and employees, directly or indirectly, or through any corporate or other device, in the course of its business in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

> Paying or contracting for the payment of anything of value to, or for the benefit of, any customer of the respondent as compensation for or in consideration of advertising or promotional services, or any other service or facility furnished by or through such customer in connection with the handling, sale, or offering for sale of wearing apparel products manufactured, sold or offered for sale by respondent, unless such payment or consideration is made available on proportionally equal terms to all other customers competing with such favored customer in the distribution or resale of such products.

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

It is further ordered, That respondent notify the Commission at

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

IN THE MATTER OF

MOUNTAIN STATES HEARING SERVICE, INC., ET AL.

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

Docket 8798. Complaint, Sept. 9, 1969—Decision, May 21, 1970

Consent order requiring a Billings, Montana, distributor of hearing aids and accessories to cease misrepresenting that it is a multiple city firm, that it conducts research in hearing disability, that its devices will restore "normal" hearing or prevent its deterioration, failing to disclose its business is selling hearing aids, claiming that its salemen have been scientifically trained, or misrepresenting in any way its business, sales personnel, or efficacy of its hearing aids.

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 Mountain States Hearing Service, Inc., a corporation, and William R. Vota, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mountain States Hearing Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Montana, with its principal office and place of business located at 4 North Broadway, in the city of Billings, State of Montana.

Respondent William R. Vota is an individual and an officer of the corporate respondent. He formulates, directs and controls the acts and practices hereinafter set forth. His address is Route 3, in the city of Billings, State of Montana.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of hearing aids and accessories which come within the classification of device as the term "device" is defined in the Federal Trade Commission Act.

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

PAR. 4. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are in substantial competition in commerce, with corporations, firms and individuals in the sale of hearing aids and accessories of the same general kind and nature as that sold by respondents.

PAR. 5. In the course and conduct of their aforesaid business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said devices by the United States mails and by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers, and by means of radio broadcasts transmitted by radio stations located in the State of Montana, 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 devices.

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

Hearing Information Center,
1029 Vermont Ave., N.W.,
Washington, D.C. 20005

Hearing Information Center,
215 Commerce Bldg.,
St. Paul, Minnesota.

. . . From research carried on since 1960, we have found several ways to restore the hearing of such persons—even if they have "nerve loss" or poor hearing in both ears . . .

. . . But a new invention (by a deaf inventor) is proving that you can have good hearing again without surgery . . . . it can overcome deafness.

To learn more about this new way to hear better . . .

STOP DEAFNESS WITHOUT SURGERY! ! !

If you have nerve deafness . . . the most important thing you can do is find out how you can be helped with one of today's newest inventions . . .

. . . CANNOT be seen when you are wearing it.

INVISIBLE HEARING AID? . . . Send for fascinating details on this invisible (when you wear it) hearing instrument. It positively cannot be seen.

Representative and illustrative, albeit neither verbatim nor all inclusive, of oral statements and representations made to prospective purchasers are the following:

If you want to be helped with your hearing problem . . . be sure to contact Mountain States Hearing Service, Inc. . . . The people most qualified to help you are located at Mountain States Hearing Service, Inc.

The Mountain States Hearing Service understands the problems of the hard of hearing . . . that's their business.

The following is a hearing test . . . courtesy of Mountain States Hearing Service, Inc. Here is a 4,000 cycle tone * * *. Perhaps you have a hearing problem . . . perhaps you had difficulty hearing the 4,000 cycles.

PAR. 6. By and through the use of said advertisements, and others of similar import and meaning but not expressly set out herein, and by oral statements and representations of their salesmen and representatives, the respondents have represented, and are now representing, directly or by implication that:

1. They maintain offices or places of business in St. Paul, Minnesota, and Washington, D.C.

2. Their primary activity is the dissemination of free information or that they are other than a profit-making organization, through the use of the assumed name, Hearing Information Center.

3. They conduct or have conducted research in the hearing disability field.

4. They merchandise a hearing aid which is a new invention or involves a new mechanical or scientific principle.

5. They merchandise a hearing aid which will restore or improve an individual's natural or nerve hearing, or will prevent an individual from becoming totally deaf.

6. They merchandise a hearing aid which will be beneficial regardless of an individual's type of hearing disability.

7. They merchandise a hearing aid which is invisible or indiscernible when worn.

8. Their sales personnel have had medical or scientific education or training which enables them to diagnose hearing disabilities or to prescribe the proper hearing aid for an individual with a hearing disability.

9. Difficulty in hearing a 4,000 cycle tone, broadcast over radio, is an indication of a hearing disability.

PAR. 7. In truth and in fact:

1. They do not maintain an office or place of business in any town or city other than Billings, Montana.

2. Their primary activity is not the dissemination of free information, but engaging in, as a profit-making organization, obtaining the names of potential purchasers, offering for sale, sale and distribution of hearing aids and accessories to the public.

3. They do not conduct nor have ever conducted research in the hearing disability field.

4. They do not merchandise a hearing aid which is a new invention or involves a new mechanical or scientific principle.

5. They do not merchandise a hearing air which will restore or improve an individual's natural or nerve hearing, or will prevent an individual from becoming totally deaf.

6. They do not merchandise a hearing aid which will be beneficial regardless of an individual's type of hearing disability.

7. They do not merchandise a hearing aid which is invisible or indiscernible when worn.

8. Their sales personnel have not had medical or scientific education or training which enables them to diagnose hearing disabilities or to prescribe the proper hearing aid for an individual with a hearing disability.

9. Difficulty in hearing a specially emitted tone broadcast over radio or otherwise reproduced, except on equipment in general use in the testing for hearing disabilities, is not an indication of the listener's ability to hear.

Therefore, the advertisements referred to in Paragraphs Five and 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, and the aforesaid statements and representations referred to in Paragraphs Five and Six were and are false, misleading and deceptive.

PAR. 8. In the course and conduct of their aforesaid business, respondents by use of advertising mailers, including reply cards attached hereto, invite the addressees to return the reply cards with their addresses to respondents in order to receive helpful information relative to improving their hearing.

Respondents represent through the use of the aforesaid advertising mailers, and the reply cards attached thereto, that they are making a

bona fide offer to furnish free of charge helpful information to those handicapped by deafness.

In truth and in fact the respondents' aforesaid representations were not and are not bona fide offers to furnish free helpful information as aforesaid, but to the contrary, said representations were, and are made by respondents, for the purpose of developing leads to prospective purchasers of respondents' devices.

In numerous instances persons sending in respondents' reply cards for "free" information were visited in their homes by respondents' salesmen for the purpose of selling respondents' devices, and said salesmen have attempted to and often succeeded in selling such persons respondents' hearing aids.

PAR. 9. The dissemination by respondents of the aforesaid false advertisements and the use of the aforesaid false, misleading and deceptive statements, representations and practices have had, and now have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said advertisements, statements and representations were and are true and into the purchase of substantial quantities of respondents' devices by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, including the dissemination of false advertisements as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on September 9, 1969, charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and respondents having been served with a copy of that complaint; and

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

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

statement that the signing of the agreement by respondents 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 considered the matter and having determined that it provides an adequate basis for appropriate disposition of this proceeding, provisionally accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days; and having received and duly considered the comments from an interested party and having determined that the adoption of the proposal in said comment would not be in the public interest for the reason that it would lessen the effectiveness of the order, now, in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby accepts the agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mountain States Hearing Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Montana, with its principal office and place of business located at 4 North Broadway, in the city of Billings, State of Montana.

Respondent William R. Vota is an individual and an officer of the corporate respondent. He formulates, directs and controls the acts and practices. His address is Route 3, in the city of Billings, State of Montana.

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

PART I

It is ordered, That respondents Mountain States Hearing Service, Inc., a corporation and its officers, and William R. Vota, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distibution of hearing aids and accessories do forthwith cease and desist from:

1. Disseminating, or causing the dissemination of any advertisement by means of the United States mails or by any means in

commerce, as "commerce" is defined in the Federal Trade Commission Act, which represents directly or by implication, that:

(a) They maintain an office or place of business in any town or city other than Billings, Montana.

(b) They conduct or have conducted research in the hearing disability field.

(c) They merchandise a hearing aid which is a new invention or involves a new mechanical or scientific principle.

(d) They merchandise a hearing aid which will restore an individual's "natural" or "normal" hearing, will prevent deterioration of an individual's hearing, will prevent an individual from becoming deaf, will physiologically improve or correct a sensorineural hearing disability.

(e) They merchandise a hearing aid which will be beneficial to individuals unless in immediate conjunction therewith it is clearly and conspicuously disclosed that not all individuals suffering from a disability will benefit from use of a hearing aid.

(f) They merchandise a hearing aid which is invisible or indiscernible when worn.

2. Disseminating, or causing the dissemination of any advertisement by means of the United States mails, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, which fails to clearly and conspicuously disclose that:

(a) The business of respondents is the sale of hearing aids.

(b) Persons replying to respondents' advertisements will be contacted by salesmen, or otherwise, for the purpose of inducing them to purchase a hearing aid sold by respondents.

3. Disseminating, or causing to be disseminated, by any means, for the purpose of inducing or, which is likely to induce, directly or indirectly, the purchase of hearing aids in commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains any of the representations prohibited in Paragraph 1, Part I of this order or fails to comply with the affirmative requirements of Paragraph 2 of Part I hereof.

PART II

It is further ordered, That respondents Mountain States Hearing Service, Inc., a corporation, and its officers and William R. Vota,

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 the offering for sale, sale or distribution of hearing aids and accessories in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Their sales personnel have had medical or scientific education or training which enable them to diagnose hearing disabilities or to prescribe the proper hearing aid for an individual with a hearing disability.

(b) Difficulty in hearing a specially emitted tone broadcast over radio or other otherwise reproduced, except on equipment in general use in the testing for hearing disabilities, is an indication of the listener's ability to hear.

2. Misrepresenting, in any manner:

(a) The nature and purpose of their business.

(b) The education or training of their sales personnel.

(c) The efficacy of their hearing aids.

(d) The efficacy or the results of tests, testing devices or testing procedures employed in connection with the hearing of any individual either before or after a sale of said devices to said individual.

3. Failing to deliver a copy of this order to cease and desist to all operating divisions of the corporate respondents and to all officers, managers and salesmen, both present and future, and any other person now engaged or who becomes engaged in the sale of hearing aids as respondents' agent, representative or employee; and to secure a signed statement from each of said persons acknowledging receipt of a copy thereof.

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 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.

Complaint

IN THE MATTER OF

FUNERAL DIRECTORS INSTITUTE INTERNATIONAL, INC., ET AL.

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

Docket C-1739. Complaint, May 21, 1970—Decision, May 21, 1970

Consent order requiring a Chicago Heights, Ill., public relations agency which sells memberships, advertising and public relations programs to funeral directors, to cease misrepresenting that it is a large organization with several departments, using the words "institute" or "funeral directors institute" as part of its trade or corporate name, exaggerating the benefits accruing to its customers, and misrepresenting the nature and extent of its services.

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 Funeral Directors Institute International, Inc., a corporation, and John T. Arends, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charge in that respect as follows:

PARAGRAPH 1. Respondent Funeral Directors Institute International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 2706 South Chicago Road, Chicago Heights, Illinois.

Respondent John T. Arends is an individual and is an officer of the corporate respondent. Said individual respondent formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business 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 advertising, offering for sale, sale and distribution of memberships and services in connection therewith to funeral directors, morticians and similar corporations, firms and individuals for use in selling funeral services to the general public.

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

respondents, their employees and agents, from their principal place of business in the State of Illinois, have sold memberships in and services offered by the corporate respondent to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of membership in and services from the corporate respondent, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in magazines and professional publications, in promotional material, in written correspondence and in oral presentations to prospective member funeral directors.

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

1. Since that time [1961], Funeral Directors Institute has enjoyed phenomenal growth. . . .

Funeral Directors Institute, International, is now entering a world-wide expansion program which will give it an even stronger position, as the foremost leader in the funeral service profession.

2. Funeral Directors Institute, International.

3. "Qualification for Membership" requires an intensive investigation of the "applicant funeral director's business record, the policies and principles of the firm, ethical practices and reputation for honesty, integrity and sincerity of purpose." Qualification for membership is based upon the member's public concern, honesty and high standards of personalized service. And to maintain active membership requires yearly re-qualification.

4. The Institute is staffed with the top men in the field of Funeral Directing, Business Administration and Counciling (sic) and Public Relations.

5. The Institute is a fellowship organization. . .

6. All members of the Funeral Directors Institute have experienced and reported that they have met hundreds, yes even thousands, of new families through the use of the many progressive programs the institute provides for its members.

7. Quarterly survey by service representative Consultation Service
52 Pieces of Individual Prepared Copy
Market survey
Workshop
Collection Service
Accounting-Bookkeeping-Business Analysis.

PAR. 5. By and through the use of such statements and representations and others similar thereto, but not specifically set forth herein, separately and in connection with the oral sales presentations of the individual respondent and other representatives, agents and em-

ployees of the corporate respondent, respondents have represented, and are now representing, directly or by implication:

1. That respondent, Funeral Directors Institute International, Inc., is a large organization with many members which maintains more than one place of business and a substantial staff organized into several functional operating departments including an Art Department, Copy Department, Business Department, Production Department and Family Contact Department.

2. Through the corporate name Funeral Directors Institute International, Inc., that respondents are conducting an institution of learning with a competent, experienced and qualified staff offering instruction pertaining to the subjects of funeral home operation and management.

3. That respondents carefully screen applications for membership and limit membership to the most ethical and progressive funeral director in each community.

4. That the staff of the corporate respondent includes individuals highly skilled in the various fields of Funeral Directing, Business Administration, Counseling and Public Relations.

5. That corporate respondent is a fellowship organization, *i.e.*, a society or association of members with an equal voice in policy and planning which seeks to promote its cause through the mutual exchange of ideas and experiences.

6. That all funeral directors who have become members of the corporate respondent have met hundreds or thousands of new families through the use of the programs which the corporate respondent provides for its members.

7. That the respondents will provide member funeral directors with the following services:

a. Public opinion surveys of the member funeral directors' communities performed at quarterly intervals by respondents, or their agents or representatives;

b. Consultation with staff personnel of the corporate respondent concerning the problems of member funeral directors in the areas of funeral home operation and management;

c. Advertising copy specially prepared for the member funeral director's particular market situation, if the advertising service was purchased;

d. Complete market surveys of the areas in which the member's funeral home was located;

e. Annual workshops which would be held at times and locations convenient for member funeral directors; and

f. Complete collection service, complete bookkeeping and tax service and complete business analysis service if any of these services were purchased.

PAR. 6. In truth and in fact:

1. The respondent, Funeral Directors Institute International, Inc., is a small organization with few members which maintains only one place of business and a staff which consists solely of the individual respondent and his secretary.

2. The respondents' business is not an institution of learning. Respondent has neither a curriculum, teaching faculty nor facilities for the purpose of teaching or providing educational courses to prospective members in the field of funeral home operation and management. Respondents are merely a commercial enterprise engaged in selling memberships and advertising and public relations programs in connection therewith for a profit.

3. The respondents do not carefully screen applications for membership, but admit to membership any funeral director willing to pay the annual dues.

4. The corporate respondent is staffed only by the individual respondent and his secretary and not by persons highly skilled in Funeral Directing, Business Administration and Counseling and Public Relations.

5. The respondent is not a society of members with an equal voice in policy and planning which seeks to promote its cause through the mutual exchange of ideas and experiences but is a corporation organized for profit.

6 Few, if any, members have experienced and reported that they have met hundreds or thousands of new families through the use of programs which the corporate respondent provides for its members.

7. a. Public surveys are not performed at quarterly intervals by respondents or their representatives, agents or employees, on behalf of members;

b. The respondents do not provide members with an expert consultation service;

c. The advertising copy supplied to members by respondents is not specially prepared for the individual members' market situation;

d. Complete market surveys are not performed;

e. Annual workshops are not held at times and locations convenient to member funeral directors; and

f. Respondents do not provide complete collection services, complete bookkeeping and tax services and complete business analysis services to member funeral directors.

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

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of memberships and services of the same general kind and nature as those sold by respondents.

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the funeral service industry and the public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of memberships and services offered for sale by respondents on the part of the said funeral directors, and into the patronage of the establishments of members of the corporate respondent, on the part of the general public, because of such erroneous and mistaken belief.

PAR. 9. 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 and deceptive acts and practices in 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 Bureau of Deceptive Practices 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Funeral Directors Institute International, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its prinicpal office and place of business located at 2706 South Chicago Road, Chicago Heights, Illinois.

Respondent John T. Arends is an individual and an officer of said corporation. He formulates, directs and controls the acts and practices of said corporation. His address is the same as that of the 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 Funeral Directors Institute International, Inc., a corporation, and its officers, and John T. Arends, 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 the advertising, offering for sale, sale or distribution of memberships in the corporate respondent and services in connection therewith, do forthwith cease and desist from:

1. Representing, directly or by implication, that respondent, Funeral Directors Institute International, Inc., is a large organization, or has many members, or maintains more than one place of business, or has a substantial staff, or is organized into several functional operating departments including but not limited to an Art Department, Copy Department, Business Department, Production Department or Family Contact Department; or misrepresenting, in any manner, the size, scope, extent or amount or volume of respondents' business or operations; or misrepresenting, in any manner, the number or size of separate functional departments or divisions; or using any fictitious organizational description or designation.

2. Using the words "institute" or "funeral directors institute"

either singly or together or in conjunction with any other word or words of similar import and meaning or any abbreviation or simulation therof as part of respondents' trade or corporate name, or using said word or words in any other manner to designate, describe or refer to respondents' business; or misrepresenting, in any manner, the nature of respondents' organization.

3. Representing, directly or by implication, that respondents screen applications for membership or limit membership to the most ethical and progressive funeral director in each community; or misrepresenting, in any manner, the criteria for admission to membership in the corporate respondent.

4. Representing, directly or by implication, that the staff of the corporate respondent includes individuals highly skilled in the various fields of funeral directing, business administration, counseling and public relations; or misrepresenting, in any manner, the number, kind or qualifications of the persons employed in the respondents' organization.

5. Representing, directly or by implication, that the corporate respondent is a fellowship or other nonprofit organization; or misrepresenting, in any manner, the nature of respondents' business.

6. Representing, directly or by implication, that all persons who have purchased memberships in the corporate respondent have met a large number of new potential customers through the use of the programs which the respondents provide for their customers; or misrepresenting, in any manner, the effect or benefits that membership in the corporate respondent has bestowed upon member funeral directors.

7. Representing, directly or by implication, that for the basic purchase price of membership, or for an additional fee, the respondents will provide any of the following named items or services to persons purchasing memberships in the corporate respondent:

(a) Public opinion surveys of the member funeral directors' community performed at quarterly intervals by respondents, or their agents or representatives;

(b) Consultation services with staff personnel of the corporate respondent concerning the problems of member funeral directors in the areas of funeral home operation and management;

(c) Advertising copy specially prepared for the member funeral director's particular market situation;

(d) Complete market surveys of the areas in which the member funeral director's establishment is located;

(e) Annual workshops which are held at times and places convenient to member funeral directors; or

(f) Complete collection service, complete bookkeeping and tax services and complete business analysis service;

or, misrepresenting, in any manner, the services or items which the respondents provide member funeral directors.

8. Failing to deliver a copy of this order to cease and desist to all operating divisions of the corporate respondent, and to all present or future salesmen or other persons engaged in the sale of respondents' memberships or services in connection therewith, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

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 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

TEXTRON INC.

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

Docket C-1740. Complaint, May 22, 1970—Decision, May 22, 1970

Consent order requiring a major manufacturer of industrial machinery and other products headquartered in Providnce, R.I., to divest within one year its Aetna Bearing Co. Division and to refrain from acquiring any manufacturer of antifriction bearing assemblies for a period of ten years without prior Commission approval.

COMPLAINT

The Federal Trade Commission having reason to believe that Textron, Inc., a corporation subject to the jurisdiction of the Commission,

has acquired The Farnir Bearing Company, in violation of Section 7 of the Clayton Act (15 U.S.C. Section 18), hereby issues this Complaint, pursuant to Section 11 of that Act stating its charges in that respect as follows:

I. Definitions

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

(a) Ball bearings are antifriction bearing assemblies consisting of an outer and inner race or upper and lower washers separated by balls as rolling elements.

(b) Radial ball bearings are ball bearings primarily designed to support load perpendicular to shaft axis.

(c) Thrust ball bearings are ball bearings primarily designed to support load parallel to shaft axis.

II. Textron Inc.

2. Textron Inc. (hereinafter "Textron"), the respondent herein, is a corporation organized and doing business under the laws of the State of Delaware with its principal office and place of business located at 10 Dorrance Street, Providence, Rhode Island.

3. Textron ranks among the 50 largest industrial corporations in the United States. In 1968, it had sales of $1.7 billion, assets of $892 million and net income of $74 million.

4. Textron's growth has been achieved in large part since 1951 through mergers and acquisitions.

5. In 1963, Textron acquired Parkesburg-Aetna Corp., a producer of ball bearings among other products. In addition to its sales to distributors for the replacement market, Textron's Aetna Bearing Company Division is a substantial supplier of ball bearings to manufacturers of automotive equipment, farm machinery and general machinery equipment. In 1967, Textron shipped ball bearings having a value of over $7.8 million, amounting to 1.6 percent of total industry shipments.

6. At all times relevant herein, Textron sold and shipped its products throughout the United States and was and is now engaged in commerce as "commerce" is defined in the Clayton Act.

III. The Fafnir Bearing Company

7. The Fafnir Bearing Company (herinafter "Fafnir") was a corporation organized and doing business under the laws of the State

of Connecticut with its principal office and place of business located in New Britain, Connecticut.

8. Fafnir was a leading manufacturer of ball bearings, and sells to numerous industries including the automotive, farm machinery, machine tool, construction machinery, aircraft, and aerospace industries. In 1966, Fafnir had sales of $113.8 million, assets of $72.1 million, and net income of $11.8 million. Its 1967 shipments of ball bearings totaled more than $77 million representing 17.1 percent of the industry's shipments.

9. At all times relevant herein, Fafnir sold and shipped its products throughout the United States and engaged in commerce as "commerce" is defined in the Clayton Act.

IV. Trade and Commerce

10. Trade and commerce in the sale of ball bearings is substantial with 1967 shipments amounting to over $453 million.

11. Concentration in the production and sale of ball bearings is high. In 1967, the four largest producers accounted for 63.4 percent of total industry shipments and the eight largest producers accounted for 80.3 percent of such shipments. Between 1963 and 1967, the number of ball bearing producers declined from 38 to 34, a decline of more than 10 percent.

12. Barriers to entry into the production of ball bearings are high. In addition to the high investment required for production machinery and equipment, highly specialized technology and manufacturing know-how is required. Further, satisfactory completion of lengthy qualification testing is often required by purchasers of ball bearings.

13. Acquisitions and mergers have significantly decreased the number of firms producing ball bearings. Since 1955 at least 11 ball bearing manufacturers have been acquired by firms already producing ball bearings. Seven of these acquisitions have occurred since 1961.

14. Given the existing high barriers to entry and the high concentration in the ball bearing industry, the most likely sources of increased competition are firms already in the industry which have both the capability and the incentive to expand their existing product line. The skills, technological know-how and plant facilities used in the production of one type of ball bearing can be utilized to produce other types of ball bearings.

15. Textron, through its Aetna Bearing Company Division, is the leading producer of thrust ball bearings which compete with radial ball bearings for use in automotive clutch release applications. Tex-

tron also is a significant producer of unground adapter ball bearings for use in mounted power transmission applications and is a significant producer of unground ball bearings mounted in idler pulleys and sprockets. Unground adapter ball bearings and unground ball bearings mounted in idler pulleys and sprockets compete with precision ball bearings in low speed and load applications.

16. Textron, prior to its acquisition of Fafnir, was one of the few firms with prospects of becoming a substantial producer of precision radial ball bearings.

17. Fafnir was the second largest producer of precision radial ball bearings and a leading producer of adapter ball bearings for use in mounted power transmission applications and ball bearings mounted in idler pulleys and sprockets. Fafnir possessed the technological know-how and the resources necessary to be a substantial producer of thrust ball bearings.

18. Textron is a significant purchaser of ball bearings. In 1967 its purchases of ball bearings totaled approximately $4 million.

V. The Transaction

19. On or about January 3, 1968, Textron acquired the business and assets of Fafnir for a consideration of approximately $184 million in Textron stock.

VI. Effects of the Acquisition

20. The effects of Textron's acquisition of Fafnir may be substantially to lessen competition or tend to create a monopoly in the manufacture and sale of ball bearings generally and in particular kinds of ball bearings throughout the United States in violation of Section 7 of the Clayton Act, as amended, in the following ways among others:

(a) Substantial actual and potential competition between Textron and Fafnir may be eliminated.

(b) Competing manufacturers of ball bearings may be foreclosed from a substantial segment of the market and may thereby be deprived of a fair opportunity to compete.

(c) Already high barriers to entry of new competition in the ball bearing industry may be heightened with the result that concentration may remain high.

(d) Additional acquisitions between ball bearing producers and ball bearing users may be encouraged.

VII. The Violation Charged

21. The acquisition by Textron of the assets of Fafnir constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. Section 18).

Statement of Commission

MAY 22, 1970

The Commission reconsidered the proposed consent agreement in light of the comments submitted and decided to accept the agreement in the manner and form proposed. The consensus of the public comments was that the proposed consent order was inadequate in that it represented a rejection of the "leading company approach" to conglomerate mergers recommended in the FTC staff *Economic Report on Corporate Mergers*. That approach is that acquisitions by large diversified firms of leading firms in concentrated industries should be challenged.

The Commission has determined that under the particular circumstances presented, it probably would not have challenged respondent's acquisition of Fafnir, absent respondent's ownership of Aetna. While the Commission rejects any *per se* rule of "leading company" illegality, it looks most carefully at leading firm acquisitions by conglomerates into a concentrated industry, and stands ready to challenge these acquisitions where they may tend to eliminate potential competition, create reciprocity or cross-subsidization opportunities, or result in full-line forcing, predatory pricing, tie-in sales, or other anticompetitive practices.

Respondent, through Aetna, was a small factor in the ball bearing industry, producing different, though related types of ball bearings than those produced by Fafnir. Commission concluded that the acquisition of Fafnir did not eliminate potential competion, since Textron absent its acquisition of Fafnir and without its position in Aetna which it is now required to divest, would not have been considered a likely potential entrant through internal expansion into Fafnir's ball bearing markets.

A review of respondent's overall purchase requirements indicates that it has little or no ability to force its bearing customers to deal with it in a systematized reciprocal manner. Moreover, there is no evidence to indicate that respondent will confer additional power to

subsidize Fafnir's bearing operations in the light of the latter's profitable operations.

The Commission reasoned further that in the circumstances of this case, it was more in the public interest to obtain an order requiring prompt divestiture of Aetna, in that such divestiture would not only reinstate the competition that formerly existed between Aetna and Fafnir, but would also recreate the opportunity for the new owners of Aetna to expand internally its product line to compete more directly with Fafnir.

Decision and Order

The Federal Trade Commission having initiated an investigation of the acquisition of The Fafnir Bearing Company, a corporation, hereinafter sometimes referred to as Fafnir, by Textron Inc., a corporation, hereinafter sometimes referred to as respondent, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 7 of the Clayton 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 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 respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon provisionally accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, and having received and duly considered comments from several interested members of the public, 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 Textron 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 10 Dorrance Street, Providence, Rhode Island.

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

ORDER

I

It is ordered, That respondent, Textron Inc., and its officers, directors, agents, representatives, and employees shall, within one (1) year from the effective date of this order, divest itself absolutely and in good faith, subject to the prior approval of the Federal Trade Commission, of all the assets, properties, rights and privileges, tangible or intangible, including but not limited to all properties, plants, machinery, equipment, raw material reserves, patents, trade names, trademarks, contract rights, marketing organizations, and good will, acquired by said respondent as a result of its acquisition of the Aetna Bearing Company, together with all additions and improvements thereto, so as to assure that said company is reestablished as an effective, viable competitor in the production, distribution and sale of antifriction bearings.

II

It is further ordered, That, if respondent is unable to sell or dispose of Aetna Bearing Company for cash, nothing in this order shall be deemed to prohibit respondent from retaining, accepting and enforcing in good faith any security interest therein, not to exceed five years in duration, for the sole purpose of securing to respondent full payment of the price, with interest, at which Aetna Bearing Company is sold or disposed of; *Provided, however*, That if after a good faith divestiture of Aetna Bearing Company pursuant to this order, the buyer fails to perform his obligations and respondent regains ownership or control of Aetna Bearing Company by enforcement of any security interest therein, respondent shall redivest such company within one year in the same manner as provided for herein.

III

It is further ordered, That pending divestiture, respondent shall not make any changes, other than in the ordinary course of business, or permit any deterioration in any of the plants, machinery, build-

ings, equipment or other property or assets of whatever description of its Aetna Bearing Company Division which may impair said Division's capacity for the manufacture, distribution or sale of antifriction bearings.

IV

It is further ordered, That the divestiture required by Paragraph I of this order shall not be effected, directly or indirectly, to anyone who, subsequent to such divestiture, is an officer, director, employee, or agent of, or otherwise under the control or influence of respondent, or who owns or controls, directly or indirectly, more than one (1) percent of the outstanding stock of respondent.

V

It is further ordered, That, pending divestiture, respondent shall cease and desist from acquiring, directly or indirectly, the whole or any part of the stock, share capital, or assets (other than products, machinery and equipment sold in the ordinary course of business and non-exclusive patent and know-how licenses) of any concern engaged in the manufacture and/or distribution of antifriction bearings in the United States.

VI

It is further ordered, That, for a period commencing upon the effective date of this order and continuing for a period of ten (10) years from and after the date of completing the divestiture required by this order, respondent shall cease and desist from acquiring, directly or indirectly, without prior approval by the Federal Trade Commission, the whole or any part of the stock, share capital, or assets (other than products, machinery and equipment sold in the normal course of business and non-exclusive patent and know-how licenses) of any domestic concern, corporate or noncorporate, engaged in the manufacture and/or distribution of antifriction bearings in the United States, or any foreign concern, corporate or noncorporate, engaged in the manufacture and/or distribution of antifriction bearings whose sales in the United States in the five years preceding the acquisition exceeded an average of $500,000 per year. (For the purposes of this order a concern will be deemed to be engaged in the distribution of antifriction bearings if it derives 50 percent or more of its total annual sale from such activity.)

This prohibition on acquisitions shall include, but not be confined to, the entering into of any arrangement by respondent pursuant to which respondent acquires the market share, in whole or in part, of any concern, (a) through such concern discontinuing manufacturing or selling antifriction bearings under a brand name or label it owns and thereafter manufacturing or selling any of said products under any of respondent's brand names or labels, or (b) by reason of such concern discontinuing manufacturing antifriction bearings and thereafter transferring to respondent customer lists or any other way making available to respondent access to customers or customer accounts.

VII

It is further ordered, That commencing upon the effective date of this order and continuing for a period to ten (10) years from and after the date of completing the divestiture required by this order, respondent shall cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital or assets (other than products, machinery and equipment sold in the ordinary course of business and nonexclusive patent and known-how licenses) of any domestic concern, corporate or noncorporate, whose purchases of precision ball bearings (ABEC–1 and above) for use in original equipment manufacture in any of the immediately preceding three years exceeded one million dollars ($1,000,000).

VIII

It is further ordered, That respondent shall, within sixty (60) days after the effective date of this order, and every sixty (60) days thereafter, until respondent has fully complied with Paragraph I of this order, and annually thereafter, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which respondent intends to comply, is complying, or has complied with this order. All compliance reports shall include, in addition to such other information and documentation as may hereafter be required, without limitation, a summary of all contracts and negotiations with any parties concerning divestiture of the specified assets and properties, the identity of all such parties and copies of all written communications to and from such parties.

IN THE MATTER OF

CAMPBEL COUP COMPANY, ET AL.

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

Docket C-1741. Complaint, May 25, 1970—Decision, May 25, 1970

Consent order requiring a major soup company with headquarters in Camden, N.J., and its New York City advertising agency to cease falsely advertising soup and other food products by the deceptive use of experiments or demonstrations such as a TV commercial in which marbles were placed in a bowl of soup in order to increase the apparent abundance of solid ingredients. The order also denies the request of SOUP, Inc. (Students Opposing Unfair Practices), for further intervention in the case, but grants SOUP's request for a free copy of the transcript of the oral argument heard February 5, 1970.

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 Campbell Soup Company, a corporation, and Batten, Barton, Durstine & Osborn, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Campbell Soup Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 375 Memorial Avenue, in the city of Camden, State of New Jersey.

Respondent Batten, Barton, Durstine & Osborn, Inc., 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 383 Madison Avenue, in the city of New York, State of New York.

PAR. 2. Respondent Campbell Soup Company is now, and for some time last past has engaged in the sale and distribution of Campbell's canned soups.

Respondent Batten, Barton, Durstine & Osborn, Inc., is now and for some time last past has been, an advertising agency of Campbell Soup Company, and now prepares and places, and for some time

last past has prepared and placed, for publication, advertising material, including but not limited to the advertising referred to herein, to promote the sale of the said canned soup and other products.

PAR. 3. Respondent Campbell Soup Company causes said products, when sold, to be transported from its various places of business located in the State of New Jersey to purchasers thereof located in various other States of the United States and in the District of Columbia. Thus respondent maintains 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. 4. Respondents, by means of advertisements which depict and have depicted a bowl or container of Campbell soup, apparently prepared in accordance with the dilution directions on the can, in a "ready-to-eat" situation, demonstrate the quantity or abundance of solid ingredients (garnish) present in a can of Campbell soup.

PAR. 5. In truth and in fact, in many of the aforesaid advertisements, which purport to demonstrate or offer evidence of the quantity or abundance of solid ingredients (garnish) in a can of Campbell soup, respondents have placed, or caused to be placed in the aforesaid bowl or container a number of clear glass marbles which prevent the solid ingredients (garnish) from sinking to the bottom, thereby giving the soup the appearance of containing more solid ingredients (garnish) than it actually contains, which fact is not disclosed.

The aforesaid demonstration exaggerates, misrepresents, and is not evidence of, the quantity or abundance of solid ingredients in a can of Campbell soup; therefore, the aforesaid advertisements are false, misleading and deceptive.

PAR. 6. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Campbell Soup Company has been, and is now, in substantial competition, in commerce, with other corporations in the sale of canned soup of the same general kind and nature as that sold by said respondent.

In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Batten, Barton, Durstine & Osborn, Inc., has been, and is now, in substantial competition, in commerce, with corporations, firms and individuals in the advertising business who represent sellers of canned soup.

PAR. 7. The use by respondents of the aforesaid false, misleading and deceptive advertisements has had, and now has, the tendency

and capacity to mislead members of the purchasing public as to the quantity of solid ingredients (garnish) in a can of Campbell soup and into the purchase of substantial quantities of Campbell soup by reason thereof.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

OPINION OF THE COMMISSION

MAY 25, 1970

BY WEINBERGER, *Commissioner:*

This matter involves a number of advertisements by the Campbell Soup Company which the Commission has challenged as being false, misleading, and deceptive in violation of Section 5 of the Federal Trade Commission Act. The advertisements in question included pictures of a bowl of soup, apparently prepared in accordance with the directions on the can, in a ready-to-eat situation. Solid ingredients appear at the top of the bowl. The Commission charged that this picture did not accurately represent the appearance of a bowl of soup prepared according to the instructions on the can because Campbell had "mocked up" the bowl of soup pictured in the advertisements by placing glass marbles in the bottom of the bowl. It was further charged that these marbles at the bottom of the bowl were designed to force the solid ingredients to the top, thus making visible in the picture that which would not have been visible in a bowl of soup prepared in the home.

When this practice came to the Commission's attention in 1969, it proposed to issue an order prohibiting Campbell from using any such picture or any deceptive test or demonstration in advertising its products and, further, from misrepresenting the ingredients of any of its products in any manner. Respondents consented to the entry of this order. On September 19, 1969, the Commission provisionally accepted the order and, in accordance with FTC Rules § 2.34 (b), directed that it be placed on the public record for thirty days, until October 20, 1969, to permit interested members of the public to file comments concerning it.

On October 20, 1969, SOUP, Inc., filed a petition requesting the Commission to withdraw its provisional acceptance of the consent

order and made a motion to intervene in the proceedings. SOUP also asked an opportunity to present oral argument to the Commission, urging that the consent order as provisionally accepted was inadequate to protect the public interest.

On February 24, 1970, after a hearing had been held on February 5, 1970, on SOUP's motion to intervene, the Commission allowed SOUP until March 20, 1970, to submit further written comments on the adequacy of the proposed consent order. "Intervention" in the proceedings was granted to this extent. The Commission delayed consideration of the consent order until after SOUP's comments were filed. This was done on March 20, 1970.

By petition of that date, SOUP presents us with the following issues for decision. (1) We are asked to withdraw our provisional acceptance of the consent order for the reasons given in SOUP's brief of March 20, 1970, which supersedes the petition of October 20, 1969, on this point. (2) We are asked to reconsider our decision of February 24, 1970, and to grant SOUP a hearing on the issues raised in its March 20, 1970, brief. (3) We are asked to reconsider our decision of February 24, 1970, and to grant SOUP intervention in these proceedings. (4) SOUP requests the Commission to provide it with a free copy of the complete transcript of the February 5, 1970, oral argument.

II

§ 2.34 of the Commission's Rules of Practice provides for the submission of comments by interested persons on consent orders which have been provisionally accepted by the Commission. SOUP has submitted extended comments which have been seriously considered by the Commission.

While the Commission's rules do not explicitly provide for "intervention" in its consent order proceedings—an omission which we have referred to our Advisory Council on Rules of Practice and Procedure—, we feel that the participation permitted SOUP in this case provided it an adequate opportunity to bring its views to the Commission's attention. Had the arguments made in SOUP's brief raised substantial issues of the law or the facts involved in this case, further presentations, perhaps in the form of a hearing, might have been appropriate. *Cf. Office of Communication of the United Church of Christ* v. *F.C.C.*, 359 F. 2d 994 (D.C. Cir. 1966). But the short of the matter is that there is no disagreement between petitioner and the Commission as to either the facts of this case or the Commission's power to deal with them.

In SOUP's brief of March 20, 1970, there is no suggestion that the Commission has misconceived what Campbell actually did in this case. Our complaint was in agreement with petitioner that Campbell put glass marbles in the bottom of its bowls of soup before photographing them, and that this practice was a deceptive one in violation of Section 5 of the Federal Trade Commission Act.

Nor is there any disagreement between the Commission and petitioner as to the scope of the order which the Commission has the power to issue in this case. Particularly, petitoner argues at length that the Commission has the power to require respondent to make affirmative disclosure in future advertisements of the deceptive practices discovered by the Commission in order to alert the public to these practices. We have no doubt as to the Commission's power to require such affirmative disclosures when such disclosures are reasonably related to the deception found and are required in order to dissipate the effects of that deception. *All-State Industries of North Carolina, Inc.*, v. *F.T.C.*, 423 F. 2d 423 (4 Cir., No. 13,568, decided March 19, 1970); *Portwood* v. *F.T.C.* 418 F. 2d 419 (10 Cir., No. 9983, decided November 14, 1969). Nor is there any doubt as to the Commission's right and power to alert the public as to the acts and practices which it has challenged as deceptive, as well as to all orders entered with respect to these acts and practices. *F.T.C.* v. *Cinderella Career Finishing Schools, Inc.*, 404 F. 2d 1308, 1314 (D.C. Cir. 1968). All that is required is that there be a "reasonable relation to the unlawful practices found to exist." *Jacob Siegel Co.* v. *F.T.C.*, 327 U.S. 608, 613 (1946).

Because there is no dispute as to the facts of this particular case or as to the Commission's powers to remedy them in the way which petitioner suggests, it does not appear to us that any purpose would be served by permitting SOUP to make additional submissions, whether in written or in oral form. It remains only for the Commission to decide, in light of the arguments made by SOUP and other relevent considerations, whether the final acceptance of the provisionally accepted consent order is in the public interest.

III

The petitioner recognizes, as it must that the Commission has wide discretion in determining the scope of its orders. Indeed, the thrust of much of petitioner's brief is to the effect that the Commission should use its discretion to include additional provisions in its order in this case. The Supreme Court has summarized the state of the law in the following passage, cited in petitioner's brief:

It has been repeatedly held that the Commission has wide discretion in determining the type of order that is necessary to cope with the unfair practices found . . . and that Congress has placed the primary responsibility for fashioning orders upon the Commission. *F.T.C.* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 390 (1965).

The issue before us, then, is simply what provisions we should include in this order so as to protect the public.

SOUP contends that the order provisionally accepted by the Commission is inadequate to protect the public. It argues that in order effectively to protect the public from the deception involved in Campbell's advertisements the order must require Campbell's future soup advertisements to disclose that their prior advertisements of this product had been challenged by the Commission as being deceptive. It is proposed that this disclosure be required to be included in advertisements for the same period of time that the challenged advertisements appeared, and in the same media.

Petitioner raises three principal questions concerning the provisionally accepted order: whether members of the public will be adequately informed of respondent's alleged deception and thus be able to protect themselves from future recurrences; whether it contains sufficient assurances that the alleged violations will not be repeated in the future; and whether the order adequately insures that the effects of the deception alleged here have been adequately dissipated.

These questions are, of course, among those which the Commission must consider in determining whether final acceptance of the proposed order is in the public interest. There are also other questions which we should consider—among them the extent and type of the deception, whether it involves a danger to health or safety of consumers, and, what is particularly important where a proposed order has been agreed to by respondent, whether the matter merits further expenditure of the Commission's limited resources when compared with other matters within our jurisdiction. All these questions, it should be noted, concern the general policy of the Commission in administering the statutes referred to it by the Congress; they are in no way peculiar to this case or to this order.

Considering all of these factors, and giving particular attention to the arguments made in petitioner's brief, the Commission is of the opinion that final acceptance of the proposed consent order is in the public interest. Our reasons follow.

This order is substantially identical in its terms to orders in other "mock-up" cases, orders which have been upheld by the courts. See

F.T.C. v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965). It would prohibit respondent from advertising any of its food products by presenting pictures or demonstrations which do not accurately represent the products and, further, from misrepresenting the ingredients of any of its products in any manner. A violation of this order will be punished by the imposition of substantial fines pursuant to Section 5(1) of the Federal Trade Commission Act. We think that the order completely describes the practices alleged to exist and will deter respondent from repeating them. The order also covers some practices not actually used by this respondent but which are reasonably related to these practices. We further think that the Commission's press release describing its disposition of this case, while perhaps not as widely disseminated as Campbell's advertisements including the affirmative disclosure proposed by petitioner would be, will give the public adequate notice of the respondent's conduct here. With regard to petitioner's final point about dissipating the effects of the alleged deception, we think that stopping the said deception itself should be our principal objective; further, we are doubtful that to require, perhaps only in 1972 or 1973 or even later, after trial and appeal, a public apology for placing marbles in soup advertisements of 1968, would have the effect petitioner seeks.

These considerations, while important, are not, however, what principally persuade us that final acceptance of the proposed order is in the public interest. It is because we think that the Commission has other important matters to deal with that we do not believe further resources should be devoted to this case. A sensible assessment of our priorities convinces us that the added amount of relief which might theoretically be obtained after years of protracted litigation is not worth the expenditure of resources which could be put to better use elsewhere.

While the alleged deception here is not one which creates dangers to the health and safety of consumers, as do many matters which come before the Commission, and while it does not even involve an affirmative misstatement of fact, it is, of course, a deception—unnecessary and deceitful—designed, as the complaint alleged, to create a false impression of the amount of solid ingredients in Campbell's soup. However, we do have an order, obtained without an interminable trial and series of appeals, which is fully adequate to protect the public; we shall not hesitate to enforce this order if this tawdry practice is revived.

There should now be an end to this matter.

IV

We make, then, the following disposition of the issues presented to us in SOUP's petition. The motions to grant a hearing on the issues raised in SOUP's March 20, 1970 brief, and to allow further intervention in these proceedings, and the motions to reconsider, are denied. The motion to withdraw our provisional acceptance of the proposed consent order is also denied, and the proposed consent order is finally accepted. Our November 12, 1969, order, according petitioner's limited request to proceed *in forma pauperis*, is still in effect, and we hold that petitioner's request for a copy of the transcript of the February 5, 1970, oral argument should be granted.

An order accompanies this opinion.

Commissioners Elman and Jones have filed separate statements.

SEPARATE STATEMENT

MAY 25, 1970

BY ELMAN, *Commissioner:*

On October 20, 1969, SOUP filed a petition for intervention which raised serious and substantial questions—questions of law, fact, policy, and discretion—as to the adequacy of the proposed consent order to remedy the deceptions alleged in the complaint. The order, it was contended, was too narrow in that it was limited to a negative prohibition of future advertisements involving misrepresentations similar to those challenged by the Commission. SOUP urged, with considerable force, that the order should go further and require respondents' future advertising to contain affirmative disclosures designed to overcome and dissipate any residual deceptions of the public resulting from past misrepresentations.

It seemed clear to me in October 1969, as it does now, that the public interest would be best served by prompt adjudication of these issues in an adversary proceeding in which SOUP could participate as a public intervenor. In my view, the proper course for the Commission was, and is, to issue a formal complaint under Part 3 of the Rules of Practice, referring the case for trial before a hearing examiner. Consent decrees and orders undoubtedly serve a useful purpose, saving the time and expense of litigation where no real controversy exists. That cannot be said here, where basic issues relating to the adequacy of the remedy have not been fully canvassed on an evidentiary record and remain unresolved.

There is no doubt of the Commission's general authority, com-

parable to that of a court of equity, to insist upon affirmative disclosures or other actions necessary to remedy unlawful acts and practices found by it. The question for the Commission to consider in each case is whether, in light of the nature, gravity, duration, and effects of the illegal conduct, adequate protection of the public requires such additional provisions in the order.

In determining whether, and to what extent, there is a need in this case for the type of affirmative relief urged by SOUP, the crucial facts—which the Commission does not now have—are those bearing on the residual effects of respondents' alleged misrepresentations. Consumers' buying habits can be influenced by many factors, including the impressions left by past advertising claims long discontinued. Although a deceptive advertising campaign may have run its course, its adverse effects on the public, and on honest competitors, may continue unabated, thus creating the need for a remedy beyond a simple order to cease and desist.

SOUP's claim that there is such a need here seems to me to call for a factual inquiry—which the Commission has not made—into the effects of respondents' advertisements. As I see it, the need for an affirmative remedy to dissipate the effects of the alleged deceptions cannot be dismissed on the basis of conjecture or unverified assumptions. It may well be that, after evidence is taken and findings made on a record, the Commission would still conclude that a merely negative prohibitory order is all that the public interest requires. But I am not prepared to make that judgment now, in the absence of facts showing the extent, if any, of the residual harm to the public which would remain after discontinuance of the challenged advertisements.

As all agree, the questions raised by SOUP have a broad significance in the general area of the Commission's consumer protection responsibilities which is not confined to this case. Issues of such large importance to the public should not be "settled" on the basis of respondents' acceptance of a consent order whose adequacy has been seriously challenged by responsible representatives of the public interest.

Regrettably, the disposition of this case has been unduly delayed by the peripheral and pointless controversy over SOUP's standing to intervene—which seems to me too clear for argument. The kind of "intervention" which SOUP has been permitted thus far is indicated by the quotation marks which the Commission puts around the word. The fact is, as the Commission recognizes, that our present Rules makes no provision for intervention in proceedings disposed

of by consent orders. SOUP's petition to intervene has, at least, served a useful purpose in bringing this deficiency to our attention. In any event, it surely is not a valid reason for denying the petition that it cannot easily be fitted into our present procedures.

If the allegations of the complaint are true, we are confronted here with an egregious violation of law by one of America's largest companies. The charge is that, several years after the Supreme Court had specifically outlawed the practice, respondents used a deceptive "mock-up" in advertising their product, a household staple. In dealing with such a case, it is important that the Commission's response be swift and sure. I fear that, in both these respects, the disposition of this matter will be found wanting.

Separate Statement

MAY 25, 1970

By Jones, *Commissioner:*

John Gardner, speaking of the problems raised by dissenters, said recently that "The solution lies in giving them outlets *within the system*, that is, in providing them constructive paths of action."

Granting members of the public affected by and concerned with Federal Trade Commission actions the *right* of intervention in Federal Trade Commission proceedings would provide one legitimate and traditional channel for members of the public to make proposals, present data or express their viewpoints and ideas to the Commission about Commission actions.

The instant petition for intervention by SOUP raises important issues going to the effectiveness of Commission action. These issues affect the basic viability of the Commission and its potential for effective action. It presents a graphic illustration of the responsibility and high quality of the substantive contribution which members of the public are in a position to make to the work of federal agencies.

The issues posed by the SOUP petition do not involve questions respecting the scope of Commission's remedial powers. They go directly to a key issue respecting the order proposed to be entered here, namely, its adequacy to protect the public. Petitioners argued that the Commission's proposed order was inadequate. They went further and made a concrete proposal respecting a remedial provision which they urged would go a long way to rectify the order's inadequacy.

I cannot agree with the majority's interpretation of petitioners'

proposal as calling for "a public apology" from the respondent. It is designed for much more serious purposes: to seek to dissipate the effects of the alleged deception involved here. This concept of relief is a traditional one and integral to all antitrust decrees. It surely deserves more thoughtful consideration than labeling it a call for public apology.

Nor can I agree that the adequacy of relief should only be of concern to the Commission when the deception involves the health or safety of members of the public. Congress did not make such a distinction in formulating our statutory mandate and we should not undertake to do so at this late date.

I believe the constructiveness of the proposal and its direct relevance to the substantive performance by the Commission of its statutory duty compels the Commission to hold a hearing on the issue of the order's adequacy, and to grant petitioner the right to intervene and in that hearing to present their arguments and offer evidence. Therefore, I dissent from the Commission's decision which disregards the substantive proposals of the petition and determines instead to enter the order as originally proposed.

Agreement Containing Consent Order to Cease and Desist

The agreement herein, by and between Campbell Soup Company, a corporation, by its duly authorized officer, and Batten, Barton, Durstine & Osborn, Inc., a corporation, by its duly authorized officer, proposed respondents in a proceeding the Federal Trade Commission intends to initiate, and their attorneys, and counsel for the Federal Trade Commission, is entered into in accordance with the Commission's rule governing consent order procedure. In accordance therewith the parties hereby agree that:

1. Proposed respondent Campbell Soup Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 375 Memorial Avenue, in the city of Camden, State of New Jersey.

Respondent Batten, Barton, Durstine, & Osborn, Inc., 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 383 Madison Avenue, in the city of New York, State of New York.

2. Proposed respondents have been served with notice of the Commission's determination to issue its complaint charging them with

violation of Section 5 of the Federal Trade Commission Act, and with a copy of the complaint the Commission intended to issue, together with a form of order the Commission believed warranted in the circumstances.

3. Proposed respondents admit all the jurisdictional facts set forth in the copy of the draft of complaint here attached.

4. Proposed respondents waive:

(a) Any further procedural steps;

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.

5. This agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission. If this agreement is accepted by the Commission it, together with the draft of complaint contemplated thereby, will be placed on the public record for a period of thirty (30) days and information in respect thereto publicly released; and such acceptance may be withdrawn by the Commission if, within thirty (30) days after the acceptance, comments or views submitted to the Commission disclose facts or considerations which indicate that the order contained in the agreement is inappropriate, improper, or inadequate.

6. This agreement is for settlement purposes only and does not constitute an admission by proposed respondents that the law has been violated as alleged in the said copy of the draft of complaint here attached.

7. This agreement contemplates that, if it is accepted by the Commission, and if such acceptance is not subsequently withdrawn by the Commission pursuant to the provisions of Section 2 34(b) of the Commission's Rules, the Commission may, without further notice to proposed respondents, (1) issue its complaint corresponding in form and substance with the draft of complaint here attached and its decision containing the following order to cease and desist in disposition of the proceeding and (2) make information public in respect thereto. When so entered, the order to cease and desist shall have the same force and effect and shall become final and may be altered, modified or set aside in the same manner and within the same time provided by statute for other orders. The complaint may be used in construing the terms of the order.

8. Proposed respondents have read the proposed complaint and order contemplated hereby, and they understand that once the order has been issued, they will be required to file one or more compliance

reports showing that they have fully complied with the order, and that they may be liable for a civil penalty of up to $5000 for each violation of the order after it becomes final.

ORDER

I

It is ordered, That respondent Campbell Soup Company, a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of soup or any other food product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Advertising any such product by presenting evidence, including tests, experiments or demonstrations, or the results thereof, or any other evidence that appears, or purports, to be proof of any fact or product feature that is material to inducing the sale of the product, but which is not evidence which actually proves such fact or product feature.

II

It is further ordered, That respondent Campbell Soup Company, a corporation, and its officers, agents representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of soup in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Falsely representing, in any respect material to inducing the sale of any such product, its ingredients or contents.

III

It is ordered, That respondent Batten, Barton, Durstine & Osborn, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of soup, or of any other food product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Advertising any such product by presenting evidence, including tests, experiments or demonstrations, or the results thereof, or any other evidence that appears, or purports, to be proof of any

fact or product feature that is material to inducing the sale of the product, but which is not evidence which actually proves such fact or product feature, unless respondent neither knew nor had reason to know such to be the case.

IV

It is further ordered, That respondent Batten, Barton, Durstine, & Osborne, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of soup in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

Falsely representing, in any respect material to inducing the sale of any such product, its ingredients or contents, when respondent knew or had reason to know that such representation was not true.

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

It is further ordered, That the 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.

ORDER

The Commission having considered the petition of SOUP, Inc., filed March 20, 1970, in which SOUP, Inc., moves for withdrawal of provisional acceptance of the consent agreement in this matter, for a hearing on the adequacy of the provisionally accepted consent agreement, for permission to intervene in this matter, and to be furnished at Commission expense with a copy of the transcript of oral argument heard February 5, 1970:

It is ordered, That the motion of SOUP, Inc., to withdraw provisional acceptance of the proposed consent order be, and it hereby is, denied.

It is further ordered, That the attached consent agreement be, and it hereby is, finally accepted, and the order to cease and desist contained therein issue.

It is further ordered, That the respondents herein shall, within sixty (60) days after service upon them of this order, file with the

Commission a report in writing setting forth in detail the manner and form in which they have complied with this order.

It is further ordered, That the motions of SOUP, Inc., for a hearing, for further intervention in this matter, and for reconsideration of our February 24, 1970, decision be, and they hereby are, denied.

It is further ordered, That the motion of SOUP, Inc., for a copy at Commission expense of the transcript of oral argument in this matter heard February 5, 1970, be, and it hereby is, granted.

The opinion of the Commission accompanies this order.

Commissioners Elman and Jones filed separate statements.

IN THE MATTER OF

THE COLORADO SADDLERY COMPANY, ET AL.

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

Docket C-1742. Complaint, May 27, 1970—Decision, May 27, 1970

Consent order requiring a Denver, Colo., distributor of woolen saddle blankets and other western-type articles to cease misbranding and falsely advertising its wool products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act 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 Colorado Saddlery Company, a corporation, and Pershing R. Van Scoyk, individually and as officer of the aforesaid corporation, sometimes hereinafter 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 its 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 Colorado Saddlery Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado.

Respondent Pershing R. Van Scoyk is an officer of the corporate respondent. He formulates, directs and controls the acts, practices and policies of the corporate respondent, including the acts, practices and policies hereinafter set forth.

Respondents are engaged in the sale and distribution of woolen saddle blankets and other western articles with their office and principal place of business located at 1631 15th Street, Denver, Colorado.

PAR. 2. Respondents now and for some time last past have introduced into commerce, sold, transported, distributed, delivered for shipment, shipped and offered for sale, 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 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 wool products which were stamped, tagged, labeled, or otherwise identified by respondents as 100 percent wool, 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 certain wool products, namely woolen saddle blankets, 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 the said 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. The acts and practices of the 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, within the intent and meaning of the Federal Trade Commission Act.

PAR. 6. Respondents are now and for some time last past have been engaged in the advertising, offering for sale, sale and distribution of certain products, namely saddle blankets. In the course and

conduct of their business the aforesaid respondents now cause and for some time last past have caused, their said products, when sold, to be shipped from their place of business in Denver, Colorado to purchasers located in various other States of the United States, and maintain and at all times mentioned herein have maintained a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Respondents in the course and conduct of their business have advertised their products, namely saddle blankets, by means of catalogues, which catalogues were distributed, in commerce, through the various States of the United States.

In the aforesaid catalogues, respondents have represented their blankets to be 100 percent wool and have designated their blankets as "Commanche," "Indian" and "Sun Dance," among other names, and thereby have represented that these blankets had been produced by Indian weavers. In truth and in fact, the said blankets were not 100 percent wool and had not been woven by Indian weavers and the said advertisements were false and deceptive.

PAR. 8. The acts and practices set out in Paragraph Seven have the tendency and capacity to mislead and deceive the purchasers of said products as to the true content and origin thereof.

PAR. 9. The foresaid acts and practices of respondents, as herein alleged were, and are, all to the prejudice and injury of the public, and constituted, and now constitute, unfair and deceptive acts and practices in commerce, within the intent and meaning 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 the draft of complaint which the Bureau of Textiles and Furs 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 Textile Fiber Products Identification Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, and 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 admis-

sion 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Colorado Saddlery Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado.

Respondent Pershing R. Van Scoyk is an officer of said corporate respondent. He formulates, directs and controls the acts, practices and policies of said corporate respondent.

Respondents have their office and principal place of business located at 1631 15th Street, Denver, Colorado.

Respondents are engaged in the sale and distribution of woolen saddle blankets and other western articles.

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 The Colorado Saddlery Company, a corporation, and its officers, and Pershing R. Van Scoyk, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the 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 as to the character or amount of the constituent fibers contained therein.

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.

It is further ordered, That respondents The Colorado Saddlery Company, a corporation, and its officers, and Pershing R. Van Scoyk, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of saddle blankets or other products in commerce, as "commence" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) Misrepresenting the character or amount of the constituent fibers contained in such products.

(b) Misrepresenting that their products are woven or manufactured by Indians.

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

It is further ordered, That 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

LOU RUGGIERO CORP., ET AL.

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

Docket C-1743. Complaint, May 27, 1970—Decision, May 27, 1970

Consent order requiring two New York City manufacturing and wholesale furriers to cease falsely invoicing and deceptively guaranteeing its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority

vested in it by said Acts, the Federal Trade Commission, having reason to believe that Lou Ruggiero Corp., a corporation, and Ultima Fur Corp., a corporation, and Milton Costopoulos and Louis Ruggiero, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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. Respondents Lou Ruggiero Corp. and Ultima Fur Corp. are interrelated corporations organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondents Milton Costopoulos and Louis Ruggiero are officers of the corporate respondents. They formulate, direct and control the acts, practices and policies of the said corporate respondents including those hereinafter set forth.

Respondents are manufacturers and wholesalers of fur products with their office and principal place of business located at 345 Seventh Avenue, New York, New York.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored when such was the fact.

PAR. 4. Certain of said fur products were falsely and deceptively invoiced in that said fur products were invoiced to show that the fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed or otherwise artificially colored, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 5. Respondents furnished false guaranties under Section 10(b) of the Fur Products Labeling Act with respect to certain of their fur products by falsely representing in writing that respondents had a continuing guaranty on file with the Federal Trade Commission when respondents in furnishing such guaranties had reason to believe that the fur products so falsely guarantied would be introduced, sold, transported and distributed in commerce, in violation of Rule 48(c) of said Rules and Regulations under the Fur Products Labeling Act and Section 10(b) of said Act.

PAR. 6. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and 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 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 Textiles and Furs 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 Fur Products Labeling 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 has 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 records for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondents Lou Ruggiero Corp. and Ultima Fur Corp. are interrelated corporations 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 345 Seventh Avenue, New York, New York.

Respondents Milton Costopoulos and Louis Ruggiero are officers of said corporations. They formulate, direct and control the policies, acts and practices of said corporation and their address is the same as that of said corporations.

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 Lou Ruggiero Corp., a corporation, and its officers, and Ultima Fur Corp., a corporation, and its officers, and Milton Costopoulos and Louis Ruggiero, individually and as officers of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction, into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution, of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from falsely or deceptively invoicing any fur product by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Representing, directly or by implication, on an invoice that the fur contained in such fur product is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

It is further ordered, That respondents Lou Ruggiero Corp. a corporation, and its officers, and Ultima Fur Corp., a corporation, and its officers, and Milton Costopoulos and Louis Ruggiero, individually and as officers of said corporation, and respondents' rep-

resentatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any fur product is not misbranded, falsely invoiced or falsely advertised when the respondents have reason to believe that such fur product may be introduced, sold, transported, or distributed in commerce.

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

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

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

EVERSHARP, INC.

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

Docket C-1744. Complaint, May 27, 1970—Decision, May 27, 1970

Consent order requiring a major manufacturer of razor blades with headquarters in Culver City, Calif., to cease misrepresenting the shaving performance of its Schick Krona Chrome razor blades and disparaging the razor blades of any competitor.

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 Eversharp, Inc., 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 Eversharp, 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 5933 West Slauson Avenue, in the city of Culver City, State of California.

PAR. 2. Respondent now, and for some time past, has been engaged in the manufacture, sale and distribution of a razor blade described as Schick Krona Chrome, which when sold is shipped to purchasers located in various States of the United States. Thus respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said razor blades in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondent at all times mentioned herein has been and now is in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of razor blades.

PAR. 4. In the course and conduct of its business, and for the purpose of inducing the sale of its said product, respondent employs advertising in national and regional magazines and other publications and on network and local television and through various other outlets including point of sale displays. A major advertising theme employed by respondent consists of a comparison of blade corrosion occuring after five shaves between a Schick Krona blade and a Schick stainless steel blade.

PAR. 5. Typical and illustrative of the advertising referred to in Paragraph Four, but not all inclusive thereof, is the following television commercial. The visual portion of the commercial depicts a photograph of a corroded section of a Schick Super Stainless Steel blade edge and a photograph of a section of a Schick Krona Chrome blade edge, each blade having been subjected to five shaves and each blade section shown having been greatly magnified before photographing. The photographs are placed side by side. The audio portion of the commercial calls on the viewer to compare the two blades and decide which blade he would prefer to shave with, and in addition states that the Schick Krona Chrome blade has an edge so durable it outshaves and outlasts any super stainless blade.

PAR. 6. Through the use of the aforesaid advertising and the statements and representations made in connection therewith, respondent represents, directly or by implication that:

(1) the stainless steel blade depicted corroded to such an extent during five (5) shaving uses as to materially affect its shaving performance, and

(2) Schick Krona Chrome blades do not corrode during the first five (5) shaving uses and that therefore, their shaving performance during such uses its materially superior to that of stainless steel blades.

PAR. 7. In truth and in fact:

(1) The corrosion that occured during five (5) shaving uses of the stainless steel blade depicted did not materially affect its shaving performance.

(2) During the first five (5) shaving uses the shaving performance of Schick Krona Chrome blades is not materially superior to that of stainless steel blades.

Therefore, the representation set forth in Paragraph Six hereof were and are false, misleading and deceptive.

PAR. 8. The use by respondent of the aforesaid advertising and the statements and representations made in connection therewith has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said advertising and the representations made in connection therewith were and are true, and into the purchase of a substantial quantity of respondent's razor blades because of such erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondent, as herein alleged, were, and are, all to the prejudice and injury of the public, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in 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 respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission thereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Eversharp, 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 5933 West Slauson Avenue, Culver City, California.

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

ORDER

It is ordered, That respondent Eversharp, Inc., a corporation, its officers, representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution of Schick Krona Chrome razor blades or any other razor blade in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting the shaving performance of any such product.

2. Disparaging by untruthful statements or any misleading or deceptive method, razor blades competitive with those of respondent Eversharp, Inc.

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

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

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

It is further ordered, That respondent shall file a report of compliance with the Commission within sixty (60) days from the date this order becomes final.

IN THE MATTER OF

JACK ESTREICH FURS, INC., ET AL.

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

Docket C-1745. Complaint, May 27, 1970—Decision, May 27, 1970

Consent order requiring a New York City manufacturing and retailing furrier to cease falsely invoicing, deceptively guaranteeing, and misbranding its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Jack Estreich Furs, Inc., a corporation, and Jack Estreich, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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 Jack Estreich Furs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York.

Respondent Jack Estreich is an officer of the said corporation. He formulates, directs and controls the policies, acts and practices of the said corporation.

Respondents are manufacturers and retailers of fur products with their office and principal place of business located at 130 West 30th Street, New York, New York.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising,

and offering for sale in commerce and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show the fur contained therein was "natural" when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the Rules and Regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the Rules and Regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed:

1. To show the true animal name of the animal or animals which produced the fur used in such fur products.

2. To disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

3. To show the country of origin of imported furs contained in fur products.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced with respect to the name or designation of the animal or animals that produced the fur from which the said fur products had been manufactured, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products which were invoiced as "Broadtail" thereby implying that the furs contained therein were

entitled to the designation "Broadtail Lamb," when in truth and in fact the furs contained therein were not entitled to such designation.

PAR. 7. Respondents furnished false guaranties that certain of their fur products were not misbranded, falsely invoiced or falsely advertised when respondents in furnishing such guaranties had reason to believe that fur products so falsely guarantied would be introduced, sold, transported or distributed in commerce, in violation of Section 10(b) of the Fur Products Labeling Act.

PAR. 8. The aforesaid acts and practices of respondents, as herein alleged, are in violation of the Fur Products Labeling Act and the Rules and Regulations promulgated thereunder and 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 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 Textiles and Furs 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 Fur Products Labeling 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 has 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Jack Estreich Furs, 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 130 West 30th Street, New York, New York.

Respondent Jack Estreich is an officer of the 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 Comission 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 Jack Estreich Furs, Inc., a corporation, and its officers, and Jack Estreich, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the introduction, or manufacture for introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding any fur product by:

1. Represcenting, directly or by implication on a label that the fur contained in such fur product is "natural" when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

2. Failing to affix a label to such fur product showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

B. Falsely or deceptively invoicing any fur product by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Setting forth on an invoice pertaining to such fur

product any false or deceptive information with respect to the name or designation of the animal or animals that produced the fur contained in such fur product.

It is further ordered, That respondents Jack Estreich Furs, Inc., a corporation and its officers, and Jack Estreich, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from furnishing a false guaranty that any fur product is not misbranded, falsely invoiced or falsely advertised when the respondents have reason to believe that such fur product may be introduced, sold, transported, or distributed in commerce.

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

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

CAROLINA HOSIERY MILLS, INC., ET AL.

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

Docket C-1746. Complaint, May 28, 1970—Decision, May 28, 1970

Consent order requiring a Burlington, N.C., manufacturer and distributor of hosiery to cease deceptively pricing its products through preticketing, fictitious markups or in any other manner, and furnishing others with means of deception.

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 Carolina Hosiery

Mills, Inc., a corporation, and Ernest A. Koury and Maurice Koury, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Carolina Hosiery Mills, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of North Carolina, with its principal office and place of business located in the city of Burlington, State of North Carolina.

Respondents Ernest A. Koury and Maurice Koury 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.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the business of purchasing hosiery, manufacturing and purchasing from other manufacturers hosiery greige goods, finishing hosiery, selling and distributing said hosiery to mill agents, wholesalers, distributors, jobbers, dealers, and retailers for resale to the public.

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

PAR. 4. Respondents, for the purpose of inducing the purchase of hosiery which is labeled and/or packaged by them have engaged in the practice of using fictitious prices by attaching to said hosiery, stickers, labels, tickets and tags upon which certain amounts are printed, thereby representing, directly or by implication, that said amounts are the usual and regular retail prices of said hosiery.

In truth and in fact, said amounts are not the usual and regular retail prices of said hosiery, but are in excess of prices at which said hosiery generally sells at retail in some of the trade areas where the representations are made.

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

PAR. 5. By and through the use of the aforesaid acts and practices respondents place in the hands of jobbers, retailers, dealers and others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 6. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the manufacture, sale and distribution of hosiery.

PAR. 7. The use by respondents of the aforesaid false, misleading, and deceptive representations and practices has had, and now has, the capacity and tendency to mislead purchasers 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. 8. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in 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 Bureau of Deceptive Practices 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Carolina Hosiery Mills, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of North Carolina, with its office and principal place of business located at Burlington, North Carolina.

Respondents Ernest A. Koury and Maurice Koury 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 the respondents, Carolina Hosiery Mills, Inc., a corporation, and its officers, and Ernest A. Koury and Maurice Koury, individually and as officers of said corporation and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of hosiery, or any other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(a) Representing, by preticketing or in any other manner, that any amount is the usual and regular retail price of merchandise when such amount is in excess of the price at which said merchandise is usually and regularly sold at retail in the trade area or areas where the representations are made.

(b) Placing in the hands of jobbers, retailers, dealers, and others, means and instrumentalities by and through which they may deceive and mislead the purchasing public concerning any merchandise in the respects set out above.

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

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the

emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

It is 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

CITY SEWING MACHINE COMPANY, INC., ET AL.

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

Docket C-1747. Complaint, June 1, 1970—Decision, June 1, 1970

Consent order requiring a Marysville, Kansas, retailer of sewing machines to cease using deceptive prices, failing to maintain adequate records to support its pricing practices, using contests and other promotional devices deceptively to obtain leads, misusing the term "automatic" to describe its sewing machine, falsely guaranteeing its products, and misrepresenting that it has posted bond in support of its guarantees.

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 City Sewing Machine Company, Inc., a corporation, and Lee R. Dam, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent City Sewing Machine Company, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its principal office and place of business located at 818 Broadway, in the city of Marysville, State of Kansas.

Respondent Lee R. Dam is an individual and an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and prac-