

IN THE MATTER OF
CHRYSLER CORPORATION, ET AL.

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

Docket 9072. Complaint, Feb. 10, 1976—Decision, Jan. 9, 1981

This consent order requires, among other things, Aurora Chrysler-Plymouth, Inc., a Seattle, Wash. automobile dealership, to adopt and adhere to the "Reposessed Vehicle Surplus/Deficiency system" established by Chrysler Corporation pursuant to the disposition of Docket 9072 as to Chrysler Corporation. The firm is further required to establish to the reasonable satisfaction of the Commission that it has paid all surpluses realized from February 10, 1973 from reposessed vehicles returned to the company; corrected all prior erroneous credit reports; and provided credit reporting agencies with corrected information.

Appearances

For the Commission: *Dean Fournier, Bruce D. Carter, Sharon S. Armstrong, David Bricklin and Stevan Phillips.*

For the respondent: *Louis D. Peterson, Hillis, Phillips, Cairncross & Martin, Seattle, Wash.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Chrysler Motors Corporation, Chrysler Credit Corporation, and Aurora Chrysler-Plymouth, Inc., corporations, have violated the provisions of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint.

PARAGRAPH 1. *Respondents.* Respondent Chrysler Motors Corporation ("Chrysler Motors") is a Delaware corporation with its office and principal place of business at 12000 Oakland Ave., Highland Park, Michigan. It is a wholly-owned subsidiary of Chrysler Corporation.

Respondent Chrysler Credit Corporation ("Chrysler Credit") is a Delaware corporation with its office and principal place of business at 16250 Northland Drive, Southfield, Michigan. It is a wholly-owned subsidiary of Chrysler Financial Corporation, which is wholly-owned by Chrysler Corporation.

Respondent Aurora Chrysler-Plymouth, Inc. ("Aurora") is a Delaware corporation with its office and principal place of business

at 13733 Aurora Ave. North, Seattle, Washington. It is a wholly-owned subsidiary of Chrysler Motors Corporation.

Allegations stated below in the present tense include the past tense.

PAR. 2. *Respondents' Business.* Chrysler Motors manufactures, distributes and sells motor vehicles, including automobiles and trucks. It also owns all or part of the voting stock of various retail dealers of its vehicles, whose business operations and policies it controls. It is responsible for the acts and practices of Aurora and its other wholly- or partially-owned dealers.

Wholly- or partially-owned as well as independent retail Chrysler dealers are referred to below as "Chrysler dealers."

Chrysler Credit is a finance company which provides retail financing to customers of Chrysler dealers for their retail installment contract purchases of new and used motor vehicles. It also provides wholesale financing for inventories held by Chrysler dealers.

Aurora is a wholly-owned Chrysler dealer selling new and used motor vehicles.

PAR. 3. *Commerce.* Each of respondents participates in some or all phases of the sale, distribution and repossession of motor vehicles, and in the transmission across state lines of contracts, monies, and other business papers related to the extension and enforcement of credit obligations. Respondents each maintain a substantial course of trade in motor vehicles and motor vehicle credit in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. *Retail Installment Contract Sales.* Aurora and most other Chrysler dealers arrange financing through Chrysler Credit or other lenders for retail sales of motor vehicles to their customers. Most of the sales to be financed by Chrysler Credit are executed on a printed "retail installment contract" form provided by Chrysler Credit, naming the customer as buyer and the dealer as seller. This "retail installment contract" form indicates that the contract is to be assigned to Chrysler Credit for value, that the buyer is to be indebted to the dealer or its assignee, and that the dealer or its assignee is to be a secured party holding security interest in the vehicle sold. In the event the buyer defaults, Chrysler Credit and Aurora and other retail Chrysler dealers have also undertaken the obligation, by express or implied representations in their retail installment contracts, to account to the defaulting buyer for any surplus arising from the resale of repossessed collateral. This obligation is reaffirmed after default in notices sent to defaulting buyers by Chrysler

Credit. These representations have the tendency and capacity to lead buyers to a reasonable expectation that Chrysler Credit will refund any surplus.

PAR. 5. *Statutory Duty to Account for Surplus.* The respective rights and duties of the defaulting buyer and secured party after repossession are defined by state commercial law, derived by almost every state from Article Nine of the Uniform Commercial Code, and the retail installment contract. State law requires the secured party, after repossessing and/or disposing of the collateral, to account to the defaulting buyer for any surplus of proceeds from the sale or disposition in excess of the amount needed to satisfy all secured indebtedness, reasonable expenses of retaking, holding, preparing for sale, selling, and the like, and allowable legal costs and fees.

PAR. 6. *Post-Default Procedures Determined by Master Agreement.* In instances where Chrysler Credit as secured party declares a default, it usually repossesses or causes repossession of the vehicle. The procedures followed by Chrysler Credit and the dealer after repossession are determined by a master vehicle financing agreement between Chrysler Credit and the dealer, as well as by the terms of the assignment of each retail installment contract to Chrysler Credit. A substantial majority of the agreements executed between Chrysler Credit and Chrysler dealers in the United States are repurchase or similar agreements (hereinafter "repurchase" agreements).

PAR. 7. *Repurchase Transfer and Payoff.* Pursuant to the agreements described in Paragraph Six, Chrysler Credit in most instances returns the repossessed vehicle to the repurchase dealer and receives from the dealer a payoff, consisting of the unpaid balance of the retail installment contract adjusted by applicable charges and credits. The dealer then resells the vehicle to a third party.

PAR. 8. *Joint Liability.* Under applicable state law, a dealer who receives a transfer of collateral from a secured party pursuant to a repurchase agreement has a duty to properly dispose of the collateral and to account to the defaulting buyer for any surplus. Chrysler Credit also is obligated to ensure that a proper disposition of the collateral is made and that a proper accounting for any surplus is given to the defaulting buyer. Chrysler Credit shares this obligation jointly with the dealer because (1) it continues to be the secured party and continues to be a fiduciary with respect to the defaulting buyer's equity interest; (2) Chrysler Credit, as assignor of the contractual duties of a secured party, continues to be liable for performance of those duties; (3) Chrysler Credit has dictated, controlled and acted jointly with the repurchase dealer in executing

relevant aspects of the credit transaction; and (4) Chrysler Credit has made representations to buyers, as set forth in Paragraph Four, that these duties would be properly performed.

PAR. 9. *Failure to Account for Surpluses.* In a substantial number of instances Chrysler Credit, Aurora, and other Chrysler repurchase dealers, have (1) failed to institute or follow correct procedures for determining the existence or amounts of surpluses realized from the sale of repossessed vehicles, (2) failed to disclose the existence of these surpluses to defaulting buyers, and (3) wrongfully retained such surpluses in violation of the defaulting buyers' statutory and contractual rights. The failure to identify and disclose surpluses has concealed their existence from these consumers and consequently few have asserted their rights under applicable state law. The failure to remit surpluses has deprived numerous consumers of substantial amounts of money rightfully theirs and has unjustly enriched Chrysler Credit and its repurchase dealers. These practices are therefore unfair and deceptive.

PAR. 10. *Misrepresentation of Right to Deficiency.* Chrysler Credit provides to dealers and Chrysler dealers make use of retail installment contracts which represent that the seller or its assigns shall seek any deficiency due on a retail installment contract. In many instances state law limits or denies this right. These representations have the tendency and capacity to induce defaulting buyers to pay sums to which the dealer, Chrysler Credit, or its assigns is not entitled or otherwise to change their position to their detriment. Therefore, use of these misleading contracts is unfair and deceptive.

PAR. 11. *Failure to Disclose Material Facts Concerning Redemption.* Chrysler Credit and its repurchase dealers fail, in some instances, to inform defaulting buyers of facts necessary to their exercise of the right of redemption granted by state law, including but not limited to (1) the nature and duration of the right to redeem, and (2) the amount required to redeem. This failure to disclose material facts has the tendency and capacity to hinder defaulting buyers in exercising the right to redeem and is therefore an unfair and deceptive act or practice.

PAR. 12. *Owned Chrysler Dealers Using Non-Chrysler Credit Financing.* Aurora and a number of other wholly- or partially-owned Chrysler dealers engage in the acts and practices ascribed to dealers in Paragraphs Nine, Ten and Eleven, in instances where retail installment financing for their customers is obtained from finance institutions other than Chrysler Credit. These acts and practices, for the reasons stated above, are unfair and deceptive.

PAR. 13. *Conclusion.* The acts and practices of respondents set

forth in Paragraphs Nine, Ten, Eleven and Twelve are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER AS TO AURORA CHRYSLER-PLYMOUTH, INC.

The Commission having heretofore issued its complaint charging Aurora Chrysler-Plymouth, Inc. and others with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint together with a proposed form of order; and

Respondent Aurora Chrysler-Plymouth, Inc., its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by said respondent of the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in the complaint, and waivers and other provisions in accordance with the Commission's Rules; and

The Secretary of the Commission having thereafter, in accordance with Section 3.25(c) of its Rules, withdrawn this matter from adjudication as to Aurora Chrysler-Plymouth, Inc.; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days; now, in further conformity with the procedure prescribed in Section 3.25(5) of its Rules, the Commission makes the following jurisdictional findings and enters the following order:

1. Respondent Aurora Chrysler-Plymouth, Inc. is a Delaware corporation with its principal place of business at 13733 Aurora Ave. North, Seattle, Washington.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding as to Aurora Chrysler-Plymouth, Inc., and of said respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered. That respondent Aurora Chrysler-Plymouth, Inc., a corporation, and its successors, assigns, officers, agents, representatives and employees, and any corporation, subsidiary, division or

device through which they act directly or indirectly, shall forthwith (A) adopt and adhere to the "Repossessed Vehicle Surplus/Deficiency" system established by Chrysler Corporation pursuant to the disposition of Docket 9072 as to Chrysler Corporation, and (B) deliver a copy of the Repossessed Vehicle Surplus/Deficiency system to all appropriate supervisory personnel.

II.

It is further ordered, That respondent shall, no later than 60 days after service of this Order:

A. Establish to the reasonable satisfaction of the Commission that (1) all surpluses generated from repossessed vehicles returned to respondent between February 10, 1973 and the date of service of this Order have been paid, and (2) for each such surplus, corrected information has been provided to any credit reporting agency to which respondent had previously reported the existence of a deficiency.

B. File with the Commission a written report setting forth in detail the manner and form in which respondent has complied with this Order.

III.

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

IN THE MATTER OF
INTERNATIONAL TELEPHONE & TELEGRAPH
CORPORATION, ET AL.

Docket 9000. Interlocutory Order, Jan. 21, 1981

Granting complaint counsel leave to withdraw and dismissing "Motion for Disciplinary Action."

ORDER

On October 15, 1980, complaint counsel in this matter filed a "Motion For Disciplinary Action," asking that the Commission take "appropriate steps" against respondent's counsel for allegedly improper conduct. They asked the Commission to direct Administrative Law Judge Miles J. Brown to make certain findings under Rule of Practice 4.1(e) in a show cause hearing, and they asked the Commission to defer any disciplinary action until it had the results of the ALJ's investigation. The ALJ earlier denied complaint counsel's motion that he conduct such a hearing.

Very briefly, the subject of the requested investigation and the alleged cause for disciplinary action is a sequence of events over the course of discovery in this matter from 1976 to 1980. Those events, described in some detail in the pleadings, generated questions by complaint counsel about a) the thoroughness of respondent's search for and production of documents responsive to a 1976 subpoena and b) the duty of respondent and its counsel to supplement that subpoena response with additional material that was either newly discovered or, as suggested, intentionally withheld.

On December 1, 1980, respondent's counsel filed their "Opposition," accompanied by an affidavit. They denied that there was any improper conduct or any basis for disciplinary action, and they explained the questioned circumstances in detail. They also indicated that they had been engaged in extensive discussions with Bureau of Competition attorneys since the October 15 motion was filed and that the information they had provided would lead complaint counsel to withdraw their motion for disciplinary action. Still, respondent's counsel alleged that charges contained in the motion were made without adequate investigation, that they were incorrect, and that they had received damaging publicity. Therefore, respondent's counsel request that the Commission issue a press release stating its reasons for dismissing complaint counsel's motion.

As respondent's counsel indicated, on December 1, 1980, complaint counsel filed a "Reply" to the "Opposition" in which they withdrew

their request for a hearing and their request for disciplinary action. In so doing, however, complaint counsel recommended that the Commission consider and adopt policy positions or rules regarding certain enumerated discovery issues. Furthermore, complaint counsel state that the matter before us is not mooted by their withdrawal, since there are still unfulfilled discovery duties incumbent upon respondent and its counsel.

A brief, general outline of the salient facts described in the pleadings is necessary. In 1974, the respondent produced certain documents in private litigation, some of which later appeared to relate to the same subject matter as an FTC subpoena. In 1976, respondent produced further documents in response to an FTC subpoena, *not* including at least one relevant document believed to have surfaced in the 1974 private litigation. Thus, this controversy concerned pre-existing documents responsive to the 1976 subpoena, not discovered in 1976 and only later discovered (in subsequent phases of the private discovery) and thereupon produced to the Commission. There is no question that respondent's counsel did come forward with the lately discovered information, although there were questions about the timing of that production, which have been resolved. Furthermore, a subsequent Commission subpoena in 1979 yielded other documents said to be responsive to the 1976 subpoena which existed in 1976 but were not previously discovered or produced.

While questions of ethical conduct arising from this sequence of events are no longer before us, complaint counsel separately assert that respondent had a continuing obligation after 1976 to go back to various document sources, including the document production in the private litigation, in order to search for and produce documents responsive to the 1976 subpoena. In fact, complaint counsel claim that respondent's counsel have still not searched the contents of twelve boxes of Continental Baking Company documents which are duplicates of those produced in the private litigation and likely to contain responsive documents. We note that, despite claims of prejudice to complaint counsel's case, the ALJ has reopened the record to allow introduction of the lately discovered and produced documents. Therefore, with complaint counsel's withdrawal of the request for Commission disciplinary action, complaint counsel's residual concern focuses on the lack of an analog to Federal Rules of Civil Procedure 26(e) in the Commission's Rules of Practice and the ambiguity of responsibility thus created.

Rule 26(e), FRCP, imposes upon parties and their lawyers a duty to amend a prior discovery response if they obtain new information

that indicates 1) that the response was incorrect when made or 2) that the response was correct when made but is no longer true *and* that failing to amend the response would be a knowing concealment. Complaint counsel contend that the duty to supplement prior responses to Commission discovery orders includes 1) the obligation to submit documents that were responsive to a prior discovery order and in the custody, control or knowledge of the party at the time production was made but that were not furnished at that time, as well as 2) the obligation to produce, under certain circumstances, newly acquired information or documents. They say that the lack of a Rule 26(e) analog in the Commission's Rules of Practice makes this duty ambiguous. Consequently, complaint counsel, in withdrawing their motion, recommend that the Commission "consider" certain enumerated issues arising from this ambiguity. Furthermore, they recommend that the Commission adopt certain policies regarding the duty to supplement prior discovery responses, by which we assume that complaint counsel recommend promulgation of corresponding changes in our Rules of Practice.

Our response must necessarily be limited, for contrary to complaint counsel's suggestion, we regard the instant controversy as moot with the withdrawal of the motion for disciplinary action, which we allow. As for complaint counsel's request that respondent's counsel search through the twelve boxes of documents assembled for the private litigation to find pre-existing documents responsive to the 1976 subpoena, we believe that this matter should be left to the administrative law judge. In fact, the matters suggested by complaint counsel as the subjects of specific rules changes, such as entitlement to a subsequent discovery order when there is reason to believe that documents responsive to a prior order have not been produced, are matters presently reposed in the authority and discretion of the administrative law judges. See Rules of Practice Section 3.38.

As for the recommendation that the Commission "consider" certain discovery-related issues, because of the mootness of the specific request before us, we decline the opportunity to discuss generally any reasons for or effects of the absence of an express analog to FRCP 26(e) in our Rules of Practice. Therefore,

It is hereby ordered, That we grant complaint counsel leave to withdraw, and we hereby dismiss the October 15, 1980, "Motion For Disciplinary Action." Accordingly, the requests for Commission action and the specific questions of ethical conduct raised therein are rendered moot. We think that the press release requested by respondent's counsel is unnecessary.

Interlocutory Order

97 F.T.C.

IN THE MATTER OF

E.I. DUPONT de NEMOURS & CO.

Docket 9108. Interlocutory Order, Jan. 21, 1981

ORDER EXTENDING IN CAMERA TREATMENT

On January 16, 1980, E.I. DuPont de Nemours and Company ("DuPont") requested a three year extension of *in camera* treatment for certain documents in the record of this proceeding. By order of October 20, 1980, the Commission ordered that *in camera* protection of all documents so designated should continue until certain questions on which the Commission requested additional information are resolved. Respondent has submitted its response to that order and the Commission is now prepared to rule on the requested extension.

The Commission's standards for *in camera* protection of exhibits in adjudicative proceedings are clearly expressed in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961); *Bristol-Myers Company*, 90 F.T.C. 455 (1977); and *General Foods Corporation*, Docket No. 9085, Order of March 10, 1980. Despite respondent's arguments to the contrary, the provisions of the F.T.C. Improvements Act of 1980 (Pub Law 96-252) governing treatment of confidential information do not alter the long-established fact that Section 6(f) of the Federal Trade Commission Act does not absolutely bar disclosure of business data as evidence in our adjudicatory proceedings.¹

The standard for *in camera* treatment is one of "clearly defined, serious injury." *H.P. Hood & Sons, Inc.*, 58 F.T.C. at 1188. We pointed out in *Bristol-Myers Co.*, 90 F.T.C. at 457 and in our March 10 Order in *General Foods* that the secrecy and materiality of the business information sought to be protected comprise the two elements of the serious injury analysis. As aids in the determination of secrecy and materiality, the Commission in *Bristol-Myers* cited six factors mentioned in the Restatement of Torts. 90 F.T.C. at 457. Furthermore, we have acknowledged that the showing of serious injury does not necessarily require a specific demonstration of the manner in which other firms would use material to the disadvantage of the firm

¹ New Section 21(d)(2) of the FTC Act provides that

[a]ny disclosure of relevant and material information in adjudicative proceedings to which the Commission is a party shall be governed by the rules of the Commission for adjudicative proceedings . . . except that the rules of the Commission shall not be amended in a manner inconsistent with the purposes of this section.

Discussing what ultimately was enacted as Section 21(d)(2), the Senate Report on S.1991 stated specifically that the Commission should maintain the procedures in Rules 1.18(b) and 3.45 for granting *in camera* treatment. Senate Report No. 96-500 at pp. 27-28 (1979).

whose information is at issue. Rather, we have said that it is proper to infer, without a specific showing of how a competitor would use it, that disclosure of allegedly sensitive information would seriously affect the firm's commercial position.² Underlying this analysis is a general concern for the seriousness of injury to a firm's commercial or competitive position. Of course, the injury contemplated in *Hood* and its successors is not limited to "commercial" injury in any strict or exclusive sense, nor is such injury confined to the precise type under consideration in *Hood*, but our precedents appear to distinguish it from the kind of injury arising from potential tax liability envisioned by respondent.

In essence, respondent argues that certain earnings data should be given extended *in camera* treatment because of the possibility that disclosure would result in increased tax liability for the firm. In *Hood*, the Commission weighed the possibility that disclosed data might give rise to and be used in private treble-damage actions, and it concluded that such an eventuality was not the kind of injury that should govern its determination of whether to disclose the information. As such, it appears that respondent's potential tax liability is more like the potential private damage liability in *Hood* and less like the type of direct business injury contemplated by our *in camera* standards. Nevertheless, it is unnecessary for us to make a definitive determination on this point inasmuch as respondent advances an independent, and we think valid, ground for continued *in camera* treatment of the same information to which its tax argument applies.

The exhibits in question contain valuable, secret and material investment, earnings, profit, operative return and cost information about respondent's titanium dioxide and pigments business, the release of which might enable DuPont's competitors to construct an accurate financial model of DuPont's business, to its detriment. While it appeared to the Commission that certain information in question had been previously disclosed in public exhibits, respondent points out that the *in camera* data in question are *actual* while the previously disclosed data were only projections and forecasts. DuPont asserts, and we are persuaded, that the actual data were expensive to compile, are more sensitive and secret than the projections and are more likely to result in injury to respondent's business if released.

The Commission also asked DuPont for clarification of the status of certain *in camera* information that appeared to be too old to be of

² General Foods Corporation, Docket No. 9085, Order of August 1, 1980, pp. 1-2.

competitive concern. Respondent has persuaded us that, despite its age (1975), the actual data in question—trends of profits, earnings, unit costs and sales volumes of titanium dioxide—might enable competitors to extrapolate an accurate model of its current business. We also asked for further argument concerning certain comparisons of costs of production by plant. DuPont asserts that this information is more recent, more detailed and more accurate than similar information apparently disclosed in other exhibits and that this information is highly proprietary and sensitive, having been developed at substantial expense to DuPont. The Commission finds this a sufficient ground for extending *in camera* protection for the plant data. Finally, the Commission inquired about certain lists of prices for 1976, 1977 and 1978. Respondent contends that these exhibits contain indexed averages of actual discounted prices which are secret and which would assist its competitors if released. We are persuaded that this group of documents should also be given continued *in camera* treatment.

Having disposed of the specific groups of documents discussed in our October 20 Order, we now move to the whole *in camera* record of this proceeding. We have found it unnecessary to disclose any of the *in camera* information in writing our opinion in this case, which is a primary consideration in determining whether to grant *in camera* treatment to adjudicative information or to disclose it, 58 F.T.C. at 1187. Moreover, we have carefully reviewed each of the documents for which respondent seeks extended *in camera* treatment and are satisfied that all of them meet the criteria set out in the holdings cited above. Therefore,

It is ordered, That all exhibits presently in the *in camera* record of Docket No. 9108 shall remain *in camera* for three years from the date of this order, at which time respondent may show cause why those documents should not be made public.

IN THE MATTER OF
THE CENTRAL FLORIDA ELECTRICAL BID DEPOSITORY,
INC., ET AL.

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

Docket 9132. Complaint, Nov. 28, 1979—Decision, Jan. 22, 1981

This consent order requires, among other things, a Winter Park, Fla. corporation operating a non-profit electrical bid depository service, and nine individuals to cease engaging in any course of action, conspiracy or agreement which has the purpose or effect of fixing, maintaining, stabilizing, or tampering with the price of electrical contracting services, including: encouraging or requiring members or signatories to exchange relevant bid information prior to bid opening time; barring them from negotiating or submitting bids after the bid filing deadline; requiring them to function exclusively through the bid depository; and penalizing those who fail to do so. Further previously suspended recalcitrants must be reinstated, and the corporation is required to promptly amend its rules and regulations so as to conform with the terms of the order.

Appearances

For the Commission: *Truett M. Honeycutt and David R. Flowerree.*

For the respondent: *William A. Harmening, Stanley, Harmening, Lovett & Cohen, Orlando, Fla.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Central Florida Electrical Bid Depository, Inc., a corporation, and David Perry, Robert Behe, Larry Poirier, and Fred Newton, individually and as officers and directors of said corporation, and Charles Mayo, Helmuth Eidel, Donald Burchnell, Patrick Kelly, and Lynn Harden, individually and as directors of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

I. DEFINITIONS

1. For the purposes of this complaint the term "*bid filing deadline*" shall mean the time set by The Central Florida Electrical Bid Depository, Inc., for the receipt by the depository of final bids from electrical contractors to general contractors for a specific job.

2. For the purposes of this complaint the term "*bid shopping*" shall mean the practice of a general contractor seeking to obtain an offer, after the bid filing deadline but either before or after the award of the prime contract, from an electrical contractor to perform work at a price lower than that submitted by that electrical contractor or another electrical contractor bidding through The Central Florida Electrical Bid Depository, Inc.

3. For the purposes of this complaint the term "*bid peddling*" shall mean the practice of an electrical contractor offering, after the bid filing deadline but either before or after the award of the prime contract, to perform work at a price lower than that submitted by himself or another electrical contractor bidding through The Central Florida Electrical Bid Depository, Inc.

II. PARTIES

PAR. 1. Respondent The Central Florida Electrical Bid Depository, Inc., (hereinafter sometimes referred to as corporate respondent, or CFEBD) is a nonprofit corporation, organized and existing under the laws of the State of Florida, with its principal office and place of business located at 707 Nicolet Ave., Winter Park, Florida.

Respondents David Perry, Robert Behe, Larry Poirier and Fred Newton are the officers and directors of the corporate respondent, and Charles Mayo, Helmuth Eidel, Donald Burchnell, Patrick Kelly, and Lynn Harden are directors of said corporation (hereinafter sometimes referred to as individual respondents). 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. Respondent CFEBD was organized for, and serves its members and users as, an instrumentality which promotes cooperative activity among member and user contractors, collects business data from such contractors, and generally purports to assist them in the operation of their businesses. One of the functions of respondent CFEBD is the operation of a bid depository. Said respondent CFEBD's members and users represent a substantial, if not dominant, part of the construction industry contractors in the central area of the State of Florida.

For the purposes of this complaint, the members and users of the bid depository operated by respondent CFEBD consist of two groups: "participating members" (hereinafter sometimes referred to as "members") and "signatories to the depository" (hereinafter sometimes referred to as "signatories"). The members group is composed of electrical contractors who perform their electrical contracting services principally in Flagler, Volusia, Lake, Seminole, Orange, Osceola and Brevard Counties, Florida. The signatory group is composed of general contractors who wish to avail themselves of the bid depository service offered by respondent CFEBD as hereinafter described and for that purpose become signatories to such service.

III. COMMERCE

PAR. 3. Respondents maintain, and have maintained a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

IV. COUNTS

A. Price-Fixing

PAR. 4. Since at least 1976, respondent CFEBD, individual respondents, and the signatories to and members of its bid depository have agreed to engage, and have engaged, in unfair and unlawful acts, policies and practices, the purpose or effect of which is, or may be, to fix, maintain, raise, stabilize or otherwise tamper with prices and thereby unlawfully hinder, restrain or destroy competition in the providing of electrical and general contracting services related to building construction in or affecting commerce.

Pursuant to, and in furtherance of, said agreement, respondents have engaged in the following acts, policies and practices, among others:

(1) Prohibiting, in the rules and regulations of the CFEBD, any electrical contractor from engaging in bid peddling or from otherwise submitting bids to general contractors using the services of the depository unless such bids were deposited with the depository in accordance with the rule regarding the bid filing deadline.

(2) Prohibiting, in the rules and regulations of the CFEBD, any general contractor using the services of the depository from engaging in bid shopping or from otherwise submitting a bid to an awarding authority unless such bid uses the price for electrical contracting

services which was chosen from those bids filed with the depository in accordance with the rule regarding the bid filing deadline.

(3) Facilitating, as part of the aforesaid agreement, the restraint on bid shopping and bid peddling or facilitating, fixing, raising, stabilizing or otherwise tampering with prices by:

(a) Providing in the rules and regulations of CFEBD for the exchange, among member electrical contractors, prior to the bid filing deadline, of the names of those member electrical contractors who express their intent to bid on a project for which bids will be received through the bid depository.

(b) Encouraging in the rules and regulations of CFEBD that electrical contractors who are members of the depository register with the depository any jobs which are the subject of negotiation between such electrical contractors and general contractors and providing that all parties so registering shall be provided with the names of those previously or subsequently registering for a specific job.

(c) Providing in the rules and regulations of the CFEBD that any job which has been registered by two or more electrical contractors is automatically required to be bid through the bid depository.

B. Group Boycott

PAR. 5. Since at least 1976, respondent CFEBD, individual respondents, and the signatories to and members of its bid depository have agreed to engage, and have engaged, in unfair and unlawful acts, policies and practices, the purpose or effect of which is, or may be, to create and perpetuate a group boycott or concerted refusal to deal which unlawfully hinders, restrains, or destroys competition among companies providing electrical and general contracting services related to building construction in or affecting commerce.

Pursuant to and in furtherance of said agreement, respondents have engaged in the following acts, policies and practices, among others:

(1) Providing a bid service or depository in which participating members and signatories of said respondent corporation agree, with respect to any specific job for which they use the depository, to function exclusively through the aforesaid bid depository.

In particular, on any specific job which an electrical contractor participates in the respondents' bid depository program, the electrical contractor may not accept a contract for that particular job from

any general contractor who did not participate in the bid depository on that same job.

(2) Facilitating, as part of the aforesaid agreement, a group boycott or concerted refusal to deal by:

(a) Threatening directly or indirectly suspension from participation in the bid depository of:

(i) Any member electrical contractor for submitting bids to general contractors in violation of said bid depository rules and regulations; and,

(ii) Any signatory general contractor for awarding a contract based upon bids received in violation of bid depository rules and regulations from electrical contractors who have not submitted bids through said bid depository.

(b) Providing in the rules and regulations of CFEBD for the circulation of the name of any member or signatory suspended from use of the respondents' bid depository among the members and signatories of the CFEBD.

V. VIOLATIONS

PAR. 6. The aforesaid acts and practices of respondents have been and are now having the effect of hampering and restraining competition in providing electrical and general contracting services, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

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

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an

admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

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

1. Respondent The Central Florida Electrical Bid Depository, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its office and principal place of business located at 707 Nicolet Ave., in the City of Winter Park, State of Florida.
2. Respondents David Perry, Robert Behe, Larry Poirier, and Fred Newton are officers and directors of said corporation. Respondents Charles Mayo, Helmuth Eidel, Donald Burchnell, Patrick Kelly and Lynn Harden are directors of said corporation. Their address is the same as that of said corporation.
3. 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 Central Florida Electrical Bid Depository, Inc., a corporation, its successors and assigns, the officers and directors, David Perry, Robert Behe, Larry Poirier, and Fred Newton, individually and as officers and directors of said corporation, and Charles Mayo, Helmuth Eidel, Donald Burchnell, Patrick Kelly, and Lynn Harden, individually and as directors of said corporation, and respondents' agents, representatives and employees, directly or indirectly, or through any corporate or other device, or through any member of or signatory to its bid depository, in connection with the receipt, solicitation, use, submission or transmission of bids or estimates which are, or may be, employed in the awarding of building construction contracts and subcontracts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from

entering into, continuing, cooperating in, or carrying out, any course of action, conspiracy, undertaking or agreement:

(1) Which requires or provides that electrical contractors using the services of a depository are prohibited from (a) negotiating, after the deadline for the filing or deposit of bids with the depository, with general contractors using the services of the depository; or (b) submitting further bids to such general contractors after the deadline for the filing or deposit of bids with the depository; or (c) accepting a contract at a price other than the price submitted by such electrical contractors through the depository prior to the deadline for the filing or deposit of bids;

(2) Which requires or provides that general contractors using the services of a bid depository are prohibited from (a) negotiating, after the deadline for the filing or deposit of bids with the depository, with electrical contractors using the services of the depository; or (b) attempting to obtain or obtaining further offers to perform jobs for which bids were taken through the depository; or (c) awarding contracts to electrical contractors at prices other than those submitted through the depository prior to the deadline for the filing or deposit of bids;

(3) Which requires or encourages the exchange, prior to bid opening time, among member electrical contractors of the names, addresses or other identifying information with respect to those member electrical contractors who register or otherwise express their intent to bid on a project, or provides for the disclosure to any member or participant in the depository of the name, address, or other identifying information with respect to any subcontractor who expresses an intent to bid and requests confidentiality for such information prior to the opening of bids by those companies, firms, or individuals to whom bids are submitted;

(4) Which encourages, provides for or requires the registration of or exchange of information among member electrical contractors with respect to any job which is the subject of negotiation between member electrical contractors and companies, firms, or individuals engaged in general contracting;

(5) Which requires or provides that any work which is the subject of negotiation between any general contractor and one or more electrical contractors and has been registered by two or more electrical contractors is automatically required to bid through a depository;

(6) Which requires or provides that any member, signatory, company, firm or individual that uses a bid depository operated by

one or more of the respondents with respect to any specific job shall receive or solicit bids from, or submit bids to, only those companies, firms or individuals that are using the services of the depository with respect to that job;

(7) (a) Which subjects any member, signatory, company, firm or individual using a bid depository to submit bids in connection with any specific job, to suspension from the use of the bid depository or to a fine, penalty or any other sanction, or threat of sanction, for submitting any bid to any company, firm or individual that is not a member of or signatory to the bid depository or that is not using the bid depository with respect to that job;

(b) Which subjects any member, signatory, company, firm or individual using a bid depository to solicit or receive any bids in connection with any specific job, to suspension from the use of the bid depository or to a fine, penalty or any other sanction, or threat of sanction, for soliciting or receiving any bid from any company, firm, or individual that is not a member of or signatory to the bid depository or is not using the bid depository with respect to that job; or,

(c) Which subjects any member, signatory, company, firm, or individual using a bid depository to solicit or receive any bids in connection with any specific job, to suspension from the use of the bid depository or to a fine, penalty or any other sanction, or threat thereof, for awarding any contract based upon any bid received from any company, firm or individual that did not use the bid depository with respect to that job;

(8) Which requires or provides that any member, signatory, company, firm, or individual that in any fashion uses a bid depository operated by one or more of the respondents shall receive or solicit bids from, or submit bids to, only those companies, firms, or individuals that are also members, signatories or participants in said bid depository;

(9) (a) Which suspends from participation in a bid depository, or fines or imposes any other sanction or threat of sanction upon any member, signatory, company, firm, or individual that submits any bid in any fashion to any company, firm, or individual that is not a member of or signatory to said bid depository, or that does not employ or use said bid depository.

(b) Which suspends from participation in a bid depository, or fines or imposes any other sanction or threat of sanction upon any member, signatory, company, firm, or individual that receives or solicits any bid in any fashion from any company, firm, or individual

that is not a member of or signatory to said bid depository, or that does not employ or use said bid depository;

(c) Which suspends from participation in a bid depository, or fines or imposes any other sanction or threat of sanction upon any member, signatory, company, firm, or individual for awarding any contract based upon any bid received from any company, firm, or individual that is not a member of or signatory to said bid depository or that does not employ or use said bid depository in connection with the particular job for which the contract was awarded; or,

(10) Which requires or provides for the circulation of any notice that any member or signatory of a bid depository operated by one or more of the respondents shall be, or has been, suspended or otherwise disciplined for violation of the rules and regulations of the bid depository;

(11) Which has the purpose or effect of fixing, maintaining, stabilizing, or tampering with the price of electrical contracting services.

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

It is further ordered, That respondents shall promptly amend the rules and regulations of the corporate respondent and all documents used by the corporate respondent in the operation of its bid depository so that such rules, regulations and documents are consistent with the terms of this order.

It is further ordered, That each individual respondent named herein promptly notify the Commission at such time as he may discontinue his affiliation with the corporate respondent, its successors or assigns. In addition, each individual respondent shall for a period of fifteen (15) years after the date of service of this order promptly notify the Commission of each new affiliation of himself as officer, director, employee or consultant with any corporation or association whose activities include the operation of a bid depository. Such notice shall include the respondent's business address at such corporation or association and a statement of the nature of the affiliation, as well as a description of the respondent's duties and responsibilities in connection with said affiliation.

It is further ordered, That respondent corporation shall within fifteen (15) days of the service of this order distribute a copy of this order to all individuals who are employees, officers and directors as

of the time of service of this order and to all members, signatories, companies, firms, or individuals that have participated in said bid depository at any time prior to service of this order. Furthermore, respondent corporation shall within fifteen (15) days of the date that individuals, companies, or firms become affiliated with, or commence participation in such bid depository, its successors or assigns, distribute a copy of this order to all such new employees, officers and directors who become affiliated with the bid depository, its successors or assigns, and to all such new members, signatories, companies, firms, or individuals that begin participation in the bid depository, its successors or assigns.

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 or at least thirty (30) days prior to the formation by or with the participation of any respondent of any other corporation or organization which conducts the business of a bid depository.

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
MOBIL OIL CORPORATION

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

Docket C-3054. Complaint, Jan. 22, 1981—Decision, Jan. 22, 1981

This consent order requires, among other things, a New York City manufacturer of chemical, fuel and lubrication products to cease representing in the advertising, labeling and sale of "Mobil 1" that its use in automobiles will reduce the consumption of engine lubricating oil, unless, in conjunction with such representation, respondent sets forth a prescribed statement advising new users of the product to check the oil level of their cars frequently because some cars will experience higher oil consumption with low viscosity oils like Mobil 1.

Appearances

For the Commission: *Joseph L. Hickman, John McNally and Sam Carusi.*

For the respondent: *John McGrath, Donovan, Leisure, Newton & Irvine, Washington, D.C., and Susan Csia and John McConnin, in-house counsel.*

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 Mobil Oil Corporation, a corporation, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mobil Oil Corporation is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at 150 East 42nd St., New York, New York.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, sale and distribution of various fuel, chemical and lubrication products throughout the United States for use by industry and by the general public.

PAR. 3. For several years last past, respondent has manufactured, and has sold and distributed to the general public through automo-

ble service stations and other retailers throughout the United States a synthesized automotive lubricant under the trade name: "Mobil 1".

PAR. 4. Respondent causes Mobil 1 to be transported from various places of manufacture, storage and distribution in various States of the United States to purchasers thereof located in various other States of the United States. Respondent maintains, and at all times material herein has maintained, a substantial course of trade in said product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. At all times material herein, respondent has been, and is, in substantial competition in or affecting commerce, with individuals, firms and corporations engaged in the sale and distribution of automotive lubricants for use by the general public.

PAR. 6. In the course and conduct of its business, and for the purpose of inducing the sale of Mobil 1, respondent disseminates, and causes the dissemination of advertising by various means, including those in national publications and brochures distributed by the mail across state lines, point of sale promotional materials displayed or distributed in automobile service stations and in other retail stores throughout the United States, statements on Mobil 1 labels, and through television broadcasts transmitted by television stations located in various states of the United States which broadcast within said states and across state lines.

PAR. 7. Typical statements in such advertising include, but are not limited to, "Reduces oil consumption up to 25% in engines in good mechanical condition," "Reduces oil consumption in engines in good mechanical condition," and ". . . Mobil 1 saves . . . up to 25% on oil consumption in engines in good mechanical condition."

PAR. 8. By and through its advertisements, respondent represents, directly or indirectly, that by switching from conventional mineral oils to Mobil 1 purchasers will achieve in cars with engines in good mechanical condition a substantial reduction in the amount of engine lubricating oil consumed in the operation of such cars.

PAR. 9. In truth and in fact, many purchasers of Mobil 1, by switching from a heavier viscosity conventional mineral oil, will not achieve a substantial reduction in the amount of oil consumed in the operation of their cars. To the contrary, the use of Mobil 1 may result in increased oil consumption in various types or categories of cars, including certain older or higher mileage cars, high performance cars, and cars with rebuilt or rebored engines, which, because of larger engine clearances, consume less oil of a heavier viscosity than they consume when Mobil 1 is used.

PAR. 10. In the advertisements described in Paragraph Six,

respondent fails to disclose that some types of vehicles will experience increased oil consumption with the use of low viscosity oils such as Mobil 1. Therefore, respondent's advertisements and representations described in Paragraphs Six and Eight, were and are unfair and deceptive.

PAR. 11. The use by respondent of the aforesaid unfair and deceptive statements, representations, acts and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondent's products and services by reason of said erroneous and mistaken belief.

PAR. 12. The acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair or deceptive acts or practices and unfair methods of competition in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

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

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

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

agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Mobil Oil 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 150 East 42nd St., in the City of New York, State of New York.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

It is ordered, That respondent Mobil Oil Corporation, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, labeling, offering for sale, sale or distribution of Mobil 1 in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, directly or indirectly, that use of such product results in reduced consumption of engine lubricating oil unless there is set forth, and in immediate conjunction with such representation, the following disclosure:

NEW USERS OF [NAME OF PRODUCT] SHOULD CHECK OIL LEVELS MORE FREQUENTLY. SOME CARS WILL EXPERIENCE HIGHER OIL CONSUMPTION WITH LOW VISCOSITY OILS LIKE [NAME OF PRODUCT].

Provided however, such disclosure shall not be required if (1) the representation concerns only vehicles which are not general purpose passenger automobiles and (2) the representations do not appear in media primarily directed to individual consumers.

II

It is further ordered, That the disclosures covered by Paragraph I above:

1. If in print media, it shall be set forth clearly and conspicuously

and shall be separated from the principal portion of the text of the advertisement so it can be readily noticed.

2. If on labels or packaging materials, shall be parallel to the base of the label or package and the letters must be easily readable.

III

It is further ordered, That if the disclosure required by Paragraph I above is made in:

1. Radio advertising, the duration of the disclosure will be at least eight (8) seconds.

2. Television advertising, the disclosure may be in either audio or visual form; the duration of the disclosure will be at least eight (8) seconds.

3. Visual form in television advertising, each word shall be in letters of color or shade which contrasts with the principal background against which it is displayed with letters that are easily readable and without distracting noise or action in the background.

IV

It is further ordered, That the provisions of this Order shall apply only to representations disseminated within the United States, any of its territories or the District of Columbia.

V

For purposes of this Order,

"*Mobil 1*" shall mean any SAE 5W-20 synthetic motor oil manufactured or distributed by Mobil for use in the engines of general purpose passenger automobiles.

"*General purpose passenger automobile*" shall mean any automobile or light truck owned by individual consumers and principally used for personal transportation. It does not include commercial or rental fleets of automobiles or trucks, heavy or medium weight trucks, or trucks or automobiles primarily used for commercial purposes.

VI

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

dissolution of any subsidiary, or any other change in the corporation which would affect compliance obligations arising out of this Order.

VII

It is further ordered, That the respondent shall forthwith distribute a copy of this Order to each of its operating divisions involved with the sale, distribution or advertising of Mobil 1 and to each of its officers, representatives and employees who are engaged in the preparation and placement of advertisements and creation of product labels for such product.

VIII

It is further ordered, That any change required in the labels, containers or packing material used with Mobil 1 will be deemed to be in compliance with this Order if such changes are made and used with all Mobil 1 which is packaged after six (6) months from the effective date of this Order.

IX

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

IN THE MATTER OF
OWENS-CORNING FIBERGLAS CORPORATION

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

Docket C-2842. Decision, Sept. 30, 1976—Modifying Order, Jan. 28, 1981

This order reopens the proceeding and modifies the Commission order issued on September 30, 1976 (41 FR 50811, 88 F.T.C. 465), by substituting for the order in its entirety, a modified order which retains the major requirements of the original order and provides that upon the effective date of the Commission's Trade Regulation Rule on Labeling and Advertising of Home Insulation (the Rule), any provision of the order which is inconsistent with a provision in the Rule be deemed automatically deleted. The order also provides for the reinstatement of the deleted provision, should the relevant provision of the Rule be rescinded, invalidated or amended.

ORDER GRANTING REQUEST TO REOPEN THE PROCEEDING AND
MODIFYING ORDER TO CEASE AND DESIST

Respondent, Owens-Corning Fiberglas Corporation, having requested, on July 15, 1980, that the Commission reopen the proceeding in Docket No. C-2842 for the purpose of modifying the Order to Cease and Desist entered in that matter; and

The Commission having placed such request, together with supporting documents attached thereto, upon the public record for a period of thirty (30) days, pursuant to Section 2.51 of its Rules; and

The Commission being of the opinion that the public interest would be served by such reopening of the proceedings;

Now therefore, it is ordered, That the proceeding in Docket No. C-2842 be, and it is hereby, reopened; and

It is further ordered, That the Order entered in Docket No. C-2842 be modified by substituting for the Order in its entirety the following Modified Order:

I

It is ordered, That respondent Owens-Corning Fiberglas Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly or through any corporation, subsidiary, division or other device, in connection with consumer advertising, offering for sale, sale, or distribution of fibrous glass insulation for residential buildings, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Directly or by implication misrepresenting in any advertising or sales promotion material, that respondent has a reasonable basis for statements or representations which are made concerning the amount of energy or money the consumer can save as a result of installing said insulation, or concerning any recommended level of insulation, including an R-value recommendation.

B. Directly or by implication making any statements or representations in any advertising or sales promotion material, concerning insulating characteristics of said insulation, concerning savings in money or energy which consumers can realize as a result of installing said insulation, or concerning any recommended level of insulation, including an R-value recommendation, unless at the time of such statements or representations respondent has a reasonable basis for such statements or representations.

Such reasonable basis shall consist of competent scientific, engineering, or other objective material, or industry-wide standards based on such material, or reliance upon governmental laws, regulations, orders, standards or recommendations; provided, however, that in the case of reliance on governmental laws, regulations, orders, standards or recommendations: (1) such laws, regulations, orders, standards or recommendations must have been finally adopted by the agency involved; (2) such laws, regulations, orders, standards, or recommendations must be applicable to the context of the advertisement or sales promotion material and must not render any portion of the advertisement or sales promotion material misleading; and (3) the agency promulgating such laws, regulations, orders, standards, or recommendations must be identified.

C. Directly or by implication misrepresenting, in any advertising or sales promotion material, the amount of energy or money which a consumer can save by installing said insulation, or by installing any recommended level of insulation, including any recommended R-value.

D. Directly or by implication misrepresenting, in any advertising or sales promotion material, the facts, conditions, and/or assumptions which form the basis for energy savings claims, money savings claims, or R-value recommendations.

E. Failing to disclose in advertising or sales promotion material containing money or energy savings claims, facts, conditions and/or assumptions which, within the confines of the medium being used, are significant to the consumer and which affect the amount of money and energy a consumer can save by installing said insulation or by installing any recommended level of insulation, including any

recommended R-value (e.g., whether the savings claimed have taken into account the cost of the insulation and installation thereof). _____

II

It is further ordered, That any provision of this order that is inconsistent with any provision of the Commission's Trade Regulation Rule on Labeling and Advertising of Home Insulation (the Rule), as such provision is finally made effective, shall be deemed deleted to the extent of such inconsistency. This deletion shall be considered to have occurred on the date such provision of the Rule becomes effective. If such provision of the Rule shall be rescinded, invalidated or amended, the deleted provisions shall be automatically reinstated. Such reinstatement shall be considered to have occurred sixty (60) days after the date of the rescission, invalidation, or amendment.

III

It is further ordered, That respondent Owens-Corning Fiberglas Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with consumer advertising, offering for sale, sale, or distribution of fibrous glass insulation for residential buildings, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain and produce accurate records which may be inspected by Commission staff members upon reasonable notice:

A. Which consist of documentation in support of any claims included in advertising or sales promotion material, insofar as the text of such material is prepared or is authorized and approved by any person who is an officer or employee of respondent Owens-Corning Fiberglas Corporation, or of any division or subdivision of respondent, or by any advertising agency engaged by respondent or by any such division or subsidiary, which concern the insulating characteristics of said insulation or the savings which consumers can realize from the installation of said insulation or of any recommended level of insulation, including any recommended R-value; and

B. Which provided the basis upon which respondent relied as of the time those claims were made; and

C. Which shall be maintained by respondent for a period of three

(3) years from the date such advertising or sales promotion material was last disseminated.

IV

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

V

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

VI

It is further ordered, That respondent herein shall file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order, on the following dates:

- A. Within sixty (60) days after service upon it of this order;
- B. On July 1, 1981; and
- C. On January 31, 1982.

IN THE MATTER OF
CHRYSLER CORPORATION, ET AL.

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

Docket 9072. Complaint, Feb. 10, 1976—Decision, Feb. 10, 1981*

This consent order requires, among other things, a Highland Park, Mich. motor vehicle manufacturer (Chrysler) and its Troy, Mich. credit corporation subsidiary (Chrysler Credit) to timely provide dealerships with a prescribed system, together with a standardized form, to be used in calculating and recording payment of surpluses realized on repossessed vehicles; and to make the "Repossessed Vehicle Surplus/Deficiency system" a part of Chrysler's Dealer Uniform Accounting System Manual. Respondents are required to conduct training programs designed to familiarize dealers with their obligations in handling repossessions; and follow up the programs with a series of audits to verify that surpluses are being correctly calculated and paid. The order further requires that Chrysler take specified measures with respect to repayment of surpluses realized by Chrysler-owned dealerships from May 1, 1974; send bulletins to dealers urging them to pay surpluses on vehicles returned to them by Chrysler Credit since May 1, 1974; and notify each customer whose vehicle is repossessed of the nature and duration of customer's rights to redemption or refund of surpluses. Additionally, Chrysler Credit is required to develop revised retail installment contract forms that include a clear, concise statement advising customers that in the event of repossession, they are entitled to a refund of any surplus realized from the resale of the vehicle.

Appearances

For the Commission: *Dean Fournier, Bruce D. Carter, Sharon S. Armstrong, David Bricklin and Stevan Phillips.*

For the respondents: *Clifford L. Johnson, House Counsel, Chrysler Corporation, Detroit, Michigan, A.L. Ronquillo, House Counsel, Chrysler Credit Corporation, Troy, Michigan and William A. Krohley, Kelley Drye & Warren, New York City.*

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the above respondents* with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having

* Complaint previously published at 97 F.T.C. 107.

In the original form of the complaint, Chrysler Motors Corporation was a named party and Chrysler Corporation was not. Upon advice that Chrysler Corporation had succeeded Chrysler Motors pursuant to a merger effective December 31, 1975, the complaint was amended by mutual consent on June 14, 1976 to substitute Chrysler Corporation as a party respondent in lieu of Chrysler Motors.

been served with a copy of that complaint together with a proposed form of order; and

Respondents Chrysler Corporation and Chrysler Credit Corporation, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, admissions by these respondents as to the Commission's jurisdiction, 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 the complaint, and waivers and other provisions in accordance with the Commission's Rules; and

The Secretary of the Commission having thereafter, in accordance with Section 3.25(c) of its Rules, withdrawn this matter from adjudication as to Chrysler Corporation and Chrysler Credit Corporation; and

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

1. Respondent Chrysler Corporation is a Delaware corporation with its office and principal place of business at 12000 Lynn Townsend Drive, Highland Park, Michigan.
2. Respondent Chrysler Credit Corporation is a Delaware Corporation with its office and principal place of business at 900 Tower Drive, Troy, Michigan.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding as to Chrysler Corporation and Chrysler Credit Corporation, and of these respondents, and the proceeding is in the public interest.

ORDER

I.

It is ordered. That for purposes of this Order the following definitions shall apply:

A. "*Chrysler Respondents*" means Chrysler Corporation ("Chrysler") and Chrysler Credit Corporation ("Chrysler Credit"). It shall not refer to Aurora Chrysler-Plymouth, Inc. References to either or

both of the Chrysler respondents shall include their successors, assignees of any of their business operations subject to this Order, officers, agents, representatives and employees, as well as any corporations, subsidiaries, divisions or other forms of business organization through which they may act in the United States. *Provided, however,* that references to Chrysler shall not include Chrysler Credit, and references to Chrysler Credit shall not include Chrysler, and references to either or both of the Chrysler respondents shall not include Dealerships.

B. "*Vehicle*" means a passenger car or a truck with a gross Vehicle weight less than 26,000 pounds (11,794 kilograms).

C. "*Dealer*" or "*Dealership*" means a corporation, partnership or proprietorship that is a Chrysler, Plymouth or Dodge Vehicle Dealership pursuant to a Direct Dealer Agreement with Chrysler or any subsequent comparable agreement but excludes truck Dealerships whose principal business is the sale of trucks with a gross Vehicle weight of more than 8,000 pounds (3,629 kilograms).

D. "*Retail Sale*" means the installment credit sale of a Vehicle, other than for purposes of resale (*e.g.*, sale to Dealerships or wholesalers), lease or rental, to a purchaser who is not a fleet purchaser.

E. "*Repurchase Financing*" means the financing of a Retail Sale subject to an agreement between a finance company or institution and a Dealership (generally called a "repurchase," "recourse," or "guaranty" agreement) which provides that the Dealership is obligated to pay off the outstanding obligation to the finance company or institution after receiving a transfer of the repossessed Vehicle.

F. "*Repurchase Dealer*" or "*Repurchase Dealership*" means a Dealership that engages more than occasionally in Repurchase Financing transactions.

G. "*Equity Dealership*" means a Dealership in which Chrysler holds more than 50 percent of the voting stock or is entitled to elect more than 50 percent of the board of directors.

H. "*Liquidating Dealership*" means an Equity Dealership whose business has been or is being wound up by Chrysler or under Chrysler's supervision. It shall not mean a Dealership not previously an Equity Dealership whose assets come into the possession or control of either of the Chrysler Respondents by virtue of default on or compromise of a debt obligation.

I. "*Financing Customer*" means a purchaser of a Vehicle from a Dealership by means of a Retail Sale.

J. "*Disposition*" or "*Dispose*" refers to a Dealership's sale or

initial lease of a repossessed Vehicle previously sold by that Dealership and returned to it by or for a finance company or institution pursuant to a repurchase agreement. Such sale or lease includes only transactions with an independent third party; *i.e.*, it does not include a sale or lease to the finance company or institution, the Dealership or their representatives, or to a person or firm liable under a guaranty, endorsement, or repurchase agreement covering the repossessed Vehicle. Disposition or Dispose shall not refer to the repurchase of a repossessed Vehicle by a Dealership pursuant to a repurchase agreement, or refer to a sale subsequent to a judicial sale in Louisiana.

K. "*Proceeds*" means whatever is received upon Disposition in exchange for the repossessed Vehicle, but exclusive of sales taxes, service contracts or separately priced warranties.

L. "*Allowable Expenses*" means only actual out-of-pocket expenses incurred as the result of a repossession. The expenses must be reasonable and directly resulting from the repossessing, holding, preparing for Disposition and Disposing of the Vehicle, and not otherwise reimbursed to the Dealership. They are limited to the following charges (if allowable under applicable state law):

1. expenses paid to others, who are not employees of the Dealership or of the finance company or institution that financed the Vehicle, for repossessing, towing or transporting the Vehicle;
2. filing fees, court costs, cost of bonds, fees paid to a sheriff or similar officer, and fees and expenses paid to an attorney who is not an employee of the Dealership or the finance company or institution for obtaining possession of or title to the Vehicle;
3. fees paid to others to obtain title to the Vehicle, to obtain legally required inspection of the Vehicle, or to register the Vehicle;
4. expenses paid to others for storage (excluding a charge for storage at facilities operated by the Dealership);
5. labor and associated parts and supplies furnished by the Dealership for the repair, reconditioning or maintenance of the Vehicle in preparation for Disposition, computed at Dealership cost (as defined in the Initial Compliance Report);
6. amounts paid to others for labor and associated parts and supplies purchased for the repair, reconditioning or maintenance of the Vehicle in preparation for Disposition;
7. cost of sales commissions paid for actual participation in the Disposition of the particular Vehicle, computed at a rate no higher than for a similar nonrepossessed Vehicle and excluding portions of

commissions attributable to the selling of service contracts, separately priced warranties, financing or insurance;

8. expenses of advertisements that specifically mention the particular Vehicle, including a proportional share of any advertisement that also mentions other Vehicles;

9. auctioneer expenses and fees paid;

10. amounts paid to others for communication (including telephone calls, postage, and military locator fees) and photocopying necessary in arranging for the repossession, holding, transportation, reconditioning and Disposition of the Vehicle; and

11. amounts paid to insure the particular Vehicle while holding it.

M. "*Contract Balance*" means (1) the unpaid balance as of the date of repossession less unearned finance charge and insurance premium rebates deducted by the finance company or institution, plus (2) other charges authorized by contract or law and actually assessed or incurred prior to repossession.

N. "*Surplus*" means the excess of (1) the Proceeds plus applicable insurance or warranty reimbursements received by the Dealership or finance company or institution plus any other applicable rebates or credits not deducted by the finance company or institution, over (2) the Contract Balance, Allowable Expenses, and amounts paid to discharge any security interest provided for by law.

O. "*Pay*" or "*Paid*," in reference to payment of a Surplus, means a reasonable attempt to pay in accordance with the standards set forth in the Initial Compliance Report.

II.

It is further ordered, That Chrysler shall provide to all existing Dealerships within sixty (60) days of the effective date of this Order, and to each new Dealership within thirty (30) days of entering into a Direct Dealer Agreement, a system for determining the existence of Surpluses and for accounting for Surpluses and for any deficiencies sought (hereinafter the "Repossessed Vehicle Surplus/Deficiency system").

A. The Direct Dealer Agreements presently in effect between Chrysler and Dealerships provide that the Dealership "will use and keep accurate and current at all times a uniform accounting system and will follow accounting practices, both satisfactory to Chrysler". Chrysler shall make the Repossessed Vehicle Surplus/Deficiency system part of the uniform accounting system and accounting practices referred to in the Direct Dealer Agreements and any

subsequent comparable agreements. So long as the Direct Dealer Agreements or subsequent comparable agreements remain in effect, Chrysler shall not change them so as to affect the status of the Repossessed Vehicle Surplus/Deficiency system without sixty (60) days notice to the Commission and shall not change those agreements so as to affect the status of the Repossessed Vehicle Surplus/Deficiency system if the Commission, within that time period, advises Chrysler that it objects to the change.

B. The Repossessed Vehicle Surplus/Deficiency system shall include a standardized form ("Record of Repossessed Vehicle Sale") for Dealerships' use in determining the existence and amount of Surpluses and of any deficiencies sought, and in recording payment of each Surplus in accordance with the provisions of Paragraph II.C below.

C. The Repossessed Vehicle Surplus/Deficiency system shall contain provisions that:

1. Each Surplus is to be determined according to Paragraphs I.J through I.N of this Order and Paid to the defaulting customer within forty-five (45) days of Disposition.

2. Expenses other than Allowable Expenses are not to be deducted in calculating Surpluses and deficiencies sought.

3. Dispositions are to be commercially reasonable, which in practice means that the Dealership should make the same efforts to Dispose of the repossessed Vehicle at the best available price as would be made for a comparable used Vehicle except that a Dealership is not required to offer a warranty without extra charge even though such warranties are provided on other used Vehicles.

4. If any rebate owing to the defaulting customer's account has not been received at the time the Record of Repossessed Vehicle Sale is completed, such rebate is to be applied for promptly.

5. If any rebate is received after completion of the Record of Repossessed Vehicle Sale, any Surplus or deficiency sought is to be redetermined, a new or amended Record of Repossessed Vehicle Sale is to be prepared, and any remaining Surplus Paid within forty-five (45) days of Disposition or within ten (10) days of receiving the rebate, whichever is later.

6. The Record of Repossessed Vehicle Sale is to be prepared by the Dealership for each Disposition of a repossessed Vehicle and:

- a. is to set forth the calculation of each Surplus, and of each deficiency sought;

- b. is to be certified by a person authorized to sign retail installment contracts on behalf of the Dealership;

c. a copy of the form is to be sent with the Surplus payment to each defaulting customer to whom a Surplus is Paid and to each defaulting customer from whom a deficiency is sought; and

d. is to be retained by the Dealership, together with all relevant books and records, for at least two (2) years from the date of Disposition.

7. Dealerships are not to seek or obtain waivers of Surplus or redemption rights from Financing Customers, except in the precise manner and circumstances contemplated by the applicable version of Section 9-505 of the Uniform Commercial Code. Under Section 9-505 a waiver of a customer's right to a surplus may not be sought unless the Dealer intends to retain the collateral for its own use for the immediate future rather than to resell the collateral in the ordinary course of business. If a waiver is sought, the Dealer shall not represent that it thereby proposes to forego its right to a deficiency judgment unless it intends to seek such a judgment should the waiver not be given.

8. The Dealership may seek a deficiency only to the extent allowed by state law.

9. The Dealership shall, in accordance with state law, permit redemption of a repossessed Vehicle at any time prior to a binding agreement for its Disposition, except as may otherwise be provided by the laws of the individual states.

D. The Repossessed Vehicle Surplus/Deficiency system shall state that:

1. The Repossessed Vehicle Surplus/Deficiency system is part of the uniform accounting system and accounting practices referred to in Paragraph 9 of the Direct Dealer Agreement between Chrysler and the Dealership.

2. Failure to adhere to the standards of Paragraph II.C or to account properly to customers for Surpluses may expose the Dealership to legal action by the Federal Trade Commission and/or consumers.

E. Chrysler shall give the Federal Trade Commission thirty (30) days advance notice of any change in its manner and form of carrying out the requirements of Part II of this Order.

F. The Repossessed Vehicle Surplus/Deficiency system shall not apply to sales of repossessed Vehicles subsequent to judicial sales in Louisiana.

G. The Federal Trade Commission has proposed a Trade Regulation Rule that defines duties involved in disposing of a repossessed

Vehicle differently from the method described in Subparagraph II.C.3 above. Said Subparagraph is not to be considered a ratification or acceptance by the Commission of that method of Disposition except for purposes of this Order.

III.

A. *It is further ordered, That Chrysler:*

1. Shall, in the manner and in accordance with the schedule set forth in the Initial Compliance Report, develop and provide assistance and detailed educational materials to each Repurchase Dealership to carry out the purposes of Part II of this Order and of Part VI (insofar as it relates to reinstatement and redemption rights).

2. Shall, commencing no later than one hundred eighty (180) days after the effective date of this Order, include detailed information on all pertinent aspects of Part II of this Order and Part VI (insofar as it relates to reinstatement and redemption rights) in the "Dealership Accounting Conference" and in all comparable successor courses of instruction, and in all courses and training materials dealing with repossession accounting or the rights and duties of the parties with respect to Surpluses, deficiencies, redemption, and reinstatement which may be made available by Chrysler to Dealerships.

3. Shall provide no instructions to Dealerships inconsistent with this Order.

4. Shall, within ninety (90) days of the effective date of this Order, send to each Repurchase Dealership a letter which contains information to the following effect, with nothing to the contrary or in mitigation thereof:

a. state law requires that any surplus generated on the disposition of a repossessed Vehicle must be returned to the defaulting customer;

b. the duty to pay surpluses has existed for many years and the company urges Dealerships to pay all Surpluses on repossessed Vehicles disposed of prior to the date of the letter, as well as those arising later;

c. except in California and Louisiana, state law provides that if a Dealership does not pay a surplus owed, the defaulting customer has the right to recover a penalty equal to "an amount not less than the credit service charge plus 10 percent of the principal amount of the debt or the time price differential plus 10 percent of the cash price";

d. if a customer to whom a Surplus is owed has been reported by

the Dealership or its agent to a credit reporting agency as owing a deficiency, the Dealership should promptly advise such agency of the correct facts; and

e. the Federal Trade Commission has issued complaints against three automobile Dealerships charging that their failure to pay past Surpluses violated federal law.

5. Shall include in the above mailing a copy of this Order and of the Commission's published Analysis of Consent Order, except those portions of the Analysis referring to the Order as a "proposed" Order open to public comment.

6. Shall, within ninety (90) days of the effective date of this Order, develop and provide to all Marketing Investment Department branch personnel (other than clerical employees) educational materials and training to carry out the purposes of Parts II and V of this Order, as described in the Initial Compliance Report.

7. Shall provide to authorized representatives of the Federal Trade Commission upon thirty (30) days written notice a set of mailing labels addressed to an appropriate officer or manager of each Dealership, together with a list containing the same information and a certification that the labels and list are complete and accurate. These materials need be provided only once and are to be used by the Commission solely in connection with the service on Dealerships of any final order issued in Docket Nos. 9072, 9073 or 9074, and related notices.

B. *It is further ordered*, That Chrysler Credit:

1. Shall, within one hundred five (105) days of the effective date of this Order, send to each Dealership to which Chrysler Credit has returned a Vehicle, pursuant to a repurchase agreement, that was repossessed since May 1, 1974:

a. Chrysler Credit's endorsement of the statements in Subparagraphs III.A.4.a-e above; and

b. a list containing the following data for each Chrysler Credit repossession returned to the Dealership between May 1, 1974 and the effective date of this Order: name, address and account number of the Financing Customer, net payoff and date of repossession of the Vehicle.

2. Shall, within ninety (90) days of the effective date of this Order, develop and provide to all Chrysler Credit branch personnel involved in Repurchase Financing transactions (other than clerical employees) educational materials and training to carry out the

purposes of Parts II and VI of this Order, as described in the Initial Compliance Report.

3. Shall provide no instructions to Repurchase Dealerships inconsistent with this Order.

IV.

It is further ordered, That:

A. To determine whether Dealerships are correctly calculating and Paying Surpluses after implementation of Part II of this Order, Chrysler shall conduct or cause to be conducted a series of audits of Repurchase Dealers as described below and in the Initial Compliance Report.

1. Four successive twelve-month periods shall be audited, as further described in the Initial Compliance Report.

2. One hundred ten (110) Repurchase Dealers and not more than three thousand (3,000) of their Repurchase Financing repossessions per twelve-month audit period shall be audited, selected pursuant to procedures established by the staff of the Federal Trade Commission and set forth in the Initial Compliance Report, plus not more than sixty (60) Dealerships found in the preceding twelve-months' audit to require a further audit as set forth in the Initial Compliance Report.

3. The audit process shall consist of examination of the prescribed number of Repurchase Financing repossessions with resort to relevant books and records as set forth in the Initial Compliance Report. The audit shall include, for each Dealership audited, the preparation of a report ("Dealer Report") as described in the Initial Compliance Report. The Dealer Report shall contain a certification that it is accurate to the best of the knowledge of the person who performed the audit, and that such person has informed the Dealership in writing that it should retain the relevant books and records relating to any non-complying transaction for at least three (3) years after the audit. For each non-complying transaction, the person performing the audit shall attach to the Dealer Report (a) a Transactional Report Form completed in connection with the audit as described in the Initial Compliance Report, and (b) any worksheet he or she prepares in connection with such transaction.

B. Dealer Reports and documents prepared in the course of an audit pursuant to Paragraph IV.A, by the person who performed the audit, shall be maintained by Chrysler for four (4) years following the end of the twelve-month audit period for which they were prepared.

C. Chrysler shall file with the Commission an "Annual Audit Summary" within one (1) year after the end of each twelve-month audit period described in Subparagraph IV.A.1; *provided, however*, that the filing deadline for any such summary otherwise due between the 10th and 31st of December shall instead be January 31 of the following year. Each Annual Audit Summary shall contain the following information in aggregate form:

1. the period audited, the number of Repurchase Dealers audited, and the total number of Repurchase Financing repossessions returned to those dealerships during that period;
2. the number of Repurchase Financing repossessions audited and, with respect to those repossessions:
 - a. the number and total dollar amount of Surpluses properly calculated and Paid by the Dealers, and the number and total dollar amount of those Surpluses as to which the Dealers' attempts to pay were unsuccessful;
 - b. the number and total dollar amount of Surpluses which were properly calculated by the Dealers but not Paid, and the number of Dealerships involved;
 - c. the number of Surpluses not properly calculated by the Dealers, the number of Dealerships involved, and the total dollar amount which was not Paid;
 - d. the number of deficiencies sought in an amount in excess of the amount permitted by the Repossessed Vehicle Surplus/Deficiency system, the number of Dealerships involved, and the total excess dollar amount sought;
 - e. the number of repossession transactions in which a waiver of the customer's Surplus rights was sought or obtained, and the number of Dealerships involved;
 - f. the number of repossession transactions in which one or more entries on the Record of Repossessed Vehicle Sale were not substantiated by information contained in Dealership books and records and (i) as a result thereof the person performing the audit was unable to determine whether or not the disposition resulted in a Surplus or the correct amount thereof in accordance with the Repossessed Vehicle Surplus/Deficiency system, or (ii) the Dealership sought a deficiency in excess of the amount substantiated by information contained in its books and records; and the number of Dealerships involved;
 - g. the number of repossessed Vehicles disposed of other than to an independent third party, and the number of Dealerships involved;
 - h. the number of repossessed Vehicles sold at wholesale; and

3. a statement describing the action(s) taken by Chrysler, although none is required, to correct the non-compliance of Dealerships discovered during the audit to have failed to follow the Repossessed Vehicle Surplus/Deficiency system in calculating or Paying Surpluses or in seeking deficiencies.

D. The audits described in Subparagraph IV.A shall be performed by qualified persons as defined in the Initial Compliance Report. The following conditions shall be observed:

1. The Chrysler respondents shall not inform Dealerships or other third parties of the details of the random selection process established by the staff of the Federal Trade Commission, except to the extent described in this Order and in the Initial Compliance Report.

2. The Chrysler respondents shall not inform Dealerships or other third parties (excluding third parties engaged to participate in the audit process) of the details of the audit procedure, the audit periods, or the identity of Dealerships selected for audit, except to the extent described in this Order and in the Initial Compliance Report.

3. Dealerships selected for audit under this Part IV shall not be given more than ten (10) business days advance notice of the scheduled audit.

V.

It is further ordered, That:

A. Chrysler shall, as a shareholder holding a majority of the voting stock of each Equity Dealership (or as it otherwise may become entitled to elect more than 50 percent of the board of directors pursuant to any change in its relationship with Equity Dealerships), exercise all of its lawful rights for the purpose of causing the directors thereof to vote for resolutions requiring that each such Dealership:

1. within sixty (60) days of the effective date of this Order or within sixty (60) days of initiating operation as a Dealership, whichever is later, adopts and maintains the Repossessed Vehicle Surplus/Deficiency system described in Part II of this Order;

2. Pays all Surpluses with respect to repossessed Vehicles returned to the Dealership after the effective date of this Order;

3. shall not seek or obtain waivers of Surplus or redemption

rights from Financing Customers except in strict conformity with Paragraph II.C.7 of this Order; and

4. has an annual examination of its documents by a certified public accounting firm to determine whether the Dealership is following the Repossessed Vehicle Surplus/Deficiency system.

a. The first such examination after the effective date of this Order shall include an inspection of the relevant books and records and the Record of Repossessed Vehicle Sale forms (described in Part II of this Order) for all Repurchase Financing repossessions returned to the Dealership by financing institutions since January 1, 1979; *provided, however*, that such examination need not include repossessions audited pursuant to Part IV of this Order or examined for these purposes in a prior examination by a certified public accounting firm and reported to the Dealership board of directors regarding any non-compliance.

b. Subsequent examinations in succeeding years shall include an inspection of the relevant books and records and the Record of Repossessed Vehicle Sale forms (described in Part II of this Order) for all Repurchase Financing repossessions returned to the Dealership by financing institutions since the period covered by the last annual examination pursuant to Subparagraph V.A.4 and not audited pursuant to Part IV of this Order.

c. Each such examination shall be followed by a report to the Dealership board of directors regarding any non-complying transactions.

B. If any examination required by Subparagraph V.A.4 or any audit conducted under Part IV reveals that an Equity Dealership has any non-complying transaction as defined in the Initial Compliance Report which has not been corrected by the Dealership, then Chrysler shall, as a shareholder holding a majority of the voting stock of that Equity Dealership, exercise all of its lawful rights for the purpose of causing the directors thereof to institute appropriate measures to correct the non-compliance.

C. Chrysler shall (1) ascertain, for each Equity Dealership which becomes a Liquidating Dealership after the effective date of this Order, whether any unpaid Surpluses have arisen since the effective date of the Order or the period covered by the last annual audit by an independent certified public accounting firm during which repossession transactions were examined pursuant to the standards set forth in Part IV of this Order and the Initial Compliance Report, whichever is later, and (2) cause each such Surplus to be paid. *Provided*, that the provisions of Paragraphs V.A, B, and C shall

remain in effect for seventy-five (75) years from the effective date of this Order, at which time the provisions of said Paragraphs will be of no further force or effect.

D. Chrysler shall, within one hundred eighty (180) days of the effective date of this Order, with respect to repossessed Vehicles returned between May 1, 1974 and December 31, 1978 to Dealerships which are Equity Dealerships as of the effective date of this Order, establish to the reasonable satisfaction of the Commission, as described in the Initial Compliance Report, that:

1. all Surpluses have been Paid; and
2. in each instance where a defaulting customer entitled to receive a Surplus pursuant to Subparagraph V.D.1 above had been previously reported by the Dealership or its agent to a credit reporting agency as owing a deficiency, such agency has been subsequently notified of the correct facts.

E. Chrysler shall, within three hundred sixty (360) days of the effective date of this Order, with respect to repossessed Vehicles returned between May 1, 1974 and the effective date of this Order to any Liquidating Dealership which began operation as an Equity Dealership after July 30, 1978 or whose books and records, as of July 30, 1978, were located at the Kansas City, San Francisco or Troy liquidating centers or at the Dealership, establish to the reasonable satisfaction of the Commission, as described in the Initial Compliance Report, that:

1. all Surpluses have been Paid; and
2. in each instance where a defaulting customer entitled to receive a Surplus pursuant to Subparagraph V.E.1 above had been previously reported by the Dealership or its agent to a credit reporting agency as owing a deficiency, such agency has been subsequently notified of the correct facts.

VI.

It is further ordered, That Chrysler Credit:

A. Shall develop revised Chrysler Credit retail installment contract forms that include a clear, concise statement in lay language that, in the event of repossession:

1. no expenses other than reasonable expenses incurred as a direct result of repossessing (including, where permitted, attorneys' fees and court costs), holding, preparing for Disposition and Dispos-

ing of the Vehicle may be deducted from the Proceeds in determining a Surplus or deficiency; and

2. any Surplus realized on the resale or other Disposition of the Vehicle is to be Paid to the customer.

B. Shall distribute the revised retail installment contract forms to all Dealers who use Chrysler Credit installment contract forms, within one year after the Commission issues a final rule or final adjudicated order no less restrictive than the Paragraph VI.A statements concerning allowable expenses and the duty to pay surpluses. If the Commission's final rule or final adjudicated order is deemed by Chrysler Credit to be less restrictive than the said Paragraph VI.A statements, Chrysler Credit shall (1) within forty-five (45) days after written notice by Commission staff to the Secretary of Chrysler Credit that such rule or order has become final, request a reopening of this proceeding to conform the Paragraph VI.A statements to such rule or order; and (2) perform the above distribution of revised forms within one year after the Commission has acted on its request for conformance.

C. Shall, no later than twelve (12) months after the effective date of this Order, cease and desist the use of any Chrysler Credit retail installment contract form which represents that the debtor may be liable to pay a deficiency where Chrysler Credit knows or should know that it is not entitled under state or federal law to collect a deficiency.

D. Shall direct its branch offices that, commencing thirty (30) days after the distribution to a Dealership of revised Chrysler Credit retail installment contract forms pursuant to Paragraphs VI.B and/or C, they are not to purchase from that Dealership Chrysler Credit forms of retail installment contracts that are not on the revised forms. For a period of two (2) years thereafter, Chrysler Credit shall examine its branch office files at least every twelve (12) months in accordance with the procedures established in the Initial Compliance Report to determine whether prior retail installment contract forms are being used, and, if so, shall institute appropriate corrective action.

E. Shall, commencing seventy-five (75) days after the effective date of this Order, include the following information in clear lay language in a notice (which may be included in a notice of intent to repossess) sent prior to repossession to those Chrysler Credit Financing Customers to whom a notice of intent to repossess is sent:

1. the total amount past due as of the date stated in the notice,

which shall be mailed within five (5) days of the date stated in the notice;

2. in transactions where the customer is entitled under state law to reinstatement of the contract, the customer will have an absolute right to such reinstatement and to regain possession of the Vehicle by paying all past due installments and by paying such other amounts and fulfilling such other conditions as provided by law, or provided by contract and not prohibited by law;

3. that the customer will have an absolute right to redeem the Vehicle at any time prior to a binding agreement for its Disposition, except as otherwise provided by state law, and that this right can be exercised by paying the Contract Balance plus all reasonable expenses incurred as a direct result of repossessing the Vehicle (including, where permitted, attorneys' fees and court costs), holding it, and preparing it for Disposition;

4. the date prior to or interval of time during which the Vehicle will not be Disposed of;

5. that if the Vehicle is not redeemed (nor the contract reinstated) the customer will be entitled to a refund of any Surplus, and that where the Vehicle is returned to the Dealership such refund is to be made within forty-five (45) days after Disposition (the notice may also state that the refund should be made by the Dealer);

6. that failure to account for and refund a Surplus will give the customer a right to sue for the amount of the Surplus and, except in California and Louisiana, for statutory penalties as provided by state law; and

7. the statutory limitations and restrictions on the right of Chrysler Credit and the Dealership to collect a deficiency.

F. Shall, within sixty (60) days after the effective date of this Order, establish and follow a procedure for uniformly sending a written notice ("post-repossession notice") to each Chrysler Credit Financing Customer as soon as practicable after repossession. The post-repossession notice shall specify in clear, lay language:

1. the name, address and telephone number of the Dealership to which the Vehicle has been or will be returned for Disposition, if applicable, and the address and telephone number of the Chrysler Credit branch office to be contacted;

2. the date or interval of time within which the customer may reinstate the contract in states where the creditor is required to permit reinstatement of the contract;

3. the net amount necessary to redeem the Vehicle, and, in transactions where the customer is entitled to reinstatement, the

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amount necessary to reinstate the contract, at the time the notice is sent;

4. the date or interval of time prior to which the Vehicle will not be sold;

5. that the Vehicle can be redeemed at any time prior to a binding agreement for its Disposition, except as otherwise provided by state law;

6. that under the law the only expenses which need be paid upon redemption are reasonable expenses incurred as a direct result of repossessing the Vehicle, holding it, and preparing it for Disposition; and that these may increase in amount if redemption is delayed;

7. that Chrysler Credit should be contacted for further information about reinstatement of the contract, in states where the customer is entitled to reinstatement;

8. that Chrysler Credit should be contacted for further information about redemption including the procedure for redeeming the Vehicle;

9. that if the Vehicle is not redeemed (nor the contract reinstated) the customer is entitled to a refund of any surplus, and that where the Vehicle is returned to the Dealership such refund is to be made within forty-five (45) days after Disposition (the notice may also state that the refund should be made by the Dealer);

10. that in those instances where the Vehicle is returned to the Dealership, the Dealership is to send a copy of the Record of Repossessed Vehicle Sale to each defaulting customer to whom a Surplus is Paid or from whom a deficiency is sought;

11. that failure to account for and refund a Surplus will give the customer a right to sue for the amount of the Surplus and, except in California and Louisiana, for statutory penalties as provided by state law;

12. that the customer may be liable for a deficiency or that state law restricts or prohibits Chrysler Credit and the Dealership from collecting a deficiency (the notice is to include the applicable language only); and

13. that the customer has the right to direct the Dealership to apply for a rebate of any unearned premiums payable by any insurance carrier or agent from whom the Dealership has, on behalf of the customer, obtained a credit life, accident and health, or collision insurance policy.

G. Shall, for a period of two (2) years commencing seventy-five (75) days after the effective date of this Order, examine its branch files at least once every twelve (12) months in accordance with the

procedures established in the Initial Compliance Report to determine whether the notices required by Paragraphs VI.E and F have been and are being sent, and shall institute appropriate actions to assure that this procedure is adhered to.

H. Shall take no action to obtain or attempt to obtain or bring about any waiver of a Financing Customer's redemption or Surplus rights, except in the precise manner and circumstances contemplated by the applicable version of Section 9-505 of the Uniform Commercial Code. Under Section 9-505 a waiver of a customer's right to a surplus may not be sought unless the secured party intends to retain the collateral for its own use for the immediate future rather than to (1) resell it in the ordinary course of business or (2) return it to another party pursuant to a repurchase agreement. If a waiver is sought, Chrysler Credit shall not represent that it thereby proposes to forego its right to a deficiency judgment unless it intends to seek such a judgment should the waiver not be given.

I. Shall instruct its branch office personnel involved in Repurchase Financing transactions to cease and desist from making any representation, directly or by implication, contrary to the representations required by Paragraphs VI.E and F of this Order, and shall within sixty (60) days of the effective date of this Order establish procedures which reasonably assure strict adherence by branch personnel to these instructions.

J. Shall, within twelve (12) months after the effective date of this Order, revise all pertinent Chrysler Credit forms (including but not limited to repurchase agreement forms, form letters, and notices) and internal written procedures to be consistent with the provisions of this Order, as described in the Initial Compliance Report.

VII.

It is further ordered, That:

A. In the event the Federal Trade Commission issues a final Trade Regulation Rule establishing standards less restrictive on automobile manufacturers, finance companies or institutions, or Vehicle Dealerships than a provision or provisions of this Order relative to (1) the disposition of repossessed Vehicles, (2) the determination, calculation or communication of the existence of or the amount of Surpluses or deficiencies, including waivers of Surplus rights, or the time or manner of paying or accounting for Surpluses or deficiencies, or (3) the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem), then such less

restrictive standards shall, on the effective date of the Rule, supersede and replace the corresponding provision(s) of this Order. The enumeration of the subject matter contained in clauses (1), (2) and (3) of this Paragraph is exclusive. *Provided, however*, that a Chrysler Respondent shall advise the Commission of its intention to rely upon any provision of a Trade Regulation Rule as having superseded any provision of this Order thirty (30) days in advance of reliance thereon. *Provided further* that this Paragraph shall not be construed as exempting the Chrysler Respondents from any Trade Regulation Rule, or as limiting in any way their legal right or standing to challenge or otherwise contest any Trade Regulation Rule.

B. In the event any of the proceedings bearing Docket Nos. 9072, 9073, or 9074 results in a final adjudicated or consent order applying standards less restrictive on any automobile manufacturer, finance company, or Vehicle Dealership than a provision or provisions of this Order relative to:

1. the disposition of repossessed Vehicles;
2. the determination, calculation or communication of the existence of or the amount of Surpluses or deficiencies, including waivers of Surplus rights, or the time or manner of paying or accounting for Surpluses or deficiencies; or
3. the determination or communication of reinstatement or redemption rights (including their duration and/or the amount necessary to reinstate or redeem);

then the Commission shall, within one hundred twenty (120) days of a Chrysler Respondent's request pursuant to Section 2.51 of the Commission's Rules of Practice, reopen this proceeding and order modifications of this Order and/or other relief, as necessary and appropriate, to conform this Order to such less restrictive standards applied in the other order(s). The enumeration of the subject matter contained in clauses B.1, 2, and 3 of this Paragraph is exclusive.

C. In the event a Chrysler Respondent is of the opinion that changed conditions of law or fact require that this Order be altered, modified, or set aside, or that the public interest so requires, the Chrysler Respondent may, pursuant to Section 2.51 of the Commission's Rules of Practice, file a request for reopening of this proceeding for that purpose.

VIII.

It is further ordered, That:

A. Each Chrysler Respondent shall, as described in the Initial Compliance Report, maintain complete business records relative to the manner and form of its compliance with this Order and shall retain all such records for at least three (3) years, and shall, upon reasonable notice, make them available for inspection and photocopying by authorized representatives of the Federal Trade Commission. Except as provided in Paragraph III.A.7 of this Order, respondents will disclose the identity or identities of any individual Dealership or Dealerships to Commission representatives only upon service of a civil investigative demand issued under Section 2.7 of the Rules of Practice of the Federal Trade Commission.

B. Each of the Chrysler Respondents shall, within one hundred eighty (180) days after the effective date of this Order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this Order and has implemented the Initial Compliance Report submitted with the Agreement Containing Consent Order.

C. Chrysler shall, within four (4) weeks of the effective date of this Order, distribute a copy of this Order to its U.S. Automotive Sales Division, to each Zone Manager, and to its Marketing Investment Department and each of its branch offices. Chrysler Credit shall, within the same time frame, distribute a copy of this Order to each of its branch offices.

D. Each of the Chrysler Respondents shall notify the Commission at least thirty (30) days prior to any corporate change which may reasonably be expected to affect compliance obligations arising out of this Order such as those dissolutions, assignments or sales resulting in the emergence of a successor corporation or corporations, the creation or dissolution of subsidiaries, or any other change which may reasonably be expected to affect compliance with this Order. Chrysler shall notify the Commission at least thirty (30) days prior to effecting any change in its program for investing in Equity Dealerships, which may reasonably be expected to affect compliance with this Order.

Interlocutory Order

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, Feb. 13, 1981

Denial of respondent's motions seeking disqualification of Chairman Pertschuk respecting issues outside the scope of his prior recusal.

ORDER

On July 21, 1980, respondent Kellogg Company ("Kellogg") filed a motion requesting Chairman Pertschuk to disqualify himself from all further participation in any aspect of this case or, in the alternative, that the Commission direct his disqualification. On August 5, 1980, respondent General Mills, Inc. ("General Mills") likewise moved to disqualify the Chairman. On September 22, 1980, Chairman Pertschuk filed a memorandum declining to disqualify himself and referring the matter to the full Commission for consideration of the alternative requests of Kellogg and General Mills that the Commission direct his disqualification. Chairman Pertschuk's response was placed on the public record and served on respondents.¹ For the reasons stated in the Chairman's September 22, 1980, memorandum, and the additional reasons discussed below, the alternative requests of Kellogg and General Mills are denied.

I.

Kellogg contends that "a decisionmaker cannot legally recuse himself from part of an adjudicative proceeding, while purporting to reserve to himself the right to continue presiding over the remainder of that proceeding." (Kellogg Motion at 3.) In support, Kellogg cites the same authorities and rationales as those it advanced in connection with its earlier request that Judge Berman be disqualified from presiding over the proceedings on the merits of the Commission's complaint.²

We cannot agree with Kellogg that the Chairman's recusal from the proceedings concerning Judge Hinkes' retirement mandates his disqualification from the proceedings on the merits. Each of the

¹ Because Chairman Pertschuk has himself referred the alternative requests to the Commission for decision without his participation, we need not consider whether, absent such a referral, the Commission would have power to disqualify one of its members over that member's objection.

² See Memorandum In Support of Motion of Respondent Kellogg Company to Disqualify Administrative Law Judge or, In the Alternative, for Related Discovery (Feb. 1, 1980); Memorandum of Respondent Kellogg Company in Reply to Complaint Counsel's Answer to Motion to Disqualify Administrative Law Judge (Feb. 11, 1980); Memorandum of Respondent Kellogg Company to the Commission In Support of Its Motion to Disqualify Administrative Law Judge or, In the Alternative, For Related Discovery (Feb. 20, 1980).

arguments advanced by Kellogg in support of its request has already been considered, and rejected, in our July 31, 1980, order in which we declined to disqualify Judge Berman. There, we stated:

[T]he inquiry concerning the circumstances of Judge Hinkes' retirement is "distinct and separable" from the proceedings on the merits of the complaint. * * * The proceedings involve different witnesses and testimony, bearing upon different legal and factual issues.

In these circumstances, in the absence of any statute providing to the contrary,³ the case law has permitted partial disqualification with respect to discrete aspects of what amounts to a single proceeding. *Warner v. Rossignol*, 538 F.2d 910, 913 n.6 (1st Cir. 1976) (trial judge disqualified from participating in damages phase of trial retained power to deny subsequently filed motion for new trial); *United States v. Lawrenson*, 334 F.2d 468 (4th Cir. 1964) (fact that judge assigned civil action, which was related to criminal prosecution, to another judge after presentation of affidavit of prejudice was no basis for disqualification from subsequent motions in criminal case); *Middletown Nat'l Bank v. Toledo, A.A. & N.M. R. Co.*, 105 F. 547 (S.D.N.Y. 1900); *Coastal Petroleum Co. v. Mobil Oil Corp.*, 378 So.2d 336 (Fla. App. 1980) (trial judge recused as to issues severed for separate trial properly reserved jurisdiction to enter final judgment on issues already tried); *Flannery v. Flannery*, 452 P.2d 846, 849 (Kan. 1969) (judge disqualified from presiding over divorce case based on knowledge of disputed facts was authorized to hear motion to modify divorce decree); *Price v. Gibson*, 192 P.2d 219, 224 (Kan. 1978) (probate judge disqualified from admitting will to probate because of his knowledge of testamentary capacity of testator was authorized to preside over matters arising in administration of estate).⁴

In some situations nothing less than full disqualification is

³ There is no statutory requirement that one who is disqualified from a separate, collateral phase of an adjudication is barred from participating in the decision of its other aspects. Indeed, the Commission's treatment of disqualification motions is an example. The Commissioner whose exclusion is sought in effect disqualifies himself from participating in the Commission's decision of that matter. That limited disqualification, however, does not automatically take the challenged Commissioner out of the remainder of the proceedings. Compare 5 U.S.C. 556(d). No court has specifically considered the question presented here in the context of an administrative proceeding from which a decisionmaker has partially withdrawn. However, *United Air Lines, Inc. v. CAB*, 281 F.2d 53 (D.C. Cir. 1960), implicitly supports our view that the procedures adopted in this case are proper. There, the court ordered the CAB to conduct an inquiry into claims of improper *ex parte* contacts raised on review of CAB orders. After the remand, the court sustained the procedures adopted by the CAB, specifically noting that the inquiry had been conducted "before a new examiner" who issued an initial decision limited to the *ex parte* issues. *United Air Lines v. CAB*, 309 F.2d 238, 239 (D.C. Cir. 1962).

⁴ In "bifurcated" trials, evidence on the issue of damages is heard following a decision by the trier of fact on the question of liability. There is no requirement in such instances that the same trier of fact rule on the question of damages. See, e.g., *Foerster v. Illinois Bell Tel. Co.*, 315 N.E.2d 63, 66, 20 Ill.App.3d 656 (1974); *State ex rel. La Follette v. Raskin*, 34 Wis.2d 607, 150 N.W.2d 318 (1967). Likewise, in proceedings where legal and equitable issues are mingled, a trial judge may try and determine the equitable issues while the jury is simultaneously deciding the legal issues. See *Schoenfeld v. Atomic Products Corp.*, 350 N.Y.S.2d 736 (App. Div. 1973); *Scotsas v. Citizens Ins. Co.*, 112 N.H. 47, 289 A.2d 64 (1972).

required. For example, when the decisionmaker has a financial interest in the outcome of the proceedings, or is related to one of the parties, it is obvious that partial disqualification would not cure any actual or apparent impropriety. That is not, however, the situation that we have before us. Chairman Pertschuk's withdrawal from further participation in Commission consideration of motions and requests relating to the contractual arrangement with Judge Hinkes was based on the possibility that the Commission in its deliberations concerning that separate aspect of the case might be called upon to consider the validity of the Chairman's actions, including the legal sufficiency of statements submitted by him to the Commission, and on the possibility that his testimony concerning the offer of the contract might be requested. Cf. *Flannery v. Flannery, supra*; *Price v. Gibson, supra*. But these possibilities do not impair his ability impartially to decide the remaining issues in the case. As we indicated in our January 29, 1979, order denying a similar motion by General Foods' requesting disqualification of the Chairman and each other Commissioner advised in advance of the Hinkes' contract offer, the problem which arose out of Judge Hinkes decision to retire presented managerial questions that are normally the province of the Chairman. (See Reorg. Plan No. 8 of 1950, 64 Stat. 1264.) Issues arising out of that managerial decision are distinct from the substantive merits of the case. As the record in the Commission's continuing inquiry into the Bureau of Competition's role in the Hinkes contract offer now stands there is nothing that creates even an appearance of partiality.⁵

II.

General Mills presents a somewhat different argument. Chairman Pertschuk participated in Commission orders of December 8, 1978, January 29, 1979, November 13, 1979, and March 19, 1980. Each of these orders disposed of motions and requests of respondents pertaining to the contractual arrangement with Judge Hinkes. On July 18, 1980, the Chairman recused himself from Commission consideration of then pending motions requesting further fact-finding concerning the circumstances of the contractual arrangement with Judge Hinkes. General Mills contends that the facts upon which the Chairman based his July 18, 1980, recusal were relevant to

⁵ As Chairman Pertschuk noted in his statement of July 18, 1980, (p. 1), his impartiality is "confirmed by the fact that, after reviewing the arguments made by respondent, [he] reversed [his] previous decision and determined not to submit the Hinkes contract to the Office of Personnel Management for approval, thereby affording respondents much of the relief they were seeking." See Separate Statement of Chairman Pertschuk attached to the Commission's order of December 8, 1978.

the resolution of the four aforementioned orders, and that the Chairman's failure to also recuse himself from those deliberations so tainted his appearance of impartiality that he is now required to disqualify himself from the entire case. (General Mills Motion at 2.) General Mills does not articulate why, if Chairman Pertschuk's participation in the four cited orders was improper, his disqualification from all further participation in the proceedings on the merits is now required.⁶ In any event, we disagree with General Mills' characterization of the aforementioned Commission orders.

In his July 18, 1980, memorandum, the Chairman observed that certain statements referring in part to action taken by him with respect to the Hinkes contractual arrangement had been submitted to the Commission. Because, as we have discussed above, the resolution of motions and requests then pending before the Commission pertaining to the need for additional fact-finding required consideration of the sufficiency of his statements, the Chairman concluded that his participation in those deliberations would be inappropriate. (Pertschuk Memorandum at 2.) None of the four earlier Commission orders involved comparable considerations. Thus his participation in those orders was not inconsistent with his subsequent recusal, nor did such participation raise an appearance of bias or prejudgment.

It is therefore ordered, That the motions of Kellogg and General Mills seeking Chairman Pertschuk's disqualification with respect to issues outside the scope of his prior recusal are denied.

Chairman Pertschuk and Commissioner Pitofksy did not participate.

⁶ As discussed in Part I *supra*, we have already held that the Commission's inquiry into the circumstances surrounding the contractual arrangement with Judge Hinkes is "distinct and separable" from the proceedings on the merits of the Commission's complaint.

IN THE MATTER OF
GLENDINNING COMPANIES, INC.

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

Docket 8824. Decision, Oct. 26, 1976—Modifying Order, Feb. 24, 1981

This order reopens the proceeding and modifies the cease and desist order issued against the company in the Matter of Glendinning Companies, Inc., *sub nom.*, The Coca-Cola Company, et al., on October 26, 1976, 88 F.T.C. 565, 41 FR 53653, by deleting the language "including all entry forms submitted by participants therein," from Paragraph 1(c), which required the company to keep all entry forms submitted in connection with both games of chance and games of skill, and adding to Paragraph 2 of the order, specified language which limits respondent's record-keeping obligation to maintaining only those entry forms submitted for games of skill.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND
DESIST ORDER

Petitioner, Glendinning Companies, Inc., seeks the modification of a record-keeping provision of the Order to Cease and Desist issued on October 26, 1976. Petitioner is engaged in the manufacture, promotion, sale, and distribution of promotional games used to induce the sale of products. On October 23, 1980, petitioner sought from the Commission an advisory opinion, pursuant to Rule 2.41 of the Federal Trade Commission's Rules of Practice, interpreting the phrase "all entry forms" in Paragraph 1(c) of the Order to apply solely to games of skill, and not to games of chance. On November 7, 1980, petitioner was informed that an advisory opinion was not the appropriate vehicle for the requested relief, and that the request would be treated as a Petition to Reopen and Modify the Order pursuant to Rule 2.51 of the Rules of Practice. The petition was accordingly placed on the public record for comment for thirty days. No comments were received.

Paragraph 1(c) now orders petitioner to cease and desist from:

1. Engaging in, promoting the use of, or participating in any such promotional game, contest, sweepstake or similar device, by means of any announcement, notice or advertisement, unless:

(c) There are maintained by respondent or its designee for a period of at least two years after the closing of each such promotional game or contest and the awarding of all prizes in such connection therewith, full and adequate records *including all entry forms submitted by participants therein*, which clearly disclose the operation of such promotional game or contest, the basis or method used to determine entitlement to prizes, and the facts as to the receipt of such prizes by participants entitled thereto;

which said records and documents shall be open for inspection during normal business hours by each contest participant or his duly authorized representative. (Emphasis supplied.)

Thus, petitioner is currently required to save, for two years, all entry forms submitted in both chance and skill contest promotions. Petitioner asserts that while this requirement makes sense when applied to games of skill, it serves no useful purpose in the case of games of chance. In skill contests, entry forms can be inspected by the Commission to determine whether prizes were awarded to contestants who submitted the correct entries. In games of chance, however, all entry forms are identical, and winners are selected by random drawing. The forms are therefore of no value in determining whether the promotion was fairly conducted. The storage of these forms does, however, impose significant costs upon petitioner.

Petitioner and Compliance staff have agreed upon proposed modifications to the Order that would limit petitioner's obligation to maintain all entry forms to those submitted in games of skill. This would be accomplished by moving the language requiring petitioner to maintain entry forms from Paragraph 1 of the Order, which governs both skill and chance promotions, to Paragraph 2, which only concerns skill contests. The Commission, having considered the Petition, determines that petitioner has made a satisfactory showing that the public interest requires that the Order be reopened and modified as requested.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on October 26, 1976, is hereby modified by:

- (1) Deleting the italicized language from Paragraph 1(c):

There are maintained by respondent or its designee for a period of at least two years after the closing of each such promotional game or contest and the awarding of all prizes in such connection therewith, full and adequate records *including all entry forms submitted by participants therein*, which clearly disclose the operation of such promotional game or contest, the basis or method used to determine entitlement to prizes by participants entitled thereto; which said records and documents shall be open for inspection during normal business hours by each contest participant or his duly authorized representative; and

- (2) Adding the following language to Paragraph 2:

- (f) Respondent or its designee maintains for at least two years

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Modifying Order

after the closing of each skill contest and the awarding of all prizes in connection therewith, in addition to the records required by Paragraph 1(c), all entry forms submitted by participants in such skill contests.

It is further ordered, That the foregoing modification shall become effective upon service of this Order.

Modifying Order

97 F.T.C.

IN THE MATTER OF

REVLON, INC., ET AL.
and
DELUXOL LABORATORIES, INC., ET AL.

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

*Dockets C-2868 and C-2869. Decision, Jan. 3, 1977—Modifying Order, Feb. 24,
1981.*

This order reopens the proceeding and modifies the Commission order issued on January 3, 1977, 42 FR 17108, 89 F.T.C. 1, by amending Paragraph IA4 to permit conditioning and manageability claims with proper substantiation.

ORDER GRANTING REQUEST TO REOPEN THE PROCEEDING AND
MODIFYING ORDER TO CEASE AND DESIST

Revlon, Inc., on behalf of itself and its subsidiaries Revlon-Realistic Professional Products, Inc. and Deluxol Laboratories, Inc., having requested on December 4, 1980 that the Commission reopen the proceedings in Dockets C-2868 and C-2869 for the purpose of modifying the Order to Cease and Desist entered in those dockets; and

The Commission having placed such request, together with supporting documents attached thereto, upon the public record for a period of thirty (30) days, pursuant to Section 2.51 of its Rules; and

The Commission having duly considered the comments filed thereafter by interested persons; and

The Commission being of the opinion that the public interest would be served by such reopening of the proceedings;

Now, therefore, it is ordered, That the proceedings in Dockets C-2868 and C-2869 be, and they hereby are, reopened; and

It is further ordered, That the Order in Dockets C-2868 and C-2869 be modified by amending Paragraphs IA4 as follows:

4. Any hair straightening product conditions or helps condition or improves condition of hair or makes or helps make hair more manageable, unless, at the time the representation is made, respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation.

It is further ordered, That the foregoing modifications shall be effective upon service of this order.

Complaint

IN THE MATTER OF
BENTON & BOWLES, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECTIONS 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3055. Complaint, March 4, 1981—Decision, March 4, 1981

This consent order requires, among other things, a New York City advertising agency to cease, in connection with the advertising and sale of Encare or any similar over-the-counter vaginal contraceptive suppository product, misrepresenting or failing to substantiate claims relating to the product's effectiveness, safety and performance characteristics. The firm is further prohibited from disseminating advertisements using performance or quality heightening modifiers such as "highly," or "extremely," in conjunction with words like "effective" or "reliable." Additionally, the order requires the company to disclose in print, radio and TV consumer advertising, certain facts material to contraceptive suppository use; and to maintain business records for a period of three years.

Appearances

For the Commission: *Shirley F. Sarna and Paula K. Stein.*

For the respondent: *Stuart L. Friedel, Davis & Gilbert, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Benton & Bowles, Inc., a corporation (hereinafter "respondent"), has violated Sections 5 and 12 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Benton & Bowles, Inc. is a New York corporation with its principal place of business at 909 Third Ave., New York, New York.

Allegations stated in the present tense include the past tense.

PAR. 2. For purposes of this complaint the following definitions shall apply:

(1) A "vaginal contraceptive suppository" is a spermicidal contraceptive product which is inserted into the vagina prior to coitus. Body temperature or vaginal secretions dissolve the suppository and spread its sperm killing agent through the vaginal cavity.

(2) "Use effectiveness" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of

subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

(3) "*Commerce*" means commerce as defined in the Federal Trade Commission Act, as amended.

PAR. 3. Respondent Benton & Bowles, Inc. is an advertising agency for Morton-Norwich Products, Inc. and Eaton-Merz Laboratories, Inc. In such capacity respondent Benton & Bowles, Inc. has prepared and placed advertising for publication and has caused the dissemination of advertising, including the advertising referred to herein, to promote the sale of a vaginal contraceptive suppository product named "Encare" or "Encare Oval" (hereinafter "Encare") a "drug" within the meaning of Section 15 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business respondent has disseminated or caused the dissemination of certain advertising concerning Encare (1) by United States mail, or by various means in or having an effect upon commerce, including but not limited to insertion in newspapers or magazines of interstate dissemination and radio broadcasts of interstate transmission for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Encare; or (2) by various means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Encare in or having an effect upon commerce.

PAR. 5. Respondent has disseminated or caused the dissemination of the advertisement identified as Attachment 1 which is incorporated by reference herein.

PAR. 6. Through the use of this advertisement, respondent represents, directly or by implication, that:

1. Encare has an extremely high use effectiveness, approaching the level of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD").
2. Encare has novel contraceptive performance characteristics.

PAR. 7. In truth and in fact:

1. Encare's use effectiveness is approximately that of other vaginal contraceptive products. It is not considered to have a use effectiveness on the level of the pill or IUD.
2. Encare does not have novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery. Its sperm killing ingredient, nonoxynol 9, has been in use for many years in various contraceptive products.

Therefore, the advertising and representations referred to in Paragraphs Five and Six are false, deceptive or misleading.

PAR. 8. At the time respondent made the representations alleged in Paragraph Six, respondent had no reasonable basis for making those representations. Therefore, the making and dissemination of such representations constitute deceptive or unfair acts or practices in or affecting commerce.

PAR. 9. Through dissemination of the advertisement identified as Attachment 1, respondent advertises Encare without disclosing to the purchasing public through the advertising that:

1. Women for whom pregnancy presents a special health risk should make a contraceptive choice in consultation with their physician.
2. Some Encare users experience irritation in using the product.
3. Encare requires a waiting period of ten minutes before intercourse.

PAR. 10. Furthermore, respondent advertises Encare without disclosing to the purchasing public through the advertising that:

Encare is approximately as effective as vaginal foam contraceptives in actual use.

PAR. 11. The facts described in Paragraphs Nine and Ten are material with respect to the consequences which may result from use of Encare as a contraceptive under such conditions as are customary or usual. Respondent's failure to disclose these material facts renders the advertising referred to in Paragraphs Four and Five false, deceptive or misleading.

PAR. 12. Furthermore, through the use of the advertising referred to in Paragraphs Four and Five, respondent, directly or by implication, favorably compares some characteristics of Encare to the pill or the IUD and represents in the same advertising that Encare has an extremely high use effectiveness. Favorable comparison of Encare to certain characteristics of the pill or IUD has the tendency and capacity to lead members of the public into the erroneous and mistaken belief that Encare's use effectiveness is equal to that of the pill or IUD. Respondent fails to disclose the material fact that Encare has a use effectiveness below that of the pill or IUD and approximately the same as other vaginal foam contraceptive products.

PAR. 13. The fact described in Paragraph Twelve is material in light of the comparative representations made in respondent's advertising. Respondent's failure to disclose this material fact in advertising containing such comparative representations renders

the advertising referred to in Paragraphs Four and Five false, misleading or unfair.

PAR. 14. In the course and conduct of its business, and at all times mentioned herein, respondent is in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of services of the same general kind and nature as are sold by respondent.

PARA. 15. The use by respondent of the aforesaid false, misleading, deceptive or unfair statements, representations, acts or practices and the dissemination of the aforesaid false advertising has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondent's products or services by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondent as herein alleged, including the dissemination of false advertising, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioner Pitofsky did not participate.

Birth control Now it's as simple as this.



At last, Encare™

Neat, compact, no bigger than your fingertip, Encare™ is fast becoming the most talked about contraceptive we have today.

Free from hormonal side effects, Encare™ is available without a prescription. And it might well be the easiest method of birth control you will ever use.

Simply simple.

You simply insert Encare™ with the tip of your finger. There's no fiv measuring, no tubes, no applicators. And no messy paraphernalia to clean up

afterward. Each tiny insert contains an exact, premeasured amount of the clinically proven spermicide, nonoxonyl 9.

Simply effective.

Very simply, Encare™ works by neutralizing sperm. When used properly, Encare™ melts and gently effervesces, spreading throughout your vagina for protection against pregnancy.

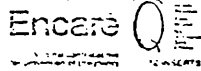
Even under very rigorous testing conditions, Encare's spermicide was

found to be highly effective.

Simply safe.

And if you ask your gynecologist about Encare™, you'll be reassured to hear that Encare™ cannot harm your body the way the pill or IUD might.

Which means, you simply won't be worried about those complications.



For maximum protection, it is essential that you read and follow the directions carefully, and, if indicated, consult your physician. No birth control method is guaranteed to prevent pregnancy.

Birth control, simplified.

DECISION AND ORDER

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

The respondents, their attorneys, 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 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 charge in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Benton & Bowles, Inc. is a New York corporation with its principal place of business at 909 Third Ave., New York, New York.
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

This Order applies to respondent Benton & Bowles, Inc. its successors, assigns, officers, agents and employees, whether acting directly or through any corporation, subsidiary, division or other device; *provided however*, that this Order shall not apply to ethical (professional) advertising prepared or disseminated by Medicus Communications, Inc. for any OTC (over-the-counter) contraceptive product other than Encare or any other vaginal contraceptive

suppository product. Except as otherwise provided, Order provisions apply to any act taken in connection with respondent's advertising, offering for sale, sale or distribution of Encare or any OTC contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States. The reasonable basis standards used in this Order are not intended to set a standard for drug products other than OTC contraceptives.

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

1) "*Use effectiveness*" or effectiveness "*in actual use*" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

2) "*Encare*" means the vaginal contraceptive suppository product marketed under the tradename Encare or Encare Oval, or any vaginal contraceptive suppository product of substantially the same chemical formulation.

3) "*Advertisement*" means any written, verbal or audiovisual statement, illustration, depiction or presentation, which is designed to effect the sale of any OTC contraceptive product, or to create interest in the purchasing of such products (except a package or package insert) whether same appears in a brochure, newspaper, magazine, leaflet, circular, mailer, book insert, catalog, billboard, public transit card, point-of-sale display, film strip, video presentation, or in a radio or television broadcast or in any other media, regardless of whether such statement, illustration, depiction or presentation is characterized as promotional, educational or informative; *provided, however*, that the term advertisement does not include material which solely refers to the product without making any claims for the product.

4) "*Product or use characteristic*" includes but is not limited to efficacy, safety or convenience.

I

It is ordered, That respondent cease and desist from:

A. Making in consumer (lay) advertisements any contraceptive effectiveness claims regarding Encare which use the words "effective" or "reliable" in conjunction with any performance or quality heightening modifiers such as "highly", "extremely" and the like.

B. Misrepresenting, directly or by implication, the effectiveness

of any OTC contraceptive product; unless respondent neither knew nor should have known that the representation was false, deceptive or misleading.

C. Representing, directly or by implication, that Encare has novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery.

D. Making any representation, directly or by implication, concerning the effectiveness of any OTC contraceptive product unless respondent has a reasonable basis for such representation consisting of a consistent body of valid and reliable scientific evidence; *provided, however*, that respondent may represent that Encare is effective or reliable or make other effectiveness claims as permitted by this Order (for example, "Encare provides reliable protection against pregnancy").

II

It is ordered, That respondent make the following affirmative disclosures in any consumer (lay) print advertisement for Encare:

A. For best protection against pregnancy, it is essential to follow package instructions.

B. If your doctor has told you that you should not become pregnant, you should ask your doctor which contraceptive method, including Encare, is best for you.

C. Some Encare users experience irritation in using the product.

D. It is essential that you insert Encare at least ten minutes before intercourse.

E. Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above affirmative disclosures shall be made clearly and conspicuously. Disclosures C, D and E shall be made in the exact language indicated above; *provided, however*, that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure D consistent with such reasonable basis. Disclosures D and E shall be made in type at least as large as the type face of the major portion of the text of the advertising copy. Disclosures D and E shall be separate and distinguishable from the main body of the advertisement for the period from the date of signing of this Order to February 19, 1982.

III

It is further ordered. That respondent make the following affirmative disclosure in any consumer (lay) print advertisement for Encare in which any product or use characteristic of Encare is compared, directly or by implication, to any product or use characteristic of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD"):

Encare is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

or

Encare is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Either above affirmative disclosure shall be made, where required, in lieu of Disclosure II.E above. The disclosure shall satisfy the requirements regarding exact language, size of type and relation to the main body of the advertisement specified for Disclosure II.E.

IV

It is further ordered. That respondent make the following disclosures in any consumer (lay) TV advertisements for Encare:

A. Follow directions exactly, including the ten minute waiting period.

B. Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above disclosures shall be made clearly and conspicuously as video supers and in the exact language indicated above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure IV.A consistent with such reasonable basis.

V

It is further ordered. That respondent make the following disclosure in any consumer (lay) radio advertisements for Encare:

Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above disclosure shall be made clearly and conspicuously and in the exact language indicated above.

VI

It is further ordered, That respondent shall make the following disclosures in ethical (professional) advertisements for Encare.

- A. Irritation accompanies use of the product in some instances.
- B. Encare must be inserted according to product instructions and at least ten minutes before intercourse.
- C. Encare is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

or

Encare is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Affirmative Disclosures A and B shall be made in language the same as or substantially similar to the language set forth above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure B consistent with such reasonable basis. Disclosure C shall be made in the exact language indicated above, in typeface at least as large as the typeface of the major portion of the text of the advertising copy.

VII

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

- A. Disseminating or causing the dissemination of any advertisement, by means of the United States mail or by any means in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, which contains any of the representations prohibited in Paragraph I.A-C of this Order or, with respect to Encare, fails to include any of the disclosures required by this Order.
- B. 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 Encare or any OTC contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, any advertisement which contains any of the representations prohibited in Paragraph I.A-C of this Order or, with respect to Encare, fails to include any of the disclosures required by this Order.

VIII

It is further ordered, That respondent maintain complete business records relative to the manner and form of its compliance with this Order. Such records shall include, but not be limited to, copies of and dissemination schedules for all advertisements; and documents which substantiate or contradict any claim made in advertising, promoting or selling the products. Such records shall be retained for at least three (3) years beyond the last dissemination of any relevant advertisement. Upon thirty (30) days notice respondent shall make any and all such records available to Commission staff for inspection or photocopying.

IX

It is further ordered, That respondent forthwith deliver a copy of this Order to each operating division and to all employees or agents now or hereafter engaged in the sale or offering for sale of Encare or in any aspect of the preparation, creation or placing of advertising for Encare on behalf of respondent. A statement acknowledging receipt of this Order shall be obtained in each case.

X

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in corporate respondent in which the respondent is not a surviving entity, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, or any other change in said corporation which may affect compliance obligations arising out of this Order.

XI

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

Commissioner Pitofsky did not participate.

IN THE MATTER OF

SHALLER RUBIN ASSOCIATES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECTIONS 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-3056. Complaint, March 4, 1981—Decision, March 4, 1981

This consent order requires, among other things, a New York City advertising agency to cease, in connection with the advertising and sale of Encare or any similar over-the-counter vaginal contraceptive suppository product, misrepresenting or failing to substantiate claims relating to the product's effectiveness, safety and performance characteristics. The firm is further prohibited from disseminating advertisements using performance or quality heightening modifiers such as "highly," or "extremely," in conjunction with words like "effective" or "reliable." Additionally, the order requires the company to disclose in print, radio and TV consumer advertising, certain facts material to contraceptive suppository use; and maintain business records for a period of three years.

Appearances

For the Commission: *Shirley Sarna and Paula Steiner.*

For the respondent: *Ellis Ratner, Davis & Gilbert, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Shaller Rubin Associates, Inc., a corporation (hereinafter "respondent"), has violated Sections 5 and 12 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Shaller Rubin Associates, Inc. is a New York corporation with its principal place of business at 909 Third Ave., New York, New York.

Allegations stated in the present tense include the past tense.

PAR. 2. For purposes of this complaint the following definitions shall apply:

(1) A "vaginal contraceptive suppository" is a spermicidal contraceptive product which is inserted into the vagina prior to coitus. Body temperature or vaginal secretions dissolve the suppository and spread its sperm killing agent through the vaginal cavity.

(2) "Use effectiveness" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of

subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

(3) "*Commerce*" means commerce as defined in the Federal Trade Commission Act, as amended.

PAR. 3. Respondent Shaller Rubin Associates, Inc. is a former advertising agency for Morton-Norwich Products, Inc. and Eaton-Merz Laboratories, Inc. In such capacity respondent Shaller Rubin Associates, Inc. has prepared and placed advertising for publication and has caused the dissemination of advertising, including the advertising referred to herein, to promote the sale of a vaginal contraceptive suppository product named "Encare" or "Encare Oval" (hereinafter "Encare") a "drug" within the meaning of Section 15 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business respondent has disseminated or caused the dissemination of certain advertisements concerning Encare (1) by United States mail, or by various means in or having an effect upon commerce, including but not limited to insertion in newspapers or magazines of interstate dissemination and radio broadcasts of interstate transmission for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Encare; or (2) by various means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Encare in or having an effect upon commerce.

PAR. 5. Among the advertisements and other sales promotion materials, and typical of the statements and representations made in respondent's advertisements but not all inclusive thereof, is the advertisement identified as Attachment 1 which is incorporated by reference herein.

PAR. 6. Through the use of this advertisement, and others not specifically set forth herein, respondent represents, directly or by implication, that:

1. Encare has an extremely high use effectiveness, approaching the level of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD").
2. Encare has novel contraceptive performance characteristics.

PAR. 7. In truth and in fact:

1. Encare's use effectiveness is approximately that of other vaginal contraceptive products. It is not considered to have a use effectiveness on the level of the pill or IUD.
2. Encare does not have novel contraceptive performance charac-

teristics except as to the characteristics associated with its method of delivery. Its sperm killing ingredient, nonoxynol 9, has been in use for many years in various contraceptive products.

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

PAR. 8. At the time respondent made the representations alleged in Paragraph Six, respondent had no reasonable basis for making those representations. Therefore, the making and dissemination of such representations constitute deceptive or unfair acts or practices in or affecting commerce.

PAR. 9. Through dissemination of the advertisement identified as Attachment 1, respondent advertises Encare without disclosing to the purchasing public through the advertising that:

1. Women for whom pregnancy presents a special health risk should make a contraceptive choice in consultation with their physician.
2. Some Encare users experience irritation in using the product.
3. Encare requires a waiting period of ten minutes before intercourse.

PAR. 10. Furthermore, respondent advertises Encare without disclosing to the purchasing public through the advertising that:

Encare is approximately as effective as vaginal foam contraceptives in actual use.

PAR. 11. The facts described in Paragraphs Nine and Ten are material with respect to the consequences which may result from use of Encare as a contraceptive under such conditions as are customary or usual. Respondent's failure to disclose these material facts renders the advertisements referred to in Paragraphs Four and Five false, deceptive or misleading.

PAR. 12. Furthermore, through the use of the advertisements referred to in Paragraphs Four and Five, respondent, directly or by implication, favorably compares some characteristics of Encare to the pill or the IUD and represents in the same advertisement that Encare has an extremely high use effectiveness. Favorable comparison of Encare to certain characteristics of the pill or IUD has the tendency and capacity to lead members of the public into the erroneous and mistaken belief that Encare's use effectiveness is equal to that of the pill or IUD. Respondent fails to disclose the material fact that Encare has a use effectiveness below that of the pill or IUD and approximately the same as other vaginal foam contraceptive products.

PAR. 13. The fact described in Paragraph Twelve is material in light of the comparative representations made in respondent's advertisements. Respondent's failure to disclose this material fact in advertisements containing such comparative representations renders the advertisements referred to in Paragraphs Four and Five false, misleading or unfair.

PAR. 14. In the course and conduct of its business, and at all times mentioned herein, respondent is in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of services of the same general kind and nature as are sold by respondent.

PAR. 15. The use by respondent of the aforesaid false, misleading, deceptive or unfair statements, representations, acts or practices and the dissemination of the aforesaid false advertisements has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondent's products or services by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondent as herein alleged, including the dissemination of false advertising, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioner Pitofsky did not participate.

THE FACTS:

1 HUNDREDS OF THOUSANDS OF AMERICAN WOMEN ARE ALREADY USING ENCARE OVAL™

Encare Oval™ was introduced in the U.S. to doctors in November 1977, and has drawn the attention of both the medical profession and the public to a greater extent than any contraceptive product since the pill. Gynecologists have been recommending it with high frequency. And Encare Oval already has become the vaginal contraceptive most often recommended by pharmacists.

Today, Encare Oval is being used by hundreds of thousands of women, and users surveyed report overwhelming satisfaction. Encare Oval users say they find it an answer to their concerns about the pill, IUDs, diaphragms, and aerosol foams.



the potent sperm-killing agent, nonoxynol 9. Once properly inserted, Encare Oval melts and gently effervesces, dispersing the protective, sperm-killing agent within the vagina.

It is known that the success of any contraceptive method depends on consistent and accurate use. Encare Oval™ has been designed to be so convenient, you won't be tempted to forget it. And so simple to insert, it's hard to make a mistake.

If you've been advised not to become pregnant for reasons of health, a decision about any contraceptive method should be made after consultation with your doctor.

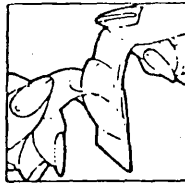
3 UNLIKE THE PILL, ENCARE OVAL HAS NO HORMONAL SIDE EFFECTS.

Encare Oval™ is free of hormones, so you're sure it won't disrupt your hormonal chemistry. Encare Oval™ cannot create hormone-related health problems—like strokes and heart attacks—that have been linked to the pill.

And because you don't take the pill, there's none of the associated weight gain, bloating, or breast enlargement. Since there is no hormonal disruption of your

2 ITS EFFECTIVENESS HAS BEEN ESTABLISHED IN CLINICAL TESTS.

In a recent U.S. clinical study, Encare Oval was subjected to one of the most rigorous tests ever conducted for a vaginal contraceptive. It showed that Encare Oval provides consistent and extremely high sperm-killing protection. These excellent results support earlier studies in European laboratories and clinics. Each Encare Oval insert contains a precise, premeasured dose of



The most contraceptive

menstrual cycle your periods should remain normal.

In some cases a feeling of warmth has been reported when using Encare Oval. This is usually no cause for concern.

In a limited number of cases, however, a burning sensation or irritation has been experienced by either or both partners. This can occur in varying degrees with virtually all vaginal contraceptives.

In these instances, use should be discontinued.

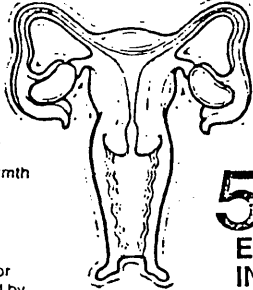
4 ENCARE OVAL IS EASIER TO INSERT THAN A TAMPON.

The Encare Oval is smooth and small, so it inserts quickly and easily—without an applicator. Simply use as directed.

There's none of the bother of aerosol foams and diaphragms. Just insert an Encare Oval when you need protection. There's nothing to wear. No device inside you to slip out of place. No pill to remember every day.

Each Encare Oval provides maximum protection during the period from 10 minutes to 1 hour after insertion.

You can buy Encare Oval whenever you need it...it's available without a prescription. And each Encare Oval



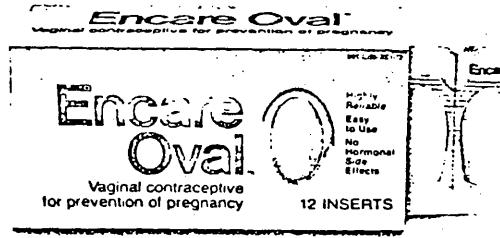
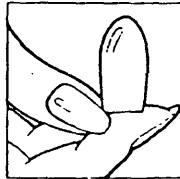
is individually wrapped to fit discreetly into your pocket or purse.

5 BECAUSE ENCARE OVAL IS INSERTED IN ADVANCE, IT WON'T INTERRUPT LOVEMAKING.

Since there's no fuss or bother, Encare Oval encourages spontaneity, providing a measure of freedom many other contraceptives can't match.

The hormone-free Encare Oval. Safer for your system than the pill or IUD. Neater and simpler than traditional vaginal contraceptives. So effective and easy to use that hundreds of thousands have already found it—quite simply—the preferred contraceptive.

© 1978 Eaton-Merz Laboratories, Inc.
Norwich, New York 13815 EA-1615



talked about since the pill.

DECISION AND ORDER

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

The respondents, their attorneys, 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 admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Shaller Rubin Associates, Inc. is a New York corporation with its principal place of business at 909 Third Ave., New York, New York.
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

This Order applies to respondent Shaller Rubin Associates, Inc. its successors, assigns, officers, agents and employees, whether acting directly or through any corporation, subsidiary, division or other device. Except as otherwise provided, order provisions apply to any act taken in connection with respondent's advertising, offering for sale, sale or distribution of Encare or any OTC (over-the-counter) contraceptive product in or affecting commerce within the United

States, including the Commonwealth of Puerto Rico and any territory or possession of the United States. The reasonable basis standards used in this Order are not intended to set a standard for drug products other than OTC contraceptives.

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

1) "*Use effectiveness*" or effectiveness "in actual use" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

2) "*Encare*" means the vaginal contraceptive suppository product marketed under the tradename Encare or Encare Oval, or any vaginal contraceptive suppository product of substantially the same chemical formulation.

3) "*Advertisement*" means any written, verbal or audiovisual statement, illustration, depiction or presentation, which is designed to effect the sale of any OTC contraceptive product, or to create interest in the purchasing of such products (except a package or package insert) whether same appears in a brochure, newspaper, magazine, leaflet, circular, mailer, book insert, catalog, billboard, public transit card, point-of-sale display, film strip, video presentation, or in a radio or television broadcast or in any other media, regardless of whether such statement, illustration, depiction or presentation is characterized as promotional, educational or informative; provided, however, that the term advertisement does not include material which solely refers to the product without making any claims for the product.

4) "*Product or use characteristic*" includes but is not limited to efficacy, safety or convenience.

I

It is ordered, That respondent cease and desist from:

A. Making in consumer (lay) advertisements any contraceptive effectiveness claims regarding Encare which use the words "effective" or "reliable" in conjunction with any performance or quality heightening modifiers such as "highly", "extremely" and the like.

B. Misrepresenting, directly or by implication, the effectiveness of any OTC contraceptive product; unless respondent neither knew nor should have known that the representation was false, deceptive or misleading.

C. Representing, directly or by implication, that Encare has

novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery.

D. Making any representation, directly or by implication, concerning the effectiveness of any OTC contraceptive product unless respondent has a reasonable basis for such representation consisting of a consistent body of valid and reliable scientific evidence; provided, however, that respondent may represent that Encare is effective or reliable or make other effectiveness claims as permitted by this Order (for example, "Encare provides reliable protection against pregnancy").

II

It is further ordered, That respondent make the following affirmative disclosures in any consumer (lay) print advertisement for Encare:

A. For best protection against pregnancy, it is essential to follow package instructions.

B. If your doctor has told you that you should not become pregnant, you should ask your doctor which contraceptive method, including Encare, is best for you.

C. Some Encare users experience irritation in using the product.

D. It is essential that you insert Encare at least ten minutes before intercourse.

E. Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above affirmative disclosures shall be made clearly and conspicuously. Disclosures C, D and E shall be made in the exact language indicated above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure D consistent with such reasonable basis. Disclosures D and E shall be made in type at least as large as the type face of the major portion of the text of the advertising copy. Disclosures D and E shall be separate and distinguishable from the main body of the advertisement for a period of 24 months following the date of service of this Order or 27 months from the date of signing of this Order, whichever expires earlier.

III

It is further ordered, That respondent make the following affirma-

tive disclosure in any consumer (lay) print advertisement for Encare in which any product or use characteristic of Encare is compared, directly or by implication, to any product or use characteristic of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD"):

Encare is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

or

Encare is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Either above affirmative disclosure shall be made, where required, in lieu of Disclosure II.E above. The disclosure shall satisfy the requirements regarding exact language, size of type and relation to the main body of the advertisement specified for Disclosure II.E.

IV

It is further ordered, That respondent make the following disclosures in any consumer (lay) TV advertisements for Encare:

A. Follow directions exactly, including the ten minute waiting period.

B. Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above disclosures shall be made clearly and conspicuously as video supers and in the exact language indicated above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure IV.A consistent with such reasonable basis.

V

It is further ordered, That respondent make the following disclosure in any consumer (lay) radio advertisements for Encare:

Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above disclosure shall be made clearly and conspicuously and in the exact language indicated above.

VI

It is further ordered, That respondent shall make the following disclosures in ethical (professional) advertisements for Encare.

- A. Irritation accompanies use of the product in some instances.
- B. Encare must be inserted according to product instructions and at least ten minutes before intercourse.
- C. Encare is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

or

Encare is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Affirmative Disclosures A and B shall be made in language the same as or substantially similar to the language set forth above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure B consistent with such reasonable basis. Disclosure C shall be made in the exact language indicated above, in typeface at least as large as the typeface of the major portion of the text of the advertising copy.

VII

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

- A. Disseminating or causing the dissemination of any advertisement, by means of the United States mail or by any means in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, which contains any of the representations prohibited in Paragraph I.A-C of this Order or, with respect to Encare, fails to include any of the disclosures required by this Order.
- B. 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 Encare or any OTC contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, any advertisement which contains any of the representations prohibited in Paragraph I.A-C of this Order or, with respect to Encare, fails to include any of the disclosures required by this Order.

VIII

It is further ordered, That respondent maintain complete business records relative to the manner and form of its compliance with this Order. Such records shall include, but not be limited to, copies of and dissemination schedules for all advertisements; and documents which substantiate or contradict any claim made in advertising, promoting or selling the product. Such records shall be retained for at least three (3) years beyond the last dissemination of any relevant advertisement. Upon thirty (30) days notice respondent shall make any and all such records available to Commission staff for inspection or photocopying.

IX

It is further ordered, That respondent forthwith deliver a copy of this Order to each operating division and to all employees or agents now or hereafter engaged in the sale or offering for sale of Encare or in any aspect of the preparation, creation or placing of advertising for Encare on behalf of respondent. A statement acknowledging receipt of this Order shall be obtained in each case.

X

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in corporate respondent in which the respondent is not a surviving entity, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, or any other change in said corporation which may affect compliance obligations arising out of this Order.

XI

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

Commissioner Pitofsky did not participate.

IN THE MATTER OF
CITICORP FINANCIAL, INC.

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

Docket C-3057. Complaint, April 18, 1973—Decision, March 4, 1981*

This consent order requires, among other things, a Towson, Md. financial organization to cease issuing any unsolicited credit card, except in renewal of or in substitution for an accepted credit card. Respondent is additionally required to maintain prescribed records for specified periods.

Appearances

For the Commission: *Frederick D. Clements.*

For the respondent: *Lucian C. Jones, Shearman & Sterling, New York City.*

DECISION AND ORDER

The Commission having heretofore issued its decision and order in Docket No. C-2383 in the matter of Arlen Realty & Development Corp., a corporation, also doing business as Korvettes, a division, and NAC Credit Corporation, a corporation, on April 18, 1973, which provides that said order shall apply to "successors and assigns" of said respondents; and

Citicorp Financial, Inc., having succeeded to a substantial part of the assets of NAC Credit Corporation, a corporate respondent in Docket No. C-2383, and to the management and operation of the NAC Charge Plan formerly managed and operated by NAC Credit Corporation; and

Citicorp Financial, Inc., and counsel for the Commission having executed an agreement containing a consent order, an admission by Citicorp Financial, Inc., of the jurisdiction of the Federal Trade Commission of the subject matter of this proceeding and of Citicorp Financial, Inc., as a successor of NAC Credit Corporation, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Citicorp Financial, Inc., that it has violated the law as alleged in the Arlen Realty & Development Corp., *et al.* Complaint (Docket No. C-2383),

* Complaint previously published at 82 F.T.C. 1234.

and waivers and other provisions as required by the Commission's Rules; and

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

1. Respondent Citicorp Financial, 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 7720 York Road, Towson, Maryland.

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 Citicorp Financial, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the issuance of credit cards, as "credit card" is defined in Regulation Z (12 CFR 226) of the Truth in Lending Act, as amended, (P.L. 90-321, 15 U.S.C. 1601, *et seq.*), shall forthwith cease and desist from:

Issuing any credit card, other than a credit card issued in renewal of or in substitution for an accepted credit card, as "accepted credit card" is defined in Section 226.13(a) of Regulation Z, unless:

1. In response to the recipient's separate signed, affirmative and specific written request or written application therefor.

Or

2. In response to the recipient's specific oral request obtained pursuant to oral solicitation, *provided*, that the following procedures are employed:

a) The person making the oral solicitation must state the following, or words of similar meaning and import, at the very outset of the conversation with the person being solicited:

The purpose of this telephone call [or conversation] is to find out if you would like to have a NAC [or other specific name, as applicable] credit card.

And

b) A detailed log of all oral solicitations is maintained for a period of at least two years, such log to include:

- (1) The name of the individual who made the oral solicitation;
- (2) The name of the person with whom the solicitor spoke;
- (3) The time and date of the solicitation; and
- (4) Whether or not a credit card was requested.

A. *It is further ordered*, That for a period of five (5) years from the date of entry of this order respondent shall:

1. Maintain records of all oral and written complaints it receives concerning its solicitation programs; provide those records to the staff of the Federal Trade Commission upon request; reflect in those records, in the case of each such oral complaint, the name and address of the complainant together with a brief identification of the nature of the complaint, and to include in those records, in the case of each such written complaint, a copy of the complaint.

2. Maintain a copy of each contract between it and any other party pursuant to which that party will solicit new holders for any credit card issued by Citicorp Financial, Inc., and to provide those copies to the staff of the Federal Trade Commission upon request.

3. Take steps to insure that a full consumer credit report on any applicant solicited during any new account solicitation program is not obtained by Citicorp Financial, Inc. (or by any person soliciting new accounts on behalf of Citicorp Financial, Inc.) during the period of time commencing on the date on which such applicant is first contacted, orally or in writing, by Citicorp Financial, Inc. (or by any person soliciting new accounts on behalf of Citicorp Financial, Inc.) and ending on the earlier of (i) the date on which the applicant submits a written request for the credit card or (ii) the date on which the applicant first uses the credit card.

B. *It is further ordered*, That respondent shall forthwith deliver a copy of this order to cease and desist to all persons engaged in the solicitation or issuance of respondent's credit cards, whether or not employed by respondent, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

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

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

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

Interlocutory Order

97 F.T.C.

IN THE MATTER OF

GROLIER, INCORPORATED

*Docket 8879. Interlocutory Order, March 10, 1981*ORDER GRANTING DISCOVERY IN PART; DENYING DISCOVERY IN PART
AND "CLARIFYING" SEPTEMBER 12, 1980 ORDER

On September 12, 1980, we issued an order reopening this proceeding to comply with the mandate of the Court of Appeals for the Ninth Circuit in *Grolier, Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980). On November 6, 1980,¹ respondent Grolier, Incorporated ("Grolier"), filed motions for discovery and "clarification" of our Order. The memorandum ("Resp. Memo.") accompanying the motions argued that the Commission had issued an order that "contradicts" the mandate of the Ninth Circuit (Resp. Memo. 6) and sought to justify extensive discovery. On November 26, 1980, complaint counsel filed an answer ("Answer"), with accompanying affidavits, which contends that additional discovery is not necessary. Finally, on December 22, 1980, Grolier filed a motion for leave to file a reply memorandum and a request for additional discovery.

Upon review it is difficult to escape the conclusion that Grolier's motion for "clarification" is largely designed to delay this proceeding. The only "clarification" sought is whether the September 12 Order requires "Grolier to follow a procedure different from what the Ninth Circuit mandated." Resp. Memo. at 6.² The answer is that it does not. As noted above, the Ninth Circuit's remand was premised on the fact that it believed Grolier was improperly denied any knowledge of Judge von Brand's prior participation in this case. The Court of Appeals, however, was unaware that an FOIA request, identical to Grolier's original discovery motion, had yielded all but 28 documents prior to remand. Our Order (Order at 2) invited the parties to comment on whether the release of those documents rendered the original discovery motion moot. Grolier chose not to comment. We, therefore, hold that, with our action today, Grolier's original discovery request for documents has been granted in its entirety. We do not believe the Court of Appeals intended the

¹ By the terms of the Commission's order of September 12, 1980, Grolier was allowed to renew its motion to disqualify Judge von Brand if it desired, and required to present the Commission with specified evidence on questions relevant to the motion by October 23, 1980. On September 29, 1980, Grolier sought additional time purportedly to review the documents it had possessed for several years by virtue of a FOIA request, before responding to the Commission's order.

² In seeking additional time on September 29, 1980, Grolier did not allude to any uncertainty as to what the Commission had ordered it to do and suggested to the Commission only that the additional time it requested was necessary to examine the documents it had received years ago under the FOIA, so that it could point to specific facts that demonstrated Judge von Brand should be disqualified.

Commission to elevate form over substance and search the same documents repeatedly³ simply to provide them in formal response to Grolier's discovery motion. The documents Grolier has, and has had for some time,⁴ along with the documents we make available by this order and the affidavits of Judge von Brand and former Commissioner MacIntyre should "adequately disclose the existence or non-existence of ALJ von Brand's involvement in prior Grolier matters." *Grolier, Inc. v. FTC, supra*, 615 F.2d at 1222. Now, according to the Court of Appeals, "Grolier, who has the burden of proof on the disqualification issue, may rightfully be obligated *** to offer evidence contradicting the sworn statements of the [FTC] ***." *Id.*

In its motion of November 6, 1980, Grolier seeks discovery beyond that which the Ninth Circuit ordered the Commission to consider. The requested discovery includes three depositions and ten categories of documents. Complaint counsel's Answer argues that most of this requested discovery will not shed light on the question of whether Judge von Brand was involved with information related to Grolier "received outside of the controlled adjudicative setting." 615 F.2d at 1220.

Complaint counsel has examined the remaining twenty-eight documents involved in Grolier's original request and not currently available to Grolier and states that none of the documents indicate they were "written, received or reviewed" by Judge von Brand. Affidavit of Edward B. Craig, IV. Complaint counsel also points out that a review of the Index to Documents⁶ (Submission of Documents, Exhibit C) in the FOIA suit makes it clear that nothing in the withheld portions of the documents would reveal anything about Judge von Brand's involvement with Grolier matters while he was an attorney-advisor. For example, the segments excised from the six documents in category A are only staff recommendations or opinions which could not reveal Judge von Brand's involvement. The documents in category B (Commission circulations) could only reveal whether Commissioner MacIntyre circulated a matter. Similarly the documents in category C (assignment sheets) could only reveal that a

³ The Commission searched its files two times at Grolier's request in the FOIA suit. Submission of Documents in Response to the Commission's Order of September 12, 1980 ("Submission of Documents"), Exhibits B and E. In addition, it responded to lengthy interrogatories from Grolier as to the nature of the Commission's record keeping systems. Submission of Documents, Exhibit D.

⁴ Some of the documents were provided to Grolier as early as May 1976. As of June 1976, only 41 documents were being withheld and some of those were partially released. In March 1979, the Commission released all of its blue minutes to Grolier with minor deletions. Submission of Documents, Exhibits B and G.

⁵ The Court of Appeals also would have allowed Grolier "to point out the inadequacy and inconsistency, if any, in the sworn statements" before it could subpoena documents. 615 F.2d at 122. Since this order and the FOIA response make available all the documents originally requested, this point is moot.

⁶ The district court in the FOIA suit reviewed the documents *in camera* and found the documents were both accurately described in the Index and properly withheld. Submission of Documents, Exhibit F.

matter was assigned to Commissioner MacIntyre. Because the Ninth Circuit rejected Grolier's argument that Judge von Brand is chargeable with involvement in all matters before the Commission while an attorney-advisor, whatever Commissioner MacIntyre reviewed or did has little relevance to Judge von Brand's "actual involvement" with Grolier information. 615 F.2d at 1221. Moreover, Mr. MacIntyre has provided an affidavit in which he states that he divided work in his office between investigative matters and adjudicative matters and only assigned adjudicative matters to Judge von Brand. Answer, Exhibit A. Grolier also requests documents referred to in the blue minutes which the Commission has already released. But, Grolier already has four of these documents. Answer, p. 10. Two others involve requests by state attorneys general for access to information contained in the Grolier file and do not concern the merits of the investigation. Answer, p. 10 and Exhibit B. The final document referenced contains a typographical error in the blue minute and, in any event, was prepared after Judge von Brand ceased to serve as an attorney-advisor. The last category of documents (staff notes on conversations with Grolier personnel) would not have come to the attention of the Commission.

Although the arguments summarized above do strongly suggest that the 28 documents in question, by their nature, could not shed light upon ALJ von Brand's involvement with Grolier matters, and although the district court has ruled that the documents are properly withheld as privileged in the FOIA context, the Commission has determined, in the exercise of its discretion, to release these documents to Grolier.

Grolier's other discovery requests in the November 6, 1980, motion called for documents that do not exist or appear unnecessary, especially in view of Mr. MacIntyre's affidavit, and are denied.⁷ Grolier has also filed a "reply" in support of its discovery motion and requested yet a fourth deposition. A reply is not normally permitted under our Rules (16 C.F.R. 3.22(c)). While we will grant leave to file the reply we deny the request for additional discovery. Grolier argues that Mr. MacIntyre's affidavit is at variance with Judge von Brand's affidavit and our previous opinions. But Grolier is factually incorrect.⁸ More fundamentally, Grolier misconstrues the Ninth

⁷ For example, several categories of documents sought concern items in Mr. MacIntyre's personal files. But Mr. MacIntyre states he has no such files relating to Grolier. Answer, Exhibit A. Other categories of documents sought involve all Commission cases in the relevant period that concerned encyclopedia sales or door-to-door sales on the ground they may be related cases because the same issues may be involved. This request is too sweeping and goes beyond the crucial question we must answer on disqualification, i.e., the extent to which the challenged adjudicator (Judge von Brand) was actually involved in his former position "with the case he is deciding." 615 F.2d at 1221. See also *Kroger, Inc.*, Docket 9102, Order, June 5, 1980.

⁸ There simply is no inconsistency between former Chairman Engman's perception that an attorney-advisor

(Continued)

Circuit's mandate to allow it endless discovery. The Ninth Circuit only required us to provide the documents Grolier requested if there were inconsistencies in the affidavits dealing with Judge von Brand's prior involvement. See note 5, *supra*. The Commission has now done this. Grolier has all the documents it originally requested; all the documents related to Grolier which came before the Commission while Judge von Brand served as an attorney advisor; the sworn statements of Judge von Brand and Commissioner MacIntyre that they cannot recall his involvement with, or knowledge of, Grolier matters while he was an attorney-advisor. This wealth of materials far exceeds that available in *R.A. Holman & Co. v. SEC*, 336 F.2d 446, 452-54 (2d Cir. 1966) (the case the Ninth Circuit relied upon in ordering us to consider further discovery). There the Court held that it was not improper to refuse to allow depositions of the individual allegedly disqualified and others, when the party seeking disqualification received a summary of the investigation and sworn statements that the individual did not have any "substantial knowledge of the facts in issue."

With the benefit of everything involving Grolier that was before the Commission during the period Judge von Brand served as an attorney advisor, Grolier must now present evidence of his "actual involvement" with the Grolier case and demonstrate with particularity, his involvement, with *ex parte* matters received outside the controlled adjudicative setting and relevant to facts in issue. (615 F.2d at 1220.) We expect Grolier to file a renewed disqualification motion "if it is appropriate" (Reply 1, n.1), conforming to our Order of September 12, 1980, no later than March 30, 1981.⁹

Therefore, it is ordered, That Grolier is granted leave to file its reply and Grolier's motion for discovery is granted insofar as it requests the twenty-eight documents withheld in the FOIA suit and denied in all other respects, and

It is further ordered, That complaint counsel, upon receipt of this

"has access to the whole of his Commissioner's business," our statement that there is a "public perception that an attorney-advisor has some *** knowledge of all matters received the Commissioner's office," and Mr. MacIntyre's sworn statement that he compartmentalized the functions his advisors performed. First, what is at issue here is not a question of potential access or knowledge, but Judge von Brand's "actual involvement" with Grolier facts. 615 F.2d at 1221. Second, we are uniquely aware that each Commissioner has different office policies. Finally, and most important the Ninth Circuit specifically rejected the applicability of our clearance cases to the disqualification context by observing that Grolier's approach would produce an "unnecessarily unpractical approach." We do not see any inconsistency either in the fact that to the best of Mr. MacIntyre's recollection Judge von Brand "never saw or knew about" Grolier matters and Judge von Brand's statement that he could not recall such matters even though he could not "flatly rule out" the possibility.

⁹ In view of the fact that Grolier has had virtually all the documents originally requested since 1976, the fact that Grolier previously led the Commission to believe it was examining those documents to comply with the Commission's order, and the fact that there are only 28 new documents to examine, an extension of time will be granted only in the most extraordinary circumstances.

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order serve Grolier with unexcised copies of the twenty-eight documents withheld in the Grolier FOIA suit, and

It is further ordered, That Grolier, if it desires, file a renewed motion to disqualify Judge von Brand, addressing the issues specified in our Order of September 12, 1980, no later than March 30, 1981.

Commissioner Pitofsky did not participate.

Interlocutory Order

IN THE MATTER OF

BOISE CASCADE CORPORATION

Docket 9133. Interlocutory Order, March 12, 1981

Denial of motions to disqualify Commissioner and dismiss complaint.

ORDER

On January 5, 1981, respondent filed a motion seeking recusal and alternatively, disqualification, of Commissioner Paul Rand Dixon based upon his public statement on April 23, 1980, which elucidated his reason for voting for the issuance of the complaint in this proceeding. On October 24, 1980, respondent had previously sought dismissal of the complaint from Administrative Law Judge Parker on the same basis. Although Judge Parker denied respondent's motion for dismissal and refused to certify this issue to the full Commission, respondent now seeks dismissal as a remedy from the Commission based upon Commissioner Dixon's statement. Complaint counsel seeks to have the motion returned to respondent "without Commission action" because Judge Parker had previously refused to certify the issue for Commission disposition.* On January 30, 1981, Commissioner Dixon placed a statement on the record in which he declined to recuse himself and stated his belief that it would be appropriate for the Commission to address the issue. On February 26, 1981, respondent filed a document denominated "Answer of Respondent Boise Cascade Corporation to Statement of Commissioner Dixon in Response to Motion for Recusal." The Commission has determined that respondent's motion should be denied.

We see no reason to disqualify Commissioner Dixon, since we do not believe that any bias, prejudice or apparent unfairness has been demonstrated. *Cinderella Career & Finishing School, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970); *Amos Treat & Co. v. SEC*, 306 F.2d 260, 267 (D.C. Cir. 1962). Commissioner Dixon's statement, in context, was an official, on-the-record expression of his view that the statutory requirement that the Commission's complaint be based on "reason to believe" had been fulfilled. *Cf., FTC v. Standard Oil Co.*, 101 S.Ct. 488, 493-94, 496-97 n. 14 (1980); *FTC v. Cement Institute*, 333 U.S. 683, 700-03 (1948); *Duffield v. Charleston Area Medical Center*, 503 F.2d 512, 517-19 (4th Cir. 1974); *Pangburn v. CAB*, 311 F.2d 349, 356-58 (1st Cir. 1962). It is axiomatic that in determining

* The ALJ certified other claims presented in the motion to dismiss which will be treated in a separate order at a later date.

whether the Commission has "reason to believe" sufficient to issue a complaint, the Commissioners must be able to review information, gathered by the staff in the investigation, which may ultimately be offered in evidence in the adjudicative proceeding.

In his statement issued simultaneously with the complaint, Commissioner Dixon said, in pertinent part, "[F]rom my review of the investigatory record I have reason to believe that there is sufficient evidence to find a violation" Respondent contends that Commissioner Dixon's statement "shows that he has weighed the evidence and concluded before any trial that [respondent] is guilty." In particular, respondent argues that Commissioner Dixon should have said only that he had reason to believe there *may be* evidence sufficient to find a violation, not that he had reason to believe there *is* evidence sufficient to find a violation. Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), clearly provides, however, that the Commission may issue a complaint only when it has "reason to believe any . . . corporation *has been or is* using any unfair method of competition. . . ." (emphasis added). See *FTC v. Standard Oil Co.*, 101 S.Ct. 488, 493-94 (1980). Section 11(b) of the Clayton Act, 15 U.S.C. 21(b), contains a parallel provision. We conclude there is no basis to disqualify Commissioner Dixon or to dismiss the complaint.

It is ordered, (1) That respondent's motion to disqualify Commissioner Dixon be, and hereby is, denied;

(2) That respondent's motion to dismiss the complaint based on the alleged prejudgment of Commissioner Dixon be, and hereby is, denied.

Commissioner Dixon not participating.

IN THE MATTER OF

JIM WALTER CORPORATION, ET AL.

Docket 8986. Interlocutory Order, March 13, 1981

Reopening proceedings on remand of the United States Court of Appeals.

ORDER

On September 12, 1980, the United States Court of Appeals for the Fifth Circuit vacated the Commission's Final Order in this matter and remanded the case for reconsideration in light of its findings. Upon expiration of the time for filing petitions for rehearing and for a writ of certiorari, the matter has returned to the jurisdiction of the Commission.

It is therefore ordered, That the proceeding be, and hereby is, reopened;

It is further ordered, That complaint counsel and respondent file briefs presenting their views as to further disposition of this matter.* The parties should address all issues relevant to the question whether further evidentiary hearings are warranted, including, but not limited to, the facts to be established in any future evidentiary hearings, the current market shares of the respondent and the other firms in this relevant product market, any relevant post-acquisition experience of respondent and other firms in this relevant product market, the court's findings with respect to the relevant geographic market, the public interest in further evidentiary hearings and the likelihood of effective relief.

Complaint counsel shall submit their brief within thirty days of the date of this Order, and respondent shall submit its brief within thirty days of the date of service of complaint counsel's brief. No other brief will be permitted without leave of the Commission. All briefs shall follow the form and page limitations set forth in Section 3.52(b), (c) and (e) of the Commission's Rules of Practice.

Commissioner Pertschuk not participating.

* The briefs should be filed *in camera* initially. The Commission will thereafter request appropriate views of the parties, and determine which material should remain *in camera* in accordance with the standards in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184 (1961), *Bristol-Myers Company*, 90 F.T.C. 455 (1977) and *General Foods Corp.*, Docket No. 9085, Order of March 10, 1980.

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IN THE MATTER OF

INTERNATIONAL TELEPHONE & TELEGRAPH
CORPORATION, ET AL.*Docket 9000. Interlocutory Order, March 13, 1981*

ORDER DENYING REQUEST FOR REIMBURSEMENT OF EXPENSES

By a brief filed with the Commission on September 29, 1980, Interstate Brands Corporation ("Interstate") seeks to appeal the denial by Administrative Law Judge Brown of its motion of July 24, 1980, for payment of costs incurred in the production of documents in response to a subpoena *duces tecum*. The subpoena, issued on September 19, 1979, at respondents' request as part of their deferred discovery of nonparties, called for the production of certain documents in Interstate's possession for inspection and copying by respondents. On October 4, 1979, Interstate filed a motion to quash the subpoena on several grounds. Limiting the subpoena somewhat, the ALJ otherwise denied the motion to quash on October 17, 1979. Interstate thereafter complied fully with the subpoena. On August 26, 1980, the ALJ denied Interstate's request for reimbursement of its costs of compliance, stating that "in [his] opinion, the Administrative Law Judge does not have authority to issue an enforceable order granting a money judgment against a respondent on behalf of a nonparty."^{*}

Although Judge Brown's language is ambiguous, his order appears to state that while the Commission may exercise such authority in its discretion, the ALJ may not. If this holding was intended, then Interstate's motion of July 24 should have been certified under Section 3.22(a) of the Commission's Rules of Practice.¹ See *Crush International Limited*, 80 F.T.C. 1023, 1024 (1972). In view of the ambiguity, and in order to provide guidance to ALJs on the appropriate treatment of such reimbursement requests, the Commission will treat the present motion as having been certified.²

An ALJ does have the authority, in proper cases, to condition issuance of a subpoena upon an agreement to reimburse expenses of

^{*} Order Denying Motion of Interstate Brands Corporation for Compensation for the Production of Documents Subpoenaed as Part of Respondents Discovery, at 2.

¹ Rules of Practice Section 3.22(a) provides, in pertinent part:

"Any motion upon which the Administrative Law Judge has no authority to rule shall be certified by him to the Commission with his recommendation where he deems it appropriate."

² In their response to the present motion, respondents correctly point out that Interstate has not requested or obtained certification of this question by the ALJ, a prerequisite to interlocutory Commission review of the ALJ's August 26, 1980, order under Rule 3.23(b) of the Commission's Rules of Practice. However, as discussed above, we shall treat the matter as properly before us under Rule 3.22(a).

compliance, or to deny a motion to quash on the condition that reimbursement be made. This authority is integral to the ALJ's general authority to "deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Rules of Practice Section 3.31(c)(1). See also Fed. R. Civ. P. 45(b)(2).

The standards applicable to reimbursement requests in adjudicative proceedings are essentially the same as those previously announced by the Commission with respect to investigative subpoenas.³ A subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, but reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable.⁴ To determine whether expenses are "reasonable," the ALJ should compare the costs of compliance in relation to the size and resources of the subpoenaed party. See, e.g., *SEC v. OKC Corp.*, 474 F.Supp. 1031 (N.D. Tex. 1979).

As to the timing of a subpoenaed party's request for reimbursement of costs of compliance, the Commission's Rules of Practice provide that a motion to quash or limit a subpoena in an adjudication "shall set forth all assertions of privilege or other factual and legal objections to the subpoena, including all appropriate argument, affidavits and other supporting documentation." Rules of Practice Section 3.34(c). A request for the costs of compliance based on the burdensomeness of the subpoena should be raised at the same time the subpoenaed party files its motion to quash with the ALJ, because a request for reimbursement must be predicated upon the "factual and legal objection" that the costs of compliance with the subpoena would be unreasonable. If the ALJ finds such an objection to be merited, he should require the proponent of the subpoena to cure the unreasonable burden, either by conditioning his denial of the motion to quash upon the proponent's agreement to reimburse the recipient so as to reduce compliance costs to a reasonable level,⁵ or (absent such an agreement) by granting the motion to quash.

Of course, compliance costs may not be fully foreseen. A subpoena recipient may undertake compliance with a subpoena on the belief,

³ See Order Denying Motion to Reimburse Costs of Complying With Subpoena Duces Tecum, File No. 782 3078, August 31, 1979 (Creditors Service Bureau of El Paso, Inc.)

⁴ See *SEC v. Arthur Young*, 504 F.2d 1013 (D.C. Cir. 1978), cert. denied, 439 U.S. 1071 (1979); see also *United States v. Dauphin Deposit Trust Co.*, 385 F.2d 129, 130 (2d Cir. 1967) (recipient of a summons has a duty of cooperation and at least up to some point must shoulder the financial burden of cooperation).

⁵ The provision of the Operating Manual (Chap. 10, Section 13.6.4.7.8) relating to ALJ reimbursement orders and the proponent's obligation to tender payment, refers to this situation, in which the proponent obtains enforcement of its subpoena only because it agrees to reimburse the costs of compliance. Once the proponent elects to ameliorate the otherwise undue burden of its subpoena in this way, it is bound by that election.

which turns out to be incorrect, that the costs will be reasonable. Therefore, the ALJ should afford the producing party the opportunity, even after compliance begins, to file a motion for a protective order conditioning further compliance upon an agreement for reimbursement of anticipated costs. The producing party may be able to show that its experience with partial compliance reveals the unreasonableness of the costs of remaining compliance. If so, the ALJ may act to relieve the undue burden in either of the ways available to him were a motion to quash filed: by conditioning further compliance upon the proponent's agreement to reimburse such compliance costs, or, if the subpoena proponent will not agree, by terminating the obligation for further compliance.

However, requests for reimbursement for compliance costs already incurred are untimely and inconsistent with the Commission's rules, because they deprive the ALJ and the proponent of the subpoena of the choice of means by which to ameliorate unreasonable burdens.

Interstate did not request reimbursement in its motion to quash, nor did it do so at any time during compliance. It suggests that the extent of its expenses could only be known after compliance. Brief at 4. Perhaps the exact dollar amounts could only be known after the fact, but we cannot credit the contention that Interstate was incapable of bringing to the ALJ's attention a reasonable approximation of anticipated expenses prior to their being incurred. Accordingly, Interstate's after-the-fact request is denied as untimely.

It is ordered, That Interstate's request for reimbursement be denied in light of the standards set out in this order.