

## Modifying Order

## IN THE MATTER OF

## DIAMOND CRYSTAL SALT COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF  
SECTION 7 OF THE CLAYTON ACT

*Docket 7323. Final Order, Feb. 4, 1960—Modifying Order, July 30, 1984*

This order reopens the proceeding and modifies the Commission's order issued on February 4, 1960 (56 F.T.C. 818), by deleting the provision that required the company to give the Commission 90 days' notice of any acquisition of a salt producer or distributor.

## ORDER MODIFYING FINAL ORDER

On February 4, 1960, the Federal Trade Commission, pursuant to Section 7 of the Clayton Act, issued the Order in this case against Diamond Crystal Salt Company. The Commission has determined that the public interest would be served by deleting the provision of that Order that requires Diamond Crystal to give the Commission 90 days' notice of any acquisition of a salt producer or distributor. Respondent has no objection to this modification.

Accordingly,

*It is ordered,* That this matter be, and it hereby is, reopened and that the Order in Docket No. 7323 be modified so that the reporting requirement contained in Paragraph 5 terminates on the date of service of this order.

FEDERAL TRADE COMMISSION DECISIONS

Complaint

104 F.T.C.

IN THE MATTER OF

CYNEX MANUFACTURING CORPORATION

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

*Docket C-3139. Complaint, Aug. 6, 1984—Decision, Aug. 6, 1984*

This Consent Order requires a Hillside, N.J. manufacturer and seller of a power factor controller (a device claimed to reduce the amount of electricity used by any motorized electrical home appliance or tool), among other things, to cease making any energy-related claim for its product unless the claim is based on competent and reliable substantiation. The order also bars respondent from making energy-related claims using the term "up to" or words of similar import, unless a significant number of consumers can achieve the maximum levels of savings or performance claimed; and where consumers cannot reasonably foresee the major factors or conditions affecting the maximum levels of savings or performance, respondent is required to clearly and prominently disclose the class of consumers who can achieve those levels. The firm is further prohibited from misrepresenting the purpose, content or conclusions of any test or study; and required to retain records substantiating claims for a period of three years.

*Appearances*

For the Commission: *Brinley H. Williams and Mitchell Paul.*

For the respondent: *Maurice H. Bitner, Parsippany, N.J.*

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 Cynex Manufacturing 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 aspect as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 2800 10th Avenue, Hillside, New Jersey.

PAR. 2. Respondent is now, and at all times relevant to this complaint has been, engaged in the manufacture and sale to the public of

a device known as a power factor controller which is sold by respondent under the name "Watt Wizard Model PFC 1000".

PAR. 3. In the course and conduct of its business, respondent has caused its power factor controller, when sold, to be shipped from its place of business in New Jersey to its distributors, retailers and individual customers in various States of the United States. Respondent's manufacture, sale and distribution of its power factor controller constitutes maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent at all times mentioned herein has been and now is in competition with individuals, firms and corporations engaged in the sale of power factor controllers and other products.

PAR. 5. In the course and conduct of its business, and for the purpose of promoting the sale and distribution of its power factor controller, respondent has disseminated and caused the dissemination of advertising for its power factor controller in magazines, newspapers and catalogs distributed by mail and across state lines and in radio and television broadcasts transmitted by stations located in various States of the United States and the District of Columbia having sufficient power to carry such broadcasts across state lines. In addition, respondent has distributed by mail or other means, product brochures and other sales literature directly to consumers or to dealers for display or distribution to consumers prior to or at the time of sale.

PAR. 6. Typical of said advertisements and promotional materials, disseminated as previously described, but not necessarily inclusive thereof, are the advertisements and promotional materials attached hereto as Exhibits A, B, C, D, E, F, and G. An example of the statements contained in said advertisements is "Save up to 60% of the cost of running your motorized home & shop appliances" (Exhibit B).

PAR. 7. Through the use of the advertisements and promotional materials referred to in Paragraph Six and others not specifically set forth herein respondent has represented, and now represents, directly or by implication, that:

Use of the Watt Wizard Model PFC 1000 power factor controller will save an appreciable number of consumers 60 percent or close to 60 percent of the electricity used by and cost of operating any motorized electrical home appliance or tool under circumstances reasonably foreseen by consumers.

PAR. 8. In truth and in fact, contrary to respondent's representation set forth in Paragraph Seven:

(a) Few, if any, consumers, using Watt Wizard Model PFC 1000, will save 60 percent or close to 60 percent of the electricity used by and

the cost of operating any motorized electrical home appliance or tool under reasonably foreseen circumstances.

(b) The Watt Wizard Model PFC 1000 power factor controller can only be used with appliances having electric alternating current motors, and therefore it cannot save electricity or reduce the cost of operating motorized electrical home appliances or tools powered by universal or brush motors.

Therefore, said representation is false, misleading and deceptive.

PAR. 9. In Exhibits A, B, C, D, E, F, G, and other advertisements and promotional materials substantially similar thereto, respondent has represented, directly or by implication, that at the time of the initial and each subsequent dissemination of the representation set forth in Paragraph Seven, it possessed and relied upon a reasonable basis for that representation.

PAR. 10. In truth and in fact, respondent did not possess and rely upon a reasonable basis for the representation set forth in Paragraph Seven, because, *inter alia*, respondent's test protocols and calculations were not designed or conducted to assess product performance under circumstances reasonably foreseen by consumers in operating motorized electrical home appliances or tools. Therefore, the advertisements and promotional materials containing the representation set forth in Paragraph Seven were and are false, misleading and deceptive.

PAR. 11. The use by respondent of the aforesaid false, misleading and deceptive representations and the placement in the hands of its distributors and retailers of the means and instrumentalities by and through which others may have used the aforesaid false, misleading and deceptive representations have had the capacity and tendency to mislead consumers into the erroneous and mistaken belief that said representations were and are true and complete, and into the purchase of respondent's power factor controller by reason of said erroneous and mistaken belief.

PAR. 12. The acts and practices of respondent as herein alleged are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair methods of competition and unfair and deceptive acts or practices in or affecting commerce, in violation of Section 5(a) of the Federal Trade Commission Act.

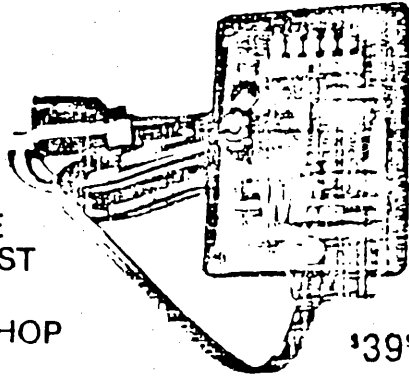
Commissioners Pertschuk and Bailey voted in the negative.

## EXHIBIT A

# WATT WIZARD

You are wasting money each time you run your electrically-powered motors!

**WATT WIZARD  
SAVES MONEY ...  
MACHINES ...  
MAINTENANCE!  
ALLOWS YOU TO SAVE  
UP TO 60% OF THE COST  
OF RUNNING YOUR  
MOTORIZED HOME & SHOP  
APPLIANCES!**



\$39<sup>95</sup>

#### HOW IT WORKS:

To put it simply, the WATT WIZARD enables your refrigerator (for example) to run efficiently on just 60 to 80 volts, instead of the full 120 volts direct from the power line. In addition to the wasted electricity cost, the wasted power produces an excess amount of heat within the motor, thus reducing its life and efficiency and increasing the probability of repairs and maintenance.

The WATT WIZARD senses the Power Factor of the motor and applies the exact voltage required to keep the motor running at a constant energy saving speed.

#### RESULTS:

You save up to 80% on each WATT WIZARD application. Your motor runs more efficiently, quieter, cooler, and longer, it's a more trouble-free temperature!

Since motor life is typically doubled for each 10°C reduction in insulation temperature, the WATT WIZARD could reduce the temperature of a motor up to 25 degrees. Motors like refrigerators and freezers that use large amounts of electricity and run hot are excellent applications for this device.

30 Day Money Back Guarantee  
Try the WATT WIZARD for 30 days. If you are not satisfied, we will refund your money. No questions asked. The WATT WIZARD is the only device that can sense the power factor of your motor and adjust the voltage to keep the motor running at a constant energy saving speed.

CALL  
Professional  
Marketing Services  
997-6468  
VISA or Mastercard  
accepted.  
8930 Suite J  
Oakland Center  
Columbia, Md. 21045

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EXHIBIT B



**Sale Ends 12-14-81**

# WATT WIZARD

## Demonstration

Sunday, December 13  
10 a.m. - 4 p.m.  
Naperville Store Only

SAVE UP TO 60%

OF THE COST OF  
RUNNING YOUR  
MOTORIZED HOME  
& SHOP APPLIANCES

**IT REALLY  
WORKS!**

*makes motors run  
cooler, longer, more  
trouble-free...and  
COST LESS TO OPERATE!*

REG. \$39.95



ONLY

# 34<sup>95</sup>



LESS \$2.00  
FACTORY REBATE

NAPOERVILLE ACE  
1638 E. Washington  
Naperville, IL  
328-0677

WHEATON NORTH ACE  
1705 N. Main  
Wheaton, IL  
682-0436

WHEATON SOUTH ACE  
1245 E. Burlington  
Wheaton, IL  
686-0336

MONTGOMERY ACE  
Chicago & Montgomery Sts.  
Montgomery, IL  
693-9666

# CYNEX Manufacturing Corporation

26 SAGER PLACE • HILLSIDE NEW JERSEY 07036  
 (201) 399-3334 • FAX 710-995-4730 • CYNEX MAIL

Ref: Watt Wizard 60' Fan

Rate - Moderate to fast.

AMCR:

Listen carefully. I'm gonna tell you about the Watt Wizard. Watt Wizard can save you up to 60% of the electric power needed to run the motor-operated appliances in your home or business saving up to 60% of the costs, too. Watt Wizard was developed by a way to save energy. Use it to save money and your machines life span. How? Just plug your appliance into Watt Wizard and plug Watt Wizard into a wall outlet. Watt Wizard is yours for only \$39.95 + 2.00 postage & handling. Look at your electric bills. You need Watt Wizard . . . Today. To order call 800-453-4000 That's 800-453-4000 or send \$39.95 + 2.00 postage & handling to M.E.C. Corp. Box 953, Elizabeth, NJ 07207, that's M.E.C. Corp., Box 953, Elizabeth, N.J. 07201.

Bills piling up? The Watt Wizard can save you, and it comes with a money back guarantee.  
 N.J. residents please add sales tax

Complaint

EXHIBIT C





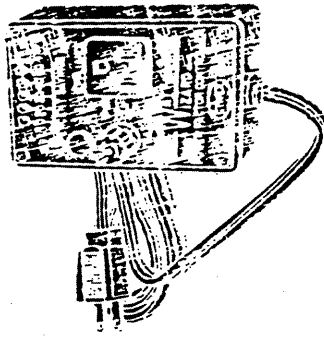
Complaint

EXHIBIT E

EFFECTIVE THROUGH 1967

# Gem NAME BRANDS

DEPARTMENT STORES



## CYNEX THE WATT WIZARD

The WATT WIZARD senses the Power Factor of the motor, and supplies the exact voltage required to keep the motor running at a constant, energy saving speed. Designed and patented by Nasa

### CONSUMER USES

- Refrigerators
- Freezers
- A/C Fans
- Swimming Pool Pumps
- Lamps
- Electric Fans

# 39.77

Per Watt (30.99)

100% EFFICIENCY, the WATT WIZARD senses the motor's Power Factor to run efficiently on the exact voltage required. It saves energy by adjusting the voltage to the motor's needs. In addition, the WATT WIZARD senses the motor's speed and adjusts the voltage to keep it constant, thus reducing its wear and tear.

EXHIBIT F

# SAVE MONEY!

USE **LESS ELECTRICITY** WITH

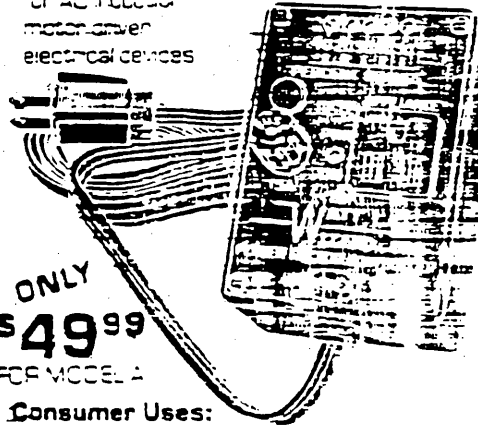
## The Watt Wizard

PAYS FOR ITSELF



### SAVE

up to 60%  
of the power used  
for AC induction  
motor-driven  
electrical devices



ONLY  
**\$49.99**

FOR MODEL A

#### Consumer Uses:

- Refrigerators
- Freezers
- A/C Fans
- Swimming Pools
- Furnaces
- Washers\*
- Dryers\*\*
- Air Conditioners\*

#### Industrial Uses:

- Drill Presses
- Lathes
- Food Processing  
Machines
- Printing Machines
- Textile Machines
- Pumps
- Conveyors

#### Features:

- Power-on Light
- LED Readout To  
Show Savings
- Fuse Protected
- Factory Preset
- Solid State Design
- Compact Size
- UL & CSA Approved
- 1 Year Limited  
Warranty
- Model PLUG-111
- Requires Wire & Nuts
- Licensed From NASA

Complaint

EXHIBIT G

## COLD WEATHER BARGAINS

**Glass Enclosures By Fireguard**

Price **79<sup>95</sup>**

**Reddy Space Heater**

159<sup>95</sup>

269<sup>95</sup>

We Sell **Kerasene**

**Titan Portable Utility Heater**

28<sup>88</sup>

Special

**Watt 77**

ENERGY SAVING POWER FACTOR CONTROLLER

**SAVE! UP TO 60% OF THE COST**

RUNNING YOUR MOTORIZED ELECTRICAL DEVICES

CONSUMER USES	INDUSTRIAL USES
• Air Conditioners	• Air Compressors
• Blenders	• Drills
• Dishwashers	• Dryers
• Freezers	• Grinders
• Lawn Mowers	• Saws
• Power Tools	• Washers
• Stoves	• Vacuums
• Water Heaters	• Welders

39<sup>95</sup>

PLUS 200<sup>00</sup> F.D. REBATE

ACTUAL COST **37<sup>95</sup>**

PLUS YOU GET 10% ENERGY TAX CREDIT

**Boekamp Quartz Heater**

Sole 29<sup>88</sup>

# ALBERT BROS.

2207 BELLMORE AVE BELLMORE I.I. 516 785-2262

Open Daily 9am - 9pm  
Mon. 9am - 10pm  
Closed Sundays

## DECISION AND ORDER

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

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

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

1. Respondent Cynex Manufacturing Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 28 Sager Place, in the City of Hillside, State of New Jersey.

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

## ORDER

*Definitions*

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

*Energy-related claim* means any general or specific, oral or written representation that, directly or by implication, describes or refers to

energy savings, efficiency or conservation, electricity savings, or electricity cost savings.

A *competent and reliable test* means any scientific, engineering, or other analytical report or study prepared by one or more persons with skill and expert knowledge in the field to which the material pertains and based on testing, evaluation, and analytical procedures that ensure accurate and reliable results.

A *power factor controller* means any device for use with motorized home appliances or tools that reduces the voltage applied to electric alternating current motors by sensing the phase angle between motor voltage and current.

#### PART I

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

(1) Making any energy-related claim for any power factor controller unless, at the time that the claim is made, respondent possesses and relies upon a reasonable basis consisting of a competent and reliable test or other objective material which substantiates the claim.

(2) Making any energy-related claim which uses the phrase "up to" or words of similar import unless the maximum level of savings or performance can be achieved by an appreciable number of consumers; and, further, in any instances where consumers could not reasonably foresee the major factors or conditions affecting the maximum level of savings or performance, cease and desist from failing to disclose clearly and prominently the class of consumers who can achieve the maximum level of savings or performance.

(3) Making any claim concerning the performance capabilities of any power factor controller unless, at the time that the claim is made, respondent possesses and relies upon a reasonable basis consisting of a competent and reliable test or other objective material which substantiates the claim.

(4) Misrepresenting in any manner, directly or by implication, the purpose, content, or conclusion of any test or study upon which respondent relies as substantiation for any energy-related claim or performance claim, or making any statement or representation which is inconsistent with the results or conclusions of any such test or study.

## PART II

*It is further ordered,* That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any power factor controller, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall maintain written records:

1. Of all materials relied upon in making any claim or representation covered by this order;
2. Of all test reports, studies, surveys or demonstrations in its possession that contradict, qualify, or call into question the basis upon which respondent relied at the time of the initial dissemination and each continuing or successive dissemination of any claim or representation covered by this order.

Such records shall be retained by respondent for a period of three years from the date respondent's advertisements, sales materials, promotional materials or post purchase materials making such claim or representation were last disseminated. Such records shall be made available to the Commission staff for inspection upon reasonable notice.

## PART III

*It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees engaged in the preparation and placement of advertisements or other sales materials, and to each of its distributors, dealers and any other person engaged in the wholesale or retail sale of any power factor controller manufactured by or for respondent.

## PART IV

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

## PART V

*It is further ordered,* That respondent shall, within sixty (60) days after this order becomes final, file with the Commission a report in

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writing, setting forth in detail the manner and form in which it has complied with the order.

Commissioners Pertschuk and Bailey voted in the negative.

## IN THE MATTER OF

## SOVEREIGN CHEMICAL &amp; PETROLEUM PRODUCTS, INC.

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

*Docket C-3140. Complaint, Aug. 8, 1984—Decision, Aug. 8, 1984*

This consent order requires a Chicago, Ill. manufacturer and seller of automotive products, among other things, to cease representing that any automatic transmission fluid or motor oil possesses certain performance or quality characteristics, including any claim that a motor oil has an American Petroleum Institute (API) service classification or a Society of Automotive Engineers (SAE) viscosity, unless such claims can be substantiated by competent and reliable evidence. Respondent must retain representative samples of motor oil and automatic transmission fluid from its production batches and filling runs, documents its sampling method, and pay for an independent laboratory to test these and other samples obtained in the marketplace. Respondent must also maintain records to substantiate claims covered by the order and distribute a copy of the order to all personnel with responsibility for advertising, quality control or corporate policy.

*Appearances*

For the Commission: *James K. Leonard.*

For the respondent: *Ira Berman, Zissu, Berman, Halper, Barron & Gumbinger, Chicago, Ill. and Gary B. Homsey, Oklahoma City, Okl.*

## COMPLAINT

The Federal Trade Commission, having reason to believe that Sovereign Chemical & Petroleum Products, Inc., hereinafter referred to as respondent, has violated Section 5 of the Federal Trade Commission Act and that an action is in the public interest, issues this complaint and alleges:

PARAGRAPH 1. Respondent Sovereign Chemical & Petroleum Products, Inc., is a Delaware corporation with its office and principal place of business located at 6801 West 66th Place, Chicago, Il. Until August 18, 1982, respondent was known as Sovereign Oil Company, Inc. All of the respondent's business is done through its four wholly-owned subsidiaries: Future Chemical & Oil Corporation (New York), Sovereign Oil Company (Illinois), Sovereign Oil Company of Pennsylvania, Inc., and Sovereign Oil of Florida, Inc.

PAR. 2. Respondent is, and has been, engaged in the manufacture and sale of substantial quantities of motor oils, automatic transmis-



sion fluids and other automotive products. Respondent packages its products under its own brand names, including "Monarch" and "Route 55," and under the brand names of independent merchandisers.

PAR. 3. In the course and conduct of its business, respondent causes its products to be sent to purchasers throughout the United States. Respondent prepares promotional and labeling materials for its products and disseminates these materials throughout the United States. Respondent maintains, and at all times relevant herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

#### PART I

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Three are incorporated by reference.

PAR. 4. In the course and conduct of its business, and in order to induce the sale of its motor oils, respondent has made statements on the labels and tops of its containers of motor oil. Typical of these statements are the following:

1. SAE 10W-40
2. For API Service SF SE SD

PAR. 5. Through the use of these and other similar statements, respondent has represented, directly or by implication, that its motor oils meet standards established by the Society of Automotive Engineers (SAE) and by the American Petroleum Institute (API) and that its motor oils therefore have a certain SAE viscosity and API service classification.

PAR. 6. In truth and in fact, the actual SAE viscosity of respondent's motor oil has frequently been different from the SAE viscosity (for example, 10W-40) marked on the container, and the actual API service classification has frequently been different from the API service classification (for example, SF SE SD) marked on the container. Therefore, the statements described in Paragraph Four and the representations described in Paragraph Five have been and are false and misleading.

PAR. 7. Respondent's false and misleading statements and representations have had the tendency to induce consumers to buy and use motor oils not suited for the purpose of protecting automobile engines from undue wear. This has caused and causes substantial injury to consumers which they could not have reasonably avoided.

PAR. 8. The statements and representations described in Para-

graphs Four and Five, respectively, having had the capacity and tendency to mislead the public, and having been to the prejudice and injury of the public, therefore were and are unfair and deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act.

#### PART II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One through Five are incorporated by reference:

PAR. 9. Through the use of the statements alleged in Paragraph Four, respondent has represented, directly or by implication, that it possessed and relied upon a reasonable basis for making the representations set forth in Paragraph Five at the times they were made. In truth and in fact, respondent did not then possess and rely upon a reasonable basis for making such representations. Therefore, respondent's representations have been and are false and misleading.

PAR. 10. The representations alleged in Paragraph Five, having had the capacity and tendency both to mislead the public to think that respondent had a reasonable basis for those representations and to induce the sale of respondent's motor oils, and having been to the prejudice and injury of the public, therefore were and are unfair and deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act.

The acts and practices of respondent alleged in this complaint are continuing and will continue in the absence of the relief requested herein.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of respondent Sovereign Chemical & Petroleum Products, Inc., and respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago 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

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that 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, 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 Sovereign Chemical & Petroleum Products, 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 6801 West 66th Place, in the City of Chicago, State of Illinois.

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

#### ORDER

##### I

*It is ordered,* That for purposes of this Order, the following definition shall apply:

*Sovereign* shall mean respondent Sovereign Chemical & Petroleum Products, Inc., a corporation, and its subsidiaries; their successors and assigns; and their officers, agents, representatives and employees.

##### II

*It is further ordered,* That Sovereign, directly or through any corporation, subsidiary, division or other device, in connection with the production, advertising, offering for sale, sale or distribution of any motor oil or automatic transmission fluid in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication:

A. That any motor oil has any American Petroleum Institute (API) service classification; or

B. That any motor oil has any Society of Automotive Engineers (SAE) viscosity; or

C. That any automatic transmission fluid meets any specification set by General Motors Corporation, Ford Motor Company or any other company; or

D. That any motor oil or automatic transmission fluid possesses any other performance or quality characteristic;

unless such representation is true and unless, at the time of making such representation, Sovereign possesses and relies upon a reasonable basis consisting of competent and reliable evidence which substantiates the representation.

### III

*It is further ordered,* That Sovereign shall draw a representative sample from each production batch or run, and from each filling run, of motor oil or automatic transmission fluid, shall document the method or methods used to draw such samples, and shall for at least one year retain a properly marked portion of each such sample and that for a period of three years after the date of service of this Order Sovereign shall, at the option of the Commission, cause to be tested (as described below) by a competent and independent laboratory, at Sovereign's expense, up to 50 (fifty) samples of motor oil and/or automatic transmission fluid, the samples either being such retained samples or being samples sold by Sovereign, and shall submit to the Commission copies of the results of such tests:

A. Motor oil samples tested pursuant to this Part shall be subjected to the then current version of the following American Society for Testing and Materials (ASTM) tests and other tests or any succeeding tests that have the same force and effect:

1. Kinematic viscosity at 100 degrees C. (ASTM D445);
2. Kinematic viscosity at 40 degrees C. (ASTM D445) (test required only for single-grade oils);
3. Low-temperature viscosity (ASTM D2602) (test required only for multigrade oils);
4. Viscosity index (ASTM D2770) (test required only for single-grade oils);
5. Nitrogen (ASTM D3228 or chemiluminescence);
6. Color (ASTM D1500);
7. Total Base Number (ASTM D664); and

8. Elemental analysis showing parts per million of calcium, magnesium, phosphorus, and zinc (emission spectrometry or other generally accepted method).

B. Automatic transmission fluid samples tested pursuant to this Part shall be subjected to the then current version of the following tests or any succeeding tests that have the same force and effect:

1. Kinematic viscosity at 100 degrees C. (ASTM D445);
2. Flash point (ASTM D92);
3. Brookfield viscosity at -40 degrees C. (ASTM D2983);
4. Copper strip corrosion (ASTM D130) (for automatic transmission fluids represented to meet a General Motors specification, three hours at 150 degrees C.; for automatic transmission fluids represented to meet any other specification, three hours at 100 degrees C.); and
5. Antifoam test (for automatic transmission fluids represented to meet a General Motors specification, the procedure described in General Motors document RLSP73-2, Second Edition, July 1978, or any succeeding document with the same force and effect; for automatic transmission fluids represented to meet any other specification, ASTM D892).

#### IV

*It is further ordered,* That for any motor oil or automatic transmission fluid sold by Sovereign for three years after the date of service of this Order, Sovereign shall maintain records which substantiate the representations listed in Part II of this Order, shall retain such records for three years from the last date on which the representation to which it pertains was made and upon reasonable notice shall make such records available to the Commission for inspection and copying. For motor oils and automatic transmission fluids produced or packaged by Sovereign, such records shall include blend formulas; specifications for motor oils and automatic transmission fluids; formulas and specifications supplied to Sovereign by additive companies, and documents describing the physical and chemical characteristics of additives purchased by Sovereign; records describing Sovereign's purchases and inventories of base stocks and additives; records showing for each production batch or run the production date, the gallonage of each ingredient used in production, the date of transfer to a holding or storage tank, the holding or storage tank(s) used, and the results of quality control tests run; records showing for each holding or storage tank the date of each filling run from that tank and the dates on which that tank is emptied; and records showing for each filling run the size and number of containers filled, the results of quality control

tests run, and, if known at the time of the filling run, the shipping destination and intended customer.

## V

*It is further ordered,* That respondent shall forthwith distribute a copy of this Order to each of its subsidiaries and divisions and to all agents, representatives or employees having advertising, quality control or corporate policy responsibilities with respect to the subject matter of this Order.

## VI

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

## VII

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

## IN THE MATTER OF

## AVCO FINANCIAL SERVICES, INC.

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

*Docket C-3141. Complaint, Aug. 9, 1984—Decision, Aug. 9, 1984*

This consent order requires a Newport Beach, Ca. finance company to cease, in connection with the collection of debts, using obscenities in conversations with debtors and third parties; threatening to use physical force or violence; improperly contacting or communicating with debtors, their friends, relatives and employers; or engaging in any conduct that would harass, abuse or oppress a debtor or third party. The order prohibits the company from contacting consumers known to be represented by an attorney or who request in writing that the company cease communications. The order further requires respondent to maintain a toll-free customer service telephone number; include in certain notices, a prescribed statement informing the recipient of his/her rights under federal law and of the availability of complaint resolution procedures; resolve complaints within 90 days; maintain a plan with explicit policies and procedures for lawful debt collection practices; and impose disciplinary sanctions for violations of this plan.

*Appearances*

For the Commission: *Christopher Schwartz.*

For the respondent: *Herbert Smith, Newport Beach, Ca.*

## 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 Avco Financial Services, Inc., a corporation, hereinafter sometimes referred to as respondent or Avco, 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. For purposes of this complaint the following definitions shall apply:

A. *Consumer loan* means a cash advance by Avco, which is received by a consumer, for which the payment of a *finance charge* within the meaning of the Truth in Lending Act, 15 U.S.C. 1601, and Regulation Z, 16 C.F.R. 226 (1980), is or may be required, and which is used primarily for personal, family or household purposes.

B. *Debt* means any obligation or alleged obligation of a consumer to pay money to Avco, in which the money, property, or services which are the subject of the transaction which gave rise to the obligation are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment.

C. *Debtor or Consumer* means any natural person obligated or alleged by Avco to be obligated to pay any debt, including any cosigner.

D. *Delinquent* means the state at which a debt is due and unpaid at the time fixed by contract.

E. *Subsidiary* means any domestic corporation or entity, fifty (50) percent or more of the outstanding voting shares of which are owned directly or indirectly by Avco.

F. *Third party* means any natural person or any entity not obligated to pay the debt which is the basis of the debt collection activity by Avco.

PAR. 2. Respondent, Avco Financial Services, 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 620 Newport Center Drive, Newport Beach, California. Respondent's policy and procedures are developed in and disseminated from Avco's principal place of business. Such policies and procedures govern respondent's operations throughout the United States. Avco now exercises and for some time in the past has exercised domination and control over the acts and practices of its wholly-owned subsidiaries and the acts and practices of each Avco branch office.

PAR. 3. Avco conducts and has conducted its business in all States of the United States (except Arkansas and Alaska) and in the United States Commonwealth of Puerto Rico, directly and indirectly through approximately 165 wholly-owned domestic subsidiaries. Avco operates approximately 620 branch offices in the United States. Therefore, respondent maintains and has maintained a substantial course of business which is in or affects commerce, as defined in the Federal Trade Commission Act.

PAR. 4. Respondent is now and has for some time in the past been regularly engaged in the extension of consumer credit in various forms. Avco's business activities denominated herein as financial service operations include and have included issuance of consumer loans, including the refinancing of consumers' outstanding indebtedness. Avco's business activities denominated herein as sales finance operations include the acquisition and issuance of retail installment contracts. In the ordinary course and conduct of the aforesaid business, respondent, through its representatives, agents and employees, regularly engages and has engaged in the collection of debts arising from these transactions.



PAR. 5. In the course and conduct of its aforesaid business, and for the purpose of inducing payment on debts alleged by respondent to be delinquent, Avco, through its representatives, agents and employees, has engaged in, and in some instances continues to engage in the following acts and practices:

(a) Using obscene or profane language in conversations with debtors or third parties, or language or tone of voice the natural consequence of which is to harass or abuse such persons.

(b) Making repeated or continuous telephone calls to debtors or third parties with intent to harass or abuse persons at the called number.

(c) Contacting debtors or third parties by telephone or otherwise, at times or places which Avco knew or should have known would interfere with the debtors' or third parties' employment or would harass or abuse the debtors or third parties.

(d) Using or threatening the use of force or violence against a debtor's person or property.

PAR. 6. The use by respondent of the acts and practices described in Paragraph Five has had and now has the capacity and tendency to cause substantial injury to debtors or third parties who are contacted by Avco by, among other things, adversely affecting the debtor's reputation, interfering with the debtor's or third party's employment relations including, but not limited to, causing warnings by employers of possible discharge, impairing the debtor's relations with friends, relatives, neighbors, and co-workers, and inducing the payment of disputed debts. Therefore, the use by respondent of such acts and practices was and is unfair.

PAR. 7. In the course and conduct of its aforesaid business, and for the purpose of inducing payment on debts alleged to be delinquent, Avco, through its representatives, agents and employees, has communicated, and in some instances continues to communicate, the existence of a consumer's debt, directly or by implication, to third party employers, co-employees, friends, neighbors or relatives of the debtor, without the prior consent of the consumer or the permission of a court of competent jurisdiction, and before the entry of a judgment thereon.

PAR. 8. The acts and practices of respondent set forth in Paragraph Seven has had and now has the capacity and tendency to cause substantial injury to debtors or third parties who are contacted by Avco by, among other things, adversely affecting the debtor's reputation, interfering with the debtor's employment relations including, but not limited to, causing warnings by employers of possible discharge, impairing the debtor's relations with friends, relatives, neighbors, and

co-workers, and inducing the payment of disputed debts. Therefore, the use by respondent of such facts and practices was and is unfair.

PAR. 9. In the course and conduct of its aforesaid business, and for the purpose of inducing payment on debts alleged by Avco to be delinquent, respondent, through its representatives, agents and employees, in conversations with debtors, by telephone or otherwise, utilized, and in some instances continue to utilize, fictitious identities including, but not limited to, attorneys, deputy sheriffs, police officers and other law enforcement officials.

PAR. 10. In truth and in fact, the said representatives, agents and employees of respondent were and are not the persons whom they purported to be as described in Paragraph Nine. Therefore, the representatives referred to in Paragraph Nine were and are false, misleading and deceptive.

PAR. 11. In the course and conduct of its aforesaid business, and for the purpose of inducing payment on debts alleged by Avco to be delinquent, respondent, through its representatives, agents, and employees has represented, and in some instances continues to represent to debtors, directly or by implication, orally or in writing that:

(a) Unless payment is received, respondent will institute or will cause to be instituted legal action against the debtor.

(b) Unless payment is received, respondent will seize or repossess, or will cause to be seized or repossessed, the property of the debtor.

PAR. 12. In truth and in fact, representations set forth in Paragraph Eleven were made, and in some instances continue to be made, where respondent did not intend and did not take the specified actions in the event of nonpayment. Therefore, such representations have been and are false, misleading and deceptive.

PAR. 13. The use by respondent of the false, misleading and deceptive representations set forth in Paragraphs Nine and Eleven has had and now has the capacity and tendency to mislead debtors into the belief that such representations are true, and to induce and coerce by subterfuge the payment of alleged delinquent debts by reason of such erroneous and mistaken belief.

PAR. 14. In the course and conduct of its aforesaid business, and for the purpose of acquiring information regarding the whereabouts of the debtor, respondent, through its representatives, agents and employees, in conversations with third parties by telephone or otherwise, has utilized, and in some instances continues to utilize, various fictitious identities including, but not limited to, insurance investigators, persons with money due to the debtor, friends and relatives of the debtor, and law enforcement officials.

PAR. 15. In truth and in fact, the said representatives, agents or

employees of respondent were and are not the persons whom they purported to be as described in Paragraph Fourteen. Therefore, the representations referred to in Paragraph Fourteen were and are false, misleading and deceptive.

PAR. 16. The use by respondent of the false, misleading and deceptive representations set forth in Paragraph Fourteen has had and now has the capacity and tendency to mislead members of the public into the belief that such representations are true, and to induce by subterfuge the disclosure of private information about the debtor by reason of such erroneous and mistaken belief.

PAR. 17. In the course and conduct of its aforesaid business, and for the purpose of inducing payment on debts alleged by respondent to be delinquent, Avco, through its representatives, agents and employees has engaged in, and in some instances continues to engage in, conduct the natural consequence of which is to deceive the debtor or third party, including, but not limited to, making false, deceptive or misleading representations which include, among other things, falsely representing that the debtor has committed a crime or engaged in other conduct that would subject him to ridicule or disgrace. Therefore, the use of such acts and practices was and is misleading and deceptive.

PAR. 18. In the course and conduct of its business, and at all times mentioned herein, respondent has been and now is in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the extension of consumer credit and the collection of debts arising therefrom.

PAR. 19. The acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted, and now constitute, unfair methods of competition and unfair 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

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, and

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that the 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, 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 Avco Financial Services, 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 620 Newport Center Drive, in the City of Newport Beach, State of California.

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

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

#### *Definitions*

A. *Avco Financial Services, Inc.*, means Avco Financial Services, Inc. and its subsidiaries, to the extent that such entities are engaged in the extension of consumer credit through the issuance of consumer loans, the refinancing of consumer's outstanding indebtedness and the acquisition of retail installment contracts, within the United States of America, its territories or possessions, and each officer, director, employee, agent or representative acting or purporting to act on its or their behalf.

B. *Subsidiary* means any domestic corporation or entity, fifty (50) percent or more of the outstanding voting shares of which are owned directly or indirectly by Avco Financial Services, Inc.

C. *Consumer loan* means a cash advance by Avco Financial Ser-

vices, Inc., which is received by a consumer, for which the payment of a *finance charge* within the meaning of the Truth in Lending Act, 15 U.S.C. 1601, as amended, and Regulation Z, 16 CFR 226 (1980), is or may be required, and which is used primarily for personal, family or household purposes.

D. *Debtor* or *Consumer* means any natural person obligated or allegedly obligated to pay any debt, including any cosigner.

E. *Debt* shall mean any obligation or alleged obligation of a natural person to pay money to Avco Financial Services, Inc., in which the money, property or services which are the subject of the transaction which gave rise to the obligation are primarily used for personal, family or household purposes, whether or not such obligation has been reduced to judgment.

F. *Delinquent* means the state at which a debt is due and unpaid at the time fixed by contract.

G. *Collecting a debtor debt collection* means any activity other than the use of judicial process and the making of ancillary third party contacts which is intended to or does bring about repayment of all or part of a consumer debt.

H. *Ancillary third party contacts* means communications which are collateral to the direct debt collection process, including but not limited to, contacts with other creditors, submission of credit reports or credit inquiries to credit bureaus, and contacts with debt collection agencies, collection attorneys, bankruptcy attorneys and judicial and quasi-judicial authorities.

I. *Third party* means any natural person or entity not obligated to pay the debt which is the basis of the debt collection activity by Avco Financial Services, Inc.

J. *Location information* means a consumer's residence and his telephone number at such place, or his place of employment.

## I.

*It is ordered,* That respondent Avco Financial Services, Inc., 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 the course of collecting a debt, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

a. Using obscene or profane language in conversations with debtors or third parties, or language or tone of voice the natural consequence of which is to harass, abuse or oppress the hearer.

b. Making repeated or continuous telephone calls with intent to harass, abuse or oppress the person at the called number.

c. Contacting or communicating with:

(1) Any person, by telephone or otherwise, at times or places known or which should be known by the contactor or communicator to be inconvenient to such person. Respondent shall assume that the convenient time for communicating with such person is after 8 o'clock AM and before 9 o'clock PM, local time at such person's location, unless respondent has knowledge of circumstances to the contrary.

(2) Any consumer's place of employment, by telephone or otherwise, where such contacts are known or should be known by the contactor or communicator to be objected to or prohibited by the consumer's employer.

(3) Any consumer, where respondent knows that the consumer is represented by an attorney acting on behalf of and in the name of the consumer with respect to the debt, and has knowledge of such attorney's name and address; *provided, however*, that respondent may communicate directly with the consumer if: 1) the attorney fails to respond to a communication from respondent within such time as prescribed by state law or, if state law is silent, within twenty-one (21) days, or 2) the attorney consents to direct communication with the consumer, or 3) the communication is made with the express permission of a court of competent jurisdiction.

(4) Any consumer if such person has notified respondent in writing that said consumer refuses to pay the debt or is not obligated to pay the debt and wishes respondent to cease further communication; except that respondent may transmit such written notices as are required by law and, in addition, may make one further contact after the initial notification by the consumer to cease further communication:

(i) To inform the consumer of the specified remedies which are ordinarily invoked by respondent; or

(ii) To pursue bona fide compromise and settlement negotiations which may continue upon the written consent of the consumer; or

(iii) To advise the consumer that respondent will cease further communication.

d. Using or threatening the use of force or violence to harm the physical person or property of any person.

e. Engaging in any conduct, the natural consequence of which is to deceive any person including, but not limited to, making any false, misleading or deceptive representation.

f. Engaging in any conduct the natural consequence of which is to harass, abuse or oppress any person including, but not limited to,

repeated, substantial harassment and threatening that nonpayment will result in actions which are not intended to be taken or which cannot legally be taken, such as disclosure of the debt to third parties other than through ancillary third party contacts.

g. Contacting any third party in the course of collecting a debt without the express consent of the consumer given at the time of collecting the debt, except:

(1) The consumer's attorney.

(2) Third parties, for the purpose of acquiring location information where the whereabouts of the consumer are genuinely unknown and to make reasonable inquiries concerning the nature and extent of a consumer's property; *provided, however*, that no mention of the debt is made.

(3) Third parties, as permitted by a court of competent jurisdiction.

(4) Other creditors, credit reporting agencies, debt collection agencies, collection attorneys, bankruptcy attorneys and other judicial and quasi-judicial authorities.

For the purpose of this paragraph, the term *consumer* includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

h. Misrepresenting the business, company or personal identity of respondent or its employees.

*Provided*, That it shall be permissible under this paragraph for respondent's representatives, agents or employees to identify themselves in accordance with regularly used pseudonyms which are recorded, and said records are maintained by respondent for a period of three (3) years.

i. Representing, directly or by implication, either orally or in writing, that (1) nonpayment of a debt will result in respondent instituting or causing to be instituted legal action against the debtor and/or (2) nonpayment of a debt will result in respondent seizing or repossessing or causing to be seized or repossessed a consumer's property unless respondent can show that it intended to take the represented action at the time such representation was made.

Intent may be determined by any of the following factors: (1) whether respondent had issued a *bona fide* authorization to take such action at the time of the representation; (2) whether respondent ordinarily takes such action in similar circumstances; or (3) other factors and circumstances which demonstrate that respondent intended to take the represented action.

*Further*, respondent shall cease and desist from representing, directly or by implication, that respondent or any third party may take any action unless respondent can show that at the time the represen-

tation was made there was a reasonable likelihood of such action occurring.

## II.

*It is further ordered,* That respondent Avco Financial Services, Inc., its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in the course of collecting a debt, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended shall maintain and at all times comply with a plan for collecting debts which shall provide for:

(a) Policies and procedures which explicitly prohibit such debt collection practices as are specified as unfair or deceptive in the complaint here attached or otherwise prohibited by federal law.

(b) The training of all such respondent's personnel as reasonably may engage in debt collection activities with respect to the policies and procedures set forth in subparagraph (a) above.

(c) The maintenance of a toll-free customer service telephone number at respondent's principal place of business for the receipt of complaints regarding respondent's acts and practices in connection with its debt collection activities within such States of the United States as are denominated as states of the date this order becomes final.

(d) Distribution of the following notice to consumers within such States of the United States as are denominated as states as of the date this order becomes final:

The law prohibits unfair or deceptive debt collection practices. These practices include harassment, abuse, improper disclosure of the debt to other persons and threats to take legal action which is not intended to be taken. If you have any complaints about the way we are collecting this debt, contact our branch manager (phone number on front) or call our *toll-free* customer service number (all U.S. except California 800-854-3883 - California only 800-432-7025). You may also write to Avco Financial Services, Customer Service Department, P.O. Box 2210, Newport Beach, CA 92663 or the Federal Trade Commission, Correspondence Branch, 6th and Pennsylvania Ave., N.W., Washington, D.C. 20580, or your state Attorney General.

Said notice shall be transmitted to consumers on each computer generated acknowledgement of receipt of payment and/or computer generated statement of account on an outstanding debt (receipt/statement). The notice shall be provided in the identical type size, position and manner as it is displayed on attached Appendix "A". The color of ink used shall be the same as that used for the other pre-printed information or darker.

In addition, the statement **IMPORTANT: SEE OVER ABOUT**



**YOUR RIGHTS** shall be clearly and conspicuously printed on the front side of said receipt/statement in the identical type size, position and manner as it is displayed on attached Appendix "B" and in the same color ink as that used for other pre-printed information or darker.

(e) Distribution of the following notice on informational material accompanying the first receipt/statement:

Unfair or deceptive collection practices, including harassment, abuse, improper disclosure of the debt to other persons and threats to take legal action which is not intended, are prohibited by law. See reverse side of the \_\_\_\_\_ Statement for further information.

An appropriate descriptive term denominating the receipt/statement and consistent with the term used on said informational material shall be inserted in the notice prior to the word "Statement".

Said notice shall be clearly and conspicuously provided in the identical type size, position and manner as it is displayed on attached Appendix "E". The notice shall be in red so long as other information is principally provided in blue; if blue is not used the designated notice shall be printed in a distinctive and contrasting color.

(f) Distribution of the following notice to consumers not within such states of the United States as are denominated as states as of the date this order becomes final:

The law prohibits unfair or deceptive debt collection practices. These practices include harassment, abuse, improper disclosure of the debt to other persons and threats to take legal action which is not intended to be taken. If you have any complaints about the way we are collecting this debt, contact our branch manager. You may also write to Avco Financial Services, Customer Service Department, P.O. Box 2210, Newport Beach, California 92663 or the Federal Trade Commission, Correspondence Branch, 6th and Pennsylvania Avenue, N.W., Washington, D.C., 20580 or your Attorney General.

Said notice shall be clearly and conspicuously provided on the reverse side of delinquency notices regularly sent to past due accounts in the same manner and type size as displayed on Appendix "C". In addition, the statement **IMPORTANT: SEE OVER ABOUT YOUR RIGHTS** shall be clearly and conspicuously printed on the front side of said notice in the same manner and type size as displayed on Appendix "D" but with the word "Important" in a different and distinctive color from the balance of the required statement. For all debt collection activities conducted in Puerto Rico the above notices shall be provided in Spanish on Spanish language delinquency notices. The Spanish translation of the notice shall be approved by the Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission prior to its initiation.

(g) The resolution of each complaint received by respondent, either oral or written, within ninety (90) days from the receipt of such complaint.

(h) Maintenance of a record, in writing, of each complaint, oral or written, received by respondent regarding the following debt collection practices: use of obscenity or profanity; harassment, abuse, deception, or coercion; repeated or continuous telephone calls; contacts at inconvenient times or places or at places of employment, or when a consumer is represented by an attorney; contacts when a consumer has requested that further communication cease; use or threat of use of force or violence; the making of false, misleading or deceptive representations; threats to take legal action; contacts with third parties; and misrepresentation of the business, company or personal identity of the company or its employees.

The record shall be maintained without regard to the method by which the complaint was received. Said record shall show the name, telephone number and account number (if applicable) of the complainant, date and place of filing, a brief description of the complaint, and the location of the branch office(s) involved in the subject matter of the documents relating to the complaint shall be retained for three (3) years from the date the complaint was received. If the written record is compiled or maintained at a location other than the respondent's principal place of business, a copy of said record shall, within a reasonable period of time after its compilation, be transmitted to and maintained at respondent's principal place of business for three (3) years from the date the complaint was received.

(i) Maintenance of a record of each communication by respondent made or attempted with any person in the course of collecting a debt. Said record shall include, with regard to each such communication, an identification of such person and the date of the communication. With respect to written communications, a copy of said communication must be retained in the file of the debtor; *provided, however*, that if a form document is used, it will be adequate to designate the name or number of the form. The recordkeeping required by this subparagraph shall either utilize a uniform notation system for which a key to decoding is maintained, or be kept in such a manner as to be understandable by a person not familiar with respondent's notation system. Each record shall be retained for a period of three (3) years after the date of such contact.

(j) Disciplinary sanctions for violation of respondent's collection procedures.

## III.

*It is further ordered, That:*

(a) Respondent shall permit access by the Commission, to any of its debt collection records upon reasonable notice and at reasonable hours. Respondent may provide the original documents or exact copies in lieu of access.

(b) In the event that the Federal Trade Commission promulgates a Trade Regulation Rule applicable to respondent's third party contact activities, compliance with that rule shall be deemed to be compliance with Section II(f) of this order.

(c) Respondent shall distribute, for a period of five (5) years after the date this order becomes final, a copy of this order to each of its operating departments and subsidiaries and to each of its present and future officers, agents, representatives or employees engaged in any aspect of respondent's debt collection activities, including without limitation, management, supervision, auditing, training, day-to-day debt collection, the development of policy and procedures, and customer service. Respondent shall secure a signed statement acknowledging receipt of the order from each such person and retain such statements for a period of five (5) years from the date this order becomes final.

*Provided,* That respondent shall be deemed to be in compliance with this paragraph if a copy of this order is distributed for insertion or is inserted in the Collection Section of each Operations Policy and Procedure Manual which has been or will be distributed and a signed statement obtained from each person designated in the proceeding subsection which specifies that said person has read the order of the Federal Trade Commission, understands that Avco is bound by it and that disciplinary sanctions for its violation may result. Such statements must be retained for a period of five (5) years.

(d) Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation(s), or any other change, including the creation or dissolution of subsidiaries, if any such changes may affect compliance obligations arising out of this order.

(e) Respondent shall, within one hundred twenty (120) 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.





## EXHIBIT C

THE LAW PROHIBITS UNFAIR OR DECEPTIVE DEBT COLLECTION PRACTICES. THESE PRACTICES INCLUDE HARASSMENT, ABUSE, IMPROPER DISCLOSURE OF THE DEBT TO OTHER PERSONS AND THREATS TO TAKE LEGAL ACTION WHICH IS NOT INTENDED TO BE TAKEN. IF YOU HAVE ANY COMPLAINTS ABOUT THE WAY WE ARE COLLECTING THIS DEBT, CONTACT OUR BRANCH MANAGER. YOU MAY ALSO WRITE TO AVCO FINANCIAL SERVICES, CUSTOMER SERVICE DEPARTMENT, P.O. BOX 2210, NEWFORT BEACH, CALIFORNIA 92663 OR THE FEDERAL TRADE COMMISSION, CORRESPONDENCE BRANCH, 6TH AND PENNSYLVANIA AVENUE, N.W., WASHINGTON, D.C., OR YOUR STATE ATTORNEY GENERAL.

## EXHIBIT D

**AVCO FINANCIAL SERVICES**

Dear Customer:

Just a friendly reminder letting you know that our records show your payment is past due. With all the important dates people have to keep in mind, it's no wonder that one particular date can skip by unnoticed. If this has happened to you, won't you please drop your check in the mail today? However, if you are experiencing any sort of financial difficulty, please let us know about it. After all we're here to help. You always have our personal commitment to serve you when it concerns your financial matters.

Please feel free to call, or better yet come around and see us. We'll try our best to meet your financial service requirements.

Thank you,

THE MANAGER

Our People Put You in the Best Company.

If you have already made this payment, please disregard this notice. **IMPORTANT: SEE OVER ABOUT YOUR RIGHTS**

03-1652 (REV 7-82)

Decision and Order

104 F.T.C.

## EXHIBIT E

The enclosed Periodic Billing Statement reflects the details of your new account with Avco. A Periodic Billing Statement will be prepared and sent to you each month and will reflect all activity on your account for the billing cycle shown on the Statement.

Note that your Periodic Billing Statement also shows the telephone number of the office that services your account; so, if you have any questions about your account, give us a call.

When you make your payments, detach the bottom portion of the Periodic Billing Statement and send it along with your payment in the envelope which is provided. (Be sure the Avco Office address shows through the window in the envelope.) Keep the top portion of the Periodic Billing Statement for your personal records.

See the reverse side of the Periodic Billing Statement for important information regarding your rights to dispute billing errors and for a detailed explanation of how the Finance Charge is computed on your account.

Unfair or deceptive collection practices, including harassment, abuse, and proper disclosure of the debt to other persons and threats to take legal action, which is not intended, are prohibited by law. See reverse side of the Periodic Billing Statement for further information.

Thank you for doing business with Avco.

SEE OVER FOR IMPORTANT INFORMATION



07-0004 (REV. 10-82)



IN THE MATTER OF  
PEABODY BARNES, INC.

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

*Docket C-3142. Complaint, Aug. 15, 1984—Decision, Aug. 15, 1984*

This consent order requires a Mansfield, Ohio manufacturer and seller of sump and sewage pumps and pump systems, among other things, to cease offering a warranty whose duration is measured from the date of manufacture, unless the warranty coverage extends for three years from the date of manufacture, or the company clearly discloses in the warranty, either the date the product was manufactured or an explanation as to how a customer can discover the date of manufacture. Any representation that a product's warranty coverage runs for a certain time is prohibited, unless the warranty will actually be in effect for that period. The order also requires respondent to treat every claim for warranty service made within 12 months of installation as timely, regardless of the product's date of manufacture, if the warranty document is not in compliance with this order; issue warranties that comply with the Magnuson-Moss Warranty Act; and send a notice explaining the revisions and changes in the company's warranty policy and documents to its dealers and distributors.

*Appearances*

For the Commission: *Rachel Miller* and *Christopher R. Brewster*.

For the respondent: *Stephen Greiner* and *Mitchell J. Auslander*,  
New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and of the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act ("Warranty Act") and the implementing Rules promulgated under the Warranty Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Peabody Barnes, Inc., a corporation ("respondent"), has violated the provisions of those Acts and implementing Rules, 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

PARAGRAPH 1. Respondent Peabody Barnes, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1651 North Main Street, Mansfield, Ohio.

PAR. 2. Respondent is and has been engaged in the manufacture, distribution, offering for sale and sale of sump pumps, sewage pumps, and other pumps and pump systems. Respondent causes and has caused these products to be shipped into more than 45 states for sale to the public. Respondent therefore maintains and has maintained a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 3. In the course and conduct of its business, respondent offers and has offered warranties to retail purchasers. These warranties accompany each individual product item.

PAR. 4. These warranties typically, and by way of illustration, state, in pertinent part:

*One Year Warranty*- Peabody Barnes warrants each [type of product] for a period of one (1) year from the date of installation, or 18 months from the date of manufacture, whichever comes first. . . .

PAR. 5. Respondent disseminates and has disseminated, to distributors, dealers or others, materials describing its warranties as "one-year warranty" or "standard one-year warranty."

PAR. 6. Through the acts, practices, statements and representations alleged in Paragraphs Three through Five above, respondent represents and has represented, expressly or by implication, that respondent provides purchasers with a one-year warranty.

PAR. 7. In truth and in fact, a substantial number of respondent's products are and have been first sold at retail more than six months after manufacture, and a substantial number are and have been first sold at retail more than eighteen months after manufacture. Thus, since the warranty on a product expires eighteen months after manufacture, a substantial number of purchasers receive and have received less than a year of coverage under the warranty, or no coverage whatsoever.

PAR. 8. The statements, representations, acts, and practices alleged in Paragraphs Three through Seven above have and have had the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that those statements and representations are true and complete, and to induce a substantial number of

such persons to purchase respondent's products by reason of this erroneous and mistaken belief.

PAR. 9. The acts and practices of respondent alleged in Paragraphs Three through Eight above are all to the prejudice and injury of the public, and constitute deceptive acts or practices in or affecting commerce, in violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended.

## II

The allegations of Paragraphs One through Nine above are incorporated by reference in this Part as though fully set forth below.

PAR. 10. In the course and conduct of its business, respondent is and has been a supplier of consumer products distributed in commerce, as "supplier," "consumer product," and "commerce" are defined in the Warranty Act. Respondent offers and has offered written warranties, as described in Paragraphs Three and Four above, to consumers on these consumer products, and therefore is and has been a warrantor, as "written warranty," "consumer," and "warrantor" are defined in that Act.

PAR. 11. Respondent fails and has failed to disclose the dates of manufacture of its products to retail purchasers or prospective purchasers.

PAR. 12. Respondent's failure to disclose the date of manufacture of an item, where the duration of respondent's warranty on the item may depend on that date, constitutes a failure to contain a statement of the duration of respondent's warranty on the item.

PAR. 13. The statement of duration of a warranty is information which is necessary, in light of all the circumstances, to make the warranty not misleading to a reasonable individual exercising due care.

PAR. 14. Respondent's warranty, which fails to contain a statement of duration as alleged in Paragraphs Eleven through Thirteen above, is a "deceptive warranty" as defined in Section 110(c)(2)(A)(ii) of the Warranty Act.

PAR. 15. As alleged in Paragraphs Six and Seven above, respondent's warranty represents that its duration is one year, a representation which is false in a substantial number of cases. The warranty thus contains a representation which is false or which would, in light of all the circumstances, mislead a reasonable individual exercising due care. The warranty is therefore a "deceptive warranty" as defined in Section 110(c)(2)(A)(i) of the Warranty Act.

PAR. 16. As alleged in Paragraphs Four through Seven above, the term of respondent's warranty limiting its duration to eighteen

months from date of manufacture causes the warranty to expire prior to the first retail sale of the warranted product in a substantial number of cases. The term thus so limits the scope and application of the warranty as to deceive a reasonable individual. The warranty is therefore a "deceptive warranty" as defined in Section 110(c)(2)(B) of the Warranty Act.

PAR. 17. Pursuant to Sections 110(c)(1) and 110(b) of the Warranty Act, respondent's deceptive warranty, as alleged in Paragraphs Fourteen through Sixteen above, violates Section 5(a)(1) of the Federal Trade Commission Act, as amended.

PAR. 18. Respondent's failure, as alleged in Paragraphs Eleven and Twelve above, to disclose the durations of those written warranties offered to consumers on consumer products manufactured after December 31, 1976, and actually costing consumers more than \$15, is and has been in violation of Section 701.3(a)(4) of the rule on Disclosure of Written Consumer Product Warranty Terms and Conditions, 16 CFR Part 701, implementing Section 102(a) of the Warranty Act. Pursuant to Section 110(b) of that Warranty Act, respondent's failure to disclose the duration of those written warranties also is and has been in violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended.

PAR. 19. In written warranty documents provided to consumers on consumer products manufactured after December 31, 1976, and actually costing consumers more than \$15, respondent fails and has failed to make the disclosures required by and set forth in Sections 701.3(a)(8) and 701.3(a)(9) of the rule on Disclosure of Written Consumer Product Warranty Terms and Conditions, 16 CFR 701, implementing Section 102(a) of the Warranty Act. These failures are and have been in violation of the Warranty Act, and, pursuant to Section 110(b) of that Act, in violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended.

PAR. 20. In written warranty documents provided to consumers on consumer products manufactured after July 4, 1975, respondent includes and has included the following term:

The company makes no additional warranties, expressed or implied, of merchantability or fitness. . . .

This statement constitutes a disclaimer of implied warranties in violation of Section 108 of the Warranty Act, and, pursuant to Section 110(b) of the Warranty Act, in violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended.

## DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act and the Federal Trade Commission Act; and

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

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

1. Respondent Peabody Barnes, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 1651 North Main Street, in the City of Mansfield, State of Ohio.

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 Peabody Barnes, Inc., 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 the offering for

sale, sale or distribution of any pump or pump system in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Offering on any such pump or pump system a warranty whose duration is measured from date of manufacture, unless:

1. The period measured from date of manufacture is at least 36 months, and

2. Respondent discloses clearly and conspicuously in the warranty document either:

a. The date of manufacture of the item warranted, or

b. An explanation of how a customer can discover the date of manufacture from a simple visual inspection of the item, exclusive of packaging.

B. Representing, directly or by implication, that a warranty on any such pump or pump system runs for a certain period (e.g., by calling it a one-year warranty), unless the warranty on that item will actually be in effect for that period (beginning on the date of sale or installation of the item, unless the representation clearly and conspicuously states otherwise).

## II

*It is further ordered,* That respondent, 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 the offering for sale, sale or distribution of any pump or pump system in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall treat every claim for warranty service made within 12 months of installation as timely, regardless of the date of manufacture, for any such pump or pump system sold by respondent prior to the date of service of this order with a warranty document not in compliance with this order.

## III

The definitions contained in Section 101 of the Magnuson-Moss Warranty Act (15 U.S.C. 2301) shall apply to the terms used in this Part.

*It is further ordered,* That respondent, its successors and assigns, and respondent's officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other de-

vice, in connection with the offering for sale, sale or distribution of any consumer product in or affecting commerce, do forthwith cease and desist from:

A. In any written warranty, disclaiming any implied warranty, or modifying any implied warranty in a manner prohibited by Section 108 of the Magnuson-Moss Warranty Act (15 U.S.C. 2308);

B. In any written warranty to which the rule on Disclosure of Written Consumer Product Warranty Terms and Conditions (16 CFR 701) applies, failing to make all disclosures required by that rule, in the manner and form specified therein, and as that rule may be amended, including, but not limited to, all disclosures required by Sections 701.3(a)(8) and 701.3(a)(9) of that rule.

#### IV

*It is further ordered,* That, within 30 days after the date of service of this order respondent shall provide notice in writing to all current dealers and distributors of any of respondent's products who are known to respondent, as follows:

A. An explanation of revisions in the current warranty documents made to comply with Parts I.A., III.A, and III.B of this order. In regard to Part III.A of this order, the notice shall briefly explain that respondent's warranty no longer contains a disclaimer of implied warranties; that respondent recognizes that in some cases customers may have rights in addition to those in the written warranty; and that if a dealer or distributor believes a situation may call for assistance beyond the written warranty terms, or if a customer requests such assistance, the matter should be referred to respondent for its consideration.

B. A statement that respondent will honor valid warranty claims for one year after installation, regardless of date of manufacture, for any product distributed prior to the date of service of this order with an unrevised warranty document.

C. An instruction that dealers and distributors refrain from stating or implying that respondent's warranty on any pump or pump system runs for a certain period (*e.g.*, by calling it a one-year warranty), unless the warranty on the item will actually be in effect for that period (beginning on the date of sale or installation of the item, unless the representation clearly and conspicuously states otherwise).

## V

*It is further ordered,* That respondent shall distribute a copy of this order to all of respondent's divisions and to all present and future personnel, agents or representatives of respondent having responsibilities with respect to the subject matter of this order.

## VI

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

## VII

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



## IN THE MATTER OF

## GENERAL MOTORS CORPORATION, ET AL.

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

*Docket 8907. Final Order, Jan. 10, 1975—Modifying Order, Aug. 16, 1984*

This order reopens the proceeding and modifies the Commission's 1975 Cease and Desist Order which barred a motor vehicle manufacturer and its advertising agency [85 F.T.C. 27] from making superior handling claims for any automobile, unless the claims were substantiated by scientific tests. In response to petitions from both respondents, the Modifying Order redefines the term "handling" as it relates to the control of a moving automobile; adds a paragraph defining the phrase "vehicle handling characteristics;" clarifies the definition of the scientific tests required for substantiating comparative claims; and permits respondents to make superiority claims regarding one or more specifically identified vehicle handling characteristics without having to raise substantiation requirements for other handling characteristics.

ORDER REOPENING PROCEEDING AND MODIFYING  
CEASE AND DESIST ORDER

On April 19, 1984 General Motors Corporation [hereinafter G.M.C.], a respondent in the above captioned matter, filed a petition pursuant to Rule 2.51 of the Commission's Rules of Practice to reopen the above-captioned proceeding and modify the order entered therein (85 F.T.C. 32). On May 7, 1984 Campbell-Ewald Company, an advertising agency for G.M.C. and also a respondent in the above matter, filed a petition to reopen and modify the order entered against Campbell-Ewald (85 F.T.C. 35).

The order, which was entered in 1975, prohibits the respondents from representing that any automobile is superior in handling to any other automobile or all other automobiles unless respondents have a reasonable basis for such representations. Handling is defined in terms of the response of the vehicle:

- (a) under conditions where rapid steering inputs in evasive or emergency maneuvers are necessary;
- (b) under cornering conditions at speeds in excess of 30 miles per hour in which levels of lateral acceleration in excess of .2g are attained; and
- (c) in gusty crosswinds, on rough roads and under severe steering-braking conditions.

Respondents now seek to modify the order by, inter alia, substitut-

ing a new definition for handling, adding a new paragraph defining vehicle handling characteristics, and adding a further clarification to the definition of scientific test. The modified order would permit respondents to advertise specific aspects concerning the comparative handling of motor vehicles, without having to prove overall handling superiority.

The Commission has concluded that, to avoid any unintended restriction on the dissemination to the public of information material to purchasing decisions, the petitions are in the public interest and should be granted. The proposed modified order will continue to require that respondents have a reasonable basis for vehicle handling claims.

*It is therefore ordered,* That the proceeding is hereby reopened and the Decision and Order issued January 10, 1975, in Docket No. 8907 is hereby modified to read as follows:

DECISION AND ORDER AS TO GENERAL MOTORS CORPORATION

I.

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

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

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

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

written statement that such reasonable basis exists which substantiates the representation.

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

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

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

## II.

*It is further ordered,* That for the purposes of Paragraph I of this Order, the following definitions shall apply:

### 1. *Handling*

The term *handling* is defined as the interaction of the driver, automobile, road, and environment as it relates to the control of a moving automobile.

### 2. *Vehicle Handling Characteristics*

The term *vehicle handling characteristics* is defined as the separately identifiable vehicle attributes which influence the automobile's contribution to handling. Vehicle handling characteristics include numerous vehicle attributes, such as, but not limited to, steering sensitivity, roll compliance, lateral acceleration response time, steering effort, maximum lateral acceleration, and task performance maneuvering capability.

### 3. *Scientific Test*

The term *scientific test* is defined and construed in accordance with the Federal Trade Commission's Order as stated in *Firestone Tire & Rubber Co.*, Docket No. 8818. [81 F.T.C. at 463]

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

Scientific tests for claims of superiority in handling or vehicle handling characteristics shall include reliable measures to control the variable influences of the driver, road, and environment so that the contribution of the automobile or of a specific vehicle attribute, can be identified.

### III.

*It is further ordered,* That for the purposes of Paragraph I of this Order a statement about handling or any vehicle handling characteristic implies superiority if the statement is phrased in the comparative or superlative degree, or if any advertising containing such statement conveys a net impression of comparative superiority; *provided, however,* that any statement or statements in such advertising phrased in the comparative or superlative degree regarding any subject other than handling or vehicle handling characteristics will not, for that reason alone and without a statistically valid consumer survey, render any statement in such advertising which does relate to the handling or the vehicle handling characteristics of a vehicle and which is phrased in the positive degree to be deemed a representation that handling or vehicle handling characteristic of the vehicle are superior to any other vehicle or all other vehicles. A representation of superiority with respect to one or more specifically identified vehicle handling characteristics shall not give rise to any substantiation requirements with respect to any other vehicle handling characteristic.

### IV.

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

### V.

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

## VI.

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

## DECISION AND ORDER AS TO CAMPBELL-EWALD COMPANY

## I.

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

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

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

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

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

(a) which consist of the documentation constituting the reasonable basis required by Paragraph I.1 of this Order; and

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

## II.

*It is further ordered,* That for the purposes of Paragraph I of the Order, the following definitions shall apply:

### 1. *Handling*

The term *handling* is defined as the interaction of the driver, automobile, road, and environment as it relates to the control of a moving automobile.

### 2. *Vehicle Handling Characteristics*

The term *vehicle handling characteristics* is defined as the separately identifiable vehicle attributes which influence the automobile's contribution to handling. Vehicle handling characteristics include numerous vehicle attributes, such as, but not limited to, steering sensitivity, roll compliance, lateral acceleration response time, steering effort, maximum lateral acceleration, and task performance maneuvering capability.

### 3. *Scientific Tests*

The term *scientific test* is defined and construed in accordance with the Federal Trade Commission's Order as stated in *Firestone Tire & Rubber Company*, Docket No. 8818. [81 F.T.C. at 463]

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

Scientific tests for claims of superiority in handling or vehicle handling characteristics shall include reliable measures to control the variable influences of the driver, road, and environment so that the contribution of the automobile or of a specific vehicle attribute, can be identified.

## III.

*It is further ordered,* That for the purposes of Paragraph I of this Order, a statement about handling or any vehicle handling characteristic implies superiority if the statement is phrased in the comparative or superlative degree, or if any advertising containing such statement conveys a net impression of comparative superiority; *provided, however,* that any statement or statements in such advertising phrased in the comparative or superlative degree regarding any subject other than handling or vehicle handling characteristics will not, for that reason alone and without a statistically valid consumer survey, render any statement in such advertising which does relate to the handling or the vehicle handling characteristics of a vehicle and which is phrased in the positive degree to be deemed a representation that handling or vehicle handling characteristics of the vehicle are superior to any other vehicle or all other vehicles. A representation of superiority with respect to one or more specifically identified vehicle handling characteristics shall not give rise to any substantiation requirements with respect to any other vehicle handling characteristic.

## IV.

*It is further ordered,* That respondent Campbell-Ewald Company shall forthwith distribute a copy of this Modified Order to each of its officers, agents, representatives, or employees who are engaged in the creation or approval of advertisements.

## V.

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

## VI.

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

IN THE MATTER OF  
THE ESTES PARK ACCOMMODATIONS ASSOCIATION, INC.

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

*Docket C-3143. Complaint, Aug. 21, 1984—Decision, Aug. 21, 1984*

This consent order requires an association composed of operators of motels, hotels, cabins and campgrounds in the area of Estes Park, Colorado, to cease inhibiting competition by restricting, impeding or advising its members and others against the truthful advertising of the terms and conditions of their accommodations; and by declaring such activities unethical. The association is precluded from taking any action against a person charged with violating an ethical standard without first providing that person with reasonable notice of the allegations and a hearing, as well as written findings and conclusions concerning the allegations. Respondent must also remove from its membership application, policy statement or guidelines, any provision which is inconsistent with the prohibitions contained in the order.

*Appearances*

For the Commission: *Claude C. Wild, III.*

For the respondent: *R. Hallberg, Estes Park, Col.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the named respondent has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, hereby issues this Complaint, stating its charges as follows:

PARAGRAPH 1. Respondent, The Estes Park Accommodations Association, Inc., is a corporation formed pursuant to the laws of the State of Colorado, with its mailing address at P.O. Box 178, Estes Park, Colorado.

PAR. 2. Respondent is an association formed to represent the interests of operators of motels, hotels, campgrounds, cabins, and other lodging facilities for travelers in the area of Estes Park, Colorado. Respondent has approximately 80 members, and these members control a substantial majority of the lodging facilities available to travelers in that area.

PAR. 3. Members of respondent are engaged in the business of pro



viding lodging facilities to travelers for a profit. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other operators of lodging facilities for travelers.

PAR. 4. Respondent is organized for the purpose, among others, of guarding and fostering the interests of its members. Respondent engages in activities which further its members' pecuniary interests. By virtue of its purposes and activities, respondent is a corporation within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 5. In the conduct of their business, members of respondent provide lodging facilities for travelers from other states and countries. Additionally, the respondent and its individual members send advertisements to recipients in other states, place advertisements in publications with interstate circulation, and participate in trade shows in other states. The acts and practices described below are "in or affecting commerce" within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 6. Respondent has acted as a combination of at least some of its members or has conspired with at least some of its members to foreclose, frustrate, and eliminate competition among the operators of lodging facilities for travelers in the Estes Park, Colorado, area by:

A. Prohibiting its members from truthfully advertising their facilities and prices to the public, from distributing truthful information about their prices and facilities, and from otherwise soliciting travelers' business; and

B. Coercing individual members into abandoning their efforts to truthfully advertise their facilities, to distribute truthful information about their prices, and to otherwise solicit travelers' business.

PAR. 7. Respondent has engaged in various acts or practices in furtherance of this combination or conspiracy, including:

A. Adopting and implementing written and unwritten codes of ethics, policy statements and guidelines that prohibit efforts by its members to truthfully advertise the prices for their lodging facilities by means of posting price signs, or to otherwise distribute truthful information to the public about their facilities and prices;

B. Publishing statements by some of its officials advising members that certain advertising of prices is unethical and threatening expulsion and other sanctions against members that post price signs; and

C. Sending letters to individual members who truthfully advertised their facilities and prices that pressured such members to abandon such activities.

PAR. 8. Through the combination or conspiracy and the acts or

practices described above, certain members of respondent have agreed not to, and do not, advertise or post the prices of their lodging facilities, and certain individual members of respondent have been coerced into abandoning the advertising of prices for their lodging facilities. Consequently, competition among the operators of lodging facilities for customers has been foreclosed, frustrated and eliminated, and customers have been deprived of the benefits of competition among the operators of lodging facilities.

PAR. 9. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition or unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act. Such combination or conspiracy is continuing and will continue absent the entry against respondent of appropriate relief.

#### 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 Denver 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 attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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 provision as required by the Commission's Rules; and

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

1. Respondent The Estes Park Accommodations Association, Inc., is a corporation organized, existing and doing business under and by

virtue of the laws of the State of Colorado, with its mailing address at P.O. Box 178, Estes Park, Colorado.

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.

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

A. *EPAA* means The Estes Park Accommodations Association, Inc., its members, officers, directors, committees, representatives, agents, employees, successors and assigns.

B. The term *lodging facilities* means motel rooms, hotel rooms, cottages, cabins and any other accommodations designed for the housing of travelers.

##### II.

*It is ordered*, That EPAA shall cease and desist from, directly or indirectly, or through any corporate or other device:

A. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the advertising, publishing, or posting by any person of the prices, terms, or conditions concerned with the furnishing of lodging facilities; and

B. Suggesting, inducing, urging, encouraging or assisting any person, business, or any other nongovernmental organization to take any of the actions prohibited by Part II (A).

Nothing contained in Part II shall prohibit EPAA from (1) filing any complaint with a governmental agency concerning violations of any law, or (2) formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

##### III.

*It is further ordered*, That EPAA shall cease and desist from taking any action against a person alleged to have violated any ethical standard promulgated in conformity with this Order without first providing such person with:

- A. Written notice of the allegations against him or her;
- B. A hearing wherein such person, or a person retained by him or her, may seek to rebut such allegations; and
- C. The written findings or conclusions of EPAA with respect to such allegations.

#### IV.

*It is further ordered, That EPAA shall:*

- A. For a period of three years after service of the final Order, provide each new member of EPAA with a copy of the letter attached as Appendix A at the time the member is accepted into EPAA;
- B. Within thirty (30) days after service of the final Order, send a copy of the letter attached as Appendix A to each current member of EPAA;
- C. Within thirty (30) days after service of the final Order, remove from any existing EPAA membership application, policy statement, or guideline, any provision, interpretation, or policy statement which is inconsistent with Part II or Part III of this Order;
- D. Within sixty (60) days after service of the final Order, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this Order;
- E. For a period of three (3) years after service of the final Order, maintain and make available to the Commission staff for inspection and copying, upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Part II or Part III of this Order; and
- F. Within one year after service of the final Order, and annually thereafter for a period of three (3) years, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with the activities covered by Part II or Part III of this Order.

#### V.

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

## APPENDIX A

[Letterhead of EPAA]

Dear Member:

The Estes Park Accommodations Association, Inc. (EPAA), and the Federal Trade Commission have entered into an agreement which resulted in an Order prohibiting EPAA or its members from:

1. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the advertising, publishing, or posting by any person of the prices, terms, or conditions concerned with the furnishing of lodging facilities; and
2. Suggesting, inducing, urging, encouraging or assisting any person, business, or any other nongovernmental organization to take any of the actions prohibited by the above paragraph.

The Order does not prohibit EPAA from:

1. Filing any complaint with a governmental agency concerning violations of any law, or
2. Formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act.

EPAA may not take any action against a person alleged to have violated any ethical standard promulgated in conformity with this Order without providing such person with:

1. Written notice of the allegations against him or her;
2. A hearing wherein such person, or a person retained by him or her, may seek to rebut such allegations; and
3. The written findings or conclusions of EPAA with respect to such allegations.

A copy of the Complaint and Order issued pursuant to this agreement will be furnished by EPAA upon request.

Thank you for your cooperation.

Sincerely,

---

President  
The Estes Park Accommodations  
Association, Inc.

## IN THE MATTER OF

THE AMERICAN COLLEGE OF OBSTETRICIANS AND  
GYNECOLOGISTSMODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL  
TRADE COMMISSION ACT

*Docket C-2855. Consent Order, Dec. 14, 1976—Modifying Order, Aug. 28, 1984*

This Order reopens the proceeding and modifies the Consent Order entered against The American College of Obstetricians and Gynecologists ("ACOG"), 88 F.T.C. 955. Pursuant to ACOG's request, the Order has been modified by deleting Paragraph II(B), which barred the association from advising in favor of or against any relative value scale developed by third parties; and by inserting a provision identical to that contained in the Commission Order entered against *Michigan State Medical Society*, 101 F.T.C. 191. This provision allows ACOG more freedom to discuss any issue, including reimbursement, with third-party payers and governmental entities.

## ORDER REOPENING AND MODIFYING FINAL ORDER

By petition filed May 2, 1984, the American College of Obstetricians and Gynecologists ("ACOG") asked the Commission to reopen and modify the Commission order in Docket No. C-2855 entered by consent against ACOG on December 14, 1976 ("Order") [88 F.T.C. 955]. ACOG requested that the Commission modify the Order by a) deleting Paragraph II(B) of the Order, which prohibits ACOG from advising in favor of or against any relative value scale developed by third parties (except that ACOG is permitted to provide historical data), and b) inserting a provision identical to a provision contained in the Commission's Order in *Michigan State Medical Society*, Docket No. 9129, 101 F.T.C. 191 (1983) ("*Michigan State*") that would allow ACOG more freedom to discuss issues relating to reimbursement with third-party payers and governmental entities. ACOG's petition was placed on the public record and no comments were received.

Upon consideration of ACOG's petition and other relevant information, the Commission finds that the public interest would be served by deleting Paragraph II(B) of the Order and by inserting the relevant provision contained in the order in *Michigan State*. ACOG has demonstrated that the Order's restriction on ACOG's ability to discuss relative value scales with third-party payers and governmental entities has caused injury to ACOG and the public that outweighs any benefit that may be derived from the restriction. Modification is also consistent with the Commission's decision in *Michigan State*.

The Order continues to prohibit ACOG from developing or circulat-

ing its own relative value guide for use by its members. In addition, although the Order no longer will prohibit ACOG from discussing relative value scales with governmental entities and third-party payers, serious antitrust concerns would arise were ACOG to negotiate or attempt to negotiate an agreement with any such party or engage in any type of coercive activity to effect such an agreement.

Accordingly,

*It is ordered,* That this matter be, and it hereby is, reopened and that the Order in Docket No. C-2855 be modified 1) to delete Paragraph II(B) and to redesignate Paragraphs II(C) and II(D) of the Order Paragraphs II(B) and II(C) respectively; 2) to renumber Paragraphs III, IV and V of the Order Paragraphs IV, V and VI respectively; and 3) to insert the following:

### III.

*It is further ordered,* That this order shall not be construed to prevent ACOG from:

A. Exercising rights permitted under the First Amendment to the United States Constitution to petition any federal or state government, executive agency, or legislative body concerning legislation, rules or procedures, or to participate in any federal or state administrative or judicial proceeding.

B. Providing information or views, on its own behalf or on behalf of its members, to third-party payers concerning any issue, including reimbursement.

## IN THE MATTER OF

## SMITTY'S SUPER MARKETS, INC.

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

*Docket 9172. Complaint, Dec. 16, 1983—Decision, Sept. 7, 1984*

This consent order requires a Springfield, Missouri operator of retail grocery stores, among other things, to cease engaging in any concerted action to impede the collection or dissemination of comparative price information. For a period of five years, the company is prohibited from requiring price checkers to purchase items to be priced as a condition of allowing them to price check; denying price checkers the same access to its stores as is provided to customers; or coercing any price checker, publisher or broadcaster to refrain from collecting or reporting comparative price information. The company is also required to offer to reimburse TeleCable up to \$1,000 for the broadcast of a comparative grocery price information program. Should the station elect to broadcast such a program, respondent is further required to post signs and place newspaper ads notifying the public that such a program is being broadcast.

*Appearances*

For the Commission: *Patricia Bremer.*

For the respondent: *Donald W. Jones, Springfield, Mo.*

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Smitty's Super Markets, Inc., Roswil, Inc., and David Porter (hereinafter sometimes referred to collectively as "respondents") have violated Section 5 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 this complaint charging as follows:

1. Smitty's Super Markets, Inc., is a Missouri corporation with its principal offices at 218 South Glenstone, Springfield, Missouri.
2. Roswil, Inc., is a Missouri corporation trading and doing business as Ramey Super Markets. Its registered agent is Flavius Freeman, 1-130 Corporate Square, Springfield, Missouri.
3. David Porter is an individual trading and doing business as Porter's So-Lo Markets. Porter's business address is 1475 North National, Springfield, Missouri.



4. At all times relevant to this complaint, respondents have been engaged in the operation of retail grocery stores in Greene or Christian counties, Missouri (hereafter "Springfield"), said activities being in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

5. Except to the extent that competition has been restrained as herein alleged, in the course and conduct of their retail grocery businesses respondents have been and are now in competition in or affecting commerce among themselves and with other corporations, firms, or individuals engaged in the operation of retail grocery stores in Springfield.

6. Vector Enterprises, Inc., (hereafter "Vector") has been and is engaged in the business of collecting and selling comparative retail grocery price information in various cities throughout the United States for publication or broadcast to consumers. This activity is sometimes referred to herein as "price checking."

7. On or about July 15, 1980, Vector began collecting comparative price information on a weekly basis at about five Springfield retail grocery stores, including stores of some of the respondents. Vector then began selling this comparative retail grocery price information to TeleCable of Springfield ("TeleCable"), a cable television operator in Springfield. TeleCable broadcast this information to cable television subscribers in Springfield. During the weeks immediately preceding October 14, 1981, Vector's price checking included stores operated by respondents and two other operators of retail grocery stores in Springfield.

8. Prior to October 14, 1981, each respondent agreed with one or more other respondents or other operators of retail grocery stores in Springfield to impede Vector's ability to price check. On or about that date, in furtherance of their agreements, each respondent and others took action that effectively prevented Vector from price checking in their stores.

9. As of October 14, 1981, as a direct result of the agreements alleged in Paragraph 8, and the actions taken in furtherance thereof, Vector was able to price check only one of the retail grocery chains that had been included in its survey. Thereafter, TeleCable broadcast the prices for just that one chain. On or about December 31, 1981, TeleCable stopped broadcasting Vector's price reporting program because Vector was no longer able to provide comparative price information for the major retail grocery chains in Springfield.

10. Through the acts and practices described above, each respondent has agreed, combined or conspired with one or more other respondents or other operators of retail grocery stores to prevent or obstruct the collection and dissemination of comparative grocery

price information, with the following actual or potential effects, among others:

a. Price competition among Springfield grocery retailers has been hindered or restrained; and

b. Consumers in Springfield have been deprived of comparative retail grocery price information that can be used in the selection of a grocery store.

11. The acts and practices described above constitute an unlawful restraint on price competition and constitute unfair methods of competition or unfair acts or practices. Respondents have violated Section 5(a)(1) of the Federal Trade Commission Act, as amended.

12. The acts and practices described above constitute an unlawful boycott and constitute unfair methods of competition or unfair acts or practices. Respondents have violated Section 5(a)(1) of the Federal Trade Commission Act, as amended.

13. The violations charged herein or the effects thereof are continuing and will continue in the absence of appropriate relief.

#### DECISION AND ORDER

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

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication as to this respondent 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25 of its Rules the

Commission hereby makes the following jurisdictional findings and enters the following order:

1. Smitty's Super Markets, Inc., is a Missouri corporation, with its principal office at 218 South Glenstone, Springfield, Missouri.
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.

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

A. *Smitty's* means Smitty's Super Markets, Inc., its divisions and subsidiaries, officers, directors, representatives, agents, employees, successors and assigns.

B. *Price checker* or *price checking* means the collecting, from information available to customers, of retail prices of items offered for sale by any retail grocery store (SIC 5411), which is done neither by nor on behalf of a person engaged in the sale of groceries, and which information is used in price reporting.

C. *Price checker* means any person engaged in price checking.

D. *Price reporting* or *price report* means the dissemination to the public of price checking information through any medium by any person not engaged in the sale of groceries.

E. *Springfield* means the counties of Christian and Greene, Missouri.

F. *Customer* means any individual who enters a retail grocery store for the purpose of grocery shopping, whether or not that individual actually makes a purchase.

G. *Person* means individuals, corporations, partnerships, unincorporated associations, and any other business entity.

H. *Geographic area* means: (1) a Standard Metropolitan Statistical Area as defined by the Bureau of the Census, U.S. Department of Commerce, as of October 1, 1982; or (2) a county.

I. *Supermarket* means any retail grocery store (SIC 5411) with annual sales of more than one million dollars (\$1,000,000.00).

##### II.

*It is further ordered, That:*

- A. Smitty's shall forthwith cease and desist from taking any action

in concert with any other person engaged in the sale of grocery products which has the purpose or effect of restricting, impeding, interfering with or preventing price checking or price reporting.

B. Except as provided in paragraph II.C., for five (5) years following the date on which this Order becomes final, Smitty's shall cease and desist from taking or threatening to take any unilateral action that would:

1. Require price checkers to purchase items to be price checked as a condition of allowing them to price check; or
2. Deny price checkers the same access to Smitty's supermarkets as is provided to customers; or
3. Coerce, or attempt to coerce, any price checker, publisher or broadcaster into refraining from or discontinuing price checking or price reporting.

C. 1. Nothing in paragraph II.B. shall prevent Smitty's from adopting reasonable, non-discriminatory rules governing the number of price checkers in its supermarkets at any one time for the purpose of preventing disruption of Smitty's normal business operations.

2. Nothing in subparagraph II.B.3. shall prevent Smitty's from publicly commenting upon or objecting to any price report in which its prices are compared to those of any other grocery retailer.

3. Whenever Smitty's believes that conditions exist that justify the exclusion of a price checker, it may submit to the Federal Trade Commission a sworn statement setting forth with particularity the facts that Smitty's believes meet such conditions. For purposes of this Order, the only conditions justifying the exclusion of a price checker are that another supermarket operator with whose prices Smitty's prices are compared in a price report has knowingly tampered with or manipulated the results of such price report for its own competitive gain either (a) by the use of information wrongfully obtained and not available to all supermarket operators whose prices are being compared, or (b) by inducing any price reporter or price checker to cause false information to be published or broadcast. Following the Federal Trade Commission's actual receipt of such statement, Smitty's may exclude the price checkers from its supermarkets in the geographic area(s) covered by the affected price report for so long as the conditions set forth in Smitty's statement shall exist. In any civil penalty action against Smitty's for a violation of subparagraph II.B. 2. occurring after notice to the Federal Trade Commission was given by Smitty's as provided in this subparagraph, Smitty's shall have the burden of proving, by a preponderance of the evidence, that the conditions justifying the exclusion of a price checker as set forth in this subpara-

dence only for the purpose of proving the facts set forth in its statement to the Federal Trade Commission. Nothing in this subparagraph shall be construed to be an exception to the prohibitions of paragraph II.A. of this Order.

### III.

*It is further ordered,* That, upon the resumption of price reporting by TeleCable of Springfield that is similar in quality and coverage to that broadcast by it prior to October 14, 1981, and that includes any Smitty's supermarket, and upon receipt by Smitty's of written request for payment from TeleCable, Smitty's shall reimburse TeleCable for its actual cost of obtaining a price reporting program up to the amount of two hundred fifty dollars (\$250.00) per week. Smitty's obligation under this Part (III) shall terminate either when it has reimbursed TeleCable in the total amount of one thousand dollars (\$1,000.00) or three (3) years following the date on which this Order becomes final, whichever occurs first. Smitty's shall not reimburse TeleCable for costs incurred by TeleCable during any week for which TeleCable's costs are reimbursed by any other person.

### IV.

*It is further ordered,* That, within seven (7) days following the date on which this Order becomes final, Smitty's shall send a letter, a copy of which is attached here as Exhibit A, together with a copy of this Order, to TeleCable of Springfield, informing TeleCable of Smitty's obligations under Parts II and V of this Order, TeleCable's rights under Part III, and the notices that Smitty's must receive from TeleCable before certain Order provisions become binding upon Smitty's.

### V.

*It is further ordered,* That, if at any time during the two years following the date on which this Order becomes final, Smitty's is notified in writing by TeleCable of Springfield that price reporting that includes any of Smitty's supermarkets has resumed in Springfield:

A. For a period of sixty (60) days following the receipt of such notice, Smitty's shall post signs no smaller than 30 inches by 40 inches in a front window in each of Smitty's supermarkets in Springfield, stating:

## GROCERY PRICE SURVEY

A price survey comparing prices of selected grocery items at Smitty's and other Springfield grocery supermarkets is being broadcast over cable television. This comparative price survey can be seen on channel \_\_\_\_\_ and is broadcast from \_\_\_\_\_ to \_\_\_\_\_.

B. For a period of sixty (60) days following the receipt of such notice, whenever Smitty's places food advertisements of one-half page or larger in any printed advertising medium with circulation of 15,000 or more copies in Springfield, Smitty's shall publish an announcement as a part thereof in the same language provided in paragraph V.A. This announcement shall be no smaller than 3 inches high by 3 inches wide and shall be printed in conspicuous type. In each week in which Smitty's does not place a one-half page or larger food advertisement in such printed advertising medium, Smitty's shall place this announcement as a display advertisement in any printed advertising medium with circulation of 15,000 or more copies in Springfield.

## VI.

*It is further ordered,* That Smitty's shall, within seven (7) days after the date on which this Order becomes final, and once a year thereafter for three years, provide a copy of this Order to each of its officers and supermarket managers, and secure from each such individual a signed statement acknowledging receipt of this Order.

## VII.

*It is further ordered,* That Smitty's shall, within sixty (60) days after the date on which this Order becomes final, file with the Commission a verified written report, setting forth in detail the manner and form in which Smitty's has complied with this Order. Additional reports shall be filed at such other times as the Commission may by written notice require. Each compliance report shall include all information and documentation as may be required by the Commission to show compliance with this Order.

## VIII.

*It is further ordered,* That Smitty's shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in it such as dissolution, assignment or sale resulting in the emergence of a successor corporation, or any other proposed change in the corpo-

ration or its retail grocery operations, which may affect compliance obligations arising out of this Order.

EXHIBIT A

TeleCable of Springfield  
1533 South Enterprise  
Springfield, Missouri 65801

Dear Sir or Madam:

This is to notify you that Smitty's Super Markets, Inc. ("Smitty's"), which operates Smitty's grocery stores in Springfield, Missouri, has entered into a consent order with the Federal Trade Commission in which it has agreed that it will not interfere with efforts by independent parties such as TeleCable of Springfield to engage in price reporting or price checking in Smitty's grocery stores in Springfield. Smitty's has agreed that it will not require price checkers to purchase the items being price checked, will not deny price checkers the same access to its supermarkets as is provided to customers, and will not attempt to coerce any price checker, publisher or broadcaster into refraining from or discontinuing price checking or price reporting. The terms of and limitations on Smitty's agreement are set forth in a consent order issued by the Federal Trade Commission, a copy of which is enclosed herewith.

If TeleCable of Springfield institutes a price reporting program similar or superior in quality and coverage to the one broadcast by TeleCable in 1981, and if the program includes any of Smitty's grocery stores in Springfield, Missouri, Smitty's will reimburse TeleCable for its actual costs of obtaining price reports, up to the amount of \$250 per week, and up to \$1,000 in total. Smitty's will also place notices in its Springfield grocery stores and in its weekly advertisements, informing consumers of TeleCable's price surveys. The precise terms of Smitty's obligations to place such notices, and to reimburse TeleCable for certain of its costs, are set forth in the enclosed consent order.

In order to receive any funds to which you may be entitled and to effect the placement of the notices described above, please notify Smitty's in writing, c/o President, Smitty's Super Markets, Inc., 218 South Glenstone, Springfield, Missouri 65802, stating when the program began or is scheduled to begin, the time and channel on which the survey will be broadcast, and TeleCable's costs, if any, of obtaining the survey information.

Very truly yours,

President  
Smitty's Super Markets, Inc.

## IN THE MATTER OF

## DAVID PORTER

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

*Docket 9172. Complaint\*, Dec. 16, 1983—Decision, Sept. 7, 1984*

This consent order requires a Springfield, Missouri operator of retail grocery stores, among other things, to cease engaging in any concerted action to impede the collection or dissemination of comparative price information. For a period of five years, Mr. Porter is prohibited from requiring price checkers to purchase items to be priced as a condition of allowing them to price check; denying price checkers the same access to his stores as is provided to customers; or coercing any price checker, publisher or broadcaster to refrain from collecting or reporting comparative price information. Mr. Porter is also required, upon the resumption of price reporting by TeleCable of Springfield, to reimburse the company \$250 per week for the cost of the program, up to \$1,000, or for a period of three years, whichever comes first; and to notify consumers of the broadcast through posted signs and newspaper ads.

*Appearances*

For the Commission: *Patricia Bremer.*

For the respondent: *Donald W. Jones, Springfield, Mo.*

## DECISION AND ORDER

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

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

The Secretary of the Commission having thereafter withdrawn this

\*Complaint previously published at 104 F.T.C. 526.



matter from adjudication as to this respondent 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 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent David Porter is an individual trading and doing business as Porter's So-Lo Markets, with his principal business office at 1475 North National, Springfield, Missouri.

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.

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

A. *Porter* means David Porter, individually and through Porter's So-Lo Markets or any other entity or corporate device, and his representatives, agents, employees, successors and assigns.

B. *Price check* or *price checking* means the collecting, from information available to customers, of retail prices of items offered for sale by any retail grocery store (SIC 5411), which is done neither by nor on behalf of a person engaged in the sale of groceries, and which information is used in price reporting.

C. *Price checker* means any person engaged in price checking.

D. *Price reporting* or *price report* means the dissemination to the public of price checking information through any medium by any person not engaged in the sale of groceries.

E. *Springfield* means the counties of Christian and Greene, Missouri.

F. *Customer* means any individual who enters a retail grocery store for the purpose of grocery shopping, whether or not that individual actually makes a purchase.

G. *Person* means individuals, corporations, partnerships, unincorporated associations, and any other business entity.

H. *Geographic area* means: (1) a Standard Metropolitan Statistical Area as defined by the Bureau of the Census, U.S. Department of Commerce, as of October 1, 1982; or (2) a county.

I. *Supermarket* means any retail grocery store (SIC 5411) with annual sales of more than one million dollars (\$1,000,000.00).

## II.

*It is further ordered, That:*

A. Porter shall forthwith cease and desist from taking any action in concert with any other person engaged in the sale of grocery products which has the purpose or effect of restricting, impeding, interfering with or preventing price checking or price reporting.

B. Except as provided in paragraph II.C., for five (5) years following the date on which this Order becomes final, Porter shall cease and desist from taking or threatening to take any unilateral action that would:

1. Require price checkers to purchase items to be price checked as a condition of allowing them to price check; or
2. Deny price checkers the same access to Porter's supermarkets as is provided to customers; or
3. Coerce, or attempt to coerce, any price checker, publisher or broadcaster into refraining from or discontinuing price checking or price reporting.

C. 1. Nothing in paragraph II.B. shall prevent Porter from adopting reasonable, non-discriminatory rules governing the number of price checkers in his supermarkets at any one time for the purpose of preventing disruption of Porter's normal business operations.

2. Nothing in subparagraph II.B.3. shall prevent Porter from publicly commenting upon or objecting to any price report in which his prices are compared to those of any other grocery retailer.

3. Whenever Porter believes that conditions exist that justify the exclusion of a price checker, he may submit to the Federal Trade Commission a sworn statement setting forth with particularity the facts that Porter believes meet such conditions. For purposes of this Order, the only conditions justifying the exclusion of a price checker are that another supermarket operator with whose prices Porter's prices are compared in a price report has knowingly tampered with or manipulated the results of such price report for its own competitive gain either (a) by the use of information wrongfully obtained and not available to all supermarket operators whose prices are being compared, or (b) by inducing any price reporter or price checker to cause false information to be published or broadcast. Following the Federal Trade Commission's actual receipt of such statement, Porter may exclude the price checkers from his supermarkets in the geographic area(s) covered by the affected price report for so long as the condi-

tions set forth in Porter's statement shall exist. In any civil penalty action against Porter for a violation of subparagraph II.B. 2. occurring after notice to the Federal Trade Commission was given by Porter as provided in this subparagraph, Porter shall have the burden of proving, by a preponderance of the evidence, that the conditions justifying the exclusion of a price checker as set forth in this subparagraph have been met. In meeting his burden, Porter may offer evidence only for the purpose of proving the facts set forth in his statement to the Federal Trade Commission. Nothing in this subparagraph shall be construed to be an exception to the prohibitions of paragraph II.A. of this Order.

### III.

*It is further ordered,* That, upon the resumption of price reporting by TeleCable of Springfield that is similar in quality and coverage to that broadcast by it prior to October 14, 1981, and that includes any Porter supermarket, and upon receipt by Porter of written request for payment from TeleCable, Porter shall reimburse TeleCable for its actual cost of obtaining a price reporting program up to the amount of two hundred fifty dollars (\$250.00) per week. Porter's obligation under this Part (III) shall terminate either when he has reimbursed TeleCable in the total amount of one thousand dollars (\$1,000.00) or three (3) years following the date on which this Order becomes final, whichever occurs first. Porter shall not reimburse TeleCable for costs incurred by TeleCable during any week for which TeleCable's costs are reimbursed by any other person.

### IV.

*It is further ordered,* That, within seven (7) days following the date on which this Order becomes final, Porter shall send a letter, a copy of which is attached here as Exhibit A, together with a copy of this Order, to TeleCable of Springfield, informing TeleCable of Porter's obligations under Parts II and V of this Order, TeleCable's rights under Part III, and the notices that Porter must receive from TeleCable before certain Order provisions become binding upon Porter.

### V.

*It is further ordered,* That, if at any time during the two years following the date on which this Order becomes final, Porter is notified in writing by TeleCable of Springfield that price reporting that includes any of Porter's supermarkets has resumed in Springfield:

A. For a period of sixty (60) days following the receipt of such notice, Porter shall post signs no smaller than 30 inches by 40 inches in a front window in each of Porter's supermarkets in Springfield, stating:

#### GROCERY PRICE SURVEY

A price survey comparing prices of selected grocery items at Porter's So-Lo Markets and other Springfield grocery supermarkets is being broadcast over cable television. This comparative price survey can be seen on channel \_\_\_\_\_ and is broadcast from \_\_\_\_\_ to \_\_\_\_\_.

B. For a period of sixty (60) days following the receipt of such notice, whenever Porter places food advertisements of one-half page or larger in any printed advertising medium with circulation of 15,000 or more copies in Springfield, which advertisements cover only his own stores, Porter shall publish an announcement as a part thereof in the same language provided in paragraph V.A. This announcement shall be no smaller than 3 inches high by 3 inches wide and shall be printed in conspicuous type. In each week in which Porter does not place a one-half page or larger food advertisement in such printed advertising medium, Porter shall place this announcement as a display advertisement in any printed advertising medium with circulation of 15,000 or more copies in those areas of Springfield in which Porter's stores are located.

#### VI.

*It is further ordered,* That Porter shall, within seven (7) days after the date on which this Order becomes final, and once a year thereafter for three years, provide a copy of this Order to each of his supermarket managers, and secure from each such individual a signed statement acknowledging receipt of this Order.

#### VII.

*It is further ordered,* That Porter shall, within sixty (60) days after the date on which this Order becomes final, file with the Commission a verified written report, setting forth in detail the manner and form in which Porter has complied with this Order. Additional reports shall be filed at such other times as the Commission may by written notice require. Each compliance report shall include all information and documentation as may be required by the Commission to show compliance with this Order.

## VIII.

*It is further ordered,* That Porter shall notify the Federal Trade Commission at least thirty (30) days prior to the discontinuance of his present business or employment as an individual proprietorship in the sale of groceries, or at least thirty (30) days prior to his affiliation with a new business or employment, or of any similar change which may affect compliance obligations arising out of this Order. The notice provision of this Part shall include any change in the organizational status of Porter's present business, such as incorporation, assignment or sale, resulting in the emergence of a successor entity, or any other change in Porter's business or his retail grocery operations.

## EXHIBIT A

TeleCable of Springfield  
1533 South Enterprise  
Springfield, Missouri 65801

Dear Sir or Madam:

This is to notify you that I, David Porter, the owner of Porter's So-Lo Markets in Springfield, Missouri, have entered into a consent order with the Federal Trade Commission in which I have agreed that I will not interfere with efforts by independent parties such as TeleCable of Springfield to engage in price reporting or price checking in my grocery stores in Springfield. I have agreed that I will not require price checkers to purchase the items being price checked, will not deny price checkers the same access to my supermarkets as is provided to customers, and will not attempt to coerce any price checker, publisher or broadcaster into refraining from or discontinuing price checking or price reporting. The terms of and limitations of the agreement are set forth in a consent order issued by the Federal Trade Commission, a copy of which is enclosed herewith.

If TeleCable of Springfield institutes a price reporting program similar or superior in quality and coverage to the one broadcast by TeleCable in 1981, and if the program includes any of my grocery stores in Springfield, Missouri, I will reimburse TeleCable for its actual costs of obtaining price reports, up to the amount of \$250 per week, and up to \$1,000 in total. I will also place notices in my Springfield grocery stores and in weekly advertisements, informing consumers of TeleCable's price surveys. The precise terms of my obligations to place such notices, and to reimburse TeleCable for certain of its costs, are set forth in the enclosed consent order.

In order to receive any funds to which you may be entitled and to effect the placement of the notices described above, please notify me in writing, c/o Porter's So-Lo Markets, 1475 North National, Springfield, Missouri 65802, stating when the program began or is scheduled to begin, the time and channel on which the survey will be broadcast, and TeleCable's costs, if any, of obtaining the survey information.

Very truly yours,

David Porter

## IN THE MATTER OF

## ARMSTRONG CORK COMPANY

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

*Docket C-1010. Consent Order, Nov. 3, 1965—Modifying Order, Sept. 10, 1984*

This Order reopens the proceeding and modifies an FTC Consent Order issued on November 3, 1965, 68 F.T.C. 849, which alleged that a manufacturer and distributor of floor-covering products had conspired with its wholesalers to reduce competition by fixing resale prices and conditions of product sale to retailers and flooring contractors, and by discriminating in price between competing buyers. After considering company petitions, supporting materials and other relevant information, the Commission concluded that hardships to the company and the public outweighed any benefit derived from the prohibition against imposing "terms or conditions" on resale of products, and deleted the language "terms or conditions" from paragraphs 1, 2, and 4 of Part I of the Order. The Commission also deleted the word "rebates" from paragraph 2 after finding that such modification would also be in the public interest since it would permit the company to funnel "direct-to-consumer" rebates through its wholesalers and retailers. However, the Commission declined to set or modify other parts of the Order, holding that the firm had failed to demonstrate any change of law, fact, or public interest consideration that would justify further modification.

## ORDER REOPENING AND MODIFYING FINAL ORDER

By petition of October 21, 1983, as supplemented and refiled on February 28, 1984, Armstrong World Industries, Inc. (formerly Armstrong Cork Company and hereinafter "Armstrong") asked the Commission to reopen and modify the Commission order issued against Armstrong on November 3, 1965. Armstrong requested that the Commission (1) modify Part I of the order by (a) deleting provisions prohibiting certain non-price vertical restraints; and (b) limiting the geographic scope of the resale price maintenance prohibitions; (2) set aside Parts II and III of the order; (3) set aside or modify Part IV of the order; and (4) substitute "Armstrong World Industries, Inc." for "Armstrong Cork Company" as the respondent to the order. Armstrong's October 21, 1983 and February 28, 1984 submissions were placed on the public record and no comments were received.

Upon consideration of Armstrong's petition and supporting materials, and other relevant information, the Commission finds that a modification of the order to delete the words "terms or conditions" from paragraphs 1, 2, and 4 of Part I is in the public interest. Armstrong has sufficiently demonstrated that the prohibition against Armstrong's imposing any terms or conditions on the resale of its

products by Armstrong's customers has caused hardships to Armstrong and the public that outweigh any benefits that may be derived from the prohibition. The "terms or conditions" language of the order, which was intended to reach only price terms, not non-price restraints, was overly broad in this case. Thus, modification of the order to delete the words "terms or conditions" is both in the public interest and consistent with the treatment of non-price vertical restraints in *Continental T.V. Inc. v. GTE-Sylvania, Inc.*, 433 U.S. 36 (1977).

The Commission also finds that deletion of the term "rebates" from paragraph 2 of Part I of the order is in the public interest. Armstrong states that it views the presence of the term "rebates" in that paragraph as prohibiting it from funnelling "direct-to-consumer" rebates through wholesalers and retailers. Armstrong has demonstrated that permitting it to offer rebates in this manner will benefit both Armstrong and consumers. And, permitting Armstrong to funnel "direct-to-consumer" rebates through wholesalers and retailers should not affect the wholesalers' and retailers' ability to independently determine the resale price of the product. Moreover, if Armstrong should use the rebates to engage in resale price maintenance, it would violate the order provisions prohibiting resale price fixing. Thus, because deleting "rebates" from paragraph 2 of Part I of the order should benefit both Armstrong and consumers without permitting resale price maintenance, granting Armstrong's requested modification is in the public interest.

However, the Commission has denied Armstrong's request to set aside paragraph 3 of Part I of the order. That paragraph is an integral part of the order's prohibition of resale price maintenance and Armstrong has demonstrated no change of law or fact or public interest considerations sufficient to require setting it aside.

The Commission has also declined to set aside paragraph 5 of Part I of the order. That paragraph does not require Armstrong to incur the costs it states it has incurred in fashioning a program to comply with the order. Nor does the order prohibit wholesalers from supplying inventory information in the least costly fashion possible. Rather the order simply prohibits Armstrong from *requiring* or *requesting* purchasers of its products to supply Armstrong with information concerning the resale prices charged by these purchasers. On the other hand, permitting Armstrong to request or require its purchasers of Armstrong's products to provide reports showing the prices at which they resell these products could affect its purchasers' pricing practices because they could view such reports as a means of monitoring their pricing. Thus, the benefits of this provision outweigh its *de minimis* costs, particularly when the order does not *require* either Armstrong or its customers to incur such costs.

Additionally, the Commission has refused Armstrong's request to limit the geographic scope of the order's resale price maintenance provisions to "within the United States." The Foreign Trade Antitrust Improvements Act of 1982, which clarified the extraterritorial application of domestic antitrust laws and the Federal Trade Commission Act, substantially addressed the concerns expressed by Armstrong in its petition. Moreover, Armstrong has failed to demonstrate any need to impose a limitation on the extraterritorial application of the order beyond that provided by statute.

The Commission also has found it unnecessary to set aside Parts II and III of the order. By their terms these provisions impose no prospective obligations on Armstrong.

Armstrong also asked the Commission to set aside or modify Part IV of the order, but the Commission has declined to do so because Armstrong has not demonstrated a change of law or fact or public interest considerations sufficient to require setting aside or modifying that Part. Part IV of the order only requires that Armstrong treat competing customers equally or be able to justify any differences in treatment by means of one of the statutory defenses or the defense applicable to sales to the United States government. *See Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952). Thus, the Commission sees no need to set aside or limit the term of Part IV. Moreover, if Armstrong is uncertain whether a proposed course of conduct would violate Part IV of the order, Armstrong may ask the Commission for an advisory opinion under Section 2.41 of the Commission's Rules, 16 C.F.R. 2.41 (1984).

Finally, Armstrong asked that the order be modified to substitute "Armstrong World Industries, Inc." for "Armstrong Cork Company" as the respondent to the order. The Commission finds that this modification is unnecessary because the order expressly binds the successors and assigns of Armstrong Cork Company and Armstrong's request therefore is denied.

Accordingly,

*It is ordered*, That this matter be reopened and that paragraphs 1, 2, and 4 of Part I of the order in Docket No. C-1010 be modified, as of the date of service of this order. Those paragraphs will now provide:

1. Engaging in, participating in, continuing, carrying out or enforcing any contract, agreement, arrangement or understanding, with any wholesalers, distributors, or other purchasers of Armstrong floor covering products, which directly or indirectly establishes, maintains or fixes prices of resale of such products by such wholesalers, distributors, or other purchasers.

2. Enforcing or attempting to enforce the price or prices or suggest-



ed prices or discounts for the resale of Armstrong floor covering products.

\* \* \* \* \*  
4. Circulating to or exchanging with any wholesaler or distributor or other purchaser, any circulars, price lists, suggested price lists, policy letters or other information, the effect of which is to create a contract, agreement, arrangement, or understanding which fixes or establishes a price or prices at or upon which any Armstrong floor covering products shall be resold.

Modifying Order

104 F.T.C.

IN THE MATTER OF

WILLIAM H. RORER, INC.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL  
TRADE COMMISSION ACT AND SEC. 2(a) OF THE CLAYTON ACT*Docket 8599. Final Order, Aug. 21, 1967—Modifying Order, Sept. 14, 1984*

This Order modifies the August 21, 1967 Order issued against a pharmaceutical manufacturer, 72 F.T.C. 412, pursuant to the March 20, 1967 decision of the Court of Appeals for the Second Circuit, 374 F.2d 622 (1967). After reviewing respondent's request and other relevant information, the Commission denied the request to vacate the Order in its entirety and retained the provision that prohibited the company from charging different prices for its products to competing customers. The Commission noted that the Order "in essence requires compliance with Section 2(a) of the Robinson-Patman Act," and the firm had not shown that complying with an order that essentially requires adherence to the law is causing it injury. However, the Commission determined that retaining certain "fencing-in" provisions that had been in effect for 17 years "placed the firm at a disadvantage with respect to its competitors by increasing its compliance costs unnecessarily." Therefore, in accordance with its conclusions, the Commission modified the Order by deleting requirements that the company promptly inform the Commission when it charged competing retailers different prices for its products, submit to the Commission a written statement containing justification for price differences, and publicize to all its retail customers that prices to some are higher than to others, together with reasons and details of the price differences or discounts.

## ORDER MODIFYING CEASE AND DESIST ORDER ISSUED AUGUST 21, 1967

On March 2, 1984, respondent William H. Rorer, Inc. ("Rorer") filed a "Request To Reopen Proceeding And Vacate Cease And Desist Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Commission's Rules of Practice. The Request asked the Commission to reopen the proceeding and vacate the cease and desist order issued on August 21, 1967 ("the Order") in its entirety.

After reviewing respondent's Request and other relevant information, the Commission has concluded that respondent has not made a satisfactory showing that changed conditions of law or fact or public interest considerations require that the Order be vacated in its entirety. The Commission has found, however, that it is in the public interest to modify the Order to terminate certain of its provisions.

The Order against Rorer prohibits price discrimination in the sale of prescription and nonprescription pharmaceutical products and in essence requires compliance with Section 2(a) of the Robinson-Patman Act. Additionally, the Order contains certain provisions de-

signed to help ensure compliance with the prohibition of price discrimination. The Commission finds that the changed facts relied on by Rorer do not provide a basis for setting aside the Order. Rorer maintains that the nature of the marketplace for antacids has changed since the Order was issued. In particular, Rorer says that independent drug stores are less significant outlets for its products than they were at the time the Order issued. However, Rorer has failed to show that independent drugstores or other retailers would not suffer competitive injury from illegal price discrimination favoring their competitors. Moreover, such changes do not warrant setting aside an order that applies to all competing retailers, not merely to independent drugstores. Indeed, the growing importance of mass marketers in the sale of covered products cited by Rorer demonstrates that it was appropriate for the Commission to issue, and for the Court of Appeals to sustain, an order applicable to all competing retailers.

Further, the Order's requirement that Rorer comply with the law in its sales of all of its "prescription and nonprescription pharmaceutical products" does not justify reopening of the Order. The fact that Rorer has introduced new products since the Order was issued and that the percentage of total Rorer sales accounted for by Maalox (the product involved in the original case) has declined are not reasons for setting aside the Order. Rorer has not shown that complying with an order that essentially requires adherence to the law is causing it injury.

Rorer also says that legal and economic thinking about the Robinson-Patman Act has changed since the Order was issued and that the level of Commission enforcement activity has declined. Request, pp. 27-29. Rorer does not contend, however, that the conduct that led to the Order would be legal today. Indeed, the Second Circuit found that the discrimination in this case, which continued for eight years, constituted a serious and extensive violation and amounted to "a classic price discrimination in favor of the chains as against individual retailers, a principal reason for and target of the Robinson-Patman Act." 374 F.2d 622, at 625 (2d Cir. 1967).

Nor has Rorer demonstrated that there has been a change in law or policy regarding the duration of conduct orders issued by the Commission. As a general rule, the Commission has issued perpetual orders in conduct cases and the perpetual conduct order is an important element of the Commission's ability to deter law violations. The deterrent effect of law enforcement actions by the Commission could be adversely affected if the Commission were to sunset conduct orders that do no more than require compliance with the law. And in recent cases the Commission has declined to terminate conduct orders solely because of their age. *See, e.g., National Dairy Products Corp.*, 100

F.T.C. 431 (1982) (Commission declined either to rescind or terminate in five years a perpetual order issued under Section 2(a) of the Clayton Act); *ABC Vending Corp.*, Docket No. 7652 (Letter from Secretary of the Commission to Arthur H. Kahn, Esquire, dated January 28, 1982, declining to set aside perpetual order provision based on Section 2(f) of the Clayton Act that "merely restates the law that must be adhered to by the respondent . . . and consequently does not hinder the respondent's ability to compete"); Letter of April 11, 1984 from Secretary of the Commission to James T. Halverson, Esq. concerning the Beecham Petition (Docket Nos. 8547, C-2037, C-2266 and Docket No. 4332); *Textileather Corp.*, Docket No. 1585 (Letter of January 20, 1984 from Secretary of the Commission to Kenneth B. Peterson, Esq.).<sup>1</sup>

Rorer has also failed to show that it would be in the public interest to terminate the Order. Rorer's arguments that the Order prevents it from competing misconstrue the scope and meaning of the Order in two important respects. First, Rorer claims in effect that the Order bars *all* price discrimination among competing retailers that is not concurrently cost justified to the Commission. Request, p. 37. This, however, is not the case. The Order does not bar all price discrimination, although it does require certain compliance procedures regarding discriminations in price that are allegedly justified by savings in costs. Second, Rorer says that no "meeting competition" defense is included in the Order. Request, pp. 38-39. While it is true that the defense is not explicitly stated in the Order, the Supreme Court held in *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952), that the cost justification and meeting competition defenses "are necessarily implicit in every order issued under the authority of the act just as if the order set them out *in extenso*." 343 U.S. at 476. Thus, the order does not prohibit Rorer from granting price discounts either in instances where it can cost justify those discounts or where it is meeting the lawful competition of a competitor.

However, the Commission has determined that the public interest warrants modifying the Order to terminate certain "fencing-in" provisions. These provisions require that in any instance where respondent institutes a price schedule charging a different price for its products to competing retail customers "on the basis or in the belief" that such difference in price is cost justified (1) it promptly notify the Commission of the institution of such price schedule; (2) submit to the Commission a written statement with necessary underlying data in support of the cost justification of such price discrimination; and (3)

<sup>1</sup> In *Occidental Petroleum Corp.*, Docket No. C-2492, the Commission terminated a perpetual reciprocity order after the expiration of ten years. However, *Occidental* involved a broad order, issued under Section 5 of the Federal Trade Commission Act, that prohibited all forms of reciprocity including practices that are today considered lawful and procompetitive. In contrast to the broad reach of Section 5, the Robinson-Patman Act is far more specific in defining prohibited forms of conduct.

adequately and regularly publicize to all retail customers that prices to some are higher than to others, together with reasons and details of the price differences or discounts. These "fencing-in" provisions have now been in effect for almost 17 years. The Commission finds that the pattern of conduct by Rorer which led to the entry of these "fencing-in" provisions has now been interrupted for a sufficient period of time so that they are no longer necessary either to dissipate the effects of respondent's past conduct or to prevent its recurrence. Although these provisions were justified at the time the Order was issued, their continued existence puts respondent at a disadvantage with respect to its competitors by increasing its compliance costs unnecessarily.

Accordingly, *it is ordered* that this matter be, and it hereby is, reopened, and that the Commission's Order issued on August 21, 1967, be, and it hereby is, modified to read as follows:

*It is ordered*, That respondent William H. Rorer, Inc., a corporation, and its officers, representatives, agents and employees, directly, indirectly, or through any corporate or other device, in or in connection with the sale of prescription and nonprescription pharmaceutical products in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from discriminating, directly or indirectly, in the price of such products of like grade and quality by selling to some retailers at prices higher than the price charged to any other retailer who, in fact, competes in the resale and distribution of respondent's products with the retailer paying the higher prices.

Set Aside Order

104 F.T.C.

IN THE MATTER OF  
FOREMOST DAIRIES, INC.

*Docket C-1161. Consent Order, Jan. 23, 1967—Set Aside Order, Sept. 18, 1984*

This Order reopens the proceeding and sets aside the divestiture Order issued against a dairy products processor in 1967 (71 F.T.C. 56) and modified in 1983 (101 F.T.C. 343) by deleting the provision requiring prior Commission approval for any further acquisitions by the company. After considering the request of successor company, McKesson Corporation, together with supporting materials and other relevant data, the Commission found that the competitive problem that had prompted issuance of the divestiture Order no longer existed and termination of the Order to relieve respondent of compliance costs was in the public interest.

ORDER REOPENING AND SETTING ASIDE MODIFIED ORDER ISSUED ON  
JANUARY 23, 1967

By a petition filed on May 16, 1984, and a supplement thereto dated June 29, 1984, McKesson Corporation (formerly Foremost-McKesson, Inc. and Foremost Dairies, Inc. and hereafter "McKesson") requests that the Commission reopen the proceeding in Docket No. C-1161 and set aside the modified order against McKesson issued by the Commission on January 23, 1967. Pursuant to Section 2.51 of the Commission's Rules of Practice, McKesson's petition was placed on the public record for comment. No comments were received.

Upon consideration of McKesson's petition and supporting materials, and other relevant information, the Commission now finds that changed conditions of fact and the public interest warrant reopening the proceeding and setting aside the modified order. The record demonstrates that the competitive problem Paragraph IV of the order intended to remedy no longer exists and termination of the order to relieve respondent of compliance costs is in the public interest.

Accordingly,

*It is ordered*, That this matter be, and it hereby is reopened and that the Commission's modified order be, and it is hereby set aside.

Chairman Miller did not participate.

## IN THE MATTER OF

SPERRY CORPORATION,  
DKG ADVERTISING, INC.,  
NORTH AMERICAN PHILIPS CORPORATION

and

MCCAFFREY AND MCCALL, INC.

*Dockets C-3068, C-3069, C-3105 & C-3106. Interlocutory Orders, Sept. 21, 1984*

In four separate Orders Terminating Show Cause Proceeding, the FTC declined to modify the "reasonable" provision in individual consent orders issued against two manufacturers of electric shavers for black men, and their advertising agencies. This provision barred the companies from claiming, without a reasonable basis consisting of two well-controlled clinical studies, that their products reduced or alleviated "razor bumps," a skin condition affecting many black men. The Commission asserted that while its Show Cause Orders had solicited from the four companies and other interested parties evidence that one well-controlled clinical study would satisfy the "reasonable basis" requirement and serve the public interest, lesser substantiation was not warranted in this case. The Commission's review of the entire record, including public comment and complaint counsel's memoranda, together with the alleged improper conduct of respondents in the past, indicated that the "reasonable basis" requirement of two well-controlled clinical tests should not be modified.

## ORDER TERMINATING SHOW CAUSE PROCEEDING

On March 8, 1983, the Federal Trade Commission issued a Show Cause Order instructing respondent Sperry Corporation to show cause, if any, why a Decision and Order issued against the company on July 17, 1981 [98 F.T.C. 4], should not be reopened and modified. The July 17, 1981, cease and desist order prohibited Sperry Corporation from claiming that the Black Man's Shaver or any other product reduces or treats a painful medical condition known as pseudofolliculitis barbae (or "razor bumps") unless the company possesses and relies on a reasonable basis consisting of two well-controlled clinical studies. In its Show Cause Order the Commission solicited evidence from respondent and any other interested party as to whether one well-controlled clinical study would satisfy the reasonable basis requirement contained in the order and as to whether it would be in the public interest to replace the existing two clinicals requirement with a one clinical test requirement.

Our review of the entire record of this proceeding, including the eight public comments received and complaint counsel's extensive memorandum, leads us to conclude that, although a different level of

substantiation might be appropriate in other circumstances, two clinical studies represent the appropriate level of substantiation that should be required in this order. In arriving at this conclusion we have, among other things, weighed the benefits of having two well-designed tests, such as increased certainty that claims based on the tests are accurate, against the costs saved by requiring only one such test. The significance of these factors varies from case to case. Here, the benefits are self-evident and substantial. Requiring two tests will significantly reduce the risk that the respondent will disseminate inaccurate claims concerning a product that not only fails to treat a serious and painful medical condition as advertised but may actually prolong or exacerbate the condition. In contrast, savings the company might achieve by conducting one fewer test appear modest since the relatively low cost of conducting a second test would not greatly exceed the cost of a single test that included additional procedural safeguards needed to enhance its reliability, such as those proposed by complaint counsel and the experts who commented. Finally, respondent's past conduct, as alleged in the complaint, of making false and unsubstantiated claims for its product on the basis of inadequate and flawed testing warrants imposition of a more rigorous substantiation requirement to provide additional assurance that the respondent will not engage in such conduct in the future.

For these reasons, we are unpersuaded that the public interest would be served by a reduction in the level of substantiation required under this order. We therefore direct that the show cause proceeding instituted on March 8, 1983, be terminated and that no modification be made to the Decision and Order issued against Sperry Corporation on July 17, 1981.

#### ORDER TERMINATING SHOW CAUSE PROCEEDING

On March 8, 1983, the Federal Trade Commission issued a Show Cause Order instructing respondent DKG Advertising, Inc. to show cause, if any, why a Decision and Order issued against the company on July 17, 1981 [98 F.T.C. 15], should not be reopened and modified. The July 17, 1981, cease and desist order prohibited DKG Advertising, Inc. from claiming that the Black Man's Shaver or any other product reduces or treats a painful medical condition known as pseudofolliculitis barbae (or "razor bumps") unless the company possesses and relies on a reasonable basis consisting of two well-controlled clinical studies. In its Show Cause Order the Commission solicited evidence from respondent and any other interested party as to whether one well-controlled clinical study would satisfy the reasonable basis requirement contained in the order and as to whether it would be in the



public interest to replace the existing two clinicals requirement with a one clinical test requirement.

Our review of the entire record of this proceeding, including the eight public comments received and complaint counsel's extensive memorandum, leads us to conclude that, although a different level of substantiation might be appropriate in other circumstances, two clinical studies represent the appropriate level of substantiation that should be required in this order. In arriving at this conclusion we have, among other things, weighed the benefits of having two well-designed tests, such as increased certainty that claims based on the tests are accurate, against the costs saved by requiring only one such test. The significance of these factors varies from case to case. Here, the benefits are self-evident and substantial. Requiring two tests will significantly reduce the risk that the respondent will disseminate inaccurate claims concerning a product that not only fails to treat a serious and painful medical condition as advertised but may actually prolong or exacerbate the condition. In contrast, the savings the company might achieve by conducting one fewer test appear modest since the relatively low cost of conducting a second test would not greatly exceed the cost of a single test that included additional procedural safeguards needed to enhance its reliability, such as those proposed by complaint counsel and the experts who commented. Finally, respondent's past conduct, as alleged in the complaint, of making false and unsubstantiated claims for its product on the basis of inadequate and flawed testing warrants imposition of a more rigorous substantiation requirement to provide additional assurance that the respondent will not engage in such conduct in the future.

For these reasons, we are unpersuaded that the public interest would be served by a reduction in the level of substantiation required under this order. We therefore direct that the show cause proceeding instituted on March 8, 1983, be terminated and that no modification be made to the Decision and Order issued against DKG Advertising, Inc. on July 17, 1981.

#### ORDER TERMINATING SHOW CAUSE PROCEEDING

On March 8, 1983, the Federal Trade Commission issued a Show Cause Order instructing respondent North American Philips Corporation to show cause, if any, why a Decision and Order issued against the company on March 7, 1983 [101 F.T.C. 359], should not be reopened and modified. The March 7, 1983, cease and desist order prohibited North American Philips Corporation from claiming that the Black Pro shaver or any other electric shaver, drug, or device reduces or treats a painful medical condition known as pseudofolliculitis bar-

bae (or "razor bumps") unless the company possesses and relies on a reasonable basis consisting of two well-controlled clinical studies. In its Show Cause Order the Commission solicited evidence from respondent and any other interested party as to whether one well-controlled clinical study would satisfy the reasonable basis requirement contained in the order and as to whether it would be in the public interest to replace the existing two clinicals requirement with a one clinical test requirement.

Our review of the entire record of this proceeding, including the eight public comments received and complaint counsel's extensive memorandum, leads us to conclude that, although a different level of substantiation might be appropriate in other circumstances, two clinical studies represent the appropriate level of substantiation that should be required in this order. In arriving at this conclusion we have, among other things, weighed the benefits of having two well-designed tests, such as increased certainty that claims based on the tests are accurate, against the costs saved by requiring only one such test. The significance of these factors varies from case to case. Here, the benefits are self-evident and substantial. Requiring two tests will significantly reduce the risk that the respondent will disseminate inaccurate claims concerning a product that not only fails to treat a serious and painful medical condition as advertised but may actually prolong or exacerbate the condition. In contrast, savings the company might achieve by conducting one fewer test appear modest since the relatively low cost of conducting a second test would not greatly exceed the cost of a single test that included additional procedural safeguards needed to enhance its reliability, such as those proposed by complaint counsel and the experts who commented. Finally, respondent's past conduct, as alleged in the complaint, of making false and unsubstantiated claims for its product on the basis of inadequate and flawed testing warrants imposition of a more rigorous substantiation requirement to provide additional assurance that the respondent will not engage in such conduct in the future.

For these reasons, we are unpersuaded that the public interest would be served by a reduction in the level of substantiation required under this order. We therefore direct that the show cause proceeding instituted on March 8, 1983, be terminated and that no modification be made to the Decision and Order issued against North American Philips Corporation on March 7, 1983.

#### ORDER TERMINATING SHOW CAUSE PROCEEDING

On March 8, 1983, the Federal Trade Commission issued a Show Cause Order instructing respondent McCaffrey and McCall, Inc. to

show cause, if any, why a Decision and Order issued against the company on March 7, 1983 [101 F.T.C. 367], should not be reopened and modified. The March 7, 1983, cease and desist order prohibited McCaffrey and McCall, Inc. from claiming that the Black Pro shaver or any other electric shaver, drug, or device reduces or treats a painful medical condition known as pseudofolliculitis barbae (or "razor bumps") unless the company possesses and relies on a reasonable basis consisting of two well-controlled clinical studies. In its Show Cause Order the Commission solicited evidence from respondent and any other interested party as to whether one well-controlled clinical study would satisfy the reasonable basis requirement contained in the order and as to whether it would be in the public interest to replace the existing two clinicals requirement with a one clinical test requirement.

Our review of the entire record of this proceeding, including the eight public comments received and complaint counsel's extensive memorandum, leads us to conclude that, although a different level of substantiation might be appropriate in other circumstances, two clinical studies represent the appropriate level of substantiation that should be required in this order. In arriving at this conclusion we have, among other things, weighed the benefits of having two well-designed tests, such as increased certainty that claims based on the tests are accurate, against the costs saved by requiring only one such test. The significance of these factors varies from case to case. Here, the benefits are self-evident and substantial. Requiring two tests will significantly reduce the risk that the respondent will disseminate inaccurate claims concerning a product that not only fails to treat a serious and painful medical condition as advertised but may actually prolong or exacerbate the condition. In contrast, savings the company might achieve by conducting one fewer test appear modest since the relatively low cost of conducting a second test would not greatly exceed the cost of a single test that included additional procedural safeguards needed to enhance its reliability, such as those proposed by complaint counsel and the experts who commented. Finally, respondent's past conduct, as alleged in the complaint, of making false and unsubstantiated claims for its product on the basis of inadequate and flawed testing warrants imposition of a more rigorous substantiation requirement to provide additional assurance that the respondent will not engage in such conduct in the future.

For these reasons, we are unpersuaded that the public interest would be served by a reduction in the level of substantiation required under this order. We therefore direct that the show cause proceeding instituted on March 8, 1983, be terminated and that no modification

be made to the Decision and Order issued against McCaffrey and McCall, Inc. on March 7, 1983.

MATTTEL, INC., et al.

Modifying Order

IN THE MATTER OF

MATTTEL, INC.

and

CARSON-ROBERTS, INC.

*Dockets C-2071 & C-2072. Consent Orders, Nov. 1, 1971—  
Modifying Order, Sept. 24, 1984*

In response to a joint petition from a toy manufacturer and its advertising agency, this Order reopens the proceedings and modifies Paragraph One of two 1971 consent orders issued against Mattel, Inc., 79 F.T.C. 667, and Carson-Roberts, Inc. (succeeded by Ogilvy & Mather U.S., a Division of Ogilvy & Mather International Inc.), 79 F.T.C. 674. Noting that Paragraph One of the Orders prohibited the use of certain film or camera techniques in children's advertising only if they misrepresented advertised product's performance; operation or use, the Commission held that modification clarifying the circumstances under which these techniques may be used would be in the public interest. The Commission therefore added a proviso permitting the non-deceptive use of the techniques if respondents possessed and relied on competent and reliable tests establishing this lack of deception; and a requirement that the supporting data be maintained for a period of two years. However, the Commission declined to modify Paragraph Four on the ground that petitioners had not demonstrated that the requested modification to remove the broadcast advertisement disclosure requirement regarding the incompatibility of some "Hot Wheels" toys with others is supported by a change in law, change in fact or the public interest.

ORDER REOPENING THE PROCEEDINGS AND  
MODIFYING CEASE AND DESIST ORDERS

On January 19, 1984, Mattel, Inc., and Ogilvy & Mather U.S., a Division of Ogilvy & Mather International Inc., (successor corporation to Carson Roberts, Inc.), respondents in the above captioned matter, filed a joint petition pursuant to Rule 2.51 of the Commission's Rules of Practice to reopen the proceedings and modify the consent orders entered therein. [79 F.T.C. 667, 674 (1971)] By letters dated June 7, 1984, June 21, 1984, July 19, 1984, and August 13, 1984, Petitioners modified their original joint proposal.

The Orders relate to alleged unfair and deceptive practices by Mattel and Carson-Roberts in connection with the advertising of toy racing sets and dancing or walking dolls. The first three paragraphs of the Orders against the two petitioners are substantively identical. These paragraphs: (1) prohibit the use of certain film or camera techniques in advertising addressed to children that misrepresent the product's performance, operation or use, (2) limit the circumstances under which endorsements may be used in advertising addressed to

children, and, (3) require that, whenever two or more "Hot Wheels" products which are sold separately are advertised together, that separate status be disclosed. Paragraph Four of the Order against Ogilvy & Mather requires a disclosure in broadcast advertising regarding the incompatibility of some Hot Wheels products with other Hot Wheels products. Paragraph Four of the Order against Mattel requires this disclosure in print advertising and on packages as well as in broadcast advertising. The Order against Mattel also prohibits the misrepresentation of the velocity at which a toy car travels (Paragraph Five) and requires a disclosure regarding the ability of dancing or walking dolls to stand by themselves (Paragraph Six).

Petitioners seek modification only of Paragraphs One and Four of the Order—the paragraphs restricting the use of certain camera techniques<sup>1</sup> and requiring compatibility disclosures. Petitioners seek to add a proviso to Paragraph One of the Order. This proviso would state that respondents' use of the camera techniques restricted by Paragraph One would not constitute a violation of that Paragraph as long as they possessed and relied upon results of competent and reliable tests showing that such techniques, in the context of the advertisement as a whole, do not misrepresent the advertised product's performance to the age group of children to whom the advertisement is addressed. Petitioners also propose a provision which requires that proper records pertaining to these tests be maintained.<sup>2</sup>

Petitioners argue that the addition of this proviso to the Orders is in the public interest. They point out that the current Order does not flatly prohibit the use of the camera techniques described in Paragraph One. They are proscribed only if the result of their use "in the context of the advertisement as a whole is to misrepresent the product's performance, operation or use to the age groups of children to whom the advertisement is addressed, taking into consideration the level of knowledge, sophistication, maturity, and experience of such age group or age groups." Paragraph 1, Clauses (a)(b)(c) and (d). Petitioners claim that even though the Order is thus not designed to totally ban the use of these camera techniques, such is its practical effect. They argue that the order language fails to give them clear guidance by which they can tailor their actions for compliance, and that whether any given use of a particular camera technique in a

<sup>1</sup> These techniques are: (1) the use of "any visual perspective . . . which purports to be but is not one which a child can experience . . ."; (2) "[a]ny sequence of different visual perspectives which purports to depict perspectives which a child can experience but which changes faster than a child can change his visual perspective . . ."; (3) "[a]ny visual perspective which purports to depict the actual performance of a particular function of the product and which differs substantially from the length of time required to perform that function . . ."; and (4) "[c]amera over-cranking or under-cranking to depict a performance characteristic of such product which does not exist or cannot be perceived under ordinary conditions of the product's use. . . ." [79 F.T.C. 672, 679 (1971)]

<sup>2</sup> Ogilvy & Mather, successor to Carson-Roberts, Inc., also proposes that the name, Ogilvy & Mather U.S., a division of Ogilvy & Mather International, Inc., be substituted for the name Carson-Roberts, Inc., wherever the latter name appears in the Order in Docket C-2072.

particular advertisement "misrepresents" the product can only be decided in a post hoc Commission civil penalty action. Therefore, to avoid such an action, they must totally abstain from the use of such techniques.

Petitioners also propose that Paragraph Four of the original Orders be modified to remove the broadcast advertisement disclosures currently required. In place of these disclosures, Paragraph Four of the Mattel Order would be modified to require all package disclosures to appear on the front of the packages. Also, the clear and conspicuous standard would be applied to both the package and print advertising disclosure requirements. Finally, Paragraph Four of the Ogilvy & Mather Order would be modified to include the same package front and print advertising requirements as in Paragraph Four of the Mattel Order.

The Commission believes that the proposed proviso to Paragraph One is in the public interest. The theory behind the Orders clearly was not that the specified camera techniques are always deceptive. Had it been so, they would simply have been prohibited in all circumstances. The Orders do not proscribe those techniques, but only prohibit their use when the effect of such is to misrepresent the product's performance. The practical effect of the Orders, however, appears to be to raise substantial questions with regard to what constitutes proper compliance with Paragraph One. The proviso would allow the non-deceptive use of these camera techniques. Petitioners would have to possess and rely upon competent and reliable tests establishing this lack of deception. The requested modification would thus provide Petitioners with additional guidance as to the circumstances under which these camera techniques may be used while continuing to prevent that advertising from misrepresenting the performance of the advertised products.

However, the Commission has determined that Petitioners have not demonstrated that the requested modifications in Paragraph Four of the Orders are supported by a change in law, change in fact or the public interest. Petitioners argue that consumers are clearly aware that some Hot Wheels vehicles are not compatible with some Hot Wheels playsets, and can determine from pre-purchase visual inspection which vehicles are compatible with which sets. However, Petitioners present no evidence in support of this assertion. Furthermore, Commission staff attempted to test Petitioners' assertion by examining one Hot Wheels set and a variety of Hot Wheels vehicles. Staff was unable to reliably predict from visual inspection which vehicles would be compatible with the set. Petitioners also argue that the broadcast advertisement disclosures currently required by the Order provide no consumer benefit. They claim that an order which

requires package-front disclosures, rather than broadcast disclosures and written disclosures which may be placed anywhere on the package, would provide better protection to consumers. However, Petitioners have presented no evidence to support this claim. The Commission concludes that Petitioners' arguments for the modification of Paragraph Four of the Orders do not meet the requirements of Section 2.51(b) of the Commission's Rules of Practice.

By letter of August 13, 1984, Petitioners requested that the Commission reopen the proceedings to modify both Paragraphs One and Four of the Orders, or, in the alternative, if the Commission should decide not to reopen the proceedings to modify both of those Order paragraphs, that the Commission reopen the proceedings to modify just Paragraph One as they have requested or reopen the proceedings to modify just Paragraph Four as they have requested. The Commission accepts only Petitioners' alternative request to reopen the proceedings solely to modify Paragraph One of the Orders. The Commission denies Petitioners' other requests to reopen the proceedings for the purpose of modifying both Paragraphs One and Four of the Orders and to reopen the proceedings for the purpose of modifying only Paragraph Four of the Orders.

The modified Orders will ensure that Petitioners' use of the camera techniques specified therein is not deceptive. At the same time, Petitioners' duties under the Orders have been clarified and their burdens of compliance lessened.

*It is therefore ordered,* That the proceeding in Docket Number C-2071 is hereby reopened and the Order issued November 1, 1971, is hereby modified as follows:

1. The following language shall be added to the end of Paragraph 1 of the Order.

*Provided, however,* That respondent shall not be in violation of the provisions of this paragraph if, at the time an advertisement incorporating any visual perspective or film or camera technique described in this paragraph is broadcast, respondent possesses and relies upon a test(s) which compares the impressions created by two advertisements which are identical except for the presence or absence of the visual perspective(s) or film or camera technique(s) being tested, and which is sufficiently sensitive to measure differences between the impressions conveyed by the advertisements with an accuracy of plus or minus less than five (5) percentage points, and which is otherwise competent and reliable, or any other competent and reliable test(s), which demonstrate(s) that such visual perspective(s) or film or camera technique(s), in the context of the advertisement as a whole, does not



misrepresent the product's performance, operation, or use to the age group or age groups of children to whom the advertisement is addressed, taking into consideration the level of knowledge, sophistication, maturity, and experience of such age group or age groups. "Competent and reliable" shall mean for purposes of this Order a test conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in that profession to yield accurate and reliable results.

2. The following paragraph shall be added following Paragraph 6.

*It is further ordered,* That respondent Mattel, Inc., shall maintain for at least two years from the date of the last dissemination of the representation, and upon request make available to the Federal Trade Commission for inspection and copying, all test results, data, and other documents or information relied upon for any representation containing any visual perspective(s) or film or camera technique(s) described in Paragraph 1 of this Order, and any information possessed or known of which contradicts, qualifies or calls into serious question that representation.

*It is further ordered,* That the proceeding in Docket Number C-2072 is hereby reopened and the Order issued November 1, 1971, is hereby modified as follows:

1. The corporate name, Ogilvy & Mather U.S., a division of Ogilvy & Mather International, Inc., shall be substituted for the corporate name Carson-Roberts, Inc., wherever the name Carson-Roberts, Inc., appears in this Order.

2. The following language shall be added to the end of Paragraph 1 of the Order.

*Provided, however,* That respondent shall not be in violation of the provisions of this paragraph if, at the time an advertisement incorporating any visual perspective or film or camera technique described in this paragraph is broadcast, respondent possesses and relies upon a test(s) which compares the impressions created by two advertisements which are identical except for the presence or absence of the visual perspective(s) or film or camera technique(s) being tested, and which is sufficiently sensitive to measure differences between the impressions conveyed by the advertisements with an accuracy of plus or minus less than five (5) percentage points, and which is otherwise competent and reliable, or any other competent and reliable test(s), which demonstrate(s) that such visual perspective(s) or film or camera technique(s), in the context of the advertisement as a whole, does not misrepresent the product's performance, operation, or use to the age

group or age groups of children to whom the advertisement is addressed, taking into consideration the level of knowledge, sophistication, maturity, and experience of such age group or age groups. "Competent and reliable" shall mean for purposes of this Order a test conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted by others in that profession to yield accurate and reliable results.

3. The following paragraph shall be added following Paragraph 4.

*It is further ordered,* That respondent Ogilvy & Mather U.S., a division of Ogilvy & Mather International, Inc., shall maintain for at least two years from the date of the last dissemination of the representation, and upon request make available to the Federal Trade Commission for inspection and copying, all test results, data, and other documents or information relied upon for any representation containing any visual perspective(s) or film or camera technique(s) described in Paragraph 1 of this Order, and any information possessed or known of which contradicts, qualifies or calls into serious question that representation.

Commissioner Pertschuk dissented.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL PERTSCHUK

The Commission today takes yet another giant step backward from protecting children against commercial exploitation. By agreeing to modify these 1971 orders, the Commission continues to ease the restraints against the sophisticated psychological manipulation of six, seven and eight year olds.

The 1971 orders against Mattel and its ad agency were entered to settle charges that ads for Mattel's "Hot Wheels" toys made the toys look bigger and move faster than they would appear to children. Although the orders did not ban Mattel's use of the questionable video techniques, for thirteen years Mattel apparently felt constrained from using a distorted sales pitch to sell its toys. But armed with the knowledge that the current Commission refuses to take a hard look at advertising directed to children,<sup>1</sup> last January Mattel pleaded hardship and asked the Commission to lift the burden of the orders.<sup>2</sup>

The solution agreed to by the Commission permits Mattel to use the techniques listed in the 1971 orders as long as Mattel's comparative

<sup>1</sup> For a more complete critique of the Commission's recent approach to children's advertising, see my Report to the Subcommittee on Oversight and Investigations, House Committee on Energy and Commerce, "The Performance of the Federal Trade Commission, 1977-1984," at IV-61 - IV-70.

<sup>2</sup> In its petition, Mattel noted that the staff has recently closed investigations of two of its competitors for using video techniques similar to those prohibited by the 1971 orders. The fact that those cases were not pursued is indeed worthy of public attention—since they demonstrate the Commission's continuing abdication of its statutory role

testing of the camera techniques on two groups of children shows that the ads do not misrepresent the toys. But comparative testing of ads directed toward children is not adequate. I am skeptical that techniques for testing children's perceptions are sufficiently reliable to demonstrate that an ad is nondeceptive. As the FTC staff noted in its 1983 recommendation to close the Children's Advertising Rulemaking, "[Y]oung children do not possess the cognitive ability to evaluate adequately child-oriented television advertising." To the best of my knowledge, the Commission has previously respected this fact and has never before entered an order that incorporates a requirement for testing directed at children. Mattel has not presented any reason why the Commission should alter this long-standing policy and chance sanctioning deception.