Such advertisement shall be run no later than sixty (60) days after service upon respondents of this order.

It is further ordered, That respondents cease and desist from representing, directly or indirectly, in their advertising, promotional material, package label, or any other similar material that their vitamin, mineral, or vitamin and mineral products have "super potency," and from using the word "super" or any word of similar import or meaning as a part of the trade name of their vitamin, mineral, or vitamin and mineral products.

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

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

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

IN THE MATTER OF

GEORGE V. DUGAN D/B/A GEORGE DUGAN CHEVROLET

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

Docket C-2525. Complaint, July 30, 1974—Decision, July 30, 1974

Consent order requiring a Klamath Falls, Oreg., new and used automobile dealer, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Michael A. Katz, Stephen A. Kikuchi* and *Thornton P. Percival.*

For the respondent: *Robert D. Boivin*, Klamath Falls, Oreg.

575-956 O-LT - 76 - 15

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that George V. Dugan, an individual trading and doing business as George Dugan Chevrolet, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent George V. Dugan is an individual trading and doing business as George Dugan Chevrolet, with his principal office and place of business located at 677 South Seventh Street, Klamath Falls, Ore.

Par. 2. Respondent is now and for some time last past has been engaged in the offering for sale, and retail sale of new and used motor vehicles to the public.

Par. 3. In the ordinary couse and conduct of the business as aforesaid, respondent regularly extends consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

Par. 4. Subsequent to July 1, 1969, respondent, in the ordinary course of business as aforesaid, and in connection with his credit sales, as "credit sale" is defined in Regulation Z, has caused and is causing customers to execute a binding order, hereinafter referred to as the "Order Contract." In some instances, respondent has caused and is causing customers to execute blank retail installment contracts. Respondent does not provide customers with any other consumer credit cost disclosures before the transaction is consummated, except in those instances noted in Paragraph Five below, when respondent furnishes a completed retail installment contract.

By and through the use of the order contract, respondent:

1. Fails to disclose the amount of credit extended, and to describe that amount as the "amount financed," as required by Section 226.8(c)(7) of Regulation Z.

2. Fails to disclose the sum of all charges required by Section 226.4 of Regulation Z to be included therein, and to describe that sum as the "finance charge," as required by Section 226.8(c)(8)(i) of Regulation Z.

3. Fails to disclose the sum of the cash price, all charges which are

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

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

5. Fails in some instances to disclose the number, amounts and due dates or periods of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

6. Fails to disclose the sum of the payments scheduled to repay the indebtedness, and to describe that sum as the "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

7. Fails to identify the amount or the method of computing the amount of any default, delinquency or similar charge payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

8. Fails to describe or identify the type of security interest held or to be retained or acquired by the creditor in connection with the extension of credit, as required by Section 226.8(b)(5) of Regulation Z.

9. Fails to identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, and to state the amount or method of computation of any charge deductible from any rebate of unearned finance charge which may be credited to the obligation or refunded to the customer, as required by Section 226.8(b)(7) of Regulation Z.

10. Fails to furnish to the customer a duplicate of the instrument or other statement containing the disclosures prescribed by Section 226.8 of Regulation Z, as required by Section 226.8(a) of Regulation Z.

Par. 5. Subsequent to July 1, 1969, respondent, in the ordinary course of business, and in connection with his credit sales, as "credit sale" is defined in Regulation Z, has caused and is causing customers to execute, in addition to said order contract, a retail installment contract, hereinafter referred to as the "Installment Contract." In some instances, respondent furnishes the customer with a completed copy of the installment contract before the transaction is consummated but does not make any other consumer credit cost disclosures, with the exception of those set forth in the order contract.

By and through such use of the installment contract, respondent has failed to include in the finance charge certain charges or premiums for credit life and/or disability insurance when a specific dated and separately signed affirmative written indication of the customer's desire for

such insurance was not obtained as prescribed by Section 226.4(a)(5)(ii) of Regulation Z. Respondent has thereby failed to determine and disclose the finance charge accurately as required by Sections 226.4 and 226.8(c)(8)(i) of Regulation Z, and to compute and disclose the annual percentage rate accurately to the nearest quarter of one percent, as required by Sections 226.5(b) and 226.8(b)(2) of Regulation Z.

Par. 6. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent George V. Dugan is an individual trading and doing business as George Dugan Chevrolet with his principal office and place of business located at 677 South Seventh Street, Klamath Falls, Oreg.

2. The Federal Trade Commission has jurisdiction of the subject

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

ORDER

It is ordered, That respondent George V. Dugan, an individual trading and doing business as George Dugan Chevrolet, or under any other name or names, and respondent's successors, assigns, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or any advertisement to aid, promote or assist directly or indirectly an extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to disclose the amount of credit extended, and to describe that amount as the "amount financed," as required by Section 226.8(c)(7) of Regulation Z.

2. Failing to disclose the sum of all charges required by Section 226.4 of Regulation Z to be included therein, and to describe that sum as the "finance charge," as required by Section 226.8(c)(8)(i) of Regulation Z.

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

4. Failing to compute and disclose the annual percentage rate accurately to the nearest quarter of one percent, as required by Sections 226.5(b) and 226.8(b)(2) of Regulation Z.

5. Failing to disclose the number, amounts and due dates or periods of payments scheduled to repay the indebtedness, and the sum of such payments, and to describe that sum as the "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

6. Failing to identify the amount or the method of computing the amount of any default, delinquency or similar charge payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

7. Failing to describe or identify the type of any security interest held or to be retained or acquired by the creditor in connection with the extension of credit, as required by Section 226.8(b)(5) of Regulation Z.

8. Failing to identify the method of computing any unearned

portion of the finance charge in the event of prepayment of the obligation, and to state the amount or method of computation of any charge deductible from any rebate of unearned finance charge which may be credited to the obligation or refunded to the customer, as required by Section 226.8(b)(7) of Regulation Z.

9. Failing to furnish to the customer, before the transaction is consummated, a duplicate of the instrument or other statement containing the disclosures required by Section 226.8 of Regulation Z, as required by Section 226.8(a) of Regulation Z.

10. Failing to itemize and include in the finance charge, for purposes of disclosure of the finance charge and computation of the annual percentage rate, any and all charges or premiums for credit life or disability insurance unless respondent has obtained a specific dated and separately signed affirmative written indication of the customer's desire for such insurance coverage as prescribed by Section 226.4(a)(5)(ii) of Regulation Z.

11. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, at the time and in the manner, form and amounts required by Sections 226.6, 226.7, 226.8 and 226.10 of Regulation Z.

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

It is further ordered, That respondent prominently display the following notice in two or more locations in that portion of respondent's business premises most frequented by prospective customers, and in each location where customers normally sign consumer credit documents or other binding instruments. Such notices shall be considered prominently displayed only if so positioned as to be easily observed and read by the intended individuals:

NOTICE TO CREDIT CUSTOMERS

IF THE DEALER IS FINANCING OR ARRANGING THE FINANCING OF YOUR PURCHASE, YOU ARE ENTITLED TO CONSUMER CREDIT COST DISCLOSURES AS REQUIRED BY THE FEDERAL TRUTH IN LENDING ACT. THESE MUST BE PROVIDED TO YOU IN WRITING BEFORE YOU ARE ASKED TO SIGN ANY DOCUMENT OR OTHER PAPERS WHICH WOULD BIND YOU TO SUCH A PURCHASE.

This notice required by order of the Federal Trade Commission.

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

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

IN THE MATTER OF

FROZEN FOOD FORUM, INC., ET AL.

Docket 8890. Interlocutory Order, Aug. 5. 1974

Order establishing periods of time for filing and length of briefs by counsel supporting the complaint and respondent respectively, on the question of whether, in view of the unavailability of evidence, this proceeding should be dismissed.

Appearances

For the Commission: *William E. Mumford, Lewis F. Parker, Joel S. Thwaites, Ronald C. Cougill* and *Charles C. Murphy, Jr.*

For the respondents: *Arnall, Golden & Gregory*, Atlanta, Ga. and *W. A. Bentley, Chickering & Gregory*, San Francisco, Calif.

In view of the Commission's request to the United States District Court for the Northern District of Georgia to dismiss the subpoena enforcement proceeding against respondents, with the result that the evidence called for by the subpoenas will not be produced, the Commission has determined to consider whether to dismiss this proceeding:

Accordingly, *It is ordered*, That complaint counsel shall within thirty (30) days from the date of this order serve and file a brief (not to exceed fifty (50) pages) with the Commission limited to the following question: whether, in view of the unavailability of evidence, this proceeding should be dismissed. Upon receipt of complaint counsel's brief, respondents may within twenty (20) days serve and file a reply brief (not to exceed (50) pages) limited to the same question.

IN THE MATTER OF

DAHLBERG ELECTRONICS, INC.

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

Docket 8929. Complaint, May 8, 1973—Decision, Aug. 6, 1974

Consent order requiring a Minneapolis, Minn., manufacturer of hearing aids, among other things to cease imposing customer and territorial restrictions and exclusive dealing requirements on its dealers; maintaining resale prices; restricting dealers in cooperative advertising from stating that dealers deal in other brands of hearing aids. Failing to include warranties with products sold by respondents. Further, respondent is required to place in a trade journal a full-page ad clearly disclosing particulars of the order, and to maintain for a ten-year period a file record of any refusal to sell.

Appearances

For the Commission: *Alan I. Leibowitz, L. Barry Costilo, Dennis R. Carluzzo* and *James C. Donoghue.*

For the respondent: *Arent, Fox, Kintner, Plotkin & Kahn*, Wash., D. C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (Title 15, U.S.C. Section 41, *et seg.*) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the party identified in the caption hereof, and more particularly described and referred to hereinafter as respondent, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the interest of the public, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Dahlberg Electronics, Inc., (hereinafter sometimes referred to as "Dahlberg") is a corporation organized under the laws of the State of Minnesota, with its principal office and place of business at 7731 Country Club Drive, Minneapolis, Minn. Dahlberg is a wholly-owned subsidiary of Detection Sciences, Inc., a Minnesota Corporation, with its office and principal place of business located at 7731 Country Club Drive, in the city of Minneapolis, State of Minnesota.

Par. 2. Respondent is engaged in the business of manufacturing, distributing, selling and repairing of hearing aids and related articles, sometimes referred to as "Dahlberg products." It distributes and sells

to selected retail dealers located throughout the United States, who then resell to the general public.

Par. 3. In the course and conduct of its business, respondent ships or causes to be shipped hearing aids from its facilities in the State of Minnesota to selected retail dealers throughout the United States. There is now and has been for several years a constant and substantial flow of respondent's hearing aids in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Except to the extent that competition has been restrained by reason of the practices hereinafter alleged, respondent's selected retail dealers in the course and conduct of their business of offering for sale and selling Dahlberg hearing aids are in substantial competition in commerce with one another and with dealers engaged in the offering for sale and selling of other brands of hearing aids; and respondent is in substantial competition in commerce with others engaged in the manufacturing, distributing, selling and repairing of hearing aids.

PAR. 5. Trade and commerce in the United States in hearing aids is substantial. In 1970, the total value of shipments amounted to approximately $50 million at the manufacturers' prices, and is estimated to have exceeded $175 million at retail prices. In 1970, about fifty domestic manufacturers, domestic subsidiaries of foreign manufacturers and domestic distributors of foreign manufacturers sold approximately 510,000 hearing aids through 5,000 retail dealers who employed over 10,000 salesmen.

PAR. 6. In 1970, the top four companies in the hearing aid industry, including respondent Dahlberg, accounted for approximately 50 percent of the dollar value of shipments, the top eight companies accounted for approximately 70 percent of such shipments; and the top twenty companies accounted for over 90 percent of the industry's shipments.

PAR. 7. In 1970, respondent Dahlberg was the third largest hearing aid manufacturer with sales in excess of $4 million, representing an estimated 8 percent of the market. It and its corporate predecessors have manufactured hearing aids since 1949.

PAR. 8. Hearing aids are sold by the manufacturers directly to the retail dealers, who resell the hearing aids to members of the general public. Wholesalers are rarely used in the distribution process.

Approximately 60 percent of the retail sales of hearing aids occur as a result of an initial, direct contact between the hearing aid dealer and the hearing handicapped, while most of the remaining sales are made after the hearing handicapped are referred to dealers by medical doctors or hearing clinics. It is the practice among medical doctors and hearing clinics, after having determined that an individual may benefit

from use of a hearing aid, to recommend a hearing aid to the patient by the brand name and model, rather than by its general performance characteristics. This is done on the basis of actual tests with hearing aids which have been placed with such doctors or clinics by either the manufacturers or dealers. Then, because the doctors and clinics do not sell hearing aids, the patient is referred to the hearing aid dealer in his locale who deals in the brand of hearing aid recommended. While the average price of a hearing aid to a dealer is about $100, the average retail price to the hearing handicapped is about $350. More than 50 percent of the persons with hearing impairment who purchase hearing aids are over 65 years of age.

PAR. 9. In the distribution and sale of their hearing aids, a number of the manufacturers of hearing aids for many years have used and pursued a parallel course of business behavior.

Among such courses of business behavior are the following:

(1) distributing and selling their hearing aids directly to selected retail dealers, refusing to deal with all other dealers;

(2) entering into agreements or understandings with their dealers, which agreements:

(a) establish territories within which the dealers may advertise and sell their products,

(b) require exclusive dealing in the manufacturers' products,

(c) assign sale or purchase quotas to be met by their dealers,

(d) encourage or require the use of the manufacturers' brand name in the dealers' trade styles,

(e) restrict the classes of customers with whom their dealers may deal,

(f) require their dealers to submit the names and addresses of their customers to the manufacturers,

(g) permit the manufacturers to terminate such agreements without cause upon thirty days notice, and

(h) in the event of such termination permit the manufacturers to repurchase the terminated dealers' products purchased from such manufacturers;

(3) refusing to issue the express product warranty to consumers unless and until their dealers have reported the names and addresses of their customers to the manufacturers;

(4) encouraging or requiring their dealers to participate in cooperative advertising programs which preclude mention that the dealers offer competing brands of hearing aids for sale;

(5) engaging in extensive national brand advertising of their hearing aids;

(6) suggesting to their dealers retail prices for hearing aids which are often more than 300 percent above the manufacturers' prices to the dealers, with such dealers generally selling at such suggested retail prices;

(7) selling repair parts and offering repair service only to their selected dealers, refusing to sell such parts of all others, including independent repairmen or repair centers, and refusing to offer repair service to all other dealers.

The effect of the aforesaid parallel courses of business behavior has been to eliminate intra-brand and to hinder or suppress inter-brand competition in the hearing aid industry, and, further, to aggravate the unfair and anticompetitive effect of the acts and practices of the respondent as alleged in Paragraphs Ten and Eleven.

PAR. 10. In the course and conduct of its business of manufacturing, distributing, selling and repairing its hearing aids in commerce, Dahlberg pursues the following course of action:

A. It requires its selected dealers to sell Dahlberg hearing aids within assigned geographic territories;

B. It requires its selected dealers to deal exclusively in Dahlberg hearing aids;

C. It fixes, establishes, controls and maintains the retail prices at which its selected dealers sell or repair Dahlberg hearing aids;

D. It prohibits its dealers from dealing with certain potential customers;

E. It prevents others, not its dealers, from dealing in, or repairing Dahlberg products;

F. It appropriates and uses for its own purposes the names and addresses of its dealers' customers.

PAR. 11. In furtherance of this course of action, respondent has been and now is engaged alone or with its dealers in the following acts and practices, among others:

(1) Respondent uses agreements or understandings which

(a) require a dealer to sell Dahlberg hearing aids only to customers found within an assigned territory;

(b) require a dealer to sell Dahlberg hearing aids in preference to other brands;

(c) require a dealer to submit to respondent the name and address of each customer who purchases a Dahlberg hearing aid;

(d) allow for termination of the contract upon dealer's violation of any provision thereof;

(2) Respondent refuses to sell to all but a few dealers, selected in such a manner that each of such selected dealers enjoys territorial

exclusivity so that he is not in competition with any other dealer selling Dahlberg hearing aids;

(3) Respondent represents to its dealers that if a dealer sells other brands of hearing aids, Dahlberg has the right to convert the standard-form dealer contract into a so-called Limited Dealer Agreement under which dealers have no right, on a proportionately equal basis, or otherwise, to such services or facilities as advertising, sales management, operating and technical assistance, provided by respondent to full dealers; and the respondent expressly reserves the right to appoint other dealers in the territory assigned to such a limited dealer;

(4) Respondent offers to its full dealers a cooperative advertising plan which provides that Dahlberg will not share the cost of any dealer advertisements in another dealer's territory, or which mention in any way that the dealer also offers for sale other brands of hearing aids; limited dealers have no right to a cooperative advertising plan, on a proportionately equal basis with full dealers, or otherwise;

(5) Respondent represents to its dealers that it will not assign additional dealers to the territory of an existing dealer who complies with the requirement that he sell and promote the sale of Dahlberg hearing aids in preference to any other brand;

(6) Respondent requires its dealers to accept and fulfill sales quotas for their assigned territories; as fixed from time to time by the respondent;

(7) Respondent refuses to issue its express product warranty unless and until the dealer from whom the hearing aid was purchased forwards the retail purchaser's name and address to respondent;

(8) Respondent requires dealers whose advertising may reach into other dealers' territories to surrender to such other dealers the names of prospective purchasers responding to such advertising if they reside in such other dealers' territories;

(9) Respondent supplies a dealer only with names of prospective customers arising in the dealers' assigned territory;

(10) Respondent issues to its dealers price lists or provides other means by which the retail prices for Dahlberg hearing aids are set forth;

(11) Respondent refuses to sell Dahlberg repair parts or to provide schematics to all dealers, or to persons engaged in the business of repairing or servicing hearing aids;

(12) Respondent refuses to supply promotional and advertising materials, price lists, hearing aid specifications or performance information to all dealers;

(13) Respondent prohibits its selected dealers from selling Dahlberg hearing aids to other dealers of hearing aids;

(14) Respondent has the right to terminate the standard-form contract without cause upon thirty days notice to the dealer; and the limited contract without cause upon seven days notice; and

(15) Respondent provides in both contracts that in the event of termination, Dahlberg has the right to repurchase the terminated dealer's inventory of Dahlberg products.

PAR. 12. The acts and practices of respondent enumerated hereinabove in Paragraphs Ten and Eleven, taken either individually or collectively, are oppressive, coercive, unfair and anticompetitive, and have the tendency and capacity of hindering, suppressing, or eliminating competition, or constitute unfair methods of competition, or unfair acts or practices, with the following effects, among others:

(1) Competition between respondent and other manufacturers of hearing aids has been hindered and suppressed;

(2) Competition among dealers dealing in Dahlberg hearing aids has been eliminated;

(3) Such dealers have been deprived of their freedom to select their customers and otherwise to function as free and independent businessmen;

(4) Such dealers have been deprived of their ownership of, and freedom to maintain, confidential lists of their customers;

(5) Competition among dealers dealing in Dahlberg hearing aids and dealers dealing in other brands of hearing aids has been hindered and suppressed;

(6) Retail dealers of hearing aids have been deprived of their freedom to act in the best interests of the hearing impaired public;

(7) Consumers have been deprived of their right to fair and impartial recommendations from dealers in the selection of hearing aids for the alleviation of their hearing impairment;

(8) Consumers have been deprived of the benefits of free competition;

(9) Those engaged in the repairing or servicing of hearing aids in competition with respondent have been deprived of their right to repair or service Dahlberg hearing aids.

PAR. 13. The aforesaid acts and practices of respondent have the tendency unduly to restrict and restrain competition and have injured, hindered, suppressed, lessened or eliminated actual or potential competition, are to the prejudice and injury of the public, and constitute unfair methods of competition in commerce and unfair acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued a complaint which charges respondent Dahlberg Electronics, Inc. with violating the Federal Trade Commission Act; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid 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 accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and after having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Dahlberg Electronics, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 7731 Country Club Drive, Minneapolis, Minn.

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 Dahlberg Electronics, Inc., and its subsidiaries, divisions, affiliates, successors, assigns, officers, directors, agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the manufacturing, distribution, advertising, offering for sale, sale or repair of its own brand name or trademark hearing aids, or related products, in commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Entering into, maintaining, preserving, or enforcing, by refusal to sell or repair, setting of sales quota or equivalent thereof, termination or threat thereof, communicated expectation or request, or in any other manner, any arrangement or method of doing

business with a dealer of hearing aids and/or accessories which has the purpose or effect of precluding or preventing a dealer from selling the product of one or more other hearing aid manufacturers;

2. Refusing to make available promptly upon request

(a) a hearing aid, accessory or any written materials necessary to fit and sell such hearing aid or accessory, to any dealer engaged in the sale of hearing aids, if respondent makes such products available to any dealer, other than a dealer to whom hearing aids are made available pursuant to this paragraph, located within 100 miles of the requesting dealer, or

(b) a repair or replacement part or any written materials necessary to repair or replace such hearing aid, to any person engaged in the repair of hearing aids when requested for such purpose, if respondent makes repair or replacement parts available to any dealer for such purpose, *Provided however*, That respondent may impose a $10. minimum order requirement for such parts;

(c) repair service on a nondiscriminatory basis with respect to a hearing aid manufactured by respondent when requested by any dealer who sold such aid;

Provided, however, That if no other provision of this order is violated thereby:

(1) respondent may require as a condition to the availability directly from it of any of its products that the dealer or person referred to in 2(a), (b) or (c) above has received instruction or met standards necessary for the fitting, servicing and/or repairing of respondent's hearing aids which are required at that time of all then existing dealers of respondent's products or all persons then engaged in the repair of respondent's products, so long as such instruction, if made available to any dealer or person, is made available by respondent on reasonable terms and conditions to all dealers or persons wanting to deal in or repair respondent's product,

(2) respondent may refuse to make available directly from it any of its products to any dealer or person if such requesting dealer or person is able promptly to obtain the product from another dealer or distributor at respondent's price to such dealer for a single unit (meaning the same price and discount terms available from respondent) plus a reasonable handling charge, and

(3) respondent may refuse to make available directly from it any of its products or services to any dealer or person on other

grounds related to that dealer's or person's professional competence or ethical conduct, so long as such refusals are uniformly made where such gounds exist;

3. Entering into, maintaining, preserving or enforcing by refusal to sell or repair, setting of sales quota or equivalent thereof, termination or threat thereof, communicated expectation or request, report of sale, warranty limitation, use of names or addresses of a dealer's customers, or in any other manner, any arrangement or method of doing business which has the purpose or effect of restricting or limiting

(a) the territory or area in which a dealer of respondent's hearing aids advertises, offers for sale, sells or repairs such products, or

(b) the person or persons with whom a dealer of respondent's hearing aids deals;

4. Failing to return any hearing aid submitted to respondent for repair directly to the person who submitted such product for repair, unless otherwise instructed in writing by such person;

5. Fixing, establishing, stabilizing, maintaining or suggesting the prices at which a dealer of respondent's hearing aids may or shall advertise, offer for sale, or sell to the public, or a person repairing respondent's hearing aid may repair, such products; *Provided, however*, That nothing in this order shall prohibit respondent after ten years from the date of entry of this order from exercising any lawful rights it may then have under the Miller-Tydings Act, 50 Stat. 693 (1937) and the McGuire Act, 66 Stat. 632 (1952) with respect to hearing aids.

6. Requiring that a dealer participating in respondent's cooperative advertising program must not state or imply, in such cooperative advertisements, that the dealer also deals in other brands of hearing aids; *Provided, however*, That respondent may continue to prohibit in such cooperative advertisement the stating of other brand names of hearing aids;

7. Requiring or coercing a dealer of respondent's hearing aids to submit to respondent the names or addresses of any customers of such dealer, or, with respect to such customer names or addresses obtained from a dealer after the effective date of this order, maintaining, using, publishing or disseminating them for any purpose, without securing the free and informed written consent of the dealer for each such purpose based upon full disclosure to the dealer of the specific uses and disseminations which would be made of the customer names. No such consent shall be sought for other

than respondent's advertising and promotional programs for at least one hundred and twenty (120) days from the date of respondent's initial inventory shipment of hearing aids to a new dealer or, in the case of an existing dealer, at least sixty (60) days after service on the dealer of this order and letter attached hereto as Appendix A.

8. Preventing any dealer from using respondent's product (brand) name in connection with the advertising, offering for sale, sale or repair of any of respondent's products, except that respondent may protect its rights in such name recognized at law;

9. Failing to include and deliver with any of respondent's hearing aids sold by respondent any express product warranty for such product provided by respondent to the user.

II.

It is further ordered, That respondent shall:

(a) Forthwith distribute a copy of this order to each of its operating divisions, to its present corporate officers and to its present sales and repair personnel, and shall secure from each such officer, employee or other person, a signed statement acknowledging receipt of said order;

(b) Within thirty (30) days after service upon it of this order, distribute a copy of the letter appended to this order and made a part hereof as Appendix A to each of its existing hearing aid dealers and to every person known to be engaged in the repair of respondent's products;

(c) Within sixty (60) days after service upon it of this order, place a full-page advertisement in a trade journal or publication with circulation among hearing aid dealers, which advertisement shall clearly and conspicuously disclose the provisions of Part I of this order;

(d) Within one hundred and 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, including a list of all dealers and other persons on whom it has served a copy of Appendix A, and a copy of the publication which includes respondent's advertisement required by this order;

(e) For a period of ten (10) years from the date hereof establish and maintain a file of all records referring or relating to respondent's refusal to sell to any hearing aid dealer, or person engaged in the business of repairing hearing aids, which file must contain a

575-956 O-LT - 76 - 16

record of a communication to such dealers or persons explaining respondent's refusal to sell, and which file will be made available for Commission inspection on reasonable notice; and annually, for a period of five (5) years from the date hereof, submit a report to the Commission listing the names of all dealers or persons with whom respondent has refused to deal over the preceding year, a description of the reason for the refusal, and the date of the refusal;

(f) 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 this order.

APPENDIX A

(LETTER TO HEARING AID DEALERS)

(Official Stationery of Dahlberg Electronics, Inc.)

Date

Dear

The Federal Trade Commission has entered a consent order against Dahlberg Electronics, Inc. which obligates the company not to impose various restrictions upon dealers or to engage in certain other practices. A copy of the pertinent provisions of the Order is enclosed for your careful examination. If in the future you believe that any of its terms have been violated, the details may be reported in writing to:

Federal Trade Commission,
Bureau of Competition,
Washington, D.C. 20580

We welcome the opportunity to do business with you on terms which are in accordance with the letter and the spirit of the Federal Trade Commission Order.

Very truly yours,

(Name)
President,
Dahlberg Electronics, Inc.

IN THE MATTER OF

PAY'N SAVE CORPORATION

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

Docket C-2526. Complaint, Aug. 6, 1974—Decision, Aug. 6, 1974

Consent order requiring a Seattle, Wash., owner and operator of retail drug, general merchandise, department and hardware stores, among other things to cease failing to have advertised specials readily available for sale at or below the advertised prices. Further, respondent is required to hire an independent testing company to check on its compliance with the order for a period of two years.

Appearances

For the Commission: *David A. Middaugh.*

For the respondent: *Michael Rayton, Ryan, Bush, Swanson and Hendel,* Seattle, Wash.

COMPLAINT

The Federal Trade Commission, having reason to believe that Pay'N Save Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated and is now violating Section 5 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Pay'N Save Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the state of Washington, with its office, and principal place of business located at 1511 Sixth Ave., Seattle, Wash.

PAR. 2. Respondent owns and operates retail drug and general merchandise stores in the States of Washington, Oregon, Alaska and California and in Canada. Respondent also owns and operates retail department stores and hardware stores.

PAR. 3. In the course and conduct of its business, respondent ships and distributes and causes the shipment and distribution of various articles of merchandise from warehouses and sellers located in various states to its retail stores located in various other states and in Canada, and then from its retail stores to consumers. In the further course and conduct of its business respondent transmits contracts, business correspondence, monies and other documents from its stores, offices, and divisions located in various states to others of its stores, offices and

divisions located in other states and in Canada. In the further course and conduct of its business respondent disseminates advertisements in newspapers of interstate circulation and in broadcast media, which broadcasts are received in states other than those of origination. Respondent maintains and at all times mentioned herein has maintained substantial business in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business, respondent disseminates and causes to be disseminated certain advertisements. In said advertisements respondent makes certain statements and representations with respect to the terms and conditions under which various items of merchandise will be sold to members of the public. The terms and conditions include descriptions or depictions of items of merchandise, their prices, time periods and geographical areas.

PAR. 5. By disseminating advertisements which offer items of merchandise for sale at certain prices during certain times at certain stores, and by failing to have, during the effective period of such advertisements:

1. Each advertised item clearly and conspicuously available for sale to the public;

2. At each location where an advertised item is displayed for sale, a sign or other marking clearly disclosing that the item is as "advertised" or "on sale"; and

3. Each advertised item individually and clearly marked with a price which is at or below the advertised price;

respondent is engaged in unfair acts and practices.

PAR. 6. Respondent is in substantial competition in commerce with other drug and general merchandise businesses.

PAR. 7. The use of the respondent of the aforesaid false, misleading, unfair and deceptive statements, representations, acts and practices, has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations are true and to induce such persons to go to respondent's stores and to purchase from respondent items other than the advertised items and the advertised products at prices in excess of those advertised.

PAR. 8. The aforesaid 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 and deceptive acts and practices in commerce and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Pay'N Save Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the state of Washington, with its office and principal place of business located at 1511 Sixth Avenue, Seattle, Wash.

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

ORDER

It is ordered, That Pay'N Save Corporation, a corporation, its successors and assigns, its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from representing orally, in writing, visually or in any other manner, directly or by implication, that any product is available for sale to the public at its stores at any price unless:

1. Each advertised item is clearly and conspicuously available for sale to the public at or below the advertised price in each store covered by the advertisement;

2. At each location where an advertised item is displayed for sale, there is a sign or other conspicuous marking clearly disclosing that the item is "as advertised" or "on sale" or words of similar import and meaning; and

3. Each advertised item, which is individually marked with a price, is individually and clearly marked with a price which is at or below the advertised price;

Provided however,

1. A product shall be deemed clearly and conspicuously available if a clear and conspicuous notice is displayed stating that said product is in stock and may be obtained upon request, and such product is furnished immediately upon request.

2. A product shall not be deemed unavailable if respondent maintains such records as will clearly and convincingly disclose (a) that the advertised products were ordered in adequate time for delivery and were delivered to its stores in quantities sufficient to meet reasonably anticipated demands; or (b) that ordered items were not delivered due to circumstances beyond respondent's control; and (c) furthermore, respondent offers a rain check to customers which allows them to purchase the product in the near future at or below the advertised price or respondent immediately offers a similar product of equal or better quality at or below the advertised price.

3. If an advertisement includes two or more stores, a product shall not be deemed unavailable or mispriced if such advertisement contains a specific exemption or limitation with respect to each product and each store in which the product is unavailable.

4. If an advertised item is placed for sale in a large stack, pyramid or other special display containing a great number of such items, all of the items need not be individually marked at or below the advertised price, if the items not marked individually at or below the advertised price are so situated that it would be difficult or impossible for a customer to select that unmarked item.

It is further ordered, That for a period of two (2) years from the date this order becomes final respondent shall place notices during the effective period of each advertisement which represents that any product is available at respondent's stores (a) at or near each door offering entrance to the public in each retail store; and (b) at or near each cash register or place where customers pay for merchandise. The notice shall contain the following information:

"NOTICE"

1. A copy of the advertisement.

2. A statement that: "All items listed in the above advertisement are required to be readily available for sale at or below the advertised price."

3. If any advertised item that you wish to purchase is unavailable either (a) you will be given a rain check which will enable you to purchase the item at or below the advertised price in the near future; or (b) you will be allowed to immediately purchase a similar product of equal or better quality at or below the advertised price.

4. A statement that: "If you have any questions, please speak to the store manager."

It is further ordered, That for a period of two (2) years from the date this order becomes final, in each advertisement which represents that products are available at any of its stores, respondent shall place the following statement: "Each of these advertised products are required to be readily available for sale at or below the advertised price in each _____ (name of store) store, except as specifically noted in this ad."

It is further ordered, That:

1. Respondent shall deliver a copy of the complaint and this order to each of its present and future officers and other personnel in its organization down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities as to individual retail stores of respondent.

2. Respondent shall institute a program of continuing surveillance adequate to reveal whether the business practices of each of its retail stores conform with this order; and

3. Respondent shall hire under written contract an independent testing company, to be approved by authorized representatives of the Federal Trade Commission. Such contract shall provide that the testing company shall randomly select four of respondent's retail stores every four months for a period of two years from the date this order becomes final, and survey such stores for compliance with this order; that respondent shall not receive prior notification of which stores will be surveyed or when the stores will be surveyed; that the testing company shall submit its proposed testing procedure for approval by authorized representatives of the Federal Trade Commission prior to testing; that the Federal Trade Commission reserves the right to require changes in the testing procedure during the course of the testing program; and that upon

completion of each survey the testing company shall send the survey results to the Federal Trade Commission and to respondent.

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

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

IN THE MATTER OF

PASTIME INDUSTRIES, INC., ET AL.

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

Docket 8923. Complaint, Apr. 13, 1973—Order, Aug. 16, 1974

Consent order requiring a New York City seller and distributor of toy, gift and hobby products to jobbers and retailers, among other things to cease deceptively packaging its merchandise.

Appearances

For the Commission: *Herbert S. Forsmith*, *Alan Rubinstein* and *Armando Labrada*.

For the respondents: *Martin Greene*, *Aberman, Greene & Locker*, New York, N. Y.

COMPLAINT

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

PARAGRAPH 1. Respondent Pastime Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 200 Fifth Avenue, New York, N. Y.

PAR. 2. Respondent Frank Gebbia is an individual and is president of the corporate respondent, and formulates, directs and controls its acts and practices, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 3. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of toy, gift and hobby products to jobbers and retailers for resale to the public.

PAR. 4. In the course and conduct of their business, respondents now cause, and for some time last past have caused, said products, when sold, to be shipped from their place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Among the products which are offered for sale and sold by the respondents are a number of toy, gift and hobby products. Through the use of certain methods of packaging, respondents have represented, and have placed in the hands of others the means and instrumentalities through which they might represent, directly or indirectly, that certain of the above products, as depicted or otherwise described on the exteriors of packages, corresponded, in their lengths and widths, or their lengths, widths and thicknesses, with the boxes in which they were contained, and that others of such products were offered in quantities reasonably related to the size of the containers in which they were presented for sale.

PAR. 6. In truth and in fact, such products often have not corresponded with their container or package dimensions and are often not offered in quantities reasonably related to the size of the containers or packages in which they are presented for sale. Purchasers of such a product are thereby given the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact.

Therefore the methods of packaging referred to in Paragraph Five hereof were and are unfair and false, misleading and deceptive.

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

PAR. 8. The use by respondents of the aforesaid unfair, false, misleading and deceptive methods of packaging has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the quantum or amount of the product being sold was and is greater than the true such quantum or amount, and into the purchase of substantial quantities of respondent's product by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having issued its complaint on Apr. 13, 1973, charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with a copy of that complaint, together with a proposed form of order; and

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

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

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

1. Respondent Pastime Industries, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its offices and principal place of business located at 200 Fifth Avenue, New York, N.Y.

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

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

ORDER

It is ordered, That respondent Pastime Industries, Inc., a corporation, and its officers, and Frank Gebbia, individually and as an officer of said corporation, and respondents' agents, representatives, employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of toy, gift and hobby merchandise or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Packaging said products in oversized boxes or other containers so as to create the appearance or impression that the width or thickness or other dimensions or quantity of products contained in a box or container is appreciably greater than is the fact; but nothing in this order shall be construed as forbidding respondents to use oversized containers if respondents justify the use of such containers as necessary for the efficient packaging of the products contained therein and establish that respondents have made all reasonable efforts to prevent any misleading appearance or impression from being created by such container;

2. Providing wholesalers, retailers or other distributors of said products with any means or instrumentality with which to deceive the purchasing public in the manner described in Paragraph (1) above.

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

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business

address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

It is further ordered, That the respondents distribute a copy of this order to all operating divisions and subsidiaries of said corporation, and also distribute a copy of this order to all firms and individuals involved in the formulation or implementation of respondents' business policies, and all firms and individuals engaged in the advertising, marketing, or sale of respondents' products.

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

IN THE MATTER OF

SAM NAGLER

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

Docket C-2527. Complaint, Aug. 16, 1974—Decision, Aug. 16, 1974

Consent order requiring a New York City wholesaler of furs and fur products, among other things to cease misrepresenting his business as being a manufacturer of fur products; misbranding, mislabeling, and falsely invoicing his fur products; and furnishing false guaranties as to his fur products.

Appearances

For the Commission: *James Manos* and *Richard A. Givens.*
For the respondent: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sam Nagler, an individual, hereinafter referred to as respondent, has violated the provisions of said Acts and the rules and regulations promulgated under the Fur Products Labeling Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sam Nagler is an individual trading as Sam Nagler.

Respondent is a wholesaler of furs and fur products with his office and principal place of business located at 224 West 30th Street, New York, N.Y.

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

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

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

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

PAR. 5. Certain of said fur products were misbranded in violation of the Fur Products Labeling Act in that they were not labeled in accordance with the rules and regulations promulgated thereunder in that required item numbers were not set forth on labels, in violation of Rule 40 of said rules and regulations.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced by the respondent in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the rules and regulations promulgated under said Act.

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

PAR. 7. Certain of said fur products were falsely and deceptively invoiced, in violation of Section 5(b)(2) of the Fur Products Labeling

Act, in that the said fur products were invoiced to show that the fur contained therein was "natural," when in fact such fur was dyed.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced in violation of Section 5(b)(2) of the Fur Products Labeling Act in that respondent, by and through the use of the word "Manufacturers," on his invoices, represented that he owned, operated or controlled a manufacturing plant in which some or all of the various fur products sold by him are made.

In truth and in fact, said representations were, and are, false, misleading and deceptive. Respondent at all times mentioned herein did not, and does not now, own, operate or control a manufacturing plant in which any of the fur products sold by him are made.

PAR. 9. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the rules and regulations promulgated under such Act in that required item numbers were not set forth on invoices, in violation of Rule 40 of said rules and regulations.

PAR. 10. Fur products of the respondent were falsely and deceptively advertised in violation of Section 5(a) of the Fur Products Labeling Act through representations set forth on respondent's stationery that his business was that of "Manufacturing Furriers." Such representations were intended to aid, promote and assist directly and indirectly in the sale and offering for sale of the respondent's fur products. In truth and in fact respondent's business is and was that of a wholesaler of fur products manufactured by other firms and respondent's business is and was not that of "Manufacturing Furriers."

PAR. 11. Respondent furnished false guaranties under Section 10(b) of the Fur Products Labeling Act with respect to certain of his fur products by falsely representing in writing that respondent had a continuing guaranty on file with the Federal Trade Commission when respondent in furnishing such guaranties had reason to believe that the fur products so falsely guarantied would be introduced, sold, transported and distributed in commerce, in violation of Rule 48(c) of said rules and regulations under the Fur Products Labeling Act and Section 10(b) of said Act.

PAR. 12. The aforesaid acts and practices of respondent, as herein alleged are in violation of the Fur Products Labeling Act and the rules and regulations promulgated thereunder and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce in violation of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished 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 Fur Products Labeling Act; and

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

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

1. Respondent, Sam Nagler, is an individual trading as Sam Nagler.

2. Respondent is a wholesaler of furs and fur products with his office and principal place of business located at 224 West 30th Street, New York, N.Y.

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

ORDER

It is ordered, That respondent, Sam Nagler, an individual trading as Sam Nagler, or under any other name or names, his successors and assigns, and respondent's representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the introduction, or manufacture for introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in

connection with the manufacture for sale, sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Representing directly or by implication, on labels that the fur contained in any fur product is natural when the fur contained therein is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

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

3. Failing to set forth on labels the item number or mark to be assigned to each fur product.

B. Falsely or deceptively invoicing fur products by:

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

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

3. Describing fur products which have been bleached, dyed or otherwise artificially colored by the name of mink or any other animal name or names without disclosing that the said fur products are bleached, dyed or otherwise artifically colored.

4. Failing to set forth on invoices the item number or mark required to be assigned to such fur products.

5. Representing directly or indirectly on invoices the word "manufacturers" or any other word of similar import or meaning implying that the respondent manufactures the fur products sold by him, unless and until respondent actually owns and operates, or directly and absolutely controls the manufacturing plant wherein his fur products are made.

C. Falsely or deceptively advertising any fur product through the use of any advertisement, representation, public announcement or notice which is intended to aid, promote or assist, directly or

indirectly, in the sale or offering for sale of any such fur product, which implies that the respondent manufactures the fur products sold by him, unless and until respondent actually owns and operates, or directly and absolutely controls the manufacturing plant wherein his fur products are made.

D. Furnishing a false guaranty that any fur product is not misbranded, falsely invoiced or falsely advertised when the respondent has reason to believe that such fur product may be introduced, sold, transported, or distributed in commerce.

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

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

IN THE MATTER OF

SUN OIL COMPANY, ET AL.

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

Docket 8889. Complaint, June 2, 1972—Decision, Aug. 19, 1974

Order requiring a Philadelphia, Pa., manufacturer and distributer of gasoline and other petroleum products and its New York City advertising agency, among other things to cease making false performance and uniqueness claims for its Sunoco gasoline, and using misleading demonstrations.

Appearances

For the Commission: *Wallace S. Snyder, Kaid Benfield* and *Craig Annear.*

For the respondents: *Robert M. Dubbs*, Sun Oil Company, et al., *John Harkins, Jr., Barbara W. Mather* and *Jon A. Baughman, Pepper, Hamilton & Scheetz*, Phila, Pa., *David Grossberg, Cohen & Grossberg*, New York, N. Y.

575-956 O-LT - 76 - 17

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 Sun Oil Company, a corporation, and William Esty Company, a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Sun Oil Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 1608 Walnut Street, Philadelphia, Pa.

PAR. 2. William Esty Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 100 E. 42nd Street, New York, N.Y.

PAR. 3. Respondent Sun Oil Company is now, and for some time last past has been, engaged in the manufacture, sale and distribution of a gasoline designated at "Sunoco" gasoline, and other petroleum products to the public.

PAR. 4. In the course and conduct of its business as aforesaid, respondent Sun Oil Company now causes, and for some time last past has caused, the said Sunoco gasoline, when sold, to be shipped from its plants and facilities to purchasers thereof located in various States other than the state of origination and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said Sunoco gasoline in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondent Sun Oil Company at all times mentioned herein has been and now is in substantial competition in commerce with individuals, firms and corporations engaged in the sale distribution of automobile gasoline.

PAR. 6. Respondent William Esty Company is now, and for some time past has been, the advertising agency of Sun Oil Company, and now and for some time past has prepared and placed for publication, advertising material, including but not limited to the advertising referred to herein, to promote the sale of Sun Oil Company's gasoline.

---

*Reported as amended by the administrative law judge's order of Nov. 30, 1972.

PAR. 7. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent William Esty Company has been, and is now, in substantial competition in commerce with other advertising agencies.

PAR. 8. In the course and conduct of their businesses and for the purpose of inducing the sale of Sunoco gasoline, respondents employ advertising in national and regional magazines, other publications, on network and local television and radio, and through various other outlets including point-of-sale displays.

PAR. 9. Respondents' major television advertising theme associates, by statement and demonstration, two Sun Oil Company "exclusives" with enhanced or maximum power and performance in any automobile engine. The first of these "exclusives" is "Sunoco 260," the highest octane gasoline available for sale to the public and having a Research Octane Number of 102.8. The second "exclusive" is Sunoco's "Custom Blending Pump" which offers purchasers eight different gasoline blends each with a distinct octane rating. Other major gasoline distributors provide a maximum of three distinct gasoline octane blends.

Based on its "exclusive" "Sunoco 260" and "Custom Blending Pump," respondents ascribe to all eight Sunoco gasoline blends the qualities of "260 Action."

PAR. 10. Typical of the statements and representations made and demonstrations used by respondents in their advertising of Sunoco gasoline, but not limited thereto, are the following television commercials:

A. In "Trains," an automobile of unstated make, model and performance specifications is supplied with Sunoco gasoline of unstated octane rating. The automobile is then coupled with three empty railroad cars, two boxcars and a caboose, standing stationary on a siding. The automobile, after a signal from the announcer, proceeds to pull away with the load of approximately 100 tons.

ANNOUNCER: We're * * * demonstrat[ing] an "unusual" gasoline. A gasoline that will help this car's engine put out every last ounce of power it has.

What makes this gasoline unusual? It's blended with the action of Sunoco 260 * * * the highest octane gasoline at any station, anywhere.

There you have it. Sunoco 260 Action in this car is pulling over 100 tons. Not just one boxcar, but two boxcars and a caboose. This is the same 260 Action you get in every Sunoco blend. Because Sunoco's Custom Blending Pump blends just the right amount of 260 * * * into every gallon of premium, middle premiums, even regular.

You're seeing Sunoco premium deliver in this car. [Repeat of demonstration]

Let Sunoco, with 260 Action, deliver in your car.

Get Sunoco 260 Action. Action to be used. Not abused.

B. In "Coliseum," the message is essentially the same. An automobile of unstated make, model, and performance specifications is supplied with Sunoco gasoline of unstated octane rating. The automobile then proceeds, on cue, to pull an empty U-haul trailer of unstated weight up a ramp specially constructed over a bank of seats in the Los Angeles Coliseum.

ANNOUNCER: We're going to drive a car, pulling this trailer from the field to * * * the top of the stands to demonstrate an unusual gasoline. A gasoline that will help this car's engine put out every bit of power it has.

What makes this gasoline unusual? It's blended with the action of Sunoco 260 * * * the highest octane gasoline at any station, anywhere.

With 260 Action, the car and trailer go up the ramp just like that.

You get that same 260 Action at Sunoco * * *

Watch again as Sunoco regular * * * delivers in this car. [Repeat of demonstration.]

Let Sunoco, with 260 Action, deliver in your car.

Get Sunoco 260 Action. Action to be used. Not abused.

PAR. 11. By and through the use of the aforesaid statements, representations, and demonstrations, and others similar thereto not specifically set out herein, respondents have represented and are now representing directly, and by implication that:

A. Blending Sunoco's highest octane gasoline, "260," into Sunoco's lower octane gasolines results in blends of gasoline that by reason of their respective octane levels provide more engine power than do competing gasolines having octane ratings comparable to Sunoco's blends.

B. Blending Sunoco's highest octane gasoline, "260," into Sunoco's lower octane gasolines conveys to resulting blends of Sunoco gasoline the octane benefits of Sunoco "260," or "260 Action."

C. Only when operated on the octane of Sunoco's "Custom Blended" gasolines will automobile engines operate at maximum power and performance.

D. Said demonstrations are evidence which actually prove that Sunoco gasolines blended with "Sunoco 260 Action" are unique or unusual in that they alone provide the power necessary to enable an automobile to perform the task depicted.

PAR. 12. In truth and in fact:

A. Sunoco's gasoline blends do not provide more engine power by reason of their respective octane levels than do competing gasolines of comparable octane rating.

B. Blending Sunoco "260" into Sunoco's lower octane gasolines conveys to resulting blends of Sunoco gasoline no more octane benefits than provided by the octane level of the resultant blends.

C. Octane is a measure of motor fuel antiknock quality, and to the extent that octane relates to power and performance any gasoline of sufficient octane will provide maximum power and performance.

D. Said demonstrations are not evidence which actually prove that Sunoco gasolines blended with "Sunoco 260 Action" are unique or unusual. Other gasolines of comparable octane rating will also provide the power necessary to enable an automobile to perform the tasks depicted.

Therefore, the aforesaid statements and representations, and demonstrations used in conjunction therewith, as set forth in Paragraphs Ten and Eleven were, and are, false, misleading and deceptive.

PAR. 13.* The aforesaid advertisements and demonstrations, and others similar but not specifically set out herein, have falsely represented, and are now falsely representing, directly and by implication, that Sunoco gasoline has unique qualities not found in other brands of gasoline. With respect to octane, all automobile gasolines, regardless of brand name, will provide maximum power and performance in an automobile engine if sufficient gasoline octane is provided. The aforesaid acts and practices were, and are now, false, misleading, deceptive and unfair, and therefore constitute unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce.

PAR. 14. The use by respondents of the aforesaid false, misleading, and deceptive statements, representations and demonstrations, including the misleading and deceptive statements and representations made in connection with said demonstrations, has had, and now has, the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of a substantial quantity of respondent Sun Oil Company's gasoline because of such erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

---

*Amended by order of the administrative law judge dated Nov. 30, 1972, by striking the period at the end of said paragraph 13 and adding: ", and unfair or deceptive acts or practices in commerce."

INITIAL DECISION BY HARRY R. HINKES, ADMINISTRATIVE LAW JUDGE

JUNE 28, 1974

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this proceeding on June 2, 1972, charging respondent Sun Oil Company (herein "Sun") and respondent Esty Company (herein "Esty") with violating the provisions of Section 5 of the Federal Trade Commission Act in certain statements, representations and demonstrations involving Sun gasoline. By answer duly filed, respondents denied violating the Federal Trade Commission Act. Prehearing conferences were then held in Sept. and Nov. 1972, after which successive requests for admissions and various motions were filed and responded to. Thereafter, document and witness lists were exchanged. Hearings were conducted in Wash., D. C. and Los Angeles, Calif., in the months of Sept. 1973 and Jan. 1974. The record in this proceeding was closed Feb. 11, 1974, following which proposed findings and briefs were filed by the parties.

Any motions not heretofore, or herein, specifically ruled upon either directly or by necessary effect of the conclusions in this initial decision, are hereby denied.

The proposed findings, conclusions and briefs as submitted by the parties have been given careful consideration and to the extent not adopted by this decision in the form proposed or in substance are rejected as not supported by the evidence or as immaterial.

References to the record are made in parenthesis using the following abbreviations:

CX - Commission's Exhibit
RS - Sun's Exhibit
Ans. - Answer
Tr. - Transcript of the testimony
SPF - Sun's proposed findings
EPF - Esty's proposed findings

Having reviewed the record in this proceeding and having considered the demeanor of the witnesses as they testified, together with the proposed findings, conclusion and briefs submitted by the parties, I make the following:

FINDINGS OF FACT

1. Respondent Sun Oil Company of Pennsylvania is incorporated in the Commonwealth of Pennsylvania and its principal office and place of business is located at 1608 Walnut Street, Philadelphia, Pa. (CX 283 Relevant and material facts to which there is no dispute; SPF 1).

2. Respondent William Esty Company, Inc. is incorporated in the State of New York and its principal office and place of business is located at 100 East 42nd Street, New York, N. Y. (CX 283, par. 2; SPF 2; EPF 1).

3. Sun is now and has been engaged in the manufacture, sale and distribution of Sunoco gasoline and other petroleum products to the public (CX 283 par. 3; SPF 3).

4. Sun causes and has caused in the past Sunoco gasoline when sold to be shipped from its plants and facilities to purchasers thereof located in various states other than the state of origination and maintains and at all times mentioned herein has maintained, a substantial course of trade in said Sunoco gasoline in commerce, as "commerce" is defined in the Federal Trade Commission Act (CX 283 par. 4; SPF 4; EPF 3).

5. Sun at all times mentioned in the complaint has been and now is, in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of automobile gasoline (CX 283 par. 5; SPF 6).

6. Esty was at the time of the dissemination of the advertisements under consideration in this proceeding one of the advertising agencies of Sun (CX 283 par. 6; SPF 5; EPF 2).

7. Esty at all times mentioned in the complaint has been in substantial competition in commerce with other advertising agencies (CX 283 par. 7; SPF 7; EPF 4).

8. In the course and conduct of their businesses and for the purpose of promoting the sale of Sunoco gasoline, Sun and Esty employ advertising in national and regional magazines, other publications, on network and local television and radio, and through various other outlets. Sun prepares point of sale materials. The media employed in the advertising of Sunoco gasoline vary from time to time (CX 283 Par. 8; SPF 13).

9. The following television advertisements for Sunoco gasoline were disseminated to the public on network television and by spot television announcements from time to time during portions of 1971: "Train" (CX 254, 255, depicted in Storyboards CX 185 and 186); "Coliseum" (CX 256, 257, Storyboards CX 187, 188); "Son of Donahue" (CX 278, Storyboard CX 78); "Don Quixote" (CX 279, Storyboard CX 79); and "Father and Son" (CX 270, Storyboard CX 57). (Stipulated in CX 286; SPF 15).

10. The following television advertisements for Sunoco gasoline were disseminated to the public on network television and by spot television announcements from time to time during portions of 1970 and 1971:

"Wagon on the Track" (CX 259 Storyboard CX 46); "Bronco" (CX 260 Storyboard CX 47); "Chalk Talk" (CX 261 Storyboard CX 48); "Every Drop" (CX 263 Storyboard CX 50); "Pit Stop" (CX 265 Storyboard CX 52); "Sign" (CX 266 Storyboard CX 53); "Cave Man" (CX 267 Storyboard CX 54); "Classic Cars" (CX 268 Storyboard CX 55); "Tanker" (CX 269 Storyboard CX 56); "Snowflake" (CX 276 Storyboard CX 76); and "Toothache" (CX 277 Storyboard CX 77). (CX 268; SPF 15).

11. The following television advertisements for Sunoco gasoline were disseminated to the public on network television and by spot television announcements from time to time during the months of Nov. and Dec. 1971 and Jan. 1972.

"Transam Winter - 260 Action" (CX 258 Storyboard CX 45); "Open Road" (CX 275 Storyboard CX 74); and "Thompson" (CX 280 Storyboard CX 80). (CX 286; SPF 15).

12. The following television advertisements for Sunoco gasoline were disseminated to the public on network television and by spot television announcements from time to time during portions of 1969 and 1970:

"Sebring" (CX 271 Storyboard 58); "Train Station" (CX 272 Storyboard CX 59); and "Racing" (CX 273 Storyboard CX 60). (CX 286; SPF 15).

13. The following radio advertisements for Sunoco gasoline were disseminated to the public from time to time during portions of 1970 and 1971:

"If you think" (CX 281 Script CX 61); "Stop For a Moment" (CX 281 Script CX 65); "My Dad" (CX 281 Script CX 66); "Myths" (CX 281 Script CX 67); "Piece of the Action I" (CX 281 Script CX 68); "Did you know" (CX 281 Script CX 69); "Middle Road 1 and 3" (CX 281 Script CX 81); "Middle Road 2 and 4" (CX 281 Script CX 82); "Salt Rock" (CX 281 Script CX 83); "Hard Rock" (CX 281 Script CX 84); "Rythm in Blues" (CX 281 Script CX 85); "Country and Western" (CX 281 Script CX 86); "Stop a Moment Revised" (CX 281 Script CX 87); "Did you Know Revised" (CX 281 Script CX 88); and "If You Think Revised" (CX 281 Script CX 89). (CX 286; SPF 15).

14. The following print advertisement for Sunoco gasoline was disseminated to the public during the year 1970:

DX Switchover to Sunoco (CX 70) (CX 286; SPF 15).

15. The radio advertisements for Sunoco gasoline entitled "Toothache" (CX 281 Script CX 90) was provided to wholesale distributors of

Sunoco gasoline for the purpose of dissemination to the public during the year 1971 and during Jan. 1972 (CX 286; SPF 16).

16. The following print advertisements for Sunoco gasoline were disseminated to the public during the year 1971 and during Jan. 1972.

Over 129 companies sell gasoline in America (CX 71); and Sunoco 260 Action gets me to the supermarket too (CX 72) (CX 286; SPF 15).

17. The Commission has charged that respondents have made, and complaint counsel contend that the foregoing advertisements make, the following representations specified in the complaint:

Paragraph 11:

a. Blending Sunoco's highest octane gasoline "260," into Sunoco's lower octane gasolines results in blends of gasoline by reason of their respective octane levels provided more engine power than do competing gasolines having octane ratings comparable to Sunoco's blend.

b. Blending Sunoco's highest octane gasoline, "260," into Sunoco's lower octane gasolines conveys to resulting blends of Sunoco gasoline the octane benefits of Sunoco "260," or "260 Action."

c. Only when operated on the octane of Sunoco's "Custom blended" gasolines will automobile engines operate at maximum power performance.

d. Said ['Train' and 'Coliseum'] demonstrations are evidence which actually prove that Sunoco gasolines blended with "Sunoco 260 Action" are unique or unusual in that they alone provide the power necessary to enable an automobile to perform the tasks depicted.

* * * * * * *

Paragraph 13:

* * * Sunoco gasoline has unique qualities not found in other brands of gasoline. With respect to octane, all automobile gasolines, regardless of brand name, will provide maximum power and performance in an automobile engine if sufficient gasoline octane is provided. * * *

18. Certain portions of these representations are not in dispute here. Respondents admit that their advertisements represented that power and performance benefits would be derived from Sun's blended gasolines. It is further admitted that the advertisements represented that these benefits are conveyed through the blending of Sunoco 260 into the intermediate blends, such blending making them unusual (Foster, Tr. 860). There is no dispute that Sunoco 260 was consistently advertised throughout the campaign as the highest octane gasoline available to motorists (Foster, Tr. 873).

19. Typical of the advertisements of Sun which were received in evidence in support of the charges in the complaint were the following:

Bronco (CX 260, 47): Get the action of the world's highest octane gasoline. Sunoco 260 Action.

Chalk Talk (CX 261, 48): No other station can give you the action of the world's highest octane gasoline.

Every Drop (CX 263, 50): Every drop of every tenth of every gallon of Sunoco from regular up you get the action of the world's highest octane gasoline.

Cave Man (CX 267, 54): Every gallon gives you 260 Action * * * only Sunoco gives you the action of the world's highest octane gasoline. So, ipso facto. All gasolines are not created equal.

Tanker (CX 269, 56): The custom blending pump blends it in automatically. So every gallon gives you Sunoco 260 Action.

Son of Donahue (CX 278, 78):

I use a Sunoco middle premium in my family car * * * and it has 260 Action, the action of the world's highest octane gasoline at any station. 260 Action. That's the difference at Sunoco.

Middle of the Road #4 (CX 281, 82): Only Sunoco has the action of 260 * * * highest octane gasoline at any station anywhere * * * Sunoco blends 260 into premium, middle premiums even regular. That's 260 Action, and you can't get it any where else.

If you think revised (CX 281, 89): What's 260 Action? Action you can't get at any other gasoline station. 260 Action. The action of the world's highest octane gasoline.

20. Typical of the statements and representations in the TV advertisements disseminated were the following:

a. In "Trains," an automobile is supplied with Sunoco gasoline of unstated octane rating. The automobile is then coupled with 3 empty railroad cars, two box cars and a caboose standing stationary on a siding. The automobile, after a signal from the announcer, proceeds to pull away with a load of approximately 100 tons.

Announcer: We're coupling this automobile to a box car weighing more than 34 tons to demonstrate an unusual gasoline - a gasoline that will deliver every last ounce of power designed into this car's engine * * * what makes this gasoline so unusual is that it's blended with the action of Sunoco 260, the highest octane gasoline, at any station, anywhere. There you have it. 260 Action pulling not just 1 but 2 box cars and a caboose * * * over 100 tons being moved by the same 260 Action you get in every Sunoco blend. The custom blending pump blends just the right amount of 260 into every gallon of premium, middle premiums, even regular. Let Sunoco with 260 Action deliver in your car.

b. In "Coliseum" an automobile is supplied with Sunoco gasoline of unstated octane rating. The automobile then proceeds to pull an empty U-Haul trailer up a ramp especially constructed over a bank of seats in Los Angeles Coliseum.

Announcer: We're going to drive a car pulling this trailer from the field to * * * to the top of the stands to demonstrate an unusual gasoline. A gasoline that will help this car's engine put out every bit of power it has. What makes this gasoline unusual? It's blended with the action of Sunoco 260 * * * the highest octane gasoline at any station anywhere. With 260 Action the car and trailer go up the ramp just like that. You get the same action at Sunoco * * * The custom blending pump blends just the right amount of 260 into every gallon of premium, middle premiums, even regular. Let Sunoco with 260 Action deliver in your car.

21. The subject matter of the two challenged advertisements, "Train" and "Coliseum" is "power" (CX 283; SPF 19).

22. None of the representations alleged in paragraphs 11 and 13 of

the complaint are made expressly in any advertising for Sunoco gasoline (SPF 24; Preston, Tr. 405).

23. The issue, therefore, is whether the representations alleged are made by implication in the challenged advertistments (SPF 26).

24. The challenged advertisements convey to readers, listeners, and viewers the following impressions:

(1) Sunoco 260 is unique in that it is the highest octane gasoline available to consumers.

(2) Octane is associated with automobile power and performance.

(3) Sunoco 260 is therefore unique in its ability to create octane benefits including power in automobile engines.

(4) Sunoco 260, the highest octane gasoline available, is blended into Sunoco's intermediate grades of gasoline.

(5) Because Sunoco's blended grades of gasoline consist partly of Sunoco 260, the highest octane available, they are thereby endowed with an attribute called "260 Action."

(6) "Sunoco 260," "High Octane," "Power," and "260 Action" are all associated with each other and with Sunoco gasoline generally and are interchangeable attributes.

(7) Sunoco's blended grades of gasoline consisting partly of Sunoco 260, the highest octane available, are therefore uniquely able to create octane benefits including power in automobile engines.

(8) Sunoco's blended grades of gasoline, because of their unique ability to create octane benefits, are more powerful than their competitors.

(9) Because they are more powerful than their competitors only Sunoco's gasolines with "260 Action" are able to provide automobile engines with the power necessary to perform the tasks depicted.

25. A test of consumer perception was initiated by respondent Esty and conducted by the Russell Marketing Research in May 1971 (CX 123; Russell, Tr. 780). The study was limited to a group of male residents of Bergen County, N. J., half of whom were Sunoco users who were listed in the telephone book, are home in the evening, watched the particular television program on which the advertisement was run and own a car for which they purchased the gasoline. These subjects were asked to rate Sunoco and two competing gasolines with regard to power, performance and quality. They were then asked to observe the advertising program for Sunoco and again rate the 3 gasolines. In addition they were asked what the main point was of the commercial about Sunoco, what else they could tell about the commercial, what they remembered seeing in the commerical and what they remembered hearing in the commercial. The subjects' comments were then paraphrased by the

interviewers and an analysis of the results made by respondent Esty for Sun (CX 110, 123, 252; Russell, Tr. 781-782).

26. The Russell Marketing Research Company has had vast experience in the marketing survey area, having conducted four or five thousand of such surveys over a 25-year period (Russell, Tr. 778). Furthermore, the procedures followed in the survey were standard ones normally used by marketing research organizations (Russell, Tr. 799).

27. Some of the comments of the viewers surveyed as pharaphrased by the Russell Marketing Research interviewer were:

> That Sunoco gasoline with 260 in it gives you a lot more power. Because it is a high octane gas it gives your car a better performance * * * Sunoco is the only gas with such a high octane gas which will give your car a better performance.
>
> Sunoco makes all its gas with high octane. The 260 Action of Sunoco is supposed to make your car have more power because of its high octane * * * just how great Sunoco premium 260 gasoline is for your car. It is high in octane so it increases the performance of your car.
>
> Sunoco has the highest octane power in today's gas.
>
> All Sunoco gasolines have higher octane meaning extra power.
>
> That Sunoco contains the highest amount of octane than any other gasoline and that increases the performance of your cars' engine.
>
> That Sunoco gasoline is the highest octane gasoline of any gasoline around.
>
> That they had the best gas for your car with 260 octane.
>
> Only Sunoco can give such power (CX 123, 110).

28. Although the "Train" commercial (CX 254) which was tested differs from most of the challenged advertisements in that it is one of only two visual demonstration advertisements under challenge, it contains language similar to that found throughout the "260 Action" campaign. It is not unreasonable to infer that viewers would perceive other "260 Action" commercials similarly.

29. Many of those surveyed rated Sunoco gasolines higher after seeing the "Train" commercial than they had before seeing that commercial. According to Mr. Russell, however, the changes were not statistically significant (Russell, Tr. 786-787). Nevertheless, Mr. Trepte of respondent Esty told Sun that the study showed improvement in respondents' attitudes toward Sunoco's power, performance and quality after viewing the "Train" advertisement (CX 123).

30. The viewers' responses as paraphrased by the Russell Marketing Research interviewers cannot be considered as verbatim reports. The paraphrased reports, however, having been made by experienced personnel of that agency after detailed instructions, must be given considerable probative weight.

31. Respondents offered no independent survey, test of perception,

consumer testimony or opinion testimony to rebut the findings of the Russell Marketing Research.

32. Dr. Ivan L. Preston is a professor of advertising and communications at the University of Wisconsin. He teaches certain courses in communications and advertising at the University, has been employed by various universities, has had experience in advertising working with two advertising agencies, reviews published materials in the field of advertising as well as law review articles in the advertising field and is a member of certain societies or organizations concerned with advertising. He has conducted research on consumer's understanding of advertisements which he described as most closely related to his analysis in this action. These articles were introduced by respondents as RS 1 and RS 2 (Preston, Tr. 292-302).

33. Dr. Preston reviewed two of the challenged advertisements, the 60 second versions of "Coliseum" and "Train." He stated:

> * * * The Principal process of communication and reception of ideas that occurred in the commercials was a consideration of the comparison between the term "260" and the phrase "260 Action." Now, by that linguistic or semantic analysis of these two terms, they would be expected to refer to approximately the same thing * * *
>
> Viewers would expect the phrase "260 Action" to be a reference to the fact that those gasolines given that label would contain 260, and the octane level of 260, and the resulting power benefits (Preston, Tr. 303).
>
> It represents a demonstration of something that can presumably be performed only with the gasolines that have the octane levels and resulting power of "260 Action" * * * the word "unusual" has the latent meaning of "unique" in that context (Preston, Tr. 303).

34. Dr. Preston saw no reference, directly or indirectly, in any advertisement he reviewed to phosphorous or any other gasoline additive, composition or ingredient other than octane (Preston, Tr. 304-306). He did, however, state that the ads referred to helping the engine achieve power (Preston, Tr. 401).

35. Dr. Preston's testimony constituted the sole expert opinion at the hearing as to what representations were made by any of the challenged advertisements.

36. At complaint counsel's request Dr. Preston conducted a small survey in May 1973 testing student reaction to the "Train" and "Coliseum" advertisements. 303 University of Wisconsin students viewed film supplied by Sun of either "Train" or "Coliseum" twice and then responded to a series of 11 questions designed to elicit their opinion of "what the advertiser appears to be telling you." (CX 191 p. 4).

37. The subjects were asked to mark as "accurate" which of the 11 statements appeared to them to have been implied or stated in the

advertisement. The following percentages of the sample marked as "accurate" the following key statements:

(5) You can get the power supplied by Sunoco 260 Action only by buying Sunoco gasoline: 78 percent.

(6) When your gasoline is blended with the action of Sunoco 260 you will get all the benefits of using the highest octane gasoline at any station anywhere: 61 percent.

(7) You're seeing a stunt which a car can perform only if it is powered by Sunoco's 260 Action: 48 percent.

(8) Gasolines blended with the action of Sunoco 260 are unusual because they provide more power than you would get with other gasoline: 79 percent.

(9) This demonstration shows that gasolines with 260 Action are unusual: 71 percent.

(10) Having 260 Action means that you have the highest octane gasoline available at any station anywhere: 67 percent.

38. Although the results of "Train" and "Coliseum" are not numerically projectable the survey is of some value in indicating how some consumers generally reacted to the "260 Action" campaign. Dr. Preston testified, however, that while the survey was not a representative survey he considered it to be reliable as an indication of the general public's reaction inasmuch as the subjects, university students, would be apt to have less confusion than the general public (Preston, Tr. 333). As a consequence, the percentage figures would be higher with the general public. Although Dr. Preston conceded that some survey participants would view as accurate logically fallacious premises drawn from an advertisement consisting of no more than a blank piece of paper with the word "advertisement" appearing on it and a company name such as "RCA" and that he would get accurate responses to other logically fallacious propositions derived from selling themes of other gasoline marketers and their advertising and that his test conditions were not the same as actual television viewing in the home and, finally, that the survey participants in his test were asked to look for implications, I conclude that Dr. Preston's test tends to support the allegations of the complaint as to the representations made in the advertisements of the respondents.

39. Dr. Raymond A. Bauer, a witness called by respondent Sun, offered a critique of Dr. Preston's testimony. According to Dr. Bauer, Dr. Preston's 1971 survey, RS 1, showed that the subjects designated 54 percent of the logically valid propositions as accurate as well as 57 percent of the logically invalid propositions. These results were so close to the 50-50 results of a chance designation as to support no conclusion

other than the subjects couldn't readily distinguish between them.

40. Dr. Bauer also concluded that advertising messages are more apt to be accepted as accurate despite logically invalid propositions.

41. Dr. Bauer concluded that since approximately 62 to 65 percent of the responses to the logically fallacious propositions were deemed accurate no conclusions can be drawn from this methodology. Dr. Bauer also criticized Dr. Preston's tests in that the subjects were forced to decide whether a statement was accurate or inaccurate with no middle ground; that the study was conducted in a controlled situation immediately after the subjects were given prime attention to the advertisements; that the subjects were not asked simply to state his recall of the advertising; and because no controls were used to eliminate false positive responses.

42. Dr. Bauer, unlike Dr. Preston, has not conducted any tests himself or compiled any data regarding the challenged advertising in this case. Nor did Dr. Bauer express any personal opinion as to what the advertising may or may not imply. Although Dr. Bauer worked with and associated with the conduct of consumer recall or consumer perception tests, he has not himself conducted such tests (Bauer, Tr. 1184,1225).

43. Comparisons between Preston's earlier tests (RS 1 and RS 2) and the current tests (CX 191) may be misleading. Thus in the earlier tests Dr. Preston had chosen a group of advertisiements which were in his opinion highly capable of leading the subjects to illogical behavior. In CX 191 the statements chosen were from the Commission's complaint (RS 2, pp. 2 and 3; RS 1, pp. 2 and 3; Preston, Tr. 380, 382, 392-393). Moreover, since RS 1 and RS 2 involved advertisements in print media while CX 191 involved television advertisements, media differences could affect the results (Bauer, Tr. 1233-1234). Finally, RS 1 and RS 2 were based on the number of different products whereas CX 191 was based only on Sunoco gasoline which might affect the test results (Bauer, Tr. 1234-1235).

44. Accepting Dr. Bauer's hypothesis that there is a valid basis for comparison of CX 191 with Dr. Preston's earlier works, RS 1 and RS 2, the affirmative responses to several of the key statements in CX 191 (Finding 37) were nevertheless substantially higher than the average result obtained in Dr. Preston's earlier works.

45. Power is the subject matter of the two ads specifically described as typical in the complaint, "Train" and "Coliseum" (Stip. CX 283).

46. Every advertisement stressed "highest octane" while none even comes close to mentioning phosphorous or additives.

47. In none of the campaign's planning documents is there any reference to phosphorous as a justification or a basis for any of the claims

made. At meetings between respondents in Aug. 1967 an Esty representative suggested advertising Sunoco's new "Custom-blending" pump face in a manner utilizing "the fact that there is just the right amount of Sunoco 260, the highest octane available in all blends starting with 200" (CX 16). Similar thoughts were conveyed in a later report and a later meeting (CX 17).

48. In Aug. 1970 officials of Esty wrote to officials of Sun:

> The current "260 Action" campaign focuses in on two of the key attributes - "the action of the highest octane gasoline" and "the custom blending system" * * * Past consumer research has told us that among adult men octane is considered to be a measure of quality -- the higher the octane, the higher the quality of the gasoline (CX 31).

49. In Apr. 1971 a similar communication from Esty to Sun read:

> The overall objective * * * is to successfully establish Sunoco as an important new high quality brand of gasoline that offers consumers performance advantages over all other gasolines.
>
> Build awareness of Sunoco's performance superiority by stressing that some 260 is available in all blends from regular on up * * * the recommended plan is based on the following considerations: * * * to clearly establish that Sunoco 260 is the world's highest octane gasoline and begin to communicate the idea that the custom blending pump puts some of 260 in every blend (CX 160). See also CS 39 where Esty told Sun:
>
> * * * our task is to effectively motivate them [users] to change to Sunoco by offering some benefit which is quite tangible and which they will perceive as *not available* from their current brand.

Also in Apr. 1971, Esty reported:

> The results of this study tend to confirm our belief that a performance strategy based on 260 "world's highest octane" claim is meaningful and believable to consumers * * * we feel we have laid a sound foundation of awareness of 260 Action the world's highest octane claim. Placing greater emphasis on the performance value individual blends derive from 260 we will make our story more relevant, meaningful and persuasive in terms of a specific consumer benefit (CX 143).

50. In none of the texts of advertising presentations is there any reference to phosphorous or any other additive as the basis or justification for the campaign. Respondents introduced no text of an advertising presentation containing such a reference.

51. Several documents were introduced in evidence during the hearings purporting to show a phosphorous advantage in Sunoco's blended gasolines over their competitors (RS 23, 24 and 25). Messrs. Dugan and Foster, employees of respondent Sun, testified that RS 23, 24 and 25 as well as oral presentations concerning phosphorous were communicated by Sun to its advertising department and there was, in addition, testimony that Sun's phosphorous advantage was one of the elements in the challenged campaign (Foster, Tr. 834-835).

52. Mr. Foster testified that the concept of phospherous was not advertised by name because of unfavorable publicity concerning phosphates at that time. Nor was avoidance of spark plug fouling used because the concept was too technical for explanation in mass media advertising (Foster, Tr. 873-875).

53. The weight of probative evidence indicates that phosphorous content was not a major consideration in the formulation of the challenged advertising.

54. The parties have stipulated certain technical definitions:

Octane, which is measurable in different ways, is a measure of motor fuel anti-knock quality, regardless of the method of measurement. The anti-knock quality is one of many measurable properties of a gasoline (CX 283).

An octane number or octane rating of a gasoline is a measure of the anti-knock quality of a gasoline or its ability to resist knock during combustion in an engine and an octane number or octane rating of a gasoline can be measured in different ways (Sun's request for admissions #97, admitted by complaint counsel).

Knock, or as it is sometimes called ping or detonation, is the uncontrolled excessively rapid reaction of a portion or all of the air-fuel mixture in the combustion chamber of the engine (Sun's request for admissions #119, admitted by complaint counsel).

Knock can also result in a loss of engine power (Sawyer, Tr. 639).

55. The sole function of octane is to control knock. "Knock and the possible resultant power loss can be prevented by using any gasoline that has sufficient octane anti-knock quality" (complaint counsel's request for admissions #21, admitted by respondent Sun). "Use of a gasoline with an anti-knock quality exceeding the requirements of a particular engine is nonadvantageous as far as preventing knock is concerned" (complaint counsel's request for admissions #23, admitted by respondent Sun).

56. Paragraph 12(a) of the complaint alleges:

> Sunoco's gasoline blends do not provide more engine power by reason of their respective octane levels than do competing gasolines of comparable octane rating.
> Respondent Sun admits that Sunoco gasoline blends may not provide more engine power by reason of their respective octane levels, *qua* octane levels, than do competing gasolines of comparable octane rating (Ans. of Respondent Sun Oil).

57. Since octane relates to engine power only by preventing knock, no gasoline, including Sunoco's blends, will consistently provide superior anti-knock resistance under actual driving conditions when compared to a competing gasoline with the same octane number as determined by

the same test (Caretto, Tr. 620-621; Perrine, Tr. 669; Sawyer, Tr. 640; Samuelsen, Tr. 709-710).

58. Sun did not, during the period of the challenged advertisements, produce regular and premium gasolines with consistently higher octane ratings than the regulars and premiums of other companies (Samuelsen, Tr. 686, 700; CX 243; CX 7, 8, 9 and 11).

59. It follows, therefore, that Sunoco's blends do not consistently provide more engine power by reason of their respective octane levels than do competing gasolines of comparable octane rating.

60. Paragraph 12(b) of the complaint alleges:

> Blending Sunoco "260" into Sunoco's lower octane gasolines conveys to resulting blends of Sunoco gasoline no more octane benefits than provided by the octane level of the resultant blends.

Sun admits "although one of the blending agents for Sunoco's 'custom blending' gasolines is Sunoco 260, the resultant blends of Sunoco gasolines do not retain the high octane anti-knock quality of Sunoco 260 but rather possess the octane anti-knock qualities of the resultant blends" (complaint counsel's request for admissions #27, admitted by respondent Sun).

61. Paragraph 12(c) of the complaint alleges:

> Octane is a measure of motor fuel anti-knock quality and to the extent that octane relates to power and performance any gasoline of sufficient octane will provide maximum power and performance.

Respondent Sun admits "any gasoline of sufficient octane will, by definition of the word 'sufficient', provide the desired anti-knock quality" (Ans. of respondent Sun, par. 12(c)). There may be other factors contributing to the realization of engine power but if octane relates to engine power only by preventing knock any gasoline of sufficient octane will provide maximum power and performance to the extent that octane relates to power and performance.

62. The use of leaded gasolines causes fouling of engine parts including spark plugs which can under certain conditions cause spark-plug misfire and power loss.

63. Phosphorous has a beneficial effect on this problem of power loss. Spark plug fouling may be reduced or delayed with the use of phosphorous (Samuelsen, Tr. 714; Hall, Tr. 909).

64. In the "Train" and "Coliseum" advertisements the gas tanks of the cars were drained and refilled with Sunoco gasolines immediately prior to the showing (CX 195). Any benefits resulting from the use of a phosphorous gasoline are not conveyed immediately (Hall, Tr. 918; Samuelsen, Tr. 714). It follows, therefore, that any power benefits

derived from the use of Sunoco gasolines that were demonstrated by these ads could not have resulted immediately from switching to the use of the Sunoco gasolines containing the phosphorous additive.

65. At the time the challenged advertising campaign was run Sunoco gasolines were unusual in that typically the *majority* of gasolines in the marketplace did not have as high a phosphorous content (Samuelsen, Tr. 702). There were, however, several brands of gasoline with as high or higher phosphorous content and there may have been even more inasmuch as the research did not attempt to ascertain the phosphorous content of *all* brands of gasoline in the marketplace (CX 218, 219, 223, 225, 226). Moreover, in at least one market area, Toledo, Sun's director of applied research testified that "this unusual posture did not persist." (Kennedy, Tr. 1033).

Finally, respondent's comparisons of phosphorous content make no reference to low lead or unleaded gasolines (Dugan, Tr. 1048).

66. Respondents generally assert that a gasoline containing more theories of phosphorous will be more effective than containing fewer theories. There is testimony that approximately .2 theory at the premium level and .1 theory at the regular level will make a measurable difference in fouling protection (Bettoney, Tr. 960). Respondents offered no scientific studies which directly tested Sunoco gasoline against competitives containing some phosphorous. Moreover, there was some doubt that slight differences of 10 to 15 percent in theory content would make any difference. An official of the Ethyl Corporation testified that "there are so many variables in engine testing that I might have to run a half dozen comparisons and I am not even sure I could find it then, the difference between .15 and .17, because it is so small" (Hall, Tr. 926). An official of the Dupont Company testified that the phosphorous content tests in general are accurate in terms of correlating the number of theories of phosphorous to the spark plug fouling benefits only to the level of about plus or minus 10 to 15 percent (Bettoney, Tr. 960).

67. There are a number of situations in which the presence of phosphorous in gasoline makes little or no difference in power output. A car with new spark plugs and, therefore, no lead deposits has no use for a phosphorous gasoline since there is no lead for the phosphorous to counteract. If such a car continues to run on unleaded gasoline the presence of phosphorous will not enhance its power (Hall, Tr. 915). If spark plug fouling is so advanced that the plugs are not firing at all the phosphorous will be of no benefit (Hall, Tr. 919). Finally, the need for a phosphorous gasoline would be lessened if the driver of the car put the car through a number of hard accelerations to fairly high speeds which

would modify the lead deposits and possibly alleviate the problem (Hall, Tr. 912-913).

68. Respondent Esty participated in the creation of the advertisements in question (see Esty brief p. 9). There were series of meetings concerning this advertising between officials of Esty and officials of Sun and formal presentations of the advertisements were made by Esty to Sun management (Foster, Tr. 840).

69. Correspondence from Esty to Sun indicates Esty's familiarity with research showing that among adult men octane is considered to be a measure of quality, that Sunoco has the highest octane gasoline on the market, that some users associate Sunoco's highest octane with more power and that many users were confused or ignorant about the concept of octane (CX 30, 31, 110, 123 and 124). See Findings 47-49.

70. There is nothing in the record of this proceeding to indicate that Esty relied on any material from Sun or any other source on which to base the claims made in the challenged advertisements.

71. Survey evidence in the record of this proceeding establishes that a substantial number of consumers were aware of an believed claims that Sunoco 260 is the world's highest octane gasoline and that getting 260 in each grade helps improve car performance. A 1970 study reported that 50 percent of all survey respondents were aware of the "highest octane" claim and that 48 percent of them believed that claim. 65 percent of the steady users surveyed knew of the "highest octane" claim and 73 percent of them believed it. 39 percent of all respondents knew of the "260 in each grade" claim and believed it, but among steady users, 52 percent knew of that claim and 65 percent believed it (CX 146). A 1971 study reports that 40 percent of all survey respondents knew of the "highest octane" claim and 47 percent of them believed it. In the same study 60% of the respondents who were steady users knew of the "highest octane" claim and 67% of them believed it. Similarly, 39 percent of all respondents knew of the "260 in each grade" claim and 39 percent of them believed it, while 53 percent of the steady users knew of that claim and 64 percent of them believed it (CX 145).

72. Dr. Frank M. Bass, a professor at Purdue University and an authority in the field of marketing research, testified that the belief levels stated above were very high and that such levels were derived from the advertising as opposed from other sources, although the strength of the beliefs was not measured (Bass, Tr. 506, 507, 508 and 538).

73. Dr. Bass further testified that there is a positive association in the minds of consumers between automobile performance in general and octane. Consumers believe that the higher the octane level in gasoline

the better their automobiles will perform. They also associate specific kinds of auto performance such as good mileage and power with high levels of octane (Bass, Tr. 529, 532; CX 157).

74. The 1971 study referred to above (CX 145, establishes that 70 percent of all respondents stated that the higher the octane the better the car performs (CX 145 p. 28). A special analysis in that same study showed that motorists who were aware of the "highest octane" claim gave a significantly higher rating than other motorists on "good for your engine," "good mileage" and "provides plenty of power" (CX 145 p. 26).

75. A 1972 study notes that "according to the ratings, Sunoco's image is not clearly distinguishable from the competitive average on any of these 3 characteristics": "good mileage," "quick starting," and "cleans your engine." The study goes on to state "our image is most clearly distinguishable from competition on 2 factors * * * "high octane" and "provides plenty of power." All three user types clearly rate Sunoco above competitive average on both of these attributes (RS 7 p. 16). Motorists, even Sunoco users, do not, however, rank these two attributes very important. Among motorists who were aware of the "highest octane" claim Sunoco was rated higher than among other motorists on the characteristics of good mileage, quick starts, powerful gasoline and high octane (RS 7 p. 25).

76. Respondents do not dispute that higher octane will not provide superior performance (see respondent Sun's Appendix p. 29, submitted with its reply brief).

77. Beliefs concerning the superior performance benefits provided by the octane in Sunoco gasoline are enduring in the minds of consumers and will continue to endure in the future for some time after the ads cease. The ads ceased 2-1/2 years ago (Bass, Tr. 512). If advertising the "highest octane" claim were stopped there would be a tendency for awareness level, belief levels particularly, to decay (Bass, Tr. 511).

78. A Gallup survey was conducted in Oct. and Nov. of 1973, almost 2 years after the challenged advertising had ceased, among 2,149 licensed drivers in the Sun Oil Company marketing area, the findings of which are projectable to the entire universe sampled, *i.e.*, all licensed drivers in the Sun marketing area (RS 32; Wood, Tr. 1111-1119).

80. The Gallup survey shows that while 34 percent of all motorists think "some" brands of gasoline have higher octane than others, 66 percent of them either think all brands are the same or don't know. Even among the 34 percent who discerned a difference 13 percent (or about 40 percent of the 34 percent) were unable to rate Sunoco.

81. In the Gallup survey the total rating given each brand was divided by the total number of respondents able to rate that brand,

resulting in a "mean average rating." The mean average rating on the octane rating scale for Sunoco among all motorists was higher than each of the other 6 competitive brands. It was not significantly higher, statistically, than the ratings for American and Shell (Wood, Tr. 1167). When the mean average ratings by those who used the brands in the past several months and those who used the brand most frequently are compared, they "follow the same patterns as you find among all motorists" (Wood, Tr. 1167).

82. On preventing knock, 34 percent of all motorists thought "some" brands better but 66 percent thought them the same or didn't know. A similar pattern existed among Sunoco users, with only about 40 percent of them thinking some brands better preventing knock. Users of other brands showed approximately the same attitudes as Sunoco users (RS 32 p. 3).

83. On power or pick up, 32 percent of all motorists thought some brands better but 68 percent thought them the same or didn't know. Of those discerning a difference, 12 percent (or more than one-third of the 32 percent) were unable to rate Sunoco and 7 percent gave Sunoco a high rating. 9 percent to 12 percent were unable to rate the other 6 brands named and 5 percent to 9 percent gave high ratings to such brands. I find no significant difference in attitudes re power between Sunoco and the 6 other brands (RS 32 p. 27).

84. Even among the 32 percent who thought a particular brand to have better power than other brands, only 11 percent or only 3 percent of all motorists gave octane rating as the reason (RS 32 p. 29).

85. The Gallup survey, however, shows that only 10 percent of the surveyed respondents chose a particular station because of the quality of the brand sold, compared to 86 percent who chose because of location, price or service (RS 32 p. 13). Similarly only 10 percent of motorists consider octane rating important compared to 41 percent for price, 21 percent for mileage and 20 percent for performance (RS 32 p. 9). Even among recent past users of Sunoco 40 percent rate price important, 19 percent mileage, 18 percent performance and 18 percent octane rating. Among most frequent users of Sunoco, 25 percent rate price important, 21 percent mileage, 24 percent performance and only 14 percent think octane rating important. Among the frequent users of the 6 other brands between 7 percent and 12 percent think octane rating important (RS 32 pp. 11-12).

86. Conditions affecting the marketing of gasoline in the Sunoco marketing area have changed in a number of respects from the period of the advertising in question to the present. In the earlier period gasoline was in liberal supply but now gasoline is in short supply. The

price of gasoline has risen very noticeably at the retail level. Automobile engines have been charged from high compression with stress on performance to lower compression engines using lower octane fuel. Unlike the practice during the earlier period gasoline pumps now show the octane number of the gasoline being dispensed. As a result of these changes Sun's advertising practices have changed and diminished and it is not utilizing any gasoline related promotions (Burtis, Tr. 1091-1099).

COMMENT

The principal issues in this proceeding are: (1) Were certain representations made in the challenged advertistments? (2) Did these representations have a tendency or capacity to deceive? (3) If so, should both respondents be held liable? (4) What is the appropriate order and, particularly, is corrective advertising appropriate?

The complaint charges that the challenged advertisements made certain representations (See Finding 17). The ads themselves which were disseminated between 1969 and Jan. 1972 are set forth in Findings 9 through 16. Typical excerpts from these ads are set forth in Finding 19; Finding 20 contains a detailed description of two television ads. It is true, as respondents contend, that in none of the ads are the representations alleged in the complaint made expressly. This, however, does not end the inquiry for it is not only what is said that should be considered but what that is reasonably implied. As Judge Kaufman of the Second Circuit in FTC v. Sterling Drug Co. held:

> * * * since the purpose of the statute is not to punish the wrongdoer but to protect the public, the cardinal factor is the probable effect which the advertiser's handiwork will have upon the eye and mind of the reader. It is therefore necessary in these cases to consider the advertisement in its entirety and not to engage in disputatious dissection. The entire mosaic should be viewed rather than each tile separately "the buying public does not ordinarily carefully study or weigh each word in an advertisement. The ultimate impression upon the mind of the reader arises from the sum total of not only what is said but also of all that is reasonably implied" (317 F. 2d 669, 674).

See also *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F. 2d 513, 528, where Judge Wisdom of the Fifth Circuit said:

> The Commission need not confine itself to the literal meaning of the words used but may look to the overall impact of the entire commercial.

In this connection I note respondents' observation that Paragraph 13 of the complaint speaks of Sunoco's "unique qualities not found in other brands of gasoline." Sun states that it "does not claim to have unique qualities in its gasolines" and that "Complaint counsel have admitted that only in reference to Sunoco 260 and the middle premiums is the

word unique used in advertisements." (Sun's Appendix #95). The issue seems to be the difference in meaning attributable to the word "unique" compared to the word "unusual." This may be of interest to lawyers and semanticists, but hardly to vast numbers of the general public. We are here concerned with the meanings communicated by these ads not merely to lawyers and semanticists but to the general buying public.

I considered the ads and particularly the two television ads referred to above. I have concluded in Finding 24 that the ads convey the impression that Sunoco's blended grades of gasoline consisting partly of Sunoco 260, "the world's highest octane available," are uniquely able to create octane benefits, including power, in an automobile engine; that they are more powerful than competitive gasolines; and that, therefore, they alone provide the automobiles with power necessary to perform the seemingly difficult, if not impossible, tasks. Although I can rely on my own cumulative knowledge and experience to make these conclusions (*FTC* v. *Colgate-Palmolive Co.* 380 U.S. 374, 391-92; *Carter Products, Inc.* v. *FTC, supra*) there is record evidence in this proceeding which, in my opinion, supports the conclusions I have reached.

Findings 25 through 30 refer to a test of consumer perception conducted by the Russell Marketing Research. In this study a group of 300 viewers saw the "Train" television commercial and then were asked several open-end questions such as "What do you remember?" The viewers' reactions are set forth in Finding 27 and demonstrate clearly their perception of a claim that Sunoco gasolines with 260 in them give more power and that Sunoco is the only gas with such high octane; that Sunoco makes all its gas with high octane; that all Sunoco gasolines have higher octane meaning extra power; that only Sunoco can give such power. Even an official of respondent Esty told Sun that the study showed improvement in the attitudes of these viewers toward Sunoco's power, performance and quality after viewing that advertisement (Finding 29). It is significant that the respondents offered no independent survey test of perception, consumer testimony or opinion testimony to rebut the findings of the Russell Marketing Research.

The record also has the testimony of Dr. Preston. This advertising authority reviewed the "Train" and "Coliseum" commercials and, in his opinion, viewers would expect that Sunoco gasolines would contain the octane level of 260 and that the demonstrations could be performed only with such gasolines. Dr. Preston, in addition to giving his opinion of the commercials, conducted a small survey testing the reaction of 303 students to these ads. After viewing the commercials they were then asked what the advertiser "appears to be telling you." Their answers are set forth in Finding 37. Fully 79 percent of them said that gasolines

blended with the Action of Sunoco 260 are unusual because they provide more power than you would get with other gasolines. 67 percent said that having 260 Action means you have the highest octane gasoline available at any station anywhere.

Although neither the Russell survey or the Preston survey were numerically projectable, they tend to indicate the general public's reaction and tend to confirm rather than dispute the conclusions I have reached concerning the representations. Compare *Elliot Knitwear Inc.*, 59 F.T.C. 893, where a survey of 60 students was conducted under the auspices of a university professor who had conducted other consumer surveys. There the issue was the labelling of a sweater "cashmora" when, in fact, it contained no cashmere. When asked what they thought of the sweater, only 12 percent referred to the sweater as containing cashmere. When asked what material it was made from, only 22 percent said they thought it was made of cashmere. 70 percent of this small group referred to the label as the source of their information, making a total of only 13 percent of the students surveyed. The Commission held the cashmere survey reliable and establishing that the labels are deceptive. *A fortiori* the Russell survey and the Preston survey must be deemed reliable and establishing the representations of the challenged ads. In the case of the Preston survey which was conducted among university students it is likely that with the general public the percentages of belief would be even higher than with the students who might have less confusion with semantics as was held in *Elliot Knitwear*, *supra*. p. 903.

Dr. Bauer, an advertising authority called by the respondents, did not criticize the opinion of Dr. Preston but did criticize his survey in that the subjects were forced to decide whether a statement was accurate or inaccurate with no middle ground; that the study was conducted in a controlled situation immediately after the subjects gave prime attention to the advertisement; that the subjects were not asked open-ended questions such as "what do you recall?" It may be assumed that the survey could have been improved upon. This, however, does not destroy the value of the survey entirely. Indeed, one of Dr. Bauer's chief objections to the survey was based on his attempt to link the survey with earlier surveys conducted by Dr. Preston in which Dr. Preston found that the subjects couldn't readily distinguish between logically valid propositions and logically invalid propositions. I found, however, that comparisons between Dr. Preston's survey and his earlier works are not necessarily appropriate because of differences in circumstances surrounding the tests (See Finding 43).

Sun argues that the challenged ads were not intended by respondents to make the representations alleged in the complaint. But lack of intent to deceive is irrelevant. *National Dynamics Corp.*, FTC Docket No. 8803 p. 9 [82 F.T.C. 488]. On the other hand, however, the intent of the advertiser should be helpful in determining whether the impressions gained from the ads were reasonably foreseeable. In ascertaining intent, respondents refer to several internal communications between Sun's advertising department and its research department which mentioned the power effect of Sun's phosphorous additive. Communications between Esty and Sun, however, make no such reference. Instead, emphasis is placed upon the action of the highest octane gasoline and high performance. In one such communication Esty reported "the results of this study tend to confirm our belief that a performance strategy based on 260 'world's highest octane' claim is meaningful and believable to consumers." (See Findings 46 through 52). Consequently, I have found that the weight of evidence indicates that phosphorous content was not a major consideration in the formulation of the challenged advertising (Finding 53).

Considerable testimony was received concerning the phosphorous additives. Although Sunoco gasolines were unusual in that their phosphorous content was higher than a majority of other gasolines, there were some other brands that had as high or even higher phosphorous content. No tests were offered by the respondents to show Sunoco's superiority against competitives containing *some* phosphorous but only that Sunoco contained more phosphorous. In many cases the difference was slight and perhaps insignificant. Moreover, the presence of phosphorous in Sunoco gasolines was not suggested or intimated in the advertisements.

In short, I conclude that the presence of phosphorous in Sunoco gasolines is immaterial to this proceeding which is based upon ads representing that certain results were achieved or were achievable because of Sunoco's use of 260 "the world's highest octane gasoline." Even if I were to assume that the phosphorous additive in Sunoco gasolines was the reason for the ads' reference to power, I cannot conclude that such representation was accurate. Some gasolines had a phosphorous content as high as or higher than Sunoco blends (See Finding 65). Moreover, in many instances the presence of phosphorous in gasoline makes little or no difference in power (See Finding 67).

In sum, we are left with the representation that Sunoco gasolines are unusual (and in the case of Sunoco's middle premiums and 260 are unique) in that they alone can provide high performance by reason of

the presence of "the world's highest octane gasoline." As a matter of fact, however, the octane ratings pertain only to the anti-knock qualities of the gasoline and Sunoco gasolines of a given octane rating contain no more anti-knock capacity than competitives of a similar octane rating. The element of power is not an attribute of the octane rating except insofar as knock is prevented. In this respect, however, Sunoco's regular gasolines when compared to competitive brands of regular gasolines and Sunoco's premium when compared to competitive brands of premium are no better or no worse and often the same in octane ratings (See Findings 57-58). Accordingly, Sunoco's anti-knock performance would not differ from its competitors and, absent anti-knock differences, octane rating cannot involve power. The challenged advertisements in implying that the high octane rating contributed to, if not made possible, the seemingly extraordinary power performance of the automobiles' engines and in this respect Sunoco gasolines were unusual, were therefore deceptive and misleading.

The responsibility of an advertising agency has been spelled out in several decisions of the Commission and courts. In *Carter Products, Inc.* v. *FTC*, *supra*, the extent to which the advertising agency actually participates in the deception is the proper criterion. In *Colgate-Palmolive, Co.* v. *FTC*, 310 F.2d 89, the Commission was upheld in holding the agency liable where the agency was an active, if not the prime, mover. Indeed, an agency might be able to detect misconceptions in advertising more so than the principal.

> The agency, more so than its principal, should have known whether advertisements had the capacity to mislead or deceive the public. This is an area in which the agency has expertise. Its responsibility for creating deceptive advertising cannot be shifted to the principal who is liable in any event. *Merck & Co.* 69 F.T.C. 526, 559.

The decision in the *ITT Continental case*, FTC Docket No. 8860 [83 F.T.C. 865], is pertinent here:

> It is not necessary to establish that the agency knew or had reason to know that the specific representations found to exist here were being made in the challenged advertisements. Clearly, it is the advertising agency which is the expert in determining what representations are made in a given advertisement. [Footnote omitted] Indeed this is the very role which it is called on to perform for its client * * *
> An agency is clearly liable for the advertising it has created, produced, or assisted in producing unless it can be shown that it did not know or could not know that the challenged advertising was false [Footnote omitted] * * * It was Bates [the advertising agency] which developed the good nutrition theme which was the cornerstone of respondents' advertising campaign for Wonder Bread and which was the source of the deception which we found in this advertising campaign. Bates had a clear duty to assemble all of the facts bearing on the nutritional value of these products if it intended to use this product attribute as its central selling message, its unique selling proposition as it termed it. * * *

Unless advertising agencies were under a duty to make independent checks of information relied upon to frame their advertising claims, the law would be placing a premium on ignorance. *In re Dolcin* 247 F.2d 524, 534 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 988 (1957). * * * The agency must assume full responsibility for the claims which it makes about a product. If it is unable to do so, it should not make the claims. If it can only do so to some limited degree, it must frame its claims accordingly * * * Bates selected the central selling messages. It had a clear duty in these circumstances to be certain that these advertisements did not have a capacity to deceive.

I have found that respondent Esty participated in the creation of the advertisements in question and held series of meetings with officials of Sun concerning this advertising. It also made formal presentations of the advertisements to the Sun management and conducted research showing that octane is considered to be a measure of quality, that Sunoco has the highest octane gasoline on the market, that some users associate Sunoco's highest octane with more power and that many users were confused or ignorant about the concept of octane. It was Esty who reported its belief that a performance strategy based on 260 "world's highest octane" claim is meaningful and believable to consumers and who urged placing greater emphasis on the performance value individual blends derived from 260 (See Findings 47 through 49 and 68 through 70). It is incontrovertible that Esty participated in the development of the challenged advertisements and that it clearly knew or should have known that these representations were false.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Sun Oil Company of Pennsylvania, a corporation and William Esty Company, Inc., a corporation.

2. Said respondents have been at times relevant herein engaged in interstate commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

3. Respondents have engaged in unfair methods of competition in commerce and have committed unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

THE REMEDY

The law is well-established that the Commission not only is empowered but also bound to enter an order of sufficient breadth to ensure that a respondent will not engage in future violations of the law. *e.g. Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 611-613 (1946); *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473

(1952); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 428-430 (1957); *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). The only constraints which the courts have set down upon the Commission's powers in this area are that the order must bear a reasonable relationship to the unlawful practices found to exist and must be clear and precise so that it is easily understood by the party under its authority. *Siegel*, *supra*, 327 U.S. at 611-613; *Ruberoid*, *supra*, 343 U.S. at 473; *National Lead*, *supra*, 352 U.S. at 428-430; *Colgate*, *supra*, 380 U.S. at 392, 394-395; *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683, 726 (1948).

Within this framework, the Commission has wide discretion in shaping order provisions. It is clear that the parameters of an order are not dictated by the specific violations which have occurred, but rather the Commission may "close all roads," fencing in respondents so that its orders cannot be circumvented easily. *Ruberoid*, *supra*, 343 U.S. at 473; *National Lead*, *supra*, 352 U.S. at 429; *Colgate*, *supra*, 380 U.S. at 394-395. The courts have consistently upheld orders which enjoin "like and related" practices in addition to the specific legal practices alleged in the complaint. *Federal Trade Commission* v. *Mandel Bros., Inc.*, 359 U.S. 385, 393 (1959); *Niresk Industries* v. *Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir.) *cert. denied*, 364 U.S. 883 (1960).

Respondent Sun takes exception to complaint counsel's proposed order Paragraph I-D wherein respondent Sun is ordered to cease and desist from

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

Complaint counsel cites the decision of the Commission in *Colgate*, *supra*, as support for this provision but, as counsel for respondent Sun points out, the provision in the order pertaining to Colgate was not identical with the provision now proposed. Accordingly, the provision will be modified to conform with that prescribed in the Colgate case.

Respondent Sun also objects to Paragraph I-E which reads:

> Misrepresenting, in any manner, the performance characteristic of Sunoco gasoline or any other gasoline.

Sun contends that it could be:

> Faced with a situation in which a claim made for Sunoco gasoline could be absolutely true and contain no expressed comparison or

assertions of uniqueness and yet a Preston survey would show that such claims had been made by implication.

The difficulty with Sun's contention is that Sun did misrepresent Sunoco's performance characteristics. Consequently, we must guard against any such future deception.

Respondent Sun also contests complaint counsel's proposed order at Paragraph I-F which reads:

> Representing, directly or by implication that any such product is unique among competing products, when such is in fact not the case.

Here as in the case of Paragraph I-E the record supports the conclusion that Sun did represent its Sunoco gas to be unique among competing products when such was in fact not the case. I conclude, therefore, that complaint counsel's proposed order Paragraph I with a modification in Subparagraph D is appropriate here as respects respondent Sun.

The proposed order would prohibit the specified misrepresentations with regard to "gasoline or any other product in commerce." In effect, however, only Paragraphs D (concerning demonstrations) and F (concerning uniqueness) apply to all products, since Paragraphs A, B, and C are by their terms limited to Sunoco gasoline and Paragraph E is limited to gasoline generally. Complaint counsel argues that the coverage to all products in these Paragraphs is justified in view of the large number of false and deceptive commercials which ran for portions of 4 years. Since Sun primarily markets only petroleum and automotive products there would appear to be little reason not to extend the order coverage to all Sun's products. In the case of respondent Esty, however, the all product coverage would likely encompass many products totally unlike gasoline and its promotion. In view of Esty's active participation in the deception found here, it becomes necessary to guard against any future deception on the part of Esty as well as Sun involving demonstrations and claims of uniqueness whether or not related to gasoline.

Here as in the *Colgate* case, respondents used a number of different commercials employing the same deceptive practice, *i.e.*, implying that because all Sunoco blended gasolines contain Sunoco 260, the world's highest octane, only Sunoco gasolines could do the seemingly difficult, if not impossible, feats of performance. This, as the Supreme Court held in *Colgate*, gives "the Commission a sufficient basis for believing the respondents would be inclined to use similar commercials with respect to the other products they advertise" p. 395. I find it necessary, therefore, to prohibit misleading demonstrations and false uniqueness claims regardless of the products involved.

Paragraph II of the proposed order would prohibit respondent Sun Oil Company from advertising Sunoco gasoline for a period of one (1)

year unless certain of the advertising contained a corrective message. Specifically, the company would be required to make a clear and conspicuous disclosure that, contrary to prior representations found in Sunoco advertising,

> To the extent that automobile performance depends on octane levels, automobiles do not perform better with Sunoco than with other gasolines of equal octane.

The said disclosure would have to consist of at least 25 percent of the space used in each print advertisement and not less than 25 percent of the time devoted to each radio and television commercial.

The position of the Commission with respect to corrective advertising is unmistakable. In *Firestone Tire and Rubber Co.*, 81 F.T.C. 398, 471, the Commission held that:

> An order requiring corrective advertising is well within the arsenal of relief provisions which the Commission may draw upon in fashioning effective remedial measures to bring about a termination of the acts or practices found to have been unfair or deceptive. If such relief is warranted to prevent continuing injury to the public, it is neither punitive nor retrospective.
> Corrective advertising orders where necessary and appropriate will violate neither the letter nor the spirit of the First Amendment guarantees of free speech and press and are clearly within the remedial authority of the Commission.

See also *ITT Continental Baking Co. Inc.*, F.T.C. Docket 8860 [83 F.T.C. 865], decision of the Commission at Slip Opinion page 31.

A more difficult question is presented in the appropriateness of a corrective advertising order in this proceeding. Inasmuch as corrective advertising is warranted to prevent continuing injury to the public it becomes necessary to determine whether the deception practiced by the respondents continues to injure the public. As Federal Trade Commission Chairman Kirkpatrick stated in the *Firestone* case, in which corrective advertising was *not* ordered:

> No showing was made that the particular advertisements challenged by the complaint in this matter were in fact commercials which succeeded in achieving the effect desired by advertisers—*i.e.*, to continue to influence consumers' purchasing decisions long after the advertisements had been perceived by consumers * * * For the present, however, it is my view that our knowledge in this area is not deep enough to justify such an approach.

See also *ITT Continental Baking Co. Inc.*, *supra*, in which the Commission held:

> We have further evidence that many months after conclusion of the advertising campaign a small percentage of consumers recall the nutritional advertising of respondents though it is not clear from this evidence to what extent those consumers continued to believe that Wonder Bread is an extraordinary food (the misrepresentation found to have been made) * * * we cannot find in the record a sufficient basis upon which to conclude that corrective advertising is needed to eliminate the misrepresentation found.

Here we know that the deceptive advertising was disseminated from 1969 until Jan. 1972. Expert opinion, substantiated as well by surveys, have found that during those years the public was led to believe the representations of these ads. Approximately 2-1/2 years have elapsed since the ads ceased. Dr. Bass, an expert called by complaint counsel, stated that the erroneous beliefs of the public would continue to endure in the future for some time after the ads ceased. At the same time, however, he stated that there would be a tendency for awareness level, and belief levels particularly, to decay.

Complaint counsel relies on the findings of the Gallup survey in 1973 to demonstrate the need for corrective advertising. Respondents rely upon the same survey to demonstrate the inappropriateness of corrective advertising. In the Gallup survey which was conducted in October and November 1973, only 34 percent of the motorists surveyed thought some brands of gasoline had a higher octane rating than others and even among these 34 percent almost half couldn't rate Sunoco. The Gallup survey also showed that motorists thought the octane rating for American and Shell to be at least as high as Sunoco. With respect to power only 32 percent of all motorists thought some brands better than others. 68 percent thought them the same or didn't know. Even among the 32 percent more than 1/3 were unable to rate Sunoco and only about 11 percent of the 32 percent (or 3 percent of all motorists) gave octane rating as their reason for a particular brand to have better power than others.

The Gallup survey also shows that only 10 percent of the motorists chose a particular station because of the quality of the brand sold. A similar percentage consider octane rating important.

Finally, one cannot overlook the change in the conditions affecting the marketing of gasoline since Jan. 1972. The supply of gasoline has become limited and its price has risen very noticeably at retail. Automobile engines have been changed and practically all models now use lower octane fuel. Power is no longer the theme of gasoline promotions. Indeed, greater use of any particular brand of gasoline is no longer being urged in view of the short supply.

It appears that as long ago as Nov. 1973 the beliefs of motorists with respect to the association of power with octane levels had diminished and few considered octane levels as important.

Moreover, this low level of residual injury which consumers retained may not have resulted from Sun's advertising, but from misconceptions gained from other sources or experiences. The record does not support the conclusion that the residual injury, if any, at this time and henceforth, is attibutable to respondents' advertising practices of 1969-1972.

In any event, with the change in marketing conditions in the sale of gasoline, it is not likely that power and high octane ratings will be advertised in the near future. Nevertheless, should the gasoline situation change sometime in the future, as many hope it will, respondents should be prohibited from resurrecting their deceptive claims of power for their gasoline. Therefore, a cease and desist order is necessary. But until the gasoline situation improves, the buying public's belief in the deceptive claims will continue to "decay," as Dr. Bass states, because such advertising has ceased and continues to be non-existent. No corrective advertising is necessary to remedy this fast disappearing belief which is slight even now and certainly insignificant by the time the gasoline situation improves and power once again becomes an important attribute of gasoline to the motorist. I conclude, therefore, that insufficient basis has been established for requiring corrective advertising in this case.

Even were I to find that some corrective advertising would be warranted here, the record does not permit prescribing any details. Complaint counsel seek a one year period of corrective advertising with 25 percent of the space or time employed by the ad devoted to such corrective advertising. Relevant evidence is lacking to furnish a substantial basis from which to infer the fact at issue and due process requires such relevant evidence. There is nothing in the record in this case to indicate that one year of corrective advertising is the appropriate amount rather than 6 months or 5 years or any other period of time. Similarly, there is no evidence in the record of this case to indicate that 25 percent of a given commercial is the appropriate proportion to be devoted to corrective advertising in order to accomplish the desired effect. For all this record shows, 5 percent or 50 percent might be more nearly appropriate. It is not within the expertise of the undersigned to determine the time or amount of corrective advertising needed to correct false impressions which continue to influence the buying public. It may not be within the expertise of the Commission as well. Without such expertise and without such relevant evidence the issuance of an order as suggested by complaint counsel would be clearly improper, even if some corrective advertising were found necessary. A corrective advertising order which had a longer duration or a greater proportion of space or time than necessary to remedy the consumers' residual injury which continued after the misleading ads had ceased would be punitive and improper. It is not sufficient, therefore, to order "some" corrective advertising. The conditions, amount and duration of such corrective advertising must be prescribed or be subject to guidance from the Federal Trade Commission, but cannot be without relevant evidence on

these subjects. The necessity for relevant evidence may be obviated in time when the Commission acquires more experience and expertise in this field of knowledge. For further elaboration on the subject of corrective advertising see Rosden, *The Law of Advertising* (1973) Chapter 9; *Consumer Research and Corrective Advertising*, Marketing Science Institute (1973); 85 Harvard Law Review pp. 477-506.

ORDER

It is ordered, That respondent Sun Oil Company, a corporation, and respondent William Esty Company, a corporation, either jointly or individually, and their officers, agents, representatives, employees, successors, and assigns, directly or through any corporate device in connection with the advertising, offering for sale, sale, or distribution of gasoline or any other product in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Advertising respondent Sun Oil Company's highest octane gasoline, currently designated "Sunoco 260" or any other such product, howsoever designated, in such a manner as to indicate, directly or by implication, that blending said gasoline with any lower octane gasoline results in gasoline blends that provide more engine power than do competing gasolines having octane ratings comparable to respondent Sun Oil Company's blends.

B. Advertising respondent Sun Oil Company's gasolines in such a manner as to indicate directly or by implication that the blending of Sunoco's highest octane gasoline, currently designated "Sunoco 260," or any other such product howsoever designated, with Sunoco's lower octane gasolines conveys to the resulting blends of Sunoco gasoline more octane benefits than provided by octane level of the resultant blends.

C. Advertising respondent Sun Oil Company's "custom blended" gasoline in such a manner as to indicate, directly or by implication, that automobile engines will operate at maximum power and performance only when operated on the octane of said blended gasoline.

D. Advertising any such product by presenting evidence including tests, experiments or demonstrations or the results thereof, or any other evidence of any fact or product feature that is material in inducing the sale of the product which is not evidence which actually proves such fact or product feature.

E. Misrepresenting, in any manner, the performance characteristics of Sunoco gasoline or any other gasoline.

F. Representing, directly or by implication, that any such product is unique among competing products, when such is in fact not the case.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions involved in the advertising, promotion, distribution, or sale of consumer products.

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

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

FINAL ORDER

No appeal from the initial decision of the administrative law judge having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.51 of the Commission's Rules of Practice (effective Aug. 15, 1971), the initial decision should be adopted and issued as the decision of the Commission:

It is ordered, That the initial decision of the administrative law judge shall, on the 19th day of Aug. 1974, become the decision of the Commission, with the following slight modifications:

On p. 5, final paragraph, delete second sentence, [p. 255, *reduced* Par. 13, herein.];

On p. 4, line 32, substitute "Rhythm" for "Rythm" [p. 254, para. 13, subparagraph, herein.];

On p. 5, line 1, delete "s" from "advertisements" [p. 256, para. 15, herein.];

On p. 5, line 18, insert "that" before "by" [p. 255, reduced Par. 11(a) herein.];

On p. 10, line 12, substitute "of any" for "than any other" [p. 258, para. 27, fifth *reduced* subparagraph, herein].

It is further ordered, That Sun Oil Company, a corporation, and William Esty Company, Inc., a corporation, shall within sixty (60) days and at the end of six (6) months after service of this order upon them,

file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

ARLEN REALTY AND DEVELOPMENT CORPORATION, ET AL.

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

Docket C-2528. Complaint, Aug. 20, 1974—Decision, Aug. 20, 1974

Consent order requiring a New York City development corporation and two of its subsidiaries, among other things to cease making deceptive claims concerning the price, quality or guarantee of home improvement products or services; and failing to maintain adequate records to substantiate advertised claims. Further respondents are required to maintain a customer relations department for servicing customer inquiries, complaints and requests for contract adjustments or replacement of faulty products or services; to institute a continuing surveillance program to see that home improvement contractors and employees abide by the order; to preserve all rights and defenses of customers purchasing home improvements on credit if their notes are assigned to third parties; and to cease acting in a manner not in accord with the Trade Regulation Rule (16 C.F.R. §429, 37 F.R. 22934) relating to the Cooling-Off Period for Door-to-Door Sales.

Appearances

For the Commission: *Herbert S. Forsmith.*

For the respondents: *Barry J. Brett* of *Parker, Chapin & Flattau*, New York, N.Y., *James M. Nicholson, Nicholson & Carter*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Arlen Realty and Development Corporation, a corporation, and Charles C. Bassine and Leonard Blackman, individually and as officers or directors of said corporation, and E. J. Korvette, Inc., a corporation, and Mannix Industries, Inc., a corporation, doing business as the E. J. Korvette Home Improvement Department, and Mitchell Maged, Saul A. Stitch, Joseph G. Benjamin, Arnold Mandel and Mark Mitchell, individually and as officers or directors of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondents Arlen Realty and Development Corporation and E. J. Korvette, Inc., are corporations organized, existing and doing business under and by virtue of the laws of the State of New York. The principal office and place of business of each of the aforesaid corporations is located at 450 West 33rd Street, New York, N.Y.

Respondent Arlen Realty and Development Corporation owns a controlling interest in the stock of respondent Mannix Industries, Inc.

Respondents Charles C. Bassine and Leonard Blackman are individuals and officers or directors of Arlen Realty and Development Corporation. They formulate, direct and control the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

Respondent Mannix Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at Glen Cove Road and Westbury Avenue, Carle Place, Long Island, N.Y.

Respondents Mitchell Maged, Joseph G. Benjamin, Saul A. Stitch, Arnold P. Mandel, and Mark Mitchell are individuals and are officers or directors of Mannix Industries, Inc. They formulate, direct and control the acts and practices of said corporation doing business as the E. J. Korvette Home Improvement Department, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

The above-named respondents (hereinafter sometimes referred to as "Korvette") formulate the policies of the E. J. Korvette Home Improvement Department and cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents, doing business as The E. J. Korvette Home Improvement Department have been and are now engaged in the advertising, offering for sale, sale and distribution of home improvement products and services.

PAR. 3. In the course and conduct of their business respondents now cause and for sometime last past have caused their advertising and promotional material, and their said products, sales contracts, and other business papers and documents to be shipped and transmitted to, from and between their several places of business, located as aforesaid, and to prospective purchasers and purchasers thereof located in various other States of the United States other than the state of origination; and maintain and at all times mentioned herein have maintained a substantial course of trade in said products and services in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their products and services, respondents and their employees, salesmen, representatives, licensees, franchisees or contractors represented and now represent, directly or by implication, in advertising and promotional material and in oral solicitations to prospective purchasers, that:

1. Korvette and its representatives and workmen are reliable and dependable.

2. Korvette's products and services are unconditionally guaranteed by Korvette for life or "a lifetime" or guaranteed unconditionally without limitation of time or up to 20 years.

3. Korvette's products or services are being offered for sale at special or reduced prices and that savings are thereby afforded to purchasers from respondents' regular selling prices.

4. Purchasers of products or services offered by Korvette would receive certain named or described services or products of a specific brand, type, style or model, or quality.

5. Korvette maintains a responsive customer relations department to which purchasers of respondents' products and services may refer complaints and/or requests for contract adjustments or replacement of faulty products or services.

6. Purchasers dealing with Korvette know exactly what they are going to pay before signing because Korvette submits detailed and complete pre-contract estimates with the result that there are no hidden costs or unknown expenses to worry about.

7. Korvette performs the entire job.

8. Korvette's home improvement service is fast, and certain services will be performed immediately, or within a time certain.

9. A purchaser dealing with Korvette can be sure of carefully inspected quality workmanship.

10. Korvette interior and exterior railings are permanently installed by Korvette or installed without screws or bolts or embedded in concrete.

11. Korvette's home improvement service includes permanent waterproofing of leaky basements or waterproofing of basements without digging, or without damage to lawns, driveways or shrubs.

12. Complete termite control treatment is included in the basement waterproofing service and complete waterproofing treatment is included in the termite control service.

13. Korvette offers a confidential home termite inspection.

14. The homes of prospective purchasers of termite control services are in immediate danger of serious termite damage.

15. Korvette has evidence in its possession adequate to support its claim that seven out of ten homes in the locality of a prospective purchaser of termite control services have termites or probably have termites, or that the United States Government has warned about winter termites or that no home is safe from such termites.

16. Damp or leaky basements must be waterproofed before a home can be effectively protected against termites.

17. The purchaser of a Korvette termite control service receives the benefit of modern scientific methods backed by the finest technical staff.

18. The homes of prospective purchasers of termite or basement waterproofing control are infested with termites or are in danger of termite infestation, as determined by scientific tests or examinations.

19. Costly, prolonged or elaborate procedures involving very expensive equipment or several workmen are employed to waterproof a customer's basement or to perform termite control service and thus a heavy investment by the customer is justified.

PAR. 5. In truth and in fact:

1. Korvette agents, employees or salesmen have, in many instances, acted in an unreliable and undependable manner, and have demonstrated indifference and unconcern regarding customer product and service problems.

2. Throughout the period during which the afore-mentioned representations concerning guarantees were made, Korvette has offered only a one year, conditional warranty on home improvement products or services, has refused to honor oral representations of warranty covering a longer period of time and has refused to honor even its one year, conditional warranty. Further, representations of guarantee have been made without setting forth the extent and nature of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder.

3. Korvette's products are often not being offered for sale at special or reduced prices and savings are not thereby afforded purchasers because of reductions from Korvette's regular selling prices. In fact, Korvette does not have regular selling prices for many products and services, but to the contrary, the prices at which Korvette products and installations are sold often vary from customer to customer, depending on the resistance of the prospective purchaser.

4. Purchasers often did not receive the products or services bargained for but received products or services of a different brand, type, style, model or quality.

5. Korvette does not maintain a responsive customer relations de-

partment to which purchasers of respondents' products or services may refer complaints and/or requests for contract adjustments or replacement of faulty products or services.

6. Agents, employees or representatives of Korvette have frequently failed to submit detailed or complete estimates to purchasers, before contract, of the cost, method, nature, quality, or quantity of the products or services to be sold, and have refused to perform agreed-upon work without additional payments not included in contracts or in pre-contract estimates.

7. A substantial proportion of the services advertised are not performed by people supervised or controlled by Korvette.

8. Services offered by Korvette had been marked by delay and have not been fast as represented. Further, in many instances, services have not been performed immediately or within a time certain, as promised.

9. Services offered by Korvette have frequently been performed in a manner indicating lack of skill or training, incompetence or indifference, and have often been of poor quality.

10. Interior or exterior railings offered by Korvette are often temporarily installed, or fastened with screws or bolts, or not embedded in concrete.

11. Waterproofing services offered by Korvette often have not been permanent, and have resulted in damage to lawns, shrubs or driveways.

12. Complete termite control treatment is often not provided with the Korvette basement waterproofing service, or complete waterproofing treatment with the Korvette termite control service.

13. The results of Korvette termite inspections have been published among neighbors of persons whose homes had been inspected.

14. The majority of homes, even those infested with termites, are in no immediate danger of serious termite damage.

15. Korvette does not have evidence in its possession adequate to support its claim that seven out of ten homes in the locality of each prospective purchaser of termite control services have or probably have termites, or to support its claim that the United States Government has warned about winter termites or that no home is safe from such termites.

16. Homes with damp or leaky basements can be effectively protected against termites without the performance of waterproofing treatment.

17. The termite control methods offered by Korvette often were not effective and were often performed by poorly prepared or poorly equipped workmen, or recommended by ill-trained or uninformed salesmen.

18. Korvette salesmen reported actual or probable termite infestations to home owners upon the basis of unscientific tests or examinations.

19. Korvette basement waterproofing and termite control services were often performed hastily with simple and sometimes poorly maintained equipment and often by just two men.

Such statements, representations, acts and practices were and are therefore, unfair and false, misleading and deceptive.

PAR. 6. In the further course and conduct of their business and in furtherance of a sales program for inducing the purchase of their home improvement products and services, respondents and their salesmen, representatives, licensees, franchisees, or contractors have engaged in the following false, misleading and deceptive acts and practices:

1. Respondents and their salesmen or representatives have obtained purchasers' signatures on blank completion certificates and other instruments by making false and misleading representations and deceptive statements, including false and deceptive representations with respect to the nature or effect of such documents.

2. In a substantial number of instances, and in the usual course of their business, respondents sell and transfer their customers' obligations, procured by the aforesaid unfair, false, misleading and deceptive means, to various financial institutions. In any subsequent legal action to collect on such obligations, these financial institutions or other third parties may claim to be holders in-due-course and consequently may have available and can interpose various defenses which may cut off certain valid claims customers may have against respondents for failure to perform, or for certain other unfair, false, misleading or deceptive acts and practices. Therefore, the acts and practices as set forth in Paragraph Six hereof were and are unfair and false, misleading and deceptive acts and practices.

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

PAR. 8. The use by the respondents of the aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Arlen Realty and Development Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 888 Seventh Avenue, New York, N.Y.

E.J. Korvette, Inc., is an operating division of respondent Arlen Realty & Development Corporation with its main office and principal place of business located at 450 West 33rd Street, New York, N.Y.

Mannix Industries, Inc., is a corporation doing business as the E.J. Korvette Home Improvement Department, with its main office and principal place of business located at Westbury Avenue and Glen Cove Road, Carle Place, L.I., N.Y.

Respondents, Mitchell Maged, Joseph G. Benjamin and Mark Mitchell,

are officers of Mannix Industries, Inc. They have formulated, directed and controlled policies, acts and practices of said corporation and their address is the same as said corporation.

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

ORDER

It is ordered, That Arlen Realty & Development Corporation, a corporation, and its officers, and E.J. Korvette, Inc., a corporation and Mannix Industries, Inc., a corporation and Joseph G. Benjamin, Mark Mitchell, and Mitchell Maged, individually and as officers or directors of said corporation, and respondents' agents, representatives, employees, successors and assigns directly or through any corporation, subsidiary, division or other device, in connection with the advertisement, offering for sale, sale or distribution of home improvement products or services in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or representations are made, directly or by implication, in order to obtain leads or prospects for the sale of, or to induce purchases of goods or services.

2. Employing any claim or representation, directly or indirectly, to obtain leads for or to induce sales of goods or services without having in their possession evidence adequate to support a reasonable basis for such claim or representation.

3. Failing to disclose fully, both orally and in writing, prior to the execution of any contracts or retail installment applications, the nature and description of the work, services and products, including brand names and model numbers where applicable, to be provided and the total price thereof.

4. Failing to perform all contracts relating to home improvement products and services; or failing to undertake the delivery or performance of all home improvement products and services upon the terms and conditions and at the prices agreed upon.

5. Representing, directly or by implication, that any of respondents' products or services are guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and unless respondents promptly and

fully perform all of their obligations under the terms of each such guarantee.

6. Representing, directly or by implication, that any price for respondents' products or services is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products have been sold in substantial quantities by respondents in the recent, regular course of their business; or misrepresenting, in any manner, the savings available to purchasers.

7. Failing to maintain adequate records (a) which disclose the facts upon which any savings claims, including former pricing claims and comparative value claims, and similar representations of the type described in this order are based, and (b) from which the validity of any savings claims, including former pricing claims and comparative value claims, and similar representations of the type described in this order can be determined.

8. Representing, directly or indirectly, that purchasers of products or services will receive certain brand name products, or products or services of a certain type, quality, style or model unless (i) such are available for sale and sold or delivered if ordered or (ii) such were available for sale at the time the customer's order was taken; or misrepresenting in any manner the nature, scope or effectiveness of such products or services.

9. Providing home improvement products or services while failing to (a) maintain a customer relations department for the full and expeditious serving of customer inquiries and complaints and requests for contract adjustments or replacement of faulty products or services, to which all purchasers of home improvement products and services are directed to submit inquiries and complaints with respect thereto, which department shall be supervised and staffed by persons other than those responsible for providing the products and services and (b) indicate prominently on all contracts for products or services the fact that all requests and inquiries should be directed to the customer relations department referred to in subparagraph (a) above and the telephone number and mailing address thereof.

10. Further, directly or indirectly, engaging in the business of providing termite control or waterproofing services from the date of this order without the written approval of the Federal Trade Commission. For purposes of this paragraph, respondents shall not be deemed to be engaged in providing termite control or waterproofing service in connection with the providing of goods or ser-

vices to any customer with whom a contract therefor was made before the date of this order.

11. Inducing or causing purchasers or prospective purchasers of products or services to sign blank or partially filled-in completion certificates or other legal instruments or documents; or misrepresenting, in any manner, the true nature or effect of such documents.

12. Assigning, selling or otherwise transferring notes, contracts or other documents evidencing a purchaser's indebtedness, unless any rights or defenses which the purchaser has and may assert against respondents are preserved and may be asserted against any assignee or subsequent holder of such note, contract or other document evidencing the indebtedness.

13. Failing to include the following statement clearly and conspicuously on the face of any note, contract or other instrument of indebtedness executed by or on behalf of respondents' customers:

NOTICE

Any holder takes this instrument subject to the terms and conditions of the contract which gave rise to the debt evidenced hereby, any contractual provision or other agreement to the contrary notwithstanding.

14. Acting in a manner which does not accord with the requirements of the Trade Regulation Rule (a copy of which is attached hereto as Exhibit A) set forth in 16 C.F.R. §429; 37 Federal Register 22934, and any amendments thereto; it being expressly agreed that the requirements of that rule shall apply notwithstanding the repeal or invalidity thereof, and that respondents accept the application of the provisions set forth in that rule to all sales subject to this order, including those which do not fall within the rule's definition of door-to-door sales.

It is further ordered, That respondents deliver by registered mail a copy of this order to each of their operating divisions and departments and to each contractor, subcontractor, agent, representative, licensee, franchisee, and employee presently or in the future engaged in the consummation of any extension of consumer credit or engaged in the offering for sale or sale of any product or service, or in any aspect of the preparation, creation or placing of advertising; and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents institute a program of continuing surveillance adequate to reveal whether the business operations of each of the aforesaid persons and firms conform to requirements of this order; give prompt warning against the initiation or continuance of acts

or practices prohibited by this order to any of the aforesaid persons or firms discovered to be planning or engaging in any such prohibited act or practice; and discontinue dealing with any of such persons or firms if they, after warning, are found to have initiated or continued any act or practice prohibited by this order.

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

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

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

EXHIBIT A.

Cooling-Off Period for Door-to-Door Sales

16 CFR 429; 37 *Federal Register* 22934; effective date to be announced.

§429.1. The Rule.

In connection with any door-to-door sale, it constitutes an unfair and deceptive act or practice for any seller to:

(a) Fail to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution,which is in the same language, e.g., Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used and in bold face

type of a minimum size of 10 points, a statement in substantially the following form:

"You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right."

(b) Fail to furnish each buyer, at the time he signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in 10-point bold face type in the same language, e.g., Spanish, as that used in the contract:

NOTICE OF CANCELLATION

(enter date of transaction)

_____

(date)

You may cancel this transaction, without any penalty or obligation, within 3 business days from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within 10 business days following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do not agree to return the goods to the seller, or if the seller does not pick them up within 20 days of the date of your notice of cancellation, you may retain or dispose of the goods without any further obligation.

To cancel this transaction, mail or deliver a signed and dated copy of this cancellation notice or any other written notice, or send a telegram, to

_____
(name of seller)

at_____
(address of seller's place of business)

not later than midnight of _____
(date)

I hereby cancel this transaction.

_____
(date)

_____
(buyer's signature)

(c) Fail, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

(d) Include in any door-to-door contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this section including specifically his right to cancel the sale in accordance with the provisions of this section.

(e) Fail to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

(f) Misrepresent in any manner the buyer's right to cancel.

(g) Fail or refuse to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to: (i) Refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

(h) Negotiate, transfer, sell, or assign any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

(i) Fail, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

NOTE 1: *Definitions.* For the purposes of this section the following definitions shall apply:

(a) *Door-to-Door Sale*—A sale, lease, or rental of consumer goods or services with a purchase price of $25 or more, whether under single or multiple contracts, in which the seller or his representative personally solicits the sale, including those in response to or following an invitation by the buyer, and the buyer's agreement or offer to purchase is made at a place other than the place of business of the seller. The term "door-to-door sale" does not include a transaction:

(1) Made pursuant to prior negotiations in the course of a visit by the buyer to a retail business establishment having a fixed permanent location where the goods are exhibited or the services are offered for sale on a continuing basis; or

(2) In which the consumer is accorded the right of rescission by the provisions of the Consumer Credit Protection Act (15 U. S. C. 1635) or regulations issued pursuant thereto; or

(3) In which the buyer has initiated the contact and the goods or services are needed to meet a bona fide immediate personal emergency of the buyer, and the buyer furnishes the seller with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within 3 business days; or

(4) Conducted and consummated entirely by mail or telephone; and without any other contact between the buyer and the seller or its representative prior to delivery of the goods or performance of the services; or

(5) In which the buyer has initiated the contact and specifically requested the seller to visit his home for the purpose of repairing or performing maintenance upon the buyer's personal property. If in the course of such a visit, the seller sells the buyer the right to receive additional services or goods other than replacement parts necessarily used in performing the maintenance or in making the repairs, the sale of those additional goods or services would not fall within this exclusion; or

(6) Pertaining to the sale or rental of real property, to the sale of insurance or to the sale of securities or commodities by a broker-dealer registered with the Securities and Exchange Commission.

(b) *Consumer Goods or Services*—Goods or services purchased, leased, or rented primarily for personal, family, or household purposes,

575-956 O-LT - 76 - 20

including courses of instruction or training regardless of the purpose for which they are taken.

(c) *Seller*—Any person, partnership, corporation, or association engaged in the door-to-door sale of consumer goods or services.

(d) *Place of Business*—The main or permanent branch office or local address of a seller.

(e) *Purchase Price*—The total price paid or to be paid for the consumer goods or services, including all interest and service charges.

(f) *Business Day*—Any calendar day except Sunday, or the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

NOTE 2: *Effect on State Laws and Municipal Ordinances.*

(a) The Commission is cognizant of the significant burden imposed upon door-to-door sellers by the various and often inconsistent State laws which provide the buyer with the right to cancel door-to-door sales transactions. However, it does not believe that this constitutes sufficient justification for preempting all of the provisions of such laws or of the ordinances of the political subdivisions of the various States. The Record in the proceedings supports the view that the joint and coordinated efforts of both the Commission and State and local officials are required to insure that a consumer who has purchased from a door-to-door seller something he does not want, does not need, or cannot afford, is accorded a unilateral right to rescind, without penalty, his agreement to purchase the goods or services.

(b) This section will not be construed to annul, or exempt any seller from complying with the laws of any State, or with the ordinances of political subdivisions thereof, regulating door-to-door sales, except to the extent that such laws or ordinances, if they permit door-to-door selling, are directly inconsistent with the provisions of this section. Such laws or ordinances which do not accord the buyer, with respect to the particular transaction, a right to cancel a door-to-door sale which is substantially the same or greater than that provided in this section, or which permit the imposition of any fee or penalty on the buyer for the exercise of such right, or which do not provide for giving the buyer notice of his right to cancel the transaction in substantially the same form and manner provided for in this section, are among those which will be considered directly inconsistent.

Statement of Basis and Purpose

[Statement of basis and purpose of the door-to-door rule omitted, except for Chapter XII, dealing with effective date, which follows. The

statement covers the following topics: (1) history of the proceeding; (2) background; (3) nature of door-to-door sales; (4) problems associated with door-to-door sales, including deceptive door openers, high-pressure sales tactics, misrepresentation of price and quality, and other aspects; (5) a discussion of the proposed rule; (6) support for the rule, noting consumer, government and industry support; (7) past history of the effectiveness of cooling-off rules; (8) opposition to the rule, noting consumer and industry opposition; (9) authority of the FTC to promulgate the rule; (10) scope of the rule; (11) mechanics of the rule; and (12) effective date. The statement follows the rule in the *Federal Register*. See citation preceding the rule.—CCH.]

Chapter XII. Effective Date of the Rule

Industry representatives originally stated they would need 9 months following promulgation of the rule to change contracts, train sales personnel, adjust computers, and take the other actions necessary to implement the rule following its promulgation.[244]

In the notice which included the revised proposed rule when it was released for comment, industry members and other knowledgeable persons were specifically invited to provide information relative to the length of time industry members would need to make the necessary arrangements to comply with the rule following its promulgation in final form. Industry recommendations on this point ranged from a low of 60 days to a high of 2 years, with perhaps the majority agreeing that 6 months should be sufficient.[245]

Among the factors which it was said should be considered were time to design and print the revised contract forms and notices, distribution of these to the various offices in the field, training of sales personnel in the use of the new forms, and finally a reasonable period to permit exhaustion of the existing stocks on hand.[246]

Encyclopaedia Britannica recommended that the rule be made effective upon promulgation with the understanding that companies who are unable to comply with its provisions be granted a 6- to 9-month grace period.[247]

The view of the Commission which is shared by at least one consumer

---

[244] Tr. 881, R. 794.

[245] Airline Schools Pacific of Van Nuys (R. 2182); National Pest Control Association, Inc. (R. 2284); Direct Selling Association (R. 2225); Ad Hoc Committee (R. 2263); Crowell, Collier and Macmillan, Inc. (R. 2419).

[246] "An effective date, 6 months after promulgation of the Rule, would allow sufficient time to prepare new contract forms, have them printed, and distributed to all sales representatives. It would also enable most companies effectively to reach and train all sales and administrative personnel in the mechanics of operation, as well as the imperative for compliance with the spirit as well as the letter of the Rule." (Stephen Sheridan, vice-president, Electrolux. (R. 2180).

[247] R. 2254

group[248] is that the rule should become effective as soon as possible but that the practical obstacles to prompt action on the part of most industry members should be recognized by allowing them a maximum of 6 months to comply with the rule.

The Commission has carefully considered whether it would be best to issue the rule in the form of a policy statement or guide, or to issue it in its present form and to defer its effective date. The affirmative requirements of this rule do not lend themselves to either a guide or policy statement format. Moreover publication of either a guide or a policy statement would not reduce the enforcement problems or enhance the possibility of industry compliance in the interim period. Accordingly, the Commission has decided to promulgate the rule.

In view of pending litigation regarding the Commission's rulemaking authority, the Commission has decided to defer the announcement of an effective date for this rule. It should be noted, however, that this rule constitutes an expression of the Commission's view of what should be the application of section 5 of the Federal Trade Commission Act to door-to-door transactions. The Commission will encourage all States and localities with cooling-off legislation to begin immediately to remove inconsistencies between their cooling-off requirements and the provisions of this rule, in order to remove the burden of compliance with differing requirements at the State and Federal level.

---

[248] Virginia Citizens Consumer Council, Inc. (R. 2406).

IN THE MATTER OF

CAMPERTOWN, INC., ET AL.

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

Docket C-2529. Complaint, Aug. 20, 1974—Decision, Aug. 20, 1974

Consent order requiring a Hayward, Calif., new and used camper and motor home dealer, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Howard G. Sodergren.*
For the respondents: *Merle L. Harding*, San Ramon, Calif.

COMPLAINT

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

PARAGRAPH 1. Respondent Campertown, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 25656 Mission Boulevard, Hayward, Calif.

Respondent William W. Clack is president of the corporate respondent. He formulates, directs and controls the policies, acts and practices of said corporation, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the sale of new and used motor homes, campers, and trucks to the public.

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

PAR. 4. In order to promote the sale of new and used motor homes, campers, and trucks, respondents have caused advertisements to be placed in various media. These advertisements aid, promote or assist directly or indirectly extensions of consumer credit. Certain of said advertisements which were published, broadcast, or delivered subsequent to July 1, 1969:

1. Stated installment amounts and periods of repayment which respondents do not usually or customarily arrange, in violation of Section 226.10(a)(1) of Regulation Z.

2. Stated that no downpayment was required, the amount of installment payments, the number of installments, and the period of repayment to be made if the credit is extended, without also stating all of the

following items in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

a. the cash price;

b. the number and amount of payments scheduled to repay the indebtedness if the credit is extended;

c. the annual percentage rate; and

d. the deferred payment price.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

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

1. Respondent Campertown, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 25656 Mission Boulevard, Hayward, Calif.

Respondent William W. Clack is an officer of said corporation. He

formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

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

ORDER

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

1. Causing to be disseminated to the public in any manner whatsoever any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, which advertisement states:

(a) The amount of the downpayment required or that no downpayment is required, the amount of any installment payment, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless it states all of the following items in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

(1) the cash price;

(2) the amount of the downpayment required or that no downpayment is required, as applicable;

(3) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(4) the amount of the finance charge expressed as an annual percentage rate; and

(5) the deferred payment price.

(b) That a specific amount of credit, installment amount, or period of repayment can be arranged unless respondents usu-

ally and customarily arrange or will arrange credit amounts or installments for the stated amount and for the stated period, as required by Section 226.10(a)(1) of Regulation Z.

2. Failing, in any consumer credit transaction or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

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

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

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

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

IN THE MATTER OF

MORGAN COMPANY TRADING AS ROWE FURNITURE COMPANY, ET AL.

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

Docket C-2530. Complaint, Aug. 21, 1974—Decision, Aug. 21, 1974

Consent order requiring a Billings, Mont., seller of home furnishings, among other things to cease using deceptive price advertising and failing to maintain adequate records to substantiate any advertised pricing claims.

Appearances

For the Commission: *Arnold E. Howard.*

For the respondents: *James W. Thompson, McNamer & Thompson,* Billings, Mont.

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 Morgan Company, a corporation doing business as Rowe Furniture Company, and Raul B. Hoyt, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and that a proceeding in respect thereof would be in the public interest, issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Morgan Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 33rd and 1st Avenue North, Billings, Mont.

Respondent Raul B. Hoyt is an individual and an officer of Morgan Company. He formulates, directs and controls the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the business of advertising, offering for sale, sale and distribution of home furnishings including, but not limited to, furniture, carpeting, mattresses and box springs.

PAR. 3. In the course and conduct of their business as aforesaid, respondents cause advertisements for said merchandise to be published in media of interstate circulation which are designed and intended to induce persons to purchase said merchandise.

In the further course and conduct of their business, respondents ship merchandise from their place of business to retail customers located in a state other than that from which said shipments originate.

Respondents maintain, and at all times mentioned herein have maintained, a course and conduct of business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of furniture and other merchandise, respondents have made certain statements and representations concerning such merchandise in their advertisements in media of interstate circulation.

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

King Koil Spinal Guard

TWIN SIZE SETS-Reg. $179 * * * * * *SALE $129
FULL SIZE SETS-Reg. $199 * * * * * * SALE $149
QUEEN SIZE SETS-Reg. $269 * * * * * * SALE $198
KING SIZE SETS-Reg. $379 * * * * * * SALE $298

ONE ROLL OF CARPET, 38-2/3 YARDS,
Closeout — Green high-lo Loop, Avlin Polyester Reg. $432 * * * $199

ENGLANDER ROYAL SUITE COLLECTION
TWIN SIZE SET—Mfg. Suggested Retail $139 * * * $99
FULL SIZE SET—Mfg. Suggested Retail $159 * * * $119
QUEEN SIZE SET—Mfg. Suggested Retail $279 * * * $219
KING SIZE SET—Mfg. Suggested Retail $319 * * * $269

END TABLES — COFFEE TABLES — LAMPS
— PICTURES & MISCELLANEOUS
MANY REDUCED 1/2 AND MORE!

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning not expressly set out herein, repondents represent and have represented, directly or by implication:

1. That the higher stated prices, accompanied by the word "Reg.," or words or terms of similar import and meaning, were the prices at which the advertised articles were sold or offered for sale in good faith for a reasonably substantial period of time by the respondents in the recent, regular course of business, and that purchasers of such articles would

save an amount equal to the difference between the advertised higher prices and the lower offering prices corresponding thereto.

2. That purchasers of merchandise advertised in conjunction with the phrase "Many Reduced 1/2 and More!," or words, terms or symbols of similar import and meaning, would realize a savings of the stated fractional amount from the actual prices at which the merchandise so advertised was sold or offered for sale in good faith for a reasonably substantial period of time by respondents in the recent regular course of business.

3. That certain higher stated price amounts accompanied by the phrase "Mfg. Suggested Retail," or words or terms of similar import and meaning, did not appreciably exceed the prices at which such merchandise has usually and customarily been sold at retail in the trade area where the representations appeared.

PAR. 6. In truth and in fact:

1. The higher stated prices, accompanied by the word "Reg.," or words of similar import and meaning, were not the prices at which the advertised articles were sold or offered for sale in good faith for a reasonably substantial period of time by respondents, and purchasers thereof would not save amounts equal to the difference between the advertised higher prices and the lower offering prices corresponding thereto.

2. Purchasers of merchandise advertised in conjunction with the phrase "Many Reduced 1/2 and More!," or words, terms or symbols of similar import and meaning, did not realize savings of the stated fractional amount from the actual prices at which the merchandise so advertised was sold or offered for sale in good faith for a reasonably substantial period of time by respondents in the recent regular course of business.

3. The higher stated price amounts accompanied by the phrase "Mfg. Suggested Retail," or words or terms of similar import and meaning, appreciably exceeded the prices at which such merchandise has usually and customarily been sold at retail in the trade area where the representations appeared.

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

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

PAR. 8. The use by respondents of the aforesaid false, misleading and

deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Morgan Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 33rd and 1st Avenue North, Billings, Mont.

Respondent Raul B. Hoyt is an officer of Morgan Company. He

formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Morgan Company, a corporation, and its officers, and Raul B. Hoyt, individually and as an officer of said corporation, and respondents' successors, assigns, 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 home furnishings or other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from

1. Using the word "Reg.," or words or terms of similar import and meaning, to refer to any price amount unless said amount is the price at which such merchandise has been sold or offered for sale in good faith by respondents for a reasonably substantial period of time in the recent, regular course of their business.

2. Representing directly or by implication that any amount, accompanied or unaccompanied by descriptive language, is respondents' usual and customary retail price for an article of merchandise unless such amount is not in excess of the price or prices at which said article has been sold or offered for sale in good faith by respondents for a reasonably substantial period of time in the recent, regular course of their business.

3. Using the words "Many Reduced 1/2 and More!," or words, terms or symbols of similar import and meaning, except in specific reference to articles which have been sold or offered for sale in good faith by respondents for a reasonably substantial period of time in the recent, regular course of their business, at prices no less than the indicated multiple of the offering price so described or alluded to.

4. Using the words "Mfg. Suggested Retail" or words or terms of similar import and meaning unless the merchandise so described is regularly and in good faith offered for sale at this or a higher price by respondents or by a substantial number of the principal retail outlets in the trade area; *Provided, however*, That this order shall not apply to point-of-sale offering and display of merchandise which is preticketed by the manufacturer or distributor thereof and the removal of which preticketed price is impossible or impractical.

5. Misrepresenting in any manner that savings are available to

purchasers or prospective purchasers of respondents' merchandise, or the amount of such savings.

6. Failing to maintain, for at least six months after publication and dissemination of all advertising they are relied upon to support, adequate business records (a) which disclose the facts upon which are based any and all savings claims, including comparisons to respondents' former prices and to trade area prices or values of same or comparable merchandise, and similar representations of the type described in this order, and (b) from which the validity of any and all such savings claims and representations can be determined.

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

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

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

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

IN THE MATTER OF

BOISE CASCADE CORPORATION, ET AL.

Docket 8958. Interlocutory Order, Aug. 26, 1974

Order denying respondents' motions for discontinuance or suspension of proceeding until discovery in eleven (11) private treble damage cases allegedly involving same underlying facts and industry practices as those challenged in this proceeding.

Appearances

For the Commission: *L. Barry Costilo, Ira S. Nordlicht, Hugh F. Bangasser, Bradley D. Stam, Edward M. Ricci* and *Amy R. Richter.*

For the respondents: *Bell, Boyd, Lloyd, Haddad & Burns*, Chicago, Ill.

ORDER DENYING RESPONDENTS' MOTIONS FOR DISCONTINUANCE OR SUSPENSION OF PROCEEDINGS

Respondent Boise Cascade Corporation filed a motion on July 19, 1974, requesting that the Commission withdraw the instant complaint or, in the alternative, that the proceeding before the administrative law judge be suspended pending the completion of discovery in eleven (11) private treble damage cases allegedly involving the same underlying facts and industry practices as those that are challenged in this proceeding. Respondent also moved for the production of any Commission documents reflecting a Commission policy of avoiding "duplication" of private antitrust actions. The administrative law judge denied the discovery motion and certified the others to the Commission without recommendation on July 31, 1974. The four other respondents subsequently joined in these motions and, on Aug. 6, 1974, these were similarly certified to the Commission.

The law is clear that the Commission is not required to dismiss an antitrust case merely because the same factual situation is in litigation in another forum. *Federal Trade Commission* v. *Cement Institute*, 333 U.S. 683 (1948). The private actions in question are brought under Section 1 of the Sherman Act, 15 U.S.C. §1, and Section 2(a) of the Clayton Act, U.S.C. §13(a), and it is again well settled that the Federal Trade Commission Act reaches acts and practices that do not rise to the magnitude of Sherman Act violations. *Id.* While the private plaintiffs in those actions seek both damages and injunctive relief, they could of course be settled or otherwise disposed of without providing the kind of relief the Commission might ultimately believe the public interest, as contrasted with the private interests of the litigants in question, requires.

Suspension of this proceeding until discovery has been completed in those private cases would unnecessarily delay the matter and hence is not in the public interest. Accordingly,

It is ordered, That these motions to discontinue or suspend the proceeding and for oral argument be, and they hereby are, denied.

Commissioner Nye not participating.