IN THE MATTER OF

HOOPER HOLMES, INC.

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

Docket C-3020. Complaint, June 11, 1980—Decision, June 11, 1980

This consent order requires, among other things, a Basking Ridge, N.J. firm, through its Credit Index Division, a consumer reporting and collection agency, to cease violating federal credit laws by failing to maintain reasonable procedures designed so as to ensure that reports are furnished only for lawful purposes and assure the maximum accuracy of reported information. In its role as a debt collector, the agency is required to include in collection communications prescribed notices informing consumers of their rights under federal credit laws. Consumers requesting information in their credit files must be provided with a copy of this information. Additionally, the agency is required to mail to its subscribers, each year for a five-year period, a prescribed notice informing them of their statutory obligations.

Appearances

For the Commission: *Rachel Wolkin Sesser.*

For the respondent: *Edmund Burke, Steptoe & Johnson,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Fair Credit Reporting Act and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hooper Holmes, Inc., a corporation, through its Credit Index Division, hereinafter referred to as respondent, has violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent, Hooper Holmes, 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 170 Mt. Airy Road, Basking Ridge, New Jersey.

COUNT I

Alleging violations of the Fair Credit Reporting Act and Section 5 of

the Federal Trade Commission Act, the allegations of Paragraph One hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 2. Respondent, Hooper Holmes, Inc., operating through its Credit Index Division (hereinafter "Credit Index" or "respondent",) is now and for some time in the past has been, for monetary fees, regularly engaged in the practice of assembling or evaluating consumer credit information for the purpose of furnishing to third parties consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act. Respondent regularly uses a means or facility of interstate commerce for the purpose of preparing and furnishing said consumer reports. Therefore, respondent is a consumer reporting agency, as "consumer reporting agency" is defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 3. Respondent in the ordinary course and conduct of its business as aforesaid is now, and subsequent to April 25, 1971 has been, engaged in the preparation, offering for sale, sale and distribution of consumer reports, as defined in Section 603(d) of the Fair Credit Reporting Act.

PAR. 4. In the ordinary course and conduct of its business, as aforesaid, respondent utilizes an automated information retrieval system which produces consumer reports containing designated information concerning all individuals having a specified mailing address and the same, or similar, last name to the person inquired upon. In a substantial number of instances, using this system respondent has furnished and is furnishing consumer reports on individuals not involved in the extension of credit or other business transaction. Respondent's system uses no identifiers in addition to the last name and street address to ensure that information concerning separate individuals with the same or similar last name at a specific mailing address are not reported and, therefore, respondent has failed to follow reasonable procedures designed to limit the furnishing of consumer reports for the purposes listed under Section 604 of the Fair Credit Reporting Act and has, therefore, violated Section 607(a) of that Act.

PAR. 5. In the ordinary course and conduct of its business as aforesaid respondent produces consumer reports which it alleges contain information on a single applicant at a specific mailing address using the same or a similar last name and a different first name for the purposes of defrauding the respondent's subscribers. Respondent uses no system of supplementary identifiers to identify with more specificity items which may relate to neighbors, relatives or spouses of the applicant, and in a substantial number of instances, the information items included in the respondent's reports relate not to the applicant but to neighbors, relatives or spouses of the applicant. By and through

use of respondent's present information retrieval and reporting system respondent has failed and is failing to follow reasonable procedures designed to assure the maximum possible accuracy of the information concerning the individual about whom the report relates as required by Section 607(b) of the Fair Credit Reporting Act.

PAR. 6. The acts and practices set forth in Paragraphs Four and Five were and are in violation of the Fair Credit Reporting Act, and pursuant to Section 621(a) of that Act, said acts and practices constitute unfair or deceptive acts or practices in commerce in violation of Section 5(a) of the Federal Trade Commission Act.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act in connection with respondent's debt collection activities. The allegations of Paragraphs One, Two and Three are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 7. Respondent is now, and for some time last past has been, engaged in the practice of collecting or attempting to collect debts owed or due or asserted to be owed or due another.

PAR. 8. In the course and conduct of its business as aforesaid, respondent solicits and receives accounts for collection from businesses located in the State of New Jersey and in various other States of the United States, which accounts the respondent seeks thereafter to collect from consumer debtors. In the further course and conduct of its business, respondent transmits through the mail collection messages from its place of business within the State of New Jersey to debtors located in the various States of the United States. The respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 9. In the course and conduct of its business, and at all times mentioned herein, respondent has been and now is, in competition in commerce with other corporations, firms and individuals in the attempted collection and collection of consumer debts on behalf of creditors.

PAR. 10. In the course and conduct of its business as aforesaid, and for the purpose of inducing consumers to pay allegedly delinquent accounts, respondent has transmitted and caused to be transmitted, and is now transmitting and causing to be transmitted unsolicited form letters demanding payment which are attached hereto as Exhibits 1 and 2.

Typical and illustrative of the statements and representations made

in said forms and printed materials, but not all inclusive, are the following:

1. We have received a report from your creditor on your overdue account. This information is being included in our computerized national delinquent debtor file, and will be reported to any one of the credit granting firms using our service should they order a credit report on you.

2. *Your record will remain in our system for at least five years unless you take action now to settle this account.*

3. Your credit file will show this seriously past due amount with. . . .

4. *Enclose this letter, with payment in full today.*

5. Your creditor must notify us of any change in the status of your credit record.

6. You must realize how very important it is to protect a most valuable asset . . . *your credit rating.*

7. Credit Index is a consumer credit reporting agency which maintains a computerized national delinquent debtor file. *Delinquent accounts are included in this file and reported to credit granting organizations using our service.*

8. We have been requested by your creditor to advise you that because of the seriousness of your delinquency, *your credit record may be placed in our national delinquent debtor file.*

9. Our information shows your very serious delinquency with. . .

10. You can still avoid this unnecessary and unpleasant action by paying the total balance of your overdue account. *Enclose this letter with payment in full today,* using the envelope provided.

PAR. 11. By and through the use of said forms and the aforesaid statements and representations set forth therein, respondent, operating by utilizing its position as a consumer reporting agency for debt collection purposes, is acting in an oppressive or coercive manner by intimidating consumers while it is engaged in debt collection activities and has failed to exercise its responsibilities as a consumer reporting agency in a fair and impartial manner. Respondent's use of said forms therefore constitute unfair acts or practices.

PAR. 12. By and through the use of said forms and the aforesaid statements and representations set forth therein, respondent, when utilizing its position as a consumer reporting agency for debt collection purposes, has failed to apprise collection-letter addressess of their statutory rights to obtain disclosure of the information in their files and to dispute inaccurate or incomplete information in respondent's file under the Fair Credit Reporting Act. By and through the use of said forms and the aforesaid statements and representations set forth therein, respondent threatens that if a consumer not act immediately to settle his account, the consumer's record will remain in its system for at least five years and will be reported to any one of the credit-granting firms utilizing its services. Respondent, by emphasizing the importance of one's credit rating and the injury to it that may result from failure to pay the amount alleged due while at the same time

failing to apprise collection-letter addresses of their rights under the Fair Credit Reporting Act has failed to disclose material facts to consumers concerning the nature of its responsibilities as a consumer reporting agency engaged in debt collection activities. Respondent thereby, has engaged in unfair acts and practices.

PAR. 13. The use by respondent of the aforementioned statements, representations and forms and the failure to apprise collection-letter addressees of their rights under the Fair Credit Reporting Act has had, and now has, the tendency and capacity to coerce the recipients of these forms into the payment of accounts to respondent or its subscribers without exercising their statutory right to dispute debts they do not owe or have an offsetting claim or defense to paying.

PAR. 14. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public, and constituted, and now constitute, unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT III

Alleging violation of Section 5 of the Federal Trade Commission Act in connection with respondent's consumer reporting activities. The allegations of Paragraphs One, Two and Three are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 15. Respondents in the ordinary course and conduct of its business as a consumer reporting agency includes in its consumer reports a "Summary Item" which indicates the aggregate number of items of derogatory information in respondent's file at the mailing address of the person inquired on and which contains the derogatory information received by respondent in a form not identifiable to an individual consumer. In a substantial number of instances information in the Summary Item is used by creditors to deny credit to the individuals inquired on based on the paying habits of other individuals who have or sometime in the past had the same mailing address. Since the Summary Item results in the exclusion of some consumers from credit transactions based on the paying habits of prior residents, neighbors and relatives, its use by respondent constitutes an unfair act or practice.

PAR. 16. Respondent in the ordinary course and conduct of its business as a consumer reporting agency includes in its consumer reports a "Activity Summary Item" which records the number of creditor inquiries made concerning persons with names which are not the same or similar to the person inquired upon but who have the same

mailing address specified for the person inquired on during the last six months. In a substantial number of instances information in the Activity Summary Item is used by creditors to deny credit to individuals inquired on based on information concerning other individuals who have, or sometime in the past had, the same mailing address. Since the Activity Summary Item results in the exclusion of some consumers from credit transactions based on information concerning prior residents, neighbors and relatives, its use by respondent constitutes an unfair act or practice.

PAR. 17. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public, and constituted, and now constitute, unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

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

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

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

1. Hooper Holmes 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 170 Mt. Airy Road, in the City of Basking Ridge, State of New Jersey.

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

ORDER I

It is ordered, That respondent, Hooper Holmes, Inc., a corporation, through its Credit Index Division, its successors and assigns, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection, assembling or furnishing of consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act (Pub. Law No. 91–508, 15 U.S.C. 1681, *et seq.*), shall forthwith cease and desist from:

(1) Failing to maintain reasonable procedures designed to limit the furnishing of consumer reports for the purposes listed under Secton 604 of the Fair Credit Reporting Act.

(2) Failing, when preparing a consumer report, to follow reasonable procedures designed to assure maximum possible accuracy of the information concerning the individual about whom the report relates as required by Section 607(b) of the Fair Credit Reporting Act.

(3)(a) Providing reports containing information concerning accounts of individuals having inconsistent courtesy titles, different first names, different last names, different mailing addresses or inconsistent suffixes from the creditor's inquiry unless the respondent can show on a statistically valid basis that its reporting system is reasonably designed to retrieve and report such information only in instances in which the individual consumer inquired on is using different first names and identical or similar last names as a means of deceiving respondent or its subscribers. Respondent shall provide the Commission with copies of any such statistical studies not less than 90 days prior to implementing changes to its system based on such studies and if requested by the Commission will delay implementation of changes an additional 120 days.

(3)(b) For the purposes of this order:

(i) The last name of the individual reported upon shall not be considered different from the last name of the inquiry if;

(A) the last name contains five or more letters and all but two of the letters are identical to the letters of the last name of the inquiry; or,

(B) the last name has four letters and all but one are identical to the letters of the last name of the inquiry; and

(C) the address used in the inquiry under either A or B is a full street address (specific house or building number plus street name) or post

office box number, and does not contain an inconsistent apartment number, a rural route number, general delivery or similar mailing address, and

(D) the inquiry contains a full first name, not initials, which, subject to the tolerances provided in (A) and (B) for last names, is not inconsistent with the first name or initial on the report.

(ii) A first initial which is not inconsistent with the individual's first name shall not be considered a different first name, if respondent:

(A) instructs its subscribers to use the full first name, whenever available, in making inquiries or submitting information to the file; and

(B) the address used in the inquiry is a full street address (specific house or building number plus street name) or post office box number, and does not contain an inconsistent apartment number, general delivery, rural route number or similar mailing address; and

(C) the inquiry is not made with an inconsistent courtesy title or suffix.

(iii) A first name which is a commonly accepted nickname for the first name of the individual inquired upon shall not be considered a different first name.

(4) Including in any consumer report a "Summary Item", "Activity Summary Item" or other information concerning the creditworthiness of other individuals with the same mailing address as, but with a different last name from, the individual inquired on, provided that the above restriction on Summary Items and Activity Summary Items does not apply to summary or activity reports generated by respondent internally for use by respondent identifying credit applications for which respondent will conduct additional investigation but respondent shall not reject, recommend rejection or otherwise directly or indirectly issue a negative report based solely on a summary or activity item, or on the applicant's failure to respond to a request for additional information from respondent.

ORDER II

It is ordered, That respondent, Hooper Holmes, Inc., a corporation, through its Credit Index Division, its successors and assigns, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection of consumer debts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

Failing to disclose to consumers, in any communication relating to debt

collection activities, their rights under the Fair Credit Reporting Act and Fair Debt Collection Practices Act as set forth in the exact facsimile of Exhibit A attached hereto.

A. *It is further ordered,* That respondent, each year for a five year period, mail to each subscriber the following notice in not less than 12 point boldface type:

IMPORTANT NOTICE

Credit Index is a consumer reporting agency subject to the provisions of the Federal Fair Credit Reporting Act. As a user of these reports you also are subject to the requirements of this law. If you use any information reported by Credit Index in whole or in part in your decision to deny credit, employment or insurance, you must notify the rejected applicant of that fact and provide our name, street address and phone number. Your failure to do so would violate Federal law.

[Insert Name, street address and phone number.]

Additionally, Credit Index, upon request and proper identification will disclose all information in its file to consumers by mail and we would appreciate your including this information in your notice also.

B. *It is further ordered,* That respondent make the disclosures required by Sections 609 and 610 of the Fair Credit Reporting Act for credit reports issued by its Credit Index subsidiary, by mailing a copy of all information (except medical information) in its files on the consumer at the time of the request (or a transcription of all such information) to the consumer upon request and proper identification or, in lieu thereof, in person or by telephone upon specific request by the consumer. If the consumer is provided with a copy of the actual report, he shall also be provided with all information necessary to decode the report.

C. *It is further ordered,* That respondent herein shall deliver a copy of this order cease and desist to all present and future personnel of its Credit Index division, including employees and representatives, engaged in the preparation of reports including consumer reports, and engaged in the disclosure and reinvestigation of information in said reports, and that respondent secure a signed statement acknowledging receipt of said order from each person.

D. *It is further ordered,* That respondent shall provide each consumer who requests disclosure of information in his or her file in accordance with the Fair Credit Reporting Act, with an exact facsimile of Exhibit B attached hereto.

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

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

EXHIBIT 1

CREDIT INDEX
THE NATIONAL COMPUTER CREDIT FILE

170 MT. AIRY RD. BASKING RIDGE, N. J. 07920

Credit Index is a consumer credit reporting agency which maintains a computerized national delinquent debtor file. Delinquent accounts are included in this file [illegible] reported to credit granting organizations using our service.

We have been requested by your creditor to advise you that because of the seriousness of your delinquency, your credit record may be placed in our national delinquent debtor file.

Our information shows your very serious delinquency with

You can still avoid this unnecessary and unpleasant action by paying the total balance of your overdue account. Enclose this letter with payment in full today, using the envelope provided. If the information stated is inaccurate, contact either your creditor or us, using this letter for comments.

Thank you for your cooperation.

Sincerely Yours,

J. L. Marino

FILE MAINTENANCE DEPT.
CREDIT INDEX

P.S. PLEASE USE SPACE BELOW FOR COMMENTS.

EXHIBIT 2

170 MT. AIRY RD. BASKING RIDGE, N. J. 07920

We have received a report from your creditor on your overdue account. This information is being included in our computerized national delinquent debtor file, and will be reported to any one of the credit granting firms using our service should they order a credit report on you.

Your record will remain in our system for at least five years unless you take action now to settle this account.

Your credit file will show this seriously past due amount with

Enclose this letter, with payment in full today. Use the envelope provided. If the information stated is inaccurate, contact either your creditor or us, using this form for comments. Your creditor must notify us of any change in the status of your credit record. We strive to maintain accurate credit files and you must realize how very important it is to protect a most valuable asset . . . . . your credit rating.

Sincerely Yours,

J. L. Marino

FILE MAINTENANCE DEPT.
CREDIT INDEX

P.S. PLEASE USE SPACE BELOW FOR COMMENTS.

IN THE MATTER OF

STANDARD OIL COMPANY OF CALIFORNIA, ET AL.

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

Docket 8827. Decision, Nov. 26, 1974—Modified Order, June 16, 1980

This order modifies a Nov. 26, 1974 order, 84 F.T.C. 1401, 40 FR 13488, against a San Francisco, Calif. distributor of gasoline and other petroleum products and its New York City advertising agency, requiring compliance with a court of appeals decision that the "blanket" order provision as to all advertising of "any" product was wholly unwarranted based on three misleading advertisements. The order is modified to cover only advertising of its additive, F–310.

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Ninth Circuit petitions for review of the Commission's cease and desist order issued herein on November 26, 1974; and the Court having rendered its decision modifying the Commission's order and, as so modified, affirming and enforcing the order; and the time for filing a petition for certiorari having expired and no petition for certiorari having been filed:

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and hereby is, modified in accordance with the decision and judgment of the Court of Appeals to read as follows:

I.

It is ordered, That respondent Standard Oil Company of California, a corporation, its successors and assigns, its officers, representatives, agents, employees, directly or through any corporate or other device, in connection with the advertising of the additive F–310, forthwith cease and desist from:

1. Representing directly or by implication that such product:

(a) Will produce or result in motor vehicle exhaust which is pollution ree or generally pollution free; or

(b) Will eliminate or reduce air pollution caused by motor vehicles; or

(c) Will eliminate or reduce emissions from all or any number or oup of motor vehicles in which it is used;

that:

(d) Such gasoline additive product has any other quality, perfor- nce ability or other characteristic; or

(e) Tests, demonstrations, research or experiments have been conducted which prove or substantiate any of said representations;

Unless and only to the extent that each and every such representation is true and has been fully and completely substantiated by competent scientific tests. The results of said tests, the original data collected in the course thereof and a detailed description of how said tests were performed shall be kept available in written form for at least three years following the final use of the representation.

2. Representing directly or by implication that:

(a) Automotive exhaust has certain observable or measurable characteristics in all or any number or group of motor vehicles when such is not the fact; or

(b) Any machines, measuring devices or technical instruments have particular characteristics or capacities when such is not the fact; or

(c) Such product has any effectiveness in reducing air pollution or any air pollutant or air pollutants without at the same time, in the same advertisement or other form of communication, conspicuously disclosing that not all of the harmful pollutants in automotive exhaust are affected by said product; or

(d) Such product will reduce any emissions of pollutants from automobile exhaust by any percentage or numerical quantity unless in connection therewith there is a clear, accurate and conspicuous disclosure of the type of vehicle which can expect to achieve reductions of such magnitude and the approximate percentage of such vehicles in the general car population.

II.

It is ordered, That respondent Standard Oil Company of California, a corporation, its successors and assigns, its officers, representatives, agents, employees, directly or through any corporate or other device, in connection with the advertising of the additive F–310, forthwith cease and desist directly or indirectly from:

1. Advertising by or through the use of or in conjunction with any test, experiment, or demonstration, or the result thereof, or any other information or evidence that appears or purports to confirm or prove, or is offered as confirmation, evidence, or proof of any fact, product characteristic or the truth of any representation, which does not accurately demonstrate, prove, or confirm such fact, product characteristic, or representation.

2. Using any pictorial or other visual means of communication with

or without an accompanying verbal text which directly or by implication creates a misleading impression in the minds of viewers as to the true state of material facts which are the subject of said pictures or other visual means of communication.

3. Misrepresenting in any manner or by any means any characteristic, property, quality, or the result of use of such gasoline additive product.

III.

It is ordered, That respondent Batten, Barton, Durstine & Osborn, Inc., a corporation, its successors and assigns, its officers, representatives, agents, employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of the additive F-310, forthwith cease and desist from:

1. Representing directly or by implication that such product:

(a) Will produce or result in motor vehicle exhaust which is pollution free or generally pollution free; or

(b) Will eliminate or reduce air pollution caused by motor vehicles; or

(c) Will eliminate or reduce emissions from all or any number or group of motor vehicles in which it is used;

or that:

(d) Such gasoline additive product has any other quality, performance ability or other characteristic; or

(e) Tests, demonstrations, research or experiments have been conducted which prove or substantiate any of said representations;

Unless and only to the extent that respondent has a reasonable basis for such representation based upon competent scientific tests by it or its client. The results of said tests and the data collected in the course thereof relied upon by respondent shall be kept available in written form for at least three years following the final use of the representation.

2. Representing directly or by implication that:

(a) Automotive exhaust has certain observable or measurable haracteristics in all or any number or group of motor vehicle when uch is not the fact; or

(b) Any machines, measuring devices or technical instruments have articular characteristics or capacities when such is not the fact; or

(c) Such product has any effectiveness in reducing air pollution or

any air pollutant or air pollutants without at the same time, in the same advertisement or other form of communication, conspicuously disclosing that not all of the harmful pollutants in automotive exhaust are affected by said product; or

(d) Such product will reduce any emissions of pollutants from automobile exhaust by any percentage or numerical quantity unless in connection therewith there is a clear, accurate and conspicuous disclosure of the type of vehicle which can expect to achieve reductions of such magnitude and the approximate percentage of such vehicles in the general car population.

IV.

It is ordered, That respondent Batten, Barton, Durstine & Osborn, Inc., a corporation, its successors and assigns, its officers, representatives, agents, employees, directly or through any corporate or other device, in connection with the advertising of the additive F–310, forthwith cease and desist directly or indirectly from:

1. Advertising by or through the use of or in conjunction with any test, experiment, or demonstration, or the result thereof, or any other information or evidence that appears or purports to confirm or prove or is offered as confirmation, evidence or proof of any fact, product characteristic, or of the truth of any representation which does not accurately demonstrate, prove, or confirm such fact, product characteristic, or representation unless the respondent can establish it neither knew, nor had reason to know, nor upon reasonable inquiry could have known that such was the case.

2. Using any pictorial or other visual means of communication with or without an accompanying verbal text which directly or by implication creates a misleading impression in the minds of viewers as to the true state of material facts which are the subject of said pictures or other visual means of communication unless the respondent can establish it neither knew nor had reason to know nor upon reasonable inquiry could have known the true facts.

3. Misrepresenting in any manner or by any means any characteristic, property, quality, or the result of the use of such gasoline additive product unless the respondent can establish it neither knew nor had reason to know nor upon reasonable inquiry could have known that such representations are false.

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

It is further ordered, That respondents herein shall notify the

Commission at least thirty (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 any other change in the corporation which may affect compliance obligations arising out of the order.

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

Commissioner Pitofsky did not participate.

IN THE MATTER OF

JORDAN-SIMNER, INC., ET AL.

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

Docket C-3022. Complaint, June 19, 1980—Decision, June 19, 1980

This consent order requires, among other things, a Ft. Lauderdale, Florida manufacturer of pharmaceutical products to cease making any misrepresentations of the efficacy or novel performance characteristics of its vaginal contraceptive suppository products. The order specifically prohibits any exaggerated efficacy claims for the products such as "highly" or "extremely" effective. Additionally, respondent is prohibited from making claims of efficacy without a reasonable basis consisting of a consistent body of valid and scientific evidence.

Appearances

For the Commission: *Susan Lerner.*

For the respondents: *Raymond D. McMurray, Hamel, Park, McCabe & Saunders,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Jordan-Simner, Inc., a corporation, and Robert Cohen, individually and as an officer of said corporation (hereinafter "respondents"), have violated Sections 5 and 12 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Jordan-Simner, Inc. is a Florida corporation with its principal place of business at 6852 N.W. 12th Ave., Ft. Lauderdale, Florida.

Respondent Robert Cohen is an officer of said corporation. He formulates, directs and controls its acts and practices, including the acts and practices hereafter set forth. His business address is the same as said corporation.

Allegations stated in the present tense include the past tense.

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

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

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

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

PAR. 3. Respondents engage in the manufacturing, advertising, offering for sale and sale of pharmaceutical products, including a vaginal contraceptive suppository product named "S'Positive", a "drug" within the meaning of Section 15 of the Federal Trade Commission Act.

PAR. 4. Respondents cause their products when sold, to be shipped and distributed from their place of business to purchasers located in various other States of the United States and the District of Columbia. Respondents maintain a substantial course of trade in all their products, including their product S'Positive, in or affecting commerce.

PAR. 5. In the course and conduct of their business respondents disseminate or cause to be disseminated certain advertisements concerning S'Positive (1) by United States mails, or by various means in or having an effect upon commerce, including but not limited to insertion in newspapers or magazines of interstate dissemination for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of S'Positive, or (2) by various means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of S'Positive in or having an effect upon commerce.

PAR. 6. Among the advertisements and other sales promotion materials, and typical of the statements and representations made in respondents' advertisements, but not all inclusive thereof, are the advertisements identified as Attachments 1 and 2.

PAR. 7. Through the use of such advertisements, and others not specifically set forth herein, respondents represent, directly or by implication, that:

1. S'Positive has an extremely high use effectiveness, approaching the level of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD").

2. S'Positive has novel contraceptive performance characteristics.

PAR. 8. In truth and in fact:

1. S'Positive's use effectiveness is approximately that of other vaginal contraceptive products. It is not considered to have a use effectiveness on the level of the pill or IUD.

2. S'Positive does not have novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery. Its sperm killing ingredient, nonoxynol 9, has been in use for many years in various contraceptive products.

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

PAR. 9. Furthermore, through the use of the advertisements referred to in Paragraphs Five and Six, respondents represent, directly or by implication, that:

1. S'Positive has an extremely high use effectiveness.
2. S'Positive has novel contraceptive performance characteristics.
3. S'Positive has undergone years of successful medical or consumer testing.

PAR. 10. At the time respondents made the representations alleged in Paragraph Nine, respondents had no reasonable basis for making those representations. Therefore, the making and dissemination of such representations constitute deceptive acts or practices in or affecting commerce.

PAR. 11. Furthermore, respondents market or advertise S'Positive without disclosing to the purchasing public through their advertising that:

1. For best protection against pregnancy, it is essential that one follow instructions.
2. Women for whom pregnancy presents a special health risk should make a contraceptive choice in consultation with their physician.
3. Some S'Positive users experience irritation.
4. S'Positive requires a waiting period of fifteen minutes before intercourse to ensure effectiveness.
5. S'Positive is approximately as effective as vaginal foam contraceptives in actual use.

PAR. 12. The facts described in Paragraph Eleven are material with respect to the consequences which may result from use of S'Positive as a contraceptive under such conditions as are customary or usual. Respondents' failure to disclose these material facts renders the advertisements referred to in Paragraphs Five and Six false, deceptive or misleading.

PAR. 13. Furthermore, through the use of the advertisements referred to in Paragraphs Five and Six, respondents, directly or by implication, favorably compare some characteristics of S'Positive to

the pill or the IUD and represent in the same advertisement that S'Positive has an extremely high use effectiveness. Favorable comparison of S'Positive to certain characteristics of the pill or IUD has the tendency and capacity to lead members of the public into the erroneous and mistaken belief that S'Positive's use effectiveness is equal to that of the pill or IUD. Respondents fail to disclose the fact that S'Positive has a use effectiveness below that of the pill or IUD and approximately the same as other vaginal foam contraceptive products.

PAR. 14. The fact described in Paragraph Thirteen is material in light of the comparative representations made in respondents' advertisements. Respondents' failure to disclose this material fact in advertisements containing such comparative representations renders the advertisements referred to in Paragraphs Five and Six false, misleading or unfair.

PAR. 15. In the course and conduct of its business, and at all times mentioned herein, respondents are in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of drugs or contraceptive products of the same general kind and nature as advertised or sold by respondents.

PAR. 16. The use by respondents of the aforesaid false, misleading, deceptive or unfair statements, representations, acts or practices, and the dissemination of the aforesaid false advertisements has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondents' products or services by reason of said erroneous and mistaken belief.

PAR. 17. The aforesaid acts and practices of respondents are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

S'POSITIVE.°
A new, medically tested, positive method of birth control.

S'Positive looks like a pill. But it isn't. Yet it does all the things you want the pill to do. And none of the things you don't want it to do (no hormone side effects and no effect upon your fertility will be incl).

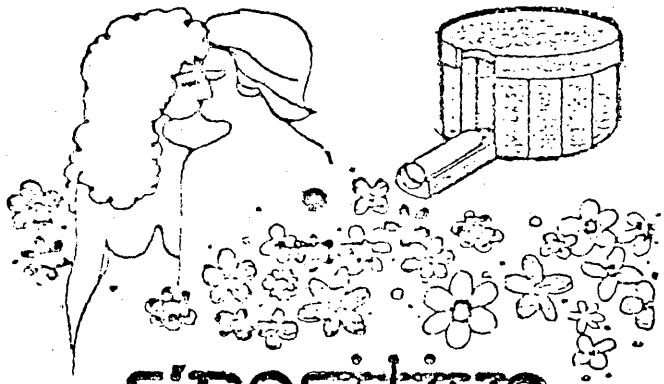
It's a new, one step contraceptive. You see, S'Positive is a suppository, but unlike any other you've ever seen or heard about.

Here's how it works: As soon as it is inserted directly to the cervix, the chemistry of your body fluids melt and takes over, dissolving the S'Positive. This process allows the S'Positive to expand, blanketing the cervix and inner vaginal area with a medically safe and proven effective spermicide.

S'Positive is not detectable and its delicately scented formula acts as a gentle lubricant. There is no embarrassing messiness, no applicators, and nothing to remove, thereby eliminating troublesome before-and-after steps.

S'Positive comes in an attractive package that includes your own personal Roto-Matic (TM) Dispenser. Completely hygienic, the convenient 12-unit dispenser can easily be carried in pocket or purse. Ask your druggist for S'Positive. If it is not available in your area, write: Jordan Simner, Inc., 15430 Northwest 7th Avenue, Miami, Florida 33169.

S'Positive. Thoroughly tested and proven effective. The modern method for today's modern woman.



S'Positive

IF YOU HAVE A PROBLEM CHOOSING A RELIABLE BIRTH CONTROL METHOD

...YOU NO LONGER HAVE A PROBLEM..

After years of successful medical and consumer testing, S POSITIVE is now available to you.

This proven method of birth control is different from anything else you may have tried. It's an easy-to-use, tiny vaginal suppository called S POSITIVE and it protects you against unwanted pregnancy two ways.

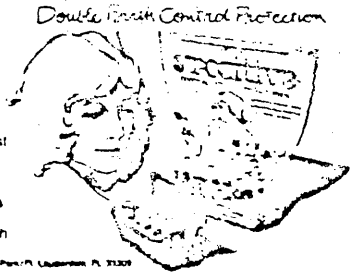
First. The formula contains a medically-tested and proven-effective sperm aide. After insertion, the natural vaginal fluids dissolve the S POSITIVE suppository dispersing the spermicide throughout the vaginal area.

Second. Simultaneously, a combination of ingredients forms a blanket of protection which shields the uterine opening and physically blocks sperm.

Unlike other vaginal contraceptives, there is no mess or inconvenience. Just insert S POSITIVE and forget it's there. Best of all, S POSITIVE was proven extremely effective in extensive clinical tests. While no contraceptive method is guaranteed, when used as directed S POSITIVE can end your worry over birth control.

S POSITIVE suppositories are a welcome relief from messy foams, side effects of the pill, and potentially dangerous appliances. Nowhere in the millions of women in Europe and the United States rely with confidence on the effectiveness of S POSITIVE. Ask your doctor or pharmacist about S POSITIVE today. Available without prescription. Handy 12 unit dispenser at leading pharmacies.

S'POSITIVE
Double Birth Control Protection



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Clarkson 2-79

DECISION AND ORDER

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

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

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

1. Respondent Jordan-Simner, Inc. is a Florida corporation with its principal place of business at 6852 N.W. 12th Ave., Fort Lauderdale, Florida.

Respondent Robert Cohen is an officer of said corporation. He formulates, directs and controls its acts and practices, including the acts and practices hereafter set forth. His business 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

This order applies to respondent Jordan-Simner, Inc., its successors, assigns, officers, agents and employees, and to respondent Robert Cohen, individually and as an officer of the corporation, whether

acting directly or through any corporation, subsidiary, division or other device. Except as otherwise provided, order provisions apply to any act taken in connection with respondents' advertising, offering for sale, sale or distribution of S'Positive or any OTC (over the counter) contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States. The reasonable basis standards used in this order are not intended to set a standard for drug products other than OTC contraceptives.

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

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

2) "S'Positive" means the vaginal contraceptive suppository product marketed under the tradename S'Positive, or any vaginal contraceptive suppository product of substantially the same chemical formulation.

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

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

I.

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

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

B. Misrepresenting, directly or by implication, the effectiveness of any OTC contraceptive product.

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

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

II.

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

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

B. If your doctor has told you that you should not become pregnant, ask your doctor if you can use S'Positive.

C. Some S'Positive users experience irritation in using the product.

D. It is essential that you insert S'Positive at least fifteen minutes before intercourse.

E. S'Positive is approximately as effective as vaginal foam contraceptives in actual use.

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

III.

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

tive disclosure in any consumer (lay) advertisement for S'Positive in which any product or use characteristic of S'Positive is compared, directly or by implication, to any product or use characteristic of oral contraceptives or intra-uterine devices:

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

OR

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

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

IV.

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

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

B. Approximately as effective as contraceptives foams.

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

V.

It is further ordered, That respondents make the following disclosure in any consumer (lay) radio advertisements for S'Positive:

S'Positive's effectiveness is approximately equal to contraceptive foams.

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

VI.

It is further ordered, That respondents shall make the following disclosures in ethical (professional) advertisements for S'Positive:

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

OR

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

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

If respondents have a reasonable basis, consisting of a consistent body of valid and reliable scientific evidence, for any change in Disclosures contained in Paragraphs II.A, B, C or E, III, IV.B, V, and VI.A or C above, respondents may petition the Commission for appropriate modification of this order.

VII.

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

A. Disseminating or causing the dissemination of any advertisement, by means of the United States mails or by any means in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, which contains any of the representations prohibited in Paragraph I. A–C of this order or fails to include any of the disclosures required by this order.

B. Disseminating, or causing to be disseminated, by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of S'Positive or any OTC contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, any advertisement which contains any of the representations prohibited in Paragraph I. A–C of this order or fails to include any of the disclosures required by this order.

VIII.

It is further ordered, That respondents shall, within sixty (60) days after the date of service of this order, mail under separate cover a copy of either this order or the Federal Trade Commission's news release relating to this Order to:

A. Every physician or health care professional to whom respondent previously sent any promotional materials regarding S'Positive.

B. Every pharmacist who has sold S'Positive to the public within the two year period prior to the date of service of this order.

An affidavit of mailing shall be sworn to by an official of the corporate respondent verifying said mailing has been completed.

IX.

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

X.

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

XI.

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

XII.

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 addition, for a period of five (5) years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment whose activities include the sale or advertising of OTC contraceptive products or of his affiliation with a new business or employment in which his own duties and responsibilities involve the sale or advertising of OTC contraceptive products. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged, as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

XIII.

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

Commissioner Pitofsky did not participate.

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION

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

Docket C-3023. Complaint, June 19, 1980—Decision, June 19, 1980

This consent order requires, among other things, a New York City manufacturer of pharmaceutical products to cease making any misrepresentations of the efficacy or novel performance characteristics of its vaginal contraceptive suppository products. The order specifically prohibits any exaggerated efficacy claims for the products such as "highly" or "extremely" effective. Additionally, respondent is prohibited from making claims of efficacy without a reasonable basis consisting of a consistent body of valid and scientific evidence. Respondent is also required to distribute an information pamphlet discussing the advantages and disadvantages of various over-the-counter contraceptive methods as well as setting forth specifically required affirmative disclosures.

Appearances

For the Commission: *Barry E. Barnes, Susan Lerner* and *Rachel Wolkin Sesser.*

For the respondent: *William W. Vodra, Arnold & Porter, Charles F. Hagen* and *William P. Woods,* New York City.

COMPLAINT

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

PARAGRAPH 1. American Home Products Corporation is a Delaware corporation with its principal place of business at 685 Third Ave., New York, New York.

Allegations stated in the present tense include the past tense.

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

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

2) "Use effectiveness" means that level of effectiveness which is

obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

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

PAR. 3. Respondent American Home Products Corporation engages in the manufacturing, advertising, offering for sale and sale of pharmaceutical products, including a vaginal contraceptive suppository product named "Semicid", a "drug" within the meaning of Section 15 of the Federal Trade Commission Act.

PAR. 4. Respondent American Home Products Corporation causes its products when sold, to be shipped and distributed from its places of business to purchasers located in various other States of the United States, the District of Columbia and Puerto Rico. Respondent American Home Products Corporation maintains a substantial course of trade in all its products, including its product Semicid, in or affecting commerce.

PAR. 5. In the course and conduct of its business respondent disseminates or causes to be disseminated certain advertisements concerning Semicid (1) by United States mails, or by various means in or having an effect upon commerce, including but not limited to insertion in newspapers or magazines of interstate dissemination and radio and television broadcasts of interstate transmission, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Semicid, or (2) by various means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Semicid in or having an effect upon commerce.

PAR. 6. Among the advertisements and other sales promotion materials, and typical of the statements and representations made in respondent's advertisements, but not all inclusive thereof, are the advertisements identified as Attachments 1 through 4.

PAR. 7. Through the use of such advertisements, and others not specifically set forth herein, respondent represents, directly or by implication, that:

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

PAR. 8. In truth and in fact:

1. Semicid's use effectiveness is approximately that of other

vaginal contraceptive products. It is not considered to have a use effectiveness on the level of the pill or IUD.

2. Semicid does not have novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery. Its sperm killing ingredient, nonoxynol 9, has been in use for many years in various contraceptive products.

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

PAR. 9. Furthermore, through the use of the advertisements referred to in Paragraphs Five and Six, respondent represents, directly or by implication, that:

1. Semicid has an extremely high use effectiveness.
2. Semicid has novel contraceptive performance characteristics.
3. Semicid has been scientifically or medically proven to have an extremely high use effectiveness.

PAR. 10. At the time respondent made the representations alleged in Paragraph Nine, respondent had no reasonable basis for making those representations. Therefore, the making and dissemination of such representations constitute deceptive or unfair acts or practices in or affecting commerce.

PAR. 11. Furthermore, respondent markets or advertises Semicid without disclosing to the purchasing public through its advertising that:

1. For best protection against pregnancy, it is essential that one follow instructions.
2. Women for whom pregnancy presents a special health risk should make a contraceptive choice in consultation with their physician.
3. Some Semicid users experience irritation.
4. Semicid requires a waiting period of fifteen minutes before intercourse to ensure effectiveness.
5. Semicid is approximately as effective as vaginal foam contraceptives in actual use.

PAR. 12. The facts described in Paragraph Eleven are material with respect to the consequences which may result from use of Semicid as a contraceptive under such conditions as are customary or usual. Respondent's failure to disclose these material facts renders the advertisements referred to in Paragraphs Five and Six false, deceptive or misleading.

PAR. 13. Furthermore, through the use of the advertisements

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

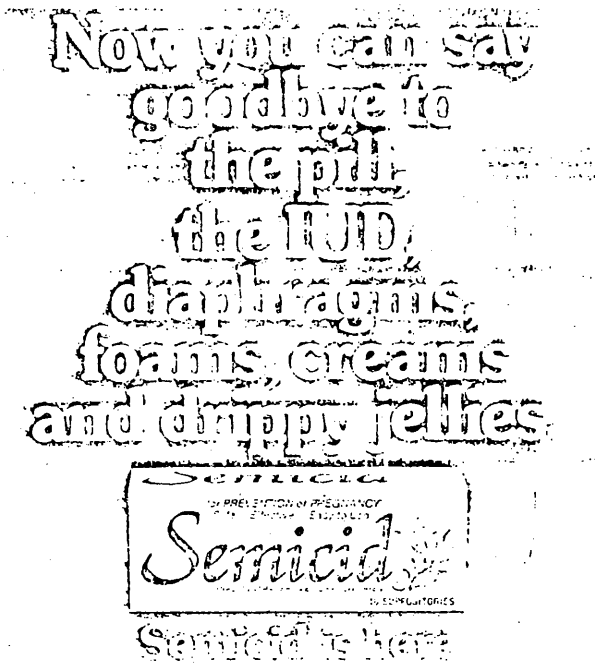
PAR. 14. The fact described in Paragraph Thirteen is material in light of the comparative representations made in respondent's advertisements. Respondent's failure to disclose this material fact in advertisements containing such comparative representations renders the advertisements referred to in Paragraphs Five and Six false, misleading or unfair.

PAR. 15. In the course and conduct of its business, and at all times mentioned herein, respondent American Home Products Corporation is in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of drugs or contraceptive products of the same general kind and nature as advertised or sold by respondent.

PAR. 16. The use by respondent of the aforesaid false, misleading, deceptive or unfair statements, representations, acts or practices, and the dissemination of the aforesaid false advertisements has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondent's products or services by reason of said erroneous and mistaken belief.

PAR. 17. The aforesaid acts and practices of respondent are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioner Pitofsky did not participate.



A medically tested, vaginal contraceptive suppository developed for the woman of today.

As a contemporary woman, you know about birth control. You know what works, what feels right, what is aesthetically pleasant.

Whatever method you choose, you want it to be effective, safe and easy to use.

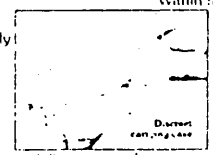
Now there's a non-hormonal contraceptive to satisfy your contemporary needs. Semicid.

Proven to be effective.

Semicid is an effective vaginal contraceptive for the prevention of pregnancy. It is a non-hormonal, vaginal mini-suppository that safely kills sperm in seconds. Semicid's active ingredient is nonoxynol-9, a spermicide used effectively by millions of women for over 10 years.

Laboratory tested. Doctor tested.

A U.S. clinical study of hundreds of women of childbearing age over a four year period proved Semicid's high degree of effectiveness. This study was conducted by a gynecologist and was carefully reviewed by an independent research laboratory. In comparing the findings of this group with published reports of other contraceptive methods, Semicid is shown to be effective in the prevention of pregnancy.



Semicid is safe.

Semicid contains no hormones. As a result, none can enter your bloodstream. What is more, Semicid is safer than the IUD, because it cannot pierce the uterine walls. Semicid is so safe that you can purchase it without a prescription, and it is non-irritating based on reports from doctors and from women using the product.

Easy and convenient to use.

Within minutes, Semicid dissolves and spreads a protective covering over the cervical opening and adjoining vaginal walls. And because Semicid is quick and easy to insert, it will not interfere with spontaneity.

The Semicid package is so small and discreet that it can be kept anywhere. Semicid has no applicator, so there is nothing to fill, clean or remove.

Semicid is lubricating and has no unpleasant taste or odor. It was formulated for the kind of life you are living, today. Ask your gynecologist about it.

Semicid is from Whitehall Laboratories, one of the world's leading pharmaceutical companies. It is available at your local drugstore. Use only as directed.

SEMICID. Today's contraceptive for today's woman.

advertisements identified as Attachments 1 and 2 which are incorporated by reference herein.

PAR. 7. Through the use of such advertisements, and others not specifically set forth herein, respondents represent, directly or by implication, that:

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

PAR. 8. In truth and in fact:

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

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

PAR. 9. At the time respondents made the representations alleged in Paragraph Seven, respondents had no reasonable basis for making those representations. Therefore, the making and dissemination of such representations constitute deceptive or unfair acts or practices in or affecting commerce.

PAR. 10. Through dissemination of the advertisement identified as Attachment 2, respondents market or advertise Encare without disclosing to the purchasing public through the advertising that:

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

PAR. 11. Furthermore, respondents market or advertise Encare without disclosing to the purchasing public through the advertising that:

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

PAR. 12. The facts described in Paragraphs Ten and Eleven are material with respect to the consequences which may result from use of Encare as a contraceptive under such conditions as are customary or usual. Respondents' failure to disclose these material facts renders the advertisements referred to in Paragraphs Five and Six false, deceptive or misleading.

PAR. 13. Furthermore, through the use of the advertisements referred to in Paragraphs Five and Six, respondents, directly or by implication, favorably compare some characteristics of Encare to the pill or the IUD and represent in the same advertisement that Encare has an extremely high use effectiveness. Favorable comparison of Encare to certain characteristics of the pill or IUD has the tendency and capacity to lead members of the public into the erroneous and mistaken belief that Encare's use effectiveness is equal to that of the pill or IUD. Respondents fail to disclose the fact that Encare has a use effectiveness below that of the pill or IUD and approximately the same as other vaginal foam contraceptive products.

PAR. 14. The fact described in Paragraph Thirteen is material in light of the comparative representations made in respondents' advertisements. Respondents' failure to disclose this material fact in advertisements containing such comparative representations renders the advertisements referred to in Paragraphs Five and Six false, misleading or unfair.

PAR. 15. In the course and conduct of their business, and at all times mentioned herein, respondents Morton-Norwich Products, Inc. and Eaton-Merz Laboratories, Inc. are in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of drugs or contraceptive products of the same general kind and nature as advertised or sold by respondents.

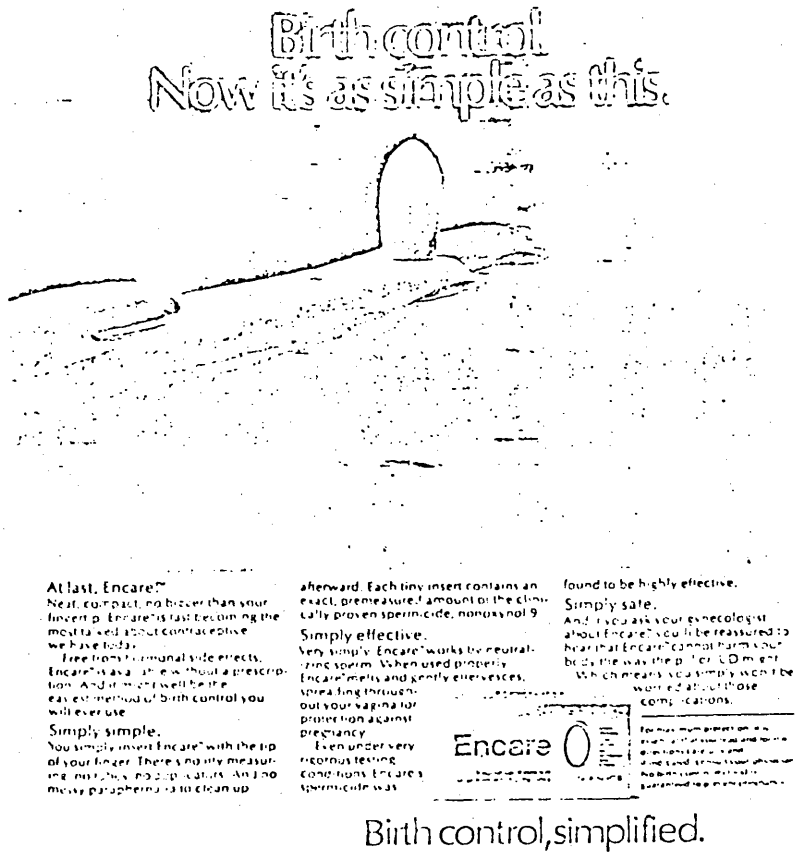
PAR. 16. The use by respondents of the aforesaid false, misleading, deceptive or unfair statements, representations, acts or practices, and the dissemination of the aforesaid false advertisements has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondents' products or services by reason of said erroneous and mistaken belief.

PAR. 17. The aforesaid acts and practices of respondents are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. The acts and practices of

respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioner Pitofsky did not participate.

THE FACTS:
1 HUNDREDS OF THOUSANDS OF AMERICAN WOMEN ARE ALREADY USING ENCARE OVAL.
2 ITS EFFECTIVENESS HAS BEEN ESTABLISHED IN CLINICAL TESTS.
3 UNLIKE THE PILL, ENCARE OVAL HAS NO HORMONAL SIDE EFFECTS.
4 ENCARE OVAL IS EASIER TO INSERT THAN A TAMPON.
5 BECAUSE ENCARE OVAL IS INSERTED IN ADVANCE, IT WON'T INTERRUPT LOVEMAKING.
the most convenient time pill
the most convenient time pill


Birth control.
Now it's as simple as this.
At last, Encare™
Neat, compact, no bigger than your lipstick. Encare is fast becoming the most talked about contraceptive we have today.
Free from hormonal side effects, Encare is available now without a prescription. And it may well be the easiest method of birth control you will ever use.
Simply simple.
You simply insert Encare with the tip of your finger. There's no messy measuring, no messy paraphernalia to clean up afterward. Each tiny insert contains an exact, premeasured amount of the clinically proven spermicide, nonoxynol 9.
Simply effective.
Very simply, Encare works by neutralizing sperm. When used properly, Encare melts and gently effervesces, spreading throughout your vaginal for protection against pregnancy.
Even under very rigorous testing conditions, Encare's spermicide was found to be highly effective.
Simply safe.
And if you ask your gynecologist about Encare, you'll be reassured to hear that Encare cannot harm your body the way the pill or IUD might.
Which means you simply won't be worried about those complications.
Encare
Birth control, simplified.

DECISION AND ORDER

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

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

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

1. Respondent Morton-Norwich Products, Inc. is a Delaware corporation with its principal place of business at 110 N. Wacker Drive, Chicago, Illinois.

Respondent Eaton-Merz Laboratories, Inc. is a Delaware corporation with its principal place of business at 17 Eaton Ave., Norwich, New York. It is a joint venture owned in equal shares by Morton-Norwich Products, Inc. and Merz and Co., Chemische-Fabrik of Frankfurt, Federal Republic of Germany.

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

ORDER

This order applies to respondent Morton-Norwich Products, Inc. and respondent Eaton-Merz Laboratories, Inc., their successors, assigns,

officers, agents and employees, whether acting directly or through any corporation, subsidiary, division or other device. Except as otherwise provided, order provisions apply to any act taken in connection with either respondent's advertising, offering for sale, sale or distribution of Encare or any OTC (over the counter) contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States. The reasonable basis standards used in this order are not intended to set a standard for drug products other than OTC contraceptives.

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

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

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

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

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

I.

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

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

B. Misrepresenting, directly or by implication, the effectiveness of any OTC contraceptive product.

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

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

II.

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

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

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

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

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

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

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

III.

It is further ordered, That each respondent make the following affirmative disclosure in any consumer (lay) print advertisement for Encare in which any product or use characteristic of Encare is

compared, directly or by implication, to any product or use characteristic of oral contraceptives or intrauterine devices:

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

OR

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

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

IV.

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

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

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

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

V.

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

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

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

VI.

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

A. Irritation accompanies use of the product in some instances.

B. Encare must be inserted according to product instructions and at least ten minutes before intercourse.

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

OR

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

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

If respondent has a reasonable basis, consisting of a consistent body of valid and reliable scientific evidence, for any change in disclosures contained in Paragraphs II.A, B, C or E, III, IV.B, V, and VI.A or C above, respondent may petition the Commission for appropriate modification of this order.

VII.

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

A. Disseminating or causing the dissemination of any advertisement, by means of the United States mails or by any means in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, which contains any of the representations prohibited in Paragraph I. A–C of this order or fails to include any of the disclosures required by this Order.

B. Disseminating, or causing to be disseminated, by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of Encare or any OTC contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, any advertisement which contains any of the representations prohibited in Paragraph I. A–C of this order or fails to include any of the disclosures required by this order.

VIII.

It is further ordered, That respondents shall, within six (6) months after the date of service of this order, run print advertisements for

Encare in at least two (2) separate issues of at least nine (9) professional (ethical) publications approved by authorized representatives of the Federal Trade Commission. The advertisements required by this paragraph shall comply with Paragraphs I.B–D and VI, of this order. Advertisements run after the date of the signing of this order, but prior to the date of service of this order, shall be considered satisfactory compliance with this order.

IX.

It is further ordered, That respondents prepare an informational pamphlet, in a form to be approved by authorized representatives of the Federal Trade Commission, which clearly and conspicuously sets forth the affirmative disclosures specified in Paragraphs II and III above, as well as other information regarding the advantages and disadvantages of various OTC contraceptive methods. The pamphlet shall be at least (4) pages in length, oriented toward a lay audience, and based upon current labeling of, and published scientific literature regarding OTC contraceptive products. The form of the pamphlet shall be submitted by the respondents to the Federal Trade Commission within sixty (60) days after the date of service of the order. Copies of the pamphlet shall be distributed within sixty (60) days after the date on which the representatives of the Federal Trade Commission serve notice on the respondents that they have approved the form of the pamphlet. Copies of the pamphlet shall be initially distributed to all physicians and other health care professionals engaged in obstetric and gynecological practice or family planning activities who previously received any promotional material concerning Encare. A cover letter and postpaid reply card shall be provided with the initial mailing of the pamphlet indicating its availability, at no charge, in reasonable quantities upon request. Copies shall also be distributed to retail pharmacies who purchase Encare directly from respondents with a request that the pamphlet be made available to consumers. Respondents shall thereafter provide, at no charge, additional copies of the pamphlet upon reasonable request for a period of one (1) year.

X.

It is further ordered, That each respondent maintain complete business records relative to the manner and form of its compliance with this order. Such records shall include, but not be limited to, copies of and dissemination schedules for all advertisements; documents which substantiate or contradict any claim made in advertising, promoting or selling the product; and an affidavit of compliance with

Paragraph IX of this order. Such records shall be retained for at least three (3) years beyond the last dissemination of any relevant advertisement. Upon thirty (30) days notice each respondent shall make any and all such records available to Commission staff for inspection or photocopying.

XI.

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

XII.

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

XIII.

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

Commissioner Pitofsky did not participate.

IN THE MATTER OF

SCHLUMBERGER LIMITED

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket C-3025. Complaint, June 23, 1980—Decision, June 23, 1980

This consent order requires, among other things, a New York City multinational company, engaged in various activities, including the manufacture of electrical and electronic devices, to divest all stock it owns in the Unitrode Corporation ("Unitrode") within six months from the date of the order. Prior to such divesture, the order requires that respondent treat Unitrode as an independent entity, and refrain from attempting to influence or control Unitrode. Respondent is further prohibited from acquiring any Unitrode stock or assets without prior Commission approval for a period of ten years.

Appearances

For the Commission: *Gordon Youngwood.*

For the respondent: *R. Bruce MacWhorter* and *Stanley I. Rubenfeld, Shearman & Sterling*, New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent, subject to the jurisdiction of the Commission, has acquired Fairchild Camera and Instrument Corp. ("Fairchild"), a corporation, in violation of Section 7 of the Clayton Act, as amended, (15 U.S.C. 18) and Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. 21) and Section 5(b) of the Federal Trade Commission Act (15 U.S.C. 45(b)), stating its charges as follows:

I. DEFINITIONS

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

(a) "Respondent" shall mean Schlumberger Limited, a corporation, and its subsidiaries, affiliates, successors and assigns; and

(b) "Diodes" shall mean semiconductor products consisting of a two-electrode device which passes current in one direction but not in the opposite direction.

II. RESPONDENT

2. Respondent is a corporation organized and doing business under and by virtue of the laws of the Netherlands Antilles, with its principal executive offices at 277 Park Ave., New York, New York.

3. Respondent is a multinational company with significant operations in the United States and Europe. Its primary activities are wireline services of oil fields, the drilling and servicing of oil wells and the manufacture of a multitude of electrical and electronic devices. In 1978, Respondent had total foreign and domestic assets of $2.95 billion and total sales of $2.7 billion.

4. At all times relevant herein, Respondent has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

III. UNITRODE CORPORATION

5. Unitrode Corporation ("Unitrode") is a corporation organized and doing business under and by virtue of the laws of the State of Maryland, with its principal executive offices at 580 Pleasant St., Watertown, Massachusetts.

6. Unitrode is engaged in the manufacture of diodes and other electronic components. In fiscal year 1979, Unitrode had total assets of $40.2 million and sales of $48.4 million.

7. Since March 1978, Respondent has purchased approximately 496,000 shares of Unitrode common stock, which total constitutes 17.1% of all outstanding Unitrode shares. As of June 1979, Respondent was the largest holder of Unitrode common stock.

8. From March 1978 to date, Respondent has had and now has substantial opportunities to influence the business operations of Unitrode.

9. At all times relevant herein, Unitrode has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

IV. FAIRCHILD CAMERA & INSTRUMENT CORPORATION

10. At the time of the acquisition, Fairchild was a corporation organized and doing business under and by virtue of the laws of the

State of Delaware, with its principal executive offices at 464 Ellis St., Mountain View, California.

11. Fairchild's primary operations are in the manufacturing of diodes and other semiconductors, automatic test systems, and reconnaissance and surveillance systems. In 1978, its total assets were $423 million and its total sales were $534 million.

12. At all times relevant herein, Fairchild has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

V. ACQUISITION

13. On May 19, 1979, Schlumberger and Fairchild entered into an agreement under which Respondent agreed to the purchase by Schlumberger (California) Inc., a wholly-owned subsidiary of Respondent, of all outstanding Fairchild shares for $66 per share. The transaction was valued at $363 million as of June, 1979. More than 97% of Fairchild shares were tendered. Respondent purchased the shares on June 30, 1979. Schlumberger has since acquired the remaining outstanding Fairchild shares.

VI. TRADE AND COMMERCE

14. For purposes of this complaint, the relevant lines of commerce are the manufacture and sale of diodes and submarkets thereof, and the relevant section of the country is the United States as a whole.

15. Sales of diodes in the United States are substantial, amounting to an estimated $343 million in 1977.

16. Fairchild and Unitrode are and have been for many years substantial and actual competitors in the manufacture and sale of diodes.

17. In the year 1977, Fairchild had sales of diodes in the United States of $20.8 million. Unitrode had sales of diodes in the United States of $23.1 million in 1978.

18. Concentration in the manufacture and sale of diodes is high.

19. Barriers to entry into the manufacture and sale of diodes are substantial.

VII. EFFECTS OF THE ACQUISITION

20. The effect of the acquisition of Fairchild by Respondent may be substantially to lessen competition or tend to create a monopoly in the

manufacture and sale of diodes in the United States in the following ways, among others:

(a) Substantial actual and potential competition between Fairchild and Unitrode and other firms in the manufacture and sale of diodes has been eliminated;

(b) Already high concentration in the manufacture and sale of diodes has been increased; and

(c) The likelihood of eventual deconcentration may be lessened.

VIII. THE VIOLATION CHARGED

21. The aforesaid acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the Respondent named in the caption hereof, and the Respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition 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 Clayton Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondent has violated the said 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Schlumberger Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the Netherlands Antilles with its office and principal place of business located at 277 Park Ave., in the City of New York, State of New York.

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

ORDER

For purposes of this order, "Respondent" shall mean Schlumberger Limited, a corporation, and its subsidiaries, affiliates, successors and assigns.

I.

It is ordered, That Respondent, prior to a date not to exceed six (6) months from the date of service of this order, shall divest absolutely to an acquiror or acquirors, subject to the prior approval of the Commission, all stock and other share capital of Unitrode Corporation (Unitrode) held by Respondent, so as to establish Unitrode as a company independent of any other company manufacturing and selling diodes.

II.

It is further ordered, That prior to sixty (60) days from the date on which Respondent is served with this order, Respondent shall present to the Commission:

(a) A final executory contract with an acquiror or acquirors, consistent with Article I above, to divest all stock and other share capital of Unitrode held by Respondent, subject to the prior approval of the Commission; or

(b) a plan for a public offering of all stock and other share capital of Unitrode held by Respondent, subject to the prior approval of the Commission, and reasonably assuring that no more than one percent of the outstanding stock or other share capital of Unitrode is acquired by a person not acceptable to the Commission.

III.

It is further ordered, That, for a period of ten (10) years from the date on which Respondent is served with this order, Respondent shall not acquire, directly or indirectly, through subsidiaries or otherwise,

without prior Commission approval, any assets, stock or other share capital of Unitrode or its subsidiaries, affiliates, successors and assigns; *provided, however,* that this paragraph shall not apply to products manufactured by Unitrode in the normal course of its business that are held for sale by Unitrode to its customers and used by Respondent in the manufacture of its products.

IV.

It is further ordered, That prior to the divestiture of Unitrode stock and other share capital required by Paragraph I of this order, Respondent shall:

(a) In all dealings with Unitrode, treat Unitrode on an arm's length basis as an entity independent of Respondent; and

(b) not exercise or seek to exercise influence or control over Unitrode.

V.

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

IN THE MATTER OF

EXXON CORP., ET AL.

Docket 8934. Interlocutory Order, June 30, 1980

REGARDING SUBPOENAS TO CONGRESSIONAL RESEARCH SERVICE AND TO THIRTEEN EXECUTIVE BRANCH AGENCIES AND THE GENERAL ACCOUNTING OFFICE

Respondents in this matter, seeking discovery of documents relating to the oil production industry in the possession of thirteen Executive Branch agencies,[1] the Congressional Research Service of the Library of Congress, and the General Accounting Office, petitioned Administrative Law Judge James P. Timony for issuance of subpoenas to the above-named entities. Between February 15 and 21, 1980, Judge Timony issued the requested subpoenas pursuant to Commission Rule of Practice 3.36. We stayed the return date on the subpoenas on February 28, 1980, to consider whether the Commission has the authority to issue them.

Both respondents and complaint counsel contend that Section 9 of the FTC Act authorizes the subpoenas issued by Judge Timony. The Department of Justice, in a brief filed on behalf of all subpoena recipients, except the Federal Energy Regulatory Commission, the Department of the Treasury, and the Congressional Research Service, disagrees and asserts that Section 8 of the Act is the sole authority for the Commission to obtain information from Executive Branch agencies, and that Section 9 may not be exercised for that purpose. The Congressional Research Service takes yet another view, and argues that its documents are not subject to Commission process because they are privileged under the congressional immunity for speech or debate.

In brief, we have determined that a request under Section 8 must be made before a subpoena to an Executive Branch agency may be issued, though we hold that the Commission has the authority to issue such a subpoena pursuant to Section 9 if necessary and appropriate, and if a prior request for the material under Section 8 has proved unavailing. We further hold that the documents sought from the Congressional Research Service are beyond the Commission's subpoena authority.

[1] The thirteen agencies are the Departments of Defense, Energy, Commerce, Interior, Justice, Transportation, State and Treasury, the Interstate Commerce Commission, Environmental Protection Agency, General Services Administration, Central Intelligence Agency, and the Executive Office of the President. We assume that the brief filed by the Department of Justice embodies the position of the President in the matter.

I.

The Justice Department's argument rests upon its belief that Section 8 of the FTC Act[2] is the exclusive grant of authority by which the Commission may obtain access to records of Executive Branch agencies. It finds support for its conclusion in the legislative history of the FTC Act. In pointing out that Section 8 was added to enable the Commission to obtain materials possessed by agencies, the Justice Department cites House of Representatives debates on that section of the bill:

> It appears that in time past there have been jealousies in various departments and bureaus, and at times it was difficult to obtain information from one department of great value to another in work of investigation. 51 Cong. Rec. 8858 (1914) (remarks of Rep. Knowland).

During further debate in the House, concern was expressed that confidential tax returns and census data submitted by companies would be made public under this section. In response, Representative Covington (a member of the committee that drafted the bill) conceded that this was true, but added that presidential control would provide an adequate protection against inappropriate disclosure of the information. He stated that the first draft of the section did not contain the phrase, "when directed by the President," but that the committee had reconsidered:

> We then determined, however, that by limiting the authority to turn over such information by direction of the President, all the safeguards that ought to surround any class of information would be in the possession of the government. 51 Cong. Rec. 9045 (1914).

It appears that Congress intended that the Commission have access to information it needed to carry out its mission, but that the President should serve as a "mediator" of interagency disputes and as a decisionmaker regarding the Commission's need for the information. Based on its belief that this represents Congress' intent, the Justice Department argues that Section 8 is an exclusive-grant of authority and, therefore, that Section 9 cannot be used as an alternate means of obtaining government documents because Section 9 contains no similar provision for presidential discretion. It sets up instead a system of judicial enforcement of Commission subpoenas. Thus, if the Commis-

[2] Section 8 of the FTC Act states:

> The several departments and bureaus of the Government when directed by the President shall furnish the Commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this Act, and shall detail from time to time such officials and employees to the Commission as he may direct.

sion were able to compel production of documents pursuant to Section 9, the safeguard established by Executive review could be avoided by the Commission, and Congress' intent frustrated.

This analysis has much force, and we agree that the grant of authority in Section 9 may not be exercised so as to make the Presidential prerogative in Section 8 a nullity. However, the Justice Department's conclusion—that Section 8 is therefore the *exclusive* means by which the Commission may obtain information from Executive Branch agencies—does not necessarily follow. Indeed, such a conclusion would be inconsistent with Congress' intention in granting the Commission quasi-judicial authority and with the rights of respondents in an adjudication.

The Supreme Court long ago established that:

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the Executive. Its duties are performed without Executive leave and, in the contemplation of the statute, must be free from Executive control. *Humphrey's Executor* v. *U.S.*, 295 U.S. 602, 628 (1935).

Foremost among the Commission's "quasi-judicial" powers is the conduct of adjudications under Section 5(b) of the FTC Act. These proceedings are, of course, conducted strictly in accordance with the framework for adjudicatory decisionmaking later prescribed by Congress in the Administrative Procedure Act. The FTC Act and APA alike ensure that all decisions in an adjudication are made by an administrative law judge, the Commission itself, or a Federal court in an enforcement or review action. Presidential involvement in any aspect of adjudicatory decisionmaking would be fundamentally inconsistent with this statutory scheme. Yet if the Justice Department's position were adopted, a President's decision to deny access to information necessary to a proceeding would amount to just such involvement.

Such Presidential involvement in an adjudication is the more problematic because it may infringe upon the rights of private parties. The Commission's discovery rules reinforce and amplify a respondent's right under the APA to exercise the agency's subpoena authority in aid of its defense. See 5 U.S.C. 555(d). If, however, Section 8 were the exclusive means for access to Executive Branch information, a respondent would be able to obtain potentially exculpatory information only by grace of an exercise of Presidential discretion, the refusal of which would evidently be a discretionary act beyond judicial review.

Cf. *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 102 (1948).

In these circumstances, we think that a proper reading of the interrelationship between Sections 8 and 9 must harmonize the competing considerations, so that Congress' intent be fully preserved, that is with Presidential prerogative and adjudicatory independence alike maintained. This end may be achieved, we believe, if Section 8 is understood as a *prerequisite* to the potential use of Section 9. In this way the President will be afforded the opportunity initially to determine the extent to which requested documents will be made available. Should he decline to direct the furnishing of certain information or decline to involve himself in deciding one way or the other whether the requested material should be furnished, the Commission may thereafter determine, in its adjudicatory capacity, whether to issue a subpoena to the particular agency to obtain the information.

We emphasize that such a subpoena will be issued only in the most compelling circumstances. The applicable rule requires that a subpoena to another governmental agency not be issued unless the motion for issuance of the subpoena makes not only the showing required for any use of discovery but also "a specific showing that the information or material sought cannot reasonably be obtained by other means." Rules of Practice Section 3.36(b). If a party requests information of another government agency, the administrative law judge shall carefully consider the relevance of the requested information and its availability through other means. If, after consideration of these and other factors properly within his discretion, see Rules of Practice Section 3.31(c), the law judge believes that the request should be sent pursuant to Section 8, he shall certify the matter to the Commission. In the event that material requested by the Commission under Section 8 is not made available, and if a party thereupon moves for issuance of a subpoena, the law judge may issue such subpoena if the requirements of the rule are met.

II.

We next consider whether Section 9 can be read to authorize subpoenas to the agencies served in this matter. With the exception of the Congressional Research Service, we decide that it can. Section 9 authorizes the Commission to issue subpoenas to "persons, partnerships or corporations." Thus, service on an agency head brings such subpoenas within the scope of the statute. See, *e.g.*, *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir.), *cert. denied*, 375 U.S. 896 (1963) (Secretary of

the Air Force served with subpoena under Federal Rule of Civil Procedure 45) and *Boeing Airplane Co.* v. *Coggeshall*, 280 F.2d 654 (D.C. Cir. 1960) (Chairman of the Renegotiation Board served).

Although agencies are not, and could never be, proper subjects of FTC investigations, it is settled that that is not a prerequisite to issuance of a subpoena. See *FTC* v. *Cockrell*, 431 F. Supp. 561 (D.D.C. 1977). Further, we can see no reason why a distinction should be drawn between agencies and any other third party holding relevant evidence for purposes of subpoenas.[3] Accordingly, we agree with complaint counsel and respondents that Section 9 authorizes the subpoenas issued here, with the exception of the subpoena to the Congressional Research Service (CRS).

III.

Our interlocutory order In the Matter of Grand Union, Docket No. 9121, issued today, sets out our conclusion that the subpoena issued to a congressional committee must be quashed. The reasoning provided there applies equally to the subpoena issued to the CRS, a dependent branch or arm of Congress. In transforming the Legislative Reference Service into the CRS in 1970, Congress specified that CRS' duties were primarily to assist Congress and its committees in the "analysis, appraisal, and evaluation of legislative proposals." 2 U.S.C. 166(d). The legislative history of the statute further reflects the view that Congress envisioned a close relationship between itself and CRS, in which CRS would play a supporting role for Congress' legislative function. The House Report states: "These analyses and appraisals [supplied by CRS] will be directed toward assisting committees in determining the advisability of enacting legislative proposals, of estimating the probable results of such proposals and alternatives thereto, and of evaluating alternative methods for accomplishing the results sought." H.R. Rep. No. 91–1215, 91st Cong., 2d Sess. (1970), *reprinted in* 1970 U.S. Code Cong. & Ad. News 4417, 4434.

The Fourth Circuit has noted that CRS performs a legislative function, even though the Library of Congress, of which CRS is a separate department, may have other nonlegislative functions. *Eltra* v. *Ringer*, 579 F.2d 294, 301 (4th Cir. 1978). See also *Kissinger* v.

[3] We think that the principle stated by the Supreme Court in *United States* v. *Nixon*, 418 U.S. 638, 709 (1974), where it held that the President was subject to a third party judicial subpoena, is as pertinent in this context as well:

> The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the Rules of Evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Reporter's Committee for Freedom of the Press, 48 U.S.L.W. 4223, 4225 (March 3, 1978) (Lower court holding that Library of Congress not an "agency" for purposes of the Freedom of Information Act not disturbed by Supreme Court).

Because of its essentially legislative function, documents requested by the Commission's subpoena would most likely be those produced by CRS on request of Congress and in aid of its legislative role. There can be little argument that documents produced to aid Congress in making decisions regarding proposed or anticipated legislation are an integral part of Congress' lawmaking function, or that they would reveal motives behind individual legislators' votes. Therefore, we agree with CRS and decide that these documents are privileged under the doctrine of separation of powers and the speech or debate clause, and unobtainable by Commission subpoena.[4]

Accordingly, *it is ordered*, That the subpoena issued to the Congressional Research Service is hereby quashed.

It is further ordered, That the subpoenas issued to the thirteen Executive Branch agencies and to the General Accounting Office are hereby quashed. The matter is remanded to the law judge with instructions to treat the parties' requests for subpoenas as motions that the information be requested pursuant to Section 8. The law judge shall consider these motions in accordance with this order. This consideration shall take into account the arguments raised by the thirteen Executive Branch agencies and the General Accounting Office in their papers filed with the Commission, particularly as they concern the burden of compliance, the relevance of the documents sought, and claims of privilege such as national security privilege. The law judge may order additional briefing if he deems it necessary. Should the law judge conclude that certain information ought to be requested under Section 8, he shall certify his recommendation in that regard to the Commission.

Finally, we note that respondent oil companies have again taken the opportunity to urge that this matter be withdrawn from adjudication to permit the Commission to reassess the merits of the current complaint.[5] Complaint counsel observe in reply that the administrative

[4] The General Accounting Office also holds a position in the government different from that of the other subpoena recipients. It performs its duties of *inter alia*, auditing all executive branch agencies and reporting specially to Congress as an "agency of the Congress." 31 U.S.C. 65.

In spite of this apparent role as a supporting arm of Congress and with a duty to inform legislators concerning government expenditures, GAO, unlike CRS, has not asserted any form of congressional immunity. Instead, it has aligned itself with the Executive Branch agencies in submitting a joint brief opposing the subpoenas on Section 8 grounds only.

For purposes of the subpoena issued here, then, we conclude that GAO should be categorized with the Executive agencies that received subpoenas.

[5] Certain respondents have also moved for placement on the public record of "all written and oral communications received or generated by the Commission which relate to the Commission's February 28 Order." We have,

law judge, in ordering respondents to make discovery in this matter, has also established an October 31, 1980 deadline by which complaint counsel are to re-assess and narrow the issues in the adjudication, based upon the results of their discovery. It would appear that any reassessment of this matter by the Commission, whether it take the form of withdrawal from adjudication or modification of the complaint upon motion by a party, would be best undertaken shortly after complaint counsel's review of respondents' documents and October filing of the Statement of Issues required by paragraph 2(a) of Judge Timony's Order Re Pretrial Procedures, dated March 12, 1980. Therefore, the motions to withdraw from adjudication are denied.

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simultaneously with issuance of this order, as a matter of discretion, placed on the public record, memoranda from personnel in the Commission's Office of General Counsel that recite conversations—none in any respect violative of the Commission's Rules of Practice or otherwise improper—in connection with this matter. Internal communications between the Commission and its advisory personnel are, of course, not a proper subject for disclosure to either side in an adjudication.

IN THE MATTER OF

THE GRAND UNION COMPANY, ET AL.

Docket 9121. Interlocutory Order, June 30, 1980

QUASHING SUBPOENA ISSUED TO THE JOINT ECONOMIC COMMITTEE OF CONGRESS

On January 20, 1980, Chief Administrative Law Judge Ernest G. Barnes acting on respondent's request issued a subpoena *duces tecum* to Dr. John Albertine, staff director of the Joint Economic Committee of Congress. The subpoena sought data in the Committee's possession that had been used by its consultant, Dr. Bruce Marion, in writing his report for the Committee entitled *The Profit and Price Performance of Leading Food Chains, 1970–1974.* Respondents sought the data for the purpose of cross-examining Dr. Marion, who has been designated by complaint counsel as one of its trial witnesses in the field of economics. On January 22, 1980, the Commission, acting pursuant to its Rule of Practice 3.23, stayed the subpoena to consider whether the Commission has jurisdiction to subpoena a congressional committee.

In Section 9 of the FTC Act, Congress granted the Commission broad subpoena power to compel testimony of witnesses and production of documents. We do not believe, however, that in drafting that section Congress intended to make its own documents subject to Commission process.

The "Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed ***." *Humphrey's Executor* v. *United States*, 295 U.S. 602, 628 (1935). It would be anomalous indeed if Congress were to compromise its independence under the constitutional separation of powers by subjecting itself, its committees or its staff to any form of compulsion by the agency it created to carry out its will or by the courts in enforcement of agency process. We will not infer such an intention absent a clear, affirmative indication in Section 9's language or legislative history that Congress extended the Commission's subpoena authority to its own legislative activities. We find no such indication.

The absence of such an indication is hardly surprising. For in conferring subpoena power on the Commission, Congress legislated in light of the immunities assured it by the speech or debate clause in Article 1, Section 6, Clause 1 of the Constitution.[1] "In our system, 'the

[1] The Senators and Representatives . . . shall . . . be privileged from arrest during their attendance at the session of their respective Houses . . .; and for any speech or debate in either House, they shall not be questioned in any other place.

clause serves the additional function of reinforcing the separation of powers so deliberately established by the founders.'" *Eastland* v. *United States Serviceman's Fund*, 421 U.S. 491, 502 (1975).

The clause has been held to protect various facets of the legislative process including a report issued by a congressional subcommittee, *Doe* v. *McMillan*, 412 U.S. 306 (1973), and issuance of an investigatory subpoena by a subcommittee, *Eastland* v. *United States Serviceman's Fund, supra*. The Supreme Court has also held that it prevents Grand Jury questioning of a Senator's aide (or the Senator himself) concerning legislative acts of the Senator's subcommittee, *Gravel* v. *United States*, 408 U.S. 606 (1972).

These precedents also indicate that a Commission subpoena to Congress would be unenforceable by a court. See, *e.g.*, *Eastland*, *supra* at 502 ("the purpose of the [speech or debate] clause is to insure that the legislative function the Constitution allocates to Congress may be performed independently,"); *Gravel*, *supra* at 617 ("central role" of the speech or debate clause is the prevention of "intimidation of legislators by the Executive and accountability before a possibly hostile judiciary").

The congressional immunity defined by these precedents applies to the documents sought by Grand Union, materials used in preparation of a committee report and obtained by legislative subpoena. The Joint Economic Committee's investigation was patently a proper subject of congressional interest, and the report itself is therefore an integral part of the legislative process. It is in any event beyond the scope of our authority under Section 9.[2]

Accordingly, *it is ordered*, That the subpoena issued by Judge Barnes to the Joint Economic Committee of Congress on January 20, 1980, is hereby quashed.

[2] In deciding the reach of our subpoena authority under Section 9, we are not authorized to determine whether the information sought relates to a legitimate legislative function. Our point is rather that Congress never intended to authorize us to make such an inquiry because it legislated on the assumption that the doctrine of separation of powers and the speech or debate clause foreclose the issuance of Commission subpoenas to the Congress.

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