

Complaint

IN THE MATTER OF

BILL CROUCH FOREIGN, INC., d/b/a BILL CROUCH
IMPORTS, INC. (formerly MAZDA OF BOULDER, INC.)

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

Docket C-3030. Complaint, July 31, 1980—Decision, July 31, 1980

This consent order requires, among other things, a Boulder, Colo. retail dealer for new Honda automobiles to cease from charging customers more than its actual cost for transporting vehicles to its showroom; misrepresenting that optional equipment is installed by the manufacturer or required by law; and failing to disclose to customers any additional charges that would be included in the purchase price of the automobile. The order further requires the firm to make refunds, in a prescribed manner, to eligible Honda Accord customers who had paid more than \$30.00 above the actual cost for freight; and retain specified records for a period of two years.

Appearances

For the Commission: *John H. Evans* and *Allen R. Franck*

For the respondent: *Miles C. Cortez, Jr.* and *Debra R. Lappin*,
Welborn, Dufford, Cook & Brown, Denver, Colo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*, as amended), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Bill Crouch Foreign, Inc., dba Bill Crouch Imports, Inc. (formerly Mazda of Boulder, Inc.), a corporation, hereinafter sometimes referred to as "respondent," has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Colorado with its principal office and principal place of business located at 2555 Thirtieth St., Boulder, Colorado.

PAR. 2. Respondent is now, and for some time has been, engaged in the advertising, offering for sale, and sale of new automobiles, and the parts and equipment thereof, to retail customers. Respondent is an authorized dealer for the Honda Automobile Company.

PAR. 3. Respondent's volume of business is substantial and its acts and practices, as set forth herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

COUNT I

The allegations contained in Paragraphs One through Three are incorporated by reference herein as if fully set forth verbatim.

PAR. 4. In the course of offering for sale and selling new Honda automobiles to retail customers, respondent regularly has listed on purchase orders and bills of sale, and has collected from customers as part of the total purchase price, a charge for "Freight." This terminology represents that the charge is intended to reimburse the respondent for its actual costs or outlays to third parties for the transportation of new automobiles to the dealership from the point where they are delivered by the manufacturer.

PAR. 5. In truth and in fact, in many instances the charges referred to in Paragraph Four, which respondent has listed and collected from customers for "Freight," have exceeded respondent's actual outlays to third parties for the transportation of new automobiles.

PAR. 6. The practices described hereinabove have had the capacity and tendency to mislead and deceive new automobile consumers and have induced customers to make payments which they might not have made but for respondent's aforesaid representations.

PAR. 7. Respondent's conduct as alleged in Count I was and is to the detriment and injury of the purchasing public and constituted, and now constitutes, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. Furthermore, respondent's retention of funds collected from customers by means of such conduct constituted, and now constitutes, an unfair or deceptive act or practice in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

The allegations contained in Paragraphs One through Seven are incorporated by reference herein as if fully set forth verbatim.

PAR. 8. In the further course of selling new Honda automobiles to retail customers, respondent or respondent's agents regularly have represented to customers that the application or installation of

several dealer-installed items, including, but not limited to, "undercoating" and "Polyglycoat" (a chemical paint polish and sealant), is recommended, required, or performed by the automobile manufacturer or that the respondent has no control over the installation or application of these items.

PAR. 9. In truth and in fact, the items referred to in Paragraph Eight are installed or applied at the direction of respondent to new automobiles which come into respondent's possession. Furthermore, the manufacturer of these new automobiles neither recommends, requires, nor performs the installation or application of these items.

PAR. 10. Respondent's representations as set forth in Paragraph Eight were and are false and misleading. Relying upon such representations, customers have been misled into accepting and paying for items that they might otherwise not have purchased.

PAR. 11. Respondent's conduct as alleged in Count II was and is to the detriment and injury of the purchasing public, and constituted, and now constitutes, unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having hereafter 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, 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 Bill Crouch Foreign, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2555 Thirtieth St., in the City of Boulder and State of Colorado.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

For purposes of this Order:

1. "New automobile" shall mean any passenger car or station wagon the equitable or legal title to which has never been transferred by a manufacturer, distributor, or dealer to an ultimate purchaser.
2. "Optional equipment" shall mean, with respect to any new automobile, any equipment or features not included within the manufacturer's suggested retail price, as defined in 15 U.S.C. 1232(f)(1).

I

It is ordered. That respondent Bill Crouch Foreign, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with any sale, offering for sale, advertising or distribution of new automobiles, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Listing on stickers affixed to any new automobile, or on purchase orders, bills of sale, or sales contracts, and collecting from consumers, any freight, transportation or destination charges that exceed respondent's cost as determined herein for the shipment of the new automobile from any port-of-entry to respondent's showrooms. For purposes of this Order, respondent's cost shall be deemed to be the amount shown on the most recent invoice received by respondent covering the shipment of comparable automobiles from a

comparable port-of-entry to respondent's showrooms plus five dollars (\$5.00).

2. Affirmatively representing that any optional equipment is recommended, required, or installed by the manufacturer or is required by law, unless such is in fact the case; *provided, however*, that this requirement shall not be construed to impose a duty on respondent or its agents to affirmatively disclose information regarding such optional equipment, including but not limited to the nature or source of or requirement for such equipment, except in response to a specific consumer inquiry.

3. Failing to disclose clearly and conspicuously, prior to signing of a completed purchase order, if the total purchase price exceeds the manufacturer's suggested retail price, the precise amount of any handling, service, or similar charges which will be included in the purchase price of a new automobile.

II

It is further ordered, That:

1. The respondent shall submit to the Commission, within fifteen (15) days after the date this Order is served on respondent's corporate president (hereinafter "date of service"), a notarized affidavit, executed by the president of respondent to the effect that the respondent has made or has caused to be made a good faith search of documents that pertain to purchasers of new Honda Accord automobiles from the respondent and that the respondent, to the best of its knowledge, has previously or simultaneously with said affidavit submitted to the Commission the names of all purchasers of such automobiles covered by this Order.

2. The respondent shall submit to the Commission, within sixty (60) days after the date of service, all necessary documents, including but not limited to, purchase orders, bills of sale, buyer's orders, freight invoices and billings, internal worksheets, and invoices and all other materials necessary for the Commission to determine the amount paid by the respondent to third parties for freight. Based upon the information supplied to the Commission by the respondent pursuant to this paragraph and Paragraph II(1), the Commission or its designee shall deliver to respondent a list of all purchasers of new Honda Accord automobiles who are "eligible class members," setting forth the amount of refund due from the respondent to each such class member, derived in accordance with Part II of this Order, which list shall be served on the respondent.

3. On the ninetieth (90th) day after service on the respondent of

the list of eligible class members as provided in Paragraph II(2) above, the respondent shall make refunds to eligible class members in the following manner:

(a) except as provided in subparagraph (b) below, submit to the Commission or its designee a refund check, undated, drawn on the account of respondent made payable to each eligible class member or his or her legal representative in the amount provided by the Commission;

(b) in the event a refund check for any eligible class member is not so submitted, submit to the Commission or its designee a list of "disputed eligible class members" stating the reasons why the purchaser whose name is shown on the list prepared by the Commission is not an eligible class member or is not entitled to the refund in the amount specified by the Commission, as the case may be. If necessary, counsel for the Commission and counsel for the respondent shall thereafter confer and determine if and/or in what amount a refund is due and owing to any such disputed eligible class member.

4. Thereafter, the Commission or its designee shall send to each eligible class member, by registered mail, with return receipt requested, and with copy to respondent, a letter in the language, manner, and form shown in Appendix A, with an enclosed stamped envelope showing the address of the Commission or its designee. Upon receipt of the executed Receipt and Waiver form from an eligible class member, as provided in Appendix A, the Commission or its designee shall thereafter enter a current date on the appropriate refund check submitted to the Commission by respondent in accordance with Paragraph II(3) above and forward the check to such eligible class member.

5. On or before the three-hundredth (300th) day after date of service, the Commission or its designee shall serve on respondent (a) a list of names, addresses and received refunds in accordance with the provisions of this Part II, and (b) a list of names, addresses and refund amounts of those eligible class members whose initial mailing in the form of Appendix A or refund check was returned by the United States Postal Service. The Federal Trade Commission shall have one year from the date of service of this list to locate such eligible class members. At such time as any class member is located, the Federal Trade Commission shall follow the procedure authorized in Paragraph II(4) above with respect to the initial mailing of a letter in the form of Appendix A and subsequent mailing, if appropriate, of a refund check to such eligible class member.

6. The respondent shall, on the three-hundred and thirtieth (330th) day after the date of service, file with the Commission a report in writing setting forth the manner and form in which it has complied with Part II of this Order.

7. At the end of the one-year period described in Paragraph II(5) above, the Commission shall return to the respondent all refund checks payable to eligible class members whom the Commission is unable to locate and respondent shall thereupon be relieved of any further obligation to make payments to such eligible class members.

8. Except as modified by Paragraph II(9) below, "eligible class members" means those persons who purchased any new Honda Accord automobile at the respondent's showrooms between July 15, 1976 and the date of service of this Order, and who paid any amount for "freight," or charge of similar import, in excess of respondent's actual outlays to third parties to transport the automobile from the port-of-entry to respondent's showrooms, if such actual outlays are known, or, if unknown, in excess of respondent's outlays as computed pursuant to subparagraph 10(b) below.

9. If at the time of sale the charge made by the respondent for "freight" to a person who purchased a new Honda Accord automobile between July 15, 1976 and the date of service of this Order was a "good faith estimate" of the respondent's actual freight outlays to third parties, such person shall not be an "eligible class member" within the meaning of this Consent Order. Any charge for freight made by the respondent shall be deemed a "good faith estimate" by the respondent if such charge cannot be shown to have exceeded the respondent's subsequent actual outlays, or, if unknown, its estimated outlays, as determined under subparagraph 10(b) below, to third parties for transportation of the automobile from the port-of-entry to the respondent's showrooms by more than thirty dollars (\$30.00).

10. The respondent shall make refund payments to each eligible class member as follows:

(a) each eligible class member shall receive as a refund one-half (1/2) of that amount by which the charge paid by the class member to the respondent for "freight" exceeded the respondent's actual outlays to third parties for transportation of the automobile purchased by the class member from the port-of-entry to respondent's showrooms.

(b) if such actual outlay is unknown, each eligible class member shall receive as a refund one-half (1/2) of that amount by which the charge paid by the class member to the respondent for "freight" exceeded the average sum paid by the respondent to third parties to

transport automobiles comparable to that purchased by the class member from comparable ports-of-entry to respondent's showrooms during the three (3) calendar months preceding the month of sale to the class member.

The amount of each refund under this section shall be determined by the Commission on the basis of the information supplied by the respondent under Paragraph II(2) above.

11. The respondent shall maintain records and documents for two (2) years after the filing of the report referred to in Paragraph 6 of Part II of this Order, which demonstrate that the respondent has complied with Part II of this order.

12. If any duty required to be performed on a certain day under Part II of this Order falls upon a non-business day, the respondent herein shall perform such duty on the next following business day.

III

It is further ordered, That:

1. Respondent shall notify the Commission at least thirty (30) days prior to any proposed changes in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other changes in the corporation which may affect compliance obligations arising out of the Order.

2. Respondent shall forthwith deliver a copy of this Order to each of its operating divisions and to each of its present and future officers; and forthwith deliver a summary of this Order, stating that the respondent is subject to an order of the Commission and enumerating the requirements of Part I of this order, to each employee or agent who is engaged in the sale of new automobiles, or who, directly or indirectly, has any responsibility relating in any way to the pricing of new automobiles, or who is engaged in any aspect of the preparation, creation, or placing of advertising; and the respondent shall secure a signed statement acknowledging receipt of said order or summary from each such person.

3. Respondent shall retain each of its sales contracts and freight invoices for new automobiles for two (2) years after the date of the sales transaction, and shall make such records available for inspection and copying upon reasonable request by the Commission or any of its duly authorized representatives.

4. Respondent shall, at reasonable times, afford the Commission, or any of its duly authorized representatives, access to such records,

memoranda, and other documents relating to the provisions contained herein as may be appropriate to enable the Commission to determine respondent's compliance with the Order.

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

IN THE MATTER OF
BENEFICIAL CORPORATION, ET AL.

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

Docket C-3032. Complaint, August 5, 1980—Decision, August 5, 1980

This consent order requires, among other things, a Wilmington, Del. firm and Beneficial Management Corp. of Morristown, N.J. to cease, in connection with the extension of consumer credit and purchase of consumer contracts, from misrepresenting the effect of state laws and consumer's right to assert against contract holder any claim or defense arising from the contract. The order further bars respondents from using past notice to defeat any valid consumer claim and requires them to notify all active account consumers who received the notice that their claims and defenses have not been waived.

Appearances

For the Commission: *Ivan L. Orton* and *Randall H. Brook*.

For the respondents: *John P. Howland*, for Beneficial Management Corporation, Morristown, N.J.

COMPLAINT

The Federal Trade Commission, having reason to believe that Beneficial Corporation and Beneficial Management Corporation have violated Section 5 of the Federal Trade Commission Act, as amended, and that a proceeding is in the public interest, issues this complaint.

PARAGRAPH 1. Respondent Beneficial Corporation ("Beneficial") is a Delaware corporation with its office and principal place of business at 1300 Market St., Wilmington, Delaware.

Respondent Beneficial Management Corporation ("Beneficial Management") is a Delaware corporation with its office and principal place of business at 200 South St., Morristown, New Jersey.

Beneficial directs and controls the Beneficial Finance System comprised of wholly owned subsidiaries including local loan offices and Beneficial Management. Beneficial Management provides centralized accounting, auditing and legal services to these consumer finance subsidiaries.

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

PAR. 2. Beneficial through Beneficial Finance System is engaged in the extension of consumer credit to the general public. It purchases

installment contracts and other consumer credit agreements from retailers in addition to making direct consumer loans.

PAR. 3. In connection with the extension of consumer credit and purchase of contracts, Beneficial and Beneficial Management has supervised the dissemination of legal forms and other printed materials throughout the country. This is done through the United States mails. Beneficial and Beneficial Management maintain a substantial course of trade in extending consumer credit and purchasing retail contracts in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course of purchasing consumer credit contracts, the Beneficial Finance System becomes a holder of these consumer credit contracts as "holder" is used in the FTC Trade Regulation Rule, Preservation of Consumer Claims and Defenses, 16 C.F.R. 433 (the "Holder Rule").

PAR. 5. These contracts usually, if not always, contain the following notice as required by the Holder Rule.

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

This notice is required by the FTC to preserve the consumer's legally sufficient claims and defenses so that they may be asserted against a creditor where a seller fails to keep its side of the bargain.

PAR. 6. Upon purchasing these contracts, the Beneficial Finance System sends "Notification of Purchase" forms to the consumers whose contracts were purchased. These notices contain the following language or language to the following effect:

THE FOLLOWING REFERENCES MAY APPLY TO THE STATE(S) INDICATED

ARIZONA—YOU HAVE NINETY (90) DAYS FROM THE DATE OF RECEIPT OF THE GOODS OR RENDERING OF SERVICES WITHIN WHICH TO NOTIFY US IN WRITING OF ANY COMPLAINTS, CLAIMS OR DEFENSES WHICH YOU MAY HAVE AGAINST THE SELLER. SUCH WRITTEN NOTICE MUST BE SENT BY CERTIFIED MAIL TO THE SELLER AND YOU SHOULD FORWARD A COPY TO US. IF SUCH WRITTEN NOTICE IS NOT RECEIVED WITHIN THE NINETY (90) DAY PERIOD, THE ASSIGNEE WILL HAVE THE RIGHT TO ENFORCE THE CONTRACT FREE OF ANY CLAIMS OR DEFENSE THE BUYER OR LESSEE MAY HAVE AGAINST THE SELLER OR LESSOR WHICH HAS ARISEN BEFORE THE END OF THE NINETY (90) DAY PERIOD.

DELAWARE—WITHIN 15 DAYS OF THE DATE OF MAILING OF THIS NOTICE YOU MUST NOTIFY THIS OFFICE IN WRITING OF ANY FACTS GIVING RISE TO ANY CLAIM OR DEFENSE THAT YOU MAY HAVE AGAINST THE SELLER OR ELSE SUCH CLAIM IS WAIVED.

IDAHO— . . . THREE (3) MONTHS . . .

Decision and Order

96 F.T.C.

INDIANA AND SOUTH DAKOTA— . . . 60 DAYS . . .*IOWA, NORTH CAROLINA, OKLAHOMA AND TENNESSEE*— . . . 30 DAYS . . .*MARYLAND*— . . . NINETY (90) DAYS . . .*PENNSYLVANIA AND WYOMING*— . . . 45 DAYS . . .*TEXAS*— . . . 3 DAYS . . .*WEST VIRGINIA*— . . . 180 DAYS . . .*WISCONSIN*— . . . 12 MONTHS . . .

PAR. 7. The representation that the consumer waives the right to assert claims or defenses if the Beneficial Finance System is not notified is false. Consumers continue to have this right as stated in the contract.

State laws like those referenced by the Beneficial Finance System on the "Notification of Purchase" forms might apply to contracts not governed by the Holder Rule. However, some of the references themselves misrepresent state law. All of the references misrepresent the impact of state law on contracts governed by the Holder Rule.

PAR. 8. The notice has the tendency and capacity to deter consumers from asserting valid claims and defenses against the Beneficial Finance System.

For example, consumers with valid warranty claims against a seller might feel that they had no claim against the Beneficial Finance System and had to continue making payments. This would undermine the purpose of the Holder Rule.

PAR. 9. For the reasons stated above, the acts and practices of Beneficial and Beneficial Management are to the prejudice and injury of the public and constitute false, misleading, deceptive and unfair acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission has initiated an investigation of certain acts and practices of the respondents Beneficial Corporation and Beneficial Management Corporation. The respondents have been furnished with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration. This complaint, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended.

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

The Commission considered the matter and determined that it had reason to believe that the respondents have violated the Federal Trade Commission Act, as amended, and that complaint should issue. It then accepted the executed consent agreement and placed it on the public record for a period of 60 days. Part III of the Order has been modified to follow the complaint allegations. The correction notice required by Part III must be sent only to accounts in the 15 states whose laws were misrepresented by Beneficial's original notice. Now, in conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission issues its complaint, makes the following jurisdictional findings and enters the following Order:

1. Respondent Beneficial Corporation is a Delaware corporation. Its office and principal place of business is located at 1300 Market St., Wilmington, Delaware.

Respondent Beneficial Management Corporation is a Delaware corporation. Its office and principal place of business is located at 200 South St., Morristown, New Jersey.

Respondent Beneficial Corporation directs and controls the Beneficial Finance System comprised of wholly-owned subsidiaries including local loan offices and Beneficial Management.

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

3. The proceeding is in the public interest.

ORDER

This order applies to respondents Beneficial Corporation ("Beneficial") and Beneficial Management Corporation ("Beneficial Management"), their successors, assigns, officers, agents and employees, whether acting directly or through any corporation, subsidiary, division or other device, including any part of the Beneficial Finance System.

I.

It is ordered, That Beneficial and Beneficial Management cease

and desist from representing, directly or by implication, that a consumer's right to assert claims or defenses against a holder of the consumer's contract:

A. is contingent upon the consumer giving notice of the claim or defense to the holder within a stated time after the holder purchases the contract;

B. is in any other way limited by state law unless this is true.

II.

It is further ordered, That Beneficial not assert any defect in a consumer's assertion of a claim or defense against the Beneficial Finance System (or any part of it) when that defect is based on the consumer's failure to give prior notice to the Beneficial Finance System (or any part of it).

III.

It is further ordered, That Beneficial Management, within 30 days after service of this order, send the following notice to all active installment sales contract accounts in Arizona, Delaware, Idaho, Indiana, Iowa, Maryland, North Carolina, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, West Virginia, Wisconsin and Wyoming:

Dear Customer:

When we purchased your contract, we sent you a notice. This notice said you might not have the right to assert claims or defenses against us unless you notified us within a certain time period.

This statement was not correct.

You have always had the right to assert claims or defenses against us that you could assert against the seller. You have this right even if you have not previously told us of your claim or defense.

Beneficial Finance System
Affiliated Companies

IV.

It is further ordered, That respondents maintain complete business records relative to the manner and form of their compliance with this Order. Respondents shall retain each record for at least three years. Upon reasonable notice, respondents shall make any and all

the records available for inspection and photocopying by authorized representatives of the Federal Trade Commission.

V.

It is further ordered, That Beneficial forthwith distribute a copy of this Order to each office of its respective domestic consumer finance subsidiaries.

VI.

It is further ordered, That respondents notify the Commission at least 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 the corporation which may affect compliance obligations arising out of the Order.

VII.

It is further ordered, That respondents shall, within 60 days after service of this Order, file with the Commission a report setting forth in detail the manner and form in which they have complied with this Order.

IN THE MATTER OF
HERBERT R. GIBSON, SR., ET AL.

MODIFYING ORDER AND OPINION IN REGARD TO ALLEGED
VIOLATION OF SEC. 2 OF THE CLAYTON ACT AND THE FEDERAL
TRADE COMMISSION ACT

Docket 9016. Final Order, April 30, 1980—Modifying Order, Aug. 8, 1980

This order, granting in part, and denying in part, respondents' petitions for reconsideration, modifies the order issued on April 30, 1980, 45 FR 38352, 95 F.T.C. 564, by inserting the word "while" before the word "acting," in paragraph 1, line 2 of Section II; and by inserting a comma and the phrase "while acting as a buyer or acting for in behalf of or subject to the direct or indirect control of a buyer," after the word "respondent[s]," in paragraph 2, line 3 of Section II.

ORDER GRANTING IN PART, AND DENYING IN PART, RESPONDENTS'
PETITIONS FOR RECONSIDERATION

An opinion and final order in this matter having been issued on April 30, 1980; respondents having been served by mail with the said opinion and order on May 20, 1980 and May 21, 1980; respondents having petitioned for reconsideration of said opinion and order on June 12, 1980; and the Commission, for the reasons stated in the accompanying opinion, having determined to grant in part, and deny in part, respondents' petitions for reconsideration;

It is ordered, That the final order to cease and desist be, and hereby is, modified as follows:

In paragraph 1 of Section II of the Order, line 2, insert the word "while" in front of the word "acting"; and

In paragraph 2 of Section II of the Order, line 3, after the word "respondent[s]," insert a comma and the phrase "while acting as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer,".

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner*:

Respondents have filed two petitions for reconsideration of our recent opinion and order. Each petition asserts: (1) that the language and coverage of Section II of the Final Order should be changed; (2) that application of the opinion of the Court of Appeals in *Grolier, Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980), requires disqualification of the administrative law judge ("ALJ"), Theodor P. von Brand, and hence

dismissal or remand of the case; and (3) that certain actions taken by the Commission during periods of allegedly lapsed appropriations, including actions taken in the investigation and adjudication of this case, violated the Antideficiency Act, 31 U.S.C. 665(a) (1976), and hence require dismissal or remand of the case.

Section 3.55 of the Commission's Rules of Practice limits the scope of a petition for reconsideration to "new questions raised by the decision or final order and upon which the petitioner had no opportunity to argue before the Commission." While certain of respondents' objections are appropriate for disposition by reconsideration, other contentions are not new or are untimely. We consider each of the objections raised *seriatim*.

A.

The petition filed by Herbert R. Gibson, Jr., Gerald P. Gibson and others objects to the inclusion of any respondent other than Herbert R. Gibson, Sr. in the provisions of Section II of the Final Order, which essentially enjoins respondents from violating Section 2(c) of the Clayton Act, 15 U.S.C. 13(c) (1976), as amended. This issue of order coverage is not new and these respondents had ample opportunity, which they exercised, to address this question during the course of trial and on appeal to the Commission. See, *e.g.*, Answering Brief of Herbert R. Gibson, Jr., filed May 29, 1979, at 9. The instant request is, therefore, inappropriate, *cf. Interstate Builders, Inc.*, 72 F.T.C. 1009, 1010 (1967); *Lester S. Cotherman*, 77 F.T.C. 1621, 1622 (1970), and is denied.

The petition filed by Herbert R. Gibson, Sr. and Belva Gibson notes that the language of paragraphs 1 and 2 of Section II of the Final Order are at variance, in that only the former includes the phrase "as a buyer or acting for or in behalf of or subject to the direct or indirect control of a buyer." The petition requests that the latter paragraph be altered to conform to the former. As the petitioners surmise, it was the Commission's intention that this phrase appear in both paragraphs, and an appropriate order correcting this typographical omission is annexed. To sum up, all Gibson respondents, except dissolved corporations, are bound by Section II of the Final Order not to receive or induce payments which would violate Section 2(c) of the Clayton Act. This proscription applies irrespective of whether the respondent acts as a buyer, or on behalf of or subject to the control of a buyer.

B.

All respondents petition for reconsideration of the Commission's opinion and order in light of *Grolier, Inc. v. FTC*, 615 F.2d 1215 (9th Cir. 1980). In that case, the Commission issued a complaint charging Grolier with violating Section 5 of the Federal Trade Commission Act. During the course of the hearings, Administrative Law Judge von Brand advised the parties that he had previously served as an attorney-advisor to former Commissioner Everette MacIntyre from 1963 to January 1971, during which time the Commission was investigating Grolier and its subsidiaries. "Upon learning of ALJ von Brand's advisory responsibility during the eight-year period, Grolier requested that the judge disqualify himself from further participation in the proceedings." 615 F.2d at 1217. Judge von Brand declined to recuse himself, and the Commission affirmed Judge von Brand's decision in an interlocutory order, 87 F.T.C. 179, 179-81 (1976), and again in its final order and opinion, 91 F.T.C. 315, 485-86 (1978). On appeal, the Ninth Circuit concluded that the Commission had incorrectly interpreted Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 554(d) (1976), in ruling on Grolier's disqualification challenge, and remanded the case to the Commission.

Although respondents in this case have not submitted a motion and affidavits as required by Rules of Practice Section 3.42(g)(2),¹ we understand the facts to be essentially as follows. Beginning in 1967, the Commission and its staff investigated respondents; the investigation culminated in a complaint issued in 1975. Judge von Brand presided over the proceedings from the issuance of the complaint, through trial (which began on December 19, 1977), and until his issuance of the initial decision in early 1979.

Judge von Brand had previously served with the Commission as an attorney-advisor to Commissioner MacIntyre from 1963 until 1971. During Judge von Brand's tenure as attorney-advisor to Commissioner MacIntyre, the Commissioners themselves, including Commissioner MacIntyre, participated in certain decisions connected

¹ In relevant part, Rules of Practice Section 3.42(g), 16 C.F.R. 3.42(g), provides: "Whenever any party shall deem the Administrative Law Judge for any reason to be disqualified to preside, or to continue to preside, in a particular proceeding, such party may file with the Secretary, a motion addressed to the Administrative Law Judge . . . to be supported by affidavits setting forth the alleged grounds for disqualification." The requirement of affidavits, grounded in 5 U.S.C. 556 (1976), is not an empty formality to be cast aside unilaterally by a party to a Commission proceeding. There are many reasons for such a requirement. An affidavit provides an exact, sworn recitation of facts, collected in one place; a disqualification motion must not be made by a party, nor taken by the Commission, lightly. "Such a charge, unfairly made, not only impugns without warrant the integrity of the government official entrusted with responsibility for deciding a given dispute, but it also unnecessarily tarnishes our beneficent traditions of legal due process." *Marcus v. Director, Office of Wkrs' Comp. Prog.*, 548 F.2d 1044, 1050 (D.C. Cir. 1976) (per curiam). Accordingly, the affidavit requirement serves not only to focus the facts underlying the charge, but to foster an atmosphere of solemnity commensurate with the gravity of the claim. Respondents' failure to submit affidavits is thus an independently sufficient basis to deny their petitions in this respect.

with the investigation of respondents (e.g., the Commission voted on two investigational resolutions and ruled on a motion to quash three subpoenas).

In a pretrial conference on February 23, 1977 (about one year after issuance of the Commission's interlocutory opinion affirming Judge von Brand's participation in *Grolier*, *supra*, and almost ten months before the start of trial in this case), Judge von Brand, apparently acting out of candor and an abundance of caution, disclosed to the parties on the record² the fact of his prior service to Commissioner MacIntyre, and recited his "understanding that none of the respondents * * * would raise an objection to [his] continuing in the case on that ground." (Tr. at 242.) All counsel, including counsel for the instant petitioners, responded unequivocally that there would be no such objection. (*Id.* at 242-43.) The case proceeded through trial, and, consistent with their statements, respondents did not object to Judge von Brand's participation. Neither did respondents object in their appeal papers before the Commission, or at oral argument in July, 1979.

The Ninth Circuit's opinion in *Grolier* was issued on January 24, 1980; respondents did not attempt to present a *Grolier*-type challenge to Judge von Brand in this case before the Commission's decision and order issued on April 30, 1980.

Respondents now urge, for the first time, that the Ninth Circuit's decision in *Grolier* requires the Commission, under the Constitution, the Administrative Procedure Act, and the Commission's Rules of Practice³ either (1) to disqualify Judge von Brand and (a) dismiss the case or (b) vacate its decision and remand for a new trial;⁴ or (2) to grant discovery in the form, *inter alia*, of a deposition from Judge

² The transcript reveals that Judge von Brand disclosed his prior service off the record as well. (Tr. at 242.)

³ The Court of Appeals' decision in *Grolier* involved only an interpretation of Section 5(c) of the Administrative Procedure Act, 5 U.S.C. 554(d) (1976), and did not purport to interpret the Constitution or the Commission's Rules of Practice; accordingly, it offers no basis for relief on those grounds.

Respondents' very general assertion of their right to trial by a "fair and impartial judiciary" is based upon the due process clause of the Fifth Amendment. While we are and must be sensitive to such considerations, neither will we substitute our judgment for that of the federal judiciary or the Congress. Assuming *arguendo* that Judge von Brand possessed some familiarity with the facts of the case gained through his service to Commissioner MacIntyre (notwithstanding that Judge von Brand's tenure as an attorney-advisor ended four years before issuance of the complaint), his presiding over the trial would not constitute a due process violation. "Mere familiarity with the facts of a case gained by an agency in the performance of its statutory role does not * * * disqualify a decisionmaker." *Hortonville Joint School District No. 1 v. Horton Education Ass'n*, 426 U.S. 482, 493 (1976); *accord*, *Withrow v. Larkin*, 421 U.S. 35, 47-59 (1975) (contention that combination of investigative and adjudicative functions violates due process carries difficult burden of persuasion); *Pangburn v. CAB*, 311 F.2d 349, 358 Cir. 1962). Moreover, under the exception contained in the fourth sentence to Section 5(c) of the APA, agency members may participate in investigative and adjudicative decisions in the same case. To hold that Judge von Brand's participation violated the Constitution would thus be to declare that the Administrative Procedure Act is constitutionally deficient. *Cf. Withrow v. Larkin*, *supra*, 421 U.S. at 56 (APA not unconstitutional).

As to the respondents' reference to the Commission's Rules, they cite none, and we are aware of none, that might be relevant.

⁴ Even if fully applicable, *Grolier* at most would require reconsideration by the Commission. The Ninth Circuit's opinion, by its terms, requires neither retrial nor dismissal. 615 F.2d at 1222.

von Brand and access to Commission records. In our view, even apart from estoppel due to respondents' waiver, there is an important element—timeliness—present in *Grolier*, but lacking here, which makes the cases altogether different; indeed, respondents' lack of timeliness bars them from any relief.

"A basic requirement for any disqualification motion is, of course, that it be presented either at the outset of the proceeding or immediately after ascertainment of the circumstances that prompt its filing." *Kroger Co.*, Dkt. 9102 (Order filed June 5, 1980, at 2) (quoting 5 U.S.C. 556(b)). See Rules of Practice Section 3.42(g)(2) (motion to be filed "[w]henver" a party deems ALJ disqualified; also provides for expedited Commission determination). In this respect, the Commission's requirements are consistent with the "general rule governing disqualification, normally applicable to the federal judiciary and the administrative agencies alike," that disqualification claims must be raised "as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist." *Marcus v. Director, Office of Wkrs.' Comp. Prog.*, 548 F.2d 1044, 1051 (D.C. Cir. 1976) (per curiam) (footnotes omitted); accord, *Capitol Transp., Inc. v. United States*, 612 F.2d 1312, 1325 (1st Cir. 1979); *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512, 515-16 (4th Cir. 1974) (collecting cases); *Safeway Stores, Inc. v. FTC*, 366 F.2d 795, 802-03 (9th Cir. 1966), cert. denied, 386 U.S. 932 (1967); *R. A. Holman & Co. v. SEC*, 366 F.2d 446, 454-55 (2d Cir. 1966), cert. denied, 389 U.S. 991 (1967); *Marquette Cement Mfg. Co. v. FTC*, 147 F.2d 589, 592 (7th Cir.), aff'd, 333 U.S. 683 (1945). See also *United States v. L. A. Tucker Truck Lines*, 344 U.S. 33, 38 (1952). The rule of timeliness requires that a party act as soon as possible after the facts have become known. *Satterfield v. Edenton-Chowan Bd. of Ed.*, 530 F.2d 567, 574 (4th Cir. 1975) (citing cases); and inaction may waive a separation-of-functions disqualification claim, *International Paper Co. v. FPC*, 438 F.2d 1349, 1357 (2d Cir.), cert. denied, 404 U.S. 827 (1971); *Democrat Printing Co. v. FPC*, 202 F.2d 298 (D.C. Cir. 1952); see *Satterfield v. Edenton-Chowan Bd. of Ed.*, supra; *Duffield v. Charleston Area Medical Center*, supra. Under Section 3.42(g)(2) of the Commission's Rules of Practice, a party "may" choose to present a disqualification challenge; it need not do so. However, if it chooses to do so, it must do so promptly after the facts supporting the charge are known to it. A disqualification challenge to an ALJ's participation subsequent to the Commission's final decision based on circumstances known to a party before the Commission's final decision is not timely. *Capitol Transp., Inc. v. United States*, supra; *International Paper Co. v. FPC*, supra; *Safeway Stores, Inc. v. FTC*, supra.

The reasons supporting such a rule are manifold. A contrary holding, *inter alia*, would allow a party the possibility of invalidating the proceedings retroactively, unilaterally, and at will, if it feared or received an unfavorable ruling, or merely wished to delay the proceedings; might cause substantial delays, and, if retrial were required, significant unnecessary duplication of effort and expenditure of resources; and might make determinations of disqualification more difficult and less certain because of the passage of time. See generally *Marcus v. Director, Office of Wkrs.' Comp. Prog.*, *supra*, 548 F.2d at 1050-51; *Duffield v. Charleston Areas Medical Center*, *supra*.

Applying these principles to this case, it is clear that the facts are substantially different from those in *Grolier*. In *Grolier*, the respondents in the Commission's adjudicative proceedings raised the issue promptly after Judge von Brand's record announcement of his prior service as attorney-advisor to Commissioner MacIntyre; both the ALJ and the Commission considered the claims promptly, during trial and before the closing of the record. Despite the ALJ's and the Commission's interlocutory rulings, the *Grolier* respondents pressed their claim—as was their right—on appeal of the initial decision to the Commission and on appeal of the Commission's decision to the Ninth Circuit. Moreover, the *Grolier* respondents never agreed not to present their disqualification claims.

In this case, Judge von Brand formally notified the parties on February 23, 1977, of his prior service to Commissioner MacIntyre. It is thus clear that, in the event that respondents did not know of Judge von Brand's service to Commissioner MacIntyre as of the time of Judge von Brand's appointment as an ALJ or as of the time the Commission issued its interlocutory order in *Grolier* in 1976, they did know of it at least nine months before trial began. Respondents agreed to put forward no objection, and, indeed, honored that agreement throughout the administrative trial and appeal of this case. Consistent with the above-cited authorities, which require timeliness in a disqualification application, respondents may not now for the first time raise this issue.

Of course, respondents do not contend that their failure to object—indeed, their agreement not to object—was predicated upon the Commission's 1976 *Grolier* ruling. Rather, they only suggest, in an indirect manner, that their failure to raise the issue at oral argument in July, 1979 was based on their reliance on *Grolier*. Yet, after the Ninth Circuit's decision in *Grolier*, they waited months before presenting any objection. During this time, the Commission issued its final order and opinion. Accordingly, even assuming that

an objection might have been timely after the Ninth Circuit's decision in *Grolier*, it is untimely now.

Finally, we note that respondents have not demonstrated or even asserted that they were prejudiced by any bias or reliance on extra-record materials by Judge von Brand; our review of the record convinces us that Judge von Brand was impartial in every respect, that his decision was thoroughly researched, and that his meticulous findings and conclusions were firmly and exclusively based on the record evidence. Of course, to the extent respondents challenged Judge von Brand's findings, conclusions, and proposed order, we undertook an exhaustive, independent review. In that review, we did not find that issues of demeanor or discretion were especially important in the determination of the case; thus, even if it were to be determined that Judge von Brand was disqualified, our decision of April 30, 1980, would not be void, as respondents have neither demonstrated nor suggested actual prejudice from his presiding, and we perceive none.⁵ See Attorney General's Manual on the Administrative Procedure Act at 73-74 (1974).

For the foregoing reasons, respondents' motion for reconsideration based upon Judge von Brand's participation is denied.

C.

Finally, respondents assert that the Commission took various actions in this adjudication and in the investigation preceding it at times when the Commission was without authority and without appropriated funds, and, consequently, that the Commission violated the Antideficiency Act. Respondents assert that the Commission should either declare the entire adjudicatory proceeding void or remand the proceeding to the Administrative Law Judge to allow discovery by respondents as to the Commission acts performed during periods of lapsed appropriations.

The Antideficiency Act, 31 U.S.C. 655(a) (1976), prohibits any government officer or employee, unless expressly authorized by statute, from incurring any obligation on the part of the United States to pay money in advance of appropriations for that purpose.

⁵ Ironically enough, at another point in this proceeding, Judge von Brand suggested to the parties that it might be necessary or advisable to have another ALJ assigned to this case because of his heavy case load. When asked for his reaction to this possibility, counsel for Herbert R. Gibson, Sr., and Herbert R. Gibson, Jr., told Judge von Brand "We'd like to keep you." Tr. at 276.

Although the Commission's funding did lapse during several of the periods listed by respondents in their petitions for reconsideration,⁶ the legal validity of the Commission's actions is unaffected by the temporary lapse of appropriations for the following reasons.

First, actions by Commission employees completed prior to the expiration of appropriations do not create an unfunded obligation and, therefore, do not result in a violation of the Antideficiency Act.

Second, even if a Commission action on the *Gibson* matter was not completed prior to the expiration of appropriations and, therefore, were to be interpreted as incurring a Commission obligation, such action was ratified by Congress when the Commission's funding was made retroactive either explicitly or implicitly to the start of the period of lapsed appropriations.⁷ As noted in the recent opinion letter of the Attorney General, on which respondents rely, such a ratification has the effect of providing legal authority for agency actions, even where there was none before. Letter from Attorney General Benjamin Civiletti to President Jimmy Carter (April 25, 1980). Thus, even assuming that respondents have standing to challenge the Commission actions,⁸ none of the Commission's activities has been invalidated by the Antideficiency Act.

In this respect, too, therefore, the petitions for reconsideration are denied.

⁶ Contrary to respondents' assertion, the Commission's funding did not lapse during the periods July 1-September 30, 1976, and March 12-March 15, 1980. See Public Laws 94-121 and 96-123, respectively. The former period, in particular, related not to a lapse in funding, but to a change in the United States Government's fiscal year.

⁷ See Public Laws 93-118, 93-124, 93-448, 93-563, 95-431, 96-86, and 96-219.

⁸ Neither the Antideficiency Act itself nor its legislative history or scheme suggests that private persons are to be afforded a remedy under the Act. The language of the statute specifies that a government officer or employee who violates Sections 665(a) or (b) of the Act will be subjected to administrative and/or criminal penalties. 31 U.S.C. 665(i)(1). Moreover, the legislative history clearly indicates that the intended beneficiary of the regulatory scheme was Congress; the statutory scheme was designed to require the careful apportionment by Federal agencies of the funds distributed by Congress and thereby ensure the efficient administration of the government's business.

Complaint

96 F.T.C.

IN THE MATTER OF
CHRYSLER CORPORATION

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

Docket C-3033. Complaint, Aug. 12, 1980—Decision, Aug. 12, 1980

This consent order requires, among other things, a Highland Park, Mich. manufacturer of motor vehicles to cease failing to notify owners of 1976/1977 Aspens and Volares, purchased or driven in specified states and locales, of the availability of replacement and reimbursement programs for premature rusting; remove and replace, without charge, the front fender(s) of vehicles that began to experience premature rusting within 36 months-in-service; and reimburse owners of affected vehicles for costs incurred in attempting to correct the premature rusting problem. The manufacturer is further required to notify dealers, in writing, of the existence of premature rusting; supply them with an adequate supply of replacement parts; and inform them of the firm's obligations under the terms of the order.

Appearances

For the Commission: *Aaron H. Bulloff, Richard H. Gateley, David Montgomery, Noble F. Jones and David V. Plottner.*

For the respondent: *Robert T. Talbot-Stern, Detroit, Mich.*

COMPLAINT

Having reason to believe that Chrysler Corporation, a corporation, has violated Section 5 of the Federal Trade Commission Act, and that a proceeding against it would be in the public interest, the Federal Trade Commission issues this complaint stating its charges. This complaint is issued pursuant to the provisions of and by virtue of the authority granted by the Federal Trade Commission Act.

PARAGRAPH 1. Respondent Chrysler Corporation is a Delaware corporation. Respondent's address is 12000 Lynn Townsend Drive, Highland Park, Michigan.

PAR. 2. Respondent is now, and has been, engaged in the manufacture, advertising, sale, and distribution of motor vehicles.

PAR. 3. Respondent causes motor vehicles to be shipped to purchasers in various states, and therefore maintains, and at all times mentioned in this complaint has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. For the purpose of this complaint, "premature rusting"

shall mean rusting which may perforate the top rear portion of the front fenders of 1976 and 1977 model year Aspens and Volares. Rusting attributable to normal deterioration as a result of age is excluded.

PAR. 5. Aspen and Volare vehicles produced from 1975 through 1977 are subject to premature rusting.

PAR. 6. Notwithstanding its knowledge since 1977 of premature rusting, respondent has failed, and is failing, to disclose to owners of Aspen and Volare vehicles the possibility of premature rusting, and the nature and extent of repairs necessary to correct such rusting. Respondent's failure to disclose this information to owners of vehicles subject to such rusting may cause owners substantial economic harm due to their inability to avoid or prevent premature rust. Such failure to disclose is an unfair or deceptive act or practice.

PAR. 7. In some cases, when owners have complained of premature rusting, respondent has provided replacement fenders free of charge. In other cases, respondent has provided replacement fenders free of charge and has paid labor costs for installing replacement fenders. In most instances, however, owners are not compensated because they are unaware of respondent's actions with respect to providing replacement fenders free of charge or paying labor costs.

PAR. 8. Respondent has failed, and is failing, to disclose to owners of Aspen and Volare vehicles its actions with respect to providing replacement fenders free of charge or paying labor costs. Respondent's failure to disclose such actions to owners of affected vehicles may cause them substantial economic harm by denying them an opportunity to request compensation from respondent. Such failure to disclose is an unfair or deceptive act or practice.

PAR. 9. Respondent's acts and practices, as alleged in this complaint, were and are all to the prejudice and injury of the public and constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter, and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Chrysler Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 12000 Lynn Townsend Drive, in the City of Highland Park, State of Michigan.

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

1. "Motor vehicle(s)" shall mean all 1976 and 1977 model year Aspens and Volares.

2. "Premature rusting" shall mean the presence of holes, blisters or bubbles in exterior paint caused by rust in the top rear portion of the front fender(s) of motor vehicles within two feet of the rear edge of such fender(s).

3. "Dealer(s)" shall mean any person(s), partnership(s), firm(s), or corporation(s) which, pursuant to a sales and service agreement with respondent receives on consignment or purchases motor vehicles from respondent for resale or lease to the public, including

any person(s), partnership(s), firm(s), or corporation(s) owned or operated by respondent.

4. "Owner" shall mean any person, partnership, firm, or corporation having custody and/or possession of a motor vehicle, including those vehicles held for resale.

5. "Remove and replace" shall mean removing any front fender affected by premature rusting and replacing it with a new, one-side galvanized front fender; *provided that* if such replacement fender is not available due to circumstances beyond respondent's control, respondent may substitute a zincrometal front fender. Also included in this term is the labor necessary to hang and paint the replacement front fender and to affix trim and accessory items, including splash shields.

6. "Months-in-service" shall be calculated as beginning on the date on which Chrysler began warranty coverage on the motor vehicle. If the date on which warranty coverage began ("in-service" date) cannot be established by Chrysler, then such date shall be calculated as beginning on:

October 1, 1976, for any 1976 model year motor vehicle;

October 1, 1977, for any 1977 model year motor vehicle.

I

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

A. Failing to send by first-class mail, within sixty (60) days after the date of service of this Order, a copy of the letter attached to this Order as Attachment A, incorporated herein by reference, a form approved by the Federal Trade Commission, and a self-addressed, postage-paid envelope. This material shall be sent in one envelope similar in all material respects to Attachment B of this Order, incorporated herein by reference. The letter, form, and self-addressed, postage-paid envelope shall be mailed to each owner of a motor vehicle registered in any of the following states or localities, and to each owner of a motor vehicle purchased in any of the said

states or localities, even though the vehicle is no longer registered in that state or locality.

All counties within the states of:

Connecticut	New Hampshire
Delaware	New Jersey
Illinois	New York
Indiana	Ohio
Iowa	Pennsylvania
Maine	Rhode Island
Massachusetts	Vermont
Michigan	Wisconsin

The following counties in Maryland, Minnesota and West Virginia:

Maryland

Allegheny	Garrett
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Minnesota

Anoka	Mower
Blue Earth	Nicollet
Carlton	Olmsted
Carver	Pine
Chisago	Ramsey
Dakota	Rice
Dodge	Scott
Faribault	Sherburne
Fillmore	Sibley
Freeborn	Steele
Goodhue	Wabasha
Hennepin	Waseca
Houston	Washington
Isanti	Winona
LeSueur	Wright
McLeod	

West Virginia

Brooke	Monongalia
Hancock	Ohio
Marion	Preston
Marshall	Wetzel

B. Failing to remove and replace the front fender(s) of any motor vehicle at no cost to the owner within one hundred twenty (120) days after the owner initially contacts respondent or a dealer, *provided that* respondent may require any owner to sign a statement, approved by the Federal Trade Commission, that the vehicle began to experience premature rusting within thirty-six (36) months-in-service.

C. Failing to reimburse any owner of a motor vehicle for the actual or the usual and customary charges in the owner's trade area, whichever is lower, for parts and labor for front fender repairs or replacements made at the owner's expense which eliminated, or were made in an attempt to eliminate, premature rusting, *provided that* respondent may require any owner to sign a statement, approved by the Federal Trade Commission, that the vehicle experienced premature rusting within thirty-six (36) months-in-service and to furnish reasonable evidence of repair or replacement. Such reimbursement shall be made within sixty (60) days after the owner initially contacts respondent or a dealer. For owners who were sent the letter and form pursuant to paragraph A of part I of this Order, such repairs or replacements must have been made prior to an owner's receipt of the letter and form.

D. Failing to provide all dealers with adequate supplies of front fenders and any other items necessary to effectuate removal and replacement.

E. Failing to provide all dealers with adequate supplies of unsigned statements referenced in paragraphs B and C of part I of this Order.

F. Failing to notify all dealers in writing within ten (10) days after the date of service of this Order of the existence of premature rusting, of the necessity for using galvanized front fenders or zincrometal front fenders and of the terms and conditions of respondent's obligations under this Order.

II

It is further ordered, That respondent's obligations under paragraphs B and C of part I of this Order shall not extend to those owners who initially contact respondent or a dealer after November 1, 1980, or after 42 months-in-service, whichever date is later.

III

It is further ordered, That respondent maintain documents demonstrating compliance with this Order for a period not less than three

(3) years. Such documents shall be made available to the Commission or its staff for inspection and copying upon reasonable request, and shall include, but are not necessarily limited to, those revealing:

A. The name and last known address of each owner who was sent the disclosures required by paragraph A of part I of this Order.

B. The name and last known address of each owner who requested repairs or reimbursement for repairs for premature rusting.

C. The name and last known address of each owner whose motor vehicle was repaired or who was reimbursed for repairs as required by paragraphs B and C of part I of this Order.

D. Communications with respondent concerning repairs or reimbursements for repairs made to motor vehicles affected by premature rusting.

E. Each instance arising under paragraph C of part I of this Order where Chrysler reimbursed an owner of a motor vehicle for less than one hundred percent (100%) of the actual charges for parts and labor, and those documents revealing the underlying basis for determining the usual and customary charges in each such instance.

F. Each instance arising under paragraphs B or C of part I of this Order involving a dispute over months-in-service, unless Chrysler determined to remove or replace front fenders or reimburse an owner in accordance with said paragraphs, notwithstanding the fact that the vehicle allegedly exceeded thirty-six (36) months-in-service.

G. Each instance arising under paragraph B of part I of this Order when Chrysler failed to remove and replace the front fenders of any motor vehicle, and each instance arising under paragraph C of part I of this Order when Chrysler failed to reimburse any owner of a motor vehicle, and those documents revealing the underlying basis for such failures.

IV

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this Order, and at one year intervals thereafter through 1982, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form in which it has complied with this Order.

V

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate

respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this Order.

ATTACHMENT A
SERVICE & PARTS DIVISION



Dear Aspen or Volare owner:

Chrysler Corporation has a continuing interest in the quality of its cars. We have become aware of a condition in some 1976 and 1977 Aspens and Volares which you should know about. This condition may cause the front fenders of your Aspen or Volare to rust prematurely. In areas where roads are heavily salted, the condition is aggravated. Replacing front fenders is costly. By agreement with the Federal Trade Commission, Chrysler will replace your front fender(s) free or repay you for past repairs if:

- (a) your front fender(s) is rusted in the affected area, as described below; and
- (b) this rust appears(ed) within the car's first 36 months-in-service; and
- (c) you contact Chrysler or your dealer before November 1, 1980, or before 42 months-in-service, whichever is later.

CHRYSLER'S REPLACEMENT/REPAY PROGRAM

1. Description Of The Front Fender Rust Condition

The rust problem occurs on the top horizontal part of the fender, within approximately two feet of the windshield. The fender's design sometimes hindered proper priming in this area at the factory. The rust starts on the front fender's underside. It appears first as bubbles or blisters in the paint. Soon, holes appear. The drawing at the end of this letter shows the problem area.

2. What is "Months-in-Service"?

The "36 months-in-service" limitation and the "42 months-in-service" claim limitation start the day Chrysler began warranty coverage on your car. This "in-service" date appears on the attached form.

3. What You Do If The Rust Appears On A Fender Now

- (a) Determine if the rust is in the front fender area described in paragraph 1. Also determine if the rust appeared during your car's first 36 months-in-service.
- (b) If so, call any Dodge, Plymouth or Chrysler new car dealer to request free fender replacement.
- (c) When an appointment has been arranged, bring the enclosed form to the dealer. Your car's fenders will be inspected. You will be asked to sign the statement on the repair part of the form certifying that the premature rust appeared within your car's first 36 months-in-service. If you qualify, the dealer will then arrange to have a new fender installed within 120 days of your request.

4. What You Do If The Rust Does Not Appear On A Front Fender Now, But Appears In The Future

Not all 1976 or 1977 Aspen or Volare front fenders will rust prematurely. But, just in case your car's front fenders rust in the future (but within 36 months-in-service), keep this letter and the form with the car. Then, you do (a), (b) and (c) in paragraph 3.

(If you sell your car, please give this letter and the form to the next owner.)

5. What You Do If You Paid For Front Fender Rust Repairs Yourself Before You Got This Letter

- (a) Determine if the rust is in the front fender area described in paragraph 1. Also determine if the rust appeared during your car's first 36 months-in-service.
- (b) Carefully read the statement (in the repayment part of the form) about when the rust first appeared on your car's front fender. If the rust occurred during the car's first 36 months-in-service, sign the statement and mail it with your original repair bills (keep a copy for yourself), copies of cancelled checks, or other proof that repairs were done, to the address shown. If you do not have your original bill, try to get one from the repair shop. If you cannot get an original, send a copy.
- (c) Chrysler will repay you for reasonable repair bills. (Chrysler may wish to see your car and proof of payment before repaying you.)

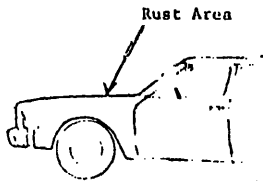
6. What You Should Remember

Chrysler's replacement program covers you only if you call or go to a Dodge, Plymouth or Chrysler dealer. Chrysler's repay program covers you only if you had repairs before you got this letter. In either case, you should act promptly after the rust appears.

Keep in mind that where road salt is used heavily our dealers' shops may be overcrowded. Also, matching paints exactly is not always possible. We deeply regret any inconvenience to you. We will handle each situation as quickly and fairly as possible. If you lose your form or if you have any problems with our program, call your local Chrysler Corporation Zone Office (listed in your Pages or Owner's Manual), or write to:

Chrysler Corporation
Service and Parts Division
Post Office Box 1718
Detroit, Michigan 48288

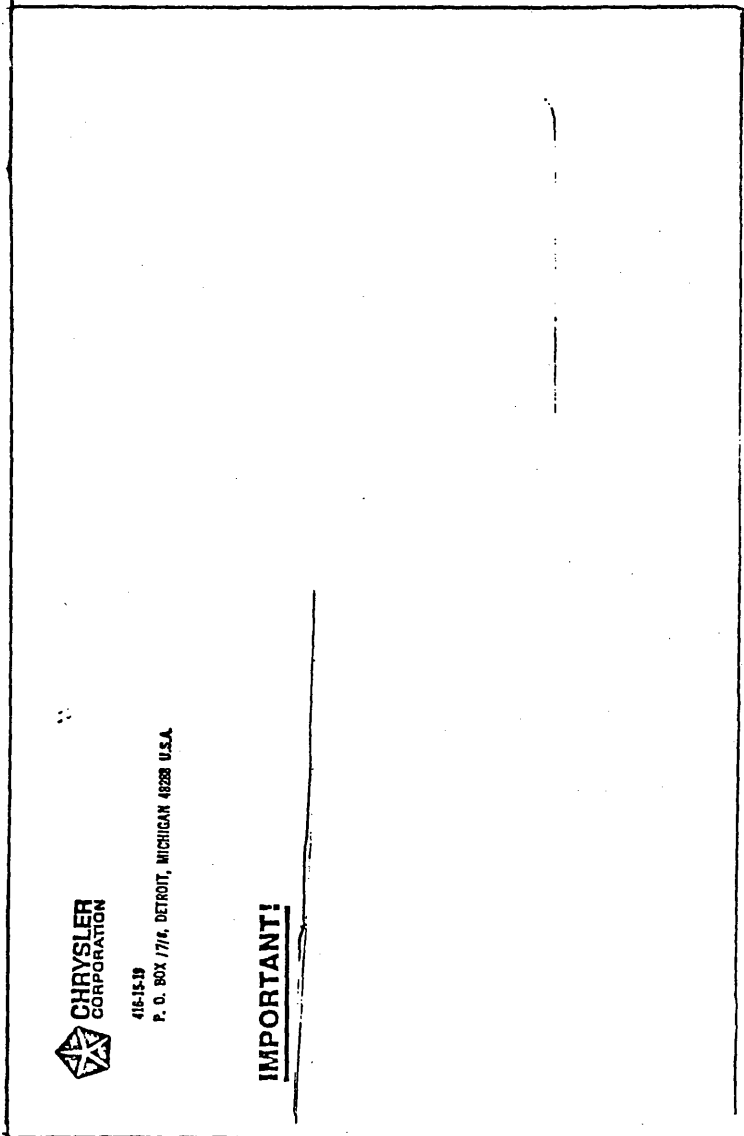
If you have difficulty finding your local Chrysler Corporation Zone Office phone number, you may call (313) 956-5970.



Very truly yours,

CHRYSLER CORPORATION

C. W. JOINER
General Manager -
Service and Parts Division



CHRYSLER
CORPORATION

416-15-10
P. O. BOX 1714, DETROIT, MICHIGAN 48208 U.S.A.

IMPORTANT!

Complaint

IN THE MATTER OF

DARVEL, INC.

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

Docket C-3034. Complaint, Aug. 12, 1980—Decision, Aug. 12, 1980

This consent order requires, among other things, a Bellgarden, Calif. manufacturer and distributor of wearing apparel and related accessories to cease fixing or otherwise controlling the resale prices at which its products are sold or advertised; seeking the identity of dealers who fail to adhere to suggested resale prices and sales periods; and taking any adverse action against them. Respondent is barred from restricting the lawful use of brand names and trademarks in the advertising and sale of its products, and from granting any consideration, service or benefit to any dealer because of the resale price that another dealer has advertised or sold a product. Additionally, the order prohibits the firm from suggesting retail prices for its products for a period of one year.

Appearances

For the Commission: *Jeffrey A. Klurfeld.*

For the respondent: *J. Eddstepp Jr., Gibson, Dunn & Crutcher, Los Angeles, Calif. and Hal L. Cofkey, Cofkey, Cofkey & Boxer, Los Angeles, Calif.*

COMPLAINT

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

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

“Product” is defined as any item of wearing apparel or related accessory which is manufactured, offered for sale or sold by respondent.

“Dealer” is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

“Resale Price” is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any

dealer for pricing any product. Such term includes, but is not limited to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

"Sale Period" is defined as any time during which any dealer offers to sell any product at resale prices lower than those in effect during the usual and ordinary course of said dealer's business; or any suggested, authorized or customary time for selling or advertising any product at prices lower than the suggested, established or customary resale prices.

PARAGRAPH 1. Respondent Darvel, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 6891 Florence Place, Bellgarden, California.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of wearing apparel and related accessories. Sales by respondent for fiscal year 1978 exceeded \$6 million.

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

PAR. 4. Respondent sells and distributes its products directly to more than 2,000 retail dealers located throughout the United States who in turn resell respondent's products to the general public.

PAR. 5. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale, sale and distribution of merchandise of the same general kind and nature as merchandise manufactured, advertised, offered for sale, sold and distributed by respondent.

PAR. 6. In the course and conduct of its business as above described, respondent has for some time last past effectuated and pursued a policy throughout the United States, and has employed various means and methods in furtherance thereof, the purpose or effect of which is and has been to fix, control, establish, manipulate and maintain the resale prices at which its dealers advertise, offer for sale and sell its products.

PAR. 7. The aforesaid acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of respondent's products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or

unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent as herein alleged, are continuing and will continue in the absence of the relief herein requested.

DECISION AND ORDER

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

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

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

1. Respondent Darvel, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 6891 Florence Place, in the City of Bellgarden, State of California.

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

ORDER

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

"Product" is defined as any item of wearing apparel or related

accessory which is manufactured, offered for sale or sold by respondent.

"Dealer" is defined as any person, partnership, corporation or firm which sells any product in the course of its business.

"Resale Price" is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any suggested, established or customary resale price as well as the retail price in effect at any dealer.

"Sale Period" is defined as any time during which any dealer offers to sell any product at resale prices lower than those in effect during the usual and ordinary course of said dealer's business; or any suggested, authorized or customary time for selling or advertising any product at prices lower than the suggested, established or customary resale prices.

It is ordered, That respondent Darvel, Inc., a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

1. Fixing, establishing, controlling or maintaining, directly or indirectly, the resale price at which any dealer may advertise, promote, offer for sale or sell any product, or the sale period of any dealer.
2. Requesting, requiring or coercing, directly or indirectly, any dealer to maintain, adopt or adhere to any resale price or sale period.
3. Requesting or requiring, directly or indirectly, any dealer to report the identity of any other dealer who deviates from any resale price or sale period; or acting on any reports or information so obtained by threatening, intimidating, coercing or terminating said dealer.
4. Requesting or requiring that any dealer refrain from or discontinue selling or advertising any product at any resale price.
5. Hindering or precluding the lawful use by any dealer of any brand name, trade name or trademark of respondent in connection with the sale or advertising of any product at any resale price.
6. Making any payment or granting any consideration, service or

benefit to any dealer because of the resale price at which any other dealer has advertised or sold any product.

7. Conducting any surveillance program to determine whether any dealer is advertising, offering for sale or selling any product at any resale price, where such surveillance program is conducted to fix, maintain, control or enforce the resale price at which any product is sold or advertised.

8. Terminating or taking any other action to restrict, prevent or limit the sale of any product by any dealer because of the resale price at which said dealer has sold or advertised, is selling or advertising, or is suspected of selling or advertising any product.

II

1. For a period of one (1) year from the date of service of this Order, orally suggesting or recommending any resale price or sale period to any dealer.

2. For a period of one (1) year from the date of service of this Order, communicating in writing any resale price or sale period to any dealer; *provided, however*, that after said one (1) year period, respondent shall not suggest any resale price or sale period on any list, or in any advertising, book, catalogue or promotional material, unless it is clearly and conspicuously stated on each page where any suggested resale price or sale period appears, the following:

THE [RESALE PRICES OR SALE PERIODS] QUOTED HEREIN ARE SUGGESTED ONLY. YOU ARE FREE TO DETERMINE YOUR OWN [RESALE PRICES OR SALE PERIODS].

III

It is further ordered, That respondent shall within ninety (90) days after service of this Order, mail a copy of the enclosure set forth in the attached Exhibit A to each of its present accounts. An affidavit shall be sworn to by an official of the respondent verifying that the attached Exhibit A was so mailed.

IV

It is further ordered, That respondent shall forthwith distribute a copy of this Order to all operating divisions of said corporation, and to present or future personnel, agents or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this order, and that respondent secure from each such person a signed statement acknowledging receipt of said Order.

V

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

VI

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

EXHIBIT A

Dear Retailer:

Without admitting any violation of the law, Darvel, Inc. has agreed to the entry of an Order by the Federal Trade Commission regulating certain distribution practices. In connection therewith, the Company is required to send you this letter describing the Order.

The Order provides, among other things, as follows:

1. You can advertise and sell Darvel and Zeppelin products at any price you choose.
2. Darvel will not take any action against you, including termination, because of the price at which you advertise or sell Darvel and Zeppelin products.
3. Darvel will not suggest retail prices for any product until [1 year from the date of service of the Order].
4. The price at which you sell or advertise Darvel or Zeppelin products will not affect your right to use Darvel or Zeppelin trademarks or other identification in your sale or advertising of products bearing Darvel or Zeppelin trademarks or identification.

If you have any questions regarding the Order or this letter, please call

for Darvel, Inc.

IN THE MATTER OF
BRUNSWICK CORPORATION, ET AL.

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

Docket 9028. Complaint, April 15, 1975 —Final Order, August 14, 1980*

This order requires, among other things, a Skokie, Ill. manufacturer and marketer of outboard motors and other products and its subsidiary, Mariner Corp., to dissolve their joint venture agreement with Yamaha Motor Co., Ltd. ("Yamaha"); sell all their interests in Sanshin Kogyo Co., Ltd. to Yamaha, within 90 days; and remove their representatives on Sanshin's board of directors immediately. Further, the firms are prohibited for three years from acquiring, without prior Commission approval, any interest in a company manufacturing outboard motors for sale in the United States.

Appearances

For the Commission: *Steven R. Newborn.*

For the respondents: *Henry Y. Ota, Mori & Ota, Los Angeles, Calif., James H. Wehrenberg, Skokie, Ill., Mindy Liss, Mayer, Brown & Platt, Wash., D.C., and John R. Ferguson, Pettit & Martin, Wash., D.C.*

FINAL ORDER

For the purposes of this Order:

a) "Brunswick" shall mean the Brunswick Corporation, together with its present and future domestic and foreign subsidiaries, affiliates, joint ventures, related corporations (including Mariner Corp.), and corporations controlled by Brunswick Corporation; and all successors to Brunswick Corporation and their domestic and foreign subsidiaries, affiliates, joint ventures and related corporations; and all corporations controlled by the successors of Brunswick Corporation.

b) "Yamaha" shall mean Yamaha Motor Co., Ltd., together with its present and future domestic and foreign subsidiaries, affiliates, joint ventures, related corporation, and corporations controlled by Yamaha Motor Co., Ltd.; and all successors to Yamaha Motor Co., Ltd. and their domestic and foreign subsidiaries, affiliates, joint

* Complaint, Initial Decision, Opinion of the Commission, and Order Remanding for Additional Evidence previously published in 94 F.T.C. 1174.

ventures and related corporations; and all corporations controlled by the successors of Yamaha Motor Co., Ltd.

c) "Mariner" shall mean Mariner Corp., together with its present and future domestic and foreign subsidiaries, affiliates, joint ventures, related corporations, and corporations controlled by Mariner Corp.; and all successors to Mariner Corp. and their domestic and foreign subsidiaries, affiliates, joint ventures and related corporations; and all corporations controlled by the successors of Mariner Corp.

I.

It is ordered, That within 90 days of the date this Order becomes final, Brunswick and Mariner shall sell to Yamaha, and Yamaha shall buy from Brunswick and Mariner, all capital stock, bonds, debentures, and other securities and other interests held by Brunswick and Mariner in Sanshin Kogyo Co., Ltd. ("Sanshin"). The purchase price shall be equal in dollars to the value of the net tangible assets per share, computed and adjusted to the last day of the six month term immediately preceding the date of the sale.

II.

It is further ordered, That, on or before 90 days from the date this Order becomes final, Brunswick, Yamaha, and Mariner shall rescind in all respects the Joint Venture Agreement, and the agreements attached thereto, entered into on November 21, 1972, and all agreements modifying the Joint Venture Agreement and the agreements attached thereto, shall consider them null and void, and shall cease and desist from observing or enforcing the terms of said agreements.

III.

It is further ordered, That from the date this Order becomes final, Brunswick and Mariner shall cease any and all representation on the board of directors of Sanshin, cease and desist from taking any steps to nominate, seat, or admit any representatives of Brunswick and Mariner to the board of directors of Sanshin, and cease and desist from exercising any of the rights of a shareholder of Sanshin except the right to receive dividends.

IV.

It is further ordered, That from the date this Order becomes final, neither Brunswick nor Mariner shall enter into, continue to be a party to, or enforce any agreement which in whole or in part prevents a manufacturer, seller, or distributor of outboard motors from manufacturing, selling, or distributing such motors in the United States, its territories or possessions.

V.

It is further ordered, That from the date this Order becomes final, Yamaha shall not enter into, continue to be a party to, or observe any agreement which in whole or in part prevents Yamaha from manufacturing, selling, or distributing outboard motors in the United States, its territories or possessions.

VI.

It is further ordered, That Brunswick, Yamaha, and Mariner shall, for a period of three years from the date this Order becomes final, cease and desist from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, all or any part of the stock or share capital of any concern, corporate or noncorporate, engaged in the production, distribution or sale of outboard motors in or for the United States, or capital assets pertaining to such production distribution or sale of such motors in or for the United States.

VII.

It is further ordered, That Brunswick, Yamaha, and Mariner notify the Federal Trade Commission at least 30 days prior to any proposed change in its corporate structure such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any change in the corporation which may affect compliance obligations arising out of this Order.

VIII.

It is further ordered, That Brunswick, Yamaha, and Mariner shall within 120 days of the date this Order becomes final, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Brunswick, Yamaha,

and Mariner each intends to comply or has complied with this Order. Brunswick, Yamaha, and Mariner shall submit such other information as may from time to time be requested by the Commission.

Commissioner Bailey did not participate.

OPINION OF THE COMMISSION

BY PITOFSKY, *Commissioner*:

The sole question here is the formulation of an appropriate order of relief. On November 9, 1979, we determined that a joint venture between Brunswick Corporation ("Brunswick") and Yamaha Motor Company, Limited ("Yamaha") violated Section 7 of the Clayton Act¹ and Section 5 of the Federal Trade Commission Act.² Since the Administrative Law Judge ("ALJ") had originally ordered the dismissal of the complaint, his initial decision lacked findings and recommendations on the issue of appropriate relief. We therefore remanded the proceeding to enable him to address those questions. Additional hearings were held on February 19 and 20, 1980, and on March 14, 1980, the ALJ issued his "Findings and Proposed Order." After considering briefs filed by Complaint Counsel, Brunswick and Yamaha we have determined to adopt the ALJ's findings and issue the proposed order, with the minor modification discussed below.³

I

We concluded, in our previous opinion, that the joint venture violated the antitrust laws on three theories: (1) it eliminated the potential competition likely to result from Yamaha's probable independent entry into the United States outboard motor market; (2) it eliminated the existing competition Yamaha provided in that market; and (3) it included collateral agreements unreasonably limiting competition between Yamaha and Brunswick. In remanding the proceeding, we instructed the ALJ to determine the most effective means of terminating the joint venture, nullifying the

¹ 15 U.S.C.18.

² 15 U.S.C.45.

³ The following abbreviations are used herein:

IDF — Initial Decision Finding of Fact No.

RDF — Remand Decision Finding of Fact No.

CX — Complaint Counsel's Exhibit No.

CCRAB — Complaint Counsel's Remand Appeal Brief Page No.

BRRB — Brunswick's Remand Reply Brief Page No.

restrictive agreements, and restoring Yamaha as an actual and potential competitor in the U.S. outboard motor market.

In brief summary, the ALJ's proposed order recommended: (1) the rescission of the joint venture agreement and all collateral agreements;⁴ (2) the sale to Yamaha of all Brunswick's stock in Sanshin, the jointly owned manufacturing facility of Yamaha and Brunswick;⁵ and (3) a three year prohibition upon Brunswick's or Yamaha's acquisition of any competitor in the outboard motor market without the prior approval of the Commission.⁶

II

Our goal, in fashioning relief for a violation of Section 7, is "to restore, so far as practicable and equitable, the state of competition in the relevant market as it would have been but for the acquisition."⁷ As we observed in remanding this question to the ALJ, "we cannot turn back the clock," but "we can seek to restore the market structure to that which existed at the time the venture was entered upon."⁸ This joint venture violated the antitrust laws because it eliminated the actual and potential competition that Yamaha represented in the U.S. outboard motor market. A satisfactory remedy must restore Yamaha, to the extent possible, as an actual and potential competitor with approximately that competitive vigor, independence and strength that it possessed in 1972.

We agree with the ALJ's conclusion that this objective can be achieved only by a complete undoing of the joint venture. The joint venture agreement and all collateral agreements must be rescinded, and the Sanshin stock held by Brunswick must be resold to Yamaha.

Divestiture of the acquired firm is the familiar remedy for a merger found to lessen actual or potential competition in violation of Section 7.⁹ As the Supreme Court observed in *United States v. du Pont & Co.*, 366 U.S. 316 (1961), "divestiture is peculiarly appropriate in cases of stock acquisitions which violate Section 7 . . . The very words of Section 7 suggest that an undoing of the acquisition is a natural remedy."¹⁰ By making the acquired firm an actual or potential competitor again, a divestiture order helps restore the market structure existing before the challenged acquisition. The

⁴ Paragraph II

⁵ Paragraph I

⁶ Paragraph VI

⁷ *Fruehauf Trailer Co.*, 68 F.T.C. 1167, 1168 (1965), modified, 69 F.T.C. 180 (1966).

⁸ *Brunswick Corp.*, [94 F.T.C. 1174 at 1278] [1979] Trade Reg. Rep. (CCH) (FTC Complaints and Orders) Para. 21,623 at 21,788.

⁹ See, e.g., *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *United States v. du Pont & Co.*, 366 U.S. 316 (1961).

¹⁰ *United States v. du Pont & Co.*, 366 U.S. 316, 328-29, (1961).

lessening of competition resulting from this joint venture, as we noted in our previous opinion, is "roughly equivalent" to that which would have resulted from Brunswick's acquisition of an actual or potential competitor.¹¹ Just as an order of divestiture would have been an appropriate remedy for such an acquisition, we conclude that an undoing of the transaction is appropriate here as well.

We cannot accept Brunswick's suggestion that the order of relief void the various joint venture agreements, but allow Brunswick to retain and vote its shares of Sanshin common stock. Although Brunswick would be guaranteed no representation on the board of directors under this proposed plan,¹² Yamaha's independence and vitality as a competitor might still be impaired. Brunswick's ownership of 38% of Sanshin's voting stock could enable Brunswick to hamper Sanshin's competitive efforts, making Sanshin a less effective competitor than it had been before the joint venture.

Yamaha owned a majority of Sanshin stock prior to the creation of the joint venture, enough to control most questions raised in votes at shareholder meetings.¹³ Since Yamaha now owns only 38%, Brunswick could conceivably enlist sufficient support among the remaining 24% held by individual Japanese shareholders to create a majority on some issues or at least to extract significant compromise concessions from Yamaha. Moreover, under the Japanese Commercial Code and Sanshin's articles of incorporation, a two thirds vote is necessary to approve several significant types of corporate actions—a merger or acquisition, for example, a change in authorized capital, or the issuance of new shares of stock.¹⁴ With respect to these questions, Brunswick's 38% of the outstanding stock would amount to an absolute veto.

Finally, aside from the possible influence or control resulting from Brunswick's ownership of Sanshin stock, that stock ownership would also provide Brunswick access to competitively sensitive information otherwise unavailable to competitors.¹⁵ Brunswick's access to such information—profitability data, inventory schedules or new construction reports, for example—might significantly impair Sanshin's effectiveness as a competitor.

¹¹ *Brunswick Corp.* [94 F.T.C. 1174 at 1268] [1979] Trade Reg. Rep. (CCH) (FTC Complaints and Orders) Para. 21,623 at 21,782.

¹² The present division of seats on the board of directors—five to Brunswick and six to Yamaha—is required by the joint venture agreement. See CX 1. If that agreement were voided, the directors would be elected by shareholders under Sanshin's articles of incorporation. See CX 1-Y. Since those articles do not provide for cumulative voting, Brunswick's 38% of the outstanding Sanshin stock is insufficient, alone, to elect any directors.

¹³ Sanshin's articles of incorporation provide that: "Unless otherwise provided by law or by these Articles of Incorporation, all resolutions of meetings of shareholders shall be adopted by a majority of the voting rights present at the meeting." CX 1-X.

¹⁴ See RDF 42-49.

¹⁵ See RDF 53.

This possible lessening of competition resulting from Brunswick's ownership of 38% of Sanshin's common stock is, no doubt, more attenuated than that accompanying the original joint venture itself. Nonetheless, ample authority holds that Section 7 may be violated when an acquisition of less than a majority of a firm's stock creates the possibility that the acquiring firm either may gain access to confidential competitive information, or may be able to steer the acquired firm towards less competitive strategies.¹⁶ Considering the record evidence that Brunswick has eagerly seized opportunities to minimize the competition provided by Sanshin—evidence that can be found in both the creation of this joint venture and in Brunswick's actions during its existence¹⁷—we conclude that the possible lessening of competition likely to result from allowing Brunswick to keep its Sanshin stock is far from insubstantial.

These same considerations dictate that an order requiring the divestiture of Brunswick's Sanshin stock to any buyer would also be an insufficient remedy; the stock must be sold to Yamaha. Divestiture of Brunswick's Sanshin stock to any other buyer would not restore Yamaha to its pre-joint venture competitive position. Yamaha would be left with only a minority holding of Sanshin stock, and not the controlling position it held prior to the joint venture. Without majority control, Yamaha might be unable to enter or compete effectively in the U.S. outboard motor market. Indeed, if Brunswick's Sanshin stock were divested to another competitor in that market, or ultimately come to rest in such a competitor's hands, competition might be lessened in much the same manner as if Brunswick retained the stock—that competitor might be able to influence Sanshin's decision-making, for example, or gain access to competitively sensitive information. We conclude, therefore, that fashioning a satisfactory remedy in this case—a remedy effectively restoring Yamaha as an actual and potential competitor—requires not only the voiding of the joint venture agreements, but the return of Brunswick's Sanshin stock to Yamaha as well.¹⁸

¹⁶ See, e.g., *United States v. du Pont & Co.*, 366 U.S. 316 (1961); *F&M Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 597 F.2d 814 (2d Cir. 1979); *Gulf & Western Indus., Inc. v. Great Atlantic & Pacific Tea Co., Inc.*, 476 F.2d 687 (2d Cir. 1973); *American Crystal Sugar Co. v. Cuban-American Sugar Co.*, 259 F.2d 524 (2d Cir. 1958); *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F.Supp. 307 (D. Conn.), *aff'd*, 206 F.2d 738 (2d Cir. 1953).

¹⁷ The ALJ observed that Brunswick had effectively used its holdings of Sanshin stock and its position on Sanshin's board of directors to hinder any direct competition provided by Sanshin, and hence, Yamaha. See, e.g., RDF 22, 23.

¹⁸ No previous decision has ever addressed the problem of determining an appropriate remedy for a joint venture found to violate Section 7. Although consent decrees hold little precedential value, see *United States v. du Pont & Co.*, 366 U.S. 316, 330 n. 12 (1961), we note that consent decrees in such cases have ordered relief similar to that suggested here by the ALJ—the voiding of any joint venture agreement and the rescission of any stock acquisition. See, e.g., *Continental Oil Co.*, 72 F.T.C. 850 (1967) (consent order); *Phillips Petroleum Co.*, 70 F.T.C. 456 (1966) (consent order); *United States v. Monsanto Co.*, 1967 Trade Cas. Para. 72,001 (W.D. Pa. 1967) (consent decree). Courts have concluded that their equitable power encompasses an order directing the rescission of a stock

The provision governing the sale of Brunswick's stock in the ALJ's proposed order of relief differed from a simple order of rescission in one important respect. It ordered that Brunswick sell its Sanshin stock to Yamaha at a price different from that which Brunswick originally paid. Under the joint venture agreement executed in 1972, Brunswick purchased the newly issued Sanshin stock at a price equal to the "value of the net tangible assets per share" of Sanshin's then outstanding stock.¹⁹ That value was calculated by a procedure outlined in the joint venture agreement.²⁰ Requiring Brunswick to receive the same dollar figure for its sale of the stock under this order might inflict substantial economic hardship; the value of the shares may have appreciated considerably during the intervening years.

The possibility of such hardship, of course, would not be sufficient reason to chose a less effective form of relief. As the Supreme Court noted in *United States v. du Pont & Co.*, 366 U.S. 316 (1961), once a conclusion has been reached "that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result."²¹ But the issue here is not a choice between an effective form of relief and a less effective one, but rather a question of how to implement the form of relief we have already determined to be most effective. We have decided that Brunswick's Sanshin stock must be sold to Yamaha; the question that remains is the appropriate price. In these circumstances, it is important to consider any hardship attendant upon our decree.²²

No easy answer exists to this problem. The ALJ apparently concluded that any hardship could be minimized by defining the price as "the value of the net tangible assets per share, computed and adjusted to the last day of the six month term immediately preceding the date of the sale."²³ We affirm that conclusion. The

acquisition violating Section 7. See *U.S. v. Coca-Cola Bottling Co. of L.A.*, 575 F.2d 222 (9th Cir.), cert. denied, 439 U.S. 959 (1978); *United States v. Reed Roller Bit Company*, 274 F.Supp. 573 (W.D. Okla. 1967). See also *U.S. v. Phillips Petroleum Co.*, 367 F.Supp. 1226 (C.D. Cal. 1973), aff'd, 418 U.S. 906 (1974). We believe that our remedial powers encompass no less. See *Ekco Products Co.* 65 F.T.C. 1163 (1964), aff'd, 347 F.2d 745 (7th Cir. 1965).

¹⁹ CX 1-C.

²⁰ CX 1-C.

²¹ *United States v. du Pont & Co.*, 336 U.S. 316, 327 (1961). One court of appeals, in affirming a district court's issuance of a preliminary injunction to preserve the ultimate availability of rescission as a remedy for an acquisition, observed that the possible unfairness to the acquiring company would not be reason to deny the remedy of rescission: "If nothing else, the buyers in this transaction . . . might be required to give back the illegally acquired assets . . . without accepting full repayment." *U.S. v. Coca-Cola Bottling Co. of L.A.*, 575 F.2d 222, 231 (9th Cir.), cert. denied, 439 U.S. 959 (1978).

²² See *Ekco Products Co.*, 65 F.T.C. 1163, 1221 (1964), aff'd, 347 F.2d 745 (7th Cir. 1965) ("If the Commission enjoys, as we think it does, essentially equitable powers under Section 11 of the Clayton Act, it must, as a corollary, assume equitable responsibilities.")

²³ Paragraph I.

valuation formula chosen by the ALJ was the same one used by the parties to determine the price Brunswick initially paid for the Sanshin stock.²⁴ The arms length bargaining that occurred suggests some fairness in that formula.²⁵ Yet by requiring that the assets be valued near the time of the sale to Yamaha, rather than at the time of Brunswick's initial purchase, the order is likely to reduce any hardships resulting from changes in either Sanshin's assets or their value.²⁶

III

In addition to the provisions voiding the joint venture agreements and ordering the divestiture of Brunswick's Sanshin shares, the ALJ's proposed order of relief contained a three year requirement that both Brunswick and Yamaha seek Commission approval before acquiring any firm engaged in the production, distribution or sale of outboard motors.²⁷ We consider that provision both an appropriate and necessary element of the relief in this case. The authority to include such a requirement in an order of relief cannot be questioned.²⁸ The sole issue—as it is with any element of a Commission remedial order—is whether this requirement of Commission approval of future acquisitions has some “reasonable relation” to the violations of Brunswick and Yamaha.²⁹ We conclude that it does.

Brunswick's acquisition of Sanshin stock presents the more typical instance of illegal conduct where this kind of relief is appropriate.³⁰ Commission review is necessary to insure that Brunswick does not again act to substantially lessen competition in the U.S. outboard motor market by acquiring an actual or potential competitor. Considering the thoroughness with which this joint venture was constructed to minimize the competition provided by Yamaha in the U.S. market, it is reasonable to predict that such a path could be followed again.

Although Yamaha's actions present a more unusual case—Yam-

²⁴ CX 1-C.

²⁵ We cannot accept Brunswick's suggestion that the parties be allowed to negotiate a price for the sale. It is difficult to imagine fair bargaining once an order has required that the stock be sold.

²⁶ We reject Yamaha's suggestion that Sanshin's assets be valued as of October 31, 1979, the close of the accounting period immediately preceding the publication of our opinion finding that the joint venture violated Section 7. Since considerable time may pass before our order is effectuated, we believe that both parties should share in any appreciation in the value of Sanshin's assets.

²⁷ Paragraph VI.

²⁸ See, e.g., *Ekco Products Co.*, 65 F.T.C. 1163, 1215 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965); *Abex Corp v. FTC*, 420 F.2d 928, 933 (6th Cir.), *cert. denied*, 400 U.S. 865 (1970).

²⁹ See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-5 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957); *Jacob Siegal Co. v. FTC*, 327 U.S. 608, 612-13 (1946).

³⁰ See, e.g., *RSR Corp.*, 88 F.T.C. 800 (1976), *aff'd*, 602 F.2d 1317 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1313 (1980); *Avnet, Inc.*, 82 F.T.C. 391 (1973), *aff'd*, 511 F.2d 70 (7th Cir.), *cert. denied*, 423 U.S. 833 (1975).

aha's violations consisted of participation in this joint venture through sale of stock and of agreement to various covenants not to compete—they nonetheless justify similar relief. A requirement of Commission approval of future acquisitions is especially valuable in the drafting of remedial orders seeking to insure that the possible procompetitive benefits of entry by a potential competitor are not lost.³¹ In this case, a primary goal of the order of relief is to preserve the possible procompetitive benefits of Yamaha's potential entry into the U.S. outboard motor market. By participating in the joint venture with Brunswick, Yamaha chose to enter that market in a manner that substantially lessened competition. Requiring Yamaha to come before the Commission before entering the market by acquisition or joint venture is necessary to insure that future entry is not also anticompetitive.³²

Though a requirement of Commission approval is appropriate here, we consider too broad the provision drafted by the ALJ. Yamaha, for example, has objected that the ALJ's order might hamper possible future acquisitions or joint ventures in Japan, or other foreign markets—legitimate competitive acts having no impact upon the U.S. outboard motor market. To allay such concern, we have narrowed the scope of the provision so that it applies only to acquisitions of the stock or assets of firms engaged in the production, distribution or sale of outboard motors "in or for the United States."

The ALJ's proposed order also contained provisions prohibiting both Brunswick and Yamaha from again entering mutual covenants not to compete—either with one another or with any other competitor in the U.S. outboard motor market.³³ We conclude that these provisions are also appropriate and necessary components of the order of relief. They prohibit the repetition of conduct we have found illegal—an example of the clearest reasonable relation of remedy to violation.³⁴ And, as we have already observed, in light of the record evidence it is not unreasonable to conclude that a danger of future anticompetitive conduct exists.³⁵

³¹ See, e.g., *Ekco Products Co.*, 65 F.T.C. 1163, 1228 (1964), *aff'd*, 347 F.2d 745 (7th Cir. 1965).

³² Drafting an effective order of relief often requires consideration of possible conduct not involved in the original violation: "When the purpose to restrain trade appears from a clear violation of the law, it is not necessary that all untravelling roads to that end be left open and that only the worn one be closed." *International Salt Co. v. U.S.*, 332 U.S. 392, 400 (1947). See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965) (discussing necessity of "fencing in" in advertising violations); *International Salt Co. v. U.S.*, 332 U.S. 392 (1947) (similar issues in tying violation).

³³ Paragraphs IV and V.

³⁴ See, e.g., *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

³⁵ The ALJ's proposed order of relief also contained a provision requiring Brunswick and Yamaha to notify the Commission of significant changes in their corporate structure. Paragraph VII. This provision is necessary to ensure effective monitoring of Brunswick and Yamaha's compliance with the order.

IV

In our previous opinion remanding this proceeding, we instructed the ALJ to study the effect of a termination of this joint venture upon the ability of Mariner dealers to obtain satisfactory supplies of outboard motors. We cautioned that the achievement of an appropriate remedy in this case "should not be accomplished at the expense of the Mariner dealers if that is avoidable."³⁶

On remand, Complaint Counsel argued that Mariner dealers would be satisfactorily protected only if the order of relief required Yamaha to continue to supply Mariner with "commercially reasonable quantities" of outboard motors until April 30, 1983, and of spare parts for those motors until April 30, 1990.³⁷ To insure that Yamaha would have the technology necessary to satisfy those supply obligations, Complaint Counsel also proposed provisions in the order of relief: (1) requiring royalty free grants between Brunswick and Yamaha of any patent rights or licenses utilized by the joint venture; and (2) establishing as joint property any other technical information exchanged during the joint venture.³⁸

The ALJ concluded that neither the imposition of the supply requirements nor the grants of access to patented and nonpatented technology were necessary to protect Mariner dealers. We accept that conclusion. There is no convincing evidence in the record that Mariner dealers will be endangered by any sudden supply shortages. Sanshin presently sells 25% of its production to Mariner dealers.³⁹ It seems unlikely that Yamaha would readily relinquish so substantial a source of profit. And, even if Sanshin's sales to Mariner dealers did decrease somewhat, the record shows that Brunswick has long desired the capability of satisfying the needs of Mariner dealers from its own production, and has been preparing that capability throughout the life of the joint venture.⁴⁰ In light of this evidence we conclude that Mariner dealers face no significant danger from our termination of this joint venture.

³⁶ *Brunswick Corp.* [94 F.T.C. 1174 at 1279] [1979] Trade Reg. Rep. (CCH) (FTC Complaints and Orders) ¶ 21,623 at 21,788.

³⁷ Paragraph VII of Complaint Counsel's Proposed Order. CCRAB, Attachment A, p. 3.

³⁸ Paragraph IV of Complaint Counsel's Proposed Order. CCRAB, Attachment A, p. 2.

³⁹ RDF 66.

⁴⁰ See, e.g., IDF 199; RDF 74-77. Brunswick has taken the position on this appeal that it is "prepared to supply Mariner if necessary." BRRB p. 6.

Interlocutory Order

96 F.T.C.

IN THE MATTER OF

GENERAL FOODS CORPORATION

*Docket 9085. Interlocutory Order, Aug. 18, 1980*ORDER DEFINING PERMISSIBLE SCOPE OF TESTIMONY OF WILLIAM
H. SPRUNK UNDER QUARTERLY FINANCIAL REPORTS
CONFIDENTIALITY RULES

By order of March 20, 1980, the Commission stayed, pending its review of the matter, the return on the subpoena issued to a Commission employee, William H. Sprunk, Assistant Director for Financial Statistics, Bureau of Economics. The purpose of the stay was for the Commission to review the interpretation and application of the confidentiality rules governing the Quarterly Financial Reports (QFR)¹ and Line of Business (LB)² programs to the subpoenaed testimony of an employee of the Commission's Division of Financial Statistics, Bureau of Economics, in a Commission adjudicative proceeding. The crux of the instant order is the resolution of the apparent conflict between Mr. Sprunk's permissible functions under the QFR and Line of Business confidentiality rules and his testimony in response to the adjudicative subpoena.

The complaint in this case alleges General Foods' use of pricing practices and other policies to the injury of competitors in eastern coffee markets. Complaint counsel's expert witness used data obtained from published aggregate data in the QFR survey to establish a benchmark as to the existence of monopoly power, one of the issues in the case. The subpoena *ad testificandum* for Mr. Sprunk, who heads the Division of Financial Statistics, in which the QFR report is prepared, was issued by the Administrative Law Judge in order to

ha[ve] someone who knows what these figures are about testify as to the accuracy of the figures, how they are compiled, and why this contract was let to Standard and Poor's. [Tr. 5242]³

The Commission's order staying the subpoena return invited

¹ 38 Fed. Reg. 18720, 26162 (1973).

² 41 Fed. Reg. 28041, 34703 (1976); 40 Fed. Reg. 21542, 22318 (1975); 39 Fed. Reg. 30970 (1974). The subpoena issued to Mr. Sprunk appears to concern only QFR data, and the Commission's LB confidentiality rules are relevant here only insofar as they might suggest that no employee of the Division of Financial Statistics may appear in an adjudicative proceeding for any purpose. The Commission's order does not reach issues concerning the admissibility of LB reports or the privileged status of individual company data obtained in the LB program. See note 8, *infra*.

³ The transcript reflects discussion of a contract using a data tape prepared by Standard & Poor's leading to a "final report, including a statistical statement re QFR accuracy * * *." (Tr. 5237)

General Foods and complaint counsel to submit simultaneous memoranda on the following issues:

1. Whether response to a subpoena in a Commission adjudicative proceeding by an employee of the Division of Financial Statistics constitutes "engag[ing] in any activity of the Commission which involves regulation or investigation * * *"⁴ or "participat[ion] in any Commission investigation or proceeding for carrying out specific law enforcement responsibilities of the Commission * * *,"⁵ within the meaning of the prohibitions established by the QFR and LB confidentiality rules;

2. If such activity is appropriate, whether it nevertheless remains the case that an employee of the Division of Financial Statistics may not give an answer concerning the QFR program which would disclose "the names of companies, financial data, and all other information which are obtained from the respondent companies" (*i.e.*, individual company data) in connection with the QFR program; and

3. Whether substantial prejudice to any party will result if the confidentiality rules are interpreted as outlined in (1) and (2) above.

The first question posed in the Commission's order staying the subpoena return may be answered directly, and in the negative. The clear purpose of both the LB and QFR confidentiality rules is to ensure that the individual company data be kept confidential and used only for statistical purposes, and specifically, as stated in the Commission's QFR authorizing resolution, that the individual company data "not be available for use in any Commission adjudication or in connection with any investigation for the purpose of initiating adjudicative proceedings * * *."⁶ Both sets of rules prohibit employees of DFS, which in general has sole access to the data, from engaging in investigatory and law enforcement activities of the Commission. This division of internal agency functions is a preventative measure designed to avoid any appearance, or any remote possibility, that investigatory or enforcement decisions at the FTC would be made on the basis of individual company QFR or LB data. To the extent that Mr. Sprunk's testimony here would not be based on individual company QFR data, it would be consistent with the purpose of the confidentiality rules. Accordingly, insofar as the rules are concerned, Mr. Sprunk should be permitted to testify about matters such as the methods and procedures for compiling the QFR survey and its overall accuracy, but he should not be permitted to

⁴ 38 Fed. Reg. at 26162 (1973).

⁵ *E.g.*, 41 Fed. Reg. at 28041 (1976).

⁶ 38 Fed. Reg. at 18720 (1973).

testify to the extent that he would be required to disclose, or to utilize his knowledge of, individual company data.

The second and third questions present related issues: (1) whether the QFR aggregate data meet tests of admissibility without inquiry into the underlying data, despite their arguably hearsay nature and respondent's right to "conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. 556(d); and (2) whether the privilege against disclosure created by the QFR confidentiality rules is outweighed by respondent's need for individual company data.

Respondent relies on *Wirtz v. Baldor Elec. Co.*, 337 F.2d 518 (D.C. Cir. 1963) and *Powhatan Mining Co. v. Ickes*, 118 F.2d 105 (6th Cir. 1941), for the proposition that survey results may not be admitted into evidence unless the underlying data are made available to respondent's counsel. In both cases, the challenged survey results were tabulated specifically for use in administrative proceedings by officials who had exclusive access to the underlying material. The agency officials introduced the survey results into evidence during the administrative proceedings, but objected to discovery of the underlying survey data because of confidentiality provision. In neither case was the claim of privilege upheld.

The *Wirtz* and *Powhatan* cases may be distinguished on a number of grounds. First, while the Commission has followed the general rule making underlying data available when survey results are compiled for litigation, *Avnet, Inc.*, 78 F.T.C. 1562, 1563 n.1 (1971), there is no allegation here that tabulation of QFR data was in any way connected to this case. In fact, as the confidentiality rules make clear, QFR data are collected and reports prepared "for the purpose of preparing statistical compilations." 38 Fed. Reg. at 18720. Second, this is evidently not a case where a governmental party's introduction of survey results waives its right to a claim of privilege for underlying data to which it has access. See Wright & Miller, *Federal Practice and Procedure: Civil Section 2019*; *of. United States v. Reynolds*, 345 U.S. 1, 12 (1953). Rather, because of the strict confidentiality rules in effect, complaint counsel here have no access to the data General Foods is seeking; indeed, complaint counsel cannot produce the data because they have no authority to do so. See *United States v. International Business Mach. Corp.*, CCH 1975-2 Trade Cas. ¶ 60383, 66666-67 (S.D.N.Y. 1975). Third, should the preceding grounds for distinction not be deemed dispositive, the Commission notes that the *Wirtz* court held:

[D]ocuments supporting the tables and on which they are based must also be introduced or at least be made available to the opposing party to the extent that they

are necessary for purposes of rebuttal and cross-examination. 337 F.2d at 526. (Emphasis added.)

Thus, the respondent would be required to demonstrate why information on QFR methodology and procedures would be inadequate for rebuttal or cross-examination, and why individual company data are necessary.

It does not appear that the respondent has successfully made such a showing; and, as is discussed below, the record before the Commission is too limited to suggest whether or not this showing might be made in the future. The Commission will therefore not make a final determination on admissibility at this time, but will simply assume that the challenged QFR aggregate data may properly be introduced without necessarily requiring disclosure of individual company information.⁷

As to the issue of privilege, the Commission finds that the QFR rules create a qualified privilege for individual company data. This privilege is unique to government and may be termed a qualified confidential report privilege.⁸ See *Association for Women in Science v. Califano*, 566 F.2d 339, 346 (D.C. Cir. 1977). This privilege requires a balancing of "the need of the litigants for information possessed by the Government and the need of the Government to foster the free flow of information provided to it" recognizing that "clear and strong indication is required before it may be implied that the policy of prohibition is of such force as to dominate the broad objective of doing justice." *Id.* (citations omitted). See *Avnet, Inc.*, 77 F.T.C. 1686, 1687-88 (1970).

Respondent asserts a need for, and a basic procedural right to, unrestricted discovery of information as to the "validity, accuracy, reliability and composition" of QFR data for its "efforts to cross-

⁷ Issues of admissibility are, in any event, best determined initially by the law judge. Rulings on the admissibility of the aggregate QFR data should be made, however, not only in light of the foregoing discussion, but also with regard to circumstantial guarantees of the trustworthiness of QFR reports and the necessity for using QFR data in aggregate form.

⁸ As to the nature of the privilege created, the Commission recognizes that an absolute privilege against disclosure must be based on statutory language that at least specifically addresses the confidentiality of the material. The QFR confidentiality rules were based on Sections 6(f) and 6(g) of the FTC Act, 15 U.S.C.46(f), (g), and to some extent on confidentiality provisions of the Tax Reform Act of 1976, 28 U.S.C.6103, and prior tax law. While Section 6(f) does pertain specifically to confidential treatment of business information, it does not act as an absolute bar to the release of such data in adjudications. See *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1148, 1150 (1961). Section 6(g) generally empowers the Commission to make rules and regulations for the purpose of carrying out the Act, and thus does not readily appear to support a claim of absolute privilege. The tax statutes deal explicitly with confidential treatment and may therefore provide the basis of an absolute privilege for some QFR material. In view of its disposition of this interlocutory appeal, the Commission need not decide the applicability of the tax statutes at this time, and will assume *arguendo* that they too support only a qualified privilege.

By contrast, the Commission's Line of Business confidentiality rules are based directly on statutory language that expressly protects LB data from disclosure. See 41 Fed. Reg. 28041, 34708 (1976); 40 Fed. Reg. 21542, 22318 (1975); Section 6 of the Federal Trade Commission Act, 15 U.S.C.46, as amended by Pub. Law No. 96-252; see also 88 Stat. 1822, 1840 (1974); 89 Stat. 611, 694 (1975), and 90 Stat. 937, 956 (1976). Such authority provides more compelling justification for a claim of absolute privilege. The type of evidentiary privilege that may be claimed for LB data is not at issue in this proceeding, however.

examine and defend against a benchmark based on that data, arguing that the aggregate data is not otherwise admissible." General Foods notes its prior objection to "utilization of QFR data for computing a 'competitive benchmark' and to receipt in evidence of documents containing the QFR calculations" and its prior questioning of complaint counsel's witness as to "the percentage of companies in the 'QFR benchmark' which are engaged in the sale of branded consumer grocery products and the number of food companies comprising the 'QFR benchmark'." (Memorandum of Respondent General Foods Corporation, at 1, 2, 3-4.) General Foods cites to statements assertedly casting doubt on the validity of QFR data and argues that the confidentiality rules were not intended to foreclose a respondent's inquiry under these circumstances. We need not decide the question of the admissibility of the aggregate QFR data at this time, but will assume it is admissible and discuss the application of the QFR rules to the individual company data.

Balanced against respondent's claims of need are complaint counsel's arguments that: (1) respondent has other means at its disposal sufficient to challenge use of QFR data; and (2) the "overriding concern" of the QFR rules to protect individual company data, and the evident purpose of the rules to encourage compliance with the reporting requirements by assuring confidentiality. The parties have referred to such matters as the reliability of the QFR data, the adequacy of the information respondent has already obtained, and the degree to which the QFR data are relied on exclusively in this case. However, a full record is not before the Commission on these and other issues concerning the respondent's need for the data, nor should it be at this stage.

Rather, it is within the broad discretion of the ALJ to rule on discovery and evidentiary questions, including privilege, in light of the circumstances of the proceeding. *Missouri Portland Cement Co.*, 77 F.T.C. 1688, 1689-70 (1970). The purpose of Rule 3.36 (concerning subpoenas addressed to the Commission or its employees) may be understood in light of a predecessor provision, which required certification to the full Commission of requests for subpoenas to government officials. There, the Commission said that the purpose of the rule "is not to relieve the examiner of his essential role" concerning basic questions of discovery and evidence, but rather "to provide a means of informing the Commission of any such action to prevent the possibility of abuse" and to "give the Commission an opportunity to work out appropriate arrangements with other agencies involved if a request is found to be justified." *Avnet, Inc.*, *supra*, 77 F.T.C. at 1687-88, 1688 n.3. Here, although it is not obvious

from the papers before the Commission that inquiry into individual company data was contemplated by the ALJ in issuing the subpoena, and, if so, how he viewed the confidentiality rules, the Commission must make an interim decision on the scope of discovery, reserving to the ALJ (and to the Commission on review of the entire record of the proceeding) the ultimate resolution of this issue.

Based on the necessarily limited record, the Commission has determined that the agency's need for accurate, timely and complete individual company QFR data (including company names) is more compelling than respondent's need for that data. *See Association for Women in Science v. Califano, supra*, 566 F.2d at 346-47.⁹ Nor is respondent's need so evident from the materials before the Commission to require disclosure under a protective order. Therefore, the Commission will at this time construe the QFR confidentiality rules to create a qualified privilege, barring the testimony of Mr. Sprunk as to individual company data in connection with the QFR program.

Accordingly, *it is ordered*, That William H. Sprunk may, consistent with the Commission's LB and QFR confidentiality rules, appear and testify in response to the Administrative Law Judge's subpoena *ad testificandum* issued March 3, 1980, but that the inquiry be limited to only those questions which would not disclose "the names of companies, financial data, and all other information which are obtained from the respondent companies" as protected by the QFR confidentiality rules in connection with the QFR program. The General Counsel is directed to represent Mr. Sprunk for the purpose of asserting any other privileges arising out of his Commission employment.

Commissioner Bailey did not participate.

⁹ This conclusion is based, in part, on the nature of respondent's QFR criticisms. These criticisms relate to the methodology and procedures for compiling the QFR reports, aspects of the QFR program into which respondent can inquire of Mr. Sprunk without inquiring into individual company data. See *Avnet, Inc., supra*, 78 F.T.C. at 1563.

Moreover, given the agency's compelling need to obtain the QFR data, respondent must make a strong showing of need in order to overcome the qualified privilege and thereby compel disclosure of the individual company information. On the record as it now stands, respondent's showing is wholly inadequate.

Interlocutory Order

96 F.T.C.

IN THE MATTER OF
GENERAL FOODS CORPORATION

Docket 9085. Interlocutory Order, Aug. 19, 1980

ORDER ON FOLGER'S APPLICATION FOR REVIEW

The Folger Coffee Company and the Procter & Gamble Company (hereinafter collectively referred to as "Folger") have applied to the Commission for review of the Administrative Law Judge's order of April 9, 1980, denying continued *in camera* treatment of certain exhibits and related testimony. The law judge has certified Folger's appeal to the Commission pursuant to Rule 3.23(b). Complaint counsel have filed an answer opposing this appeal.

The exhibits in question consist primarily of Folger memoranda, written during the period of 1971 to mid-1976, concerning the company's then ongoing expansion into the markets of the eastern states. The law judge found that these documents analyzed the new markets, discussed the strengths and weaknesses of both Folger and its competitors, and described Folger's promotional activity, such as its use of advertising, discount coupons, and pricing allowances. These and other exhibits for which *in camera* treatment is sought also contain detailed information on Folger's sales, costs, revenues, and profits nationally and in specific areas. Finally, Folger asks that *in camera* status be given to testimony on these exhibits as well as to testimony on the results of a taste test comparing Maxwell House and Folger coffees and on the impact of a 1975 frost in Brazil.

The law judge concluded that the release of most of the exhibits and testimony covered by Folger's request would not be likely to result in "clearly defined, serious injury," as set forth in *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1148 (1961). He therefore denied Folger's motion, subject to only two exceptions. First, he granted *in camera* treatment for testimony on Folger's northeast expansion, which he found would be of present value to competitors since Folger's expansion there is still underway. Second, he determined to retain *in camera* treatment of testimony and an excerpt from an exhibit (RX 1080) that disclosed Folger's profits on High Point coffee for the years 1976 through 1979. The High Point data were deemed particularly sensitive because the product is still being test marketed.

Folgers presents four arguments in support of its *in camera* request. First, in its motion before the law judge, Folger has contended that the information in the exhibits and testimony in question is secret and material to its business, and, taken as a whole, constitutes a "unique encyclopedia of marketing knowledge." Folger

insists that, regardless of their age, these materials would be valuable to competitors by affording them the benefits of Folger's experiences in entering new markets and by disclosing to them Folger's strategies for mounting or responding to competitive challenges. Second, in its application for review, the company states that the 1976-1979 profit data on High Point coffee appears in an exhibit containing similar data on Folger vacuum and flaked coffee, and argues that these recent data are equally sensitive and equally deserving of *in camera* protection. Third, Folger points out that it is not a party to this proceeding and asserts that it should not have to make the same kinds of showings for *in camera* treatment as parties are required to present. Fourth, in a memorandum supplementing its application for review,¹ the company contends that amendments to the Commission's statute made by the Federal Trade Commission Improvements Act of 1980, Pub. Law No. 96-252, prohibit the Commission from removing any of the materials at issue here from *in camera* status.

The last two arguments can be disposed of quickly. Concerning the effect of the amendatory legislation, we agree with Folger that Section 6(f) of the Federal Trade Commission Act now secures confidential treatment for a broader class of business information obtained by the Commission. However, we do not agree that anything in the Federal Trade Commission Improvements Act, or its legislative history, weakens the long-held position that Section 6(f) does not absolutely bar disclosure of business data as evidence in adjudicatory proceedings. See *H.P. Hood & Sons, Inc.* New Section 21(d)(2) of the FTC Act provides that "[a]ny disclosure of relevant and material information in adjudicative proceedings to which the Commission is a party shall be governed by the rules of the Commission for adjudicative proceedings . . . except that the rules of the Commission shall not be amended in a manner inconsistent with the purposes of this section." Discussing what ultimately was enacted as Section 21(d)(2), the Senate Report on S.1991 stated specifically that the Commission should maintain the procedures in Rules 1.18(b) and 3.45 for granting *in camera* treatment. Senate Report No. 96-500 at pp. 27-28 (1979). Rule 3.45 governs Folger's instant request, and provides that evidence may be held *in camera* only for good cause, citing *H.P. Hood & Sons, Inc.* as support. Thus, the recent amendments to the Federal Trade Commission Act only support the view that Section 6(f)'s confidentiality provisions do not prohibit disclosure of evidence in adjudications.

¹ Folger's request to file its supplementary memorandum of June 26, 1980, is hereby granted.

As to Folger's contention that third parties should be afforded more lenient standards for *in camera* treatment, we similarly note that such a rule would conflict with consistent Commission policy. While it is true that in *Crown Cork & Seal Co.*, 71 F.T.C. 1714 (1967), we suggested that the *in camera* request of an uninvolved bystander warranted special solicitude, we nevertheless applied the same standards as had been enunciated in *H.P. Hood & Sons, Inc.*, and denied *in camera* treatment. Furthermore, our decision in *Bristol-Myers Co.*, 90 F.T.C. 455 (1977), which elaborated on the *Hood* standards, also involved an *in camera* request from a non-respondent.

Folger's remaining two arguments present no new questions of law or policy, but simply raise the issue whether the law judge has properly applied the Commission's guidelines for *in camera* status to the facts before him. In our order of March 10, 1980, concerning General Food's own *in camera* motion, we stated that the bases for *in camera* treatment were secrecy and materiality, and advised law judges to consider the six factors listed in the Restatement of Torts citing our *Bristol-Myers* opinion. We also stated that "administrative law judges have broad discretion in determining what information should be placed *in camera* and we do not ordinarily disturb their determinations except on the basis of showing of abuse," Order of March 10, 1980 at p.3. We emphasize that point here. If the law judge has properly interpreted the Commission's *in camera* standards and applied them clearly to the facts in issue, we will be reluctant to question his conclusions. At the interlocutory stage, we are neither familiar with the broad contours of the case below or the specifics of the information in question, and we are therefore ill-equipped to second-guess an ALJ's factual findings on *in camera* motions.

In the present case, we are not prepared to overturn the law judge's decision to deny *in camera* treatment to most of the exhibits and testimony covered by Folger's motion. The law judge carefully reviewed Folger's arguments concerning each of the six factors cited in our *Bristol-Myers* order, and concluded that the information in question may at one time have provided competitors with advantages had it been released. However, the ALJ also noted that the documents were three and a half to nine years old, and dealt with marketing campaigns that have already been put into effect. He concluded, therefore, that Folger's competitors have already obtained, through experience, much of the business information contained in the exhibits and testimony and that their release now would not be likely to result in serious injury. While there may be some merit in Folger's argument that discussions of its marketing

and promotional strategies might continue to have significance to competitors, we have previously placed movants for *in camera* treatment under a greater burden when the information is old. *See, e.g., General Foods*, Docket No. 9085, Order of March 10, 1980; *Crown Cork & Seal Co., supra*. That is the case here, and we do not believe we are in a position to question the law judge's specific finding that the information at issue has not lost its competitive sensitivity.

In contrast, the law judge has not clearly articulated his reason for distinguishing between recent profit data on High Point coffee and profit and sales data on Folger's vacuum and flaked coffees. Presumably, he may have concluded that the release of such data on the vacuum and flaked brands would not seriously injure Folger since they already have established market positions. However, as we note in our companion order on General Foods' *in camera* motion, the law judge may have construed the meaning of the "clearly defined, serious injury standard" too narrowly, so as to require a specific demonstration of how the release of concededly secret and material information would be likely to injure the competitor that provided it.² Given this possibility, coupled with the apparent sensitivity of recent coffee profit data, we believe that the law judge should provide a more explicit analysis of why the release of such data is not likely to prove harmful. Accordingly, we remand on the narrow issue of whether the remainder of RX 1080 and any testimony thereon should be held *in camera*.³ We reiterate, however, that once the law judge reconsiders this issue and articulates his position under the appropriate standards,⁴ his determination will be upheld absent an abuse of discretion. Accordingly,

It is ordered, That Folger's application is denied except to the extent that it seeks *in camera* treatment for the entirety of RX 1080 and testimony thereon, in which respect it is remanded for reconsideration and additional findings.

Commissioner Bailey did not participate.

² Order Denying in Part and Remanding in Part General Foods' Application for Review at p. 2.

³ As we stated in our order of March 10, particularly difficult questions may be resolved by granting *in camera* status to information until the close of trial, at which point the law judge may review the motion, or until appeal to the Commission which may take up the motion when it has greater familiarity with the case and access to the information itself.

⁴ Recent sales and profit data generally suggest themselves as being both secret and material to the firm concerned. Specific inquiries relevant to the secrecy and materiality of such data include whether substantially equivalent information is available from other sources and, if not, whether the products concerned are so well established in the market that disclosures about them would not prove injurious. In addition, as we state in our order today concerning General Foods' own *in camera* request, "when certain information is found to be materially valuable and secret to a firm's competitive business activities, the Administrative Law Judge may infer, without a specific showing of how a competitor would use it, that the loss of information would adversely affect the possessor's commercial position." Order Denying in Part and Remanding in Part General Foods' Application for Review at p. 2.

Complaint

96 F.T.C.

IN THE MATTER OF
MIDLAND-ROSS CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF
THE CLAYTON ACT

Docket C-3035. Complaint, Aug. 21, 1980—Decision, Aug. 21, 1980

This consent order prohibits, among other things, a Cleveland, Ohio corporation from having as a director any individual who also serves as a director of a competitive company whose revenues exceed the lesser of ten million dollars, or one percent of the company's total annual revenues.

Appearances

For the Commission: *Dennis F. Johnson and Thomas J. Keary.*

For the respondent: *Robert H. Rawson, Jr., Jones, Day, Reavis & Pogue, Cleveland, Ohio.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated the provisions of Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and that a proceeding by it in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

COUNT 1

PARAGRAPH 1. Gould Inc. ("Gould") is a corporation organized under the laws of the State of Delaware, with its principal place of business located at 10 Gould Center, Rolling Meadows, Illinois. Gould has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 2. Respondent Midland-Ross Corporation ("Midland-Ross") is a corporation organized under the laws of the State of Ohio, with its principal place of business located at 20600 Chagrin Boulevard, Cleveland, Ohio. Midland-Ross has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 3. Respondent Claude M. Blair is an individual, with his principal place of business located at National City Corporation, Post Office Box 5756, Cleveland, Ohio.

PAR. 4. Gould conducts its business, as described herein, in various

States of the United States and is thereby engaged in activity in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 5. Midland-Ross conducts its business, as described herein, in various States of the United States and is thereby engaged in activity in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 6. Claude M. Blair was, until his resignation from Gould's board of directors on or about July 24, 1979, a member of the boards of directors of both Gould and Midland-Ross. He has been a director of Midland-Ross since 1974, and was a director of Gould from 1969 until his resignation.

PAR. 7. During all or part of the period that Claude M. Blair concurrently served as a director of Gould and Midland-Ross, the business of Gould and Midland-Ross included the manufacture and sale of various electrical products, including electrical busways and electrical conduit fittings.

PAR. 8. By the nature of their business as hereinabove described and the locations of their operations, Gould and Midland-Ross have been competitors, during all or part of the time period that Claude M. Blair concurrently served as a director of Gould and Midland-Ross, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

PAR. 9. The simultaneous membership of Claude M. Blair on the boards of directors of Gould and Midland-Ross constitutes a violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act.

COUNT II

PAR. 10. Paragraphs One and Four are incorporated herein.

PAR. 11. Respondent Narco Scientific, Inc. ("Narco") is a corporation organized under the laws of the State of Delaware, with its principal place of business located at Fort Washington Industrial Park, Fort Washington, Pennsylvania. Narco has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 12. Respondent William C. Musham is an individual, with his principal place of business located at Gould Inc., 10 Gould Center, Rolling Meadows, Illinois.

PAR. 13. Narco conducts its business, as described herein, in various States of the United States and is thereby engaged in activity

in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 14. William C. Musham was, until his resignation from Narco's board of directors during January 1980, a member of the boards of directors of both Gould and Narco. He has been a director of Gould since 1976, and was a director of Narco from 1977 until his resignation.

PAR. 15. During all or part of the period that William C. Musham concurrently served as a director of Gould and Narco, the business of Gould and Narco included the manufacture and sale of electronic medical devices.

PAR. 16. By the nature of their business as hereinabove described and the locations of their operations, Gould and Narco have been competitors, during all or part of the time period that William C. Musham concurrently served as a director of Gould and Narco, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

PAR. 17. The simultaneous membership of William C. Musham on the boards of directors of Gould and Narco constitutes a violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of interlocking personnel relationships between Gould Inc. and other corporations, and Midland-Ross Corporation (hereinafter referred to as "Midland-Ross"), 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 Midland-Ross with violation of Section 8 of the Clayton Act (15 U.S.C. 19) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45); and

Midland-Ross, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Midland-Ross 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 Midland-Ross 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 Midland-Ross 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, 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. Midland-Ross is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 20600 Chagrin Boulevard, Cleveland, Ohio.

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

ORDER

I

It is ordered, That the following definitions shall apply herein:

(a) "Subsidiary" of a corporation means any corporation, partnership, firm, association or other legal or business entity of which 50 percent or more of the issued and outstanding voting securities (or other indicia of control for non-stock business organizations) is owned or controlled, directly or indirectly, by such corporation.

(b) "Parent" means any corporation which owns or controls 50 percent or more of the issued and outstanding voting securities (or other indicia of control for non-stock business organizations) of any other business organization.

(c) "Sister" corporations mean corporations that share a common parent.

(d) "Product or service market" means any line of commerce in which Midland-Ross' (including its subsidiaries and divisions) annual revenues exceed the lesser of:

(1) five million dollars; or

(2) one-half of one percent of Midland-Ross' total annual revenues.

II

It is further ordered, That Midland-Ross, its subsidiaries, successors and assigns, shall forthwith cease and desist from having, and in the future shall not have, any director who also serves as a director

of any other corporation if Midland-Ross and such other corporation are, by virtue of their business and location of operation, competitors, so that the elimination of competition between them would constitute a violation of any of the antitrust laws, providing that the revenues of either corporation derived from the product or service market(s) in which they are competitors exceed the lesser of:

- (a) Ten million dollars; or
- (b) One percent of the total annual revenues of that corporation.

III

It is further ordered, That within thirty (30) days of the date of service of this order, and annually thereafter, Midland-Ross shall obtain, review, and retain from and as to each of its directors, the name and address of each other corporation not related to Midland-Ross as parent, sister or subsidiary, which such director also serves as a director, and a descriptive listing of all products and services manufactured, produced, sold or leased by each such other corporation. Midland-Ross shall not permit any person to serve as a director who fails to submit to Midland-Ross any information required by this paragraph. Midland-Ross shall provide the information received pursuant to this paragraph to the Commission upon request. If competition arises in any product or service market between Midland-Ross and any other corporation with which Midland-Ross shares a common director, by virtue of action taken by such other corporation subsequent to a submission of information by such director pursuant to this paragraph, then Midland-Ross shall not be liable under Paragraph II until the date for the next submission of information.

IV

It is further ordered, That within ten (10) days from the date of issuance of this order Midland-Ross shall distribute a copy of this order to each of its current directors and thereafter, shall distribute a copy of this order to each prospective or newly-elected or appointed director.

V

It is further ordered, That Midland-Ross shall:

- (a) within sixty (60) days after the date of service of this order, file

with the Commission a written report setting forth in detail the manner and form in which it has complied with this order; and

(b) file with the Commission such other reports of compliance as may be requested by the Commission.

VI

It is further ordered, That the obligations imposed upon Midland-Ross under the terms of this order shall continue for a period of seven years following the date of service of this order.

VII

It is further ordered, That Midland-Ross shall notify the Commission not more than thirty (30) days after any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Complaint

96 F.T.C.

IN THE MATTER OF
NARCO SCIENTIFIC, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF
THE CLAYTON ACT

Docket C-3036. Complaint, Aug. 21, 1980—Decision, Aug. 21, 1980

This consent order prohibits, among other things, a Fort Washington, Pa. corporation from having as a director any individual who also serves as a director of any competitive company whose revenues exceed the lesser of ten million dollars or one percent of the company's total annual revenues.

Appearances

For the Commission: *Dennis F. Johnson and Thomas J. Keary.*

For the respondent: *James G. Rosenberg, Saul, Ewing, Remick & Saul, Philadelphia, Pa.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated the provisions of Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and that a proceeding by it in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

COUNT I

PARAGRAPH 1. Gould Inc. ("Gould") is a corporation organized under the laws of the State of Delaware, with its principal place of business located at 10 Gould Center, Rolling Meadows, Illinois. Gould has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 2. Respondent Midland-Ross Corporation ("Midland-Ross") is a corporation organized under the laws of the State of Ohio, with its principal place of business located at 20600 Chagrin Boulevard, Cleveland, Ohio. Midland-Ross has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 3. Respondent Claude M. Blair is an individual, with his principal place of business located at National City Corporation, Post Office Box 5756, Cleveland, Ohio.

PAR. 4. Gould conducts its business, as described herein, in various

States of the United States and is thereby engaged in activity in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 5. Midland-Ross conducts its business, as described herein, in various States of the United States and is thereby engaged in activity in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 6. Claude M. Blair was, until his resignation from Gould's board of directors on or about July 24, 1979, a member of the boards of directors of both Gould and Midland-Ross. He has been a director of Midland-Ross since 1974, and was a director of Gould from 1969 until his resignation.

PAR. 7. During all or part of the period that Claude M. Blair concurrently served as a director of Gould and Midland-Ross, the business of Gould and Midland-Ross included the manufacture and sale of various electrical products, including electrical busways and electrical conduit fittings.

PAR. 8. By the nature of their business as hereinabove described and the locations of their operations, Gould and Midland-Ross have been competitors, during all or part of the time period that Claude M. Blair concurrently served as a director of Gould and Midland-Ross, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

PAR. 9. The simultaneous membership of Claude M. Blair on the boards of directors of Gould and Midland-Ross constitutes a violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act.

COUNT II

PAR. 10. Paragraphs One and Four are incorporated herein.

PAR. 11. Respondent Narco Scientific, Inc. ("Narco") is a corporation organized under the laws of the State of Delaware, with its principal place of business located at Fort Washington Industrial Park, Fort Washington, Pennsylvania. Narco has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 12. Respondent William C. Musham is an individual, with his principal place of business located at Gould Inc., 10 Gould Center, Rolling Meadows, Illinois.

PAR. 13. Narco conducts its business, as described herein, in various States of the United States and is thereby engaged in activity

in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 14. William C. Musham was, until his resignation from Narco's board of directors during January 1980, a member of the boards of directors of both Gould and Narco. He has been a director of Gould since 1976, and was a director of Narco from 1977 until his resignation.

PAR. 15. During all or part of the period that William C. Musham concurrently served as a director of Gould and Narco, the business of Gould and Narco included the manufacture and sale of electronic medical devices.

PAR. 16. By the nature of their business as hereinabove described and the locations of their operations, Gould and Narco have been competitors, during all or part of the time period that William C. Musham concurrently served as a director of Gould and Narco, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

PAR. 17. The simultaneous membership of William C. Musham on the boards of directors of Gould and Narco constitutes a violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of interlocking personnel relationships between Gould Inc. and other corporations, and Narco Scientific, Inc. (hereinafter referred to as "Narco"), 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 Narco with violation of Section 8 of the Clayton Act (15 U.S.C. 19) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45); and

Narco, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Narco 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 Narco 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 Narco 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, 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. Narco is a corporation organized existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Fort Washington Industrial Park, Fort Washington, Pennsylvania.

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

ORDER

I

It is ordered, That the following definitions shall apply herein:

(a) "Subsidiary" of a corporation means any corporation, partnership, firm, association or other legal or business entity of which 50 percent or more of the issued and outstanding voting securities (or other indicia of control for non-stock business organizations) is owned or controlled, directly or indirectly, by such corporation.

(b) "Parent" means any corporation which owns or controls 50 percent or more of the issued and outstanding voting securities (or other indicia of control for non-stock business organizations) of any other business organization.

(c) "Sister" corporations mean corporations that share a common parent.

(d) "Product or service market" means any line of commerce in which Narco's (including its subsidiaries and divisions) annual revenues exceed the lesser of:

- (1) Five million dollars; or
- (2) One-half of one percent of Narco's total annual revenues.

II

It is further ordered, That Narco, its subsidiaries, successors and assigns, shall forthwith cease and desist from having, and in the future shall not have, any director who also serves as a director of

any other corporation if Narco and such other corporation are, by virtue of their business and location of operation, competitors, so that the elimination of competition between them would constitute a violation of any of the antitrust laws, providing that the revenues of either corporation derived from the product or service market(s) in which they are competitors exceed the lesser of:

- (a) Ten million dollars; or
- (b) One percent of the total sales of that corporation.

III

It is further ordered, That within thirty (30) days of the date of service of this order, and annually thereafter, Narco shall obtain, review, and retain from and as to each of its directors, the name and address of each other corporation not related to Narco as parent, sister or subsidiary, which such director also serves as a director, and a descriptive listing of all products and services manufactured, produced, sold or leased by each such other corporation. Narco shall not permit any person to serve as a director who fails to submit to Narco any information required by this paragraph. Narco shall provide the information received pursuant to this paragraph to the Commission upon request. If competition arises in any product or service market between Narco and any other corporation with which Narco shares a common director, by virtue of action taken by such other corporation subsequent to a submission of information by such director pursuant to this paragraph, then Narco shall not be liable under Paragraph II until the date for the next submission of information.

IV

It is further ordered, That within ten (10) days from the date of issuance of this order Narco shall distribute a copy of this order to each of its current directors, and thereafter, shall distribute a copy of this order to each prospective or newly-elected or appointed director.

V

It is further ordered, That Narco shall:

- (a) within sixty (60) days after the date of service of this order, file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order; and

178

Decision and Order

(b) file with the Commission such other reports of compliance as may be requested by the Commission.

VI

It is further ordered, That the obligations imposed upon Narco under the terms of this order shall continue for a period of seven years following the date of service of this order.

VII

It is further ordered, That Narco shall notify the Commission not more than thirty (30) days after any change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

Complaint

96 F.T.C.

IN THE MATTER OF
CLAUDE M. BLAIR

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF
THE CLAYTON ACT

Docket C-3037. Complaint, Aug. 21, 1980—Decision, Aug. 21, 1980

This consent order prohibits, among other things, an individual whose principal place of business is located at the National City Corporation in Cleveland, Ohio, from serving simultaneously as a director of two or more competing companies, any one of which has capital, surplus, and undivided profits aggregating more than one million dollars and revenues that exceed the lesser of ten million dollars, or one percent of the corporation's total revenues.

Appearances

For the Commission: *Dennis F. Johnson and Thomas J. Keary.*

For the respondent: *Robert H. Rawson, Jr., Jones, Day, Reavis & Pogus, Cleveland, Ohio.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated the provisions of Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and that a proceeding by it in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

COUNT I

PARAGRAPH 1. Gould Inc. ("Gould") is a corporation organized under the laws of the State of Delaware, with its principal place of business located at 10 Gould Center, Rolling Meadows, Illinois. Gould has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 2. Respondent Midland-Ross Corporation ("Midland-Ross") is a corporation organized under the laws of the State of Ohio, with its principal place of business located at 20600 Chagrin Boulevard, Cleveland, Ohio. Midland-Ross has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 3. Respondent Claude M. Blair is an individual, with his

principal place of business located at National City Corporation, Post Office Box 5756, Cleveland, Ohio.

PAR. 4. Gould conducts its business, as described herein, in various States of the United States and is thereby engaged in activity in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 5. Midland-Ross conducts its business, as described herein, in various States of the United States and is thereby engaged in activity in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 6. Claude M. Blair was, until his resignation from Gould's board of directors on or about July 24, 1979, a member of the boards of directors of both Gould and Midland-Ross. He has been a director of Midland-Ross since 1974, and was a director of Gould from 1969 until his resignation.

PAR. 7. During all or part of the period that Claude M. Blair concurrently served as a director of Gould and Midland-Ross, the business of Gould and Midland-Ross included the manufacture and sale of various electrical products, including electrical busways and electrical conduit fittings.

PAR. 8. By the nature of their business as hereinabove described and the locations of their operations, Gould and Midland-Ross have been competitors, during all or part of the time period that Claude M. Blair concurrently served as a director of Gould and Midland-Ross, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

PAR. 9. The simultaneous membership of Claude M. Blair on the boards of directors of Gould and Midland-Ross constitutes a violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act.

COUNT II

PAR. 10. Paragraphs One and Four are incorporated herein.

PAR. 11. Respondent Narco Scientific, Inc. ("Narco") is a corporation organized under the laws of the State of Delaware, with its principal place of business located at Fort Washington Industrial Park, Fort Washington, Pennsylvania. Narco has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 12. Respondent William C. Musham is an individual, with his

principal place of business located at Gould Inc., 10 Gould Center, Rolling Meadows, Illinois.

PAR. 13. Narco conducts its business, as described herein, in various States of the United States and is thereby engaged in activity in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 14. William C. Musham was, until his resignation from Narco's board of directors during January 1980, a member of the boards of directors of both Gould and Narco. He has been a director of Gould since 1976, and was a director of Narco from 1977 until his resignation.

PAR. 15. During all or part of the period that William C. Musham concurrently served as a director of Gould and Narco, the business of Gould and Narco included the manufacture and sale of electronic medical devices.

PAR. 16. By the nature of their business as hereinabove described and the locations of their operations, Gould and Narco have been competitors, during all or part of the time period that William C. Musham concurrently served as a director of Gould and Narco, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

PAR. 17. The simultaneous membership of William C. Musham on the boards of directors of Gould and Narco constitutes a violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of interlocking personnel relationships between Gould Inc. and other corporations, and Claude M. Blair, 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 Claude M. Blair with violation of Section 8 of the Clayton Act (15 U.S.C. 19) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45); and

Claude M. Blair, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Claude M. Blair 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 Claude M. Blair 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 Claude M. Blair 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, 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. Claude M. Blair is an individual with his office and principal place of business located at National City Corporation, P.O. Box 5756, Cleveland, Ohio.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Claude M. Blair, and the proceeding is in the public interest.

ORDER

I

It is ordered, That the following definition shall apply herein:

"Product or service market" means any line of commerce in which the annual revenues of a corporation of which Claude M. Blair is a director exceed the lesser of:

- (a) Five million dollars; or
- (b) One-half of one percent of the total annual revenues of that corporation.

II

It is further ordered, That Claude M. Blair shall not be a director in any two or more corporations, any one of which has capital, assets, and undivided profits aggregating more than one million dollars, engaged in whole or in part in commerce, if such corporations are, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws, providing that the revenues of either corporation derived from the product or service market(s) in which they are competitors exceed the lesser of:

- (a) Ten million dollars; or
- (b) One percent of the total revenues of that corporation.

If, after his election, competition arises in any product or service market between corporations upon which Claude M. Blair serves as a director such as would cause him to violate the terms of this paragraph, then Claude M. Blair shall not be liable under this paragraph until the date of the first annual meeting of shareholders following the time such competition arose.

III

It is further ordered, That Claude M. Blair shall:

- (a) within sixty (60) days after the date of service of this order, file with the Commission a written report setting forth in detail the manner and form in which he has complied with this order; and
- (b) file with the Commission such other reports of compliance as may be requested by the Commission.

IV

It is further ordered, That the obligations imposed upon Claude M. Blair under the terms of this order shall continue for a period of five years following the date of service of this order.

Complaint

IN THE MATTER OF
WILLIAM C. MUSHAMCONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF
THE CLAYTON ACT

Docket C-3038. Complaint, Aug. 21, 1980—Decision, Aug. 21, 1980

This consent order prohibits, among other things, an individual whose principal place of business is located at Gould, Inc. in Rolling Meadows, Ill. from serving simultaneously as a director of two or more competing companies, any one of which has capital, surplus, and undivided profits aggregating more than one million dollars; and revenues that exceed the lesser of ten million dollars or one percent of the corporation's total revenues.

Appearances

For the Commission: *Dennis F. Johnson* and *Thomas J. Keary*.

For the respondent: *Edward M. Posner, Drinker, Biddle & Reath*, Philadelphia, Pa.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents have violated the provisions of Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and that a proceeding by it in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

COUNT I

PARAGRAPH 1. Gould Inc. ("Gould") is a corporation organized under the laws of the State of Delaware, with its principal place of business located at 10 Gould Center, Rolling Meadows, Illinois. Gould has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 2. Respondent Midland-Ross Corporation ("Midland-Ross") is a corporation organized under the laws of the State of Ohio, with its principal place of business located at 20600 Chagrin Boulevard, Cleveland, Ohio. Midland-Ross has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 3. Respondent Claude M. Blair is an individual, with his

principal place of business located at National City Corporation, Post Office Box 5756, Cleveland, Ohio.

PAR. 4. Gould conducts its business, as described herein, in various States of the United States and is thereby engaged in activity in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 5. Midland-Ross conducts its business, as described herein, in various States of the United States and is thereby engaged in activity in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 6. Claude M. Blair was, until his resignation from Gould's board of directors on or about July 24, 1979, a member of the boards of directors of both Gould and Midland-Ross. He has been a director of Midland-Ross since 1974, and was a director of Gould from 1969 until his resignation.

PAR. 7. During all or part of the period that Claude M. Blair concurrently served as a director of Gould and Midland-Ross, the business of Gould and Midland-Ross included the manufacture and sale of various electrical products, including electrical busways and electrical conduit fittings.

PAR. 8. By the nature of their business as hereinabove described and the locations of their operations, Gould and Midland-Ross have been competitors, during all or part of the time period that Claude M. Blair concurrently served as a director of Gould and Midland-Ross, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

PAR. 9. The simultaneous membership of Claude M. Blair on the boards of directors of Gould and Midland-Ross constitutes a violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act.

COUNT II

PAR. 10. Paragraphs One and Four are incorporated herein.

PAR. 11. Respondent Narco Scientific, Inc. ("Narco") is a corporation organized under the laws of the State of Delaware, with its principal place of business located at Fort Washington Industrial Park, Fort Washington, Pennsylvania. Narco has capital, surplus and undivided profits aggregating more than one million dollars.

PAR. 12. Respondent William C. Musham is an individual, with his

principal place of business located at Gould Inc., 10 Gould Center, Rolling Meadows, Illinois.

PAR. 13. Narco conducts its business, as described herein, in various States of the United States and is thereby engaged in activity in or affecting commerce within the meaning of Section Four of the Federal Trade Commission Act, as amended, 15 U.S.C. 44, and Section 1 of the Clayton Act, 15 U.S.C. 12.

PAR. 14. William C. Musham was, until his resignation from Narco's board of directors during January 1980, a member of the boards of directors of both Gould and Narco. He has been a director of Gould since 1976, and was a director of Narco from 1977 until his resignation.

PAR. 15. During all or part of the period that William C. Musham concurrently served as a director of Gould and Narco, the business of Gould and Narco included the manufacture and sale of electronic medical devices.

PAR. 16. By the nature of their business as hereinabove described and the locations of their operations, Gould and Narco have been competitors, during all or part of the time period that William C. Musham concurrently served as a director of Gould and Narco, so that the elimination of competition by agreement between them would constitute a violation of the antitrust laws.

PAR. 17. The simultaneous membership of William C. Musham on the boards of directors of Gould and Narco constitutes a violation of Section 8 of the Clayton Act and Section 5(a)(1) of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission, having initiated an investigation of interlocking personnel relationships between Gould Inc. and other corporations, and William C. Musham, 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 William C. Musham with violation of Section 8 of the Clayton Act (15 U.S.C. 19) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45); and

William C. Musham, his attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by William C. Musham 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 William C. Musham that the law has been violated as alleged in such complaint, and waives 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 William C. Musham 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, 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. William C. Musham is an individual with his office and principal place of business located at Gould Inc., 10 Gould Center, Rolling Meadows, Illinois.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of William C. Musham, and the proceeding is in the public interest.

ORDER

I

It is ordered, That the following definition shall apply herein:

"Product or service market" means any line of commerce in which a corporation's annual revenues exceed the lesser of:

- (a) Five million dollars; or
- (b) One-half of one percent of the total annual revenues of that corporation.

II

It is further ordered, That William C. Musham shall not be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than one million dollars, engaged in whole or in part in commerce, if such corporations are, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws, providing that the revenues of either corporation derived from the product or service market(s) in which they are competitors exceed the lesser of:

- (a) Ten million dollars; or
- (b) One percent of the total revenues of that corporation.

If, after his election, competition arises in any product or service market between corporations upon which William C. Musham serves as a director such as would cause him to violate the terms of this paragraph, then William C. Musham shall not be liable under this paragraph until the date of the first annual meeting of shareholders following the time such competition arose.

III

It is further ordered, That William C. Musham shall:

- (a) within sixty (60) days after the date of service of this order, file with the Commission a written report setting forth in detail the manner and form in which he has complied with this order; and
- (b) file with the Commission such other reports of compliance as may be requested by the Commission.

IV

It is further ordered, That the obligations imposed upon William C. Musham under the terms of this order shall continue for a period of five years following the date of service of this order.

Modifying Order

96 F.T.C.

IN THE MATTER OF
SCHERING-PLOUGH CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF SEC.
2 OF THE CLAYTON ACT AND THE FEDERAL TRADE COMMISSION
ACT

Docket C-2986. Decision, Aug. 10, 1979—Modifying Order, Aug. 22, 1980

This order reopens the proceeding and modifies the order issued on August 10, 1979, 44 FR 554712, 94 F.T.C. 307, by adding to Paragraph I of that order language that would permit the company, its subsidiaries, affiliates, divisions, successors and assigns to continue to market Solvex athlete's foot products, under license from the acquirer of the assets to be divested, until no later than December 31, 1980.

ORDER MODIFYING DECISION AND ORDER ISSUED AUGUST 10, 1979

The Federal Trade Commission having received respondent's request contained in its divestiture application dated June 23, 1980, to reopen this matter and to modify the consent order issued by the Commission on August 10, 1979, to allow respondent's subsidiary, Scholl, Inc., to continue to market Solvex athlete's foot products, under license from the acquirer of the divested assets, until December 31, 1980, and having placed such request on the public record for a period of thirty (30) days, and no comments thereon having been received, and having considered such request and determined that reopening and modification of the order is warranted:

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That Paragraph I of the order be, and it hereby is, modified to read as follows:

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondent Schering-Plough, through its officers, directors, agents, representatives, employees, subsidiaries, affiliates, divisions, successors and assigns, shall, within one (1) year from either the date Schering-Plough acquires Scholl or service of this Order, whichever comes later, divest the assets, tangible and intangible, acquired, improved or added by respondent as a result of its acquisition of Scholl and utilized by Scholl primarily for the manufacture, distribution or sale in the United States of Solvex athlete's foot products. Such assets shall include all raw material

reserves, inventory, machinery, equipment, trade names, trademarks, patents, licenses, research and development projects, good will and other property of whatever description; *provided, however*, that nothing in this provision shall prohibit or prevent Schering-Plough, its subsidiaries, affiliates, divisions, successors or assigns, from continuing to market Solvex athlete's foot products, under license from the acquirer of the assets to be divested, until no later than December 31, 1980.

Commissioner Bailey did not participate.

IN THE MATTER OF

TRANS WORLD ACCOUNTS, INC., ET AL.

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

Docket 9059. Order, Oct. 25, 1977—Modifying Order, September 2, 1980

In accordance with the mandate of the Court of Appeals for the Ninth Circuit, this order further modifies the Modified Order To Cease and Desist issued on July 25, 1979, 44 FR 49650, 94 F.T.C. 141, by inserting a new "Paragraph 3" which substitutes the term "lawsuit" for the phrase "legal action" as used in "Paragraph 3" of FTC's October 25, 1979 Order of Remand, 44 FR 66576, 94 F.T.C. 1051.

MODIFICATION OF MODIFIED ORDER TO CEASE AND DESIST

On July 25, 1979, the Commission entered a "Modified Order To Cease and Desist" in this matter, thereby effectuating those portions of its order of October 25, 1977 that had been affirmed and enforced by the Ninth Circuit Court of Appeals in *Trans World Accounts v. FTC*, 594 F.2d 212 (9th Cir. 1979). On October 25, 1979, the Commission entered an "Order on Remand", adding a new "Paragraph 3" to its order of July 25, 1979. Respondents appealed this order to the Ninth Circuit Court of Appeals, and, thereafter, respondents and the Commission entered into a stipulation before the court, which rendered its judgment modifying and enforcing as modified the order under appeal. Because both sides have waived any rights to seek further review of the court's order, it is now appropriate that the order of the Commission be rendered in accordance with the mandate of the court, 15 U.S.C. 45(i).

Therefore, it is ordered, That the Commission's "Modified Order To Cease and Desist" dated July 25, 1979, be further modified by the insertion of Paragraph 3 to read:

3. Misrepresenting directly or by implication, that a lawsuit with respect to an alleged delinquent debt has been or will be initiated, or misrepresenting in any manner the imminency of a lawsuit.

IN THE MATTER OF
PAY LESS DRUG STORES NORTHWEST, INC.

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-3039. Complaint, Sept. 2, 1980—Decision, Sept. 2, 1980

This consent order requires, among other things, Pay Less Drug Stores Northwest, Inc. ("Northwest"), a Beaverton, Oregon, drug chain to refrain from acquiring Pay Less Drug Stores ("Pay Less"), located in the California communities of Lodi, Salinas and Livermore, because the acquisition eliminates the actual competition between Northwest and Pay Less "super drug stores." Further, the order requires that divestiture only be made to a person approved in advance by the Commission and the divested businesses continue as going concerns.

Appearances

For the Commission: *Laurence O. Masson.*

For the respondent: *Robert M. Heller, Kramer, Lowenstein, Nessen, Kamin & Soll, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Pay Less Drug Stores Northwest, Inc. ("Northwest"), a corporation subject to the jurisdiction of the Commission, has acquired the stock and will acquire additional stock of Pay Less Drug Stores ("Pay Less"), a corporation, or has entered into an agreement and plan of reorganization and merger with Pay Less 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 the purposes of this complaint the following definitions shall apply:

(a) "Super drug store" means a retail establishment, as distinguished from a traditional neighborhood or corner drug store, which

carries a much broader selection of traditional drug store merchandise as well as numerous lines not normally found in neighborhood drug stores and which caters to a relatively large trading area.

(b) "Lodi Area" means the city of Lodi, California.

(c) "Salinas Area" means the city of Salinas, California.

(d) "Livermore Area" means the city of Livermore, California, and its surrounding environs, including the unincorporated areas known as Dublin, California and San Ramon, California.

(e) "Prescription drugs" mean ethical drugs available at retail only by prescription.

II. PAY LESS DRUG STORES NORTHWEST, INC.

2. Northwest is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland with its headquarters office and principal place of business located, through February 15, 1980, at 10605 S.W. Allen Boulevard, Beaverton, Oregon and, after February 15, 1980, at 9275 S.W. Peyton Lane, Wilsonville, Oregon.

3. Northwest and its subsidiaries engage in the business of operating thirty-six super drug stores in communities in Oregon, twenty-eight super drug stores in communities in Washington, nineteen super drug stores in communities in California, and seven super drug stores in communities in Idaho. Northwest owns two of the super drug stores operated in Oregon and two in Washington; Northwest's other super drug store premises are leased. Northwest owns substantially all of the furniture and fixtures it uses in its stores with the exception of certain fixtures which are leased in Northwest's California super drug stores.

4. Northwest operates its super drug stores in California under the name "Value Giant."

5. For its fiscal year ending January 31, 1979, Northwest and its subsidiaries had total assets of \$136,465,000 and net sales and other income of \$347,959,000, yielding net earnings after income taxes of \$9,853,000.

III. PAY LESS DRUG STORES

6. Pay Less is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its principal offices at 8000 Edgewater Drive, Oakland, California.

7. Pay Less and its subsidiaries engage in the business of operating forty-eight super drug stores in communities in California,

two super drug stores in communities in Nevada and ten super drug stores in communities in Hawaii. All of Pay Less' super drug stores are leased, except for the premises owned and occupied by Pay Less' Sacramento, California store at 1012 "K" Street. Pay Less owns the fixtures and equipment used in most of its super drug stores.

8. Pay Less operates its super drug stores in California under the name "Pay Less."

9. For its fiscal year ending February 3, 1979, Pay Less and its subsidiaries had total assets of \$102,477,000 and sales and other income of \$278,354,000, yielding net earnings after income taxes of \$2,854,000.

IV. JURISDICTION

10. At all times relevant herein, Northwest and Pay Less have been engaged in the ownership or operation of super drug stores in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and the businesses of Northwest and Pay Less are in or affect commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

V. TENDER OFFER AND MERGER AGREEMENT

11. On January 17, 1980 Northwest commenced a tender offer to purchase, through its wholly owned subsidiary PNW Inc., any and all of the outstanding shares of common stock, no par value, of Pay Less at \$22.50 net per share, the offer expiring on February 14, 1980 at 5:00 p.m. New York City time, unless extended, and being conditioned upon the valid tender of at least 917,000 shares prior to the expiration of the offer or any extension thereof. The purpose of the offer was to enable Northwest to acquire the entire equity interest of Pay Less. On February 4, 1980 Northwest amended its tender offer to increase, to \$24.00 net in cash per share, the price it will pay for shares of Pay Less. In addition, Northwest extended the expiration of its tender offer to 12:00 midnight on February 15, 1980, unless further extended.

12. As of December 28, 1979 Northwest had obtained 269,000 shares, approximately 12.2% of the outstanding shares, of Pay Less in open market purchases. On or about February 27, 1980 Northwest acquired a controlling interest in Pay Less.

13. On February 1, 1980 Pay Less and Northwest, including certain wholly owned subsidiaries, entered into an agreement and plan of reorganization and merger, subject to the approval of a majority of shareholders of Pay Less, providing that Pay Less enter

into an agreement of merger whereby it become a wholly-owned indirect subsidiary of Northwest. A Pay Less shareholder's meeting has been called for March 31, 1980 for purposes of voting on the agreement and plan of reorganization and merger.

VI. TRADE AND COMMERCE

14. The relevant lines of commerce are the retail sale of prescription drugs or retail sales by super drug stores.

15. At all times relevant herein, Northwest and Pay Less are actual competitors in the Lodi Area, Salinas Area and in the Livermore Area.

VII. EFFECTS

16. The effects of the acquisition of Pay Less by Northwest may be substantially to lessen competition or tend to create a monopoly 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, in the following ways, among others:

(a) actual competition between Northwest and Pay Less in the super drug store business in the Lodi Area will be eliminated;

(b) actual competition between Northwest and Pay Less in the retail sale of prescription drugs in the Lodi Area will be eliminated;

(c) actual competition between Northwest and Pay Less in the super drug store business in the Salinas Area will be eliminated;

(d) actual competition between Northwest and Pay Less in the super drug store business in the Livermore Area will be eliminated;

(e) actual potential competition between Northwest and Pay Less in the super drug store business in the Livermore Area will be eliminated;

(f) concentration in the super drug store business in the Lodi Area, Salinas Area or the Livermore Area will be increased or the possibility for eventual deconcentration may be diminished;

(g) concentration in the retail sale of prescription drugs in the Lodi Area will be increased or the possibility for eventual deconcentration may be diminished; and

(h) mergers or acquisitions between other super drug stores may be fostered or encouraged, causing a further substantial lessening of competition in the super drug store business.

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 San Francisco Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; 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 has 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, 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 Pay Less Drug Stores Northwest, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 9275 S.W. Peyton Lane, in the City of Wilsonville, State of Oregon.
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 the purposes of this Order the following definitions shall apply:

1. "Northwest" means Pay Less Drug Stores Northwest, Inc., a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland with its principal offices,

through February 15, 1980, at 10605 S.W. Allen Boulevard, Beaverton, Oregon, and, after February 15, 1980, 9275 S.W. Peyton Lane, Wilsonville, Oregon, and each of its successors, assigns, subsidiaries, affiliates, directors, officers, employees and agents.

2. "Pay Less" means Pay Less Drug Stores, a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its principal offices at 8000 Edgewater Drive, Oakland, California, and each of its successors, subsidiaries and affiliates.

3. "Person" means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association, or other business or legal entity.

4. "Super drug store" means a retail establishment which carries a much broader selection of drug store merchandise than a traditional neighborhood drug store, as well as numerous lines not normally found in a neighborhood drug store, and which caters to a relatively large trading area.

5. "Super drug stores subject to the terms and provisions of this Consent Order" mean

(1) the super drug stores operated at the following locations by Pay Less:

- (a) 300 West Kettleman, Lodi, California; and
- (b) 7201 Regional Street, Dublin, California; and

(2) the super drug store operated by Northwest at the following location:

- (a) 1623 Chestnut Street, Livermore, California.

6. "Eligible person" means any person subject to prior approval by the Commission.

I.

It is ordered, and directed that within one (1) year of the date of service of the Consent Order, except in the case of the super drug store located at 1623 Chestnut St., Livermore, California, as to which the date for compliance shall be eighteen (18) months of the date of service of this Consent Order or within four months of respondent's opening a new super drug store in Livermore, whichever comes first, Northwest shall divest itself of all assets, title, interests, rights, and privileges, of whatever nature, tangible and intangible, presently owned or acquired in the future by Northwest, including without

limitation all buildings, equipment, fixtures, inventory, leasehold interests and other property of whatever description of each of the super drug stores subject to the terms and provisions of this Consent Order. Divestiture may be accomplished by the disposition of aforementioned super drug stores either separately or jointly.

II.

It is further ordered, That divestiture shall be made only to an eligible person and shall be in a manner which preserves the assets and business of the super drug stores subject to the terms and provisions of this Consent Order as going concerns and fully effective competitors.

III.

It is further ordered, That pending divestiture required by this Consent Order, Northwest shall not cause or permit any deterioration of the assets and businesses of the super drug stores subject to the terms and provisions of this Consent Order in a manner that impairs the viability of any such assets and businesses.

IV.

It is further ordered, That the divestiture ordered and directed by this Consent Order shall be made in good faith and shall be absolute and unqualified; *provided, however,* that an eligible person may give and Northwest may accept and enforce any bona fide lien, mortgage, deed of trust or other form of security on all or any portion of any one or more of the super drug stores subject to the terms and provisions of this Consent Order. If a security interest is accepted, in no event should such security interest be interpreted to mean that Northwest has a right to participate in the operation or management of such stores. In the event that Northwest as a result of the enforcement of any bona fide lien, mortgage, deed of trust or other form of security interest reacquires possession of any one or all of the aforementioned super drug stores, then Northwest shall divest the reacquired assets and business in accordance with the terms of this Consent Order within six (6) months of the reacquisition.

V.

It is further ordered, That Northwest shall use its best efforts to fulfill and complete the current expansion plans of Pay Less with

respect to the lease, construction, opening and operation of new super drug stores to be located in San Ramon, California and Livermore, California.

VI.

It is further ordered. That, in the event Northwest has not terminated the lease of the premises of its super drug store located at 1045 N. Main St., Salinas, California, and vacated the premises on or before March 31, 1980, Northwest shall divest itself of the aforesaid super drug store within one (1) year of the date of service of this Consent Order and otherwise in the same manner as the divestiture of super drug stores subject to the terms and provisions of this Consent Order.

VII.

It is further ordered. That Northwest shall within ninety (90) days from the date of service of this Consent Order and every ninety (90) days thereafter until divestiture is completed and the new San Ramon and Livermore super drug stores opened submit in writing to the Commission a report setting forth in detail the manner and form in which respondent intends to comply, is complying, and has complied with the terms of this Order and such additional information relating thereto as may from time to time be required.

VIII.

It is further ordered. That Northwest 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 with the obligations arising out of this Consent Order.

IN THE MATTER OF
STERLING DRUG INC., ET AL.

Docket 8919. Interlocutory Order, Sept. 3, 1980

ORDER DENYING STERLING'S APPLICATION FOR INTERROGATORIES

Respondent Sterling Drug Inc., ("Sterling") seeks authorization to serve complaint counsel with interrogatories concerning the issuance of a Federal Trade Commission press release dated April 17, 1980. Sterling's application was certified to us by the Administrative Law Judge on May 15, 1980; the law judge has declined to rule on the matter because he believes that Rules 3.31(b)(1) and 3.35 do not authorize him to do so.

The press release involved here announced the Commission's initial acceptance of a consent agreement with Dancer-Fitzgerald-Sample, Inc. ("DFS"), an advertising agency that was named as a respondent in this proceeding due to its former responsibility for handling Sterling's Bayer Aspirin and Cope accounts. The agreement specifically limited the superiority and other types of claims that DFS could make in the future on behalf of Bayer Aspirin, Bayer Children's Aspirin, Cope, and any other over-the-counter analgesic. Sterling claims that the press release on this agreement was deceptive, however, and led to erroneous news reports that Bayer (i.e., Sterling) had agreed not to claim that its aspirin was superior to others. More specifically, Sterling contends that the release should at least have stated that DFS no longer handles advertising for Sterling and that Sterling is "now vigorously defending" against Commission charges at trial. In fact, the company's basic position appears to be that the press release should not have named any of its products at all since DFS is no longer connected with them in any way.

Complaint counsel have stated that they reviewed the press announcement prior to dissemination. Sterling contends that this fact raises the issue of prosecutorial misconduct and that interrogatories are necessary to establish complaint counsel's role in approving the release.

We do not consider lightly the kinds of concerns which Sterling has raised, for we recognize the impact that an agency press release may have on a company's reputation and competitive position. It is essential, therefore, that every effort be made to ensure that press releases are accurate and fair, and are not likely to be misconstrued by the news media. However, it is also clear that the Commission has an important obligation to inform the public of its activities, and

that the Commission's authority to publish announcements on the progress of agency proceedings is not eclipsed by the possibility that a respondent's goodwill might suffer. *Federal Trade Commission v. Cinderella Career & Finishing Schools, Inc.*, 404 F.2d 1308 (D.C. Cir. 1968). Thus, a respondent who objects to a press release would have no legally enforceable claim for relief unless it can at least show that it was injured by an inaccurate or discriminatory announcement. *See id.* at 1314. Assuming that such a showing would warrant some form of remedy—and we withhold judgment on that issue—the respondent should not be entitled to take the extraordinary step of serving interrogatories on complaint counsel without offering some reason to connect the inaccurate or discriminatory statement to prosecutorial abuse.¹ In this case, we find no inaccuracies in the release and no indications of prosecutorial abuse.²

The company argues that the announcement was inaccurate because it failed to make clear that DFS no longer had a direct stake in the case and that Sterling itself had strongly denied Commission charges. We disagree. The proposed disclosure regarding DFS might have suggested that the agency settled because it no longer had a sufficient interest to continue litigation. However, the accuracy of such an explanation is speculative and its relevance to the consent agreement strikes us as marginal. Sterling may believe that such a disclosure would tend to support its position opposing the charges in the complaint, but staff members should not be required to prepare press releases to achieve that purpose. In any event, the release stated that DFS, in accepting the consent agreement, did not admit that it had violated the law.

Similarly, the release noted that charges against Sterling and another advertising agency were still pending. Perhaps this statement was not so emphatic as Sterling would have wished, but we do not believe that there was an obligation to ensure that the release disclosed the vigor of Sterling's opposition to the charges made against it.

Finally, Sterling argues that the release should not have "emphasized" its products. However, the agreement signed by DFS covers claims for those products. One may thus expect that an accurate summary of this agreement would name Sterling's products. Fur-

¹ However, a respondent or any other party affected by a Commission press release may always seek the publication of corrected press releases by contacting the Office of Public Information (OPI), or by submitting a formal request to the Commission itself.

² It should be noted that OPI has primary responsibility for drafting press announcements, and that the function of other staff members, such as complaint counsel here, is merely to consult with OPI as needed. *See* FTC Operating Manual Section 17.2.2 (1980); *cf. id.* Section 5.14.6.13. In this and in other respects, complaint counsel are expected to follow Rule 7-107(H) of the Code of Professional Responsibility. *See The Raymond Lee Organization, Inc.*, 89 F.T.C. 208 (1977).

205

Interlocutory Order

thermore, since the complaint in this proceeding was directed specifically against advertisements of Sterling analgesics, it is hardly inappropriate that a settlement with one of the respondents should clearly identify the products concerned.

We therefore deny the respondent's application. Accordingly,

It is ordered, That respondent's application to serve interrogatories on complaint counsel be, and hereby is, denied.

Commissioner Pitofsky did not participate.