IN THE MATTER OF

FOOTE, CONE & BELDING ADVERTISING, INC.

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

Docket C-3116. Complaint, Sept. 30, 1983—Decision, Sept. 30, 1983

This consent order requires a Chicago, Ill. advertising agency affiliated with Amana Refrigeration, Inc., among other things, to cease representing that only Amana microwave ovens passed independent laboratory testing conducted in 1980 and that Amana microwave ovens rated "best quality" in a 1980 consumer survey. The order prohibits misrepresentations concerning the purpose, content or conclusion of any test or survey and requires the agency to maintain accurate records which substantiate and/or contradict any claim made for products covered by this order. Further, the agency must have a reasonable basis for all future quality, safety or comparative performance representations made for microwave ovens.

Appearances

For the Commission: *Andrew Sacks* and *Joel Winston.*

For the respondent: *Elroy H. Wolff* and *Philip J. Crihfield, Sidley & Austin,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Foote, Cone & Belding Advertising, 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 Foote, Cone, & Belding Advertising, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located in Chicago, Illinois.

PAR. 2. Respondent is now and at all times relevant to this complaint has been an advertising agency of Amana Refrigeration, Inc.

PAR. 3. Respondent has caused to be prepared and placed for publication and has caused the dissemination of advertising and promo-

tional material, including but not limited to the advertising referred to herein, to promote the sale of Amana microwave ovens.

PAR. 4. Respondent's dissemination of advertisements for Amana microwave ovens mentioned herein constitutes maintenance of a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of its business, and for the purpose of promoting sale and distribution of Amana microwave ovens, and other consumer products, respondent has prepared, disseminated and caused the dissemination of advertising in national magazines and newspapers distributed by mail and across state lines, and in radio broadcasts transmitted by radio stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines.

PAR. 6. Typical statements and representations in said advertisements, and promotional materials, prepared and disseminated as previously described, but not necessarily inclusive thereof, are found in advertisements attached hereto as Exhibits A, B, C and D.

PAR. 7. Through the use of the statements and representations referred to in Paragraph Six and other representations contained in advertisements not specifically set forth herein, respondent has represented, and now represents directly or by implication, the following claims:

1. An independent laboratory tested Amana microwave ovens and ovens of five other manufacturers in four of the tests required for exemption from displaying a warning label. Only the Amana ovens passed all four tests.

2. A survey of microwave oven owners found that owners of nine other brands of microwave ovens rated Amana ovens "best quality."

PAR. 8. In truth and in fact the direct or implied representations found in Paragraph Seven are false, for the following reasons:

1. The independent laboratory tested ovens of six manufacturers in addition to Amana. Ovens of one other manufacturer—Panasonic—passed all of the tests.

2. The survey relied upon did not find that owners of nine other brands of microwave ovens rated Amana "best quality" more often than they rated their own brand "best quality". As many or more owners of all other brands for which the data were tabulated rated their own brand "best quality". The vast majority of owners of other brands did not rate Amana "best quality" in the survey. In addition, the data relied upon reported results for owners of only four other brands of microwave ovens.

PAR. 9. At the time respondent made the representations alleged in

Paragraph Seven, respondent did not possess and rely upon a reasonable basis for making such representations. Therefore, respondent's making and dissemination of said representations, as alleged, constituted and now constitute unfair and deceptive acts or practices.

PAR. 10. Through the use of the advertisements referred to in Paragraph Six, and other advertisements not specifically set forth herein, respondent has represented, directly or by implication, that it possessed and relied upon a reasonable basis for the representations set forth in Paragraph Seven at the time of the initial dissemination of the representations and each subsequent dissemination. In truth and in fact, respondent did not possess and rely upon a reasonable basis for making such representations, and respondent knew or should have known that it did not possess and rely upon a reasonable basis at the time of dissemination. Therefore, respondent's making and dissemination of said representations, as alleged, constituted and now constitute unfair and deceptive acts or practices.

PAR. 11. As the representations referred to above are false, and respondent knew or should have known that they were false at the time of their dissemination, such representations are deceptive, misleading, and unfair.

PAR. 12. The use by respondent of the aforesaid false, unfair, or deceptive statements, representations, acts, and practices, and the placement in the hands of others of the means and instrumentalities by and through which others may have used the aforesaid statements, representations, acts, and practices, have had the capacity and tendency both to mislead consumers into the erroneous and mistaken belief that said statements and representations are true and complete and to induce such persons to purchase Amana microwave ovens by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts or practices of respondent, herein alleged as aforesaid, were and are all to the prejudice and injury of the public and of Amana Refrigeration, Inc.'s competitors, and constituted and now constitute unfair or deceptive acts and practices in or affecting commerce and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended.

EXHIBIT A

FCB
CHICAGO

CLIENT	AMANA REFRIGERATION INC.		DATE	11/14/80
PRODUCT	RADARANGE		NUMBER	AMC0821
TITLE	"TORTURE TEST"	AS PRODUCED	LENGTH (OR SPACE)	:25/:05 RADIO

0-1149

(SFX: CRASH OF STEEL BALL) That was a 5-pound steel ball dropped onto the door of the Amana Radarange. One of the safety tests established by the U. S. Government. Voluntary tests that microwave ovens have to pass to be exempt from displaying the safety warning label. An independent lab put 6 major brands of microwave ovens through 4 of the tests. (SFX: CRASH) Only Amana passed all 4. The Amana Radarange. Built better than it has to be. The Amana Way.

:05 DEALER TAG

LH/31A/1110.4

EXHIBIT B

FCB
CHICAGO

CLIENT	AMANA REFRIGERATION INC.		DATE	11.14/80
PRODUCT	RADARANGE		NUMBER	AMRCE22
TITLE	"TORTURE TEST"	AS PRODUCED	LENGTH (OR SPACE)	:50/:10 RADIO

JP80-1149

(SFX: CRASH OF STEEL BALL) That was a 5-pound steel ball being dropped onto the door of the Amana Radarange. And that's just one of the safety tests established by the U. S. Government. Voluntary tests that microwave ovens have to pass to be exempt from displaying the safety warning label. An independent lab put 6 major brands of microwave ovens through 4 of the tests. They slammed the steel ball at the front of the oven doors. (SFX: CRASH) They opened the doors, and slammed the ball into the seal of the ovens. (SFX: CRASH) They slammed it into the seal of the doors. (SFX: CRASH) And with up to 125 pounds of force, they closed the doors onto a steel rod. (SFX: CRASH) Only Amana passed all 4 tests. Only the Amana Radarange is built tough enough to take it. It's built better than it has to be. (SFX: CRASH) That's the Amana Way.

LH/31B/1110.4

EXHIBIT C

ONLY ONE MICROWAVE OVEN IS BUILT BETTER THAN IT HAS TO BE.

The Amana Radarange microwave oven. For years we've been telling you it's built better. Here's one more way we can prove it.

Four times in the last five years, we submitted our "RR" series of Radarange ovens to a U.S. Government safety test program. Every time we've passed every test. We're still the only microwave oven manufacturer that has. So we're still the only one exempt from displaying the Government's safety-warning label.

We volunteered to take these tests. But not all manufacturers have.

We wanted to know how some of the other ovens compared to our Radarange oven. So we asked an independent lab to test them—at our expense.

The test lab pitted five other major brands against our Amana Radarange. And then conducted four of the Government's most abusive impact tests.

For the first test, they slammed a five-pound steel ball into the front of the doors.

For the second test, they opened the doors, and slammed the ball into the inside seal of the ovens.

For the third, they slammed it into the seals of the doors.

And for the fourth test, they closed the doors, with up to 105 pounds of force, onto a steel rod.

The results? Only Amana passed all four tests.

We know that, in reality, no microwave oven would ever encounter such abuse. Yet we build our Radarange oven tough enough to take it.

We build it with our patented choke-seal door. That way, even if the door and seal are severely damaged, the choke-seal will keep the microwave energy inside the oven, where it belongs.

In short, we build the Amana Radarange better than it has to be. Because that's The Amana Way.

To see the Amana Radarange, see your Amana retailer. Or for more information, write to:
Amana Refrigeration, Inc., Dept. 576, Amana, Iowa 52204.

IT DOESN'T SAY Amana. IT'S NOT A Russianan

THE AMANA® RADARANGE®

Every part of every product we make is backed by a century-old tradition of fine craftsmanship.

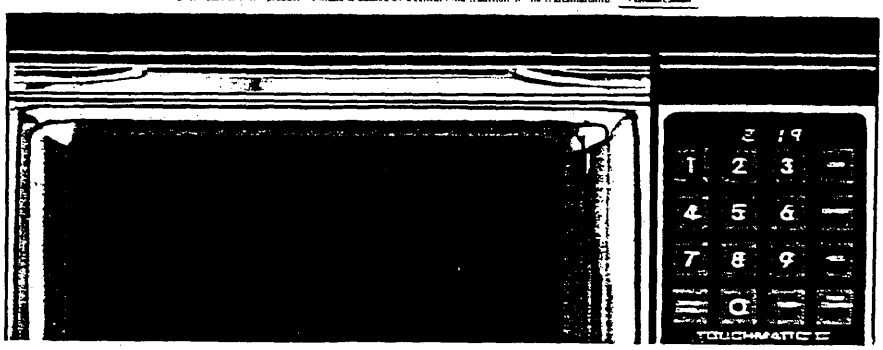


EXHIBIT D

EVEN OWNERS OF THE NINE OTHER LEADING MICROWAVE OVENS RATED AMANA BEST QUALITY.

*Appliance Manufacturer** magazine recently asked microwave oven owners to list the "best quality" brand of microwave oven. You'll be interested to know that more oven owners rated Amana "best quality" than any other brand.

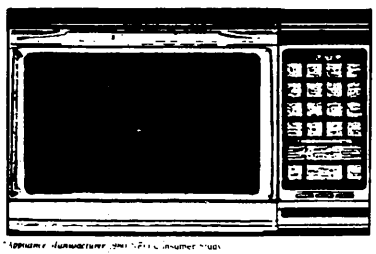
Among Amana owners, 97% said they received the quality they expected from their ovens. And that's the highest indicator of satisfaction in the survey.

Of course, this is just proof of what you already know: quality produces satisfied customers.

And quality is what The Amana Way is all about.

For more information, write to: Amana Refrigeration, Inc., Dept. 470, Amana, Iowa 52204.

IF IT DOESN'T SAY **Amana.** IT'S NOT A *Radarange*, MICROWAVE OVEN



*Appliance Manufacturer, 1981 F.T.C. Consumer Study

Every part of every product we make is backed by a century-old tradition of fine craftsmanship. Amana

Decision and Order

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

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

The Commission having 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 Foote, Cone & Belding, Advertising, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 401 N. Michigan Avenue, in the City of Chicago, State of Illinois.

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

Order

I

It is ordered, That respondent Foote, Cone & Belding Advertising, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertis-

ing, offering for sale, sale, or distribution of any Amana microwave oven or Amana combination microwave and convection oven for consumer or commercial use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from:

A. Representing, directly or by implication, that only Amana ovens passed independent testing conducted by an independent laboratory in 1980.

B. Representing, directly or by implication, that in a 1980 consumer survey, owners of nine other brands of microwave ovens rated Amana "best quality."

II

It is further ordered, That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of any product specified in Part II(C) of this Order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the purpose, content, sample, reliability, results or conclusions of any survey, opinion research, or test.

B. Failing to maintain records:

1. Of all materials that were relied upon in disseminating any representation covered by this order, insofar as the text of such representation is prepared, authorized, or approved by any person who is an officer or employee of respondent, or of any division, subdivision or subsidiary of respondent.

2. Of all test reports, studies, surveys, or demonstrations in its possession or control that contradict any representation made by respondent that is covered by this Order.

Such records shall be retained by respondent for three years from the date that the representations to which they pertain are last disseminated, and may be inspected by the staff of the Commission upon reasonable notice.

C. Part II of this Order shall apply to the following products for consumer use: all microwave ovens; all other ranges, cooktops, or ovens; all refrigerators, freezers, or combination refrigerator/freezers; all garbage compactors; all clothes washers and dryers; all air

conditioners; all heating equipment and heat pumps; and all dehumidifiers.

III

A. *It is further ordered,* That respondent, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of any microwave oven, or combination microwave and convection oven, for consumer use in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do cease and desist from representing, directly or by implication, the quality and/or safety of any such product, or from comparing any such product as to quality and/or safety to any product or products of one or more competitors, unless, at the time of such representation, respondent possesses and relies upon a reasonable basis for such representation, consisting of reliable and competent evidence that substantiates such representation.

B. To the extent the evidence of a reasonable basis consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of professionals in the relevant area, such evidence shall be "reliable and competent" for purposes of Part III(A) only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession or science to yield accurate and reliable results.

Provided, however, That in circumstances where the scientific or professional tests, analyses, research, studies, or any other evidence based on expertise of professionals in the relevant area was not directly or indirectly prepared, controlled, or conducted by respondent, it shall be an affirmative defense to an alleged violation of Part III of this Order for Respondent to prove that it reasonably relied on the expert judgment of its client or of an independent third party in concluding that it had a reasonable basis in accordance with Part III of this Order. Such expert judgment shall be in writing signed by a person qualified by education or experience to render the opinion. Such opinion shall describe the contents of such evidence upon which the opinion is based.

Provided further, That nothing in this Order shall be deemed to deny or limit respondent with respect to any right, defense, or other affirmative defense to which respondent otherwise may be entitled by law in a compliance action or any other action.

IV

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

V

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

VI

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

VII

It is further ordered, That this Order shall take effect on the day that an order of the Commission to cease and desist in *Amana Refrigeration, Inc.,* Docket 9162 [102 F.T.C. 1262 (1983)], has become final and effective, and this Order shall be effective only for such period of time as the Order in Docket 9162 is effective.

IN THE MATTER OF

BAYLEYSUIT, INC.

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

Docket C-3117. Complaint, Sept. 30, 1983—Decision, Sept. 30, 1983

This consent order requires the Fortuna, Calif. manufacturer of the "Bayley exposure suit," among other things, to publish advertisements, send notices, and use its best efforts to locate and notify users of the suits that the bladder hose assembly used to inflate the flotation pillow requires a safety modification. The manufacturer must send to each BayleySuit user who requests it, a retrofit kit, together with understandable instructions to permit easy repair of the suit. If, by July 15, 1983, 80% of BayleySuit users have not requested a retrofit kit, the manufacturer must search dealer records, ship registeries and listings, and the rolls of fishermen's unions to obtain the names and addresses of retail purchasers, so they can be notified by letter of the safety hazard and provided with a repair kit request card. Further, the order prohibits false representations concerning the buoyancy or safety of the Bayley exposure suit or any other product.

Appearances

For the Commission: *Dennis D. McFeely.*

For the respondent: *Richard D. Warren, Landels, Ripley & Diamond,* San Francisco, Calif.

COMPLAINT

The Federal Trade Commission, having reason to believe that BayleySuit, Inc. has violated Section 5 of the Federal Trade Commission Act and that an action is in the public interest, therefore issues this complaint and alleges:

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

Bayley exposure suit means a suit manufactured before June, 1980 by BayleySuit, Inc., with a flotation pillow attached, made of flexible buoyant material completely enclosing the body (except for the face) and designed for emergency use to increase the chance of survival in cold water.

User means any business or individual who owns or possesses a Bayley exposure suit for any purpose other than resale.

Flotation pillow means an inflatable bladder attached to the upper

back of a Bayley exposure suit so that, when inflated, the suit wearer's head and shoulders are elevated out of the water.

Bladder hose assembly means a two-piece tube used to orally inflate the flotation pillow.

2. Respondent BayleySuit, Inc. is a California corporation with its principal office and place of business at 900 S. Fortuna Boulevard, Fortuna, California.

3. Respondent is, and has been, engaged in the sale of substantial quantities of Bayley exposure suits.

4. In the course and conduct of its business, respondent has caused the exposure suits to be transported from its place of business in Fortuna, California to users and retailers located in various other States of the United States. Respondent maintains and at all times relevant herein has maintained a substantial course of trade in those products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

5. For the purpose of inducing the purchase of Bayley exposure suits, respondent has made or has caused to be made, in advertising and promotional materials, certain statements and representations about the Bayley exposure suits of which the following are typical:

YOU WANT THE BEST, SAFEST PROTECTION AVAILABLE, RIGHT?
INSURE YOUR SAFETY WITH QUALITY
MORE BUOYANCY
FLOTATION BLADDER (MORE FREEBOARD)

6. Through the use of these and other similar statements and representations, and by offering Bayley exposure suits for sale as a product fit for the purpose of improving the chance of survival in cold water, respondent has represented directly or by implication that Bayley exposure suits will consistently and safely support the head and shoulders out of the water, thereby substantially diminishing the likelihood of drowning.

7. In truth and in fact the Bayley exposure suits would not consistently and safely support the head and shoulders out of the water. Due to the design of the bladder hose assembly, the flotation pillow which provides the support for the head and shoulders would not consistently remain inflated in actual use, substantially increasing the likelihood of drowning. Therefore, these statements and representations were false, misleading, and deceptive.

8. Respondent's false statements and representations have had the capacity and tendency to mislead potential users into the mistaken belief that the statements and representations were true and to induce the purchase of such products by virtue of the said mistaken belief. Respondent has therefore engaged in unfair and deceptive 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 having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Seattle Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

The Commission having 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 BayleySuit, 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 900 S. Fortuna Blvd., in the City of Fortuna, 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 purposes of this Order, the following definitions shall apply:

Bayley exposure suit shall mean a suit manufactured before June 1, 1980 by BayleySuit, Inc., with a flotation pillow attached, made of flexible buoyant material completely enclosing the body (except for

the face) and designed for emergency use to increase the chance of survival in cold water.

User means any business or individual who owns or possesses a Bayley exposure suit for any purpose other than resale.

Flotation pillow means an inflatable bladder attached to the upper back of a Bayley exposure suit so that, when inflated, the suit wearer's head and shoulders are elevated out of the water.

I.

It is ordered, That respondent BayleySuit, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, division, or other device, in connection with the manufacture, advertising, offering for sale, sale or distribution of any Bayley exposure suit or any other product, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith cease and desist from representing, directly or by implication, that the product will ensure buoyancy or is safe to use unless such is the case.

II.

It is further ordered, That respondent, its successors and assigns shall:

A. Publish advertisements, send notices, and use its best efforts to locate and notify users that Bayley exposure suits need a safety modification of the bladder hose assembly on the flotation pillow;

B. Mail to each Bayley exposure suit user who requests it, a retrofit kit, accompanied by easily understandable modification instructions, sufficient to modify the bladder hose assembly in a manner approved by the U.S. Coast Guard;

C. If requests for modification kits have not been received by July 15, 1983 from the users of at least eighty percent of Bayley exposure suits:

1. Respondent shall use its best efforts to obtain directly from past and present dealers the names and addresses of all Bayley exposure suit retail purchasers. Respondent may obtain these names from dealers in whatever sequence and manner it chooses, but it will continue the process until the names and addresses of at least eighty percent of the above-described suit retail purchasers are obtained. This process shall be completed no later than November 30, 1983; and

2. After July 15, 1983, respondent shall, within 15 days of identification of any retail purchaser, send Attachments A and B by first class

mail to that retail purchaser at his or her last known address. "IMPORTANT SAFETY NOTICE" shall be conspicuously placed on the front of the envelope;

D. Within 10 days of the return of each mailing of Attachments A and B marked by the Post Office as undeliverable, respondent will search for the current address of the addressee of each returned mailing. This search shall include contacting relevant ship registries and listings, and fishermen's unions;

E. Within 10 days of locating a new address through the search required by II.D, remail Attachments A and B in the manner required by II.C.2 of this Order to each retail purchaser for whom a new address is found.

III.

It is further ordered, That respondent maintain complete records of the nature of its compliance with this Order including:

1. The names, addresses, and dates of mailing of all notices required by this Order, and

2. The names, addresses, and dates of mailing of all modification kits required to be sent by this Order.

IV.

It is further ordered, That respondent notify the Commission at least 30 days prior to any proposed change in the respondent such as dissolution, merger, 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.

V.

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

ATTACHMENT A

[COMPANY LETTERHEAD]

** VERY IMPORTANT **

SAFETY HAZARD NOTICE

Dear BayleySuit Customer:

According to our records, you purchased a Bayley Exposure Suit made between August 1977 and June 1980.

We wish to inform you that a *safety hazard* may exist in some models of our exposure suits manufactured before June 1980. BayleySuit has received reports that in some suits made before June 1980, the bladder hose assembly, which inflates the suit's flotation pillow, has separated. This separation would prevent inflation of the flotation pillow, which when inflated helps keep the head and shoulders above water.

We have developed a free modification kit to fix this problem and eliminate the safety hazard. To see if your suit needs this modification, look inside the suit for a white label that looks like this:

Exposure Suit
BayleySuit, Inc.
900 S. Fortuna Blvd.
Fortuna, CA 95540

Model: 7–01–04
Serial: 1–23–45
Date: 1–15–78

If the date shows that your suit was made before June 1980, please fill out and mail in the enclosed card or call us collect at (707) 725–3391. We will send you a *free,* easy to use kit for modifying the bladder hose.

While examining your suit for the manufacturing date, we recommend that you use this opportunity to give your suit an overall examination.

1. Work all zippers and re-wax them with the pariffin provided. Store the suit with the front entry zip *open,* so your suit will be easier to put on.
2. Check for water damage, mildew, etc. Has the suit been stored in a dry place? Dry thoroughly, inside and out, before storage.
3. Inflate the flotation pillow to 3/4 capacity. Be sure you know how to use it.
4. Give the suit a general inspection to assure it is in good working order.
5. Try the suit on . . . Do a practice drill. Be sure you are familiar with the suit.

These simple checks will ensure that your suit is safe and useful.

We sincerely appreciate your cooperation, and look forward to serving you in the future. If you have any questions or concerns, do not hesitate to contact us.

Sincerely,

BAYLEYSUIT, INC.
Susan Forbes
President

Enclosures

ATTACHMENT B

Customer Response Card December, 1982

I have received your information on the modification kit available for my Bayley Exposure Suit. Please send the kit to the address below.

Name _____

Address _____

_____

Exposure Suit Serial # _____

Date of Manufacture _____

F/V or Company Sold to: _____

# of Kits needed _____

BayleySuit, Inc.
P.O. BOX 487
FORTUNA, CALIFORNIA 95540

IN THE MATTER OF

WASHINGTON, D.C., DERMATOLOGICAL SOCIETY

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

Docket C-3118. Complaint, Oct. 5, 1983—Decision, Oct. 5, 1983

This consent order requires a Washington, D.C. medical society, among other things, to cease inhibiting competition by restricting or advising member dermatologists against the truthful advertising of their fees and services; and by declaring such activities unethical. The society must remove from its Principals of Professional Conduct, constitution and bylaws, any provision which is inconsistent with the prohibitions contained in the order; and publish revised versions of these documents. The order also requires that the society take no formal action against a person charged with violating an ethical standard without first providing that person with reasonable notice of the allegations and a hearing, as well as written findings and conclusions concerning the allegations. Further, for a period of 5 years, the society must provide each new member with a copy of the complaint and order in this matter.

Appearances

For the Commission: *Jill M. Frumin.*

For the respondents: *Pro se.*

COMPLAINT

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

PARAGRAPH 1. Respondent Washington, D.C., Dermatological Society is a corporation formed pursuant to the laws of District of Columbia with its mailing address at George Washington University Medical School, c/o Department of Dermatology, 2150 Pennsylvania Avenue, N.W., Washington, D.C.

PAR. 2. Respondent is a professional association of physicians who limit their practice to dermatology, and who are Diplomates of the American Board of Dermatology. Respondent has approximately one

hundred (100) members, constituting a substantial majority of dermatologic physicians in the greater Washington metropolitan area.

PAR. 3. Members of respondent are engaged in the business of providing dermatologic health care services for a fee. Except to the extent that competition has been restrained as herein alleged, members of respondent have been and are now in competition among themselves and with other dermatologists.

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

PAR. 5. In the conduct of their business, members of respondent receive and treat patients from other states and counties, receive substantial sums of money from the federal government and from private insurers for rendering dermatologic services, which monies flow across state lines, and prescribe medicines which are shipped in interstate commerce. The acts or practices described below are in interstate commerce, or affect the interstate activities of respondent's members, third-party payers, other third parties, and some patients of respondent's members, and are in or affect commerce within the meaning of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

PAR. 6. Respondent has acted as a combination of at least some of its members or has conspired with at least some of its members to foreclose, frustrate, and eliminate competition among dermatologic physicians in the greater Washington metropolitan area by:

A. Prohibiting its members from truthfully advertising their prices, fees, or charges, and otherwise restricting truthful advertising by its members; and

B. Attempting to coerce individual members or prospective members into ceasing to advertise their services truthfully, to disseminate truthful information about their fees and services, and otherwise to solicit patients' business.

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

A. Enacting ethical restrictions that prohibit its members from truthfully advertising any financial matters, and otherwise restricting truthful advertising by its members. By virtue of such ethical restraints, members are prohibited from truthfully advertising, among other things, their prices, fees, or charges, types or methods of treatment, professional training and experience, and special expertise; and

B. Threatening to exclude from membership any physician who is associated with a health care delivery organization that advertises the identity, fees, or services of an affiliated physician.

PAR. 8. Through the combination or conspiracy and the acts or practices described above, members of respondent have agreed not to advertise their services or otherwise solicit patients' business, and certain individual members of respondent may have been coerced into abandoning advertising their services or otherwise soliciting patients' business. Such advertising and solicitation enables physicians to compete on the basis of price and quality, and enables individual patients to choose among dermatologic physicians on the basis of price or quality. Consequently:

A. Competition among dermatologic physicians for patients is being foreclosed, frustrated, and eliminated; and

B. Consumers are being deprived of the benefits of competition among dermatologic physicians. In particular, patients are being deprived of truthful information about dermatologic physicians' fees and services, including, among other things: physicians' prices, fees, or charges, types or methods of treatment, professional training and experience, and special expertise.

PAR. 9. The combination or conspiracy and the acts and practices described above constitute unfair methods of competition and unfair acts or practices which violate Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. Such combination or conspiracy is continuing and will continue absent the entry against respondent of appropriate relief.

DECISION AND ORDER

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

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

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

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

1. Respondent Washington, D.C., Dermatological Society is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at George Washington University Medical School, c/o Department of Dermatology, 2150 Pennsylvania Avenue, N.W., in the City of Washington, D.C.

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

ORDER

I.

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

A. *DCDS* means respondent Washington, D.C., Dermatological Society, its delegates, trustees, councils, committees, Board of Directors, officers, representatives, agents, employees, successors, and assigns.

II.

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

A. Restricting, regulating, impeding, declaring unethical, interfering with, or advising against the advertising or publishing by any person of the prices, terms, or conditions of sale of dermatologic physicians' services, or of information about dermatologic physicians' facilities or equipment that are offered for sale or made available by dermatologic physicians or by any organization with which dermatologic physicians are affiliated;

B. Restricting, regulating, impeding, declaring unethical, interfer-

ing with, or advising against the solicitation, through advertising or by any other means, of patients, patronage, or contracts to supply dermatologic physicians' services, by any dermatologic physician or by any organization with which dermatologic physicians are affiliated; and

C. Inducing, urging, encouraging, or assisting any dermatologic physician, group of dermatologic physicians, or any other non-governmental organization to take any of the actions prohibited by this part.

Nothing contained in this part shall prohibit respondent from formulating, adopting, disseminating to its members, and enforcing reasonable ethical guidelines governing the conduct of its members with respect to representations, including unsubstantiated representations, that DCDS reasonably believes would be false or deceptive within the meaning of Section 5 of the Federal Trade Commission Act, or with respect to uninvited, in-person solicitation of actual or potential patients, who, because of their particular circumstances, are vulnerable to undue influence.

III.

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

A. Reasonable written notice of the allegations against him or her;

B. A hearing wherein such person or a person retained by him or her may seek to rebut such allegations; and

C. The written findings or conclusions of respondent with respect to such allegations.

IV.

It is further ordered, That DCDS shall:

A. For a period of five (5) years, provide each new member of DCDS with a copy of the complaint and this Order at the time the member is accepted into membership;

B. Within sixty (60) days after the Order becomes final, publish and distribute a copy of the complaint and this Order to each of its members;

C. Within ninety (90) days after this Order becomes final, remove from respondent's Principles of Professional Conduct, its constitution and bylaws, and any other existing policy statements or guidelines of respondent, any provision, interpretation, or policy statement which

is inconsistent with Part II of this Order, and within one hundred and twenty (120) days after this Order becomes final, publish and distribute a copy of the revised versions of such documents, statements, or guidelines to each of its members;

D. Within one hundred twenty (120) days after this Order becomes final, file a written report with the Federal Trade Commission setting forth in detail the manner and form in which it has complied with this Order;

E. For a period of five (5) years after this Order becomes final, maintain and make available to the Commission staff for inspection and copying upon reasonable notice, records adequate to describe in detail any action taken in connection with the activities covered by Part II of this Order, including but not limited to any advice or interpretation rendered with respect to advertising or solicitation involving any of its members; and

F. Within one year after this Order becomes final, and annually thereafter for a period of five (5) years, file a written report with the Federal Trade Commission setting forth in detail any action taken in connection with the activities covered by Part II of this Order, including but not limited to any advice or interpretations rendered with respect to advertising or solicitation involving any of its members.

V.

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

IN THE MATTER OF

ITT CONTINENTAL BAKING COMPANY

Docket 7880. Interlocutory Order, Oct. 12, 1983

ORDER SETTING ASIDE ORDER REQUIRING FILING OF SPECIAL REPORT

By a petition filed on June 13, 1983, respondent ITT Continental Baking Company ("ITT Continental") requests that the Commission reopen this proceeding and set aside or in the alternative modify the November 26, 1974 Order Requiring Filing of Special Report, which requires ITT Continental to give sixty days prior notice before making any acquisition in the baking industry. *See ITT Continental Baking Co.*, 84 F.T.C. 1349 (1974). Pursuant to Section 2.51 of the Commission's Rules of Practice, the petition was placed on the public record for comment. No comments were received.

Upon consideration of ITT Continental's request and supporting materials, and other relevant information, the Commission finds that the public interest and changed conditions of law warrant reopening of the proceeding and setting aside of the order.

Since the Order to File Special Report was issued, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a, was passed. ITT Continental must now notify the Commission and the Assistant Attorney General in charge of the Antitrust Division of any acquisitions in the baking industry that are required to be reported by the statute and implementing rules. In view of this overlap between the Hart-Scott-Rodino premerger reporting requirements and the reporting requirements of the Order, the Commission believes that the Order is no longer necessary in order for the Commission to have the opportunity to scrutinize respondent's acquisitions in the baking industry that are subject to the Hart-Scott-Rodino premerger reporting requirements. As to other acquisitions, the Commission believes the costs of continuing to require reporting under the Order outweigh the benefits of the prior notice because such acquisitions, generally those that do not meet the Hart-Scott-Rodino dollar threshold, do not appear sufficiently likely to raise competitive concern.

Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that the Order Requiring Filing of Special Report be set aside as of the effective date of this order.

IN THE MATTER OF

DILLON COMPANIES, INC.

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

Docket C-3119. Complaint, Oct. 13, 1983—Decision, Oct. 13, 1983

This consent order requires a Hutchinson, Kansas operator of retail grocery stores, among other things, to cease engaging in any concerted action to impede the collection or dissemination of comparative price information. For a period of 5 years, the company is prohibited from requiring price checkers to purchase items to be priced, as a condition of allowing them to price check; denying price checkers the same access to its stores as is provided to customers; or coercing any price checker, publisher or broadcaster to refrain from collecting or reporting comparative price information. Additionally, respondent must offer to reimburse TeleCable up to $1,000 for the broadcast of a comparative grocery price information program. Should the station elect to broadcast such a program, respondent must post signs and place newspaper ads notifying the public that such a program is being broadcast.

Appearances

For the Commission: *Patricia A. Bremer.*

For the respondent: *Norman Diamond, Arnold & Porter,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41 *et seq.,* and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Dillon Companies, Inc., has violated Section 5 of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint charging as follows:

1. Dillon Companies, Inc., (hereafter "respondent") is a Kansas corporation with its principal offices at 700 E. 30th Avenue, Hutchinson, Kansas.

2. At all times relevant to this complaint, respondent has been engaged in the operation of retail grocery stores in various areas in the United States including the city of Springfield, Missouri, and Greene or Christian counties, Missouri (hereafter "Springfield").

3. At all times relevant to this complaint, respondent has engaged

in activities in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Except to the extent that competition has been restrained as herein alleged, in the course and conduct of its business respondent has been and is now in substantial competition in or affecting commerce with corporations, firms, or individuals engaged in the operation of retail grocery stores in Springfield.

5. Vector Enterprises, Inc., ("Vector") is engaged in the business of gathering and selling comparative retail grocery price information in various cities throughout the United States. In each city, Vector visits grocery stores weekly and collects price information on a sample of 80 or more grocery products in four categories: meat, produce, grocery and non-food. This activity is sometimes referred to as "price checking." Vector processes the price data and sells it to cable television stations, which typically broadcast the comparative prices of the stores on each of the items checked as well as weighted market basket comparisons on each of the four grocery categories and the total of all categories.

6. On or about July 15, 1980, Vector began collecting comparative price information on a weekly basis at about five retail grocery stores, including the largest chains, in Springfield, and Vector began selling this comparative retail grocery price information to TeleCable, a cable television station in Springfield. TeleCable broadcast Vector's information 24 hours a day. For more than one year, Vector collected and TeleCable broadcast comparative price information for a number of retail grocery stores in Springfield, including one or more stores operated by respondent.

7. Prior to October 14, 1981, the Vector price check compared the prices of five Springfield grocers including respondent. Some time shortly before October 14, 1981, respondent and other operators of retail grocery stores in Springfield whose prices were also included in the Vector survey agreed that they would act in concert to impede Vector's ability to gather comparative grocery prices. On or about that date, pursuant to the agreement, respondent and other operators of retail grocery stores in Springfield simultaneously took concerted action that effectively prevented Vector from collecting comparative grocery price information in their stores. Respondent refused to permit Vector to collect price information in its stores. The other stores either did likewise or they required Vector to purchase each grocery item it desired to price check. The weekly cost of purchasing the groceries would have been substantially higher than the price at which Vector had agreed to sell the grocery price information to TeleCable.

8. As of October 14, 1981, as a direct result of the agreement among

respondent and its competitors, Vector was able to price check at only one of the five Springfield grocery retailers that had been included in the survey. Thereafter TeleCable broadcast the prices for just that one store. On or about December 31, 1981, TeleCable stopped broadcasting Vector's price reporting program and terminated its agreement with Vector because Vector was no longer able to provide comparative price information for the largest retail grocery chains in Springfield.

9. Through the acts and practices described above, respondent and others have agreed, combined or conspired to obstruct the collection and dissemination of comparative grocery price information, with the following actual or potential effects, among others:

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

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

c. Competition in the collection and dissemination of retail grocery price information has been hindered and restrained;

d. Competition in the development of new forms of retail grocery price information has been hindered and restrained; and

e. The free forces of competition have been prevented from determining the amount of comparative retail grocery price information that will be available to consumers in the marketplace.

10. Respondent and others have agreed, combined or conspired to engage, and they have actually engaged, in conduct that constitutes a restraint on price competition. Respondent thereby has unreasonably restrained trade in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended; and respondent's conduct as alleged herein constitutes an unfair method of competition or an unfair act or practice in violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended.

11. Respondent and others have agreed, combined or conspired to boycott, and they have actually boycotted, firms that collect or disseminate comparative grocery price information. Respondent thereby has unreasonably restrained trade in or affecting commerce in violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended; and respondent's conduct as alleged herein constitutes an unfair method of competition or an unfair act or practice in violation of Section 5(a)(1) of the Federal Trade Commission Act, as amended.

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption

hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

The Commission having 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 Dillon Companies, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its office and principal place of business located at 700 E. 30th Avenue, in the City of Hutchinson, State of Kansas.

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

ORDER

I.

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

A. *Dillon* means Dillon Companies, Inc., its retail grocery divisions and subsidiaries, its officers, representatives, agents, employees, successors and assigns.

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

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

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

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

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

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

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

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

J. *Springfield Division* means (i) Washington County, Arkansas; Crawford County, Kansas; Mayes and Ottawa Counties, Oklahoma; and Boone, Callaway, Camden, Cass, Cole, Greene, Henry, Jasper, Miller, Moniteau and Morgan Counties, Missouri; and (ii) any other geographic area in which the Dillon retail division based in Greene County, Missouri, operated a supermarket on or after October 14, 1981.

II.

It is further ordered, That:

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

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

1. Require price checkers to purchase items to be price checked as a condition of allowing them to price check; or

2. Deny price checkers the same access to Dillon's supermarkets as is provided to customers; or

3. Coerce, or attempt to coerce, any price checker, publisher or broadcaster into refraining from or discontinuing price checking or price reporting.

C. 1. Nothing in paragraph II.B. shall prevent Dillon from adopting

reasonable, non-discriminatory rules governing the number of price checkers in its supermarkets at any one time for the purpose of preventing disruption of Dillon's normal business operations.

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

3. Whenever Dillon believes that conditions exist that justify the exclusion of a price checker, it may submit to the Federal Trade Commission a sworn statement setting forth with particularity the facts that Dillon believes meet such conditions. For purposes of this Order, the only conditions justifying the exclusion of a price checker are that another supermarket operator with whose prices Dillon's prices are compared in a price report has knowingly tampered with or manipulated the results of such price report for its own competitive gain either (a) by the use of information wrongfully obtained and not available to all supermarket operators whose prices are being compared, or (b) by inducing any price reporter or price checker to cause false information to be published or broadcast. Following the Federal Trade Commission's actual receipt of such statement, Dillon may exclude the price checkers from its supermarkets in the geographic area(s) covered by the affected price report for so long as the conditions set forth in Dillon's statement shall exist. In any civil penalty action against Dillon for a violation of subparagraph II.B. 2. occurring after notice to the Federal Trade Commission was given by Dillon as provided in this subparagraph, Dillon shall have the burden of proving, by a preponderance of the evidence, that the conditions justifying the exclusion of a price checker as set forth in this subparagraph have been met. In meeting its burden, Dillon may offer evidence only for the purpose of proving the facts set forth in its statement to the Federal Trade Commission. Nothing in this subparagraph shall be construed to be an exception to the prohibitions of paragraph II.A. of this Order.

III.

It is further ordered, That, upon the resumption of price reporting by TeleCable of Springfield similar in quality and coverage to that broadcast by it prior to October 14, 1981, and upon receipt by Dillon of written request for payment from TeleCable, Dillon shall reimburse TeleCable for its actual cost of obtaining a price reporting program up to the amount of two hundred fifty dollars ($250.00) per week. Dillon's obligation under this Part (III) shall terminate either when it has reimbursed TeleCable in the total amount of one thousand dollars ($1,000.00) or three (3) years following the date on which

this Order becomes final, whichever occurs first. Dillon shall not reimburse TeleCable for costs incurred by TeleCable during any week for which TeleCable's costs are reimbursed by any other person.

IV.

It is further ordered, That, within seven (7) days following the date on which this Order becomes final, Dillon shall send a letter, which has been approved in advance by the Federal Trade Commission, together with a copy of this Order, to TeleCable of Springfield, informing TeleCable of Dillon's obligations under Parts II and V of this Order, TeleCable's rights under Part III, and the notices that Dillon must receive from TeleCable before certain Order provisions become binding upon Dillon.

V.

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

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

GROCERY PRICE SURVEY

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

B. For a period of sixty (60) days following the receipt of such notice, whenever Dillon places food advertisements in the *Springfield Daily News* of one-half page or larger, Dillon shall publish an announcement as a part thereof in the same language provided in paragraph V.A. This announcement shall be no smaller than 3 inches high by 3 inches wide and shall be printed in conspicuous type. In each week in which Dillon does not place a one-half page or larger food advertisement in the *Springfield Daily News,* Dillon shall place this announcement as a display advertisement in the Lifestyle/Food Section of the *Springfield Daily News*

VI.

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

VII.

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

VIII.

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

IN THE MATTER OF

GREAT DANE TRAILERS, INC.

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

Docket C-3120. Complaint, Oct. 13, 1983—Decision, Oct. 13, 1983

This consent order prohibits the manufacturer and seller of Great Dane truck trailers, among other things, from taking any action which frustrates or eliminates competition in the sale of new Great Dane truck trailers. Great Dane Trailers, Inc. is barred from entering into any agreement with the Great Dane Distributor Council, a dealer's association, or its members, to restrict sales to certain territories or customers; and from formulating or utilizing exclusive territories until Dec. 1, 1984. The manufacturer must make available to dealers and customers a brochure listing all independent dealers and advise customers that any dealer may be contacted regarding the purchase of a new Great Dane truck trailer.

Appearances

For the Commission: *Douglas B. Brown* and *Phyliss W. Richardson.*

For the respondent: *John M. Hewson, III, Hunter, Maclean, Exley & Dunne,* Savannah, Ga. and *Barry J. Brett, Parker, Chapin, Flattau & Klimpe,* New York City.

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 Great Dane Trailers, Inc., a corporation, and Great Dane Distributor Council, an unincorporated association, and its members, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

I. DEFINITIONS

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

A. *Truck trailer* is a property-carrying vehicle, or chassis thereof, drawn by a truck or truck tractor and having one or more axles with a rating of 10,000 pounds or more per axle.

B. *Dealer* is any proprietorship, partnership, firm or corporation authorized by Great Dane Trailers, Inc., to sell its new truck trailers but which is not owned or controlled by Great Dane Trailers, Inc. *Provided, however,* That two or more dealers that are majority-owned subsidiaries of a common parent shall not be regarded as separate dealers for the purposes of this complaint.

C. *Factory branch* is any corporation which is controlled by, or a division of, Great Dane Trailers, Inc., and which sells new Great Dane truck trailers.

D. *Area of primary responsibility* is a geographic area or customer or customers assigned to a dealer on a nonexclusive basis for which the dealer is responsible for sales penetration.

E. *Historic trading area* is a geographic area or specific customer for which primary responsibility has been assigned at some time in the past.

II. RESPONDENTS AND TRADE AND COMMERCE

PARAGRAPH 1. Respondent Great Dane Trailers, Inc., (hereinafter "Great Dane") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia with its offices and principal place of business located at East Lathrop Avenue, Savannah, Georgia.

PAR. 2. Respondent Great Dane is now, and for some time last past has been, engaged in the manufacture, advertising, offering for sale, sale and distribution of truck trailers.

PAR. 3. Respondent Great Dane 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, as amended.

PAR. 4. Respondent Great Dane sells and distributes its products directly to dealers and to factory branches located throughout the United States, who in turn resell respondent Great Dane's products to the general public.

PAR. 5. Approximately 50 percent of respondent Great Dane's new truck trailers are sold and distributed by dealers, with the remainder being sold and distributed by factory branches.

PAR. 6. Respondent Great Dane's sales for fiscal year 1980 were in excess of 200 million dollars.

PAR. 7. Respondent Great Dane Distributor Council (hereinafter "Distributor Council," also known as the Great Dane Dealer's Association) is an unincorporated association formed in 1976, with membership comprised of dealers for respondent Great Dane located throughout the United States.

PAR. 8. Respondent Distributor Council was formed and has operated for the purpose of mutual economic benefit of its members. Its members conduct a substantial course of business, including the acts and practices hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

III. COUNT I: ALLOCATION OF MARKETS BY GREAT DANE DISTRIBUTOR COUNCIL

PAR. 9. In the course and conduct of its business, respondent Distributor Council and some or all of its members have engaged in acts and practices that have hindered, frustrated, restrained and tended to eliminate competition among Great Dane dealers. As part of the foregoing, respondent Distributor Council and some or all of its members have acted in some or all of the following ways:

A) Agreed among themselves that no member will make or solicit sales for new Great Dane truck trailers outside of its respective area of primary responsibility or historic trading area.

B) Encouraged each member dealer not to solicit or make sales outside of its area of primary responsibility or historic trading area.

C) Encouraged or requested respondent Great Dane to prohibit or discourage sales of new Great Dane truck trailers by factory branches or dealers in another dealer's area of primary responsibility or to a customer with whom another dealer had a historic relationship.

D) Agreed among themselves that dealers will quote prices consistent with those of competing dealers when customers solicit competing bids.

E) Facilitated the allocation of territories by serving as a conduit for complaints by a dealer regarding sales or solicitation of sales of new Great Dane truck trailers outside of areas of primary responsibility or historic trading area.

IV. COUNT II: GREAT DANE'S FACILITATION OF DEALER EFFORTS TO ALLOCATE MARKETS

PAR. 10. In the course and conduct of their business, respondent Great Dane, respondent Great Dane Distributor Council, and some or all of its members have engaged in acts and practices that have caused a horizontal division of markets which have hindered, frustrated, restrained and tended to eliminate competition among Great Dane dealers and between dealers and factory branches. As part of the

foregoing, respondent Great Dane has acted in some or all of the following ways:

A) Agreed with the Great Dane Distributor Council and its members not to make sales or solicit sales of new Great Dane truck trailers through its factory branches in the area of primary responsibility of its dealers.

B) Despite a contractual provision that areas of primary responsibility are nonexclusive, fostered a belief or otherwise encouraged dealers to view areas of primary responsibility as exclusive territories for the solicitation or sale of new Great Dane truck trailers.

C) In some instances, assigned specific customers or classes of customers to named dealers or factory branches for the solicitation or sale of new Great Dane truck trailers.

D) Suggested that a dealer or factory branch maintains or has had a historic relationship with a specified customer and that no other dealer or factory branch should solicit that customer for sales of new Great Dane truck trailers.

E) Discouraged dealers from making sales of new Great Dane truck trailers outside their areas of primary responsibility or from making sales of new Great Dane truck trailers to specified customers.

F) Encouraged dealers not to solicit sales for new Great Dane truck trailers in specified geographic areas or not to solicit specified customers for sales of new Great Dane truck trailers.

G) Encouraged or suggested that dealers resolve territorial disputes among themselves.

H) Facilitated resolution of disputes between dealers concerning sales to specified customers or sales in specified geographic areas of new Great Dane truck trailers.

I) Facilitated the policing of sales by serving as a conduit for complaints by a dealer or factory branch regarding sales or solicitation of sales of new Great Dane truck trailers by a dealer or factory branch in the complainant's area of responsibility.

J) Facilitated a policy of policing sales by aiding a dealer in the identification of the seller of new Great Dane truck trailers to a specified customer.

K) In certain instances, paid a dealer a commission or share of profits on sales of new Great Dane truck trailers made by another dealer or factory branch to a customer located in the recipient's area of primary responsibility.

L) Suggested or encouraged a dealer or factory branch to contact another dealer before soliciting sales for new Great Dane truck trailers in the second dealer's area of primary responsibility.

V. EFFECTS

PAR. 11. By agreeing together and engaging in the aforesaid acts and practices as alleged, respondents have agreed to a division of territories among dealers and between dealers and factory branches that has unreasonably hindered, restricted, and restrained competition. The aforesaid acts and practices, therefore, constitute unfair methods of competition and unfair acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). The aforesaid acts and practices will continue in the absence of the relief herein specified.

Commissioners Miller and Douglas dissented.

DECISION AND ORDER

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

Respondent Great Dane Trailers, Inc., its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent Great Dane Trailers, Inc., 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 Great Dane Trailers, Inc., 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 Great Dane Trailers, Inc., 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 Great Dane Trailers, Inc., is a corporation organized,

existing and doing business under and by virtue of the laws of the State of Georgia, with its offices and principal place of business located at East Lathrop Avenue in Savannah, Georgia.

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 purpose of this order, the following definitions shall apply:

A. *Truck trailer* is a property-carrying vehicle, or chassis thereof, drawn by a truck or truck tractor and having one or more axles with a rating of 10,000 pounds or more per axle.

B. *Dealer* is any proprietorship, partnership, firm, or corporation authorized by Great Dane Trailers, Inc., to sell its new truck trailers but which is not owned or controlled by Great Dane Trailers, Inc. *Provided, however,* That two or more dealers that are majority-owned subsidiaries of a common parent shall not be regarded as separate dealers for the purposes of this order.

C. *Factory branch* is any corporation which is controlled by, or a division of, Great Dane Trailers, Inc., and which sells new Great Dane truck trailers.

D. *Area of primary responsibility* is a geographic area or customer or customers assigned to a dealer on a nonexclusive basis for which the dealer is responsible for sales penetration.

E. *Exclusive territory* is any agreement restricting or prohibiting a dealer from making sales outside of its territory, area of primary responsibility, or historic trading area.

F. *Profit-pass-over* is any agreement which provides compensation to a dealer by a second dealer directly or indirectly for sales made within the first dealer's area of primary responsibility or historic trading area by the second dealer, except for services actually performed in preparing new Great Dane truck trailers for delivery, including but not limited to clean up costs, repairs, demurrage, transportation, or any other costs related to the handling of such trailers.

I

It is ordered, That respondent, Great Dane Trailers, Inc., (hereinafter referred to as "Great Dane"), a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, through any corporation, subsidiary,

division or other device used in connection with the manufacture, advertisement, offer for sale, sale or distribution of any new Great Dane truck trailer in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Entering into a contract, combination or conspiracy among any of its dealers or with any dealer association, or aiding and abetting any such contract, combination or conspiracy, which has the purpose or effect of limiting, allocating or restricting the territory, customer or class of customers in which or to whom a dealer may solicit or sell new Great Dane truck trailers. The foregoing shall not be deemed to limit or prohibit Great Dane's ability to take any unilateral action that is otherwise lawful, with respect to the marketing or distribution of its products, even though it has been suggested or encouraged by one or more dealers.

2. From the date this order is served upon respondent until December 1, 1984, imposing or attempting to impose any limitation or restriction (including but not limited to exclusive territories and profit-pass-over restrictions) respecting the geographic area, customer, or class of customers in which or to whom a dealer may solicit or sell new Great Dane truck trailers.

3. From the date this order is served upon respondent until December 1, 1984, entering into, attempting to enter into, continuing, maintaining or enforcing any contract, understanding, or agreement to limit, allocate, or restrict the territory, customer, or class of customers in which or to whom a dealer may solicit or sell new Great Dane truck trailers (including but not limited to exclusive territories and profit-pass-over restrictions).

Provided, however, That nothing in this order shall prohibit Great Dane Trailers, Inc., from utilizing areas of primary responsibility.

Provided further, however, That nothing in this order shall prohibit Great Dane from terminating any dealer, or deciding not to renew any dealer's contract, for failure to achieve adequate levels of sales performance, to pay accounts promptly, to provide adequate services and warranty repair, or any other legal business reason, *provided* that paragraphs I(1), I(2), or I(3) of this order have not been violated as to such dealer by such termination.

Provided further, however, That nothing in this order shall prohibit Great Dane from agreeing with any dealer that it will not authorize a new dealer or establish a factory branch within a distance of up to 150 miles of that dealer.

II

A. *It is further ordered,* That respondent shall distribute a copy of this order to all operating divisions of said corporation and to present and future personnel, agents or representatives having sales, advertising, or policy responsibilities with respect to the subject matter of this order and that respondent shall secure from each such person a signed statement acknowledging receipt of said order. The signed acknowledgement must be obtained within sixty (60) days of the service upon them of this order or thirty (30) days after the employment of new personnel.

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

C. *It is further ordered,* That respondent shall send a copy of this order to all present dealers within sixty (60) days after the date of service of this order and that an additional copy be sent attached to contract renewals until January 1, 1984. All new dealers must also be given copies of this agreement prior to entering into a distributor sales agreement with Great Dane Trailers, Inc.

D. *It is further ordered,* That respondent shall, within sixty days of this order being served upon it, make available to all dealers and customers a brochure identifying all independent dealers and stating that a customer may contact any dealer regarding the purchase of a new Great Dane truck trailer. All Great Dane advertisements in trade publications shall disclose the availability of that brochure from the service date of this order until December 1, 1984.

E. *It is further ordered,* That the respondent herein shall, within ninety (90) 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. An additional report shall be filed within sixty (60) days after Great Dane Trailers, Inc., begins to utilize, if it so chooses, additional territorial or customer restrictions. That latter report shall include a copy of all new Distributor Sales Agreements, as well as a list of all Great Dane's distributors who have been terminated or not renewed for any reason since January 1, 1982.

Commissioners Miller and Douglas dissented.

IN THE MATTER OF

GREAT DANE DISTRIBUTOR COUNCIL

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

Docket C-3121. Complaint, Oct. 13, 1983 —Decision, Oct. 13, 1983*

This consent order prohibits an unincorporated association of truck trailer dealers, and its individual members, from taking any action which frustrates or eliminates competition in the sale of new Great Dane truck trailers. The dealer's association must distribute a copy of the order to all current and future members and ensure that members' sales personnel are provided with a copy of the order.

Appearances

For the Commission: *Douglas B. Brown* and *Phyliss W. Richardson.*

For the respondents: *John M. Hewson, III, Hunter, Maclean, Exley & Dunne,* Savannah, Ga. and *Barry J. Brett, Parker, Chapin, Flattau & Klimpe,* New York City.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent

* Complaint previously published at 102 F.T.C. 1307.

Great Dane Distributor Council and respondent members have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Great Dane Distributor Council is an unincorporated association, with membership comprised of dealers for respondent Great Dane located throughout the United States. Its respondent members are:

Ace-Chicago Great Dane Corporation
Allied Body Works, Inc.
American Equipment & Trailer, Inc.
Empire Southern Tier Equipment Corp.
American Equipment & Trailer, Inc.
A. W. Logan, Inc.
Colorado Semi-Trailer Sales, Inc.
Double AA Trailer Sales

Estes Great Dane Trailers, Inc.
Freightliner Sales & Service of Portland, Inc.
Kansas City Great Dane

Midwest Great Dane Trailer of Minnesota, Inc.
V & W Sales, Inc.

New England Trailer Equipment Corp.
H. A. DeHart and Son
Jim Hawk Truck-Trailers, Inc.
Marathon Trailers Sales, Inc.

Nelson Trailers Sales, Inc.

Road Equipment, Inc.
Tom Nowatzke Transport Equipment
Trans Equipment Services, Inc.
Trudell Trailer Sales, Inc.

Southwest Kenworth, Inc.

Trailer Company of Lancaster, Inc.
Truck Trailer Sales

Western Trailer Service

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

ORDER

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

A. *Truck trailer* is a property-carrying vehicle, or chassis thereof, drawn by a truck or truck tractor and having one or more axles with a rating of 10,000 pounds or more per axle.

B. *Dealer* is any proprietorship, partnership, firm, or corporation authorized by Great Dane Trailers, Inc., to sell its new truck trailers but which is not owned or controlled by Great Dane Trailers, Inc. *Provided, however,* That two or more dealers that are majority-owned subsidiaries of a common parent shall not be regarded as separate dealers for the purposes of this order.

C. *Area of primary responsibility* is a geographic area or customer or customers assigned to a dealer on a nonexclusive basis for which the dealer is responsible for sales penetration.

D. *Historic trading area* is a geographic area or specific customer for which primary responsibility has been assigned at some time in the past.

E. *Exclusive territory* is a geographic area or customer(s) designated by any agreement restricting or prohibiting a dealer from making sales outside of its territory, area of primary responsibility, or historic trading area.

I

It is ordered, That respondent, Great Dane Distributor Council, an unincorporated association, its successors, substitutes, and assigns, and its individual members, officers, agents, representatives, and employees, in connection with the sale or distribution of any new Great Dane truck trailer in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, forthwith cease and desist from:

1. Entering into any agreement with a dealer not to make or solicit sales of new Great Dane truck trailers outside of any specific area of primary responsibility, historic trading area or exclusive territory.

2. Entering into any agreement with a dealer not to make or solicit sales of new Great Dane truck trailers to or from any specific customer or class of customers.

3. Encouraging or suggesting to a dealer that a dealer not solicit or make sales of new Great Dane truck trailers outside of its area of primary responsibility, historic trading area, or exclusive territory, or not solicit or make sales of new Great Dane truck trailers to or from any customer or class of customers.

4. Encouraging or suggesting to Great Dane Trailers, Inc., that it take any action or impose any restriction for the purpose of having extra-territorial sales or sales to a specific customer or class of customers stopped or inhibited, directly or indirectly.

Provided, however, That nothing in paragraph 4 of part I of this order shall prohibit any individual dealer, not in concert with any other dealer, from unilaterally suggesting or encouraging Great Dane Trailers, Inc., to take any action, otherwise lawful, with respect to the marketing or distribution of new Great Dane truck trailers.

II

A. *It is further ordered,* That respondent shall distribute a copy of this order to all of its members and that those members shall distribute copies of this order to all truck trailer salesmen employed by them. Respondent shall secure from each dealer a signed statement acknowledging receipt of this order and the distribution of this order to their salesmen within sixty (60) days after service upon them of this order. All new members must be given a copy of this order within sixty (60) days of affiliation.

B. *It is further ordered,* That respondent shall notify the Commission at least thirty (30) days prior to the disbanding or incorporation of the Great Dane Distributor Council or the formation of a successor or substitute or any other changes in the Great Dane Distributor Council which may affect compliance obligations under this order.

C. *It is further ordered,* That the respondent herein shall within ninety (90) 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.

III

A. Each dealer signing this order agrees to be individually bound by this order for any act it commits or for any act committed by an employee, agent, or representative of such dealer. No dealer signing this agreement shall be jointly and severally liable for civil penalties for the actions of the association unless it ratified or participated in the encouragement, institution, or carrying out of those actions.

B. This agreement may be executed in two or more counterparts and when so executed shall have the same force and effect as though all signatures appeared on one document.

Commissioners Miller and Douglas dissented.

IN THE MATTER OF

SPINAL HEALTH SERVICES, INC., ET AL.

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

Docket C-3122. Complaint, Oct. 13, 1983—Decision, Oct. 13, 1983

This consent order requires two Florida chiropractors and the two companies which they operate, among other things, to cease representing without competent and reliable scientific tests or evidence, that their "laser face lift" or "biostimulation face lift" will reduce, smooth out or remove facial lines, depressions and wrinkles, or otherwise give the recipient a more youthful facial appearance; or that their cosmetic treatment will provide as long-lasting an improvement as that of a surgical face lift. The order also requires that respondents retain documentation substantiating claims for a period of three years, and provide its sales and advertising personnel with a copy of the order and an acknowledgement form.

Appearances

For the Commission: *Matthew Daynard.*

For the respondents: *Roger W. Calton,* Kansas City, Mo.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by that Act, the Federal Trade Commission, having reason to believe that Spinal Health Services, Inc., a corporation, Laser Toning Center, Inc., a corporation, Fred J. Gehl, D.C. and Samuel Lux, D.C., hereinafter referred to as respondents, have violated the provisions of that 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. For purposes of this complaint, the following definitions shall apply:

A. *Commerce* means commerce as defined in the Federal Trade Commission Act (15 U.S.C. 44).

B. *Class II laser device* means a Class II laser device as defined in regulations promulgated by the United States Food and Drug Administration, Performance Standard for Laser Products, 21 CFR 1040.10.

C. *Class III device* means a Class III medical device as defined in the Food, Drug and Cosmetic Act, 21 U.S.C. 360c.

PARAGRAPH 1. Respondent Spinal Health Services, Inc. ("SHS") is

a Florida corporation with its principal place of business located at 6800 NW 169th Street, Miami, Florida.

Respondent Laser Toning Center, Inc. ("LTC"), doing business as the Laser Facial Toning Center, is a Florida corporation with its principal place of business located at 1029 Kane Concourse, Bay Harbor Islands, Florida.

Respondent Fred J. Gehl, D.C. is a licensed chiropractic physician under Florida laws. His principal place of business is located at 7160 SW 62nd Avenue, Miami, Florida. He also conducts business at the same address as LTC.

Respondent Samuel Lux, D.C., is a licensed chiropractic physician under Florida laws. His principal place of business is located at 2072 North University Drive, Pembroke Pines, Florida.

PAR. 2. Respondent Gehl is an officer or director of SHS and LTC, and, individually or in concert with others, formulates, directs and controls the acts and practices of SHS and LTC.

Respondent Lux is an officer of SHS, and, individually or in concert with others, formulates, directs and controls the acts and practices of SHS.

PAR. 3. Each of the respondents advertises or promotes, offers for sale, and sells to the public non-surgical facial cosmetic treatment programs. Respondents represent that these treatment programs produce significant, long-lasting changes in the facial appearance of recipients by reducing, smoothing out, or removing facial lines, depressions and wrinkles. Respondents sometimes refer to the treatment programs as laser "facelifts", or "biostimulation facelifts." A treatment program typically consists of about 12 to 20 weekly (or bi-weekly) applications, for a period of about 15 to 30 minutes each, of a beam of light from a Class II laser device on specified facial points, facial lines, depressions and wrinkles, and other facial areas. Respondents recommend additional applications every 3 to 4 months following the initial treatment program. The laser used by respondents is classified by the United States Food and Drug Administration as an experimental Class III device under the Food, Drug and Cosmetic Act (21 U.S.C. 360c).

PAR. 4. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising and promotional material, including but not limited to the advertising referred to herein, to promote the sale of their laser facelift treatment programs. The laser used by respondents is classified by the United States Food and Drug Administration as an experimental Class III device under the Food, Drug and Cosmetic Act (21 U.S.C. 360c).

PAR. 5. Respondents maintain and have maintained a substantial course of business in or affecting commerce.

PAR. 6. In the course and conduct of their businesses and for the purpose of promoting the sale of their laser facelift treatment programs, respondents have disseminated and caused the dissemination of advertisements in newspapers and magazines distributed interstate by United States mail, in brochures, pamphlets and other promotional materials disseminated through the United States mail, and in commercial radio broadcasts having sufficient power to carry such broadcasts across state lines.

PAR. 7. Typical statements and representations made by respondents in advertisements and other written promotional materials and in oral presentations, but not necessarily inclusive thereof, are the following:

1. Facelift Without Surgery—the cold laser beam (or biostimulation) facelift is an attractive alternative for those wishing to look younger.
2. Non-Surgical Facelift—designed by doctors, is only 1/3 to 1/10 the cost of a surgical facelift.
3. This facelift will last approximately as long as the surgical kind; periodic booster treatments can greatly enhance the longevity of results obtained.
4. Look years younger—this treatment will flatten lines, pull up sagging bags and skin.

PAR. 8. By and through the use of the statements and representations set forth in Paragraph Seven and others of similar import and meaning, but not expressly set forth herein, respondents have represented, directly or by implication, that:

1. The laser treatments offered by respondents reduce, smooth out, or remove facial lines, depressions and wrinkles, and result in a non-surgical facelift; and

2. Respondents' laser treatments provide long-lasting improvement in recipients' facial appearance, or improvement lasting about as long as that of a surgical facelift.

At the time these representations were made, respondents possessed and relied upon no reasonable basis for the above representations. Therefore, the dissemination and making of the representations as alleged constituted, and now constitute, deceptive acts or practices in or affecting commerce.

PAR. 9. The acts or practices, as herein alleged, have had, and now have, directly or by implication, the capacity and tendency to deceive members of the public, and to induce the purchase of respondents' laser treatment programs.

PAR. 10. The described acts or practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, deceptive acts or practices in or af-

fecting commerce, in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

Decision and Order

The Federal Trade Commission having initiated an investigation of certain acts and practices of Spinal Health Services, Inc., Laser Toning Center, Inc., Fred J. Gehl, D.C., and Samuel Lux, D.C., respondents, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the Federal Trade Commission Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed it 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 it complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Spinal Health Services, Inc. ("SHS") is a Florida corporation with its principal place of business located at 6800 NW 169th Street, Miami, Florida.

Respondent Laser Toning Center, Inc. ("LTC"), doing business as the Laser Facial Toning Center, is a Florida corporation with its principal place of business located at 1029 Kane Concourse, Bay Harbor Islands, Florida.

Respondent Fred J. Gehl, D.C. is a licensed chiropractic physician under Florida laws. His principal place of business is located at 7160 SW 62nd Avenue, Miami, Florida. He also conducts business at the same address as LTC.

Respondent Samuel Lux, D.C. is a licensed chiropractic physician

under Florida laws. His principal place of business is located at 2072 North University Drive, Pembroke Pines, Florida.

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

ORDER

1. *It is ordered,* That respondents Spinal Health Services, Inc. and Laser Toning Center, Inc., corporations, their successors and assigns, and their officers, and respondents Fred J. Gehl, D.C. and Samuel Lux, D.C., individually (and as officers or directors of said corporations), and respondents, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, or sale, directly or indirectly, of nonsurgical facial cosmetic treatments involving the use of a laser device to reduce, smooth out, or remove facial lines, depressions and wrinkles, or otherwise give recipients a more youthful facial appearance, shall cease and desist from representing, orally or in writing, directly or by implication, (1) that such cosmetic treatment is effective for facelifts, or reduces, smooths out, or removes facial lines, depressions or wrinkles or otherwise gives recipients a more youthful facial appearance, or (2) that such cosmetic treatment provides long-lasting improvement in recipients' facial appearance or provides improvement that will last about as long as that of a surgical facelift, unless, at the time such claims are first made, respondents possess and rely upon adequate substantiation that provides a reasonable basis for the representations, which substantiation shall consist of a competent and reliable scientific test or other competent and reliable evidence; and

2. *It is further ordered,* That respondents maintain and produce for inspection by Federal Trade Commission staff members upon reasonable notice all documents constituting the reasonable basis required by Paragraph 1. of this order. Such records shall be maintained by respondents for a period of three (3) years from the date on which any such representations were last made.

3. *It is further ordered,* That respondents distribute a copy of this order to present or future employees, agents or representatives having advertising, promotion, sales, or policy responsibilities with respect to the subject matter of this order and that respondents secure from each such person a signed statement acknowledging receipt of the order.

4. *It is further ordered,* That each corporate 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.

5. *It is further ordered,* That, for a period of 10 years from the date of service of this order, each individual respondent promptly shall notify the Commission of the discontinuance of his present business or employment and of his affiliation with any new business or employment involving cosmetic treatment. Each notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

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

IN THE MATTER OF

BRISTOL-MEYERS COMPANY, ET AL.

Docket 8917. Interlocutory Order, Opinion, Oct. 14, 1983

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

Respondent, Bristol-Myers Company ("Bristol") has filed a petition for reconsideration asking that the Commission delete two paragraphs of the order entered against it on July 5, 1983 [102 F.T.C. 21]. Bristol asserts that Paragraph II of the order places the company at a competitive disadvantage and is excessively vague and not reasonably related to the violations giving rise to it. Bristol contends Paragraph III-A should be deleted because our order dismissed all the claims on which it was premised. In addition, Bristol asserts that marketplace changes have eliminated entirely the need for the kind of relief ordered in the two provisions. For the reasons stated below, the petition is denied in its entirety.

Paragraph II

Paragraph II of our order reads in pertinent part:

> *It is* * * * *ordered,* That respondent Bristol-Myers * * * do forthwith cease and desist from making any therapeutic performance or freedom from side effects claim for ["Bufferin", "Excedrin", or any other nonprescription internal analgesic] unless respondent possesses a reasonable basis for making that [2] claim. A reasonable basis for such a claim shall consist of competent and reliable scientific evidence supporting that claim. Well-controlled clinical tests conducted in accordance with the criteria set forth in Order Paragraph I shall be deemed to constitute a reasonable basis for a claim.

Bristol contends that Paragraph II places it at an unwarranted competitive disadvantage vis-a-vis its competitor, American Home Products Corporation ("AHP"), because a "virtually identical" provision in the order we entered against AHP (Paragraph II(D)) was deleted by the Third Circuit on AHP's petition for review. *See American Home Products Corp.* v. *FTC (AHP),* 695 F.2d 681, 710–711 (3d Cir. 1982).

Preliminarily, we disagree that the two provisions are "virtually identical". The provision deleted on AHP's petition for review was directed to noncomparative representations of effectiveness or freedom from side effects of all over-the-counter drugs. By contrast, Paragraph II of the order in this case applies only to claims concerning the company's internal analgesics. It was this greater breadth of the AHP order that constituted one of the Third Circuit's objections to it.

Even more important is the fact that the only violation of the sort prohibited by Paragraph II(D) that AHP actually committed was covered by another provision in its order. Moreover, the AHP order contains provisions not found in the Bristol order, and taken as a whole, provides protection against deceptive advertising at least as great. To delete the corresponding provision in this case would mean that the numerous nonestablishment performance and freedom from side effects claims made by Bristol (*see* slip op. at 7–17) [102 F.T.C. at 321–330] would not be covered by any other provision in our order, and Bristol would be free to engage in deceptive advertising now foreclosed by order to its competitors.

Bristol next argues that Paragraph II is impermissibly vague because it does not specify the amount and kinds of evidence that are necessary to constitute a reasonable basis for future claims.

We believe that Bristol will have no difficulty in applying the requirements of Paragraph II to its contemplated future advertising. In its opinion the Commission construed the "reasonable basis" requirement of Paragraph II to mean "competent and reliable scientific evidence." We also specified a type of scientific evidence that will always satisfy that standard—*i.e.*, two well-controlled clinical trials[1] (Slip op. at 71). [102 F.T.C. at 375] [3] However, because we were unable to determine on the basis of the record whether some lesser standard might ever constitute a reasonable basis, we fashioned an order that allows Bristol to show in a given case that a lesser amount of support is adequate. Indeed, it is the advertiser who best knows the product and is best situated to verify the accuracy of claims made for it, *Sears Roebuck & Co.* v. *FTC*, 676 F.2d 385, 400 (1982). Should a situation arise in which Bristol is genuinely unable to determine whether two well-controlled clinical trials are required, it can, by complying with Rule 2.41(d) of the Commission's Rules of Practice and Procedure, obtain definitive advice as to whether its profferred substantiation would satisfy the order. *See, e.g., FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965); *Jay Norris, Inc.* v. *FTC*, 598 F.2d 1244, 1251 (2d Cir. 1979).

Bristol's final objection to Paragraph II is that it is premised on too slender a basis—*i.e.*, the tension relief claims for Bufferin and Excedrin. In support of this argument it relies on the portions of the Third Circuit's opinion in *AHP* that explain why the one noncomparative tension-relief claim for Anacin did not justify imposing a reasonable basis requirement on all efficacy and freedom-from-side effects claims for all over-the-counter drugs.

[1] Thus this case differs from *Standard Oil Co.* v. *FTC*, 577 F.2d 653 (9th Cir. 1978). There, the court of appeals rejected the Commission's suggestion that any vagueness could be cured by an advisory opinion because various paragraphs of the Commission's order simply restated general principles of fair advertising. 577 F.2d at 661.

Paragraph II, however, is more solidly based and more narrowly drawn. The only advertising claim made by AHP in the category proscribed by Paragraph II(D) of our order was the one noncomparative tension-relief claim for Anacin. Bristol, on the other hand, disseminated at least 20 inadequately substantiated tension-relief claims for Bufferin and Excedrin (slip op. at 44–48) [102 F.T.C. at 353–356] and also claimed without a reasonable basis that Bufferin would cause no stomach upset (slip op. at 30–31) [102 F.T.C. at 341–342]. Finally, in contrast to the provision that we entered against AHP, Paragraph II is narrowly limited to internal analgesics—the specific product category for which the offending claims were made. Thus, there is no conflict with the Third Circuit's decision in *AHP*, which, as noted before, sustained a Commission order that taken as a whole was at least as extensive as that here.

Paragraph III-A

Paragraph III-A of our order prohibits Bristol from representing that any nonprescription drug product contains an "unusual" or "special" ingredient when in fact the ingredient is commonly used in other nonprescription drug products that are intended for the same use. Bristol objects that the provision is inappropriate in view of our decision to dismiss the allegations of the complaint that charged the company with falsely [4] representing the uniqueness of the ingredients in Excedrin P.M. *See* slip op. at 56–57. [102 F.T.C. at 362–363]

Paragraph III-A is not, however, premised on the advertisements for Excedrin P.M. *See* slip op. at 73. [102 F.T.C. at 377] Rather, it was based on the advertisements for Bufferin and Excedrin that falsely claimed that the analgesic ingredient was something other than aspirin (the violation specifically prohibited by Paragraph IV) and that also implied that those ingredients were special and unusual. *See* slip op. at 50–52. [102 F.T.C. at 358–359]

Marketplace Changes

Finally, Bristol contends that Paragraphs II and III-A should be deleted because it faces the growing market dominance of McNeilab's Tylenol and a significant increase in private enforcement under the Lanham Act, similar state statutes, and through the advertising industry's self-regulatory mechanism.

Under Section 3.55 of the Commission's Rules of Practice the scope of petitions for reconsideration is limited to "new questions raised by the decision or final order upon which the petitioner had no opportunity to argue before the Commission. Bristol, having had adequate opportunity to raise these contentions before the administrative law judge and again on its appeal from the law judge's decision, cannot

now assert them for the first time in a petition for reconsideration of our final order.

CONCLUSION

For all the foregoing reasons, the petition for reconsideration is denied in its entirety.

ORDER DENYING RESPONDENT BRISTOL-MYERS' PETITION FOR RECONSIDERATION

An opinion and final order in this matter were issued on July 5, 1983. [102 F.T.C. 21] Respondent Bristol-Myers was served with the opinion and order and petitioned for reconsideration thereof on August 8, 1983. The Commission, for reasons stated in the accompanying opinion, has determined to deny Bristol-Myers' Petition for Reconsideration. Therefore,

It is ordered, That Respondent Bristol-Myers' Petition for Reconsideration be, and hereby is, dismissed.

IN THE MATTER OF

STERLING DRUG, INC., ET AL.

Docket 8919. Interlocutory Order, Opinion, Oct. 14, 1983

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

Respondent Sterling Drug Inc. ("Sterling") has filed a Petition for Reconsideration seeking to delete Paragraphs II, III and V of the order that we entered against it on July 5, 1983. [102 F.T.C. 395] For the reasons stated below, the Petition is denied in its entirety.

Paragraph II of the order prohibits Sterling from representing that the superior freshness, purity, stability or speed of disintegration of a nonprescription analgesic has been established unless Sterling possesses a reasonable basis for such a claim. In petitioning for reconsideration, Sterling contends that its advertising did not make superior freshness, purity, stability or speed of disintegration claims; that we misinterpreted test results for two other aspirin brands, and improperly disregarded factors other than test results relating to physical integrity of the tablets; and that the record does not demonstrate a propensity to make future claims regarding specific pharmaceutical attributes.

We reject Sterling's assertion that its advertising made no superior freshness, purity, stability, or speed of disintegration claims. Sterling, having had adequate opportunity to argue the meaning of its advertisements in its appeal from the administrative [2] law judge's initial decision, cannot challenge our interpretation of the advertisements in petitioning for reconsideration of our final order. *See* 16 C.F.R. 3.55.

With respect to the substantiation for these claims, Sterling contends (1) that the Parke-Davis test results should be disregarded because they included an inadequate number of samples; (2) that the test results of the Safeway and Safeway S Brands should be grouped together and that when so combined, the results demonstrate Bayer's superiority; (3) that we considered an improper mix of test results in determining that Bayer was not fresher, purer, or more stable; and (4) that we should have considered factors other than the actual speed of disintegration in determining whether Bayer was quicker to dis integrate.

Each of these contentions is without merit. First, the test result may be inconclusive, because of the limited sample size, to demonstrate the Parke-Davis brand's superiority. Sterling was charged however, with falsely representing that tests established Bayer's su

periority over other tested brands. *See* Slip op. at 14. [102 F.T.C. at 755] That representation was clearly false. Secondly, we decline Sterling's belated invitation to combine the test results. Sterling's own tests treat the Safeway and Safeway Super S brands separately. *See* Ex. 430. Thirdly, we see no reason to reverse the position that we took in our opinion concerning which tests were relevant to Sterling's claims that Bayer was fresher, purer, and more stable. In order to determine which mix was appropriate, we relied on the testimony of Dr. Rhodes, an expert in drug formulation and evaluation, and of Sterling's own chemist. *See* Slip op. 33–35. [102 F.T.C. at 773–775] Sterling, on the other hand, has not cited anything in the record to support its claim that the mix of test results was improper. Lastly, Sterling's contention that the Commission erred in failing to consider that disintegration time can easily be shortened by taking steps that will cause more breakage and deterioration fails to take into account the actual representations that were made.

The advertisements claimed simply that Bayer was quicker to disintegrate than other leading brands (Slip op. at 14). [102 F.T.C. at 755] Sterling made no attempt to qualify those claims or to explain that this representation must be considered in light of other factors. Furthermore, in determining whether a particular aspirin brand disintegrates rapidly enough to be marketed, the United States Pharmacopoeia examines the actual speed of disintegration, not the other factors mentioned by Sterling.

Sterling next objects that Paragraph II is inappropriate because the Commission has no reason to anticipate that it will make future claims regarding specific pharmaceutical attributes. Abandonment of a practice does not, however, preclude entry of an order provision prohibiting the practice. Paragraph II is carefully tailored to prohibit precisely the types of violations that Sterling has committed. [3]

Finally, none of Sterling's arguments regarding order Paragraph II is properly raised for the first time in a petition for reconsideration. *See* 16 C.F.R. 3.55. Sterling had ample opportunity on appeal to contest the finding that its advertisements represented Bayer's superiority with respect to certain attributes. Indeed, the administrative law judge reached this finding (F. 329) and it is discussed in Sterling's Brief on Appeal (pp. 43, 85–86). Furthermore, Sterling took advantage of its opportunity on appeal to raise arguments regarding whether the 223 Study showed Bayer to be fresher, purer, more stable and quicker to disintegrate. (In fact, in its appeal brief Sterling argued, in contrast to the position it now takes, that the results of the 223 Study should not be used to draw conclusions regarding any specific pharmaceutical attribute (p. 43).)

Paragraph III

Paragraph III of our order prohibits Sterling from making any therapeutic performance claims regarding a nonprescription internal analgesic unless it possesses a reasonable basis for that claim. Well-controlled clinical tests supporting a claim are deemed to be a reasonable basis. This provision is similar to Paragraph II of the order that we entered against Bristol-Myers and Sterling's objections are similar to those asserted by Bristol-Myers in its Petition for Reconsideration (Petition for Reconsideration pp. 2–6). For the reasons set forth below, we reject each of Sterling's arguments regarding Paragraph III and decline to modify it.

First, Sterling contends that Paragraph III is vague and imprecise, noting that these reasons were cited by the Third Circuit when it set aside a similar provision in the order that we entered against its competitor, American Home Products Corporation ("AHP"). [98 F.T.C. 136 (1981)] However, as we explained in our response to Bristol-Myers' Petition for Reconsideration, there are important differences in the cases that are reflected in the challenged provisions. Paragraph III applies only to nonprescription analgesics and our opinion in this case contains an extensive discussion of analgesic testing. On the other hand, Paragraph II(D) in the AHP order applied to all drugs even though our opinion in that case contained no discussion of the criteria for testing any product other than analgesics. Moreover, Paragraph III sets forth a level of evidence (well-controlled clinical tests) that will constitute a reasonable basis. Paragraph II(D) contained no such standard.

Even more important, Paragraph II(D) was based only upon AHP's tension-relief claims for Anacin. On the other hand, as discussed in our opinion in this case, we found numerous instances in which Sterling had represented that Cope and Midol could relieve tension (Slip op. pp. 39–40). [102 F.T.C. at 778–779] We also found that Sterling lacked a reasonable basis for these claims and for its comparative superiority claims regarding Bayer (Slip. op. [4] p. 38). [102 F.T.C. at 777] Finally, we found that Sterling made numerous other nonestablishment claims which should be judged under a reasonable basis standard (*see, e.g.*, slip op. pp. 16–19). [102 F.T.C. at 757–759] Thus we found that Sterling lacked a reasonable basis for claims regarding three of its analgesics. Since it appears that Paragraph III would only apply to a total of five analgesics (slip op. p. 56) [102 F.T.C. at 794], the order in this case is much narrower and more carefully tailored to the violation than the order provision rejected by the Third Circuit.

Sterling contends that the order does not give it adequate direction as to what constitutes a reasonable basis. It also contends that Com-

mission advisory opinions are not an adequate means of curing this imprecision (Petition for Reconsideration pp. 3–4). We reject these arguments for the same reasons that we rejected identical arguments raised by Bristol-Myers.

Paragraph V

Paragraph V of our order prohibits Sterling from falsely representing that the analgesic ingredient in an aspirin-containing product is different from aspirin. This provision was based upon advertisements placed by Sterling regarding Midol. In its Petition for Reconsideration, Sterling contends that our interpretation of the Midol advertisements was inconsistent with our interpretation of advertisements disseminated by Bristol-Myers for Excedrin P.M. Sterling argues that its analgesic was different from aspirin (Petition for Reconsideration pp. 10–15).

Sterling misunderstands the portion of the Bristol-Myers decision that addressed the Excedrin P.M. advertisements. What we held in that decision was that Bristol-Myers did not represent that the sleep-inducing ingredient in Excedrin P.M. was *unique.* The complaint in that case did not allege that Bristol-Myers had represented that the sleep-inducing ingredient was different from another ingredient. In fact, advertisements for Excedrin P.M. do not contrast the sleep-inducing ingredient with the sleep-inducing ingredient in any other product.

The advertising for Midol is different. We did not find that the Midol advertisements represent that Midol's pain relieving ingredient is unique. Indeed, the Complaint contains no such allegation. Thus our interpretation of the Midol and Excedrin P.M. ads is consistent. However, we did find that advertisements for Midol represent that its pain-relieving ingredient is different from the pain-relieving ingredient in "ordinary pain relievers." Sterling contends that this finding is also inconsistent with our Bristol-Myers opinion. It argues that in *Bristol-Myers* we found that Bufferin and Excedrin ads falsely represented that the product did not contain aspirin by stressing the aspirin content of competing products and failing to disclose the aspirin content of Bufferin and Excedrin. Sterling seems to be arguing that since its Midol advertisements did not take the exact same approach as the Bristol-Myers [5] advertisements the Commission could not find that the advertisements falsely differentiated the product's analgesic ingredient from aspirin.

We reject this argument. It is true that the approach taken in the Midol advertisements is not exactly the same as in those for Bufferin and Excedrin. Nonetheless, using a slightly different approach, Sterling created the impression that Midol's analgesic ingredient is other

than aspirin. Since we discuss the Midol advertising in great detail in the opinion on pages 45–48 [102 F.T.C. at 783–787], there is no reason to repeat it here.

We reject Sterling's arguments regarding paragraph V for the reasons stated above and for the additional reason that the arguments are not timely. Petitioner would appear to argue that it had no opportunity to raise these arguments regarding paragraph V on appeal because it had not yet seen our decision in *Bristol-Myers*. However, although Sterling does mention the *Bristol-Myers* decision, in fact all of its arguments could have been raised in its appeal brief. Sterling chose to devote only one page of a 90 page appeal brief (p. 89) to the Midol advertising. It is not entitled to a second opportunity to raise those arguments now.

Conclusion

For each of the foregoing reasons, we deny Sterling Drug's Petition for Reconsideration in its entirety.

ORDER DENYING RESPONDENT STERLING DRUG'S PETITION FOR RECONSIDERATION

An opinion and final order in this matter were issued on July 5, 1983. [102 F.T.C. 395] Respondent Sterling Drug was served with the opinion and order and petitioned for reconsideration thereof on August 8, 1983. The Commission, for the reasons stated in the accompanying opinion, has determined to deny Sterling Drug's Petition for Reconsideration. Therefore,

It is ordered, That Respondent Sterling Drug's Petition for Reconsideration be, and hereby is, dismissed.

IN THE MATTER OF

DAMON CORPORATION

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

Docket C-2916. Consent Order, Feb. 23, 1978—Modifying Order, Oct. 14, 1983

The Federal Trade Commission has modified Part II of the order issued against Damon Corporation on Feb. 23, 1978 (91 F.T.C. 301). The addition of Paragraph E exempts from the prior approval requirements of Paragraphs A-C of Part II, acquisitions of any independent laboratory whose net sales of tests and services during the 4 most recent fiscal quarters preceding the acquisition was less than $2 million.

MODIFIED ORDER TO CEASE AND DESIST

The Commission having considered respondent Damon Corporation's Petition of June 1, 1982, for reopening and modification of the Commission's Order, entered February 23, 1978, in Docket No. C-2916; and the Commission having denied the said Petition and, instead, having issued, on March 29, 1983, an Order to Show Cause Why Order Requiring Commission Approval For Certain Acquisitions Should Not Be Modified; and the Commission, having considered responses to its Order to Show Cause, now enters the following order:

It is hereby ordered, That pursuant to 15 U.S.C. 45, and Section 3.72 of the Commission's Rules of Practice, 16 C.F.R. 3.72 (1983), Part II, Paragraph E of the aforesaid order to cease and desist be, and it hereby is, modified to read:

E. Acquisitions consummated after [the date at which this modification becomes effective], of any independent laboratory which, during the four most recent fiscal quarters preceding the acquisition, has had less than $2 million in Net Sales of Medical Laboratory Tests and Test Services performed on all specimens (from wherever originating) are exempt from the provisions of Paragraphs A through C of this Part II.

Commissioner Pertschuk dissents for the reasons stated in his Dissenting Statement on the Order to Show Cause.*

* Copies of the Commission's Order to Show Cause and Commissioner Pertschuk's Dissenting Statement are available from the Public Reference Branch, Room 130, Federal Trade Commission, 6th St. and Pa. Ave., N.W., Washington, D.C. 20580.

IN THE MATTER OF

NEW YORK COFFEE AND SUGAR EXCHANGE, INC., ET AL.

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

Docket 6235. Consent Order, April 1, 1955—Vacating Order, Oct. 18, 1983

The Federal Trade Commission has reopened this proceeding and vacated its order issued on April 1, 1955 (51 F.T.C. 859), in light of the Commodity Futures Trading Commission's exclusive jurisdiction over respondents' activities.

ORDER VACATING CEASE AND DESIST ORDER ISSUED ON APRIL 1, 1955

On April 1, 1955, [51 F.T.C. 859] the Federal Trade Commission, pursuant to Section 5 of the Federal Trade Commission Act, as amended, issued the consent order in this case against the New York Coffee and Sugar Exchange, Inc., et al., (now known as the Coffee, Sugar and Cocoa Exchange), prohibiting, among other things, the use of certain restrictive contracts for trading in coffee futures.

Since enactment of the Commodity Futures Trading Commission Act, in 1974, 7 U.S.C. 1 *et seq.*, the Exchange's activities have come under the exclusive jurisdiction of the Commodity Futures Trading Commission ("CFTC"). Because the conduct covered by the Commission's order is now specifically regulated by the CFTC, the Commission has determined that it would be in the public interest to vacate its order in Docket No. 6235.

On August 1, 1983, the Commission issued an order to show cause why the order in Docket No. 6235 should not be vacated. The proposed action was accepted by the respondents.

Accordingly,

It is ordered, That this matter be, and it hereby is, reopened and that the order in Docket No. 6235 be vacated.

IN THE MATTER OF

HUGHES TOOL COMPANY, ET AL.

Docket 9138. Interlocutory Order, Oct. 18, 1983

ORDER

Upon final acceptance and issuance of consent agreements with corporate respondents Hughes Tool Company and Big Three Industries, Inc., in this matter, and upon determination that resumption of this adjudicatory proceeding with respect to individual respondent Ben F. Love alone is unnecessary to protect the public interest,

It is ordered, That the complaint is dismissed as to respondent Ben F. Love.

IN THE MATTER OF

THE SOUTHLAND CORPORATION

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

Docket 8915. Consent Order, Jan. 24, 1974—Modifying Order, Oct. 25, 1983

This order deletes Paragraphs I-F through I-J and Paragraph II of the Order issued against respondent on Jan. 24, 1974 (83 F.T.C. 1282). The remaining order provisions are to be vacated on January 24, 1984.

ORDER REOPENING AND VACATING IN PART AND MODIFYING IN PART ORDER ISSUED JANUARY 24, 1974

On June 24, 1983, respondent The Southland Corporation (Southland") filed a "Request to Reopen and Vacate In Part And Modify In Part A Consent Order" ("Request"), pursuant to Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b) and Section 2.51 of the Commission's Rules of Practice. The Request asks the Commission to reopen the consent order, issued on January 24, 1974 [83 F.T.C. 1282] (the Order"), and (1) vacate Paragraphs I-F through I-J and Paragraph II of the Order immediately; and (2) vacate the remaining provisions of the Order ten years from the date of their initial entry. Southland's Request was on the public record for thirty days and no comments were received.

After reviewing respondent's Request, the Commission has concluded that the public interest warrants reopening and modification of the Order in the manner requested by respondent. The action we take today is consistent with our recent determination in *Occidental Petroleum Corporation,* Docket No. C–2492, March 9, 1983, [101 F.T.C. 373] which also involved a perpetual reciprocity order.

Accordingly, *it is ordered,* that Paragraphs I-F through I-J and Paragraph II of this Order be vacated at this time and the remaining provisions be vacated ten years from the date of their initial entry, that is on January 24, 1984.

Commissioner Bailey voted in the negative.

IN THE MATTER OF

CHRISTIAN SERVICES INTERNATIONAL, INC., ET AL.

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

Docket C-3127. Complaint, Oct. 27, 1983—Decision, Oct. 27, 1983

This consent order requires a Stilwell, Kansas developer, marketer, and operator of life care homes throughout the country, among other things, to cease representing, unless true, that its life care homes are affiliated with any religious denomination or group who may also be morally or legally responsible for the home; that there is little or no risk involved in entering into a life care contract; that service fees will never exceed corresponding social security increases; that the mortgagor of the home ensures the economic survival of the home; and that the corporation has established reserve funding to ensure the home's financial security. Further, respondents are required to give prospective residents, at least five days before they execute a life care contract, specific disclosures concerning the home's financial status and other relevant information which could influence their decision to enter a life care home. The order also requires respondents to send to all present and future personnel engaged in the sale or promotion of life care contracts a copy of the order and a form on which they can acknowledge their intention of complying with the order's provisions. Additionally, Kenneth Berg must notify the Commission of any change in his present business or employment relating to the marketing, management and operation of any life care home, nursing home or foster care facility and, for a period of 10 years, promptly advise the Commission of his affiliation with any new such concern.

Appearances

For the Commission: *Henry R. Whitlock, Christopher G. FitzPatrick, Dennis J. Saffran* and *Roger Paszamant.*

For the respondents: *A. Glenn Sowders, Jr.,* Kansas City, Mo.

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 Christian Services International, Inc., a corporation, and Kenneth P. Berg, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. For the purpose of this complaint the following definitions shall apply:

(a) *Entrance Fee* shall mean money or other property transferred or promised to be transferred as consideration for one or more individuals' becoming a resident or residents of a life care home pursuant to a life care contract. Such fee may be paid upon the initial entrance of a resident to a life care home or may be deferred.

(b) *Life Care Contract* shall mean a contract between a resident and a provider to provide the resident, for the duration of such resident's life, living accommodations and related services in a life care home together with nursing care services, medical services and/or other health-related services, conditioned upon the transfer of an entrance fee to the provider, and which may be further conditioned upon the payment of periodic service fees.

(c) *Life Care Home* shall mean the facility or facilities occupied, or planned to be occupied, by residents or prospective residents where a provider undertakes to provide living accommodations and services pursuant to life care contracts.

(d) *Provider* shall mean the person, corporation, partnership, association or other legal entity which undertakes to provide residents with living accommodations and services pursuant to life care contracts.

(e) *Resident* shall mean a person who has entered into a life care contract with a provider.

(f) *Service Fee* shall mean a periodic fee in addition to the entrance fee charged to a resident by a provider pursuant to a life care contract.

PAR. 2. Respondent Christian Services International, Inc. ("CSI") is a corporation organized and existing under the laws of the State of Missouri, with its offices and principal place of business located at 5809 West 164th Street, Stilwell, Kansas.

Respondent Kenneth P. Berg is sole stockholder and an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 3. Respondents are now, and for some time last past have been, engaged in the business of planning, developing, structuring finance for, promoting, marketing, designing, supervising construction of and operating life care homes in many States of the United States.

PAR. 4. In the course and conduct of the aforesaid business, respondent CSI commonly enters into long-term management, marketing

and/or development contracts with providers. Pursuant to such contracts CSI often assumes control over the operations of life care homes. Specifically, such contracts commonly authorize CSI to make all contracts which are necessary for the maintenance of the life care homes; give it sole authority to establish rates for entrance fees, service fees and charges for all other services offered by the providers; authorize it to hire administrators and executive directors who are employees of CSI; and give it responsibility for the advertising for and marketing of life care contracts.

PAR. 5. In the course and conduct of the aforesaid business, respondents now cause, and for some time last past have caused, promotional materials, contracts and various business papers to be transmitted through the U.S. mail and other interstate instrumentalities from their places of business in various States of the United States to their agents, employees, purchasers and prospective purchasers of life care contracts in various other States of the United States. Respondents maintain and operate and, for some time last past, have maintained and operated places of business and have made substantial sales to purchasers of life care contracts in various States of the United States. Respondents maintain and, at all times mentioned herein, have maintained a substantial course of trade in said life care contracts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 6. In the course and conduct of the aforesaid business and at all times mentioned herein, respondents have been and now are in substantial competition, in or affecting commerce, with corporations, firms and individuals in the marketing of life care contracts and the development and/or management of life care homes.

PAR. 7. In the course and conduct of the aforesaid business, respondents disseminate advertisements through television and radio broadcasts and in various publications of general circulation, distribute promotional material through the mail and in person to members of the public, and make sales presentations by means of oral and written statements.

PAR. 8. In the advertisements, promotional material and sales presentations alleged in Paragraph Seven herein, respondents have utilized corporate trade names with religious connotations, have emphasized the fact that the individual respondent is an ordained minister, have utilized religiously oriented names for many of the life care homes which they market, and have made various other statements and representations relating to the religious affiliation of many of the life care homes managed and/or marketed by respondents. By and through such means, respondents have represented, directly or by implication, to purchasers and prospective purchasers

of life care contracts that the life care homes marketed by them may be affiliated with some religious organization and that such organization may be legally and/or morally responsible for the debts and obligations of the providers of such life care homes.

PAR. 9. In truth and in fact, no life care home marketed by respondents has any affiliation with any religious denomination or congregation or other religious organization which entails a legal or moral responsibility for the debts and obligations of the providers of such life care homes. Therefore, the acts or practices alleged in Paragraphs Seven and Eight herein are unfair and deceptive.

PAR. 10. By and through the advertisements, promotional material and sales presentations alleged in Paragraph Seven herein, respondents have represented, directly or by implication, that there is little or no financial risk involved in entering into the life care contracts offered by them.

PAR. 11. In truth and in fact, in a significant number of instances, the life care contracts which respondents are offering to prospective residents may involve significant financial risk. Therefore, the acts or practices alleged in Paragraphs Seven and Ten herein are unfair and deceptive.

PAR. 12. By and through the advertisements, promotional material and sales presentations alleged in Paragraph Seven herein, respondents have represented, directly or by implication, that large institutional lenders which hold mortgages on the life care homes marketed by respondents would ensure their financial stability and economic survival.

PAR. 13. In truth and in fact, the lenders holding mortgages on life care homes marketed by respondents have no legal obligation to ensure the economic survival of the life care homes covered by their mortgages. Therefore, the acts or practices alleged in Paragraphs Seven and Twelve herein are unfair and deceptive.

PAR. 14. By and through the advertisements, promotional material and sales presentations alleged in Paragraph Seven herein, respondents have represented, directly or by implication, that increases in the service fees at the life care homes marketed by respondents, if necessary at all, would in no instance exceed corresponding increases in average Social Security benefits over the same periods of time.

PAR. 15. In truth and in fact, in many instances life care homes marketed by respondents have raised monthly service fees in amounts exceeding corresponding increases in average Social Security benefits over the same periods of time. Therefore, the acts or practices alleged in Paragraphs Seven and Fourteen herein are unfair and deceptive.

PAR. 16. By and through the advertisements, promotional material

and sales presentations alleged in Paragraph Seven herein, respondents have represented, directly or by implication, that providers of many of the life care homes marketed by respondents have established sizable reserve funds, and that these reserve funds exist to ensure the financial protection of residents' interests in their life care contracts.

PAR. 17. In truth and in fact, reserve funds established at life care homes marketed by respondents commonly exist primarily for the protection of the mortgagees' investments, and not for the protection of the residents' interests, and may be later waived by the mortgagees. Therefore, the acts or practices alleged in Paragraphs Seven and Sixteen herein are unfair and deceptive.

PAR. 18. By and through the advertisements, promotional material and sales presentations alleged in Paragraph Seven herein, respondents have misrepresented the financial positions and net worths of the providers of life care homes marketed by them by utilizing an accounting method which in the circumstances failed to match appropriately revenues to expenses, and which resulted in the overstatement of the financial positions and the net worth of many of the providers of such life care homes. Therefore, the acts or practices alleged herein and in Paragraph Seven are unfair and deceptive.

PAR. 19. In the course and conduct of the aforesaid business, respondents have offered and are offering for sale life care contracts without disclosing to prospective purchasers that architectural, construction supervisory and various other services at life care homes managed and/or marketed by respondents are commonly provided by various operating divisions and affiliates of the corporate respondent; that independent contractors commonly do not have the opportunity to competitively bid to provide such services; and that through the provision of such services the corporate respondent realizes various separate and substantial fees from the providers of such life care homes. Therefore, respondents have failed to disclose material facts relating to their sale of life care contracts which, if known to certain prospective purchasers, would likely affect their consideration whether to purchase such a life care contract. Such failure to disclose is an unfair and deceptive act or practice.

PAR. 20. In the course and conduct of the aforesaid business, respondents have offered and are offering for sale life care contracts without disclosing to prospective purchasers material facts with respect to: (1) pending litigation against respondents and/or the providers of the life care homes marketed by respondents, which, if adversely determined, might materially affect the ability of respondents or such providers to fulfill their obligations under the life care contracts; (2) a currently effective administrative order relating to

respondents' marketing practices. Such material facts, if disclosed, would likely affect the decisions of certain prospective purchasers as to whether to purchase such a life care contract. Such failure to disclose is an unfair and deceptive act or practice.

PAR. 21. In the course and conduct of the aforesaid business, respondents have offered and are offering to prospective residents of life care homes marketed by them the option of paying all or a portion of their entrance fees in advance as a refundable deposit to ensure future residency in such life care homes without disclosing that in many instances the payments are not escrowed or set aside in separate accounts for such future residents. Therefore, respondents have failed to disclose material facts relating to their treatment of prepaid entrance fees which, if known to certain prospective residents, would likely affect their consideration whether to prepay their entrance fees or purchase a life care contract. Such failure to disclose is an unfair and deceptive act or practice.

PAR. 22. In the course and conduct of the aforesaid business, respondents have offered and are offering for sale life care contracts without disclosing to prospective purchasers that certain of the moneys derived from entrance fees and service fees are sometimes used in connection with transactions involving entities not directly related to the specific life care homes in which the prospective purchasers may reside. Therefore, respondents have failed to disclose material facts relating to the uses of the moneys to be paid by prospective purchasers, which if known to certain of them, would likely affect their consideration whether to purchase such a life care contract. Such failure to disclose is an unfair and deceptive act or practice.

PAR. 23. The use by respondents of the aforementioned unfair and deceptive acts or practices has had the capacity and tendency to mislead and deceive the purchasing public.

PAR. 24. The aforementioned acts or practices, as herein alleged, were and are all to the prejudice and injury of the public and respondents' competitors and constituted and now constitute unfair methods of competition in or affecting commerce and unfair and deceptive 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 having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and

which, if issued by the Commission, would charge respondents with violations of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such an 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 Christian Services International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 5809 W. 164th Street, in the City of Stilwell, State of Kansas.

Respondent Kenneth P. Berg is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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

ORDER

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

1. *Business Day* shall mean any calendar day except Saturday, Sunday and the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day, Thanksgiving Day and Christmas Day.

2. *Entrance Fee* shall mean money or other property transferred or promised to be transferred as consideration for one or more individu-

als becoming a resident or residents of a life care home pursuant to a life care contract. Such fee may be paid upon the initial entrance of a resident to a life care home or may be deferred.

3. *Life Care Contract* shall mean a contract between a resident and a provider to provide the resident, for the duration of such resident's life, living accommodations and related services in a life care home together with nursing care services, medical services and/or other health-related services, conditioned upon the transfer of an entrance fee to the provider, and which may be further conditioned upon the payment of periodic service fees.

4. *Life Care Home* shall mean the facility or facilities occupied, or planned to be occupied, by residents or prospective residents where a provider undertakes to provide living accommodations and services pursuant to a life care contract.

5. *Provider* shall mean the person, corporation, partnership, association or other legal entity which undertakes to provide residents with living accommodations and services pursuant to life care contracts.

6. *Resident* shall mean a person who has entered into a life care contract with a provider.

7. *Service Fee* shall mean a periodic fee in addition to the entrance fee charged to a resident by a provider pursuant to a life care contract.

For purposes of this order, all required disclosures shall be made in a clear and conspicuous manner.

I.

It is ordered, That respondent Christian Services International, Inc. ("CSI"), a corporation, its successors and assigns, and its officers, and respondent Kenneth P. Berg, individually and as an officer of such corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, or sale of any life care contract, in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Representing, directly or by implication, that any religious denomination, organization or group is affiliated with a provider of any life care home marketed by respondents, or is legally or morally responsible for the debts and commitments of any provider of a life care home marketed by respondents, unless such is the fact.

2. Representing, directly or by implication, that there is little or no

financial risk involved in entering into a life care contract marketed by respondents.

3. Representing, directly or by implication, that any lender which holds a mortgage on a life care home marketed by respondents ensures the economic survival of the life care home covered by the mortgage, unless such is the fact.

4. Representing, directly or by implication, that service fees at life care homes marketed by respondents will never be increased, or that service fee increases will never exceed corresponding increases in Social Security benefits over equivalent periods of time, or that service fee increases will be limited by any other objective criteria, unless such is the fact.

5. Representing, directly or by implication, that any provider of a life care home marketed by respondents has established reserve funding which ensures financial ability to perform obligations to residents under its life care contract, unless such is the fact.

6. Failing to furnish each prospective resident, at least five business days prior to the execution of a life care contract, or at least five business days prior to the transfer of any money or other property to a provider by or on behalf of a prospective resident, whichever shall first occur, a disclosure statement which contains the following disclosures:

(a) A statement explaining any affiliation which the provider of the life care home marketed by respondents has with any religious denomination, organization or group, and the extent to which the affiliated religious denomination, organization or group will be responsible for the financial or contractual obligations of the provider; or, where no such affiliation exists, a statement that there is no affiliation with any religious denomination, organization or group.

(b) A statement that entering into a life care contract may involve significant financial risk, and that the prospective resident, before entering into the life care contract, should seek advice from an attorney, banker or other financial adviser who is independent of respondents and the provider.

(c) A statement explaining that a resident's interest provided by the life care contract is subject and subordinate to any mortgages on the life care home, or the interests of other creditors occupying a preferred status, if such is the fact.

(d) A statement that service fees are subject to periodic increases, if such is the fact.

(e) A statement describing the provisions that have been made, if any, to provide reserve funding or security as an aid to the provider in the performance of its obligations under life care contracts, includ-

ing, but not limited to, the establishment of escrow accounts, trusts, or reserve funds; and whether, and under what circumstances, such reserve funding or security may be waived or reduced by the provider, the mortgagee, or other parties; or, where no provision for reserve funding or security has been made, a statement that such does not exist.

(f) A statement listing all fees to which respondents or the operating divisions, subsidiaries or affiliates of the corporate respondent are or will be entitled to be paid pursuant to contract or contracts with the provider including, but not limited to, fees for consulting, architectural, construction supervisory, marketing and management services. Such statement shall describe the nature of the services rendered or to be rendered, the fee rates or percentages, and the trade names under which respondents perform such services.

(g) A statement listing the names and addresses of all professional services, firms, associations, trusts, partnerships or corporations in which respondents have, or which have in respondents, a ten percent or greater interest and which provide, or intend to provide, goods, leases or services to the provider of a value of $500 or more within any year, and a description of the goods, leases or services and the cost or probable or anticipated cost thereof to the provider, or a statement that such cost cannot presently be estimated, if such is the fact.

(h) A statement describing any currently effective injunctive or restrictive order of a court of record, or any federal or state administrative order, to which respondents and/or the provider are subject, relating to the marketing, management or operation of, without limitation, a life care home, retirement home, home for the aged, nursing home or foster care facility. The statement shall set forth the date and nature of the order and identify the court or authority which issued it. The statement required herein need not include orders which do not materially affect the financial condition of the life care home being marketed, or affect respondents' ability to market, manage or operate said home.

(i) A statement describing briefly the material facts with respect to pending litigation to which respondents and/or the provider are a party, and any outstanding but unsatisfied judgments against respondents and/or the provider, involving the marketing, management or operation of any life care home. The statement required herein need not include disclosure of litigation or claims which, if adversely determined, would cause no material adverse change in the properties or financial condition of the life care home being marketed, or would cause no material adverse change in respondents' ability to market, manage or operate said home.

(j) A statement as to whether advance payments made by prospec-

tive residents as all or a portion of their entrance fees are set aside in escrow accounts with banks, trust companies or other escrow agents.

(k) A statement disclosing that revenues derived from entrance fees or service fees have been, or are intended to be, used in connection with ventures not directly related to the specific life care home in which the prospective purchaser may reside, if revenues are so used. The statement shall list the total amount of expenditures made or planned to be made in connection with such ventures.

7. Failing to furnish each prospective resident, at the time the disclosure statement required by Paragraph 6 is furnished, at least the following financial information:

(a) An audited financial statement of the provider prepared by an independent certified public accountant, including a balance sheet as of the end of the most recent fiscal year and income statements for the three most recent fiscal years or such shorter period of time as the provider shall have been in existence. If the provider's fiscal year ended more than ninety (90) days prior to the contract date or date of transfer of money or other property, and audited financial statements for that fiscal year are not yet available, interim financial statements shall be included, but need not be certified.

(b) A development budget for any life care home in a planning, development or expansion stage. The budget shall consist of a statement of the anticipated source and application of the funds used or to be used in the purchase or construction of any facility or building which is planned or under development.

(c) Pro forma financial statements which shall include pro forma annual income statements and balance sheets of the provider for a period of not less than five fiscal years. The pro forma annual income statements shall include:

(i) A beginning cash balance consistent with the certified income statement required by subsection (a) of this paragraph or, if operations at the life care home have not commenced, consistent with the statement of anticipated source and application of funds required by subsection (b).

(ii) Anticipated earnings on cash reserves, if any.

(iii) Estimates of net receipts from entrance fees, other than entrance fees included in the statement of source and application of funds required by subsection (b), less estimated entrance fee refunds, if any. A description of the actuarial basis and method of calculation for the projection of entrance fee receipts shall be included.

(iv) An estimate of gifts or bequests if any are to be relied on to meet operating expenses.

(v) A projection of estimated income from fees and charges other than entrance fees, showing individual rates presently anticipated to be charged and including a description of the assumptions used for calculating the estimated occupancy rate of the life care home and the effect on the income of the life care home of government subsidies for health care services, if any, to be provided pursuant to the life care contracts.

(vi) A projection of estimated operating expenses of the provider of the life care home, including a description of the assumptions used in calculating the expenses, and separate allowances, if any, for the replacement of equipment and furnishings and anticipated major structural repairs or additions.

(vii) An estimate of annual payments of principal and interest required by any mortgage loan or other long-term financing.

In the treatment of entrance fees which are included in any of the financial statements required by this Paragraph an accounting method must be utilized which conforms to generally accepted accounting principles and which appropriately matches revenues to expenditures.

II.

It is further ordered:

(a) That respondents deliver, by certified mail or in person, a copy of this order to all of their present or future salesmen and other employees who sell or, through personal contact or telephone communication with prospective residents, promote the sale of life care contracts, and to any advertising agency utilized by respondents.

(b) That respondents provide a form to each of the persons referred to in subparagraph (a) of this paragraph, to be returned to respondents, clearly affirming the intention of that person to be bound by and to conform his practices with the requirements of this order;

(c) That respondents inform in writing each of the persons in their employ referred to in subparagraph (a) of this paragraph that respondents are required by this order not to use, and shall not use, any such person to sell or to promote the sale of life care contracts unless that person complies with the provisions of this order;

III.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment relating to the marketing, management or

operation of, without limitation, a life care home, retirement home, home for the aged, nursing home or foster care facility. In addition, for a period of ten (10) years from the date of service of this order, the respondent shall promptly notify the Commission of each affiliation with any new business or employment relating to the marketing, management or operation of a life care home, retirement home, home for the aged, nursing home or foster care facility. Each such notice shall include the respondent's new business address and a statement of the nature of the aforesaid business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the aforesaid business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

IV.

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

V.

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

VI.

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

IN THE MATTER OF

THE GILLETTE COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 2 OF THE CLAYTON ACT

Docket 9152. Complaint, Feb. 19, 1981—Decision, Oct. 31, 1983

This consent order requires a leading manufacturer of razor blades, razors, toiletries and grooming aids, among other things, to make alternative advertising allowances available to customers that compete in the resale of Gillette products but do not regularly advertise in newspapers. The order requires the company to notify all its customers, as specified, of its advertising and promotional programs, and of the availability of usable and economically feasible alternatives. Such alternatives shall consist of handbills and circulars in amounts not less than 1,000; off-shelf, end-of-aisle or dump displays; window or wall posters and other in-store promotional activities acceptable to the company. Further, respondent must distribute a special written notice informing customers of the change in its promotional programs and provide sales personnel with a copy of the order.

Appearances

For the Commission: *Karen G. Bokat.*

For the respondent: *Stephen M. Axinn,* Boston, Mass. and *David Cavers, Jr., Palmer & Dodge,* Boston, Mass.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above named respondent has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 41 *et. seq.*) and subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13), and believing that a proceeding by it in respect thereof is in the public interest, hereby issues this complaint, charging as follows:

PARAGRAPH 1. Respondent, The Gillette Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at Prudential Tower Building, Boston, Massachusetts.

PAR. 2. Respondent is now and for many years has been engaged in the manufacture, sale and distribution of razor blades, razors, toiletries and grooming aids.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined

in the Clayton Act and Federal Trade Commission Act, having sold and shipped its products or caused them to be transported from its principal place of business in Massachusetts to customers located in other States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of credits or sums of money, hereinafter referred to as promotional allowances, either directly or indirectly by way of discounts, allowances, rebates or deductions, as compensation or in consideration for promotional services or facilities, including advertising in various media such as newspapers, furnished by customers in connection with the offering for sale or sale of respondent's products.

PAR. 5. Respondent's promotional allowances discriminated against particular customers or classes of customers in that they were not available, in a practical business sense, on proportionally equal terms to all customers competing in the sale and distribution of respondent's products. Respondent failed to offer alternative terms and conditions to customers for whom respondent's basic promotional allowance plan is not usable and suitable.

PAR. 6. The acts and practices of respondent set forth in Paragraphs 4 and 5 above violate Section 5 of the Federal Trade Commission Act, as amended, and Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein contemplated.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and Subsection (d) of Section 2 of the Clayton Act, as amended, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

The Secretary of the Commission having thereafter withdrawn this

matter from adjudication in accordance with Section 3.25(c) of its Rules; and

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

1. Respondent The Gillette Company 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 Prudential Tower Building, in the City of Boston, Commonwealth of Massachusetts.

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

ORDER

I.

A. *It is ordered,* That respondent, The Gillette Company, a corporation, its successors and assigns, and its officers, directors, agents, representatives and employees, directly or indirectly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of razor blades, razors, toiletries or cosmetic grooming aids sold or offered for sale by respondent (hereinafter referred to as "Respondent's Covered Products") in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, or the Clayton Act, as amended, shall cease and desist from paying or contracting to pay to or for the benefit of any customer anything of value as compensation or in consideration for newspaper advertising or promotional services or facilities furnished by or through such customer in connection with the handling, sale or offering for sale of any of Respondent's Covered Products unless:

(1) respondent makes such compensation or consideration available on proportionally equal terms for alternative services or facilities that are usable and economically feasible for all customers who compete in the distribution or resale of Respondent's Covered Products and who do not regularly advertise in newspapers or for whom any newspaper advertising or promotional program or plan subject to Paragraph IA of this Order is not usable or economically feasible,

which services or facilities shall consist of: handbills and circulars in amounts not less than 1,000; off-shelf, end-of-aisle or dump displays; window or wall posters; store banners or shelf talkers; or other in-store promotional activities acceptable to respondent; and

(2) respondent (i) imprints on the smallest shipping container used for Respondent's Covered Products the legend "Advertising, promotional, and display allowances are periodically made available by Gillette to all retailers. To obtain information about these promotional opportunities contact your supplier or write to: The Gillette Company [Safety Razor Division, Sales Promotion Department - P.O. Box 2131, Boston, Massachusetts 02106], [Personal Care Division, Sales Promotion Department, 101 Huntington Avenue, Boston, Massachusetts 02199]"; and (ii) for each promotion causes copies of "deal sheets" or similar materials explaining the availability of alternative methods of participation in respondent's advertising or promotional program or plan to be supplied to its wholesalers or distributors in sufficient quantity for presentation or delivery by such wholesalers or distributors to each customer of such wholesaler or distributor.

B. *Provided, however,* That nothing herein contained shall be construed or interpreted to abridge or otherwise restrict respondent's entitlement to avail itself of the "Meeting Competition Defense," the provisions of which are contained in Section 2(b) of The Clayton Act, 15 U.S.C. 2(b), as amended.

II.

It is further ordered, That respondent shall within the twelve (12) month period beginning thirty (30) days after service upon it of this Order (hereinafter referred to as the "Effective Period") notify those retailers who purchase Respondent's Covered Products of the availability of alternative methods of participation in respondent's allowance programs by distributing a written notice in the form attached hereto as Exhibit A in the following manner:

(1) Such notice shall be contained in the "deal sheets" respondent delivers to its wholesalers, for presentation or delivery by such wholesalers to each customer of such wholesalers, in connection with five (5) major product promotions offered by respondent during the Effective Period; and

(2) Such notice shall be contained in a printed insert which will be included in each presealed "Counter Display" and "Floor Stand" distributed by respondent in connection with respondent's "World Series" promotion occurring within the Effective Period.

For purposes of paragraph II (1) of this Order, respondent shall give

the notice contemplated therein in connection with respondent's "Super Bowl," "Valentine's Day," "All Star," "Miss America" and "World Series" product promotions if such product promotions are offered during the Effective Period. In the event that any of these product promotions are not offered during the Effective Period, respondent shall give the notice contemplated by paragraph II (1) in connection with a product promotion that is comparable to the one no longer offered.

III.

It is further ordered, That respondent shall deliver a copy of this Order to cease and desist to all sales and sales management personnel employed on the date of service of this order in each of respondent's operating divisions that is engaged in the sale of Respondent's Covered Products within the United States.

IV.

It is further ordered, That (i) within sixty (60) days after service upon respondent of this Order and (ii) within ninety (90) days after the end of the Effective Period, respondent shall file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied and is complying 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.

EXHIBIT A

Performance Alternatives: For accounts that do not regularly advertise in newspapers or for whom any other promotional program offered by The Gillette Company is not usable or economically feasible, The Gillette Company offers compensation for the following performance alternatives: handbills and circulars in amounts not less than 1,000; off-shelf, end-of-aisle or dump displays; window or wall posters; store banners or shelf talkers; or other in-store promotional activities acceptable to The Gillette Company.

IN THE MATTER OF

LOMAS & NETTLETON FINANCIAL CORPORATION, ET AL.

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

Docket C-3125. Complaint, Nov. 1, 1983—Decision, Nov. 1, 1983

This consent order requires a Dallas, Texas mortgage banker, among other things, to establish and maintain procedures to ensure that it will timely pay all obligations due and payable from homeowners' escrow accounts. The company must maintain procedures to identify and correct any injury caused by its failure to pay obligations from a homeowner's escrow account when due. The company is prohibited from misrepresenting that funds have been withdrawn from escrow and the nature of any fee or obligation imposed upon a homeowner's escrow account.

Appearances

For the Commission: *David R. Flowerree.*

For the respondent: *John C. Fricano, Skadden, Arps, Slate, Meagher & Flom,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Lomas & Nettleton Financial Corporation, a corporation, and The Lomas & Nettleton Company, a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Parties

PARAGRAPH 1. Respondent Lomas & Nettleton Financial Corporation, hereinafter "LNFC," 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 2001 Bryan Tower, Dallas, Texas.

Respondent The Lomas & Nettleton Company, hereinafter "L&N," is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut. Its office and principal

place of business is the same as that of LNFC. L&N is a wholly-owned subsidiary of LNFC.

Commerce

PAR. 2. Respondents maintain and have maintained a substantial course of business, including the acts and practices hereinafter set forth, which are in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent's Business

PAR. 3. Respondents are now and for some time have been engaged in the business of mortgage banking, including the origination of residential mortgage loans, the selling of these mortgages to institutional investors, and the servicing of residential mortgage loans for themselves and others.

PAR. 4. Respondents service mortgage loans by receiving periodic payments from mortgagors, hereinafter "homeowners," on behalf of lending institutions and other mortgage holders. These payments include the principal and interest due on mortgage notes and, in many instances, funds to be deposited into escrow accounts by respondents. Respondents undertake to pay from funds accumulated in escrow the premiums due on homeowners' hazard insurance policies and property taxes due to appropriate authorities.

Count I

PAR. 5. In 1979, L&N acquired National Homes Acceptance Corporation (hereinafter "National Homes"). The National Homes acquisition raised the number of residential mortgage loans serviced by respondents from approximately 300,000 to approximately 450,000.

PAR. 6. Respondents failed to make adequate preparations for the integration of the National Homes files onto the L&N computer system. Because of this inadequate preparation, and because of the difficulties L&N experienced with its computer facility during 1979–1980, a significant amount of homeowners' correspondence was not processed promptly by L&N during that time. While respondents took certain steps to halt or ameliorate the problem, they were inadequate.

PAR. 7. As a direct result of the events alleged in Paragraph Six, in numerous instances respondents, being on notice that premiums were due for homeowner-selected policies of hazard insurance, failed to make timely payments of such premiums.

PAR. 8. Respondents' acts and practices as described in Paragraphs Five through Seven constituted unfair acts or practices.

Count II

PAR. 9. Until February 1981, whenever, for any reason, a homeowner's hazard insurance policy lapsed, respondents mailed to the homeowner a letter advising the homeowner that respondents had obtained alternative hazard insurance coverage.

PAR. 10. By and through certain statements contained in the aforesaid letter, respondents represented to the homeowner, directly or by implication, that respondents had in their possession an alternative hazard insurance policy which was paid for by L&N out of the funds contained in the homeowner's escrow account, and, therefore, that funds were no longer available in that account to pay for the hazard insurance of the homeowner's choice. Other statements contained in the aforesaid letter represented, directly or by implication, that a "substitution fee" would be charged if the homeowner chose to replace the alternative hazard insurance obtained by L&N with a policy of that homeowner's choice.

PAR. 11. At the time said representations were made, however, respondents did not have in their actual possession the alternative hazard insurance policy, nor had they paid the premium for that policy out of the funds contained in the homeowner's escrow account. Thus, that account still contained sufficient funds to pay the premium on a hazard insurance policy of the homeowner's choice, and no "substitution fee" could be charged for substituting a homeowner-chosen policy for the alternative hazard insurance described in the aforesaid letter.

PAR. 12. Respondents' use of the representations set forth in Paragraph Ten had the capacity and tendency to mislead homeowners into the erroneous belief that such representations were true and complete and had the capacity to deter homeowners from purchasing hazard insurance of their choice.

Violation

PAR. 13. The acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and constituted unfair and 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 respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office

proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of Section 5 of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, 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 Lomas & Nettleton Financial Corporation, hereinafter "LNFC," 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 2001 Bryan Tower, Dallas, Texas.

Respondent The Lomas & Nettleton Company, hereinafter "L&N," is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut. Its office and principal place of business is the same as that of LNFC. L&N is a wholly-owned subsidiary of LNFC.

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

Order

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

a. *Homeowner* means any person who is the mortgagor of residential real estate.

b. *Hazard insurance* means any insurance on mortgaged property for fire, theft, or other hazards, including homeowners' insurance.

I.

It is ordered, That respondents Lomas & Nettleton Financial Corporation, a corporation, and The Lomas & Nettleton Company, a corporation, their successors and assigns, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device in connection with the administering or servicing of any loan, including a home mortgage, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Failing to maintain procedures designed reasonably to ensure timely payment of all obligations payable from homeowners' escrow accounts;

B. Failing to maintain procedures designed reasonably to ensure that any failure of respondents to make timely payment of any obligation payable from a homeowner's escrow account is identified and corrected, and any injury to the homeowner resulting therefrom is redressed;

C. Failing promptly to correct and to redress any injury to a homeowner caused by any failure of respondents to make timely payment of any obligation payable from the homeowner's escrow account once respondents are placed on notice of such an injury;

D. Misrepresenting, directly or by implication, that funds have or have not been withdrawn by respondents from a homeowner's escrow account;

E. Misrepresenting, directly or by implication, the nature of any charge or fee having been or to be imposed by respondents on a homeowner or against a homeowner's escrow account.

II.

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

III.

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

emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the Order.

IV.

It is further ordered, That the respondents shall, within ninety (90) days after service upon them of this Order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this Order.