IN THE MATTER OF

KENNECOTT CORPORATION

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

Docket C-3075. Complaint, Sept. 28, 1981—Decision, Sept. 28, 1981

This consent order requires, among other things, a Stamford, Conn., manufacturer engaged in the production of various products, including fabric air filter bags utilized in the control of industrial air pollution, to timely divest its subsidiary, the Filter Media Division, "FMD," in accordance with the terms of the order. Pending such divestiture, the firm is required to operate its prospective acquisition, National Filter Media, as a separately managed entity. The order further bars the company from certain acquisitions for a period of ten years without prior Commission approval.

Appearances

For the Commission: *Steven R. Newborn, Michael Antalics, Nancy Markowitz,* and *Virginia L. Snider.*

For the respondent: *Richard E. Carlton* and *Richard Lyons, Sullivan & Cromwell,* New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent, Kennecott Corporation ("Kennecott"), a corporation subject to the jurisdiction of the Commission, has entered into an agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

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

a. The term *baghouse* means a system used for the filtration of particulate matter from gas streams for environmental and safety reasons or for the recapture of valuable particulates.

b. The term *fabric air filter bag* means a tubular or non-tubular,

seamed or seamless bag, varying in length, width and material, which is used within air pollution control systems called *baghouses.*

II. KENNECOTT CORPORATION

2. Kennecott is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal executive offices at Ten Stamford Forum, High Park Ridge, Stamford, Connecticut.

3. At all times relevant herein, Kennecott has been and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission and Clayton Acts, as amended.

III. DORR-OLIVER INCORPORATED

4. Curtiss-Wright Corporation ("Curtiss-Wright") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices at One Passaic St., Wood-Ridge, New Jersey.

5. Dorr-Oliver Inc. ("Dorr-Oliver") is a corporation organized and doing business under and by virtue of the laws of the State of Delaware with its principal offices at 77 Havemeyer Lane, Stamford, Connecticut. Dorr-Oliver is a wholly-owned subsidiary of Curtiss-Wright.

6. At all times relevant herein, Curtiss-Wright has been and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission and Clayton Acts, as amended.

IV. ACQUISITION

7. On January 29, 1981, Kennecott and Curtiss-Wright entered into an agreement for the sale of Curtiss-Wright's Dorr-Oliver subsidiary to Kennecott for approximately $110,000,000.

V. TRADE AND COMMERCE

8. The relevant geographic market is the United States as a whole.

9. The relevant product market is the manufacture and sale of fabric air filter bags.

10. Concentration in the manufacture and sale of the relevant product is high.

11. There are barriers to entry into the manufacture and sale of the relevant product.

12. Both Kennecott through its Filter Media Division and Dorr-Oliver, through its subsidiary, National Filter Media Corporation, are significant competitors in the relevant market.

VI. EFFECTS OF THE ACQUISITION

13. The effects of the proposed acquisition may be to substantially lessen competition or tend to create a monopoly in the relevant market enumerated in Paragraphs 7 and 8 of this Complaint in the following ways, among others:

(a) it will eliminate substantial actual competition between Kennecott and Dorr-Oliver in the relevant market;

(b) it will significantly increase the already high levels of concentration in the relevant market;

(c) it will further raise the barriers to entry that exist in the relevant market;

(d) customers of fabric air filter bags may be denied the benefits of free and open competition.

VII. VIOLATIONS CHARGED

14. The proposed acquisition set forth in Paragraph 7, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

15. The agreement described in Paragraph 7, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition of Dorr-Oliver Incorporated (hereinafter "Dorr-Oliver"), a wholly-owned subsidiary of Curtiss-Wright Corporation ("Curtiss-Wright"), by Kennecott Corporation (hereinafter "Kennecott"), and Kennecott 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 Kennecott with violations of the Federal Trade Commission Act and the Clayton Act; and

Kennecott, its attorneys, and counsel for the Commission having

thereafter executed an agreement containing a consent order, an admission by Kennecott 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 Kennecott 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 Kennecott has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Kennecott is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal executive offices at Ten Stamford Forum, High Ridge Park, Stamford, Connecticut.

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

ORDER

I.

It is ordered, That for the purposes of this order the following definitions shall apply:

1. *Kennecott* means Kennecott Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal offices at Ten Stamford Forum, Stamford, Connecticut, as well as its officers, employees, agents, its parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, employees or agents of Kennecott's parents, divisions, subsidiaries, affiliates, successors, or assigns.

2. *Curtiss-Wright* means Curtiss-Wright Corporation, a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal offices at One Passaic St., Wood-Ridge, New Jersey, as well as its officers, employees, agents, it parents, divisions, subsidiaries, affiliates, successors,

assigns, and the officers, employees or agents of Curtiss-Wright's parents, divisions, subsidiaries, affiliates, successors, or assigns.

3. *Dorr-Oliver* means Dorr-Oliver Inc., a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware and a wholly-owned subsidiary of Curtiss-Wright, with its principal offices at 77 Havemeyer Lane, Stamford, Connecticut, as well as its officers, employees, agents, its parents, divisions, subsidiaries, affiliates, successors, assigns, and the officers, employees or agents of Dorr-Oliver's parents, divisions, subsidiaries, affiliates, successors, or assigns.

4. *Filter Media Division* or *FMD* means all assets, properties, titles to property, interests, rights and privileges of whatever nature, tangible and intangible, including, but not limited to, all real property, buildings, machinery, equipment, raw materials, inventory, customer lists, trade names, patents, patent applications, trademarks, orders for purchase that are unfilled on the date of the divestiture, and all other property of whatever description presently owned or operated, together with all additions, replacements, and improvements hereafter made, by the Filter Media Division of the Kennecott Engineered Systems Company, a division of Kennecott Corporation.

5. *National Filter Media* or *NFM* means the National Filter Media Corporation, a subsidiary of Dorr-Oliver. It includes all assets, properties, titles to property, interests, rights and privileges of whatever nature, tangible and intangible, including but not limited to, all real property, buildings, machinery, equipment, raw materials, inventory, customer lists, trade names, patents, patent applications, trademarks, orders for purchase that are unfilled on the date of the divestiture, and all other property of whatever description presently owned or operated by NFM.

6. *Relevant products* means fabric air filter bags, wet filtration media, and cages.

a. The term *fabric air filter bag* means a tubular or non-tubular, seamed or seamless bag, varying in length, width, and material, which is used within air pollution control systems called *bag houses.*

b. The term *bag house* means a system used for the filtration of particulate matter from gas streams for environmental or safety reasons or for the recapture of valuable particulate.

c. The term *wet filtration media* means fabric filters of any shape used in industrial applications to separate liquids from solids.

d. The term *cages* means cylindrical wire mesh forms used in bag houses as a support for fabric air filter bags.

7. *Eligible Person* means any individual, corporation (including subsidiaries thereof), partnership, joint venture, trust, unincorporated association, other business or legal entity, or any combination thereof, approved by the Commission. Such approval shall be in the sole discretion of the Commission.

II.

It is ordered, That Kennecott shall divest absolutely and unqualifiedly FMD to an Eligible Person within nine months from the date of the issuance of this order.

III.

It is further ordered, That divestiture under Paragraph II shall be in a manner which preserves the assets and business divested as a viable competitor.

IV.

It is further ordered, That, pending the divestiture of FMD required by Paragraph II of this Order, Kennecott shall not take any action other than in the ordinary course of business, without the consent of the Federal Trade Commission, to diminish the value of FMD.

V.

It is further ordered, That pending divestiture under Paragraph II required by this order:

A. Kennecott shall operate NFM as a separately managed subsidiary, separately maintaining its own financial books and records, internal auditors, employees and management. Earnings and profits of NFM shall be retained by NFM and shall not be distributed to Kennecott or any third party as dividends or in any other form; *provided, however,* that ordinary dividends may be declared by NFM and that portion of dividends due the Filter Fabrics Company may be paid to the Filter Fabrics Company.

B. Kennecott: (1) shall exert no control over or influence on or interfere in any way in any of the business decisions or operations of NFM; (2) shall not cause NFM, directly or indirectly, to adopt policies preferred, suggested, or dictated by Kennecott; (3) shall not change NFM's existing policies or methods of operation. Furthermore, no Kennecott officer, director, employee, representative, or

agent shall serve in any NFM position and no Kennecott officer, director, employee, representative or agent shall serve on NFM's Board of Directors; *provided, however,* that Messrs. S. P. Felt, Jr., P. S. Felt, R. G. McElhanney, C. B. Scoble, G. Ehinger, and W. P. Holden may continue to serve on NFM's Board of Directors if they provide to the Commission an executed copy of the affidavit attached as Appendix I to this Order.

VI.

It is further ordered, That, for a period of ten years from the date of issuance of this order, Kennecott, its parents, divisions, subsidiaries, affiliates, successors, or assigns, shall not, directly or indirectly, acquire any stock, share capital, or equity interest in or assets used in the manufacture of any relevant product by, any concern, corporate or non-corporate, engaged in the manufacture or sale of any relevant product without the prior approval of the Federal Trade Commission.

VII.

It is further ordered, That Kennecott shall, within ninety days from the date of issuance of this order, and every ninety days thereafter until divestiture is completed, submit in writing to the Commission a report setting forth in detail the manner and form in which Kennecott intends to comply, is complying, and has complied with the terms of this order and such additional information relating thereto as may from time to time reasonably be required. All such reports shall include a summary of contacts or negotiations with anyone for the specified assets, the identity of all such persons, and copies of all written communications to and from such persons. After divestiture is completed, Kennecott shall submit in writing annual reports showing the manner and form of compliance with this order.

VIII.

It is further ordered, That for a period of ten years from the date of issuance of this order, Kennecott shall notify the Commission at least thirty days prior to any change in Kennecott which may affect compliance with the obligations arising out of this consent order, 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.

APPENDIX I

AFFIDAVIT

STATE OF)
) ss:
CITY OF)

_____ being duly sworn, hereby deposes and says:

I, _____ affirm that I have read the Agreement Containing Consent Order to which this Sworn Statement is attached, and that pending divestiture of FMD as ordered in Paragraph II of that Agreement:

(1) I shall not cause NFM, directly or indirectly, to adopt policies or methods of operation preferred, suggested, or dictated by Kennecott and that Kennecott shall exert no control over or influence on or interfere in any way in, my consideration of any of the business decisions or operations of NFM;

(2) I will in no way, either directly or indirectly, participate in the business decisions or operations of FMD;

(3) I will make any reports on the business or operations of NFM to either Dorr-Oliver or Kennecott only in writing and will simultaneously forward a copy of each such report to the Commission.

_____

Sworn to before me this _____ day of _____ 1981.

_____

Notary Public

My Commission expires _____ .)

IN THE MATTER OF

COMMERCIAL CREDIT COMPANY

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2420. Decision, June 26, 1973—Modifying Order, Sept. 29, 1981

This order reopens the proceeding and modifies the Commission's order issued on June 26, 1973 (38 F.R. 20229; 82 F.T.C. 1841) against one of the nation's largest finance companies by substituting for the order in its entirety, a modified order which deletes language requiring the company to obtain a "Personal Insurance Authorization" form from each borrower before the loan could be completed. For the next five years, the modified order requires the company to give borrowers who elect to purchase insurance a notice entitled "Your Right To Cancel Insurance," and give the customer the right to cancel credit insurance within 15 days of signing for a loan and receive a full refund of insurance funds.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

Upon consideration of a request by respondent to reopen the proceeding and modify the Cease and Desist Order entered by consent against respondent in this matter on June 26, 1973, with the concurrence of the Divisions of Credit Practices and Compliance, and with the Director of the Bureau of Consumer Protection having recommended that the requested modifications of the Order be granted, the Commission has concluded on the basis of the foregoing that respondent's request should be granted,

It is therefore ordered, That this proceeding be reopened and that the following Modified Final Order be substituted and issued in lieu of the Order entered on June 26, 1973:

MODIFIED FINAL ORDER

I. *It is ordered,* That respondent Commercial Credit Company, it successors and assigns, and its officers, agents, representatives an employees, directly or through any corporation, subsidiary, divisic or other device, in connection with the granting of consumer loa subject to the provisions of Regulation Z, 12 C.F.R. 226.8 (1980), aft April 1, 1982 12 C.F.R. 226.17 and 226.18 (1981), and the Truth Lending Act, 15 U.S.C. 1601 *et seq.,* as amended, do forthwith ce and desist from:

1. Failing, when the charges for credit life insurance an

credit accident and health insurance are not included in the finance charge:

(a) To quote monthly payments, whether on the telephone, in person, or otherwise, which exclude the cost of credit life insurance and/or credit accident and health insurance.

(b) If monthly payments do reflect credit life insurance and/or credit accident and health insurance, such payments may be quoted only if the consumer is clearly told that:

(i) credit life insurance and/or credit accident and health insurance are optional; and

(ii) the consumer's choice regarding the insurance coverage will not be considered in respondent's approval of the consumer's credit.

2. Failing to include in the finance charge, charges for credit life insurance and/or credit accident and health insurance written in connection with the credit transaction unless:

(a) The insurance coverage is not required by the respondent and is not a factor in the approval by the respondent of the extension of credit and this fact is clearly and conspicuously disclosed in writing to the customer; and,

(b) Any customer desiring such insurance coverage gives specifically dated and separately signed affirmative written indication of such desire after receiving written disclosure to the customer of the cost of such insurance, as required by 12 C.F.R. 226.4(a)(5) (1980) (12 C.F.R. 226.4(d) (1981) after April 1, 1982).

3. When the charges for credit life insurance and/or credit accident and health insurance are not included in the finance charge:

(a) Misrepresenting, orally or otherwise, directly or by implication, that credit life and/or credit accident and health insurance are required as a condition for obtaining credit from respondent.

(b) Discouraging, by misrepresentation, oral or otherwise, directly or by implication, the declination of credit life and/or credit accident and health insurance.

4. When the charges for credit life insurance and/or credit accident and health insurance are not included in the finance charge, failing:

(a) To grant each borrower who is covered by credit life and/or credit accident and health insurance a period of not less than fifteen

days in which to cancel such insurance and receive a full refund of insurance funds. Such cancellation period shall begin to run on the day that respondent delivers to the borrower the notice of "Cancellation Right" and "Cancellation Request" referred to in section (b) and (c) of this paragraph 4. A borrower's notification to respondent of cancellation of his or her insurance coverage shall be considered given on the date mailed or otherwise delivered to respondent.

(b) To deliver to each borrower who is covered by credit insurance a notice entitled "Your Right to Cancel Insurance." Such notice shall:

(i) be printed on paper of a color different from other loan documents;

(ii) be printed in print not smaller than the print of Attachment A hereto;

(iii) be substantially similar to the content of Attachment A hereto;

(iv) be the last document delivered to the borrower at the time of closing together with an acknowledgement of receipt which is specifically dated and separately signed by the borrower.

(c) To deliver to each borrower who is covered by credit insurance a borrower's copy of the "Cancellation Request" which contains only the contents of Attachment B hereto, and an envelope addressed to respondent.

(d) To mail or personally deliver to each borrower covered by credit insurance who orally inquires about cancellation, the notice of cancellation right described in section (b) and the envelope described in section (c).

(e) However, where the respondent receives a request for an extension of credit by mail, telephone, or written communication without personal solicitation, the provisions of this paragraph 4 shall not be applicable if the respondents' printed material delivered or made available to the customer clearly sets forth the disclosures required by 12 C.F.R. 226.4(a)(5) (1980) (12 C.F.R. 226.4(d) (1981) after April 1, 1982), and also sets forth the scheduled amount of payments both including the cost of credit and/or credit accident and health insurance and excluding the cost of credit and/or credit accident and health insurance, and which otherwise meets the requirements of 12 C.F.R. 226.8(g)(2) (1980) (12 C.F.R. 226.17(g) (1981) after April 1, 1982).

5. Failing to compute and disclose accurately the finance charge,

as required by 12 C.F.R. 226.4(a)(5) and 226.8(d) (1980) (12 C.F.R. 226.4(d) and 226.18(b) and (c) (1981) after April 1, 1982).

6. Failing to compute and disclose accurately the annual percentage rate to the nearest quarter of one percent as required by 12 C.F.R. 226.5(b) and 226.8(b) (1980) (12 C.F.R. 226.22 and 226.18 (1981) after April 1, 1982).

7. Failing, in any consumer loan transaction or advertisement to make all disclosures, determined in accordance with 12 C.F.R. 226.4 and 226.5 (1980) (12 C.F.R. 226.4 and 226.22 (1981) after April 1, 1982) in the manner, form and amount required by 12 C.F.R. 226.6, 226.8, 226.9, and 226.10 (1980) (12 C.F.R. 226.17, 226.18, 226.23, and 226.24 (1981) after April 1, 1982).

II. *It is further ordered,* That the respondent's obligations under the Order issued on June 26, 1973, shall remain effective and binding upon any of the consumer loan offices of respondent until such office is in compliance with paragraph 4 of this modified order, *provided, however,* that all of respondent's consumer loan offices shall be in compliance with paragraph 4 of this modified order not later than six months from the date of service of this modified order. Each of respondent's consumer loan offices shall be obligated to comply with paragraph 4 of this modified order only for the period of five years following immediately after the day on which the loan office is in compliance with such paragraph 4.

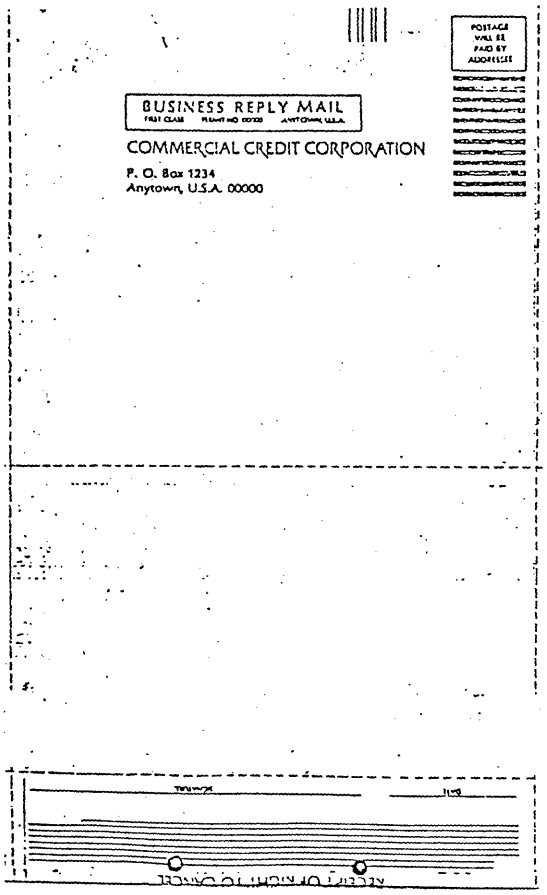
III. *It is further ordered,* That respondent shall maintain for a three year period, by individual consumer loan offices, records of the total number of borrowers and the names and addresses of each borrower who exercises his or her right to cancel credit insurance. At the request of the Commission staff, the respondent shall maintain records for an additional two-year period. The records required by this paragraph shall be available for inspection and copying by Commission staff upon request.

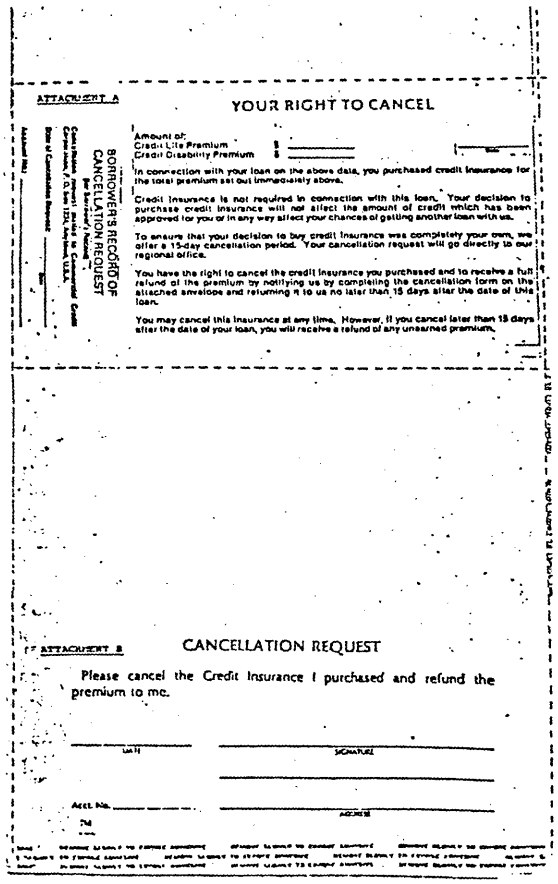
IV. *It is further ordered,* That respondent, shall not later than six months after the service of this Order upon it, deliver a copy of this Order to Cease and Desist to all present and future personnel of respondent at its general offices in Baltimore and in each of its subsidiary or other loan offices who are engaged in the extension of consumer loans.

V. *It is further ordered,* That respondent notify the Commission within thirty (30) days of any change in the corporate respondent which may affect compliance obligations with regard to the exten-

sion of consumer loans arising out of this Order, 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 with regard to the extension of consumer loans which may affect compliance obligations arising out of this Order.

VI. *It is further ordered,* That respondent shall within two hundred ten (210) 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.


POSTAGE WILL BE PAID BY ADDRESSEE
BUSINESS REPLY MAIL
COMMERCIAL CREDIT CORPORATION
P. O. Box 1234
Anytown, U.S.A. 00000



ATTACHMENT A

YOUR RIGHT TO CANCEL

BORROWER'S RECORD OF CANCELLATION REQUEST

Amount of:
Credit Life Premium $ _____
Credit Disability Premium $ _____ $ _____

In connection with your loan on the above date, you purchased credit insurance for the total premium set out immediately above.

Credit insurance is not required in connection with this loan. Your decision to purchase credit insurance will not affect the amount of credit which has been approved for you or in any way affect your chances of getting another loan with us.

To ensure that your decision to buy credit insurance was completely your own, we allow a 15-day cancellation period. Your cancellation request will go directly to our regional office.

You have the right to cancel the credit insurance you purchased and to receive a full refund of the premium by notifying us by completing the cancellation form on the attached envelope and returning it to us no later than 15 days after the date of this loan.

You may cancel this insurance at any time. However, if you cancel later than 15 days after the date of your loan, you will receive a refund of any unearned premium.

ATTACHMENT B

CANCELLATION REQUEST

Please cancel the Credit Insurance I purchased and refund the premium to me.

_____ _____
DATE SIGNATURE

_____
ACCT. No.

_____
ADDRESS

IN THE MATTER OF

ALDENS, INC.

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

Docket C-3076. Complaint, Oct. 8, 1981—Decision, Oct. 8, 1981

This consent order requires, among other things, a Chicago, Illinois mail order house to cease, in connection with the collection of debts, improperly contacting consumers or third parties. Except to advise consumers of legal remedies usually taken to collect debts, respondents are prohibited from communicating with consumers who have written the firm indicating that they will not pay the debt or wish no further contact regarding the debt. Additionally, for a five-year period, the order requires the insertion of a prescribed statement in all charge account agreements, which states that the company will limit discussions with third parties to information necessary to locate the consumer. The order also provides that should the Commission promulgate a trade regulation rule applicable to respondent's third party contacts, compliance with that rule will be considered part of the order.

Appearances

For the Commission: *Alan D. Reffkin.*

For the respondent: *Lawrence F. Henneberger* and *Christopher Smith, Arent, Fox, Kintner, Plotkin & Kahn,* 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 Aldens, Inc., a corporation, hereinafter referred to as Aldens or 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, Aldens, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and only place of business located at 5000 West Roosevelt Road, Chicago, Illinois.

PAR. 2. Respondent is now and for some time in the past has been regularly engaged in the sale of consumer products by catalog and direct mail merchandising to consumers residing throughout the United States. All orders, whether for cash or credit (extended by

respondent using its Aldens Charge Accounts), are solicited by mail through catalogs, flyers and other direct mail literature. For its fiscal year ending January 31, 1980, Aldens' sales were approximately $ 250 million, making it the nation's fifth largest mail order company.

PAR. 3. In the ordinary course and conduct of its business, Aldens, by its agents, representatives and employees, regularly engages in the collection of consumer debts allegedly owed to Aldens for the sale, on credit, of mail order consumer products as described in Paragraph Two. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said business in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course of attempting to collect the consumer debts referred to in Paragraph Three, herein, respondent, by means of the U.S. Postal Service, has transmitted and in certain instances continues to transmit to consumers and others not necessarily responsible for the financial affairs of said consumers, unsolicited forms, letters and notices demanding payment or requesting assistance or information to aid in the collection of said consumer debts. Copies of some of the forms used by Aldens are attached hereto as Exhibits 1 through 14.

Typical and illustrative, but not necessarily all inclusive, of the statements and representations made in said forms and printed materials are the following excerpts.*

1. Prior to accepting this for final settlement I am asking our Credit people to determine why you have failed to discharge your obligation.

A review of your history indicates:

you receive income from [employer].

bank affiliations with [bank].

you have credit with [merchant].

Additionally, [name of a credit-reference/friend/relative] may be in a position to hel you. Of course, as we proceed we will update and uncover current conditions.

2. I have been instructed to place your seriously past due account locally f collection.

It is possible a local investigation will be made regarding your financial status. order to determine the most expedient means of obtaining payment in full. Y

* Excerpt numbers correspond to the numbers of the exhibits from which they are extracted.

employer, both past and present, references, neighbors, local merchants and credit bureau may all be asked to report.

3. Your name was given to us as a personal reference or relative when we opened a Credit Account for [consumer's name].

The terms under which payments were to be made have not been kept. Despite numerous requests for settlement in a friendly manner, a serious past due condition still exists.

It is our desire to avoid the necessity of legal action in the local courts. That is why we are writing to you.

Perhaps a word from you will emphasize the gravity of this situation and result in payment . . .

4. The above named person has an account with us which is seriously past due . . .

Would you be interested in contacting this party regarding a loan for $ _____ , the total amount owed us?

If you find that you cannot grant this loan, but you can complete the following questionnaire, please do so and return it to us. We will gladly reimburse you for any investigative expense.

Verified address _____ Phone _____
Place of employment _____ Phone _____
Wife's place of employment _____
Phone _____
Neighbor or relative where customer might be contacted by phone _____

5. memo to:

n. g. hodges [Alden's Collection Dept. Employee]
[from: j. l. davis, Alden's Collection Dept. Supervisor]

Re: [Consumer's Name]

In reply to your memo stating that the above named person has ignored our efforts towards a friendly settlement, I recommend one of the following methods for enforcing payment.

Contact the debtor's employer to ask his assistance in obtaining payment in full . . .

copy of this letter is being sent to the debtor to inform him of our intentions. If a full yment is not received within the next seven days, proceed with whatever action you sider the most appropriate and expedient.

The delivery of this letter at your place of employment indicates that you are fully employed, and can pay your just obligations.

aps you don't realize the seriousness of your position . . .

We don't want to cause you unnecessary embarrassment. Nevertheless, action will be taken to collect the entire balance of $ _____through your employer unless you send a payment of $ _____ today.

7. Before authorizing an agent in your locality to act on our behalf, I intend to ask your employer for assistance in arranging payment of this long overdue account. I shall contact him in approximately 10 days.

An immediate payment of $ _____ will eliminate the necd for involving your employer in this matter, as well as the possibility of legal proceedings.

I advise you to act promptly, before it is too late.

8. May we ask your assistance in obtaining payment from your employee whose name appears above?

This person has not completed payments on merchandise purchased from us . . .

If you would be kind enough to speak to your employee about this obligation, I feel sure it would make him realize the seriousness of the situation and help bring about an amicable settlement.

If our customer no longer works for you, can you give us the name and address of his present employer?

9. I sincerely hope you didn't think we were trying to unload our problems on your shoulders when we asked you to speak to the above named person about his past due indebtedness to Aldens.

From our long experience in the credit field, we know that a few words from the employer usually result in the resumption of payments. Without your assistance, our only recourse will be to place the account with a local attorney. Since we don't want to take such drastic action if it can possibly be avoided, anything you can do to influence a friendly settlement will be greatly appreciated.

If this person no longer works for you, can you give us the name and address of his new employer?

10. From our previous communications with the Military Department, it is evident that they, too, desire to be cooperative and be of assistance to military personnel having financial difficulties . . .

Your reply and payment must be sent within the next seven (7) days. Otherwise, we will appeal to your Commanding Officer for assistance. Have you considered the consequences of such action? Notice of our intention is given so that you may avoid any unpleasantness or reflection on your record.

11. SEND $ _____ AT ONCE, UNLESS YOU RESPOND WE WILL CONTACT YOUR COMMANDING OFFICER. YOU OF COURSE REALIZE HE MAY ENFORCE THE PROVISIONS OF ARTICLE 133 OR 134 OF THE UNIFORM CODE OF MILITARY JUSTICE.

12. We are having a serious collection problem with the customer named above who we believe is under your command. When he opened his account in _____ , 19____ , he agreed to pay $ _____ per month. At present his account balance is $ _____ of which $ _____ is past due . . .

A substantial amount of the items purchased may have been for the support of the serviceman's dependents.

We would greatly appreciate your discussing this matter with our customer, as we are confident that such a discussion would result in the resumption of regular payments.

Any information you can give us regarding this man's problem and his plan for payments will be helpful.

13. We are wondering . . . if you received our previous letter concerning the above named person who we believe is serving under your command.

Apparently he is experiencing financial difficulties since his Open End Credit Account has become considerably past due . . . as is evident by the data shown above.

Would you kindly arrange to have this matter called to his attention . . .

14. We regret very much . . . that it was necessary to contact your Commanding Officer about your past due account.

Since the Military Department encourages a serviceman to discharge his obligations satisfactorily, this matter will undoubtedly be brought to your attention by your superior officer . . .

As soon as this [payment] is received, at your request, we will notify your Commanding Officer of your agreement to settle this account.

If you fail to cooperate, we will have no choice but to further proceed through proper military channels.

PAR. 5. In the ordinary course and conduct of its business as aforesaid, respondent has transmitted and in some instances continues to transmit to consumers and third parties in a number of States thousands of copies of Exhibits 1–14 per month via the United States Postal Service. By and through the use of Exhibits 1, 2, 5, 6, 7, 10, 11, & 14, respondent threatened and in some instances continues to threaten consumers that it will contact third parties (including, but not limited to: friends, relatives, neighbors, commanding officers, employers and supervisors) in connection with its attempt to collect allegedly delinquent consumer debts. By and through the use of Exhibits 3, 4, 8, 9, 12, & 13, Aldens contacted and in some instances continues to contact such third parties. If no reply is received from the initial third party contact, a second contact may be attempted. (Respondent frequently made and continues to make third party contacts by means of the telephone, as well.) In the course of such practices, respondent frequently divulged and in some instances continues to divulge to third parties the fact, substance, and details of consumer's alleged indebtedness.

By and through the use of these acts and practices, respondent has the past, and is in some instances presently, acting in an

oppressive or coercive manner, thereby unfairly threatening the jobs, reputations, emotional and mental security, and individual privacy of several thousands of consumers each month.

PAR. 6. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and have constituted, and now constitute, unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

Chairman Miller did not participate.

[redacted] 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60644

May 9, 1970

Mr. Stanley, of our Credit Department was asked us to handle your seriously delinquent account as a "Collection" matter.

Prior to accepting this for final settlement I am asking our Credit people to determine why you have failed to discharge your obligation.

A review of your history indicates:

YOU RECEIVE INCOME FROM

BANK AFFILIATIONS WITH

YOU HAVE CREDIT WITH

Additionally, may be in a position to help you. Of course, as we proceed we will update and uncover current conditions.

In any event we will begin our pursuit unless payment and satisfactory arrangements are made. If you have sincere intentions of completing your agreement, let me advise to us, absorbing the added expense of full collection of your defaulted agreement.

M. C. Hodges

M. C. HODGES
Collection Department

MCH:ser

EXHIBIT 1

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

ALDENS 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60650

May 16, 1978

Dear

I have been instructed to place your seriously past due account locally for collection.

It is possible a local investigation will be made regarding your financial status, in order to determine the most expedient means of obtaining payment in full. Your employer, both past and present, references, neighbors, local merchants and credit bureau may all be asked to report.

An investigation of this type followed by legal action in your local courts could seriously endanger your credit standing. You don't want this to happen . . and neither do we.

To prevent the drastic action outlined above, send the past due amount of $7.91 immediately.

M. G. Hodges

M. G. HODGES
Collection Department

MGH:fns

ALDENS 5020 WEST ROOSEVELT-ROAD / CHICAGO, ILLINOIS 60644

July 18, 1972

RE:

Your name was given to us as a personal reference or relative when we opened a Credit Account for

The terms under which payments were to be made have not been kept. Despite numerous requests for settlement in a friendly manner, a serious past due condition still exists.

It is our desire to avoid the necessity of legal action in the local courts. That is why we are writing to you.

Perhaps a word from you will emphasize the gravity of this situation and result in payment. Anything you can do certainly will be in this party's best interests. Your cooperation towards an amicable settlement will be appreciated.

Sincerely,

ALDENS, INC.

M. G. Hodges

M. G. HODGES
Collection Department

MGH:tpc

EXHIBIT 3

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

[illegible] 2600 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60612

January 20, 1977

Household Finance Co

RE:

The above named person has an account with us which is seriously past due. Because of the expense of collecting small installments by mail, we are seeking payment in full.

Would you be interested in contacting this party regarding a loan for $158.28, the total amount owed us?

If you find that you cannot grant this loan, but you can complete the following questionnaire, please do so and return it to us. We will gladly reimburse you for any investigation expense.

Verified address _____ Phone _____

Place of employment _____ Phone _____

Wife's place of employment _____

Phone _____

Neighbor or relative where customer might be contacted by phone. _____

M. G. Hodges

LOAN
ENCLOSE

M. G. HODGES
Collection Department

EXHIBIT 4

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

June 23, 1976

MEMO TO:

W. G. HODGES

RE:

In reply to your memo stating that the above named person has ignored our efforts towards a friendly settlement, I recommend one of the following methods for enforcing payment.

1. Contact the debtor's employer to ask his assistance in obtaining payment in full.

2. Have a local investigation made to determine the extent of the debtor's assets preparatory to seeking a judgment.

3. Retain a local attorney to file suit.

A copy of this letter is being sent to the debtor to inform him of our intentions. If a full payment is not received within the next seven days, proceed with whatever action you consider the most appropriate and expedient.

J. L. Davis

JLD:jl
CC:customer

J. L. DAVIS
Collection Department

EXHIBIT 5

ALDENS 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60650

184

The delivery of this letter at your place of employment indicates that you are gainfully employed, and can pay your just obligations.

Perhaps you don't realize the seriousness of your position. Your signed agreement with Aldens is legally binding. Despite this agreement, you have used our merchandise without completing your payments.

We don't want to cause you unnecessary embarrassment. Nevertheless, action will be taken to collect the entire balance of $327.14 through your employer unless you send a payment of $80.00 TODAY.

Sincerely,

ALDENS, INC

M. G. Hodges

M. G. HODGES
Collection Department

MGH:chn

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT 6

ALDENS 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60507

It is becoming more apparent that it will be necessary to enforce payment of the money you owe Aldens through the means available to us in Illinois.

Before authorizing an agent in your locality to act on our behalf, I intend to ask your employer for assistance in arranging payment of this long overdue account. I shall contact him in approximately 10 days.

An immediate payment of $ will eliminate the need for involving your employer in this matter, as well as the possibility of legal proceedings.

I advise you to act promptly, before it is too late.

Sincerely,

ALDENS, INC.

J. L. DAVIS
Collection Department

JLD:dl

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

May we ask your assistance in obtaining payment from your employee whose name appears above?

This person has not completed payments on merchandise purchased from us, even though we have offered the most lenient terms possible. We realize many people are hard pressed at times, and hesitate to discuss their problems. However, if we knew what was wrong, we would gladly cooperate.

If you would be kind enough to speak to your employee about this obligation, I feel sure it would make him realize the seriousness of the situation and help bring about an amicable settlement.

If our customer no longer works for you, can you give us the name and address of his present employer? We will be very grateful for any assistance you are able to give us.

Sincerely,

ALDENS, INC.

N. G. Hodges

NGH:mepa
ENC:bte

N. G. HODGES
Collection Department

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT 8

ALDENS 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60644

I sincerely hope you didn't think we were trying to unload our problems on your shoulders when we asked you to speak to the above named person about his past due indebtedness to Aldens.

From our long experience in the credit field, we know that a few words from the employer usually result in the resumption of payments. Without your assistance, our only recourse will be to place the account with a local attorney. Since we don't want to take such drastic action if it can possibly be avoided, anything you can do to influence a friendly settlement will be greatly appreciated.

If this person no longer works for you, can you give us the name and address of his new employer? Thank you very much for your cooperation.

Sincerely,

ALDENS, INC.

N. G. Hodges

NGH:espb
ENC:bre

N. G. HODGES
Collection Department

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT 9

[illegible] 500 West Madison Street / Chicago Illinois 6[illegible]

July 18, 1972

Dear Sgt. :

Let's be frank with each other. We've written you many times, but for some reason, unknown to us, no answer or payment has been received.

We are not hard to get along with, and we are inclined to be helpful . . and not unreasonable. However, since you have remained silent to our request for payment, this causes us not only to misjudge you, but it is also defeating our sincere efforts to help you.

From our previous communications with the Military Department; it is evident that they, too, desire to be cooperative and be of assistance to military personnel having financial difficulties.

We are willing to help every way we can . . within reason. But, we must have a definite understanding as to exactly what you are going to do, and not continue this present uncertainty.

Your reply and payment must be sent within the next seven (7) days. Otherwise, we will appeal to your Commanding Officer for assistance. Have you considered the consequences of such action? Notice of our intention is given so that you may avoid any unpleasantness or reflection on your record.

We await your payment and response.

W. G. Hodges

W. G. HODGES
Collection Department

WGH:bco

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT 10

ALDENS, INC.

COLLECTION DEPARTMENT MESSAGE

CODE AG-7 URGENT MESSAGE TO DELINQUENT DEBTOR DATE 7/18/72

SEND $80.00 AT ONCE. UNLESS YOU RESPOND WE WILL CONTACT YOUR COMMANDING OFFICER. YOU OF COURSE REALIZE WE MAY ENFORCE THE PROVISIONS OF ARTICLE 133 OR 134 OF THE UNIFORM CODE OF MILITARY JUSTICE.

SENDER'S NAME J. L. DAVIS AREA CODE 312

CLASS NUMBER 184 PHONE NO. 554-3305 CHICAGO

EXHIBIT 11

ALDENS

5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60607

January 20, 1977

COMMANDING OFFICER

RE:

We are having a serious collection problem with the customer named above who we believe is under your command. When he opened his account in July, 1976, he agreed to pay $15.00 per month. At present, his account balance is $335.53, of which $90.00 is past due.

Our agreement covering this obligation requires the debtor to make regular monthly payments. A substantial amount of the items purchased may have been for the support of the serviceman's dependents.

We would greatly appreciate your discussing this matter with our customer, as we are confident that such a discussion would result in the resumption of regular payments.

We realize that anyone can experience financial difficulties, but if this man will cooperate with us, he may be sure we will be reasonable in dealing with him.

Any information you can give us regarding this man's problem and his plan for payments will be helpful. In your reply please refer to case [illegible]. The required Certificate of Compliance is enclosed.

N. G. Hodges

N. G. HODGES
Collection Department

NGH:mco
Encl.:cert.,bre

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT 12

ALOETTS 5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60607

January 20, 1977

COMMANDING OFFICER

Balance $244.66
Monthly
Payment $10.00
Past Due $48.00

RE:

We are wondering . . . if you received our previous letter concerning the above named person who we believe is serving under your command.

Apparently he is experiencing financial difficulties since his Open End Credit Account has become considerably past due . . as is evident by the data shown above.

We will be most happy to cooperate in working out some arrangement whereby he can discharge his obligation. All he has to do is to write and tell us how we can help him. Perhaps a payment and plan for repaying would be a good way to start this man on the way to re-establish his credit.

Would you kindly arrange to have this matter called to his attention giving him our assurance that we wish to cooperate in every way. Or . . if you should have any suggestions, we would be very glad to cooperate in any manner you might suggest.

Thank you for your kind attention to this letter.

When replying please refer to our file ARSHIELAPONY1.

N. G. Hodges

NGH:acf
ENC: bro

N. G. HODGES
Collection Department

EXHIBIT

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

5000 WEST ROOSEVELT ROAD / CHICAGO, ILLINOIS 60607

July 18, 1972

We regret very much . . that it was necessary to contact your Commanding Officer about your past due account.

Since the Military Department encourages a serviceman to discharge his obligations satisfactorily, this matter will undoubtedly be brought to your attention by your superior officer.

It was . . . and is . . . our intention to help you in whatever way we can. Send $80.00 within five (5) days along with your assurance to continue payments on any reasonable terms you choose. As soon as this is received, at your request, we will notify your Commanding Officer of your agreement to settle this account.

If you fail to cooperate, we will have no choice but to further proceed through proper military channels. We sincerely hope that we may hear favorably from you in reply to this letter.

W. G. Hodges

W. G. HODGES
Collection Department

WGH:afco

MEMBER OF THE INTERNATIONAL CONSUMER CREDIT ASSOCIATION

EXHIBIT 14

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, their 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 Aldens, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 5000 West Roosevelt Road, 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

DEFINITION: For the purposes of this Order, the term *consumer* shall mean any natural person obligated or allegedly obligated to pay any debt.

I

It is ordered, That respondent, Aldens, Inc., a corporation, its

successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection or attempted collection of any consumer debt, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

(1) Communicating with any consumer without the prior consent of the consumer given directly to respondent at the time of the attempt to collect any debt, or the express permission of a court of competent jurisdiction if:

(a) Such communication is at any unusual time or place, or a time or place known (or which should be known) by respondent to be inconvenient to the consumer, including the consumer's place of employment, if respondent knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication; or

(b) Respondent knows the consumer is represented by an attorney acting on behalf of and in the name of the consumer with respect to such debt, and has knowledge of or can readily ascertain such attorney's name and address; *provided, however,* that respondent is permitted to communicate directly with the consumer if the attorney fails to respond, within a reasonable period of time, to a communication from respondent, or the attorney consents to direct communication with the consumer.

(2) Communicating with any consumer if the consumer has notified respondent in writing that he or she refuses to pay the debt, or wishes respondent to cease further communication, except:

(a) as reasonably necessary to inform the consumer that respondent may invoke specified remedies which are ordinarily invoked by respondent; or

(b) to advise the consumer that respondent will cease further communication.

(3) Failing to comply with the terms of the following statement which shall appear as a contract provision in all of respondent's charge account agreements for a period of five (5) years, beginning no later than six (6) months after this Order becomes final:

In the course of collecting or attempting to collect any debt arising from this charge agreement, Aldens will not discuss or threaten to discuss my debt with any person other than me or my attorney, without my written consent (given at the time of the attempt to collect) unless permitted by a court. However, Aldens may contact other

persons without mentioning any debt, if that is necessary to locate me. This provision does not limit Aldens' right to contact its attorneys or debt collection and credit reporting agencies, when permitted by law.

(a) This provision shall be printed clearly and conspicuously in the same size type as are the other provisions of the agreement.
(b) The term "collecting or attempting to collect any debt," as used in the above statement, shall not include contacts by respondent:

(1) with a credit reporting agency for the purpose of reporting or obtaining information;
(2) with a debt collection agency engaged or being engaged to collect the debt in question;
(3) with any person with the written consent of the consumer, given at the time of the attempt to collect;
(4) with its own attorneys;
(5) with third persons for the purpose of acquiring location information as provided in paragraph 3(c) of this Order; or
(6) which are reasonably necessary to effectuate a post-judgment judicial remedy.

(c) When contacting third persons to determine the location of the consumer, respondent shall:

(1) request information only as to the consumer's home address, home phone number, and place of employment;
(2) identify itself and state the purpose of the contact (i.e., Aldens is trying to locate the consumer) without stating that the consumer owes any debt; and
(3) not communicate more than once with any such person, unless it is reasonably believed to be necessary.

(d) Upon the expiration of the five (5) year period provided for in Paragraph (3) of this Order, respondent shall continue to comply with the terms of the statement contained in that paragraph.

II

It is further ordered, That:

(4) In the event that the Federal Trade Commission promulgates a valid trade regulation rule applicable to respondent's third party contact activities, then compliance with that rule shall be deemed compliance with Paragraph (3) of this Order.
(5) Respondent shall deliver a copy of this Order to cease and

desist to all present and future personnel of its collection staff who are engaged in the preparation or use of materials and procedures to be used in connection with the training of personnel or the actual day-to-day operation of respondent's collection activities, and shall secure a signed statement acknowledging receipt of said Order from each such person.

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

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

Chairman Miller did not participate.

IN THE MATTER OF

COOGA MOOGA, INC., ET AL.

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

Docket C-2925. Order, Aug. 9, 1978—Modifying Order, Oct. 15, 1981

In response to the Commission's adoption of the material connection Endorsement Guide, this order reopens the proceeding and modifies the Commission's order issued on August 9, 1978 (43 FR 40804, 92 F.T.C. 310) by deleting the words "any financial interest in the sale of the product or service which is the subject of the endorsement or" from the definition of material connection contained in Paragraph I.D. This modification relieves the petitioners of the obligation of disclosing any financial interest they may have in the sale of an endorsed product.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

Charles E. "Pat" Boone and Cooga Mooga, Inc., (hereinafter "Petitioners") have filed, pursuant to Rule 2.51 of the Commission's Rules of Practice, a Petition to Reopen, Modify, Alter or Set Aside Parts of Consent Order (hereinafter "Petition"). The Petition seeks the modification or elimination of two provisions of the Commission's Order of August 9, 1978. The Order concerns petitioners' representations as advertisers and as endorsers, and requires them to contribute a pro rata share to a restitution program for purchasers of Acne-Statin, a product endorsed by petitioners.

The first issue raised by the Petition concerns the "material connection" disclosure provision of Paragraph I.D. of the Order. This provision requires petitioners, when they act as endorsers, to disclose "any financial interest in the sale of the product or service which is the subject of the endorsement or any familial connection between the endorser and the advertiser or its advertising agency." Petitioners argue that this provision unfairly discriminates against them because no other celebrity endorser is required to disclose such interest. Petitioners further contend that the Order provision conflicts with the Commission's "Guides Concerning Use of Endorsements and Testimonials in Advertising." 16 C.F.R. Part 255 (1980). In addition, they maintain that the material connection disclosure requirement is harmful to small business and infringes petitioners' First Amendment rights.

The Petition does not present any evidence of changed circumstances regarding the familial connection portion of the material

connection definition, nor is there any indication that the modification of this language would be in the public interest. The Commission therefore declines to set aside or alter the requirement that petitioners disclose familial connections with the advertiser or its advertising agency.

The financial interest portion of the material connection definition requires petitioners to disclose any interest in the sale of the endorsed product. This covers situations in which the compensation received by petitioners for the endorsement is related to the volume of sales of the product, i.e., a "share of the action." The Order does not require petitioners to disclose remuneration if it is in the form of a fixed sum in advance of the endorsement, or if it is based upon the extent of the dissemination of the advertisement.

On January 16, 1980, the Commission promulgated its Endorsement Guides. Guide 5, regarding the disclosure of material connections between advertisers and endorsers, provides:

> When there exists a connection between the endorser and the seller of the advertised product which might materially affect the weight or credibility of the endorsement (i.e., the connection is not reasonably expected by the audience) such connection must be fully disclosed. An example of a connection that is ordinarily expected by viewers and need not be disclosed is the payment or promise of payment to an endorser who is an expert or well known personality, as long as the advertiser does not represent that the endorsement was given without compensation. However, when the endorser is neither represented in the advertisement as an expert nor is known to a significant portion of the viewing public, then the advertiser should clearly and conspicuously disclose either the payment or promise of compensation prior to and in exchange for the endorsement or the fact that the endorser knew or had reasons to know or to believe that if the endorsement favors the advertised product some benefit such as an appearance on TV, would be extended to the endorser.

The Commission has determined that under this Guide, advertisers are not required to disclose that celebrity endorsers are compensated for endorsements, regardless of the method of compensation. This is because the Commission believes that the manner in which celebrities are compensated does not materially affect the weight or credibility of an endorsement. The Commission further finds that the adoption of the material connection Endorsement Guide constitutes a change in the law regarding the obligation of celebrity endorsers to disclose their financial interest in the sale of the advertised product. The Commission therefore concludes that petitioners have made a satisfactory showing, as required by Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45, that the section of the definition of material connection pertaining to petitioners' financial interest in the sale of the advertised product should be deleted from the Order.

Petitioners also seek relief from their obligation under the Order

to contribute a pro rata share to the restitution program for purchasers of Acne-Statin. This claim is based on the alleged disparity in the Commission's treatment of petitioners versus other endorsers subject to Commission Orders. The two other Orders cited by petitioners are those against Gordon Cooper and against Harvey Glass, M.D. (C–3004). The factual circumstances of these cases differed substantially, however, from those involved in the instant case; the cases involve disparities in *inter alia,* the volume of sales of the endorsed product and the remuneration received by the endorser. These differences amply justify the differential remedies selected in each case. The *Cooper* and *Glass* Orders do not, therefore, constitute a change in law. Nor do any changes in fact or the public interest warrant the alteration or elimination of petitioners' restitution obligations.

It is therefore ordered, That the proceeding is hereby reopened and the Decision and Order issued on August 9, 1978, in Docket No. C–2925 is hereby modified by deleting from the definition of material connection contained in Order Paragraph I.D. the words, "any financial interest in the sale of the product or service which is the subject of the endorsement or." Petitioners' request for the modification of Paragraph II of the Order is hereby denied.

It is further ordered, That the foregoing modification shall become effective upon service of this Order.

IN THE MATTER OF

GREAT NORTH AMERICAN INDUSTRIES, INC., ET AL.

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

Docket C-3077. Complaint, Oct. 29, 1981—Decision, Oct. 29, 1981

This consent order requires, among other things, two Gainesville, Texas corporations and a corporate officer to cease representing that substantial fuel economy can be achieved by the use of Teflon oil additives such as "Tephguard." Further, respondents are prohibited from making representations that the use of any automobile retrofit device, fuel or engine oil additive will increase fuel economy, unless substantiated by competent scientific evidence, and accompanied by the disclosure of any limitations on the performance or efficacy of such products. Additionally, the Order bars claims of government approval without written and dated authorization; prohibits misrepresentations concerning the conclusions of product tests or surveys; and requires that consumer endorsements of any product or service reflect typical consumer experiences.

Appearances

For the Commission: *Laurence M. Kahn* and *William Haynes.*

For the respondent: *Jack Paller, Katz, Paller & Land,* Atlanta, Ga., *Marshall Dooley,* Dallas, Tex., and *Donald Higgenbotham,* Austin, Tex.

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 North American Industries, Inc., a corporation, Products on the Move, Inc., a corporation, and Patrick O. McCrary, individually and as an officer of Great North American Industries, Inc., and Products on the Move, Inc., hereinafter sometimes referred to as "respondents," have violated the provisions of the 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. Respondents Great North American Industries, Inc., and Products on the Move, Inc., are corporations organized, existing, and doing business under and by virtue of the laws of the

State of Texas with their office and principal place of business located at 104 West Main St., Gainesville, Texas.

Respondent Patrick O. McCrary is President of the corporate respondents Great North American Industries, Inc., and Products on the Move, Inc. He formulates, directs, and controls the acts and practices of all said corporate respondents, including the acts and practices hereinafter set forth. His address is the same as that of said corporations.

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

PAR. 2. Respondents are now and for sometime last past have been engaged in the advertising, offering for sale, sale, and distribution of a product known as Tephguard (Tefguard), hereinafter sometimes referred to as "product," which product is advertised as a means of improving fuel economy in automobiles. Said product is an automobile engine oil additive. Respondents, in connection with the marketing of said product, have disseminated, published and distributed and now disseminate, publish and distribute advertisements and promotional materials for the purpose of promoting the sale of said product.

PAR. 3. In the course and conduct of their said business, the respondents have disseminated and caused the dissemination of certain advertisements for said product through the United States mails and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, the insertion of advertisements in magazines and newspapers with national circulations; and have disseminated and caused the dissemination of advertisements for said product by various means, including, but not limited to, the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product in commerce.

PAR. 4. Among the advertisements and other sales promotional materials disseminated by respondents are the materials identified as Exhibits A and B which are attached hereto.

PAR. 5. Through the use of the advertisements referred to in Paragraph Four, and other advertisements and sales promotional materials, respondents represented and now represent, directly or by implication, that

a. Tephguard when used in a typical automobile engine will substantially improve fuel economy;

b. under normal conditions, a typical driver can ordinarily obtain

a fuel economy improvement which will approximate or equal twenty-six percent when Tephguard is used in his/her automobile;

c. competent scientific tests have proven the fuel economy claims made for Tephguard;

d. results of consumer usage, as evidenced by consumer endorsements, prove that Tephguard substantially improves fuel economy;

e. the Environmental Protection Agency (E.P.A.) has approved the use of Tephguard in automobiles to improve fuel economy;

f. the consumer endorsements which appear in advertisements and sales promotional materials for Tephguard reflect the typical or ordinary experience of members of the public who have used Tephguard.

PAR. 6. In truth and in fact, contrary to respondent's representations set forth in Paragraph Five:

a. Tephguard when used in a typical automobile will not substantially improve fuel economy;

b. under normal driving conditions, a typical driver cannot ordinarily obtain a fuel economy improvement which will approximate or equal twenty-six percent when Tephguard is used in his/her automobile;

c. no competent scientific tests have proven the fuel economy claims for Tephguard;

d. results of consumer usage, as evidenced by consumer endorsements, do not prove that Tephguard substantially improves fuel economy;

e. the Environmental Protection Agency (E.P.A.) has not approved the use of Tephguard in automobiles to improve fuel economy;

f. the consumer endorsements which appear in advertisements and sales promotional materials for Tephguard do not reflect the typical or ordinary experience of members of the public who have used Tephguard.

Therefore, said advertisements and sales promotional materials are deceptive or unfair.

PAR. 7. At the time respondents made the representations alleged in Paragraph Five of the complaint, they did not possess and rely upon a reasonable basis for such representations. Therefore, said advertisements and sales promotional materials are deceptive or unfair.

PAR. 8. The advertisements referred to in Paragraph Four and other advertisements and sales promotional materials represent,

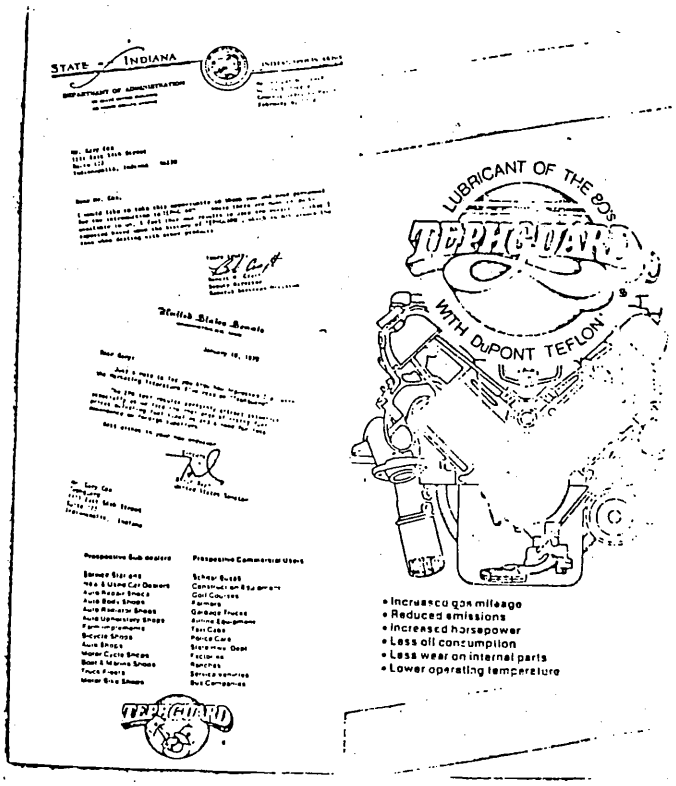
directly or by implication, that respondents had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph Five. In truth and in fact, respondents had no reasonable basis for such representations. Therefore, said advertisements and sales promotional materials are deceptive or unfair.

PAR. 9. In the course and conduct of their 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 engaged in the sale of engine oil additives, gasoline additives, and automobile retrofit devices.

PAR. 10. The use by respondents of the aforesaid unfair or deceptive statements, representations, acts and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

PAR. 11. The acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public, and of respondents' competitors, and constituted and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

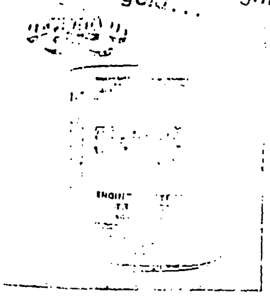
Chairman Miller did not participate.


STATE OF INDIANA
LUBRICANT OF THE 80's
WITH DUPONT TEFLON
• Increased gas mileage
• Reduced emissions
• Increased horsepower
• Less oil consumption
• Less wear on internal parts
• Lower operating temperature

Development

Tephguard was originally developed as a dry lubricant for fire arms. It was during this development period that the principles for fire arm treatment was refined for application inside an internal combustion engine. Liquid carriers distribute the micro-thin particles of polymers throughout the inside of the engine. The liquid carriers act not unlike a good detergent oil in that they clean and purge all metal surfaces of carbon, sludge and foreign build up. As these are purged, the polymers adhere to the exposed crevices . . . polymers attract more polymers and in a matter of some thirty minutes all metal surfaces are permeated and coated with a micro thin layer of polymers and the liquid carriers have evaporated or dissipated away. The advantages of a polymer coating are many and varied. It allows oil to flow faster and freer. It reduces heat, water and friction. By coating two surfaces with built in clearances you have polymer against polymers . . . and just as Teflon, the only way to get it off is by hard and deliberate scraping or gouging by a foreign object . . . which very rarely occurs inside an engine.

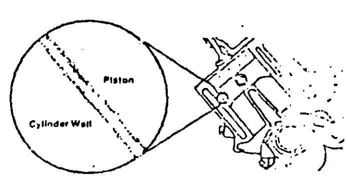
Worth its weight In gold . . .



■ What Tephguard Is NOT . . .

- Tephguard Is NOT and oil additive
- Tephguard Is NOT and oil treatment
- Tephguard Is NOT a "Molly"
- Tephgurad Is NOT a synthetic oil

Can add years of life to an [illegible] combustion engine plus s[illegible] through increased fuel ec[illegible]



A close look at a typical metal surface reveals [illegible] TEPHGUARD penetrates, fills and [illegible] areas [illegible] cylinder walls, piston rings and bearings [illegible] a surface virtually free of metal to metal contact.

Since the [illegible] have been promoting and selling [illegible], gadgets and additives purported to increase gas mileage. The [illegible] is even worse now with our energy crisis.

None of these gimmicks or additives have [illegible] rigid scientific laboratory testing. Some [illegible] actually worked but the disadvantages they created in doing so exceeded the [illegible] increase. Others [illegible]

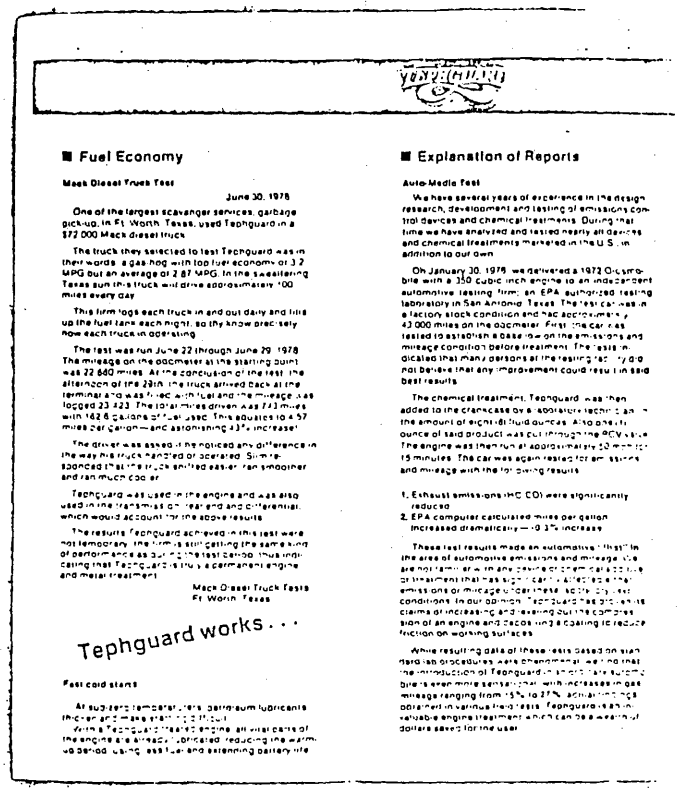
Tephguard really works . . . and has the tests to prove it.

Tested by EPA (Environmental Protection Agency), Automotive Research Associates and Auto [illegible]

Tephguard is fully guaranteed to perform as [illegible] if applied correctly.

☐ Gas mileage increase
9.93%/26.6%

Actual in field tests show mileage increases as [illegible] as 26.6% [illegible] tests and should continue to prove these benefits and the only governing factor would be the degree of the engine [illegible]. Another interesting benefit is the reduction of emissions as reported by a New York firm and further confirmed by Automotive Research in San Antonio. Carbon Monoxide decreased from 23% to 15.16% [illegible] coupled with increased [illegible] R.P.M.'s and the dramatic decrease [illegible] Power loss comparison further proves the [illegible] Tephguard to greatly improve the efficiency [illegible] engine.



■ Fuel Economy

Mack Diesel Truck Test

June 30, 1978

One of the largest scavenger services, garbage pick-up, in Ft. Worth, Texas, used Tephguard in a $72,000 Mack diesel truck.

The truck they selected to test Tephguard was in their words "a gas hog" with too fuel economy of 3.2 MPG but an average of 2.87 MPG. In the sweltering Texas sun this truck will drive approximately 100 miles every day.

This firm logs each truck in and out daily and fills up the fuel tank each night, so they know precisely how each truck is operating.

The test was run June 22 through June 29, 1978. The mileage on the odometer at the starting point was 22,640 miles. At the conclusion of the test, the afternoon of the 28th, the truck arrived back at the terminal and was fueled with fuel and the mileage was logged 23,423. The total miles driven was 783 miles with 162.6 gallons of fuel used. This equates to 4.57 miles per gallon—and astonishing 43% increase!

The driver was asked if he noticed any difference in the way his truck handled or operated. Simply pronounced that the truck shifted easier, ran smoother and ran much cooler.

Tephguard was used in the engine and was also used in the transmission, rear end and differential, which would account for the above results.

The results Tephguard achieved in this test were not temporary, the firm is still getting the same kind of performance as during the test period, thus indicating that Tephguard is truly a permanent engine and metal treatment.

Mack Diesel Truck Tests
Ft. Worth, Texas

Tephguard works . . .

Fast cold starts

At subzero temperatures, petroleum lubricants thicken and make starting difficult.

With a Tephguard treated engine, all vital parts of the engine are already lubricated, reducing the warm-up period, using less fuel and extending battery life.

■ Explanation of Reports

Auto-Media Test

We have several years of experience in the design, research, development and testing of emissions control devices and chemical treatments. During that time we have analyzed and tested nearly all devices and chemical treatments marketed in the U.S., in addition to our own.

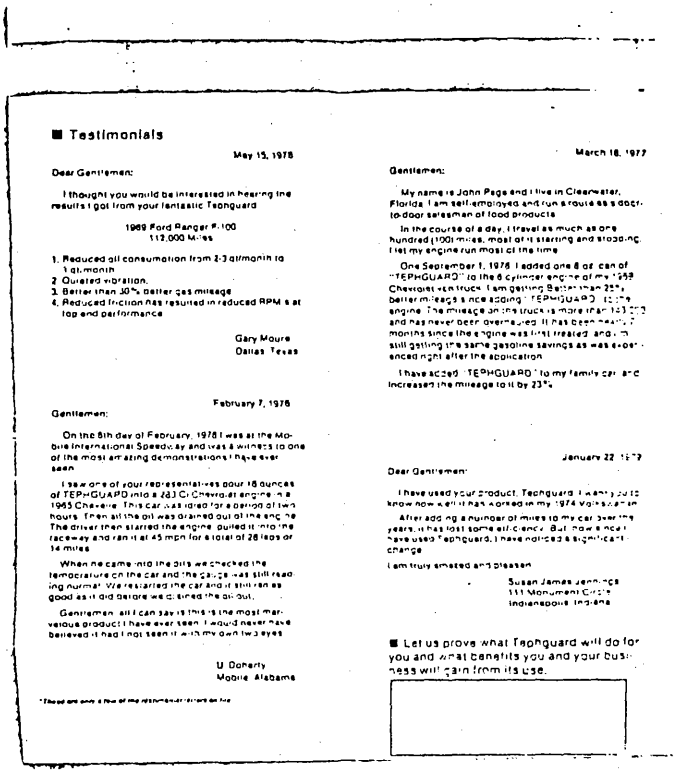
On January 30, 1978, we delivered a 1972 Oldsmobile with a 350 cubic inch engine to an independent automotive testing firm, an EPA authorized testing laboratory in San Antonio, Texas. The test car was in a factory stock condition and had accumulated 43,000 miles on the odometer. First, the car was tested to establish a baseline on the emissions and mileage condition before treatment. The tests indicated that many persons at the testing facility did not believe that any improvement could result in said best results.

The chemical treatment, Tephguard, was then added to the crankcase by a laboratory technician in the amount of eight fluid ounces. Also one fluid ounce of said product was put through the PCV valve. The engine was then run at approximately 50 mph for 15 minutes. The car was again tested for emissions and mileage with the following results:

1. Exhaust emissions (HC, CO) were significantly reduced.
2. EPA computer calculated miles per gallon increased dramatically—9.3% increase.

These test results made an automotive first! In the area of automotive emissions and mileage, we are not familiar with any device, chemical additive or treatment that has such dramatic effect on the emissions or mileage under these strict, exact conditions. In our opinion, Tephguard substantiates claims of increasing and lasting cushion of compression of an engine and decoupling & coating to reduce friction on working surfaces.

While resulting data of these tests based on standard procedures were phenomenal, we feel that the introduction of Tephguard into your daily driving duties even more sensational, with increases in gas mileage ranging from 15% to 27% achievements obtained in various field tests. Tephguard is a truly valuable engine treatment which can be a wealth of dollars saved for the user.



■ Testimonials

May 15, 1978

Dear Gentlemen:

I thought you would be interested in hearing the results I got from your fantastic Teahguard

1969 Ford Ranger F-100
112,000 Miles

1. Reduced oil consumption from 2-3 qt/month to 1 qt/month
2. Quieted vibration.
3. Better than 30% better gas mileage
4. Reduced friction has resulted in reduced RPM's at top end performance

Gary Moure
Dallas Texas

February 7, 1978

Gentlemen:

On the 5th day of February, 1978 I was at the Mobile International Speedway and was a witness to one of the most amazing demonstrations I have ever seen.

I saw one of your representatives pour 16 ounces of TEPHGUARD into a 283 Ci Chevrolet engine in a 1965 Chevelle. This car was idled for a period of two hours. Then all the oil was drained out of the engine. The driver then started the engine, pulled it into the raceway and ran it at 45 mph for a total of 28 laps or 14 miles.

When he came into the pits we checked the temperature on the car and the gauge was still reading normal. We restarted the car and it still ran as good as it did before we drained the oil out.

Gentlemen, all I can say is this is the most marvelous product I have ever seen. I would never have believed it had I not seen it with my own two eyes.

U. Doherty
Mobile, Alabama

*The last one and a few of the testimonials on file.

March 18, 1977

Gentlemen:

My name is John Page and I live in Clearwater, Florida. I am self-employed and run a route as a door-to-door salesman of food products.

In the course of a day, I travel as much as one hundred (100) miles, most of it starting and stopping. I let my engine run most of the time.

One September 1, 1976 I added one 8 oz. can of "TEPHGUARD" to the 6 cylinder engine of my 1959 Chevrolet van truck. I am getting Better than 25% better mileage since adding "TEPHGUARD" to the engine. The mileage on the truck is more than 123,000 and has never been overhauled. It has been nearly 7 months since the engine was first treated, and I'm still getting the same gasoline savings as was experienced right after the application.

I have added "TEPHGUARD" to my family car and increased the mileage to it by 23%.

January 22, 1979

Dear Gentlemen:

I have used your product, Teahguard. I want you to know how well it has worked in my 1974 Volkswagen.

After adding a number of miles to my car over the years, it has lost some efficiency. But, now since I have used Teahguard, I have noticed a significant change.

I am truly amazed and pleased.

Susan James Jennings
111 Monument Circle
Indianapolis, Indiana

■ Let us prove what Teahguard will do for you and what benefits you and your business will gain from its use.

EPA TESTED
ENGINE PROTECTIVE TREATMENT

TEPIGUARD® is an incredible, scientifically developed engine protection treatment, providing a tough, almost friction-free, barrier of clear DuPont Teflon®

- Up to 26 % per mile better mileage
- Reduced emissions
- Increased horsepower
- Less oil consumption
- Less wear on internal parts
- Lower operating temperature

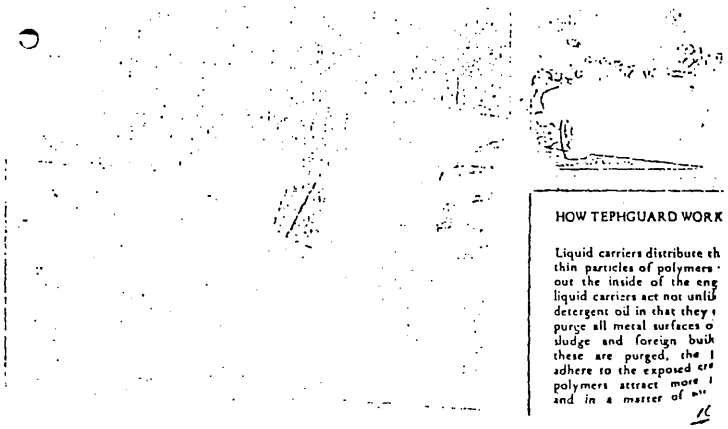
HERE IS WHAT OTHERS HAVE SAID:

— Diesel Engineer

"Just a note to let you know Tephguard® really works. As you know, I keep weekly mileage and gasoline records and thought that I would pass the following on to you. The three weeks prior to putting Tephguard in my car, I drove 1,994 miles, used 176.6 gallons of gas for an average of 11.291 m. p. g. The three weeks following application, I drove 1,603 miles, used 104.2 gallons for an average of 15.383 m. p. g. That is an almost unbelievable increase of 26.6%! You've got a true believer!"

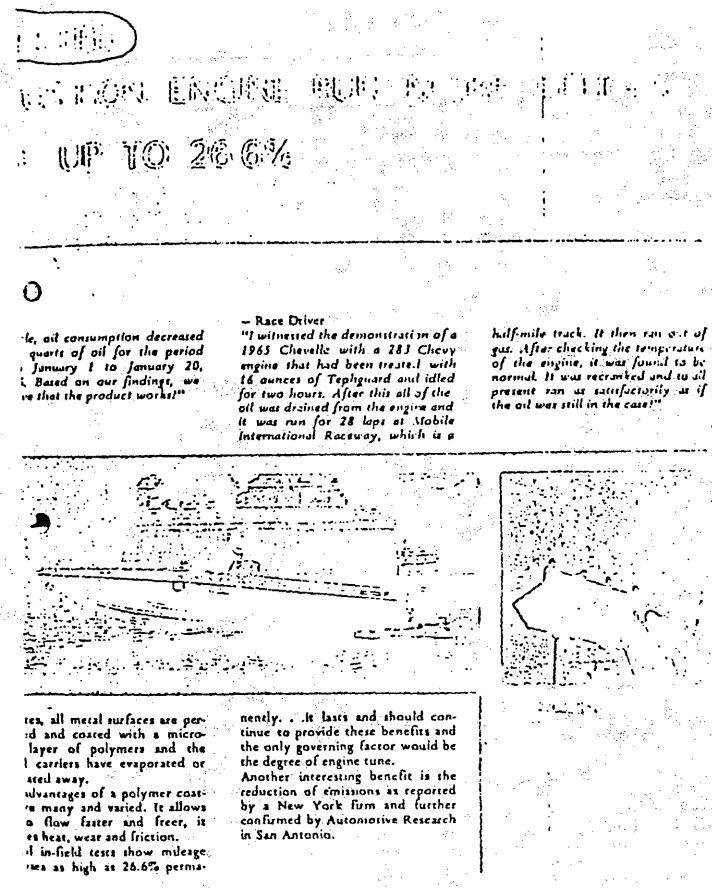
— Police Chief

"On January 1, 1976, approximately eight ounces of Tephguard added to a vehicle in our fleet was experiencing high oil consumption. On a monthly average, the was consuming approximatel quarts of oil. After adding Tephguard to



HOW TEPHGUARD WORK

Liquid carriers distribute th thin particles of polymers out the inside of the eng liquid carriers act not unlik detergent oil in that they purge all metal surfaces o sludge and foreign built these are purged, the adhere to the exposed me polymers attract more and in a matter of



UP TO 26.6%

le, oil consumption decreased quarts of oil for the period January 1 to January 20, . Based on our findings, we e that the product works!"

— Race Driver

"I witnessed the demonstration of a 1965 Chevelle with a 283 Chevy engine that had been treated with 16 ounces of Teflguard and idled for two hours. After this all of the oil was drained from the engine and it was run for 28 laps at Mobile International Raceway, which is a half-mile track. It then ran out of gas. After checking the temperature of the engine, it was found to be normal. It was recranked and to all present ran as satisfactorily as if the oil was still in the case!"

tes, all metal surfaces are per- d and coated with a micro- layer of polymers and the carriers have evaporated or ated away.

dvantages of a polymer coat- e many and varied. It allows o flow faster and freer, it es heat, wear and friction. l in-field tests show mileage ased as high as 26.6% permanently. . .It lasts and should continue to provide these benefits and the only governing factor would be the degree of engine tune.

Another interesting benefit is the reduction of emissions as reported by a New York firm and further confirmed by Automotive Research in San Antonio.

EPA TESTED Table 4. 55 mph Steady State

55 mph	Number of Tests	HC gm/mi	CO gm/mi	NO gm²/mi	CO_2 gm²/mi	Fuel Economy mpg
Baseline	4	1.03	33.38	4.41	478.4	16.88
		±.13	±4.34	±.99	±13.3	±.52
8 oz. Additive	3	1.03	33.33	4.99	466.3	17.58
		±.15	±8.34	±.39	±16.7	±.93
16 oz. Additive	3	1.19	36.44	4.36	433.1	18.17
		±.33	±12.11	±.87	±47.9	±2.35

WORLD'S LARGEST INDEPENDENT AUTOMOTIVE LAB
HIGHWAY FUEL ECONOMY TEST
ANALYTICAL DATA

	BEFORE	AFTER
Hydrocarbons (Exhaust)	450.0 ppm	400.0 ppm
Hydrocarbons (Background)	21.0 ppm	15.0 ppm
Carbon Monoxide (Exhaust)	1339.3 ppm	1430.7 ppm
Carbon Monoxide (Background)	3.0 ppm	3.0 ppm
Carbon Dioxide (Exhaust)	2.5180%	2.3080%
Carbon Dioxide (Background)	.0370%	.0370%

TEST RESULTS (GRAMS/MILE)

	BEFORE	AFTER
HC:	2.734	2.428
CO:	18.190	16.966
CO_2:	493.817	448.903
Calculated Fuel Economy:	16.71 mpg	18.37 mpg (increase of 9.93%)

A Cummings Diesel Engine was set up on a dynamometer showing 44 lbs. at 1800 rpm. The following results speak for themselves.

	H POWER	RPM
Before Application of Tepluguard	160	1800
15 Minutes after Application	172	2100
30 Minutes after Application	184	2400

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 Bureau 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 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 such 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 this 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 the 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. Respondents Great North American Industries, Inc., and Products on the Move, Inc., are corporations organized, existing, and doing business under and by virtue of the laws of the State of Texas, with their principal office and place of business at 104 West Main St., Gainesville, Texas. Respondent Patrick O. McCrary is an officer of said corporations. He formulates, directs and controls the policies, acts and practices of said corporations 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

Part I

It is ordered, That respondents Great North American Industries,

Inc., a corporation, and Products on the Move, Inc., a corporation, their successors and assigns, and their officers, and Patrick O. McCrary, individually and as an officer of Great North American Industries, Inc., and Products on the Move, Inc., and respondents' 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 the engine oil additive known as Tephguard (Tefguard) or of any other engine oil additive containing polytetrafluoroethylene (PTFE) fluoropolymers in resin or micropowder form, including, but not limited to, "Teflon," "Fluon," and "Halon" resins, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such additive will or may result in substantial fuel economy improvement when used in an automobile, truck, recreational vehicle, or other motor vehicle.

Part II

It is further ordered, That respondents Great North American Industries, Inc., a corporation, and Products on the Move, Inc., a corporation, their successors and assigns, and their officers, and Patrick O. McCrary, individually and as an officer of Great North American Industries, Inc., and Products on the Move, Inc., and respondents' 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 engine oil additive, any fuel additive, or any automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such additive or device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle unless:

(1) such representation is true; and

(2) at the time of making such representation, respondents rely upon written results of competent, scientific testing on a chassis dynamometer according to the then current urban dynamometer driving schedule (40 C.F.R. 86, Appendix I) and the then current highway fuel economy driving schedule (40 C.F.R. 600, Appendix I) established by the Environmental Protection Agency to substantiate

such representation. Provided that, for any such test, respondents may select the type of vehicle, its model year, its engine size, mileage, fuel type, and motor oil. Any break-in period used in the testing of any engine oil additive, fuel additive, or automobile retrofit device shall be the break-in period specified in the respondents' use directions for such additive or device; and

(3) respondents clearly and conspicuously disclose (i) any limitation on the efficacy of the engine oil additive, fuel additive, or automobile retrofit device; (ii) the characteristics of any vehicle used in any test, including the vehicle type, vehicle model year, engine size, mileage, and the break-in period for the engine oil additive, fuel additive, or automobile retrofit device; and (iii) where any representation of fuel economy improvement from the use of a retrofit device, oil additive, or fuel additive is expressed in miles per gallon, miles per tankful, percentage, or other numerical representation, or where the representation of the benefit from the use of such additive or device is expressed as a monetary saving in dollars, percentage, or other numerical representation, all advertising and other sales promotional materials which contain the representation must also clearly and conspicuously disclose the following disclaimer: "Reminder: Your actual saving may vary. It depends on the kind of driving you do, how you drive, and the condition of your car."

Part III

It is further ordered, That respondents Great North American Industries, Inc., a corporation, and Products on the Move, Inc., a corporation, their successors and assigns, and their officers, and Patrick O. McCrary, individually and as an officer of Great North American Industries, Inc., and Products on the Move, Inc., and respondents' 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 or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. representing, directly or by implication, any performance characteristic of any product or service, other than any representation covered by Part II of this order concerning any engine oil additive, any fuel additive, and any automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, unless, at the time of making the representation, respondents possess and reason-

ably rely upon a reasonable basis which substantiates such representation. For any representation of any performance characteristic of any product, other than any representation covered by Part II of this order concerning any engine oil additive, any fuel additive, or any automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, such reasonable basis must consist of competent scientific evidence;

b. representing, directly or by implication, that any federal, state, or local governmental agency has approved, in any manner, any product or service unless respondents possess, at the time of making such representation, written and dated authorization from such governmental agency that such representation may appear in advertising or sales promotional materials for the specific purpose for which such representation is used in the advertising or sales promotional materials.

Provided, that this paragraph shall not be construed to prohibit respondents from directly representing that they have tested any product or service in accordance with test procedures established by any federal, state, or local governmental agency so long as such representation is otherwise in compliance with the provisions of this order;

c. representing, directly or by implication, that any consumer endorsement of any product or service which appears in advertising or sales promotional materials reflects the typical experience of consumers with such product or service unless such representation is true;

d. misrepresenting, in any manner, the purpose, content, or conclusion of any test or survey pertaining to any product or service.

Part IV

It is further ordered, That respondents Great North American Industries, Inc., a corporation, and Products on the Move, Inc., a corporation, their successor and assigns, and their officers, and Patrick O. McCrary, individually and as an officer of Great North American Industries, Inc., and Products on the Move, Inc., and respondents' 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 or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain the following accurate records

which may be inspected by Commission staff members upon fifteen (15) days' notice: copies of and dissemination schedules for all advertisements, sales promotional materials, and post-purchase materials; all documents which substantiate, contradict, or otherwise relate to any claim which is a part of the advertising, sales promotional materials, or post-purchase materials disseminated by respondents directly or through any business entity; copies of all documents generated by the requirements of Part V of this order. Such documentation relating to advertising shall be retained by respondents for a period of three (3) years from the last date any such advertising, sales promotional material, or post-purchase material was disseminated. Documentation relating to Part V of the order shall be retained by respondents for a period of three (3) years from the last date Exhibit C was disseminated.

Part V

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

Respondents shall also, within thirty (30) days of the date this order is served upon them, distribute, via first class mail, a copy of Exhibit C and a copy of this Agreement Containing Consent Order to Cease and Desist to each and every individual or other entity that has purchased from them, through one purchase or through a series of purchases, more than twelve (12) cans of Tephguard. Respondents shall also, at least five (5) days prior to filling any order or series of orders which individually or collectively indicate that more than twelve (12) cans of Tephguard have been ordered by any individual or other entity, distribute, via first class mail or any faster means, a copy of Exhibit C and a copy of this Agreement Containing Consent Order to Cease and Desist to each and every such individual or other entity.

Exhibit C and the envelope containing it shall be the corporate stationery of one of the corporate respondents. The envelope containing Exhibit C shall contain no marking other than name and return address of that corporate respondent, the name and address of the individual or other entity purchasing or ordering Tephguard,

and the words " IMPORTANT NOTICE " conspicuously disclosed on the front of the envelope.

Part VI

It is further ordered, That the corporate respondents 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.

Part VII

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

Part VIII

It is further ordered, That the respondents shall, within sixty (60) days after service upon them of this order, and also one (1) year thereafter, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Chairman Miller did not participate.

EXHIBIT C

Dear Tephguard Customer:

I am enclosing for your information a copy of an Agreement and Consent Order entered into by Great North American Industries, Products on the Move, myself and the Federal Trade Commission.

The Agreement and Consent Order, as stated in the Agreement

itself, is not an admission that any law enforced by the Federal Trade Commission has been violated, but, rather, sets forth certain requirements for any future advertising of Tephguard that Great North American Industries, Products on the Move, and I must follow. These requirements affect you also in the sense that they represent the views of the Federal Trade Commission on how Tephguard should be advertised in the future. I thus encourage you to closely review the enclosed document.

Your continued confidence in our line of products is appreciated.

Very truly yours,

Patrick O. McCrary, President
Great North American Industries, Inc.
and Products on the Move, Inc.

IN THE MATTER OF

BALL-MATIC CORPORATION, INC., ET AL.

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

Docket C-3078. Complaint, Oct. 29, 1981—Decision, Oct. 29, 1981

This consent order requires, among other things, an Orange, California corporation and corporate officer to cease representing that the use of the "Ball-Matic" or any similar retrofit device will result in substantial fuel economy improvement. Further, respondents are prohibited from making representations that the use of any retrofit device or product will result in an energy savings, unless substantiated by competent scientific evidence. In addition, where any claim or characterization pertaining to energy savings is made, respondents are barred from making any endorsements without written and dated authorization, and prohibited from making misrepresentations concerning the purpose, content or conclusion of any test or survey.

Appearances

For the Commission: *Laurence M. Kahn* and *William Haynes.*

For the respondent: *Richard Barich,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ball-Matic Corporation, Inc., a corporation, and Lonnie W. Smith, individually and as an officer of Ball-Matic Corporation, Inc., hereinafter sometimes referred to as "respondents," have violated the provisions of the 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 Ball-Matic Corporation, 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 1336 West Collins, Orange, California.

Respondent Lonnie W. Smith, is President of the corporate respondent Ball-Matic Corporation, Inc. He formulates, directs, and controls the acts and practices of said corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

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

PAR. 2. Respondents are now and for sometime last past have been engaged in the marketing, advertising, offering for sale, sale, and distribution of a product variously known as the Ball-Matic, the Ball-Matic Gas Saver Valve and the Gas Saver Valve, hereinafter sometimes referred to as "product," which product is advertised as a means of improving fuel economy in automobiles. Said product is an automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011. Respondents, in connection with the marketing of said product, have disseminated, published and distributed and now disseminate, publish and distribute advertisements and promotional material for the purpose of promoting the sale of said product.

PAR. 3. In the course and conduct of their business, the respondents have disseminated or caused the dissemination of certain advertisements for said product through the United States mail and by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, the insertion of advertisements in magazines and newspapers with national circulations; and have disseminated or caused the dissemination of advertisements for said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product in commerce.

PAR. 4. Among the advertisements and other sales promotional materials disseminated or caused to be disseminated by respondents are the materials identified as Exhibits A–I which are attached hereto.

PAR. 5. Through the use of the advertisements referred to in Paragraph Four, and other advertisements and sales promotional materials, respondents represented and now represent, directly or by implication, that

a. the Ball-Matic when installed in a typical automobile will significantly improve fuel economy;

b. under normal conditions, a typical driver can ordinarily obtain a fuel economy improvement which will approximate or equal four miles per gallon when the Ball-Matic is installed in his/her automobile;

c. competent scientific tests prove the fuel economy claims made for the Ball-Matic;

d. results of consumer usage, as evidenced by consumer endorse-

ments, prove that the Ball-Matic significantly improves fuel economy;

e. the consumer endorsements which appear in said advertisements and sales promotional materials reflect the typical or ordinary experience of members of the public who have used the Ball-Matic.

PAR. 6. At the time respondents made the representations alleged in Paragraph Five of the complaint, they did not possess and rely upon a reasonable basis for such representations. Therefore, said advertisements and sales promotional materials are deceptive or unfair.

PAR. 7. In truth and in fact, contrary to respondents' representations in Paragraph Five:

a. the Ball-Matic when installed in a typical automobile will not significantly improve fuel economy;

b. under normal driving conditions, a typical driver cannot ordinarily obtain a fuel economy improvement which will approximate or equal four miles per gallon when the Ball-Matic is installed in his/her automobile;

c. no competent scientific tests prove the fuel economy claims for the Ball-Matic;

d. results of consumer usage, as evidenced by consumer endorsements, do not prove that the Ball-Matic significantly improves fuel economy;

e. the consumer endorsements which appear in said advertisements do not represent the typical or ordinary experience of members of the public who have used the Ball-Matic.

Therefore, said advertisements and sales promotional materials are deceptive or unfair.

PAR. 8. The advertisements referred to in Paragraph Four and other of respondent's advertisements and sales promotional materials represent, directly and by implication, that respondents had a reasonable basis for making, at the time they were made, the representations alleged in Paragraph Five. In truth and in fact, respondents had no reasonable basis for such representations. Therefore, said advertisements and sales promotional materials are deceptive or unfair.

PAR. 9. In the course and conduct of their 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 engaged in the sale of automobile retrofit devices.

PAR. 10. The use by respondents of the aforesaid unfair or deceptive statements, representations, acts and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' product by reason of said erroneous and mistaken belief.

PAR. 11. The acts and practices of respondents, as herein alleged, including the dissemination of the aforesaid false advertisements, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute, unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

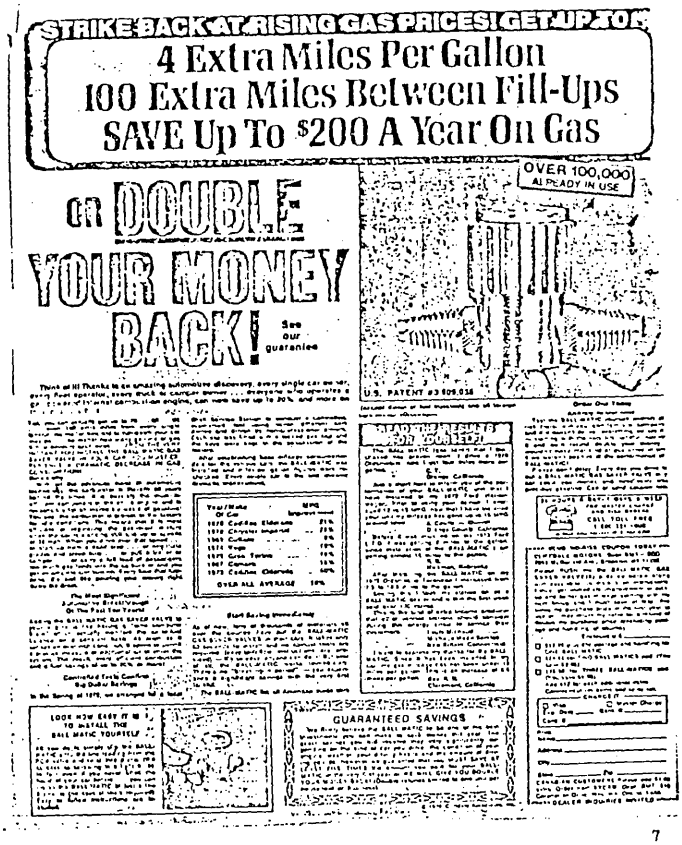
Chairman Miller did not participate.

Exhibit A

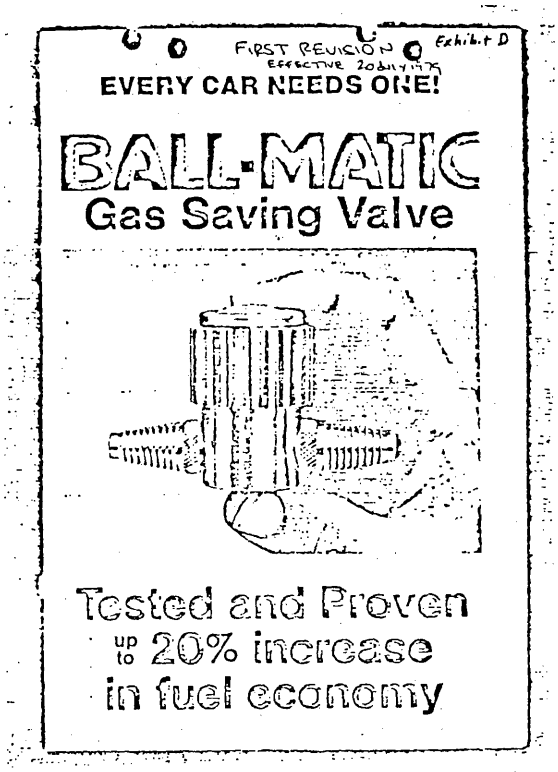

STRIKE BACK AT RISING GAS PRICES! GET UP TO 5
4 Extra Miles Per Gallon
100 Extra Miles Between Fill-Ups
The Wall Street Journal 7-23-79
SAVE UP TO $200 A YEAR ON GAS
OVER 100,000 ALREADY IN USE
GUARANTEED SAVINGS

FEDERAL TRADE COMMISSION
RECEIVED
1979

Exhibit C


STRIKE BACK AT RISING GAS PRICES! GET UP TO:
4 Extra Miles Per Gallon
100 Extra Miles Between Fill-Ups
SAVE Up To $200 A Year On Gas
OR DOUBLE YOUR MONEY BACK!
See our guarantee
OVER 100,000 ALREADY IN USE
U.S. PATENT #3,105,038
GUARANTEED SAVINGS

7


FIRST REVISION
Exhibit D
EVERY CAR NEEDS ONE!
BALL-MATIC
Gas Saving Valve
Tested and Proven
up to 20% increase
in fuel economy

BALL-MATIC GAS SAVER VALVE
Questions Most Frequently Asked

Q. WHAT IS THE BALL-MATIC?

A. The Ball-Matic is a precision-engineered, vacuum operated air induction valve. The unit is automatically controlled by the amount of vacuum produced by the engine under varying speeds and loads.

Q. WHAT IS THE OPERATING PRINCIPLE OF THE BALL-MATIC?

A. To induce into the combustion chamber of an automobile engine cool fresh air which, in turn, produces a more efficient combustion whenever the mixture is rich (the vacuum [illegible]).

Q. CAN THE BALL-MATIC DAMAGE AN ENGINE?

A. Absolutely not. The Ball-Matic is an automatically controlled valve which only opens when the mixture is rich, and then it only opens sufficiently to restore the [illegible] combustion mixture of 16 parts of air to one part of gasoline.

Q. DOES THE BALL-MATIC "LEAN" THE MIXTURE?

A. Technically, the unit does not lean the mixture, in that the valve is automatically in a closed position whenever the mixture is lean (high vacuum). The valve opens only when the mixture is rich. The mixture at no time cuts from thin to thinner; instead, the compensation is from rich to normal.

Q. WHAT HAPPENS WHENEVER AN ENGINE NEEDS MORE AIR?

A. The answer is simple. The amount of air to the amount of fuel is inadequate at the point of firing in the combustion chamber causing a severe loss of power and wasted gasoline. This occurs whenever the vacuum is low, such as when the car is starting up again from a dead stop, while negotiating grades, hills and mountains, while traveling at speeds in excess of 45 mph, and when pulling a trailer or carrying a full load of passengers.

Q. WILL THE BALL-MATIC FIT ANY AUTOMOBILE?

A. Yes, the Ball-Matic fits all cars . . . American and most foreign (Volkswagens excluded) from a Cadillac to a Datsun . . . and any gasoline-driven internal combustion engine powering boats, trucks, vans, etc.

Q. IF A PERSON GETS A NEW CAR OR TRADES FOR ANOTHER CAR, CAN THEY TRANSFER THE BALL-MATIC?

A. Yes, the Ball-Matic fits all cars; transference is the simplest of jobs.

Q. EXACTLY WHERE IS THE BALL-MATIC INSTALLED?

A. On most all cars on the road today, the Ball-Matic is installed in the crankcase vent hose leading from the base of the carburetor to the Positive Crankcase Ventilation valve (the PCV Valve). Only a couple of minutes time is needed to install the Ball-Matic once you have located the proper hose.

Q. WILL A PERSON HAVE TO RE-ADJUST THEIR CARBURETOR AFTER INSTALLATION?

A. No. When your engine is idling, maximum pressure exists in the manifold. This pressure closes the valve—the heart of the Ball-Matic — allowing the engine to idle normally.

Q. WHAT MAKES THE BALL-MATIC OPERATE?

A. The Ball-Matic opens or closes automatically from the power of engine vacuum.

Q. WHAT IS THE GUARANTEE ON THE BALL-MATIC?

A. [illegible] Associates will replace any Ball-Matic air injector which is not free of defects in materials or workmanship for one year from the date of purchase. In addition, [illegible] will refund the full purchase price to anyone who does not realize an annual savings of at least 5 times the purchase price.

Q. DOES THE BALL-MATIC EVER MALFUNCTION?

A. In itself the Ball-Matic should never malfunction. However, the unit will become inoperative if the Positive Crankcase Ventilation valve is plugged up. Therefore, it is very important that you keep the PCV valve always clean, as it is not only against the law to operate your automobile with a plugged PCV valve, but you will not enjoy all the wonderful benefits of having the Ball-Matic installed under your hood.

Q. IF THE BALL-MATIC IS SO GREAT, WHY ISN'T IT INSTALLED BY THE CAR COMPANIES AS ORIGINAL EQUIPMENT?

A. We don't know, but look at radial tires, electronic ignition systems, and even rear view mirrors. All of these were available outside of Detroit first. Frequently, new devices are installed by the car manufacturers only on public demand.

Q. DOES THE UNIT REQUIRE CLEANING?

A. The Ball-Matic requires no maintenance and is self-cleaning.

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Q. WHAT PRECAUTIONS MUST ONE TAKE TO MAKE SURE OF ALL THE [illegible] YOU CLAIM?

A. It is only necessary to make sure your PCV valve is not plugged up and that you have installed the Ball-Matic in the crankcase vent hose leading from the base of the carburetor to the PCV valve on late model automobiles.

Q. WHY IS THE BALL-MATIC NEEDED ON A CAR?

A. Since its inception the internal combustion engine has been notoriously inefficient, due to design of the carburetor. The carburetor is set at the factory [illegible] efficiency. The air fuel mixture is set at a 15 to 1 ratio, which is efficient only when a car [illegible] 30 to 40 mph (2,000 rpm) is reached. [illegible] performance.

In 1977, the 113,696,111* registered automobiles in the U.S. cc sumed 107,976,395,000 gallons of gasoline. If each of these vehic had a Ball-Matic, the potential savings would have been almost *6 a lion gallons of gasoline per day.*

*Source: U.S. Dept. of Transportation — Federal Highway Administration.

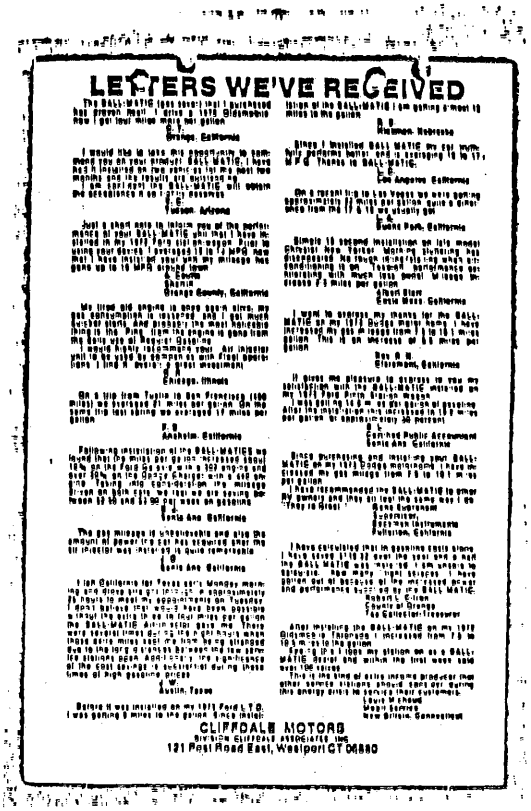
ANNUAL SAVINGS WITH 20% INCREASE IN FUEL ECONOMY

Assuming Gasoline At 80¢ Per Gallon

Miles Driven Per Year	MILES PER GALLON YOUR CAR GETS NOW				
	5 mpg	10 mpg	15 mpg	20 mpg	25 mpg
5,000	$ 160.00	$ 80.00	$ 53.33	$ 40.00	$ 32.00
10,000	320.00	160.00	106.67	80.00	64.00
15,000	480.00	240.00	160.00	120.00	96.00
20,000	640.00	320.00	213.33	160.00	128.00
30,000	960.00	480.00	320.00	240.00	192.00
40,000	1,280.00	640.00	426.67	320.00	256.00
50,000	1,600.00	800.00	533.33	400.00	320.00

This chart is based on a 20% increase in miles per gallon assuming an average cost of gasoline at 80¢ per gallon. The specific economy achieved with the BALL-MATIC will vary with the efficiency of each engine, driving habits, local driving conditions and the price of gasoline in each area.

© 1978, [illegible]



LETTERS WE'VE RECEIVED

The BALL-MATIC does save! that I guaranteed has proven itself. I drive a 1975 Oldsmobile Now I get four miles more per gallon

C. J.
Orange, California

I would like to take this opportunity to compliment you on your product BALL-MATIC. I have had it installed on two vehicles for the past two months and the results are outstanding.

I can confidently tell BALL-MATIC will obtain the satisfaction it so richly deserves

R. E.
Tucson, Arizona

Just a short note to inform you of the performances of your BALL-MATIC unit that I have installed in my 1977 Ford station wagon. Prior to using your device I averaged 13 to 14 MPG now that I have installed your unit my mileage has gone up to 16 MPG average town

C. Davis
Alamo
Orange County, California

My tired old engine is once again alive. My gas consumption is restored and I will avoid further visits and passport the most noticeable thing is the "pink" from the engine is gone from my tank was all Regular Gasoline

I would highly recommend your Air Injector unit to be used by owners of any Fiat, especially cars I find it invaluable for fuel economy

F. S.
Chicago, Illinois

On a trip from Tustin to San Francisco (500 miles) we averaged 21 miles per gallon. On the same trip using we averaged 17 miles per gallon

P. S
Anaheim, California

Following installation of the BALL-MATICS we found that the miles per gallon increased about 10% on the Ford Econoline with a 302 engine and over 15% on the Dodge Charger with a 440 engine Taking into consideration the mileage driven on both cars, we feel we are saving per season 12 to and 14 per week on gasoline

F. L.
Santa Ana, California

The gas mileage is unbelievable and also the amount of power it's car has returned after the air injector was installed in cold temperature

L. S
Santa Ana, California

I am California for Texas early Monday morning and drove approximately 20 hours to meet my appointments on Tuesday I don't believe that would have been possible I kept the gauge in an to four miles per gallon the BALL-MATIC Air-in action gave me. There were several times during the 20 hours when there were miles east me now being stopped due to the long stretches between the new service stations open Additionally the significance of the cost savings is substantial during these times of high gasoline prices

J. W.
Austin, Texas

Before it was installed on my 1971 Ford L T D. I was getting 9 miles to the gallon Since installation of the BALL-MATIC I am getting almost 10 miles to the gallon

R. S
Madison, Nebraska

Since I installed BALL MATIC my car has truly performs better and is averaging 16 to 17 M P G Thanks to BALL-MATIC.

L. E.
Los Angeles, California

On a recent trip to Las Vegas we were getting approximately 22 miles per gallon quite a difference from the 17 & 18 we usually get

L. S
Buena Park, California

Simple 10 second installation on late model Chrysler Alpa Trailer Mowing plumbing has disappeared No more incentive lag when air conditioning is on Lessened performance on inclines with much less period to accelerate 7 5 miles per gallon

Robert Stone
Santa Maria, California

I want to express my thanks for the BALL-MATIC on my 1972 Dodge Pickup here I have increased my gas mileage from 7 to 10 1 miles gallon This is an increase of 3 5 miles per gallon

Rev. R. M.
Claremont, California

It gives me pleasure to express to you my satisfaction with the BALL-MATIC installed on my 1971 Ford Pinto Station Wagon

I was getting 16 5 m. p. gal on gasoline After the installation this increased to 17 7 miles per gallon on comparatively the percent

R. L.
Certified Public Accountant
Santa Ana, California

Since purchasing and installing your BALL-MATIC on my 1973 Dodge motorhome I have increased my gas mileage from 7 5 to 10 1 miles per gallon

I have recommended the BALL-MATIC to other my owners and they all tell me the same now I do They're Great

Dave Eastman
Supervisor
Eastman Instruments
Fullerton, California

I have calculated that in gaining costs since I have saved 17 10 12 over the year and a half the BALL MATIC was here to I am unable to calculate how many miles I have gotten out of because of the increased power and performance both as by the BALL MATIC

Robert L. Ellison
County of Orange
Tax Collector-Treasurer

After installing the BALL-MATIC on my 1972 Oldsmobile Toronado I increased from 7 5 to 10 5 miles to the gallon

Prior to I I took my station on as a BALL-MATIC Dealer and within the first week sold over 100 units

This is the kind of sales income producer that other service stations should seek out During this energy crisis no service their customers

Lloyd H Cloud
Wagon Service
New Orleans, Commercial

CLIFFDALE MOTORS
Division Cliffdale Associates, Inc.
121 Post Road East, Westport CT 06880

Exhibit E

Without the BALL-MATIC™ you're wasting up to $200 or more a year on gasoline!

EVERY CAR NEEDS ONE!

OVER 100,000 ALREADY IN USE

U.S. PATENT #3,809,035

GUARANTEED SAVINGS

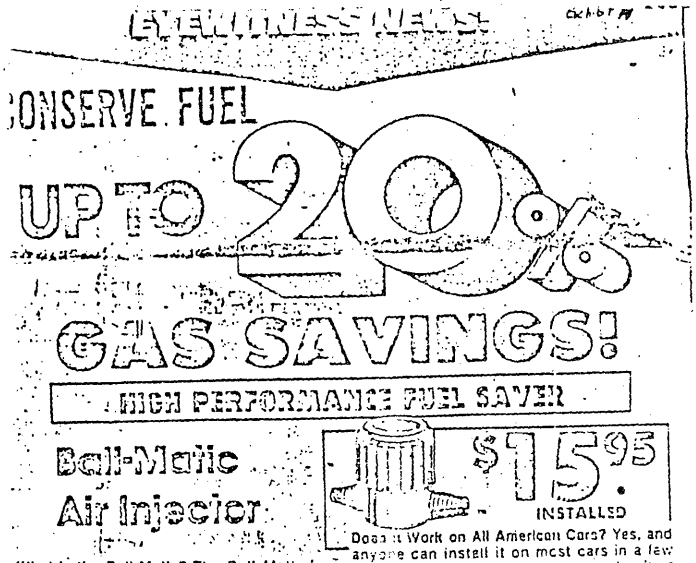
Order One Today

24 HOURS A DAY-7 DAYS A WEEK FOR FASTER CHARGE AND HIGH GROSS

CALL TOLL FREE 1-800-331-1038


Exhibit F
SAVE
BALL-MATIC
AIR-INJECTOR
THE GAS SAVING VALVE
BALL-MATIC™
LOW VACUUM AIR INJECTOR
The Gas Saving Valve
TO CORRECT EXCESSIVE FUEL CONSUMPTION
No Special Tools Required
MADE IN U.S.A.
ONE SIZE FITS ALL CARS
Tested and Reported
*Save Up To $200 A Year
On Gasoline


BALL MATIC CONSULTANTS REPORT
"UP TO
20%
GAS
SAVINGS!"
Ball-Matic Air Injector
Just
$14.88



What is the Ball-Matic? The Ball-Matic is a precision-engineered, vacuum-operated air induction valve.

What Does It Do? It injects filtered air into the combustion chamber to produce the improved mixture of air and gas that your car needs for that "extra" performance.

Why Is the Ball-Matic Needed on Your Car? Carburetors are notoriously inefficient. Most carburetors are set at a 15 to 1 ratio of air to fuel. This is efficient up to about 55 M.P.H. At higher speeds, the combustion chamber demands more fuel. But the amount of air entering the chamber is fixed causing too rich a mixture. The mixture does not burn completely, resulting in gasoline waste and loss of power. The Ball-Matic was designed to improve the mixture of air and fuel at all speeds. **Results:** Gas Savings And More

Does It Work on All American Cars? Yes, and anyone can install it on most cars in a few minutes. It works on your camper, truck or boat engine! For Foreign cars see instruction sheets.

How do you Install the Ball-Matic on Your Car? Complete instructions come with the unit for all major automobile manufacturers, excluding Volkswagens.

What Have You Got to Gain? Amazing Gas Savings. Up to 20%! New found power, effortless cruising, even up steep hills or when hauling trailers, campers, etc. A cleaner, more efficiently running engine with less carbon build-up.

Guarantee. The Ball-Matic is guaranteed to be free from defects in workmanship and materials. Your authorized dealer will replace or refund full purchase price on any unit that is inoperative under normal use for a period of up to one year from date of pur-

Exhibit 1 page

BALL-MATIC AIR INJECTOR

QUESTIONS MOST FREQUENTLY ASKED

1. Q. WHAT IS THE BALL MATIC?
   A. The Ball Matic is a precision engineered, vacuum operated air induction valve. The unit is automatically controlled by the amount of vacuum produced by the engine under varying speeds and loads.

2. Q. WHAT IS THE OPERATING PRINCIPLE OF THE BALL MATIC?
   A. To induce into the combustion chamber of an automobile engine cool, fresh, filtered air which, in turn, produces a more efficient combustion whenever the mixture is rich (the vacuum low).

3. Q. CAN THE BALL MATIC DAMAGE MY ENGINE?
   A. Absolutely not. The Ball Matic is an automatically controlled valve which only opens when the mixture is rich and then it only opens sufficiently to restore the ideal combustion mixture of 15 parts of air to one part of gasoline.

4. Q. DOES THE BALL MATIC "LEAN" THE MIXTURE?
   A. Technically, the unit does not lean the mixture, in that the valve is automatically in a closed position whenever the mixture is lean (high vacuum). The valve opens only when the mixture is rich. The mixture at no time cuts from thin to thinner, instead, the compensation is from rich to normal.

5. Q. WHAT HAPPENS WHENEVER MY ENGINE NEEDS MORE AIR?
   A. The answer is simple. The amount of air to the amount of fuel is inadequate at the point of firing in the combustion chamber, causing a severe loss of power and wasted gasoline. This occurs whenever the vacuum is low, such as when the car is starting up again from a dead stop, while negotiating grades, hills and mountains, while traveling at speeds in excess of 45 mph, and when pulling a trailer or carrying a full load of passengers.

   Whenever these conditions occur, there is a drop in the engine vacuum caused by the mixture being too rich. Now the Ball-Matic opens, permitting cool, filtered air to enter the intake manifold and restore the proper air to fuel ratio.

6. Q. WILL THE BALL-MATIC FIT MY PARTICULAR AUTOMOBILE?
   A. Yes, the Ball Matic fits all cars . . . American and most foreign (Volkswagens excluded) from a Cadillac to a Datsun . . . and any gasoline-driven internal combustion engine powering boats, trucks, vans, etc.

7. Q. IF I GET A NEW CAR OR TRADE FOR ANOTHER CAR, CAN I TRANSFER THE BALL-MATIC?
   A. Yes, the Ball Matic fits all cars, transference is the simplest of jobs.

8. Q. EXACTLY WHERE IS THE BALL MATIC INSTALLED?
   A. On most all cars on the road today, the Ball Matic is installed in the crankcase vent hose leading from the base of the carburetor to the Positive Crankcase Ventilation valve (the PCV Valve). Only a couple of minutes time is needed to install the Ball-Matic once you have located the proper hose.

9. Q. WILL I HAVE TO RE-ADJUST MY CARBURETOR AFTER INSTALLATION?
   A. No. When your engine is idling, maximum pressure exists in the manifold. This pressure closes the valve — the heart of the Ball Matic — allowing the engine to idle normally.

10. Q. WHAT MAKES THE BALL MATIC OPERATE?
    A. The Ball-Matic opens or closes automatically from the power of engine vacuum.

11. Q. WHAT IS THE GUARANTEE ON THE BALL MATIC?
    A. Ball Matic Corporation will replace any Ball Matic air injector which is not free of defects in materials or workmanship, for one year from the date of purchase.

12. Q. DOES THE BALL-MATIC EVER MALFUNCTION?
    A. In itself, the Ball-Matic should never malfunction. However, the unit will become inoperative if the Positive Crankcase Ventilation valve is plugged up. Therefore, it is very important that you keep the PCV valve always clean, as it is not only against the law to operate your automobile with a plugged PCV valve, but you will not enjoy all of the wonderful benefits of having the Ball-Matic installed under your hood.

13. Q. IF THE BALL MATIC IS SO GREAT, WHY ISN'T IT INSTALLED BY THE CAR COMPANIES AS ORIGINAL EQUIPMENT?
    A. We don't know. But look at radial tires, electronic ignition systems, and even rear view mirrors. All of these were available outside of Detroit first. Frequently, new devices are installed by the car manufacturers only on public demand.

14. Q. DOES THE UNIT REQUIRE CLEANING?
    A. The Ball-Matic requires no maintenance and is self cleaning. At about 35,000 miles, clean the filter by swishing in solvent.

15. Q. WHAT PRECAUTIONS MUST I TAKE TO MAKE SURE I ENJOY ALL THE WONDERFUL BENEFITS YOU CLAIM?
    A. It is only necessary to make sure your PCV valve is not plugged up and that you have installed the Ball-Matic in the crankcase vent hose leading from the base of the carburetor to the PCV valve on all late model automobiles.

16. Q. WHY IS THE BALL-MATIC NEEDED ON MY CAR?
    A. Since its inception, the internal combustion engine has been notoriously inefficient, due to the design of the carburetor. The carburetor is set at the factory in the idle position for maximum efficiency. The air-fuel mixture is set at a 15 to 1 ratio, which is inefficient only until a speed of 30 to 40 mph (2,000 rpm) is reached. At this point, the combustion chamber demands more fuel and the amount of gasoline entering the chamber increases while the amount of air is fixed. This results in an overly rich mixture of fuel and air. This mixture burns incompletely, resulting in waste of gasoline and loss of power through inefficient combustion. The Ball-Matic was designed to minimize this loss of power — thus increasing power — to provide a situation where there is less carbon build up, thus minimizing engine wear . . . to permit quicker acceleration and better engine performance.

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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 Bureau of Consumer Protection 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 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 such 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 this 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 the 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 Ball-Matic Corporation, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business at 1336 West Collins, Orange, California. Respondent Lonnie W. Smith 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 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

Part I

It is ordered, That respondents Ball-Matic Corporation, Inc., a corporation, its successors and assigns, and its officers, and Lonnie W. Smith, individually and as an officer of Ball-Matic Corporation, Inc., and respondents' 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 the automobile retrofit device variously known as the Ball-Matic, the Ball-Matic Gas Saver Valve and the Gas Saver Valve, or of any other automobile retrofit device having substantially similar properties, as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle.

Part II

It is further ordered, That respondents Ball-Matic Corporation, Inc., a corporation, its successors and assigns, and its officers, and Lonnie W. Smith, individually and as an officer of Ball-Matic Corporation, Inc., and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle unless (1) such representation is true, and (2) at the time of making such representation, respondents possess and rely upon written results of dynamometer testing of such device according to the then current urban and highway driving test cycles established by the Environmental Protection Agency and these results substantiate such representation, and (3) where the representation of the fuel economy improvement from use of such device is expressed in miles per gallon, miles per tankful, or percentage, or

where the representation of the benefit from use of such device is expressed as a monetary saving in dollars or percentage, all advertising and other sales promotional materials which contain the representation expressed in such a way must also clearly and conspicuously disclose the following disclaimer: " REMINDER: Your actual saving may be less. It depends on the kind of driving you do, how you drive and the condition of your car."

Part III

It is further ordered, That respondents Ball-Matic Corporation, Inc., a corporation, its successors and assigns, and its officers, and Lonnie W. Smith, individually and as an officer of Ball-Matic Corporation, Inc., and respondents' 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 in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. using, publishing, or referring to any endorsement from any person or organization concerning any energy consumption or energy saving characteristic of any product unless, within the twelve (12) months immediately preceding any such use, publication, or reference, respondents have obtained from that person or organization an express written and dated authorization for such use, publication, or reference;

b. representing, directly or by implication, any energy consumption or energy saving characteristic of any product, other than any automobile retrofit device as "automobile retrofit device" is defined in Section 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. 2011, unless, at the time of making the representation, respondents possess and reasonably rely upon competent scientific evidence which substantiates such representation;

c. misrepresenting, in any manner, the purpose, content, or conclusion of any test or survey pertaining to any energy consumption or energy saving characteristic of any product;

d. misrepresenting, in any manner, either preference for any product or service or the results obtained through usage of any product where such preference or results pertain to any energy consumption or energy saving characteristic of such product.

Part IV

It is further ordered, That respondents Ball-Matic Corporation, Inc., a corporation, its successors and assigns, and its officers, and Lonnie W. Smith, individually and as an officer of Ball-Matic Corporation, Inc., and respondents' 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 in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain the following accurate records which may be inspected by Commission staff members upon fifteen (15) days' notice: copies of and dissemination schedules for all advertisements, sales promotional materials, and post-purchase materials; documents authorizing use, publication or reference to endorsements; documents which substantiate, contradict, or otherwise relate to any claim pertaining to any energy consumption or energy saving characteristic of any product which is a part of the advertising, sales promotional materials, or post-purchase materials disseminated by respondents directly or through any business entity. Such documentation shall be retained by respondents for a period of three (3) years from the last date any such advertising, sales promotional material, or post-purchase material was disseminated.

Part V

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

Part VI

It is further ordered, That respondents 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.

Part VII

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

Part VIII

It is further ordered, That the respondents 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.

Chairman Miller did not participate.

IN THE MATTER OF

LEHIGH PORTLAND CEMENT COMPANY, ET AL.

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

Docket 9142. Complaint, July 30, 1980—Decision, Oct. 30, 1981

This consent order requires, among other things, an Allentown, Pennsylvania corporation engaged in the production of cement to divest, in accordance with the terms of the Order, the Universal plant at Hannibal, Missouri and three Midwestern States distribution facilities. The order also bars the company for specified time periods, from making certain acquisitions in prescribed areas, without prior Commission approval.

Appearances

For the Commission: *Stephen Riddell* and *Seth B. Zimmerman.*

For the respondent: *Richard C. Lowery* and *Nolan E. Clark, Kirkland & Ellis,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Lehigh Portland Cement Company ("Lehigh"), a corporation subject to the jurisdiction of the Commission, intends to acquire the assets of the Universal Atlas Division ("Universal") of the United States Steel Corporation ("U.S. Steel"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint, pursuant to Section 11 of the Clayton Act, as amended, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, as amended, 15 U.S.C. Section 45(b), stating its charges as follows:

I. Definitions

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

a. *Portland cement* includes Types I through V of portland cement as specified by the American Society for Testing Materials. Neither masonry nor white cement is included.

b. *Relevant Market* refers to the manufacture and sale of portland cement in the "Midwestern Market," which consists of the northeastern region of the State of Missouri, the State of Iowa, the southern region of the State of Minnesota, the western region of the State of Wisconsin, the State of Illinois excluding the southern region, and the northwestern region of the State of Indiana.

II. Lehigh

2. Lehigh is a corporation organized and existing under the laws of the State of Pennsylvania with its principal office at 718 Hamilton Mall, Allentown, Pennsylvania.

3. Lehigh is a wholly-owned subsidiary of Heidelberg Cement, Inc. (a corporation organized and existing under the laws of the State of Delaware), which is a wholly-owned subsidiary of Heidelberger Zement Aktiengesellschaft ("Heidelberger") (a corporation organized and existing under the laws of the Federal Republic of Germany).

4. Lehigh is engaged primarily in the production and sale of portland cement.

5. In 1979, Lehigh had total sales of $104,700,000 and total assets in 1980 of $167,000,000.

6. Lehigh has portland cement plants located in Iowa, Indiana, Maryland, New York, and Washington. Lehigh's Mason City, Iowa and Mitchell, Indiana plants sell portland cement in the Midwestern Market.

III. U.S. Steel

7. U.S. Steel is a corporation organized and existing under the laws of the State of New Jersey, with its principal office at 600 Grant Street, Pittsburgh, Pennsylvania.

8. U.S. Steel's cement manufacturing division, Universal Atlas, produces and sells portland cement and specialty cement.

9. In 1979, Universal had total sales of approximately $156,000,000 and total assets in 1980 of $138,000,000.

10. Universal has portland cement plants located in Missouri, Kansas, Alabama, Indiana, Wisconsin, Illinois, Pennsylvania, and Texas. Universal's Buffington, Indiana and Hannibal, Missouri plants sell portland cement in the Midwestern Market.

IV. Jurisdiction

11. At all times relevant herein U.S. Steel and Lehigh have been engaged in the production and sale of portland cement in interstate

commerce and U.S. Steel and Lehigh are engaged in commerce as "commerce" is defined in the Clayton Act, as amended, 15 U.S.C. 12, *et seq.,* and each is a corporation whose business is in or affects commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*

V. The Acquisition

12. On or about February 15, 1980, Heidelberger and U.S. Steel entered into an agreement in principle which provides, *inter alia,* for the acquisition of the assets of Universal. Heidelberger and U.S. Steel have been working toward a final agreement and plan that on July 31, 1980, or soon thereafter, Lehigh will acquire Universal's assets, including the cement plants at Hannibal and Buffington.

VI. Trade and Commerce

13. The relevant line of commerce is the manufacture and sale of portland cement.

14. The relevant section of the country is the Midwestern Market.

VII. Actual Competition

15. U.S. Steel and Lehigh are now and have been for many years actual competitors in the manufacture and sale of portland cement within certain geographic markets, including the Midwestern Market.

VIII. Effects

16. The effects of the proposed acquisition may be substantially to lessen competition or to tend to create a monopoly in the relevant market in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and the acquisition constitutes an unfair method of competition and unfair act or practice within the meaning of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, in the following ways, among others:

(a) actual competition between Lehigh and U.S. Steel in the relevant market may be eliminated;

(b) actual competition among competitors generally in the relevant market may be lessened;

(c) concentration in the relevant market may be increased and the possibilities for eventual deconcentration may be diminished;

(d) mergers or acquisitions between other portland cement producers in the relevant market may be fostered, thus causing a further substantial lessening of competition or tendency toward monopoly in that market; and

(e) barriers to entry into the relevant market may be increased.

Violations Charged

17. By reason of the foregoing, the proposed acquisition by Lehigh of the assets of Universal constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violations of Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

Respondent Lehigh Portland Cement Company (hereinafter "Lehigh"), its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Lehigh 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 Lehigh 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, and having duly considered the comments filed thereafter by interested persons pursuant to Section 3.25(f) of its Rules, 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. Lehigh Portland Cement Company is a corporation organized, existing and doing business under the laws of the State of Pennsylva-

nia with its principal office located at 718 Hamilton Mall, Allentown, Pennsylvania.

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

ORDER

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

1. "Lehigh" means Lehigh Portland Cement Company, a corporation, organized, existing and doing business under the laws of the State of Pennsylvania with its principal office located at 718 Hamilton Mall, Allentown, Pennsylvania, and its subsidiaries and the successors and assigns of its business. For the purpose of Paragraphs III, IV, VI and VII of this Order only, "Lehigh" also includes Heidelberg Cement, Inc. (hereinafter "HCI"), a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office located at 100 West Tenth Street, Wilmington, Delaware, and its subsidiaries and the successors and assigns of its business, and Heidelberger Zement Aktiengesellshaft (hereinafter "Heidelberger"), a corporation organized, existing and doing business under the laws of the Federal Republic of Germany, with its principal office located at Berliner Strasse 6, 6900 Heidelberg, West Germany, and its subsidiaries and the successors and assigns of its business.

2. With respect to any business entity named herein, "Subsidiary" means any corporation in which such named business entity owns more than fifty percent (50%) of the outstanding shares of a class of securities having voting power to elect a majority of the Board of Directors of the corporation (whether or not any other class of security has or might have voting powers by reason of the happening of a contingency).

3. "Cement" means portland cement clinker or finished portland cement Types I through V, as specified by the American Society for Testing and Materials. Neither masonry cement, white cement, masonry clinker, nor white cement clinker is included.

4. "Lehigh Cement Manufacturing Plant" means a facility which is then owned by Lehigh, HCI or Heidelberger and which is then engaged in the manufacture of Cement or has been engaged in the manufacture of Cement within the immediately preceding twelve (12) months. For any acquisition(s) of Assets subject to Paragraph IV

of this Order, "Lehigh Cement Manufacturing Plant" shall be determined as of the date of each such acquisition of Assets.

5. "Plant Area" means (i) the area included within the States of Missouri, Iowa, Minnesota, Wisconsin, and Illinois so long as a Lehigh Cement Manufacturing Plant is located within any of these states and (ii) each area in the United States within a 300 mile radius of any Lehigh Cement Manufacturing Plant (except for the facility located at Buffington, Indiana) not located within such states. For any acquisition(s) of Assets subject to Paragraph IV of this Order, "Plant Area" shall be determined as of the date of each such acquisition of Assets.

6. With respect to any acquisition subject to Paragraph IV of this Order, "Assets" means:

(a) any Cement manufacturing plant located in any Plant Area other than a Cement manufacturing plant that has not been engaged in the manufacture of Cement for at least twelve (12) months immediately preceding its acquisition;

(b) any Cement distribution terminal located in any Plant Area other than a Cement distribution terminal that has not been used as a Cement distribution terminal for at least three (3) months immediately preceding its acquisition; or

(c) any equity interest in a business entity, corporate or non-corporate (other than the equity securities of a business entity in which Lehigh owned an equity interest as of February 29, 1980), which owns a facility or facilities described in (a) or (b) above.

7. "U.S. Steel" means United States Steel Corporation, a corporation organized, existing and doing business under the laws of the State of Delaware with its principal office located at 600 Grant St., Pittsburgh, Pennsylvania.

8. "Hannibal Plant" means the Cement manufacturing plant located at Hannibal, Missouri and the Cement distribution terminals located at Summit, Illinois, Bettendorf, Iowa and St. Louis, Missouri, all of which Lehigh has acquired from U.S. Steel, together with such other assets associated with the plant and terminals as may be necessary for the plant and terminals to operate as a going concern and a viable competitor in the production and sale of Cement.

I

It is ordered, That within two (2) years from the date on which this Order becomes final, Lehigh, its directors, officers, employees, and agents shall divest absolutely all right, title and interest in the

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Hannibal Plant together with any and all additions and improvements thereto. Divestiture shall be made to an acquirer or acquirers subject to the prior approval of the Federal Trade Commission.

II

It is further ordered, That pending divestiture of the assets required by Paragraph I of this Order, Lehigh shall not cause or permit the wasting or deterioration of such assets, in any manner which may impair the marketability or viability of any such assets, except for normal wear and tear or in the ordinary course of operation.

III

It is further ordered, That the divestiture required by this Order shall not be made, directly or indirectly, to any person who, at the time of divestiture, is a director, officer, employee or agent of, or is otherwise under the control or direction of, Lehigh.

IV

It is further ordered, That, for a period of ten (10) years from the date on which this Order becomes final, Lehigh shall not acquire, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of any Assets, located in any Plant Area(s) in which Lehigh, at the time of the acquisition, is then engaged in the manufacture of Cement at a Lehigh Cement Manufacturing Plant.

Provided, however, that if Lehigh acquires any Assets which are located only in Plant Area(s) in which no Lehigh facility is then engaged in the manufacture of Cement, but in which any Lehigh facility has been engaged in the manufacture of Cement within twelve (12) months immediately preceding such acquisition of Assets, then Lehigh shall not, without prior Commission approval, engage in the manufacture of Cement at such non-operating facility or facilities for a period of twelve (12) months from the date of such acquisition of Assets or for a period of ten (10) years from the date on which this Order becomes final, whichever period is greater.

Further provided, however, that nothing in this Paragraph affects the lawfulness, under the antitrust laws of the United States, of any acquisition of Assets by Lehigh.

V

It is further ordered, That within one hundred twenty (120) days from the date on which this Order becomes final, and every one hundred twenty (120) days thereafter until it has fully complied with Paragraph I of this Order, Lehigh shall submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by Lehigh to make public its desire to divest the assets described herein, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and (d) copies of all reports, internal memoranda, offers, counteroffers, communications and correspondence concerning said divestiture.

VI

It is further ordered, That within ninety (90) days of January 1, 1982, and annually thereafter until the expiration of the prohibitions in Paragraph IV of this Order, Lehigh shall submit in writing to the Federal Trade Commission verified reports listing all acquisitions of any equity interest in, and mergers with, any business entity, corporate or non-corporate, engaged in the production of Cement in the United States, the date of each such acquisition or merger, and such additional information relating thereto as may from time to time be requested.

VII

It is further ordered, That Lehigh shall notify the Commission at least thirty (30) days prior to any proposed corporate changes which may affect compliance obligations arising out of this Order, such as dissolution, assignment or sale resulting in the emergence of successor corporations.

IN THE MATTER OF

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL UNION 959

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

Docket C-2963. Order, May 9, 1979—Modifying Order, Nov. 2, 1981

In response to recent appeals court decisions under the National Labor Relations Act (NLRA), this order reopens the proceeding and modifies the Commission's order issued on May 9, 1979 (44 FR 34923, 93 F.T.C. 739) by modifying the last proviso of the first ordering paragraph, so as to permit Local 959 to negotiate NLRA-authorized subcontracting agreements with construction industry employers.

ORDER

The Commission on September 18, 1981 having issued an order against respondent to show cause why the proceeding herein should not be reopened for the purpose of modifying the first ordering paragraph of the consent order to cease and desist entered on May 9, 1979; and respondent having answered that it has no objection to the reopening of the proceeding and the modification of the consent order, as set forth in the order to show cause;

Accordingly, *It is ordered,* That the matter is reopened and that the first ordering paragraph of the order herein is modified so that it will read:

It is ordered, That respondent International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 959, its successors and assigns, affiliated sub-divisions, officers, trustees, employees, agents and members, directly or indirectly through any other form of business organization, shall forthwith cease and desist from:

1. Entering into any agreement or understanding that requires an employer engaged in the construction business to use or deal only with third party businesses who agree to perform work on the same terms and conditions as are agreed to between such employer engaged in the construction business and respondent;

2. Entering into any agreement or understanding with an employer engaged in the construction business that requires a third party business to be signatory to a collective bargaining agreement

or other type of agreement that is binding between respondent and such employer engaged in the construction business;

3. Entering into any agreement or understanding with an employer engaged in the construction business that requires respondent to agree to the same terms and conditions of employment with a third party business as are binding between respondent and such employer engaged in the construction business;

4. Taking any action which would discriminate against or economically injure those employers engaged in the construction business which deal with third party businesses on terms other than those agreed to between such employer engaged in the construction business and respondent.

Provided, however, That respondent shall not be prohibited from engaging in any legal activity now or later authorized by federal labor law such as the right of respondent to engage in standards picketing, or entering into any agreement authorized by Section 8(e) of the National Labor Relations Act, 29 U.S.C. 158(e).

IN THE MATTER OF

SOUTHWEST SUNSITES, INC., ET AL.

Docket 9134. Interlocutory Order, Nov. 10, 1981

AFFIRMATION OF ALJ ORDER DENYING RESPONDENTS MOTION FOR PARTIAL SUMMARY DECISION

ORDER

Respondents Southwest Sunsites, Inc., Green Valley Acres, Inc., Green Valley Acres, Inc. II, Sydney Gross and Edwin Kritzler (collectively "subdivider respondents") have filed an interlocutory appeal from the Administrative Law Judge's ("ALJ") Order Denying Respondents' Motion for Partial Summary Decision, dated October 8, 1980. Pursuant to Section 3.23(b) of the Commission's Rules of Practice, the ALJ, on November 28, 1980, authorized this interlocutory appeal upon a determination that "immediate review may advance the termination of the litigation." (November 26 Order at 4.) For the reasons set forth below, the Commission denies the appeal, having determined that resolution of the issues posed by developer respondents should await development of a full factual record.

I.

The Commission issued the complaint in this matter on April 29, 1980. The complaint charges that the subdivider respondents are engaged in the business of acquiring undeveloped land, subdividing the land into lots, and advertising and selling the lots to the public (Compl. ¶ 4); that the lots are sold by standard installment contracts, over terms of up to 10 years, pursuant to which the subdivider respondents retain title to the lots until the final installments are paid (Compl. ¶ 5); and that the subdivider respondents represent that (i) the lots are good investments and there is little or no financial risk involved in the purchase, and (ii) the lots are suitable for use by purchasers as homesites, farms and ranches. (Compl. ¶¶ 9, 12.) The complaint further alleges that in fact the lots have not been and are not good investments involving little or no financial risk to investors, and that the lots are not suitable for use by purchasers as homesites, farms or ranches. (Compl. ¶¶ 10, 13.)

Finally, the complaint alleges that the subdivider respondents have induced and are continuing to induce purchasers of lots * * * to make payments due on their contracts, as well as additional payments substantially in advance of their due dates as provided for

in said contracts." (Compl. ¶ 15.) Such payments are allegedly induced not only by the representations concerning the quality of the investment and the suitability of the lots for use by the purchasers, but "by means of collection letters, prepayment discount offers, and numerous representations, including deceptive representations, concerning or relating to the subdivisions." (*Id.*)

The notice of contemplated relief that accompanied the complaint stated that if the Commission should determine from the record developed herein that the respondents have violated Section 5 as alleged in the complaint, "the Commission may order such relief as is supported by the record and is necessary and appropriate * * *." Specifically, the notice stated that such relief may include, *inter alia,* (i) "[r]equiring the installation of all improvements promised by subdivider respondents within a reasonable period of time"; (ii) "[r]equiring the mailing of a form letter to all current customers informing them of certain facts concerning their purchase and offering them the right to discontinue payments and receive any refund of monies paid in excess of the lot's fair market value"; (iii) granting purchasers "the right to discontinue payments and to receive a refund of monies paid in excess of the fair market value of the purchasers' lots"; (iv) "[r]equiring the payment of all taxes, mortgage payments, and other obligations on the land"; and (v) "other provisions appropriate to correct the unfair and deceptive practices engaged in by respondents."

On July 31, 1980, the developer respondents moved for a partial summary decision, pursuant to Section 3.24(a)(2) of the Commission's Rules of Practice. They argued that the above-mentioned items listed in the notice of contemplated relief are beyond the Commission's authority to order, relying principally upon *Heater* v. *FTC,* 503 F.2d 321 (9th Cir. 1974). They further contended that the question of the Commission's remedial authority in this case is foreclosed under principles of collateral estoppel by the district court's decision in *FTC* v. *Southwest Sunsites, Inc., et al.,* No. CA 3–80–258–F (N.D. Tex), *appeal pending* No. 80–1793 (5th Cir.).

II.

The developer respondents have raised important and difficult questions concerning the scope of the Commission's remedial authority in this proceeding. The Commission has concluded, however, that those issues should be resolved on a complete factual record, rather than through a partial summary decision.

Section 3.24 of the Commission's Rules of Practice contemplates

both full and partial summary decisions. Both procedures can be useful in appropriate cases, but they serve somewhat different purposes. A full summary decision can be used to resolve an entire case where the material facts are undisputed and a trial is needless. In contrast, a partial summary decision does not eliminate the need for a trial, but can be useful to limit and focus the issues to be tried. Many issues, however, can better be addressed after the facts are fully explored at trial. In considering a motion for summary decision, the decisionmaker—the ALJ or the Commission—must weigh the possible benefits from streamlining the trial against the value of a fully developed record in illuminating the issues.

Where, as here, the motion for partial summary decision addresses no distinct claims, but rather certain aspects of the notice of contemplated relief, the benefits of a partial summary decision will rarely outweigh the value of awaiting a fully developed record. Even if particular items of proposed relief are eliminated, that will not ordinarily have the effect of significantly limiting the factual issues for trial. For example, in the present case, the factual issues raised by the charges in the complaint would not appear to be substantially narrowed even if the requested partial summary decision were granted. To be sure, it may be possible to isolate some narrow factual issues relating solely to the elements of contemplated relief challenged by the developer respondents, but those relief elements appear to be factually intertwined with the violation charges set forth in the complaint. This conclusion is consistent with the ALJ's order certifying this appeal, since the ALJ appears to have accepted complaint counsel's argument that, even if a partial summary decision were granted, proof of the value of the land would be a principal issue in the case. (Order of Nov. 26, 1980 at 4.)

More important is the fact that relief issues are particularly difficult to resolve in isolation, without consideration of the factual context in which they arise. In construing the Commission's remedial authority, the guiding principle is that "where the problem lies within the purview of the [Commission] * * * , Congress must have intended to give it authority to deal with the evil at hand." *Pan American World Airways, Inc.* v. *United States,* 371 U.S. 295, 312 (1963). See *Warner Lambert Co.* v. *FTC,* 562 F.2d 749, 756 (D.C. Cir. 1977), *cert. denied,* 435 U.S. 950 (1978). At the present time, the Commission does not know what, if any, evil is at hand in this case, and the authority required to deal with it cannot be finally determined until completion of this proceeding and review of the full record by the Commission. As the notice of contemplated relief plainly states, at this point the Commission is committed only to

ordering "such relief as is supported by the record and is necessary and appropriate * * *." The difficulty and importance of the issues raised by the developer respondents counsel against premature resolution. The Commission prefers to consider what, if any, relief is appropriate before it considers the outer limits of its authority to grant relief.

The Commission's concern that it is premature to address the relief issues posed by the developer respondents is not overcome by respondents' reliance upon *Heater* v. *FTC, supra.* In *Heater* the Commission determined that Heater and a number of corporations he controlled had made a variety of misrepresentations in marketing a credit card program. *Universal Credit Acceptance Corp.,* 82 F.T.C. 570, 643–44 (1973). The Commission ordered restitution of monies collected through the use of the misrepresentations, stating that its goal was "to restore the competitive balance which existed prior to his illegal practices" (*id.* at 652) and to deter future fraudulent and deceptive conduct by depriving Heater of the fruits of his past conduct. *Id.* at 563. On review, the court of appeals held that "[t]he construction placed by the Commission upon its power to define and prohibit 'an unfair act or practice' would, if accepted, operate to invest the Commission with remedial powers which are inconsistent and at variance with the overall purpose and design of the Act. In particular, it would permit the Commission to order private relief for harm caused by acts which occurred before the Commission had declared a statutory violation, and thus before giving notice that the prior conduct was within the statutory purview." However, the Court also conceded that the Commission "has power, in order to remedy the continuing effect of violations of the Act, to order acts imposing economic costs properly attributed to conduct occurring before the conduct is declared illegal." *Id.* at 324 n.13. See also *FTC* v. *Virginia Homes Mfg. Corp.,* 509 F. Supp. 51, 55 n.2 (D. Md. 1980), *aff'd,* No. 81–1187 (4th Cir. July 14, 1981) (*per curiam*).

As complaint counsel point out, the Commission has not acquiesced in the reasoning of *Heater.*[1] But even if the *Heater* analysis were accepted, it is not entirely clear, without a complete factual record, precisely how that analysis would apply to the instant proceeding. For example, the complaint raises charges of continuing deception in an ongoing transaction between the developer respondents and land purchasers—allegations which if proven, may significantly distinguish this case from *Heater.*[2] Under the circum-

[1] The developer respondents also rely on *Congoleum Indus., Inc.* v. *CPSC,* 602 F.2d 220 (9th Cir. 1979). This case was decided by the same court that issued the *Heater* opinion and rested on the *Heater* precedent. It therefore contributes little to respondents' argument.

[2] *Holiday Magic, Inc.* 85 F.T.C. 90 (1975), is not inconsistent with the result here. In that case, the Commission

(Continued)

stances, the Commission concludes that a partial summary decision is not appropriate.

III.

The developer respondents also contend that the elements of the notice of contemplated relief that they challenge are foreclosed by principles of collateral estoppel, based upon the district court's decision on the Commission's request for a preliminary injunction in *FTC* v. *Southwest Sunsites, Inc., supra.* As a preliminary matter, the Commission notes that the decision is presently on appeal, and that a reversal by the court of appeals would obviate any preclusive effect of the district court's decision. See *Prager* v. *El Paso Nat'l Bank,* 417 F.2d 1111, 1112 (5th Cir. 1969). The developer respondents argue that the pendency of the appeal does not affect the preclusive effect of the district court's decision, so long as that decision stands. The Commission does not accept that proposition, at least as respondents would have it apply to this case in its present posture. It would not be a sensible rule of administration to grant a partial summary decision before the appeal is decided.

In any event, the developer respondents' contention is without merit. The proceeding before the district court was a proceeding for a preliminary injunction pursuant to 15 U.S.C. 53(b). The district court was not empowered to decide the merits of the administrative proceeding, but merely issues relating to preliminary relief. See *FTC* v. *Food Town Stores, Inc.,* 539 F.2d 1339, 1342 (4th Cir. 1976). In cases arising under the analogous provisions of the National Labor Relations Act, 29 U.S.C. 160(1), it is well settled that determinations by the district court in a preliminary injunction proceeding do "not foreclose a proceeding on the merits * * *." *NLRB* v *Denver Bldg. & Const. Trade Council,* 341 U.S. 675, 683 (1951). As the District of Columbia Circuit explained in the same case:

> Since two remedies are provided in the statute for the purpose of accomplishing two separate though related purposes of Congress, one in the District Court of a preliminary or interlocutory character, the other before the Board and reviewing courts, of a final character, the separate means designed by Congress for the accomplishment of these purposes must not be permitted to impair the freedom and effectiveness of either.

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had issued a final order which included a restitution provision, and review of the order had been sought in the Ninth Circuit. Concluding that it was not "privileged to disregard judicial precedent of such recent and clearly dispositive vintage" (*id.* at 91), the Commission, *sua sponte,* reopened the proceeding and struck the provision for restitutionary relief from the order. In this case, for reasons set forth above, the Commission is not prepared at this time to determine whether, or to what extent, *Heater* would be dispositive as to the elements of the notice of contemplated relief challenged by the developer respondents.

Denver Bldg. & Const. Trades Council v. *NLRB,* 186 F.2d 326, 331 (D.C. Cir. 1950). Accord, *Walsh* v. *International Longshoreman's Ass'n,* 488 F. Supp. 524, 528 (D. Mass. 1980) (because preliminary injunction proceedings are "merely ancillary to and in aid of the Board's jurisdiction, *res judicata* and collateral estoppel should not apply"). The Commission believes that the same rule, for the same reasons, is applicable to preliminary injunction proceedings under Section 13(b).

It is, therefore, ordered, That the Administrative Law Judge's order denying the developer respondents' motion for partial summary decision be, and hereby is, affirmed.

IN THE MATTER OF

RSR CORPORATION

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

Docket 8959. Order, Dec. 2, 1976—Modifying Order, Nov. 13, 1981

This order reopens the proceeding and modifies the Commission's order issued on December 2, 1976 (42 F.R. 4; 88 F.T.C. 800), so as to relieve respondent of the obligation of divesting the lead recycling plants specified in the original order, since no purchaser(s) could be found. Among other things, the modified order requires respondent to timely divest or auction at no minimum price all the assets and properties (with certain specified exceptions) constituting the lead recycling plants in Dallas, Texas and Seattle, Washington; and offer to license all of its patented sulphur removal and battery recycling process to a qualified purchaser(s).

ORDER MODIFYING ORDER TO DIVEST AND TO CEASE AND DESIST

On April 17, 1981, respondent RSR Corporation filed a "Petition for Relief From Divestiture Order," seeking to be relieved of its obligation to divest Quemetco, Inc. on the ground that it has been unable to find an acquirer for Quemetco's lead recycling plants at any price. Based upon respondent's petition, supplemental information submitted by respondent, and other information available to it, the Commission has determined that it is in the public interest to reopen and modify the order in this case. The Commission also has considered a draft agreement between its staff and respondent concerning modification of the order and has determined that the agreed-to modification is in the public interest.

Accordingly,

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

It is further ordered, That Paragraphs I, II and VII of the Final Order to divest and to cease and desist issued by the Commission on December 2, 1976 be, and they hereby are, modified to read as follows:

I.

It is ordered, That Respondent, RSR Corporation (hereinafter "RSR"), a corporation, and its officers, directors, agents, representatives, employees, subsidiaries, affiliates, successors and assigns, shall divest all assets, title, properties, interest, rights and privileges, of whatever nature, tangible and intangible, including without limitation all buildings, machinery, equipment, customer lists, and other

property of whatever description that comprise the lead recycling plants owned by RSR subsidiaries in Dallas, Texas and Seattle, Washington, except as listed in Appendix A hereto. The plants may be divested either as a unit or separately. In the event that divestiture is not accomplished by other means, RSR must auction the plants, at no minimum price, to an acquirer or acquirers who represent that the plants will be used as lead recycling plants. The divestiture required by this Paragraph shall be absolute, shall be accomplished no later than one (1) year from the date when this modified order shall become final, and shall be subject to the prior approval of the Federal Trade Commission.

II.

It is further ordered, That such divestiture shall be accomplished absolutely and in good faith to an acquirer or acquirers approved in advance by the Federal Trade Commission so as to transfer the plants as operable and viable plants engaged in the production of recycled bulk lead, lead alloys and lead products. RSR shall grant to the acquirer or acquirers of the plants ordered to be divested under this order, at the option of such acquirer or acquirers, a non-exclusive license, subject to a reasonable royalty not to exceed 2%, to all of RSR's patented sulphur removal and battery recycling processes; *provided, however,* that in the event the acquirer of either of the plants to be divested is a battery manufacturer RSR shall only be required to grant such patent licenses to such an acquirer for use at the acquired plant; and *further provided* that RSR is not required to grant such licenses to an acquirer that is a primary lead producer.

VII.

It is further ordered, That within thirty (30) days from the effective date of this modified order and every sixty (60) days thereafter until it has fully complied with Paragraph I of this modified order, RSR shall submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying or has complied therewith. All such reports shall include, in addition to such other information and documentation as may hereafter be requested, (a) a specification of the steps taken by RSR to make public its desire to divest the Dallas, Texas and Seattle, Washington plants, (b) a list of all persons or organizations to whom notice of divestiture has been given, (c) a summary of all discussions and negotiations together with the identity and address of all interested persons or organizations, and

(d) copies of all reports, internal memoranda, offers, counter-offers, communications and correspondence concerning said divestiture.

APPENDIX A

ASSETS NOT REQUIRED TO BE DIVESTED

1. All assets and liabilities related to Bestolife Corporation.
2. Undeveloped land near the 26 acres of the Dallas, Texas plant property.
3. Inventory, including obligations by RSR or its subsidiaries to return such inventory under tolling contracts, and also including raw materials, work in process and finished goods.
4. Accounts receivable.
5. Accounts payable.
6. Cash.
7. Books and records, other than books and records relating to production.

IN THE MATTER OF

THE GILLETTE COMPANY

Docket 9152. Interlocutory Order, Dec. 1, 1981

Granting complaint counsel's motion for review of ALJ's order.

ORDER UPON APPLICATION FOR INTERLOCUTORY REVIEW

This matter is before the Commission on Complaint Counsel's Application For Review Of The Order Granting Discovery Of Commission Records, filed August 17, 1981,[1] ("Complaint Counsel's Application") and Respondent's Answer In Opposition To Complaint Counsel's Application For Interlocutory Appeal, filed August 27, 1981 ("Respondent's Answer").

I. Appropriateness of Interlocutory Review

As the Commission has frequently stated, we generally disfavor interlocutory appeals, particularly those seeking Commission review of an ALJ's discovery rulings. *See, e.g., Bristol-Myers Co.*, 90 F.T.C. 273 (1977). The Commission believes that routine review of such rulings would substantially delay adjudicative proceedings. Moreover, resolution of discovery issues, as a general matter, should be left to the discretion of the ALJ. Section 3.23 of the Commission's Rules of Practice ("Section 3.23") reflects both of these policy decisions; however, it also recognizes that special circumstances may require narrow exceptions to this rule.

Section 3.23(a)(1) provides for discretionary Commission review of an ALJ's order which "requires the disclosure of records of the Commission . . . if such appeal is based solely on a claim of privilege." In this case the requirements of the Rule are technically fulfilled as the ALJ's Order requires disclosure of Commission records and Complaint Counsel's Application is based solely on claims of privilege. The Commission has determined that this matter is appropriately before it on review, not only because the requirements of the Rule are met, but also because the issues raised by Complaint Counsel's Application recur in our proceedings with some frequency.

Respondent requested that, in the event that the Commission entertained this appeal, it be permitted to file a brief and present

[1] The order entitled, Order Ruling on Respondent's Motion For Subpoena *Duces Tecum* Directed To The Federal Trade Commission ("ALJ Order"), was issued on August 11, 1981, by Administrative Law Judge Miles J. Brown.

oral argument on the merits. Section 3.23(a), however, makes further briefing a matter of discretion. In this instance, the Commission believes that counsel on both sides have ably addressed the merits of a narrow set of issues in their briefs before the ALJ and the Commission. Therefore, we do not believe that the delay attendant to the filing of further briefs and additional oral argument is necessary and we proceed to a discussion of the merits of this appeal.

II. Discovery of Names of Informants

The ALJ's Order requires complaint counsel to reveal the names of all nonparties that were contacted in connection with the investigation or preparation of this case. ALJ Order at 2. The ALJ's Order also limits the availability of the informant's privilege only to complainants or to those who complaint counsel can show will be "prejudiced in their future business relations with Gillette." ALJ Order at 2.[2] Complaint counsel argues that the names of all persons contacted during its investigation and pretrial preparation are subject to the informant's privilege. Moreover, complaint counsel asserts that respondent failed to meet its burden to show a need for the names that outweighs the policy behind the informant's privilege. Complaint Counsel's Application at 3–4. The Reply of Respondent The Gillette Company to Complaint Counsel's Answer to Respondent's Motion for Subpoena *Duces Tecum* Directed to the Federal Trade Commission, filed on August, 1981, ("Respondent's Reply") states only that "respondent's need for the identities of those interviewed outweighs the interest of the free flow of information." Respondent's Reply at 7–8. Respondent, however, subsequently filed a supplemental affidavit with the ALJ that it now relies on to demonstrate its "need" for the names of the informants. Respondent's Answer at 5.

It is well established that the government may refuse to disclose the identity of its informants at trial. *See McCray* v. *Illinois,* 386 U.S. 300 (1967). The rationale for this privilege was described in *Roviaro* v. *United States,* 353 U.S. 53 (1957).

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. 353 U.S. at 59.

See also Graber Manufacturing Company, Inc., 68 F.T.C. 1235 (1965)

[2] Although not manifestly limited, this description is treated by both complaint counsel and respondent as encompassing only retailers of Gillette products contacted by complaint counsel.

citing *United States* v. *Deere & Co.,* 9 F.R.D. 523, 527 (D. Minn. 1949). However, the privilege is not applicable unless the information supplied relates to the commission of an unlawful act or is of a nature that would reasonably be expected to precipitate reprisals if it were revealed. *See Wirtz* v. *B. A. C. Steel Products, Inc.,* 312 F.2d 14, 16 (4th Cir. 1962), *United States* v. *Swift & Company,* 24 F.R.D. 280 (N.D. Ill. 1959). Nor is the privilege absolute. *See Roviaro* v. *United States, supra* at 60–61. The burden of overcoming the privilege, however, falls squarely on the party requesting disclosure. Thus the grounds on which disclosure is sought must be clearly articulated. *See United States* v. *Russ,* 362 F.2d 843 (2d Cir.), *cert. denied,* 385 U.S. 923 (1966); *United States* v. *Coke,* 339 F.2d 183 (2d Cir. 1964). A simple request by the moving party for disclosure is not enough to meet this burden. *United States* v. *Mainello,* 345 F. Supp. 863, 881–82 (E.D.N.Y. 1972).

Although the issue of protecting the identity of an informer usually arises in the context of criminal cases, the privilege is also applicable in civil cases. *See Westinghouse Electric Corp.* v. *City of Burlington,* 351 F.2d 762 (1965), *on remand City of Burlington* v. *Westinghouse Electric Corp.,* 246 F. Supp. 839 (D.D.C. 1965); *Mitchell* v. *Roma,* 265 F.2d 633 (3d Cir. 1959). The District Court in *Westinghouse Electric,* a private antitrust case, stated, ". . . The *Roviaro* balance should be struck in each case, civil and criminal, in deciding whether disclosure is essential to a fair determination of a cause." 246 F. Supp. at 769.

The ultimate determination of whether the informant's privilege is applicable in a given factual context depends on a balancing of two considerations: the public interest in protecting the information at issue and the moving party's need for that information in order to prepare a defense. As stated in *Roviaro* v. *United States, supra:*

> . . . Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors. 353 U.S. at 62.

The extent of the informant's participation in the events at issue is critical to finding disclosure necessary. *See Roviaro* v. *United States, supra; United States* v. *Lloyd,* 400 F.2d 414, 415–16 (6th Cir. 1968); *Portomene* v. *United States,* 221 F.2d 582, 583–84 (5th Cir. 1955). The materiality of the informant's testimony to the disputed substantive issues is also highly relevant. *See Encinas-Sierras* v. *United States,* 401 F.2d 228 (9th Cir. 1968); *United States* v. *Franzese,* 392 F.2d 954 (2d Cir. 1968), *vacated per curiam in other grounds sub nom.*

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Giordano v. *United States,* 394 U.S. 310 (1969). Furthermore, the necessity for revealing the informant's identity may also depend on the stage at which discovery is sought. *See McCray* v. *Illinois, supra* at 307. In *United States* v. *Aluminium Limited,* 268 F. Supp. 758 (D.N.J. 1966), an antitrust case, defendant sought discovery of all names of persons contacted by the government. In that case, the District Court denied disclosure stating:

> . . . a defendant is not entitled to every bit of disclosure which he feels would be helpful . . . [A]lthough the information sought may be helpful . . . it may still not be essential to a fair opportunity for defendant's trial preparation. And if it is not essential his interests will not overcome the privilege. *Mitchell* v. *Roma,* 265 F.2d 633, 636 (3rd Cir. 1959). 268 F. Supp. at 762.

Respondent implies that it would not need all of complaint counsel's contacts in an ordinary Section 2(d) case, but the theory of this case calls for unusual case preparation. Respondent's Answer at 6, footnote. However, respondent has not demonstrated nor has it specified how it plans to use the names of the individuals contacted by complaint counsel. It is clear that this need must be examined and weighed, in the first instance by the ALJ.

In this case, the Commission believes that the ALJ failed to make an explicit inquiry into the facts that would militate either in favor of overcoming or retaining the privilege. Moreover, the ALJ's Order did not provide a basis for satisfying Section 3.36, which requires a specific showing that the material sought cannot be reasonably obtained by other means. Therefore, that part of the ALJ's Order that deals with the informant's privilege is reversed and remanded to the ALJ to conduct a factual inquiry and make findings consistent with this Order.[3]

III. Discovery of Reports of Interview

Complaint Counsel's Applicaton also seeks reversal of the directive in the ALJ's Order that compels production of "the factual content of any interview report on such contact prepared by complaint

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[3] The Commission believes that the type of hearing contemplated by the Supreme Court in its proposed Rule of Evidence 510 is an appropriate procedural model. Although this proposal ultimately was not adopted by Congress it, nevertheless, should be accorded considerable weight. Section 510(c)(2) of the proposed rule stated:

> If it appears from the evidence in the case or from other showing by a party that an informer may be able to give testimony necessary to a fair determination . . . of a material issue on the merits in a civil case to which the government is a party, and the government invokes the privilege, the judge shall give the government an opportunity to show *in camera* facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the judge may direct that testimony be taken if he finds that the matter cannot be resolved satisfactorily upon affidavit . . . Evidence submitted to the judge shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall be permitted to be present at every stage of proceedings under this subdivision except a showing *in camera,* at which no counsel or party shall be permitted to be present.

See generally 2 Weinstein, *Evidence,* Section 510-1-7, Section 510 [05] (1980).

counsel." ALJ Order at 2. Complaint counsel argues that production of the interview reports would disclose the names of informants[4] as well as the contents of the communications without regard for the informant's privilege and work product privilege.[5] Respondent argues that the informant's privilege and work product privilege are not applicable to the reports of interview since respondent has met its burden of showing a substantial need for the information.

Section 3.31(b)(3) provides for two layers of protection for materials sought in discovery by a party which were "prepared in anticipation of litigation or for hearing by or for another party." It requires that the ALJ "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party."[6] However, the Rule also protects all work product against disclosure, absent a showing of "substantial need of the materials in the preparation of [the requesting party's] case," and a further showing "that he is unable without undue hardship to obtain the substantial equivalent of the material by other means."

The ALJ's Order makes no specific reference to the requirements of Section 3.31(b)(3) nor any explanation of how the requirements of that Rule or the established requirements of the work product privilege are satisfied by respondent's arguments. Furthermore, there is no indication that the ALJ weighed respondent's need for the information against the presumption that interview reports are privileged as work product. Rather, the ALJ simply held that, "Respondent is entitled to know the evidentiary substance of the Commission's investigation, including the documents which complaint counsel intend to offer into evidence as well as the documents which they do not intend to offer." ALJ Order at 1–2. Having reached this conclusion, the ALJ went on find that complaint counsel's files were the only available source of this information.

[4] We believe that the names of potential witnesses in and of themselves are not ordinarily work product as contemplated by the Supreme Court in *Hickman* v. *Taylor*, 329 U.S. 495, 511 (1947). Therefore, discovery of the names is privileged, if at all, only under the informant's privilege.

[5] Although the subpoena in question seeks reports of interviews with those who may be regarded as potential witnesses for complaint counsel in this proceeding, we are not concerned here with the application of the Jencks Act principle. *See U.S. Life Credit Corp.*, 91 F.T.C. 984 (1978). That principle supports production of complaint counsel's interview reports, if at all, only after a witness has actually testified, in order to aid cross-examination. *Inter-State Builders, Inc.*, 69 F.T.C. 1152, 1165–67 (1966). It also requires the strict application of criteria intended to ensure that the reports or statements sought are accurate and complete. *U.S. Life, supra*, at 1038–39. Neither the appropriate circumstances nor the requisite showings are presented here for the application of this principle, nor has respondent sought its application.

[6] This provision is not at issue here, since the ALJ has authorized excision of such material. ALJ Order at 2. We note, however, a presumably inadvertent variance between the ALJ's formulation and that of the rule, in that the Order speaks of excision of "legal opinions" ragher than simply "opinions." We also note that the Commission has previously indicated that interview reports may be entitled to protection under this "inner core" provision. *See Inter-State Builders, supra* at 1164. *See also Hickman* v. *Taylor, supra.* In view of our holding here, we deem it unnecessary to reach this question in the present context.

Second, we believe that the ALJ failed to articulate the appropriate legal standard and factual basis for reaching his conclusion regarding the reports of interview. As was stated in *Hickman* v. *Taylor, supra,* there must be ". . . a proper showing of the necessity for the production of any of this material or [a] demonstration that denial of production would cause hardship or injustice." 329 U.S. at 509. *See also Allied Chemical Corp.,* 75 F.T.C. 1055, 1057 (1969). There is no doubt that respondent may have a need for information relating to complaint counsel's case; however, discovery of the results of complaint counsel's investigation is not a "need" nor a right recognized by our rules or that of any other authority of which we are aware. In the orderly course of preparation for trial respondent will obtain witness and exhibit lists and can interview or depose intended witnesses to fully explore complaint counsel's contentions.[7] Therefore, recognizing a categorical "need" for all information gathered during the investigation, without a showing, of "substantial need," would directly contradict the purpose of Section 3.31(b)(3), as well as the carefully defined limits of the Jencks Act principle. At best, respondent's strongest argument is merely one of convenience. *See Bell & Howell Co.,* Docket No. C–9099 (Order of April 11, 1978). This rationale, however, does not meet the "substantial need" test that has been long established as the cornerstone of the work product privilege. Indeed, as Justice Jackson stated in his concurring opinion in *Hickman* v. *Taylor, supra,*

> Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary. 329 U.S. at 516

It is therefore ordered, That, upon consideration of the pleadings submitted by complaint counsel and respondent, complaint counsel's application for review be granted.

It is further ordered, That the Administrative Law Judge's August 11, 1981, Order be *Reversed* and *Remanded.*

[7] Indeed, the ALJ's Order specifically contemplates such further discovery; however, it states, "Return on these specifications would be premature [at this time]." ALJ Order at 2.

IN THE MATTER OF

GODFREY COMPANY

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-3066. Order, May 14, 1981—Modifying Order, Dec. 3, 1981

This order reopens the proceeding and modifies the Commission's order issued on May 14, 1981 (46 F.R. 29458; 97 F.T.C. 457), by modifying Paragraph I(G) of the Order to relieve respondent from the obligation of divesting a specified retail grocery store.

ORDER MODIFYING CEASE AND DESIST ORDER ISSUED MAY 14, 1981

The Federal Trade Commission having considered respondent Godfrey Company's petition filed on August 5, 1981 to reopen this matter and to modify the consent order to cease and desist issued by the Commission on May 14, 1981, and having determined that reopening and modification of the order is warranted:

It is ordered, That this matter be, and it hereby is reopened and that Paragraph I(G) of the Commission's order be and it is hereby modified to read as follows:

(G) The "disposition stores" means the following Godfrey ("G") stores and Jewel ("J") stores:

1. G–427 (3045 S. 13th St., Milwaukee, WI.)
2. G–607 (6077 S. Packard Ave., Cudahy, WI.)
3. G–810 (3939 S. 76th St., Milwaukee, WI.)
4. J–1201 (1201 N. 35th St., Milwaukee, WI.)
5. J–729 (719 S. Layton Blvd., Milwaukee, WI.)
6. J–15182 (N81 W. 15182 Appleton Ave., Menomonee Falls, WI.).

IN THE MATTER OF

GROLIER INCORPORATED, ET AL.

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

Docket 8879. Order, March 13, 1978—Modifying Order, Dec. 10, 1981

This order reopens the proceeding and modifies the Commission's order issued on March 13, 1978 (91 F.T.C. 315; 43 F.R. 18652), by changing the disclosure requirements contained in Paragraphs II(A), (B), (D), and (E), so as to give respondents a choice of several approved methods of making required disclosures in advising those who reply to respondents' solicitations that they may be contacted directly by a salesperson; and allows sales personnel to present a business card containing prescribed information when making a sales visit.

ORDER MODIFYING CEASE AND DESIST ORDER

On August 13, 1981, the Commission issued an order denying respondents' motion to disqualify the Administrative Law Judge who rendered the Initial Decision in this proceeding. In its order, the Commission also invited the parties in this matter to file before the Commission their views as to whether the original Final Order of the Commission, 91 F.T.C. 315 (1978), should be modified to conform to the modified order in *Encyclopaedia Britannica,* 96 F.T.C. 778 (1980).

On September 30, 1981, respondents filed a response to the Commission's order. In this submission, respondents first proposed modifying the *Grolier* order to incorporate modifications made in *Britannica* on October 28, 1980. Second, respondents asked for guarantees that any future modifications in *Britannica* also be granted to respondents here. Third, respondents moved that the instant proceeding be stayed until the Commission takes action on a pending motion for further modifications in the *Britannica* order. Finally, respondents also seek a stay on the ground that a trade regulation rulemaking, rather than an adjudication, is the appropriate manner to conduct further proceedings involving Grolier.

Complaint counsel, on October 14, 1981, filed its answer to respondents' submission, pursuant to the August 13 order. Complaint counsel do not oppose modification of the *Grolier* order to conform with modifications already made in *Britannica.* But, they oppose any assurances of future modifications on the ground that in the event of such modifications, the Commission's rules afford Grolier an appropriate procedural vehicle, Rule 2.51(b), by which Grolier may petition for further modifications in its order. An

ssessment of whether further modifications should be made in either of the orders in question depends on facts and circumstances particular to the acts and practices of each company. Complaint counsel also oppose granting any stay in order to facilitate a conversion of this adjudication to a rulemaking proceeding.

The Commission agrees with the parties that the modifications in the *Britannica* order granted on October 28, 1980, should now be granted to Grolier. However, the Commission believes that the issue of further modifications in *Britannica* cannot now be resolved with respect to these respondents because the request for further modifications that Britannica made (and which we will allow Grolier to make) depends upon experience in complying with the first modification. See paragraphs 2 and 3, *infra.* Britannica has had this experience, but Grolier has not.[1] Moreover, Grolier has available to it a right to petition the Commission for reopening the *Grolier* matter should any further modifications in *Britannica* justify similar treatment of Grolier. Therefore, a stay of this matter pending further events in *Britannica* would be inappropriate.

Nor does the Commission believe a stay is justified pending resolution of this matter by an industrywide rulemaking proceeding. Respondents rely on *Ford Motor Co.* v. *FTC,* 654 F.2d 599 (9th Cir. 1981) for the proposition that rulemaking is preferable to adjudication where the Commission is attempting to change existing law or to establish rules of widespread application. In this matter the Commission did not engage in any novel interpretation of existing law as the court of appeals believed occurred in *Ford Motor Co.,* but rather the Commission declared practices to be unlawful that were established as violations of Section 5 of the FTC Act over a decade ago, see, e.g., *P.F. Collier & Son Corp.* v. *F.T.C.,* 427 F.2d 261 (6th Cir.), *cert. denied* 400 U.S. 926 (1970). It is true that issues of relief involving affirmative disclosures distinguish *Grolier* from earlier cases, but the crafting of relief is particular to the facts and circumstances of each case. In this instance, affirmative disclosures were ordered because of the Commission's experience that mere cease and desist order provisions were inadequate to remedy the abuses found to be in violation of Section 5, practices that had persisted over time, despite earlier prohibitive relief. *Grolier, Inc.,* 91 F.T.C. 315, 437, n.98. In this regard, the Seventh Circuit held, in a related case, that rulemaking was not required to replace adjudication where relief differed because "[a] prior insufficient order do

[1] Grolier's argument that it would be at a competitive disadvantage if the Commission does not now as Grolier it will receive all future modifications granted in *Britannica* is disingenuous. As matters now st Britannica is bound by our order while Grolier is not. Grolier has offered no evidence that it is volunt complying with our order and until it does comply it probably has a competitive advantage.

not necessitate the insufficiency of all later orders." *Encyclopaedia Britannica, Inc.* v. *FTC,* 605 F.2d 964, 974 (7th Cir. 1979), *cert. denied,* 445 U.S. 934 (1980).

Therefore, it is ordered, That Paragraphs II(A), (B), (D), and (E) of the Order issued in this docket on March 13, 1978, shall be modified as follows:

1. Paragraph II(A) shall read:

A. Disseminating or causing to be disseminated any advertisement or promotional material which solicits participation in any contest, drawing or sweepstakes, or solicits any response to any offer of merchandise, service or information, unless any such solicitation clearly and conspicuously discloses that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondents' products, using one of the following disclosures:

1. IMPORTANT: This card will let you know of my interest and enable your [location designation, if appropriate] sales representatives to
(contact me at home) (information)
(call or visit me) with (details)
(contact me in person) (facts)
on how I may (purchase) [applicable product].
(buy)
2. IMPORTANT: Returning this card allows me to have your [location designation, if appropriate] sales representative to
(contact me at home) (information)
(call or visit me) with (details)
(contact me in person) (facts)
on how I may (purchase) [applicable product].
(buy)
3. IMPORTANT: Returning this card will enable your [location designation, if appropriate] sales representative to
(contact me at home) (information)
(call or visit me) with (details)
(contact me in person) (facts)
on how I may (purchase) [applicable product].
(buy)

n prior approval in writing of the Assistant Director of the sion of Compliance of the Bureau of Consumer Protection, or his nee, respondents may use any other disclosure that clearly and

conspicuously discloses that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondents' products. A request for approval shall be in writing and shall be deemed granted if not disapproved within 30 days after receipt by the Assistant Director of the Division of Compliance of the Bureau of Consumer Protection.

2. Paragraph II(B) shall read:

B. Providing any return card, coupon or other device which is used to respond to any advertisement or promotional material covered by Paragraph II(A) above, unless one of the disclosures set forth in such Paragraph, or a disclosure approved by the Assistant Director of the Division of Compliance or his designee as satisfying the requirements of Paragraph II(A), clearly and conspicuously appears in immediate proximity to the space provided for a signature or other identification of the responding party. During the one (1) year period from the date this Order becomes final, respondents may submit a request to reopen these proceedings pursuant to Section 2.51 of the Commission's Rules of Practice. Such petition shall contain information demonstrating that any proposed modifications of Paragraphs II(A) and II(B) will clearly and conspicuously disclose to potential purchasers of respondents' products that a person who replies as requested may be contacted directly by a salesperson for the purpose of selling respondents' products. The foregoing sentence shall not be construed as a limitation of respondents' submission of additional information regarding the request to reopen, including information relating to the financial impact of Paragraphs II(A) and II(B) on respondents. Should a request be submitted, the Commission shall determine whether to reopen these proceedings within one hundred-twenty (120) days of receipt of such request. The procedure to reopen the proceedings as set forth herein is in addition to, and not in lieu of, any other procedure (or time period with respect to such procedure) permitted by law or the Commission's Rules of Practice.

3. Paragraph II(D) shall be amended by adding the following proviso at the end thereof:

Provided, however, That for one (1) year from the date this Order becomes final, respondents may, in lieu of the card required by this Paragraph of the Order, substitute a business card of at least 2 inches by 3½ inches containing only the following information:

1. the name of the corporation

2. the name of the salesperson
3. the term "sales representative"
4. An address and telephone number at which the corporation or salesperson may be contacted
5. the product or the corporation logo or identifying mark.

During this one (1) year period, respondents shall comply in all other respects with the requirements of Paragraph II(D) above. Prior to the expiration of the aforesaid time period, respondents may submit a request to reopen these proceedings pursuant to Section 2.51 of the Commission's Rules of Practice. Such petition shall contain information demonstrating that the business card required in Paragraph II(D), as modified above, is effective in communicating to potential purchasers, prior to the entry into their homes or places of business by any of respondents' sales representatives, that the purpose of the sales representatives' call is to solicit the sale of respondents' products. The foregoing sentence shall not be construed as a limitation on respondents' submission of additional information regarding the request to reopen, including information on the financial impact of Paragraph II(D) on respondents. Should a request be submitted, the Commission shall determine whether to reopen these proceedings within one hundred-twenty (120) days of receipt of such request. Respondents may continue to use the business card, as described by this proviso, during the time that a request to reopen these proceedings pursuant to this Paragraph is pending, and, if such proceedings are reopened, until the Commission determination of the matter has become final. The procedure to reopen the proceedings as set forth herein is in addition to, and not in lieu of, any other procedure (or time period with respect to such procedure) permitted by law or the Commission's Rules of Practice.

4. Paragraph II(E) shall be amended by striking the words "to direct each such person to read the information contained on such card." The amended Paragraph shall read:

E. Failing to give the card, required by Paragraph II(D), above, to each person and to provide each such person with an adequate opportunity to read the card before engaging any such person in any sales solicitation.

It is further ordered, That the foregoing modifications shall come effective upon service of this Order.

It is further ordered, That in all other respects, respondents' other requests are denied.

IN THE MATTER OF

CREDIT CARD SERVICE CORPORATION

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

Docket 8861. Final Order, Jan. 19, 1973—Modifying Order, Dec. 14, 1981

This order reopens the proceeding and modifies the Commission's order issued on January 19, 1973 (82 F.T.C. 191; 38 FR 5157) by updating the "IMPORTANT NOTICE" contained in Paragraph 5 of the order, to reflect revisions to Regulation Z, altering the conditions of cardholder liability.

ORDER REOPENING THE PROCEEDING AND MODIFYING CEASE AND DESIST ORDER

On August 14, 1981, the respondents, whose principal service is notification to credit card issuers that a subscriber's credit cards have been lost or stolen, filed a request that the Commission reopen the proceeding in the above docketed matter for the purpose of: (1) eliminating paragraph 5 of the Order of January 19, 1973, which requires that the IMPORTANT NOTICE as set forth therein be incorporated verbatim in all written advertisements disseminated by the respondents; (2) substituting in its place only "a general disclosure that the cardholder's liability is limited to $50, but then only if the conditions imposed by Federal regulation are met by the card issuer"; and (3) deleting John P. Ferry as an individual respondent. Respondents also requested that the 30-day public comment period be waived.

By letter dated August 27, 1981, the Secretary informed the respondents that the Commission had denied their waiver request.

Paragraph 5 of the order reads as follows:

5. Failing to incorporate the following notice clearly and conspicuously in any written material offering the sale of respondents' credit card registration service to the public:

IMPORTANT NOTICE

Effective January 24, 1971, a Federal law provides that a cardholder has no liability for unauthorized use of his credit card unless all of the following four conditions are met. If the card issuing company (1) has notified you of your new limited liability, (2) has provided you with a pre-stamped envelope by which to notify them of a loss, (3) the card contains an approved method of identification, and (4) the use occurred before the card issuer is notified, then your liability is limited to $50 per card.

Respondents state that the IMPORTANT NOTICE is no longer "a

correct statement of the requirements for card issuers to impose the $50 liability"; that the continued imposition of a single notice can be misleading and confusing to the consumer and often contrary to the actual practices of the credit card issuer; and that the Truth in Lending Simplification and Reform Act and the amended Regulation Z have modified some of the conditions under which a cardholder can be held liable for unauthorized use. As an example, they mention the fact that card issuers are no longer required to provide pre-stamped envelopes for notice of loss or theft, but only "adequate notice" of the "means by which the card issuers may be notified of loss or theft of the card." Respondents also state that, since Regulation Z imposes the disclosure requirements on the card issuers, they should not be required any longer to include the IMPORTANT NOTICE in their advertising, especially in view of the fact that the respondents place "virtually no emphasis on risk of loss" in their advertising and in view of the fact that there are many other companies in the credit card registration business which are not required to include such a verbatim statement in their advertising.

Respondents contend that since they market their "credit card registration service primarily through joint promotions with banks, department stores, automobile rental companies, airlines, and other credit card issuers", and "since these joint promotions are generally made under the name of the card issuer, all advertising materials must be tailored to the particular practices of that card issuer", and that since "some credit card issuers continue to provide pre-stamped envelopes, others permit telephone notification, while still others require notification of loss or theft in written form . . . [as] permitted by amended Regulation Z, it is extremely difficult to draft language which would be accurate under all circumstances." They further contend that "as more and more credit card issuers begin to determine their own specific means for notification, the adoption of a single notice becomes all but impossible."

Finally, respondents request that John P. Ferry be dropped as the named individual respondent because he "is no longer the only shareholder" and because the company has been in full compliance with the Order for eight years.

On September 14, 1981, respondents filed a memorandum in support of their request to reopen proceeding and modify the order. They state that Credit Card Service Corporation is no longer wholly-owned by Mr. Ferry; that more than one-third of its stock is held by an employee trust and an additional 12 percent by outside shareholders; that Mr. Ferry is no longer the person responsible for the formulation of its advertising practices; that for the past 5 years the

corporate respondent has had a President who is the chief operating officer with responsibility for advertising; that Mr. Ferry has served as Chairman exercising only broad policymaking authority; and that Mr. Ferry "should no longer be individually subject to the terms of the Order" in view of the change of circumstances since 1973 when the Order was issued.

After the hearing in January 1972, the Administrative Law Judge found that Mr. Ferry . . . formulated, directed and controlled the acts and practices of the corporate respondent (82 F.T.C. at 196); and that he knew of the existence and effective date of the Truth in Lending Act amendment which set the $50 limit on liability for unauthorized use of lost or stolen credit cards (82 F.T.C. at 197) before he disseminated advertising with false, misleading and deceptive representations that cardholders would be liable for all goods and services obtained by unauthorized use of such cards and might suffer financial ruin (82 F.T.C. at 198, 202). We adopted these findings and the United States Court of Appeals for the District of Columbia Circuit affirmed our decision in its entirety on March 29, 1974. See 495 F.2d 1004. The evidence received in this matter fully supported the findings and the Order.

It is well settled that a corporation is not the only vehicle through which individuals, who have been personally involved in unlawful practices, may in the future continue to engage in such practices. *Tractor Training Service* v. *F.T.C.*, 227 F.2d 420, 425 (9th Cir. 1955), *cert. denied,* 350 U.S. 1005 (1956); *Consumer Sales Corp.* v. *F.T.C.*, 198 F.2d 404, 407–408 (2d Cir., 1952), *cert. denied,* 344 U.S. 912 (1953). Furthermore, it would seem incongruous to keep in force an order against the lifeless entity of a corporation, while exempting from its operation the living individual who was responsible for the illegal practices. See *Pati-Port, Inc.* v. *F.T.C.*, 313 F.2d 103, 105 (4th Cir. 1963).

Mr. Ferry owns more than 50% of the stock of Credit Card Service Corporation and is the Chairman of its Board of Directors. As such, he would be responsible for the acts and practices of the corporation. A claim of past and current compliance with the order raises only a collateral issue on the question of whether Mr. Ferry should no longer be named, and it is not determinative. The determining factor is the likelihood of resumption of the prohibited practices. We have not been convinced by respondents' arguments to the contrary.

Respondents have represented to us in their request to reopen that the absence of the IMPORTANT NOTICE statement would not be misleading since they place "virtually no emphasis on risk of loss" in their advertising. This assertion, however, seems to be at variance

with the respondents' advertising disseminated during September and/or October 1980 to the holders of Master Charge credit cards, serviced by the Bank of Virginia. The four page letter contains the IMPORTANT NOTICE at the bottom of the first page. It is preceded by these statements:

> What would you do tomorrow if you suddenly discovered that your purse or wallet—with all of your credit cards—was missing? . . . Would you know how to protect yourself in a hurry? . . . How quickly could you find the phone numbers of each credit card company and locate the right people to talk to? I ask "How quickly" because you certainly don't want to wait until some criminal starts making dishonest purchases on your cards.

And it is followed by these statements:

> The whole purpose of the Credit Card Service Bureau . . . is to safeguard credit cardholders from this kind of financial worry and emotional hassle . . . Last year alone, nearly *fifteen and a half million* credit cards were reported lost or stolen—and one in sixteen of these missing cards was used to make *fraudulent purchases averaging $410 per card*!

Other statements as to liability are interspersed throughout the letter such as:

> 2. . . . and you will avoid even one cent of liability for fraudulent purchases that are charged subsequently to your account.

Respondents' statement that the adoption of a single notice becomes all but impossible as more and more credit card issuers "determine their own specific means for notification" of the loss of credit cards, is a misstatement of the applicable law as interpreted by the Board of Governors of the Federal Reserve System. The method of notification of a lost or stolen credit card is not left to the whims of each card issuer. Section 226.12(3) of Regulation Z, as amended, provides that "Notification may be given, at the option of the person giving it, in person, by telephone, or in writing." Finally, we are of the opinion that allowing the respondents to design their own disclosure statement would be to invite renewal of the practices which led to entry of the order in the first place. Therefore we conclude that the IMPORTANT NOTICE should be retained.

In view of the changes in the law and in Regulation Z, the remaining issue is whether the proceeding should be reopened for the limited purpose of updating the IMPORTANT NOTICE. Since the Truth in Lending Act no longer requires that a credit card issuer provide a pre-stamped envelope to its subscribers for use in reporting the loss of the credit card, we hold that it is in the public interest to

reopen the proceeding and make the necessary changes in the IMPORTANT NOTICE to reflect the current law. Therefore:

It is ordered, That the proceeding in Docket 8861 be, and is hereby reopended; and

It is further ordered, That the IMPORTANT NOTICE of paragraph 5 of the order be rescinded and hereby replaced by the following:

IMPORTANT NOTICE

Federal law provides that a cardholder has no liability for unauthorized use of his or her credit card unless all of the following four conditions are met. If the card issuer (1) has notified you of your limited liability, (2) has provided you with adequate means to notify it of the credit card loss, (3) has provided a means of identifying the authorized user, and if (4) the unauthorized use occurred before the card issuer is notified, then your liability is limited to $50 per card.

It is further ordered, That the foregoing modification shall be effective upon service of this order.