IN THE MATTER OF

PAY'N PAK STORES, INC.

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

Docket C-2780. Complaint, Jan. 16, 1976—Decision, Jan. 16, 1976

Consent order requiring a Kent, Wash., general merchandise retail chain, among other things to cease misrepresenting the availability of goods. Further, respondent is required to prominently display the location and price of items advertised below the regular price; and to issue rainchecks for any advertised items temporarily out of stock.

Appearances

For the Commission: *Sarah J. Hughes* and *W. Lee Buck.*

For the respondent: *William N. Moloney, Davis, Wright, Todd, Riese & Jones*, Seattle, Wash.

COMPLAINT

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

PARAGRAPH 1. Pay'n Pak Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 1209 So. Central, Kent, Washington.

PAR. 2. All allegations made in the present tense include the past tense.

PAR. 3. Respondent owns and operates retail hardware, plumbing and general merchandise stores in Washington, Idaho, Oregon, Montana, Alaska and other States in the United States. In the operation of its retail stores, respondent offers and promotes for sale and sells to its customers an extensive line of products, all of which are referred to hereafter as "items." Respondent's sales for the year ending February 28, 1974 exceeded 50 million dollars.

PAR. 4. In the course and conduct of its business, respondent causes the shipment and distribution of various items from warehouses and sellers located in various States to its retail stores located in various other States. Respondent transmits contracts, business correspondence, monies and other documents among and between its stores,

offices and divisions located in various States. Respondent disseminates advertisements in newspapers of interstate circulation. Respondent maintains and at all times mentioned herein has maintained a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of its business, as aforesaid, respondent disseminates and causes to be disseminated certain advertisements concerning the aforesaid items by various means including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said items from respondent. Many of the said advertisements list, describe or depict various items and also contain statements and representations concerning the prices, terms or conditions under which said items would be offered for sale and sold to the public.

PAR. 6. By disseminating the aforesaid advertisements, respondent represents directly or by implication that in those stores covered by those advertisements, the items listed or depicted in such advertisements would be or are:

A. Readily available for sale;

B. readily available for sale at or below the advertised prices; and

C. sold to customers at or below the advertised price.

PAR. 7. In truth and in fact, in a number of respondent's stores in the State of Washington covered by the aforesaid advertisements, in the two or three day period following the date of the dissemination of the advertised offers, a substantial number of items listed or depicted in the said advertisements are:

A. Not readily available for sale;

B. not readily available for sale at or below the advertised prices; or

C. sold to customers at prices higher than the advertised prices.

The statements and representations as referred to herein are false, misleading and deceptive and respondent's sale of items to customers at prices higher than the advertised prices as described above is unfair. Therefore, respondent is engaged in deceptive and unfair acts and practices.

PAR. 8. The use by respondent of the aforesaid false, misleading, unfair and deceptive statements, representations, acts and practices has the capacity and tendency to mislead the purchasing public into the erroneous and mistaken belief that said statements and representations are true and to induce such persons to patronize respondent's stores

and to purchase from respondent items other than the advertised items and the advertised items at prices in excess of those advertised.

PAR. 9. By disseminating advertisements which announce a "store wide clearance," "more January clearance buys," a "pre-inventory sale," and similar phrases, and by failing to segregate and identify in the advertisements those items which are not offered at reduced prices, respondent represents that all items listed and depicted are offered at reduced prices.

PAR. 10. In truth and in fact, a substantial number of the items listed and depicted in said advertisements are not offered at reduced prices.

PAR. 11. The use by respondent of the aforesaid false, misleading, unfair and deceptive statements, representations, acts and practices as described in Paragraphs Nine and Ten has the capacity and tendency to cause the purchasing public to believe that every item is at a reduced price. Therefore, respondent is engaged in unfair and deceptive acts and practices.

PAR. 12. In a substantial number of instances, respondent places more than one sign at the location where an advertised item is displayed in respondent's retail stores. Such signs show different prices for the advertised item such as the manufacturer's suggested price, the regular price, the advertised price or a clearance price, or all of said prices.

PAR. 13. The use by respondent of more than one sign at the location where an advertised item is displayed has the capacity and tendency to confuse the purchasing public about the price at which the advertised item will be sold, and constitutes an unfair or deceptive act or practice.

PAR. 14. In the course and conduct of its business, respondent is in substantial competition in commerce with corporations, partnerships, firms and individuals in the retail hardware, plumbing, electrical and auto repair supply and sporting goods businesses.

PAR. 15. The acts and practices of respondent, as herein alleged, are all to the prejudice and injury of the public and of respondent's competitors, and constitute unfair and deceptive acts and practices and unfair methods of competition in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent 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 days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Respondent Pay'n Pak Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Washington, with its office and principal place of business located at 1209 So. Central, Kent, Washington.

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

ORDER

I

It is ordered, That Pay'n Pak Stores, Inc., a corporation, its successors and assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of hardware, plumbing, electrical and auto repair supply, sporting goods, or other products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from representing orally, in writing, visually or in any other manner, directly or by implication, that any item is available for sale to the public at its stores at any price unless:

A. Each advertised item is readily available for sale to customers in

the public area of the store, or if not readily available there, a clear and conspicuous notice is posted where the item is regularly displayed which states that the item is in stock and may be obtained upon request, and said item is made available upon request; and

B. At each location where an advertised item is displayed for sale, there is one, and only one sign or other conspicuous marking which clearly discloses that the item is "as advertised" or "on sale" or words of similar import and meaning and the advertised price and, in addition, there may be only one other sign which states respondent's regular price; and

C. If items comparable in function, type and kind, but not necessarily in price, to the advertised item(s) are displayed and are readily available on a self-service basis, the advertised item(s) must also be displayed at the same location and when appropriate in a comparable range of sizes, colors and styles; and

D. Each advertised item, excluding items which by their nature are too small to be individually marked and items which are listed on Attachment I as not being individually marked with a price in the normal course of respondent's business, is individually and clearly marked with the advertised price; and

E. Each advertised item is sold to customers at or below the advertised price;

Provided, That it shall not be deemed a violation of the above subparagraphs A, D, or E, if respondent is complying with a specific exception, limitation or restriction with respect to store, item, or price which is clearly and conspicuously disclosed in all advertisements, or if merchandise must be prepared according to the customer's specifications;

Provided, further, That it shall constitute a defense to a charge of unavailability under subparagraph A. if respondent maintains and furnishes or makes available for inspection and copying upon the request of the Federal Trade Commission, such records and affidavits as will show that (a) the advertised items were ordered in adequate time for delivery and were delivered to its stores in quantities sufficient to meet reasonably anticipated demands, or (b) ordered items were not delivered due to circumstances beyond respondent's control, and respondent, upon notice or knowledge of such nondelivery acted immediately to contact the media to correct the advertisement or proposed advertisement to reflect the limited availability or unavailability of each advertised item, and (c) respondent immediately offered to customers on inquiry a "raincheck" entitling them at respondent's option to purchase the item in the near future at the advertised price or a similar item of equal or better quality at the advertised price, if

available. If a "raincheck" is issued and the item does not become available in the next 30 days, respondent will then allow the customer to purchase a similar item of equal or better quality at the advertised price, if available.

II

It is further ordered, That Pay'n Pak Stores, Inc., a corporation, its successors and assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, shall, in any advertisement which offers both reduced price and regular price items:

A. Clearly and conspicuously segregate and identify those items which are not offered at reduced prices; and

B. Clearly and conspicuously qualify the "sale" or reduction representation by a statement in immediate conjunction thereto in the advertisement which indicates that all items advertised are not offered at reduced prices.

III

It is further ordered, That respondent cease and desist from disseminating, or causing the dissemination of any advertisement by any means which offers any items for sale at a stated price, unless the advertisement contains a statement that: "Each of the advertised items is required to be readily available for sale at or below the advertised price in each Pay'n Pak store, except as specifically noted in this ad," and a statement of the specific period during which the items will be available at the advertised prices.

IV

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

"NOTICE"

A. A copy of the advertisement.

B. A statement that: "All items listed in the above advertisement are required to be readily available for sale at or below the advertised price, except as specifically noted in the above advertisement."

C. A statement that: "If any advertised item that you wish to purchase is unavailable, you will be entitled to a 'raincheck' which will enable you to purchase the item at the advertised price in the near future, or if the item does not become available in the next 30 days, then a similar item of equal or better quality at the advertised price, if available."

D. A statement that: "If you have any questions, please speak to the manager, department head or assistant manager."

V

It is further ordered, That:

A. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities with respect to individual retail stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent secure a signed statement acknowledging receipt of said order from each such person;

B. Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its retail stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

C. Respondent shall, for a period of two (2) years subsequent to the date of service of the order:

1. Maintain business records which show the efforts taken to insure continuing compliance with the terms and provisions of this order, including but not limited to duplicates of all rainchecks issued;

2. Grant any duly authorized representative of the Federal Trade Commission access to all such business records;

3. Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives.

D. Respondent shall, all other provisions of this order notwithstanding, on or before each of the first two (2) anniversary dates of service of the 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 in the preceding year.

VI

It is further ordered, That respondent shall notify the Commission at

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least thirty days prior to any dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the respondent which may affect compliance obligations arising out of this order.

VII

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

ATTACHMENT I

Items which are (1) prepared according to customer specification, or (2) delivered directly to the customer from the non-public areas of the store and sold on invoice. Items which are delivered directly to the customer from non-public areas of the store include, but are not necessarily limited to, the following:

1. Fluorescent light fixtures
2. Laundry tubs
3. Fiberglass paneling (corrugated)
4. Sliding aluminum windows
5. Microwave ovens
6. Major appliances
   a. electric and gas ranges
   b. refrigerators
   c. dishwashers
   d. hot water heaters
   e. Franklin, conical and zero-clearance fireplaces
7. Insulation — in rolls
8. Paneling — (wood finish wall paneling)
9. Plasterboard — (referred to as sheetrock)
10. Bath tubs
11. Shower stalls — steel or fiberglass
12. Medicine cabinets
13. Toilets
14. Roofing material
15. Fencing material
16. Tents
17. Storm and screen doors
18. Bi-fold doors
19. Pre-hung doors
20. Pool tables
21. Ceiling tile
22. Bathroom vanities

IN THE MATTER OF

ARGONAUT INVESTMENTS, INC., ET AL.

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

Docket C-2781. Complaint, Jan. 19, 1976—Decision, Jan. 19, 1976

Consent order requiring a Hollywood, Calif., mortgage loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Robert C. Amador.*
For the respondents: *Erwin I. Grant*, Hollywood, Calif.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Argonaut Investments, Inc., a corporation, and Barney Lieberman and Frank Williams, individually and as officers of said corporation, hereafter sometimes referred to as respondents, have violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending 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 Argonaut Investments, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 1680 North Vine St., Suite 309, Hollywood, California.

Respondents Barney Lieberman and Frank Williams are officers of the corporate respondent. They formulate, direct, and control the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the business of arranging for the extension of consumer credit through the operation of a mortgage brokerage business, which

generally arranges, for a fee, for investors to lend money to consumers using real property for security for the performance of the obligation arising out of the transaction.

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

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of business as aforesaid, respondents have provided customers with credit cost disclosure statements which fail to disclose the annual percentage rate computed accurately to the nearest quarter of one percent, as is required by Section 226.5(b) of Regulation Z.

PAR. 5. By and through the use of respondents' real estate loan agreement, a security interest, as "security interest" is defined in Section 226.2(z) of Regulation Z, is or will be retained or acquired in real property which is used or expected to be used as the principal residence of the respondents' customers. Respondents' retention or acquisition of such security interest in said real property thereby entitles their credit customers to be given the right to rescind that transaction until midnight of the third business day following the consummation of the transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later.

Respondents have in some instances failed to give their credit customers the right to rescind until midnight of the third business day following the consummation of the transaction or the date of delivery of all disclosures, whichever is later, and have failed to set forth the "effect of rescission" in the rescission notice to their customers as required by Sections 226.9(a) and (b).

Further, respondents have caused or permitted the disbursement of money, other than in escrow, prior to the expiration of the three-day rescission period. Respondents' failure to refrain from disbursing any money, other than in escrow, pursuant to rescindable contracts before the rescission period has expired is in violation of Section 226.9(c) of Regulation Z.

PAR. 6. Subsequent to July 1, 1969, in the ordinary course of business as aforesaid, respondents have caused or attempted to cause, a customer to modify or waive his right to rescind a transaction subject to Section 226.9 of Regulation Z by and through the use of a preprinted form entitled *Notice of Nonexercise of Right to Rescission* in violation of Section 226.9(e) of Regulation Z.

PAR. 7. Subsequent to July 1, 1969, in the ordinary course of business

as aforesaid, respondents have provided customers with additional information or explanation which is stated, utilized, or placed so as to mislead or confuse the customer or contradict, obscure, or detract attention from the information required by Section 226.9 of Regulation Z by and through the use of respondents' preprinted form entitled *Notice of Nonexercise of Right of Rescission.* Said use of such inconsistent disclosures is a violation of Section 226.6(c) of Regulation Z.

PAR. 8. By and through the acts and practices set forth above, respondents have failed and are now failing to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The 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 the copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, the Truth in Lending Act and the implementing regulation promulgated thereunder; and

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

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

its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Argonaut Investments, 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 1680 North Vine St., Suite 309, Hollywood, California.

Respondents Barney Lieberman and Frank Williams are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation, and their 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

It is ordered, That respondents Argonaut Investments, Inc., a corporation, its successors and assigns, and its officers, and Barney Lieberman and Frank Williams, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with any extension of, or arrangement for the extension of, consumer credit as "consumer credit" is defined in Regulation Z(12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

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

2. Failing, in any transaction in which a security interest is or will be retained or acquired in any real property which is used or is expected to be used as the principal residence of the customer, to provide each customer with two copies of the notice of the right to rescind, as set forth in Section 226.9 of Regulation Z, in the form and manner specified by Section 226.9(b) of Regulation Z.

3. Causing or permitting the disbursement of any monies, other than in escrow, until after the rescission period has expired, as required by Section 226.9(c)(1) of Regulation Z.

4. Causing or permitting a customer to modify or waive his right to rescind a transaction subject to Section 226.9 of Regulation Z, unless:

(a) the extension of credit is needed in order to meet a bona fide immediate personal financial emergency of the customer;

(b) the customer has determined that a delay of three (3) business days in performance of the respondents' obligation under the transaction will jeopardize the welfare, health or safety of natural persons or

endanger property which the customer owns or for which he is responsible; and

(c) the customer furnishes the respondents with a separate dated and signed personal statement describing the situation requiring immediate remedy and modifying or waiving his right of rescission.

5. Causing or requiring a customer to execute any document that indicates, expressly or by implication, that said customer's right of rescission period as set forth by Section 226.9(a) of Regulation Z has expired and the creditor may proceed with his obligation.

6. Failing, in any transaction in which respondents retain or acquire a security interest in real property which is used or expected to be used as the principal residence of the customer, to comply with all requirements regarding the right of rescission set forth in Section 226.9 of Regulation Z.

7. Failing in any consumer credit transaction to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form, and amount required by Sections 226.6 and 226.8 of Regulation Z.

It is further ordered, That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to all present and future personnel of respondent engaged in the consummation of any extension of consumer credit, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

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

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

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

IN THE MATTER OF

FRED MEYER, INC.

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

Docket C-2782. Complaint, Jan. 20, 1976—Decision, Jan. 20, 1976

Consent order requiring a West Coast retail food and general line merchandise store chain operating in Oregon, Washington and Montana, among other things to cease misrepresenting the availability of merchandise; and misrepresenting the price at which merchandise may be purchased. Further, respondent is required to prominently display the location and price of items advertised below the regular price and to post a notice to consumers and a copy of the advertisement near entrances to its stores; and to issue rainchecks for any advertised items temporarily out of stock.

Appearances

For the Commission: *Dennis McFeely* and *Sarah J. Hughes.*

For the respondent: *Robert L. Ridgley, Davies, Biggs, Strayer, Stoel & Boley*, Portland, Oreg.

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 Fred Meyer, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

COUNT I

Alleging violations of Sections 5 and 12 of the Federal Trade Commission Act.

PARAGRAPH 1. Respondent Fred Meyer, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Oregon, with its principal office and place of business located at 3800 S.E. 22nd, Portland, Oregon.

PAR. 2. All allegations made in the present tense include the past tense.

PAR. 3. Respondent is engaged in the operation of a chain of retail stores selling food, drug, variety and other general merchandise. Respondent operates such stores in Oregon, Montana and Washington.

The volume of its retail business has been and is substantial. In the operation of its retail stores, respondent offers and promotes for sale to its customers, and sells to its customers an extensive line of products, including "food," as that term is defined in the Federal Trade Commission Act, groceries, drugs, household articles, apparel, paint, hardware and other general merchandise, all of which are sometimes referred to hereafter as "items." Many of the said items are purchased from numerous suppliers located throughout the United States.

PAR. 4. In the course and conduct of its business as aforesaid, respondent causes, directly and indirectly, the aforesaid items to be shipped and distributed from manufacturing and processing plants or from other sources of supply to its warehouses and distribution centers, or retail stores located in States other than the State of origination, distribution or storage of said items. Respondent maintains a substantial course of trade in the distribution, advertising, offering for sale and sale of the aforesaid items in or having an effect on commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of its business, as aforesaid, respondent disseminates, and causes the dissemination of, certain advertisements concerning the aforesaid items by various means in or having an effect on commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, including but not limited to, advertisements in newspapers of general and interstate circulation and other advertising media, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said items from respondent; and respondent disseminates, and causes the dissemination of, advertisements concerning said items 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 from respondent of the said items in or having an effect on commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. Many of the said advertisements list or depict the aforesaid items and also contain statements and representations concerning the price or terms at which said items would be offered for sale. Many of the aforesaid advertisements contain further direct and express statements and representations concerning the time periods during which the offers would be in effect and the locations of respondent's stores at which the offers would be made.

PAR. 6. Through the use of such advertisements being disseminated in various areas of Washington, Oregon and Montana served by respondent's retail stores, respondent represents directly or by implication that in those stores covered by such advertisements,

throughout the effective periods of the advertised offers, the consumer would be charged for the items listed or depicted in such advertisements a price equal to or below the advertised price.

PAR. 7. In truth and in fact, in a significant number of respondent's retail stores located in the Portland, Oregon-Vancouver, Washington metropolitan areas and the Tacoma, Washington area in which the aforesaid advertisements are disseminated, in stores covered by such advertisements, during the effective periods of the advertised offers, in a substantial number of instances the consumer is charged a price higher than the advertised price. Therefore, the statements and representations as referred to in Paragraph Six, are misleading and deceptive, and where food, drugs, devices or cosmetics are advertised each of such advertisements is misleading in material respects and constitutes a "false advertisement," as that term is defined in the Federal Trade Commission Act.

PAR. 8. By disseminating or causing the dissemination of advertisements which offer or present for sale items at specific prices, as aforesaid, and during the effective periods of such advertised offers at a number of stores covered by said advertisements, by charging the consumer prices which are higher than the advertised prices on said items, respondent is engaged in unfair acts and practices.

PAR. 9. In the course and conduct of its business, and at all times referred to herein, respondent is in substantial competition in commerce with corporations, partnerships, firms and individuals selling the same types of products as respondent.

PAR. 10. The use by respondent of the aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices, including the dissemination of the aforesaid "false advertisements," has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations are true, and to induce such persons to go to respondent's stores and to purchase from respondent substantial quantities of the advertised items at prices in excess of the advertised prices and substantial quantities of items other than the advertised items.

PAR. 11. The acts and practices as aforesaid, and the dissemination by respondent of the false advertisements, as aforesaid, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in or having an effect on commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

COUNT II

Alleging violation of the Federal Trade Commission Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices (16 C.F.R. §424).

PAR. 12. The allegations of Paragraphs One, Two, Three, Four, Five and Nine, respectively, of Count I hereof are incorporated by reference in Count II as if set forth verbatim.

PAR. 13. The Federal Trade Commission, pursuant to the Federal Trade Commission Act, as amended, 15 U.S.C. §41, *et seq.*, and the provisions of Subpart B, Part 1, of the Commission's Procedures and Rules of Practice, 16 C.F.R. §1.11, *et seq.*, conducted a proceeding for the promulgation of a trade regulation rule regarding retail food store advertising and marketing practices. Notice of this proceeding, including a proposed rule, was published in the *Federal Register* on November 14, 1969 (34 F.R. 18252). Thereafter, the Commission duly published and promulgated the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices on May 31, 1971, effective July 12, 1971, 16 C.F.R. §424.1 (1973).

PAR. 14. Respondent is a member of the retail food store industry, and its acts and practices in connection with the sale and offering for sale of food and grocery products and other merchandise are subject to the jurisdiction of Sections 5 and 12 of the Federal Trade Commission Act and are within the intent and meaning of, and are subject to, the provisions of the aforesaid trade regulation rule.

PAR. 15. In connection with its aforesaid advertisements, respondent, in a substantial number of instances, fails to comply with Paragraph (2) of the trade regulation rule by offering items for sale at stated prices by means of advertisements disseminated in areas served by a significant number of its stores which were covered by such advertisements and by failing to charge the consumer the advertised price or a lower price for a substantial number of such advertised products. In fact, the respondent is, in some instances, charging the consumer prices higher than the advertised prices, thereby failing to make said advertised items readily available for sale at or below the advertised prices.

PAR. 16. Respondent's aforesaid violations of the Trade Regulation Rule Concerning Retail Food Store Advertising and Marketing Practices constitute violations of Sections 5 and 12 of the Federal Trade Commission Act.

PAR. 17. The acts and practices as aforesaid are to the prejudice and injury of the public and constitute unfair or deceptive acts or practices

in or having an effect on commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

The respondent 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 days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

A. Respondent Fred Meyer, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Oregon with its office and principal place of business located at 3800 S.E. 22nd, Portland, Oregon.

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

ORDER

I

It is ordered, That respondent Fred Meyer, Inc., a corporation, its successors or assigns, its officers, agents, representatives, and employees, directly, or through any corporate subsidiary, as defined below, or

through any division or other device, shall, in connection with the advertising, offering for sale, or sale of food, drug, variety, and other merchandise offered or sold in its retail stores, hereinafter sometimes referred to as items, in or having an effect on commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended:

Cease and desist from directly or indirectly disseminating or causing the dissemination of any advertisement by any means which offers any items for sale at a stated price, unless throughout the effective period of the advertised offer at each retail store covered by the advertisement:

1. There is a sign or other conspicuous marking at the place where an item advertised below regular shelf price is displayed for sale clearly disclosing that the item is "as advertised," or "on sale," or words of similar import as appropriate, and disclosing on such sign or marking, the advertised price;

2. Each advertised item which respondent usually and customarily individually marks with a price is individually, clearly, and conspicuously marked with the advertised price;

3. Each advertised item is sold to customers at or below the advertised price;

Provided, That it shall not be deemed a violation of the above subparagraphs 1., 2., and 3., if respondent is complying with a specific exemption, limitation, or restriction with respect to store, item, quantity, or price which is clearly and conspicuously disclosed in all advertisements.

Provided, further, That in stores equipped with optical scanning devices which electronically "read" an identification code marked on the packaging of items, which transmit the information to a computer which then transmits the correct price of the items to an electronic cash register where the price is displayed so it is visible to the customer and where the item and price are printed on the cash register tape, the items need not be pricemarked in any additional manner; but this proviso will not be applicable unless respondent clearly and conspicuously posts the advertised prices of such items at the point of display and is in compliance with Section I(3) hereof.

The Commission recognizes that technical per se violations of Section I of this order are inevitable. Therefore, in determining compliance with Section I of this order, the Commission will consider the circumstances surrounding failure to mark the advertised items conspicuously or to sell them at or below the advertised prices due to circumstances beyond respondent's control. Further, both parties

recognize that the second proviso to Section I is limited solely to the purpose of this proceeding.

Definition of "corporate subsidiary:" All corporate subsidiaries except those corporate grocery retailers wherein respondent has obtained shares of stock solely to protect past due accounts receivable owing to respondent or to provide as security for promissory notes for monetary advances to purchase real estate, fixtures, and inventory; wherein respondent has provided a contractual right to manage the corporation to a person not an employee of respondent; and wherein respondent exercises no operational control over the grocery retailer.

II

It is further ordered, That respondent Fred Meyer, Inc., a corporation, its successors or assigns, its officers, agents, representatives, and employees, directly, through any corporate subsidiary, as defined above, or through any division or other device, shall cease and desist from disseminating or causing to be disseminated, any advertisement which contains any of the offers prohibited by Section I of this order:

A. By United States mails, or in or having an effect upon commerce by any means, as "commerce" is defined in the Federal Trade Commission Act, as amended, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food, grocery products, or other items of merchandise covered by Section 12 of the Federal Trade Commission Act which are offered for sale or sold in its retail stores;

B. By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, of food, grocery products, or other items of merchandise covered by Section 12 of the Federal Trade Commission Act which are offered for sale or sold in its retail stores.

III

It is further ordered, That, throughout each advertised sale period in each of its retail stores covered by an advertisement, respondent shall post conspicuously (1) at or near the place where customers pay for items, and (2) in such location or locations as is reasonably calculated to catch the attention of each person who enters the retail store, a notice which contains the following:

A. A copy of the advertisement.

B. A statement that:

All items advertised are readily available for sale at or below advertised price except as specifically noted in this ad. Rainchecks will be gladly issued for any advertised items

temporarily out of stock that will enable you to purchase those items at or below the advertised price in the near future. If you have any questions, the department manager will be glad to assist you.

IV

It is further ordered, That respondent shall cause the following statement to be clearly and conspicuously set forth in each advertisement which represents that items are available for sale at a stated price in any of its retail stores: "Each of these advertised items must be readily available for sale at or below the advertised price in each Fred Meyer store, except as specifically noted in this ad."

V

It is further ordered, That:

A. Respondent shall forthwith deliver a copy of this order to each of its operating divisions and to each of its present and future officers and other personnel in its organization down to the level of and including assistant store managers who, directly or indirectly, have any supervisory responsibilities with respect to individual retail stores of respondent, or who are engaged in any aspect of preparation, creation, or placing of advertising, and that respondent shall secure a signed statement acknowledging receipt of said order from each such person;

B. Respondent shall institute and maintain a program of continuing surveillance adequate to reveal whether the business practices of each of its retail stores conform to this order, and shall confer with any duly authorized representative of the Commission pertaining to such program when requested to do so by a duly authorized representative of the Commission;

C. Respondent shall, for a period of three (3) years subsequent to the date of this order:

1. Maintain business records which show the efforts taken to ensure continuing compliance with the terms and provisions of this order, except that magnetic tapes need be retained for six months only;

2. Grant any duly authorized representative of the Federal Trade Commission access to all such business records; and

3. Furnish to the Federal Trade Commission copies of such records which are requested by any of its duly authorized representatives.

D. Respondent shall, all other provisions of this order notwithstanding, on or before each of the first three (3) anniversary dates 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 in the preceding year. The anniversary dates of the order shall be based upon the original date of service of the order upon respondent.

VI

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

VII

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

IN THE MATTER OF

THE ANACONDA COMPANY

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

Docket 8994. Complaint, Sept. 23, 1974—Decision, Jan. 23, 1976

Consent order requiring a New York City manufacturer and seller of primary metals and wire mill products to divest itself of the stock and assets of Systems Wire and Cable, Inc., a manufacturer of semiflexible coaxial cable within two years of service upon them of this order. Further, respondent is prohibited from acquiring, for a period of ten (10) years, the stock or assets of any firm engaged in the manufacture of semiflexible coaxial cable without prior F.T.C. approval.

Appearances

For the Commission: *Charles W. Corddry, III* and *Paul N. Kane.*

For the respondent: *Zachary Shimer, Chadbourne, Parke, Whiteside & Wolff*, New York City.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Anaconda Company, a corporation subject to the jurisdiction of the Commission, has acquired all the stock of Systems Wire & Cable, Inc., a corporation, in violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18), and Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45), and that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, pursuant to Section 11 of the Clayton Act (15 U.S.C. §21) and Section 5 of the Federal Trade Commission Act (15 U.S.C. §45 (b)), stating its charges as follows:

I

DEFINITIONS

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

(a) "*Coaxial cable*" is cable consisting of a metal center conductor, surrounded by an insulating material, or dielectric, and encased in a metal outer conductor which has a common axis with the center conductor. Coaxial cable is often coated by a polyethylene jacket or other protective covering.

(b) "*Semiflexible coaxial cable*" is coaxial cable sold on reels in

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standard lengths of 2,000 feet and longer, with outer conductors of seamless, welded, wrapped or folded metal tubing, and outer diameters 1 inch or smaller.

II

RESPONDENT

2. Respondent, The Anaconda Company (hereinafter "Anaconda") is now, and was at the time of the acquisition hereinafter set forth, a corporation organized and existing under and by virtue of the laws of the State of Montana, with its principal office and place of business located at 25 Broadway, New York, New York.

3. In 1972 Anaconda had revenues of over $1 billion and assets of $1.6 billion. In that year it was the 138th largest publicly held industrial corporation in the nation in total sales and revenues and ranked 69th in assets.

4. Anaconda, prior to and following the acquisition hereinafter set forth, was and is a large vertically integrated corporation with numerous subsidiaries and affiliates. Anaconda is the third largest producer of copper, and, through a wholly-owned subsidiary, is among the ten largest producers of aluminum, in the United States. Principal products manufactured and sold by Anaconda and its subsidiaries include primary metals and wire mill products. Anaconda represents itself as having the resources and capability in the wire and cable industry to process materials from "mine-to-consumer."

5. Anaconda Wire and Cable Company (hereinafter "Anaconda W&C") was at the time of the acquisition hereinafter set forth a corporation organized and existing under and by virtue of the laws of the State of Delaware. Anaconda W&C at the time of the acquisition hereinafter set forth was a wholly-owned subsidiary of Anaconda and was operated under the direction and control of Anaconda. Anaconda W&C was merged into Anaconda on or about December 28, 1972 and is now a division of Anaconda. Anaconda W&C, prior to and following the acquisition hereinafter set forth, manufactured and sold wire mill products including semiflexible coaxial cable.

6. At all times relevant herein, Anaconda and Anaconda W&C sold and shipped their products in interstate commerce throughout the United States, and were and are now engaged in commerce as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

III

SYSTEMS WIRE & CABLE, INC.

7. Prior to the acquisition hereinafter set forth, Systems Wire & Cable, Inc. (hereinafter "Systems") was a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3500 South 30th St., Phoenix, Arizona.

8. In 1972, Systems had revenues of approximately $5 million and assets of approximately $2 million.

9. Incorporated in 1969, Systems was, prior to the acquisition hereinafter set forth, an aggressive, independent and profitable company. In 1972, approximately 60 percent of Systems' sales were of semiflexible coaxial cable manufactured by it.

10. At all times relevant herein, Systems sold and shipped its products in interstate commerce throughout the United States, and was and is now engaged in commerce as "commerce" is defined in the Clayton and Federal Trade Commission Acts.

IV

THE ACQUISITION

11. On or about December 27, 1972, Anaconda W&C, acting under the direction and control of Anaconda and pursuant to an agreement with the shareholders of Systems, acquired all of the outstanding stock of Systems. To consummate the acquisition, Anaconda issued 165,000 shares of Anaconda common stock at an approximate value of $3 million to the shareholders of Systems. The acquisition was negotiated and consummated in commerce, as "commerce" is defined in the Federal Trade Commission Act.

V

TRADE AND COMMERCE

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

13. The relevant product market is the manufacture and sale of semiflexible coaxial cable. Rigid coaxial cable is coaxial cable having an air dielectric which is sold in straight pieces, 20 feet or less in length, with outer diameters of 7/8 inch or more, and which is not designed to be bent. Flexible coaxial cable is coaxial cable with a metallic braid or foil outer conductor which permits a smaller bending radius than does the outer conductor tubing of semiflexible coaxial cable. Because of differences in manufacturers, production facilities, prices, customers,

characteristics and uses and on the basis of industry recognition, semiflexible coaxial cable is readily distinguishable from flexible and rigid coaxial cable.

14. Sales of semiflexible coaxial cable in the United States are substantial, amounting to approximately $28 million in 1972.

15. The primary user of semiflexible coaxial cable is the cable television industry, which has grown from 70 systems with 14,000 subscribers in 1952 to 2,750 systems and 5.9 million subscribers in 1972. New subscribers were added at a rate of 80,000 per month in 1972, and industry revenues were about $350 million.

16. Concentration in the manufacture and sale of semiflexible coaxial cable is high, with the four and eight top ranking firms accounting in 1972 for more than 75 percent and 96 percent of domestic sales, respectively. In that year, 10 firms were engaged in the manufacture and sale of semiflexible coaxial cable in the United States.

17. Entry into the manufacture and sale of semiflexible coaxial cable is difficult, requiring large financial resources, sophisticated technological skills, precise quality control and an effective distribution system. Few firms possess such prerequisites for entry.

18. In 1972, Anaconda W&C was the sixth ranked domestic producer of semiflexible coaxial cable with sales of $1.61 million. In that year, Anaconda W&C accounted for approximately 5.8 percent of total domestic sales of semiflexible coaxial cable.

19. In 1972, Systems was the fourth ranked domestic producer of semiflexible coaxial cable with sales of $3.02 million. In that year, Systems accounted for approximately 11.1 percent of total domestic sales of semiflexible coaxial cable.

20. As a result of the aforesaid acquisition, Anaconda W&C became the third ranking firm in the semiflexible coaxial cable market, accounting for approximately 16.9 percent of total domestic sales of semiflexible coaxial cable as of the end of 1972. As a result of such acquisition, concentration among the top four firms in the relevant market increased from 75.8 percent to 81.6 percent.

21. Prior to the aforesaid acquisition, Anaconda W&C and Systems were substantial and actual competitors in the manufacture and sale of semiflexible coaxial cable.

VI

EFFECTS OF THE ACQUISITION

22. The effect of the aforesaid acquisition may be substantially to lessen competition or to tend to create a monopoly in the manufacture

and sale of semiflexible coaxial cable throughout the United States in the following ways, among others:

a. Substantial actual competition between Anaconda and Systems has been eliminated;

b. The restraining influence of Systems as a substantial, independent competitor has been eliminated;

c. Concentration in the manufacture and sale of semiflexible coaxial cable has been increased to the detriment of actual as well as potential competition;

d. Additional mergers and acquisitions in the relevant market may be encouraged;

e. The combination of Anaconda W&C and Systems may so increase Anaconda's manufacturing and sales capability in the relevant market as to provide it with a decisive competitive advantage in the relevant market to the detriment of actual and potential competition.

VII

THE VIOLATIONS CHARGED

23. The acquisition by Anaconda W&C, acting under the direction and control of Anaconda, of Systems constitutes a violation of Section 7 of the Clayton Act, as amended (15 U.S.C. §18).

24. The acquisition by Anaconda W&C, acting under the direction and control of Anaconda, of Systems constitutes an unfair method of competition in commerce and an unfair act or practice in commerce in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45).

DECISION AND ORDER

The Commission having issued its complaint charging that the respondent named in the caption hereof has violated the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. §45) and Section 7 of the Clayton Act, as amended (15 U.S.C. §18); and

Respondent and complaint counsel, by joint motion filed June 18, 1975, having moved to have the matter withdrawn from adjudication for the purpose of submitting an executed consent agreement; and

The Commission, by order issued July 8, 1975, having withdrawn this matter from adjudication pursuant to Section 3.25(c) of its Rules; and

The executed agreement containing a consent order, an admission by respondent of all the jurisdictional facts set forth in the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law

has been violated as alleged in the complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered and provisionally accepted the agreement, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and no public comments having been received, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent, The Anaconda Company, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Montana, with its office and principal place of business located at 25 Broadway, New York, New York.

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

ORDER

I

It is ordered, That, subject to the prior approval of the Federal Trade Commission, respondent, through its officers, directors, agents, representatives and employees shall, as soon as possible, and in any event within two (2) years from the date of service upon it of this order, divest absolutely and in good faith, all assets, properties, rights and privileges, tangible and intangible, presently owned or controlled by or hereafter assigned to Systems Wire and Cable, Inc. (excluding, however, receivables and inventories and any equipment, machinery, or other property presently located at Rome, New York) including but not limited to the plant operated by respondent and located at 3500 South 30th St., Phoenix, Arizona (hereinafter the "Plant") and all machinery, equipment and other property of whatever description located at the Plant and all customer lists, trade names, trademarks and good will acquired as a result of its acquisition of Systems Wire and Cable Inc., and all additions and improvements thereto of whatever description (hereinafter "Systems"), to a person, firm or corporation willing and able to operate the business now operated by Systems as a separate, independent and viable going concern in the manufacture and sale of semiflexible coaxial cable; *provided, however*, that if by the end of said two (2) year period respondent, after having made bona fide efforts to do so, has been unable to make such divestiture to a person, firm or corporation acceptable to the Federal Trade Commission then respondent shall be relieved of its obligation hereunder to make such

divestiture, and shall be free to dismantle the Plant and dispose of it or any part thereof.

II

It is further ordered, That, if respondent is unable to sell or dispose of Systems for cash, nothing in this order shall be deemed to prohibit respondent from retaining, accepting and enforcing in good faith any security interest therein, not to exceed five (5) years in duration, for the sole purpose of securing to respondent full payment of the price, with interest, at which Systems is sold or disposed of; *provided, however*, that if after a good faith divestiture of Systems pursuant to this order, respondent reacquires any of the divested assets by virtue of such security interest, respondent shall redivest such assets within six (6) months subject to the terms of Paragraph I of this order.

III

It is further ordered, That none of the assets, rights or privileges to be divested pursuant to Paragraph I above, shall be transferred, directly or indirectly, to anyone who at the time of such divestiture is an officer, director, employee, or agent of, or under the control, direction or influence of respondent or any of its subsidiaries or affiliated corporations, or who owns or controls more than one (1) percent of the outstanding shares of respondent's capital stock.

IV

It is further ordered, That pending divestiture, respondent shall not make any changes, other than in the ordinary course of business, or permit any deterioration in Systems which may impair its capacity for the manufacture, distribution or sale of semiflexible coaxial cable; *provided, however*, that nothing in this order shall prevent respondent from exercising reasonable business judgment with respect to conducting the business and operations of Systems pending divestiture, including the discontinuance of all operations at the Plant.

V

It is further ordered, That respondent shall cease and desist for the period beginning on the date of service of this order and ending ten (10) years thereafter from acquiring, directly or indirectly, without prior approval of the Federal Trade Commission, one (1) percent or more of the stock or other share capital, of any domestic concern, corporate or non-corporate, which is engaged in the manufacture in the United

States of semiflexible coaxial cable, or capital assets from such a concern pertaining to the manufacture of such cable.

VI

It is further ordered, That respondent shall within sixty (60) days after date of service of this order, and every sixty (60) days thereafter until respondent has fully complied with the provisions of Paragraphs I and IV of this order, submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which respondent has endeavored to comply with such provisions. All compliance reports shall include, among other things that are from time to time required, a summary of contracts or negotiations with anyone for the property and assets specified in Paragraph I of this order and the identity of all such persons and copies of all written communications to and from such persons. Respondent shall within one (1) year from the date of service of this order, and every year thereafter until respondent has fully complied with the provisions of Paragraph V of this order, submit in writing to the Federal Trade Commission a verified report setting forth the manner and form in which respondent has complied with Paragraph V of this order.

VII

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

IN THE MATTER OF

COPE ENTERPRISES, LTD., ET AL.

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

Docket C-2783. Complaint, Jan. 23, 1976—Decision, Jan. 23, 1976

Consent order requiring a Brooklyn, N.Y., distributor of batteries and cosmetics, among other things to cease misrepresenting the high potential earnings of distributors; the type and number of sales locations the respondents would secure for distributors; the availability of training, business assistance, sales aids and advertising; the product line to be added; and the history of the company. Further, respondents are required to make refunds to requesting distributors and to disclose to prospective franchisees their right to cancel the agreement and obtain a full refund within ten (10) days of signing the agreement.

Appearances

For the Commission: *Sandra L. Bird* and *Sandra L. Grayson.*

For the respondents: *Soloman Z. Ferziger*, New York City and *Marvin Wolinetz*, Brooklyn, N.Y.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Cope Enterprises, Ltd., a corporation, Andrew Montero, individually and as an officer of said corporation, and Stanley Fuchs, individually and as former sales manager of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Cope Enterprises, Ltd., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. It formerly maintained its principal office and place of business at 2701 Avenue U, Brooklyn, New York.

Respondent Andrew Montero is an officer of the corporate respondent, Cope Enterprises, Ltd. He formulates, directs and controls the policies, acts and practices of the corporate respondent including those hereinafter set forth. His business address was the same as that of said corporation and his home address is 3626 Kings Hwy., Brooklyn, New York.

Respondent Stanley Fuchs was the sales manager of the corporate

respondent during the period from August 1972, to approximately October 1973. As such he cooperated and acted together with respondent Montero in formulating, directing and controlling the policies of the corporate respondent and was responsible for the planning, supervision and execution of certain of the acts and practices hereinafter set forth. His present address is 8 Paerdegat 1st St., Brooklyn, New York.

PAR. 2. Respondents Cope Enterprises, Ltd., Andrew Montero, individually and as an officer of said corporation, and Stanley Fuchs, individually and as former sales manager of said corporation, were and for some time in the past have been, engaged in the advertising, offering for sale, and sale of distributorships which authorize the purchasers to sell to members of the public items of merchandise, including Helen Neushaefer Hypo-Allergenic cosmetics and Burgess batteries.

PAR. 3. In the course and conduct of their business, respondents Cope Enterprises, Ltd., Andrew Montero, individually and as an officer of said corporation, and Stanley Fuchs, individually and as former sales manager of said corporation caused, and for some time last past have caused, said products, when sold, to be shipped from their suppliers' places of business in the States of New Jersey and Minnesota to purchasers thereof located in various other States of the United States. In addition, in the course and conduct of their business, respondents have disseminated and caused to be disseminated in newspapers of interstate circulation, advertisements designed to be read by persons residing outside the State of New York and intended to induce such persons to enter into contractual agreements with respondents to purchase distributorships and products from respondents. Respondents also introduced into interstate circulation, through the instrumentality of the United States mails, promotional materials, circulars, business papers and other written instruments and communications with the result and effect that members of the public residing outside the State of New York, in various other States of the United States did, in fact, purchased respondents' distributorships and products, thereby placing respondents' business in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

Respondents have maintained, and at all times mentioned herein maintained, a substantial course of trade in distributorships and products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as above mentioned and for the purpose of inducing the purchase of their distributorships and products, respondents Cope Enterprises Ltd.,

Andrew Montero, individually and as an officer of said corporation, and Stanley Fuchs, individually and as former sales manager of said corporation, engaged in a program of recruitment of distributors for their distributorship program. As part of this program respondents have made numerous statements and representations in promotional materials and in newspaper advertisements.

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

P-T 5-6 Hours Weekly Nets To $700 a MONTH

F-T 50 Hours Weekly Nets To $7,000 a MONTH

$2800 part time secured investment has unlimited growth potential with eventual full time earning of $100,000 per year. This public company has an outstanding success record since 1945 and is seeking reliable individuals to service company secured routes.

NO SELLING, NO OVERHEAD

Simply restock merchandise and collect money * * *.

* * * * * * *

Our national advertised name brand product opens the door to top retail accounts. All accounts secured by the company * * *. Your job is to restock and collect money. This is the only experience you will ever know * * *.

* * * * * * *

For a minimum investment of $2,800 you can earn approximately $624 or more a month * * *.

* * * * * * *

A full time distributorship can produce earnings from $60,000 up to $100,000 a year * * *.

* * * * * * *

Earnings increase with the addition of add-on items which we literally have 100's of * * *.

* * * * * * *

National accounts * * *.

* * * * * * *

Types of locations

Airports, Food Stores, Discount Stores, Variety stores * * *.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning not

expressly set forth herein, respondents have represented directly or by implication:

A. That persons who purchase a distributorship from respondents can earn sums ranging from approximately $600 a month to $100,000 a year in their spare time or through full time operation of a distributorship.

B. That said earnings projections are the earnings made by a significant number of persons who have purchased and operated respondents' distributorships.

C. That respondents will secure established, sales producing accounts or locations for purchasers of respondents' distributorships.

D. That purchasers of respondents' distributorships will not be required to sell products or engage in sales activities with potential customers in order to operate and maintain their distributorships successfully.

E. That corporate respondent is a public company with an outstanding record of success for a period of time in excess of 25 years.

PAR. 6. In truth and in fact:

A. Relatively few, if any, persons who purchased distributorships from the respondents earned sums ranging from $600 a month to $100,000 a year in their spare time or through full time operation of their distributorships.

B. Respondents' claimed earnings projections are far in excess of the earnings of any person or persons who purchased and operated respondents' distributorships.

C. In the vast majority of cases respondents did not secure established, sales-producing locations for purchasers of their distributorships, but placed most of their merchandise in retail establishments which have very little consumer traffic. The locations secured by respondents were usually undesirable, unsuitable and unprofitable.

D. The purchasers of the distributorships are required to sell and engage in sales activities in order to operate and maintain their distributorships successfully. It is frequently necessary to place merchandise in other locations because of the unprofitable nature of the locations selected by the respondents.

E. The corporate respondent is not a public company. It has not had an outstanding record of success for twenty-five or more years. In fact, at the time of this representation, the corporate respondent had been in business less than a year.

Said statements and representations were therefore false, misleading, deceptive or unfair.

PAR. 7. In the further course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their

distributorships and products, respondents, their agents, representatives or employees, or any of them, have made representations, either orally or in writing, that:

A. Respondents will secure a specific number of profitable locations for each purchaser of a distributorship within a specified time period.

B. Merchandise and/or sales aids purchased from respondents by respondents' distributors will be furnished to said distributors within a specified time period.

C. Respondents will provide purchasers of its distributorships with sales literature, instruction manuals, order forms and other materials in connection with the operation of their distributorships.

D. Respondents will provide national and local advertising of the products purchased by their distributors so as to create a greater demand for same.

E. Purchasers of respondents' distributorships will be trained in the operation of their distributorships, and respondents will furnish business assistance which will be of value to their distributors.

F. Respondents will repurchase a distributorship at 75 percent of its original value, after a period of one year, if a distributor fails to maintain a stated quota for said distributorship or respondents, at the request of a distributor, will aid in the resale of a distributorship.

G. New cosmetic products are added every six weeks to the line of Helen Neushaefer Hypo-Allergenic cosmetics available to distributors.

H. Respondent Cope Enterprises, Ltd. and the Helen Neushaefer Division of Supronics Corp., an established company, are one and the same company and that purchasers of distributorships are dealing with both.

PAR. 8. In truth and in fact:

A. In a substantial number of instances, respondents did not secure the agreed upon number of locations for the purchasers of distributorships within the time period specified, or only secured them after undue delay. In a substantial number of instances, the locations respondents did obtain were unprofitable and the merchandise was later removed at the location owner's request.

B. In a substantial number of instances, respondents failed to cause delivery of the merchandise and/or sales aids purchased from respondents by distributors within the time period specified, or only shipped them after undue delay and repeated complaints.

C. In a substantial number of instances, respondents failed to provide distributors with sales literature, instruction manuals, order forms and other materials in connection with the operation of the distributorships within the time period specified, or only furnished such materials after undue delay and repeated complaints.

D. Very few, if any, local or national advertisements or advertisements of any kind, were published or disseminated by respondents for products purchased by respondents' distributors.

E. Respondents failed to train distributors in the operation of their distributorships and did not furnish any significant business assistance to distributors.

F. Respondents rarely, if ever, repurchased at 75 percent of its original value, or for any other amount, the distributorship of any distributor after a one year period, or aided in any way in the resale of such distributorships.

G. New products are not added every six weeks to the line of Helen Neushaefer Hypo-Allergenic cosmetics available to distributors.

H. Respondent Cope Enterprises, Ltd. and the Helen Neushaefer Division of Supronics Corp. are not one and the same company. Respondent Cope Enterprises, Ltd. is an independent distributor and Supronics Corp. disclaims any responsibility for the agreements between Cope Enterprises, Ltd. and its distributors.

Said statements and representations were, therefore, false, misleading, deceptive or unfair.

PAR. 9. The use by respondents of the aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices, has had the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were true and complete, and into the purchase of respondents' distributorships and products by reason of said erroneous and mistaken belief, and into the assumption of obligations and the payment of monies, as a result thereof, which they might otherwise not have incurred.

PAR. 10. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of distributorships and products of the same general kind and nature as those sold by respondents.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, were all to the prejudice and injury of the public and of respondents' competitors and constituted unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

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

1. Respondent Cope Enterprises, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York. It formerly maintained its principal place of business at 2701 Avenue U, Brooklyn, New York.

Respondent Andrew Montero is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation. His business address was the same as that of said corporation and his home address is 3626 Kings Hwy., Brooklyn, New York.

Respondent Stanley Fuchs was sales manager of said corporate respondent during the period from August 1972 to approximately October 1973. As such he cooperated and acted together with respondent Montero in formulating, directing and controlling the policies of the corporate respondent. His present address is 8 Paerdegat 1st St., Brooklyn, New York.

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

ORDER

It is ordered, That respondents Cope Enterprises, Ltd., a corporation,

its successors and assigns and its officers and Andrew Montero, individually and as an officer of said corporation, and Stanley Fuchs, individually and as former sales manager of said corporation, and respondents' agents, representatives and employees, individually, or in concert, directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution of cosmetics, batteries or any other products, distributorships or franchises in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or by implication:

A. 1. Representing in any manner the potential sales, income, gross or net profits of a prospective distributor, franchisee or salesman unless:

a. such sales, income or profits are reasonably likely to be achieved by the person to whom the representation is made;

b. the basis and assumptions for such representation are set forth in detail;

c. such representation and the underlying data have been prepared in accordance with generally accepted accounting principles;

d. in immediate conjunction therewith, the following statement is clearly and conspicuously disclosed:

"THERE IS NO ASSURANCE THAT INCOME AND PROFIT PROJECTIONS WILL BE ATTAINED BY ANY SPECIFIC (DISTRIBUTOR, FRANCHISEE OR SALESMAN). THEY ARE MERELY ESTIMATES."; and,

e. the amounts represented are not in excess of sales, income or profits actually achieved by existing distributors, franchisees or salesmen and where distributors, franchisees or salesmen have not been in operation long enough to indicate what sales, income or profits may result, making any representation of such to a prospective distributor, franchisee or salesman.

2. Representing that respondents, their agents, representatives or employees will secure sales producing and profitable locations or accounts for purchasers of respondents' distributorships or franchises; or misrepresenting, in any manner, the desirability of the locations to be provided by respondents.

3. Representing that prior sales experience or training is not necessary to successfully operate and maintain respondents' distributorships or franchises.

4. Representing that the corporate respondent is a public company or that respondents have been successful or have been in business for any significant period of time or misrepresenting in any manner the history, status or nature of respondents' business.

5. Representing that respondents will secure any number of locations for any distributor or franchisee within a specified period of time unless in fact they secure said number of locations within the stated period and offer to replace any locations that (1) refuse to receive the distributor's or franchisee's merchandise or (2) request the distributor or franchisee to remove the merchandise within three months of its initial placement.

6. Representing that any merchandise and sales aids offered for sale or sold by respondents to their distributors or franchisees will be delivered to said distributors or franchisees within a specified time period, unless respondents have available, or in stock, all such merchandise or sales aids in quantities sufficient to meet all reasonably anticipated orders.

7. Representing that respondents will provide their distributors or franchisees with sales literature, promotional literature, instructional manuals, forms or any other materials relating to the operation of respondents' distributorships or franchises within a specified time period, unless respondents have available, or in stock, all such literature, manuals, forms or such other materials in quantities sufficient to meet all reasonably anticipated orders.

8. Representing that respondents will provide national and local advertising of the products offered for sale or sold by respondents to their distributors or franchisees; or misrepresenting, in any manner the extent, type, and method of promotion and services provided by respondents in connection with the advertising of products offered for sale or sold by respondents to their distributors or franchisees; or misrepresenting, in any manner, the media in which said advertising has appeared or will appear.

9. Representing that purchasers of respondents' distributorships or franchises will be trained in the operation of their distributorships or franchises; or misrepresenting in any manner the quality, amount and nature of assistance to be provided by respondents.

10. Representing that respondents will repurchase distributorships or franchises or will aid or assist in the resale of the same.

11. Misrepresenting, in any manner the amount, nature, type and character of the products available to distributors through respondents' distributorships or franchises.

12. Representing that respondents have any connections, financial or otherwise, with the Helen Neushaefer Division of Supronics Corp. other than that of purchasers of cosmetics manufactured by that company; or misrepresenting, in any manner, respondents' business connections or associations with other firms, organizations, groups or individuals.

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B. Making any claim, either orally or in writing, for which the respondents do not have in their possession valid substantiating data, which data shall be made available to prospective distributors or franchisees, or to the Commission or its staff upon demand.

C. Failing to furnish any prospective distributor or franchisee with all of the following information, in a clear and concise manner, at the time when a contract is first established between such prospective distributor or franchisee and the respondents or their representatives:

1. The official name(s) and address(es) of the franchisor, and the parent firm or holding company of the franchisor, if any.

2. A detailed statement setting forth all the rights and obligations of the parties under the distributorship or franchise agreement.

3. The business experience of the respondents, including the length of time the respondents have conducted a business of the type to be operated by the distributor or franchisee, or have granted distributorships or franchises for such business, or have granted distributorships or franchises in other lines of business.

4. Where such is the case, a statement that the franchisor or any of its directors, stockholders owning more than ten percent of the stock, or chief executive officers:

a. has been held liable in a civil action, convicted of a felony, or pleaded nolo contendere to a felony charge in any case involving fraud, embezzlement, fraudulent conversion, or misappropriation of property; or

b. is subject to any currently effective injunctive or restrictive order or ruling relating to business activity as a result of action by any public agency or department; or

c. has filed bankruptcy or been associated with management or any company that has been involved in bankruptcy or reorganization proceedings; or

d. is, or has been, a party to any cause of action brought by distributors or franchisees against the franchisor.

Such statement shall set forth the identity and location of the court, date of conviction or judgment, any penalty imposed or damages assessed, and the date, nature and issuer of each such order or ruling.

5. The financial history of the corporate respondent including balance sheets and profit and loss statements for the most recent five-year period; and a statement of any material changes in the financial condition of the corporate respondent since the date of such financial statement.

6. Complete financial details pertaining to the distributorship or franchise agreement including the amount to be paid by the distributor or franchisee, the amount to be paid for any services to be rendered by

respondents and the amount to be paid for any merchandise offered for sale or sold thereunder.

7. A description of the distributorship or franchise fee; and a statement indicating whether all or part of this fee may be returned to the distributor or franchisee and the conditions under which the fee will be refunded.

8. A statement of the number of distributorships or franchises that are presently operating and the number proposed to be sold.

9. A list of the names and addresses of all persons who, in the two calendar years immediately preceding, purchased a distributorship or franchise for products or product lines similar to, or the same as, those being offered by respondents to any prospective distributor or franchisee and who are situated in the same geographical area as the prospective distributor, or franchisee, and the gross dollar volume of purchases of such products from respondents by each such distributor or franchisee, exclusive of dollar amount of merchandise purchased and paid for at the time of purchase of the distributorship or franchise.

10. A statement of the conditions under which the distributorship or franchise agreement may be terminated or repurchased at the option of the corporate respondent, and a statement setting forth the number of distributors or franchisees that fell into each of those categories during the past 12 months.

11. If the respondents inform prospective distributors or franchisees that they intend to provide them with training, they must state the number of hours of instruction and furnish prospective distributors or franchisees with a brief biography of the instructors who will conduct the training.

12. A statement of the average length of time between the signing of a distributorship or franchise agreement and the time when a distributor could commence operation of his distributorship or franchise.

All of the foregoing information in 1 to 12 above shall be set forth in a single disclosure statement, which shall not contain any promotional claims or other information not required by this order. The statement shall carry a distinctive and conspicuous cover sheet with the following notice (and no other) imprinted thereon in boldface type of not less than 10 point size:

INFORMATION FOR PROSPECTIVE DISTRIBUTORS REQUIRED BY FEDERAL TRADE COMMISSION

This package of information is provided for your own protection. It is in your best interest to study it carefully before making any commitment.

If you do sign a contract, you may cancel it, and obtain a full refund of any money paid,

for any reason within ten business days after signing. Details appear on the contract itself.

The information contained herein has not been reviewed or approved by the Federal Trade Commission, but any misrepresentation constitutes a violation of Federal law. If you feel you have been misled, you should contact the Federal Trade Commission in Washington, or the Federal Trade Commission Regional Office nearest you.

D. Failing to include immediately above and on the same page as the distributor's or franchisee's signature line of any contract establishing or confirming a distributorship or franchise agreement, the following statement in boldface print at least 50 percent larger than any other print in the body of such contract, or in boldface print of a contrasting color:

NOTICE: YOU ARE ENTITLED TO CERTAIN IMPORTANT INFORMATION CONCERNING THIS TRANSACTION, ENTITLED "INFORMATION FOR PROSPECTIVE DISTRIBUTORS REQUIRED BY FEDERAL TRADE COMMISSION." IT IS IN YOUR BEST INTEREST TO DEMAND AND STUDY SUCH INFORMATION. *YOU MAY CANCEL THIS CONTRACT FOR ANY REASON WITHIN TEN BUSINESS DAYS AFTER YOU SIGN IT.* If you do choose to cancel, you will be entitled to receive full refund of any money paid within ten business days after the franchisor receives notice of your cancellation. You must notify the franchisor by certified mail with return receipt requested, which would be sent to the address below. [Respondents will insert here the address and telephone number to which such notices should be sent.]

E. Failing to cancel any contract for which a notice of cancellation was sent by any reasonable means within ten business days after the contract's execution or to fail to refund any money paid by distributor or franchisee within ten business days after the date of receipt of such notice of cancellation.

F. Failing to furnish the prospective distributor or franchisee, upon request, at any time and in the absence of any request, before consummation of any agreement, with a copy of the franchise agreement proposed to be used.

As used in this order, the following definitions shall apply:

1. "Prospective distributor or franchisee" means any person who approaches, or is approached by, respondents or their agents or representatives for the purpose of investigating a distributorship or franchise between such person and respondents;

2. "Time when contact is first established" means the earlier of the time when:

(a) a direct personal meeting first occurs between respondents or their agents or representatives and a prospective distributor or franchisee or

(b) any document or promotional literature is distributed to a prospective distributor or franchisee.

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

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

It is further ordered, That respondent Stanley Fuchs promptly notify the Commission of his current business address and the nature of the business or employment in which he is presently engaged, as well as a description of his duties and responsibilities.

It is further ordered, That the respondents herein distribute a copy of this order to each of their officers, agents or representatives engaged in the offering for sale of respondents' distributorships or franchises or in any aspect of the preparation, creation, or placing of advertisements or promotional materials for this purpose.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders, or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or State regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

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

IN THE MATTER OF

AMREP CORPORATION

Docket 9018. Order, Jan. 27, 1976

Complaint counsel directed to consider whether to seek preliminary injunction under Section 13(b) of Federal Trade Commission Act, with appropriate motion to Commission seeking such action with notice to respondent.

Appearances

For the Commission: *Perry W. Winston, Jon R. Calhoun* and *George E. Schulman.*

For the respondent: *Solomon Friend, Theodore Schaeier* and *I. David Parkoff,* In-house General Counsel for Amrep Corporation, N.Y. *Morton M. Maneker, Proskauer, Rose, Goetz & Mendelsohn,* New York City.

ORDER

In accordance with the suggestion of the Court in *United States* v. *Amrep Corp.*, 75 Cr. 1023 (S.D.N.Y.), that the Commission might apply for a preliminary injunction under Section 13(b) of the Federal Trade Commission Act[1], the Commission directs complaint counsel to consider whether a preliminary injunction should be sought. In the event that complaint counsel so conclude, they should make a motion, on notice to respondent, requesting the Commission to take such action.

It is so ordered.

[1] Opinion, dated January 15, 1976, pp. 10-11.

IN THE MATTER OF

CAVANAGH COMMUNITIES CORPORATION, ET AL.

Docket 9055. Order, Jan. 27, 1976

Portions of complaint counsel's motion to supplement complaint with paragraphs 95a and 95b and the notice order with paragraph 50 granted; and portion of complaint counsel's motion to supplement complaint with paragraphs 95c-95e, remanded to administrative law judge for determination.

Appearances

For the Commission: *Jeffrey Tureck*, *David C. Keehn* and *Pamela B. Stuart.*

For the respondents: *Philip Zeidman* and *Sara Holtz*, *Brownstein, Zeidman, Schomer & Chase*, Washington, D.C.

ORDER GRANTING IN PART AND REMANDING IN PART MOTION TO SERVE SUPPLEMENTAL PLEADING

This matter is before us upon complaint counsel's motion to amend the complaint. The administrative law judge certified the motion to the Commission on December 23, 1975.

Complaint counsel request that the complaint be amended to allege that (1) respondents' statements to purchasers concerning the instant proceedings, including but not limited to, statements characterizing the complaint allegations and describing their applicability to the Rotonda subdivisions are false and deceptive (proposed paragraphs 95a, 95b) and (2) respondents are misrepresenting the extent of recent development activities at Rotonda (proposed paragraphs 95c-95e).[1] In addition, complaint counsel move that a prohibition against misrepresentations concerning legal proceedings pending before the Commission or any other forum be added to the notice order.

The Commission will treat complaint counsel's motion to amend the complaint as a motion to serve a supplemental pleading since the motion concerns "transactions, occurrences, or events which have allegedly happened since the date of the pleading * * *." Rules of Practice, Section 3.15(b).

The Commission agrees with the administrative law judge's decision to certify those portions of complaint counsel's motion which relate to alleged misrepresentations concerning these proceedings and which seek an addition to the notice order since the above-described allegation is sufficiently different in theory from the allegations

[1] With respect to paragraphs 95c-95e, the Commission assumes that complaint counsel refer to alleged misrepresentations made after the complaint issued.

already in the complaint to require certification to the Commission. *See, Standard Camera Corp.*, 63 F.T.C. 1238, 1266 (1963).[2]

Upon consideration of complaint counsel's motion, the Commission has concluded that there is reason to believe that the misrepresentations alleged with respect to these proceedings were made and that it is in the public interest to try said misrepresentations. The Commission has also determined that the notice order should be modified as requested by complaint counsel.

The Commission disagrees with the law judge's decision to certify the portion of the motion concerning allegations that respondents are misrepresenting the extent of recent development activities at Rotonda. The complaint alleges that respondents have made various deceptive representations concerning improvements to be provided in the Rotonda subdivisions and the progress being made toward their completion. (complaint, Pars. 32-36.) The allegation that respondents have misrepresented that they have recently made substantial improvements at Rotonda is clearly relevant to the allegations already in the complaint.[3] This portion of the motion should, therefore, be decided by the administrative law judge. Accordingly,

It is ordered, That the portions of complaint counsel's motion to supplement the complaint with paragraphs 95a and 95b and to supplement the notice order with paragraph 50, set forth in the aforesaid motion be, and they hereby are, granted;

It is further ordered, That the portion of complaint counsel's motion to supplement the complaint with paragraphs 95c, 95d and 95e, set forth in the aforesaid motion, be, and it hereby is, remanded for determination by the administrative law judge.

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[2] The administrative law judge has authority to amend the complaint if the amendment is "reasonably within the scope of the original complaint or notice." He has authority to permit service of a supplemental pleading or notice setting forth transactions, occurrences, or events which have happened since the date of the original pleading or notice which are "relevant" to any of the issues involved. Whichever standard is applied, the law judge lacks authority to permit modifications where the effect is an alteration of the underlying theory behind the complaint.

[3] "Certainly there are many proposed amendments, such as those intended to merely clarify the allegations of a complaint, or to add examples of practices alleged to be unlawful * * * which are not excluded from those to be ruled on by the [law judge]." Capitol Records Distributing Corp., 58 F.T.C. 1170, 1173 (1961).

IN THE MATTER OF

LUSTRASILK CORPORATION OF AMERICA, INC., ET AL.

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

Docket C-2784. Complaint, Jan. 27, 1976—Decision, Jan. 27, 1976

Consent order requiring a St. Louis Park, Minn., manufacturer of cosmetics, among other things to cease misrepresenting that its hair conditioners are safe and from making other false claims; and further requiring the firm to include a health hazard warning in advertising and labeling for the products.

Appearances

For the Commission: *Sharon S. Armstrong.*
For the respondents: *Edward A. Zimmerman*, Edina, Minn.

COMPLAINT

The Federal Trade Commission, having reason to believe that Lustrasilk Corporation of America, Inc., a corporation, and D. C. Smith and Guenther Roth, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated Sections 5 and 12 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Lustrasilk Corporation of America, Inc. is a Minnesota corporation with its office and principal place of business located at 6989 Oxford St., St. Louis Park, Minnesota.

Respondents D. C. Smith and Guenther Roth are officers and principal shareholders of Lustrasilk Corporation of America, Inc. They formulate, direct and control the acts and practices of said corporation, including those hereinafter set forth. Their address is the same as that of Lustrasilk Corporation of America, Inc.

All allegations in this complaint stated in the present tense include the past tense.

PAR. 2. Respondents engage in the manufacturing, advertising, offering for sale, sale, and distribution of Lustrasilk Home Permanent and Lustrasilk 4 Application Home Perm Kit, which are "cosmetics" as that term is defined in Section 15 of the Federal Trade Commission Act. The Lustrasilk solution is a liquid which contains ethylene glycol, acid and other ingredients. The solution is applied to the hair and, while wet, the hair is straightened with a pressing comb. This process is used

by consumers and professional beauticians for the purpose of straightening curly hair.

PAR. 3. Respondents create, prepare and place for publication and dissemination advertisements, including but not limited to the advertisements referred to herein, to promote the sale of Lustrasilk Home Permanent and Lustrasilk 4 Application Home Perm Kit.

PAR. 4. In the course and conduct of their business, the respondents cause the aforementioned Lustrasilk products, when sold, to be sent from their place of business in Minnesota to retail stores and beauty salons and other purchasers located in various other States of the United States and the District of Columbia. Thus, respondents maintain a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of their business, respondents disseminate and cause to be disseminated certain advertisements concerning Lustrasilk Home Permanent and Lustrasilk 4 Application Home Perm Kit, (1) by United States mails, magazines of interstate circulation, and by various other means in or having an affect upon commerce, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of the aforementioned Lustrasilk products, or (2) by various means, for the purpose of inducing, or which are likely to induce the purchase in or having an affect upon commerce of the aforementioned Lustrasilk products, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 6. Typical and illustrative of the statements and representations made in respondents' advertisements, but not all inclusive thereof, are the following:

In magazines:

If you can't use chemical relaxers this is for you!

So gentle, it's NEVER RINSED OUT.

Lustrasilking is the only known patented, completely safe hair straightening process for super-curly hair.

Guaranteed safe — even for children.

Can Lustrasilking cause hair damage or loss?

Absolutely not.

Lustrasilking is good for your hair. Each application is actually a conditioning treatment.

A hot comb and gentle straightening solution are used for Lustrasilking.

PAR. 7. Through the use of the above-quoted statements and representations, and others of similar import and meaning not expressly set forth herein, respondents represent, directly or by implication, that:

A. The Lustrasilk solution contains no harmful ingredients, is gentle, and is completely safe.

B. The Lustrasilking process does not and cannot cause hair damage or loss.

C. The Lustrasilking process is beneficial to hair and improves its condition and appearance.

D. The Lustrasilk solution aids in the hair straightening process or helps maintain the straightened effect longer than would be possible if the pressing comb were used alone.

PAR. 8. In truth and in fact:

A. The Lustrasilk solution is not free of harmful ingredients, nor is it gentle or safe. It contains ingredients which irritate and injure eyes and, in some instances, irritate skin.

B. The Lustrasilking process can cause hair damage or loss. If used at an excessive temperature, the pressing comb can burn the hair, weakening it and causing breakage.

Therefore, the advertisements, statements and representations referred to in Paragraphs Six and Seven (A) and (B) are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and are false, misleading and deceptive.

PAR. 9. At the time the representations set forth in Paragraph Seven (A), (C) and (D) were made, respondents lacked a reasonable basis to support such representations. Therefore, the advertisements, state-

ments and representations set forth in Paragraphs Six and Seven (A), (C) and (D) are deceptive and unfair.

PAR. 10. Respondents advertise Lustrasilk Home Permanent and Lustrasilk 4 Application Home Perm Kit without disclosing that:

A. Lustrasilk can cause skin irritation and eye injury.

B. Directions must be followed carefully.

Such facts are "material" as defined in Section 15 of the Federal Trade Commission Act, and if known to consumers would be likely to affect their decision to purchase the aforementioned Lustrasilk products. Therefore, failure to disclose such material facts is misleading and deceptive and such advertisements constitute "false advertisements" as that term is defined in the Federal Trade Commission Act.

PAR. 11. In the further course and conduct of their business, respondents utilize the product names "Lustrasilk Home Permanent" and "Lustrasilk 4 Application Home Perm Kit." The use of said product names has the tendency and capacity to lead potential consumers to believe that use of such products will make the hair stay straight for a period of weeks or months, as do chemical hair straightener permanents.

In truth and in fact, hair straightened by the Lustrasilk process reverts to its former curly condition when exposed to moisture. Therefore, respondents' use of the words "permanent" and "perm" in their product names is deceptive and unfair.

PAR. 12. In the further course and conduct of their business respondents offer for sale, sale and distribute the aforementioned Lustrasilk products without disclosing on the retail product package of said products the following information:

WARNING:

1. The hair culture solution contains ingredients which can cause skin irritation and eye injury. Follow directions carefully.
2. Do not use if scalp is irritated or injured.
3. If the hair culture solution causes skin or scalp irritation, rinse out immediately. If irritation persists, consult a physician.
4. If the hair culture solution gets into eyes, rinse immediately and consult a physician.

Such facts are material and, if known to potential customers, would be likely to affect their decision to purchase the aforementioned Lustrasilk products. Furthermore, knowledge of such facts by consumers would tend to reduce the hazards of skin and eye injury posed by the use of said products. Therefore, failure to disclose said material facts on the retail product label of the aforementioned Lustrasilk products is an unfair and deceptive act or practice.

PAR. 13. The use by respondents of the aforesaid false, misleading and deceptive and unfair statements, representations, acts and practices and the dissemination of the aforesaid "false advertisements" has the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations are true and substantiated, and into the purchase of substantial quantities of Lustrasilk Home Permanent and Lustrasilk 4 Application Home Perm Kit by reason of said erroneous and mistaken belief.

PAR. 14. In the course and conduct of their business respondents are in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of products and services of the same general kind and nature as are sold by respondents.

PAR. 15. The aforesaid acts and practices of respondents, including the dissemination of "false advertisements," are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty 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:

A. Respondent Lustrasilk Corporation of America, Inc. is a Minnesota corporation with its office and principal place of business located at 6989 Oxford St., St. Louis Park, Minnesota.

Respondents D. C. Smith and Guenther Roth are officers and principal shareholders of Lustrasilk Corporation of America, Inc. They formulate, direct and control the acts and practices of said corporation, and their address is the same as that of said corporation.

B. 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

I

It is ordered, That respondents Lustrasilk Corporation of America, Inc., a corporation, its successors and assigns, and its officers, and D. C. Smith and Guenther Roth, individually and as officers of Lustrasilk Corporation of America, 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 Lustrasilk Home Permanent and Lustrasilk 4 Application Home Perm Kit or any cosmetic in or affecting commerce, as "cosmetic" and "commerce" are defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in writing, orally, visually, or in any other manner, directly or by implication, that:

1. Any hair straightening product is gentle or safe, unless at the time the representation is made respondents have a reasonable basis, consisting of competent and reliable controlled tests, to support such representation, and unless at the time and in the place such representation is made respondents also state: "Warning: The Lustrasilk process uses a pressing comb which may damage hair or scalp if not properly used."

2. Any hair straightening product or process does not or cannot cause hair damage or loss, unless at the time the representation is made respondents have a reasonable basis, consisting of competent and reliable controlled tests, to support such representation, and unless at the time and in the place such representation is made respondents also state: "Warning: The Lustrasilk process uses a pressing comb which may damage hair or scalp if not properly used."

3. Any such product is beneficial to hair or improves its condition or

appearance, unless at the time the representation is made, respondents have a reasonable basis, consisting of competent and reliable controlled tests, to support such representation.

4. Any such product is a hair straightener or aids in maintaining the straightened effect achieved by application of a pressing comb, unless at the time the representation is made, respondents have a reasonable basis, consisting of competent and reliable controlled tests, to support such representation.

B. Representing, in any manner, the safety or efficacy of any cosmetic, or the ingredients therein, unless at the time such representation is made respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body.

C. Disseminating or causing to be disseminated any advertisement of Lustrasilk Home Permanent or Lustrasilk 4 Application Home Perm Kit or any similar product which fails to disclose, clearly and conspicuously with nothing to the contrary or in mitigation thereof, the following statement exactly as it appears below:

WARNING: This product may cause skin and eye irritation. Follow directions carefully.

Provided, however, That if competent and reliable controlled tests indicate that such product does not cause skin irritation, respondents shall substitute for the first sentence of the warning statement above, the following:

This product may cause eye irritation.

D. Using the words "permanent" and "perm" or words of similar import and meaning in the trade names Lustrasilk Home Permanent and Lustrasilk 4 Application Home Perm Kit and trade names of any similar product, unless at the time the representation is made respondents have a reasonable basis, consisting of competent and reliable controlled tests, to support such representation;

Provided, however, That respondents may continue the use of such words on retail packages of the home use product until January 1, 1976 and on retail packages of the professional use product until April 1, 1976.

E. Failing to include clearly and conspicuously on an information panel of the retail product package, on the package insert, and on the label of the solution container of Lustrasilk Home Permanent and Lustrasilk 4 Application Home Perm Kit and any similar product, with

nothing to the contrary or in mitigation thereof, the following disclosures exactly as they appear below:

WARNING:

1. The hair culture solution may cause skin and eye irritation. Conduct a preliminary patch test according to enclosed instructions before using this product. Follow directions carefully.
2. Do not use if scalp is irritated or injured.
3. If the hair culture solution causes skin or scalp irritation, rinse out immediately. If irritation persists, consult a physician.
4. If the hair culture solution gets into eyes, rinse immediately. If irritation persists, consult a physician.

Provided, however, That if competent and reliable controlled tests indicate that such product does not cause skin irritation, respondents shall substitute for the first warning statement above, the following:

The hair culture solution may cause eye irritation. Follow directions carefully.

Respondents shall comply with Paragraph I.E. of this order by August 15, 1975, or by the date this order becomes effective, whichever shall occur first;

Provided, however, That respondents may use existing solution containers until exhausted or until April 1, 1976, whichever shall occur first.

F. Failing to include in the instructions for use of Lustrasilk Home Permanent and Lustrasilk 4 Application Home Perm Kit and any similar product which, according to competent and reliable controlled tests, may cause skin irritation, instructions for a skin patch test which enables the user to determine whether such product will irritate his or her skin.

II

It is further ordered, That respondents Lustrasilk Corporation of America, Inc., a corporation, its successors and assigns, and its officers, and D. C. Smith and Guenther Roth, individually and as officers of Lustrasilk Corporation of America, 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 Lustrasilk Home Permanent and Lustrasilk 4 Application Home Perm Kit, or any cosmetic, as "cosmetic" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated by United States mails or by any means in or having an effect upon commerce, as

"commerce" is defined in the Federal Trade Commission Act, as amended, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of any such product, any advertisement which contains a representation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any such product in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, any advertisement which contains a representation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

III

It is further ordered, That respondents shall distribute a copy of this order to their present and future officers, directors, and operating divisions and that respondents secure from each such person a signed statement acknowledging receipt of the order.

IV

It is further ordered, That respondents maintain complete business records relative to the manner and form of their continuing compliance with the terms and provisions of this order. Each record shall be retained by respondents for at least three years after it is made.

V

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

VI

It is further ordered, That each individual respondent promptly notify the Commission of the discontinuance of his present business or employment and/or his affiliation with a new business or employment at any time within the next five years, or, if such new affiliation is with any business associated with the cosmetic industry, then such notice shall be promptly given whenever such new affiliation occurs. Such

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notice shall include the respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

VII

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

IN THE MATTER OF

THE PERMA-STRATE COMPANY, ET AL.

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

Docket C-2785. Complaint, Jan. 27, 1976—Decision, Jan. 27, 1976

Consent order requiring a Memphis, Tenn., manufacturer of hair care cosmetics, among other things to cease misrepresenting that its hair conditioners are safe and from making other false claims; and further requiring the firm to include a health hazard warning in advertising and labeling for the products.

Appearances

For the Commission: *Sharon S. Armstrong.*

For the respondents: *Eugene Bernstein, Gerber, Bernstein, Gerber & Winestone*, Memphis, Tenn.

COMPLAINT

The Federal Trade Commission, having reason to believe that The Perma-Strate Company and Merrill Kremer, Inc., corporations, and Jeannette Goldner, individually and as an officer of The Perma-Strate Company, and Allyn S. Goldner, individually and as sole shareholder and chairman of the board of directors of The Perma-Strate Company, hereinafter sometimes referred to as respondents, have violated Sections 5 and 12 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent The Perma-Strate Company is a Tennessee corporation with its office and principal place of business located at 3442 Summer Ave., Memphis, Tennessee.

Respondent Jeannette Goldner is an officer of The Perma-Strate Company. She formulates, directs and controls the acts and practices of The Perma-Strate Company, including those hereinafter set forth. Her address is the same as that of The Perma-Strate Company.

Respondent Allyn S. Goldner is a former officer, the sole shareholder and chairman of the board of directors of The Perma-Strate Company. He formulates, directs and controls the acts and practices of The Perma-Strate Company, including those hereinafter set forth. His address is the same as that of The Perma-Strate Company.

Respondents The Perma-Strate Company, Jeannette Goldner and Allyn S. Goldner are sometimes referred to collectively herein as "the Perma-Strate respondents."

Respondent Merrill Kremer, Inc. is a Tennessee corporation with its

office and principal place of business located at 641 South Cooper, Memphis, Tennessee.

All allegations in this complaint stated in the present tense include the past tense.

PAR. 2. The Perma-Strate respondents engage in the manufacturing, advertising, offering for sale, sale and distribution of Perma Strate Cream Hair Straightener (hereinafter "Perma Strate straightener"), a "cosmetic" as that term is defined in Section 15 of the Federal Trade Commission Act. The straightener is a liquid which contains as its active ingredient ammonium thioglycolate. The liquid is combed through the hair, rinsed from the hair and neutralized with a special shampoo. The straightener and neutralizing shampoo are used by consumers and professional beauticians for the purpose of straightening curly hair.

PAR. 3. Respondent Merrill Kremer, Inc. is the advertising agency for The Perma-Strate Company and in such capacity creates, prepares, places for publication, and causes the dissemination of advertisements, including but not limited to the advertisements referred to herein, to promote the sale of Perma Strate straightener.

PAR. 4. In the course and conduct of their business, the Perma-Strate respondents cause Perma Strate straightener, when sold, to be sent from their place of business in Tennessee to retail stores and beauty salons and other purchasers located in various other States of the United States and in the District of Columbia. Thus, the Perma-Strate respondents maintain a substantial course of trade in Perma Strate straightener in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of their businesses, respondents disseminate and cause to be disseminated certain advertisements concerning Perma Strate straightener, (1) by United States mail, magazines of interstate circulation, radio broadcasts of interstate transmission, and by various other means in or having an effect upon commerce, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Perma Strate straightener, or (2) by various means, for the purpose of inducing, or which are likely to induce, the purchase in or having an effect upon commerce of Perma Strate straightener, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 6. Typical and illustrative of the statements and representations in respondents' advertisements, but not all inclusive thereof, are the following:

On radio:

There are lots of ways to straighten your hair, but the easiest — safest — longest-lasting way is with Perma Strate.

There's nothing strong or harsh in it to harm your hair or hurt your skin. Gentle, mild, Perma Strate gives you natural-looking straight hair that is soft, and easy to manage for three months or longer.

In magazines:

So safe and gentle even little girls of five can have their perm, and smooth styling.

Thousands of beauticians use it with complete confidence — even on bleached or tinted hair — with no risk of breakage.

No-lye, no-risk, no-complaint straightener!

It's formulated with ammonium thioglycolate, NOT the caustic sodium hydroxide (LYE) found in most other relaxers. The PH factor is only 9.2, well inside the safe range.

PAR. 7. Through the use of the above-quoted statements and representations, and others of similar import and meaning not expressly set out herein, respondents represent, directly or by implication, that:

A. Perma Strate straightener is safe, gentle and mild and its ingredients cannot harm hair or skin.

B. Perma Strate straightener may be used on bleached or tinted hair without risk of hair breakage.

C. Thousands of beauticians use Perma Strate straightener with complete confidence that it will not damage hair.

D. Hair straightened with Perma Strate remains straight longer than hair straightened with other products or methods.

PAR. 8. In truth and in fact:

A. Perma Strate straightener is not safe, gentle or mild and it contains ingredients which are harmful to skin and hair. Ammonium thioglycolate, the active ingredient in Perma Strate straightener, straightens hair by breaking down the cells of the hair shaft. It is also a primary skin irritant which breaks down the cells which form the epidermis. The straightening process weakens hair, and in some instances, makes it brittle and causes partial or total hair loss. In some instances Perma Strate straightener causes skin and scalp irritation and burns.

B. Perma Strate straightener may not be used on bleached or tinted hair without risk of hair breakage.

Therefore, the advertisements, statements and representations referred to in Paragraphs Six and Seven (A) and (B) are misleading in material respects and constitute "false advertisements" as that term is

defined in the Federal Trade Commission Act, and are false, misleading, deceptive and unfair.

PAR. 9. At the time the representations set forth in Paragraph Seven (C) and (D) were made, respondents lacked a reasonable basis to support such representations. Therefore, the advertisements, statements and representations set forth in Paragraphs Six and Seven (C) and (D) are deceptive and unfair.

PAR. 10. Respondents advertise Perma Strate straightener without disclosing that:

A. Perma Strate straightener can cause skin and scalp irritation, hair breakage and eye injury.

B. Directions must be followed carefully.

Such facts are material and, if known to consumers, would be likely to affect their decision to purchase Perma Strate straightener. Therefore, respondents' advertisements of said product are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and are false, misleading and deceptive.

PAR. 11. In the further course and conduct of their business, the Perma-Strate respondents offer for sale, sell and distribute Perma Strate straightener without disclosing on the retail product package of said product the following information:

A. The product contains caustic ingredients. It can cause skin and scalp burns, hair loss, and eye injury. Directions must be followed carefully.

B. The product should not be used if scalp is irritated or injured.

C. The product should not be used on hair that is bleached, dyed or tinted. If hair has been relaxed previously, apply only to new growth.

D. If the straightener causes skin or scalp irritation, it should be rinsed out immediately and neutralized with the shampoo in the kit. If irritation persists, a physician should be consulted.

E. If the straightener gets into eyes, the eyes should be rinsed immediately and a physician should be consulted.

Such facts are material and, if known to potential customers, would be likely to affect their decision to purchase Perma Strate straightener. Furthermore, knowledge of such facts by consumers would tend to reduce the hazards of hair, skin and eye injury posed by the use of Perma Strate straightener. Therefore, failure to disclose said material facts on the retail product package is an unfair and deceptive act or practice.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive and unfair statements, representations, acts and practices and the dissemination of the aforesaid "false advertisements"

has the capacity and tendency to mislead members of the consuming public and professional beauticians into the erroneous and mistaken belief that said statements and representations are true and substantiated, and into the purchase of substantial quantities of Perma Strate straightener by reason of said erroneous and mistaken belief.

PAR. 13. In the course and conduct of their businesses, respondents are in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of products and services of the same general kind and nature as are sold by respondents.

PAR. 14. The aforesaid acts and practices of respondents, including the dissemination of "false advertisements," are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty 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:

A. Respondent The Perma-Strate Company is a Tennessee corpora-

tion with its office and principal place of business located at 3442 Summer Ave., Memphis, Tennessee.

Respondent Jeannette Goldner is an officer of The Perma-Strate Company. She formulates, directs and controls the acts and practices of The Perma-Strate Company, including those hereinafter set forth. Her address is the same as that of The Perma-Strate Company.

Respondent Allyn S. Goldner is a former officer, the sole shareholder and chairman of the board of directors for The Perma-Strate Company. He formulates, directs and controls the acts and practices of The Perma-Strate Company, including those hereinafter set forth. His address is the same as that of The Perma-Strate Company.

Respondent Merrill Kremer, Inc. is a Tennessee corporation with its office and principal place of business located at 641 South Cooper, Memphis, Tennessee.

B. 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

I

It is ordered, That respondents The Perma-Strate Company and Merrill Kremer, Inc., corporations, their successors and assigns, and their officers, and Jeannette Goldner, individually and as an officer of The Perma-Strate Company, and Allyn S. Goldner, individually and as sole shareholder and as chairman of the board of directors of The Perma-Strate Company, 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 Perma Strate straightener or any cosmetic in or affecting commerce, as "cosmetic" and "commerce" are defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in writing, orally, visually or in any other manner, directly or by implication, that:

1. Any hair straightening product is safe, gentle or mild or its ingredients cannot or do not harm hair or skin.

2. Any hair straightening product may be used on bleached or tinted hair without risk of hair damage.

3. Beauticians use any such product or approve, recommend or endorse such product in any way, unless at the time the representation is made respondents have a reasonable basis, consisting of competent and reliable survey data, to support such representation.

4. Any such product is longer-lasting than any other product, unless at the time such representation is made respondents have a reasonable basis, consisting of competent and reliable tests or evidence, to support such representation.

B. Representing, in any manner, the safety or efficacy of any cosmetic, or the ingredients therein, unless at the time such representation is made respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body.

C. Disseminating or causing to be disseminated any advertisement of Perma Strate straightener or any similar product which fails to disclose, clearly and conspicuously, with nothing to the contrary or in mitigation thereof, the following statement exactly as it appears below:

> WARNING: Follow directions carefully to avoid skin and scalp irritation, hair breakage and eye injury.

Provided, however, That Paragraph I of this order shall apply to respondent Merrill Kremer, Inc. only with respect to Perma Strate straightener and any cosmetic manufactured by respondent The Perma-Strate Company, and any hair straightening product or process.

II

It is further ordered, That respondents The Perma-Strate Company and Merrill Kremer, Inc., corporations, their successors and assigns, and their officers, and Jeannette Goldner, individually and as an officer of The Perma-Strate Company, and Allyn S. Goldner, individually and as sole shareholder and as director of The Perma-Strate Company, 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 Perma Strate straightener or any cosmetic, as "cosmetic" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated by United States mails or by any means in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of any such product, any advertisement which contains a representation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing or which is likely to induce, directly or

indirectly, the purchase of any such product in or having an effect on commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains a representation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

Provided, however, That Paragraph II of this order shall apply to respondent Merrill Kremer, Inc. only with respect to Perma Strate straightener and any cosmetic manufactured by respondent The Perma-Strate Company, and any hair straightening product or process.

III

It is further ordered, That respondents The Perma-Strate Company, its successors, assigns and officers, and Jeannette Goldner, individually and as an officer of The Perma-Strate Company, and Allyn S. Goldner, individually and as sole shareholder and as director of The Perma-Strate Company, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale, or distribution of Perma Strate Straightener or any similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from failing to include clearly and conspicuously on an information panel of the retail product package, on the package insert, and on the label of the straightener container of any such product, with nothing to the contrary or in mitigation thereof, the following disclosures exactly as they appear below:

WARNING:

1. This product contains caustic ingredients. You must follow directions carefully to avoid skin and scalp burns, hair loss, and eye injury.
2. Do not use if scalp is irritated or injured.
3. Do not use on bleached, dyed or tinted hair. If hair has been relaxed previously, apply only to new growth.
4. If the straightener causes skin or scalp irritation, rinse out immediately and neutralize with the shampoo in the kit. If irritation persists or if hair loss occurs, consult a physician.
5. If the straightener gets into eyes, rinse immediately and consult a physician.

Respondents shall comply with this provision by Aug. 15, 1975 or by the effective date of this order, whichever shall occur first.

IV

It is further ordered, That respondents shall distribute a copy of this order to their present and future officers, directors, and operating

divisions and that respondents secure from each such person a signed statement acknowledging receipt of this order.

V

It is further ordered, That respondents maintain complete business records relative to the manner and form of their continuing compliance with the terms and provisions of this order. Each record shall be retained by respondents for at least three years after it is made.

VI

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

VII

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

VIII

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

IN THE MATTER OF

SOFT SHEEN COMPANY, INC., ET AL.

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

Docket C-2786. Complaint, Jan. 27, 1976—Decision, Jan. 27, 1976

Consent order requiring a Chicago, Ill., manufacturer of cosmetics, among other things to cease misrepresenting that its hair conditioners are safe and from making other false claims; and further requiring the firm to include a health hazard warning in advertising and labeling for the products.

Appearances

For the Commission: *Sharon S. Armstrong.*

For the respondents: *Jon O. Nelson, Molinair, Allegretti, Newitt & Witcoff* and *Rickey J. Ament*, Chicago, Ill.

COMPLAINT

The Federal Trade Commission, having reason to believe that Soft Sheen Company, Inc., and Franklin Lett Associates, corporations, and Edward G. Gardner and Betty Gardner, individually and as officers of Soft Sheen Company, Inc., hereinafter sometimes referred to as respondents, have violated Sections 5 and 12 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Soft Sheen Company, Inc. is an Illinois corporation with its office and principal place of business located at 7126-30 South Chicago Ave., Chicago, Illinois.

Respondents Edward G. Gardner and Betty Gardner are officers and principal shareholders of Soft Sheen Company, Inc. They formulate, direct and control the acts and practices of Soft Sheen Company, Inc., including those hereinafter set forth. Their address is the same as that of Soft Sheen Company, Inc.

Respondents Soft Sheen Company, Inc. and Edward G. Gardner and Betty Gardner are sometimes referred to collectively herein as "the Soft Sheen respondents."

Respondent Franklin Lett Associates is an Illinois corporation with its office and principal place of business located at 120 South Riverside Plaza, Chicago, Illinois.

All allegations in this complaint stated in the present tense include the past tense.

PAR. 2. The Soft Sheen respondents engage in the manufacturing,

advertising, offering for sale, sale and distribution of the hair care products Mr. Cool Hair Relaxer and Miss Cool Hair Relaxer, "cosmetics" as that term is defined in Section 15 of the Federal Trade Commission Act. The relaxer is an emulsion which contains as its active ingredient potassium hydroxide, commonly known as lye. The emulsion is applied to the hair, rinsed from the hair, and neutralized with a special shampoo. The relaxer and neutralizing shampoo are used by consumers and professional beauticians for the purpose of straightening curly hair.

PAR. 3. Respondent Franklin Lett Associates is in the advertising agency for Soft Sheen Company, Inc., and in such capacity creates, prepares, and places for publication, and causes the dissemination of advertisements, including but not limited to the advertisements referred to herein, to promote the sale of Mr. Cool Hair Relaxer and Miss Cool Hair Relaxer.

PAR. 4. In the course and conduct of their business, the Soft Sheen respondents cause their aforementioned products when sold, to be sent from their place of business in Illinois to retail stores and beauty salons and other purchasers located in various other States of the United States and the District of Columbia. Thus, the Soft Sheen respondents maintain a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of their businesses, respondents disseminate and cause to be disseminated certain advertisements concerning the aforementioned Soft Sheen products, (1) by United States mails, magazines of interstate circulation, and by various other means in or having an affect upon commerce, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of the aforementioned Soft Sheen products, or (2) by various means, for the purpose of inducing, or which are likely to induce, the purchase in or having an affect upon commerce of the aforementioned Soft Sheen products, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 6. Typical and illustrative of the statements and representations made in respondents' advertisements, but not all inclusive thereof, are the following:

In magazines:

Getting heads together * * * beautifully * * * comfortably * * * easily, with Mr. Cool and Miss Cool Hair Relaxers. The no-base hair relaxing kits that give you today's "hip" hair styles with fuller body keeping it smoother, and softer. And you get the extra needed time to style your hair the "*no-burn perm*" way with *Mr. Cool* and *Miss Cool Hair Relaxing kits.*

On radio:

Music

Announcer: A broad check on Mr. Cool. If you've seen those hip hair styles for men, you've seen some of Mr. Cool's work. That's Mr. Cool Hair Relaxer, one of the hippest men's hair relaxers for all grades of hair. It's a comfortable hair relaxer. Mr. Cool is known as the "no burn" perm. That's right! No rushing, no hurrying. You can relax as your hair relaxes with that extra working time. And each Mr. Cool no-base hair relaxer kit has a neutralizer shampoo, an excellent hair relaxer setting lotion and a time chart telling you how to relax different grades of hair. Following the directions, you will get you hair together with Mr. Cool Hair Relaxer.

Now for the ladies there is Miss Cool, one of the hippest hair relaxers around. Miss Cool gives the same comfortable relaxing action with no hurrying, no rushing. Miss Cool also provides something extra. An instant protein conditioner for healthier hair. Mr. Cool and Miss Cool no-base hair relaxers are products of Soft Sheen, the hair care people, producers of fine hair products.

PAR. 7. Through the use of the above-quoted statements and representations, and others of similar import and meaning not expressly set forth herein, respondents represent, directly or by implication, that:

A. Mr. Cool and Miss Cool hair relaxers do not burn the hair and may be used safely on all types of hair.

B. Mr. Cool and Miss Cool hair relaxers are in all instances comfortable on the skin and do not burn the skin.

C. Mr. Cool and Miss Cool hair relaxers provide the user

1. time adequate to complete application, and

2. more time for application than is available with other chemical hair straigheners.

PAR. 8. In truth and in fact:

A. Mr. Cool and Miss Cool hair relaxers can and, in some instances, do burn the hair, and cannot be used safely on all types of hair. Potassium hydroxide, the active ingredient in said products, straightens hair by breaking down the cells of the hair shaft. The relaxing process weakens hair, and, in some instances, makes it brittle and causes partial or total hair loss.

B. Mr. Cool and Miss Cool hair relaxers are not, in all instances, comfortable on the skin and, in some instances, they burn the skin. The potassium hydroxide in said products is a primary skin irritant. It is caustic to skin and breaks down the cells which form the epidermis. Mr. Cool and Miss Cool hair relaxers in some instances cause skin and scalp irritation and burns, which may produce scars and permanent follicle damage. Said products also may cause eye irritation and may impair vision.

C. Mr. Cool and Miss Cool hair relaxers do not provide extra

working time. In many instances it is difficult for the non-professional user to complete application, combing and smoothing within the time dictated by his or her individual hair type for satisfactory results. Furthermore, said products do not provide application times longer than those provided by other chemical hair straighteners.

Therefore, the advertisements, statements and representations referred to in Paragraphs Six and Seven are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and are false, misleading and deceptive.

PAR. 9. At the time the representations set forth in Paragraph Seven were made, respondents had no reasonable basis from which to conclude that such representations were true.

Therefore, the advertisements and representations set forth in Paragraphs Six and Seven are deceptive and unfair.

PAR. 10. Respondents advertise Mr. Cool and Miss Cool hair relaxers without disclosing that:

A. Said products can cause skin and scalp irritation, hair breakage and eye injury.

B. Directions must be followed carefully.

Such facts are material and, if known to consumers, would be likely to affect their decision to purchase Mr. Cool and Miss Cool hair relaxers. Therefore, respondents' advertisements of said products are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, and are false, misleading and deceptive.

PAR. 11. In the further course and conduct of their business the Soft Sheen respondents offer for sale, sell and distribute Mr. Cool and Miss Cool hair relaxers without disclosing on the retail product package of said products the following information:

A. The products contain potassium hydroxide (lye). They can cause skin and scalp burns, hair loss and eye injury. Directions must be followed carefully.

B. The products should not be used if scalp is irritated or injured.

C. The products should not be used on bleached, dyed or tinted hair. If hair is already relaxed, relaxer should be applied only to new growth, as described in the directions.

D. If the relaxer causes skin or scalp irritation, it should be rinsed out immediately and neutralized with the shampoo in the kit. If irritation persists, a physician should be consulted.

E. If the relaxer gets into eyes, the eyes should be rinsed immediately and a physician should be consulted.

Such facts are material and, if known to potential customers, would

be likely to affect their decision to purchase Mr. Cool and Miss Cool hair relaxers. Furthermore, knowledge of such facts by consumers would tend to reduce the hazards of hair, skin and eye injury posed by the use of Mr. Cool and Miss Cool hair relaxers. Therefore, failure to disclose said material facts on the retail product package is an unfair and deceptive act or practice.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive and unfair statements, representations, acts and practices and the dissemination of the aforesaid "false advertisements" has the capacity and tendency to mislead members of the consuming public and professional beauticians into the erroneous and mistaken belief that said statements and representations are true and substantiated, and into the purchase of substantial quantities of Mr. Cool and Miss Cool hair relaxers by reason of said erroneous and mistaken belief.

PAR. 13. In the course and conduct of their businesses respondents are in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of products and services of the same general kind and nature as are sold by respondents.

PAR. 14. The aforesaid acts and practices of respondents, including the dissemination of "false advertisements," are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts and practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having

determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty 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:

A. Respondent Soft Sheen Company, Inc. is an Illinois corporation with its office and principal place of business located at 7126-30 South Chicago Ave., Chicago, Illinois.

Respondents Edward G. Gardner and Betty Gardner are officers and principal shareholders of Soft Sheen Company, Inc. They formulate, direct and control the acts and practices of Soft Sheen Company, Inc. and their address is the same as that of said corporation.

Respondent Franklin Lett Associates is an Illinois corporation with its office and principal place of business located at 120 South Riverside Plaza, Chicago, Illinois.

B. 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

I

It is ordered, That respondents Soft Sheen Company, Inc., and Franklin Lett Associates, corporations, and their successors and assigns, and their officers, and Edward G. Gardner and Betty Gardner, individually and as officers of Soft Sheen Company, 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 Mr. Cool and Miss Cool hair relaxers or any cosmetic in or affecting commerce, as "cosmetic" and "commerce" are defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in writing, orally, visually, or in any other manner, directly or by implication that:

1. Any hair straightening product is safe, comfortable, or does not burn the hair or skin.

2. Any hair straightening product may be used on all grades or types of hair.

3. Any hair straightening product provides the user

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a. time adequate to complete application, or

b. more time for application than is available with other hair straightening products,

unless at the time the representation is made, respondents have a reasonable basis, consisting of competent and reliable tests or other evidence, to support such representation.

B. Representing, in any manner, the safety or efficacy of any cosmetic, or the ingredients therein, unless at the time such representation is made respondents have in their possession a reasonable basis, consisting of competent and reliable tests or other evidence, to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body.

C. Disseminating or causing to be disseminated any advertisement of Mr. Cool and Miss Cool hair relaxers or any similar product, which fails to disclose, clearly and conspicuously with nothing to the contrary or in mitigation thereof, the following statement exactly as it appears below:

WARNING: Follow directions carefully to avoid skin and scalp irritation, hair breakage and eye injury.

Provided, however, That Paragraph I of this order shall apply to respondent Franklin Lett Associates only with respect to Mr. Cool or Miss Cool hair relaxers, and any cosmetic manufactured by Soft Sheen Company, Inc., and any hair straightening product or process.

II

It is further ordered, That respondents Soft Sheen Company, Inc. and Franklin Lett Associates, corporations, and their successors and assigns and their officers, and Edward G. Gardner and Betty Gardner, individually and as officers of Soft Sheen Company, 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 Mr. Cool and Miss Cool hair relaxers or any cosmetic, as "cosmetic" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated by United States mails or by any means in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of any such product, any advertise-

ment which contains a representation prohibited by Paragraph One of this order or which omits a disclosure for such product required by Paragraph One of this order.

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any such product in or having an effect on commerce, as "commerce" is defined in the Federal Trade Commission Act, any advertisement which contains a representation prohibited by Paragraph One of this order or which omits a disclosure for such product required by Paragraph One of this order.

Provided, however, That Paragraph II of this order shall apply to respondent Franklin Lett Associates only with respect to Mr. Cool or Miss Cool hair relaxers, and any cosmetic manufactured by Soft Sheen Company, Inc., and any hair straightening product or process.

III

It is further ordered, That respondents Soft Sheen Company, Inc., a corporation, and its successors, assigns and officers, and Edward G. Gardner and Betty Gardner, individually and as officers of Soft Sheen Company, Inc., and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale, or distribution of Mr. Cool and Miss Cool hair relaxers or any similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from failing to include clearly and conspicuously on an information panel of the retail product package, the package insert, and the label of the relaxer container of any such product, with nothing to the contrary or in mitigation thereof, the following disclosures exactly as they appear below:

WARNING:

1. This product contains potassium hydroxide (lye). You must follow directions carefully to avoid skin and scalp burns, hair loss, and eye injury.
2. Do not use if scalp is irritated or injured.
3. Do not use on bleached, dyed or tinted hair. If you have previously relaxed your hair, relax only the new growth, as described in the directions.
4. If the relaxer causes skin or scalp irritation, rinse out immediately and neutralize with the shampoo in the kit. If irritation persists or if hair loss occurs, consult a physician.
5. If the relaxer gets into eyes, rinse immediately and consult a physician.

Respondents shall comply with this provision by August 15, 1975 or by the effective date of this order, whichever shall occur first.

IV

It is further ordered, That the Soft Sheen respondents shall recall and retrieve, from each beauty salon which sells or uses Mr. Cool and Miss Cool hair relaxers, each display advertisement for Mr. Cool and Miss Cool hair relaxers which contains any word or representation prohibited by Paragraph I of this order or which omits a disclosure for such products required by Paragraph I of this order.

V

It is further ordered, That respondents shall distribute a copy of this order to their present and future officers, directors, and operating divisions and that respondents secure from each such person a signed statement acknowledging receipt of this order.

VI

It is further ordered, That respondents maintain at all times in the future complete business records relative to the manner and form of their continuing compliance with the terms and provisions of this order. Each record shall be retained by respondents for at least three years after it is made.

VII

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

VIII

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

IX

It is further ordered, That respondents shall, within sixty days after

service upon them of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF

AMERICAN IMAGE CORPORATION, ET AL.

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

Docket C-2787. Complaint, Feb. 2, 1976—Decision, Feb. 2, 1976

Consent order requiring a New York City manufacturer and distributor of a skin preparation designated "Rebirth Beauty Masque," among other things to cease misrepresenting the cosmetic or beautifying effects of their product. Further, respondents are prohibited from making performance claims regarding their product without substantiating documentation in their possession backing up such claims.

Appearances

For the Commission: *Mark A. Heller.*

For the respondents: *Sheldon S. Lustigman, Bass & Ullman,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Image Corporation, a corporation, and Marvin Schere, individually and as president of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent American Image Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York with its principal place of business located at 276 Park Ave. So., New York, New York.

PAR. 2. Respondent Marvin Schere is an individual who is president of respondent American Image Corporation. He formulates, directs, and controls its acts, practices, and policies, including those hereinafter set forth. He cooperated in and effectuated the acts, policies, and practices of the corporation. His address is the same as that of the corporation.

PAR. 3. Respondents are now, and for some time past have been engaged in the manufacture, advertising, offering for sale, sale, and distribution of a skin preparation designated "Rebirth Beauty Mask" to retailers for resale to the consuming public.

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

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the sale of their said Rebirth Beauty Masque, respondents have made numerous statements and representations in print advertising respecting the effect of said product in producing clear, unblemished skin.

PAR. 6. Typical and illustrative of said statements and representations, but not all-inclusive thereof, are the following:

"PEEL OFF" COMPLEXION PROBLEMS IN ONLY 15 MINUTES!

Now you can have a beautiful complexion, free of pimples, acne, blackheads, dry flaky skin with Rebirth Beauty Masque.

You'll do as thousands do: just smooth on soothing Rebirth * * * let it dry for 15 minutes * * * then simply LIFT AWAY complexion problems!

Dirt, bacteria, all those ugly skin blemishes peel off easily, harmlessly, naturally.

Dark circles around your eyes will vanish * * * lines will be less visible * * * blotches will fade * * * for a fresh, youthful skin.

Your face is clear, glowing, satin-smooth — your "hidden beauty," revealed at last! You'll smile and the world will smile back!

PAR. 7. By and through the use of the aforesaid statements and representations, and others of similar import and meaning but not expressly set out herein, respondents have represented, and directly or by implication, that:

1. The use of Rebirth Beauty Masque will produce, within fifteen (15) minutes, skin that is free of acne, pimples, and blackheads for every individual who uses it;

2. Rebirth Beauty Masque will permanently remove dark circles from around the eyes within fifteen (15) minutes, on every individual who uses it;

3. The use of Rebirth Beauty Masque will cause skin blemishes to peel off, or lift away completely on every individual who uses it;

4. Tests or demonstrations which prove the representations numbered 1, 2, and 3 above have been conducted.

PAR. 8. In truth and in fact:

1. The use of Rebirth Beauty Masque will not produce, within fifteen (15) minutes, skin that is free of acne, pimples, and blackheads for every individual who uses it;

2. Rebirth Beauty Masque will not permanently remove dark circles from around the eyes of every individual who uses it, within fifteen (15) minutes.

3. The use of Rebirth Beauty Masque will not cause skin blemishes to peel off, or lift away completely on every individual who uses it;

4. Tests or demonstrations which prove the representations numbered 1, 2, and 3 above have not been conducted.

PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of skin preparations.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the tendency and capacity to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of Rebirth Beauty Masque by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION & ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent 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 respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of 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 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 American Image Corporation is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business at 276 Park Ave. So., New York, New York.

2. Respondent Marvin Schere, an individual, is president of said corporation. His business address is the same as that of the corporate respondent.

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

ORDER

It is ordered, That respondents American Image Corporation, a corporation, and its successors and assigns, and Marvin Schere, individually and as president of said corporation, and respondents' officers, representatives, agents, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of Rebirth Beauty Masque or any other skin creme, ointment or salve 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 any such product:

1. Produces or helps to produce skin that is blemish-free, or is free of acne, pimples, or blackheads, or will cause skin blemishes to peel off or lift away, or to be removed or eliminated;

2. Removes or eliminates, or helps to remove or eliminate, circles from around the eyes;

3. Will perform in any given manner or is effective for any purpose unless such claims are true and have been substantiated.

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

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

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

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

IN THE MATTER OF

GROLIER INCORPORATED, ET AL.

Docket 8879. Order, Feb. 10, 1976

Respondents' motion to disqualify and remove administrative law judge denied; and denial of respondents' discovery requests relative to evidence which would subject administrative law judge to disqualification; request for oral argument also denied.

Appearances

For the Commission: *Edward D. Steinman, David C. Fix* and *Robert D. Friedman.*

For the respondents: *Frederick P. Furth* and *Cullinan, Burns & Holmer*, San Francisco, Calif.

ORDER DENYING MOTION TO DISQUALIFY ADMINISTRATIVE LAW JUDGE

Administrative Law Judge Theodor P. von Brand informed the parties at a hearing on January 14, 1976, that he had been a legal advisor to Commissioner Everette MacIntyre from 1963 until January 1971. The law judge's disclosure was prompted by testimony by one of respondents' officials as to a meeting he had attended at which Mr. MacIntyre was present in 1966 or 1967.

Respondents now move under Section 3.42(g)(2) of the Rules of Practice to disqualify Judge von Brand on the ground that his presence on Commissioner MacIntyre's staff and his participation in this matter as administrative law judge violate the Administrative Procedure Act, 5 U.S.C. §554(d). The section prohibits an employee "engaged in the performance of investigative or prosecuting functions for an agency in a case" from participating or advising in the decision or recommended decision of that or a factually related case. Respondents also claim that the law judge's participation in this matter involves the appearance of impropriety.

During the time Judge von Brand was an advisor to Commissioner MacIntyre, the Commission had before it, among other things, the following matters involving respondents: a proposed complaint and proposed consent order, an assurance of voluntary compliance, and a resolution directing a non-public investigation.

The law judge has declined to disqualify himself and has submitted a response under Section 3.42(g)(2) in which he states that he has no recollection of having worked "on matters involving these respondents while serving as legal advisor to Commissioner MacIntyre," but that

"[i]n view of the volume of the circulations going through a Commissioner's office and the time span involved, [he] cannot say that [he] never saw or reviewed a circulation or staff recommendation relating to these respondents." The judge takes the position that "[l]egal advisors to the Commissioners are not engaged in the performance of investigative or prosecuting functions. Legal advisors to Commissioners, who function essentially as law clerks in reviewing circulations or staff recommendations, act in an advisory capacity to their Commissioners, as distinguished from agency employees in the operating bureaus who are responsible for securing or presenting evidence."

The requirement that adjudicatory and prosecuting or investigative functions be segregated arose out of a concern that "a man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of those who decide questions." See, Senate Judiciary Committee Print, June 1945. Those who have done the actual work of investigating and building the case and those who have prosecuted the case with a "will to win," Davis, *Administrative Law Treatise*, §13.07 (1958), may have a sufficient stake in the case to preclude the dispassionate judgment that due process and the Administrative Procedure Act require. We do not believe that an assistant to a Commissioner, who provides advice during the pre-complaint stage of an investigation, has the kind of stake in the outcome that would inhibit a fair decision. Cf. Gellhorn & Byse, *Administrative Law: Cases and Comments*, 1036 (6th ed. 1974).

For these reasons, we see no apparent impropriety in Judge von Brand's continued participation in this matter.[1]

Respondents also seek discovery of documents which they assert to be "reasonably calculated to lead to the discovery of evidence concerning Commission actions taken with respect to, or Commission contacts with, the respondents during Judge von Brand's tenure as a legal advisor." Respondents claim that some of the documents are "reasonably calculated to lead to evidence showing whether Judge von Brand had direct contact with any matters pertaining to the respondents while he served as legal advisor." Respondents also move for a subpoena addressed to the law judge directing him to appear at a deposition hearing and testify concerning any participation he may have had, from 1963 through 1971, in any Commission activities related to the respondents.

[1] The Commission expects that the law judge will confine his decision to the record. We note he has stated that he has no recollection of having seen any circulations or staff recommendations pertaining to these respondents while he was on Commissioner MacIntyre's staff.

Because we do not believe that Judge von Brand would be subject to disqualification even if it could be shown that he advised Commissioner MacIntyre on matters pertaining to these respondents, the discovery requests are denied. Accordingly,

It is ordered, That respondents' motion to disqualify and remove the administrative law judge be, and it hereby is, denied;

It is further ordered, That respondents' aforesaid discovery requests be, and they hereby are, denied.[2]

[2] Respondents' request for oral argument is also denied.

IN THE MATTER OF

VIRGINIA MORTGAGE EXCHANGE, INC., ET AL.

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

Docket 9007. Complaint, Jan. 28, 1975—Final Order, Feb. 10, 1976

Order requiring an Annandale, Va., loan broker, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Bernard Rowitz, Thomas J. Keary* and *Alan L. Cohen.*

For the respondents: *William L. Warfield*, Annandale, Va.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Virginia Mortgage Exchange, Inc., a corporation, and William L. Warfield, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending 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 Virginia Mortgage Exchange, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its principal office and place of business located at 7616 Little River Turnpike, Annandale, Virginia.

Respondent William L. Warfield is an officer of the corporate respondent. He formulates, directs, and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been,

engaged as brokers in the arranging and securing of loans for the general public.

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

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of business as aforesaid, respondents' customers are provided with consumer credit cost disclosure statements.

By and through the use of these consumer credit cost disclosures respondents:

1. Fail to identify each creditor, as "creditor" is defined by Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

2. Fail to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

3. Fail to disclose the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.8(b)(7) of Regulation Z.

4. Fail to make full consumer credit cost disclosures before the transaction is consummated, as required by Section 226.8(a) of Regulation Z.

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

INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

AUGUST 18, 1975

PRELIMINARY STATEMENT

[1] The Federal Trade Commission's complaint in this proceeding was issued on January 28, 1975, and charges respondents with violating the Truth in Lending Act, the implementing regulation issued thereunder, and the Federal Trade Commission Act.

The complaint specifically alleges that respondents, by and through the use of consumer credit cost disclosure statements provided to their customers:

1. Fail to identify each creditor as required by Section 226.6(d) of Regulation Z.[1]

[2] 2. Fail to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

3. Fail to disclose the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.8(b)(7) of Regulation Z.

4. Fail to make full consumer credit cost disclosures before the transaction is consummated, as required by Section 226.8(a) of Regulation Z.

Respondents filed their answer to the complaint on March 28, 1975, denying the first, third and fourth allegations. They neither admitted nor denied the second allegation.

A prehearing conference was held on April 11, 1975, and a hearing was held on June 2, 1975.

The parties filed proposed findings on June 30 and July 1, 1975 and replies on July 14 and 15, 1975. This decision is based on the record as a whole. The parties' proposed findings and replies have been carefully considered and to the extent they have not been adopted either verbatim or in substance, they are rejected as not supported by the evidence or as irrelevant to any issue in this proceeding.

FINDINGS OF FACT

1. Respondent Virginia Mortgage Exchange, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at 7616 Little River Turnpike, Annandale, Virginia. (Prehearing Conference, Tr. 11).[2]

[3] 2. Respondent William L. Warfield is president of the corporate respondent and owns all of its stock. He formulates, directs, and controls the acts and practices of the corporation, including those set forth in the complaint. His address is the same as that of the corporate respondent (Prehearing Conference, Tr. 11; Tr. 43-44).

3. Virginia Mortgage Exchange was incorporated in 1952 and is a broker whose business consists of arranging loans between borrowers and lenders, including consumer loans for personal debts or home improvements. The company began arranging consumer loans in 1968

[1] 12 C.F.R. §226, *et seq.* (1974).

[2] Abbreviations used in this decision are:
Tr. - Transcript of testimony.
CX - Commission exhibits.
RX - Respondents' exhibits.
Admiss. - Respondents' answers to complaint counsel's request for admissions.

or 1969 (Tr. 44-48). Another corporation, Second Virginia Mortgage Exchange (which also arranged consumer loans), was started by Mr. Warfield and a silent partner in June or July of 1971. It was dissolved after about one year. Mr. Warfield formulated, directed and controlled the acts and practices of this company while it was in existence (Tr. 44-46).

4. In 1971 approximately $184,500 worth of consumer loans were brokered by Virginia Mortgage Exchange, Inc. and Second Virginia Mortgage Exchange. In 1972 these companies brokered approximately $198,502 worth of consumer loans (Admiss. 15 and 16). Approximately 90 percent of these loans were arranged with Security Industrial Loan Association as the lender (Admiss. 19). The remainder were placed with Residential Industrial Association (Tr. 48).

5. In a typical transaction involving respondents' brokerage services, the borrower signs an "origination fee agreement" and respondents furnish the prospective lender with credit information including, in some cases, credit reports, mortgage verifications and property appraisals. The lender, usually some three to four days later, informs respondents by letter that the application has been approved (see CX 40; Tr. 49-53; Admiss. 22 and 25). Respondents then inform the borrower of approval of his application for a loan and of the closing attorney's name (CX 41). Respondents also notify the closing attorney of the loan approval, ask him to arrange settlement, furnish him with the necessary papers and request him to collect their commission (CX 42). Respondents' commission is usually 10 percent of the loan amount up to $5,000 and 5 percent above that (Tr. 72).

6. The loans which respondents arranged were subject to a finance charge and were payable in more than four installments (CX's 105-155).

[4] 7. Respondents do not give their disclosure statements directly to borrowers; instead, respondents forward the statements to the attorney who will be handling the closing with a request that they be given to the borrowers at settlement (Tr. 66-67). Two attorneys involved in loans arranged by respondents testified that they furnished respondents' statements as well as the lenders' statements to borrowers at the time of settlement, before any papers were signed (Tr. 28-29, 89-90, 99).

8. From May 1, 1971 (when respondents began giving disclosure statements to borrowers) to September 21, 1973, respondents' disclosure statements did not reveal the names of the lenders (Tr. 60; CX's 105 to 155), although at the time these disclosure statements were prepared, respondents knew the identity of the lenders (Tr. 67-68).

9. Inspection of the disclosure statements given to borrowers by respondents until September 21, 1973 reveals that while the term

"finance charge" is capitalized and underlined, other terms such as "amount of credit extended," "payments," etc., are also capitalized and are underlined. And while the term "annual percentage rate" is capitalized, it is less conspicuous than other terms which are both capitalized and underlined (CX's 105 to 155). Thus, the terms "finance charge" and "annual percentage rate" are not printed more conspicuously than other terms on the statements.

10. Respondents' disclosure statements do not reveal the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation; instead, most of respondents' statements refer the borrower to the lenders' statements for this information (CX's 107-112, 114, 116-120, 122-124, 128-143, 145-154; Tr. 62). A few of respondents' statements neither disclose the computation nor refer the borrower to the lenders' statements, a failure attributed by Mr. Warfield to clerical error (CX's 105-106, 113, 115, 121, 125-127, 144; Tr. 62-63).

11. Under Virginia law (Title 6.1, Chapter 5, Section 234), industrial loan associations are required to grant to natural persons borrowing from them the right to anticipate payment of their debt at any time and to receive a rebate computed in accordance with the Standard Rule of 78. Mr. Warfield testified that he was aware of Security Industrial Loan Association's obligations under [5] Virginia law in the event of prepayment (Tr. 64-65). Security Industrial is the lender with whom some 90 percent of the loans arranged by respondents were placed (Finding 4, *supra*).

12. Although respondents neither disclosed the names of the lenders nor revealed the lenders' method of computing any unearned portion of the finance charge in the event of prepayment, their customers were given this information at settlement when the closing attorneys turned over the lenders' disclosure statements (Tr. 28, 32-33, 93-94, 96; RX 1).

13. As a result of discussions with the Federal Trade Commission, respondents changed their disclosure statements on or about September 21, 1973 in two respects. The disclosure statements now reveal the names of both creditors (lender and broker), and the terms "finance charge" and "annual percentage rate" are now more conspicuous than other terms used (RX 4; Tr. 68-69). Only one consumer loan has been arranged by respondents since their disclosure statements were changed (Tr. 69).

14. Respondents' origination fee agreements state:

> We hereby authorize you to negotiate and act as our sole and independent agent on our behalf for the placement of a ——— mortgage loan on our property as described above.

It is understood that if you obtain a commitment in the amount of ——————— you will be entitled to, and we agree to pay, an origination fee of ———————. The closing attorney is hereby authorized to disburse said fee from our loan proceeds. (CX's 1-39)

However, there is no evidence that respondents or any other Virginia brokers have ever collected or sued for their brokerage fee from a borrower in the event that the loan transaction, although approved by the lender, was not consummated. [6]

DISCUSSION

Failure To Identify Each Creditor

Section 226.6(d) of Regulation Z[3] provides that:

If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making only those disclosures required by this Part which are within his knowledge and the purview of his relationship with the customer.

Respondents regularly arrange for the extension of consumer credit.[4] They are therefore creditors for purposes of the Truth in Lending Act and Regulation Z, including the disclosure requirements of Section 226.6(d), as are the lenders with whom respondents have arranged loans, Security Industrial Loan Association and Residential Industrial Association.[5]

[7] Although the borrowers are given separate disclosure statements of the lender and respondents at settlement and are therefore aware that there are two creditors involved in the loan which is about to be extended, complaint counsel argue that respondents have nevertheless violated Section 226.6(d) because they have not revealed the name of the lender in their disclosure statements.

This follows, say complaint counsel, because each creditor must make disclosures "required by this Part which are within his knowledge and the purview of his relationship with the customer." (Section 226.6(d))

Respondents know who the potential lenders are before settlement, but is this knowledge within the purview of their relationship with their customers?

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[3] Regulation Z was issued by the Board of Governors of the Federal Reserve System pursuant to Title I of the Truth in Lending Act (15 U.S.C. §1601, *et seq.* (1970)), 12 C.F.R. §226.1(a).

[4] Section 226.2(f) of Regulation Z states:

" 'Arrange for the extension of credit' means to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit receives or will receive a fee, compensation, or other consideration for such service * * *."

[5] Section 226.2(m) of Regulation Z states:

" 'Creditor' means a person who in the ordinary course of business regularly extends or arranges for the extension of consumer credit, or offers to extend or arrange for the extension of such credit."

See Federal Reserve Board Letter No. 677 (Mar. 8, 1973):

"In view of the fact that the 'loan finder' receives a fee for obtaining the loan, he becomes an arranger for the extension of credit under §226.2(f). As such, he is a creditor in the transaction, along with the bank, and the provisions of §226.6(d) apply with regard to multiple creditors."

There is apparently no judicial interpretation of this phrase — at least neither party has brought any to my attention. The word "purview" refers, among other things, to the "range, sphere, or field of a person's labour or occupation." *The Oxford Universal Dictionary* (3d Ed. 1955).

Since respondents necessarily know who the potential lender is by virtue of their occupation, which is to find lenders for their customers, complaint counsel argue that this knowledge is within the purview of their relationship with their customers and must be disclosed.

I do not agree. Since respondents meet their obligation to their customers when they arrange a loan with *any* [8] lender, the name of the lender is of no legal significance insofar as the relationship between respondents and their customers is concerned and is thus not within the sphere of that relationship.

I concede that complaint counsel's position finds some support in Federal Reserve Board Letter No. 699 (July 19, 1973) which commented on a similar situation. There, the Board's counsel advised that a loan broker's fee should be revealed on the lender's disclosure statement if the lender was aware of the amount of the fee. However, while such interpretations of Regulation Z are persuasive, they are not binding on me. See *Stefanski* v. *Mainway Budget Plan, Inc.*, 326 F. Supp. 138, 142 (S.D. Fla. 1971), *rev'd on other grounds*, 456 F.2d 211 (5th Cir. 1972).

I find that both the Board's and complaint counsel's interpretations of Section 226.6(d) are inconsistent with its plain language. Section 226.6(d) does not require only proof of knowledge, it demands more — proof that the knowledge is within the purview of the creditor's relationship with his customer. If one were to accept complaint counsel's interpretation which equates "knowledge" with "purview," that would be equivalent to striking everything in Section 226.6(d) after the word "knowledge." I prefer to believe that the drafters of Regulation Z deliberately adopted the "purview" language as an additional requirement. Since complaint counsel have established nothing beyond respondents' knowledge of the lender's name, they have not demonstrated that respondents are required by Section 226.6(d) to disclose that name on their statements.

Complaint counsel's alternative argument warrants little discussion because it is based on a faulty premise. They claim that respondents' failure to disclose the name of the lender on their disclosure statements violates the requirement of Section 226.8(a)(1) and (2) that all disclosures be made together on either the note or the instrument evidencing the obligation, or on one side of a separate statement.

But Section 226.8 refers only to "disclosures required by this

section." If respondents are required by other parts of Regulation Z to disclose the names of multiple creditors, [9] then they must comply with Section 226.8(a)(1) and (2); however, if the names of other creditors are not within the knowledge of respondents and the purview of their relationship with their customers, they need not disclose those names on *any* instrument or statement.

The purpose of the Truth in Lending Act is to "assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." 15 U.S.C. §1601 (1970).

Requiring the broker to reveal the lender's name when the lender will do so in his disclosure statement does nothing to further congressional intent. The Board, I believe, realized this and deliberately adopted language in Section 226.6(d) which would avoid unnecessary disclosures by multiple creditors. Therefore, respondents need not reveal the other creditor, the lender, in their disclosure statements and have complied with Section 226.6(d) of Regulation Z.

Failure To Print Certain Terms More Conspicuously Than Others

Section 226.6(a) of Regulation Z states:

> The disclosures required to be given by this Part shall be made clearly, conspicuously, in meaningful sequence, in accordance with the further requirements of this section, and at the time and in the terminology prescribed in applicable sections. Except with respect to the requirement of §226.10, where the terms "finance charge" and "annual percentage rate" are required to be used, they shall be printed more conspicuously than other terminology required by this Part * * *

Respondents' present disclosure statement form complies with this section (RX 4). However, it has only been in use since September 1973; prior statements clearly fell short of the demands of Section 226.6(a).

Respondents point out that in one sample form accompanying Regulation Z when it was promulgated, at least two other headings were as conspicuous as the terms "finance charge" and "annual percentage rate."

[10] Respondents apparently do not claim that they relied on this form in preparing theirs; they seem to be saying instead that if the agency responsible for the promulgation of Regulation Z can make mistakes, they should be allowed some too. I cannot accept this argument, for respondents are bound to comply with Regulation Z regardless of what mistakes others may make, especially when particular requirements, such as those of Section 226.6(a), are incapable of misinterpretation.

Respondents have, therefore, failed to comply with the requirements of Section 226.6(a) of Regulation Z.

Failure To Disclose Method of Computing Unearned Portion of Finance Charge in Event of Prepayment

Section 226.8(b)(7) requires any creditor when extending credit other than open end to identify "the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation * * *."

The lenders reveal this information on their disclosure statements (see RX 1),[6] and respondents refer their customers to these statements, but complaint counsel urge that respondents' disclosure statement must duplicate the language recited in the footnote because pursuant to the general disclosure requirements of Regulation Z (Section 226.6), the specific disclosure required by Section 226.8(b)(7) is within respondents' knowledge and the purview of their relationship with their customers (see Section 226.6(d)).

Respondents reply that the only fee they charge is a placement fee which they fully earn upon closing of the loan, but this misconceives complaint counsel's argument, for they claim that respondents, because of Section 226.6(d), must reveal the lender's method of computing any unearned portion of the finance charge.

[11] Respondents also argue that since they are not creditors extending credit other than open end credit,[7] they need not make the disclosure required in Section 226.8(b)(7).

"Credit" is defined in Section 226.2(1) as the "right granted by a creditor to a customer to defer payment of debt, incur debt and defer its payment, or purchase property or services and defer payment therefor."

According to this definition, respondents are not creditors extending credit, for payment of their placement fee is not deferred.

However, while respondents are not creditors extending credit, they are "creditors" for purposes of other parts of Regulation Z because they arrange for the extension of consumer credit (see Section 226.2(m)).

Thus, even though Section 226.8(a) is not applicable to respondents, disclosure of the information referred to in Section 226.8(b)(7) could be required by Section 226.6(d).

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[6] "Borrower shall have the right to anticipate payment of this debt at any time and shall receive a rebate for any unearned interest, which rebate shall be computed in accordance with the Standard Rule of 78 and shall be reduced by an anticipation premium equal to that portion of the contract interest allocable under such Rule to the next six payments."

[7] See Section 226.8(a): "Any creditor when extending credit other than open end credit shall, in accordance with §226.6 and to the extent applicable, make the disclosures required by this section * * *"

Nevertheless, respondents are not required by that section to disclose Section 226.8(b)(7) information. Lenders must comply with Virginia law concerning prepayment, and respondents are aware of this, but for the reasons I gave in discussing the allegation of failure to identify each creditor, the knowledge which respondents have of the lender's prepayment obligation is not within the purview of their relationship with their customers, because that information is not an essential aspect of their relationship. The purview of the broker-customer relationship does not depend upon how the lender computes the unearned portion of his finance charge. The broker's only obligation is to obtain a lender willing to extend credit.

As I did with respect to the claim that respondents must disclose the names of all creditors, I reject the argument that the words "knowledge" and "purview" are essentially similar, for according to this argument, each creditor would have to disclose everything he knew [12] about a credit transaction. This interpretation clearly contravenes the intent of the drafters of Section 226.6(d) which makes multiple creditors "responsible for making *only* those disclosures * * *." which are within his knowledge *and* the purview of his relationship with his customer. (Emphasis added.)

Respondents are not required by Section 226.6(d) of Regulation Z to disclose the lender's method of computing any unearned portion of the finance charge in the event of prepayment of the obligation.

Failure To Make Full Consumer Credit Cost Disclosures

Section 226.8(a) of Regulation Z states:

> Any creditor when extending credit other than open end credit shall, in accordance with §226.6 and to the extent applicable, make the disclosures required by this section with respect to any transaction consummated on or after July 1, 1969. Except as provided in paragraphs (g) and (h) of this section, such disclosures shall be made before the transaction is consummated.

Respondents' disclosure statements are not given to their customers until settlement, that is, when the loan transaction is consummated. Although Section 226.8(a) seems to refer only to loan transactions, complaint counsel claim that another transaction is consummated within the meaning of Section 226.8(a) when the lender commits itself to making a loan, because respondents earn their brokerage fee at that time. It is thus argued that because the brokerage transaction is "consummated" *before* settlement, and respondents furnish their disclosure statement *at* settlement, they have violated this disclosure requirement.

Respondents argue that since their fee is paid out of the loan

proceeds at settlement, the transaction is not consummated until that time.

Under the origination fee agreement signed by their customers, respondents are entitled to their commission if they obtain a loan commitment (see *e.g.*, CX 1). Complaint counsel urge that by analogy with Virginia real estate law, respondents must therefore make the [13] disclosures required by Section 226.8(a) when they are informed by the lender of its approval of the loan application.[8] However, one of their witnesses, a settlement attorney, gave his opinion that respondents would not be entitled to their placement fee until the loan papers were signed because that is the intent of the origination fee agreement (Tr. 102).

It is not clear, in my opinion, what the intent of broker and customer is when the origination fee agreement is signed. The agreement does state: "It is understood that if you obtain a commitment in the amount of ——————— you will be entitled to, and we agree to pay, an origination fee of ———————," and this language lends support to complaint counsel's argument.

However, respondents' customers could argue that the agreement's further language "The closing attorney is hereby authorized to disburse said fee from our loan proceeds" reveals the intent that the fee will be earned only when the loan is obtained. Further support for this argument is found in the third paragraph of the agreement:

> In the event that you obtain a loan satisfactory to us in a lesser amount than shown above, it is understood that you shall be entitled to an origination fee equaling ten percent of the first five thousand dollars of the proceeds of the loan, plus five percent of any amount over five thousand dollars. (CX 1)

[14] Why should the borrower condition payment of the placement fee on obtaining a loan for a lesser amount only if it were satisfactory to him, but commit himself to pay the fee if mere approval for the full amount is obtained? It is at least arguable that it was the intention of the parties, as revealed in this language, that the placement fee would be payable, regardless of the amount of the loan, only if the loan were satisfactory to the borrower. The point is that the language of the agreement leaves room for doubt, and complaint counsel have not furnished any evidence which would assist in interpreting it. There are apparently no court cases on this point and there is no evidence that any Virginia loan broker has ever collected or attempted to collect his

[8] See, *e.g.*, *Reiber* v. *J. M. Duncan*, 206 Va. 657, 145 S.E. 2d 157, 160 (Va. 1965).

"Generally, when a real estate broker, pursuant to a valid listing agreement, procures a purchaser for a listed property ready, willing and able to buy upon the terms defined by the owner, then the agent is entitled to his commission. The fact that the sale is not consummated does not deprive the broker of the right to receive his commission unless the failure to consummate is due to some fault of the broker."

fee even though the lender has failed to consummate the loan. Under the circumstances, I cannot find as a matter of law that the transaction between broker and borrower is consummated prior to settlement.

Furthermore, it hardly seems logical to require the broker to make disclosures prior to the time the lender must. Although complaint counsel argue that early disclosure is essential so that borrowers can shop for credit, it is apparent to me, and complaint counsel make no contrary claim, that the lenders complied with Regulation Z when they made the required disclosures at settlement. See *Stavrides* v. *Mellon National Bank & Trust Co.* 353 F. Supp. 1072, 1078 (W.D. Pa.), *aff'd*, 487 F.2d 953 (3d Cir. 1973):

> We think it would be very unusual that a mortgagor would be called upon to execute a mortgage and bond without some prior notice of its terms. But even if this were to occur we think disclosure of the terms of the loan in the mortgage papers just before closing would be adequate disclosure under §1639.

See also *Foster* v. *Maryland State Savings & Loan Ass'n.*, 369 F. Supp. 843, 846 (D.D.C. 1974); *Ljepava* v. *M.L.S.C. Properties, Inc.*, CCH Consumer Credit Guide ¶ 98,639 at pp. 88,175-176 (9th Cir. 1975):

> [Plaintiffs] argue that shopping for credit requires that the disclosure statement be provided sufficiently in advance so that a borrower would have the opportunity to go to another lender to see if he could obtain [15] better terms. While we find that this argument is logically persuasive, it has been rejected by virtually every court that has considered it.

Thus, even if it were clear that respondents' fee is earned prior to settlement, it would seem ludicrous to require them to disclose credit information which the lender need not disclose until settlement.[9]

Since complaint counsel have failed to establish that the transaction is consummated prior to settlement, respondents are not required to make Truth in Lending disclosures prior to settlement.

Liability of Mr. Warfield

Respondents have failed to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terms on their disclosure statements.

The corporate respondent's president, Mr. Warfield, is responsible for this violation of Regulation Z in the sense that he is responsible for all of the activities of the corporate respondent, and complaint counsel claim that he should therefore be subject to any cease and desist order which I might enter.

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[9] Complaint counsel point out that a recent amendment to Section 121 of the Truth in Lending Act, 15 U.S.C. §1631 (1970), requires disclosures at the time the creditor makes a commitment to extend credit. My interpretation of Section 226.8(a) must, however, be based upon the Act as it existed when the challenged transactions occurred.

There is no question that an individual can be held accountable for the acts of a corporation and can be brought within the ambit of Commission cease and desist orders. See, *e.g.*, *John A. Guziak* v. *Federal Trade Commission*, 361 F.2d 700, 704 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007 (1967); *Standard Distributors, Inc.* v. *Federal Trade Commission*, 211 F.2d 7, 14-15 (2d Cir. 1954). The reason for extending the prohibition of a cease and desist order to individuals is the fear that [16] they might avoid the order by continuing the proscribed activity in their individual capacity.

It is not enough, however, that Mr. Warfield controls the acts and practices of the corporation. If that were the basis of individual responsibility, every corporate officer whose responsibilities encompassed acts and practices challenged by a complaint would be individually liable.[10]

If it had been shown that Mr. Warfield had deliberately engaged in consumer deception, or that there is reason to believe that he would attempt to evade an order, individual liability would be appropriate. But the single violation which I have found was not intentionally devised to deceive borrowers and it does not justify an order directed against Mr. Warfield in his individual capacity.

Discontinuance

Respondents argue that if they violated the Truth in Lending and Federal Trade Commission Acts by failing to comply with certain provisions of Regulation Z, such violations were discontinued in September 1973, before the Commission's complaint was issued, and that entry of an order is therefore unnecessary and inappropriate.

Discontinuance is seldom a defense in Commission proceedings, especially when it is, or may have been, prompted by the knowledge that the Commission is investigating one's activities. *Oregon-Washington Plywood Co.* v. *Federal Trade Commission*, 194 F.2d 48, 51 (9th Cir. 1952); *Automobile Owners Safety Insurance Co.* v. *Federal Trade Commission*, 255 F.2d 295, 298 (8th Cir.), *cert. denied*, 358 U.S. 875 (1958).

[17] Respondents began using a new disclosure statement only after discussions were held with Commission representatives. The discontinuance was thus not voluntary; it was apparently prompted by knowledge of the Commission's interest in respondents' activities. See

[10] See *The Lovable Company*, 67 F.T.C. 1326, 1336-37 (1965): "To justify naming an officer as an individual there must be something in the record suggesting that he would be likely to engage in these practices in the future *as an individual*. To argue otherwise would be to hold that in every order running against a corporation the officers who control its policies, acts and practices should be named." (Emphasis in original).

Beneficial Corp., F.T.C. Dkt. 8922, p. 12 (July 15, 1975) [86 F.T.C. 119 at 165].

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over respondents and the practices described herein.

2. Respondents are not required to identify each creditor, as "creditor" is defined by Section 226.2(m) of Regulation Z.

3. Respondents are not required to disclose the lender's method of computing any unearned portion of the finance charge in the event of prepayment of the obligation.

4. Respondents have not failed to make full consumer credit cost disclosures before the transaction is consummated.

5. Respondents have failed to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z, and have therefore violated the Truth in Lending Act, and pursuant to Section 108(c) of that Act, 15 U.S.C. §1607(c)(1970), the Federal Trade Commission Act.

Because of the very narrow violation of the Truth in Lending Act, the order should be limited to enjoining further identical violations. This is not a case in which entry of a broad order outlawing other possible violations of the Truth in Lending Act is appropriate.

ORDER

It is ordered, That respondent Virginia Mortgage Exchange, Inc., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives [18] and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement for the extension of credit or advertisement to aid, promote or assist, directly or indirectly, any extension or arrangement for the extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.* (1970)), do forthwith cease and desist from:

Failing to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

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

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

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

[19] *It is further ordered*, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the arranging for the extension of consumer credit and that respondent secure a signed statement acknowledging receipt of said order from each such person.

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

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*

[1] The complaint in this matter was issued on January 28, 1975, charging respondents with violations of the Truth in Lending Act (15 U.S.C. §1601, *et seq.*), "Regulation Z" promulgated thereunder (12 C.F.R. §226, *et seq.*), and Section 5 of the Federal Trade Commission Act (15 U.S.C. §45), in connection with their arrangement, as loan brokers, of transactions between lenders and borrowers. Hearings before an administrative law judge (hereinafter sometimes ALJ) led to an initial decision on August 18, 1975, holding that Virginia Mortgage Exchange had breached the law by failing to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z. The judge recommended an order correcting this violation, and recommended that in all other respects the complaint be dismissed.

Complaint counsel have appealed, arguing that the law judge erred in failing to find that respondents, as loan brokers, are obliged to disclose the name of the lender with whom a loan is arranged, and the method by which any unearned portion of the finance charge is computed in the event of [2] prepayment of a loan. Complaint counsel further urge the Commission to extend liability to the individual respondent, and to expand the order to forbid related violations of Regulation Z not alleged in the complaint. Respondents have taken no appeal from the ALJ's conclusions and urge that no further findings of violation be made.

BACKGROUND

The facts of this matter are simple and neither side has objected to

the ALJ's concise accounting of them. The following summary borrows repeatedly (without quotation marks) from the judge's own prose:

Respondent Virginia Mortgage Exchange is a broker whose business consists of arranging loans between borrowers and lenders, including consumer loans for personal debts or home improvements. (I.D. 3)[1] The bulk of the company's consumer loans were arranged with Security Industrial Loan Association as the lender. (I.D. 4) Mr. William Warfield is the president of Virginia Mortgage Exchange. (I.D. 2)

In a typical transaction arranged by respondents, the borrower signs an "origination fee agreement" and respondents furnish the prospective lender with credit information, including, in some cases, credit reports, mortgage verifications and property appraisals. The lender, usually some three to four days later, informs respondents by letter that the application has been approved. Respondents then inform the borrower that his loan application has been approved, and of the closing attorney's name. Respondents also notify the closing attorney of the loan approval, ask him to arrange settlement, furnish him with the necessary papers and request him to collect their commission, which is usually 10 percent of the loan amount up to $5000 and 5 percent above that. (I.D. 5)

Respondents do not give their Truth in Lending disclosure statement directly to the borrower. Instead they forward the statement to the closing attorney with a request that it be provided at settlement. Attorneys involved in loans arranged by respondents testified that they furnished respondents' statements as well as the lenders' statements to borrowers at the time of settlement before any papers were signed. (I.D. 7) [3]

I. Failure to Disclose Name of Lender and Method of Computing Unearned Finance Charge

The complaint alleged that respondents had contravened the law by failing to disclose the name of the lender and the method of computing any unearned portion of the finance charge in the event of prepayment. The fact of nondisclosure is not denied. The ALJ found that prior to September 21, 1973, respondents did not disclose the name of the lender in their disclosure statement. Thereafter, following investigation by Commission staff, they began to disclose the lender's name. (I.D. 9) The ALJ further found that respondents' disclosure statements did not at any time reveal the method of computing the unearned portion of the finance charge. (I.D. 10)

[1] The following abbreviations are used herein:
I.D. - Initial Decision (Finding No.)
I.D. p. - Initial Decision (Page No.)

Respondents acknowledge their obligation, as a broker, to provide consumers with a Truth in Lending disclosure statement of some sort.[2] At issue in this proceeding is the nature of those disclosures which a loan broker must provide. Section 226.6(d) of Regulation Z establishes the disclosure obligations of each creditor when there is more than one: [4]

(d) *Multiple creditors; joint disclosure.* If there is more than one creditor in a transaction, each creditor shall be clearly identified and shall be responsible for making only those disclosures required by this part which are within his knowledge and the purview of his relationship with the customer. If two or more creditors make a joint disclosure, each creditor shall be clearly identified. * * *

Section 226.8 requires, *inter alia:*

Identification of the method of computing any unearned portion of the finance charge in the event of prepayment in full of an obligation which includes precomputed finance charges * * *.

In the instant case the identity of the lender and the method of computing the unearned finance charge were clearly within the knowledge of respondents at the time their disclosure statement was furnished (I.D. 9, 11), and the crucial question, therefore, is whether or not these terms were within the "purview" of respondents' relationship with their customers.

The ALJ reasoned that:

Since respondents meet their obligation to their customers when they arrange a loan with *any* lender, the name of the lender is of no legal significance insofar as the relationship between respondents and their customers is concerned and is thus not within the sphere of that relationship. (I.D. pp. 7-8)

We cannot agree. In our view, all terms of a given loan fall within the "purview" or "scope" of the relationship between a customer and the broker who arranges that loan. It is respondents' responsibility as broker to provide their customers with the loan they desire, and this necessarily includes a particular lender, a particular formula for computing unearned interest in the event of prepayment, as well as those other particular details of loan transactions which respondents have disclosed routinely in the course of their business.

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[2] Regulation Z, promulgated by the Federal Reserve Board to implement the Truth in Lending Act, defines a "creditor" (who must provide a disclosure statement) as "* * * a person who in the ordinary course of business regularly extends or *arranges for the extension of consumer credit*, or offers to extend or arrange for the extension of such credit." [12 CFR §226.2(m)] (emphasis added)

Section 226.2(f) defines "arrange for the extension of credit" as "* * * to provide or offer to provide consumer credit which is or will be extended by another person under a business or other relationship pursuant to which the person arranging such credit received or will receive a fee, compensation, or other consideration for such service or has knowledge of the credit terms and participates in the preparation of the contract documents required in connection with the extension of credit* * *."

[5] The origination agreement which respondents' customers sign represents that the broker, for a given fee, will obtain a loan commitment in a stated amount. (I.D. 14) No other loan terms are specified, but the contract indicates that the broker's commission will be deducted from the loan proceeds. Under these circumstances the ALJ concluded that it was highly questionable whether respondents could collect their commission from a customer who was not willing to consummate a loan for which they had obtained a commitment. (I.D. pp. 13-14)[3] What is unquestionable, in any event, is that a borrower is under no obligation to contract for the loan which respondents present. After reviewing relevant Truth in Lending disclosures the borrower may conclude that the terms are inadequate. Surely there is no warrant for concluding that the name of the lender and the formula for determining the cost of prepayment are any less relevant to the borrower's review of the deal his or her broker has arranged than are any other terms.

The foregoing construction of Section 226.6(d) is evidently favored by such precedent as exists, though it would appear that this issue is (understandably perhaps) not one which has engaged the sustained interest or even the careful attention of authorities who have expressly or impliedly dealt with it. In *Pedro* v. *Pacific Plan*, 393 F. Supp. 315 (N.D. Cal. 1975), cited by complaint counsel, the court concluded:

> * * * the requirement of 12 C.F.R. §226.6(d), namely, that the broker disclose the identity of the prospective borrower, is one with which the broker is required to comply. (at 320)

In *Ljepava* v. *M.L.S.C. Properties, Inc.*, 511 F.2d 935 (9th Cir. 1975), the court held, without discussing the "purview" question, that a mortgage broker's disclosure statement was inadequate because, among other things, he did not explain how charges for late payments were to be calculated (at p. 942). It is difficult to discern any relevant difference between the method of computing penalties for late payment of an installment and that for computing the penalty for prepayment of the entire loan balance. Both are [6] terms that come into play only after a loan has been consummated and the broker's role is complete, but both are also terms and conditions of the loan arranged by the broker. *See also, Palmer* v. *Wilson*, 359 F. Supp. 1099 (N.D. Cal. 1973), *aff'd as to liability but remanded for reconsideration of relief*, 502 F. 2d 860 (9th Cir. 1974).

The assumption of the California courts regarding the "purview of the broker's relationship with his customer" is also reflected in a

[3] The judge found that "* * * there is no evidence that respondents or any other Virginia brokers have ever collected or sued for their brokerage fee from a borrower in the event that the loan transaction, although approved by the lender, was not consummated." (I.D. 14)

Federal Reserve Board opinion letter cited by complaint counsel. [FRB Letter No. 699; CCH Consumers Credit Guide ¶30,996 (Special Releases—Correspondence Transfer Binder, July 19, 1973); see also FRB Letter No. 929 [CCH Consumers Credit Guide ¶31,268 (Special Releases—Correspondence, October 21, 1975)].] While recognizing the relevance of the Reserve Board letter, the law judge concluded that he was not bound to adhere to its reasoning. (I.D. 8) In an absolute sense this may be so, but clearly the views of Federal Reserve Board staff as to the meaning of the Board's own regulation are to be accorded great deference, *Philbeck* v. *Timmers Chevrolet, Inc.*, 499 F.2d 971, 976-77 (5th Cir. 1974), and especially so where, as here, they coincide entirely with such limited judicial authority as exists.

We believe that our construction of Section 226.6(d) of Regulation Z is, furthermore, the one most consistent with the purpose of the Truth in Lending Act itself. As complaint counsel point out, the Act as originally proposed included no requirement that loan brokers provide disclosures. Thereafter the proposed legislation was amended to cover those who "arrange" for extensions of credit as well as those who extend it themselves. In describing the purposes of his amendment its author stated:

> Another amendment would perfect Section 202. Under this section only those who actually extend credit are required to disclose credit costs. However, in terms of commercial reality, credit arrangements in mortgage transactions are generally arranged through brokers. These brokers usually extend no credit themselves, but rather pass upon the credit acceptability of applicants and place the application with lending institutions.
>
> Further, fraudulent second mortgage schemes frequently involve mortgage brokers who offer to [7] consolidate all the homeowner's debts. Another amendment will make clear that brokers and others who arrange credit transactions between borrowers and creditors are included in the disclosure requirements of the bill. 114 Cong. Record 1611 (1968)

Any interpretation of Section 226.6(d) must take into account the manifest purpose of the law to ensure full disclosure of credit terms in situations involving brokered loans as well as those negotiated by a borrower directly with a lender.

Respondents argue that in terms of this statutory purpose there has been no abuse here because all borrowers were apprised of the lender's name and formula for computing unearned interest by the lender's disclosure statement. (*See* I.D. 12) The requirements imposed by Regulation Z upon a broker appear on their face, however, in no way dependent upon the nature of any separate disclosure provided by the lender, and we can find no warrant for so construing them. Thus, a holding in this case that particular credit terms are outside the purview of a broker's relationship with a borrower would unavoidably apply

with equal force to those situations in which a broker arranges loans with individual lenders not in the business of making loans and thus not subject to Truth in Lending requirements. In such cases the commercial broker would be the only possible source of Truth in Lending disclosures, but under the interpretation espoused by respondents and the ALJ the broker would have no obligation to make them. Such a construction would entirely defeat the purpose of the law.[4]

[8] While respondents argue that given their manner of operation at the time of the complaint, our holding here could lead to the wasteful result of consumers being furnished with identical statements by both broker and lender, this result is hardly required. As Section 226.6(d) makes clear, where there is more than one creditor in a transaction, all creditors together may provide a single joint disclosure statement, listing the names of each creditor and including a single recitation of all necessary credit terms. This alternative has much to commend it in terms of clarity and economy. Absent joint disclosure, however, we think that furnishing identical separate disclosures is clearly preferable to furnishing separate disclosures with random omissions. A consumer given a single complete disclosure statement will, it is to be hoped, read, reflect upon, and retain it. Given two statements, however, similar or identical to the casual eye and each purporting to describe the same loan, even the most devoted comparison shopper may reasonably conclude that life is too short to study them both. The result of such a determination is effective nondisclosure of any items omitted from the statement which the borrower does choose to review and retain.

For all of the foregoing reasons we conclude that the lender's name and the formula for computing the unearned finance charge in the event of prepayment, are, like all other terms of a loan, matters within the purview of a loan broker's relationship with his customer, within the meaning of Section 226.6(d) of Regulation Z. Given respondents' knowledge of these terms it was incumbent upon them to disclose them in their own disclosure statements, and the failure to do so was a violation of the Truth in Lending Act, and, pursuant to Section 108(c) of that Act, 15 U.S.C. §1607(c)(1970), the Federal Trade Commission Act. [9]

[4] While we conclude that the "purview" requirement of Section 226.6(d) does not operate to exempt a loan broker from disclosing terms of a loan he arranges, we must reject the ALJ's conclusion that such an interpretation effectively robs the "purview" requirement of any meaning. One can readily envision situations in which two or more *lenders* are involved in a transaction, one providing a first mortgage, for instance, and the other a second trust. In such cases each lender would be obliged to disclose the terms of his own credit extension, but the purview requirement might, depending upon the circumstances, operate to relieve each from any obligation to account for the other's terms, even given knowledge of them. We believe it was for such situations that the purview requirement was designed.

II. *Scope of the Order*

Complaint counsel urge that the Commission adopt order provisions requiring respondents to make all disclosures required by Section 226 of Regulation Z in the manner required by the Section.

It is well established that the Commission "is not limited to prohibiting 'the illegal practice in the precise form' existing in the past. *FTC* v. *Ruberoid*, 343 U.S. 470, 473 (1952). This agency, like others, may fashion its relief to restrain 'other like or related unlawful acts.' *Labor Board* v. *Express Pub. Co.*, 312 U.S. 426, 436 (1941)"; *FTC* v. *Mandel Bros. Inc.*, 359 U.S. 385, 392; *see also Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 611 (1946); *Fedders Corp.* v. *Federal Trade Commission* (Docket No. 75-4151; 2d Cir., January 21, 1975)."

Here the violations involve failure to make certain disclosures required by Section 226 of Regulation Z, and failure to make certain disclosures in the manner required by the Regulation. We believe that an appropriate order should prohibit in the future the withholding of other Section 226 disclosures, as well as ensuring that all disclosures are made in the manner required. These are practices closely related to those involved in the complaint. The purpose of a proceeding of this sort is to ensure that the full panoply of Truth in Lending disclosures are made in the uniform manner required by Congress and the Federal Reserve Board. That purpose can best be served by an order which prohibits in the future violations kindred to those which have been shown on the record. The provision proposed by complaint counsel is further in accord with prior Commission practice in litigated cases, *e.g.*, *Zale Corp., et al.* v. *FTC*, 473 F. 2d 1317 (5th Cir. 1973), *aff'g* 78 F.T.C. 1195 (1971), and numerous consent order proceedings, *e.g.*, *Commercial Investors, Inc., et al.*, Dkt. No. C-2668 (May 12, 1975 [85 F.T.C. 858]); *Julian L. Levinson, et al.*, Dkt. No. C-2667 (May 12, 1975 [85 F.T.C. 854]); *Ted P. Simopoulos, et al.*, Dkt. No. 2666 (May 13, 1975 [85 F.T.C. 873]); *Valley Acceptance Corporation, et al.*, Dkt. No. C-2655 (May 13, 1975 [85 F.T.C. 142]); *Roy D. Hanson, et al.*, Dkt. No. 2664 (May 13, 1975 [85 F.T.C. 865]), and we shall include it in the order of the Commission (Par. 4). [**10**]

III. *Liability of Individual Respondent*

While recognizing that the individual respondent was responsible for the challenged practices of the corporation, the administrative law judge refused to impose individual liability because he concluded that there had been no showing that the individual "had deliberately

engaged in consumer deception" or "would attempt to evade an order." (I.D. pp. 15-16)

The purpose of imposing individual liability is to ensure, in a case in which an individual has been responsible for prohibited activities, that those activities are not continued by the individual after entry of an order. Where the corporate respondent is small and under the control of one or a few individuals, it becomes more likely that prohibited activities may recur if an order enters only against the corporation. One reason may be the corporation's relatively minimal exposure to civil penalty actions. Where a company is thinly capitalized with profits being diverted quickly to the individuals in control, such individuals may be much less likely to fear the bite of enforcement action than if they could be held personally liable. A second reason, and one which is fully applicable here, is that where a corporation is basically no more than an extension of one or a few people who control it, it is relatively easier and more likely that at some point the individuals will choose to do business in a different corporate setting. In this case, for example, Virginia Mortgage Exchange is little more than the corporate embodiment of the individual respondent, employing only a secretary in addition to him. Under the ALJ's approach, the individual would be perfectly free to establish a new company through which to extend consumer loans. Unless such a corporation could be shown to be a "successor" to Virginia Mortgage Exchange, the order proposed by the law judge would be of no effect.

We can readily accept the judge's conclusion that there has been no hint of deception in this case. The record reveals no more than an honest disagreement by respondent over the meaning of a complex statute. While we thus have little doubt that respondent will abide by any order that binds him, the fact remains that were he to organize a new corporate entity, for legitimate business reasons wholly unrelated to this case, there might be no binding order left. Under these circumstances we believe that effective prohibition of the practices involved in the complaint requires provision for individual liability. *See: Standard Educators, Inc.*, [11] *et al.* v. *Federal Trade Commission*, 475 F. 2d 401 (D.C. Cir. 1973); *Standard Distributors, Inc., et al.* v. *Federal Trade Commission*, 211 F. 2d 7, 14-15 (2d Cir. 1954); *Peacock Buick, Inc., et al.*, Dkt. No. 8976 (Slip op. pp. 18-19; Dec. 19, 1975 [86 F.T.C. 1532 at 1565]); *Coran Bros. Corp., et al.*, 72 F.T.C. 1, 24-25 (1957).

We have also included standard "notification" language requiring the individual respondent to report any changes of business involving the extension of consumer credit for a period following the effective date of the order. We do not agree with complaint counsel, however, that the record demonstrates any need for a provision requiring that respon-

dents post a sign on their premises alerting consumers to their right to receive a Truth in Lending disclosure statement. This provision of the notice order will, therefore, be omitted.

An appropriate order is appended.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having granted the appeal in part:

It is ordered, That pages 1-5; pages 9-10 (titled "Failure to Print Certain Terms More Conspicuously than Others"); and pages 15-16 (titled "Discontinuance") of the initial decision be, and they hereby are, adopted as the Findings of Fact and Conclusions of Law of the Commission.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

ORDER

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

1. Failing to identify each creditor as "creditor" is defined in Section 226.2(m) of Regulation Z, as required by Section 226.6(d) of Regulation Z.

2. Failing to print the terms "finance charge" and "annual percentage rate" more conspicuously than other terminology, as required by Section 226.6(a) of Regulation Z.

3. Failing to disclose the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.8(b)(7) of Regulation Z.

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

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

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

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the arranging for the extension of consumer credit and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment, and, for a period of five years from the effective date of this order, of each affiliation with a new business or employment involving any extension or arrangement for the extension of credit or advertisement to aid, promote, or assist, directly or indirectly, any extension or arrangement for the extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub.L. 90-321, 15 U.S.C. §1601, *et seq.*). Such notice shall include the address of the business or employment with which respondent is newly affiliated and a description of the business or employment, as well as a description of the respondent's duties and responsibilities in that business or employment.

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