

FEDERAL TRADE COMMISSION DECISIONS

Complaint

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IN THE MATTER OF  
GENERAL MOTORS CORPORATION

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

*Docket C-2966. Complaint, May 18, 1979 — Decision, May 18, 1979*

This consent order, among other things, requires a Detroit, Mich. motor vehicle manufacturer to cease misrepresenting the manufacturing source of engine options and the availability of standard or optional equipment. The order also requires the firm to make designated disclosures regarding the manufacturing source, ordering code, and availability of each engine option offered for the model years 1979 through 1981; notify dealers promptly of engine option substitutions; and provide them with the replacement parts and maintenance information necessary to service such equipment. Additionally, the company would be prohibited from using any wholesale order system which could prevent dealers from designating specific options requested by purchasers.

*Appearances*

For the Commission: *Sharon J. Devine, William W. Jacobs and John M. Mendenhall.*

For the respondent: *Robert C. Weinbaum, Detroit, Mich. and Richard W. Pogue, Jones, Day, Reavis & Pogue, Cleveland, Ohio.*

COMPLAINT

The Federal Trade Commission, having reason to believe that respondent General Motors Corporation, a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act and that a proceeding by it in respect thereof would be in the public interest, issues this complaint:

PARAGRAPH 1. Respondent, General Motors Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3044 West Grand Boulevard, Detroit, Michigan.

PAR. 2. Respondent is now and has been, engaged in the manufacture, distribution, sale, promotion and advertising of various products including passenger cars.

PAR. 3. Respondent maintains, and at all times mentioned herein is maintained, a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent has represented that certain standard and optional equipment is manufactured by the particular division of respondent that built the passenger car.

PAR. 5. In fact, the equipment set forth in Paragraph Four is manufactured by a division other than that represented.

Therefore, the representations set forth in Paragraph Four were, and are, an unfair and deceptive practice.

PAR. 6. Respondent has represented to purchasers that various standard and optional equipment is available in respondent's passenger cars.

PAR. 7. In fact:

(a) Some of the standard and optional equipment was not made available as represented by respondent;

(b) In some instances, respondent substituted other equipment for standard and optional equipment represented by respondent to be available; and

(c) In some instances, respondent delivered passenger cars which were ordered on behalf of a retail purchaser and which were equipped with standard or optional equipment different from that ordered by the retail purchaser.

Therefore, the representations set forth in Paragraph Six were, and are, an unfair and deceptive practice.

PAR. 8. Respondent has failed to disclose in advertising and has failed to provide notice and advertising to its dealers adequate to disclose to purchasers that for certain passenger cars:

(a) Certain standard and optional equipment offered for sale in certain lines of passenger cars is manufactured by a division other than the division under whose name such line is distributed or sold.

(b) Certain standard and optional equipment is not available in lines for which respondent has represented it as available.

(c) Other standard and optional equipment has been substituted for the unavailable equipment.

(d) Substituted standard and optional equipment differs from the unavailable equipment.

(e) An order by a retail purchaser for particular standard and optional equipment would not necessarily result in an order placed on behalf of the purchaser which specifies that particular equipment.

(f) An order placed on behalf of a purchaser for certain standard and optional equipment previously represented as available could result in delivery of a passenger car without such equipment or with different equipment.

PAR. 9. Respondent has failed to make available information and

parts adequate to enable its dealers to fulfill warranty obligations to purchasers of passenger cars equipped with substituted equipment (referred to in Paragraphs Seven and Eight).

PAR. 10. Respondent has failed to make available to purchasers of respondent's passenger cars equipped with substituted equipment accurate information regarding recommended maintenance intervals and regular maintenance replacement parts.

PAR. 11. The facts set forth in Paragraphs Eight, Nine, and Ten are material to consumers. Thus, respondent has failed to disclose material facts which, if known to purchasers, would be likely to affect their consideration to purchase respondent's items. Therefore, these practices were, and are, unfair and deceptive practices.

PAR. 12. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and is now, in substantial competition in or affecting commerce with corporations, firms, and individuals engaged in the sale of merchandise of the same general kind and nature as merchandise sold by respondent.

PAR. 13. The use by respondent of the aforesaid false, misleading, and deceptive statements, representations, acts and practices, directly or by implication, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondent's products and services by reason of said erroneous and mistaken belief.

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

#### DECISION AND ORDER

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

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts

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

1. Respondent General Motors Corporation (GM) is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 3044 West Grant Boulevard, in the City of Detroit, State of Michigan.

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

ORDER

I

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

A. The term "GM" shall mean General Motors Corporation, and all of its divisions, its successors, assigns, officers, representatives, agents, and employees, acting directly or through any subsidiary or other device.

B. The term "franchised GM passenger car dealer" shall mean any person, partnership, or corporation which is a party to a franchise agreement with GM to purchase new GM passenger cars for resale to purchasers.

C. The term "manufacturing source" shall mean the GM division or entity by which the item referred to was produced.

D. The term "line" shall mean each make and model of passenger car manufactured by General Motors Corporation and distributed or sold under the Chevrolet, Pontiac, Buick, Oldsmobile or Cadillac name.

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E. The term "engine option" shall mean any engine designated by a GM ordering code number (including the standard engine) offered by GM as factory-installed equipment. For purposes of this order, each engine option shall be assigned a single, unique ordering code designation for a given model year which does not vary across division lines.

F. The term "material difference" shall mean any difference which results in a significant difference in engine performance, including but not limited to any difference in Environmental Protection Agency (EPA) fuel economy ratings, mileage intervals in excess of 1,000 miles for recommended engine maintenance, horsepower and displacement, or which results in a difference of regular maintenance replacement parts.

G. The term "substituted engine" shall mean an engine option installed in any GM line in any area of the country as a replacement for an engine option offered for that line in the same model year, but which is unavailable in such line or area, if the replacement engine option

(1) is produced by a division other than that which produced the engine option to be replaced; or

(2) has any "material difference" from the engine option to be replaced.

H. The term "option" shall mean an item of equipment to be installed in a new GM passenger car for which GM provides purchasers a choice of alternatives.

I. The term "purchaser" shall mean a potential buyer, potential lessee, buyer and lessee of any new GM passenger car, but shall not include a franchised GM passenger car dealer.

II

*It is hereby ordered.* That GM is prohibited from misrepresenting as of the time the representation is made by GM:

A. The manufacturing source of any engine option; and

B. That an option or item of standard equipment offered for a new GM passenger car is available if in fact it is not.

III

*It is further ordered.* That GM is prohibited from displaying the name of any GM car division on any engine or visible attachment to the engine under the hood of a new GM passenger car, including the air filter cover, unless the engine is manufactured by that division.

## IV

*It is further ordered, That if:*

A. GM furnishes or has furnished, during or in preparation for any model year, any information to any franchised GM passenger car dealers regarding any engine offered for any GM line for any model year, and

B. the engine described in the information provided to such dealers is to be or has been replaced by a substituted engine for that model year,

GM shall notify such dealers in writing, with respect to the affected lines handled by them, forthwith after the decision to substitute has been made. Such written notification shall include the lines in which the substituted engine is offered, its manufacturing source, ordering code number, designation used in the vehicle identification number to identify the type of engine option, and any material differences between the substituted engine and the engine to be replaced.

## V

*It is further ordered, That, for the 1979, 1980, and 1981 model years, GM shall furnish to all franchised GM passenger car dealers point-of-sale literature for distribution to purchasers in dealer showrooms disclosing clearly and conspicuously the engine options available in the GM lines carried by the dealer, and, for each engine option, the lines and areas of the country in which it is or is not available, its manufacturing source, and its ordering code designation. GM shall take such steps as are reasonably necessary to furnish such information to such dealers on a current basis. GM shall request, in writing, that such dealers display such materials in a conspicuous, accessible area of the dealer showroom.*

## VI

*It is further ordered, That GM shall clearly and conspicuously disclose the following statement in all print advertising for the 1979 model year, and in the principal new car point-of-sale catalogs for the 1979, 1980, and 1981 model years, which contain any reference to the engine (including any representation regarding EPA fuel economy) in any GM line, group or lines or division, in which an engine option produced by a division different from the division under whose name the passenger car is distributed is offered:*

*(Line, group of lines, divisional products) is (are) equipped with GM-built engines produced by various divisions. See your dealer for details.*

## VII

*It is further ordered,* That, for the 1979, 1980, and 1981 model years:

A. GM shall clearly and conspicuously disclose, on a "window sticker" attached by GM to each new passenger car, or on the price information labels required by the Automobile Information Disclosure Act (15 U.S.C. 1232), the engine ordering code, and the manufacturing source of the engine installed in that car.

B. GM shall disclose in each owner's manual, maintenance chart or other maintenance information provided to a purchaser of a new GM passenger car, the accurate information customarily furnished regarding recommended maintenance intervals and regular maintenance replacement parts applicable to the engine installed in that car.

## VIII

*It is further ordered,* That GM shall make available, subject to *force majeure*, labor disruptions, and other causes outside GM's control, replacement parts and repair and maintenance information to franchised GM passenger car dealers adequate to allow such dealers to provide GM warranty service to purchasers of new GM passenger cars equipped with any substituted engine to the same extent as it does in the case of new GM passenger cars equipped with non-substituted engines.

## IX

*It is further ordered,* That this order shall be limited in its application to sales of new GM passenger cars in the United States and its territories.

## X

*It is further ordered,* That:

A. GM is prohibited from utilizing a wholesale ordering system whereby its franchised GM passenger car dealers may not designate the specific options, other than standard equipment, requested by the purchaser. GM shall notify its dealers in writing that purchasers should be given the opportunity to designate the specific options ordered. Provided, that GM shall indicate when an option is required to be paired with another specific option.

B. For the 1979, 1980, 1981, 1982, and 1983 model years, GM shall advise its franchised GM passenger car dealers in writing whenever

GM plans to build or has built a passenger car with options other than as ordered by the dealer. GM will disclose on such writing the following language:

Notify customer promptly of any changes indicated. If unacceptable, contact zone for disposition.

C. For the 1979, 1980, 1981, 1982, and 1983 model years, GM shall clearly and conspicuously disclose in all principal new car point-of-sale catalogs the following statement:

Some options may be unavailable when your car is built. Your dealer receives advice regarding current availability of options. You may ask the dealer for this information. GM also requests the dealer to advise you if an option you ordered is unavailable. We suggest you verify that your car includes the options that you ordered or if there are changes that they are acceptable to you.

## XI

*It is further ordered, That:*

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

B. GM 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 it has complied with this order.



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IN THE MATTER OF  
INLAND EMPIRE ROOFING CONTRACTORS  
ASSOCIATION

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

*Docket C-2968. Complaint, May 22, 1979 — Decision, May 22, 1979*

This consent order, among other things, requires a Spokane, Wash. roofing association to cease entering into agreements with others to establish and maintain terms of guarantees, prices, or other conditions of sale in connection with the sale of roofs and related services; suggesting that members adhere to any particular price, guarantee, or other condition of sale; and limiting by any means a member's right to give any guarantee, price or other term or condition of sale to its customers. The association is also prohibited from investigating and/or policing its members with regard to prices charged and guarantees imposed in the sale of their products and services.

*Appearances*

For the Commission: *Stevan D. Phillips.*

For the respondent: *Harold J. Triesch, Spokane, Washington.*

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 Inland Empire Roofing Contractors Association, an unincorporated association, hereinafter sometimes referred to as respondent, has violated the provisions of the Federal Trade Commission Act, as amended, as more particularly set forth herein, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Inland Empire Roofing Contractors Association is an unincorporated association organized, existing, and doing business under and by virtue of the laws of the State of Washington. Respondent's membership presently consists of nine (9) roofing contractors located in eastern Washington and western Idaho. It consisted of twelve (12) roofing contractors at the time the acts referred to herein occurred. Its office is located at East 130 Sprague Ave., Spokane, Washington.

PAR. 2. The respondent is a trade association established for the benefit of its members. It acts as the bargaining agent for and

negotiates labor contracts on behalf of its members with certain labor unions. The association handles grievances and other administrative problems under the terms and conditions of any collective bargaining contract entered into on behalf of its members. The association has gathered and disseminated information to its respective members concerning the guarantees which are available in the roofing contracting business for new and replacement roofs and which are available and used in regard to waterproofing and dampproofing contracts. As a result of the conduct and activities of respondent and its members as described above, the acts and practices herein complained of are in or affect "commerce" within the meaning of the Federal Trade Commission Act, as amended, and respondent is subject to the jurisdiction of the Federal Trade Commission.

PAR. 3. On or about February 15, 1974, the members of the Inland Empire Roofing Contractors Association decided to modify the terms of guarantees then being offered with regard to waterproofing and dampproofing contracts. Some time between March 22, 1974 and April 19, 1974, officers and directors of said association acting within the scope of their authority and at the direction of the Inland Empire Roofing Contractors Association, met with members of the Seattle-based Roofing Contractors Association and discussed the terms of guarantees that would be offered by members of each respective association for waterproofing and dampproofing contracts. Some time after April 19, 1974, the Inland Empire Roofing Contractors Association adopted or proposed adopting an arrangement whereby no guarantees would be issued by its members for waterproofing or dampproofing work and that a two-year guarantee would be issued by its members for roofing work on all new and replacement roofs. On or about May 16, 1974, an agreement was reached by the members of the Inland Empire Roofing Contractors Association to the effect that no guarantees would be offered on waterproofing or dampproofing work and further that no guarantee for damage to roofs caused by certain wind conditions would be provided to customers of said members.

PAR. 4. The effects, among others, of the acts and practices alleged in Paragraph Three are as follows:

A. Terms of guarantees for new and replacement roofs have been fixed, stabilized or otherwise interfered with;

B. Competition among member roofing contractors in providing roofing services has been restrained, hindered, frustrated and/or foreclosed;

C. Customers of roofing services have been deprived of information, options and services pertinent to the selection of a roofer and the benefits of competition; and

D. Member roofers have been restrained in their ability to compete and to make alternative guarantee terms available to customers.

PAR. 5. The aforesaid acts, practices, and methods of competition of respondent constitute unfair methods of competition and unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Chairman Pertschuk did not participate.

#### DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described 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 Inland Empire Roofing Contractors Association is an unincorporated association 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 East 130 Sprague Ave., in the City of Spokane, State of Washington.

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

## ORDER

### I

A. Definitions established for the purpose of the following order provisions are:

1. "Other related services" includes but is not limited to, repairing of roofs, inspecting of roofs, waterproofing and dampproofing of roofs, and estimating costs of repair or installation of roofs.
2. "Others not party hereto" means any individual, individual proprietorship, partnership, firm, corporation, association or any other form of legal or business entity.

### II

A. *It is ordered*, That respondent Inland Empire Roofing Contractors Association, an unincorporated association, its successors and assigns, and its agents, representatives, and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, sale and installation of new or replacement roofs or other related services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Entering into any contract, agreement, course of conduct, or understanding between itself and others not party hereto to fix, establish, stabilize, or maintain, the length or other term of any guarantee;
2. Entering into any contract, agreement, course of conduct, or understanding between itself and others not party hereto to fix, establish, stabilize or maintain any price or other term or condition of sale in connection with the sale and installation of new or replacement roofs or for performing other related services.

### III

A. *It is further ordered*, That respondent Inland Empire Roofing Contractors Association, an unincorporated association, its successors and assigns, and its agents, representatives, and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, sale and

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installation of new or replacement roofs or other related services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Urging, recommending, or suggesting that any of its members or any other person adopt or adhere to any particular guarantee or to any price or other term or condition of sale in connection with the sale and installation of new or replacement roofs or for performing other related services;
2. Adopting, adhering to, maintaining, enforcing or claiming any rights under any bylaw, rule, regulation, plan or program which limits in any way a member's right to give or offer a guarantee or any price or other term or condition of sale to any customer or prospective customer in connection with the sale or installation of a new or replacement roof or for performing other related services;
3. Investigating and/or policing a price or guarantee term charged or imposed by any member of the association or any other person in connection with the installation of new or replacement roofs.

IV

A. *It is further ordered,* That respondent Inland Empire Roofing Contractors Association shall within sixty (60) days after the date of service of this order, mail a copy to each of its existing members and to each person who was a member at any time from June 30, 1973 to date of service of this order, and furnish a copy of this order to each prospective member for a period of five (5) years after the date of service of this order.

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

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

Chairman Pertschuk did not participate.

IN THE MATTER OF  
FORD MOTOR COMPANY

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

*Docket 9001. Complaint, Dec. 10, 1974 — Decision, May 24, 1979*

This consent order, among other things, requires a Dearborn, Mich. automobile manufacturer to cease, in connection with automobiles marketed by its Lincoln-Mercury Division, misrepresenting the fuel economy of any automobile or its superiority over competitive products; and the purpose, contents and results of automotive tests. Additionally, the firm is required to substantiate all claims regarding the structural strength, quietness, fuel economy and performance of its products, and maintain such substantiation for a three-year period.

*Appearances*

For the Commission: *Russell Hatchl, Mitchell Paul and Deborah Randall.*

For the respondent: *Robert L. Wald, Wald, Harkrader & Ross,* Washington, D.C. and *David R. Larrouy,* Dearborn, Mich.

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

PARAGRAPH 1. Respondent Ford Motor Company is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at The American Road, Dearborn, Michigan.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the manufacture, distribution, sale, and advertising of various products including automobiles.

PAR. 3. Respondent causes the said products, when sold, to be transported from its place of business in various States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent maintains, and at

all times mentioned herein has maintained, a course of trade in said products in commerce. The volume of business in such commerce has been and is substantial.

PAR. 4. In the course and conduct of its said business, respondent has disseminated and caused the dissemination of advertisements concerning its aforementioned products including automobiles in commerce by means of advertisements printed in magazines and newspapers distributed by the mail and across state lines and transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products including automobiles.

PAR. 5. Among the advertisements so disseminated or caused to be disseminated by respondent are the advertisements attached as Exhibits A and B.

PAR. 6. Said Exhibits A and B and others substantially similar thereto contain one or more false, deceptive and misleading representations and fail to disclose facts which are material in the light of the representations contained therein. Therefore, the representations contained in said advertisements were, and are, deceptive and/or unfair.

PAR. 7. Said Exhibits A and B and others substantially similar thereto (hereinafter referred to as said advertisements) represent, directly or by implication, that the gasoline consumption rates specified in the advertisements approximate or equal the performance an ordinary driver can typically obtain from standard production model cars when taking long or cross-country trips.

PAR. 8. In truth and in fact, at the time respondent made the representations as alleged in Paragraph Seven respondent did not possess and rely upon a reasonable basis for making these representations. Therefore the said advertisements were, and are unfair and/or deceptive.

PAR. 9. Said Exhibits A and B and others substantially similar thereto represent, directly or by implication, that respondent had a reasonable basis for making, at the time they were made, the representations as alleged in Paragraph Seven.

PAR. 10. In truth and in fact, at the time respondent made the representations as alleged in Paragraph Nine respondent had no reasonable basis for making the representations as alleged in Paragraph Seven. Therefore, the said advertisements were, and are deceptive and/or unfair.

PAR. 11. Respondent failed to disclose in said advertisements that

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it had no evidence that any or all of the conditions under which the tests described in the advertisements were conducted approximated or equalled the conditions under which an ordinary driver would operate his automobile when taking long or cross country trips and that respondent had no evidence that would tend to show whether or not the conditions under which said tests were run were typical or atypical of conditions encountered by ordinary drivers.

PAR. 12. The facts set forth in Paragraph Eleven are material in light of the representations contained in said advertisements and their omission make these advertisements misleading in a material respect. Therefore, the said advertisements were, and are deceptive and/or unfair.

PAR. 13. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent Ford Motor Company has been and now is in substantial competition in commerce with corporations, firms, and individuals engaged in the sale and distribution of automobiles of the same general kind and nature as that sold by respondent.

PAR. 14. The use by respondent of the aforesaid unfair and/or deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the purchase of substantial quantities of automobiles manufactured by respondent. Further, as a result thereof, substantial trade is being unfairly diverted to respondent from its competitors.

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



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February 15th: General Environmental Corporation tested the highway mileage of Ford Motor Company's small cars. Today, the results.

EXHIBIT

# A All 5 Ford Motor Company small cars got OVER 26 MPG.

### The test.

At 7:15 AM, February 15th, five 1974 Ford Motor Company small cars (wheelbase under 112") were driven from Phoenix to Los Angeles to learn the kind of mileage they could get. The cars were a Ford Pinto, a Ford Maverick, a Ford Mustang II, a Mercury Comet and one of Mercury's Capris. All the cars were regular production models with standard engines

and transmissions. They weren't however, brand new. They had been broken in to simulate 6,000 miles of normal driving. All the cars used regular gas and had normal dealer preparation. The drivers were not professional. And they did not exceed 50 MPH. In many respects, the test was similar to one run on December 28th, 1973, where five 1974 Ford LTD's delivered an average of 18.6 MPG.

### The results.

These results show dramatically that these five small cars from Ford and Lincoln-Mercury did deliver economical gas mileage. Of course, the mileage you will get depends on many factors

equipment, engine displacement, vehicle weight, local road conditions and your personal driving style. So the mileage you get may be less or even more than the figures quoted here.

### Ford and Lincoln-Mercury dealers offer more types of gas-saving engines for small cars than anyone.

One of the most important factors determining small car mileage is a gas-saving engine. And Ford and Lincoln-Mercury dealers offer more types of gas-saving engines for small cars than anyone.

**Two 6-cylinder engines.** Some manufacturers of so-called "economy" cars don't even offer a 4-cylinder engine. Ford Motor Company makes two different sizes of 6-cylinder engines: a 2.0 liter which was used in Pinto and Capri for this test, and the 2.3 liter used in Mustang II. The 2.0 liter is the smallest displacement engine available today in an American made car from any major American manufacturer. Ford Motor Company sells more 4-cylinder engines in American made cars than anyone else.

**Two 8-cylinder engines.** Ford and Lincoln-Mercury dealers offer two sizes of 8-cylinder engines for small cars: a 200 CID which was used in Maverick and Comet for this test, and an optional 250 CID.

Ford Motor Company's major competitor offers only one 6-cylinder engine for all of its car lines.

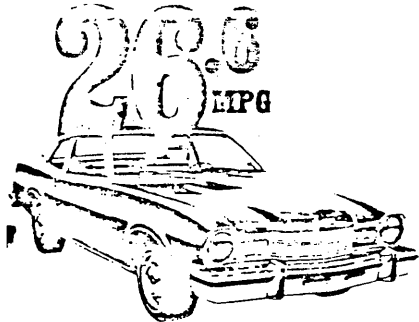
**A V-6 engine.** Ford Mustang II is the only car made by a major American manufacturer to offer an optional V-6. Mercury's imported Capri offers an optional 2.8 liter V-6 engine at a cost thousands of dollars less than any other V-6 powered import.

**An economy V-8 engine.** Ford and Lincoln-Mercury dealers offer a 302 CID V-8 engine, the smallest displacement V-8 available from any major American manufacturer. It provides extra performance while still delivering good gas mileage.

**Explanation of engine designations.** CID OR LITER is the volume, in cubic inches or liters (metric system) that the pistons displace in all the engine's cylinders.

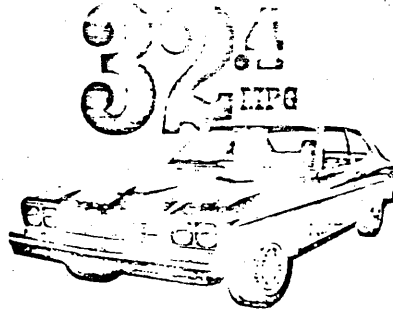


FORD MOTOR COMPANY HAS MADE MORE SMALL CARS\* THAN ANYONE ELSE IN THE WORLD (THAT INCLUDES VW, AMC, TOYOTA, GM, FIAT, DATSUN OR CHRYSLER)



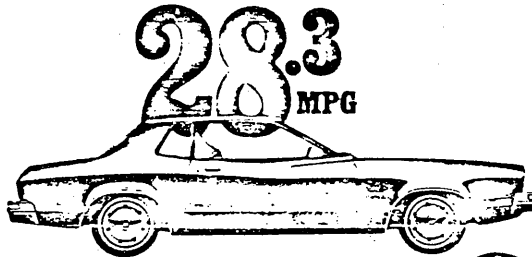
**MERCURY COMET.**

- Driver: Frank Boye
- Model: two-door sedan
- Engine: 200 CID six-cylinder
- Options: white sidewall tires, wheel covers, vinyl roof



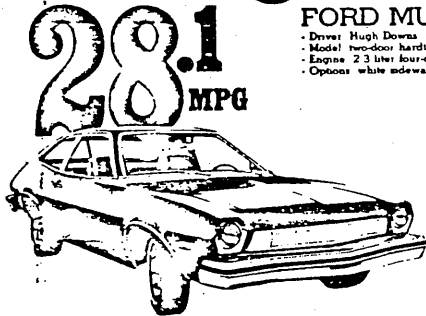
**MERCURY'S CAPRI.**

- Driver: Roger Rutherford
- Model: Sport Coupe
- Engine: 2.0 liter four-cylinder
- Options: none



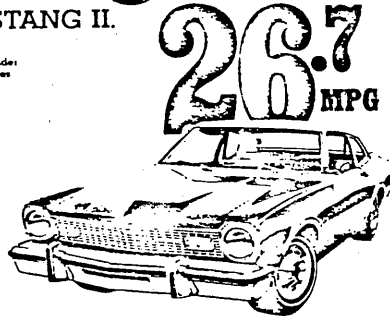
**FORD MUSTANG II.**

- Driver: Hugh Downs
- Model: two-door hardtop
- Engine: 2.3 liter four-cylinder
- Options: white sidewall tires



**FORD PINTO.**

- Driver: Mickey Sholder
- Model: two-door sedan
- Engine: 2.0 liter four-cylinder
- Options: white sidewall tires, wheel covers and Accent Group



**FORD MAVERICK.**

- Driver: Jane Miko
- Model: two-door sedan
- Engine: 200 CID six-cylinder
- Options: white sidewall tires, wheel covers and Exterior Decor Group

Ford and Lincoln-Mercury dealers offer 35 different small car models and engines, 20 with sticker prices under the best-selling import model.



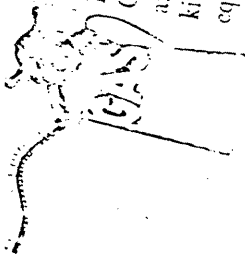
# Two Lincoln-Mercury MILEAGE CARS

EXHIBIT  
B A 6-cylinder Comet and a 4-cylinder Capri  
used in the test.

|             |          |
|-------------|----------|
| MILEAGE CAR |          |
| COMET       | 26.6 mpg |
| CAPRI       | 32.4 mpg |

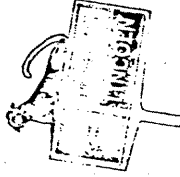


Complaint



February 19, 1974: In a 379 mile highway test through Arizona and California, supervised by General Environments Corporation, a Comet and a Capri with standard engines and transmissions delivered the kind of gas mileage you'd like to get. Each car was broken in the equivalent of 6,000 miles and driven by non-professional drivers never exceeding 50 mph. You yourself might actually average less, or for that matter more! Because mileage varies according to maintenance, equipment, total weight, driving habits and road conditions. And no two drivers, or even cars, are exactly the same. Stop in at your Lincoln-Mercury dealer's Mileage Headquarters and see what kind of mileage you can get.

Lincoln-Mercury Division



**WASHINGTON**  
**LEO BUTLER, INC.**  
 1122 21ST STREET, N.W.  
 WASHINGTON, D.C.

**SUBURBAN**

**DAVE PILES LINCOLN-MERCURY, INC.**  
 10000 RIVER TURNPIKE  
 FARMERSBURG, VIRGINIA

**BRIEN & ROHALL, INC.**  
 401 HIGHWAY  
 WASHINGTON, VA

**BILL BOGLEY LINCOLN-MERCURY, INC.**  
 7809 WPA, ON 5TH AVENUE  
 PITHESDA, MARYLAND

**B. M. WOODFIELD MERCURY**  
 26-501 RIVER ROAD  
 DAMASCUS, MARYLAND

**MERIDON MOTOR COMPANY, INC.**  
 93 W. ASHINGTON AVENUE  
 HERRINGTON VA

**TOM CURRO LINCOLN-MERCURY, INC.**  
 123 27 WASHINGTON BLVD.  
 LAUREL, MARYLAND

**JIM ECKELS LINCOLN-MERCURY, INC.**  
 8389 CENTERVILLE ROAD  
 MANASSAS, VIRGINIA

**WILSON POWELL LINCOLN-MERCURY, INC.**  
 4700 BRANCH AVENUE  
 MARLOW HEIGHTS, MARYLAND

**EAST-WEST LINCOLN-MERCURY, INC.**  
 7591 ANNAPOLIS ROAD  
 LANDOVER HILLS, MARYLAND

**THOMASSEN LINCOLN-MERCURY, INC.**  
 1125 ROCKVILLE PIKE  
 ROCKVILLE, MARYLAND

**SAFFORD LINCOLN-MERCURY**  
 8507 COLESVILLE RD.  
 SILVER SPRING, MARYLAND

**CHESTER LINCOLN-MERCURY, INC.**  
 8550 LEESBURG PIKE  
 TYSON'S CORNER, VIRGINIA

FEDERAL TRADE COMMISSION DECISIONS

Decision and Order

93 F.T.C.

DECISION AND ORDER

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

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

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

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

1. Respondent Ford Motor Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at The American Road, Dearborn, Michigan.

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

ORDER

*It is ordered,* That respondent, Ford Motor Company, its successors and assigns, its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or device, in connection with the advertising, offering for sale, sale or distribution, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, of automobiles marketed by the Lincoln-Mercury Division, do forthwith cease and desist from:

1. Misrepresenting in any manner the fuel economy of any

automobile or the superiority of any automobile over competing products in terms of fuel economy.

2. Making any representations, directly or by implication, concerning the structural strength, quietness or fuel economy of such products or any part thereof, unless respondent possesses and relies upon a reasonable basis for such representations; provided that such a reasonable basis shall consist of competent and reliable scientific tests or other competent and reliable objective materials, including competent and reliable opinions of scientific, engineering or other experts who are qualified by professional training and experience to render competent judgments in such matters.

3. (a) Representing, directly or by implication, by reference to a test or tests, that the performance of any automobile has been tested either alone or in comparison with other automobiles unless such representation(s) accurately reflect the test results and unless the tests themselves are so devised and conducted as to substantiate each such representation concerning the featured tests.

(b) Misrepresenting in any manner the purpose, contents or conclusion of any test or tests relating to the performance of its automobiles.

For purposes of Paragraph 3(a) and 3(b) of this order, "test" shall include demonstrations, experiments, surveys, reports and studies.

4. Failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) Which consist of documentation in support of any representation covered by this order included in advertising or sales promotional material disseminated by respondent, insofar as the advertising or sales promotional material is prepared, or is authorized and approved, by any person who is an officer or employee of respondent, or of any division or subdivision of respondent;

(b) Which provided the basis upon which respondent relied as of the time the representation covered by this Order was made; and

(c) Which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

*It is further ordered,* That respondent shall forthwith distribute a copy of this order to its operating divisions involved in the advertising, promotion, distribution, or sale of automobiles.

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

— TRADE COMMISSION DECISIONS

Decision and Order

93 F.T.C.

ing 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 shall, within sixty (60) days after the effective date of this order, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF  
RHINECHEM CORPORATION, ET AL.

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

*Docket 9116. Complaint, Aug. 23, 1978 — Decision, June 6, 1979*

This consent order, among other things, requires a New York City manufacturer and seller of organic pigments to terminate all agreements providing for the acquisition of the Chemetron Corporation's organic pigments business; return all confidential documents exchanged during the negotiations; and provide the Commission with evidence of its compliance with these requirements. Additionally, respondent is required, until December 31, 1981, to furnish the Commission with 90-days' advance notice should the firm seek to acquire Chemetron's organic pigment business, or sell its own organic pigment business to Chemetron or Chemetron's corporate parent, Allegheny Ludlum Industries, Inc.

*Appearances*

For the Commission: *Glenn M. Fellman, Michael P. Waxman, John M. Peterson and Benita A. Sakin.*

For the respondents: *Thomas L. VanKirk, Buchanan, Ingersoll, Roderwald, Kyle & Buerger, Washington, D.C. and H. Blair White, Sidley & Austin, Chicago, Ill.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into a merger agreement which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b), of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

Definition

For purposes of this complaint the following definition shall apply:  
Organic pigments - insoluble color particles characterized by a chemical composition which includes carbon rings or chains as the



FEDERAL TRADE COMMISSION DECISIONS

Complaint

93 F.T.C.

basic part of their molecular structure and used to impart color to a variety of materials.

Rhinechem Corporation

1. Rhinechem Corporation (Rhinechem ) is a corporation organized under the laws of the State of Delaware, with its principal place of business at 425 Park Ave., New York, New York.

2. Rhinechem is a wholly-owned subsidiary of Bayer International Finance N.A. which in turn is a wholly-owned subsidiary of Bayer Aktiengesellschaft (Bayer), a West German corporation with headquarters in Leverkusen, West Germany.

3. Bayer manufactures and sells organic pigments and organic pigment formulations throughout the world.

4. Rhinechem, through its wholly-owned subsidiaries, Mobay Chemical Corporation (Mobay) and Harmon Colors Corporation (Harmon) manufactures and sells organic pigments and organic pigment formulations in the United States.

5. In its fiscal year ended December 31, 1977, Rhinechem had total sales of approximately \$1,329,979,000 of which domestic sales accounted for \$1,151,574,000; Mobay had total commercial sales of \$622,087,000; and Harmon had total commercial sales of \$21,428,000.

6. Harmon is the eighth largest manufacturer of organic pigments in the United States.

7. Harmon is now and for many years has been a member of the Dry Colors Manufacturers Association (DCMA) which is a trade association made up of the major manufacturers of organic and inorganic pigments.

Chemetron Corporation

8. Chemetron Corporation (Chemetron) is a corporation organized under the laws of the State of Delaware, with its principal place of business at 111 E. Wacker Drive, Chicago, Illinois.

9. Chemetron is a wholly-owned subsidiary of Allegheny Ludlum Industries (Allegheny), a corporation organized under the laws of the Commonwealth of Pennsylvania, with its principal place of business at 2700 Two Oliver Plaza, Pittsburgh, Pennsylvania.

10. Chemetron through its unincorporated Pigments Division (CPD) produces organic pigments and sells said organic pigments throughout the United States.

11. In its fiscal year ended January 1, 1978, Chemetron had net sales of approximately \$493,906,000, while CPD's net sales were approximately \$51,784,000.

12. CPD is the third largest manufacturer of organic pigments in the United States.

13. Chemetron is now and for many years has been a member of the Dry Colors Manufacturers Association (DCMA).

#### Jurisdiction

14. At all times relevant herein Rhinechem and Chemetron have been engaged in the manufacture and sale of organic pigments in interstate commerce and are engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and each is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

#### The Merger Agreement

15. On or about June 12, 1978, Rhinechem and Allegheny entered into an agreement in principle which provides, *inter alia*, for the acquisition by Rhinechem of the assets of Chemetron's Pigment Division.

#### Trade and Commerce

16. The relevant line of commerce is the manufacture and sale of organic pigments and submarkets thereof.

17. A relevant section of the country or geographic market is the entire United States.

18. The manufacture and sale of organic pigments is concentrated, with the combined market share of the four largest manufacturers estimated to be approximately 51%.

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

#### Actual Competition

20. Rhinechem and Chemetron are and have been for many years actual competitors of each other in the manufacture and sale of organic pigments and submarkets thereof and actual competitors of others engaged in the manufacture and sale of organic pigments and submarkets thereof throughout the United States.

21. In 1977, Rhinechem accounted for approximately 6.73% of United States production and sale of organic pigments and Chemetron's Pigment Division accounted for approximately 11.77% thereof.

## Effects; Violations Charged

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

(a) actual competition between Rhinechem and Chemetron in the manufacture and sale of organic pigments and submarkets thereof will be eliminated;

(b) actual competition between competitors generally in the manufacture and sale of organic pigments and submarkets thereof may be lessened;

(c) Chemetron's Pigment Division will be eliminated as an actual substantial independent competitor in the manufacture and sale of organic pigments and sub-markets thereof;

(d) the merger will result in increased concentration in the manufacture and sale of organic pigments and diminishing possibilities for eventual deconcentration; and

(e) mergers or acquisitions between other organic pigment manufacturers may be fostered, thus causing a further substantial lessening of competition and tendency toward monopoly in the manufacture and sale of organic pigments.

## DECISION AND ORDER

The Commission having heretofore issued its complaint charging the Rhinechem Corporation (hereinafter "respondent") named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and Section 7 of the Clayton act, and the respondent having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

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

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

1. Respondent Rhinechem Corporation is a corporation, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 425 Park Ave., in the City of New York, State of New York.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

#### ORDER

##### Definitions

For purposes of this order the following definition shall apply:

*Organic pigments* means insoluble color particles characterized by a chemical composition which includes carbon rings or chains as the basic part of their molecular structure and used to impart color to a variety of materials.

#### I

*It is ordered,* That Rhinechem forthwith terminate all agreements which provided for the acquisition of the organic pigments business of Chemetron Corporation by a subsidiary of Rhinechem and provide evidence that all such agreements have been terminated and that all confidential documents provided to Rhinechem by Allegheny Ludlum Industries, Inc., and Chemetron Corporation in connection with the merger agreement have been returned or destroyed. Nothing herein contained shall relieve Rhinechem from any obligations of confidentiality imposed by agreement between the parties.

#### II

*It is further ordered,* That through December 31, 1981, Rhinechem, its successors or assigns, shall not acquire, either directly or indirectly, any or all of the organic pigments business of Chemetron Corporation nor shall it sell any or all of its organic pigments business to Allegheny Ludlum Industries, Inc., or Chemetron Corporation, whether represented by securities or assets, until ninety (90) days following receipt by the Director of the Bureau of

Competition of the Federal Trade Commission of written notice of the proposed acquisition or merger, such written notice to be similar in form and content to the notice required under Section 7A of the Clayton Act and the premerger notification rules promulgated thereunder and shall specifically refer to this order. (This provision shall not prohibit sales of organic pigments or other transactions between Rhinechem and Chemetron Corporation in the ordinary course of business.) If within ninety (90) days of receipt by the Director of such notice the Commission issues an administrative complaint challenging the proposed acquisition or merger, such proposed acquisition or merger shall not be consummated, nor shall any steps be taken to effectuate such proposed acquisition or merger until the administrative complaint issued by the Commission is dismissed by the Commission, until a final order as defined in 15 U.S.C. 21, 45 is entered or until a consent order is entered and served upon Rhinechem in the administrative proceeding. If within the aforesaid ninety (90) days the Bureau of Competition receives any written position papers from Rhinechem and the Bureau recommends issuance of a complaint, the Bureau shall promptly forward to the Commission such papers together with the written notice submitted to the Bureau Director. In the event that within ninety (90) days of the Director's receipt of such notice the Commission issues an administrative complaint challenging the proposed acquisition or merger, the Bureau of Competition shall exert its best efforts to complete the administrative proceeding in an expedited manner.

### III

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

### IV

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

IN THE MATTER OF  
APPLIANCE DEALERS COOPERATIVE, ET AL.

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

*Docket C-2969. Complaint, June 7, 1979 — Decision, June 7, 1979*

This consent order, among other things, requires a Newark, N.J. appliance dealers cooperative, its executive director, 22 member companies, and five affiliated firms to cease harassing, intimidating or otherwise attempting to control or interfere with retailers' resale pricing; advertising; sale and distribution of consumer products; selection of customers; or their right to locate and operate businesses in any geographic area. The cooperative is further required to supply its members, on an equal and timely basis, with all relevant information relating to its purchase and sale of merchandise; and cause its by-laws to be adjusted so as to be consistent with the terms of the order.

*Appearances*

For the Commission: *Alfred J. Ferrogari and Henry R. Whitlock.*

For the respondents: *Basil J. Mezines, Stein, Mitchell & Mezines, Washington, D.C., Ephraim Frank Schwartz, Passaic, N.J., Marvin S. Goldklang, Cahill, Gordon & Reindell, New York City and Gerard C. Sims, Jr. and Allan Raven, Raven, Davis & Sweet, Adison, N.J.*

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 the parties named in the caption hereof, hereinafter more particularly described and designated 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 Appliance Dealers Cooperative (hereinafter referred to as ADC) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. ADC maintains its home office and principal place of business at 84 Lockwood St., Newark, New Jersey. ADC operates as a buying cooperative for its shareholder-members, supplying these members with a variety of consumer appliances and products. Its members are corporate and non-corporate business enterprises which are engaged primarily in the retail sale of consumer appliances and products.

PAR. 2. Respondent Murray Gidseg (hereinafter sometimes referred to as Executive Director) is, and has been, for some time past, Executive Director of ADC and as such is, and has been, the chief executive officer of the corporation with all of the general powers and duties which are usually vested in the office of president of a corporation. As such, Murray Gidseg has charge of the administrative activities of ADC, helps conduct and actually participates in the meetings of the members of ADC and cooperates and acts together with other respondents to formulate, direct and control the policies, acts and practices of ADC, all in pursuance and furtherance of the establishing carrying out and maintaining of the policies, acts and practices hereinafter alleged. The business address of Murray Gidseg is the same as that of respondent ADC.

PAR. 3. The authority for formulation and management of policy with respect to all matters affecting the business of ADC is, and has been, vested in the ADC Board of Directors. The Board of Directors has at all times consisted of persons drawn from the companies who are members of ADC. From the inception of ADC in April 1972 until May 1974, all members of ADC were represented on its Board of Directors. From May 1974 until May 1975 one member was excluded from the ADC Board of Directors. From May 1975 until the next election of Board members in 1976, three additional members were excluded from the ADC Board of Directors. Except to the extent that decision making authority has been delegated by the Board of Directors to others, the Board has general overall supervision of all aspects of the business of ADC.

PAR. 4. Historically, since the inception of ADC in 1972, the Board of Directors has delegated much of its authority for formulation and management of policy to the Executive Director and certain officers and employees of the member companies who represent their respective firms at ADC membership meetings and who also serve on various ADC committees. Said persons, together with the Board of Directors and the Executive Director, formulated, directed and controlled the policies and activities of ADC and in doing so expressly or impliedly authorized, performed, adopted, acquiesced in or affirmed the policies, acts and practices herein alleged.

PAR. 5. Respondents Ace Electronic Service Co., Inc. (hereinafter Ace) and Solar Appliance Centers, Inc. (hereinafter Solar) are corporations organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Ace maintains its home office and principal place of business at 69 Highway 35, Neptune City, New Jersey. Solar maintains its home office and principal place of business at 2114 Route 88, Bricktown, New Jersey.

PAR. 6. Respondent Ajay Appliance Sales & Service, Inc. (hereinafter Ajay) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Ajay maintains its home office and principal place of business at 1021 Route 37 West, Toms River, New Jersey.

PAR. 7. Respondent Apex Appliance Distributors, Inc. (hereinafter Apex) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Apex maintains its home office and principal place of business at 700 Rahway Ave., Elizabeth, New Jersey.

PAR. 8. Respondent Bell Appliance Co., Inc. (hereinafter Bell) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Bell maintains its home office and principal place of business at Highway 22, Union, New Jersey.

PAR. 9. Respondent Paul Bergman is an individual trading and doing business as Brown's Appliance Co. (hereinafter Brown's) with its home office and principal place of business located at 276 Main St., Paterson, New Jersey.

PAR. 10. Respondent Charles Stein is an individual trading and doing business as Economy Stove & Plumbing Supply Co. (hereinafter Economy) with its home office and principal place of business located at 1047 Elizabeth Ave., Elizabeth, New Jersey.

PAR. 11. Respondent Flynn Appliances, Inc. (hereinafter Flynn) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Flynn maintains its home office and principal place of business at 44 Grand Ave., Englewood, New Jersey.

PAR. 12. Respondent Frank Schwartz is an individual trading and doing business as Franks Sales & Service Co. (hereinafter Franks) with its home office and principal place of business located at 739 Main Ave., Passaic, New Jersey.

PAR. 13. Respondents Goldklang's Appliance City, Inc. (hereinafter Goldklang's) and Town Appliance, Inc. (hereinafter Town), are corporations organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Goldklang's maintains its home office and principal place of business at 462 Broadway, Bayonne, New Jersey. Town maintains its home office and principal place of business at Route 46, Rockaway, New Jersey.

PAR. 14. Respondent Harvey's of New Milford, Inc. (hereinafter Harvey's) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Harvey's



maintains its home office and principal place of business at 690 River Road, New Milford, New Jersey.

PAR. 15. Respondent Karl's Sales & Service Co., Inc. (hereinafter Karl's) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Karl's maintains its home office and principal place of business at 111 Washington Ave., Belleville, New Jersey.

PAR. 16. Respondent Keystone Appliance Co., Inc. (hereinafter Keystone) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Keystone maintains its home office and principal place of business at 4237 Bergen Turnpike, North Bergen, New Jersey.

PAR. 17. Respondent Lichtman Bros. Inc. (hereinafter Lichtman) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Lichtman maintains its home office and principal place of business at 101-105 Smith St., Perth Amboy, New Jersey.

PAR. 18. Respondent Mrs. G. Inc. (hereinafter Mrs. G.) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Mrs. G. maintains its home office and principal place of business at 2960 Brunswick Pike, Trenton, New Jersey.

PAR. 19. Respondent Paul's Home Furnishings Co., Inc. (hereinafter Paul's) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Paul's maintains its home office and principal place of business at 121 New York Ave., Newark, New Jersey.

PAR. 20. Respondent Rooney Appliance, Inc. (hereinafter Rooney) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Rooney maintains its home office and principal place of business at 500 Market St., Saddle Brook, New Jersey.

PAR. 21. Respondent Schenck Appliance Corporation (hereinafter Schenck) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Schenck maintains its home office and principal place of business at Route 88 and Laurelton Circle, Bricktown, New Jersey.

PAR. 22. Respondent Summerton Appliance, Inc. (hereinafter Summerton) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Summerton maintains its home office and principal place of business at 300 Route 9, Englishtown, New Jersey.

PAR. 23. Respondent Les Turchin, Inc. (hereinafter Les Turchin) is

a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Les Turchin maintains its home office and principal place of business at 98-100 Albany St., New Brunswick, New Jersey.

PAR. 24. Respondent Tru-Home Sales Co. Inc. (hereinafter Tru-Home) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Tru-Home maintains its home office and principal place of business at 321-16th Ave., Newark, New Jersey.

PAR. 25. Respondents Turchin's Department Stores, Inc. (hereinafter Turchin's) and Turchin's-Rex, Inc. (hereinafter Turchin's-Rex) are corporations organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Turchin's maintains its home office and principal place of business at 116 N. Wood Ave., Linden, New Jersey. Turchin's-Rex maintains its home office and principal place of business at 2385 Kennedy Boulevard, Jersey City, New Jersey.

PAR. 26. Respondents Uneeda Appliance Co., Inc. (hereinafter Uneeda), Uneeda Brook's Inc. (hereinafter Uneeda Brook's), and Uneeda Appliance Company of Bayonne, Inc. (hereinafter Uneeda Bayonne) are corporations organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Uneeda maintains its home office and principal place of business at 2973 Kennedy Boulevard, Jersey City, New Jersey. Uneeda Brook's maintains its home office and principal place of business at 9 West Main Street, Somerville, New Jersey. Uneeda Bayonne maintains its home office and principal place of business at 432 Broadway, Bayonne, New Jersey.

PAR. 27. Respondents Ace, Solar, Ajay, Apex, Bell, Brown's, Economy, Flynn, Franks, Goldklang's, Town, Harvey's, Karl's, Keystone, Lichtman, Mrs. G., Paul's, Rooney, Schenck, Summerton, Les Turchin, Tru-Home, Turchin's, Turchin's-Rex, Uneeda, Uneeda Brook's, Uneeda Bayonne (sometimes referred to as "respondent retailers") are now, and for some time past, have been engaged in the purchasing, offering for sale, sale and distribution of consumer appliances and products to the public at retail.

With the exception of Solar, Town, Turchin's-Rex, Uneeda Brook's and Uneeda Bayonne, (hereinafter sometimes referred to as respondent non-members) each of the remaining respondent retailers is, and has been, for some time past, a member of respondent ADC (hereinafter sometimes referred to as respondent members). Respondent non-members are affiliated with certain of respondent members through common ownership or otherwise. Respondent members

purchase a substantial amount of consumer appliances and products from respondent ADC. Certain respondent members resell or transfer a substantial amount of said consumer appliances and products to their affiliated respondent non-members. In that manner respondent non-members derive many of the benefits of membership in respondent ADC.

PAR. 28. In the course and conduct of their respective businesses, various respondent retailers purchase for resale a substantial amount of consumer appliances and products from suppliers located in various States of the United States. Such respondents cause these products, when purchased, to be transported from the place of manufacture, storage or purchase in various States of the United States across state lines to their places of business. In the further course of their respective businesses, such respondents cause and for some time past have caused, said consumer appliances and products, when sold by them, to be shipped from their places of business located in the State of New Jersey to customers, many of whom are located in the States of the United States other than the states where said respondents' businesses are located and states other than the states where said products were originally manufactured, stored or purchased. Such respondent retailers are and were, during the several years past, engaged in a substantial course of trade in consumer appliances and products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 29. Except to the extent that competition has been hampered, restrained, lessened or restricted by reason of the practices hereinafter described, each of the respondent retailers described in Paragraph Twenty-Seven hereof is, and has been, in substantial competition with one or more of the other respondent retailers therein described and with other retailers of consumer appliances and products.

PAR. 30. In the course and conduct of its business, as aforesaid, respondent ADC purchases for resale a substantial amount of consumer appliances and products from suppliers located in various States of the United States. Respondent ADC causes these products, when purchased by it, to be transported from the place of manufacture, storage or purchase in various States of the United States across state lines to its place of business. In the course and conduct of its business, respondent ADC has caused said consumer appliances and products, when sold by it, to be shipped from its place of business located in the State of New Jersey to purchasers located in other States of the United States.

In the course and conduct of its business, as aforesaid, respondent

ADC has caused checks, bills, invoices, letters and other documents to be mailed through the facilities of the United States mail, from its place of business located in the State of New Jersey to purchasers located in other States of the United States.

Accordingly, respondent ADC has maintained, and now maintains a substantial course of trade in consumer appliances and products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 31. For several years past, respondent ADC, respondent Executive Director and certain respondent retailers have been, and are, engaged in unfair acts and practices and unfair methods of competition in or affecting commerce, as herein described, which have the purpose, tendency and effect of lessening, restricting and suppressing competition among and between said respondent retailers, and among and between said respondent retailers and others, in the offering for sale, sale and distribution of consumer appliances and products.

PAR. 32. In the course and conduct of its business, respondent ADC, acting through respondent Executive Director and various ADC committees with the cooperation and/or acquiescence of the majority of respondent members, engaged in the following acts and practices:

(a) Respondent Executive Director and representatives of various respondent members acting as ADC committees and serving as common agents of all respondents have met with, and continue to meet with, suppliers of ADC for the purpose of ascertaining and negotiating the prices, terms and conditions of sale of consumer appliances and products offered by said suppliers. Subsequent to said discussions, regular meetings of respondent members are held under the auspices of ADC at which respondent Executive Director and representatives of various respondent members acting as ADC committees and serving as common agents of all respondents, relate to, and discuss with respondent members, the prices, terms and conditions of sale which they obtained from suppliers as well as their own suggestions and wishes with respect to the pricing, marketing and sales of said products by respondent retailers. Further suggestions and directions with respect to the pricing, marketing and sale of said products are communicated to respondent retailers by respondent ADC through the medium of news bulletins which are written by respondent Executive Director. At the ADC meetings and in the news bulletins, statements, admonitions, suggestions and threats of fines and penalties are made by respondent Executive Director and representatives of various respondent members acting

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as ADC committees, which are designed to induce and persuade, and did induce and persuade, the respondent retailers named herein to comply with the suggestions, wishes and directives made with respect to the pricing, marketing and sale of consumer appliances and products by said respondent retailers.

(b) Respondent ADC, with the knowledge, consent and approval of respondent Executive Director and the majority of respondent members, has, with regard to certain consumer appliances and products, withheld and continues to withhold from respondent retailers, knowledge of the amounts of certain rebates or allowances due them from respondent ADC for purchases made from, or through ADC, thus making it difficult or impossible for respondent retailers to determine their net cost for those certain items at the time of purchase. Cost is a significant factor in pricing merchandise for resale, thus, the purpose and effect of the "undisclosed holdback" practice is to prevent, discourage or inhibit respondent retailers from lowering their resale price by all or part of the amount of the undisclosed holdback and thus establish, maintain, raise, tamper with, control or stabilize the prices at which said products are advertised, offered for sale, or sold by respondent retailers. Additionally, the same undisclosed holdback practice has the effect of preventing, discouraging or inhibiting the resale of said products by respondent retailers to other retailers, a practice known as transshipping.

PAR. 33. Pursuant to, and by means of the acts and practices described in Paragraph Thirty-Two (a) and (b) above, respondent ADC, acting through respondent Executive Director, various committees of ADC, and certain respondent members performed and did persuade, induce and coerce other respondent members and respondent retailers to acquiesce in the performance of unlawful acts and practices among which are the following:

1. Maintain, establish, raise, tamper with or stabilize the prices at which certain consumer appliances and products are advertised, offered for sale or sold by respondent retailers.
2. Prevent, limit or inhibit respondent retailers from reselling certain consumer appliances and products purchased from respondent ADC, to other retail establishments, a practice commonly known as transshipping.
3. Refrain from locating and operating retail stores for the sale of consumer appliances and products in the geographic area or territory which is occupied and serviced by another respondent retailer.
4. For the purpose of effectuating the unlawful acts and practices

herinbefore described: harass, intimidate or coerce certain respondent retailers not conforming to the agreements or understandings herinbefore described through the use or threat of; fines, penalties, price discriminations, refusals to deal, suspension or termination of membership in ADC, refusal or failure to make timely payment of debts or obligations owing to members or resigning members of ADC, removal or exclusion of members of ADC from membership on or participation in, the activities of the Board of Directors, committees or subgroups of ADC, discriminatory treatment of members of ADC, failure to provide full and fair prior notice of all meetings which any member of ADC was permitted to attend and failure to provide members of ADC with an opportunity to attend and participate in such meetings.

PAR. 34. The acts, practices and methods of competition engaged in, followed, approved or acquiesced in by respondents, as hereinabove alleged, have the purpose, tendency and effect of hindering, lessening and restraining price and other competition between and among respondent retailers and between and among respondent retailers and other retailers, in the offering for sale, sale and distribution of consumer appliances and products.

PAR. 35. The acts, practices and methods of competition of respondents and the adverse competitive effects resulting therefrom as hereinabove set forth, are to the injury and prejudice of the public and of respondents' competitors and thus constitute unfair acts and practices and unfair methods of competition in or affecting commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

#### DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with 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, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to § 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Proposed respondent Appliance Dealers Cooperative is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its home office and principal place of business located at 84 Lockwood St., Newark, New Jersey.

Proposed respondent Murray Gidseg is Executive Director of Appliance Dealers Cooperative and as such is the chief executive officer of the corporation. He cooperates and acts together with other respondents to formulate, direct and control the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

Proposed respondents Ace Electronic Service Co., Inc. (hereinafter Ace) and Solar Appliance Centers, Inc. (hereinafter Solar) are corporations organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Ace maintains its home office and principal place of business at 69 Highway 35, Neptune City, New Jersey. Solar maintains its home office and principal place of business at 2114 Route 88, Bricktown, New Jersey.

Proposed respondent Ajay Appliance Sales & Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its home office and principal place of business at 1021 Route 37 West, Toms River, New Jersey.

Proposed respondent Apex Appliance Distributors, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its home office and principal place of business at 700 Rahway Ave., Elizabeth, New Jersey.

Proposed respondent Bell Appliance Co., Inc. is a corporation organized, existing and doing business under and by virtue of the

laws of the State of New Jersey, with its home office and principal place of business at Highway 22, Union, New Jersey.

Proposed respondent Paul Bergman is an individual trading and doing business as Brown's Appliance Co. with its home office and principal place of business located at 276 Main St., Paterson, New Jersey.

Proposed respondent Charles Stein is an individual trading and doing business as Economy Stove & Plumbing Supply Co. with its home office and principal place of business located at 1047 Elizabeth Ave., Elizabeth, New Jersey.

Proposed respondent Flynn Appliances, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its home office and principal place of business at 44 Grand Ave., Englewood, New Jersey.

Proposed respondent Frank Schwartz is an individual trading and doing business as Franks Sales & Service Co. with its home office and principal place of business located at 739 Main Ave., Passaic, New Jersey.

Proposed respondents Goldklang's Appliance City, Inc. (hereinafter Goldklang's) and Town Appliance, Inc. (hereinafter Town), are corporations organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Goldklang's maintains its home office and principal place of business at 462 Broadway, Bayonne, New Jersey. Town maintains its home office and principal place of business at Route 46, Rockaway, New Jersey.

Proposed respondent Harvey's of New Milford, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its home office and principal place of business at 690 River Road, New Milford, New Jersey.

Proposed respondent Karl's Sales & Service Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its home office and principal place of business at 111 Washington Ave., Belleville, New Jersey.

Proposed respondent Keystone Appliance Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its home office and principal place of business at 4237 Bergen Turnpike, North Bergen, New Jersey.

Proposed respondent Lichtman Bros. Inc. is a corporation organized, existing and doing business under and by virtue of the laws of



the State of New Jersey, with its home office and principal place of business at 101-105 Smith St., Perth Amboy, New Jersey.

Proposed respondent Mrs. G. Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its home office and principal place of business at 2960 Brunswick Pike, Trenton, New Jersey.

Proposed respondent Paul's Home Furnishings Co., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its home office and principal place of business at 121 New York Ave., Newark, New Jersey.

Proposed respondent Rooney Appliance, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its home office and principal place of business at 500 Market St., Saddle Brook, New Jersey.

Proposed respondent Schenck Appliance Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its home office and principal place of business at Route 88 and Laurelton Circle, Bricktown, New Jersey.

Proposed respondent Summerton Appliance, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its home office and principal place of business at 300 Route 9, Englishtown, New Jersey.

Proposed respondent Les Turchin, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its home office and principal place of business at 98-100 Albany St., New Brunswick, New Jersey.

Proposed respondent Tru-Home Sales Co. Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its home office and principal place of business at 321-16th Ave., Newark, New Jersey.

Proposed respondents Turchin's Department Stores, Inc. (hereinafter Turchin's) and Turchin's-Rex, Inc. (hereinafter Turchin's-Rex) are corporations organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Turchin's maintains its home office and principal place of business at 116 N. Wood Ave., Linden, New Jersey. Turchin's-Rex maintains its home office and principal place of business at 2385 Kennedy Boulevard, Jersey City, New Jersey.

Proposed respondents Uneeda Appliance Co., Inc. (hereinafter Uneeda), Uneeda Brook's, Inc. (hereinafter Uneeda Brook's) and Uneeda Appliance Company of Bayonne, Inc. (hereinafter Uneeda

Bayonne) are corporations organized, existing and doing business under and by virtue of the laws of the State of New Jersey. Uneeda maintains its home office and principal place of business at 2973 Kennedy Boulevard, Jersey City, New Jersey. Uneeda Brook's maintains its home office and principal place of business at 9 West Main St., Somerville, New Jersey. Uneeda Bayonne maintains its home office and principal place of business at 432 Broadway, Bayonne, New Jersey.

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

##### I

*It is ordered,* That respondent Appliance Dealers Cooperative, a corporation, (hereinafter referred to as ADC) and respondent Murray Gidseg, individually and as Executive Director of ADC and said respondents' agents, representatives, employees, successors and assigns, directly or indirectly, through any corporate or other device in connection with the advertising, offering for sale, sale or distribution of consumer appliances and products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, cease and desist from either individually doing, engaging in or performing any of the following acts, practices or policies or entering into, carrying out, cooperating or acquiescing in any common course of action, understanding, agreement or combination, whether express or implied, between said respondents or between any one or more of them and any other person or firm to do or perform any of the following:

1. Establish, tamper with, maintain, raise, stabilize or control the prices at which consumer appliances and products may be advertised, offered for sale or sold by any retailer.
2. Restrict, limit or otherwise interfere with the right of any retailer of consumer appliances and products to sell such products to any other person or firm.
3. Agree with any other person or firm to refuse to resell consumer appliances and products to any member of ADC unless the member is approved, authorized or franchised by suppliers to receive their merchandise.
4. Restrict, limit or otherwise interfere with the right of any

retailer to locate and operate retail stores in any geographic area or territory.

5. Harass, intimidate, coerce or otherwise interfere with any person or firm if an actual or potential effect of such conduct would be to cause or permit any of the acts, practices or policies prohibited by paragraphs one (1) through four (4) of this order.

6. Knowingly withhold or hold back from members or other customers of ADC any purchase price information or any information relating to the amounts of rebates, allowances or discounts due said members or other customers of ADC for merchandise purchased from or through ADC, or take or withhold any other action which has, or may have, the effect of impeding or preventing members or other customers of ADC from determining their net cost for consumer appliances and products at the time of purchase.

7. Communicate, circulate or exchange any information or material which has the purpose or effect of causing any of the acts, practices or policies prohibited by paragraphs one (1) through six (6) of this order.

## II

*It is further ordered.* That Ace Electronic Service Co., Inc., Solar Appliance Centers, Inc., Ajay Appliance Sales & Service, Inc., Apex Appliance Distributors, Inc., Bell Appliance Co., Inc., Paul Bergman an individual trading and doing business as Brown's Appliance Co., Charles Stein an individual trading and doing business as Economy Stove & Plumbing Supply Co., Flynn Appliances, Inc., Frank Schwartz an individual trading and doing business as Franks Sales & Service Co., Goldklang's Appliance City, Inc., Harvey's of New Milford, Inc., Karl's Sales & Service Co., Inc., Keystone Appliance Co., Inc., Lichtman Bros. Inc., Mrs. G. Inc., Paul's Home Furnishings Co., Inc., Town Appliance, Inc., Rooney Appliance, Inc., Schenck Appliance Corporation, Summerton Appliance, Inc., Les Turchin, Inc., Tru-Home Sales Co. Inc., Turchin's Department Stores, Inc., Turchin's-Rex, Inc., Uneeda Appliance Co., Inc., Uneeda Brook's, Inc., Uneeda Appliance Company of Bayonne, Inc. (hereinafter referred to as respondent retailers) and said respondent retailers' successors, assigns, officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with the offering for sale, sale or distribution of consumer appliances and products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, shall not, either individually or collectively:

Engage in, carry out, cooperate, or acquiesce in any act, practice or policy or any common course of action, understanding, agreement or combination between any two or more of said respondent retailers or between any one or more of them and respondent ADC or respondent Murray Gidseg, their representatives, agents, designees, successors and assigns, if an effect would be to restrict, interfere, or tamper with the purchase, advertising, pricing, offering for sale, sale or distribution of consumer appliances and products, the selection of customers, or the location of places of business by any person or firm, or between any one or more of said respondent retailers and any other person or firm, if an effect would be to restrict, interfere, or tamper with the purchase, advertising, or pricing of consumer appliances and products, or the location of places of business by any person or firm.

### III

*It is further ordered,* That respondent ADC, either directly or through its representatives, designees, successors and assigns, shall disclose to ADC members on an equal and timely basis all material matters considered and actions taken at all board, committee, membership and subgroup meetings or by the membership, or any board, committee or subgroup which affect, or may affect, the business of ADC including, without limitation, all information relating to the purchase or sale by ADC of consumer appliances and products purchased or to be purchased by or on behalf of ADC, its agents, representatives or designees.

### IV

*It is further ordered,* That respondent ADC, either directly or through its representatives, designees, successors and assigns, shall provide adequate and equal prior notice to each ADC member, of all meetings (except as to meetings of committees or subgroups provided for in paragraph V below) at which merchandise matters are to, or may, be discussed or considered. If any member of ADC shall be permitted to attend any such meeting, then all members of ADC shall be provided with an opportunity to attend and participate in such meeting and related discussions and matters.

### V

*It is further ordered,* That the officers and directors of ADC, annually, shall appoint the representatives of members of ADC to serve as members of committees or subgroups, including committees

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and subgroups involved in dealings with manufacturers, distributors or suppliers. Such appointments shall be made on a fair, impartial and non-discriminatory basis, shall be determined on the basis of the trade experience and expressed desires of the respective members of ADC and shall not be determined, directly or indirectly, on the basis of the size or volume of purchases of any member or such member's status as an officer or director of ADC. If any member of ADC has expressed a desire to have its representative serve as a member of a committee or subgroup involved in dealings with manufacturers, distributors or suppliers and has been denied such membership for a particular year, such member shall have the right to have a representative attend, in a non-voting capacity, all meetings and activities of such committee or subgroup, and shall be entitled to receive timely notices thereof to the extent possible in the normal course of business. All notices of meetings and activities shall be communicated on an equal basis to all members of ADC which are entitled to have a representative attend such meetings or activities.

VI

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

VII

*It is further ordered,* That at the next meeting of the Board of Directors of respondent ADC, which shall in no event be later than thirty (30) days from the date of service of this order, said Board of Directors shall cause the by-laws of ADC to be amended to include each of the paragraphs of this order and shall terminate and cancel any rule, article, resolution, regulation or by-law of ADC which is contrary to or inconsistent with any provision of this order.

VIII

*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  
PROPOSED TRADE REGULATION RULE FOR THE  
HEARING AID INDUSTRY

*Docket 215-44. Interlocutory Order, June 7, 1979*

ORDER DENYING MOTION OF THE NATIONAL HEARING AID  
SOCIETY

The National Hearing Aid Society (NHAS) by motion of May 22, 1979 has moved that *ex parte* communications between the Commission, any individual Commissioner, or any advisor of a Commissioner, and the FTC staff members assigned to the Proposed Trade Regulation Rule for the Hearing Aid Industry proceeding, Public Record No. 215-44, or the Director of the Bureau of Consumer Protection be prohibited in the above-described proceeding. NHAS further moves that any *ex parte* communications which have already occurred since the initiation of this proceeding if written be placed on the rulemaking record subject to judicial review, or if oral, with a summary thereof. For the reasons set forth below, the Commission denies the motion.

The basic premise underlying the motion is the claim of inherent unfairness in the Commission's procedures which restrict the ability of interested outside parties to communicate with the Commission, but permit unfettered staff contact. Thus, NHAS argues, while the Commission's recently amended Rule 1.18(c) permits outside communications at some stages of a rulemaking proceeding, it fails to subject staff contacts to similar restrictions. NHAS argues that the failure to recognize staff's role as adversarial results in inherent unfairness, thereby denying the procedural due process rights of all other parties participating in the proceeding.

The Commission, as you know, recently reconsidered this issue in amending Rule 1.18(c) of its Rules of Practice, and found that no change in its current practice is required with regard to staff communications. In so doing, the Commission specifically rejected proposals that staff members who participated in rulemaking proceedings be prohibited from communicating with any individual Commissioner or Commissioners' advisors. *See also* 42 F.R. 6056 (Nov. 28, 1977). It was the Commission's belief that the Administrative Procedure Act's (APA) provisions concerning separation functions and *ex parte* communications do not apply to Magnus Moss rulemaking. The court in *Hercules, Inc. v. EPA*, No. 77-1 (D.C. Cir., Nov. 3, 1978), noted that the APA has long been construed as "allowing the agencies staff to assist agency administrator

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interpreting the record." Slip. Op. at 65. The court in that case refused to find that staff communications invalidated the rule and concluded that any change in the existing law should come from the agencies or Congress. Slip. Op. at 68-69.

The Commission's prior rule placed a total ban on outside communications in order to preserve the integrity of the rulemaking process and to avoid the appearance of unfair access to decisionmakers. The Commission, in amending the rule, decided that a less restrictive standard could serve the same ends, while allowing Commissioners access to potentially useful information from outside parties by requiring placement of the contents of such communications on the public or rulemaking record. The requirement that communications be made available to the public ensures that a full and complete record is accessible both to persons participating in the proceeding and to a reviewing court. This approach is consistent with that taken by the Administrative Conference of the United States in its recommendation 77-3, 1 C.F.R. 305.77-3, and has received the endorsement of Professor Davis. See, *Davis, Administrative Law Treatise*, 553-54 (2d. 3d. 1978).

The Commission also notes that Rules 1.18(a) and (b) require that information that the Commission considers relevant to the rule be made part of the rulemaking record and that the rulemaking record be publicly available. These provisions ensure that all information that the Commission relies upon in adopting a rule, including any internally generated information, will be made part of the rulemaking record and, more important, that the Commission will not consider any information not reflected in the final rulemaking record.

NHAS specifically alleges that a staff memorandum detailing the relationship between the FTC and the FDA with respect to regulation of hearing aids constitutes a harmful *ex parte* contact. NHAS also notes, however, that this jurisdictional issue was fully briefed both in the final staff report as well as in the lengthy comments submitted by NHAS rebutting the argument. NHAS argues that the inherent credibility afforded the staff memorandum by the Commission puts NHAS at an unfair advantage. This argument is unsupportable. The Commission believes that petitioners prove too much; current procedures have afforded interested parties, including NHAS, more than substantial opportunity to brief the jurisdictional and other issues fully and completely on the rulemaking record.

Requiring all staff communications be recorded would impose substantial burdens on the Commission. The range of communications would be significant, from the trivial to the more important,

and their length and complexity could also vary. To the extent that such communications are oral, the recordkeeping requirements could be substantial in terms of time and cost, and the needs of the Commission for fast and flexible means of communicating with its staff about a complex proceeding with a voluminous record could be seriously disserved. The Commission believes that its procedures adequately provide for contacts between non-FTC personnel and the Commission and its own staff and the Commission without endangering the procedural rights of other parties in the proceeding. The Commission's Rules of Practice ensure that all relevant information that the Commission relies upon in adopting a rule will be made a part of the rulemaking record; the Commission will not consider any comments or information that is not reflected in the final rulemaking record. The petition is hereby denied.



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IN THE MATTER OF

PROPOSED TRADE REGULATION RULE FOR THE  
HEARING AID INDUSTRY

*Docket 215-44. Interlocutory Order, June 7, 1979*

ORDER DENYING MOTION OF THE HEARING INDUSTRIES  
ASSOCIATION

The Hearing Industries Association on May 30, 1979, filed a Motion to Prohibit Ex Parte Communications Between the Commission and the FTC Staff in the above-captioned proceeding. HIA's motion relied upon and incorporated by reference the National Hearing Aid Society's Motion to Prohibit Ex Parte Communications Between the Commission and the FTC Staff filed May 22, 1979. HIA similarly incorporates by reference in support of its motion pp. 534-542 of Volume IV of its "Final Comments" filed on February 19, 1979.

HIA's motion raises no legal or policy arguments different from those set forth in the NHAS motion. The Commission's order denying that motion is attached. For the reasons set forth therein, HIA's motion is hereby denied.

IN THE MATTER OF  
HOWARD ENTERPRISES, INC., ET AL.

FINAL ORDER, OPINION, ETC., IN REGARD TO ALLEGED  
VIOLATIONS OF THE FAIR CREDIT REPORTING AND FEDERAL  
TRADE COMMISSION ACTS

*Docket 9096. Complaint, Feb. 8, 1977 — Final Order, June 12, 1979*

This order, among other things, requires a Nampa, Idaho firm and its corporate president, engaged in compiling, publishing and distributing consumer reports through franchises and otherwise, to cease disseminating such reports without following reasonable procedures to ensure that reported information is accurate and will be used for permissible purposes. They are prohibited from furnishing "Alert Lists" (lists of consumers who have allegedly passed bad checks) to subscribers who do not have a legitimate business need for information regarding all listed consumers, unless such lists are coded to protect consumers' identity until a subscriber's need has been established. A statement advising recipients of statutory requirements and prohibitions must accompany each disseminated consumer report. Additionally, the order requires respondents to obtain from all franchisees and prospective franchisees a written agreement obligating them to comply with the terms of the order.

*Appearances*

For the Commission: *Dennis D. McFeely and Sharon S. Armstrong.*

For the respondents: *L. Kim McDonald, Smith & McDonald,*  
Nampa, Idaho.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and the Fair Credit Reporting Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Howard Enterprises, Inc., a corporation, and Ralph R. Howard, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows (all allegations hereinafter made in the present tense shall include the past tense):

PARAGRAPH 1. Howard Enterprises, Inc. is a corporation organized and doing business under and by virtue of the laws of the State of Idaho, with its principal office and place of business located at 11 Third Ave., Nampa, Idaho.

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Respondent Ralph R. Howard is president of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. He also engages in the acts and practices hereinafter set forth in his individual capacity. His business address is the same as that of the corporate respondent. [2]

PAR. 2. Subsequent to April 25, 1971, in the ordinary course and conduct of their business, respondents have compiled, published and distributed lists containing, among other things, the names of consumers who have issued forged checks, who have issued checks drawn upon nonexistent accounts, or who have issued checks which have been returned by the drawee bank because of insufficient funds or other reasons.

The information contained in the aforesaid lists concerning consumers whose names appear therein, bears on said consumers' credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics and/or mode of living. Some of the information is used, is expected to be used, or is collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit to be used primarily for personal, family, or household purposes, or is used, is expected to be used, or is collected in whole or in part for use relative to other legitimate business needs for information in connection with business transactions involving consumers reported upon. Therefore, each of the aforesaid lists constitutes a series of consumer reports as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act.

Respondents are, for a monetary fee, regularly engaged in the practice of assembling such information on consumers for the purpose of furnishing such lists to third parties, and regularly use a means or facility of interstate commerce for the purpose of preparing and/or furnishing said lists. Therefore, respondents are a consumer reporting agency as "consumer reporting agency" is defined in Section 603(f) of the Fair Credit Reporting Act.

PAR. 3. Respondents furnish the aforesaid consumer reports to persons who respondents do not have reasons to believe:

A. have a legitimate business need for the information upon receipt in connection with a business transaction involving each consumer reported upon,

B. intend to use the information upon receipt in connection with credit transaction involving each consumer on whom the information is furnished and involving the extension of credit to each consumer reported upon, or [3]

C. intend to use upon receipt the information contained in each report for any of the other permissible purposes set forth in Section 604(3) of the Fair Credit Reporting Act.

Further, the furnishing of such consumer reports is not in response to a court order and is not in accordance with the written instructions of each consumer to whom the reports relate.

Therefore, respondents have violated, and are violating, Section 604 of the Fair Credit Reporting Act.

PAR. 4. Respondents fail to maintain reasonable procedures to limit the furnishing of consumer reports to the purposes listed under Section 604 of the Fair Credit Reporting Act, including failure to:

1. require prospective users of consumer reports to certify the purposes for which the information in such reports is sought,
2. require prospective users of consumer reports to certify that the information in such reports will be used for no other purposes than those which have been certified, and
3. make reasonable efforts to verify the uses certified by the prospective users of consumer reports prior to furnishing consumer reports to said users.

Therefore, respondents have violated, and are violating, Section 607(a) of the Fair Credit Reporting Act.

PAR. 5. Respondents furnish consumer reports to persons under circumstances in which there are reasonable grounds for believing that such reports will not be used for a purpose listed in Section 604 of the Fair Credit Reporting Act.

Therefore, respondents have violated, and are violating, Section 607(a) of the Fair Credit Reporting Act.

PAR. 6. Respondents fail to follow reasonable procedures to assure maximum possible accuracy of information concerning the individuals about whom respondents' consumer reports relate inasmuch as respondents fail to provide reasonable procedures to assure maximum possible accuracy in the removal from respondents' consumer report lists of the [4] names of individuals who have paid off checks which have been returned by drawee banks.

Therefore, respondents have violated, and are violating, Section 607(b) of the Fair Credit Reporting Act.

PAR. 7. Subsequent to April 25, 1971, respondents have, in the ordinary course and conduct of their business, sold franchises and business opportunities across state lines to others to engage in businesses conducted by the use of the acts and practices described in Paragraphs Two, Three, Four, Five and Six above. Since the sale of

such franchises and business opportunities, respondents have sent and received monies, papers, documents and other materials across state lines and have engaged in interstate travel and communication in connection with the continuing operation by the franchisees of their businesses in such manner as described in Paragraphs Two, Three, Four, Five and Six above. Thus, the respondents have provided and continue to provide to others a means, method and instrumentality to engage in violations of the Fair Credit Reporting Act, and respondents are accordingly engaged in acts or practices which are and have been unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce.

PAR. 8. The acts and practices set forth in Paragraph Seven above are in violation of Section 5 of the Federal Trade Commission Act; the acts and practices set forth in Paragraphs Two, Three, Four, Five and Six above are in violation of the Fair Credit Reporting Act and pursuant to Section 621(a) thereof such acts and practices constitute unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE LAW  
JUDGE

JANUARY 26, 1978

#### I. PRELIMINARY STATEMENT

##### A. History of the Proceeding

This proceeding began on February 7, 1977 with the issuance of a complaint charging that respondents Howard Enterprises, Inc. and Ralph R. Howard had violated the Fair Credit Reporting Act and the Federal Trade Commission Act. Respondents Howard Enterprises and Ralph R. Howard filed their answers to the complaint on May 31, 1977, denying the charges in the complaint. As an affirmative defense, they [2] claimed that they were not engaged in credit reporting and that the Fair Credit Reporting Act therefore did not apply to their activities. They also claimed that they engaged in no unfair or deceptive acts or practices in violation of the FTC Act. Finally, respondents stated that the federal laws referred to in the complaint were unconstitutional as applied to them.

A telephone conference call between myself and counsel for the parties was held on June 2, 1977, and deadlines were set for the filing of lists of witnesses and documents and for evidentiary hearings.

Hearings were held on October 3 and 4, 1977 in Seattle, Washington. Complaint counsel called 11 witnesses. Respondent Ralph R.

Howard was the only witness for the defense. The record was closed on October 31, 1977. Complaint counsel filed their proposed findings of fact and conclusions of law on November 25, 1977. Respondents filed theirs on December 5, 1977.

#### B. The Allegations of the Complaint

The complaint charges that Howard Enterprises and its president, Ralph E. Howard, have, in the conduct of their business, compiled, published and distributed lists containing, among other things, the names of consumers who have issued forged checks, who have issued checks drawn upon nonexistent accounts, or who have issued checks which have been returned by the drawee bank because of insufficient funds or other reasons.

The complaint states that the information contained in these lists bears on consumers' credit worthiness, reputation, personal characteristics, etc., and that the information is used in whole or in part as a factor in establishing consumers' eligibility for credit or is used in connection with other legitimate business needs for information in connection with business transactions involving consumers reported upon. Therefore, the complaint alleges, respondents' lists are "consumer reports" and respondents are a "consumer reporting agency" as those terms are defined in Sections 603(d) and 603(f) of the Fair Credit Reporting Act (FCRA). [3]

The complaint also alleges that respondents have violated Section 604 of the FCRA by furnishing their reports to persons who they do not have reason to believe (a) have a legitimate business need for the reports, (b) intend to use the reports in connection with a credit transaction involving each consumer on whom the information is furnished, or (c) intend to use the reports for other permissible purposes set forth in Section 604(3) of the FCRA.

According to the complaint, respondents have also violated Section 604(a) of the FCRA by failing to maintain reasonable procedures to limit the furnishing of consumer reports for the purposes listed under Section 604 and by furnishing consumer reports to persons under circumstances in which there are reasonable grounds for believing that such reports will not be used for a purpose listed in Section 604.

The complaint also alleges that respondents have violated Section 607(b) of the FCRA because they do not follow reasonable procedures to assure the accuracy of the information in their reports.

Finally, the complaint alleges that respondents have sold franchises and that they have provided to their franchisees a means,

method and instrumentality to engage in violations of the Federal Trade Commission Act.

The following findings of fact, conclusions of law and order are based upon the transcript of testimony, the exhibits received in evidence and the proposed findings filed by complaint counsel and respondents. Proposed findings not adopted herein verbatim or in substance are rejected as not supported by the evidence or as irrelevant.<sup>1</sup> [4]

## II. FINDINGS OF FACT

### A. Description of the Corporate and Individual Respondents

1. Respondent Howard Enterprises is a corporation organized and doing business under and by virtue of the laws of the State of Idaho (CX 1). Its principal office and place of business is located at 111 Third Ave., Nampa, Idaho (Ans. Par. 2). It is a closely held corporation whose officers and directors are Ralph R. Howard, his brother and his wife. Together Ralph R. Howard and his brother Karrell Howard own all the stock in Howard Enterprises (Tr. 147).

2. Respondent Ralph R. Howard has been president and a director of Howard Enterprises since its incorporation and has owned the majority of stock in the corporation at all times (Tr. 147-48). Mr. Howard has formulated, directed and controlled the policies, acts and practices of Howard Enterprises (Ans. Par 2). His business address is 111 Third Ave., Nampa, Idaho (Ans. Par. 2).

### B. The Nature of Respondents' Businesses

3. Howard Enterprises is and has been engaged in the business of selling franchises in an "Alert List" system (Tr. 147, 151; CXs 37-46) to purchasers located in Washington and Oregon (CXs 37-41, 42-46). The corporation itself has not engaged in the distribution of Alert Lists (Tr. 148); instead, Mr. Howard operated the Alert List system in southern Idaho and eastern Oregon from December 1974 to June 1977, at which time he sold his distribution rights in those areas to Lynn J. Whitmill, a franchisee (Tr. 148-49, 151, 161; CX 46a-c).

4. The Alert Lists distributed by Mr. Howard were lists of names of individuals who had written checks drawn upon nonexistent

<sup>1</sup> Abbreviations used herein are:

|      |  |
|------|--|
| Tr.  | : Transcript of the hearings.  |
| CX   | : Commission exhibit.  |
| RX   | : Respondents' exhibit.  |
| CPF  | : Complaint counsel's proposed findings.   |
| Adm. | : Respondents' answers to complaint counsel's requests for admissions (CXs 153A-L and 154A-L). |
| Ans. | : Respondents' answer.   |

accounts or who had written checks which had been returned by the drawee bank because of insufficient funds (Adm. 1, 3; Tr. 152). The lists were distributed weekly (CXs 54, 55; Tr. 215). [5]

### C. Interstate Commerce

5. Mr. Howard's Alert Lists were disseminated by mail (Adm. 14 and 15) to subscribers in several trade areas in southern Idaho and Oregon (Tr. 151, 157, 161, 168; CXs 29-36).

6. Also, Mr. Howard, on behalf of Howard Enterprises, travelled to the States of Washington and Oregon to assist franchisees in setting up their businesses (Tr. 223, 228-29). Howard Enterprises has sold six franchises which authorize its franchisees to disseminate Alert Lists (CXs 37, 40, 42, 44, 45, 46; Tr. 205-09). These franchisees are authorized to do business in the following areas: (a) southern Idaho, two counties of eastern Oregon, and parts of Wyoming and Utah which fall into the Idaho trade area (CX 46; Tr. 102-03); (b) Oregon State, except for a few eastern Oregon counties, plus three Washington counties (CXs 42, 44; Tr. 225-26); (c) the State of Washington, excluding three counties, and northern Idaho (CXs 37, 40).

7. Sales of all of the franchises were made by respondents from their headquarters in Nampa, Idaho. The franchise territories, with one exception, are located almost entirely outside of Idaho (CXs 37, 40, 42, 44, 45, 46). In some instances, the sales were made to persons then residing outside of Idaho (CX 45; Tr. 227, 229). One franchisee, an Idaho resident, went outside of Idaho to survey the franchise area before investing (Tr. 324). In three instances Mr. Howard travelled from Idaho to other states to assist in getting the franchises started (Tr. 223, 228, 229). Executed franchise agreements were taken or sent outside of the State of Idaho (Tr. 225, 227, 347) and respondents engaged in out-of-state telephone conversations in connection with franchise sales (Tr. 226, 228-29).

8. Except for the Idaho franchisee, all the computer discs containing the program necessary to operate the Alert system were taken outside of Idaho by franchisees (Tr. 223, 227, 326-27; Adm. 63(d)). Other materials and forms necessary to begin the operation of Alert franchisees' systems were also taken outside of Idaho for use (Tr. 316, 326-27; Adm. 69). The respondents provided training to operate franchises in areas wholly or partly outside of Idaho (Tr. 135, 223, 228, 229, 325). [6]

9. Respondents have regularly received from their past and present franchisees across state lines (except for Mr. Whitmill, a franchisee of Mr. Howard) (a) payments constituting the full or



partial cost of Alert List franchises (Adm. 68(a)); (b) periodic monthly payments at the rate of \$1.25 per subscriber until early 1976, and at the rate of \$1.46 per subscriber thereafter (Adm. 68(b); Tr. 293, 332; CXs 37, 40, 42, 44, 45, 46, par. 4); (c) a monthly computer-printed summary of all amounts owed by the franchisee to the respondents (Adm. 68(c)); and (d) copies of the actual Alert Lists disseminated by the franchisees to their subscribers (Adm. 68(d)). Respondents have made interstate telephone calls in connection with the operation of the franchises between 10 and 30 times (Adm. 67(a) and (b); Tr. 231, 329) and have crossed state lines in connection with the operation of the franchises between 10 and 20 times (Adm. 66(a) and (b); Tr. 231, 318-19, 329).

10. The franchise agreements all provide that respondents shall give advice and instructions to the franchisees, most of whom are located outside Idaho (CXs 37, 40, 42, 44-46, par. 5; Tr. 210-11). In the case of at least one franchisee, this took the form of many written interstate communications from respondents offering names of subscriber prospects, potential new employees, potential groups to contact, and other advice and information (CXs 116, 129-31, 133, 135-37, 139-42, 144, 146, 148-51; Tr. 236-46). It also included assisting a franchisee in soliciting customers outside of Idaho (Tr. 130 A) and helping to collect money owed from subscribers located outside of Idaho (Tr. 130-31).

#### D. Sources of Information on Alert Lists

11. The information on the Alert Lists which Mr. Howard published was obtained by him from subscribers who mailed Mr. Howard report cards (pre-addressed to Mr. Howard) listing the names of consumers whose checks had been dishonored (Tr. 153). Prior to the summer of 1975, the report card required reporting only of the consumer's name (CX 51; Tr. 213). Later, the report card contained space for bank account numbers or driver's license numbers (CX 50; Tr. 213).

12. The information on the report card was the only information about the check writer Mr. Howard received (Tr. 214). [7]

#### E. Recipients of Alert Lists

13. There were approximately 180 subscribers in the trade areas in which Mr. Howard disseminated his Alert Lists (CXs 29-36; Tr. 151). For the most part, Mr. Howard's subscribers were retail businesses taking in a high volume of checks, such as grocery stores, clothing stores, pizza parlors, restaurants, and bars (Tr. 157). Checks

were taken by subscribers to pay for the purchase of merchandise, in exchange for cash, and to make payment on open accounts (Tr. 162). A collection agency also received copies of the Alert Lists (Tr. 157).

14. Mr. Howard also disseminated Alert Lists weekly to law enforcement agencies in Idaho and Oregon (Adm. 16, 18; Tr. 157). Lists received by law enforcement agencies were in all respects the same as lists received by subscribers, except that the law enforcement agencies received lists for several trade areas (Tr. 157, 386).

15. Mr. Howard charged a fee to all third parties other than law enforcement agencies to whom Alert Lists were disseminated (Adm. 21). The fee was \$15 per month. Later, it was raised to \$17.50 per month (Tr. 157-58). For this fee a subscriber was entitled to as many as nine copies of the list (Tr. 158).

#### F. The Format of the Alert Lists

16. The lists compiled by Mr. Howard bore the designation "Alert Lists" at the top, a date at the left and a geographic area at the right. The names on the lists were organized alphabetically by last name and first name or initial and arranged in columns. Between 30 and 500 names appeared on the lists, depending on the geographic area and date of the list. At the left of each name was an asterisk which designated whether the name had been added in the previous week or a number which indicated how many checks had been reported for that particular individual. At the bottom of each list appeared the post office mailing address used by Mr. Howard and a caution that the list not be reproduced (CXs 2-11, 70-78). Lists compiled and disseminated prior to the summer of 1975 did not identify the consumer except by name (CXs 2-11). [8]

17. The Alert List of July 11, 1975 for the geographic area Ore-Ida (CX 6) is typical in style and format to all Alert Lists compiled and distributed by Mr. Howard until the summer of 1975 (Tr. 172-73), after which time a bank account or social security number was added beneath each individual's name (Tr. 158-59; CXs 70-78).

#### G. Recipients' Use of Alert Lists

##### (1) Subscribers

18. The purpose for which Mr. Howard compiled and disseminated Alert Lists for subscribers was to assist them in deciding whether checks proffered to them had the likelihood of becoming dishonored (Tr. 156). It was Mr. Howard's intent that if an individual whose name appeared on the Alert Lists attempted to write a check or cash a check in the subscriber's store, the subscriber would be able to

make an informed judgment to accept or refuse the individual's check (Tr. 186; CXs 54a-b, 55) and the lists were used by subscribers for that purpose (Tr. 186, 372-73, 400-01, 410, 416; CXs 54a-b, 55).

19. The acceptance of a check is part of a business transaction between the merchant and the check writer (Tr. 165). The merchant has a legitimate need for information about the check writing habits of his customers because the information enables the merchant to avoid taking checks which are likely to be dishonored.

20. However, at the time each subscriber received a list, he did not have a use for all of the names on the Alert List (Tr. 400). Mr. Howard testified that, based on his contact with subscribers, it was likely that the subscribers dealt with between 5 percent and 85 percent of the individuals listed on an Alert List (Tr. 192). Testimony of actual users of the lists indicates lower figures. The manager of a clothing store testified that his business attracted 250 to 300 customers per day, had annual sales of \$500,000, and took 85 percent of its business in payments by checks (Tr. 405), yet during the 18 months in which his store had subscribed to the Alert Lists, only three persons whose names appeared on the lists had come into the store (Tr. 411). The manager [9] of an auto salvage business which had sales of \$40,000 per month (Tr. 413), 50 to 60 percent of whose customers paid by check (Tr. 414), had never in three years had an individual on the list attempt to write a check in the store (Tr. 417). The manager of a farm supply store which did approximately \$800,000 worth of business a year during the three years his store had subscribed to the Alert Lists had seen only one individual on the lists in his store (Tr. 397, 401).

#### (2) Collection Agency

21. Emma Hatfield, the manager of a collection agency which subscribed to the Alert Lists, testified that she uses the lists to see if customers from which she is attempting to collect bills are still on the lists. She does not, however, use the lists directly for the purpose of collecting bills (Tr. 393) and therefore does not use the lists in connection with a business transaction with consumers, for collection of accounts.

#### (3) Law Enforcement Agencies

22. Mr. Howard also disseminated Alert Lists to law enforcement officials such as local police, state attorneys general, U.S. postmasters, and the U.S. Secret Service (CX 33). He disseminated Alert Lists to these agencies although not ordered to do so by a court (Adm.

26), and without receiving written instructions to provide the lists from consumers whose names appear on the lists (Adm. 27).

23. Law enforcement officials called Mr. Howard to ask for the names of subscribers holding outstanding checks. He was able to provide this information by consulting the master list (Tr. 202-03). William Alfson, a U.S. postal inspector, testified that he scanned the Alert Lists for familiar names in connection with thefts from the U.S. mail resulting in forgeries. He did not undertake investigations as a result of consulting the lists, nor did he obtain convictions as a result of using them (Tr. 382). A detective of the Ada County Sheriff's Office received Alert Lists in connection with his theft detail (Tr. 385). He did not specifically request the lists, nor had he obtained a court order for the lists, does not use them in connection with the granting of credit, the underwriting of insurance, the employment of applicants, the providing of government licenses or benefits, or in connection with a business transaction with the consumers whose names appeared on the lists (Tr. 386-87). [10]

#### H. Certification and Verification by Recipients of Alert Lists

24. Mr. Howard did not obtain from law enforcement agencies which receive Alert Lists any certification that the lists would be used only for the permissible purposes stated in the FCRA nor did he verify the law enforcement agencies' uses of the lists (Tr. 250, 388). Subscribers were not required to certify that they would use the lists only for the purposes listed in the FCRA before receiving the Alert Lists, nor did Mr. Howard verify that the lists were being used only for such purposes (Tr. 160, 250).

25. User witnesses who had made arrangements for their stores to subscribe to the Alert Lists testified that Mr. Howard or his representatives did not at any time ask the subscriber what he or she intended to do with the lists, nor were any restrictions on the use of the lists discussed (Tr. 369, 394, 398, 407).

26. Mr. Howard did not require that subscribers state in writing what uses would be made of the lists or state in writing any agreement as to restrictions on their uses of the lists (Adm. 40(a), (c)). The only writing between the subscriber and Mr. Howard was the order blank (CX 53; Tr. 215), which is silent both as to the subscriber's uses of Alert Lists and as to any restrictions on the subscriber's uses of the Alert Lists.

#### I. Mr. Howard's Procedures To Assure Accuracy of the Alert Lists

27. Prior to placing a consumer's name on an Alert List, Mr.

Howard did not request the subscriber to send the dishonored check to him (Adm. 43), and he had no way of knowing whether all the names submitted by subscribers were individuals whose checks had in fact been dishonored (Tr. 263).

28. An individual's name appeared on successive Alert Lists until a subscriber notified Mr. Howard that the name should be deleted. Mr. Howard had no regular policy of deleting names from the Alert Lists after 90 days (Tr. 253-54), and some names remained on the lists for as long as 11 months (CX 116). [11]

29. There were two mechanisms for deleting names from the Alert Lists (Adm. 50). Subscribers could mail postcards (CXs 50, 51) to Mr. Howard requesting that a name be deleted (Adm. 45), or subscribers could indicate on an audit sheet that names which they had submitted should be deleted (Adm. 46). The audit (CX 57) consisted of a computer printout of the names of consumers the subscriber had reported with instructions that the names be deleted from the list if the check had been picked up or if the subscriber considered the check uncollectable (CX 57). The audits were mailed out quarterly (Tr. 217). The purpose of the audit was to have subscribers delete names which should no longer appear on the lists (Tr. 218). The fact that subscribers returned the audit sheets indicated that they had failed to use the postcard notification mechanism (Tr. 218-19). The audit system was necessary because the postcard system was inadequate (Tr. 219).

30. Although Mr. Howard requested his subscribers to delete names promptly (Tr. 370), he did not require that subscribers agree in writing to send in delete cards (Tr. 255), he did not impose any penalty on subscribers for failing to submit delete cards on a timely basis (Tr. 256), and he had no way of knowing if a subscriber was sending in his delete cards when he should (Tr. 257). It was also Mr. Howard's policy not to delete a name if a delete card was unsigned (CX 59; Tr. 220). Thus, unless he could recognize the handwriting of the subscriber submitting the delete card, the name could not be deleted even though the individual had already paid the check (Tr. 220).

31. Mr. Howard did not penalize his subscribers for failing to return an audit list (Tr. 256), and he had no way of knowing whether each subscriber returned the audit sheet on a timely basis (Tr. 257) because he made no attempt to keep track of which audit sheets were received. In fact, the only mechanism for uncovering errors in the system was when consumers called him to complain that their names had erroneously appeared on an Alert List (Tr. 203). In those instances, his procedure was to contact the subscriber (Tr. 256), and

he discovered in some of those instances that the subscriber had in fact forgotten to have the consumer's name deleted (Tr. 425). [12]

32. For example, detective Barnes testified that his daughter's name appeared on the Alert List in December 1976. He personally accompanied his daughter to the subscriber's place of business and paid the check. Nevertheless, his daughter's name continued to appear on the Alert Lists until March 1977. When he contacted Mr. Howard, asking that his daughter's name be deleted, he was told it was up to the subscriber to turn in a delete card (Tr. 389).

#### J. The Businesses Operated by the Franchisees

##### (1) General Description

33. The manner in which the franchisees operate their Alert List systems is essentially identical to the way Mr. Howard operated his in southern Idaho before it was sold (Tr. 133, 134, 169). Subscribers to the list send in the names of persons who have written checks which have been dishonored (Tr. 115, 306, 327; Adm. 70). These names are compiled by the franchisees into lists by geographic area and the lists are disseminated to the subscribers weekly (Tr. 101, 304, 328; Adm. 71; CXs 12-28, 54-55). The franchisees charged a fee of \$15 per month for this service until early 1976, and charged \$17.50 per month thereafter (Adm. 78; Tr. 157, 158, 331). Lists are provided free to law enforcement agencies (Tr. 113, 302, 382). Alert Lists containing 3,086 names were distributed by franchisees on July 1, 1977 (CXs 12-28a-b). This is a typical number of names currently circulated on Alert Lists (Tr. 231-32).

34. Names are taken off the lists by subscribers sending in delete cards indicating individuals who have paid outstanding checks (Tr. 119, 213, 307, 349), and except for the present eastern Washington franchise, by the return of audit lists with names marked out (Adm. 69(k); Tr. 218, 349). The current eastern Washington franchisee removes names after they have been on the list for 90 days (Tr. 308). The audit lists are mailed to each subscriber quarterly or every six weeks and contain all the names on the list which have been submitted by that subscriber. The subscriber is instructed, among other things, to delete the names of those who have paid off their checks (Tr. 121, 217-18, 348-49; CXs 57, 86, 129-30). [13]

35. The lists are used by subscribers in determining whether or not to accept checks from persons whose names appear on the lists (Tr. 105, 127, 307, 374, 410). Lists are also sent by franchisees to law enforcement agencies which review the lists for names of persons who are under investigation and for similar law enforcement

purposes (Tr. 112, 202-03, 301-02, 382, 387). The lists distributed to law enforcement agencies are identical to the lists distributed to regular subscribers and include more information than required for identification only (Tr. 113-14, 301).

36. Neither the subscribers nor the law enforcement agencies use all the names on each list at the time received or at any time thereafter (Tr. 124, 310, 353). The subscribers cannot use any of the names on the lists at the time lists are received unless at that moment someone is attempting to write a check (Tr. 191, 400). From 5 to 85 percent of the names on each Alert List are actually used, depending upon the type of outlet and other variables (Tr. 192). Testimony of recipients of Alert Lists indicated that they had actual use for none of the names, or only one to three of the names from all the lists ever received (Tr. 373, 401, 417).

#### (2) Certification and Verification of Purposes by Franchisees' Subscribers

37. The franchisees do not require subscribers, prior to receiving Alert Lists, to state orally or in writing the purposes for which the information on the Alert Lists will be used (Adm. 81(a); CX 53; Tr. 110, 248-50, 299, 350), nor do the franchisees require, before sending Alert Lists to subscribers, that the subscribers state orally or in writing that the information on the lists will be used for no other purposes than those listed in Section 604 of the FCRA (Adm. 81(c), 81(d); Tr. 110, 124, 248-50, 299, 350). In no instances have franchisees obtained, in connection with lists provided to subscribers and law enforcement agencies, either a court order requiring that such lists or names be provided or written permission from the consumers to do so (Adm. 80(a), (b)). Since the franchisee's subscribers have not certified any purposes in connection with using the lists, the franchisees have not sought to verify any certified purposes (Tr. 250).  
[14]

#### (3) Franchisees' Procedures To Assure Accuracy of the Alert Lists

38. The franchisees' procedures to assure accuracy of the Alert Lists were the same as respondent Howard's (Tr. 169) with the exceptions that the present eastern Washington franchisee removes names after 90 days (Tr. 308) and that a former Washington franchisee sent his subscribers audit lists every six weeks instead of every three months (Tr. 349).

39. Franchisees have not obtained written agreements from subscribers providing that only the names of persons who had

written dishonored checks would be put on the Alert Lists (CX 53, 92a-b; Tr. 110, 215, 299, 351) and have failed to verify that bad checks were held for those whose names were sent in (Tr. 117, 214, 306).

40. Franchisees have not obtained the written agreement of subscribers to delete names when checks are paid off (CXs 53, 92a-b; Tr. 110, 215, 299, 350). Sometimes delete cards are not sent in due to poor bookkeeping on the part of the subscriber (Tr. 349). The franchisees have no way of knowing whether subscribers are sending in delete cards when they should (Tr. 120, 308). There are no penalties for failure to return delete cards (Tr. 132, 352). The franchisees were aware that Mr. Howard had reminded his subscribers to send in delete cards and should have known that their subscribers might also be ignoring or forgetting this procedure (Adm. 69(j)).

41. The return of audit lists with names marked out indicates that names could have been removed from the lists earlier (Tr. 121, 218, 349). There is no written agreement with the franchisees' subscribers that audit lists will be returned when appropriate (Tr. 110, 215, 299, 351-52). At least one subscriber simply threw the audit list away (Tr. 419). There are no procedures to help ensure return of the audit lists when appropriate (Tr. 122-23), such as the levying of penalties (Tr. 352).

#### K. The Purpose of the Alert Lists and Their Use by Recipients for Purposes Other Than Identifying Writers of Bad Checks

42. The purpose of the Alert Lists is to give merchants a means to identify consumers who may have written bad checks [15] (Tr. 106, 156). There is no evidence that the Alert Lists were designed to provide information about a consumer's credit worthiness, credit standing or credit capacity, or, aside from what might be inferred about the character of the writer of bad checks, any specific information about a consumer's character, general reputation, personal characteristics, or mode of living.

43. The Alert Lists were used by recipients only to identify consumers who may have written bad checks. They were not used for purposes of granting credit (Tr. 124, 315, 421) or insurance (Tr. 187, 380) or for employment purposes (Tr. 187).

44. The use by the recipients of the Alert Lists in the circumstances described above indicates that they were not used solely for purposes authorized by Section 604 of the FCRA.

45. The writing of bad checks, in the opinion of some merchants, reveals the writer's bad character (Tr. 375-76, 395, 402, 410). To some extent then, it can be said that the Alert Lists, although not



disseminated for that purpose, do relate to a consumer's character, general reputation or personal characteristics.

### III. CONCLUSIONS OF LAW

#### JURISDICTION

The Commission's jurisdiction over respondents' business activities depends on whether Howard Enterprises is a "consumer reporting agency" as defined in Section 603 (f) of the FCRA:

The term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

[16] "Consumer reports" are defined in Section 603(d) of the FCRA:

The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) other purposes authorized under section 604. . . .

According to complaint counsel, respondents' bad check lists are a series of "consumer reports" and respondents' dissemination of those lists makes Howard Enterprises a "consumer reporting agency." Although complaint counsel can muster in support of their position a court of appeals decision, several consent agreements and informal advisory opinions by the Commission's staff, I do not share complaint counsel's view, for the decision of the Ninth Circuit, the consent agreements and the advisory opinions are based on a literal reading of the FCRA which I cannot accept. In addition, they ignore congressional history which tends to support respondents' claim that the Commission has no jurisdiction over their activities.

The key question in this case is whether respondents provide "consumer reports" to their customers. If I were to follow the Ninth Circuit's decision in *Greenway v. Information Dynamics, Ltd.*, 524 F.2d 1145 (9th Cir. 1975), the answer would have to be yes, for there the court of appeals affirmed a district court decision which held that a bad check reporting service almost identical to respondents' was a consumer reporting agency (399 F.Supp. 1092 (D. Ariz. 1974)).

Section 603(d)(1) and (2) of the FCRA defines consumer reports in terms of the main purposes for which they are disseminated: [17]

... for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family or household purposes, or (2) employment purposes. . . .

The lower court, believing that bad check lists were not used to establish a consumer's eligibility for credit, insurance or employment, turned to another Section (603(d) (3)) to justify FCRA jurisdiction over Information Dynamics, Ltd., holding that bad check lists had a bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living and were used for "other purposes authorized under Section 1681(b)(3)(E)" (Section 604(3)(E)). Section 604(3)(E) authorizes disclosure of consumer information to a person whom the disseminator has reason to believe:

otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

The court of appeals adopted the lower court's decision but apparently to bolster its conclusion, held, in defiance of accepted understanding,<sup>2</sup> that "a check itself is, essentially, an instrument of credit." 524 F.2d at 1146. In a rather convincing dissent, Judge Wright argued that Section 604(3)(E) should not be used to establish jurisdiction over a business which provides information unrelated to credit, insurance or employment.

Judge Wright recognized that which the court of appeals and complaint counsel ignore: The main thrust of Section 604 is to limit the permissible purposes for which a consumer reporting agency may furnish a consumer report rather than to confer jurisdiction over businesses whose activities have little to do with those which Congress decided to regulate.

The evidence developed in this case reveals that while information that a person has passed a bad check bears to [18] some extent on his character or general reputation, the information was not used or collected for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance or for employment purposes (Section 603(d)(1)-(2)). The only section of the FCRA which might arguably confer jurisdiction over respondents is Section 603(d)(3), and it is this, with its incorporation of Section 604(3)(E),

<sup>2</sup> See § 3-104, *Uniform Commercial Code; Greenway, supra*, at 1146 (Dissenting opinion of Judge Wright).

upon which complaint counsel rely, just as did the court in *Greenway*.

I concede that businesses which subscribe to respondents' service have a legitimate need for the information provided and if I were to limit my inquiry to the literal wording of Section 604(3)(E), I would have to conclude that Howard Enterprises is providing consumer reports. But any business which seeks information of whatever kind has a "legitimate need" for it. Read in the way complaint counsel would have it, Section 604(3)(E) would expand the definition of consumer report to an unlimited extent. Indeed, the definitions in Section 603(d)(1) and (2) would become superfluous.

I agree with complaint counsel that Congress did intend to expand the definition of consumer report beyond that spelled out in Section 603(d)(1) and (2). See *Judicial Construction Of The Fair Credit Reporting Act: Scope And Civil Liability*, 76 Colum. L. Rev. 458, 471 and n. 84 (hereafter "Judicial Construction"). However, I believe that Congress intended the courts and the Commission to apply the language of Section 604(3)(E) with some discretion, utilizing it only where the expansion of jurisdiction is compatible with the FCRA.<sup>3</sup>

[19] Complaint counsel argue, instead, for a literal reading of Section 604(3)(E). I cannot accept this approach. Going beyond the literal language of the statute, and turning to the congressional history of the FCRA, I find that it supports respondents' claim that the Commission does not have jurisdiction over their activities. A conference report (116 Cong. Rec. 35847-35851 (October 8, 1970)) issued after the FCRA bill was added by the Senate to H.R. 15073, 116 Cong. Rec. 32639 (1970), stated:

Your conferees also intend that the definition of "consumer credit report" not include protective bulletins issued by local hotel and motel associations, and circulated only to their members, dealing solely with transactions between members of the associations and persons named in the report. 116 Cong. Rec. at 35850.

Complaint counsel discount this statement, claiming first that bad check lists such as those circulated by respondents are not "protective bulletins." Second, they argue that discussions of the conference report by Senators Proxmire and Bennett and Representative Widnall so confuse the issue that one cannot tell with any assurance what congressional intent is. It is true that Senator Proxmire "clarified" the quoted statement in the conference report by stating

<sup>3</sup> See "Judicial Construction" at 471.

Even where there is no direct conflict [between Sections 603(d)(1)-(2) and 604(3)(E)], it must be remembered that Section [604's] primary function is to delineate the purposes for which consumer reports may be furnished. When utilized as a definitional provision in conjunction with Section [603(d)], a less than literal reading of its terms may be required to effectuate the legislative intent with respect to coverage of the Act.

that “[t]o the extent that a local hotel or motel association compiles credit or other information . . . it is making consumer reports as defined under Section 603(d) . . . .” (116 Cong. Rec. 35941 (Oct. 9, 1970)). However, Senator Bennett said: “To restrict an association from providing information to its own members or individuals who have not paid their motel or hotel bill or who have paid such bills with a check which is dishonored seems to be absurd.” 116 Cong. Rec. 35942 (Oct. 9, 1970). During debate on the conference report, Representative Widnall summed up the views of the two senators and concluded with some frustration:

How does anyone interpret congressional intent with this kind of a record? I do not believe there are many of us here in the House who would deliberately vote to restrict the dissemination of the names of known criminals yet as a result of bypassing our prescribed legislative procedures we are not certain what we are voting for in title VI of this bill. 116 Cong. Rec. 36574 (Oct. 13, 1970).

[20] Although “protective bulletins” which identify known criminals or individuals who are being sought by law enforcement agencies can be viewed as “consumer reports” under a literal reading of Section 604(3)(E), the Commission has recognized, in an interpretation under the FCRA, the intent of Congress to exclude at least some protective bulletins from the definition of “consumer report.” See 16 CFR 600.2. Despite the obvious harm to those who might be listed incorrectly as criminals or fugitives, the Commission held in this interpretation that protective bulletins of the kind described above were not “consumer reports” because the information was not collected for consumer reporting purposes and because it cannot reasonably be anticipated that it will be used in connection with a legitimate business transaction with the persons reported upon.

Complaint counsel argue that in contrast to protective bulletins, bad check lists are provided for a legitimate business need<sup>4</sup> and that, for that reason, these lists are subject to FCRA requirements. The answer to this argument is that the conference report discussed and intended to exclude from FCRA coverage, the dissemination of

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<sup>4</sup> Complaint counsel are somewhat inconsistent in their use of the “legitimate business need” language of Section 604(3)(E) for they claim that the Commission has jurisdiction over bad check list services because the recipients have a legitimate business need for them, yet also argue that respondents have violated Section 604 because the recipient could *not* have a legitimate business need for all of the names on the lists (CPF Brief, pp. 14-15). I agree with complaint counsel that this is not a fatal inconsistency, but it does suggest that something more than a literal reading of Section 604(3)(E) is needed in this case.

protective bulletins (listing those who skipped without paying their bills or who passed bad checks)<sup>5</sup> which [21] obviously were designed to be used in connection with legitimate business transactions between hotels and their customers. The protective bulletins referred to in the conference report were not limited to lists of names of known criminals, and I do not accept complaint counsel's arguments that Representative Widnall's reference to "known criminals" during debate calls for limiting the language of the conference report to protective bulletins listing only "known criminals."<sup>6</sup>

In conclusion, I find that Congress intended to exclude from FCRA jurisdiction the dissemination of information about persons who pay for their hotel bills with bad checks even though such dissemination is (a) for "other purposes authorized under section 604" (Section 603(d)(3)) and (b) even though the recipient "has a legitimate business need for the information in connection with a business transaction involving the consumer." (Section 604(3)(E)). I see no reason why respondents' business, which disseminates the same kind of information, should be treated differently.

Furthermore, the history of the FCRA reveals that what prompted congressional action was not the unregulated dissemination of information about passers of bad checks. Complaint counsel recognize this:

There is no dispute that the bulk of the testimony before Congress when it formulated the FCRA concerned abuses by giant credit bureaus maintaining files on millions of consumers. Nor can it be disputed that most of the abuses testified to concerned consumers' credit, employment and insurance transactions (CPF Brief, p. 7).

A description of the typical credit or insurance report reveals how far removed it is from the very simple information provided by respondents: [22]

The credit report typically contains information on the consumer's present and past employers, income, current indebtedness, and general financial history, including such items as past performance on credit accounts and loans, bankruptcies, suits or judgments against the subject, and tax or other liens against his property. This information is gathered from the subject's credit application, investigation of the credit sources listed, and the public record. Underwriters of insurance, as well as employers and landlords, frequently demand an even more thorough investigation of

<sup>5</sup> Representative Widnall stated:

This language was included because evidence submitted to members of the Consumer Affairs Subcommittee disclosed that hotels and motels are plagued by people who skip without paying bills—or pay with checks that bounce. 116 Cong. Rec. 36574 (Oct. 13, 1970).

<sup>6</sup> I take it that Representative Widnall's reference to "known criminals" was a deliberate exaggeration designed to bolster his arguments that services providing lists of persons who passed bad checks need not be subject to the requirements of the FCRA because those who pass bad checks are, in his words, "obviously dishonest." 116 Cong. Rec. 36574 (Oct. 13, 1970).

the subject. To meet these needs, a second type of consumer reporting agency has developed and, like their sister credit bureaus, these preparers of "investigative consumer reports" are thriving. Investigative reports are more concerned with the subject's character, reputation and mode of living, and may contain information on any aspect of one's personal life, ranging from housekeeping proficiency and yard care, to associates' reputation, to drinking and sexual habits. Judicial Construction at 459-60.

Of course, one must give some meaning to the "other purposes" language in Section 603(d)(3). But as I read that section, it confers jurisdiction over activities which although not explicitly referred to in Section 603(d)(1)-(2), have some connection with the underlying purpose of the FCRA. I do not believe that the dissemination of bad check lists meets this requirement. This fact, coupled with the conference report's reference to exclusion of bad check list services from coverage under the FCRA leads to the conclusion that the Commission does not have jurisdiction over respondents' activities.

#### ORDER

Therefore,

*It is ordered*, That the complaint be, and it hereby is, dismissed.

#### OPINION OF THE COMMISSION

BY PERTSCHUK, *Commissioner*:

#### I. BACKGROUND

On February 7, 1977, the Commission issued a complaint charging that respondents, Howard Enterprises, Inc. and Ralph R. Howard, violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681, *et seq.* and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in connection with the distribution of lists of the names of individuals who have allegedly passed bad checks ("Alert Lists"). The central question presented by this proceeding is whether the Alert Lists constitute "consumer reports" under the terms of the FCRA.

Hearings were held on October 3 and 4, 1977, in Seattle, Washington before the administrative law judge (the "ALJ"). The ALJ issued his initial decision on January 26, 1978, in which he concluded that the Alert Lists are not "consumer reports," under the FCRA, and that, therefore, the Commission does not have jurisdiction over respondents' activities. Accordingly, the ALJ issued an order dismissing the complaint. Counsel supporting the complaint filed a notice of appeal of the ALJ's initial decision on February 14, 1978. Based on the mutual consent of the parties, oral argument was omitted by our order of April 7, 1978. [2]

We have reviewed the record and examined the provisions of the FCRA, its legislative history, as well as other law pertaining to the issues raised in this proceeding. Except as indicated below, we concur in and adopt the findings of fact set forth in the ALJ's initial decision. However, for the reasons discussed below, we have concluded that the Alert Lists are "consumer reports" as defined in the FCRA and that the Commission does have jurisdiction over the Respondents' activities.<sup>1</sup>

## II. SUMMARY OF RESPONDENTS' PRACTICES

Respondents Howard Enterprises, Inc. and Ralph R. Howard, its founder, president, and majority stockholder, are engaged in the Alert List business. The corporation sells Alert List franchises in a five state area in the Pacific Northwest. (IDJ at 3, 5.) Individual respondent Howard personally operated an Alert List system in parts of Idaho and Oregon from December, 1974 until June 1977. (IDJ at 3-4.)

As the ALJ found, Alert Lists are lists of names of individuals whose checks have been dishonored by the drawee bank when presented for payment. (IDJ at 4.) The lists, which were compiled and distributed weekly by Mr. Howard, bore the designation "Alert List" at the top, a date at the left and a geographic area at the right. There were between 30 and 500 names on each list, organized alphabetically by last name. Initially the lists only identified the consumer by name; however, after the summer of 1975, a bank account or social security number was added beneath each name. (IDJ at 16.)

The ALJ also found that Alert List subscribers were generally retail businesses such as grocery stores, department stores and restaurants.<sup>2</sup> These businesses accepted checks in payment for merchandise, in exchange for cash or as partial payment on open accounts. (IDJ at 13.) [3]

Mr. Howard testified that his purpose in compiling Alert Lists was to assist subscribers in deciding whether to accept checks from their customers. (IDJ at 18.) The ALJ agreed, and found no evidence that the lists were *designed* for any broader purpose. (IDJ at 18, 42-45). However, the fact that an individual wrote a bad check could certainly be seen as bearing on credit worthiness, and some evidence in the record indicates that Alert Lists could have been used in

<sup>1</sup> The following abbreviations are used in this opinion: IDJ - Initial Decision of Administrative Law Judge (cited by paragraph except where otherwise indicated); TR - Transcript of Testimony; CX - Commission's Exhibit; CCB - Complaint Counsel's Appeal Brief; RAB - Respondents' Answering Brief; CRB - Complaint Counsel's Reply Brief; Adm - Respondents' Answers to Complaint Counsel's Request for Admissions.

<sup>2</sup> Other recipients included a collection agency and law enforcement agencies. IDJ at 21.

establishing a consumer's eligibility for credit. (*See, e.g.*, Tr. 376-77; Tr. 53; Tr. 314-15.)

According to the ALJ, the information on the Alert Lists was derived from "report" cards which participating merchants sent to Mr. Howard periodically, listing names of consumers whose checks had not been honored. These cards were the only information about the check writers received by Mr. Howard. (IDJ at 11-12.) He did not require that the dishonored check be sent to him, nor did he obtain any other independent verification that the individuals whose names he placed on the list had in fact written dishonored checks. (IDJ at 27.)

The ALJ also found that Mr. Howard had no regular policy of deleting names from Alert Lists after 90 days, and that some names remained on the lists for as long as eleven months. (IDJ at 28.) The only mechanisms for correcting the lists were for subscribers to mail a postcard to Mr. Howard requesting deletion of a name, or to indicate on quarterly computer printouts, termed audit lists, that a name should be deleted. (IDJ at 29.) In other words, an individual's name appeared on successive Alert Lists until a subscriber notified Mr. Howard otherwise in writing. (IDJ at 28.) With only one exception, these procedures were also used by Alert List franchisees. (IDJ at 38.)<sup>3</sup>

Although the accuracy of Alert Lists depended upon corrections submitted by subscribers, this part of the system was not policed. Mr. Howard and other franchisees made the audit lists and delete cards available, but the ALJ found that they did not require that cards or lists be returned on a timely basis. (IDJ at 30-31.) Nor was any attempt made to monitor which audit lists were returned, despite the fact that instances occurred in which subscribers neglected to request that names erroneously appearing on the Alert List be deleted. (IDJ at 31.) [4]

The record also indicates that respondents did not attempt to regulate the manner in which subscribers handled Alert Lists. For example, subscribers were not required to agree to keep the lists confidential. As a result, the lists were posted by some subscribers in places where they were visible to the public (Tr. at 123, 255, 309, 400, 408 and 415).<sup>4</sup>

<sup>3</sup> The ALJ noted that one franchisee does remove names after 90 days. (IDJ at 38.)

<sup>4</sup> One consumer complained to Howard that "you are advertising me as a criminal or thief where all the public can see my name." (CX 62.) This letter was used by Mr. Howard as promotional material. (Adm 69(a); Tr. 350.)



### III. ARE ALERT LISTS "CONSUMER REPORTS" AS DEFINED IN THE FCRA?

In his initial decision, the ALJ ruled that Alert Lists are not "consumer reports" as defined in the FCRA. The ALJ recognized that the information on Alert Lists bears on a consumer's character or reputation, that businesses which subscribe to Alert Lists have a legitimate business need for the information, and that a literal reading of the statute compels the conclusion that Alert Lists are consumer reports. (IDJ at p. 18.) Nonetheless, he rejected a literal reading of the statute, stating that the "Congress intended the courts and the Commission to apply the language of Section 604(3)(E) with some discretion, utilizing it only where the expansion of jurisdiction is compatible with the [purpose of] the FCRA." (IDJ at p. 18.) The ALJ also concluded that Alert Lists are essentially the same as "protective bulletins" and that an exemption from the statute for protective bulletins is recognized in the legislative history of the FCRA. (IDJ at p. 21.)

On this, the key issue, we reverse the ALJ's holding. The express terms of the FCRA establish that Alert Lists fall within the definition of "consumer reports." Moreover, any other interpretation, in our opinion, would contravene the purposes of the FCRA and would be inconsistent with its legislative history.

#### A. THE EXPRESS TERMS OF THE FCRA

In determining whether respondents' activities fall within the scope of the FCRA, it is necessary to construe certain definitional terms of the Act. Section 603(f) defines a "consumer reporting agency" to be any person or institution which "regularly engages in whole or in part in the practice of assembling or evaluating consumer-credit information or other information on consumers for the purpose of furnishing consumer reports to third parties . . . ." 5 U.S.C. 1681a(f).

The definition of a "consumer report" appears in Section 603(d) which provides, in part: [5]

the term "consumer report" means any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family or household purposes, or (2) employment purposes, or (3) other purposes authorized by Section 604. . . . (Emphasis added.)

As the emphasized language indicates, the definition of "consumer report" specifically incorporates by reference Section 604. Thus, Section 604 serves two functions, the primary one being to establish the permissible uses of consumer reports, and, the second, to add content to the Section 603(d) definition of a consumer report.

Under one permissible purpose, Section 604(3) authorizes disclosure of consumer reports to a person whom the disseminator has reason to believe:

(E) Otherwise has a legitimate business need for the information in connection with a business transaction involving the consumer.

When Sections 603(d) and 604(3)(E) are read together, as they must be for definitional purposes, the resulting standard can be stated in clear, if lengthy, terms: when a person or institution disseminates information bearing on any of the seven criteria relating to a consumer, listed in Section 603(d), to a third party, and the person or institution knows or expects such information will [6] be used in connection with a business transaction involving the consumer,<sup>5</sup> then that information is a "consumer report."<sup>6</sup>

The information on respondent's Alert Lists satisfies the elements of this definition.<sup>7</sup> First, the information disseminated in the Alert Lists necessarily bears on at least one, if not all, of the seven consumer characteristics in the definition of a consumer report.<sup>8</sup> Indeed, the ALJ specifically found that Alert Lists bear upon a consumer's character, general reputation and [7] personal characteristics. (IDJ at 45.)<sup>9</sup> Second, Alert Lists are used or expected to be

<sup>5</sup> In the context of its definitional function, we interpret Section 604(3)(E) as including only business transactions between report users and consumers acting as consumers. This narrow interpretation is consistent with the clear Congressional intent that business reports not be classified, *per se*, as consumer reports. S. Rep. No. 517, 91st Cong., 1st Sess. 1 (1969). In light of this interpretation of Section 604(3)(E), we do not share the ALJ's concern that the incorporation of Section 604(3)(E) "expand[s] the definition of consumer report to an unlimited extent." (IDJ at p. 18).

<sup>6</sup> This is the test adopted by the District Court and affirmed by the Court of Appeals in *Greenway v. Information Dynamics, Ltd.*, 399 F. Supp 1099 (D. Ariz. 1974), *aff'd* 524 F.2d 1145 (9th Cir. 1975).

<sup>7</sup> Respondents urge us to reject this interpretation of the statute, arguing that the use of the word "eligibility" in Section 603(d) demonstrates that only those purposes listed in Section 604 for which a person could be "eligible" are included in the definition of consumer report, and further that a person could not be eligible to cash a check. (RAB at 4, 5, 7.) It appears, however, that the number "(1)" is misplaced in the codified statute, since one cannot be eligible for "employment purposes" or for "other purposes." The statutory syntax is only consistent and meaningful if the "(1)" is read in between "for" and "the purpose of," thus making the first category

". . . for (1) the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance. . . ."

<sup>8</sup> The characteristics are credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, and mode of living.

<sup>9</sup> Section 603(d) provides that the term " 'consumer report' means any written, oral or other communication \*\*\* which is used or expected to be used \*\*\*." (Emphasis added.) As the court held in *Belshaw v. Credit Bureau of Prescott*, 392 F. Supp. 1356, 1359-60 (D. Ariz. 1975):

" . . . 'consumer report' must be interpreted to mean any report . . . of information that could be used for one of the purposes enumerated in [Section 603(d)]. . . ." (Emphasis in the original.)

(Continued)

used in connection with business transactions involving consumers.<sup>10</sup> Again, the ALJ specifically found that the acceptance of a check is part of a business transaction between the merchant and the check writer and that the Alert List information has been used by merchants to avoid taking checks which are likely to be dishonored. (IDJ at 19.)

Judicial decisions support our conclusion that the FCRA applies in this case. For example, the facts in *Greenway v. Information Dynamics Ltd.*, 399 F. Supp. 1092 (D. Ariz. 1974) *aff'd* 524 F.2d 1145 (9th Cir. 1975), are virtually identical to the facts in this case. In *Greenway*, the defendant distributed to subscribing merchants the following information concerning consumers who allegedly passed bad checks: their names, drivers' license numbers, checking account numbers, number of checks returned, and, in some cases, the reasons for the return of the checks. There, the Court of Appeals for the Ninth Circuit concluded that such information constitutes a "consumer report," as defined in the FCRA. See also *Belshaw v. Credit Bureau of [8] Prescott*, 392 F. Supp. 1356 (D. Ariz. 1975); *Beresh v. Retail Credit Co.*, 358 F. Supp. 260 (C.D. Cal. 1973).<sup>11</sup>

#### B. THE PURPOSES AND LEGISLATIVE HISTORY OF THE FCRA

The FCRA serves important public interests by ensuring that consumer reports are prepared and disseminated in a manner that is fair and equitable to consumers. More specifically, the FCRA is intended, *inter alia*, to ensure the accuracy of consumer reports and to protect the individual consumer's right to privacy. Under Section 602(b), the purpose of the FCRA is:

to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce, for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy and proper utilization of such information

The privacy purpose of the Act is specifically articulated in Section 602(a):

The type of information on Alert Lists and other evidence suggests that Alert Lists could be used as a factor in establishing a consumer's eligibility for credit, thus providing an additional basis for the determination that Alert Lists constitute consumer reports. See p. 3, *supra*.

<sup>10</sup> Alternatively, the second element of the definition can be satisfied by establishing that the Alert Lists are used or expected to be used for any one of the other purposes enumerated in Sections 603(d) and 604.

<sup>11</sup> District court decisions cited in the dissenting opinion in *Greenway v. Information Dynamics, Ltd.*, *supra*, at 1147-48, are distinguishable from this case in that they pertain to credit reports in connection with a business entity in which the consumer was a principal, not one involving the consumer in his personal and individual capacity. See, e.g., *Wrigley v. Dun & Bradstreet*, 375 F. Supp. 969 (N.D. Ga. 1974), *aff'd* 500 F.2d 1183 (5th Cir. 1974); *Sizemore v. Bambi Leasing Corp.*, 360 F. Supp. 252 (N.D. Ga. 1973); *Fernandez v. Retail Credit Co.*, 349 F. Supp. 652 (E.D. La. 1972).

There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer's right to privacy.

As the evidence in the record indicates, the manner in which Alert List systems are operated has resulted in a significant invasion of the privacy of individual consumers. For example, operators of the Alert List systems do not require subscribers to agree that the lists will not be publicly displayed (Tr. 110, 299, 255, 351; CX 87, 92a-b), and some subscribers post the lists where they are visible to the public (Tr. 123, 255, 309, 400, 408, 415). *See also*, p. 4, *supra*. Additionally, the ALJ's findings of fact establish that the procedures followed by respondents were totally inadequate to ensure the accuracy of the Alert Lists and the fair and equitable treatment of consumers. (*See* IDJ at 27-32 and 38-41.) [9]

The ALJ also concluded that Alert Lists are indistinguishable from "protective bulletins" (IDJ at p. 21) and, accordingly, are exempted from the provisions of the FCRA. "Protective bulletins" are lists of the names (and sometimes photographs) of consumers who have issued worthless checks or who may have criminal records or arrest warrants outstanding. Such lists are circulated by the members of local hotel and motel associations or other such organizations.

As indicated by the discussion in the initial decision and complaint counsel's brief, the legislative history on the protective bulletin issue is far from clear. If anything emerges from that history, it is that Congress intended whatever exemption may have been created to apply only to a narrow category of bulletins. For example, the House managers of the FCRA stated that

Your conferees also intend that the definition of "consumer report" not include protective bulletins issued by local hotel and motel associations, and circulated *only* to their members, dealing *solely* with transactions between members of the associations and persons named in the report. (Emphasis added.) H.R. No. 1587, 91st Cong., 2d Sess. 28 (1970), reprinted in [1970] U.S. Code Cong. & Ad. News, 4411, 4414.<sup>12</sup>

A previous interpretation of the protective bulletin exemption by the Commission is consistent with this limited view. In 16 C.F.R. 600.2(b), the Commission stated that the FCRA does not apply to certain communications, described as:

a series of descriptions, usually accompanied by photographs, of individuals who are being sought by law enforcement authorities for alleged violations of criminal laws.

<sup>12</sup> However, the existence of even such a limited exemption is called into question by subsequent statements of Senator Proxmire who was the Act's author and leader of the Senate conferees. *See* 116 Cong. Rec. 35941 (Oct. 9, 1970).

However, the interpretation adds that the exemption is destroyed if such bulletins contain information used for any of the purposes described in Section 603(d).

With the purposes and history of the FCRA in mind,<sup>13</sup> we do not find it difficult to distinguish Alert Lists from protective bulletins. On its face an Alert List contains [10] more detailed personal information about individuals than a protective bulletin does, including such items as social security numbers, bank account numbers, and indications of how long the name has been on the list and how many bad checks reported. (IDJ at 16-17) Additionally, the consumers whose names appear on Alert Lists are not, at least for the most part, "forgers, swindlers or other criminals" for whom arrest warrants are outstanding. See 16 C.F.R. 600.2(c). More significantly, Alert Lists are not the result of cooperative activities by local hotel and motel or other trade associations, incidental to the primary commercial purpose of their members, about which some members of Congress expressed concern. Rather, they are the product of a professional reporting company whose express and exclusive functions are to compile consumer credit information and to disseminate it to a broad range of subscribers. We therefore conclude that the information on respondents' Alert Lists constitutes "consumer reports" within the meaning of Section 603(d), and is subject to the statutory restrictions.

#### IV. VIOLATIONS OF THE FCRA AND FTC ACT

Under Section 603(f) of the FCRA, a "consumer reporting agency" is any person which (1) regularly assembles the specified types of information on consumers for the purpose of distributing it to third parties, (2) for a fee, (3) by means of interstate commerce. The ALJ's findings of fact establish that respondent Howard meets these three requirements. Mr. Howard regularly assembled the information on the Alert Lists for the purpose of distributing it to third parties (IDJ at 3, 4, 11, 13, 14). He engaged in these activities for a fee to each subscriber of \$15.00 per month (later raised to \$17.50) (IDJ at 15) and utilized means and facilities of interstate commerce in connection therewith. (IDJ at 5, 11, 13, 14.) Therefore, respondent, Ralph R. Howard, was acting as a "consumer reporting agency" as that term is defined in the statute.

As a consumer reporting agency under the FCRA, respondent is subject to the statutory limitations on the manner in which

<sup>13</sup> Representative Widnall, a House conferee, stated that questions about the protective bulletin "exemption" should be resolved "in light of [the FCRA's] real objectives as set forth in the statement of findings and purpose in Section 602." 116 Cong. Rec. 36574 (Oct. 13, 1970).

information is compiled, maintained and disseminated. The statute requires that consumer reports be furnished to third parties only for the permissible purposes listed in Section 604. It also establishes certain "compliance procedures" in Section 607 which obligate reporting agencies to, among other things, obtain certification from recipients that the information will only be used for permissible purposes and to assure "maximum possible accuracy" when preparing consumer reports. Additionally, only limited information may be provided to governmental agencies unless Sections 604 and 607 are complied with. We now proceed to discuss whether respondents' practices violate these standards of conduct as charged in the complaint. [11]

A. DISSEMINATION OF CONSUMER REPORTS WITHOUT BUSINESS  
NEED

Alert List subscribers have a legitimate business need for information about a particular individual only in the context of a consumer transaction with that individual, such as when the individual offers a check in payment for a purchase. As noted, however, each Alert List contains the names of from 30 to 500 individuals who have reportedly passed bad checks. Therefore, as the ALJ found, subscribers did not have a legitimate business need for information regarding all of the individuals on the list. (IDJ at 20.) Testimony from Mr. Howard and his subscribers indicates that, in practice, some subscribers may have dealt with 5 percent or fewer of the individuals listed and that none had dealings with all of those individuals, the highest estimate being 85 percent. *Id.*

By providing subscribers with consumer credit information for which they had no legitimate business need, respondent Howard violated Section 604 of the FCRA. The Commission has previously indicated that the permissible purpose for furnishing the consumer report must exist at the time the report is distributed; it is not sufficient that the consumer report be distributed in anticipation that a permissible purpose will subsequently arise. 16 C.F.R. 600.1(c).

We note, as complaint counsel correctly point out in their brief, that these violations would not have occurred if respondent Howard had encoded the Alert Lists. (CCB at 21.) Coding is the use of a unique identifier, other than a name, through which the subscriber may identify the consumer and decode the information in connection with a business transaction. Thus, the decoded information will become available to the subscriber only at that point when a "legitimate business need for the information in connection with a

business transaction involving the consumer" arises, as required by Section 604.<sup>14</sup>

#### B. DISSEMINATION TO LAW ENFORCEMENT AGENCIES

Law enforcement agencies, like other users, are entitled to receive consumer reports for the permissible purposes set forth in Section 604 of the FCRA. In addition, Section 608 provides another permissible purpose: [12]

Notwithstanding the provisions of Section 604, a consumer reporting agency may furnish identifying information respecting any consumer, limited to his name, address, former address, places of employment, or former places of employment, to a governmental agency.

The Alert Lists disseminated to law enforcement agencies contain more information than is allowed under Section 608 in that they report the consumer's alleged issuance of a bad check, the consumer's bank account or social security number, the number of bad checks written and whether the check was reported during the preceding week. In addition, the ALJ's findings of fact also indicate that the law enforcement agencies which received the Alert Lists did not have a permissible purpose for the Lists as required by Section 604. Specifically, the Alert Lists were disseminated to the law enforcement agencies by Mr. Howard even though he was not instructed to do so by a court or the consumers whose names appeared on the lists, and these agencies did not use them in connection with the granting of credit, the underwriting of insurance, employment purposes, the provision of government licenses or benefits, or in connection with a business transaction with consumers whose names appeared on the lists. (IDJ at 22, 23.) Therefore, the Alert Lists were not released for any of the permissible purposes listed in either Section 604 or Section 608.

#### C. FAILURE TO OBTAIN CERTIFICATION AND VERIFICATION

The ALJ found that Mr. Howard did not obtain from subscribers or law enforcement agencies any certification that the lists would be used only for the permissible purposes stated in the FCRA, nor did he verify that the lists were only being used for such purposes. (IDJ at 24.) In addition, Mr. Howard and his representatives did not at any time ask subscribers what they intended to do with the lists or

<sup>14</sup> In this regard the Commission has previously stated:

[This interpretation] does not preclude the furnishing of information by a consumer reporting agency which is coded so that the consumer's identity will not be disclosed . . . . For example, unique identifiers such as social security number, driver's license number, or bank account number will provide adequate coding. 16 C.F.R. 600.1(e).

discuss with them any restrictions on the use of the lists. (IDJ at 25.) Finally, Mr. Howard did not require that subscribers state in writing what uses would be made of the lists or agree to restrict their uses of the Alert Lists. (IDJ at 26.) Through such omissions, respondent Ralph Howard violated Section 607 of the FCRA.

#### D. FAILURE TO ASSURE ACCURACY OF CONSUMER REPORTS

Section 607(b) of the FCRA requires consumer reporting agencies to utilize reasonable procedures to assure the maximum possible accuracy of the information contained in consumer reports. The ALJ found that, prior to placing a consumer's name on the Alert List, Mr. Howard had no way of knowing whether all the names submitted by subscribers were individuals whose checks had in fact been dishonored. (IDJ at 27.) More significantly, an individual's name appeared on successive lists until a subscriber notified Mr. Howard that the name should be deleted. (IDJ at 28.) [13]

As noted above, there were two mechanisms employed by Mr. Howard to delete names from the lists: delete cards and audit lists. See p. 3, *supra*. Both systems were inadequate inasmuch as Mr. Howard did not require the subscribers to agree in writing to send in delete cards and did not impose penalties on subscribers for failing to submit delete cards or audit lists on a timely basis. (IDJ at 30-31.) Mr. Howard had no system for determining whether each subscriber submitted the delete cards and audit sheets. *Id.* Indeed, the only mechanism for uncovering errors in the system consisted of contacts from consumers complaining that their names had erroneously appeared on the Alert Lists. (IDJ at 31.)

In sum, the record in this proceeding establishes that Mr. Howard employed only token procedures to detect errors in reporting information on the Alert Lists. Such procedures are insufficient to meet the requirements of Section 607(b) that reasonable procedures be followed to assure maximum possible accuracy of the information contained in consumer reports.

#### E. SALE OF FRANCHISES

In his initial decision, the ALJ found that respondent Howard Enterprises is engaged in the business of selling Alert List franchises. (IDJ at 4-5.)<sup>15</sup> He also found that the manner in which the

<sup>15</sup> The ALJ's findings of fact also establish that the sale and operation by respondents of Alert List franchises are in or affecting interstate commerce. (IDJ at 6-10.) See, e.g., *NLRB v. Reliance Fuel Oil Corp.*, 371 U.S. 224 (1963); *Local 167 of the International Brotherhood of Teamsters v. United States*, 291 U.S. 293, 297 (1934); *FTC v. Pacific States Paper Trade Association*, 273 U.S. 52 (1927); *Seligson v. Plum Tree, Inc.*, 361 F. Supp. 748, 751 (E.D. Pa. 1973.)



franchisees operate their Alert List systems was virtually identical to the way Mr. Howard operated his system. (IDJ at 12.) This finding is supported by the substantial influence which Mr. Howard and Howard Enterprises maintained over the business operations of their franchisees. The evidence indicates that, while establishing their systems, franchisees were trained and assisted by Mr. Howard. (See Tr. 223, 227, 318.) The computer program which franchisees used in operating their systems was supplied by Howard Enterprises (Tr. 22, 226-27, 229, 318) and could not be altered by franchisees unless Howard agreed. (Tr. 119, 317-18). Additionally, respondents supplied forms and promotional material to franchisees. (Adm. 69.)

Section 621(a) of the FCRA provides that a violation of any requirement or prohibition imposed under the FCRA constitutes an unfair or deceptive act or practice in violation of Section 5 of the FTC Act. It is a well-settled principle that one who places in the hands of another the means or instrumentality to engage in [14] an unfair or deceptive act or practice has thereby violated Section 5 of the FTC Act. See, e.g., *FTC v. Winstead Hosiery Co.*, 258 U.S. 483, 494 (1922). This principle was recently applied by the Commission in *National Housewares, Inc.*, 90 F.T.C. 512, 590 (1977) to hold respondents liable for unfair and deceptive treatment of consumers by independent distributors of respondents' products. As a factual basis for its holding, the Commission cited that respondents had provided distributors with a particular sales method, had advised and encouraged distributors to use practices which were deceptive, and had supplied materials to implement the method. *Id.*

This legal standard has been recognized in a variety of other, analogous, circumstances. See, e.g., *Benrus Watch Co. v. FTC*, 352 F.2d 313, 318 (8th Cir. 1965); *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963); *C. Howard Hunt Pen v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952).

The record in this proceeding demonstrates that, by selling Alert List franchises, respondents have provided the means for others to engage in unfair and deceptive practices. As we discussed above, Alert List systems, by their very nature, are violative of the FCRA. The lists disseminate far more consumer credit information than subscribers are entitled to, fail to provide for the required certification and verification, and are not operated in such a way as to assure maximum possible accuracy. In addition, the training and assistance provided to franchisees by respondents, which resulted in methods of operation almost identical to those of Mr. Howard found to be illegal above, support respondents' liability. By franchising a business

methodology which is inherently illegal under the FCRA, respondents have violated Section 5 of the FTC Act.

Because respondents are responsible for setting in motion the FCRA violations by franchisees, it is appropriate to reach the practices of all Alert List system operators through them. Our goal is to bring the entire network of Alert List systems into compliance with the statutory requirements of the FCRA. To that end, the order issued with this opinion requires not only that respondents themselves comply, but that they obtain compliance from their franchisees.<sup>16</sup> [15]

#### V. CONSTITUTIONALITY OF THE FCRA

Respondents assert that enforcement of the FCRA will unconstitutionally deprive them of their right under the First Amendment to free speech and press. (RAB at 11.) Although respondents purport to be challenging only the application of the FCRA to them, their arguments in effect challenge the constitutionality of the statute on its face. (RAB at 11-14.)

While administrative agencies are often called upon to determine whether particular applications of the laws they administer comport with the Constitution, there is considerable case law support for the view that an administrative agency does not have authority to determine the constitutionality of the statutes it enforces.<sup>17</sup> Such precedent is rooted in a recognition that administrative agencies are created to enforce the law and effect the legislative mandate.

Were an agency to conclude that a duly enacted statute was unconstitutional, it might thereby preclude any review of that issue by the courts, thus thwarting a constitutional scheme which contemplates passage of laws by Congress, enforcement of them by the executive, and ultimate determination of their constitutionality by the judiciary. *Verrazzano Trading Corp., et al.*, 91 F.T.C. 888, 952 (1978).

At the same time, however, the Commission has recognized that there may be persuasive reasons justifying consideration of constitutional issues by administrative agencies, arising out of both the obligation of each Commissioner to "support and defend the Constitution" and of the expertise of the agency in construing the statutes it enforces, as the result of which it may be in the best position to

<sup>16</sup> As a practical matter, because of the degree of control Respondents exercise over the way franchisees conduct business, this should not prove burdensome. Once respondents alter their Alert List format and procedures, it will be a simple matter for franchisees to follow suit. However, to ensure full compliance with the FCRA, the order also requires respondents to discontinue their business relationship with any franchisee who fails to comply. (Paragraph II.C.) We note that, if necessary, this may be accomplished through terms of the franchise agreement allowing breach if franchisees engage in any practice "detrimental to the public."

<sup>17</sup> See, e.g., *Weinberg v. Salfi*, 422 U.S. 749, 765 (1975); *Johnson v. Robinson*, 415 U.S. 361, 368 (1974); *Public Utilities Comm'n v. United States*, 355 U.S. 534, 539 (1958); *Engineers Public Service Co. v. SEC*, 138 F.2d 936, 952-53 (D.C. Cir. 1943), dismissed as moot, 332 U.S. 788.

make the first assessment of their constitutionality. These considerations have led us to suggest that, where the underlying constitutionality of a statute is challenged, the best approach is that

administrative agencies ought not blind themselves to constitutional considerations, but in taking them into account they should give extreme deference to the implicit view of Congress that such statutes are constitutional, so as to avoid thwarting the Congressional intent by precluding judicial review of a statute's constitutionality. *Verrazzano, supra*, 91 F.T.C. at 953.

[16] Here, as in *Verrazzano*, we are able to offer the perspective of our administrative experience as it relates to the constitutionality of the FCRA without precluding the opportunity for judicial review.

Respondents correctly point out that in recent cases the Supreme Court has recognized that commercial speech is not wholly beyond First Amendment protection. (RAB at 12, citing *Virginia State Board of Pharmacy v. Virginia Citizens' Consumer Council*, 425 U.S. 748 (1976); *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977); and *Bates v. Arizona State Bar*, 433 U.S. 350 (1977).) However, it is clear from those cases that the Court does not, as respondents would have us do, equate commercial and noncommercial, or "political," speech. Indeed, in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978), the Court expressly reaffirmed the "limited measure of protection" extended to commercial speech, explaining that

to require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech.

The Court in *Ohralik* also observed that commercial speech "occurs in an area traditionally subject to government regulation," and recognized that regulation of commercial speech is subject to a lower level of judicial scrutiny. *Id.* The approach taken by the courts in such situations has been one of balancing the First Amendment interests of the commercial speaker against countervailing justifications for the regulation. *See, e.g., Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Council, supra; Linmark Associates, Inc. v. Township of Willingboro, supra; and Bates v. Arizona State Bar, supra.* Respondents discuss this test, but conclude that "no balancing of interest can remove the protection . . ." (RAB at 14.)

While the FCRA does not in any sense remove the protected interest which Respondents have in disseminating Alert Lists, we believe that the FCRA will withstand their constitutional challenge. First, unlike the regulations at issue in *Virginia State Board*, *Linmark*, and *Bates*, the FCRA does not impose an absolute

prohibition on dissemination of commercial information; it merely requires that the sensitive information in consumer credit reports be handled responsibly. Thus, the FCRA requirements may be seen as reasonable "time, place and manner" restrictions on commercial speech which have been held to be constitutional. *See, e.g., Bates, supra*, at 384. Moreover, the restrictions the statute placed on [17] dissemination of consumer reports appear to be clearly justified by the interests Congress expressed in ensuring the accuracy of credit information and protecting individuals' constitutional right to privacy.<sup>18</sup>

## VI. CONCLUSION

To remedy the violations found, the Commission hereby enters the attached order.

### Synopsis of Determinations for Purposes of 15 U.S.C. 45(m)(1)(B)

#### Howard Enterprises, Inc., et al. Docket 9096

1. It is unlawful under the Fair Credit Reporting Act (15 U.S.C. 1681, *et seq.*), and therefore an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any consumer reporting agency<sup>1</sup> to disseminate consumer reports<sup>2</sup>

(a) to third parties which do not have a legitimate business need for the information in connection with a business transaction involving the consumer reported on;<sup>3</sup>

(b) to law enforcement agencies except to the extent authorized by Sections 604 and 608;

(c) without obtaining from prospective users written certification that the information will only be used for the permissible purposes stated in the FCRA, and then verifying that only such uses will be made of the information; and

<sup>18</sup> This analysis and conclusion are supported by a pre-*Virginia State Board* decision in which the Eighth Circuit ruled that certain provisions of the FCRA are constitutional based on a balancing of interests. *See Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 833 (8th Cir. 1976).

<sup>1</sup> Section 603(b) of the FCRA defines a "consumer reporting agency" as any person who, by means of interstate commerce, regularly assembles or evaluates specified consumer credit information and disseminates it to third parties for a fee.

<sup>2</sup> "Consumer reports" include the information on "bad check lists" sold to assist merchants in deciding whether or not to accept checks from their customers, as well as other communications defined in FCRA Section 603(d).

<sup>3</sup> This standard does not preclude the furnishing of such lists if they are encoded through the use of unique identifiers other than names, such as social security numbers or bank account numbers, so that a user can determine the identity of any consumer reported on only through use of additional information provided by the consumer at the time of the transaction.

(d) without following reasonable procedures to assure maximum possible accuracy of the information contained in consumer reports.

2. It is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to sell a franchise which provides the means for third parties to engage in unfair and deceptive acts or practices.

#### FINAL ORDER

This matter having been heard by the Commission upon the appeal of complaint counsel from the initial decision and upon briefs in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion having substantially granted the appeal; therefore

*It is ordered,* That pages 1 to 15 of the initial decision of the ALJ be, and they hereby are, adopted as Findings of Fact of the Commission, except to the extent inconsistent with the Commission's findings of fact and conclusions of law contained in the accompanying opinion.

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:

#### PART I

*It is ordered,* That respondent Ralph R. Howard, his agents, representatives, employees, successors, and assigns, directly or indirectly through any corporation, subsidiary, division or other device, in connection with the collecting, preparing, assembling and/or furnishing of consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act (Pub. Law 91-508, 15 U.S.C. 1681, *et seq.*), and interpreted in the accompanying Opinion of the Commission, shall cease and desist from: [2]

A. Furnishing any consumer report to any person, unless such report is furnished:

1. In response to the order of a court having jurisdiction to issue such order; or
2. In accordance with the written instructions of the consumer to whom the report relates; or

3. To a person which respondent has reason to believe intends to use the information:

a. In connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or review or collection of an account of, the consumer; or

b. For employment purposes; or

c. In connection with the underwriting of insurance involving the consumer; or

d. In connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or

e. In connection with a legitimate business need for the information in connection with a business transaction involving each consumer reported upon.

B. Furnishing "Alert Lists," or any other list, index, or compilation of consumer reports, unless encoded in such a way that a user can determine the identity of any consumer reported on only through the use of additional information and identification to be provided by the consumer at the time of the transaction with the user.

C. Failing to maintain reasonable procedures necessary to limit the furnishing of consumer reports to the purposes listed under Section 604 of the Fair Credit Reporting Act, as required by Section 607(a) of the Fair Credit Reporting Act, including, but not necessarily limited to, procedures: [3]

1. requiring prospective users of consumer reports to identify themselves,

2. requiring prospective users of consumer reports to certify the purposes for which the information in such reports is sought,

3. requiring prospective users of consumer reports to certify that the information in such reports will be used for no other purposes than those which have been certified,

4. verifying the identity of new prospective users of consumer reports prior to furnishing consumer reports to such users, and

5. verifying the uses certified by prospective users of consumer reports prior to furnishing consumer reports to said users.

D. Furnishing consumer reports to persons under circumstances in which there are reasonable grounds for believing that such

reports will not be used for purposes listed in Section 604 of the Fair Credit Reporting Act.

E. Failing to follow reasonable procedures to assure maximum possible accuracy of information concerning the individuals to whom consumer reports relate, as required by Section 607(b) of the Fair Credit Reporting Act, including but not necessarily limited to, procedures:

1. to ensure with reasonable certainty that information about consumers is accurate before placing it on "Alert Lists" or other such compilations;
2. to ensure that prospective users provide prompt notice as to information which is no longer accurate and therefore should be deleted from the "Alert List" or other compilation, and
3. requiring prospective users to agree in writing to comply with the procedures described in E.2, above.

F. Failing to include the following statement on a fact sheet to be included with any "Alert List" or other consumer reports published and distributed by respondent, with such conspicuousness and clarity as is likely to be read and understood by users of such consumer reports:

The following information is subject to the Fair Credit Reporting Act which regulates use of consumer reports. It must be used for the following permissible purposes and no other: [4]

- (1) In connection with a credit transaction involving the consumer on whom the information is to be furnished and involving the extension of credit to, or collection of an account of, the consumer; or
- (2) In connection with employment purposes; or
- (3) In connection with the underwriting of insurance involving the consumer; or
- (4) In connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility or status; or
- (5) In connection with a legitimate business need for the information in connection with a business transaction involving the consumer.

The Fair Credit Reporting Act, Public Law 91-508, Section 619, states "Any person who knowingly and willfully obtains information on a consumer from a consumer reporting agency under false pretenses shall be fined not more than \$5,000 or imprisoned not more than one year, or both."

## PART II

*It is further ordered,* That respondents, Howard Enterprises, Inc., its successors and assigns, and its officers, and Ralph R. Howard, individually and as an officer of Howard Enterprises, Inc., and

respondents' agents, representatives, employees, successors, and assigns, directly or indirectly through any corporation, subsidiary, division, or other device, in connection with the sale, or offering for sale, of franchises, licenses, or business opportunities provided by respondents to others, and in connection with respondents' continuing business relationships with such others, in or affecting commerce, as commerce is defined in the Federal Trade Commission Act, shall:

A. Cease and desist from selling or providing in any manner franchises, licenses, or business opportunities (hereinafter referred to in Section II of this order as "franchises") to others to engage in the collecting, preparation, assembling or furnishing of consumer reports, as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act and interpreted in the accompanying opinion of the Commission, unless respondents (1) obtain written agreements from the purchasers or recipients of franchises (hereinafter referred to in Section II of this order as "franchisees") in which the franchisees agree to conform their practices to the requirements of Section I of this order, (2) retain copies of such agreements during the period of any business relationship with the franchisees, and (3) make such agreements available for inspection and copying on request by Commission representatives.

B. (1) Obtain from each of the respondents' franchisees existing in such capacity on the day this order is served on respondents, the written agreements of the franchisees to conform their practices to the requirements of Section I of this order, (2) retain copies of such agreements during the period of any business relationship with the said franchisees, and (3) make such agreements available for inspection and copying on request by Commission representatives.

C. Discontinue any further business relationship with any franchisee described in paragraph II.B. above which has failed to comply with paragraph II.B. within sixty (60) days of the service of this order upon respondents.

D. Discontinue any further business relationship with any current or future franchisee which fails to comply with the terms of Section I of this order.

### PART III

*It is further ordered.* That respondents Ralph R. Howard and Howard Enterprises deliver a copy of this order to cease and desist to all present and future employees of said respondents engaged in the preparation and/or furnishing of consumer reports, and that said



respondent secure a signed statement acknowledging receipt of said order from all such personnel.

#### PART IV

*It is further ordered.* That respondents deliver a copy of this order and a copy of the Fair Credit Reporting Act to each of their present franchise or license holders within thirty days, to all future franchise or license holders, and to any entity connected with said respondents who distribute consumer reports as "consumer report" is defined in Section 603(d) of the Fair Credit Reporting Act and interpreted in the accompanying opinion of the Commission.

#### PART V

*It is further ordered.* That respondents 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 or corporations, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

#### PART VI

*It is further ordered.* That the respondents herein shall, within sixty days after service 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  
FEDDERS CORPORATION

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

*Docket C-2971. Complaint, June 14, 1979 — Decision,\* June 14, 1979*

This consent order, among other things, requires an Edison, N.J. manufacturer and distributor of various products, including split system heat pumps, to offer, without charge, a replacement defrost cycle switch to all current owners of split system heat pumps manufactured by Fedders between November, 1975 and June 1, 1978; to extend a full warranty on the sealed system of the heat pump until May 1, 1980 to those purchasers who elect installation of the new defrost switch; and to reimburse all past or current owners of the affected heat pumps for any repair to the sealed system of the unit for which the owner has paid. The company must mail notices to current and past owners of the affected heat pumps to let them know about the remedial program, and advertise the program in national magazines if a sufficient number of owners cannot be reached by letters.

*Appearances*

For the Commission: *Robert S. Blacher and Gary M. Loden.*

For the respondent: *Benjamin Zelenko, Washington, D.C.*

COMPLAINT

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

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

“Split system heat pump” shall mean a central residential heating/cooling air conditioner having a condenser section installed out-of-doors which includes an air pressure defrost cycle switch and a matching evaporator section installed indoors manufactured by

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\* Reported as modified by Commission order dated August 8, 1979.

Fedders Corporation between November 1, 1975 and June 1, 1978 under the brand names "Fedders Model CKH" or "Climatrol."

"Hermetic system" shall mean the compressor, condenser, evaporator, reversing valve and interconnecting tubing.

A "defect" in a product or component thereof occurs if the product or component thereof is subject to or potentially subject to a significant number of failures in normal operation, including failures occurring under operating conditions that either are within the parameters specified by the manufacturer or reflect reasonably expected ordinary abuse of or failures to maintain the product. For purposes of this definition, failures attributable to normal deterioration of a component as a result of age and wear are excluded.

PAR. 2. Respondent Fedders 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 located at Woodbridge Ave., Edison, New Jersey.

PAR. 3. Respondent is now, and has been, engaged in the manufacture, offering for sale, sale or distribution of split system heat pumps.

PAR. 4. In the course and conduct of its aforesaid business, respondent causes the said split system heat pumps, when sold, to be transported from its place of business located in various States of the United States to distributors thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, 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. On or about February 23, 1978, and before, respondent received information by which it knew, or had reason to believe that there was a defect in the hermetic system of split system heat pumps manufactured by respondent. At such time, respondent received information by which it knew, or had reason to believe that the hermetic system failure was attributable to improper operation of the air pressure switch that regulates the defrost cycle of the compressor. Respondent knew, or had reason to believe, that the air pressure switch operated improperly under weather conditions that respondent could reasonably expect to be encountered with such split system heat pumps. Respondent knew, or had reason to believe, that improper operation of the air pressure switch caused inadequate defrosting of the hermetic system leading to inadequate lubrication of such system and eventual failure in a significant number of instances.

PAR. 6. Respondent has represented, directly or by implication, by and through the offering for sale of its split system heat pumps, that its split system heat pumps do not have any latent defect which substantially affects the reliability, durability, or performance of such split system heat pumps.

PAR. 7. In truth and in fact, in a significant number of instances, respondent's split system heat pumps suffer or may suffer failure of the hermetic system which substantially affects the reliability, durability, or performance of such split system heat pumps. Therefore, said representations were and are unfair or deceptive.

PAR. 8. Notwithstanding its knowledge of the improper operation of the air pressure switch regulating the defrost cycle, respondent is failing and has failed to disclose to ultimate purchasers of split system heat pumps information concerning the possibility of substantial damage to the hermetic system of such heat pumps and the nature and extent of repairs which may be necessary to correct such problem. Respondent therefore is failing and has failed to disclose material facts which, if known to prospective purchasers, would be likely to affect their consideration of whether to purchase a split system heat pump from respondent. Failure to disclose the aforesaid facts to current owners of split system heat pumps has caused them substantial economic harm due to inability on their part to avoid or prevent substantial damage to the hermetic system of their split system heat pumps and to avoid paying for unnecessary repairs that do not correct the problem. Such failures to disclose are deceptive or unfair acts or practices.

PAR. 9. The use by the respondent of the aforesaid acts and practices has had, and now has, the capacity and tendency to mislead members of the consuming public who are purchasing and have purchased a substantial number of split system heat pumps equipped with the improperly operating air pressure switch regulating the defrost cycle.

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

#### DECISION AND ORDER

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

Protection proposed to present to the Commission for its consideration and which if issued by the Commission would charge respondent with violation of the Federal Trade Commission Act, as amended; and

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

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

1. Respondent Fedders Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at Woodbridge Ave., in the City of Edison, State of New Jersey.

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

#### ORDER

##### I

*It is ordered,* That respondent Fedders Corporation, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, offering for sale, sale or distribution of split system heat pumps in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, shall forthwith:

1. Make available, without charge, to each distributor or dealer

of respondent's split system heat pumps a sufficient quantity of time defrost system service kits, as described in respondent's Field Bulletin - Service dated June 5, 1978 (Publ. No. 23-65-0037N-001), to replace, as necessary pursuant to this order, the air pressure defrost cycle switches on split system heat pumps sold or distributed by respondent, and offer reasonable reimbursement for labor costs to each distributor or dealer for installation of the time defrost system service kits;

2. Offer to each current owner of a split system heat pump the option to have installed, without charge for parts or labor, the time defrost system service kit described in paragraph one (1) of this section, and install such time defrost system service kit, without charge for parts or labor, within ninety (90) days after receiving notice from such current owner that the owner has elected installation of the time defrost system. Each such current owner shall be sent, within ten (10) days after the date this order becomes final, pursuant to the procedures set forth in Section II of this order, notice of the option provided by this paragraph and a pre-addressed, postage-paid card by which to elect installation of the time defrost system. The notice of the option provided by this paragraph shall be as set forth in Appendix (A) of this order. The card by which to elect installation of the time defrost system shall be as set forth in Appendix (B) of this order. Failure of any current owner or addressee to whom such notice has been mailed, and which has not either been returned as undeliverable or notice of non-delivery provided by the postal service, to return such card within sixty (60) days of the date of mailing shall be considered an election not to have the time defrost system service kit installed;

3. Extend to each current owner of a split system heat pump who, pursuant to paragraph two (2) of this order, elects to have installed the time defrost system service kit, and to each current owner of a split system heat pump to whom notice of the option provided by paragraph two (2) of this order has not been mailed or has been mailed pursuant to Sections II (A) or (B) and has either been returned as undeliverable or notice of non-delivery provided by the postal service, a "full warranty" that meets the Federal minimum standards for warranty set forth in, and otherwise complies with, the Magnuson-Moss Warranty - Federal Trade Commission Improvements Act, 15 U.S.C. 2301, *et seq.*, and regulations promulgated thereunder. The warranty required by this paragraph shall cover any defect in material or workmanship of the hermetic system (including compressor) of the split system heat pump and shall be without charge for parts or labor. The warranty required by this

paragraph shall be effective until May 1, 1980. Such warranty shall extend to any person to whom the split system heat pump is transferred during the duration of the warranty. Each current owner of a split system heat pump shall be sent, within ten (10) days after the date this order becomes final, pursuant to the procedures set forth in Section II of this order, a copy of the warranty required by this paragraph. The warranty shall be as set forth in Appendix (C) of this order;

4. Provide to all owners of split system heat pumps reimbursement for all payments, incurred by such owners from date of installation of such split system heat pump until ninety (90) days after the date this order becomes final, in connection with any repair to the hermetic system (including compressor) of such split system heat pump. Reimbursement shall be for all such payments, covering both parts and labor. Notice of the right to reimbursement shall be provided to all past or current owners of split system heat pumps and shall be mailed pursuant to the procedures set forth in Section II of this order. The notice of the right to reimbursement shall be as set forth in Appendix (A) of this order. Proof of entitlement to reimbursement shall be by affidavit, as set forth in Appendix (D) of this order, accompanied by either (1) a cancelled check, or (2) an invoice, receipt, work order, purchase order, or similar document which gives evidence that the repair was made and paid for by the owner. The respondent shall pay, without further verification and without dispute, within forty-five (45) days after receipt, any claim for reimbursement where the proof of entitlement required by this paragraph has been provided. The respondent need not pay any claim for reimbursement under this paragraph if mailed later than sixty (60) days after such owner or addressee has been mailed notice of the right to reimbursement which has not been either returned as undeliverable or notice of non-delivery provided by the postal service.

## II

A. *It is further ordered.* That respondent shall mail, within ten (10) days after the date this order becomes final, to all owners of split system heat pumps who can be identified through respondent's dealer-distributor network, the following "consumer notice" package:

1. The letter as set forth in Appendix (A) of this order providing notice of the right to have installed the time defrost system service kit, the extended full warranty on the hermetic system (including

compressor), and the right to reimbursement for repair payments, as provided in paragraphs 2, 3 and 4 of Section I of this order;

2. A pre-addressed, postage-paid card by which the current owner may elect installation of the time defrost system service kit pursuant to paragraph two (2) of Section I of this order, as set forth in Appendix (B) of this order;

3. A copy of the extended full warranty on the hermetic system (including compressor) pursuant to paragraph (3) of Section I of this order, as set forth in Appendix (C) of this order;

4. An affidavit for proof of entitlement to reimbursement for repair payments pursuant to paragraph four (4) of Section I of this order, as set forth in Appendix (D) of this order.

The "consumer notice" package shall be sent by third class, bulk rate, metered mail with the words " ADDRESS CORRECTION REQUESTED" and "RETURN POSTAGE GUARANTEED" printed in red ink on white background in 12-point boldface type in the upper left hand corner of the envelope. The return mailing address of the respondent shall also be printed in the upper left hand corner of the envelope. The envelope shall also prominently display in 12-point extra boldface type, printed in Cheltenham, Antique, Bodoni or Helvetica lettering, in red ink on white background, the words:

#### SPECIAL CONSUMER NOTICE

OUR RECORDS SHOW THAT YOU OWN (or used to own)  
A FEDDERS [CLIMATROL] HEAT PUMP. The defrost  
switch may need repair. Fedders [Climatrol] will fix it free,  
and may pay you back for some past repairs. Details inside.

B. *It is further ordered.* That respondent shall, for each "consumer notice" package mailed pursuant to subsection (A) above for which address correction has been provided by the postal service, mail, within ten (10) days after such correction has been received, by first class mail, the "consumer notice" package to:

1. The original address to which the "consumer notice" package had been mailed, with the name of the original addressee delete and substitute therefor "RESIDENT" and

2. The corrected address provided by the postal service, with t name of the original addressee.

The envelope shall display, in the manner specified in subsection above, the words:



**SPECIAL CONSUMER NOTICE**

OUR RECORDS SHOW THAT YOU OWN (or used to own) A FEDDERS [CLIMATROL] HEAT PUMP. The defrost switch may need repair. Fedders [Climatrol] will fix it free, and may pay you back for some past repairs. Details inside.

C. *It is further ordered,* That respondent shall, within thirty (30) days after the date this order becomes final, file with the Commission a copy of the mailing list of owners of split system heat pumps to whom the "consumer notice" package has been mailed pursuant to subsection (A) above and has not been returned, and a copy of a receipt from the postal service showing the total number of pieces received for mailing.

D. *It is further ordered,* That respondent shall, within ninety (90) days after the date the Commission or its representative notifies respondent of the manner of selecting addresses to be inspected, conduct an on-site inspection at one (1) percent of the addresses to which the "consumer notice" package has been mailed pursuant to subsection (A) above and has not been returned in order to verify that such addressee is in possession of a split system heat pump. The addresses to be inspected shall be chosen at random in a manner selected by the Commission or its representative. Any mailing to an address selected for inspection which is returned during the inspection period shall be taken off the list of addresses to be inspected without necessity of substitution, and shall not be included in the calculations pursuant to Section III(A). The results of such inspections shall be filed with the Commission in the form of an affidavit, signed by an officer of the respondent, within ninety (90) days after the date the Commission or its representative notifies respondent of the manner of selecting addresses to be inspected. The affidavit shall show the total number of inspections and the total number of addressees who are not in possession of a split system heat pump. The affidavit shall show the name from the mailing list and address for each site inspected. The affidavit shall also show the number of mailings returned as specified in Sections III(A)(2) and (3).

## III

*It is further ordered,* That respondent shall, within twenty (20) days after the date the Commission or its representative notifies it of the manner of selecting addresses to be inspected, place for publication, in the national editions of the periodicals

listed in Appendix (E) of this order, in a size of not less than one-half (1/2) page, or two (2) full columns if half-page is unavailable, of the periodical in which the advertisements are inserted, both of the "recall advertisements" as set forth in Appendices (F) and (G) of this order in the style, type, and format as depicted therein.

*Provided However*, respondent is not required to place both of the "recall advertisements" set forth in Appendices (F) and (G) of this Order, if it places one advertisement in each of the periodicals listed in Appendix (E) of this Order which advertisement refers to both Fedders and Climatrol, contains language identical to that in the "recall advertisements" set forth in Appendices (F) and (G), except that reference is made to both Fedders and Climatrol heat pumps, and meets all other requirements set forth in Section III, and Appendices (E), (F) and (G) of the Order.

*Provided however*, that the recall advertisements ordered pursuant to this Section shall not be required if respondent mails the "consumer notice" package pursuant to Section II(A) to ninety (90) percent of the current owners of split system heat pumps. The percentage of current owners to whom notice has been mailed shall be calculated on the basis of:

1. The number of mailings pursuant to Section II(A) as evidenced by the receipt from the postal service showing the total number of pieces received for mailing as required by Section II(C); *minus*
2. The number of mailings pursuant to Section II(A) that were returned as undeliverable with no address correction provided by the postal service and that were not mailed again to "Resident" as provided in Section II(B)(1); *minus*
3. The number of mailings returned as undeliverable that were mailed pursuant to Section II(B)(1); and *minus*
4. The number of addressees who are not in possession of a split system heat pump based on projection from the sample of on-sit inspections carried out pursuant to Section II(D) of this order. Those not now in possession of a split system heat pump shall be presumed not to have possessed such a unit since November 1, 1975 unless respondent can establish otherwise. It is hereby agreed that margin of error for this sampling is five (5) percent.

A sample calculation pursuant to this section is set forth Appendix (H) of this order.

B. *It is furthered ordered*, That respondent shall mail "consumer notice" package as set forth in Section II(A) to any of split system heat pumps who responds within three (3) months of the last publication of any advertisement required by this

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IV

For purposes of this order:

1. "Split system heat pumps" shall mean a central residential heating/cooling air conditioner having a condenser section installed out-of-doors which includes an air pressure defrost cycle switch and a matching evaporator section installed in-doors manufactured by Fedders Corporation between November 1, 1975 and June 1, 1978 under the brand names "Fedders Model CKH" or "Climatrol."

2. "Current owners" shall include all persons who own or are in possession of split system heat pumps as of the date this order becomes final (but not including dealers or distributors), and shall not be limited to original purchasers.

"Owners" and "past owners" shall also not be limited to original purchasers, and shall also not include dealers or distributors.

3. "Hermetic system" or "sealed system" shall mean the compressor, condenser, evaporator, reversing valve and interconnecting tubing.

V

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

B. *It is further ordered*, That respondent shall maintain all records that relate to any compliance obligations arising out of this order for a period of not less than three (3) years and shall make such records available to the Commission or its representative upon request.

*It is further ordered*, That the respondent herein shall within one hundred (100) 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 it has complied with this order.

APPENDIX (A): [CONSUMER NOTICE]

CONSUMER NOTICE

Owners [Climatrol] Heat Pump Owner:

Records show that you own, or used to own, a Fedders [Climatrol] Heat Pump. On these units, the defrost switch may need repair. Some of these units have failed due to extremely cold and damp weather.

**ONLY SPLIT SYSTEM HEAT PUMPS HAVE THE PROBLEM**

Take a look at your unit. If it's part indoors and part outdoors, it's a split system.

**FEDDERS [CLIMATROL] WILL FIX YOUR HEAT PUMP. FREE.**

We have a new defrost switch which we think will fix the problem. We will install it without charge. All you have to do is return the enclosed card marked "YES" and we will contact you to install the switch.

**A NEW WARRANTY, TOO.**

*If you have the switch replaced, you'll get an extended full warranty that protects the sealed system of your heat pump until May 1, 1980. The warranty covers parts and labor. It is in addition to the warranty you received when you purchased your heat pump. A copy of the warranty is enclosed. If you do not elect to install this switch, your original warranty will continue to apply.*

**WHAT YOU MUST DO**

You *must* return the enclosed card to have the defrost cycle switch replaced. If you do not return the card, you will not get this warranty.

**PAID FOR REPAIRS? FEDDERS [CLIMATROL] PAYS YOU BACK.**

If you have already paid for repairs to the sealed system, we will pay you back. *Even if you no longer own the unit or the home in which it is installed, we will still pay you back.*

This includes repairs to the sealed system only. Included are the compressor, condenser, evaporator, reversing valve and interconnecting tubing.

You must fill out the enclosed affidavit. Attach proof that you paid for repairs. A cancelled check will do. Even better proof is some kind of receipt that shows repairs were made and you paid for them. The affidavit has full instructions. You must have the affidavit notarized. Most banks have a notary public who will do this for about 50 cents.

**ACT NOW.** You must return the enclosed card within sixty (60) days. And, if you have paid for repairs, you must return the enclosed affidavit within sixty (60) days for us to pay you back. The sixty (60) days starts to run from the date we *mailed* you this letter. So don't delay.

If you have any questions, you can call us during business hours at (201) 494-8802.

Sincerely,  
Consumer Affairs Department  
Fedders Corporation  
[Climatrol Sales Company]  
Edison, New Jersey 08817

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APPENDIX (B): [Card by which to elect installation of the defrost system service kit]

PLEASE TYPE OR PRINT CLEARLY

Name \_\_\_\_\_

Address \_\_\_\_\_

Street City State Zip Code

Telephone ( ) \_\_\_\_\_

MARK ONE:

- Yes. I want the *free* switch replacement and the extended full warranty on the sealed system.
- No. I do not want the switch replacement. I understand that I will not get the extended warranty.

If you have already had the switch replaced, please mark *Yes* and put a mark here, too.  If you have already had the switch replaced, the switch will not be replaced again but you do get the extended warranty. If you are not sure whether the switch was replaced, call your local Fedders [Climatrol] dealer or repair company.

APPENDIX (C): [Extended Full Warranty]

EXTENDED FULL WARRANTY ON "SEALED SYSTEM" UNTIL MAY 1, 1980

WHAT IS COVERED

This warranty is for "split system" heat pumps. It covers the sealed system of the heat pump. This includes the compressor, condenser, evaporator, reversing valve and interconnecting tubing.

WHAT WE PROMISE

Fedders will repair or replace any part of the sealed system that is defective. You will not be charged for parts, labor, or anything else. If we are unable to fix the sealed system of your heat pump after a reasonable number of attempts, you have a right to a full refund or a free replacement of the heat pump.

WHAT IS NOT COVERED

This warranty does not include consequential or incidental damages *except* damage to any part of the heat pump that results from any defect covered by this warranty. *Some states do not allow the exclusion or limitation of consequential or incidental damages, so the above limitation or exclusion may not apply to you.*

HOW LONG THIS WARRANTY LASTS

From May 1, 1980. Implied warranties on the sealed system of your heat pump will last as long as is provided by state law starting from the date your original written warranty became effective.

WHO IS COVERED

Covers anyone to whom...

## WHAT YOU MUST DO

You *must* return the enclosed card to have the defrost cycle switch replaced. This replacement is free. If you do not return the card, you will not get this warranty. This warranty starts the day you mail the enclosed card.

For service under this warranty, contact your local Fedders [Climatrol] Authorized Service Company. Your dealer can give you the name and address of the one nearest you. Or call (800) 882-6500 for this information. This call is free, and is available 24 hours a day, 7 days a week.

If the Fedders [Climatrol] Authorized Service Company has not solved the problem, please contact us by mail or call during business hours.

Consumer Affairs Department  
Fedders Corporation  
[Climatrol Service Company]  
Edison, New Jersey 08817  
Telephone — (201) 494-8802

THIS WARRANTY GIVES YOU SPECIFIC LEGAL RIGHTS AND YOU MAY ALSO HAVE OTHER RIGHTS WHICH VARY FROM STATE TO STATE.

APPENDIX (D): [Affidavit for proof of entitlement to reimbursement for repair payments pursuant to paragraph four (4) of Section I]

## AFFIDAVIT

Name \_\_\_\_\_

Address \_\_\_\_\_  
Street

\_\_\_\_\_  
(City) (State) (Zip Code)

Telephone \_\_\_\_\_

1. I own (or owned) a Fedders [Climatrol] heat pump. It is a split system heat pump. Part of the heat pump is outdoors. And part of it is indoors.
2. The model number on my heat pump is \_\_\_\_\_. The serial number of my heat pump is \_\_\_\_\_. NOTE: Both of these numbers can be found on a metal plate on the cabinet of the part of your unit that is outdoors.
3. I swear (or affirm) that I have paid for repairs to the sealed system of my heat pump. This includes repair or replacement of the compressor, condenser, evaporator, reversing valve and interconnecting tubing.

This includes only repairs or replacement of such parts. NOT included is routine maintenance.

4. ATTACH A COPY OF THE CANCELLED CHECK OR RECEIPT SHOWING THAT YOU PAID FOR REPAIRS. ATTACH A COPY OF ANYTHING YOU HAVE THAT SHOWS WHAT REPAIRS WERE MADE AND THAT YOU PAID FOR THE REPAIRS.

We will only pay you back if you attach a cancelled check or receipt.

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If you have lost your receipt, try to get a copy from the person or company that made the repair.

FOR FASTEST REPAYMENT, ATTACH A CANCELLED CHECK AND A RECEIPT.

5. I have not signed a release or received any payment or reimbursement or made any other settlement with Fedders [Climatrol], any of its companies or representatives, any insurance company or anyone else in connection with the claim for reimbursement now made.

All of the above information is true and correct to the best of my knowledge.

---

Date

Signature

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 1978.

---

(Notary Public)  
(SEAL)

APPENDIX (E): [List of periodicals in which both "recall advertisements" as required by Section III of this order shall be inserted for publication.]

1. Better Homes & Gardens
2. Newsweek
3. Parade Magazine
4. Sports Illustrated
5. T.V. Guide

APPENDIX (G): (CLIMATROL RECALL ADVERTISEMENT)

**Special Consumer Notice****Climatrol  
Free Heat Pump Fix-up**

**The problem.** Some of our split system heat pumps may be failing from the effects of extremely cold and damp weather.

**Only split system heat pumps** have the problem. Look at your unit. If it's part indoors and part outdoors, it's a split system.

**Climatrol will fix it. Free.** We have a new switch to fix the problem. No charge. Call us.

**A new warranty, too.** Call us to have the switch replaced. If you do, you'll get an extended full warranty that protects the sealed system of your heat pump until May 1, 1980. The warranty covers parts and labor.

**Paid for repairs? Climatrol will pay you back.** If you have already paid for repairs resulting from this problem, Climatrol will pay you back. Even if you no longer own the unit or the home in which it is installed, you may still qualify. Call us.

**Call for details.** Climatrol wants to do things right. Call us. Toll Free. 800-000-0000

**Climatrol**  
Consumer Affairs Department  
Edison, NJ 08817



APPENDIX (F): FEDDERS RECALL ADVERTISEMENT.

**Special Consumer Notice****Fedders  
Free Heat Pump Fix-up**

**The problem.** Some of our split system heat pumps may be failing from the effects of extremely cold and damp weather.

**Only split system heat pumps** have the problem. Look at your unit. If it's part indoors and part outdoors, it's a split system.

**Fedders will fix it. Free.** We have a new switch to fix the problem. No charge. Call us.

**A new warranty, too.** Call us to have the switch replaced. If you do, you'll get an extended full warranty that protects the sealed system of your heat pump until May 1, 1980. The warranty covers parts and labor.

**Paid for repairs? Fedders will pay you back.** If you have already paid for repairs resulting from this problem, Fedders will pay you back. Even if you no longer own the unit or the home in which it is installed, you may still qualify. Call us.

**Call for details.** Fedders wants to do things right. Call us. Toll Free.  
800-000-0000

**FEDDERS**  
Consumer Affairs Department  
Edison, NJ 08817

APPENDIX (H): [Sample calculation, pursuant to Section III(A),  
of percentage of current owners to whom notice has been  
mailed]

EXAMPLE

|    |  |   |        |
|----|--|---|--------|
| A. | Total number of split system heat pumps sold to owners as of the date this Order becomes final | = | 35,000 |
| B. | Number of mailings pursuant to Section II(A)   | = | 34,250 |
| C. | Number deliverable after both mailings (See Sections III(A)(2) and III(A)(3))                  | = | 1,000  |
| D. | Number of addresses inspected pursuant to Section II(D)  | = | 332    |
| E. | Number of addresses inspected which do not have split system heat pump                         | = | 33     |

Formula:  $\frac{B - C}{A} \times 100 = X\%$

$$\frac{E}{D} \times 100 = Y\%$$

$X\% - Y\% + 5\%$  [margin of error] = percentage of current owners

$$\frac{34,250 - 1,000}{35,000} \times 100 = 95\%$$

$$\frac{33}{332} \times 100 = 9.9\%$$

$95\% - 9.9\% + 5\%$  [margin of error] = 90.1%

Percentage of current owners to whom notice has been mailed = 90.1%