

Complaint

87 F.T.C.

IN THE MATTER OF
NATIONWIDE TRAINING SERVICE, INC., ET AL.
CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket C-2814. Complaint, Mar. 30, 1976—Decision, Mar. 30, 1976

Consent order requiring a Strunk, Ky., training school for heavy equipment operators, truck drivers, and related occupations, among other things to cease using unfair means and deceptive advertising to sell their courses, misrepresenting affiliation with various industries, employment opportunities, salary potential for training course graduates, training cost, manner of payment, training facilities and training programs, and job placement assistance. Respondents are required to make certain affirmative disclosures to students including three-day cooling-off period to cancel contract and have monies refunded. Respondents are further ordered to police the activities of salesmen and brokers engaged in the sale of respondents' training courses, to ensure compliance with the order.

Appearances

For the Commission: *James S. Teborek.*

For the respondents: *Harold G. Jeffers, Oneida, Tenn.*

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 Nationwide Training Service, Inc., a corporation, and Raymond E. Phillips, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Nationwide Training Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Kentucky, with its principal office and place of business located at Strunk, Kentucky.

Respondent Raymond E. Phillips is an individual and an officer of respondent corporation. His business address is the same as that of said corporate respondent.

PAR. 2. Respondents are now, and have been for some time last past, engaged in the advertising, offering for sale, sale or distribution of courses of study and instruction purporting to prepare graduates thereof for employment as heavy equipment operators, truck drivers, and related occupations. Said courses when pursued to completion

consist of a series of lessons pursued by correspondence through the United States mail and a period of inresidence training at a place designated by respondents.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, the publication of advertisements concerning the said courses in newspapers of general circulation and have caused the correspondence portion of said courses, when sold, to be sent from respondents' place of business in the Commonwealth of Kentucky to purchasers thereof located in various other States of the United States. Respondents utilize the services of salesmen who induce prospective purchasers of said courses located in States other than the Commonwealth of Kentucky to contact said salesmen at respondents' offices. Said salesmen transmit to and receive from respondents contracts, checks and other instruments of a commercial nature relating to the sale of said courses to said purchasers. Respondents also utilize the services of brokers and solicitors, who pay respondents a fee for providing the resident training portion of courses to persons recruited by said brokers and solicitors. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said courses of study and instruction in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business as aforesaid, respondents have published or caused to be published in the "Help-Wanted" and other columns of newspaper advertisements containing statements regarding job opportunities, training and wages for persons interested in becoming heavy equipment operators or truck drivers. Typical and illustrative, but not all inclusive of such advertisements are the following:

TRUCK DRIVERS

(Experience not necessary)

Professional drivers can earn up to \$5.41 per hour, plus overtime — up to \$20,000 per year. You can too after short training for local or over-the-road hauling. For application call (704)394-4320 or write: NATIONWIDE SEMI DIVISION, 3313 Belhaven Blvd., Charlotte, N.C. 28216.

HEAVY EQUIPMENT OPERATORS

Dozer-Scraper Operators needed. (Experience not necessary). Can earn up to \$300. per week, after short training. Call or write: NATIONWIDE HEAVY EQUIPMENT TRAINING SERVICE, INC. Phone (615) 622-3109, 1320 East 23rd St., Chattanooga, Tennessee 37404.

PAR. 5. By and through the use of the statements contained in the

advertisements set forth in Paragraph Four and others of similar import and meaning but not expressly set out herein, respondents represent directly or by implication, that:

1. The corporate respondent operates, is affiliated with, or represents a construction company or a trucking company.

2. Respondents are offering employment to qualified applicants who will be trained as heavy equipment operators or truck drivers.

3. Persons receiving training from respondents will earn such amounts as \$5.41 per hour; \$300 per week, or \$20,000 per year as truck drivers, heavy equipment operators or related occupations, upon completion of training.

4. There is a reasonable basis from which to conclude that there is now or will be a need or demand for heavy equipment operators or truck drivers which respondents' training is designed to meet.

PAR. 6. In truth and in fact:

1. The corporate respondent does not operate or represent and is not affiliated with any construction company or trucking company, but to the contrary is engaged in the sale of courses of instruction to prospective purchasers.

2. Respondents do not offer employment to persons who have been trained as heavy equipment operators or truck drivers, but attempt to and do sell courses of instruction to said purchasers.

3. Few, if any, persons who received training from respondents pursuant to said offer have earned amounts such as \$5.41 per hour, \$300 per week, or \$20,000 per year as truck drivers, heavy equipment operators or related occupations as a result of such training.

4. Respondents had no reasonable basis from which to conclude that there is now or will be a need or demand for heavy equipment operators or truck drivers which respondents' training is designed to meet.

Therefore, the statements and representations as set forth in Paragraphs Four and Five were, and are, false, misleading and deceptive.

PAR. 7. In the further course and conduct of their business as aforesaid, respondents cause persons who respond to the aforesaid, or similar, advertisements to visit respondents' salesmen at respondents' offices. For the purpose of inducing the sale of said courses, such salesmen make to prospective purchasers many statements and representations, directly or by implication, regarding opportunities for employment as heavy equipment operators and truck drivers available to purchasers of said courses, the assistance furnished to graduates of said courses in obtaining employment and other matters. Some of the aforesaid statements and representations appear in brochures, pam-

phlets and other printed material furnished to said salesmen by respondents and in other statements and representations made orally by said salesmen. Among and typical, but not all inclusive, of such statements and representations are the following:

1. Respondents have been requested by construction and trucking companies to train operators and drivers for jobs as heavy equipment operators and truck drivers with their companies upon completion of said training.

2. Graduates of said courses will be qualified thereby for employment as heavy equipment operators or truck drivers without further training or experience.

3. The nature of an initial payment by prospective enrollees of said courses prior to the undertaking of a formal obligation to respondents is not that of a nonrefundable tuition fee.

4. Respondents will permit enrollees of said courses to defer payment of the balance of the cost of said courses remaining after the initial or registration fee has been paid until after the graduate of said courses has obtained employment as a heavy equipment operator or truck driver.

5. Respondents will handle or arrange financing of the balance of the cost of said courses remaining after the initial or registration fee has been paid.

6. Respondents provide a placement service which will secure jobs as heavy equipment operators or truck drivers for graduates of said courses who want to work in such capacities.

7. Graduates of said courses who want to work are assured jobs as heavy equipment operators or truck drivers as a consequence of graduating from said courses.

PAR. 8. In truth and in fact:

1. Respondents have not been requested by construction or trucking companies to train people for jobs as heavy equipment operators or truck drivers, which jobs shall be offered by such companies to graduates of said training.

2. Graduates of said courses are not thereby qualified for employment as heavy equipment operators or truck drivers without further training or experience.

3. The sum of money which enrollees in said courses are required to pay prior to the undertaking of a formal obligation with respondents is a nonrefundable fee.

4. Respondents generally do not permit enrollees to defer payment of the balance of the cost of said courses remaining after the initial or registration fee has been paid until after employment as a heavy equipment operator or truck driver has been obtained.

5. Respondents seldom if ever arrange such financing to enable enrollees to pay the balance of the cost of said courses.

6. The placement service provided by respondents will not secure jobs as heavy equipment operators or truck drivers for graduates of said courses who want to work in such capacity.

7. Graduates of said courses who want to work are not assured jobs as heavy equipment operators or truck drivers as a consequence of graduating from said courses.

Therefore, the statements and representations as set forth in Paragraph Seven hereof were, and are, false, misleading and deceptive.

PAR. 9. In the course and conduct of their business as aforesaid respondents have utilized the services of brokers and other solicitors to provide students for the resident training portion of the courses offered by respondents. These brokers and other solicitors are under an obligation to pay a fee to respondents for providing to respondents enrollees of said resident training courses. Said brokers and other solicitors have published, or caused to be published, advertisements containing statements and representations similar to those described in Paragraphs Four and Five above. As a consequence of said advertisements or other inducements, prospective enrollees met with salesmen of such brokers and solicitors to discuss said courses. In their attempts to induce prospective enrollees to enroll in said courses, said salesmen made various statements and representations regarding the tuition-financing arrangements, the training program provided by respondents, the type of training equipment utilized by respondents, the assistance furnished to graduates in obtaining employment and the availability of employment opportunities, and other matters. Respondents have been aware of said statements and representations made by or in behalf of said brokers and other solicitors for the purpose of inducing prospective purchasers to enroll in courses offered by respondents. Said statements and representations are often false, misleading or deceptive.

PAR. 10. Respondents offered for sale courses of instruction to prepare graduates thereof for jobs as truck drivers without disclosing in advertising or through their sales representatives: (1) the recent percentage of graduates of each school who were able to obtain the employment for which they were trained; (2) the employers that hired any such graduates; (3) the initial salary any such graduates received; and (4) the percentage of recent enrollees of each school for each course offered that have failed to complete their course of instruction. Knowledge of such facts would indicate the possibility of securing future employment upon graduation and the nature of such employment. Thus, respondents have failed to disclose a material fact, which, if

known to certain prospective enrollees, would be likely to affect their consideration of whether or not to purchase such courses of instruction. Therefore, the aforesaid acts and practices were, and are, false, misleading, deceptive, or unfair.

PAR. 11. In the further course and conduct of their business, and in furtherance of their purpose of inducing the purchase of their courses by the general public, respondents acting directly through their company owned training facilities and furnishing the means and instrumentalities to their salesmen, directly or indirectly, have engaged in the following additional acts or practices:

Respondents have induced members of the general public to sign certain contracts entitled "Application." Respondents thereby have deceptively and misleadingly created the impression that said documents are not legally binding contractual agreements when in fact said documents are legally binding contractual agreements.

Therefore, respondents' statements, representations, acts or practices as set forth herein were, and are, false, misleading, unfair or deceptive acts or practices.

PAR. 12. Respondents have entered into contracts with purchasers of said courses of instruction which contracts contain provisions for the cancellation of said contracts and the refund of tuition monies paid by said purchasers. In many instances, respondents have failed to offer to refund and refused to refund to purchasers who have cancelled their contract such monies as may be due and owing according to the terms of said contracts.

The use by respondents of the aforesaid practice and their continued retention of said sums, as aforesaid, is an unfair act or practice and an act of unfair competition within the intent and meaning of Section 5 of the Federal Trade Commission Act.

PAR. 13. (a) Respondents have been and are now using the aforesaid unfair, false, misleading or deceptive acts and practices, which a reasonably prudent person should have known, under all of the facts and circumstances, were unfair, false, misleading or deceptive, to induce persons to pay or to contract to pay over to them substantial sums of money to purchase or pay for courses of instruction which, to such purchasers in connection with their future employment, and careers was, and is, virtually worthless. Respondents have received the said sums and have failed to offer refunds and have failed to refund such sums to or to rescind such contractual obligations of substantial numbers of enrollees and participants in such courses who were unable to secure employment in the positions and fields for which they have been purportedly trained by respondents.

The use by respondents of the aforesaid acts and practices, their

continued retention of said sums and their continued failure to rescind such contractual obligations of their customers, as aforesaid, are unfair acts or practices.

(b) In the alternative and separate from Paragraph Thirteen (a) herein, respondents, who are in substantial competition, in commerce with corporations, firms and individuals engaged in the sale of course of vocational instruction, have been and are now using, as aforesaid, false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money to purchase courses of instruction.

The effect of using the aforesaid acts and practices to secure substantial sums of money is or may be to substantially hinder, lessen, restrain, or prevent competition between respondents and the aforesaid competitors.

Therefore, the said acts and practices constitute an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

PAR. 14. By and through the use of the aforesaid acts, practices, statements and representations, respondents place in the hands of others the means and instrumentalities by and through which they mislead and deceive the public in the manner and as to the things hereinbefore alleged.

PAR. 15. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals engaged in the sale and distribution of similar courses of study and instruction.

PAR. 16. The use by respondents of the false, misleading and deceptive statements, representations, acts and practices and their failure to disclose material facts as aforesaid, has had, and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and to induce a substantial number thereof to purchase said courses of study and instruction offered by respondents by reason of said erroneous and mistaken belief.

PAR. 17. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; 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 complaint to issue herein, 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 considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Nationwide Training Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Kentucky, with its office and principal place of business located at Rural Route #1, city of Strunk, Commonwealth of Kentucky.

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

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

ORDER

It is ordered, That respondents Nationwide Training Service, Inc., a corporation, its successors and assigns, and Raymond E. Phillips, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of courses of

study and instruction in heavy equipment operation, truck driving or any other subject, trade or vocation, or in connection with any other product or service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

1. Representing, directly or by implication, orally or in writing that:

(a) They are, or represent, or are affiliated with, construction or trucking companies or any industry for which enrollees of any courses offered by respondents are being trained; or misrepresenting, in any manner, the nature of their business.

(b) Persons receiving training will, or may, earn any specified amounts of money; or misrepresenting by any means the prospective earnings of such persons for employment after completion of said training.

(c) They have been requested by construction and trucking companies or any other business or organization to train persons for specific jobs; or misrepresenting, in any manner, respondents' connection or affiliation with any industry or any member thereof.

(d) Graduates of any courses will be qualified thereby for employment at jobs for which said graduates were purportedly trained, when additional training or experience is required.

(e) The nature of the initial payment by prospective enrollees of any courses prior to the undertaking of a formal obligation to respondents, is not that of a nonrefundable tuition fee; or misrepresenting, in any manner, the nature of any payment made by prospective enrollees of any courses offered by respondents.

(f) They, or others, will permit enrollees of any courses offered by them to defer payment of the balance of the cost of said courses remaining after the initial or registration fee has been paid until after the enrollee has completed said courses and commenced employment; or misrepresenting, in any manner, the terms or conditions under which payment is to be made for said courses.

(g) They, or others, will handle or arrange financing of the balance of the cost of said courses remaining after the initial or registration fee has been paid, unless respondents, or others specifically named, will in fact, handle or arrange such financing.

(h) They, or others, provide a placement service which may or will secure a job for graduates of said courses.

(i) Graduates of said courses are assured jobs as a consequence of graduating from said courses.

(j) There is an immediate or substantial demand, or a demand of any size or proportion, for persons completing any of the courses offered by the respondents in the field of truck driving or any other field, or otherwise representing, orally or in writing, that opportunities for employment, or opportunities of any type or number, are available to such persons, except as hereinafter provided in Paragraph 7 of this order. *Provided, however,* That respondents shall cease and desist making such representations unless the respondents in each and every instance:

(1) until the passage of a base period to be determined pursuant to Paragraph 7(b) of Part I of this order, after the establishment of a new school location by respondents in any metropolitan area or county, whichever is larger, where they did not previously operate a school, and after the introduction by respondents of any new course of instruction at any school or location, shall:

(A) have in good faith conducted a statistically valid survey which establishes the validity of any such representation at all times when the representation is made and

(B) have disclosed in immediate and conspicuous conjunction with any such representation, that:

All representations for potential employment demand or opportunities for graduates of this school (course) are merely estimates. This school (course) has not been in operation long enough to indicate what, if any, actual employment may result upon graduation.

(2) After the passage of a base period to be determined pursuant to Paragraph 7(b) of Part I of this order, and until two years after the establishment of a new school location by respondents in any metropolitan area or county, whichever is larger, where they did not previously operate a school, and after the introduction by respondents of any new course of instruction at any school or location, shall:

(A) make any such representations in the form and manner provided in Paragraph 7(b) of Part I of this order, and

(B) disclose in immediate and conspicuous conjunction with any such representation, that:

This school (course) has not been in operation long enough to indicate what, if any, actual employment may result upon graduation.

2. Placing ads in "Help-Wanted" columns or representing by any means that employment is being offered when such offer is not a bona fide offer of employment.

3. Accepting as enrollees in courses offered by respondents persons sent to respondents by, or otherwise utilizing the services of, brokers,

or solicitors who engage in any of the acts or practices prohibited by this order, or who otherwise misrepresent in any way the training program offered by respondents, the type of training equipment utilized by respondents, the tuition-financing arrangements, the assistance furnished to graduates in obtaining employment and the availability of employment opportunities, and other matters.

4. Failing to disclose, in writing, clearly and conspicuously, prior to the signing of any contract, to any prospective enrollee of any course offered by respondents, the full cost of such course including the fee for any home study lessons and for any residential training.

5. Failing to place the title "CONTRACT," in boldface type, on any document which evidences an agreement between a person and respondents relating to the purchase of any of the courses offered by respondents; and failing to remove from any such document the word "application," or words of similar import or meaning.

6. Failing to show each prospective purchaser the home study portion of said courses and allow said prospective purchaser a reasonable time for examination of said home study materials before said prospective purchaser has paid any money or has signed any contract, or has obligated himself in any other way.

7. Failing to send by certified mail, return receipt requested, to each person that shall contract with respondents for the sale of any course of instruction a notice which shall disclose the following information and none other.

(a) The title "IMPORTANT INFORMATION" printed in boldface type across the top of the form.

(b) Paragraphs containing the following information in the format prescribed in Appendix A and for a base period designated as described in Appendix B:

(1) The placement rate, ratio or percentage for graduates, and also the numbers upon which such rates, ratios or percentages are based;

(2) A list of firms or employers which are currently hiring graduates of respondents' courses in substantial numbers and in the positions for which such graduates have been trained, and the number of such graduates hired, as to the same graduates used to compute the placement percentage in (b) 1 above;

(3) The salary range of respondents' graduates as to the same graduates used to compute the placement percentage in (b) 1 above;

(4) The percentage of enrollees who have failed to complete their course of instruction, such percentage to be computed separately for each course of instruction offered by respondents at each school, location or facility.

(c) An explanation of the cancellation procedure provided in this

order, namely that any contract or other agreement may be cancelled for any reason until midnight of the third business day after receipt by the customer, via the U.S. mail, of this notice.

(d) A detachable form which the person may use as notice of cancellation, which indicates the proper address for accomplishing any such cancellation.

This notice shall be sent by respondents no sooner than the next day after the person shall have contracted for the sale of any course of instruction; respondents, during such period provided for in subparagraph (c) above, shall not initiate contact with such person other than that required by this paragraph.

Provided, however, That subparagraph (b) above shall be inapplicable to any newly established school that respondents may establish in any metropolitan area or county, whichever is larger, where they did not previously operate a school, or to any course newly introduced by respondents, until such time as the new school or course has been in operation for the base period to be established pursuant to subparagraph (b) above. The following statement shall be included in such notice during such period:

All representations of potential employment or salaries are merely estimates. This school (course) has not been in operation long enough to indicate what, if any, actual employment or salary may result upon graduation from this school (course).

After such time as the new school or course has been in operation for the base period to be established pursuant to subparagraph (b) above, and until two years after the establishment of a new school location in any metropolitan area or county, whichever is larger, where they did not previously operate a school, or the introduction of any new course by respondents, the following statement shall be included in such notice:

This school (course) has not been in operation long enough to indicate what, if any, actual employment or salary may result upon graduation from this school (course).

8. Contracting for any sale of any course of instruction in the form of a sales contract or other agreement which shall become binding prior to midnight of the third business day after the date of receipt by the customer of the form of notice provided for in Paragraph 6 above. Upon cancellation of any said sales contract or other agreement as provided in Paragraph 7(c) above, respondents are obligated to refund within three business days to any person exercising the cancellation right, all monies paid or remitted up until the notice of cancellation.

9. Failing to disclose, clearly and conspicuously, in advertisements, in catalogs, brochures and on letterheads that respondents' business is

solely and exclusively that of a private school, not affiliated with any members of the construction industry, the trucking industry or any member of any other industry.

10. Failing to refund promptly to purchasers who have cancelled their contracts such monies as may be due and owing according to the terms of such contracts.

II

1. *It is further ordered, That:*

(a) Respondents herein deliver, by registered mail, a copy of this decision and order to each of their present and future franchisees, licensees, employees, sales representatives, agents, solicitors, brokers, independent contractors or to any other person who promotes, offer for sale, sells or distributes any course of instruction included within the scope of this order;

(b) Respondents herein provide each person or entity so described in subparagraph (a) of this paragraph with a form returnable to the respondents clearly stating his or her intention to be bound by and to conform his or her business practices to the requirements of this order retain said statement during the period said person or entity is so engaged; and make said statement available to the Commission's staff for inspection and copying upon request;

(c) Respondents herein inform each person or entity described in subparagraph (a) of this paragraph that the respondents will not use or engage or will terminate the use or engagement of any such party unless such party agrees to and does file notice with the respondent that he or she will be bound by the provisions contained in this order;

(d) If such party as described in subparagraph (a) of this paragraph will not agree to file the notice set forth in subparagraph (b) above with the respondents and be bound by the provisions of this order, the respondents shall not use or engage or continue the use or engagement of such party to promote, offer for sale, sell or distribute any course of instruction included within the scope of this order;

(e) Respondents herein inform the persons or entities described in subparagraph (a) above that the respondents are obligated by this order to discontinue dealing with or to terminate the use or engagement of persons or entities who continue on their own the deceptive acts or practices prohibited by this order;

(f) Respondents herein institute a program of continuing surveillance adequate to reveal whether the business practices of each said person or entity described in subparagraph (a) above conform to the requirements of this order;

(g) Respondents herein discontinue dealing with or terminate the use

or engagement of any person described in subparagraph (a) above, who continues on his or her own any act or practice prohibited by this order as revealed by the aforesaid program of surveillance.

(h) Respondents herein maintain files containing all inquiries or complaints from any source relating to acts or practices prohibited by this order, for a period of two years after their receipt, and that such files be made available for examination by a duly authorized agent of the Federal Trade Commission during the regular hours of the respondents' business for inspection and copying.

2. *It is further ordered*, That respondents herein present to each interested applicant or prospective student immediately prior to the commencement of any interview or sales presentation during which the purchase of or enrollment in any course of instruction offered by respondents herein is discussed or solicited, a 5" x 7" card containing only the following language:

YOU WILL BE TALKING TO A SALESPERSON

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

4. *It is further ordered*, That the respondent Nationwide Heavy Equipment Training Service, Inc., shall 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 respondents which may affect compliance obligations arising out of this order.

5. *It is further ordered*, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business or employment in which he is engaged as well as a description of his duties and responsibilities.

6. *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.

APPENDIX A

DISCLOSURE FORM

(NAME OF SCHOOL)

DROP OUT AND PLACEMENT RECORD FOR
(NAME OF COURSE) FOR THE PERIOD OF (DATE) TO (DATE)

Decision and Order

87 F.T.C.

- | | |
|---|---|
| 1. TOTAL ENROLLEES | [NUMBER] |
| 2. TOTAL WHO FAILED TO COMPLETE THE COURSE | [NUMBER] |
| 3. PERCENTAGE WHO FAILED TO COMPLETE THE COURSE | [%] |
| 4. TOTAL NUMBER OF STUDENTS WHO OBTAINED EMPLOYMENT IN THE POSITION FOR WHICH THIS COURSE OF STUDY PREPARED THEM | [NUMBER] |
| 5. PERCENTAGE OF STUDENTS WHO OBTAINED EMPLOYMENT IN THE POSITION FOR WHICH THIS COURSE OF STUDY PREPARED THEM | [% OF ENROLLEES] |
| 6. PERCENTAGE OF GRADUATES WHO OBTAINED EMPLOYMENT IN THE POSITION FOR WHICH THIS COURSE OF STUDY TRAINED THEM | [% OF GRADUATES] |
| 7. NUMBER AND PERCENTAGE OF TOTAL ENROLLEES AND GRADUATES WHO OBTAINED EMPLOYMENT IN THE FOLLOWING SALARY RANGES: | |
| LESS THAN \$2.50 PER HOUR | [NUMBER] STUDENTS WHICH IS [%] OF TOTAL GRADUATES |
| \$2.50 - \$3.99 PER HOUR | |
| \$4.00 - \$5.50 PER HOUR | |
| \$5.51 - \$7.00 PER HOUR | |
| MORE THAN \$7.00 PER HOUR | |
| 8. EMPLOYERS HIRING PERSONS WHO GRADUATE FROM [NAME OF COURSE] FROM (DATE) TO (DATE) AS TRACTOR TRAILER DRIVERS | TOTAL NUMBER OF GRADUATES HIRED |
| NAMES OF EMPLOYERS | |

APPENDIX B

"Base period" shall mean that period of time that begins with the entrance and ends with the graduation of respondents' most recent graduating class, provided that the class graduated at least three (3) months prior to the date on which respondents must begin to disseminate the necessary statistics with respect to the base period.

The three (3) month period immediately following the close of the base period shall be used by respondents to monitor and record the employment success of all enrollees whose enrollment terminated during the base period. Respondents may not include in the computation of statistics for the base period persons whose enrollment terminated during the three (3) month recordation period. Such persons will be included in the statistics for the base period that covers their graduating class.

On the first business day falling more than three (3) months after the graduation of the most recent graduating class respondents shall begin to disseminate statistics for that

646

Decision and Order

base period. Respondents shall continue to distribute said statistics until the first business day falling three (3) months after the graduation of the next graduating class.

The following example describes how base periods will be utilized by respondents.

Base period 1 will cover the period that begins with the entrance and ends with the graduation of the first class whose graduation date occurs after the effective date of this order. Therefore if a class began on January 1, 1975 and graduated on March 1, 1975 then from March 1, 1975 until June 1, 1975 respondents would monitor and record the employment experience of all enrollees whose enrollment terminated during the base period, January 1, 1975 to March 1, 1975. Respondents would begin disseminating these statistics on the first business day after June 1, 1975.

Base period number two (2) would begin with entrance and end with the graduation of the next graduating class. If that class began on February 1, 1975 and graduated on April 1, 1975 then from April 1, 1975 to July 1, 1975 respondents would monitor and record the employment experience of all enrollees whose enrollment terminated during base period number two (2) February 1, 1975 to April 1, 1975. Respondents would begin disseminating these statistics on the first business day after July 1, 1975.

Order

87 F.T.C.

IN THE MATTER OF
FREIGHT LIQUIDATORS, ET AL.

Docket 8937. Order, April 2, 1976

Denial of individual respondents', Harold J. Green and Joseph W. Green, petition to reopen and set aside final order.

Appearances

For the Commission: *Joan Z. Bernstein.*

For the respondents: *Hundley & Cacheris*, Washington, D.C.

ORDER DENYING PETITION TO REOPEN AND SET ASIDE PRIOR
ORDER

Petitioners through counsel have requested that the Commission reopen and set aside its final order of February 25, 1975 [85 F.T.C. 274]. The Bureau of Consumer Protection has opposed petitioners' requests. Having considered the petitions and oppositions thereto, the Commission has concluded that the order in this matter should not be reopened.

The order of February 25, 1975 is a final order of the Commission, duly entered after appropriate administrative proceedings. Petitioners signed affidavits appointing counsel in those proceedings and the Commission finds no basis upon which to conclude that they were denied effective assistance of counsel therein.

Other contentions raised by petitioners relate to the merits of the Commission's prior determination to enter an order against them. No showing of changed conditions since entry of that order has been made that would warrant reopening and setting it aside, nor can the Commission conclude that such a course of action would serve the public interest.

Accordingly, *It is ordered*, That the petitions of Harold J. Green and John W. Green to "Reopen and Set Aside" be, and they hereby are, denied.

Commissioner Nye dissenting.

IN THE MATTER OF
PACIFIC HOMES MORTGAGE AND INVESTMENT CO.,
T/A PACIFIC PLAN OF CALIFORNIA, ET AL.

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

Docket C-2815. Complaint, April 12, 1976—Decision, April 12, 1976

Consent order requiring a Menlo Park, Calif., mortgage company and its Palo Alto, Calif., advertising agency, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Harold G. Sodergren.*

For the respondents: *Thoits, Lehman & Hanna, Palo Alto, Calif.*

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Pacific Homes Mortgage and Investment Co., a corporation doing business as Pacific Plan of California (hereinafter sometimes referred to as "Pacific"), and Michelson Advertising, Inc., a corporation (hereinafter sometimes referred to as "Michelson"), have violated the provisions of said Acts and implementing regulation, 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 Pacific is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 2200 Sand Hill Rd., Menlo Park, California.

Respondent Michelson is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 3345 El Camino Real, Palo Alto, California.

PAR. 2. Respondent Pacific is now and for some time last past has been engaged in the business of arranging loans secured by real property for a fee under the California Mortgage Loan Broker Act.

PAR. 3. Respondent Michelson, an advertising agency, is now and for

some time last past has been engaged in the business of creating producing, preparing and placing advertising for its clients, one of which is respondent Pacific.

PAR. 4. In the ordinary course and conduct of its business as aforesaid, respondent Pacific regularly arranges for the extension of consumer credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 5. In order to promote or assist directly or indirectly the extension of other than open end credit, respondent Pacific has caused advertisements, as "advertisement" is defined in Section 226.2 of Regulation Z, to be placed in various media. Certain of these advertisements were created, prepared, produced and placed by respondent Michelson.

PAR. 6. In certain of the advertisements referred to in Paragraph Five which were broadcast on television subsequent to July 1, 1969 respondents Pacific and Michelson stated the amount of installment payments required (in dollars), the dollar amount of the finance charge or the number of installments, or the periods of repayment. In these advertisements the additional credit terms required to be disclosed by Section 226.10(d)(2)(i), (iii), (iv) and (v) were not disclosed:

1. Simultaneously in the same video portion of the television commercial.
2. Simultaneously in both the audio and video portions of the television commercial.
3. In letters of the same size and boldness, thereby obscuring, and detracting from, the meaning of the credit terms shown.
4. In letters of the same conspicuousness as the numerical amounts featured in conjunction therewith, thereby obscuring, and detracting from, the meaning of the credit terms shown.
5. For a sufficient duration to enable the viewer to completely read the said credit terms.

By means of such advertisements, respondents Pacific and Michelson violated Section 226.6(a) of Regulation Z which requires disclosures to be made clearly, conspicuously, and in meaningful sequence.

PAR. 7. In certain of the advertisements referred to in Paragraph Five which were published in newspapers and direct mail flyers subsequent to July 1, 1969, respondents Pacific and Michelson stated the amount of installment payments required (in dollars), the dollar amount of the finance charge or the number of installments, or the periods of repayment. In these advertisements the additional credit

terms required to be disclosed by Section 226.10(d)(2)(i), (iii), (iv) and (v) were not disclosed:

1. In letters of the same size and boldness, thereby obscuring, and detracting from, the meaning of the credit terms shown.
2. In letters of the same conspicuousness as the numerical amounts featured in conjunction therewith, thereby obscuring, and detracting from, the meaning of the credit terms shown.

By means of such advertisements respondents Pacific and Michelson violated Section 226.6(a) of Regulation Z which requires disclosures to be made clearly, conspicuously, and in meaningful sequence.

PAR. 8. Subsequent to July 1, 1969, respondent Pacific, in connection with its business of arranging consumer credit transactions has sold and is now selling, substantial numbers of customers credit life, and credit accident and health insurance in connection with the credit transaction.

Respondent Pacific includes premiums for such insurance in the sum of the "Amount Financed" in its "Disclosure Statement of Loan Made in Compliance with Federal Law" (hereinafter sometimes referred to as "the disclosure statement") on which certain disclosures required by the Truth in Lending Act and Regulation Z are made. In selling such insurance, respondent Pacific does not:

1. Clearly and conspicuously disclose in writing to the customer that such credit insurance coverage is not required by the creditor; and
2. Obtain from each customer desiring credit insurance a specifically dated and separately signed affirmative written indication of the customer's desire for such insurance after the customer has received a written disclosure of the cost of such insurance.

PAR. 9. In connection with the acts and practices described in Paragraph Eight above, respondent Pacific has failed to include charges for credit life, and credit accident and health insurance in the finance charge when a specifically dated and separately signed affirmative written indication of the customer's desire for such insurance has not been obtained as required by Section 226.4(a)(5) of Regulation Z; and thereby respondent Pacific:

1. Fails to compute and disclose accurately the "finance charge" as required by Section 226.4 and 226.8 of Regulation Z; and
2. Fails to compute and disclose the "annual percentage rate" accurately to the nearest quarter of one percent as required by Section 226.5 and 226.8 of Regulation Z.

PAR. 10. Subsequent to July 1, 1969, respondent Pacific in connection with its business of arranging consumer credit transactions has sold and is now selling substantial numbers of customers fire insurance written in connection with the credit transaction.

Complaint

87 F.T.C.

On the disclosure statement referred to in Paragraph Eight, above, the following disclosure is made:

(1) Fire Insurance Premium (includes policy servicing fee)
\$18.50.

The amount "\$18.50" is preprinted on the face of the statement.

At the same time at which the disclosure statement is furnished to the customer, respondent Pacific causes the customer to execute an Agency and Servicing Agreement, hereinafter sometimes referred to as "the Agreement." The portion of the Agreement which deals with insurance reads as follows:

Borrowers hereby appoint as their insurance agent to obtain Fire Insurance/Life and Accidental Bodily Injury and Sickness Insurance to protect their obligations under said loan in the event of sickness, injury or death:

Fire Insurance \$-----
Life, Health and Accident Insurance
-----for the term of this loan \$-----

(Borrowers write in name
of insurance agent)

Borrowers hereby state that their choice of insurance agent was voluntarily made and was not a condition precedent to their obtaining the above referred to loan, and that said Borrowers understand that said insurance may be obtained from a person of Borrowers' choice. Dated-----, 19-- Signature-----

Before the Agreement is presented to the customer, respondent Pacific types the name "Scurry-Burns" above the line immediately under which are the words "(Borrowers write in name of insurance agent)." When the Agreement is presented to the borrower, the borrower is instructed to write the name "Scurry-Burns" on the line and to sign the agreement.

PAR. 11. Despite the declaration in the above-quoted portion of the Agreement that fire insurance may be obtained from a person of the customer's choice, respondent Pacific, by instructing the customer to write the name "Scurry-Burns" in the manner described in Paragraph Ten and by preprinting the cost of insurance on the disclosure statement, defeats the elective language contained in the Agreement by obscuring the disclosure that the customer may seek the person through which the fire insurance may be obtained. This practice has the effect of discouraging substantial numbers of customers from exercising their own independent, voluntary choice of the person through which fire insurance may be obtained.

PAR. 12. By and through the acts and practices described in Paragraphs Ten and Eleven hereof, respondent Pacific has failed to include the charges for fire insurance in the Finance Charge when the customer has not been furnished a statement in writing which states

that the customer may choose the person through which the fire insurance is to be obtained, as required by Section 226.4(a)(6) of Regulation Z, and thereby respondent Pacific:

1. Fails to compute and disclose accurately the "finance charge" as required by Section 226.4 and 226.8 of Regulation Z; and
2. Fails to compute and disclose the "annual percentage rate" accurately to the nearest quarter of one percent, as required by Sections 225.5 and 226.8 of Regulation Z.

PAR. 13. By and through the use of the disclosure statement referred to in Paragraph Eight respondent Pacific:

1. Fails when making a joint disclosure, to identify all creditors to the transaction, as required by Section 226.6(d) of Regulation Z;
2. Fails to disclose the date on which the finance charge begins to accrue, when different from the date of the transaction, as required by Section 226.8(b)(1) of Regulation Z;
3. In the instances where a balloon payment is scheduled, within the meaning of Section 226.8(b)(3) of Regulation Z, fails to state the conditions under which that payment may be refinanced if not paid when due, as required by that Section;
4. Fails to disclose the amount of the first payment scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z;
5. Fails to describe the penalty charge and to explain the method of computation of such charge and the conditions under which it may be imposed for prepayment of the principal of the obligation, as required by Section 226.8(b)(6) of Regulation Z;
6. Fails to disclose the amount and method of computing the amount of foreclosure charges which automatically become due in the event of default, as required by Section 226.8(b)(4) of Regulation Z.

PAR. 14. In the ordinary course and conduct of its business as aforesaid, respondent Pacific arranges for the extension of credit in transactions in which a security interest is acquired in real property which is used as the principal residence of the customer. The retention or acquisition of such security interest in said real property thereby entitles customers to be given the right to rescind that transaction until midnight of the third business day following the consummation of the credit transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later, pursuant to Section 226.9 of Regulation Z.

Respondent Pacific has provided customers who have the right to rescind with copies of a notice of right to rescind pursuant to Section 226.9 of Regulation Z, which notice fails to contain the correct date of consummation of the credit transaction, and the correct date by which

the customer may give notice of cancellation, as required by Section 226.9(b) of Regulation Z. Respondent has, therefore, failed to give the disclosures required by Section 226.9(a) of Regulation Z in the manner and form required by Section 226.9(b) of the Regulation.

PAR. 15. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act, 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 San Francisco 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, as amended, the Truth in Lending Act, and the regulations promulgated under the Truth in Lending 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 Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Pacific Homes Mortgage and Investment Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 2200 Sand Hill Rd., Menlo Park, California.

- Respondent Michelson Advertising, Inc. is a corporation organized,

existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 3345 El Camino Real, Palo Alto, California.

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 Pacific Homes Mortgage and Investment Co., a corporation doing business as Pacific Plan of California or by any other name, its successors and assigns, and its officers, (hereinafter, in this and other paragraphs of this order, referred to as "Pacific") and Pacific's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension or arrangement of consumer credit, or any advertisement to aid, promote, or assist directly or indirectly any arrangement or extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Failing in connection with all television and radio advertisements in which cost of credit disclosures must be made, pursuant to Section 226.10 of Regulation Z, to make such disclosures clearly, conspicuously, and in meaningful sequence, as required by Section 226.6(a) of Regulation Z. The following standards shall be met in order for a television advertisement to be deemed a "clear and conspicuous" disclosure within the meaning of this order:

(a) The required disclosures shall be presented simultaneously in both the audio and video portions of the television advertisement.

(b) The video portion of the required disclosures shall contain letters of sufficient size so that said letters can be easily seen and read on all television sets, regardless of picture tube size, that are commercially available for the consuming public.

(c) The audio portion of the required disclosures shall be spoken with sufficient deliberateness, clarity, and volume, so as not to obscure or detract attention from the required disclosures.

(d) The video portion of the required disclosures shall contain letters of a color or shade that readily contrast with the background on both color and black and white television sets. The background shall consist of only one color or shade.

(e) During the video portion of the required disclosures no words or

images shall appear on the television screen which are not part of the required disclosures; *provided, however*, that during said disclosure one half of the television screen may contain images which contribute to and emphasize said disclosure.

(f) During the audio portion of the required disclosures, no other sounds, including music, may be presented.

(g) The audio and video portions of the required disclosures shall immediately follow the specific representation which triggers the affirmative disclosure requirement contained in Section 226.10(d)(2) of Regulation Z.

(h) The audio and video portions of the required disclosures shall give equal emphasis to each word and numeral of the required disclosure.

(i) The audio and video portions of the required disclosures shall be no less than ten seconds duration.

(j) The video portion of the required disclosures shall present the entire text of the required disclosure for the entire duration of the disclosure.

2. Failing in connection with all newspaper or other printed advertisements in which cost of credit disclosures must be made pursuant to Section 226.10 of Regulation Z, to make such disclosures clearly, conspicuously, and in meaningful sequence, as required by Section 226.6(a) of Regulation Z. The following standards shall be met in order for a newspaper or other printed advertisement to be deemed a "clear and conspicuous" disclosure within the meaning of this order:

(a) The required disclosures shall contain letters of sufficient size so that they can be easily seen and read in the advertisement.

(b) The advertisement shall give equal emphasis to each word and numeral of the required disclosures.

(c) The required disclosures shall contain letters of a color or shade that readily contrasts with the background. The background shall consist of only one color or shade.

(d) The required disclosures shall be a separate element in each advertisement and shall not contain or include any part of any picture, design, illustration or text within the advertisement.

(e) The required disclosures shall appear in immediate conjunction with the specific representation that triggers the affirmative disclosure required by Section 226.10(d)(2) of Regulation Z.

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

(a) Failing, immediately prior to the time that the borrower is furnished the duplicate of the instrument or the statement required by Section 226.8(a) of Regulation Z, to present to the borrower a separate,

written personal insurance authorization form which sets forth clearly and conspicuously:

(i) that a mortgage loan of a specified amount has been approved for the customer;

(ii) that the customer's decision with regard to purchasing the credit insurance available through Pacific is not considered in granting the credit;

(iii) that the purchase of credit insurance is optional and is not required by the creditor in connection with the loan;

(iv) the amount of the total premium for credit life insurance and/or the amount of the total premium for credit accident and health insurance which if elected, will become part of the loan, and that said amount(s) does not include the finance charge on said credit insurance;

(v) the insurance options available to the customer together with the total premiums (not including the finance charge on said premiums) which will become due upon the customer's election to take the loan: (1) with credit life insurance only, (2) with credit accident and health insurance only, (3) both credit life insurance and credit accident and health insurance, and (4) other available forms of credit insurance if applicable, (5) no insurance;

(vi) a signature and date line for the customer to indicate his election; and

(vii) that the borrower authorizes Pacific on behalf of the borrower to pay the insurance premiums to the insurance company for such personal insurance which has been chosen.

(b) Failing to make the disclosures required by subsection (a) above on a separate document which contains no other printed or written material. The disclosures required by subsections (i), (ii) and (iii) above shall be made in at least 12 point type.

A form substantially in conformance with Attachment A herein will be considered in compliance with the provisions of subsections (a) and (b). Pacific shall maintain the original statement relating to each credit insurance election for two years following its execution and provide the customer with a copy thereof.

(c) Failing to leave the Truth in Lending disclosure statement blank as to the cost of credit life insurance and/or credit accident and health insurance and all other information or amounts which are affected by the election or declination of insurance until the customer has signed the written disclosure required by subsection (a) above.

(d) Making any marks or otherwise instructing a customer where to sign or date the separate personal insurance authorization form required by subsection (a) above in advance of the customer's free and independent choice for such insurance.

(e) Representing, orally or otherwise, directly or by implication, that credit life and/or credit accident and health insurance are required as a condition of obtaining credit from Pacific.

(f) Discouraging, by representation, orally or otherwise, directly or by implication, the declination of credit life and/or credit accident and health insurance.

(g) Representing, orally or otherwise, directly or indirectly, that the customer's failure to elect credit insurance will result in delay in processing his loan or in his receiving the proceeds.

4. When a charge for fire insurance is not included in the finance charge:

(a) Failing to present to the customer prior to closing of the credit transaction a separate written personal insurance authorization form which sets forth clearly and conspicuously:

(i) that a mortgage loan of a specified amount has been approved for the customer;

(ii) the cost of the fire insurance if obtained from or through Pacific;

(iii) the customer may choose the person through which the insurance is to be obtained;

(iv) that the customer's decision with regard to purchasing the fire insurance available through Pacific is not considered in granting the credit;

(v) a description of insurance coverage offered.

(b) Failing to make the disclosures required by subsection (a) above on a separate document which contains no other printed or written material. The disclosures required by subsections (iii) and (iv) above shall be made in at least 12 point type. Pacific shall maintain the original statement relating to each fire insurance election for two years following its execution and provide the customer with a copy thereof.

(c) Failing to leave the Truth in Lending disclosure statement blank as to the cost of fire insurance and all other information or amounts which are affected by the election or declination of insurance until the customer has made a choice regarding the person through which the insurance is to be obtained.

(d) Using any language in addition to and/or unrelated to that which is necessary to make the disclosure statement required by Section 226.4(a)(6) of Regulation Z, which may have the effect of obscuring or detracting from the clarity and conspicuousness of such disclosure statement.

5. Failing to tell every customer the purpose(s) of each signature requested by Pacific on any document directly related to the consummation of the credit transaction.

6. Failing to compute and disclose accurately the finance charge as required by Sections 226.4(a)(5) and 226.8(d) of Regulation Z.
7. Failing to compute and disclose accurately the annual percentage rate to the nearest quarter of one percent as required by Sections 226.5(b) and 226.8(b)(2) of Regulation Z.
8. Failing to disclose the date on which the finance charge begins to accrue when different from the date of the transaction, as required by Section 226.8(b)(1) of Regulation Z.
9. Failing to state the conditions under which a balloon payment may be refinanced if not paid when due, as required by Section 226.8(b)(3) of Regulation Z.
10. Failing to disclose the amount of each payment scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.
11. Failing to disclose the amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.
12. Failing to describe the penalty charge and to explain the method of computation of such charge and the conditions under which it may be imposed for prepayment of the principal of the obligation, as required by Section 226.8(b)(6) of Regulation Z.
13. Failing in any credit transaction in which the customer has a right to rescind under Section 226.9 of Regulation Z, to provide the customer with the notice of right to rescind, in the form and manner provided in that section.
14. Failing in any consumer credit transaction or advertisement to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.
15. Failing to deliver a copy of this order to cease and desist to all present and future personnel of Pacific at its general offices in Menlo Park and in each of its subsidiary loan offices who are engaged in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and failing to secure a signed statement acknowledging receipt of said copy of this order from each such person.

II

It is further ordered, That respondent Michelson Advertising, Inc., a corporation, its successors and assigns, and its officers (hereinafter, in this and other paragraphs of this order, referred to as "Michelson") and Michelson's agents, representatives and employees, directly or through

any corporation, subsidiary, division or other device, in connection with any advertisement to aid, promote or assist directly or indirectly any arrangement or extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. §226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. §1601, *et seq.*), do forthwith cease and desist from:

1. Representing in any such advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any installment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of installments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

- (a) the amount of the loan;
- (b) the number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
- (c) the amount of the finance charge expressed as an annual percentage rate; and
- (d) the total of payments.

2. Failing to make all the disclosures required by Section 1, above, clearly, conspicuously, and in meaningful sequence as required by Section 226.6(a) of Regulation Z. In order for an advertisement to be deemed a "clear and conspicuous" disclosure within the meaning of this order, it shall meet, in the case of television and printed advertising, the standards set forth in Section 1 and Section 2 of Part I of the order, respectively.

3. Failing to deliver a copy of this order to cease and desist to all present and future personnel of Michelson engaged in reviewing the legal sufficiency of advertising prepared, created or placed on behalf of any advertiser, and failing to secure from each such person a signed statement acknowledging receipt of said order.

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

It is further ordered, That Pacific and Michelson 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.

663

Decision and Order

ATTACHMENT A

PERSONAL CREDIT INSURANCE AUTHORIZATION

Your loan has been approved in the amount of _____
YOU ARE UNDER NO OBLIGATION TO PURCHASE CREDIT INSURANCE TO OBTAIN THIS LOAN

Credit life or credit accident & health (disability) insurance is not required in connection with this extension of credit to you and your decision with regard to the credit insurance will not affect the total amount of credit which has already been approved for you.

If you elect credit insurance these premiums will be financed as part of your loan.

Type of Coverage	Cost, not including finance charge, for duration of loan
Credit Life	\$_____
Credit Accident & Health (Disability)	\$_____

I have read the above disclosure regarding insurance and have received a fully completed and executed copy of this form. I have reviewed the payment options set forth below and understand that if I choose a payment option that includes any of the insurance coverages I am authorizing Pacific Homes Mortgage and Investment Co. to pay the insurance premiums on my behalf. I understand that I am under no obligation to purchase credit insurance to obtain this loan.

CHECK COVERAGES DESIRED

	Cost (Finance charge not included)
<input type="checkbox"/> Credit Life Insurance.	\$_____
<input type="checkbox"/> Credit Accident and Health Insurance.	\$_____
<input type="checkbox"/> Credit Life, and Credit Accident and Health Insurance.	\$_____
<input type="checkbox"/> No credit insurance.	
Borrower's Signature _____	Date _____

Complaint

87 F.T.C.

IN THE MATTER OF
RUBBERMAID INCORPORATED

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

*Docket 8939. Complaint, Sept. 5, 1973—Final Order, April 13, 1976**

Consent order requiring a Wooster, Ohio, manufacturer, seller and distributor of rubber, plastic and rubber coated wire household products, under the brand name "Rubbermaid," among other things to cease maintaining contracts with wholesalers or retailers containing provisions which restrict trade and prices of respondent's commodities; refusing to deal with customers without such agreements; and discriminating against any reseller because of his failure to adhere to set resale prices or conditions. Further, respondent is required to make written offers of reinstatement to wholesalers terminated by respondent since January 1, 1966, for failure to comply with refusal to deal provisions of their contracts.

Appearances

For the Commission: *Ronald A. Bloch* and *Jerry A. Philpott*. Before the administrative law judge, *Ronald A. Bloch* and *Peter W. Marshall*.

For the respondent: *K. Norman Diamond* and *David Bonderman*, *Arnold & Porter*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Rubbermaid Incorporated, a corporation, hereinafter referred to as respondent, has been and is now in violation of Section 5(a)(1) of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges as follows:

COUNT I

PARAGRAPH 1. Unless otherwise required by context, the following definitions shall apply for purposes of this complaint and the accompanying Notice of Contemplated Relief:

(a) "State" means any State or Territory of the United States and the District of Columbia.

(b) "Fair trade law (or statute)" means any State statute or provision thereof providing in substance that contracts permitting

* Final order reported as corrected by order dated April 30, 1976.

intrastate vertical price fixing, as such statutes are described in Sections 5(a)(2) and 5(a)(3) of the Federal Trade Commission Act, are valid and enforceable against signers or nonsigners of such contracts, or against both, any other law of the State to the contrary notwithstanding.

(c) "Fair trade contract (or agreement)" means any contract or agreement entered into pursuant to a fair trade law.

(d) "Retailer contract (or agreement)" means respondent's fair trade contract forms for retail resellers of commodities which bear, or the labels or containers of which bear, respondent's "Rubbermaid" trademark, brand, or name. Copies of said contracts are incorporated by reference into this complaint and are attached hereto as Appendix A.

(e) "Fair trade State" means any State having a fair trade statute which is valid and enforceable as to signers and nonsigners, or only as to signers.

(f) "Non-signer State" means a fair trade State wherein the nonsigner clause of the State's fair trade statute is valid and enforceable. The nonsigner States are Arizona, California, Connecticut, Delaware, Illinois, Maine, Maryland, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Tennessee, Virginia and Wisconsin.

(g) "Signer-only State" means a fair trade State wherein no nonsigner clause is included in the fair trade statute, or wherein the nonsigner clause has been repealed or held invalid and unenforceable. The signer-only States are Arkansas, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, New Mexico, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Washington and West Virginia.

(h) "Free trade State" means any State wherein no fair trade statute has been enacted, or in which the last enacted fair trade statute has been repealed or held wholly invalid and unenforceable. The free trade States are Alabama, Alaska, District of Columbia, Hawaii, Kansas, Mississippi, Missouri, Montana, Nebraska, Nevada, Puerto Rico, Rhode Island, Texas, Utah, Vermont and Wyoming.

(i) "Wholesaler contract (or agreement)" means respondent's fair trade contract forms for wholesale resellers of commodities referred to in subparagraph (d) of this Paragraph. Copies of said contracts are incorporated by reference into this complaint and are attached hereto as Appendix B.

(j) The term "fair traded goods" shall refer to commodities which bear, or the labels or containers of which bear, respondent's "Rubbermaid" trademark, brand, or name and which are resold

pursuant to wholesaler and/or retailer contracts. The words "wholesaler" and "retailer" refer to resellers of said commodities. A list of said commodities is incorporated by reference into this complaint and is attached hereto as Appendix C.

PAR. 2. Respondent, Rubbermaid Incorporated is a corporation organized and existing under the laws of the State of Ohio and whose principal office address is 1255 Bowman Street, Wooster, Ohio.

PAR. 3. Respondent's consolidated net sales during its fiscal year ended December 31, 1970 were in excess of sixty-nine million dollars (\$69,000,000), approximately forty million dollars (\$40,000,000) of which sales were of respondent's fair traded goods. For its fiscal years ended December 31, 1971 and December 31, 1972, respondent's consolidated net sales were in excess of seventy-eight million dollars (\$78,000,000) and one hundred two million dollars (\$102,000,000) respectively, substantial portions of which sales were of respondent's fair traded goods.

PAR. 4. (a) Respondent is now and for some time last past has been engaged in the manufacture, advertising, offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of numerous commodities which bear, or the labels or containers of which bear, trademarks, brands and names owned by respondent.

(b) Among said commodities are rubber, plastic and coated wire houseware products which bear, or the labels or containers of which bear, the name "Rubbermaid."

(c) Respondent sells these commodities directly to both wholesalers and retailers. Respondent's wholesalers are located in every State except Delaware, Nevada, New Hampshire, Puerto Rico and North Dakota. Respondent's wholesalers purchase said merchandise and resell it to retailers located in every State.

(d) Except as set forth in Paragraph Five below, respondent's wholesalers are free to, and many in fact do or could, resell respondent's fair traded goods to retailers or other wholesalers in other States.

PAR. 5. (a) Through wholesaler contracts with all of its wholesalers in all States and retailer contracts with all direct and indirect purchasing retailers in States having fair trade laws, respondent now maintains, and for some time last past has maintained, a retail fair trade program for its goods.

(b) Respondent's wholesaler contracts (see Section 5(a), App. B) provide in part that wholesalers may not sell, consign, or transfer any of respondent's fair traded goods to any wholesaler or retailer located in a State with a fair trade law unless such wholesaler or retailer signs

or has signed a wholesaler or retailer contract (as may be appropriate). These customer restriction provisions are operative and apply either (i) when the wholesaler makes or would make a resale within a fair trade State, or (ii) regardless of whether such (first) resale occurs in a fair trade State or in a free trade State, when the merchandise will be transported to any fair trade State in which another resale will occur (see Section 5(b), App. B).

(c) Respondent's retailer contracts (see Section 3, App.A) provide in part that retailers located in States with fair trade laws may not advertise, offer for sale, or sell respondent's fair traded products at less than the retail selling prices stipulated by respondent.

PAR. 6. (a) Respondent's wholesalers are located geographically so as to efficiently serve the vast majority of respondent's direct-buying retailers.

(b) It is respondent's policy and practice to sell directly to any retailer who so requests. A number of former direct-buying retailers have elected to change to wholesaler service.

PAR. 7. All of respondent's wholesaler contracts are agreements between wholesalers or between actual or potential competitors within the meaning of Section 5(a)(5) of the Federal Trade Commission Act and are now, and since their inception have been—

(a) outside the exemption from being declared unlawful under the Antitrust Acts and the Federal Trade Commission Act afforded certain fair trade contracts and agreements by Section 5(a)(2) of the Federal Trade Commission Act;

(b) an unlawful burden and restraint upon, and interference with, interstate commerce within the meaning of Section 1 of the Sherman Act and Section 5(a)(4) of the Federal Trade Commission Act; and, therefore,

(c) unlawful under, and in violation of, Section 5(a)(1) of the Federal Trade Commission Act.

COUNT II

PAR. 8. (a) The allegations of Paragraphs One through Five are incorporated herein by reference.

(b) As set forth in Paragraph Five above, respondent has used a refusal-to-deal provision to force fair trade State resellers, primarily retailers, to sign fair trade contracts in order to obtain respondent's merchandise and has contractually required its free trade State wholesalers to deal only with signer resellers in fair trade States.

(c) Respondent thereby prevents its free trade State wholesalers from making sales of respondent's goods in interstate commerce to all

nonsigner resellers in all fair trade States, and more specifically, to such retailers in the signer-only States.

(d) Respondent's wholesaler contracts by their terms apply to resellers located, and/or to resales made, within jurisdictions having no statute, law, or public policy making contracts so limiting a reseller's right to resell lawful with respect to intrastate sales, and into which jurisdictions (free trade States) respondent has shipped or transported its merchandise for resale.

PAR. 9. Respondent's contracts with its free trade State wholesalers, insofar as said contracts in any way purport to restrict sales of respondent's goods by said free trade State wholesalers to fair trade State resellers, and particularly to nonsigner retailers in signer-only States, are now and since their inception have been—

(a) outside the exemption from being declared unlawful under the Antitrust Acts and the Federal Trade Commission Act afforded certain fair trade contracts and agreements by Section 5(a)(2) of the Federal Trade Commission Act;

(b) an unlawful burden and restraint upon, and interference with, interstate commerce between free trade States and fair trade States within the meaning of Section 1 of the Sherman Act and Section 5(a)(4) of the Federal Trade Commission Act; and, therefore,

(c) unlawful under, and in violation of, Section 5(a)(1) of the Federal Trade Commission Act.

NOTICE OF CONTEMPLATED RELIEF

Should the Commission conclude from the record developed in any adjudicative proceeding in this matter that the respondent, Rubbermaid Incorporated, is in violation of Section 5 of the Federal Trade Commission Act as alleged in the complaint, the Commission may order such relief as is supported by the record and is necessary and appropriate, including, but not limited to:

1. Cancellation of all existing wholesaler contracts and a ban on their future use.
2. Prohibition of the use of any other means to prevent wholesalers from selling to any retailer or to prevent retailers from purchasing from wholesalers without signing a fair trade contract.
3. Prohibition of the use of any means not specifically permitted by the McGuire Act for the purpose or with the effect of fixing resale prices.
4. Requirement that appropriate notices be mailed to all wholesalers and retailers informing them of their rights with respect to purchase and sale.
5. Cancellation of all retailer contracts obtained or submitted by

any Rubbermaid wholesaler, and notification to said retailers that they do not have to sign any new fair trade contract in order to purchase Rubbermaid's fair traded merchandise.

6. Notification to appropriate Rubbermaid personnel of the terms of the order.

7. Submission to the Commission of periodic compliance reports.

8. Notification to the Commission of proposed corporate changes which might affect compliance obligations under the order.

Complaint

87 F.T.C.

RUBBERMAID COPY

AUTHORIZED RETAILER

Rubbermaid Authorized Retailer Fair Trade Agreement

No. _____

AGREEMENT made at Wooster, Ohio, this _____ day of _____, 19____, by and between RUBBERMAID INCORPORATED, an Ohio Corporation with its principal offices at Wooster, Ohio, hereinafter referred to as "Rubbermaid," and _____

Please Print

of _____
 Street Address City County State Zip
 hereinafter referred to as "Retailer."

1. In consideration of the mutual obligations and covenants herein contained, Rubbermaid hereby appoints Retailer an Authorized Rubbermaid Housewares Retailer.
2. Rubbermaid products now or hereafter made subject to this agreement are and will be distributed under Rubbermaid's trademark, brand or name in free and open competition with commodities of the same general class produced or distributed by others.
3. Retailer agrees (except as specifically permitted by statute) not to advertise, offer for sale, or sell the products listed in Schedule A here to attached or in said Schedule A as it may from time to time be amended at less than the minimum retail selling price stipulated on such Schedule for such a sale.
4. Rubbermaid by written notice to Retailer may from time to time as of a date specified in said notice, amend Schedule A so as to (a) eliminate one or more products; (b) add one or more products and stipulate minimum retail selling prices therefor; or (c) change the minimum retail selling price of one or more products. Such notice may take the form of a revised Schedule A which specifies its effective date.
5. Except as authorized by Schedule A or any amendment thereof: (a) the offering or giving of any thing of value by Retailer in connection with the sale of any of the products in Schedule A; (b) the offering or making of any concession in connection with any such sale; or (c) the sale or offering for sale of any of the products in combination with any other merchandise, shall constitute a breach by Retailer of this agreement.
6. Rubbermaid will employ all reasonable means, including legal proceedings where warranted, to obtain and enforce observance by competitors of Retailer of the minimum retail selling prices established by this agreement.
7. This agreement shall apply to sales, offers or advertisements only when and where agreements of the character of this agreement shall be lawful as applied to intrastate transactions under a statute, law or public policy now or hereafter in effect in the state in which such sale is to be made or to which the products are to be transported for sale.
8. Rubbermaid agrees to provide the Retailer, either directly or through an Authorized Wholesaler, with selling aids such as newspaper mats, in-store point of sale display material and cooperation of the Rubbermaid representative in the interest of promoting the Retailer's full sales potential of Rubbermaid products.
9. Retailer agrees to cooperate with Rubbermaid to develop the full potential sales by the following: (a) maintaining an adequate inventory of the complete line of Rubbermaid products consistent with the sales potential of Retailer; (b) displaying Rubbermaid profitably and attractively in a high traffic location in the store.
10. Retailer agrees not to sell, consign or transfer any of the products listed on Schedule A to any person known by Retailer to be engaged in a resale business and located in a state permitting Fair Trade Agreements, including any wholesaler, distributor, dealer, retailer or jobber, unless (i) such person has previously signed and delivered to Rubbermaid a Rubbermaid Authorized Retailer or Wholesaler Agreement, and said agreement is in full force and effect; or (ii) unless prior to any sale, consignment or transfer of such products by Retailer, such other person executes and furnishes to Retailer such an agreement and the same has been forwarded to Rubbermaid. Prior to any sale, consignment or transfer of such products to any such person, it shall be the burden of Retailer to verify that such person has theretofore entered into an agreement similar to this agreement, or to obtain such an agreement from such a person and to forward the same to Rubbermaid.
11. This agreement may be terminated by either party on ten (10) days' written notice to the other, but such termination shall not affect the obligations of Rubbermaid or Retailer arising from any other contract made by Rubbermaid pursuant to an applicable Fair Trade Act.
12. In the event this agreement is terminated by either party, Rubbermaid shall, at its option, have the right at any time within two (2) weeks from the giving or receipt of notice of termination to purchase from Retailer at Retailer's invoice cost, Retailer's entire inventory of Rubbermaid products then listed on Schedule A.

I certify that I have read paragraphs numbered 1 through 12 above and paragraph 13 along with Schedule A on the reverse side hereof and agree to the terms therein.

 Company
 By: _____

 Title

By: 
 C. R. SNYDER
 VICE PRESIDENT, MARKETING



WOOSTER, OHIO

Complaint

13. This agreement shall become effective upon the signing by Retailer and the signing by Rubbermaid on the reverse side hereof by duly authorized representative. This agreement shall constitute the entire agreement between the parties and any verbal statements, representations or agreements made prior to or contemporaneously with the execution of this agreement which vary, amend or modify its terms, are void. This agreement shall become effective only upon its receipt by Rubbermaid at Wooster, Ohio, properly executed by both parties. The execution by Rubbermaid may be by facsimile signature.

REVISED EFFECTIVE JANUARY 1, 1970
schedule A TO RUBBERMAID AUTHORIZED
 FAIR TRADE AGREEMENT

RUBBERMAID INCORPORATED
Minimum Retail Selling Price

The products listed below shall be sold at not less than the fair trade list price set opposite the product number. Please refer to the latest illustrated RUBBERMAID Housewares Catalog - Price List for more complete product descriptions.

Unless otherwise prohibited by law, a bona fide cash discount may be given in an amount not exceeding three per cent (3%) of the minimum retail selling price only under the following terms and conditions:

1. The discount must be in the form of cash, trading stamps, coupons, cash register receipts or analogous form.
2. The discount must be given as a matter of the Retailer's general policy and not on RUBBERMAID products alone.
3. RUBBERMAID products must continue to be advertised and offered for sale at the minimum retail price as set out in this Schedule A.
4. The discount shall not be given solely for the purpose of selling trademarked RUBBERMAID products below the established minimum retail price.

Any sale of RUBBERMAID trademarked products sold at less than the established minimum retail price in violation of the above terms and conditions shall be considered a violation of RUBBERMAID'S retail fair trade agreement.

MINIMUM RETAIL SELLING PRICE

Item No.	Description	Retail Each	Item No.	Description	Retail Each	Item No.	Description	Retail Each
1131	Drainboard Mat	.98	2308	Slide-Out Storage Drawer	3.98	2935	"Busy Susan" Turntable	2.79
1133	Drainboard Mat	1.29	2309	Slide-Out Storage Drawer	4.29	2936	Single Turntable	.98
1141	Drainboard Mat	1.49	2310	Slide-Out Storage Drawer	4.69	2937	Twin Turntable	1.98
1142	Drainboard Mat	1.79	2311	Slide-Out Storage Drawer	4.98	2938	Cup 'n Plate Carousel	1.98
1161	Decorator Drainer Tray	3.98	2312	Slide-Out Vegetable Drawer	4.98	2939	Tissue Dispenser	1.79
1180	Drainer Tray	1.79	2313	Slide-Out Lid Rack	4.98	2940	Vanity Wastebasket	.98
1181	Drainer Tray	1.98	2314	Storage Drawer Stacking Kit	1.98	2948	Sink Basin	.98
1190	Drainer Tray	2.49	2350	Spacemaker Drawer	5.95	2950	Dishpan	1.79
1191	Drainer Tray	2.98	2351	Spacemaker Bread Drawer	6.95	2951	Dishpan	1.79
1211	Sink Liner Mat	1.98	2352	Towel & Wrap Dispenser	7.95	2952	Vanity Wastebasket	.98
1290	Sink Mat	.98	2353	Spacemaker Cabinet	7.95	2959	Vanity Wastebasket	1.79
1291	Sink Mat	1.49	2354	Spacemaker Canister	4.95	2960	Sponge Mop Bucket	2.29
1292	Sink Mat	1.98	2355	Spacemaker Canister Set	10.95	2963	Neat 'n Tidy Bucket	1.98
1294	Sink Divider Mat	.98	2501	Pet Feeding Dish	.98	2965	Laundry Basket	2.98
1297	Sink Divider Mat	1.49	2830	Round Wastebasket	2.98	2967	Laundry Basket	3.98
1303	Protector Mat	.98	2834	Spin-A-Bin	5.95	2969	Storage Bin	1.98
1305	Protector Mat	1.49	2837	Mini-Bin	4.95	2970	Dishpan	1.98
1314	Solid Stove Mat	.98	2844	Canister Carousel	10.95	2975	Covered Container	4.49
1315	Solid Stove Mat	1.29	2845	Wastebasket	1.98	5817	Sink Strainer	.59
1321	Stove 'n Counter Mat	1.98	2846	Wastebasket	2.98	6008	Dish Drainer	2.49
1322	Stove 'n Counter Mat	2.98	2856	Vanity Cabinet	9.95	6032	Deluxe Dish Drainer	2.98
1415	Treecasy Floor Mat	4.95	2857	Tool Caddy	2.98	6049	Twin Sink Dish Drainer	1.59
1416	Treecasy Floor Mat	5.95	2859	Small Parts Caddy	2.98	6050	Dish Drainer	1.98
1603	Shelf Liner 12 ft. roll	.98	2862	Ice Cube Bin	1.49	6051	Dish Drainer	2.98
1604	Shelf Liner 25 ft. roll	1.98	2864	Self-Closing Wastebasket	3.98	6072	Deluxe Dish Drainer	3.98
1613	Shelf Liner 6 ft. roll	.98	2865	Ice Cube Tray	.79	6103	Sink Rack	1.79
1614	Shelf Liner 12 1/2 ft. roll	1.98	2875	Diaper Pail	3.98	6104	Sink Rack	1.98
1635	Wall Cab. Shelf-Kushion yd.	.79	2882	Refuse Container	8.95	6203	Plate Rack	1.98
1644	Base Cab. Shelf-Kushion yd.	1.49	2909	Extra Silverware Cup	.59	6211	Dinnerware Rack	3.98
1901	Spatula	.29	2915	Instant Drawer Organizer	.39	7035	Safty-Grip Bathtub Mat	1.49
1903	Deluxe Bottle & Jar Scraper	.35	2916	Instant Drawer Organizer	.49	7038	Safty-Grip Bathtub Mat	1.98
1904	Deluxe Plate & Bowl Spatula	.39	2917	Instant Drawer Organizer	.49	7041	Safty-Grip Bathtub Mat	2.98
1915	Toilet Bowl Brush	1.49	2918	Instant Drawer Organizer	.79	7043	Safty-Grip Bathtub Mat	3.98
2001	Dust Pan	1.49	2921	Cutlery Tray	.98	7085	Bathtub Appliques	1.98
2003	Dust Pan	.98	2922	Cutlery Tray	1.49	7090	Bathtub Appliques	2.98
2102	Sink Stopper	.29	2923	Drawer Divider	1.98	7112	Safty-Grip Shower Mat	3.49
2206	Soup Dish	.29	2931	Colander	.98	7202	Toilet Top Tray	1.49
2300	Turntable	2.98	2933	Vanity Wastebasket	1.79	8719	Deluxe Toilet Bowl Brush Set	2.98
2301	Storage Turntable	3.98	2934	"Cool Susan" Turntable	2.29	8818	Instant Drawer Organizer Asst.	36.48
2302	Storage Turntable	4.98						

RETAILER COPY

VIRGINIA

AUTHORIZED RETAILER

Rubbermaid Authorized Retailer Fair Trade Agreement

No. _____

AGREEMENT made at Wooster, Ohio, this _____ day of _____, 19____, by and between RUBBERMAID INCORPORATED, an Ohio Corporation with its principal offices at Wooster, Ohio, hereinafter referred to as "Rubbermaid," and _____

of _____ PLEASE PRINT _____ VIRGINIA STREET ADDRESS CITY COUNTY STATE

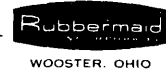
hereinafter referred to as "Retailer."

- 1. In consideration of the mutual obligations and covenants herein contained, Rubbermaid hereby appoints Retailer an Authorized Rubbermaid Housewares Retailer. 2. Rubbermaid products now or hereafter made subject to this agreement are and will be distributed under Rubbermaid's trademark, brand or name in free and open competition with commodities of the same general class produced or distributed by others. 3. Retailer agrees (except as specifically permitted by statute) not to advertise, offer for sale, or sell the products listed in Schedule A hereto attached or in said Schedule A as it may from time to time be amended at less than the minimum retail selling price stipulated on such Schedule for such a sale. 4. Rubbermaid by written notice to Retailer may from time to time as of a date specified in said notice, amend Schedule A so as to (a) eliminate one or more products; (b) add one or more products and stipulate minimum retail selling prices therefor; or (c) change the minimum retail selling price of one or more products. Such notice may take the form of a revised Schedule A which specifies its effective date. 5. Except as authorized by Schedule A or any amendment thereof: (a) the offering or giving of any thing of value by Retailer in connection with the sale of any of the products in Schedule A; (b) the offering or making of any concession in connection with any such sale; or (c) the sale or offering for sale of any of the products in combination with any other merchandise, shall constitute a breach by Retailer of this agreement. 6. Rubbermaid will employ all reasonable means, including legal proceedings where warranted, to obtain and enforce observance by competitors of Retailer of the minimum retail selling prices established by this agreement. 7. This agreement shall apply to sales, offers or advertisements only when and where agreements of the character of this agreement shall be lawful as applied to intrastate transactions under a statute, law or public policy now or hereafter in effect in the state in which such sale is to be made or to which the products are to be transported for sale. 8. Rubbermaid agrees to provide the Retailer, either directly or through an Authorized Wholesaler, with selling aids such as newspaper mats, in-store point of sale display material and cooperation of the Rubbermaid representative in the interest of promoting the Retailer's full sales potential of Rubbermaid products. 9. Retailer agrees to cooperate with Rubbermaid to develop the full potential sales by the following: (a) maintaining an adequate inventory of the complete line of Rubbermaid products consistent with the sales potential of Retailer; (b) displaying Rubbermaid profitably and attractively in a high traffic location in the store. 10. (a) Retailer agrees not to sell, consign or transfer any of the products listed on Schedule A to any person known by Retailer to be engaged in a resale business and located in a state permitting Fair Trade Agreements, including any wholesaler, distributor, dealer, retailer or jobber, unless (i) such person has previously signed and delivered to Rubbermaid a Rubbermaid Authorized Retailer or Wholesaler Agreement, and said agreement is in full force and effect; or (ii) unless prior to any sale, consignment or transfer of such products by Retailer, such other person executes and furnishes to Retailer such an agreement and the same has been forwarded to Rubbermaid. Prior to any sale, consignment or transfer of such products to any such person, it shall be the burden of Retailer to verify that such person has theretofore entered into an agreement similar to this agreement, or to obtain such an agreement from such person and to forward the same to Rubbermaid. (b) Rubbermaid agrees not to sell, consign or transfer the products listed on Schedule A to any Wholesaler located in the State of Virginia, unless such Wholesaler will agree not to resell the same to any Retailer unless the Retailer will in turn agree not to resell the same except at the stipulated minimum price; or to any Retailer unless the Retailer will agree not to resell the same except at the stipulated minimum price. 11. This agreement may be terminated by either party on ten (10) days' written notice to the other, but such termination shall not affect the obligations of Rubbermaid or Retailer arising from any other contract made by Rubbermaid pursuant to an applicable Fair Trade Act. 12. In the event this agreement is terminated by either party, Rubbermaid shall, at its option, have the right at any time within two (2) weeks from the giving or receipt of notice of termination to purchase from Retailer at Retailer's invoice cost, Retailer's entire inventory of Rubbermaid products then listed on Schedule A. 13. This agreement shall become effective upon the signing by Retailer and the signing by Rubbermaid by duly authorized representative. This agreement shall constitute the entire agreement between the parties and any verbal statements, representations or agreements made prior to or contemporaneously with the execution of this agreement which vary, amend or modify its terms, are void. This agreement shall become effective only upon its receipt by Rubbermaid at Wooster, Ohio, properly executed by both parties. The execution by Rubbermaid may be by facsimile signature.

I certify that I have read paragraphs numbered 1 through 13 above, along with Schedule A on the reverse side hereof, and agree to the terms therein.

COMPANY
By: _____

By: *C. R. Snyder*
C. R. SNYDER
VICE PRESIDENT - MARKETING



REVISED
schedule A

RUBBERMAID INCORPORATED
Minimum Retail Selling Price

The products listed below shall be sold at not less than the fair trade list price set opposite the product number. Please refer to the latest illustrated RUBBERMAID Housewares Catalog - Price List for more complete product descriptions.

Unless otherwise prohibited by law, a bona fide cash discount may be given in an amount not exceeding three per cent (3%) of the minimum retail selling price only under the following terms and conditions:

1. The discount must be in the form of cash, trading stamps, coupons, cash register receipts or analogous form.
2. The discount must be given as a matter of the Retailer's general policy and not on RUBBERMAID products alone.
3. RUBBERMAID products must continue to be advertised and offered for sale at the minimum retail price as set out in this Schedule A.
4. The discount shall not be given solely for the purpose of selling trademarked RUBBERMAID products below the established minimum retail price.

Any sale of RUBBERMAID trademarked products sold at less than the established minimum retail price in violation of the above terms and conditions shall be considered a violation of RUBBERMAID'S retail fair trade agreement.

MINIMUM RETAIL SELLING PRICE

Item No.	Description	Retail Each	Item No.	Description	Retail Each	Item No.	Description	Retail Each
1131	Drainboard Mat	.79	2303	Turntable Bin	1.98	2935	"Busy Susan" Turntable	2.49
1133	Drainboard Mat	.98	2308	Slide-Out Storage Drawer	3.98	2936	Single Turntable	1.98
1141	Drainboard Mat	1.29	2309	Slide-Out Storage Drawer	4.29	2937	Twin Turntable	1.98
1142	Drainboard Mat	1.79	2310	Slide-Out Storage Drawer	4.69	2938	Cup'n Plate Carousel	1.98
1152	Drainer Tray	3.98	2311	Slide-Out Storage Drawer	4.98	2939	Tissue Dispenser	1.49
1160	Drainer Tray	1.79	2312	Slide-Out Vegetable Drawer	4.98	2940	Vanity Wastebasket	.98
1161	Drainer Tray	1.98	2313	Slide-Out Lid Rack	4.98	2948	Sink Basin	.79
1190	Drainer Tray	2.49	2314	Storage Drawer Stacking Kit	1.98	2950	Dishpan	1.99
1191	Drainer Tray	2.98	2350	Spacemaker Drawer	4.98	2951	Dishpan	1.99
1211	Sink Liner Mat	1.79	2351	Spacemaker Bread Drawer	5.95	2952	Vanity Wastebasket	.98
1290	Sink Mat	.89	2352	Towel & Wrap Dispenser	7.95	2959	Vanity Wastebasket	1.49
1291	Sink Mat	1.29	2501	Pet Feeding Dish	.79	2960	Sponge Mop Bucket	1.98
1292	Sink Mat	1.79	2830	Round Wastebasket	2.79	2963	Neat'n Tidy Bucket	1.99
1294	Sink Divider Mat	.89	2834	Spin-A-Bin	4.98	2966	Laundry Basket	2.98
1297	Sink Divider Mat	1.29	2837	Mini-Bin	3.98	2967	Laundry Basket	3.98
1303	Protector Mat	.79	2844	Canister Carousel	9.85	2969	Storage Bin	1.98
1305	Protector Mat	1.29	2845	Wastebasket	1.98	2970	Dishpan	1.98
1314	Solid Stove Mat	.79	2846	Wastebasket	2.98	2975	Covered Container	3.98
1315	Solid Stove Mat	.98	2854	Covered Wastebasket	3.98	5104	Kneeling Pad	.89
1321	Stove'n Counter Mat	1.49	2856	Vanity Cabinet	9.95	5817	Sink Strainer	.49
1322	Stove'n Counter Mat	2.49	2857	Tool Caddy	3.98	6008	Dish Drainer	2.39
1400	Boat Tray	2.98	2858	Small Parts Caddy	4.98	6021	Dish Drainer	1.59
1407	Door Mat	2.98	2859	Small Parts Caddy	3.98	6032	Deluxe Dish Drainer	2.98
1415	Trackway Floor Mat	3.98	2903	Ice Cube Bin	1.49	6050	Dish Drainer	1.98
1416	Trackway Floor Mat	4.98	2905	Ice Cube Tray	.79	6072	Deluxe Dish Drainer	3.98
1604	Shelf Liner 25 ft. roll	1.98	2872	Covered Container	2.98	6103	Sink Rack	1.59
1614	Shelf Liner 12 ft. roll	1.98	2875	Diaper Pail	3.98	6104	Sink Rack	1.89
1635	Wall Cab. Shelf-Kushion yd.	.79	2882	Refuse Container	7.95	6203	Plate Rack	1.98
1644	Base Cab. Shelf-Kushion yd.	1.49	2909	Extra Silverware Cup	.49	6211	Dinnerware Rack	3.98
1901	Spatula	.25	2915	Instant Drawer Organizer	.39	7035	Safty-Grip Bathtub Mat	1.29
1903	Deluxe Bottle & Jar Scraper	.29	2916	Instant Drawer Organizer	.49	7038	Safty-Grip Bathtub Mat	1.98
1904	Deluxe Plate & Bowl Spatula	.39	2917	Instant Drawer Organizer	.49	7041	Safty-Grip Bathtub Mat	2.98
1915	Toilet Bowl Brush	1.49	2918	Silverware Drainer	.98	7043	Safty-Grip Bathtub Mat	3.98
2001	Dust Pan	1.49	2921	Gallery Tray	.98	7112	Safty-Grip Shower Mat	2.98
2003	Dust Pan	.98	2922	Gallery Tray	1.49	7202	Toilet Top Tray	1.29
2102	Sink Stopper	.25	2923	Drawer Divider	1.98	8700	Cabinet Organizer Set	5.95
2206	Soap Dish	.25	2925	Drawer Divider	1.59	8718	Toilet Bowl Brush Set	1.98
2300	Turntable	2.98	2931	Caddy	.79	8719	Deluxe Toilet Bowl Brush Set	2.98
2301	Storage Turntable	3.98	2933	Vanity Wastebasket	1.49	8815	Instant Drawer Organizer Asst.	32.88
2302	Storage Turntable	4.98	2934	"Casal Susan" Turntable	1.98			

Complaint

87 F.T.C.

RUBBERMAID COPY

AUTHORIZED WHOLESALER

Rubbermaid Authorized Wholesaler Fair Trade Agreement

NO. _____

AGREEMENT made at Wooster, Ohio, this _____ day of _____, 19____, by and between RUBBERMAID INCORPORATED, an Ohio Corporation with its principal offices at Wooster, Ohio, hereinafter referred to as "Rubbermaid," and _____

Please Print

of _____
 Street Address City County State

hereinafter referred to as "Wholesaler."

1. In consideration of the mutual obligations and covenants herein contained, Rubbermaid hereby appoints Wholesaler an Authorized Rubbermaid Housewares Wholesaler.

2. Rubbermaid products now or hereafter made subject to this agreement are and will be distributed under Rubbermaid's trademark, brand or name in free and open competition with commodities of the same general class produced or distributed by others.

3. Rubbermaid agrees to provide the Wholesaler with selling aids and the co-operation of the Rubbermaid representative in the interest of promoting the Wholesaler's full sales potential of Rubbermaid products.

4. Wholesaler agrees to cooperate with Rubbermaid to develop the full potential sales by (a) maintaining an adequate inventory of the complete line of Rubbermaid products consistent with the sales demand of Rubbermaid Authorized Retailers; (b) remitting to Rubbermaid in accordance with invoice terms on all purchases; (c) cooperating fully with Rubbermaid representatives in connection with sales meetings, instruction and training of salesmen and the promotion, timing and sale of seasonal products.

5. (a) Wholesaler agrees not to sell, consign or transfer any of the products listed on Schedule A to any person located in a state permitting Fair Trade Agreements and intending to sell or resell the same, including any wholesaler, distributor, dealer, retailer or jobber unless (i) such person has previously signed and delivered to Rubbermaid either an agreement similar to this agreement of the Rubbermaid Retailer Agreement, and said agreement is in full force and effect; or (ii) unless prior to any sale, consignment or transfer of such products by Wholesaler, such other person executes and furnishes to Wholesaler either an agreement similar to this agreement or a Rubbermaid Retailer Agreement and the same has been forwarded to Rubbermaid. Prior to any sale, consignment or transfer of such products to any such person, it shall be the burden of Wholesaler to verify

that such person has theretofore entered into an agreement similar to this agreement, or a Rubbermaid Retailer Agreement, or to obtain such an agreement from such person and to forward the same to Rubbermaid.

5. (b) Wholesaler located in non-fair trade jurisdiction. If Wholesaler is located in a state or other jurisdiction which does not authorize the resale price and fair trade provisions contained in the Rubbermaid Retailer Agreement, as to intrastate transactions therein, Wholesaler agrees only that he will observe the condition of the preceding subparagraph 5 (a) with respect to any sale, consignment or transfer of the products listed on Schedule A to any person who (i) intends to sell or resell the same and (ii) is located in a state in which such resale price and fair trade provisions are lawful as to intrastate transactions, and to which state said products are to be transported for sale.

6. This agreement may be terminated by either party on written notice to the other, but such termination shall not affect the obligations of Rubbermaid or Wholesaler arising from any other contract made by Rubbermaid pursuant to an applicable Fair Trade Act.

7. In the event this agreement is terminated by either party, Rubbermaid shall have, at its option, the right at any time upon the giving or receipt of notice of termination or within two (2) weeks thereof to purchase from Wholesaler at Wholesaler's invoice cost, the entire inventory of Rubbermaid products then listed on Schedule A.

8. This agreement shall become effective upon the signing by Wholesaler and Rubbermaid and upon its receipt by Rubbermaid at Wooster, Ohio, properly executed by both parties. The execution by Rubbermaid may be by facsimile signature. This agreement shall constitute the entire agreement between the parties and any verbal statements, representations or agreements made prior to or contemporaneously with the execution of this agreement which vary, amend or modify its terms are void.

I certify that I have read paragraphs 1 through 8 above along with Revised Schedule A on the reverse side hereof and agree to the terms therein.

 Company
 By: _____

 Title



WOOSTER, OHIO

By:

C. R. SNYDER
 VICE-PRESIDENT, MARKETING
 HOUSEWARE DIVISION

REVISED
schedule A

EFFECTIVE JANUARY 1, 1969
TO RUBBERMAID AUTHORIZED
FAIR TRADE AGREEMENT

RUBBERMAID INCORPORATED Minimum Retail Selling Price

The products listed below shall be sold at not less than the fair trade list price set opposite the product number. Please refer to the latest illustrated RUBBERMAID Housewares Catalog - Price List for more complete product descriptions.

Unless otherwise prohibited by law, a bona fide cash discount may be given in an amount not exceeding three per cent (3%) of the minimum retail selling price only under the following terms and conditions:

1. The discount must be in the form of cash, trading stamps, coupons, cash register receipts or analogous form.
2. The discount must be given as a matter of the Retailer's general policy and not on RUBBERMAID products alone.
3. RUBBERMAID products must continue to be advertised and offered for sale at the minimum retail price as set out in this Schedule A.
4. The discount shall not be given solely for the purpose of selling trademarked RUBBERMAID products below the established minimum retail price.

Any sale of RUBBERMAID trademarked products sold at less than the established minimum retail price in violation of the above terms and conditions shall be considered a violation of RUBBERMAID'S retail fair trade agreement.

MINIMUM RETAIL SELLING PRICE

Item No.	Description	Retail Each	Item No.	Description	Retail Each	Item No.	Description	Retail Each
1131	Drainboard Mat	.98	2301	Storage Turntable	3.98	2934	"Cool Susan" Turntable	1.98
1133	Drainboard Mat	1.29	2302	Storage Turntable	4.98	2935	"Busy Susan" Turntable	2.49
1141	Drainboard Mat	1.29	2303	Turntable Bin	1.98	2936	Single Turntable	.98
1142	Drainboard Mat	1.79	2308	Slide-Out Storage Drawer	3.98	2937	Twin Turntable	1.98
1180	Drainer Tray	1.79	2309	Slide-Out Storage Drawer	4.29	2938	Cup'n Plate Carousel	1.98
1181	Drainer Tray	1.98	2310	Slide-Out Storage Drawer	4.69	2939	Tissue Dispenser	1.79
1190	Drainer Tray	2.49	2311	Slide-Out Storage Drawer	4.98	2940	Vanity Wastebasket	.98
1191	Drainer Tray	2.98	2312	Slide-Out Vegetable Drawer	4.98	2948	Sink Basin	.98
1211	Sink Liner Mat	1.98	2313	Slide-Out Lid Rack	1.98	2950	Dishpan	1.89
1290	Sink Mat	.98	2314	Storage Drawer Stacking Kit	1.98	2951	Dishpan	1.89
1291	Sink Mat	.98	2350	Spacemaker Drawer	5.95	2952	Vanity Wastebasket	.98
1292	Sink Mat	1.79	2351	Spacemaker Bread Drawer	6.95	2959	Vanity Wastebasket	1.49
1294	Sink Divider Mat	.98	2352	Towel & Wrap Dispenser	7.95	2960	Sponge Mop Bucket	1.98
1297	Sink Divider Mat	1.29	2353	Spacemaker Cabinet	7.95	2963	Neat'n Tidy Bucket	1.69
1303	Protector Mat	.98	2354	Spacemaker Canister	4.95	2965	Laundry Basket	2.98
1305	Protector Mat	1.29	2355	Spacemaker Canister Set	10.95	2967	Laundry Basket	3.98
1314	Solid Stove Mat	.98	2501	Pet Feeding Dish	.98	2969	Storage Bin	1.98
1315	Solid Stove Mat	1.29	2830	Round Wastebasket	2.98	2970	Dishpan	1.98
1321	Stove'n Counter Mat	1.98	2834	Spin-A-Bin	4.98	2975	Covered Container	4.49
1322	Stove'n Counter Mat	2.98	2837	Mini-Bin	3.98	5817	Sink Strainer	.49
1415	Tredcasy Floor Mat	3.98	2844	Canister Carousel	9.95	6008	Dish Drainer	2.49
1416	Tredcasy Floor Mat	4.98	2845	Wastebasket	1.98	6032	Deluxe Dish Drainer	2.98
1603	Shelf Liner 12 ft. roll	.98	2846	Wastebasket	2.98	6049	Twin Sink Dish Drainer	1.59
1604	Shelf Liner 25 ft. roll	1.98	2858	Vanity Cabinet	9.95	6050	Dish Drainer	1.98
1613	Shelf Liner 6 ft. roll	.98	2857	Tool Caddy	2.98	6051	Dish Drainer	2.98
1614	Shelf Liner 12 1/2 ft. roll	1.98	2858	Small Parts Caddy	3.98	6072	Deluxe Dish Drainer	3.98
1635	Wall Cab. Shelf-Kushion yd.	.79	2859	Small Parts Caddy	2.98	6103	Sink Rack	1.79
1644	Base Cab. Shelf-Kushion yd.	1.49	2862	Ice Cube Bin	1.49	6104	Sink Rack	1.98
1830	Interior Decorator Throw Rug	5.95	2865	Ice Cube Tray	.79	8203	Plate Rack	1.98
1831	Interior Decorator Throw Rug	8.95	2875	Diaper Pail	3.98	8211	Dinnerware Rack	3.98
1840	Interior Decorator Throw Rug	6.95	2882	Refuse Container	7.95	7035	Safty-Grip Bathtub Mat	1.29
1841	Interior Decorator Throw Rug	9.95	2909	Extra Silverware Cup	.49	7038	Safty-Grip Bathtub Mat	1.98
1901	Spatula	.29	2915	Instant Drawer Organizer	.39	7041	Safty-Grip Bathtub Mat	2.98
1903	Deluxe Bottle & Jar Scraper	.35	2916	Instant Drawer Organizer	.49	7043	Safty-Grip Bathtub Mat	3.98
1904	Deluxe Plate & Bowl Spatula	.39	2917	Instant Drawer Organizer	.49	7090	Bathtub Appliques	2.98
1915	Toilet Bowl Brush	1.49	2921	Cutlery Tray	.98	7112	Safty-Grip Shower Mat	2.98
2001	Dust Pan	1.49	2922	Cutlery Tray	1.49	7202	Toilet Top Tray	1.49
2003	Dust Pan	.98	2923	Drawer Divider	1.98	8700	Cabinet Organizer Set	5.95
2102	Sink Stopper	.29	2931	Colander	.98	8719	Deluxe Toilet Bowl Brush Set	2.98
2206	Soap Dish	.29	2933	Vanity Wastebasket	1.79	8815	Instant Drawer Organizer Asst.	32.88
2300	Turntable	2.98						

Complaint

87 F.T.C.

Rubbermaid Copy

V I R G I N I A
 ADDENDUM TO RUBBERMAID AUTHORIZED
 WHOLESALER FAIR TRADE AGREEMENT

THIS AGREEMENT shall constitute an addendum to the Rubbermaid Authorized Wholesaler Fair Trade Agreement executed by and between the parties hereto as of this _____ day of _____, 19____. In consideration of the mutual promises, covenants and conditions contained therein, and in order that said agreement meet the requirements of Section 59-8.3 of the Code of Virginia, paragraph 5 of said agreement is amended as follows:

5) (c) Rubbermaid agrees not to sell, consign or transfer the products listed on Schedule A to any Wholesaler located in the State of Virginia, unless such Wholesaler will agree not to resell the same to any Retailer unless the Retailer will in turn agree not to resell the same except at the stipulated minimum price; or to any Retailer unless the Retailer will agree not to resell the same except at the stipulated minimum price.

Signed as of this _____ day of _____, 19____.

RUBBERMAID INCORPORATED

By: C. R. Snyder
 C. R. SNYDER
 Vice President, Marketing
 Houseware Division

 Company

By: _____

 Title

REVISED
schedule A

EFFECTIVE JANUARY 1, 1997
TO RUBBERMAID AUTHORIZED
FAIR TRADE AGREEMENT

RUBBERMAID INCORPORATED

The Minimum Retail Fair Trade Price for each product listed on this Schedule is the price established by Rubbermaid Incorporated and affixed to each product. Please consult the most recent Rubbermaid housewares catalog pages for product descriptions and amendments to this Schedule.

Unless otherwise prohibited by law, a bona fide cash discount may be given in an amount not exceeding three per cent (3%) of the minimum retail selling price only under the following terms and conditions:

1. The discount must be in the form of cash, trading stamps, coupons, cash register receipts or analogous form.
2. The discount must be given as a matter of the Retailer's general policy and not on RUBBERMAID products alone.
3. RUBBERMAID products must continue to be advertised and offered for sale at the minimum retail price as set out in this Schedule A.
4. The discount shall not be given solely for the purpose of selling trademarked RUBBERMAID products below the established minimum retail price.

Any sale of RUBBERMAID trademarked products sold at less than the established minimum retail price in violation of the above terms and conditions shall be considered a violation of RUBBERMAID'S retail fair trade agreement.

FAIR TRADED PRODUCTS

Item No.	Description	Item No.	Description	Item No.	Description
1120	Drainboard Mat	2350	Spacemaker Drawer	2967	Laundry Basket
1121	Drainboard Mat	2351	Spacemaker Bread Drawer	2969	Storage Bin
1161	Decorator Drainer Tray	2352	Towel & Wrap Dispenser	2970	Dishpan
1180	Drainer Tray	2353	Spacemaker Cabinet	2975	Covered Container
1181	Drainer Tray	2354	Spacemaker Canister	3030	Food Keeper - 1 Pt.
1190	Drainer Tray	2355	Spacemaker Canister Set	3031	Food Keeper - 1 Qt.
1191	Drainer Tray	2501	Pet Feeding Dish	3032	Food Keeper - 2 Qt.
1211	Sink Liner Mat	2830	Round Wastebasket	3034	Food Keeper - 4 Qt.
1290	Sink Mat	2834	Spin-A-Bin	3036	Food Keeper - 6 Qt.
1291	Sink Mat	2837	Mini-Bin	3042	Food Keeper - 2 Cup
1292	Sink Mat	2844	Canister Carousel	3044	Food Keeper - 4 Cup
1294	Sink Divider Mat	2845	Wastebasket	3046	Food Keeper - 6 Cup
1297	Sink Divider Mat	2846	Wastebasket	3048	Food Keeper - 8 Cup
1311	Protector Mat	2856	Vanity Cabinet	3052	Food Keeper - 12 Cup
1312	Protector Mat	2857	Tool Caddy	3054	Salad Keeper
1321	Stove'n Counter Mat	2859	Small Parts Caddy	3060	Bowl - 14 Oz.
1322	Stove'n Counter Mat	2862	Ice Cube Bin	3062	Covered Pitcher - 2 1/4 Qt.
1415	Tredeasy Floor Mat	2864	Self-Closing Wastebasket	3064	8 oz. Tumbler
1416	Tredeasy Floor Mat	2865	Ice Cube Tray	3066	14 oz. Tumbler
1603	Shelf Liner . . . 12 ft. roll	2875	Diaper Pail	5917	Sink Strainer
1604	Shelf Liner . . . 25 ft. roll	2882	Refuse Container	6008	Dish Drainer
1613	Shelf Liner . . . 6 ft. roll	2909	Extra Silverware Cup	6032	Deluxe Dish Drainer
1614	Shelf Liner . . . 12 1/2 ft. roll	2915	Instant Drawer Organizer	6049	Twin Sink Dish Drainer
1635	Wall Cab. Shelf-Kushion . . . yd.	2916	Instant Drawer Organizer	6050	Dish Drainer
1644	Base Cab. Shelf-Kushion . . . yd.	2917	Instant Drawer Organizer	6051	Dish Drainer
1901	Spatula	2918	Instant Drawer Organizer	6203	Plate Rack
1903	Deluxe Bottle & Jar Scraper	2921	Cutlery Tray	6211	Dinnerware Rack
1904	Deluxe Plate & Bowl Spatula	2922	Cutlery Tray	7035	Safty-Grip Bathtub Mat
1915	Toilet Bowl Brush	2923	Drawer Divider	7038	Safty-Grip Bathtub Mat
2001	Dust Pan	2931	Colander	7041	Safty-Grip Bathtub Mat
2003	Dust Pan	2933	Vanity Wastebasket	7043	Safty-Grip Bathtub Mat
2102	Sink Stopper	2934	"Cool Susan" Turntable	7075	Bathtub Appliques
2206	Soap Dish	2935	"Busy Susan" Turntable	7085	Bathtub Appliques
2300	Turntable	2936	Single Turntable	7090	Bathtub Appliques
2301	Storage Turntable	2937	Twin Turntable	7112	Safty-Grip Shower Mat
2302	Storage Turntable	2938	Cup 'n Plate Carousel	7202	Toilet Top Tray
2308	Slide-Out Storage Drawer	2939	Tissue Dispenser	8301	3-Bowl Food Keeper Set
2309	Slide-Out Storage Drawer	2940	Vanity Wastebasket	8302	3-Bowl Food Keeper Set
2310	Slide-Out Storage Drawer	2948	Sink Basin	8303	5-Bowl Food Keeper Set
2311	Slide-Out Storage Drawer	2950	Dishpan	8310	Mixing Bowl Set
2312	Slide-Out Vegetable Drawer	2951	Dishpan	8320	4-Bowl Salad Set
2313	Slide-Out Lid Rack	2952	Vanity Wastebasket	8321	Deluxe Salad Serving Set
2314	Storage Drawer Stacking Kit	2959	Vanity Wastebasket	8719	Deluxe Toilet Bowl Brush Set
2320	Clean-Up Caddy	2960	Sponge Mop Bucket	8818	Instant Drawer Organizer Asst.
2321	Wrap & Bag Organizer	2963	Neat 'n Tidy Bucket		
2322	Grocery Bag Holder	2965	Laundry Basket		

Initial Decision

87 F.T.R.

INITIAL DECISION BY ANDREW C. GOODHOPE, ADMINISTRATIVE
LAW JUDGE

DECEMBER 16, 1974

STATEMENT OF THE CASE

[1] On September 5, 1973, the Commission issued its complaint charging respondent with two violations of Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), as set out in Counts I and II by reason of its fair trade contracts with its wholesalers and retailers.

[2] On October 16, 1973, respondent filed its answer to the complaint. With respect to Count I, Rubbermaid admitted the factual allegations but denied that its wholesaler fair trade contracts are not within the protection of the McGuire Act. As to Count II, Rubbermaid also admitted the factual allegations in substantial part but likewise denied that the challenged use of its wholesaler fair trade contracts is not protected by the McGuire Act.

Certain stipulations were thereafter entered into by counsel in support of the complaint and counsel for respondent which have been incorporated into the record as Commission Exhibits 1 and 2. Thereafter, counsel in support of the complaint filed a motion for summary decision pursuant to Section 3.24 of the Commission's Rules of Practice and Procedure. Counsel for the respondent likewise filed a motion for summary decision according to the Rules and counsel in support of the complaint filed a reply brief. Oral argument on these motions were held before the administrative law judge on November 14, 1974.

There being no material issue of fact in dispute at this time, it therefore appears appropriate for the entry of an initial decision pursuant to Section 3.24 of the Commission's Rules of Practice and Procedure. The administrative law judge, having considered all of the pleadings in this matter, the stipulations entered into between counsel, the motions for summary decision and replies filed by both parties, makes the following findings of fact.

FINDINGS OF FACT

1. Rubbermaid Incorporated is an Ohio corporation with its principal place of business at 1255 Borman St., Wooster, Ohio. It manufactures rubber, plastic, and coated wire household products which it sells under the trade name "Rubbermaid."

2. Respondent's consolidated net sales during its fiscal year ended December 31, 1970, were in excess of \$69 million, approximately \$40

million of which sales were of respondent's fair traded goods. For its fiscal years ended December 31, 1971, and December 31, 1972, respondent's consolidated net sales were in excess of \$78 million and \$102 million, respectively.

[3] During the years 1969 through 1973, Rubbermaid's sales of fair traded goods to purchasers in fair trade States increased from approximately \$27.5 million to approximately \$43 million. Sales made directly to retailers increased from approximately \$8 million in 1969 to approximately \$9.5 million in 1973, while sales to wholesalers increased from \$19.5 million to \$33.5 million. As these figures show, sales to retailers increased by 18.8 percent from 1969 to 1973, while sales to wholesalers increased 71.8 percent. During the same five years, a number of substantial retailer accounts which formerly purchased directly from Rubbermaid transferred their patronage to wholesalers, while only one previous wholesale customer became a direct retailer account of Rubbermaid. (Stipulation, CX 2, pp. 1-2)

3. Respondent is now and for some time last past has been engaged in the manufacture, advertising, offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of numerous commodities which bear, or the labels or containers of which bear, trademarks, brands and names owned by respondent.

4. In pursuance of its fair trade program, Rubbermaid has entered into retail fair trade contracts with retailers of Rubbermaid fair traded goods wherever such contracts are lawful under State law.¹ These contracts provide that retailers in fair trade States will maintain Rubbermaid's established fair trade prices. A copy of a Rubbermaid retailer fair trade agreement — which Commission counsel agree is entirely lawful under the McGuire Act — is attached to the complaint as Appendix A-1(a).

[4] 5. Rubbermaid also enters into wholesaler fair trade agreements where such agreements are authorized by State law. The Rubbermaid wholesaler fair trade agreements *do not* require a wholesaler to adhere to any schedule of fair trade prices. A wholesaler remains free to sell at whatever price he chooses. A copy of respondent's wholesaler agreement is attached to the complaint as Appendix B-1(a), B-2. The wholesaler agreement provides in paragraph 5(a) that:

Wholesaler agrees not to sell, consign or transfer any of the products listed on Schedule A to any person located in a state permitting Fair Trade Agreements and intending to sell or resell the same, including any wholesaler, distributor, dealer, retailer or jobber unless (i) such person has previously signed and delivered to Rubbermaid either

¹ There are 36 fair trade States and 14 free trade States. The District of Columbia and Puerto Rico are also free trade. (Paragraph One (f), (g), (h) of complaint and Paragraph One of the Answer, CX 1)

an agreement similar to this agreement of the Rubbermaid Retailer Agreement, and said agreement is in full force and effect; or (ii) unless prior to any sale, consignment or transfer of such products by Wholesaler, such other person executes and furnishes to Wholesaler either an agreement similar to this agreement or a Rubbermaid Retailer Agreement and the same has been forwarded to Rubbermaid. Prior to any sale consignment or transfer of such products to any such person, it shall be the burden of Wholesaler to verify that such person has theretofore entered into an agreement similar to this agreement, or a Rubbermaid Retailer Agreement, or to obtain such an agreement from such person and to forward the same to Rubbermaid.

In other words, all wholesalers of Rubbermaid's fair traded products agree to confine their resales to customers in fair trade jurisdictions to those who are parties to fair trade contracts with Rubbermaid.

COUNT I

6. Count I of the complaint presents the issue whether it constitutes unlawful resale price maintenance in violation of Section 5 of the Federal Trade Commission Act for a manufacturer who sells to both wholesalers and retailers to [5] require its wholesalers, with whom the manufacturer competes in selling to retailers, to agree that they will not resell to any retailer who has not signed a resale price maintenance agreement with the manufacturer.² More simply stated the issue is whether competitors (wholesalers) can agree that they will not sell products to any retailers who have not agreed to sell at the prices set by one of the competitors (the respondent manufacturer).

7. The relevant statutes are Section 5(a)(1) of the Federal Trade Commission Act and the amendments to that Act provided by the McGuire Act, 66 Stat. 631-32 (1952), 15 U.S.C. §§ 45(a)(2)-(a)(5).³

[6] 8. There is no dispute about Section 5(a)'s application to horizontal contracts which contain resale price specifications. Nor is it disputed that for purposes of the McGuire Act Rubbermaid is a wholesaler and that Rubbermaid competes with its wholesalers for the business of retail dealers.

² This issue does not involve any question as to whether the wholesalers or the retailers are located in fair trade (signer or not) or free trade States.

³ Sections 5(a)(2) and 5(a)(5) provide as follows:

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

9. Counsel in support of the complaint urge that the contracts between respondent and its wholesalers are boycott agreements in that they prohibit respondent and its competing wholesalers from selling to any retailers not parties to a fair trade agreement with respondent. That they are boycott agreements follows from the language of the agreements themselves which limit sales to retailers who have signed such agreements. Such boycott agreements are, however, contemplated by the McGuire amendments since they make it legal for a seller to restrict his sales only to customers who are parties to such agreements. The issue framed by Paragraph Seven of the complaint is whether these agreements are price fixing agreements violative of the Sherman Act and the Federal Trade Commission Act.

10. Counsel for respondent argue that the provisions of the McGuire amendments to Section 5 of the Federal Trade Commission Act permit such contracts since Section 5(a)(2) permits contracts which require a vendee to enter into contracts or agreements prescribing minimum or stipulated prices for the resale of the commodity by subsequent purchasers (the so-called vendee clause). These contracts between respondent and its wholesalers providing for the minimum prices at which retailers can sell would undoubtedly be perfectly proper under the provisions of the McGuire amendments but for the fact that the respondent and its wholesalers are competitors in selling to retailers. Counsel for respondent present an ingenious argument to the effect that the vendee clause of Section 5(a)(2) permits such agreements between a seller and the seller's customers, and, since the provisions of Section 5(a)(5), making it clear that the establishment or maintenance of minimum or stipulated resale prices between competitors is not permitted by the McGuire amendments, does not mention the vendee clause; therefore, respondent's agreements with its wholesalers are within the protection of the McGuire amendments of Section 5(a)(2). Counsel for respondent bolster this argument with a detailed analysis of the Miller-Tydings Act and the McGuire Act and their legislative histories.

[7] 11. The argument of respondent's counsel must, however, be rejected. Respondent's contracts with its wholesalers provided that they will not sell products to retailers unless the retailer has signed a fair trade agreement with the respondent in States where such contracts are permitted by State law appear clearly to be price-fixing agreements between competitors. These agreements are certainly combinations "formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce," and are, therefore, "illegal *per se*." *U.S. v. Socony-Vacuum Co.*, 310 U.S. 150, 223 (1940); *U.S. v. General*

Motors, 384 U.S. 127 (1966); *U.S. v. Parke, Davis & Co.*, 362 U.S. 29 (1960). Inherent in the agreements between respondent and its wholesalers is a substantial restraint upon price competition by the respondent's and its wholesalers' customers. Respondent and its wholesalers by agreement are controlling the market price of respondent's products. This clearly constitutes a violation of the Sherman Act and the Federal Trade Commission Act.

12. The McGuire amendments do not specifically permit competitors to agree on the prices at which their customers must sell products. The fact that respondent's products are not fair traded at the wholesale level makes no difference. Section 5(a)(5) of the McGuire amendments would specifically prohibit such between competitors. Nor are respondent's agreements with its wholesalers given any sanction simply because the vendee clause of Section 5(a)(2) is not repeated in Section 5(a)(5).

13. It is concluded, therefore, that respondent's agreements with its wholesalers controlling the prices at which their customers must resell constitute price fixing agreements in violation of Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act.

COUNT II

14. Count II of the complaint presents the identical issue that was decided by the Commission *In the Matter of Corning Glass Works*, F.T.C. Dkt. 8874, decided June 5, 1973 [82 F.T.C. 1675]; namely, whether it is a violation of Section 5 of the Federal Trade Commission Act for respondent to require its wholesalers who are located in free trade States to resell respondent's products only to retailers located in [8] fair trade States who have signed a fair trade agreement with respondent and refuse to sell to any such retailers located in fair trade States who have not signed fair trade agreements with the respondent.

15. There are no material issues of fact between the parties which need to be litigated to dispose of Count II of the complaint. Respondent makes a distinction between this proceeding and the *Corning Glass* proceeding in that it was stipulated in the *Corning Glass* matter that title to products sold by wholesalers located in free trade States passed to the purchaser within the free trade State. There is no such stipulation in this proceeding. The technicalities of passage of title do not have any bearing upon respondent's fair trade programs and consequently are irrelevant. The fact that title to respondent's products might pass to the retailer within a fair trade State rather than in a free trade State where a wholesaler is located has nothing to do with the enforceability of respondent's fair trade agreements. The effect of respondent's fair trade agreements is that any retailer

located in a fair trade State must abide by respondent's stipulated resale prices no matter what the location of his supplier, whether in a fair trade or free trade State.

16. The *Corning Glass* decision is controlling in this matter and is, of course, binding upon the administrative law judge. That decision held that it is a violation of Section 5 to place any requirement upon a wholesaler located in a free trade State with regard to the prices at which such wholesalers' customers may resell respondent's products regardless of their location — either free trade or fair trade State. It is found that the same exact line of conduct is followed by the respondent in this proceeding that was declared illegal in *Corning Glass*.

17. The respondent urges that a decision in this matter be delayed pending the outcome of the appeal in the *Corning Glass* matter to the Seventh Circuit Court of Appeals. This request is rejected since the Commission itself can delay its decision for this purpose if it sees fit.
[9]

CONCLUSIONS

1. It is concluded that the record establishes that there is no genuine issue as to any material fact, and consequently, it is now appropriate to enter a summary decision pursuant to Rule 3.24 of the Commission's Rules of Practice for Adjudicative Proceedings.

2. It is concluded that the motion for summary decision filed by counsel in support of the complaint as to both counts of the complaint should be granted and further that the motion for summary decision filed by counsel for respondent should be denied.

3. The Commission has jurisdiction over the respondent and the subject matter involved in this proceeding.

4. The allegations contained in Count I of the complaint constitute price fixing and boycott agreements between respondent and its wholesalers who compete with respondent and one another in violation of Section 5 of the Federal Trade Commission Act.

5. It is concluded that the allegations of Count II of the complaint that respondent has placed restrictions upon its wholesalers located in free trade States requiring them to sell only to retailers in fair trade States who have signed fair trade agreements with the respondent and refusing to sell to any retailer who has not signed such an agreement constitute a violation of Section 5 of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

I

It is ordered, That respondent, Rubbermaid Incorporated, a corporation, directly or indirectly, through its officers, agents, representatives, employees, subsidiaries, successors, licensees, or assigns, or through any reseller or any other corporate or other device, in connection with the manufacture, [10] advertising, offering for sale, sale, or distribution, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of "Rubbermaid" brand commodities, or of any other commodity which bears, or the label or container of which bears, any other trademark, brand, or name owned by respondent, with respect to which commodity respondent has now established, or in the future may establish, any fair trade program, shall forthwith cease and desist from:

1. Maintaining or enforcing any existing understanding, contract, or agreement, or entering into, maintaining, or enforcing any future understanding, contract, or agreement, with any wholesaler in any State, or with any retailer located within, or applicable to resales occurring within, any State which is or henceforth shall become a free trade State, which contains any provision which restricts, is intended to restrict, or may be construed by the reseller to restrict, the reseller's right to deal with any customer, whether for subsequent resale or otherwise, in any State; or which otherwise imposes, is intended to impose, or may be construed by the reseller to impose, any qualification, precondition, or other limitation on said right; or which contains any circumstances or conditions under which any such provisions shall become applicable to any resale.

[11] 2. Maintaining or enforcing any existing understanding, contract, or agreement, or entering into, maintaining, or enforcing any future understanding, contract, or agreement, with any wholesaler in any State, or with any retailer in any State which is or henceforth shall become a free trade State, which requires, is intended to require, or may be construed by the reseller to require, as a precondition to any resale or as a qualification or other limitation on the right to resell, that said reseller —

(a) obtain from any customer or potential customer in any State any understanding, contract, or agreement by which said customer or potential customer agrees to maintain the fair trade price of the commodity to be resold; or

(b) refuse to deal with any customer or potential customer in any State unless such customer or potential customer has agreed to maintain the fair trade price of the commodity to be resold.

3. Imposing, by refusing to deal, termination or any other unilateral action, or by contract, combination or conspiracy, any limitation, qualification, or precondition not expressly permitted by Sections 5(a)(2) and 5(a)(3) of the Federal Trade Commission Act, on any reseller's right or ability to purchase or sell any fair traded commodity —

[12] (a) where the purpose or effect thereof is, or is likely to be, adherence to resale prices or any course of conduct established, required or suggested by respondent, by any reseller whose resale prices or conduct are not or cannot be, lawfully controlled by respondent; or

(b) where the purpose or effect thereof is, or is likely to be, the unavailability, through normal channels of distribution, of respondent's commodities to, or any discrimination with respect thereto against, any such reseller due to his failure or unwillingness to adhere to said resale prices or course of conduct.

II

It is further ordered, That respondent, directly or indirectly, through its officers, agents, representatives, employees, subsidiaries, successors, licensees, or assigns, or through any reseller or any other corporate or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution, in commerce, as "commerce" is defined in the Federal Trade Commission Act, of any commodity, shall forthwith cease and desist from entering into, maintaining, or enforcing any contract, combination or conspiracy which imposes any limitation, [13] qualification, or precondition not expressly permitted by applicable State law and granted immunity by Section 5(a)(2) of the Federal Trade Commission Act, on any reseller —

1. Where the purpose or effect thereof is, or is likely to be, adherence to resale prices or any course of conduct established, required, or suggested by respondent, by any reseller whose resale prices or conduct are not, or cannot be lawfully controlled by respondent; or

2. Where the purpose or effect thereof is, or is likely to be, the unavailability through normal channels of distribution of respondent's commodities to, or any discrimination with respect thereto against, any such reseller due to his failure or unwillingness to adhere to said resale prices or course of conduct.

III

It is further ordered, That respondent shall:

1. Forthwith upon this order becoming final, mail or deliver, and obtain signed receipts for, copies of this order to —

(a) every reseller who was either under fair trade contract on August 1, 1971, or who was placed under such contract thereafter, and to whom subparagraph 1(b) of this Paragraph (III) does not apply; and

[14] (b) every reseller whose fair trade contract has been terminated by respondent since January 1, 1966.

2. Within sixty (60) days from the date on which this order becomes final, and every three (3) months for a period of two (2) years thereafter, mail or deliver, and obtain signed receipts for, notices, in forms submitted to and approved by the Commission prior to mailing or delivery, which clearly inform —

(a) all wholesalers to whom subparagraph 1(a) of this Paragraph (III) applies —

(i) that their fair trade contracts are (or in the case of subsequent notices, have been) cancelled;

(ii) that such contracts cannot lawfully, nor will they, therefore, be enforced;

(iii) that said wholesalers may and are encouraged to sell respondent's goods to any customer, whether for subsequent resale or otherwise, without restriction or precondition, and irrespective of whether the customer is located within, or may resell the goods within, any fair trade State;

[15] (iv) that the exercise by said wholesalers of any of their rights previously subject to the fair trade provisions of respondent's fair trade contracts shall in no way prejudice said wholesalers' ability to obtain or to continue to obtain respondent's merchandise; and

(v) that any wholesaler who believes that respondent is violating any provision of this order, either directly or indirectly, should set forth the facts and circumstances believed relevant and submit them to

Assistant Director
Division of Compliance
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

(b) all retailers in signer-only States to whom subparagraph 1(a) of this Paragraph (III) applies, and whose retailer contracts were submitted by any wholesaler at a time when the submitting wholesaler's contract with respondent contained any provision which required said wholesaler to deal only with resellers who had agreed with respondent to maintain respondent's fair trade prices —

[16] (i) that their retailer fair trade contracts are (or in the case of subsequent notices, have been) cancelled;

(ii) that with respect to all resales of respondent's goods made since the date on which this order became final, said retailers have been deemed nonsigners of respondent's retailer contracts, and that unless and until any of said retailers voluntarily reexecute retailer contracts, they shall continue to be so deemed;

(iii) that said retailers are under no legal duty to reenter into such agreements, and that their failure to do so will in no way prejudice said retailers' ability to obtain or to continue to obtain respondent's merchandise;

(iv) that unless and until said retailers enter into new retailer contracts, said retailers may, and are encouraged to, sell respondent's merchandise to any customer and at such prices as may be individually determined by each such nonsigner retailer;

[17] (v) that neither they, nor any retailers in any signer-only State and any wholesalers in any State, may lawfully refuse to deal, or by contract be required to refuse to deal, with any other reseller due to the other reseller's failure or unwillingness to sign any fair trade contract; and that no wholesaler in any State is now directly or indirectly required to refuse to deal with any customer in any State; and

(vi) that any nonsigner retailer in any signer-only State who places an order for respondent's goods with any wholesaler which is not filled due to the buyer's failure or unwillingness to become a signer of a retailer contract, or due to the buyer's having advertised, offered for sale, or sold such goods at less than the stipulated or minimum fair trade price, should immediately notify respondent in writing of the name and address of the reseller so refusing to deal.

(vii) Each of the notices required to be mailed or delivered by this subparagraph (2)(b) shall be accompanied by a list of the names and [18] addresses (arranged by State) of all wholesalers of respondent's goods. Said list shall contain a clear and conspicuous statement that all wholesalers listed therein are free to sell to any retailer in any State without qualification, limitation or precondition.

(viii) Upon the voluntary reexecution of a retailer contract pursuant to Paragraph IV (3) of this order by any retailer to whom this subparagraph (2)(b) applies, the further mailing or delivery of notices to said retailer pursuant to this subparagraph shall not be required; and upon such reexecution, said retailer shall be given the notice required by Paragraph IV (2) of this order.

3. (a) Within sixty (60) days from the date on which by virtue of any legislative or judicial action, any nonsigner State (which is a

Initial Decision

nonsigner State on the date this order becomes final) becomes a signer-only State, and every three (3) months for a period of two (2) years thereafter, mail or deliver, and obtain a signed receipt for, the notices required by subparagraph 2(b) of this Paragraph (III).

[19] (b) Within sixty (60) days from the date on which, by virtue of any legislative or judicial action, any fair trade State (which is a fair trade State, and every three (3) months for a period of two (2) years thereafter, mail or deliver, and obtain signed receipts for, notices, in forms submitted to and approved by the Commission prior to mailing or delivery, which clearly inform all retailers therein to whom subparagraph 1(a) of this Paragraph (III) applies —

- (i) that their fair trade contracts are (or in the case of subsequent notices, have been) cancelled;
- (ii) that such contracts cannot lawfully, nor will they, therefore, any longer be enforced;
- (iii) that said retailers may and are encouraged to sell respondent's goods to any customer, whether for subsequent resale or otherwise, without restriction or precondition, and irrespective of whether the customer is located within, or may resell the goods within, any fair trade State;

[20] (iv) that said retailers may and are encouraged to sell respondent's goods to any customer at such price as may be individually determined by each such retailer; and

(v) that the exercise by said retailers of any of their rights set forth above and previously subject to the fair trade provisions of respondent's fair trade contracts shall in no way prejudice said retailers' ability to obtain or to continue to obtain respondent's merchandise.

4. Within sixty (60) days from the date on which this order becomes final and every month for a period of six (6) months thereafter, mail or deliver, and obtain a signed receipt for, the wholesaler described in subparagraph 2(b)(vii) of this Paragraph (III), and a notice, in a form submitted to and approved by the Commission prior to mailing or delivery, which clearly informs all retailers to whom subparagraph 1(b) of this Paragraph (III) applies that they are free to and are encouraged to submit their orders for respondent's merchandise to any wholesaler of their choosing whose name appears on the accompanying list; that they need [21] not sign any retailer contract in order to obtain such merchandise from any of said wholesalers; that none of respondent's wholesalers appearing on said list lawfully may or are required to refuse to deal with any of said wholesalers because of their failure or unwillingness to sign a retailer contract or because of any past or future advertising, offering for sale, or sale of respondent's merchan-

dise at less than the stipulated or minimum fair trade price; and that respondent should be notified immediately in writing of any listed wholesaler so refusing to deal.

5. Within sixty (60) days from the date on which this order becomes final, mail or deliver, and obtain a signed receipt for, a written offer of reinstatement to any wholesaler who was terminated by respondent since January 1, 1966 for failure to comply with the refusal-to-deal provision of his wholesaler contract and reinstate forthwith any such wholesaler who within thirty (30) days thereafter requests reinstatement. Said offer of reinstatement shall be accompanied by a copy of this order and any notice which would have been required to be sent to such wholesaler under subparagraph 2(a) of this Paragraph (III) had no termination occurred.

[22] 6. Immediately upon receipt, take such action as is necessary to ensure correction of all complaints received pursuant to any provision of this Paragraph (III), and retain such complaints and records of all corrective action taken thereon for a period of five (5) years from the date on which each complaint is received. Reports of said complaints and of corrective action shall be included in reports to the Commission required by Paragraph V(1) of this order.

IV

It is further ordered, That respondent shall:

1. Fully acquaint all appropriate present and future personnel with the provisions and requirements of this order.

2. Mail or deliver to all future resellers, and obtain a signed receipt for, a copy of this order, together with an appropriate notice in a form submitted to and approved by the Commission prior to its use explaining the limitations hereby imposed on respondent's resale price maintenance programs and contracts.

3. Revise the fair trade provisions of its retailer contracts to conform with the law and the requirements and intent of this order and submit said revised contracts to and obtain the approval of the Commission prior to their use; and neither execute nor obtain the execution of any [23] new retailer fair trade contract or provision thereof which is required to be cancelled by this order on any contract or form which has not been submitted to and approved by the Commission pursuant to this subparagraph (3). In no event, however, shall any new fair trade agreement be obtained by or on behalf of respondent from any signer-only State retailer to whom subparagraph 2(b) of Paragraph III applies, before thirty (30) days following the second mailing or delivery of notices required by said subparagraph.

It is further ordered, That respondent shall:

1. Within sixty (60) days from the date on which this order becomes final, and annually each year for a period of five (5) years thereafter, submit to the Commission a written report setting forth in full detail the manner in which respondent is complying with each requirement of this order, accompanied by such documents, forms, contracts, receipts, or other material as is necessary to constitute proof that respondent is in full and faithful compliance herewith.

2. Notify the Commission at least ninety (90) days in advance of any proposed change in its method of sale or distribution of fair traded commodities or in its contracts or agreements relating thereto.

[24] 3. 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.

4. Retain all receipts required to be obtained by this order for a period of five (5) years from the date of each said receipt.

OPINION OF THE COMMISSION

BY NYE, *Commissioner*:

[1] This is an appeal by respondent Rubbermaid, Incorporated (hereinafter "Rubbermaid") from the decision of an administrative law judge filed December 16, 1974, finding Rubbermaid to have violated Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. §45(a)(1)) and entering an order to cease and desist.

This case concerns the application of the McGuire Act,¹ one of the two enabling acts for the so-called State fair trade laws,² to certain contracts entered into between [2] respondent and its wholesale distributors. At issue is the legality of those contractual provisions which forbade Rubbermaid's wholesale distributors from selling to customers located in fair trade States,³ unless such customers had contracted with Rubbermaid to adhere to stipulated retail prices.⁴

[3] The facts of this case have been stipulated by the parties.

¹ Pub. L. 542, 66 Stat. 631-632 (1952).

² The other was the Miller-Tydings Fair Trade Act (Ch. 690, Title VIII, 50 Stat. 693-694) (1937). Subsequent to the initial decision, both acts were repealed by the Consumer Goods Pricing Act, Pub. L. 94-145 (December 12, 1975). For ease of comprehension, in this opinion we will cite the McGuire Act as 15 U.S.C. §45(a)(2)-(a)(5) and we will cite Sections 5(a)(2)-(a)(5) of the Federal Trade Commission Act without endlessly repeating that they have been repealed.

³ For examples of the various types of State fair trade laws, see *Corning Glass Works v. F.T.C.*, 509 F.2d 292, 295-96 (7th Cir. 1975).

⁴ The pertinent provisions in the "Rubbermaid Authorized Wholesaler Fair Trade Agreement" were as follows:

5.(a) Wholesaler agrees not to sell, consign or transfer any of the products listed on Schedule A to any person located in a state permitting Fair Trade Agreements and intending to sell or resell the same, including

(Continued)

Rubbermaid sells trademarked rubber, plastic, and coated wire household products both to independent wholesalers and to retailers throughout the United States. According to the evidence of record, Rubbermaid maintained its fair trade program in all jurisdictions in which fair trading was permitted, regardless of whether affected retailers bought their Rubbermaid products from respondent or from wholesalers. Respondent's price maintenance program was challenged and initially held to be in violation of the Federal Trade Commission Act in two respects:

1. Count I of the complaint is based upon Section 5(a)(5) of the Act, which preserved the prohibitions of the Federal Trade Commission and Sherman Acts against:

contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between * * * wholesalers, * * * or between persons, firms, or corporations in competition with each other. 15 U.S.C. §45(a)(5).

The theory of this count is that when Rubbermaid sold directly to retailers it acted as a wholesaler and was in competition with the wholesalers to whom it also sold. The complaint [4] charges that Rubbermaid's dual system of sales to both wholesalers and retailers was therefore not within the protection of Sections 5(a)(2) and 5(a)(3) of the Federal Trade Commission Act (15 U.S.C. §45(a)(2)-(3))⁵ and was

any wholesaler, distributor, dealer, retailer or jobber unless (i) such person has previously signed and delivered to Rubbermaid either an agreement similar to this agreement of the Rubbermaid Retailer Agreement, and said agreement is in full force and effect; or (ii) unless prior to any sale, consignment or transfer of such products by Wholesaler, such other person executes and furnishes to Wholesaler either an agreement similar to this agreement or a Rubbermaid Retailer Agreement and the same has been forwarded to Rubbermaid. Prior to any sale, consignment or transfer of such products to any such person, it shall be the burden of Wholesaler to verify that such person has theretofore entered into an agreement similar to this agreement, or a Rubbermaid Retailer Agreement, or to obtain such an agreement from such person and to forward the same to Rubbermaid.

5.(b) Wholesaler located in non-fair trade jurisdiction. If Wholesaler is located in a state or other jurisdiction which does not authorize the resale price and fair trade provisions contained in the Rubbermaid Retailer Agreement, as to intrastate transactions therein, Wholesaler agrees only that he will observe the condition of the preceding subparagraph 5(a) with respect to any sale, consignment or transfer of the products listed on Schedule A to any person who (i) intends to sell or resell the same and (ii) is located in a state in which such resale price and fair trade provisions are lawful as to intrastate transactions, and to which state said products are to be transported for sale. Complaint Appendix B-1(a).

⁵ Sections 5(a)(2) and 5(a)(3) provided:

(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container or which bears, the trade-mark brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or

(Continued)

thus subject to the antitrust laws' proscriptions against agreements fixing or maintaining prices.

[5] 2. Count II of the complaint challenged Rubbermaid's practice of requiring, by contract, that its wholesalers in free trade States agree to limit sales to retailers in fair trade jurisdictions to those retailers already bound by contract with Rubbermaid to adhere to retail prices dictated by Rubbermaid. This requirement affected transactions only in so-called "signer-only" States, wherein by statute or court decision no retailer was required to adhere to a resale price program unless he had expressly agreed to do so.⁶

As a preliminary matter, we must consider respondent's motion to dismiss this case as mooted by the repeal of the [6] McGuire Act.⁷ As respondent confidently predicted,⁸ that event has come to pass. We are not persuaded, however, that the repeal of the exemption Rubbermaid unsuccessfully sought to invoke either absolves it of the original wrongdoing or materially lessens the necessity of an order in this case.

Rubbermaid offers three reasons why this case is moot. We shall address each reason in turn. All three fail, however, basically because the McGuire Act was not the law that was violated but rather an exemption that was not met, and because the Commission is not constrained to limit its order to precisely the acts of respondent found in this case.⁹

The first reason given by respondent is that "a case becomes moot upon the repeal of a statute upon which a litigant is relying to justify challenged conduct."¹⁰ *Diffenderfer* [7] v. *Central Baptist Church*, 404 U.S. 412 (1972) is cited as on all fours. In *Diffenderfer*, however, the

agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby. 15 U.S.C. §45(a)(2) and (a)(3) (repealed 1975).

⁶ For reasons not made clear in the record before us, Rubbermaid even conditioned the right of wholesalers to sell to retailers located in so-called "non-signer" States (who were obligated to follow predetermined prices for resale whether they had signed or not) on the acceptance by such retailers of a Rubbermaid fair trade agreement. Since retailers located in "non-signer" States could not have legally sold below the fair trade price, it should have been unnecessary, at least in theory, for Rubbermaid to require its wholesalers to restrict customer sales in order to ensure that the prescribed price would be protected.

⁷ Motion for Deferral of Decision Pending Congressional Action on Repeal of McGuire Act and for Dismissal as Moot Upon Such Repeal. The issue has been fully briefed. See Memorandum in Support of Motion for Deferral of Decision Pending Congressional Action on Legislation to Repeal McGuire Act and for Dismissal as Moot Upon Such Repeal (hereinafter Respondent's Memorandum); Memorandum of Complaint Counsel in Opposition to Respondent's Motion for Deferral of Decision Pending Congressional Action on Legislation to Repeal the McGuire Act and for Dismissal as Moot Upon Such Repeal (hereinafter Complaint Counsel's Memorandum); Reply Memorandum on Motion for Deferral of Decision Pending Congressional Action on Repeal of McGuire Act and for Dismissal as Moot Upon Such Repeal (hereinafter Respondent's Reply Memorandum).

⁸ Respondent's Memorandum at 2. If Rubbermaid had not had such a long history of fair trading, one might almost say it had confidently and hopefully predicted.

⁹ See text at notes 17-19, 25, and 78, *infra*.

¹⁰ Respondent's Memorandum at 7.

only relief sought was a declaratory judgment that a statute was unconstitutional.¹¹ The sole purpose of that case was to have an act invalidated, and that purpose was completely achieved by legislative action while the case was pending. The Court accordingly declined to declare unconstitutional a statute subsequently repealed, absent proof of some continuing force.¹² In the case before us, illegal conduct has been challenged, based on an act still very much alive, and complaint counsel have sought to prohibit related violations of that act in the future. That a case may become moot upon the repeal of the statute that is challenged as unconstitutional does not mean a case is mooted by the repeal of a statute which, at most, provided respondent with a colorable defense.¹³

[8] The second argument of respondent is that "a case becomes moot when the party seeking relief has already obtained all the relief to which it would be entitled if it prevailed."¹⁴ Because of Rubbermaid's "total abandonment of fair trading,"¹⁵ it reasons, the Commission has already obtained more effective relief than it would have by an order alone.

If the fair trade laws had not been repealed, the answer to this argument would be easy. Rubbermaid could always resume fair trading. Since without an order it could stray over the applicable fair-trading lines again, the Commission would not have obtained all the relief to which it would be entitled.¹⁶

[9] Even though the fair trade laws have now been repealed, the

¹¹ 404 U.S. at 414-15.

¹² The Court remanded the case so appellants could amend their pleadings to show this or to challenge the newly enacted legislation. 404 U.S. at 415.

¹³ *Hall v. Beals*, 396 U.S. 45 (1969), another case respondent cite on this point, is similarly distinguishable. In that case, the fact that the date of the election for which appellants sought the right to vote had passed made any relief impossible. The Court also relied on the fact that the challenged residency statute had been changed. Just as with *Diffenderfer*, then, this case is inapposite because the statute changed was the basis of the challenge.

It should be further noted that the Court in *Hall v. Beals* emphasized the repeal of the statute because of a court's institutional duty to only decide live controversies. This duty is less applicable to the Commission. Unlike a court, the Commission regularly issues advisory opinions. And every order is, to a certain extent, an advisory opinion. Further, the Commission's duty is to prevent unfair practices. *FTC v. Gratz*, 253 U.S. 421, 435 (1920) (Brandeis, J., dissenting); *Nireak Industries, Inc. v. Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir. 1960), cert. denied, 364 U.S. 883 (1960). The Commission cannot act until a violation is proven, to be sure; but once a violation is found the relief is keyed to the violation only to prevent the imposition of "requirements that are in essence punitive because they are superfluous." *Curtis Publishing Co.*, 3 Trade Reg. Rep. ¶19,719 at 21,753 (F.T.C. 1971 [78 F.T.C. 1472 at 1514]). Since the purpose is prevention, and the violation found only a triggering device, there is less concern with mootness than there would be for an Article 3 court.

¹⁴ Respondent's Memorandum at 8.

¹⁵ *Id.*

¹⁶ *DeFunis v. Odegaard*, 416 U.S. 312 (1974) is clearly distinguishable because, since DeFunis had already started his last semester and the school had a settled and unchallenged policy to permit students to complete a term once commenced, there was no further relief needed or possible. See, 416 U.S. at 318. The Court expressly distinguished as calling for a different result the case of a voluntary (and reversible) change in the admissions policies. *Id.* So also in *Taylor v. McElroy*, 361 U.S. 709 (1959), the Court's decision turned upon the certainty that no more relief was needed or possible.

The question, we should add, is not whether the world would be better off with fair trading and with an order, or without fair trading but without an order. The question, even as respondent phrases it, is whether the Commission has obtained all the relief it is entitled to. We have determined it has not.

answer is the same. Respondent did not run afoul of the fair trade laws. It ran afoul of the antitrust laws. The Commission has "wide discretion"¹⁷ to "cope with the unlawful practices" found,¹⁸ and it "may fashion its relief to restrain 'other like or related unlawful acts.'"¹⁹ This does not mean, of course, that we necessarily either can or will issue an order covering the entire range of antitrust illegality. Lines respondent may be tempted to step over. But it does mean, at the very least, that we must consider the case on the merits and, if appropriate, issue an effective order.

The third and final reason offered by respondent is that "a case is moot where the actions at issue have ceased and 'the allegedly wrongful behavior could not reasonably be [10] expected to recur.'"²⁰ Respondent then assures us that it will never again institute the challenged restrictions. The question, however, is not whether respondent is likely to again wander beyond the area of immunity established by the fair trade laws, but whether there is a chance respondent will again engage in illegal resale price maintenance similar or related to that which it has been accused of engaging in here. As to this question, respondent has not met the "heavy burden" placed upon it.²¹

In *U.S. v. Phosphate Export Assn.*, 393 U.S. 199 (1968), a case dealing with changes in the law similar to the one found here, the Court refused to find that "subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur."²² The Court [11] carefully distinguished between the level of proof of remoteness of the likelihood of recurrence that could be used to persuade a trial judge relief was unnecessary and the much higher level of proof that the likelihood of repetition was so remote the case was moot.²³ For this question, a statement that changes in the law made it impossible to continue as before was insufficient.

¹⁷ *Fedders Corp. v. F.T.C.*, Slip Op. at 1606 (2d Cir. 1976) [529 F.2d 1398 at 1401].

¹⁸ *F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959); *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 611 (1946).

¹⁹ *F.T.C. v. Mandel Bros., Inc.*, 359 U.S. at 392, quoting *Labor Board v. Express Pub. Co.*, 312 U.S. 426, 436 (1941).

²⁰ Respondent's memo at 9, quoting *Securities and Exchange Commission v. Medical Commission for Human Rights*, 404 U.S. 403, 406 (1972), which in turn was quoting *United States Concentrated Phosphate Export Assn.*, 393 U.S. 199, 203 (1968).

²¹ *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Respondent attempts to meet that burden by showing that the facts in this case largely "track" those in *Grant*. Memorandum at 8. But the Court in *Grant* only said the fact prevented it from finding there was "no reasonable basis for the District Judge's decision" that a recurrent violation was extremely unlikely. The Court specifically said, "Were we sitting as a trial court [as the Commission in this respect is], this showing [of the chance of recurrence] might be persuasive." 345 U.S. at 634.

²² 393 U.S. 199, 203-4 (1968) (emphasis added).

²³ Respondent also cited *S.E.C. v. Medical Commission for Human Rights*, 404 U.S. 408 (1972). The Court in that case expressed certainty that a profit-oriented management would not needlessly resist placing the proposition at issue in its proxies in the future. The case is also distinguishable because of the much lower level of certainty than three years hence the same plaintiffs would litigate than that, if Rubbermaid were to resume violating the antitrust laws, the F.T.C. would again be in court. See "Mootness on Appeal in the Supreme Court," 83 Harv. L. Rev. 1672, 1685 (1970). Finally, we again note that the Court stressed the "case or controversy" limit on Article three courts that may be less applicable to the Commission. See note 13, *supra*.

This third reason offered by respondent is actually a variation of the one before—that complete relief has allegedly already been achieved. If this were a Sherman Act Section 1 criminal case, for instance, there would be no suggestion that because respondent had reformed its ways the suit was moot; nor, presumably, if this was a private action alleging violation of Section 1 of the Sherman Act. Although the Commission can only seek an injunction, the suggestion has no more merit in the case before us. [12]

The finding of a violation, we have said, acts as a trigger.²⁴ Hereafter, the Commission can prohibit “the future use of related and similar practices.”²⁵ Even if we were certain that the precise acts involved in the case would not be repeated, we would not be prevented on the ground of mootness²⁶ from prohibiting closely related violations in the future. This would be so even if respondent had abandoned the part of his business in which the violation occurred before the complaint issued.²⁷ Therefore, though we do so without the excitement that comes from addressing issues of great future legal import, we must decide this case on its merits and from the facts in the record before us. [13]

COUNT I

Where the terms of Section 5(a)(5) of the Federal Trade Commission Act are met, the effect, as indicated, is to render the erstwhile fair trader vulnerable under the basic provisions of the Federal Trade Commission and Sherman Acts. Counsel supporting the complaint contends that respondent’s distributional activities fell within Section 5(a)(5). This is so, it is argued, because when Rubbermaid sold to retailers, it was a “wholesaler,” or at least “in competition with” its wholesalers. Since contracts requiring that respondent’s wholesalers refuse to deal with those retailers in signer-only States who have not pledged to maintain prices are effectively “contracts * * * providing for the * * * maintenance of minimum or stipulated resale prices * * *,” complaint counsel concludes that the terms of Section 5(a)(5) are met and that respondent can claim no fair trade shield from antitrust law enforcement.

We agree.

[14] The stipulated record makes clear that Rubbermaid sold to some

²⁴ See note 13, *supra*.

²⁵ *Nireek Industries, Inc. v. F.T.C.*, 278 F.2d 337, 343 (7th Cir. 1960), citing *F.T.C. v. Ruberoid Co.*, 343 U.S. 470 (1952).

²⁶ See text at note 23, *supra*.

²⁷ See *Coro, Inc. v. F.T.C.*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). The slightly circular form of analysis traditionally employed would not be necessary, of course, if the Commission were able to issue punitive orders. But although the prospect of a prospective order probably serves a prophylactic role in restraining the illicit impulses of business, we are not entitled to order relief solely for purposes of punishment.

retailers and offered to sell to any retailer who chose to deal with it (Complaint p. 6; Answer p. 6). Because Rubbermaid's retail trade constituted nearly 20 percent of its volume, this is clearly not a case with a *de minimis* amount of competition.²⁸ It is further agreed that retailers have, on occasion, shifted their trade allegiances between Rubbermaid and its wholesalers. It is thus obvious that Rubbermaid and its wholesalers are "in competition with each other." Even if Rubbermaid did not in fact sell directly to retailers, its open offer to serve any retailer places it "in competition" with its wholesalers.²⁹ As has been held, "any competition for customers is an absolute bar to price maintenance agreements between the competitors." *Esso Standard Oil Co. v. Secatore's, Inc.*, 246 F.2d 17, 22 (1st Cir.) cert. denied, 355 U.S. 834 (1957).

[15] Since Rubbermaid was "in competition with" its wholesalers, its distributional practices lost their antitrust immunity if the customer restriction requirements imposed on wholesalers constituted "agreements providing for the establishment or maintenance of minimum or stipulated resale prices." Whether these restrictions constituted the type of agreement contemplated by Section 5(a)(5) is a matter of first impression.³⁰ We find that, according to the plain meaning of the statutory language, the restrictions placed by Rubbermaid on its wholesalers were such agreements.

The argument of complaint counsel, and the one we find persuasive, is relatively straightforward. While Section 5(a)(2) is limited to "prescribing" prices, Section 5(a)(5) extends to the "establishment or maintenance" of prices. "Price maintenance" has long been used by the courts to describe both resale price-fixing plans and the many ancillary refusals to deal often vital to their [16] execution.³¹ What could do more to maintain resale prices than to have an agreement prohibiting sales to price-cutters? We think it clear that if Rubbermaid today exacted a promise from its wholesalers to resell only to parties with

²⁸ In *Janel Sales Corp. v. Lanvin Parfums, Inc.*, 396 F.2d 398 (2d Cir.), cert. denied, 399 U.S. 938 (1968), Lanvin was regarded as a "retailer" on the basis of its direct sales to consumers of little more than 1 percent of its total production. 396 F.2d at 399-400. Compare *Upjohn Co. v. Charles Labs, Inc.*, 277 F. Supp. 445 (S.D.N.Y. 1967). Respondent asserts its retail sales are not growing at as fast a rate as its wholesale sales. The question, however, is not whether it will compete with wholesalers in the future but whether it was competing at the time of the alleged violation.

²⁹ *Ar-Ex Prods. Co. v. Capital Vitamin & Cosmetic Corp.*, 351 F.2d 938 (1st Cir. 1965).

³⁰ In the only case in which this specific question was raised, the court declined to find a violation on the ground that the practice had been abandoned. *United States v. McKesson & Robbins, Inc.*, 1955 Trade Cas. 168,066 (S.D.N.Y.) (agreement described in 122 F. Supp. 333 (motion for summ. judgment S.D.N.Y. 1954)), *rev'd on other grounds*, 351 U.S. 311 (1956). No court has held that the challenged fair trade activities undertaken by respondent were acceptable, and no court has interpreted the general principles of Section 5(a)(5) in the context of the factual situation here presented.

³¹ See, e.g., *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45, (1960); *United States v. Frankfort Distillers*, 324 U.S. 293, 296-97 (1945); *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 720, 721 (1944); *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U.S. 373, 407 (1911).

Rubbermaid itself has described "resale price maintenance" as "a generic synonym" for its fair trade program (which includes customer restrictions). Memorandum of Respondent in Support of Motion for Summary Dismissal of Count I and for Deferral of Decision on Count II at 24 (October 1, 1974).

whom Rubbermaid had agreed upon a retail price, a court would justly say this constituted tampering with the market and was illegal price maintenance.

Rubbermaid argues that the McGuire Act revision of the Miller-Tydings Act extended the basic fair trade exemption to permit states to sanction refusals to deal with nonsigning retailers³² but that the McGuire Act, by not [17] including language in Section 5(a)(5) corresponding to that of Section 5(a)(2), failed to withdraw fair trade protection from agreements between wholesalers or competitors to boycott nonsigning retailers. Rubbermaid contends, citing *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951) and *United States v. McKesson & Robbins, Inc.*, 351 U.S. 311 (1956), that the McGuire Act's addition of Section 5(a)(5) was meant only to withdraw the fair trade exemption from horizontal price-fixing by competitors doing business at the same rung of the distribution ladder and was not intended to affect agreements between firms at the same rung which have the effect of fixing prices only on a higher rung. Since it does not require wholesalers to sell at any stipulated prices, respondent reasons, its activities do not come within the proscriptions of Section 5(a)(5).

It is not inconceivable that even if the legal standard of liability required a showing of horizontal price-fixing, Rubbermaid could be found in violation. If Rubbermaid sold one of its products to a wholesaler at \$10, and only let a retailer sell it at \$10.50, the wholesale price has been set with substantial certainty.³³ But the fact is that the standard of liability is *not* horizontal price-fixing. That when confronted with similar restrictions some courts [18] have declared them illegal because of Section 5(a)(5)'s withdrawal of the fair trade exemptions does not mean that less direct restraints, such as customer restrictions, would not also have been found violative. Congress' use of the term "establishment *or* maintenance" (emphasis added) clearly implies that something more than mere price-setting was intended to be prohibited. The most obvious form of price-maintenance is that found here — direct maintenance of retail prices and indirect maintenance of wholesale prices.³⁴

Both respondent and complaint counsel rely heavily on the legislative history of the Miller-Tydings and McGuire Acts to support their

³² The Supreme Court had held in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), that a retailer could not be compelled to follow a manufacturer's pronouncements as to retail price, unless the retailer had signed a fair trade contract obligating him to do so. Thereafter, the McGuire Act was enacted to make clear that all retailers, including nonsigners, could be required under State law to adhere to retail prices set by the manufacturer.

³³ Respondent's argument that the wholesalers can "charge any price they want," Transcript at 13, line 27, is conditioned on the cheerful suggestion that they can sell at cost or at a loss. Transcript at 14, line 6. It does not seem likely that they could do so for long.

³⁴ See text at note 31, *supra*. A competing wholesaler like Rubbermaid could also use vendee restrictions to segment an otherwise unitary market—thus insuring two price/service packages.

respective interpretations of Section 5(a)(5). We have studied the assertedly "unedifying and unilluminating"³⁵ legislative history in an attempt to determine what Congress did and did not wish to accomplish with respect to this issue when the pertinent acts were passed. We find that our construction of Section 5(a)(5) is neither contradicted by a legislative history nor inconsistent with any of the several possible legislative intentions which may have existed when it was enacted.

[19] Congress could have had any of three views of the meaning of Section 5(a)(5), all of which lead to the same conclusion. First, Congress may have originally intended the Miller-Tydings Act to permit customer restrictions.³⁶ If so, the most reasonable construction of the Miller-Tydings prohibition of horizontal agreements to establish or maintain minimum resale prices is that it extends to horizontal boycott agreements.³⁷ It would follow that horizontal boycott agreements were illegal from the inception of the fair trade enabling legislation and, no showing having been made of a subsequent intent to legalize them, that they are still illegal.³⁸

[20] A second possibility is that the draftsmen of the Miller-Tydings Act were completely unaware of the commercial tactic of using customer restriction clauses in contracts with wholesalers for the purpose of maintaining fair trade prices. If so, the McGuire Act was Congress' first demonstration of its interest in such restrictions.³⁹ In that event, we cannot infer a Congressional intent in 1937 to permit an unforeseen category of horizontal agreements in furtherance of price maintenance, nor does it seem plausible that in 1952 Congress would have inserted a new antitrust exemption for horizontal agreements

³⁵ *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 397 (1951) (Jackson, J., concurring).

³⁶ See *Schwegmann Bros.*, 341 U.S. at 397-411 (1951) (Frankfurter, J., dissenting).

³⁷ Respondent's claim is that Section 5(a)(5) does not negate fair trade protection for horizontal agreements to restrict customers because that section recodified the second Sherman Act proviso without pertinent change at the same time as Section 5(a)(2) was enacted to declare State-sanctioned customer restrictions lawful. But if the Miller-Tydings Act had implicitly allowed customer restrictions prior to enactment of Section 5(a)(2), then that Act's reservation of the ban on horizontal agreements can hardly be read to permit horizontal agreements to restrict customers, and Congressional silence on the point in 1952 would not have altered the pre-existing law.

³⁸ There is rather persuasive evidence in the legislative history that Congress merely made explicit in the McGuire Act what had theretofore been implicit. 1952 *Hearings* 221 (statement of Herman S. Waller), H. Rep. No. 1437, *supra* n. 13, at 1. This view is at odds, however, with the interpretation placed on the Miller-Tydings Act by the Supreme Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), and was expressly rejected by the district court in *Masters, Inc. v. Sunbeam Corp.*, 112 F. Supp. 268 (S.D.N.Y. 1952). The opinions in both of those cases concluded that the boycott clause and other McGuire Act modifications had neither been expressed nor implied in the Miller-Tydings Act.

³⁹ We note that this is the least likely alternative. The outline contained in *Schwegmann*, 341 U.S. at 390-95 (1951), of the circumstances leading up to enactment of the Miller-Tydings Act indicates that some State fair trade laws contained boycott provisions even prior to enactment of the Act and that a number of bills introduced in Congress prior to the introduction of the Miller-Tydings legislation had similar provisions. It is almost inconceivable, therefore, that the draftsmen of the Act had no knowledge of the use of customer restrictions as a device for maintaining resale prices.

restraining trade without accompanying the exemption with unequivocal legislative comment.

The third possibility is that Congress intentionally omitted to insert a “vendee” clause when it passed the Miller-Tydings Act.⁴⁰ If so, the rather vague limitations expressed as the second proviso to Section 1 of the Sherman Act (the Miller-Tydings antecedent of Section 5(a)(5)) were surely [21] not intended to extend fair trade law protection to agreements between competitors to refuse to deal with non-signer retailers. This limiting proviso could not conceivably have sanctioned an antitrust exemption for horizontal agreements to restrict customers, when (under this hypothesis) the Miller-Tydings Act did not authorize customer restrictions at all.

Without focusing on the expressions of Congressional intent in 1937, respondent urges a variation of this third choice. As we understand the argument, it is as follows. By 1952 the Supreme Court had made clear that Section 5(a)(2) did not encompass vendee agreements within its antitrust immunity umbrella. Section 5(a)(5), therefore, could not have withdrawn immunity from such agreements. Because the relevant wording remained unchanged in the McGuire Act, the “meaning” must have remained constant also. Therefore, Section 5(a)(5) did not apply to vendee agreements.

We view this argument as verbally adept but singularly unpersuasive. Consider a statute with two sections, the second section saying “the provisions of section (a) shall apply in the District of Columbia.” If Congress later added to section (a), one *could* reason that unless it specified in section (b) that the provisions of amended section (a) applied, only the old section (a) should apply; but it is obviously more logical to assume that Congress in amending section (a) without changing section (b) intended section (b) to continue operating as it had [22] in the past — by the same process, but with different result. Similarly, Congress passed the McGuire Act as a fully operative statute, not just a set of amendments to prior legislation. The normal assumption is that a section is not to be mummified and frozen into its original meaning, but rather should act upon the new provisions of the statute as it would have if that had been how the statute had been written in the first place.⁴¹

To bolster its argument, respondent relies principally upon a brief commentary presented by Congressman Wright Patman to the House

⁴⁰ If Congress did this, it may have been because of a belief that no fair trade law should be so expansive as to permit retail price maintenance to be enforced against retailers who would not expressly signify their willingness to abide by it. This is the conclusion reached by the majority in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. at 889-95 (1951).

⁴¹ One can always imagine subtleties in drafting, but going overboard in doing so accords little with the political realities.

Committee which considered the McGuire Bill. Congressman Patman introduced a report of his Select Committee on Small Business, which observed that the Miller-Tydings Act was intended to forbid "the mutual observance of uniform minimum resale prices as to the commodities which [wholesalers or competitors] distribute."⁴² However, this fragmentary quotation (from a report by a committee other than the one which considered the bill and guided its passage) is unclear when situated in context.⁴³

[23] We make the foregoing observations with full realization that complaint counsel cannot muster any better specific legislative commentary to support their interpretation.⁴⁴ We reach our decision from concluding that both the plain [24] meaning of the statute and the several possible hypotheses as to Congressional intent support the position of complaint counsel. Since neither are contradicted by specific legislative history, and since our interpretation is fully consistent with the strict construction we are required to give the Miller-Tydings and McGuire Acts,⁴⁵ we are compelled to find respondent's conduct illegal.

Rubbermaid advances the proposition that because its method of distribution may have been procompetitive when compared to some alternatives, the method should be ruled acceptable. Rubbermaid

⁴² H. Rep. No. 1292, 82d Cong., 2d Sess., at 33 (1952).

⁴³ The words immediately following the cited passage cast a different light on its apparent meaning. The passage continues:

In the Frankfort Distillers case the Court held that the Act does not permit a combination of producers, wholesalers, and retailers to fix and maintain prices of products shipped into a state by adopting a single course in making contracts of sale and boycotting those who refuse to conform. (*U.S. v. Frankfort Distilleries*, 324 U.S. 293, 1945.) The illegal program in this case embraced a plan whereby the retailers agreed to boycott wholesalers or producers who refused to enter into or enforce compliance with the terms of price-fixing agreements. Noncomplying retailers were denied an opportunity to buy the goods of the complying producers and wholesalers. *Id.*

Thus, the only decision cited in support of Congressman Patman's declaration gives more attention to an illegal boycott program than to the fixing of prices. How, then, should we interpret the full declaration? The meaning of "mutual observance of uniform * * * prices" might well have comprehended boycott programs related thereto.

⁴⁴ Reference is made, for instance, to a series of hearings that do not actually focus on the question before us. *Hearings on H.R. 5767 Before Senate Comm. on Interstate and Foreign Commerce*, 82d Cong., 2d Sess., at 137, 195, 348 (1952); *Hearings on H.R. 5767 Before Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 82d Cong., 2d Sess. (1952) (hereinafter cited as "1952 Hearings").

The prevailing tenor of the hearings is illustrated by the following passage:

[H]orizontal price fixing assumes an act of persons who conspire by agreement to set up a price at which no one should undersell. That tends to restrict trade and results in the creation of monopolies. That is prohibited, and rightfully so. But vertical price fixing is a scheme of operation which sets the price not by a group engaged in a certain activity but by a person who owns the product and wishes it to compete with other products. 1952 Hearings 224 (statement of Herman S. Waller, counsel, National Assn. of Retail Druggists).

This language leaves a lacuna, within which the present case falls. While condemning horizontal conspiracies to fix prices and condoning unilateral vertical price-fixing, the statement gives no insight as to how the hybrid situation — horizontal combinations to fix prices vertically — should be regarded.

⁴⁵ The policy of the McGuire Act was in large part inconsistent with the policies of the Sherman, Clayton, and Federal Trade Commission Acts. We do not, therefore, treat the McGuire Act as an organic statute the words of which should be stretched and shaped to protect all marketing activities which have a "fair trade" ring to them. The McGuire Act had no such dynamism. We must respect its provisions, but in doing so we will construe strictly any provision which deviates from fundamental antitrust policy, for exemptions from the antitrust law are to be strictly construed. *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1955); *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963).

stresses that by eliminating its sales to retailers and selling only to wholesalers, it could have legally achieved its price maintenance objectives. It is true that Rubbermaid could have changed its posture completely (either by distributing all its products or none [25] of them), and thus avoided its current brush with Section 5(a)(5). But the question is not whether Rubbermaid could have fit its program within the boundary set out by Congress, but whether it did. It didn't. Perhaps, if the fair trade laws were still in effect, the result of our decision would be a less competitive method of distribution. But that choice was made by Congress in drawing the boundaries. We can only take comfort in thinking that Rubbermaid might tread more carefully along the line of antitrust immunity in the future. We thus rule that the customer restriction program conducted by Rubbermaid and its wholesalers was a horizontal agreement to maintain price and is in violation of Section 5(a)(1) of the Federal Trade Commission Act.⁴⁶ [26]

COUNT II

Count II charged that respondent Rubbermaid's contracts with wholesalers located in free-trade States restricted the terms of sale to fair-trade State resellers and, particularly, to fair-trade State retailers in signer-only States.⁴⁷ This charge is subsumed in Count I's broader charge of illegal price maintenance. Because we have found the contracts to be generally violative of Section 5, there is no need to reach Count II's charge of violations with regard to transactions between certain States, and we decline to do so. Count II is accordingly dismissed. [27]

THE ORDER

We have substantially simplified and otherwise modified the order in light of the repeal of the McGuire Act, and we have to a certain extent lessened the severity of the order. It is our belief that as it now stands the order is no broader than required to " 'cope with the unlawful practices' disclosed by the record."⁴⁸ The key to that belief is that, as we have pointed earlier in this opinion, Rubbermaid has engaged in illegal resale price maintenance and third party restrictions not excused by the now-repealed McGuire Act.

⁴⁶ Cf. *United States v. General Motors*, 384 U.S. 127 (1966); *United States v. Socony Vacuum Co.*, 310 U.S. 150 (1940).

⁴⁷ Complaint Par. 9, at 5.

⁴⁸ *Fedders Corp. v. FTC* (2d Cir. Jan. 21, 1976), Slip Op. 1603, 1606-7, quoting *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392 (1959).

Final Order

87 F.T.C.

The initial decision order was to a large extent patterned after the order issued in *Corning Glass Works*.⁴⁹ Because the repeal of the fair trade laws eliminates the distinctions between the policies of the fifty states, we have deleted references to the laws of particular States. We have also [28] deleted references to restrictions sanctioned by the fair trade laws and, in the notice provisions, we have removed specific references to Rubbermaid's cessation of fair trading. The order has been further simplified by the incorporation of provision I(3) into section II. Finally, we have reduced the burden of the notice requirements by removing the "anniversary" notice requirements of Section III(2) in their entirety.

Despite the changes we have made, the basic thrust of the order remains the same. There is no question that the order is broader than the narrowest description of Rubbermaid's conduct. But it must be remembered we have found that Rubbermaid violated Section 5 by engaging in resale price maintenance. There are numerous ways to achieve that same result.

If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.⁵⁰

The order is fundamentally addressed to the problem of preventing, in the least burdensome way possible, similar or related forms of price maintenance in the future.⁵¹ [29] Having yielded to temptation once, Rubbermaid's resolve to resist in the future should be strengthened by the knowledge that if it should again yield in a similar fashion it will be subject to civil penalties.⁵²

FINAL ORDER

[1] This matter having been heard by the Commission upon the appeal of respondent Rubbermaid from the initial decision, and upon

⁴⁹ 82 F.T.C. 1675 (1973), *aff'd* 509 F.2d 293 (7th Cir. 1975). In *Corning*, the Commission reconsidered the order on Corning's motion. The motion was denied and the order was reaffirmed. *Corning Glass Works*, Order denying respondent's motion for reconsideration of the final order or in the alternative for reopening of proceeding, 3 CCH Trade Reg. Rep. ¶20,393 (July 24, 1973 [83 F.T.C. 217]). After Corning abandoned its fair trade program, it petitioned for and obtained from the Commission a modification by which the order previously entered against Corning was simplified to reflect Corning's new marketing status. *Corning Glass Works*, Order Reopening Proceedings and Modifying Order to Cease and Desist (June 17, 1975 [85 F.T.C. 1077]). *E.g.*, Respondent's Appeal Brief at 52-54.

⁵⁰ *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1957).

⁵¹ The dealer notice provisions we order also in part further "the goal of removing the vestiges of past . . . violations." *Corning Glass Works v. F.T.C.*, 509 F.2d 293, 303 (1975). This may be necessary despite repeal of the fair trade laws because a Rubbermaid reseller might assume Rubbermaid desired to perpetuate, to the extent possible, policies once part of fair trading (and, to that end, maybe even provide subtle positions or negative incentives to do so).

⁵² *Cf. FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 373 (1965): "[I]t does not seem unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line," quoting *Boyce Motor Lines, Inc. v. United States*, 343 U.S. 337, 340 (1952).

briefs and oral argument in support thereof and in opposition thereto, and the Commission having determined that the respondent Rubbermaid, Incorporated is in violation of Section 5 of the Federal Trade Commission Act:

It is ordered, That the findings of fact contained in the initial decision of the administrative law judge are adopted, with the conclusions of law expressed in this opinion, as the basis for the Commission's decision in this matter.

It is further ordered, That respondent's motion for dismissal as moot upon repeal of the McGuire Act be, and it hereby is, denied.

Accordingly, the following cease-and-desist order is hereby entered:
[2]

ORDER

I

It is ordered, That respondent, Rubbermaid Incorporated, a corporation, directly or indirectly, through its officers, agents, representatives, employees, subsidiaries, successors, licensees, or assigns, or through any reseller or any other corporate or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any commodity¹ shall forthwith cease and desist from:

1. Maintaining or enforcing any existing understanding, contract, or agreement, or entering into, maintaining, or enforcing any future understanding, contract, or agreement, with any wholesaler or any retailer, which contains any provision which restricts, is intended to restrict, or may be construed by the wholesale or retail reseller (hereinafter, "reseller") to restrict the reseller's right to deal with any customer, whether for subsequent resale or otherwise; or which otherwise imposes, is intended to impose, or may be construed by the reseller to impose any qualification, precondition, or other limitation on said right; or which contains any circumstances or conditions under which such provisions shall become applicable to any resale.

2. Maintaining or enforcing any existing understanding, contract, or agreement, or entering into, maintaining, or [3] enforcing any future understanding, contract, or agreement, with any wholesaler or any retailer, which requires, is intended to require, or may be construed by the reseller to require, as a precondition to any resale or as a qualification or other limitation on the right to resell, that said reseller —

¹ Order correcting clerical error by adding phrase "of any commodity," issued April 30, 1976.

(a) obtain from any customer or potential customer any understanding, contract, or agreement by which said customer or potential customer agrees to maintain the price of the commodity to be resold; or

(b) refuse to deal with any customer or potential customer unless such customer or potential customer has agreed to maintain the price of the commodity to be resold.

II

It is further ordered, That respondent, directly or indirectly, through its officers, agents, representatives, employees, subsidiaries, successors, licensees, or assigns, or through any reseller or any other corporate or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any commodity, shall forthwith cease and desist from entering into, maintaining, or enforcing any contract, combination, or conspiracy which imposes, and from [4] imposing by refusal to deal, by termination, or by any other unilateral action, any limitation, qualification, or precondition on any reseller's right or ability to purchase or sell any commodity —

1. Where the purpose or effect thereof is, or is likely to be, adherence to resale prices or to any course of conduct established, required, or suggested by respondent by any reseller whose resale prices or conduct are not or cannot lawfully be controlled by respondent; or 2. Where the purpose or effect thereof is, or is likely to be, the unavailability through normal channels of distribution of respondent's commodities to, or any discrimination with respect thereto against, any such reseller because of his failure or unwillingness to adhere to said resale prices or course of conduct.

III

It is further ordered, That respondent shall:

1. Within sixty (60) days from the date upon which this order becomes final, mail, deliver, or cause to be delivered, and request signed receipts for, copies of this order to the following resellers:

(a) Every current reseller; and

(b) every reseller on or after January 1, 1966 whose contract for or whose supply of Rubbermaid products has been terminated by, at the request of, or with the participation of respondent, and every [5] other reseller as to whose termination of the supply of Rubbermaid products respondent has actual knowledge.

2. Within sixty (60) days from the date upon which this order becomes final, mail, deliver, or cause to be delivered, and request

signed receipts for, notices, in forms submitted to and approved by the Commission prior to mailing or delivery, which clearly inform all resellers specified in subparagraphs 1(a) and (b) of this Paragraph III:

(a) That said resellers may and are encouraged to sell respondent's goods to any customer at such price as may be individually determined by each such reseller;

(b) that said resellers may and are encouraged to sell respondent's goods to any customer, whether for subsequent resale or otherwise, without restriction or precondition;

(c) that no resellers are required to refuse to deal with any other reseller due to the other reseller's failure or unwillingness to sign any contract requiring the maintenance of resale prices;

(d) that any reseller in any state who places an order for respondent's goods with any reseller which is not filled due to its having advertised, offered for sale, or sold such goods at less than [6] respondent's suggested resale price or any former stipulated or minimum price should immediately notify respondent in writing of the name and address of the reseller so refusing to deal;

(e) that the exercise by said resellers of any of their rights previously subject to the fair trade provisions of respondent's fair trade contracts shall in no way prejudice said resellers' ability to obtain or to continue to obtain respondent's merchandise;

(f) that any reseller who believes that respondent is violating any provision of this order, either directly or indirectly (through its wholesalers or otherwise) should set forth the facts and circumstances believed relevant and submit them to

Assistant Director
Division of Compliance
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20580

The first notice required to be mailed or delivered to retailers by this subparagraph 2 shall be accompanied by a list of the names and addresses (arranged by state) of all wholesalers or respondent's goods. Said list shall contain a clear and conspicuous statement that all wholesalers listed therein are free to sell at prices of their own choosing to any retailer in any state without qualification, limitation, or precondition.

[7] 3. Within sixty (60) days from the date upon which this order becomes final, mail or deliver, and obtain a signed receipt for, a written offer of reinstatement to any wholesaler who has been terminated by respondent since January 1, 1966 for failure to comply

with any refusal-to-deal provision of his wholesaler contract, and reinstate forthwith any such wholesalers who within thirty (30) days thereafter request reinstatement. Said offer of reinstatement shall be accompanied by a copy of this order and the notice required by subparagraph 2 of this Paragraph III.

4. Immediately upon receipt, take such action as is necessary to ensure correction of all complaints received pursuant to any provision of this Paragraph III, and retain such complaints and records of all corrective action taken thereon for a period of five (5) years from the date on which each complaint is received. Reports of said complaints and of corrective action taken shall be included in reports to the Commission required by Paragraph V 1. of this order.

IV

It is further ordered, That respondent shall:

1. Fully acquaint all appropriate present and future personnel with the provisions and requirements of this order.

2. For a period of five (5) years from the date of this order, mail or deliver, and obtain a signed receipt for, [8] a copy of this order and the Federal Trade Commission press release concerning this decision and order to all new resellers to whom respondent directly sells.

V

It is further ordered, That respondent shall:

1. Within sixty (60) days from the date on which this order becomes final, and annually for a period of five (5) years thereafter, submit to the Commission a written report setting forth in full detail the manner in which respondent is complying with each requirement of this order, accompanied by such documents, forms, contracts, receipts, or other material as is necessary to constitute proof that respondent is in full and faithful compliance herewith.

2. 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.

[9] 3. Retain all receipts required to be obtained by this order for a period of five (5) years from the date of each said receipt.

Not having participated in the oral argument in this matter, Chairman Collier did not participate in the resolution of it.

Complaint

IN THE MATTER OF
CHRYSLER CORPORATIONORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8995. Complaint, Oct. 9, 1974—Final Order, April 18, 1976*

Order requiring a Detroit, Mich., automobile manufacturer, among other things to cease misrepresenting the superiority of their products over those of their competitors with regard to quality or properties, characteristics, performance and/or fuel economy.

Appearances

For the Commission: *H. Robert Field*. Before the administrative law judge, *Melvin H. Orlans* and *Richard A. Bloomfield*.

For the respondent: *Walter B. Maher*, Detroit, Mich. Before the administrative law judge, *Lee Loevinger* and *James H. Sneed*, *Hogan & Hartson*, 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 Chrysler Corporation, 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 Chrysler Corporation 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 341 Massachusetts Ave., Detroit, 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 States 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 is the advertisement attached as Exhibit A.

PAR. 6. Said Exhibit A and others substantially similar thereto (hereinafter referred to as said advertisements) represent *inter alia* that *Popular Science* magazine had reported concerning the gasoline economy of automobiles and in that report found all Chrysler small cars to be superior in terms of gasoline mileage to all Chevrolet Novas.

PAR. 7. In truth and in fact, all Chrysler small cars were not found in said report to be superior in terms of gasoline mileage to all Chevrolet Novas. Therefore, the said advertisements were, and are, deceptive and/or unfair.

PAR. 8. Respondent failed to disclose in said advertisement and others substantially similar thereto, that said report found Chevrolet Novas with certain eight cylinder engines were, in terms of gasoline mileage, equal or superior to Chrysler small cars with certain eight cylinder engines and respondent failed to adequately identify which types of Chrysler small cars had in fact been found superior in said report and which types of Chevrolet Novas had been found inferior in said report with respect to gasoline mileage.

PAR. 9. The facts set forth in Paragraph Eight are material in light of the representations contained in said advertisements and their omission makes these advertisements misleading in a material respect. Therefore, the said advertisements were, and are, deceptive and/or unfair.

PAR. 10. The facts set forth in Paragraphs Six through Eight constitute, with regard to gasoline mileage, a false comparison by respondent of Chrysler small cars with the Chevrolet Nova. Therefore, respondent has, through the use of the aforesaid acts and practices, disparaged the Chevrolet Nova.

PAR. 11. In the course and conduct of the aforesaid business, and at all times mentioned herein, respondent Chrysler Corporation 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 those sold by respondent.

PAR. 12. 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. 13. 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.

INITIAL DECISION BY ADMINISTRATIVE LAW JUDGE MILES J.
BROWN

SEPTEMBER 4, 1975

PRELIMINARY STATEMENT

[1] The Federal Trade Commission issued its complaint in this matter on October 9, 1974 (mailed October 25, 1974), charging respondent with unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act. By answer, duly filed, respondent, although admitting that it disseminated the challenged advertisement, denied that it had violated the Federal Trade Commission Act.

[2] At a prehearing conference on February 19, 1975,¹ the administrative law judge approved a stipulation of facts entered into by the parties, and ordered that said stipulation be filed with the Secretary of the Commission for inclusion in the public record.² After certain discovery, during which certain materials were voluntarily supplied by respondent, and an exchange of trial briefs, one day of adjudicative hearings was held on April 29, 1975. A stipulation of transcript corrections was approved by the administrative law judge on June 13, 1975, and the record was closed for the receipt of evidence on June 17, 1975. Proposed findings and supporting memoranda were

¹ By order dated January 10, 1975, the undersigned administrative law judge was substituted for Judge Andrew C. Goodhope, retired.

² This stipulation (also referred to as CX 1) was modified by further stipulation dated August 1, 1975, to correct an erroneous date.

filed by both parties on July 21, 1975, and reply briefs were filed on August 1, 1975.

Any motions appearing on the record not heretofore or hereby specifically ruled upon either directly or by the necessary effect of the conclusions in this initial decision are hereby denied.

The proposed findings and conclusions submitted by counsel have been given careful consideration and to the extent not adopted by this decision in the form proposed or in substance are rejected as not supported by the evidence or as immaterial.

Some of the abbreviations used in this decision are as follows:

- Stip. - Stipulation of Facts approved February 19, 1975;
- CX - Commission's Exhibits;
- RX - Respondent's Exhibits;
- Compl. - Complaint;
- Ans. - Respondent's Answer to the Complaint;
- Tr. - Transcript of testimony

This case focuses on a series of advertisements, widely disseminated in magazines and newspapers, which purported to make a gasoline mileage claim for Chrysler's "small cars" based on a report appearing in the October 1973 issue of [3] *Popular Science* magazine.³ The principal question presented is whether Chrysler misrepresented the content of the *Popular Science* report. In this connection, the secondary question is whether, as alleged in the complaint, respondent represented in the challenged advertisements that "that report found all Chrysler small cars to be superior in terms of gas mileage to all Chevrolet Novas," and/or, as complaint counsel also contend, superior in terms of gasoline mileage to all comparable Novas.

Two of the challenged advertisements are similar with respect to the representations challenged (see CXs 2, 3). The third advertisement, containing the same printed material as CX 2, has superimposed thereon certain written material (see CX 4). These advertisements are reproduced on the following three pages. These reproductions, however, do not necessarily reflect the actual size of the advertisements as they appeared in newspapers and/or magazines (Stip. 22).⁴

At this posture of the case there appears to be little dispute over the evidentiary facts. Respondent's main contention is that the challenged advertisements are true in all respects and that the interpretations as to meaning placed thereon by the Commission in its complaint, and by

³ "Gas Mileage claim based on October 1973 *Popular Science* magazine. Tests performed by *Popular Science* for its report were conducted on '73 vehicles. Figures were adjusted by *Popular Science* to reflect 1974 model changes and the results of E.P.A. tests."

⁴ Some of the exhibits (CXs 2, 3, 4 and RXs 2-8) appear in the record as physical exhibits having been reproduced in a size approximating the originals. (See Physical Exh. 2-1/8995-1 through 2-10/8995-1; Tr. 53-54.)

complaint counsel during the subsequent proceedings, are strained, untenable and unreasonable, and that the challenged advertisements were only a small part of an overall advertising campaign that was clear, unmistakable and explicit in the area of comparative gasoline mileage claims.

Having reviewed the record in this proceeding, and having considered the demeanor of the witnesses as they testified, together with the pleadings, the proposed findings, conclusions and arguments submitted by counsel supporting the complaint and counsel for respondent, I make the following findings of fact based on the record considered as a whole:

Extra care in engineering...it makes a big difference in small cars.

THE SMALL CAR THE SMALL CAR

You can buy a Volkswagen

you can buy a small car that's priced less than VW's most popular model.*

You can buy a Chevrolet Nova

you can buy a small car that can beat it on gas mileage.**

You can buy a Ford Maverick

you can buy a small car with up to 20 inches more total hiproom.

You can buy a Chevrolet Vega

you can buy a small car that seats an extra person or two.

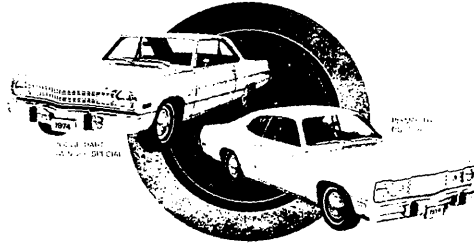
You can buy a Ford Pinto

you can buy a small car with two-to-three times more trunk space.

You can buy a small car that doesn't offer Electronic Ignition standard

you can buy a small car with Electronic Ignition standard that can save you up to \$62 on recommended ignition maintenance in the first 24,000 miles alone!

**The answer is a small car
at your Chrysler-Plymouth and Dodge Dealer's.**
(And you can drive one home today.)



SEE ALL THE DARTS AT YOUR Dodge DEALER.
SEE THE DUSTERS AND VALIANTS AT YOUR Chrysler DEALER.

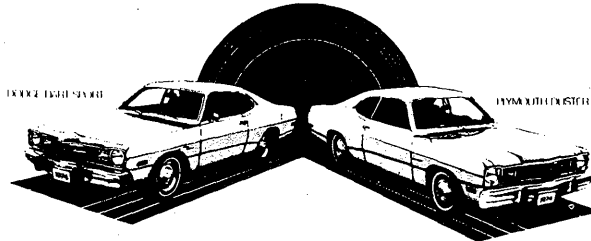
9898
4-25-76
Chrysler Corp.

Extra care in engineering...it makes a big difference in small cars.

Which small cars

- have more trunk space than 3 Pintos
- have 20" more total hiproom than Maverick
- are priced lower than the most popular VW
- and can go farther on a gallon of gas than Nova?

These small cars from Chrysler Corporation are the answer.



Small cars are not created equal.

Compare these small cars from Chrysler Corporation with any small car you may be considering. They not only give you the handling and economy of a small car, but a lot of the things you'd expect only in a big car. And best of all, you'll be surprised how little it costs to own one.

So, find out for yourself why the small cars from Chrysler Corporation are outselling all other compact cars.

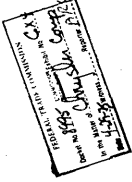


SEE ALL THE DARTS AT YOUR  DEALER.
 SEE THE DUSTERS AND VALLIANTS AT YOUR  DEALER.

*Gas mileage claim based on October 1973 Popular Science magazine. Tests performed by Popular Science for its report were conducted on '73 vehicles. Figures were adjusted by Popular Science to reflect 1974 model changes and the results of E.P.A. tests.
 Price comparison based on manufacturers' suggested retail prices, excluding destination charges, state and local taxes, and dealer preparation. Optional whitewall tires and wheel covers shown, \$53.20 extra.

Cx 3
 2-2
 8995-1
 27
 Staff

Ad No. CC-056-74
 Page (4 7/8 x 6 1/2 inches)—4 colors
 Reader's Digest—Feb., '74
 44787-0 (1) W-2-12-20-73-87283
 ROSS ROY INC.



Room and luxury, too. New Volvoo and will attract luxury car owners. The big car owners are switching to small cars. An important reason why Chrysler Corporation has a higher proportion of small GM or Ford.

No other small car can do this - or is coming in this advertisement. You've still the only dealer in town to offer this standard on every small car you sell.

Get ready for action, now!

THE SMALL CAR

At your Chrysler dealership is a small car to help you sell more cars.

- You can buy a Volkswagen
- You can buy a Chevrolet Vega
- You can buy a Ford Mustang
- You can buy a Chevrolet Vega
- You can buy a Ford Pinto
- You can buy a small car with a 1000 cc engine
- You can buy a small car with a 1300 cc engine
- You can buy a small car with a 1600 cc engine
- You can buy a small car with a 1800 cc engine
- You can buy a small car with a 2000 cc engine
- You can buy a small car with a 2300 cc engine
- You can buy a small car with a 2600 cc engine
- You can buy a small car with a 2800 cc engine
- You can buy a small car with a 3000 cc engine
- You can buy a small car with a 3300 cc engine
- You can buy a small car with a 3600 cc engine
- You can buy a small car with a 3900 cc engine
- You can buy a small car with a 4200 cc engine
- You can buy a small car with a 4500 cc engine
- You can buy a small car with a 4800 cc engine
- You can buy a small car with a 5100 cc engine
- You can buy a small car with a 5400 cc engine
- You can buy a small car with a 5700 cc engine
- You can buy a small car with a 6000 cc engine
- You can buy a small car with a 6300 cc engine
- You can buy a small car with a 6600 cc engine
- You can buy a small car with a 6900 cc engine
- You can buy a small car with a 7200 cc engine
- You can buy a small car with a 7500 cc engine
- You can buy a small car with a 7800 cc engine
- You can buy a small car with a 8100 cc engine
- You can buy a small car with a 8400 cc engine
- You can buy a small car with a 8700 cc engine
- You can buy a small car with a 9000 cc engine
- You can buy a small car with a 9300 cc engine
- You can buy a small car with a 9600 cc engine
- You can buy a small car with a 9900 cc engine
- You can buy a small car with a 10200 cc engine
- You can buy a small car with a 10500 cc engine
- You can buy a small car with a 10800 cc engine
- You can buy a small car with a 11100 cc engine
- You can buy a small car with a 11400 cc engine
- You can buy a small car with a 11700 cc engine
- You can buy a small car with a 12000 cc engine
- You can buy a small car with a 12300 cc engine
- You can buy a small car with a 12600 cc engine
- You can buy a small car with a 12900 cc engine
- You can buy a small car with a 13200 cc engine
- You can buy a small car with a 13500 cc engine
- You can buy a small car with a 13800 cc engine
- You can buy a small car with a 14100 cc engine
- You can buy a small car with a 14400 cc engine
- You can buy a small car with a 14700 cc engine
- You can buy a small car with a 15000 cc engine
- You can buy a small car with a 15300 cc engine
- You can buy a small car with a 15600 cc engine
- You can buy a small car with a 15900 cc engine
- You can buy a small car with a 16200 cc engine
- You can buy a small car with a 16500 cc engine
- You can buy a small car with a 16800 cc engine
- You can buy a small car with a 17100 cc engine
- You can buy a small car with a 17400 cc engine
- You can buy a small car with a 17700 cc engine
- You can buy a small car with a 18000 cc engine
- You can buy a small car with a 18300 cc engine
- You can buy a small car with a 18600 cc engine
- You can buy a small car with a 18900 cc engine
- You can buy a small car with a 19200 cc engine
- You can buy a small car with a 19500 cc engine
- You can buy a small car with a 19800 cc engine
- You can buy a small car with a 20100 cc engine
- You can buy a small car with a 20400 cc engine
- You can buy a small car with a 20700 cc engine
- You can buy a small car with a 21000 cc engine
- You can buy a small car with a 21300 cc engine
- You can buy a small car with a 21600 cc engine
- You can buy a small car with a 21900 cc engine
- You can buy a small car with a 22200 cc engine
- You can buy a small car with a 22500 cc engine
- You can buy a small car with a 22800 cc engine
- You can buy a small car with a 23100 cc engine
- You can buy a small car with a 23400 cc engine
- You can buy a small car with a 23700 cc engine
- You can buy a small car with a 24000 cc engine
- You can buy a small car with a 24300 cc engine
- You can buy a small car with a 24600 cc engine
- You can buy a small car with a 24900 cc engine
- You can buy a small car with a 25200 cc engine
- You can buy a small car with a 25500 cc engine
- You can buy a small car with a 25800 cc engine
- You can buy a small car with a 26100 cc engine
- You can buy a small car with a 26400 cc engine
- You can buy a small car with a 26700 cc engine
- You can buy a small car with a 27000 cc engine
- You can buy a small car with a 27300 cc engine
- You can buy a small car with a 27600 cc engine
- You can buy a small car with a 27900 cc engine
- You can buy a small car with a 28200 cc engine
- You can buy a small car with a 28500 cc engine
- You can buy a small car with a 28800 cc engine
- You can buy a small car with a 29100 cc engine
- You can buy a small car with a 29400 cc engine
- You can buy a small car with a 29700 cc engine
- You can buy a small car with a 30000 cc engine



CHRYSLER CORPORATION

Here are some reasons why Chrysler Motors dealers have the edge in selling small cars.

You can offer a lot of value. And you can offer it without any extra cost. More production of a new Volvoo at a record pace. Over 70% of our 1973 year "Slant Six" will be available. New more than 100,000 produced to meet demands.

C-4

Sec. 27
2-3
19954
Blk 70P

FINDINGS AS TO THE FACTS

[4] 1. Respondent Chrysler Corporation ("Chrysler") 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 341 Massachusetts Ave., Detroit, Michigan (Compl. Par. 1; Admitted, Ans. 1).

2. Chrysler is now, and at all times relevant hereto has been, engaged in the manufacture and advertising of various products, including automobiles. Its wholly-owned subsidiary, Chrysler Motors Corporation (also "Chrysler"), is now, and at all times relevant hereto has been, engaged in the distribution and sale of automobiles (Ans. 2).

3. Chrysler 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 the District of Columbia. Chrysler 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 substantial (Compl. Par. 3; Admitted, Ans. 3).

4. In the course and conduct of its said business, Chrysler 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 (Compl. Par. 4; Admitted, Ans. 4).

5. In the course and conduct of its aforesaid business, and at all times mentioned herein, Chrysler 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 those sold by Chrysler (Compl. Par. 11; Admitted, Ans. 11).

[5] 6. Commission Exhibit 2 (*see* reduced version, p.3A, *supra*) is a reproduction of an advertisement which Chrysler caused to be published in a very substantial number of newspapers throughout the United States in forty-six States and the District of Columbia, in most instances on December 19, 1973, and February 4, 1974 (*see* Stip. 1; Appendix A, A-1). This advertisement was also published in *Essence*, *Black*, *Encore* and *Jet*, magazines of national circulation between January and March 1974 (Stip. 1).

7. Commission Exhibit 3 (see p. 3B, *supra*) is a reproduction of an advertisement Chrysler caused to be published in the March 1974, issue of *Reader's Digest*, a magazine of national circulation (Stip. 2).

8. Commission Exhibit 4 (see reduced version, p. 3C, *supra*) is a reproduction of an advertisement Chrysler caused to be published in the February 4, 1974, issue of *Automotive News* and in the February issue of *Ward's Auto World*, magazines of national circulation (Stip. 3).

9. In pertinent part CX 2 states: "The Small Car vs. The Small Car * * * You can buy a Chevrolet Nova OR you can buy a small car that can beat it on gas mileage.** * * * The answer is a small car at your Chrysler-Plymouth and Dodge Dealers." Depicted in this advertisement are the "Dodge Dart Swinger Special" and the "Plymouth Duster." The asterisks footnote is the reference to the *Popular Science* report, set forth in full at note 3, *supra*, p. 3 (CX 2).

10. In pertinent part CX 3 states: "Which small cars * * * can go farther on a gallon of gas than Nova? These small cars from Chrysler Corporation are the answer." Pictured in this advertisement are the "Dodge Dart Sport" and the "Plymouth Duster." The text of the advertisement continues: "Small cars are not created equal. Compare these small cars from Chrysler Corporation with any small car you may be considering. They not only give you the handling and economy of a small car, but a lot of the things you'd expect only in a big car. And best of all, you'll be surprised how little it costs to own one. So, find out for yourself why the small cars from Chrysler Corporation are outselling all other compact cars.*" "See all the Darts at your Dodge dealer. See the Dusters and Valiants at your Chrysler-Plymouth dealer." The asterisk footnote is the reference to the *Popular Science* report set forth in full in note 3, *supra*, p. 3 (CX 3).

[6] 11. In pertinent part CX 4 contains the same printed language, including the asterisk reference to *Popular Science*, as that contained in CX 2. However, superimposed in handwriting (as contrasted to print) are the following legends pertaining to the gas mileage claim: "Here are some of the reasons why Chrysler Motors Corporation dealers have the edge in selling small cars." "Over 70% of our 73's had "Slant Sixes." This year even more will be available; production has been increased to meet demands" (CX 4).

12. By disseminating CX 2 and CX 3 Chrysler represented, *inter alia*, that *Popular Science* magazine had reported concerning the gasoline economy of automobiles and in that report found all Chrysler small cars to be superior in terms of gasoline mileage to all Chevrolet Novas. In this connection Chrysler also represented that all Chrysler small cars were superior in terms of gas mileage to all comparable Chevrolet Novas (see CX 2, CX 3). However, CX 4, has a specific

reference to the "Slant Six" engine, and it is found that Chrysler did not represent in that advertisement that *Popular Science* had reported that all Chrysler small cars were superior in terms of gasoline mileage to all Chevrolet Novas, but that small cars equipped with its six cylinder engines were superior in terms of gasoline mileage to all Chevrolet Novas (see CX 4).

13. *Popular Science* magazine is a monthly magazine of national circulation generally regarded as a reputable source for tests and information concerning automobile performance and equipment (Stip. 5). *Popular Science* reported the following results for the test referred to by Chrysler in the challenged advertisements:

	cyl.	c.u. in	H.P.	mpg
NOVA	6	250	100	16
	V8	350	145	14.5
	V8	350	185	12.8
PLYMOUTH VALIANT	6	198	95	18.5
	6	225	105	17.5
	8*	318	150	14.4
	8*	360	170	11.6
DODGE DART	6	198	95	18.5
	6	225	105	17.5
	8	318	150	14.4
	8	360	170	11.6

(Stip., Apdx. D.)

* A Due to a typographical or other error, the *Popular Science* magazine article attached to the Stipulation as Appendix D reports Plymouth Valiant 318 and 360 cubic inch engines as six cylinder engines. All Chrysler 318 and 360 cubic inch engines installed in Plymouth Valiants or other Chrysler automobiles were and are in fact V8 (eight cylinder) engines (Stip. 6).

14. In truth and fact *Popular Science* magazine reported that the Plymouth Valiant and Dodge Dart automobiles equipped with six cylinder engines obtained better gasoline mileage than Chevrolet Novas, but that those Chrysler small cars equipped with V8 engines did not obtain better gasoline mileage than Chevrolet Novas, including those equipped with V8 engines. Accordingly, Chrysler's representation in CX 2 and CX 3 that *Popular Science* had reported that all Chrysler small cars to be superior in terms of gasoline mileage to all Chevrolet Novas, or superior in terms of gasoline mileage to Chevrolet Novas equipped with comparable engines was not true and was false.

15. The failure to disclose in CX 2 and CX 3 that the report on gasoline mileage tests attributable to *Popular Science* magazine was either limited to test results on Chrysler small cars equipped with six cylinder engines or that the report showed that Chevrolet Novas equipped with V8 engines were superior in gasoline mileage to certain

Chrysler small cars equipped with V8 engines or that the report showed that Chevrolet Novas equipped with six cylinder engines were superior in gasoline mileage to Chrysler small cars equipped with V8 engines was a failure to disclose material facts and the omission of such material facts made such advertisements misleading in a material respect.

[8] 16. During the same general period of time that CX 2 and CX 3 were disseminated throughout the United States in a great many newspapers, Chrysler also disseminated four other advertisements in those same newspapers (Stip. 11, 12, 13, 14; Apdx. E, F, G, H). Respondent's Exhibit 2 (Stip. 11, Apdx. E) disseminated on or about December 5, 1973, contains the statement: "Which small cars * * * can go farther on a gallon of gas than Nova;" depicts "Dodge Dart Sport" and "Plymouth Duster;" and contains the following explanation:

Recent published test results by *Popular Science* show our slant six engine can go farther on a gallon of gas than Nova and you get a "Slant Six" engine standard on all our small cars. That means you get power for passing and acceleration. What's more this "Slant Six" engine gives you more miles per gallon than other comparable small cars like Maverick, Comet, Ventura and Apollo (RX 2).

Respondent's Exhibit 3 (Stip. 12, Apdx. F) disseminated on or about December 12, 1973, contains the statement: "Where's the only place in town to find a small car that * * * [among other comparatives] can go farther on a gallon of gas than Nova. Recently published test results by *Popular Science* show our 'Slant Six' engine can go farther on a gallon of gas than Nova, and you get a 'Slant Six' engine standard in all our small cars, which means you can get more miles per gallon than comparable size small cars like Maverick, Comet, Ventura and Apollo." "Dodge Dart Swinger Special" and "Plymouth Duster" are pictured (RX 3).

Respondent's Exhibit 4, disseminated on or about January 21, 1974 (Stip. 13, Apdx. G) contains the statement: "There are Good Little Cars and there are Great Little Cars * * * Good Little cars can get good gas mileage like Nova, Maverick, Comet and Ventura. Great little cars, like Dodge Dart and Plymouth Duster with a slant six engine, can get better gas mileage than Nova, Maverick, Comet and Ventura * * *" (RX 4).

Respondent's Exhibit 5, disseminated on or about January 28, 1974 (Stip. 14, Apdx. H) contains the statement: "What do you look for in a small car? * * * Good Fuel Economy? Dodge Dart and Plymouth

Duster with their slant six engines can go farther on a gallon of gas than Nova, Comet, Maverick, Apollo, Ventura and Omega"(RX 5).⁵

[9] 17. These four advertisements explicitly restricted the comparative mileage claims to Chrysler small cars with six cylinder engines and Chrysler's representation as to *Popular Science's* report on the superiority of Chrysler small cars as to Nova was accurate and true.

18. During the general time period that CX 2 and CX 3 were disseminated, Chrysler also disseminated advertisements in magazines of national circulation in which the comparative gasoline mileage results attributable to *Popular Science* magazine were explicitly limited to Chrysler's small cars equipped with "slant six" engines:

Newsweek	Feb. 11, 1974	RX 6	Stip., Apdx.	I
	Feb. 18, 1974	RX 6		I
	Feb. 11, 1974	RX 7		J
	Feb. 11, 1974	RX 8		K
	Mar. 4, 1974	RX 9		L
	Mar. 4, 1974	RX 10		M
	Apr. 15, 1974	RX 11		N
Sports Illustrated	Feb. 11, 1974	RX 6	Stip., Apdx.	I
	Feb. 11, 1974	RX 7		J
	Feb. 18, 1974	RX 7		J
	Feb. 11, 1974	RX 8		K
	Mar. 4, 1974	RX 9		L
	Apr. 15, 1974	RX 12		O
Time	Feb. 11, 1974	RX 6	Stip., Apdx.	I
	Feb. 11, 1974	RX 7		J
	Feb. 18, 1974	RX 7		J
	Feb. 11, 1974	RX 8		K
	Feb. 25, 1974	RX 9		L
	Feb. 25, 1974	RX 12		O
U.S. News & World Rpt.	Feb. 18, 1974	RX 6	Stip., Apdx.	I
	Feb. 11, 1974	RX 7		J
	Feb. 25, 1974	RX 9		L
	Feb. 25, 1974	RX 10		M
	Apr. 15, 1974	RX 11		N
Ms.	March 1974	RX 6	Stip., Apdx.	I
[10] Outdoor Life	March 1974	RX 7	Stip., Apdx.	J
Popular Science	March 1974	RX 7	Stip., Apdx.	J
Field & Stream	March 1974	RX 7	Stip., Apdx.	J
New Yorker	Feb. 11, 1974	RX 9	Stip., Apdx.	L

⁵ All four of these advertisements had the asterisk reference to the *Popular Science* test results. See n. 3, *supra* p. 8.

	Initial Decision			87 F.T.C.
	Feb. 18, 1974	RX 9		L
	Feb. 18, 1974	RX 10		M
	Feb. 11, 1974	RX 12		O
Car & Driver	March 1974	RX 9	Stip., Apdx.	L
	April 1974	RX 9		L
	March 1974	RX 10		M
	April 1974	RX 10		M
	March 1974	RX 12		O
	April 1974	RX 12		O
Motor Trend	March 1974	RX 9	Stip., Apdx.	L
	April 1974	RX 9		L
	March 1974	RX 10		M
	April 1974	RX 10		M
	March 1974	RX 12		O
	April 1974	RX 12		O

(Stip. 15-21).

19. The advertisements referred to in Finding 18, *supra*, explicitly restricted the comparative mileage claims to Chrysler's small cars with six cylinder engines and Chrysler's representation as to *Popular Science's* report on the superiority of Chrysler small cars as to Nova was accurate and true.

20. During the same period of time Chrysler did not disseminate in *Reader's Digest*, *Essence*, *Black*, *Encore* or *Jet* magazines any advertisement in which their reference to the *Popular Science* report on comparative gasoline mileage as between Chrysler small cars and Chevrolet Nova was limited to the Chrysler small cars equipped with six cylinder engines (*see* Stip.).

[11] 21. From the beginning of the 1974 model year through November 30, 1973,⁶ sales by Chrysler to dealers of Plymouth Valiant automobiles (including Duster) equipped with engines specified were:

198 cubic inch, six cyl.	—	3,955
225 cubic inch, six cyl.	—	70,326
318 cubic inch, V8	—	21,609
360 cubic inch, V8	—	579

(Stip. 8).

During the same period of time sales by Chrysler to dealers of Plymouth Duster automobiles with the engine specified were:

six cylinder engines — 48,044

⁶ By stipulation approved August 1, 1975, the parties agreed that a correction should be made to paragraphs 8 and 10 of CX 1, the Stipulation, and paragraphs 24, 26, and 28 and CX 5, the Supplemental Stipulation, so that the initial phrase of said paragraphs would read as follows: "From the beginning of the 1974 model year through November 30, 1973 * * *."

eight cylinder engines — 14,103
(CX 5B, Par. 26).

22. During the 1973 model year, sales by Chrysler to dealers of Plymouth Valiant automobiles (including Duster) equipped with engines specified were:

198 cubic inch, six cyl. — 18,290
225 cubic inch, six cyl. — 235,056
318 cubic inch, V8 — 71,798
340 cubic inch, V8 — 12,530

(Stip. 7).

During the same model year, sales by Chrysler to dealers of Plymouth Duster automobiles with the engines specified were:

six cylinder engines — 167,572
eight cylinder engines — 46,471

[12] 23. From the beginning of the 1974 model year through November 30, 1973, sales by Chrysler to dealers of Dodge Dart automobiles (including Sport) equipped with the engines specified were:

198 cubic inch, six cyl. — 1,156
225 cubic inch, six cyl. — 51,229
318 cubic inch, V8 — 24,343
360 cubic inch, V8 — 308

(Stip. 10).

During the same period of time, sales by Chrysler to dealers of Dodge Dart Swinger Special equipped with the engines specified were:

six cylinder engines — 2,790
eight cylinder engines — 275

(CX 5, Par. 24).

During the same period of time, sales by Chrysler to dealers of Dodge Dart Sport automobiles equipped with the engines specified were:

six cylinder engines — 12,014
eight cylinder engines — 6,360

(CX 5, Par. 28).

24. During the 1973 model year, sales by Chrysler to dealers of

Dodge Dart automobiles (including Sport) equipped with the engines specified were:

198 cubic inch, six cyl.	—	4,999
225 cubic inch, six cyl.	—	157,963
318 cubic inch, V8	—	78,232
340 cubic inch, V8	—	8,748

(Stip. 9).

During the same period of time, sales by Chrysler to dealers of Dodge Dart Swinger Special equipped with the engines specified were:

six cylinder engines	—	11,952
eight cylinder engines	—	1,213

(CX 5, Par. 23).

[13] During the same period of time, sales by Chrysler to dealers of Dodge Dart Sport automobiles equipped with the engines specified were:

six cylinder engines	—	33,736
eight cylinder engines	—	19,272

(CX 5, Par. 27).

25. During the 1973 model year and from the beginning of the 1974 model year until November 30, 1973, a substantial number of Plymouth Valiant (including Duster) and Dodge Dart automobiles (including Sport) equipped with V8 engines were sold to dealers by Chrysler (Findings 21, 22, 23, 24; see also Tr. 92 (Dow)).

DISCUSSION AND CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondent Chrysler Corporation. The Commission, upon issuing its complaint in this matter, determined that a proceeding by it would be in the public interest. There is nothing in this record to show to the contrary. See *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 83 (1956).

2. The acts and practices challenged in the complaint and in which Chrysler was found to have engaged were all to the prejudice and to the injury of the public and Chrysler's competitors and constitute unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

THE REPRESENTATIONS

It is well established that the meaning of an advertisement is a question of fact that may be determined by an examination of an advertisement itself. *Carter Products, Inc. v. Federal Trade Commission*, 323 F.2d 523, 528 (5th Cir. 1963); *The J. B. Williams Co. v. Federal Trade Commission*, 381 F.2d 884, 889 (6th Cir. 1967).

[14] Upon viewing the challenged advertisements (CX's 2, 3, 4), the administrative law judge is satisfied that CX 2 and CX 3 convey the representation alleged in the complaint, *i.e.*, that *Popular Science* magazine had reported that all Chrysler small cars were superior in gas mileage to all Chevrolet Novas. In my opinion this is a reasonable interpretation of the message conveyed by the gasoline economy portion of each advertisement. On the other hand, CX 4 makes reference to the "Slant Six" engine and although it could be otherwise misleading, the advertisement does not represent, in my view, that *Popular Science* magazine had reported that all Chrysler small cars were superior in gasoline mileage performance to all Chevrolet Novas. In addition, CX 4 was directed to the dealers themselves and not the consuming public.

Chrysler contends that the language of CX 2 and CX 3 could not possibly represent that *all* Chrysler small cars were superior in gas mileage to *all* Chevrolet Novas, but, given the most expansive interpretation represents that *many* or even *most* Chrysler small cars gave superior performance. Chrysler argues that this realistic meaning is accurate and true, according to the *Popular Science* report.

I do not find anything in these two advertisements which would specifically limit the gas mileage comparison to a particular type, group or kind of Dodge Dart Swinger Special, Dodge Dart Sport, Plymouth Duster or Chevrolet Nova. The representation appears unequivocal and surely might be understood to apply to all of the particular models and styles mentioned.

Chrysler also contends that these advertisements are limited to comparisons with its small cars equipped with six cylinder engines because (1) no consumer would ever consider a "small car" to be equipped with a V8 engine, (2) the only options mentioned were whitewall tires and wheelcovers and the V8 engine is optional, and was not included in the list of optional items, (3) the competitive small cars mentioned, other than Nova and Maverick, did not offer an eight cylinder engine, and (4) the \$62 saving on ignition maintenance relates to the six cylinder engine, it being a \$90 saving for the V8 engine ignition maintenance.

[15] Significantly, however, these two advertisements contain no

language referring to the six cylinder engine. There is nothing except Chrysler's argument to demonstrate whether the mention of options, the engine size of some of the competing small cars mentioned, or the ignition maintenance savings were in any way meaningful to prospective consumers in the way Chrysler suggests. On the other hand other references made in the advertisements to physical characteristics such as trunk space, hip room, seating space, and the physical appearance of the cars actually pictured in the advertisement would be identical for automobiles equipped with six or eight cylinder engines (Tr. 144-145 (Schirmer)).

Finally, the term "small car" is quite ambiguous. It has been used by the automobile industry without regard to engine size. Chrysler officials candidly admitted that in the fall of 1973, when the so-called "energy crisis" hit the gasoline distribution system due to the oil embargo, Chrysler did not have a domestically produced compact or sub-compact car. It embarked on an extensive advertising campaign to overcome any competitive disadvantage that might exist. This campaign was designed to sell the "small car" idea (Tr. 51-52 (Dow)).

In this connection it caused the so-called Atlanta "focus group" survey to be conducted in order to determine what the general population might understand by the term "small car." It is the report on this interaction group comprised of only 28 persons upon which Chrysler would base its argument that *no one* would consider an automobile equipped with an eight cylinder engine as a small car (see RX 15-15C). I do not think the protocol for the "focus group" exercises or even its purpose could be considered support for Chrysler's position (see Tr. 150-158, 161-166 (Marr)). At most "engine size" was important to *some* people after the matter was discussed among them. To take this as reflecting how a prospective purchaser of an automobile might interpret the term "small car" as it appeared in the context of Chrysler's advertisements is too unscientific to support a finding that *no one* would consider an automobile equipped with an eight cylinder engine as a small car (see Tr. 219-221 (Karle)). In any event the reports on the individual responses to the ad copy shown to the members of the "focus groups" do not reflect the understanding suggested by Chrysler (RX 15h-15z9).⁷

[16] In my opinion the most persuasive support for the finding that CX 2 and CX 3 contain the representation alleged in the complaint is a comparison between the challenged advertisements and the other advertisements of record in which the explicit limiting reference to "slant six" is made. This simple, clear disclosure dovetails with the

⁷ In fact Chrysler appears to include its Dart and Duster automobiles equipped with V8 engines in its small car lineup. See Product Information Bulletins, RX 19, 21, 22.

content of the *Popular Science* report and makes the advertisements clear and unequivocal insofar as the gasoline mileage comparisons are concerned.

Complaint counsel, in their proposed findings (CPF 22), contend that through the use of the challenged advertisements "respondent has represented that *Popular Science* magazine had reported concerning the gasoline economy of automobiles and in that report found all Chrysler small cars to be superior in terms of gasoline mileage both to all Chevrolet Novas and to comparable Chevrolet Novas (emphasis added by the administrative law judge). They argue in their memorandum in support of their proposed findings that the existence of either of these two representations is sufficient to make out a violation, that the second "meaning" is embraced within the allegation set forth in the complaint, that respondent was notified of this alternative theory early in this proceeding, and that such an additional charge does not constitute objectionable variance from the allegations of the complaint (*see* memo, p. 1).

Respondent, arguing that the allegation as to meaning of the advertisement set forth in the complaint was not made out, objects to complaint counsel "unilaterally" amending the complaint to embrace the concept of automobiles equipped with comparable sized engines (Resp. Reply, pp. 2-5).

In my opinion, and as found in this initial decision, the challenged advertisement can be construed as also conveying the message that the *Popular Science* magazine had reported that all Chrysler small cars were found to be superior in terms of gas mileage to Chevrolet Novas equipped with comparable engines. This meaning is clearly within the scope of the meaning of said advertisement as alleged in the complaint and I see no variance between the allegations of the complaint and a finding that such a [17] representation was made.⁸ In any event, in view of the finding that CX 2 and CX 3 did convey the message as alleged in the complaint, further discussion of this other meaning would be mere surplusage.

Of course, by rejecting Chrysler's contention that the challenged advertisements did not contain the representation alleged in the complaint, I am not finding that the advertisements might not also convey the limited meaning suggested by Chrysler. Advertisements may be found deceptive if they are capable of being read in a misleading way, even though other, nonmisleading interpretations may also be possible, or even likely. *Merck & Co.*, 69 F.T.C. 526, 552 n. 2

⁸ Objectionable variance arises in a situation where respondent is surprised by a change in theory to such a degree that it has no opportunity to defend itself. No such situation exists in this case. *See, Armand Co. v. Federal Trade Commission*, 84 F.2d 973, 974 (2d Cir. 1936); *J. B. Williams Co., Inc. v. Federal Trade Commission*, 381 F.2d 884, 888 (6th Cir. 1967).

(1966), *aff'd sub nom Doherty, Clifford, Steers & Shenfield, Inc. v. Federal Trade Commission*, 392 F.2d 921 (6th Cir. 1968).

It is my finding and conclusion that CX 2 and CX 3 have the tendency and capacity to deceive the prospective customer into believing Chrysler's misrepresentation as to the content of the *Popular Science* test result. Misuse of test results is an unfair trade practice. *Country Tweeds, Inc. v. Federal Trade Commission*, 326 F.2d 144 (2d Cir. 1964). In addition, Chrysler's failure to disclose in said advertisements that the report on gasoline mileage attributable to *Popular Science* showed that Chevrolet Nova equipped with six cylinder and V8 engines were superior in gas mileage to certain Chrysler small cars equipped with V8 engines was a failure to disclose a material fact. It is well settled that the purchasing public is entitled to all material facts necessary to make a sensible and informed response to advertising, usually the decision whether or not to purchase the advertised product, and that failure to disclose such a material fact is an unfair trade practice in violation of Section 5 of the Federal Trade Commission Act. *See, Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965). [18]

DISPARAGEMENT

In its complaint the Commission alleged that through misrepresentation of *Popular Science's* report as to the gas mileage superiority of Chrysler small cars over Chevrolet Novas and failure to disclose in said advertisements the true comparisons reported on the eight cylinder vehicles, Chrysler has disparaged the Chevrolet Nova. Complaint counsel argue that this charge of disparagement has been sustained, and seek a provision in a cease-and-desist order that would prohibit respondent from:

Disparaging the quality or properties of any competing product or products through the use of false or misleading comparisons.

In support of their contention complaint counsel cites *Steelco Stainless Steel, Inc. v. Federal Trade Commission*, 187 F.2d 693 (7th Cir. 1951) and "generally" 2 CCH Trade Reg. Rep. Par. 7659 at 12,357-67. As I read the case cited and the other cases referred to which relate to the quality or properties of competing products, I find that in the vast majority of adjudicated cases where the disparagement claim has been sustained or upheld, the challenged representation about the competitor's product was overt, direct and wholly untrue.

The instant case, however, is not the usual false advertising case but focuses on the inaccurate use of a single report as to the results of a

test. The truth or falsity of the actual mileage performance comparisons between Chrysler small cars and Chevrolet Novas are really not in issue. However, this record is replete with evidence that Chrysler's small cars of the 1974 model year were generally superior in gas mileage performance than the Chevrolet Novas (RX 23N; RX 24g; RX 25g, 25h, 25u). In my opinion, considering the record as a whole, Chrysler's misrepresentation of the *Popular Science* report does not reach the level of disparagement.

CONSUMER DECEPTION

As a logical extension of its argument as to the meaning that it would attribute to the challenged "small car" advertisements Chrysler points out that during the period [19] of time the challenged advertisements were disseminated it also disseminated numerous advertisements in both newspapers and magazines in which it clearly disclosed that the superiority of Chrysler small cars over Chevrolet Novas was limited to automobiles equipped with six cylinder engines. It argues that prospective customers would have seen the unchallenged type of advertisement and that only a small percentage⁹ would have only viewed the challenged advertisements.

Even assuming that Chrysler's statistical premise is correct, it is well established that it is unfair to make an initial contact or impression through a false or misleading representation, even though before purchase the consumer is provided with the true facts. *Carter Products, Inc. v. Federal Trade Commission*, 186 F.2d 821, 824 (7th Cir. 1951); *Exposition Press, Inc. v. Federal Trade Commission*, 295 F.2d 869, 873 (2d Cir. 1961).¹⁰ In this respect, complaint counsel need not prove actual deception. As stated before, it is sufficient to meet the requirements of demonstrating a violation of Section 5 of the Federal Trade Commission Act, if it is shown that the challenged advertisements have the tendency and capacity to deceive the prospective customer. See, *Charles of the Ritz. Dist. Corp. v. Federal Trade Commission*, 143 F.2d 676, 679-80 (2d Cir. 1944).

Chrysler's statistical premise as to the percent of perspective consumers being exposed to the "correct advertising" relates to the newspaper advertising only (Tr. 179-182 (Marr)). It should be emphasized that the challenged [20] advertisement appeared in certain

⁹ Apparently from a statistical point of view, considering the total number of times Chrysler's "small car" advertising was published in newspapers, only 2 percent of the recipients of newspapers containing one of the challenged advertisements (CX 2) would not have also received issues of the papers containing the unchallenged advertisements (Tr. 175-179 (Marr)).

¹⁰ Chrysler also argues that the challenged advertisements were but a small part of an otherwise extensive advertising campaign and, in the circumstances, do not justify this proceeding or an order. This sort of contention was rejected by the Commission in its recent decision in *Fedders Corporation*, Dkt. No. 8932 (dated Jan. 14, 1975) [85 F.T.C. 37].

magazines of national distribution (CX 2 - *Essence*, *Black*, *Encore* and *Jet*; CX 3 - *Reader's Digest*) in which the "correct" advertisement never appeared. Also the last of the series of six newspaper advertisements disseminated was CX 2, the challenged advertisement (Tr. 91 (Dow)).

Chrysler's argument as to the low percentage of persons who would have seen only the challenged advertisements is candidly geared to fitting this case under the rationale of Commission's recent "Dry Ban" decision.¹¹ However, there are some obvious points which distinguish that case from the instant case.

First, as the Commission seems to point out, Dry Ban is a relatively inexpensive item and the consumer, without much investment, can make up his or her own mind about whether it was as "dry" as represented (Slip. Opinion at p. 9 [85 F.T.C. 688 at 746]). Of course, an automobile is in an altogether different category. Second, the comparative dryness of an antiperspirant is just relative and goes to one's subjective needs in such a product. Comparative gasoline claims, on the other hand, are of critical importance to the prospective purchaser as a frame of reference of where to shop. Finally the 2-4 percent figure in "Dry Ban" referred to the results of a survey as to the meaning of an advertisement. Here the 2 percent related to newspaper exposure only, and not to the number of prospective customers that saw the challenged advertisements and understood them in the manner alleged in the complaint. In my opinion the "Dry Ban" case cannot control the result of the instant proceeding.

Chrysler also stresses the point that it did not intend to make the representation with which it has been charged. However, it is established law that the question of whether one intends to mislead or deceive is not relevant where the challenged advertisements have the requisite tendency and capacity to deceive. *Ford Motor Co. v. Federal Trade Commission*, 120 F.2d 175, 181 (6th Cir.), cert. denied, 314 U.S. 668 (1941); *Montgomery Ward & Co.*, 379 F.2d 666, 670 (7th Cir. 1967); *Koch v. Federal Trade Commission*, 206 F.2d 311, 317 (6th Cir. 1953). [21]

AVERAGING MILEAGE CLAIMS

Chrysler argues that, by issuing the consent order in File No. 742 3174 [C-2564] (General Motors Corporation) on July 22, 1974 [84 F.T.C. 653], and by proposing an identical order in the instant case, the Commission has authorized certain claims based on a showing of average product superiority.

¹¹ *Bristol-Myers Company, et al.*, Dkt. No. 8897 (dated April 22, 1975 [85 F.T.C. 707]). The study there showed only 2-4 percent of the viewers would think that the representation made was that "Dry Ban" would leave no visible residue.

Chrysler proposes that if its "small car" advertisements challenged herein did embrace the V8 equipped automobiles, then the test result reported by *Popular Science* would show Chrysler small cars to have an average superiority (6 cylinder and 8 cylinder engines considered) of 1.1 miles per gallon over the average computed for the Chevrolet Novas. Referring to certain language in a "staff analysis" of the General Motor's order, Chrysler concludes that, on the basis of facts asserted there, it could have published advertisements identical to those challenged herein without in any manner violating the "remedial" order proposed by complaint counsel. Put more rhetorically, Chrysler's argument is: How can any advertisement be considered substantial evidence of a violation of Section 5 when the same advertisement would not violate the terms of the order to cease and desist?

Notwithstanding certain language contained in the staff analysis of the *General Motors* consent order, I do not believe the order proposed in this case would permit the averaging of six and eight cylinder automobiles to demonstrate gasoline consumption comparatives unless a clear and conspicuous disclosure is made setting forth specifically just what the test results were for each sample or average for all samples tested. The proposed order talks in terms of the "valid average of identical samples of each model represented to have been tested." Automobiles equipped with six and eight cylinder engines are not, in my opinion, "identical samples" within the meaning of that order. In any event, if there is any inconsistency between the staff memorandum and the result reached in this initial decision, the ruling in this case prevails. See *Double Eagle Lubricants, Inc. v. Federal Trade Commission*, 360 F.2d 268, (10th Cir. 1965); *P. Lorillard Co. v. Federal Trade Commission*, 186 F.2d 52, 55 (4th Cir. 1950). [22]

REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to ensure discontinuance of the unlawful practices found. *Federal Trade Commission v. Colgate-Palmolive Co.*, *supra*, 380 U.S. at 392. The Commission's discretion is limited only to the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613 (1946); *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883.

It is also well settled that the Commission may require affirmative statements in advertising where failure to make such statements leaves false and misleading impressions. *Federal Trade Commission v.*

Colgate-Palmolive Co., supra; J. B. Williams v. Federal Trade Commission, supra.

In my opinion the notice order that accompanied the complaint satisfies the needs of this case, except that proposed paragraph 5 shall be deleted, it being my conclusion that the disparagement alleged in the complaint has not been made out in fact or in law.¹²

I have added a paragraph designed to supplement the compliance reporting requirements of the Commission's Rules of Practice if and when this proposed order, or any modification thereof, becomes "final" as "final" is used in Section 5(1) of the Federal Trade Commission Act. See *Tysons Corner Regional Shopping Center*, Dkt. 8886, Order Correcting Statement of Compliance Deadlines in Final Order (July 25, 1975). [23]

ORDER

It is ordered, That respondent Chrysler Corporation, and its officers, representatives, and agents and employees directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of products, sold by the respondent in commerce, as "commerce" is defined in the Federal Trade Commission Act do forthwith cease and desist from:

1. Representing directly or by implication, by reference to a test or tests, that any of respondent's automobiles is superior with regard to fuel economy to any other automobiles whether manufactured by respondent or others unless:

(a) such superiority has been demonstrated, as to the model(s) for which it is claimed, by such test or tests with respect to each sample, or the valid average of all identical samples, of each model represented to have been tested; or

(b) the valid test results for each sample, or the valid average of all identical samples, of each model so compared, including the advertised model as well as such makes and models to which the advertised model is compared, are clearly and conspicuously disclosed.

[24] For the purpose of this order "sample" shall mean an actual automobile tested.

2. Representing directly or by implication that any automobile or automotive product has been tested either alone or in comparison with other products unless such representations fully and accurately reflect the test results and unless the tests themselves are so devised and

¹² A "disparagement" paragraph appears in the *General Motors* consent order. However, I do not consider consent orders controlling case precedent. Such orders are negotiated by the parties, and although they are ultimately approved by the Commission, they are not based on any finding of violation, a necessary predicate to an adjudicated order.

conducted as to completely substantiate each representation as to any characteristic tested in the featured test.

3. Misrepresenting in any manner, directly or by implication, the purpose, content, or conclusion of any test, report, study, research, demonstration, or analysis.

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

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

It is further ordered, That respondent notify the Commission at least 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, [25] the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

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

OPINION

By DOLE, *Commissioner*:

[1] The advertisements which are challenged in this proceeding were part of a promotional campaign sponsored by Chrysler Corporation during the "energy crisis" of 1973 and 1974.¹ The purpose of these advertisements was to inform the car-buying public that Chrysler produced several lines of compact model automobiles which were economical and competitive with the small cars sold by both foreign and domestic producers.² [2] The small-car campaign consisted of advertisements published nationwide from December 1973, through March 1974.³ These ads compared Chrysler's compact models with the

¹ The following abbreviations will be used throughout this opinion in citations to the record: CX - Commission Exhibits; RX - Respondent's Exhibits; Compl. - Complaint; Tr. - Transcript of Testimony; I.D. - Initial Decision of the Administrative Law Judge; App. Br. - Respondent's Appeal Brief; Ans. Br. - Complaint Counsel's Answer Brief; Reply Br. - Respondent's Reply Brief.

² The ad campaign was designed to counter the adverse publicity Chrysler was receiving for introducing a new line of large cars at a time when it did not produce a domestic sub-compact model car. Tr. 51, 52, 62, 74, 206. Chrysler manufactured several compact automobiles; however, its management became concerned, in response to press criticism, that consumers would come to think Chrysler did not offer a line of small cars and many, therefore, would avoid the Chrysler dealers' showrooms. Tr. 52. To "correct" this perception, Chrysler, in December 1973, abandoned its large car advertising and launched into its small-car campaign. Tr. 75.

³ The strategy behind the advertising was "to de-segment the small car segment for the consumer" by forcing the

(Continued)

subcompact and compact cars produced by its competitors.⁴ On the question of gas economy, one of the ads stated in pertinent part:

You can buy a Chevrolet Nova OR you can buy a small car that can beat it on gas mileage * * * The answer is a small car at your Chrysler-Plymouth and Dodge Dealer's.

Below this "answer," the ad depicted a Dodge Dart Swinger Special and a Plymouth Duster.⁵

[3] Another ad inquired and answered:

Which small cars * * * can go farther on a gallon of gas than Nova? These small cars from Chrysler Corporation are the answer.

The ad then illustrated a Dodge Dart Sport and a Plymouth Duster.⁶ Further on, the ad invited the reader to:

* * * find out for yourself why the small cars from Chrysler Corporation are outselling all other compact cars.

Both ads also invited the consumer to:

See all the Darts at your Dodge dealer. See the Dusters and Valiants at your Chrysler dealer.⁷

A *Popular Science* magazine report was cited in both instances as the basis for these mileage claims.⁸

Proceedings Before the Administrative Law Judge

The complaint in this matter alleges that these ads, among others, represented to the public that *Popular Science* found all Chrysler small cars superior in terms of gas mileage to all Chevrolet Novas; and in

consumer to consider compact cars and sub-compacts in the same class and compare both compacts and sub-compacts against the same criteria. RX 14L. Once the market was "de-segmented," Chrysler planned to "segment" it again, but in a different way. The Chrysler small cars would be positioned:

* * * as a whole different kind of entry in the small car field, which serves all the desired benefits with very little compromise * * * the best fuel performance of all the "bigger" small cars, and the best package of all the "smaller" small cars. RX 14m.

⁴ One of the ads, for example, represented that there was a Chrysler small car priced less than the most popular Volkswagen, with more hip room than a Ford Maverick, more trunk space than the Pinto, and more seating capacity than the Chevrolet Vega. CX 2.

⁵ CX 2.

⁶ CX 3.

⁷ CX 2, CX 3.

⁸ The reference to *Popular Science* advised that: Gas mileage claim based on October 1973, *Popular Science* magazine. Tests performed by *Popular Science* for its report were conducted on '73 vehicles. Figures were adjusted by *Popular Science* to reflect 1974 model changes and the results of E.P.A. tests. CX 2, CX 3. See RX 17a.

this respect Chrysler failed to disclose material facts about the *Popular Science* [4] report and misrepresented the findings in the report.⁹ Neither complaint counsel nor respondent dispute the content of the magazine article.¹⁰ It reveals that Chrysler's six-cylinder Dodge Darts and Plymouth Valiants had a gasoline economy edge over GM's six and eight-cylinder Novas. But the report did not stop at that point. It went on to reveal that GM's Novas with six or eight-cylinder engines delivered gas mileage superior to the Chrysler vehicles equipped with optional eight-cylinder engines.¹¹

Complaint counsel contend that Chrysler's ads were misleading because they had a tendency and capacity to convey an impression to consumers that all Chrysler small cars were found by *Popular Science* to provide better gas mileage than all Novas and all comparable Novas.¹² Chrysler, in contrast, argues that consumers could not have understood its comparisons with Nova to include cars equipped with eight-cylinder engines because the ads were talking about small cars and, according to Chrysler, consumers do not perceive eight-cylinder engines as the engines found in "small cars."¹³

The trial of this matter before the administrative law judge lasted one day.¹⁴ Counsel supporting the complaint introduced into evidence a stipulation of facts and several [5] of respondent's advertisements and, thereafter, rested his case.¹⁵ Respondent called five witnesses and entered several document exhibits on the record. The defense evidence relates primarily to consumer "perception" of the term "small car," Chrysler's preparations for the small-car campaign, and statistical data relating to the number of consumers exposed to the various periodicals in which the advertisements were published during the campaign. On September 4, 1975, the judge issued his decision. He found that Chrysler had misrepresented the content of the *Popular Science* report and had failed to disclose material facts concerning the findings in the report.¹⁶ Chrysler appealed.

⁹ Compl. paragraphs 6-9. The complaint, paragraph 10, also alleges that the ads disparaged the Chevrolet Nova; however, the administrative law judge dismissed this allegation and complaint counsel did not appeal. I.D. 18, 22. The Commission concurs in the judge's findings and conclusions on this issue.

¹⁰ Stipulation of Facts, Appendix D. The magazine article erroneously indicates that Plymouth Valiant 318 and 360 cubic inch engines were six-cylinder engines. The parties have stipulated that all Chrysler engines of this size are in fact V8 engines. CX 1b.

¹¹ The accuracy of the mileage figures reported by *Popular Science* was not challenged by the complaint. We should mention in passing, however, that an advertiser may, under Section 5, be held accountable for the truth of claims made in advertising derived from third-party source material. Compare *Perma-Maid Co., Inc. v. FTC*, 121 F.2d 282 (1941) with *Scientific Manufacturing Co., Inc. v. FTC*, 124 F.2d 640 (1941) at footnote 8.

¹² Ans. Br. pg. 4.

¹³ App. Br. pg. 7.

¹⁴ I.D. 2.

¹⁵ Tr. 30-33.

¹⁶ I.D. 6-7.

Small Car vs. Small Car (The Advertisements)

The Commission has carefully examined the record evidence and finds that the ads in question do indeed have a tendency and capacity to mislead consumers into a mistaken belief about the content of the *Popular Science* article and about the comparative gas economy of all Chrysler small cars and all Novas and all such vehicles equipped with comparable-sized engines.¹⁷ The ads refer broadly to Chrysler "small cars" and invite consumers to see "all the Darts" and "the Dusters and Valiants," without any stated references to the cars' engines.¹⁸ It [6] would not be readily apparent to consumers from any information the ads contain that the mileage claims were limited to small cars with six-cylinder engines¹⁹; nor are the references to [7] *Popular Science* qualified in any way which would assist consumers to understand that the magazine's support for Chrysler's fuel-economy claim was confined to six-cylinder cars. Thus, viewed in their entirety, we believe the ads could reasonably lead consumers to believe that the mileage claims referred to six and eight-cylinder cars and to vehicles equipped with comparable-sized engines.²⁰ The ads, therefore, have a tendency and capacity to deceive consumers into the mistaken belief that *Popular*

¹⁷ Compare CX 2 and CX 3 with CX 4. Several of the advertisements used in Chrysler's small car campaign included a specific reference to the "slant six" engines. CX 4, RX 3-12. The administrative law judge found these ads (RX 3-12) to be "accurate and true" or not misleading (CX 4). I.D. 8-10, 14. Complaint counsel did not appeal these findings. The Commission finds that the advertisements which expressly referred to the "slant six" engines were properly qualified and, therefore, did not misrepresent the content of the *Popular Science* report.

¹⁸ On appeal, Chrysler argues that CX 2 refers to "a" small car and, therefore, could not convey the impression to consumers that the mileage claim referred to all small cars. Yet, as the court observed in *Colgate-Palmolive Co. v. FTC*, "It should be obvious by now to anyone that advertisements are not judged by scholarly dissection in a college classroom." 310 F.2d 89 (1st Cir. 1962). See also 326 F.2d 517 (1st Cir. 1963), *rev'd*, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965). In the context of this advertisement, which also refers to "small cars" generally and "all the Darts" and which depicts the "Dodge Dart Swinger Special" and the "Plymouth Duster," the Commission finds that the reference to "a" small car could reasonably be understood by consumers to mean all of the small car models with six and eight-cylinder engines depicted in or expressly referred to in the advertisement.

¹⁹ One of the challenged ads claimed that consumers could save up to \$62 on recommended ignition maintenance. CX 2. According to an internal Chrysler document, the savings of \$62 applied to the recommended maintenance on six-cylinder cars. A savings of \$90 could have been claimed if eight-cylinder engine comparisons had been used. RX 26. Yet, the consumer could not determine from the ad itself whether the \$62 savings claim applied to six-cylinder engines, eight-cylinder engines, or both.

Similarly, we must reject Chrysler's argument that its advertising representations were limited, unless otherwise expressly indicated, to vehicles equipped with standard equipment and, therefore, made no claims for cars equipped with optional extra-cost eight-cylinder engines. Four different engine options were available for each of the advertised vehicles, including a basic 198 cu. in. six-cylinder, an optional 225 cu. in. six-cylinder, a 318 cu. in. V8, and a 360 cu. in. V8. Although the director of Chrysler's advertising apparently did not know it, the record reveals that the 225 cu. in. six-cylinder engine was an extra-cost option available to consumers possibly looking for a small car with a little more horsepower than that which is developed by Chrysler's basic 198 cu. in. six-cylinder engine. Compare Tr. 97 with RX 19-22, RX 23g and RX 24a. The record also reveals that during the model years 1973 and 1974, approximately 276,000 Dodge Dart Swinger Specials and Sports and Plymouth Dusters sold by Chrysler to its dealers were equipped with six-cylinder engines. How many of these engines were optional extra-cost 225 cu. in. engines is not disclosed. During the same period, Chrysler sold to its dealers over 87,000 Darts and Dusters equipped with optional V8 engines. Stipulation of Facts CX 1b, 1c. These optional engines were available to consumers who wanted a little more "pep" from their small cars than the basic six-cylinder engine would provide. Under these circumstances, failure to identify the engine sizes to which the mileage superiority claims would apply could reasonably lead consumers to believe that the claims applied to the full range of engine options, including the optional extra-cost six and eight-cylinder engines.

²⁰ Chrysler argued before the administrative law judge and again on appeal that complaint counsel unilaterally

(Continued)

Science found Chrysler's small cars superior to the Novas in situations in which the magazine had actually reported that the Novas were the more fuel-efficient vehicles.

The Commission also finds that Chrysler's failure to disclose that the *Popular Science* report supported its mileage claim only in respect to its six-cylinder engines or, in the [8] alternative, to disclose the report's findings in respect to the eight-cylinder engines constituted an omission of material fact. The way the *Popular Science* magazine reference was used in the context of these advertisements was designed to disarm skeptical consumers who might question the reliability of Chrysler's fuel-economy claims.²¹ It was not, after all, just Chrysler's word that the consumer had to believe.²² The ads conveyed the impression to consumers that a presumably objective third party with no interest in selling respondent's automobiles had tests which proved, without qualification, that all Chrysler small cars had better gas mileage than all Chevrolet Novas.²³ This impression was misleading and deceptive and, accordingly, we find that Chrysler's failure to disclose findings in the *Popular Science* report which were unfavorable to its eight-cylinder cars, in the context of advertisements not expressly limited to its six-cylinder cars, constituted an omission of material fact and misuse of the *Popular Science* report in violation of Section 5 of the Federal Trade Commission Act.²⁴

Small Car vs. Small Car (The Defense)

Chrysler argues on appeal that a small car equipped with a V8 engine is not a small car and that consumers would not perceive such a car as a small car.²⁵ This defense is [9] predicated on conclusions derived from a "focus group" study conducted in Atlanta, Georgia, involving 28 consumer participants. The study itself involved group discussions which were observed by respondent's experts and which

amended the complaint to include the concept of automobiles equipped with comparable engines. I.D. 16, App. Br. 5, Reply Br. 5-6. The advertisements in question could reasonably be viewed by consumers as comparing vehicles with six-cylinder engines against other vehicles with six-cylinder engines and vehicles with eight cylinders against other vehicles with eight cylinders. The complaint allegations provided adequate notice to Chrysler that this issue would be litigated in this proceeding. Moreover, Chrysler presented its views to the administrative law judge and has fully briefed the issue on appeal. We believe Chrysler has been afforded an ample opportunity to defend itself in this proceeding and find no prejudice to its case.

²¹ Chrysler's Director of Advertising testified:

• • • [W]e were anxious to get third party authentication for our fuel economy advantages. And again that is why we relied on Popular Science. We could have said "our proving ground show" but it is not a question of just making the claim. It is a question of getting somebody to believe it, and we wanted some sort of third party authentication. Tr. 79-80. See RX 15 Z-4, RX 14i.

²² See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

²³ See RX 14i, wherein it is recommended to Chrysler that tests relating to the fuel-economy question "should be treated as a proof point in communications • • •"

²⁴ See, note 17, *supra*.

²⁵ App. Br. pg. 6.

were apparently tape recorded; however, these tapes are not in evidence.²⁶

The record evidence relating to this study consists of the opinion testimony offered by respondent's experts and the verbatim responses to questionnaires concerning "mock" small-car advertisements filled out by the participants before the discussion sessions were conducted.²⁷ We first observe that none of the participants' verbatim responses contain specific references to particular engine sizes.²⁸ What transpired in the group discussions is not clear on this record; but this notwithstanding, respondent believes the discussions support the view that consumers perceive small cars as cars equipped only with engines powered by fewer than eight cylinders. Precisely how the "focus group" discussions came to focus so sharply on this issue, when none of the participants previously mentioned V8 engines, is a question for which respondent's evidence provides no sufficient answer.²⁹

[10] Despite these deficiencies in the evidence, the "focus group" discussions may have been, for respondent's purposes, a valid method for determining how its advertisements might appeal to consumers who were interested in small cars. But accepting the study as valid for this limited purpose does not necessarily mean it is an adequate test to determine the meaning of the advertisements. As respondent well knows, this test clearly was not designed to provide survey data on the way consumers interpret the specific ads we have before us.³⁰ The contention that the "focus study" and the testimony based upon it provide strong empirical evidence concerning how consumers relate to the term "small car" plainly overstates the value of this test. Many consumers, for example, receive the impressions conveyed by advertisements while perusing a newspaper or magazine; and it is not likely that many pause, as they apparently did in respondent's study, to conduct lengthy in-depth discussions about their meaning.³¹ Furthermore, the study provides no insight into the meaning of these

²⁶ RX 15c, Tr. 152.

²⁷ RX 16f, Tr. 152-156.

²⁸ RX 15 H-15, Z-9. According to Chrysler, these verbatim responses are not significant at all because the important findings result from the group discussions. Reply Br. 3-4, Tr. 165. They are, however, the only direct evidence of what the participants in the study actually had to say which has not been filtered through the testimony of respondent's experts. See, e.g., Tr. 158.

²⁹ It appears the subject of engine sizes was mentioned many times in the group discussions, and respondent's expert witnesses heard and viewed the discussion groups on a TV monitor located in another room. Tr. 183. However, as one of these experts indicated:

If some questions arise or some information is being discussed in the group, we can send a message to the moderator and tell him to pursue this particular topic or this particular subject, what-have-you. Tr. 153. See, also Tr. 174.

Whether the discussion of engine size may have been prompted by the moderator or raised spontaneously by a participant is not clear; nor is it clear on this record whether it was a subject the moderator was requested to pursue. Tr. 151-159.

³⁰ Tr. 161-163, Reply Br. pg. 3.

³¹ Respondent emphasizes that the "focus study" was a *qualitative*, not quantitative, study of consumer perception

advertisements. Not only does it ignore the various contexts in which the term "small car" may be used, it ignores the specific context in which it was used in these advertisements. The ads in question had not yet been developed when the "focus group" study was conducted.³² But even if they had been considered in this study, the number of participants involved, 28 in all, would not, in any event, constitute a sufficiently large sample to provide statistically meaningful insight into impressions conveyed to consumers by the advertisements.³³

[11] In addition, according to respondent's experts, the "focus group" results convinced them that consumers view small cars as easy to handle and economical; small engines, specifically four and six-cylinder engines, may be an aspect of small-car economy.³⁴ While these conclusions suggest that engine size may be important to some consumers, a substantial number of consumers may still perceive advertisements for a compact vehicle with eight cylinders as an advertisement for a small car.³⁵ For some consumers, four and six-cylinder engines may well be an aspect of small-car economy. This, however, is not inconsistent with the notion that a small car equipped with a V8 engine may also be perceived by consumers as being more economical than a larger car equipped with a V8 engine. Yet in Chrysler's view, and the public's view as Chrysler understands it, if a vehicle has a four or six-cylinder engine, it may be a small car; if the same vehicle is equipped with an eight-cylinder engine, it may be a large car or a mid-size car, but whatever it is, it is no longer a small car.³⁶

[12] The record in this matter reveals that the public's understand-

and, therefore, it probed more deeply into consumer perceptions. Reply Br. pg. 3. Yet the "perceptions" consumers arrive at after discussing a subject with others who may influence their views may be different from the initial impressions they may have had. For this reason, group discussions may not be the best way to survey the impressions conveyed by an advertisement. In any event, the "perceptions" respondent apparently is relying upon in this proceeding concern the term "small car" in the abstract and are for this reason, if for no other, of little use to us here. Compare note 37 *infra*.

³² Reply Br. pg. 3.

³³ Tr. 220-221.

³⁴ Tr. 154-155, 206; RX 15b.

³⁵ The record as a whole suggests that both the "focus group" participants and Chrysler personnel tended to think of a small car as an amalgamation of features including the vehicle's length, its price, cost of maintenance, optional equipment, weight, and the size of its engine, among others. Tr. 63, 116, 154-155, 158, 183, 195, 203-204; RX 14e, 14f, RX 15. At the time the ads were published, the auto industry used the small-car label to describe economy imports, sub-compacts, and compact model cars. Tr. 76.

³⁶ One of the problems with Chrysler's argument is that it requires rigid adherence to a definition of "small car" which excludes reasonable alternative formulations. As the administrative law judge quite properly observed:

Of course, by rejecting Chrysler's contention that the challenged advertisements did not contain the representation alleged in the complaint, I am not finding that the advertisements might not also convey the limited meaning suggested by Chrysler. I.D. 17.

It is a well settled principle that advertisements may be deceptive if they have a tendency and capacity to convey misleading impressions to consumers even though other nonmisleading interpretations may also be possible. *Merck & Co.*, 69 F.T.C. 526, *aff'd sub nom.*, *Doherty, Clifford, Steers & Shenfield, Inc. v. FTC*, 392 F.2d 921 (6th Cir. 1968); *Continental Wax Corp. v. FTC*, 330 F.2d 475 (2d Cir. 1964); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270 (2d Cir. 1962).

To illustrate how the definition of a term may be different from the way people perceive the object of the

(Continued)

ing of the term "small car" may be much more flexible [13] than respondent suggests in its argument on appeal; and indeed it is this flexibility which apparently encouraged Chrysler to undertake an advertising campaign to convince the public that Chrysler had "the best fuel performance of all the 'bigger' small cars and the best package of all the 'smaller' small cars."³⁷ A substantial portion of the consuming public could reasonably perceive Chrysler's compact cars with V8 engines simply as small cars with big engines or high-powered small cars. Under these circumstances, the narrow interpretation of the term "small car" urged by Chrysler on appeal is unwarranted and unsupported by this record, and we reject it.³⁸ [14]

Public Interest in These Proceedings

Chrysler believes the public interest requires dismissal of the complaint because it did not intend to deceive the public, and if there

definition, we refer respondent to the celebrated case of *Regina v. Ojibway*, a case not officially reported but which may be found in 8 Criminal Law Quarterly at 137 (Toronto, 1965). In *Ojibway*, the court interpreted the meaning of a "small bird" under the Ontario Small Birds Act. The issue in the case was whether a pony saddled with a feather pillow was a small bird within the meaning of the law. In an opinion by the Honorable Blue, J., the court concluded that for purposes of the Small Birds Act, all two-legged, feather-covered animals were birds and that the legislative intent clearly was to make two legs the minimum requirement; therefore, a horse with feathers on its back must be deemed, for purposes of the Act, to be a bird, "and *a fortiori*, a pony with feathers on its back is a small bird." The judge could have, but did not, include the finding in his opinion that a small bird is a pony, but had he done so, this opinion would be on "all fours" in support of respondent's argument.

The court was quick to note, however, that different things may take on the same meaning for different purposes, and to this we add that the same thing may take on different meanings to different people. Like *Ojibway*, however, this case is a horse of a different color, for a horse with feathers on its back may be defined as a bird, but to a bystander it may still be perceived as a horse. We find ourselves in the position of the bystander. Respondent asserts that a small car with an eight-cylinder engine is not a small car. But is a horse with a feather pillow on its back any the less a horse?

³⁷ See note 3, *supra*. While it appears the "focus group" study persuaded Chrysler to change its approach to "small car" advertising by deemphasizing how many inches long its cars measured, a statistic which apparently, in the abstract, meant little to the "focus group" participants, and by refocusing on the package of features offered by its cars, the underlying strategy of its campaign to "de-segment" the market remained unchanged. RX 15b, 15d; CX 2, CX 3.

³⁸ During the trial of this matter and at the oral argument before the Commission on January 16, 1976, Chrysler vigorously pursued the argument that consumers would not consider a "small car" as a car equipped with a V8 engine. I.D. 14; Transcript of Oral Argument pgs. 11, 14. It has come to our attention, on application filed by complaint counsel to supplement the record, that Chrysler has recently described in advertising, "a tough little package," its "new small" Road Runner. The commercial began with a musical jingle, two lines of which were: "Road Runner's small at a small car price; Small car economy is something kinda nice * * *." This vehicle comes equipped with no engine other than a V8 engine.

Chrysler admits "that the commercial in question was shown on December 20, 1975, * * *" but "denies both the authenticity of some of the material (submitted by complaint counsel) and the relevance of all of it." Opposition to Complaint Counsel's Motion to File New Documentary Evidence pgs. 3, 5. The Commission has determined that Exhibits C, D and E, attached to complaint counsel's motion filed on February 6, 1976, including two letters dated January 30, 1976, from Mr. Maher, one of Chrysler's attorneys, be admitted into evidence as Commission Exhibits 5 through 7. Exhibits A and B, annexed to complaint counsel's motion, are cumulative and are, therefore, rejected. The Commission has also determined that the attachment and Exhibits A and B, annexed to Complaint Counsel's Reply to Respondent's Opposition, be admitted into evidence as Commission Exhibits 8 through 11. In accepting these exhibits, we emphasize that the meaning of the commercials and the impressions they convey to the public are not before us. The ads discussed in Mr. Maher's letters are, however, relevant to the issue of Chrysler's use of the term "small car" in advertising promoting the sale of a vehicle with a V8 engine. Since the advertisement was aired on December 20, 1975, it was not available at the trial and we believe counsel have acted with due diligence, under the circumstances, in offering these documents into evidence. Chrysler's vague objections concerning the authenticity of "some of the material" are, in view of the correspondence from its own counsel discussing these materials in detail, overruled.

were any deceptive representations conveyed by two of the ads, it was "corrected" by other nondeceptive ads which were part of the same advertising campaign. We disagree with respondent.

Proof of Chrysler's intention to deceive is not a prerequisite to establishing a violation of Section 5.³⁹ It [15] is well settled that an advertiser's good intention does not immunize it from responsibility for representations which have a tendency and capacity to deceive the public.⁴⁰ Moreover, our order is not designed to punish Chrysler for its past deception but to ensure against a recurrence of the deception in the future.

We also find unpersuasive respondent's argument that the deception in the challenged advertisements was "cured" by other advertisements in the "small car" campaign. Evidence of this cure consists of statistical estimates, prepared by respondent's expert, indicating the percentage of people who had an opportunity to be exposed to both the deceptive and nondeceptive ads. According to these estimates, fewer than 2 percent of the people who received periodicals containing the deceptive ads would not have had an opportunity to be exposed to the other small-car ads.⁴¹

As the administrative law judge noted, it is significant that these raw statistical estimates relate to newspaper exposure only and not to the number of consumers who actually saw respondent's advertisement.⁴² Yet, even if we assume [16] that each consumer who read one of the ads in respondent's campaign read all of the ads, it would not cure the deception. Section 5 prohibits deception in advertisements which are disseminated in a single publication or numerous periodicals by mail, radio, or TV without regard to whether the ad was published once by itself or several times in conjunction with other ads in a media blitz or extended advertising campaign. The fact that nondeceptive ads may be part of an ad campaign is no basis for ignoring the advertisements which are deceptive. The Commission will evaluate

³⁹ *Merck & Co., Inc. v. FTC*, 392 F.2d 921 (6th Cir. 1968); *Feil v. FTC*, 235 F.2d 879 (9th Cir. 1960); *Koch v. FTC*, 206 F.2d 311 (6th Cir. 1953); *Charles of the Ritz v. FTC*, 143 F.2d 676 (2d Cir. 1941). Respondent notes that CX 3 appeared in the *Reader's Digest* and was a scaled-down version of a full-page newspaper advertisement. In reducing the newspaper advertisement to a size appropriate for *Reader's Digest*, the explicit reference to the "slant six" engine became too small to be legible and so it was edited out of the text of CX 3. App. Br. pgs. 13-14. As the Supreme Court observed in *Colgate-Palmolive, supra*:

All methods of advertising do not equally favor every seller. If the inherent limitations of a method do not permit its use in the way the seller desires, the seller cannot by material misrepresentation compensate for those limitations. At 391.

⁴⁰ *Ford Motor Co. v. Federal Trade Commission*, 120 F.2d 175, 181 (6th Cir.), cert. denied, 314 U.S. 668 (1941); *Montgomery Ward & Co.*, 379 F.2d 666, 670 (7th Cir. 1967); *Koch v. Federal Trade Commission*, 206 F.2d 311, 317 (6th Cir. 1953).

⁴¹ Tr. 176-179, 185-187.

⁴² Respondent's expert used a "data function distribution formula" to calculate the probability of being "potentially exposed to one newspaper and only one." Tr. 176. This statistic has little, if any, bearing on the percentage of people who saw respondent's advertisements and is, for this reason, clearly distinguishable from the type of survey which the Commission considered in *Bristol-Myers Co.*, Dkt. 8897 (April 22, 1975) [85 F.T.C. 707]. Tr. 180.

each ad in an ad campaign on its own merits; and while we may find, as we did here, that some of the ads are nondeceptive, this provides no license for the deception found in others. The public has a right to expect each of respondent's advertisements to be equally free of deception.⁴³

Chrysler has also argued on appeal that the Commission's recently issued fuel-economy guide specifies the requirements for advertising the results of automobile fuel-economy tests and, therefore, there is no need for an order.⁴⁴ Yet, if Chrysler should breach the guide by misusing the E.P.A. test figures as it has misused the *Popular Science* report, *de novo* enforcement proceedings requiring a new complaint and another trial would be necessary before the public would be any closer than it is now to the protection of an order.

[17] Moreover, the guide requires, *inter alia*, advertisers using automobile fuel-economy claims to disclose both the city and highway fuel economy of the advertised vehicle as determined by the U.S. Environmental Protection Agency.⁴⁵ It must also be clear in the advertisement that the E.P.A. figures are only estimates and will vary depending upon the consumer's driving habits, the driving conditions, and the car's condition and optional equipment. Disclosures relating to engine size, type of transmission, and other factors affecting fuel economy may, under certain circumstances, also be required. Thus, compliance with the guide depends upon a candid disclosure of the contents and limitations of test reports prepared by E.P.A.

Having found that Chrysler has, in the past, misused third-party test results, it is incumbent upon us to ensure against recurrences of this type of abuse not only in respect to tests relating to fuel economy but also tests or demonstrations which purportedly offer consumers objective proof for claims pertaining to other features of the products respondent promotes in its advertising.⁴⁶ The Commission, therefore, finds it necessary, in the public interest, that an order issue against Chrysler "fencing in" the abusive use of techniques for conveying the

⁴³ See *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961); *Carter Products, Inc. v. FTC*, 186 F.2d 821 (7th Cir. 1951). Respondent argues that the allegedly deceptive ads (CX 2 and CX 3) were preceded in its campaign by ads which were nondeceptive. Therefore, according to respondent, the "initial contact" with consumers was nondeceptive. App. Br. pg. 15, footnote 34; Reply Br. pg. 7. But this is of no moment. Section 5 enforcement would take an odd turn indeed if a seller were permitted to lure customers with truthful representations only to "loose the dogs" once the customers were within reach. In any event, we hold Chrysler strictly accountable for each of its ads individually.

⁴⁴ App. Br. pg. 16.

⁴⁵ *Guide Concerning Fuel Economy Advertising for New Automobiles*, 40 F.R. 42003, September 10, 1975. This guide was adopted as an interim measure on automobile fuel-economy advertising. A proposed trade regulation rule covering these types of claims was announced on September 24, 1974, by notice published in the *Federal Register*. 39 F.R. 34382. The Commission determined that further study of the E.P.A. test results would be needed before it would promulgate the final TRR.

⁴⁶ *FTC v. Colgate-Palmolive Co.*, *supra*, note 22.

impression to consumers that product claims have been objectively verified.⁴⁷

[18] Finally, Chrysler asks, "How can the Commission rationally forbid an advertiser to issue any future advertisement containing an unintentional ambiguity?"⁴⁸ To this we respond that the relief, in this instance, does not encompass "any" future advertisement. It is limited to those advertisements in which respondent abuses certain techniques which have a tendency and capacity to lead the public into believing respondent has objective proof for its product claims. When respondent employs such techniques in its future advertising, it must be mindful of the proscriptions of our order. Its provisions, although not punitive, are designed not only to protect consumers from the continuation of the deceptive practices we have found in this proceeding but, at the same time, to provide Chrysler with the type of guidance it may need to keep it from unintentionally misleading the public.

An appropriate order is attached to this opinion.

FINAL ORDER

[1] This matter having been heard by the Commission upon respondent's appeal from the initial decision; and

The Commission having considered the oral arguments of counsel, their briefs, and the whole record; and

The Commission, for reasons stated in the accompanying opinion, having denied the appeal; accordingly

It is ordered, That, except to the extent that it is inconsistent with the Commission's opinion, the initial decision of the administrative law judge be, and it hereby is, adopted together with the opinion accompanying this order as the Commission's final findings of fact and conclusions of law in this matter;

It is further ordered, That the following order be, and it hereby is, entered:

⁴⁷ Chrysler claims to have been denied a fair, impartial hearing on the merits because the administrative law judge, at page 18 of his initial decision, stated:

The Commission, upon issuing its complaint in this matter, determined that a proceeding by it would be in the public interest. There is nothing in the record to show the contrary. App. Br. pg. 19.

Respondent believes this indicates the judge relied upon the complaint as "some evidence of wrongdoing." First, we find no prejudice to respondent in Judge Brown's paraphrase of Subsection 5(b) of the F.T.C. Act. That subsection provides that a determination by the Commission as to whether or not it appears a proceeding would be in the public interest is a prerequisite to the issuance of a complaint. Second, it is apparent from a review of Judge Brown's comprehensive findings of fact that he made his determinations based on the record, as a whole, and, on this basis alone, found respondent's ads to be deceptive. It is evident from these findings that he gave no evidentiary weight to the complaint. Having found deception in advertisements promoting the sale of automobiles nationwide, Judge Brown was entitled to presume that an order putting a stop to it was in the public interest. His statement that "there is nothing in this record to show the contrary" indicates that respondent's evidence failed to persuade him that curing this deception and preventing its continuation in the future was not in the public interest. These statements by the judge do not demonstrate that respondent was denied due process of law in these proceedings.

⁴⁸ App. Br. pg. 17.

ORDER

It is ordered, That respondent Chrysler Corporation and its officers, representatives, and agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or [2] distribution of products sold by the respondent in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, by reference to a test or tests, that any of respondent's automobiles are superior with regard to fuel economy to any other automobiles whether manufactured by respondent or others unless:

a. such superiority has been demonstrated as to the model(s) for which it is claimed by such test or tests with respect to each sample, or the valid average of all identical samples, of each model represented to have been tested; or

b. the valid test results for each sample, or the valid average of all identical samples, of each model so compared, including the advertised model as well as such makes and models to which the advertised model is compared, are clearly and conspicuously disclosed.

For the purpose of this order, "sample" shall mean an actual automobile tested.

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

3. Misrepresenting in any manner, directly or by implication, the purpose, content, or conclusion of any test, report, study, research, demonstration, or analysis.

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

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

[3] *It is further ordered,* That respondent notify the Commission at least 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

719

Final Order

other change in the corporation which may affect compliance obligations arising out of the order.

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

Not having participated in the oral argument in this matter, Chairman Collier did not participate in the resolution of it.