

Complaint

IN THE MATTER OF

UNION CARBIDE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT AND SECS. 3 AND 7 OF
THE CLAYTON ACT

Docket C-2902. Complaint, Sept. 28, 1977 — Decision, Sept. 28, 1977

This consent order, among other things, requires a New York City producer of industrial gases and gas welding apparatus, for a 20-year period, to cease using any tying arrangement, or employing any exclusive dealing contract that is not for one year or less, or which fails to provide a 90-day or less period for notice of termination. Additionally, the firm is prohibited for a ten-year period from acquiring distributors of industrial gases or gas welding equipment without prior Commission approval, except where any of the prescribed conditions exist. Further, in those instances where prior approval is not required, Union Carbide must furnish the Commission with sufficient data so as to enable it to determine whether such acquisition violates the terms of the order.

Appearances

For the Commission: *Gordon Youngwood, Roger S. Leifer and Geoffrey S. Walker.*

For the respondent: *George A. Avery, Wald, Harkrader & Ross,* Washington, D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Union Carbide Corporation ("Union Carbide"), respondent herein, has violated the provisions of Section 3 of the Clayton Act, as amended (15 U.S.C. 14), and Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

DEFINITIONS

1. For the purpose of construing this complaint, the following definitions will apply:

(a) "Industrial Gases" shall mean the following gases: Oxygen, Nitrogen, Argon, Acetylene, Hydrogen and Helium.

(b) "Welding Products" shall mean equipment, supplies and consumable items used to fuse or cut metals.

(c) "Gas Welding Apparatus" shall mean the equipment used to fuse or cut metals by means of heat produced by a gas flame.

(d) "Distributor" shall mean a business firm whose primary function in the Industrial Gas and Welding Products business is the purchase of Industrial Gases and Welding Products for the purpose of resale, but shall not include any business firm whose primary function in the resale of Industrial Gases and Welding Products is the distribution of Industrial Gases and Welding Products to entities engaged in the plumbing, heating or air conditioning trade.

RESPONDENT

2. Respondent Union Carbide is a publicly owned New York corporation with its principal place of business at 270 Park Ave., New York, New York.

3. Union Carbide is engaged in the manufacture and sale of chemicals, plastics, industrial gases and related products, welding equipment, metals, carbon products and such consumer oriented products as batteries and antifreeze.

4. For 1975 Union Carbide had net sales of \$5.7 billion and a net income of \$382 million.

5. Union Carbide, the nation's leading producer of industrial gases, sells industrial gases and welding products through its Linde Division. During 1972, Union Carbide had the largest volume of domestic sales of acetylene, argon, helium, nitrogen and oxygen to distributors, and the third largest volume of domestic sales of hydrogen to distributors. During 1972, it was one of the nation's leading manufacturers of welding products.

6. At all times relevant herein Union Carbide sold and shipped its products in interstate commerce and engaged in commerce within the meaning of the Clayton Act, as amended, and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

COUNT I

TRADE AND COMMERCE

7. The relevant lines of commerce affected by the actions of Union Carbide are the sales to distributors of each of the following relevant industrial gases: acetylene, argon, helium, hydrogen, nitrogen and oxygen.

8. The relevant geographic market for each line of commerce is the United States.

9. During 1972, there were substantial sales by Union Carbide to

distributors of acetylene, argon, helium, hydrogen, nitrogen, and oxygen. Union Carbide is one of the major sellers of those six gases to distributors.

ACTS AND PRACTICES

10. In the course of interstate commerce, Union Carbide, a leading company in each relevant line of commerce alleged herein, has engaged and is engaging in acts and practices which may foreclose competition in the sale of relevant industrial gases to distributors. Among the acts and practices in which Union Carbide has engaged and is continuing to engage, in the course of interstate commerce, are the following:

(a) Requiring distributors, pursuant to a contract, agreement or understanding, to purchase from Union Carbide their total requirements of each of the relevant industrial gases;

(b) Requiring distributors to purchase their total requirements of the relevant industrial gases from Union Carbide as a condition to their purchasing any relevant industrial gas from Union Carbide;

(c) Requiring distributors to purchase their total requirements of the relevant industrial gases from Union Carbide as a condition to their purchasing welding products from Union Carbide.

(d) Leasing or otherwise making available to customers of distributors who have ceased purchasing one or more Union Carbide industrial gases, industrial gas cylinders at rates set for the purpose of destroying a competitor or eliminating competition.

EFFECTS

11. The acts and practices identified in Paragraph 10 have or may have the following effects among others:

(a) Substantially lessening competition for the sale of relevant industrial gases to distributors;

(b) Substantially lessening competition for the sale of relevant industrial gases to consumers;

(c) Increasing entry barriers into each line of commerce alleged herein;

(d) Depriving distributors of the opportunity of competing for sales of relevant industrial gases to certain classes of customers.

VIOLATIONS

12. The acts and practices alleged herein constitute tying arrangements, exclusive dealing arrangements or total requirements

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contracts in violation of Section 3 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

13. The acts and practices alleged herein constitute unfair methods of competition or unfair acts and practices by Union Carbide in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

14. The charges of Paragraphs 1 through 6 are incorporated by reference herein as if set forth verbatim.

PLAN AND PATTERN OF ACQUISITIONS

15. Since 1969, Union Carbide, pursuant to a plan or plans, has acquired an interest of 50 percent or more in at least 22 distributors. The total dollar amount expended for these acquisitions was approximately \$18 million.

16. The sales of the acquired distributors for the year prior to their acquisition ranged from \$309,000 to \$4,835,000.

17. As part of its continuing plan of acquisitions, Union Carbide expects to acquire additional distributors within the next five years.

18. At all times relevant herein, each of the acquired distributors was engaged in the purchase or sale of products in interstate commerce, was engaged in commerce as commerce is defined in the Clayton Act, as amended, and operated a business in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

TRADE AND COMMERCE

19. The manufacture and sale of gas welding apparatus constitutes a relevant line of commerce. Union Carbide accounted for a substantial share of the domestic gas welding apparatus market in 1972.

20. The manufacture and sale of each of the following relevant industrial gases: acetylene, argon, helium, hydrogen, nitrogen and oxygen, constitutes a relevant line of commerce.

21. During 1972, there were substantial sales by Union Carbide of acetylene, argon, helium, hydrogen, nitrogen and oxygen to distributors. Union Carbide is one of the major sellers of these six gases to distributors.

22. The United States and certain sections thereof constitute geographic markets or sections of the country for each relevant line of commerce.

23. Barriers to entry are high for a new distributor of relevant industrial gases and gas welding apparatus.

24. Barriers to entry are high for a new supplier of relevant industrial gases and gas welding apparatus.

25. The purchases by those distributors in which Union Carbide has acquired an interest are and have been substantial in each relevant line of commerce.

EFFECTS OF THE ACQUISITIONS AND THE PLAN AND PATTERN OF
ACQUISITIONS

26. The effect of Union Carbide's acquisitions of stock or assets of the distributors described in Paragraph 15 individually and collectively may be substantially to lessen competition or to tend to create a monopoly in the sale of relevant industrial gases to distributors and the manufacture and sale of gas welding apparatus in the United States and certain sections thereof; and the effects arising from the past and planned future acquisitions of distributors may be unreasonably to restrain trade in the sale of relevant industrial gases to distributors and the manufacture and sale of gas welding apparatus in the United States and certain sections thereof, thus constituting an unreasonable restraint of trade, an unfair method of competition and an unfair act or practice in the following ways among others:

(a) Union Carbide's competitors have been or may be foreclosed from a substantial segment of the relevant lines of commerce;

(b) The ability of nonintegrated suppliers to compete in the relevant lines of commerce has been or may be impaired;

(c) The ability of nonintegrated distributors to compete for the sale of products in the relevant lines of commerce has been or may be impaired;

(d) Barriers to entry into the sale of relevant industrial gases to distributors and the manufacture and sale of gas welding apparatus have been raised;

(e) Barriers to entry into the distribution of relevant industrial gases by potential distributors have been raised;

(f) A trend toward vertical integration between such suppliers of relevant industrial gases and gas welding apparatus and distributors of those products may be accelerated;

(g) A dangerous probability has been created that, if not curtailed, the acquisition will enable Union Carbide to enhance its position in the relevant lines of commerce;

(h) Union Carbide has been eliminated as a potential entrant through internal expansion into the retail sale of relevant industrial

gases and gas welding products in the geographic areas where it acquired an interest in distributors.

VIOLATIONS

27. Union Carbide's acquisition of at least twenty-two distributors violates Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

28. Union Carbide's plan pursuant to which it has acquired at least twenty-two distributors and will acquire more distributors violates Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

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

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

1. Respondent Union Carbide Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business at 270 Park Ave., New York, New York.

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

ORDER

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

1. "Industrial Gases" shall mean the following gases: Oxygen, Nitrogen, Argon, Acetylene, Hydrogen and Helium.

2. "Welding Products" shall mean equipment, supplies and consumable items used to fuse or cut metals.

3. "Gas Welding Apparatus" shall mean equipment used to fuse or cut metals by means of heat produced by a gas flame.

4. "Distributor" shall mean a business firm whose primary function in the Industrial Gas and Welding Products business is the purchase of Industrial Gases and Welding Products for the purpose of resale, but shall not include any business firm whose primary function in the resale of Industrial Gases and Welding Products is the distribution of Industrial Gases and Welding Products to entities engaged in the plumbing, heating or air conditioning trade.

5. "Location" shall mean a bona fide sales and distribution facility operated by a Distributor as a receiving or distribution point for Industrial Gases, which facility ordinarily carries an inventory of Industrial Gases and Welding Products and is staffed with a bona fide sales force and operating and/or distribution personnel. Two or more facilities that are staffed by common sales and operating and/or distribution personnel shall be deemed to comprise a single Location.

6. "Requirements" of any Distributor for any Industrial Gas at any Location shall mean such Distributor's total requirements for such Industrial Gas either delivered to such Location or delivered direct by the Distributor to using customers which are generally served by sales or distribution personnel assigned to such Location.

I

It is ordered and directed, That for a period of twenty (20) years from the date of service of this Order, respondent Union Carbide Corporation (hereinafter Union Carbide), its subsidiaries, divisions, affiliates, successors, and assigns, in connection with the distribution, offering for sale, or sale of Industrial Gases or Welding Products to Distributors in which it owns less than a majority interest, shall:

A. Not offer, renew, extend or enter into any contracts or agreements, or enforce directly or indirectly those provisions of any contract or agreement, which require any Distributor:

1. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas unless (a) the initial term of such contract or agreement is one year or less, and (b) such contract or agreement may be terminated by either party effective on any anniversary date upon written notice given some minimum period in advance of such date as set forth in such contract, such minimum period to be not more than ninety (90) days; or

2. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas at one or more Locations as a condition to being permitted to purchase from Union Carbide such Industrial Gas at another Location; or

3. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas at any Location as a condition to being permitted to purchase from Union Carbide any other Industrial Gas at the same or any other Location; or

4. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas at any Location as a condition to being permitted to purchase from Union Carbide any Welding Products.

B. Not refuse to sell, subject to paragraph A1 above, Industrial Gases or Welding Products to a Union Carbide Distributor because that Distributor refuses (1) to purchase all or a designated part of its requirements of Industrial Gases from Union Carbide; or (2) to purchase from Union Carbide all or any part of its requirements of Industrial Gases at more than one of its Locations.

II

It is further ordered, That for a period of twenty (20) years from the date of service of this Order, Union Carbide shall not, either directly or indirectly through subsidiaries in which Union Carbide owns a majority interest, (i) lease or otherwise make available to customers of any Distributor who has ceased purchasing one or more Union Carbide Industrial Gases within the preceding two years, Industrial Gas cylinders at rental or demurrage rates set for the purpose of destroying a competitor or eliminating competition, or (ii) lease or otherwise make available to competitors of any Distributor who has ceased purchasing one or more Union Carbide Industrial Gases within the preceding two years, Industrial Gas cylinders at rental or demurrage rates lower than the standard rental or demurrage rate for such cylinders then in effect for Union Carbide Industrial Gas Distributors, for the purpose of destroying a competitor or eliminating competition; *provided, however,* that if either a standard cylinder

rental rate schedule to Union Carbide Industrial Gas Distributors or a standard cylinder demurrage rate schedule to such Distributors, but not both, is in effect, then, for the purpose of this Part II, one shall be deemed to be equivalent to the other on the basis of the revenue that would be generated by a single cylinder during a two-month period of continuous usage, rounded to the nearest cent; and *provided, further*, that for the purpose of this Part II, a standard cylinder rental or demurrage rate shall be a rate which is available to all Union Carbide Industrial Gas Distributors; and *provided, further*, that the purpose of destroying a competitor or eliminating competition must be established by proof of intent on the part of Union Carbide to destroy the Industrial Gas business of, or eliminate as a competitor, a Distributor who has ceased to distribute one or more Union Carbide Industrial Gases; and evidence that Union Carbide has engaged in price competition with such Distributor or that Union Carbide intends to seek or obtain the trade of particular customers then being served by such Distributor shall not, by itself, be sufficient to establish such intent; and *provided, further*, that Union Carbide may set rental or demurrage rates for customers or competitors of such Distributor lower than those in effect for Union Carbide Industrial Gas Distributors in good faith response to competitive conditions in the area served by such Distributor; and *provided still further*, that Union Carbide shall have all defenses which would be available in law, including, but not limited to, the defenses of meeting competition and cost justification.

III

A. *It is further ordered*, That for a period of ten (10) years from the date of service of this order, Union Carbide shall not without prior approval of the Commission, except as otherwise provided in paragraph B of this Part III, acquire, directly or indirectly, the whole or any part of the assets, stock, share capital of, or other equity interest in, any Distributor of Industrial Gases and/or Gas Welding Apparatus.

B. No prior approval shall be required under this order for any acquisition by Union Carbide of any assets, stock, share capital of, or other equity interest in, any Distributor of Industrial Gases or Gas Welding Apparatus if such acquisition meets any of the following standards:

1. the acquisition involves only a change in the equity interest of Union Carbide in a Distributor in which Union Carbide already holds an equity interest; or
2. except to the extent such acquisition is covered by clause 3

of this paragraph B, the consummation of the acquisition does not result in Union Carbide owning an equity interest, obtained by acquisition, in Distributors to whom, in the calendar year prior to the calendar year in which such acquisition is consummated, Union Carbide sold in excess of 16 percent of its total sales of Industrial Gases or 16 percent of its total sales of Gas Welding Apparatus sold in such year to all acquired and independent Distributors; *provided, however*, that no acquisition of a Distributor shall be exempt from prior approval under this clause 2 unless the Distributor to be acquired purchased from Union Carbide more than 50 percent of its total purchases of industrial gases in the calendar year prior to the calendar year in which such acquisition is consummated; or

3. the acquisition is not covered by clause 2 of this paragraph B, but within twelve (12) months prior to the consummation of such acquisition Union Carbide has divested absolutely and in good faith by sale or spin-off its equity interests in one or more Distributors the aggregate dollar value of whose purchases of Industrial Gases and Gas Welding Apparatus, respectively, in the calendar year in which such acquisition is consummated was equal to or in excess of the aggregate dollar value of purchases of Industrial Gases and Gas Welding Apparatus, respectively, in such prior calendar year, by the Distributor so acquired; *provided, however*, that, to the extent that any purchases by a divested Distributor are utilized by Union Carbide in a determination that an acquisition falls within the provisions of clause 2 or 3 of this paragraph B, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of this clause 3; or

4. the transaction involves only (a) the purchase of products from a Distributor in the normal course of business, or (b) the purchase of fixed assets from an independent Distributor in a transaction in which the Distributor will continue thereafter to carry on its function as an independent Distributor in which Union Carbide has no equity interest; or

5. but for the acquisition by Union Carbide, the Distributor would have ceased business operations as an Industrial Gas Distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

C. During the period that this Part III is in effect, Union Carbide shall advise the Commission, prior to consummation thereof, of each acquisition of the type described in paragraph A of this Part III as to

which prior approval is not required because of the provisions of paragraph B2 or B3 of this Part III.

D. During the period that this Part III is in effect, Union Carbide shall, within ninety (90) days from the date of each acquisition described in paragraph B5 of this Part III, provide information sufficient for the Commission to determine whether, but for the acquisition by Union Carbide, the Distributor would have ceased business operations as an Industrial Gas Distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

IV

It is further ordered. That if, during the ten (10) year period beginning on the date of service of this order, any Distributor of Industrial Gases and/or Gas Welding Apparatus in which Union Carbide holds an equity interest acquires, without the prior approval of the Commission to the extent such approval would be required under Part III of this order if such acquisition were made directly or indirectly by Union Carbide, the whole or any part of the assets, stock, or share capital of, or other equity interest in, any Distributor of Industrial Gases and/or Gas Welding Apparatus, then Union Carbide shall within six (6) months thereafter divest absolutely and in good faith by sale or spin-off its equity interests in one or more Distributors, the aggregate dollar value of whose purchases of Industrial Gases and Gas Welding Apparatus, respectively, in the prior calendar year was equal to or in excess of the aggregate dollar value of purchases of Industrial Gases and Gas Welding Apparatus, respectively, in such prior calendar year by the Distributor so acquired; *provided, however,* that to the extent that any purchases by a divested Distributor are utilized by Union Carbide in determining compliance with the divestiture provisions of this Part IV, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of Paragraph III B3 of this order.

V

It is further ordered:

A. That if the Commission does not seek against Airco, Inc., an order to cease and desist from engaging in practices set forth in paragraph 10 of the complaint here attached, similar to that provided in Parts I and II of this order, in a complaint arising out of the investigation conducted under FTC File No. 751 0010 and issued not

later than one year from the effective date of this order, then Parts I and II of this order shall be of no further force and effect after such anniversary date.

B. That if the Commission issues on or before the first anniversary of the effective date of this order a complaint against Airco, Inc. arising out of the investigation conducted under FTC File No. 751 0010 and at any time after issuance such complaint is dismissed on the motion of, or without objection by, the Commission staff, then Parts I and II of this order shall be of no further force and effect after the effective date of such dismissal.

C. That if a consent order is entered against Airco, Inc. in settlement of a proceeding arising out of the investigation conducted under FTC File No. 751 0010 which contains any provisions that differ from any provisions of Part I or II of this order, then Union Carbide may apply to the Commission for modification of, or relief from, any such different provisions in this order, and upon such application the Commission shall grant such modification or relief in the provisions covered by such application as are necessary to conform such provisions in this order with the corresponding provisions of such Airco, Inc. consent order.

VI

It is further ordered, That Union Carbide shall within twenty-one (21) days after service upon it of this order forward a copy of this order and the complaint issued herein along with a copy of the attached letter (Attachment A) on respondent's official company stationery and signed by a responsible official of Union Carbide to Distributors of Union Carbide Industrial Gases and/or Gas Welding Apparatus.

VII

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

VIII

It is further ordered, That Union Carbide shall within sixty (60) days after service upon it of this order file with the Commission a report in writing setting forth in detail the manner in which it has complied with this order, and shall file such other reports as may

from time to time be required to assure compliance with the terms and conditions of this order.

ATTACHMENT A

(Official Stationery of Union Carbide Corporation)

Dear

Date

Please be advised that Union Carbide Corporation has entered into a Consent Order with the Federal Trade Commission which obligates the company not to impose certain restrictions upon Industrial Gases* and Welding Products* Distributors* or to engage in certain other practices. A copy of the Consent Order is enclosed herewith.

Union Carbide has agreed not to enforce those provisions of any existing contract for the purchase of Industrial Gases or Welding Products which are inconsistent with Paragraph IA of this Order. Thus, you will not be required to purchase from Union Carbide any part of your requirements of any Industrial Gas at any Location* as a condition to being permitted to purchase from Union Carbide the same Industrial Gas at another Location or any other Industrial Gas at the same or any other Location or any Welding Products. Union Carbide has agreed that you may terminate any existing contract for Industrial Gases or Welding Products either in its entirety, or as to any individual Industrial Gas at any Location, upon ninety (90) days prior written notice to Union Carbide.

Union Carbide will submit to you new contracts consistent with the Consent Order discussed above no later than six (6) months from the date of service of the Order. These new contracts will replace all current contracts no later than the first anniversary of the date of service of the Order and notice of termination will be given by Union Carbide not later than ninety (90) days prior to that date. If, at any earlier date, you choose to terminate any existing contract, either in its entirety or as to a particular Industrial Gas at a particular Location, you will be offered this new contract in its place. In any event, these new contracts will replace all current contracts for Industrial Gases not later than the first anniversary of the date of service of the Order.

Please note that, pursuant to the terms of Part V of the Order, certain provisions of the Order shall no longer be effective if the Commission does not issue, or consents, on the motion of, or without objection by, the Commission staff, to the dismissal of, a complaint against Airco, Inc. Further, if the Commission consents to an order with Airco which differs from this Order, Union Carbide may obtain a corresponding modification of this Order. If any such eventualities occur, we will notify you by letter of the applicable changes.

If, in the future, you believe that any of the terms of the enclosed Consent Order have been violated, you may report the details in writing to:

Federal Trade Commission Bureau of Competition Washington, D.C. 20580

We welcome the opportunity to do business with you on terms which are in accordance with the letter and spirit of the Federal Trade Commission Order.

Very truly yours, (Name and Title of Responsible
Official) Union Carbide Corporation

Enclosure

* The terms "Industrial Gases," "Welding Products," "Distributor" and "Location" are defined in the enclosed order.

Modifying Order

90 F.T.C.

IN THE MATTER OF
SOFT SHEEN COMPANY, INC., ET AL.

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

Docket C-2786. Complaint, Jan. 27, 1976 — Modifying order, Sept. 30, 1977

This order modifies a cease and desist order issued January 27, 1976, 41 FR 7939, 87 F.T.C. 164 to conform with obligations of a consent order issued against a competitive firm, by limiting substantiation requirements for safety claims in Provision I.B., and revising the third warning, pertaining to hair relaxers, in Provision III.

Appearances

For the Commission: *Sharon S. Armstrong.*

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

ORDER MODIFYING ORDER TO CEASE AND DESIST

On October 28, 1976, respondent Soft Sheen Co., Inc. petitioned the Commission to reopen this proceeding to modify the third warning in Provision III of the consent order issued January 28, 1976 against respondents in this matter. The third warning, which is to be made in connection with the sale and distribution of respondents' hair relaxer and which is to appear on the packaging, package inserts and the labels of the product, reads, "Do not use on bleached, dyed or tinted hair. If you have previously relaxed your hair, relax only the new growth, as described in the directions." Respondent objects to the inclusion of tinted hair in the warning.

On March 18, 1976, Soft Sheen requested by letter that the order's product coverage be limited to hair relaxers. Our request is incorporated into the October 28, 1976, petition to reopen.

Complaint counsel support the petition and recommend that the warning be modified to read:

3. Do not use on bleached hair. Do not use on permanently colored hair which is breaking, splitting or otherwise damaged. For hair that has been permanently colored and shows no sign of damage, use only mild strength formula.
4. If you have previously relaxed your hair, relax only the new growth, as described in the directions.

We agree that the petition should be granted. Most if not all, of the products manufactured and sold by Soft Sheen are hair care products, and a substantial portion of the firm's revenues is derived

from the sale of hair relaxers. These latter products are generally sold directly to professional beauticians. Under these circumstances, the Commission believes that modification of the order to limit the substantiation requirements for safety claims to hair care products, and for efficacy claims to hair straighteners, will serve adequately to protect the public interest. Furthermore, additional expert information provided to the Commission after issuance of the Soft Sheen order, supports revision of the warning requirement.

Finally, after entry of its order in this matter, the Commission issued a consent order [89 F.T.C. 1] against Revlon, Inc., a competitor of Soft Sheen in the sale of hair relaxers, which includes a warning and product coverage identical to the changes recommended by complaint counsel here. For these reasons, the Commission believes that it is in the public interest to grant the modification sought by Soft Sheen.

Accordingly,

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

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting the following for the WARNING contained in Provision III of the order:

WARNING:

1. This product contains potassium hydroxide (lye). You must follow directions carefully to avoid skin and scalp burns, hair loss, and eye injury.
2. Do not use if scalp is irritated or injured.
3. Do not use on bleached hair. Do not use on permanently colored hair which is breaking, splitting, or otherwise damaged. For hair that has been permanently colored and shows no sign of damage, use only mild strength formula.
4. If you have previously relaxed your hair, relax only the new growth, as described in the directions.
5. If the relaxer causes skin or scalp irritation, rinse out immediately and neutralize with the shampoo in the kit. If irritation persists or if hair loss occurs, consult a physician.
6. If the relaxer gets into eyes, rinse immediately and consult a physician.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting the following Provision for I.B. of the order, and relettering the remaining paragraphs accordingly:

B. Representing, in any manner, directly or by implication, the efficacy of any hair straightening product or the ingredients therein, unless, at the time such representation is made, respondents have in

their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body.

C. Representing, in any manner, directly or by implication, the safety of any hair care product or the ingredients therein, unless at the time such representation is made, respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation.

IN THE MATTERS OF

BRISTOL-MYERS COMPANY, ET AL. - D. 8917

AMERICAN HOME PRODUCTS CORPORATION, ET AL. -
D. 8918

STERLING DRUG INC., ET AL. - D. 8919

Dockets 8917, 8918, 8919. Interlocutory Order, Oct. 7, 1977

Denial of complaint counsel's motion for reconsideration of August 23, 1977, order denying on procedural grounds their application for review of a discovery ruling.

ORDER DENYING COMPLAINT COUNSEL'S MOTION FOR
RECONSIDERATION

Complaint counsel seek reconsideration of our order of August 23, 1977, which denied on procedural grounds their application for review of a discovery ruling requiring production of two memoranda of interviews with potential witnesses. The Commission's ruling is characterized as excessively rigid and formalistic, and the underlying issue as a "controlling question" within the meaning of Section 3.23(b) of our Rules.

That our August 23 ruling represented a strict application of the terms of Section 3.23 is conceded. Interlocutory appeals in general are disfavored, as intrusions on the orderly and expeditious conduct of our adjudicative process. Interlocutory appeals from discovery rulings merit a particularly skeptical reception, because particularly suited for resolution by the administrative law judge on the scene and particularly conducive to repetitive delay. In the absence of close and decisive supervision by the administrative law judge, the discovery process in any but the simplest case can be productive of endless dispute, sincere or contrived, to the point that any eventual remedial order relates only to history. Further, any perception on the part of our administrative law judges that the Commission will exercise broadly its undisputed authority to review interlocutory rulings will tend toward the atrophy of their sense of responsibility for the impact of their rulings on the proceedings before them.

These considerations, as noted, apply to interlocutory review generally and to review of discovery rulings particularly. Concededly, however, the Commission has by its Rule Section 3.23(a) afforded a special status to appeals from rulings which, as here, require the disclosure of Commission records. This provision must nonetheless not be understood as a signal that such appeals are favored, but as a

recognition of the Commission's duties under its organic Act to maintain a special oversight capacity, exercisable when circumstances warrant, with regard to release of its records. See 15 U.S.C. 46(f), 50.

We find here no showing that the special concerns which Section 3.23(a) reflects are imperiled. Nor is any sufficient basis demonstrated for the invocation of Section 3.23(b) to supersede the informed discretion of the administrative law judge. If, as complaint counsel urge, the necessity for such rulings is likely to recur with some frequency as the trial progresses, we deem it all the more advisable that they be made by the officer charged with its day-to-day conduct, absent a clear showing of substantial prejudice to one of the parties.

It is therefore ordered, That the motion be, and hereby is, denied.

IN THE MATTER OF
HERBERT R. GIBSON, SR., ET AL.

Docket 9016. Interlocutory Order, Oct. 12, 1977

Denial of respondents' motion to dismiss for lack of public interest.

ORDER GRANTING RESPONDENTS' APPEAL OF ADMINISTRATIVE
LAW JUDGE'S REFUSAL TO CERTIFY MOTION TO DISMISS FOR
LACK OF PUBLIC INTEREST, AND DENYING AFORESAID MOTION

On June 10, 1977 respondents moved (1) for summary decision on Counts I and III of the complaint, (2) for removal of Count II from adjudication because they agreed to accept complaint counsel's suggested consent order as to that count, and (3) in the alternative, for certification to the Commission of their request for dismissal for lack of public interest. On the 19th and 20th of July 1977, the law judge denied all three motions.

On July 26, 1977 respondents filed an application for an interlocutory appeal from the order denying their motions for summary decision and for certification of the public interest question. On August 10, 1977, the law judge entered an order denying authorization to file an interlocutory appeal of the denial of their motion for summary decision and granting authorization to file an interlocutory appeal of the denial of their request for certification of the motion to dismiss.

The threshold question, then, is whether the motion to dismiss for asserted lack of public interest is properly before the Commission. We conclude it is because the law judge lacks authority to rule on it.¹ It is well established that an administrative law judge lacks authority to rule on and must certify motions to dismiss for lack of public interest and other motions containing questions pertaining to the Commission's exercise of administrative discretion. See *Exxon Corp.*, Dkt. 8934, CCH Trade Reg. Rep. ¶21,299 (April 19, 1977); *Amrep Corporation*, 87 F.T.C. 283 (1976); *Crush International Ltd.*, 80 F.T.C. 1023 (1972); *Philip Morris, Inc.*, 79 F.T.C. 1023 (1971); *First Buckingham Community, Inc.*, 73 F.T.C. 938 (1968); and *Suburban Propane Gas Corporation*, 71 F.T.C. 1695 (1967).²

The asserted facts as to the lack of public interest on which the motion rests are essentially the same as those that formed the basis for respondents' June 10, 1977 motion for summary decision. The

¹ Commission Rules, Section 3.22(a), provide that "[a]ny motion upon which the Administrative Law Judge has no authority to rule shall be certified by him to the Commission with his recommendation."

² Respondents were not prejudiced by the law judge's July refusal to certify their June motion to dismiss. The matter is now before the Commission for *de novo* consideration and determination. *Suburban Propane*, *supra* at 1697.

respondents argued that H. R. Gibson, Sr. had no interest in any retailer, that no monies received by the Gibson Trade Show were paid to any retailer, and that the trade show was open to any retailer. The law judge in ruling on that motion, explained that respondents' assertions involved factual issues that were in dispute, the resolution of which would require a hearing. With the proof in this posture, the motion to dismiss is no riper for decision than was the motion for summary decision. Accordingly,

It is ordered, That the aforesaid motion to dismiss for lack of public interest be, and it hereby is denied.

IN THE MATTER OF
FRANKART DISTRIBUTORS, INC., ET AL.

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

Docket C-2904. Complaint, Oct. 13, 1977 — Decision, Oct. 13, 1977

This consent order, among other things, requires a New Rochelle, N.Y. furniture dealer and its affiliates to cease using the terms "carved" or "detailed carving" or any other similar terms to describe furniture which has not been cut or carved into shape. Further, the order requires the firms to make clear and conspicuous disclosures regarding the composition or construction of their furniture, both in their advertising and on the furniture displayed in their showrooms.

Appearances

For the Commission: *Alan F. Rubinstein.*

For the respondents: *John A. Occhiogrosso, New Hyde Park, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Frankart Distributors, Inc., a corporation; Frankart Flushing, Inc., a corporation; Frankart-Fordham, Inc., a corporation; Frankart Westchester, Inc., a corporation; Frankart-New Rochelle, Inc., a corporation; Frankart Paramus, Inc., a corporation; Frankart Jamaica, Inc., a corporation; Frankart Kings, Inc., a corporation; Mallery, Inc., a corporation, doing business under that name and as Frankart-Grand Concourse, and Bernard Frankel, individually and as an officer of said corporations, 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 Frankart Distributors, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 543 Main St., New Rochelle, New York.

Respondent Frankart Flushing, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 37-11 Main St., Flushing, New York.

Respondent Frankart-Fordham, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 18 West Fordham Road, Bronx, New York.

Respondent Frankart Westchester, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1088 Central Ave., Scarsdale, New York.

Respondent Frankart-New Rochelle, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 543 Main St., New Rochelle, New York.

Respondent Frankart Paramus, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at Route 4, Spring Valley Road, Paramus, New Jersey.

Respondent Frankart Jamaica, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 160-08 Jamaica Ave., Jamaica, New York.

Respondent Frankart Kings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1209 Kings Highway, Brooklyn, New York.

Respondent Mallery, Inc., doing business under that name and as Frankart-Grand Concourse, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 2431 Grand Concourse, Bronx, New York.

Respondent Bernard Frankel is an individual and an officer of the corporate respondents. He formulates, directs and controls the policies, acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. His business address is 543 Main St., New Rochelle, New York.

PAR. 2. Respondent Frankart Distributors, Inc. is now, and for some time last past has been, engaged in the purchasing of furniture and related products for sale and distribution to the other corporate respondents named herein.

Respondents Frankart Flushing, Inc., Frankart-Fordham, Inc., Frankart Westchester, Inc., Frankart-New Rochelle, Inc., Frankart Paramus, Inc., Frankart Jamaica, Inc., Frankart Kings, Inc. and Mallery, Inc., doing business under that name and as Frankart-Grand Concourse are now, and for some time last past have been,

engaged in the advertising, offering for sale, sale and distribution of furniture and related products at retail to the public.

PAR. 3. In the course and conduct of their business as aforesaid, and at all times mentioned herein, respondent Frankart Distributors, Inc. has purchased, and continues to purchase, furniture and other merchandise from suppliers, distributors and manufacturers in states other than New York and New Jersey for the purpose of supplying said merchandise to the other corporate respondents named herein for sale at retail.

PAR. 4. In the further course and conduct of their business as aforesaid, respondents now cause and for some time last past have caused furniture and other merchandise when sold to be shipped from their places of business within the States of New York and New Jersey, to purchasers in states other than those in which said shipments originate.

PAR. 5. In the course and conduct of their business as aforesaid, respondents have caused, and now cause, the dissemination of advertisements regarding their furniture in newspapers of interstate circulation, for the purpose of inducing, and which are likely to induce, directly or indirectly, the purchase of said merchandise.

PAR. 6. By virtue of the aforesaid acts and practices, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 7. In the course and conduct of their business, and for the purpose of inducing the sale of their furniture, respondents have made and are now making, certain statements and representations in newspaper advertisements with respect to the method by which certain of their furniture has been styled.

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

. . . carved. . . . detailed carving.

PAR. 8. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set forth herein, respondents have represented and are now representing, directly or by implication, that said advertised furniture has been styled by cutting or carving.

PAR. 9. In truth and in fact: the furniture referred to in Paragraph Eight above is not styled by cutting or carving, but is formed from plastic by the use of a mold.

Therefore, the statements and representations set forth in Para-

graphs Seven and Eight hereof were and are false, misleading and deceptive.

PAR. 10. A substantial quantity of the furniture advertised, displayed, offered for sale, or sold by respondents has the appearance of being composed of solid wood, but in fact, contains exposed surfaces of veneered construction. The fact of such veneered construction is not disclosed in respondents' advertising, on the furniture itself, or on tags or labels attached thereto. Thus, respondents have failed to disclose a material fact, which, if known to certain customers would likely affect their consideration of whether or not to respond to respondents' advertisements and to purchase merchandise being offered for sale by respondents.

The aforesaid failure to disclose said material fact has the capacity and tendency to mislead purchasers or prospective purchasers with respect to the composition and construction of the furniture sold by respondents.

Therefore, respondents' failure to disclose said material fact was, and is, unfair, misleading and deceptive.

PAR. 11. A substantial quantity of the furniture advertised, displayed, offered for sale, or sold by respondents contains exposed surfaces composed of plastic or other materials which have the appearance of wood. No clear and conspicuous disclosures are made in respondents' advertising, on the furniture itself, or on tags or labels attached thereto, that the exposed surfaces of the furniture are composed of plastic or other materials which simulate wood, nor are disclosures made that such surfaces are not wood. Thus, respondents have failed to disclose material facts, which, if known to certain customers would likely affect their consideration of whether or not to respond to respondents' advertisements and to purchase merchandise being offered for sale by respondents.

The aforesaid failure to disclose said material facts, separately and in connection with the representations set forth in Paragraphs Seven and Eight hereof, has the capacity and tendency to mislead purchasers or prospective purchasers with respect to the durability, composition or construction of the furniture sold by respondents.

Therefore, respondents' failure to disclose said material facts was, and is, unfair, misleading and deceptive.

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

PAR. 13. The use by respondents of the aforesaid false, misleading,

deceptive and unfair statements, representations, acts and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of products sold by respondents by reason of said erroneous and mistaken belief.

PAR. 14. 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 methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

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

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

1. Respondent Frankart Distributors, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 543 Main St., New Rochelle, New York.

Respondent Frankart Flushing, Inc. is a corporation organized,

existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 37-11 Main St., Flushing, New York.

Respondent Frankart-Fordham, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 18 West Fordham Road, Bronx, New York.

Respondent Frankart Westchester, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1088 Central Ave., Scarsdale, New York.

Respondent Frankart-New Rochelle, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 543 Main St., New Rochelle, New York.

Respondent Frankart Paramus, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at Route 4, Spring Valley Road, Paramus, New Jersey.

Respondent Frankart Jamaica, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 160-08 Jamaica Ave., Jamaica, New York.

Respondent Frankart Kings, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1209 Kings Highway, Brooklyn, New York.

Respondent Mallery, Inc., doing business under that name and as Frankart-Grand Concourse, is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 2431 Grand Concourse, Bronx, New York.

Respondent Bernard Frankel is an individual and an officer of the corporate respondents. He formulates, directs and controls the policies, acts and practices of said corporate respondents, including the acts and practices hereinafter set forth. His business address is 543 Main St., New Rochelle, New York.

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

ORDER

It is ordered, That respondents Frankart Distributors, Inc., Fran-

Frankart Flushing, Inc., Frankart-Fordham, Inc., Frankart Westchester, Inc., Frankart-New Rochelle, Inc., Frankart Paramus, Inc., Frankart Jamaica, Inc., Frankart Kings, Inc., corporations, Mallary, Inc., a corporation, doing business under that name and as Frankart-Grand Concourse, or under any other name or names, their successors and assigns, and their officers, and Bernard Frankel, individually and as an officer of said corporations, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, displaying, offering for sale, sale and distribution of furniture, or any other products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Using the terms "carved" or "detailed carving" or any other terms of similar import and meaning, to describe any furniture or part thereof that has not been cut or carved into shape.

FOR PURPOSES OF THIS ORDER, "EXPOSED SURFACES" ARE DEFINED AS THOSE PARTS AND SURFACES EXPOSED TO VIEW WHEN FURNITURE IS PLACED IN THE GENERALLY ACCEPTED POSITION FOR USE.

2. Failing to clearly and conspicuously disclose that furniture having the appearance of solid wood, but containing exposed surfaces of veneered construction, contains such veneered construction.

3. Failing to clearly and conspicuously disclose that furniture containing exposed surfaces composed in whole or in part of plastic or other materials which have the appearance of wood, contains such plastic or other materials, or that the exposed surfaces are not wood.

4. Failing to disclose either the true composition or construction of furniture or its parts, or that material is not what it appears to be, whenever any statement, representation or depiction is used in advertising, which may otherwise be misleading as to the true composition or construction of such furniture or its parts without such disclosure. Such disclosures shall be made clearly and conspicuously and in close conjunction with any statements, representations or depictions used.

5. Failing to clearly and conspicuously disclose, on the furniture itself, or on tags or labels attached to such furniture in a manner so as not to be easily removed, either the true composition or construction of furniture or its parts, or that material is not what it appears to be, whenever the appearance of such furniture or its parts may be misleading as to its true composition or construction without such disclosure.

It is further ordered, That respondents deliver a copy of this order

to all operating divisions and to all present and future personnel of respondents responsible for any aspect of preparation, creation, or placing of advertising, and to all present and future personnel of respondents responsible for the sale or offering for sale of all products covered by this order, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

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

It is further ordered. That respondents shall maintain for at least a one (1) year period following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other promotional material utilized in the advertising, promotion or sale of all products covered by this order.

It is further ordered. That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation or corporations, 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 the individual respondent named herein promptly notify the Commission of each change in business or employment status, which includes discontinuance of his present business or employment and each affiliation with a new business or employment, for ten (10) years following the effective date of this order. Such notice shall include respondent's current business address and a description of the business or employment in which he is engaged as well as a description of his duties and responsibilities. The expiration of the notice provision of this paragraph shall not affect any other obligations arising under this order.

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

IN THE MATTER OF
JETMA TECHNICAL INSTITUTE, ET AL.

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

Docket 9061. Complaint, Oct. 28, 1975 — Decision, Oct. 19, 1977

This consent order, among other things, requires a San Francisco, Calif. seller of correspondence training courses for gas turbine engine mechanics, and technical illustrators, to cease misrepresenting the need, demand, or potential earnings of their graduates; failing to furnish prospective enrollees material disclosures regarding the employment rate, drop-out rate, and financial success of recent students. Further, respondents are required to furnish prospective students with a ten-day cooling-off period within which to cancel their contracts; to maintain for a two-year period files of inquiries and complaints relating to prohibited acts and practices; and to institute a surveillance program designed to ensure that their representatives comply with the terms of the order.

Appearances

For the Commission: *John M. Porter* and *Seela Lewis*, Consumer Protection Specialist.

For the respondents: *Daniel C. Smith, Arent, Fox, Kintner, Plotkin & Kahn*, Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Jetma Technical Institute, a corporation, and Fred Lee, Jr. and Anna H. Lee, individually and as officers of said corporation, hereinafter sometimes referred to as "respondents," have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Jetma Technical Institute, hereinafter referred to as "Jetma," 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 103 South Airport Boulevard, South San Francisco, California.

Respondents Fred Lee, Jr. and Anna H. Lee are the principal officers of Jetma. They formulate, direct and control the policies, acts and practices of the corporate respondent, including the acts and

practices hereinafter set forth. Their business address is the same as that of respondent Jetma.

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

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of training courses purporting to prepare graduates thereof for employment as gas turbine engine mechanics or technical illustrators. Said courses, when pursued to completion, consist of a series of correspondence lessons, with an optional two-week in-residence training program for the gas turbine mechanics course.

PAR. 3. In the course and conduct of their aforesaid business, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the training courses by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, commercial announcements on television transmitted across state lines, and by means of brochures, pamphlets and other promotional materials disseminated through the United States mail, for the purpose of obtaining leads or prospects for the sale of such training courses, and for the purpose or inducing the purchase of such training courses.

Respondents, from their principal place of business located in California, utilize the services of sales representatives and cause said sales representatives to visit prospective purchasers located in various other states who respond to the respondents' advertisements and commercial announcements for the purpose of inducing the purchase of such training courses by such prospective purchasers.

Respondents transmit and receive, and cause to be transmitted and received, in the course of advertising, offering for sale, sale and distribution of said training courses, advertising and promotional materials, sales contracts, invoices, billing statements, checks, monies and other business papers and documents, to and from the principal place of business operated by the respondents located as aforesaid and to prospective purchasers and purchasers thereof, located in various other States of the United States. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said training courses 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, for the purpose of obtaining leads or prospects for the sale of such training courses, and for the purpose of inducing the purchase of such

