

IN THE MATTER OF  
BEATRICE FOODS CO., ET AL.

*Docket 9112. Interlocutory Order, Feb. 27, 1984*

ORDER DENYING EXTENSION OF *IN CAMERA* TREATMENT

In response to the Commission's October 14, 1983 order to show cause for a two-year extension of *in camera* treatment for certain documents, respondent Tropicana Products, Inc. has withdrawn its motion for such an extension for all but one document, CX 413B.

CX 413B contains statistical information on Tropicana shipments of chilled and canned citrus products during the four-week period ending March 26, 1978. It is alleged that this information is not otherwise available and that the public disclosure of it would cause "clearly defined, serious injury," justifying the extension of *in camera* treatment under the standard for confidentiality articulated in *H.P. Hood and Sons, Inc.*, 58 F.T.C. 1184 (1961). Tropicana asserts that by knowing its total shipments for a one-month period almost six years ago, competitors could extrapolate from generally available A.C. Nielsen data on chain store distribution to determine the extent and strength of Tropicana's current non-chain distribution to specific geographic markets. It is alleged that non-chain distribution is a "recognized strength of Tropicana's distribution system" and that knowledge of it derived from this information could be utilized by competitors in sales and marketing strategies to Tropicana's competitive detriment. Tropicana Response to Show Cause Order at 5.

It is difficult to evaluate Tropicana's claim that the information in CX 413B is not otherwise available to the competition. We do know that it was submitted to the Florida Canner's Association, some of whose directors were executives of Tropicana's competitors, CX 414 A-B, yet it is unclear whether such individuals ever saw the information in CX 413B or would have been free to share it with their companies if they had. Regardless of this ambiguity, however, it remains the case that this information is now nearly six years old and, therefore, presumably not competitively sensitive unless Tropicana can make a "convincing showing that such data would provide significant insight into its strengths and weaknesses." *General Foods, Corporation*, 95 F.T.C. 352, 353-354 (1980).

We are not convinced it would. Accepting Tropicana's premise that its non-chain distribution is generally competitively sensitive information, we fail to see how competitors could use such old, limited data on total shipments in conjunction with Nielsen data to derive accu-

rate information on Tropicana's *current* non-chain shipments. For such analysis to be possible, the total amounts and geographic areas of Tropicana's distribution today would have to be basically unchanged from what they were six years ago. In support of this assumption, all that Tropicana contends is that there has been "limited relative growth" in the citrus industry, but even if that is true, it does not necessarily follow that Tropicana's volume and pattern of distribution have stayed the same. Absent better proof, we are not convinced that competitors of Tropicana could use the information in CX 413B in the manner suggested to any effective competitive advantage. Adding to our doubts about Tropicana's showing is its equally unsubstantiated claim that *in camera* treatment is needed for only two more years because "predicted . . . industry growth will result in ultimate minimization of the competitive sensitivity of the information." Tropicana Response at 7.

We thus find that Tropicana has not made the convincing showing of competitive injury required in seeking confidential treatment of old documents. In addition to claiming injury, Tropicana argues that there is no "countervailing consideration" in support of disclosing CX 413B to explain the Commission's decision since it was never cited in the opinion. *See General Foods Corp., supra*, 95 F.T.C. at 355. Before such countervailing considerations can even enter the analysis, however, competitive injury from disclosure must appear to be likely. This showing has not been made.

Therefore, *it is ordered* that the motion for extended *in camera* treatment for CX 413B is hereby denied.

Commissioners Miller and Douglas voted in the negative.

IN THE MATTER OF  
GENERAL MOTORS CORPORATION

*Docket 9145. Interlocutory Order, March 7, 1984*

ORDER

By letter of November 1, 1983, Chairman Florio of the House Subcommittee on Commerce, Transportation, and Tourism of the Committee on Energy and Commerce requested access to certain materials in the so-called "GM Defects" case, D. 9145. [102 F.T.C. 1741 (1983)] Generally, the Commission takes the position that it has no authority to withhold information that is responsive to an official request of a congressional committee or subcommittee acting within its jurisdiction. See 15 U.S.C. 57b-2(b)(3)(C), 57b-2(d)(1)(A); 5 U.S.C. 552(c). See also, e.g., *Ashland Oil Co. v. FTC*, 409 F.Supp. 297 (D.D.C.), *aff'd*, 548 F.2d 977 (D.C. Cir. 1976).

The materials responsive to Chairman Florio's request have been subject to a protective order that was entered by the administrative law judge in December 1980. That protective order limits access to the documents to Commission employees involved in the conduct of the proceeding and ostensibly precludes the Commission from authorizing their transmittal to Congress. Although an ALJ's order that purports to preclude the Commission from complying with an official congressional request for access is of doubtful validity, the Commission concluded that notice of its intention to disclose was appropriate and, on November 23, 1983, it issued an order that General Motors Corporation ("GM") show cause why the ALJ's order should not be modified to conform to the confidentiality provisions of the FTC Act. GM filed a response to that order on December 22, 1983.

General Motor's Response ("Res.") makes three arguments in opposition to the proposed modification. In addition, it requests access to the internal FTC staff memoranda responsive to Chairman Florio's request, return of the documents it submitted as well as of all copies made by staff, and permission to make an *in camera*, oral presentation to the Commission.

A. *GM's Arguments in Opposition and Disposition*

1. Modification After GM's Production in Reliance is Unfair

GM first argues that it is "unfair" for the Commission to "rewrite" its obligations after the company has provided documents in reliance on the order. It points out that "[t]he preamble to the Order straightforwardly declares that it has been 'stipulated and agreed to' by coun-

sel for both General Motors and the Commission." Res. at 2. Finally, the company argues that the order to show cause offers two justifications for modification, both of which "were in existence and known to the Commission when the Order was issued" (*id.*), and neither of which provides, in GM's view, "basis for any subsequent modification." *Id.*

An ALJ has no authority to issue orders that are inconsistent with applicable law, Commission decisions, policy directives or the rules. See 16 C.F.R. 0.14. To the extent, therefore, that the ALJ's order in this case bars the Commission from fulfilling its obligation to provide documents in response to official requests of the Congress, it has no force and effect. Nevertheless, as a matter of fairness, the Commission determined to notify the company before responding to Chairman Florio and it issued the November 1983 show cause order. The Commission believes that because its consistent policy has been to provide documents in response to official congressional requests—a fact which has been no secret to the major companies subject to the Commission's jurisdiction<sup>1</sup>—the agency has acted with scrupulous attention to fairness by offering GM formal notice of its intentions and soliciting its views.

Not only have other major companies been aware of the Commission's policy and practice with respect to official congressional requests (*see* note 1 *supra*), but also, GM itself has long been cognizant of the Commission's position by virtue of filings in the subpoena enforcement proceeding that preceded document production in the defects case. *FTC v. General Motors Corporation*, No. C-80-276 (N.D. Ohio 1980). Immediately prior to the enactment of the FTC Improvements Act of 1980, the district court had issued a protective order covering most of the documents subsequently made subject to the ALJ's protective order. The court order, which has now expired, limited access to the documents to FTC employees involved in the defects proceeding. Commission counsel sought to convince the court, prior to its issuance of the order, that it should conform the decree to the confidentiality provisions of the FTC Improvements bill, which was then expected to be passed by Congress within days. The court declined. Subsequently, the Commission filed a motion seeking partial relief from the order and arguing specifically for terms that would allow the Commission to provide the documents to Congress in the event they were responsive to an official access request. GM responded vigorously in opposition to the proposed change, among other things, referring to comments that had been made by the court in chambers on what it termed "the inherent tension between *hypothetical* congressional requests for documents and whatever order the

<sup>1</sup> See, e.g., *Ashland Oil Co. v. FTC*, *supra*; *Exxon Corp. v. FTC*, 589 F.2d 585 (D.C. Cir. 1978).

Court might impose." Respondent's Statement in Opposition to Petitioner's Motion for Relief from Order at 6 (emphasis added).

GM's argument opposing the Commission's current move to modify the similarly restrictive order of the ALJ is therefore inconsistent with its previous suggestion that absent an actual request, the basis for modification was too hypothetical. Moreover, its suggestion that the Commission was, or should have been, aware of the problem of congressional access in 1980 but chose to do nothing is ill-founded. As noted, the Commission did attempt to seek modification of the court's order and, when these efforts failed, complaint counsel should not be faulted for not pursuing the matter before the ALJ while a court order remained in effect that would have superseded any inconsistent provision in an order issued by an ALJ.

In light of the above, the Commission does not believe that modification of the protective order at this time would treat the company unfairly, and it does not consider GM's claims in this respect to bar such a modification.

## 2. Modification Not in Commission's Interest

The GM memorandum suggests first that because the proposed modification was triggered by Chairman Florio's request for access to the protected documents on behalf of his subcommittee, the Commission's purpose is "to assist that congressman" (Res. at 6) rather than "to advance the interests of the Commission \* \* \* [which] already enjoys full access to the documents." Res. at 7. GM then asserts that "Congress does not need the Commission's help \* \* \* [because it] retains its full constitutional authority to seek discovery of the General Motors documents directly from General Motors." *Id.* Last, GM argues that the modification, if implemented, would cause future parties to be reluctant to provide documents to the Commission pursuant to a protective order "if such an order can be summarily rewritten by the Commission to restrict or even rescind the proffered protection." *Id.*

GM's suggestion that providing documents to Chairman Florio assists the congressman but not the Commission is without merit. Clearly, it is in the Commission's interests to comply with its legal obligations, including those under which it is bound to provide information to Congress upon receipt of an official request. As to the question whether parties might be deterred in the future from providing documents under protective orders issued by ALJ's, parties always are entitled to certain statutory protections and to additional safeguards included in the Commission's rules. These protections have been held by the courts to afford adequate protection for companies responding to compulsory process, and the Commission may not

modify a protective order in a manner that is inconsistent with the law or its own rules.

### 3. Practical Alternative Better Than Modification

Finally, GM suggests a "common sense alternative" to the proposed modification—"General Motors is willing to consider, on a document-by-document basis, allowing the Commission to release such documents to Congress or appropriate law enforcement agencies." Res. at 8. This alternative is predicated both on a recognition that some of the material may be less confidential in 1984 than when it was produced in 1980 and on the condition that the Commission will permit GM to inspect documents, including staff memoranda, that are responsive to official congressional or law enforcement agency requests for access, including this one.

GM's alternative is unacceptable because it would require the Commission to divulge to the company its internal deliberations and those of its staff. The internal memoranda and related documents responsive to Chairman Florio's request consist largely of predecisional and deliberative material such as analyses, opinions and recommendations about the conduct of the then pending investigation. The staff documents also constitute attorney work product that would reveal the mental impressions of the legal staff in preparation for litigation. The documents, therefore, are both exempt from mandatory public disclosure under the Freedom of Information Act (*see NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975)) and privileged from civil discovery. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324-25 (D.D.C. 1966), *aff'd on opinion below, V.E.B. Carl Zeiss, Jena v. Clark*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967). The Commission declines to waive either of these protections by acceding to GM's alternative course of action.

#### B. GM's Other Requests and Disposition

For the reasons stated immediately above, the Commission denies GM's request for access to the internal Commission documents responsive to Chairman Florio's request. In addition, because it seems unlikely that GM will raise any arguments that would justify refusing to modify the order so as to permit transmittal of the documents in question to the Subcommittee, the Commission does not believe that oral argument on this matter is warranted.

GM's final request is for return of all documents submitted to the Commission as well as all copies of such materials that may have been made by the Commission staff. GM acknowledges that the Commission staff "was acting within its authority" to make copies of the company submissions (Res. at 10), but it proffers no argument to

justify their being surrendered to the company. Requests for return of documents are governed by Section 21(b)(5) of the FTC Act, 15 U.S.C. 57b-2(b)(5), and Section 4.12 of the Commission's Rules of Practice, 16 C.F.R. 4.12 (1983). Both of these provisions specify that the Commission must return company-submitted documents to their submitter at the close of any proceeding arising out of the investigation in which the documents were obtained, and both also allow the Commission to retain copies of those documents. In addition, Rule 4.12(b) provides:

The Commission will not return to the submitter copies of documents made by the Commission unless, upon a showing of extraordinary circumstances, the Commission determines that return would be required in the public interest.

GM has made no showing of extraordinary circumstances to justify its request for return of all copies of its submissions. The Commission however, hereby directs the Secretary to arrange for the prompt return of original submissions as required by the statute and Rule 4.12.

#### C. ORDER

In light of the above discussion:

*It is hereby ordered*, That the protective order issued by the ALJ be modified as described in the Order to Show Cause including provision for both congressional access and access by law enforcement agencies in a manner consistent with the confidentiality provisions of the FTC Act and the Commission's Rules, 15 U.S.C. 46(f), 57b-2(b), and 16 C.F.R. 4.10-4.11 (1983); and

*It is further ordered*, That GM's request for access to the Commission's internal documents be denied under Exemption 5 of the Freedom of Information Act; and

*It is further ordered*, That GM's request for return of all copies of documents it submitted to the Commission be denied; and

*It is further ordered*, That GM's request to make an oral presentation be denied.

## IN THE MATTER OF

## CLIFFDALE ASSOCIATES, INC., ET AL.

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

*Docket 9156. Complaint, July 7, 1981—Order, March 23, 1984*

This order requires a Westport, Conn. firm and two individuals engaged in the advertising, sale and distribution of an automobile retrofit device variously known as the Ball-Matic, the Ball-Matic Valve, the Ball-Matic Gas Saver Valve and the Gas Saver Valve, among other things, to cease representing that the device is a unique or new product; and that it is needed on every vehicle except Volkswagens, diesels and fuel-injection vehicles. The company is barred from making fuel economy improvement claims for the device unless it can reasonably support those claims with competent and reliable substantiation. The order further prohibits the firm from representing that a consumer endorsement is a typical experience of a user of the product; using any endorsement unless they have good reason to believe that the endorser subscribes to the facts and opinions set forth in that endorsement; and failing to disclose any material relationship existing between the endorser and respondents. Additionally, the company may not make any unsubstantiated energy savings claims for any product or misrepresent the results of any test or survey.

*Appearances*

For the Commission: *William Haynes* and *Wendy Kloner*.

For the respondents: *Solomon H. Friend* and *Jerold Dorfman*,  
*Friend, Dorfman & Marks*, New York City.

## COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Cliffdale Associates, Inc., a corporation, Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, hereinafter sometimes referred to as "respondents," have violated the provisions of the said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Respondent Cliffdale Associates, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 180 Post Road, East, Westport, Connecticut.

Respondent Jean-Claude Koven is President of the corporate respondent Cliffdale Associates, Inc. He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of said corporation.

Respondent Arthur N. Sussman has been a consultant to Cliffdale Associates, Inc., and has participated in the acts and practices hereinafter set forth. His address is Tamarack Road, Pomona, New York.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth. [2]

PAR. 2. Respondents are now and for sometime last past have been engaged in the advertising, offering for sale, sale, and distribution of a product variously known as the Ball-Matic, the Ball-Matic Gas Saver Valve and the Gas Saver Valve (hereinafter sometimes referred to as "Ball-Matic" or "product"), which product is advertised as a means of improving fuel economy in automobiles. Said product is an automobile retrofit device as "automobile retrofit device" is defined in Section 511 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 2011. Respondents, in connection with the marketing of said product, have disseminated, published and distributed, and now disseminate, publish and distribute advertisements and promotional materials for the purpose of promoting the sale of said product.

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

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

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

- a. the Ball-Matic is an important, significant, and unique new invention;
- b. the Ball-Matic is needed on every motor vehicle except Volkswagens, diesel vehicles, or fuel injection vehicles;
- c. the Ball-Matic when installed in a typical automobile and used

under normal driving conditions will significantly improve fuel economy;

d. under normal driving conditions, a typical driver can usually obtain a fuel economy improvement of 20% (or more) or an improvement that will approximate or equal four miles per gallon when the Ball-Matic is installed in his/her automobile;

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

f. results of consumer usage, as evidenced by consumer endorsements, prove that the Ball-Matic significantly improves fuel economy;

[3]

g. the consumer endorsements that appear in advertisements and sales promotional materials for the Ball-Matic are statements of persons who have used the Ball-Matic in the recent past or are currently using the Ball-Matic and who have given permission for the publication of these statements;

h. all consumer endorsements which appear in advertisements and sales promotional materials for the Ball-Matic were obtained from individuals or other entities who, at the time of providing their endorsements, were independent from all of the individuals and entities that have marketed the Ball-Matic;

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

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

a. the Ball-Matic is not an important, significant, or unique new invention;

b. the Ball-Matic is not needed on every motor vehicle except Volkswagens, diesel vehicles, or fuel injection vehicles.

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

d. under normal conditions, a typical driver cannot usually obtain a fuel economy improvement that will approximate or equal 20% or four miles per gallon when the Ball-Matic is installed in his/her automobile;

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

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

g. some individuals whose endorsements appeared in advertise-

ments and sales promotional materials for the Ball-Matic did not give prior permission for the use of their endorsements, did not use the [4] Ball-Matic at the time of the publication of their endorsements, and had not used the device in the recent past;

h. some consumer endorsements that appeared in advertisements and sales promotional materials for the Ball-Matic were obtained from individuals who, at the time they provided the endorsements, were not independent of all individuals and entities that have marketed the Ball-Matic.

i. the consumer endorsements and sales promotional materials do not reflect the typical or ordinary experience of members of the public who have used the Ball-Matic.

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

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

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

PAR. 9. In the course and conduct of their business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of automobile retrofit devices.

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

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

of respondents, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

EXHIBIT A

STRIKE BACK AT RISING GAS PRICES! GET UP TO ...

## 4 Extra Miles Per Gallon 100 Extra Miles Between Fill-Ups

The Wash. Post, 7-22-79

# SAVE UP TO \$200 A YEAR ON GAS

Think of It! Thanks to an important automotive invention, every single car owner, every fleet operator, every truck or camper owner... everyone who operates a gas-powered internal combustion engine, may now be able to save up to 20% and more on their gasoline bills!

Yes, you'll actually get up to 70...80...90 even 100 extra miles from every single tankful—no matter how old or run-down your car may be... no matter how many gallons of gas it now devours each week... FROM THE VERY INSTANT YOU INSTALL THE BALL-MATIC™ GAS SAVER VALVE IN YOUR CAR YOU WILL EXPERIENCE A NOTICEABLE DECREASE IN GAS CONSUMPTION!

How? Why?

With all the advances made in automotive technology, the carburetor still does not respond effectively to the wide range of driving conditions you encounter every day. It is possibly the most ineffective component in the entire engine and is responsible for a significant waste of gasoline. The carburetor is preset at the factory for idle conditions. This means that it is most effective in providing the proper gas-air mixture when the car is standing still and when the car is first called upon to perform under "load conditions." When you drive at higher speeds or start up from a dead stop... or negotiate grades and steep hills... or pull a trailer or camper... or carry a full load of passengers, too much gas feeds into the carburetor and you lose fuel economy! Every time this happens, it's just like pouring money down the drain.

**Stop Your Car From Wasting Gasoline**

Adding the BALL-MATIC GAS SAVER VALVE to your engine is like having a "carburetor brain" which actually controls the air-to-fuel balance on a constant basis. As soon as an improper over-rich condition develops, it opens to permit a greater measure of additional air to enter the system. The result: more effective combustion and a full savings of up to 20% or more!

**Controlled Tests Confirm Big Dollar Savings**

In the Spring of 1978, we arranged for a local Small Service Station to conduct a controlled experiment, test using seven different cars owned and driven by non-professional drivers. Each car was fitted with a locked gas cap and the test took place in the possession of the testers. After establishing base mileage consumption data for the various cars, the BALL-MATIC was installed and mile-per-gallon figures were rechecked. Every single car in the test showed dramatic improvements.

Year/Make Of Car	Improvement MPG
1970 Cadillac Eldorado	21%
1970 Chrysler Imperial	23%
1968 Oldsmobile Cutlass	8%
1974 Chevrolet Vega	10%
1972 Ford Gran Torino	19%
1967 Chevrolet Camaro	16%
1972 Cadillac Eldorado	40%

Start Saving Immediately

As of now, tens of thousands of motorists all over the country have put the BALL-MATIC GAS SAVER VALVE in their cars. It takes only a few minutes to install and no special tools are required (see-to-follow instructions are provided)—it's so easy, anyone can do it!

But best of all, the BALL-MATIC works immediately. There's no "break-in period"—you experience a significant savings with the very first tankful!

The BALL-MATIC fits all American and foreign cars except Volkswagen. Do not use on diesel or fuel injected models.

PRECISION TOoled SOLID METAL



OVER 100,000 ALREADY IN USE

U.S. PATENT #3,809,035

READ THE RESULTS FOR YOURSELF!

I have had a remarkable improvement starting with my very first tankful going from 17.20 MPG in my 1978 Oldsmobile Cutlass. Since I am Executive Vice President in Charge of Sales for my company, I total well over 35,000 miles a year. According to my calculations, the BALL-MATIC will save me over \$300.00 in the next 12 months alone. Needless to say, it was one of my best investments of the year!

Joseph O'Grady, Jr.  
Hamden, Connecticut

Just a short note to inform you of the performance of your BALL-MATIC unit that I have installed in my 1972 Ford station wagon. Prior to using your device, I averaged 12 to 13 MPG, now that I have installed your unit my mileage has gone up to 18 MPG around town.

A. Counts — Sheriff  
Orange County, California

I want to express my thanks for the BALL-MATIC. Since it has been installed in my car, my gas mileage has not been under 18 miles per gallon. This is an increase of 3.5 miles per gallon.

Rev. R. W.  
Canaan, California

After installing the BALL-MATIC on my 1972 Oldsmobile Toronado, I increased from 7.5 to 10.5 miles to the gallon.

Seeing this, I took my station on as a BALL-MATIC dealer and within the first week sold over 100 valves.

This is the kind of extra income producer that other service stations should consider during this energy crisis to service their customers.

Louis Mitchell  
Michael Mossel Service  
New Britain, Connecticut

24 HOURS A DAY — 7 DAYS A WEEK

FOR MASTER CHARGE AND VISA ORDERS

CALL TOLL FREE

1-800-351-1000

In Ohio, Call Collect (516) 864-8888

SEND NO-RISK COUPON TODAY

CLIFFDALE MOTORS, Dept. BMT-359  
2065 McDonald Ave., Brooklyn, NY 11223

Please RUSH me the BALL-MATIC GAS SAVER VALVE(S) ordered below along with easy-to-follow installation instructions. I must get immediate improvement in pick-up and better gas mileage starting with my next fill-up and I must save at least five times my purchase price in the first year of use or I may return my valve for a full refund of my purchase price (excluding postage and handling, of course).

Enclosed is \$:

\$12.99 plus 85¢ postage and handling for ONE BALL-MATIC

\$24.99 for TWO BALL-MATICS postpaid

\$36.99 for THREE BALL-MATICS postpaid

You save \$4.00

Add \$12 for each additional valve.

Connecticut residents add sales tax

CHARGE IT!

Visa  Master Charge

Card # \_\_\_\_\_ Bank # \_\_\_\_\_

Exp. Date \_\_\_\_\_

Name \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_

State \_\_\_\_\_ Zip \_\_\_\_\_

CANADIAN CUSTOMERS Please add \$2.00 extra (Order from RYKAM, Dept. BMT-310, Coronation Drive, West Hill, Ont. M1E4X6)

DEALER INQUIRIES INVITED

LOOK HOW EASY IT IS TO INSTALL THE BALL-MATIC YOURSELF!

All you do is simply slip the BALL-MATIC onto the line leading from the PCV valve and twist into place. It's as easy as screwing in a light bulb. In fact even if you never lifted the hood of your car before... you can install the BALL-MATIC in just a few moments (no special tools required), easy to follow instructions are included.



GUARANTEED SAVINGS

We firmly believe the BALL-MATIC to be one of the best investments you can make to save money this year. The exact savings you will receive may vary significantly depending on the kind of car you drive, the condition of your engine, weather, your driving habits and the amount of driving you do; however, we guarantee that you MUST SAVE AT LEAST FIVE TIMES AS MUCH YOU PAID FOR YOUR BALL-MATIC in the first year or you may return it for a full refund.

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The Washington Post Magazine, July 29, 1979

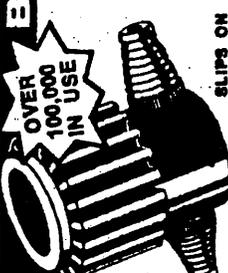
EXHIBIT B

**BEAT THE GAS CRUNCH**

**Get Up To 4 Extra Miles Per Gallon  
... 160 Extra Miles between Fill-ups**

This unique, patented valve installs in about one minute (easy to follow instructions included) on any car or truck to save you up to 20% or more gasoline consumption. Field tests for over seven years and lab tests at an Accredited Eastern University confirm that the GAS-SAVER VALVE really works to give you more miles per gallon. Every day you drive without one costs you money and needlessly wastes precious gasoline.

**SLIPS ON  
IN 60 SECONDS  
-- NO SPECIAL TOOLS**



**OVER  
100,000  
IN USE**

**GUARANTEED \$50 SAVINGS**

We firmly believe the GAS SAVER VALVE to be one of the best investments you can make to save money this year. The exact savings you will receive may vary significantly depending on the kind of car you drive, the condition of your engine, weather, your driving habits and the amount of driving you do; however, we guarantee that you **MUST SAVE AT LEAST FIFTY DOLLARS** in the first 12 months or you may return the GAS SAVER for a full refund.

NOT FOR USE ON VW'S, DIESEL AND FUEL INJECTION ENGINES © 1979, Cliffdale Associates, Inc.

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**SEND NO-RISK COUPON TODAY**

**CLIFFDALE MOTORS, Dept. BMT-894  
2055 McDonald Ave., Brooklyn, N.Y. 11223**

Please RUSH me the GAS-SAVER VALVES ordered below. If it does not save me at least \$50 in gas bills in the first 12 months I may return it for a full refund.

1 VALVE — \$12.95 + 85¢ post. & handl.  
 2 VALVES — \$24.95 ppd. (Save \$2.65)  
 3 VALVES — \$36.50 ppd. (Save \$4.90)

Add \$12 for additional valves.  
Connecticut residents add sales tax.

**FOR VISA AND MASTER CHARGE  
CALL TOLL FREE 1-800-351-1006  
7 DAYS A WEEK 24 HOURS A DAY**

Print Name \_\_\_\_\_  
 Address \_\_\_\_\_  
 City \_\_\_\_\_  
 State \_\_\_\_\_ Zip \_\_\_\_\_

**STRIKE BACK AT RISING GAS PRICES! GET UP TO ...**  
**4 Extra Miles Per Gallon**  
**100 Extra Miles Between Fill-Ups**  
**SAVE Up To \$200 A Year On Gas**

**OR DOUBLE YOUR MONEY BACK!** See our guarantee.

Think of it! Thanks to an amazing automotive discovery, every single car owner, every fleet operator, every truck or camper owner . . . everyone who operates a gas-powered internal combustion engine, can now save up to 20% and more on their gasoline bill!

Yes, you can actually get up to 20% . . . 80 . . . even 100 extra miles from **EVERY** single tankful no matter how old or run-down your car may be . . . no matter how many gallons of gas it now devours each week . . . **FROM THE VERY INSTANT YOU INSTALL THE BALL-MATIC GAS SAVER VALVE IN YOUR CAR, YOU MUST EXPERIENCE A DRAMATIC DECREASE IN GAS CONSUMPTION!**

With all the advances made in automotive technology, the carburetor is literally 50 years behind the times! It is possibly the most inefficient component in the entire engine and is responsible for an incredible waste of gasoline! You see, the carburetor is pre-set at the factory for ideal conditions. This means that it is most efficient in regulating the gas-air mixture when the car is standing still and up to speeds of 35 mph. When you drive over that speed . . . or start up from a dead stop . . . or negotiate grades and steep hills . . . or pull a trailer or camper . . . or carry a full load of passengers, too much gas leaks into the carburetor and you get incomplete combustion. Every time that happens, it's just like pouring your money right down the drain.

**The Most Significant Automotive Breakthrough Of The Past Ten Years!**

Adding the BALL-MATIC GAS SAVER VALVE to your engine is like having a "mini computer brain" which actually monitors the air-fuel balance on a constant basis. As soon as it senses an over-rich condition, it causes to permit a precise measure of additional air to enter the system. The result: more efficient combustion and a fuel savings of up to 20% or more!

**Controlled Tests Confirm Big Dollar Savings**  
 In the Spring of 1978, we arranged for a local

Shell Service Station to conduct a controlled, supervised, test using seven different cars. Each car was fitted with a locked see-saw-type float valve kept in the possession of the tester.

After establishing base mileage consumption rates for the various cars, the BALL-MATIC was installed and miles-per-gallon figures were re-checked. Every single car in the test showed dramatic improvement.

Year/Make Of Car	MPG Improvement
1979 Cadillac Eldorado	21%
1979 Chrysler Imperial	23%
1980 Cadillac	8%
1974 Vega	19%
1972 Oldsmobile Toronado	18%
1981 Camaro	18%
1973 Cadillac Eldorado	42%
<b>OVER-ALL AVERAGE</b>	<b>19%</b>

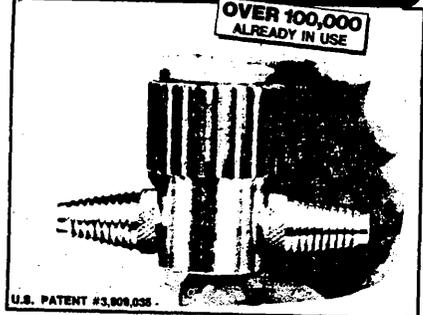
**Start Saving Immediately**  
 As of now, tens of thousands of motorists all over the country have **JOY** the BALL-MATIC GAS SAVER VALVE in their cars. IT TAKES only 60 seconds to install and no special tools are required. Step-by-step instructions are provided — it's so easy, anyone can do it! But best of all, the BALL-MATIC works immediately. There's no "breaking-in period" — you experience a significant savings with the very first tankful. The BALL-MATIC fits all American made cars

**LOOK HOW EASY IT IS TO INSTALL THE BALL-MATIC YOURSELF!**

All you do is simply slide the BALL-MATIC onto the line leading from the PCV valve and twist into place. It's as easy as screwing in a light bulb. In fact, even if you never fitted the hood of your car before . . . you can install the BALL-MATIC in just a few moments (no special tools required). Easy to follow instructions are included.



**GUARANTEED SAVINGS**  
 We firmly believe the BALL-MATIC to be one of the best investments you can make to save money this year. The exact savings you will receive may vary significantly depending on the kind of car you drive, the condition of your engine, weather, your driving habits and the amount of driving you do; however, we guarantee that you **MUST SAVE AT LEAST FIVE TIMES** the amount you paid for your BALL-MATIC in the very first year or **WE WILL GIVE YOU DOUBLE YOUR MONEY BACK!** (Double refunds limited to one unit per household or business.)



U.S. PATENT #3,908,035 (except diesel or fuel injection) and all foreign cars except Volkswagen.

**READ THE RESULTS FOR YOURSELF!**

The BALL-MATIC (gas saver) that I purchased has proven itself. I drive a 1979 Oldsmobile, now I get four miles more per gallon.  
 C. T. Orange, California  
 Just a short time to inform you of the performance of your BALL-MATIC unit. I have installed in my 1973 Ford station wagon. Prior to using your device, I averaged 12 to 13 mpg, now that I have installed your unit my mileage has gone up to 16 mpg around town.  
 A. C. — Sheriff Orange County, California

Before it was installed on my 1973 Ford LTD, I was getting 11 miles to the gallon, since installation of the BALL-MATIC I am getting almost 15 miles to the gallon.  
 R. B. Hestman, Hestman

After installing the BALL-MATIC on my 1972 Oldsmobile Toronado I increased from 7.5 to 10.5 miles to the gallon. Seeing that I took my station on as a BALL-MATIC dealer and within the first week sold over 100 valves. This is the kind of extra income producer that other service stations should consider. During this energy crisis to service their customers.  
 Mobile Service New Britain, Connecticut

I want to express my thanks for the BALL-MATIC. Since it has been installed in my car, my gas mileage has not been under 18 miles per gallon. An increase of 3.5 miles per gallon.  
 Rev. R. H. Cleveland, California

Test the BALL-MATIC yourself entirely at our risk. Install it in your own family or company car and if it doesn't deliver everything we say it will — starting with the very first tankful. Just return it and we'll refund double your money. We wouldn't make that kind of guarantee in writing if we weren't positive of the performance of the BALL-MATIC.

Please don't delay. Every day you drive without a BALL-MATIC GAS SAVER VALVE in your car costs you money and needlessly wastes precious gasoline. Call or send coupon today.

**24 HOURS A DAY - 7 DAYS A WEEK FOR MASTER CHARGE CALL TOLL FREE 1-800-231-1000**  
 in Ill. call collect (312) 96-5266

**SEND NO-REF. COUPON TODAY TO:**  
 CLIFFDALE MOTORS, Dept. BMT-057  
 2086 McDonald Ave., Brooklyn, NY 11223

Please **RUDE** the BALL-MATIC GAS SAVER VALVE(S) ordered below along with step-by-step installation instructions. I must get immediate improvement in pick-up and better gas mileage starting with my next fill-up and I must save at least five times my purchase price in the first year of use or they return my valve for a refund of double my purchase price (including postage and handling, of course).

Enclosed is —  
 \$12.95 plus \$2.50 postage and handling for ONE BALL-MATIC  
 \$24.95 for TWO BALL-MATICS ppd. (You save \$7.50)  
 \$36.95 for THREE BALL-MATICS ppd. (You save \$4.50)  
 Add \$12 for each additional valve. Connecticut residents add sales tax.

PLEASE PRINT:  
 Visa  Master Charge  
 Exp. Date: \_\_\_\_\_  Bank # \_\_\_\_\_  
 Card # \_\_\_\_\_  
 Print Name \_\_\_\_\_  
 Address \_\_\_\_\_  
 City \_\_\_\_\_  
 State \_\_\_\_\_ Zip \_\_\_\_\_

Send CANADIAN CUSTOMER: Please add \$1.00 extra Order from KYCARM, Dept. BMT, 510 Coronation Drive West Hill, Ont. M1E 0S8  
 DEALER INQUIRIES INVITED

© 1979, CHGSA ASSOCIATES, INC.

Complaint

110

EXHIBIT D

**EVERY CAR NEEDS ONE!**

# **BALL-MATIC**

**Gas Saving Valve**



**Tested and Proven**  
**up to 20% increase**  
**in fuel economy**

## **BALL-MATIC GAS SAVER VALVE**

### **Questions Most Frequently Asked**

**Q. WHAT IS THE BALL-MATIC?**

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

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

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

**Q. CAN THE BALL-MATIC DAMAGE AN ENGINE?**

A. Absolutely not. The Ball-Matic is an automatically controlled valve which only opens when the mixture is rich, and then it only opens sufficiently to restore the ideal combustion mixture of 15 parts of air to one part of gasoline.

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

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

**Q. WHAT HAPPENS WHENEVER AN ENGINE NEEDS MORE AIR?**

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

**Q. WILL THE BALL-MATIC FIT ANY AUTOMOBILE?**

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

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

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

**Q. EXACTLY WHERE IS THE BALL-MATIC INSTALLED?**

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

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

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

**Q. WHAT MAKES THE BALL-MATIC OPERATE?**

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

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

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

**Q. DOES THE BALL-MATIC EVER MALFUNCTION?**

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

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

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

**Q. DOES THE UNIT REQUIRE CLEANING?**

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

**Q. WHAT PRECAUTIONS MUST ONE TAKE TO MAKE SURE OF ALL THE BENEFITS YOU CLAIM?**

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

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

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

In 1977, the 113,696,111\* registered automobiles in the U.S. consumed 107,978,395,000 gallons of gasoline. If each of these vehicles had a Ball-Matic, the potential savings would have been almost 6 million gallons of gasoline per day.

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

## ANNUAL SAVINGS WITH 20% INCREASE IN FUEL ECONOMY

### Assuming Gasoline At 80¢ Per Gallon

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

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

## LETTERS WE'VE RECEIVED

The BALL-MATIC (gas saver) that I purchased has proven itself. I drive a 1970 Oldsmobile, now I get four miles more per gallon.

**C. T.**  
Orange, California

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

I am confident the BALL-MATIC will obtain the acceptance it so rightly deserves.

**V. C.**  
Tucson, Arizona

Just a short note to inform you of the performance of your BALL-MATIC unit that I have installed in my 1972 Ford station-wagon. Prior to using your device, I averaged 12 to 13 MPG, now that I have installed your unit my mileage has gone up to 16 MPG around town.

**A. Coultis**  
Sheriff  
Orange County, California

My tired old engine is once again alive, my gas consumption is lessened, and I get much quicker starts. And probably the most noticeable thing is, the "Ping" from the engine is gone from the daily use of Regular Gasoline.

I would highly recommend your "Air Injector unit to be used by companies with Fleet operations. I find it, overall a great investment.

**G. R.**  
Chicago, Illinois

On a trip from Tustin to San Francisco (480 miles) we averaged 21 miles per gallon. On the same trip last spring we averaged 17 miles per gallon.

**F. B.**  
Anaheim, California

Following installation of the BALL-MATICS we found that the miles per gallon increased about 10% on the Ford Galaxie with a 302 engine and over 30% on the Dodge Charger with a 440 engine. Taking into consideration the mileage driven on both cars, we feel we are saving between \$2.50 and \$3.00 per week on gasoline.

**B. J.**  
Santa Ana, California

The gas mileage is unbelievable and also the amount of power the car has acquired after the air injector was installed is quite remarkable.

**J. G.**  
Santa Ana, California

I left California for Texas early Monday morning and drove straight through in approximately 25 hours to meet my appointments on Tuesday. I don't believe that would have been possible without the extra three to four miles per gallon the BALL-MATIC Air-Injector gave me. There were several times during the night hours when those extra miles kept me from being stranded due to the long distances between the few service stations open. Additionally, the significance of the cost savings is substantial during these times of high gasoline prices.

**J. W.**  
Austin, Texas

Before it was installed on my 1973 Ford L.T.D. I was getting 9 miles to the gallon. Since instal-

lation of the BALL-MATIC I am getting almost 15 miles to the gallon.

**R. B.**  
Hickman, Nebraska

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

**L. C.**  
Los Angeles, California

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

**L. A.**  
Buena Park, California

Simple 15 second installation on late model Chrysler New Yorker. Morning stuttering has disappeared. No rough idling/stalling when air-conditioning is on. "Take-off" performance exhilarating with much less pedal. Mileage increase 2-3 miles per gallon.

**Albert Starr**  
Costa Mesa, California

I want to express my thanks for the BALL-MATIC on my 1973 Dodge motor home, I have increased my gas mileage from 7.5 to 10.1 miles gallon. This is an increase of 5.5 miles per gallon.

**Rev. R. N.**  
Claremont, California

It gives me pleasure to express to you my satisfaction with the BALL-MATIC installed on my 1973 Ford Pinto Station Wagon.

I was getting 14.8 miles per gallon of gasoline. After the installation this increased to 19.2 miles per gallon, or approximately 30 percent.

**B. L.**  
Certified Public Accountant  
Santa Ana, California

Since purchasing and installing your BALL-MATIC on my 1973 Dodge motorhome, I have increased my gas mileage from 7.5 to 10.1 miles per gallon.

I have recommended the BALL-MATIC to other RV owners and they all feel the same way I do; "They're Great."

**Gene Suprenant**  
Supervisor,  
Beckman Instruments  
Fullerton, California

I have calculated that in gasoline costs alone, I have saved \$138.32 over the year and a half the BALL-MATIC was installed. I am unable to calculate, how many "tight scrapes" I have gotten out of because of the increased power and performance supplied by the BALL-MATIC.

**Robert L. Citron**  
County of Orange  
Tax Collector-Treasurer

After installing the BALL-MATIC on my 1972 Oldsmobile Toronado I increased from 7.5 to 10.5 miles to the gallon.

Seeing this I took my station on as a BALL-MATIC dealer and within the first week sold over 100 valves.

This is the kind of extra income producer that other service stations should consider during this energy crisis to service their customers.

**Louis Michaud**  
Mobil Service  
New Britain, Connecticut

**CLIFFDALE MOTORS**  
DIVISION CLIFFDALE ASSOCIATES, INC.  
121 Post Road East, Westport CT 06880

EXHIBIT E

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

**EVERY CAR NEEDS ONE!**

by L. W. Smith

Like everybody else in America, I was caught in the rising gasoline price spiral: It seemed every time I filled up to the pump, the cost per gallon was higher! Then, things went from bad to worse! Stations ran out of gas. The government started talking about rationing... and frankly, I was scared. I needed my car for work — there was no way I could afford to stop driving. And the way things were going, it looked like there was no way I could afford to keep on driving.

**How To Turn Ordinary Air Into Gas-Saving Energy**

Then I got to thinking — what if there was a way to make my car work more efficiently. I almost gave up right then and there. After all, how could a part-time inventor accomplish what all the high priced Detroit engineers failed at?

But I was determined to give it a try. First, I completely researched automobile engine design, and what I discovered was really staggering. With all the advances made in automotive technology, the carburetor was literally 60 years behind the times! It is possibly the most inefficient component in the entire engine and is responsible for an incredible waste of gasoline!

Here's why: The carburetor is pre-set at the factory for idle conditions. This means that it is most efficient in supplying the gas-to-air mixture when the car is standing still and up to speeds of 35 mph. When you drive over that speed... or start up from a dead stop... or regulate grades and steep hills... or pull a trailer or camper... or carry a full load of passengers, too much gas feeds into the carburetor and you get incomplete combustion. Every time that happens, it's just like pouring money right down the drain.

The problem was obvious. I had to devise a way to regulate air flow into the carburetor. But what made it especially difficult was that the engine only required extra air during those driving conditions that caused the gas mixture to be too rich to burn properly. The device had to be able to sensitize the fuel-to-air ratio as a needed basis and respond immediately to deliver extra air when necessary and to shut off completely when the car was not operating under stress conditions. It was particularly important that the device did not convert partial gas mixture to lean (too much air in relation to the amount of gas), but only serve to correct an over-rich condition back to normal.

The Most Significant Automotive Breakthrough In The Past Two Years! After much trial and error, and endless hours of experimentation with different prototypes, I did it! I in-

vented the BALL-MATIC GAS SAVER VALVE. Pardon me if I blow my own horn but I firmly believe that I have developed the most significant breakthrough in automotive technology in the past ten years! The cars that have been equipped with my valve have increased their mileage per gallon up to 20%, and most Drivers report new found pep from old, tired engines and are actually saving up to \$200 a year on gasoline!

Think of it! I can save every single car owner, every fleet operator, every truck owner... everyone who operates a gas-powered internal combustion engine a small fortune. I found a way to potentially cut down America's gas consumption by millions of barrels a week! I've just gone through several years of tests to prove the BALL-MATIC GAS SAVER VALVE in the field under actual day-to-day driving conditions.

**Controlled Tests Confirm Big Dollar Savings**

In the Spring of 1970, I arranged for a local Shell Service Station to conduct a controlled, supervised test using seven different cars owned and driven by non-professional drivers. Each car was fitted with a locked gas cap and the keys were kept in the possession of the testers.

After establishing base mileage consumption data for the various cars, the BALL-MATIC was installed and miles-per-gallon figures were re-checked. Every single car in the test showed dramatic improvement.

Year/Make	MPG Improvement
1970 Cadillac Eldorado	21%
1970 Chrysler Imperial	28%
1969 Cutlass	11%
1974 Vega	11%
1972 Gran Torino	16%
1967 Camaro	16%
1973 Cadillac Eldorado	40%
<b>OVER-ALL AVERAGE</b>	<b>18%</b>

**Start Saving Immediately**

As of now, tens of thousands of motorists all over the country have put the BALL-MATIC GAS SAVER VALVES in their cars. It takes only 60 seconds to install and no special tools are required (easy-to-follow instructions are provided) — it's so easy, anyone can do it! But best of all, the BALL-MATIC works immediately. There's no "breaking-in period" — you experience a significant savings with the very first tankful. The BALL-MATIC fits all American made cars (except diesel or fuel injection) and all foreign cars except Volkswagens.

**READ THE RESULTS FOR YOURSELF!**

I want to express my thanks for the BALL-MATIC. Since it has been installed in my car, my gas mileage has not been under 18 miles per gallon. This is an increase of 2.5 miles per gallon.

Rev. R. B. — Clermont, California  
Just a short note to inform you of the performance of your BALL-MATIC unit that I have installed in my 1972 Ford station-wagon. Prior to using your device, I averaged 12 to 13 MPG, now that I have installed your unit my mileage has gone up to 18 MPG around town. A. C. — Escondido, Orange County, California

After installing the BALL-MATIC on my 1972 Oldsmobile Toronado I increased from 7.5 to 10.5 miles to the gallon.

Saving this I took my station on as a BALL-MATIC dealer and within the first week sold over 100 valves. This is the kind of extra income producer that other service stations should consider during this energy crisis to service their customers.

L. M. — Miami Beach, New Britain, Connecticut  
It gives me pleasure to express to you my satisfac-

tion with the BALL-MATIC installed on my 1973 Ford Pinto Station Wagon. I was getting 14.8 miles per gallon of gasoline. After the installation this increased to 19.2 miles per gallon, or approximately 30 percent.

B. L. — Certified Public Accountant, Santa Ana, California  
Before it was installed on my 1973 Ford L.T.D. I was getting 8 miles to the gallon, since installation of the BALL-MATIC I am getting almost 15 miles to the gallon. R. B. — Hickman, Nebraska

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I am confident the BALL-MATIC will obtain the acceptance it so rightly deserves.  
V. C. — Tucson, Arizona



**GUARANTEED SAVINGS**  
We firmly believe the BALL-MATIC to be one of the best investments you can make to save money this year. The exact savings you will receive may vary significantly depending on the kind of car you drive, the condition of your engine, weather, your driving habits and the amount of driving you do, however we guarantee that you MUST SAVE AT LEAST FIVE TIMES the amount you paid for your BALL-MATIC in the first year for you may return it for a full refund.

**Order One Today Entirely At My Risk**

There may be a reason why you don't install a BALL-MATIC on your car immediately. But, for the life of me, I can't figure it out! If after reading this ad you have any doubts whatsoever, just drop me a note and I'll gladly send you a copy of my test reports.

Better yet, order a BALL-MATIC for your own test entirely at my risk. Install it in your own family car and if it doesn't deliver everything I say it will — starting with the very first tankful, just return it and I'll refund every cent of your money!

Please don't delay. Every day you drive without a BALL-MATIC GAS SAVER VALVE in your car costs you money and needlessly wastes precious gasoline. Call or send in your coupon today.

**24 HOURS A DAY-7 DAYS A WEEK FOR MASTER CHARGE AND VISA ORDERS CALL TOLL FREE 1-800-331-1000**  
IN CALIF. CALL COLLECT (916) 644-2260

**SEND NO-RISK COUPON TODAY**

CLIFFDALE MOTORS, Dept. BMT, 2055 McDonald Ave., Brooklyn, NY 11223

Please RUSH me the BALL-MATIC GAS SAVER VALVE(S) ordered below along with easy-to-follow installation instructions. I must get immediate improvement in pick-up and better gas mileage starting with my next fill-up and I must save at least five times my purchase price in the first year of use or I may return my valve for a refund of my purchase price (excluding postage and handling, of course).

- Enclosed is \$
- \$12.95 plus 85¢ postage and handling for ONE BALL-MATIC
  - \$24.95 for TWO BALL-MATICS ppd. (You save \$1.75)
  - \$36.50 for THREE BALL-MATICS ppd. (You save \$4.90) Add \$12 for each additional valve. Connecticut residents add sales tax.

CHARGE IT —

Visa  Master Charge  
Exp. Date \_\_\_\_\_ Bank # \_\_\_\_\_  
Card # \_\_\_\_\_

Print Name \_\_\_\_\_  
Address \_\_\_\_\_  
City \_\_\_\_\_  
State \_\_\_\_\_ Zip \_\_\_\_\_

CANADIAN CUSTOMERS Please add \$1.00 extra. Order from KYCAM, Dept. BMT, 510 Coronation Drive, West Hill, Ont. M1E4X6

DEALER INQUIRIES INVITED



## INITIAL DECISION BY

MILES J. BROWN, ADMINISTRATIVE LAW JUDGE

OCTOBER 8, 1982

## INTRODUCTION

The Federal Trade Commission issued its complaint in this matter on July 7, 1981 (mailed August 5, 1981), charging respondents Cliffdale Associates, Inc. ("Cliffdale") and Jean-Claude Koven and Arthur N. Sussman with unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

More particularly, the Commission charged that respondents, in connection with the advertising, offering for sale, sale, and distribution of an "automobile retro fit" device known as the Ball-Matic Gas Saver Valve ("Ball-Matic" or "Ball-Matic Valve"), had misrepresented that (Complaint ¶¶ 5, 6): [2]

- a. the Ball-Matic is an important, significant, and unique new invention;
- b. the Ball-Matic is needed on every motor vehicle except Volkswagens, diesel vehicles, or fuel injection vehicles;
- c. the Ball-Matic, when installed in a typical automobile and used under normal driving conditions, will significantly improve fuel economy;
- d. under normal driving conditions, a typical driver can usually obtain a fuel economy improvement of 20% (or more) or an improvement that will approximate or equal four miles per gallon when the Ball-Matic is installed in his/her automobile;
- e. competent scientific tests prove the fuel economy claims made for the Ball-Matic;
- f. results of consumer usage, as evidenced by consumer endorsements, prove that the Ball-Matic significantly improves fuel economy;
- g. the consumer endorsements that appear in advertisements and sales promotional materials for the Ball-Matic are statements of persons who have used the Ball-Matic in the recent past or are currently using the Ball-Matic and who have given permission for the publication of these statements;
- h. all consumer endorsements which appear in advertisements and sales promotional materials for the Ball-Matic were obtained from individuals or other entities who, at the time of providing their en-

dorsements, were independent from all of the individuals and entities that have marketed the Ball-Matic;

i. the consumer endorsements that appear in advertisements and sales promotional materials for the Ball-Matic reflect the typical or ordinary experience of members of the public who have used the Ball-Matic. [3]

The Commission also charged that, in their advertisements and promotional material, respondents misrepresented that they had a reasonable basis for making the above enumerated claims about fuel economy (Complaint ¶ 8).

The Commission also charged that because respondents did not have a reasonable basis for making such claims, the advertisements and promotional materials were deceptive or unfair (Complaint ¶ 7).

In their answer to the complaint filed September 29, 1981, respondents admitted only that (1) Cliffdale is a Connecticut corporation and that its office and principal place of business is located at 180 Post Road East, Westport, Connecticut; (2) that respondent Jean-Claude Koven ("Koven") is its president; (3) that for a period of time, until approximately December 1979, Cliffdale marketed a product known as the Ball-Matic Valve; and (4) that in the course and conduct of its business, prior to December 1979, Cliffdale disseminated advertisements for the Ball-Matic Valve (Answer ¶¶ 1-3). Respondents denied all other allegations of the complaint and further alleged as follows (Answer ¶¶ 12-14):

The complaint fails to state a claim against Respondents upon which relief can be granted;

The Federal Trade Commission has failed to demonstrate that a formal proceeding with respect to the alleged violations is in the public interest; and

The Federal Trade Commission lacks jurisdiction over the subject matter and the Respondents with respect to the matters alleged in the complaint.

Accompanying the complaint was an eight part notice order setting forth the form of order "the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint" (Complaint, Notice Order). The Commission also stated (Complaint, Notice):

Moreover, the Commission has reason to believe that, if the facts are found as alleged in the complaint, it may be necessary and appropriate for the Commission to seek relief to redress injury to consumers, or other persons, partnerships or corporations, in the form of restitution and refunds [4] for past, present, and future consumers and such other types of relief as a rest forth in Section 19(b) of the Federal Trade Commission

Act. The Commission will determine whether to apply to a court for such relief on the basis of the adjudicative proceedings in this matter and such other factors as are relevant to consider the necessity and appropriateness of such action.

On January 5, 1982, following most of the pretrial discovery conducted by both parties, the Administrative Law Judge scheduled adjudicative hearings to commence on February 2, 1982, in Los Angeles, California.

On January 25, 1982, respondents filed a motion for consideration of a proposed consent agreement and to withdraw the matter from adjudication pursuant to Section 3.25 of the Commission's Rules of Practice ("Motion, Docket 9156"). The consent order proposed by respondents was substantially the same as the consent order issued against the manufacturer and distributor of the Ball-Matic Valve (*Compare* Agreement Containing Order to Cease and Desist, File No. 812-3182, Motion, Docket 9156, Exhibit 2 with Proposed Agreement Containing Consent Order, Motion, Docket 9156, Exhibit 4).

At a prehearing conference held January 25, 1982, complaint counsel opposed respondents' motion (*see* PHC tr. 46-72). Complaint counsel argued that the proposed consent order was not adequate and that any disposition of this matter by consent procedures would preclude the Commission from seeking consumer redress under Section 19 of the Act (*see* PHC tr. 74). After the Administrative Law Judge refused to certify the matter to the Commission because he could not make the required finding as to the likelihood of a settlement on the basis of any order other than the notice order that accompanied the complaint (PHC tr. 89, 92), respondents, on January 27, 1982, filed a supplemental submission to their motion which included a form of order identical to the notice order. On January 28, 1982, the Administrative Law Judge certified respondents' motion, as supplemented, to the Commission stating: "Notwithstanding complaint counsel's opposition to any consent order, I find that there is a 'likelihood of settlement', if the Commission is willing to forego the possibility of seeking consumer redress in federal court." On January 29, 1982, the Commission denied respondents' motion.

Thereafter, nine days of adjudicative hearings were held: February 2, 3 and 4 in Los Angeles, and February 23 and 24, [5] March 2, 3, and 4, and April 14, 1982, in New York, New York. After rulings were made on certain evidentiary matters and the transcript of the last day of hearings was received from the Office of the Secretary, the record was closed for the receipt of evidence on May 28, 1982. The parties filed their proposed findings and conclusions of law on July 14, 1982, and their answering briefs on July 28, 1982. On August 17, 1982, the Commission granted the Administrative Law Judge's request for an

extension of time until September 24, 1982, in which to file the initial decision in this matter, and on September 24, 1982, further extended the time to file the initial decision until October 8, 1982.

On July 14, 1982, the Administrative Law Judge advised the Office of the Secretary that certain documentary exhibits were missing from the official documentary exhibit binders in Docket No. 9156. On September 28, 1982, the Office of the Secretary advised the Administrative Law Judge that they had located all but four of those exhibits. On October 5, 1982, the Administrative Law Judge issued an order certifying his bench copies of CX 141, RX 7, RX 243A-D and RX 257F to the Office of the Secretary for incorporation into the official record.

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

#### PRELIMINARY STATEMENT

The principal issues presented in this matter go to whether respondents made the representations challenged in the complaint, whether such representations, if made, were false, and whether respondents had a reasonable basis for the fuel economy claims that were contained in the advertisements.

The evidence of record in this case demonstrates that owners of some vehicles (other than Volkswagens and vehicles containing diesel and fuel injection engines) may experience fuel economy of up to 11% by installing a Ball-Matic Valve. The controversy in this matter evolves from respondents' advertising claims that owners of all vehicles (except Volkswagens and vehicles containing diesel and fuel injection engines) could expect to obtain up to 20% or more fuel economy or 4 extra miles per gallon from the use of the Ball-Matic Valve and Commission counsel's position that no significant savings can be expected from use of the product. [6]

In this respect, respondents rely heavily on consumer testimonials which report fuel economy savings of up to 20% or more and up to 4 miles per gallon or more, whereas Commission counsel rely upon the testimony of their expert witnesses to the effect that consumers cannot measure the fuel consumption of their automobiles accurately enough to determine whether the Ball-Matic Valve does effect fuel economy. They also rely on an engine dynamometer laboratory test which demonstrated that the fuel economy to be expected from use of the Ball-Matic Valve was, under conditions favorable for its operation, quite small, *i.e.* less than 5%.

According to respondents, the actual performance of the Ball-Matic Valve must be determined by actual use on an automobile, and that

laboratory tests using chassis dynamometers or engine dynamometers do not duplicate or represent the driving conditions under which the Ball-Matic Valve will work.

I have considered the entire record in this matter as well as the demeanor of the witnesses, and the proposed findings of fact submitted by counsel and their arguments. All proposed findings that are not adopted in form or substance by the effect of this initial decision are rejected as being argumentative, irrelevant to the issues in this matter, or not supported by the record.

#### FINDINGS AS TO THE FACTS

1. Cliffdale is a Connecticut corporation with its office and principal place of business at 180 Post Road East, Westport, Connecticut (Answer ¶ 1). It was established in 1977 by respondent Koven and his wife, Beth Koven, who are the sole shareholders of the corporation (CX 153A, ¶ 1 (Stip.); tr. 889 (Koven)). It is a marketing company that has engaged in the mail order sale of products (tr. 889-891 (Koven)). Among the products that have been marketed by Cliffdale is the Ball-Matic Valve (Answer ¶ 2). Total net sales of Cliffdale for the year ending December 31, 1979, was \$692,998 (tr. 963 (Stip.)).

2. Respondent Koven has been president of Cliffdale since its incorporation in 1977 (tr. 889 (Koven)). He has directed the marketing and advertising activities of Cliffdale, and has shared responsibility for the administrative and bookkeeping aspects of the corporation's operation with Mrs. Koven (tr. 892 (Koven)). Koven has been engaged in various mail order and marketing businesses since 1970 (see tr. 887-893, 972 (Koven)).

3. Respondent Sussman acted as a consultant to Cliffdale from January 6, 1979, to July 1, 1979 (Sussman Admission No. 28). [7] His responsibility as consultant was to "bring in new products" to be sold by mail order by Cliffdale (tr. 804-806 (Sussman); tr. 894 (Koven)). Sussman had an agreement with Cliffdale that if Cliffdale's profits from the mail order sale of products that he "brought in" reached \$25,000, a separate corporation would be established of which he would be half owner and from which he would receive half of the profits (see CX 153A-B ¶ 4 (Stip.); tr. 804 (Sussman); tr. 999 (Koven)). Sussman met Koven in 1976 when they both worked for Film Corporation of America (tr. 804, 836 (Sussman); tr. 893 (Koven)). Sussman had been employed by various mail order businesses since 1970 (tr. 800-803 (Sussman)). One of the products Sussman "brought" to Cliffdale was the Ball-Matic Valve (tr. 806-808 (Sussman)).

4. Sherwood Marketing ("Sherwood"), also a Connecticut corporation (not a respondent), was established in October 1978. The original

shareholders were Martin Howard and Mrs. Koven, each owning 50%. In July 1979, Sherwood acquired Cliffdale's mail order business pursuant to the agreement between Cliffdale and Sussman (*see* Finding 3, *supra*). At that time Sherwood acquired the assets and liabilities of Cliffdale's mail order business. The major assets acquired were the advertisements for the Ball-Matic Valve and the right to receive income from mail order sales prior to July 1, 1979; the major obligations assumed were the obligations to pay suppliers, the obligation to pay for prior advertisements, and the obligation to make refunds when requested regardless of when the sales were made. In September 1979, Sussman acquired Howard's 50% interest in Sherwood. From July 1, to September 14, 1979, Sussman was an employee of Sherwood and was primarily responsible for implementing Sherwood's acquisition of Cliffdale's mail order operation (CX 153A-B ¶ 4 (Stip.)). After the transfer of Cliffdale's mail order business to Sherwood, Sussman and Koven received equal salaries from Sherwood at the rate of \$75,000 annually (tr. 837-39 (Sussman); tr. 998 (Koven)). Koven withdrew from Sherwood in the spring of 1980 (tr. 999 (Koven)). Sherwood filed a voluntary petition for bankruptcy under Chapter 7 of the U.S. Bankruptcy laws in November 1980, was liquidated in bankruptcy and no longer exists as a corporation (tr. 1591-92 (Sussman)).

5. Koven and Sussman were actively involved in all aspects of the mail order marketing of the Ball-Matic Valve by Cliffdale and Sherwood. Along with Howard, they created the advertisements which are the subject of this proceeding (tr. 816 (Sussman); tr. 924-38 (Koven)). They both benefitted from the sale of the Ball-Matic Valve (*see* Finding 4 *supra*). It is found that respondents, as individuals, were both responsible [8] for the activities of Cliffdale and Sherwood in the marketing of the Ball-Matic Valve.

6. In the course and conduct of their business, respondent Cliffdale and respondents Koven and Sussman (through Cliffdale and Sherwood) have disseminated advertisements for the Ball-Matic Valve in interstate commerce by publishing them in newspapers and magazines with national circulation (tr. 1491 (Stip.); Cliffdale and Koven Admission No. 21; Sussman Admission No. 21). Total advertising expenditures by Cliffdale and Sherwood for the Ball-Matic Valve have been substantial, a total of \$549,973 having been expended from April 1979 through November 1979 (*see* CXs 18-25). In the further course of their businesses, Cliffdale and Sherwood have disseminated through the mail in interstate commerce promotional materials for the Ball-Matic Valve such as CX 13 through CX 17 (Sussman Admission Nos. 16, 17 and 19; Koven Admission Nos. 15, 16, 17, 19, 20, 22; tr. 860-62 (Sussman)). In the further course and conduct of their businesses, sales of the Ball-Matic Valve were made by Cliffdale and

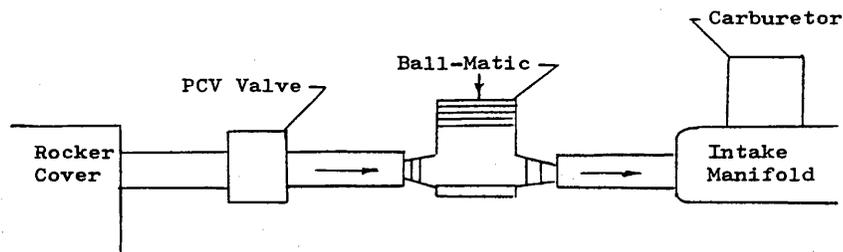
Sherwood by sending Ball-Matic Valves through the mail to consumers located in various parts of the United States (CX 153 D ¶ 25). Revenue from the sale of Ball-Matic Valves totaled \$1,781,876 (CXs 66, 67). In marketing the Ball-Matic Valve the respondents were in competition with the sellers of other products marketed to improve gasoline consumption (Koven Admission No. 25; Sussman Admission No. 25).

7. It is found, on the basis of the facts set forth in Finding 6, *supra*, that respondents Cliffdale, Koven and Sussman have engaged in commerce as "commerce" is defined in the Federal Trade Commission Act, and their business activities relating to the matters alleged in the complaint have been "in commerce" and "affect commerce" within the meaning of these terms as set forth in the Federal Trade Commission Act.

8. The Ball-Matic Valve is what is called an "air-bleed" device (tr. 444 (Patterson); CX 49A; RX 244A). Its purpose is to admit additional air into a vehicle's engine to lean the air-fuel mixture, thus improving gasoline mileage (tr. 172 (Smith), tr. 509 (Patterson)). It is inserted into the positive crankcase ventilation line ("PCV Line") of an engine (CX 99C; see CX 99K reproduced at page 8a, *infra*). The Ball-Matic Valve consists of a ball, spring, filter, and metal case (CX 99C, K). The ball, in combination with the casing, serves as a valve, which is designed to open when the vacuum in the engine is low thus admitting additional air into the engine. When the vacuum rises, the valve shuts (CX 99C; see CX 99K, reproduced at p. 8a, *infra*). Relatively lower vacuum is experienced in an engine [8a]

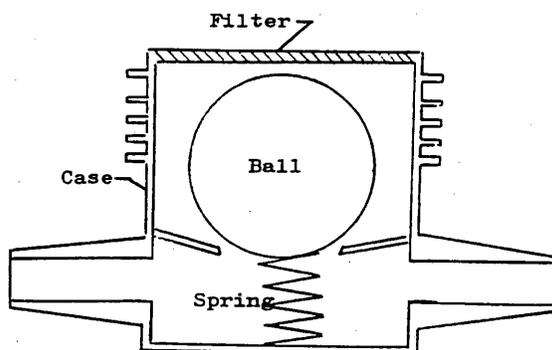
Figure 1

Schematic of Ball-Matic Installation



*Figure 2*

## Ball-Matic Construction



[9] during rapid acceleration or "floor boarding" of the foot pedal, while negotiating steep grades and hills, or while pulling trailers or campers (tr. 515-16, 518, 521, 524 (Patterson)).

9. The opening and closing of the Ball-Matic Valve is determined by the interplay of the strength of the spring in the Ball-Matic Valve and the vacuum of the engine (tr. 509 (Patterson); CX 99C). The ball is kept pulled against the casing of the device by the vacuum so long as the vacuum exerts enough force to overcome the strength of the spring in the valve. When the vacuum is not strong enough, the spring forces the ball up and air is admitted into the PCV system (*id.*). The amount of air that can be physically admitted into the PCV system is limited by the size of the opening when the ball is in the "open" position (see RX 41C, D; see also tr. 1090 (Korth)).

10. An internal combustion engine produces power by processing fuel mixed with air in its combustion chambers (tr. 372 (Patterson)). The amount of fuel reaching the engine is expressed as an "air-fuel" ratio showing the number of pounds of air delivered to the engine for

each pound of fuel that is delivered (tr. 387 (Patterson)). Gasoline engines are usually most efficient at air-fuel ratios slightly above the stoichiometric (chemically correct) value; in non-stoichiometric mixtures, there is either excess fuel (a rich mixture) or excess air (a lean mixture) in the combustion chamber (RX 212J). The excess fuel or excess air does not enter into the combustion process (*Id.*). The air and fuel entering the engine are mixed in the carburetor, which has a fuel metering system consisting of cruise circuits (providing fuel for normal operating conditions), idle jets (providing additional fuel when the vehicle is idling), and power jets (providing additional fuel when high power output is necessary) (tr. 390, 515 (Patterson); tr. 1092 (Korth)). In addition, the choke richens the mixture when the engine is cold (tr. 390 (Patterson)). Typically, carburetors are set according to normal operating conditions (cruise conditions) (tr. 387-90 (Patterson)). The actual carburetion of a particular model of vehicle is determined by the manufacturer (*id.*). The carburetor can be set to operate "rich" (low air fuel ratios), "lean" (high air-fuel ratios), or at a level anywhere in between. The carburetor setting is permanent and is not expected to change over time. Devices such as the Ball-Matic Valve admit air into the engine in addition to the air entering through the carburetor and the air which would normally enter through the PCV line (CX 99C). This additional air will dilute the air-fuel mixture. Depending upon the "air-fuel" ratio of the carburetor of a particular vehicle, the admission of additional air will [10] lead to an improvement in fuel economy, no change in fuel economy, or an actual decline in fuel economy (CX 99E, L). If the "air-fuel" ratio is "rich", improvement in fuel economy may result (CX 99; *see* ALJX 120).

11. The designed carburetion of vehicles on the road has been changed by manufacturers over the years. A number of factors, including government regulations concerning emissions and fuel economy, the increasing public demand for fuel efficient vehicles, and major technological advances in regulating emission, have led to frequent changes in carburetion systems in recent years (tr. 388-89 (Patterson)). However, in deciding how to set the carburetor for a particular vehicle, manufacturers are always faced with balancing the need to optimize fuel economy with the need to have a vehicle that is "drivable" (*i.e.*, that runs smoothly, is responsive, and does not hesitate or stumble), that meets the emission requirements set by law, and that does not experience excessive engine "knocking" (tr. 388-90, 506-07 (Patterson); RX 212 J ). Typically, rich carburetion will lead to better driveability characteristics; however, this may also lead to unacceptable levels of hydrocarbon and carbon monoxide emissions (*id.*). Cars carbureted on the lean side have less power, and thus may have driveability problems (*id.*); however, they have better hydrocar-

bon and carbon monoxide emission characteristics (*id.*). Cars with leaner carburetion also tend to experience engine knocking (*id.*). In the 1950's and earlier, cars were typically carbureted on the rich side. However, in the late 1950's and early 1960's concern about air pollution led to changes in carburetion and vehicles were then carbureted with leaner air-fuel ratios. Typically, 1960 to 1974 vehicles were carbureted chemically correct or leaner. From 1975 to 1980, vehicles were typically carbureted at or near the point of best fuel economy which occurs at an even leaner air-fuel ratio. This change was made possible by the use of the catalytic converter to control emissions (CX 99F, U). In 1979, when respondents made their advertising claims, there were 44,399,000 vehicles on the road manufactured from 1975 through 1979 and 60,264,000 vehicles manufactured before 1975 (RX 106C).

12. The record contains twelve advertisements for the Ball-Matic Valve (CXs 1-12) and five pieces of promotional material (CXs 13-17). The record also contains the publication schedules of the advertisements covering a period from April 17, 1979, to November 12, 1979 (CXs 18-25). Cliffdale placed the advertisements prior to July 1, 1979, and Sherwood placed advertisements from July 1 to approximately July 15, 1979 (Respondents' Admission No. 3). Certain promotional materials [11] were disseminated by Cliffdale during the period April 17 to December 3, 1979 (CXs 13, 15, 17) and by Sherwood (CXs 16, 17) during the period July 1 to December 3, 1979 (Cliffdale and Koven Admissions Nos. 16, 17; Sussman Admission No. 20).

13. With some minor language differences and different headlines, the advertisements are substantially similar. For example some of the headlines state:

SAVE MONEY SAVE MONEY SAVE MONEY SAVE MONEY Without the Ball-Matic you're wasting up to \$200 or more on gasoline EVERY CAR NEEDS ONE! (CX 1; see CX 5).

\* \* \* \* \*  
 STRIKE BACK AT RISING GAS PRICES! GET UP TO 4 EXTRA MILES PER GALLON—100 EXTRA MILES BETWEEN FILL-UPS—SAVE UP TO \$200 A YEAR ON GAS OR DOUBLE YOUR MONEY BACK (CX 2; see CXs 3, 4).

\* \* \* \* \*  
 GET UP TO 4 EXTRA MILES PER GALLON—100 EXTRA MILES BETWEEN FILL-UPS—SAVE UP TO \$200 A YEAR ON GAS (CXs 7, 8; see CXs 10, 11).

In most of the advertisements language similar to the following paragraphs appears somewhere in the text:

Think of it! Thanks to an important automobile invention, every single car owner, every fleet operator, every truck or camper owner . . . everyone who operates a gas-

powered combustion engine, may now be able to save up to 20% and more on their gasoline bills! (CX 8; see CXs 2, 3, 4, 6, 7, 10, 11, 12).

\* \* \* \* \*

The BALL-MATIC fits all American and foreign cars except Volkswagens. Do not use on diesel or fuel injection models (CX 8; see CXs 1, 2, 3, 4, 5, 6, 7, 9, 10, 11, 12). [12]

\* \* \* \* \*

... [T]he carburetor is pre-set at the factory for idle conditions. This means that it is most efficient in regulating the gas-to-air mixture when the car is standing still and up to speeds of 35 mph. When you drive over that speed . . . or start up from a dead stop . . . or negotiate grades and steep hills . . . or pull a trailer or camper . . . or carry a full load of passengers, too much gas feeds into the carburetor and you get incomplete combustion. Every time that happens, it's just like pouring money down the drain (CX 10; see CXs 1, 2, 3, 4, 5, 6, 7, 8, 11, 12).

\* \* \* \* \*

#### GUARANTEED SAVINGS

We firmly believe the Ball-Matic to be one of the best investments you can make to save money this year. The exact saving you will receive may vary significantly depending on the kind of car you drive, the condition of your engine, weather, your driving habits and the amount of driving you do; however we guarantee that you **MUST SAVE AT LEAST FIVE TIMES** the amount you paid for your BALL-MATIC in the first year or you may return it for a full refund (CX 5; see CX 6, 7, 8, 9, 10, 11, 12; see also CXs 2, 3, 4 ("double your money back")).

\* \* \* \* \*

Test the BALL-MATIC yourself entirely at our risk. Install it in your own family or company car and if it doesn't deliver everything we say it will—starting with the first tankful, just return it and we'll refund your purchase price (CX 7; see CXs 1, 5, 6, 8, 11, 12; see also CXs 2, 3, 4, 10 ("double your money")). [13]

#### CONTROLLED TESTS CONFIRM BIG DOLLAR SAVING

In the Spring of 1978, we arranged for a local Shell Service Station to conduct a controlled, supervised, test using seven different cars owned and driven by non-professional drivers. Each car was fitted with a locked gas cap and the keys kept in the possession of the testers.

After establishing base mileage consumption data for the various cars, the BALL-MATIC was installed and miles-per-gallon figures were re-checked. Every single car in the test showed meaningful improvement.

Make of Car	MPG Improvement
Cadillac Eldorado	21%
Chrysler Imperial	28%
Oldsmobile Cutlass	8%
Chevrolet Vega	10%
Ford Gran Torino	19%
Chevrolet Camero	16%
Cadillac Eldorado	40%

IMPROVEMENT RANGE . . . 8% to 40% (CX 7; see CXs 1-6, 8, 10-12).

Initial Decision

103 F.T.C.

\* \* \* \* \*

Yes, you can actually get up to 70 . . . 80 . . . 90 . . . even 100 extra miles from every single tankful. No matter how old or rundown your car may be . . . no matter how many gallons of gas it now devours each week . . . FROM THE VERY INSTANT YOU INSTALL THE BALL-MATIC GAS SAVER VALVE IN YOUR CAR, YOU MUST EXPERIENCE A DRAMATIC DECREASE IN GAS CONSUMPTION (CX 6; see CXs 2, 3, 4, 7, 8, 10, 11, 12). [14]

\* \* \* \* \*

READ THE RESULTS FOR YOURSELF!

The BALL-MATIC (gas saver) that I purchased has proven itself. I drive a 1970 Oldsmobile, now I get four miles more per gallon.

C.T.—Orange, California

Just a short note to inform you of the performance of your BALL-MATIC unit that I have installed in my 1972 Ford station wagon. Prior to using your device, I averaged 12 to 13 MPG, now that I have installed your unit my mileage has gone up to 16 MPG around town.

A. Coutts

Sherriff, Orange County, California

Before it was installed on my 1973 Ford L.T.D. I was getting 9 miles to the gallon, since installation of the BALL-MATIC I am getting almost 15 miles to the gallon.

R.B.—Hickman, Nebraska

After installing the BALL-MATIC on my 1972 Oldsmobile Toronado I increased from 7.5 to 10.5 miles to the gallon.

Seeing this I took my station on as a BALL-MATIC dealer and within the first week sold over 100 valves.

This kind of extra income producer that other service stations should consider during this energy crisis to service their customers.

Louis Michaud

Mobile Service, New Britain, Connecticut

I want to express my thanks for the BALL-MATIC. Since it has been installed in my car, my gas mileage has not been under 18 miles per gallon. This is an increase of 5.5 miles per gallon.

Rev. R.N. Claremont, California (CX 4; see CXs 2, 3, 6, 10; see also CXs 1, 5, 7, 8, 11, 12). [15]

14. In addition to the statements quoted above in Finding 13, *supra*, respondents' advertisements and promotional materials contain a statement that consumers can save fuel "thanks to an amazing automobile discovery" (CXs 2-6, 10; 13-15). Other advertisements describe the Ball-Matic as an "important automobile invention" (CX 7). Many of the advertisements and promotional materials also contain bold type headlines in the text stating that the Ball-Matic is "the Most Significant Automotive Breakthrough of the Last Ten Years" (CXs 2-6, 10, 13-15). Some advertisements liken the Ball-Matic to a "mini-computer brain" (CXs 2-4, 6, 8, 10-12), and in one instance the Ball-Matic is referred to as a "unique, patented" valve (CX 9).

15. Through the above representations set forth in Finding 14,

*supra*, respondents have represented to the public that the Ball-Matic is an important, significant and unique new invention.

16. Several of respondents' advertisements and promotional materials contain headlines that "EVERY CAR NEEDS ONE". (CXs 1, 5, 15, 17). Many of the respondents' advertisements and promotional materials contain the statement that "every single car owner, every fleet operator, every truck or camper owner . . . can now save up to 20% and more on their gasoline bills" (CXs 2-4, 6, 10, 13-15). Other ads contain the same statement but with the word "can" changed to "may" (CXs 7, 8, 11, 12). In addition, in the "guarantee" contained in most of the advertisements, respondents state that users will save fuel. All of the advertisements and promotional materials include a statement that Volkswagens, diesels, and fuel injection vehicles cannot use the Ball-Matic.

17. Through the statements set forth in Finding 16, *supra*, respondents have represented to the consumer that the Ball-Matic valve is needed on every car except Volkswagens, diesels, and fuel injection vehicles.

18. Most of respondents' advertisements contain the following statement in bold type (CXs 1-8; 10-12): "you experience a significant saving with the very first tankful." Many of the advertisements and promotional materials claim that consumers will "save up to 20% and more" (CXs 1-8; 10-15). A number of advertisements claim that consumers will save up to \$200 a year on gas (CXs 6-8; 10-12). Almost all of respondents' advertisements and promotional materials claim that consumers will "get up to . . . 4 extra miles per gallon" (CXs 2-4; 6-15). Other representations contained in these advertisements and promotional materials are: "Get up to . . . 100 extra miles [16] between fill-ups" (CXs 2-4, 6-9; 12-15). Most advertisements report the results of the Shell Service Station test showing savings from 11% to 40% or 8% to 40% (*see* CXs 1-8, 10-15). The consumer testimonials report savings of from 2 to 6 miles per gallon (CXs 1-8, 10-15). Most of the advertisements also describe the type of driving under which the Ball-Matic Valve will effect fuel efficiency and that the actual fuel saving will depend on the type of car driven or the amount of miles driven, the condition of the engine, weather, and driving habits (CXs 1-8; 10-15).

19. Through the claims set forth in Finding 18, *supra*, as well as the lay-out of the advertisements and promotional materials, respondents have represented to consumers that the Ball-Matic Valve, when installed in a typical automobile and used under normal driving conditions, will significantly improve fuel economy.

20. Through the claims set forth in Finding 18, *supra*, as well as the lay-out of the advertisements and promotional materials, respondents

have represented to consumers that under normal driving conditions a typical driver can usually obtain a fuel economy improvement of up to 20% or more or an improvement that will approximate or equal up to four miles per gallon when the Ball-Matic is installed in his or her car.

21. In most of respondents' advertisements and promotional materials, respondents refer to a "controlled, supervised, test" (CX 1-8, 10-15). The text of the advertisement explains that this test (the Orange Hill Shell Service Station test) used seven different automobiles owned and driven by non-professional drivers where each car was fitted with a locked gas cap and the keys were kept in the possession of the testers. The advertisements refer to the results as "dramatic" and contain a chart showing the results for each automobile and representing an overall average gas saving of 18% (*i.e.*, 8 to 40%). Several brochures that do not contain the results of the Orange Hill Shell Service Station test, represent the Ball-Matic Valve as "Tested and Proven up to 20% increase in fuel economy" (CXs 16, 17). Several advertisements and promotional materials refer to "several years of tests to prove the Ball-Matic Gas Saver Valve in the field under actual day-to-day driving conditions" as a preface to the Orange Hill Service Station Test segment of the advertisements (CXs 1, 5, 13-15). One advertisement states "[f]ield tests for over seven years and lab tests at an Accredited Eastern University confirm that the Gas Saver Valve really works" (CX 9). The existence of tests to support the claims made in respondents' advertisements and promotional [17] materials is referred to in the following: "[i]f after reading this ad you still have any doubts whatsoever, just drop [m]e a note and I'll [We'll] gladly forward a copy of my [our] test reports for your inspection" (CXs 1, 3-5, 7, 8, 10, 11, 13-17).

22. Through the representations set forth in Finding 21, *supra*, respondents have represented that competent tests prove the fuel economy claims made for the Ball-Matic Valve.

23. With one exception (CX 9), all of respondents' advertisements and promotional materials feature a black bordered box containing excerpts from consumer testimonials (CXs 1-8, 10-17). This box is captioned "Read the results for yourself." In each testimonial excerpt, the testimonialist reports a significant increase in fuel economy after the Ball-Matic Valve was installed on his or her vehicle. The range of fuel economy improvement reported by the testimonialists is from over 2 miles per gallon to 6 miles per gallon.

24. Through the publication of consumer testimonials including the gas saving claims as set forth in Finding 23, *supra*, respondents have represented that the use of the Ball-Matic Valve by consumers, and

the results reported by them, proves that the device significantly improves fuel economy.

25. The respondents' advertisements and promotional materials for the Ball-Matic Valve do not provide any information concerning when the consumer testimonials were written or whether the testimonialists were currently using the device when the advertising materials were published (see CXs 1-8, 10-17). For example, the quotations from the testimonials themselves imply that the testimonialists were currently using the Ball-Matic Valve: C.T. (Clare Thorenson, Orange, California): ". . . now I get four miles more per gallon" (CXs 1-6, 10, 13-17); A. Coutts, (Sheriff, Orange County, California): "now that I have installed your unit . . ." (CXs 1-8, 10-17). The testimonials also imply that permission has been given for their use: A. Coutts: "[j]ust a short note to inform you of the performance of your Ball-Matic" (CXs 1-8, 10-17); Gene Suprenant: "I have recommended the BALL-MATIC to other RV owners . . ." (CXs 13-15); B. L. (Billy Largent, Certified Public Accountant, Santa Ana, California): "It gives me great pleasure to express to you my satisfaction" (CXs 1, 7, 13-17).

26. Through the representations set forth in Finding 25, *supra*, respondents have represented that the consumer endorsements in their advertisements and promotional materials are statements of persons who have used the Ball-Matic in the [18] recent past or are currently using the Ball-Matic and who have given permission for the publication of their testimonials.

27. None of the testimonials used in the respondents' advertisements and promotional materials indicate that at the time of their writing, the testimonialists personally knew the manufacturers or various marketers of the Ball-Matic Valve or were connected with them in any way (CXs 1-8, 10-17). The advertisements contain claims that thousands of consumers have purchased the Ball-Matic Valve (see CXs 1-5). Moreover, the testimonials used in the advertising and promotional materials are from different cities and different parts of the country (CX 1-8, 10-17).

28. Through the use of testimonials in the manner set forth in Finding 27, along with other representations stated therein, respondents have represented that the testimonials that they used were from individuals independent of all marketers of the Ball-Matic Valve.

29. The consumer endorsement section of the advertisements and promotional brochures contain testimonials from persons living in various parts of the country, driving a wide variety of cars and representing a variety of professions (e.g. sheriff, service station owner, accountant, minister) (CXs 1-8, 10-17). In their endorsements, consumers claim the same type of fuel economy improvements from using the Ball-Matic Valve as the respondents do in the text of their

advertisements. For example, the endorsers claim fuel economy improvements ranging from over two to six miles per gallon. These claims are similar to the claims in the narrative text of the respondents' advertising and promotional material that the use of the Ball-Matic Valve can lead to improvements of up to four miles per gallon or up to 20% or more. The endorsers' claims are also similar to the results for the Orange Hill Shell Service Station test reported in the respondents' advertisements (CXs 1-8, 10-17). Moreover, the testimonials are presented in the box captioned "Read the results for yourself" or "Letters we've received" (CXs 1-8, 10-17). Every advertisement and almost all of the promotional materials contain the prominent caption "Over 100,000 already in Use" (CX 1-15). Almost all of the advertising and promotional materials include the statement that "[a]s of now, tens of thousands of motorists all over the country have [installed]" the Ball-Matic (CXs 1-8, 10-15).

30. Through the representations set forth in Finding 29, *supra*, as well as by the overall format of their advertisements and promotional material, respondents have [19] represented that the consumer endorsements that they used in their advertisements and promotional materials reflect typical or ordinary experiences of users of the Ball-Matic Valve.

31. As set forth above in Findings 21 and 22, *supra*, respondents represented in most of their advertisements and promotional material that they have test evidence to support their claims as to gas economy to be realized from the use of the Ball-Matic Valve. In addition, the advertisements and promotional material contain many explicit claims that the use of the Ball-Matic can lead to significant fuel savings (*see* Finding 18).

32. Through the use of the claims set forth in Finding 31, as well as the general format of their advertisements and promotional material, respondents have represented that they have a reasonable basis for the claims that they have made.

33. On the basis of the record in this case, it is found that respondents' performance claims for the Ball-Matic Valve as contained in their advertisements and promotional materials and as challenged in the complaint, are false. On the basis of Professor Patterson's engine dynamometer test of the Ball-Matic Valve and the testimony of Professor Patterson and Mr. Korth, it is apparent that under the most favorable conditions for the operation of the Ball-Matic Valve, it cannot effect fuel economy anywhere near "up to 20% or more" or "4 extra miles per gallon".

Professor Patterson's engine dynamometer tests were conducted on a small, 1.3 litre Ford engine that was carbureted at "13.1 to 1" which is considered to be a very rich fuel to air ratio (tr. 392 (Patterson); *see*

CX 99). In an engine dynamometer test the engine is tested independently of the automobile chassis. Although used in certain European model Ford cars, this 1.3 litre Ford engine was not sold in the United States because the engine's emission control system could not meet EPA's 50,000 mile durability requirement and because its fuel economy was relatively low, both deficiencies being attributable to its rich carburetion (tr. 391-92 (Patterson)). Professor Patterson selected this engine for his test in order to maximize the effects of the Ball-Matic Valve and to obtain results that could be qualified and used to determine the effect of the Ball-Matic Valve on typical vehicles on the road in 1979, at the time respondents' advertisements were published (tr. 390-91, 409-10 (Patterson)).

Professor Patterson modeled his test after the tests performed by the Environmental Protection Agency, which uses a [20] chassis dynamometer test. In a chassis dynamometer test the entire vehicle is used, the drive wheels exerting the power to the dynamometer. The EPA procedures are based on an established driving pattern (see RX 221E-F). Professor Patterson selected six test points from that pattern which represented approximately 75% of the energy used in the EPA test (tr. 408, 525-26, 547-48 (Patterson)).

Professor Patterson tested two Ball-Matic Valves. The results of the test on Physical CX 115 (a black Ball-Matic Valve containing a relatively weak spring) showed small increases and declines in fuel economy within the test's range of experimental uncertainty and, according to Professor Patterson, these results demonstrated that the Ball-Matic Valve was ineffective as far as fuel economy was concerned (CX 99E, G).

The results of the tests on Physical CX 116 (a silver Ball-Matic Valve containing a relatively stiff spring) showed a measurable change in fuel economy, an average improvement of 6.2 percent in fuel consumption (CX 99F, J; tr. 416 (Patterson)). One test run, which was not reproduced, showed an improvement of 11 percent in fuel consumption (tr. 544 (Patterson)).

34. On the basis of the test results on Physical CX 116, Professor Patterson calculated the effect of the use of this Ball-Matic Valve on vehicles on the road in 1979, considering the general weight of those vehicles and their carburetor settings (tr. 416-17 (Patterson); CX 99S, T, U). He considered that pre-1975 vehicles generally weighed between 4000 and 6000 pounds loaded, whereas vehicles manufactured from 1975 to 1979 were generally lighter, weighing 3000 to 4000 pounds loaded (CX 99). The results of these calculations are set forth at CX 99 J as follows: [21]

Case A represents the 1.3 litre Ford test engine with a 13.1-1 fuel-air

TABLE 2

EFFECT OF GROSS VEHICLE WEIGHT AND WEIGHT/POWER RATIO  
ON FUEL ECONOMY CHANGE WITH DILUTION  
PROVIDED BY BALL-MATIC DEVICE

Gross Vehicle Wt (1bm)	2000		3000		4000		5000		6000	
	Weight/Power	12.5 25	12.5 25	12.5 25	12.5 25	12.5 25	12.5 25	12.5 25	12.5 25	
Case A-13.1:1		5.2 6.2*	3.5 4.1	2.6 3.1	2.1 2.5	1.7 2.1				
Case B-15.7:1		-2.0-2.4	-1.4-1.6	-1.0-1.2	-.82 -.96	-.7 -.8				
Case C-14.8:1		2.0 2.4	1.4 1.6	1.0 1.2	.82 .96	.7 .8				
Case D-15.5:1		0 0	0 0	0 0	0 0	0 0				

\* Measured on Ford 1.3 litre engine - U of M Auto Lab.

ratio, Case B represents vehicles manufactured from 1975 to 1979 and Case C represents the vehicles manufactured before 1975 (see CX 99 U). Professor Patterson concluded that "the effect on fuel economy [of Physical CX 116] was judged to be both positive and negative with a maximum effect of less than 2% [fuel economy] for vehicles with carburetion typical of today's U.S. vehicle population" (CX 99G). He was of the opinion that the use of the Ball-Matic Valve in actual on-the-road driving would lead to results similar to those that he had calculated in Table 2 (tr. 550 (Patterson)). Dr. Patterson was of the opinion that under a hypothetical situation, where the effects of the Ball-Matic Valve would be maximized, an improvement could be expected of from approximately 2½ percent for a large vehicle to approximately 4 percent for a small vehicle (tr. 496-97 (Patterson)).

35. Mr. Korth testified that EPA has tested or evaluated 14 air-bleed devices, including the Ball-Matic Valve. On older engines carbureted to relatively rich fuel-air ratios, the devices reduced hydrocarbon and carbon monoxide emissions, but did not improve fuel economy (tr. 1050-51 (Korth)). He also testified that, when EPA first started looking into the effect of enleanment on fuel economy and emission, EPA conducted a wide range of engine dynamometer tests and found that enleanment affected emission but did not improve fuel economy in normal operating ranges (tr. 1092-93 (Korth)). A change in fuel economy was obtained when the engine was operating under rich conditions, such as when the carburetor was intentionally [22] altered to enrich the air-fuel mixture. In those situations, EPA found that it was possible to get as much as 5% improvement in fuel economy. These conditions, however, would not represent normal operating conditions (tr. 1092-93).

36. Mr. Korth was of the opinion that the Ball-Matic Valve could not bleed much air into an engine compared to the overall amount of air that the engine uses, especially during heavy acceleration periods when the Ball-Matic Valve is open and admitting air (tr. 1090). He concluded that, given the basic principles of engineering and combustion theory, an air enleanment device such as the Ball-Matic Valve cannot give any significant improvement in fuel economy and that an actual loss in fuel economy could be expected on vehicles operating near the point of best engine efficiency, as in the 1975 to 1979 vehicles (tr. 1090-91).

37. Respondents' representation that "Every car needs one" (except Volkswagens, diesels and fuel injection vehicles) is false. Most of the automobiles manufactured after 1974 have such lean fuel-air mixture setting on their carburetors that no fuel economy could be expected by adding a air-bleed valve to the PCV line (see Findings 8-11, 33-36).

38. Respondents' representation that the use of the Ball-Matic Valve would significantly improve fuel economy when installed in a typical automobile and used under normal driving conditions is false. Except in unusual automobiles that are carbureted for rich fuel air mixtures and driven under power conditions (such as "floor boarding") a large portion of the driving time, most automobiles will not experience significant fuel economy from using the Ball-Matic Valve (see Findings 8-11, 33-36).

39. Respondents' representation that under normal driving conditions a typical driver could usually obtain a fuel economy of up to 20% or more or an improvement that would approximate or equal four miles per gallon with the Ball-Matic installed in the automobile is false. The record shows that even under the most ideal situations favorable to the Ball-Matic Valve the fuel economy represented by respondents could not be realized (see Findings 33-36).

40. The record contains the results of other laboratory tests on the Ball-Matic Valve. In 1976, the EPA performed its test, using standard procedures (now set forth in the Code of Federal Regulations (40 C.F.R. 610)) on a black Ball-Matic Valve (containing a relatively weak spring (tr. 1572 (Stip.)). The EPA test used a 1970 Plymouth Valiant powered by a 225 cubic [23] inch 6 cylinder engine and equipped with an automatic transmission (CX 57C). Based on the test results (see CX 57D), EPA concluded that although the Ball-Matic Valve caused reductions in emissions of unburned hydrocarbons and carbon monoxide due to the enleanment of the air-fuel ration and also caused an increase in oxides of nitrogen emission, it had no significant effect upon fuel economy (CX 57E; tr. 1082-84 (Korth)). The EPA's conclusions can be considered quantitatively valid only for the specific type of vehicle used in the chassis dynamometer test; however, similar

results are likely to be achieved on other types of vehicles (CX 57B; tr. 1157 (Korth)).

A test conducted by the Vernon, California Emission Test Laboratory in February 1979, using single runs with a Ball-Matic Valve and without the Ball-Matic Valve on a 1950 Chrysler with automatic transmission obtained a fuel economy of almost 7 percent (*see* RXs 43A, 44).

An Engine dynamometer test conducted by Professor Kishibay at the University of Bridgeport in May 1979 on the Ball-Matic Valve using a V-8 Oldsmobile engine obtained results indicating a range of .2 to 4.58 percent reduction in fuel consumption for regular gas and a range of 2.64 to 6.01 percent reduction in fuel consumption for high test gasoline (RX 217D).

On August 1 and 2, 1979, a test was performed by Scott Environmental Technology Inc ("Scott") on the Ball-Matic Valve on a 1978 Plymouth Volare equipped with a standard 318 cubic inch V-8 engine with automatic transmission ("Scott Test I"). This was a chassis dynamometer test using the EPA urban cycle with some test runs using modified acceleration rates for hard acceleration (RX 221C, E). The greatest increase in fuel economy measured during this test was 3.9 percent (RX 221J).

On August 22 and 30, 1979, a second series of tests were performed by Scott ("Scott Test II"). The first test was a chassis dynamometer test performed on the 1978 Plymouth Volare (used in Scott Test I) and using the EPA urban test cycle as well as certain portions of that cycle. The results of these tests showed slight increases in fuel economy (RX 225M). The second series of tests, using the same procedures, as in the second test on the Plymouth Volare, were conducted on a 1976 Toyota Corolla equipped with a standard 96.9 cubic inch, four-cylinder engine and a four speed manual transmission. In the first two comparative tests on the Toyota there was a 10.9 percent increase in fuel economy; however, it was suspected that [24] during later tests, which showed no fuel economy, a leak had developed in the manifold vacuum system of the Toyota, which could possibly account for the lack of increased fuel economy (RX 225M).

On September 26 and 27, 1979, an engine dynamometer test was conducted by Automotive Testing Laboratories ("ATL"), East Liberty, Ohio, on the Ball-Matic Valve using a Toyota similar to that used in the second part of the Scott Test II. Unlike other dynamometers used in testing the Ball-Matic Valve, the flywheel loads at ATL were directly coupled to the drive shaft, instead of connected through a system of pulleys and belts. Two test runs, one without the Ball-Matic Valve and one with the Ball-Matic Valve obtained an 11.7% increase in fuel economy. Subsequent test runs showed only minor fuel economy, but

during those runs there was no drop in manifold vacuum when the Ball-Matic should have opened (CX 87F, K, L; see tr. 879-80 (Sussman)).

Although the record contains much debate over the validity of any of these tests, primarily because none of the results which showed fuel economy in the 10 to 12% range could be duplicated, and because the test results were introduced into evidence in this case only as notice to respondents rather than for the truth of the facts reported, it is apparent that no laboratory test indicated that the Ball-Matic Valve, under the most ideal conditions for its operation, would produce the fuel economy represented by respondents in the challenged advertisements and promotional materials.

41. The remaining evidence about the performance of the Ball-Matic Valve consists of fuel economy reports by drivers who had installed the Ball-Matic Valve on their vehicles. With one exception (see CX 87A, G), the results reported were not supported by statistical data. Such reports consisted of testimonials of consumers, the experience of individuals involved with the merchandising of the Ball-Matic Valve, and tests referred to as the "Orange Hill Service Station" test and the "Orange County Register" test. The results of such tests were obtained by measuring fuel placed in the gasoline tank of the vehicle and noting the change in the odometer reading of those vehicles. These consumers reported fuel economy of up to 20% and over and up to 4 extra miles per gallon, as represented by respondents.

Professor Patterson testified that such consumer tests were not a generally recognized way of testing fuel economy (tr. 393). He was of the opinion that the reproduceability of such [25] consumer tests could vary by 20 to 30 percent due to the attitude of the driver and the conditions of the road and the vehicle (tr. 394-96, 550-51). He also testified that measuring fuel consumer by "topping off the tank" is not an adequate control for a fuel consumption test (tr. 577).

Mr. Korth testified that the consumer is not in a position to judge whether a device such as the Ball-Matic Valve works or not (tr. 1064). He considered testimonials essentially meaningless (tr. 1063), and all consumer tests to be invalid. Dr. Wouk did not consider consumer tests, including the Orange Hill Shell Service Station test and the Orange County Register test to be scientific tests (tr. 1413, 1428).

The record contains much evidence of the variable in driving habits as well as road and vehicle conditions that can effect fuel economy. By altering driving habits, an individual can effect a fuel saving of as much as 20%. It is possible that a change in air temperature could change fuel economy by 10% or more. The record contains reference to the Hawthorn effect which recognizes that when a person, such as a driver of an automobile, knows he or she is in a test situation he or

she will attempt to make the experiment work, in the case of a driver by altering his or her driving habits (*see* tr. 393-96 (Patterson)).

It is found that the so-called consumer tests are not reliable enough to offset the other evidence of record upon which it has been determined that the Ball-Matic Valve will not produce the amount of fuel economy as represented by respondents.

42. It is also found, for the reasons set forth in Finding 41, *supra*, that respondents' use of testimonials to represent performance claims for the Ball-Matic Valve were deceptive. Their representation that the results of consumer usage as evidenced by consumer endorsements proved that the Ball-Matic Valve significantly improved fuel economy was false. Their representation that the consumer endorsements that appeared in advertisements and promotional materials for the Ball-Matic Valve reflect the typical or ordinary experience of members of the public who have used the device, was false.

43. None of the tests relied upon by respondent actually proved the performance claims made for the Ball-Matic Valve. It is found that none of these tests was competent tests. Accordingly, respondents' claim in their advertisements and promotional materials that they had competent tests that proved the fuel economy claims made for the Ball-Matic Valve was false. [26]

44. The Ball-Matic Valve was not a "new invention" when respondents marketed it in 1979. It had been marketed since 1973 by the Ball-Matic Corporation (tr. 175-78 (Smith)). Moreover, the evidence also shows that the Ball-Matic Valve was not an important, significant and unique new invention in 1973, when it was first marketed by Ball-Matic Corporation. Devices like the Ball-Matic Valve are commonly called "air bleed" devices (tr. 444, (Patterson); tr. 1139 (Korth); tr. 173 (Smith); CX 99C; RX 244). Such devices have been in existence for many years and the EPA and its predecessor agencies have tested them since 1960 (tr. 1050 (Korth)). The patent for the Ball-Matic Valve covered the fins, not the valve mechanism (tr. 284 (Smith)). Professor Patterson testified that these cooling fins were merely cosmetic and had no effect upon the operation of the Ball-Matic Valve (tr. 378 (Patterson)). Accordingly, also considering the evidence that shows the limit to the effect that some consumers could obtain in fuel economy from using the Ball-Matic Valve, it is found that respondents' representations that the Ball-Matic Valve is an important, significant and unique new invention was false.

45. Except for CX 9, all of respondents' advertisements and promotional materials which are the subject of this proceeding contain consumer endorsements (*see* CXs 1-8, 10-17). Overall there are 18 different endorsements, although only eight different endorsements appear in the advertisements (*see* CXs 1-8, 10-17). Of these 18

testimonials, only six of the individuals are named, respondents having used initials and their town of residence to identify them. The record also contains the testimonial letters of 16 of these testimonialists. There is no dispute that the letters are genuine and reflect the experience that the consumers themselves perceived from the use of the Ball-Matic Valve. Four of the testimonialists were relatives of persons associated with the Ball-Matic Corporation (Robert Ness, son of Al Ness, a Ball-Matic Valve distributor (CX 33; tr. 240-41 (Smith); Ray Barker, brother-in-law of Hugh Harron, Ball-Matic Valve salesman (CXs 31, 134A); Vincent Currier, nephew of Al Hess (CXs 32, 134A) and Fred Bray, brother-in-law of Al Ness (CX 134B)). One testimonialist was a distributor of Ball-Matic Valves (CX 36 (Michaud)) and one was a salesman for a supplier of the Ball-Matic Corporation (CX 35 (Genoway), CX 134B; tr. 242 (Smith)).

Four of the testimonialists testified and a stipulation relating to another is contained in the record (CX 133 (Thoreson)). [27]

Mr. Michaud testified that he had installed the Ball-Matic Valve on his 1972 Oldsmobile Toronado in 1974. He sold that automobile in 1976 (tr. 940). He currently uses the Ball-Matic Valves in his automobiles (tr. 948, 951). On May 4, 1979, Mr. Michaud signed a form granting Cliffdale permission to use his 1974 testimonial (CX 106; tr. 946).

Mr. Largent testified that he was the accountant for the Ball-Matic Corporation and that in 1974 Mr. Smith installed a Ball-Matic Valve on his automobile (tr. 593-94; see tr. 241-42 (Smith)). At the request of Mr. Smith he wrote the testimonial letter (CX 29; tr. 595). He "traded in" that automobile in 1977 (tr. 597). He further testified that it probably occurred to him at the time he wrote the letter that it might be used for promotional purposes and that he would not have objected to its use (tr. 600-01).

Mr. Suprenant testified that he bought a Ball-Matic Valve from the "daughter of the inventor" who was his co-worker and installed it on his Dodge Motor Home in 1974 (tr. 602-04, 610). He wrote a testimonial letter at the request of his co-worker (tr. 606, CX 37). He sold the motor home in 1976 (tr. 609). He gave Cliffdale permission to use his testimonial on May 9, 1979 (CX 93; tr. 608-09).

It was stipulated that Mrs. Thoreson would have testified that she had a Ball-Matic Valve on her 1970 Oldsmobile "98" from 1972 until 1977 when it was sold (CX 133A). She wrote the testimonial at Mr. Smith's request knowing that he was going to use it for promotional purposes (CX 38; CX 133A-B). Mrs. Thoreson never received a request from Cliffdale for permission to use her testimonial in their advertising and promotional material (CX 133B).

Mr. Coutts, an Investigator for the Orange County Sheriff's Office, and who was once a Deputy Sheriff with that office, testified that he

purchased a Ball-Matic Valve from Tex Smith in 1974 and had it on his automobile for several months (tr. 619-20). He wrote a letter about the product at Mr. Smith's request (CX 39; tr. 621). In 1979, he became aware of the advertisements in which his testimony appeared (tr. 623). He had never been contacted about permission to use his testimonial in advertising (tr. 624). The use of his name with the title "Sheriff" caused him much embarrassment (tr. 625-27).

46. Most of the testimonials were written in 1973 or 1974. Except for the details related by the four testimonialist [28] witnesses and in the stipulation (*see* Finding 45, *supra*) there is no evidence of record as to the length of time the Ball-Matic Valve was used by these consumers or if the facts related about the Ball-Matic Valve changed over time. However, based on the five reports used in the record, it is found that respondents' implied representation that in 1979 the statements were from persons who had used the Ball-Matic Valve in the recent past was false.

47. Most of the testimonials were solicited or received by Mr. Smith and were given to respondents at the time they were negotiating to become the distributor of the Ball-Matic Valve. From the contents of the letters, and the limited testimony of record, it would appear that the testimonialists either expressly, or at least tacitly, granted Mr. Smith permission to use such testimonials for promotional purposes and respondents' representation that permission was given was not false (*see* tr. 243-44 (Smith)).

48. Although some of the testimonialists were relatives of persons involved in sales or promotion of the Ball-Matic Valve, I find that no evidence that any relationship, involving family or business, was such that makes false respondents' implied representation that the testimonials and the statements contained therein were independently made.

49. In February 1979, Sussman contacted Mr. Tex Smith, the President of the Ball-Matic Corporation, to see if he was still marketing the Ball-Matic Valve (tr. 807-08 (Sussman); tr. 183 (Smith); *see* RX 4). Sussman had learned of that product when he worked at American Consumer Inc. ("ACI"), ACI having marketed the Ball-Matic Valve for a short time in 1978, discontinuing it when the Federal Trade Commission began an investigation of ACI's marketing practices involving the G.R. Valve, another automobile retro-fit device (tr. 806-07 (Sussman); tr. 175, 178, 181, 285 (Smith); *see* CX 41)). [*American Consumer, Inc., et al.*, 94 F.T.C. 648 (1979)] After Smith sent Sussman some material about the product, including some promotional flyers and the results of the Orange Hill Shell Service Station test, Sussman recommended that Koven go to California to meet with Smith (tr.

808-811 (Sussman); tr. 897-98, 903 (Koven); tr. 3 11 (Smith); see RXs 6A-B, 8, 42A-C).

50. In March of 1979, Koven traveled to California to meet Smith (tr. 899 (Koven); tr. 184-87, 294 (Smith)). At that time Koven signed the marketing agreement with the Ball-Matic Corporation (CX 42; see tr. 261-65 (Smith); tr. 902 (Koven)). The contract was actually written on a copy of a draft of a letter agreement between Ball-Matic Corporation and ACI (CX 42). While in [29] California, Koven obtained copies of a number of consumer testimonials which he selected from the approximately 100 testimonials that Smith had on file (tr. 907 (Koven); CXs 29-39; RXs 9-40)). Smith also delivered to Koven at that time or by mail shortly thereafter, a reprint of an article by James Brock of the Orange County *Register* (CX 27, RXs 46, 47; tr. 211 (Smith); tr. 907 (Koven)), a copy of the patent for the Ball-Matic Valve (RX 41A-D; tr. 283 (Smith)), and the exemption certificate for the Ball-Matic Valve from the California Air Resources Board (CX 40A-B; tr. 197-99, 304 (Smith); see tr. 917 (Koven); tr. 808-09 (Sussman)). Smith showed Koven an evaluation made by the California Air Resources Board dated September 19, 1977, and the result of a test done by a Chrysler laboratory in Vernon, California (tr. 203-07 (Smith); tr. 985-87, 1008 (Koven); RXs 44, 63A-C; but see CX 117A-E). Smith and Koven discussed a report by the Department of California Highway Control (CX 61A-B; tr. 218 (Smith); tr. 952, 980 (Koven)). While in California, Koven contacted Mr. Lockwood of the Shell Station and was satisfied that the Shell Service Station test had been conducted as stated in the test report (904, 991 (Koven)). Later, in July 1979, Barnett talked to Brock about the Orange County *Register* article (tr. 907 (Koven); tr. 723 (Barnett); CX 28).

51. In early 1979, Mr. Howard and Mr. Barnett installed Ball-Matic Valves on their private automobiles and reported favorable results (tr. 898-89, 988, 1004, 1018 (Koven)). Barnett obtained a 10 percent improvement or 1½ miles per gallon (tr. 710-17, 721 (Barnett)). Howard obtained 2 miles per gallon increase in fuel economy, from 12 to 14 miles per gallon (tr. 1532-33 (Howard)). Sussman also had experienced an increase in fuel economy from 19.8 miles per gallon to 22.4 miles per gallon by installing the Ball-Matic Valve on his automobile when he worked for ACI (tr. 877 (Sussman)).

52. Respondents relied upon the material received from Smith in the preparation of the two prototype advertisements which contain the representations challenged in the complaint (see CXs 1, 2; tr. 924-29, 933-35 (Koven); tr. 818, 884 (Sussman); tr. 351-54 (Smith); tr. 1548-49 (Howard)). The format of the Cliffdale advertisements for the Ball-Matic Valve was similar to the advertising disseminated by ACI for the G. R. Valve (tr. 1480-81, 1538 (Howard); tr. 811-12 (Sussman)).

Respondents also relied upon the experience of their employees who used the Ball-Matic Valve and, later relied on the Kishibay test results which were published May 18, 1979 (tr. 988-89 (Koven); tr. 741 (Barnett); tr. 1548-49 (Howard)). [30]

53. When respondents began marketing the Ball-Matic Valve in 1979, they were aware of a November 1978 article in *Consumer Reports* magazine which reported that there were no statistically significant changes in gasoline mileage from use of air-bleed devices such as the Ball-Matic Valve (CX 49A; see CX 50; tr. 708-09 (Barnett)). They were also aware of the EPA test on the Ball-Matic Valve (CX 57A-I; tr. 249 (Smith); tr. 919, 981 (Koven)), but had been informed by Smith that the EPA test was not a fair test of the Ball-Matic Valve because it was a dynamometer test and that the Ball-Matic Valve only worked when installed on an automobile and used under actual driving conditions (tr. 252, 334 (Smith); tr. 981 (Koven)). They were also aware of the Federal Trade Commission's investigation of ACI (tr. 900 (Koven)).

54. After preparing "paste ups" of the original advertisements, respondents, pursuant to the requirements of their agreement with Ball-Matic Corporation, submitted copy of the advertisements to Smith in early April 1979 (see tr. 349-50 (Smith); tr. 882, 884 (Sussman)). Smith approved the advertising copy without change (see RXs 49-53; tr. 882, 884 Sussman)).

55. The first Ball-Matic Valve advertisements disseminated by respondents were published in mid-April 1979 (see CX 18).

56. It is found that respondents, at the time they disseminated the Ball-Matic Valve advertisements, did not have a reasonable basis for the economy claims contained therein, as "reasonable basis" is understood for purposes of advertising substantiation under Section 5 of the Federal Trade Commission Act, and that, accordingly, their representation that they had such a "reasonable basis" was false.

57. In the last week of May 1979, respondents secured the services of Dr. Wouk. He reviewed the advertisements already published and suggested numerous changes, most of which were adopted in later advertisements (see RXs 230A-C; 231, 232, 235, 236; tr. 746, 749-50 (Barnett)). He advised respondents that consumer testimonials were not on a scientific basis for fuel economy claims and recommended that they begin a testing program to corroborate, in a laboratory setting, the fuel economy shown by the consumer tests supplied by Smith (tr. 876 (Koven); tr. 876 (Sussman)).

58. On July 11, 1979, the *Wall Street Journal* carried a front page story on "gas saving devices" which included statements made by the Commission staff as well as by Barnett of Cliffdale [31] (RX 244A-B; 775-76 (Barnett)). On or about July 16, 1979, Cliffdale received an investigational subpoena from the Federal Trade Commission relat-

ing to the marketing of the Ball-Matic Valve (tr. 844-45 (Sussman)). About that same time respondents decided to stop advertising the Ball-Matic Valve and attempted to cancel all advertising that had been placed but not published (tr. 956, 975, 1000 (Koven); tr. 1550-51 (Howard); tr. 845, 871, 875 (Sussman)).

59. Respondents' attempt to cancel all advertising for the Ball-Matic Valve was not successful because many magazines had closing dates well in advance of publication and advertisements appeared in many magazines in August, September and October. Only two advertisements appeared in November (CX 18-25; see tr. 1491-93 (Howard)). Respondents filled orders placed in response to their advertising until early December when they entered into a settlement with the Post Office Department (see tr. 956, 975 (Koven); CXs 45A-J; 67). After that time respondents returned the orders with a letter permitting the consumer to reorder only upon certification that the consumer was not relying upon respondents' advertising claims about the product (CXs 101, 102; tr. 725 (Barnett); tr. 855-56, 870-71 (Sussman)).

60. During the period of his employment by Cliffdale, from May until November 1979, Dr. Wouk conducted research and testing of the Ball-Matic Valve to develop a protocol and test results that would satisfy the government that the valve worked as respondents had claimed (tr. 956, 1000 (Koven)).

61. In all of their advertisements respondents offered a money back guarantee and honored all requests made by consumers for refunds (CX 153D, Item 27 (Stip.)). The Ball-Matic Valves returned to respondents were in turn returned to Ball-Matic Corporation (tr. 330-31 Smith).

62. Although complaint counsel admit that "the exact date on which the spring configuration [from a weak spring to a stiff spring] was made" on the Ball-Matic Valves manufactured by the Ball-Matic Corporation has not been established, they request a finding that it was not until sometime in August 1979 that Ball-Matic Valves containing the "stiff" spring were delivered to Cliffdale (CSCPF Nos. 98, 102). Complaint counsel take the position, and argue throughout their proposed findings, memorandum and reply brief, that the Ball-Matic Valves sold by Cliffdale to consumers from April through July 1979 were ineffective due to the use of a spring that was too weak to permit operation of the valve (See CSCPF No. 102). Complaint counsel contend that, accordingly, all of respondents' fuel [32] economy claims for the Ball-Matic Valve disseminated before August 1, 1979, were patently false, notwithstanding subsequent laboratory tests on the Ball-Matic Valve with the so-called "stiff" spring which might demonstrate that it does effect some fuel economy.

Respondents argue (Reply Br. p. 24) that this case does not involve

any allegation that respondents had shipped a product with an inherent defect and had not honored their money back guarantee, but rather involves the question of whether "the Ball-Matics which respondents sold, assuming they had been manufactured properly, are capable of effecting the fuel savings claimed in the advertisements, and whether respondents had a reasonable basis and reasonable substantiation for the claims in the advertisements".

The parties appear to agree that the "black" Ball-Matic Valve which was manufactured before Cliffdale became a purchaser from the Ball-Matic Corporation had a "weak" and ineffective spring and that "black" Ball-Matic Valves were supplied to Cliffdale for a short time, at the outset of its marketing program, most of them having been returned to the Ball-Matic Corporation. The results of the tests performed on the "black" Ball-Matic Valve (including the EPA test in 1976), which did not demonstrate any fuel economy, have been attributed to the "weak" spring. Tests which ostensibly demonstrated fuel economy including the consumer type tests performed in 1974 were apparently performed on "silver" Ball-Matic Valves which presumably contained a "stiff" spring.

Complaint counsel's contention, that "silver" Ball-Matic Valves delivered to Cliffdale before August 1979 actually contained "weak" springs like the black Ball-Matic Valve, is based on the testimony of Dr. Wouk concerning his visit to the Ball-Matic Corporation's product quality control facility in California and his observations during the first Scott test, as contained in his recommendation, among others, that a stiffer spring be used on the Ball-Matic Valve (tr. 1214-15, 1427 (Wouk); CXs 75, 80).

The significance of the "weak" spring in the so-called "black" Ball-Matic Valve was not developed before the hearings and the possible difference in the "springs" in the "silver" Ball-Matic Valve was not developed until after the hearings. It is not clear whether Dr. Wouk's concerns in September 1979 related to development of a Ball-Matic Valve that would admit air into the engine in amounts necessary to theoretically achieve the fuel economy claimed in the advertisements, rather [33] than to insure that the Ball-Matic Valve was not "defective". In my opinion, Dr. Wouk was suggesting the possible use of a "stiffer" spring and not that the valve was inherently defective.

In the circumstances, complaint counsel's proposed finding that Ball-Matic Valves with the "stiff" spring were not sold by Cliffdale until August 1979 is rejected and for purposes of this case it is found that the silver Ball-Matic Valves which were delivered to Cliffdale soon after the start of the Cliffdale marketing program were manufactured properly.

63. Respondents request findings that they are not responsible for

any misrepresentations that may be adjudicated on the basis of the advertisements and promotional materials challenged in this case because they relied solely on information supplied to them by the manufacturer and supplier of the Ball-Matic Valve. In this respect they point out that they had obtained specific approval of such advertising claims from the supplier and from Dr. Wouk, an eminent scientist. They also note that the Commission issued a complaint against the Ball-Matic Corporation covering the identical advertisements challenged in this docket, and has issued an order to cease and desist against the Ball-Matic Corporation.

The record shows that Koven and Sussman prepared the challenged advertisements and promotional material and were responsible for its dissemination. Howard, an employee of Cliffdale, selected certain testimonials for inclusion in the advertisements and prepared the "lay out" of the advertisements. Koven and Sussman also planned the marketing of the Ball-Matic Valve and dictated the operations of both Cliffdale and Sherwood in marketing the product.

Whatever responsibility Smith and the Ball-Matic Corporation may have had in supplying information, approving the advertising copy or supplying the means for respondents advertising claims and marketing program does not lessen respondents' responsibility for their own actions.

Finally, Dr. Wouk's approval of the advertising copy, after it had been disseminated, does not lessen respondents' legal responsibility under Section 5 of the Federal Trade Commission Act. The requested finding that respondents were not responsible for the challenged practices is rejected.

64. Respondents contend that Professor Patterson's test should be disregarded (RPF No. 90). They argue that his test does not fairly reflect typical drivers, typical automobiles and typical [34] driving conditions. They point out that Professor Patterson used an engine which is not used in automobiles manufactured in the United States, that he employed an engine dynamometer instead of the chassis dynamometer used by the EPA, that he varied the test points of the EPA test, and that he used a set of test points that were for a different engine than the one he used in his test of the Ball-Matic Valve. They argue further that if the numerous field tests, consumer usage reports and other data they relied upon, including the Kishibay chassis dynamometer test, are not reliable because, as complaint counsel contend, they do not fairly reflect typical driving conditions, then the Patterson test is not reliable for the same reasons.

The record shows that consumer type tests should not be used to support fuel economy claims because there are so many variables that can effect differences in fuel consumption that it is impossible to

determine whether changes in fuel consumption are attributable to the variable being tested, here the installation of the Ball-Matic Valve. Engine dynamometer tests, such as Professor Patterson's test, eliminate all other variables. Accordingly, such laboratory testing is more reliable than consumer type testing, notwithstanding that extrapolations of such test results to the results that any single individual may experience under actual driving conditions would not be expected to be entirely accurate.

Professor Patterson's laboratory test demonstrated that under conditions most favorable to the operation of the Ball-Matic Valve, the maximum benefit any vehicle could experience would be far less than the maximum claimed in respondents' advertising and promotional materials. In the absence of any non-consumer test to the contrary, Professor Patterson's test is the best evidence. In fact, all laboratory tests confirm Professor Patterson's results. Respondents' request that Professor Patterson's test and his accompanying testimony be disregarded is denied.

65. Respondents contend (*see* RPF, pp. 3, 61, 62) that insofar as the complaint alleges that respondents are *now* engaged in the practices challenged therein, it must be dismissed because they have not engaged in any advertising for the Ball-Matic Valve since 1979, and have not sold any Ball-Matic Valves since early in 1980. I agree. That portion of the complaint issued July 7, 1981, that alleges that respondents were then currently engaged in the challenged practices is dismissed for failure of proof (Complaint ¶¶ 2, 5, 9, 10, 11). [35]

#### DISCUSSION

The Federal Trade Commission has jurisdiction over Cliffdale, Koven and Sussman. They are engaged in commerce within the meaning of the Federal Trade Commission Act, and the challenged acts and practices are in commerce and affect commerce within the meaning of the Act. Respondents' contentions that the Commission lacks jurisdiction over them or the subject matter of the complaint or that the complaint fails to state a claim against them upon which relief can be granted, as pleaded in their answer, must be rejected.

It has been found that the advertisements contained the representations alleged in the complaint. This determination has been made from carefully considering the advertisements, including the format and the emphasis placed on certain words and phrases contained therein. It is well settled that the meaning of an advertisement may be determined by an examination of the advertisement itself. *See Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374

(1965); *J. B. Williams Co., Inc. v. Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967).

It has been found that respondents' advertising representations as contained in their advertisements and as alleged in the complaint are, with several minor exceptions, false. This determination has been made on the facts of this record as set forth in the findings of fact. It is well settled that any advertising representation that has the tendency and capacity to mislead or deceive a prospective purchaser is an unfair and deceptive practice which violates the Federal Trade Commission Act. *Chrysler Corp. v. Federal Trade Commission*, 561 F.2d 357, 363 (D.C. Cir. 1977); *Charles of the Ritz Distr. Corp. v. Federal Trade Commission*, 143 F.2d 676, 679-80 (2d Cir. 1944).

Determination as to whether an advertiser possessed and relied upon a "reasonable basis" for believing a representation to be true requires evaluation of "both the reasonableness of an advertiser's action and the adequacy of the evidence upon which such actions were based" *Pfizer, Inc.*, 81 F.T.C. 23, 64 (1972). The basic question is whether the advertiser "acted upon information which would satisfy a reasonable prudent businessman" that the representations are true and that he thus acted in "good faith". *National Dynamics Corp.*, 82 F.T.C. 488, 553, 557.

Although the record is clear that the materials relied upon [36] by respondents as basis for the performance claims made for the Ball-Matic Valve were merely consumer type tests and reports which should not form the basis for fuel economy claims, the question of the respondents' reasonableness in relying upon such material should be considered as a factual matter apart from the adequacy of the materials themselves. The record shows that there were materials available to respondents before and at the time that they published the first advertisements which indicated that the value of the Ball-Matic Valve and other such "air bleed" devices for effective fuel economy was limited. Respondents should have made further investigation into the matter instead of merely relying on the consumer tests. The steps which they took to become informed occurred after the publication of the challenged advertisements.

In support of their contention that respondents represented that they had competent, scientific tests to support their performance claims for the Ball-Matic Valve, complaint counsel point to the statements in the advertisements about the Shell Service Station Test. In their advertisements, respondents detailed how the test was conducted and the results thereof. In support of their contention that respondents falsely represented that they had scientific tests to support their performance claims for the Ball-Matic Valve, complaint counsel argue, based on the expert testimony of record, that consumer type

tests such as the Shell Service Station test, are not scientific tests. Respondents question complaint counsel logic, arguing that if the test as detailed in the advertisement is not a scientific test, it could not be an implied representation that it is. I agree with respondents. But there are other representations in each advertisement that can be interpreted as representing that such scientific tests supporting the claims did exist, whereas, as the record shows, none did.

Respondents contend that statements attributed to others containing only initials of the testimonialist and no other identifying personal characteristic are not testimonials and not governed by the Federal Trade Commission's guidelines concerning endorsements and testimonials (16 C.F.R. 255.1 (1982)).

In my opinion, respondents are correct, because the Guidelines appear to be directed at protecting the privacy of the testimonialist. Initials are not such identifying material, without more, to bring the Guidelines into operation.

Complaint counsel's contention that respondents must get direct permission from each testimonialist before they can use their statements in advertising, even though, as found in this [37] case, the testimonialists gave Mr. Smith such permission, must be rejected. Such a general proposition restricts a seller from permitting a buyer to use testimonials in the resale of products. It is sufficient that the buyer be assured that permission has been granted. The Coutts situation, which is the only matter of record where there is a question of whether permission was granted to Mr. Smith, really involves the misuse of the title "Sheriff". This one situation, where respondents did, in good faith, understand from Mr. Smith that permission was granted, is not sufficient, in my opinion to support a finding of an unfair and deceptive practice or an unfair method of competition or to support a general prohibition in an order to cease and desist.

Although it appears that the Guidelines were substantially amended in January 1980, and may not be directly applicable to this proceeding, the Commission, could, nevertheless invoke Section 5 of the Federal Trade Commission Act to find certain practices unfair and deceptive. But where the Guidelines limit or define certain practices that will be considered unfair, those practices apparently permitted by the Guidelines should not be the subject of adjudicative proceedings.

In this respect, I do not think that the undisclosed relationships between certain testimonialists quoted in respondents advertising and the marketers of the Ball-Matic Valve are the type of relationships which might affect the weight or credibility of the endorsement so as to invoke the requirement that such relationships be fully disclosed.

Finally, respondents contend that this entire proceeding, including any order to cease and desist, is not in the public interest. They show that they ceased their advertising as soon as questions arose as to the merits of the Ball-Matic Valve, that they attempted to cancel advertising already placed, that the Post Office has an outstanding consent order against them, and that there is no possibility that they will again publish advertisements about the Ball-Matic Valve. They argue that their entire endeavor was short-lived and was undertaken and terminated in good faith. In this respect, respondents emphasize the matters challenged in this case took place in 1979, and that they voluntarily started to terminate their business in the Ball-Matic Valve before the Federal Trade Commission investigation and did terminate their business in the Ball-Matic Valve more than a year before the complaint issued (*see* RPF pp. 91-94; Resp. Reply Br. 37-38). [38]

In my opinion, respondents' actions do not bar the Commission proceeding as a matter of law. The violations of Section 5 of the Federal Trade Commission Act took place. The Commission has the responsibility to seek an order to cease and desist against the use of unfair and deceptive practices, such as false fuel economy claims and misuse of testimonials, in the future. The fact that respondents *will* never sell Ball-Matic Valves again is not relevant. The record shows that respondents are still in the mail order business.

Moreover, there is nothing improper in the Commission's proceeding under Section 5 of the Federal Trade Commission Act in areas already covered by Post Office Department orders. There are many basic and material differences in the laws administered by the two public agencies. *See Reilly v. Pinkus*, 338 U.S. 269, 277 (1949); *Damar Products, Inc.*, 59 F.T.C. 1263 (1961), *aff'd. Damar Products, Inc. v. Federal Trade Commission*, 309 F.2d 323 (3d Cir. 1962).

#### CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Cliffdale, Koven and Sussman.

2. This proceeding is in the public interest. The Commission so determined upon the assumption of jurisdiction through the issuance of the complaint. *American Airlines, Inc. v. North American Airlines, Inc.*, 351 U.S. 79, 83 (1956): Nothing in the record of findings requires a different determination. *See Federal Trade Commission v. Klesner*, 280 U.S. 19 (1929).

3. The individual respondents formulated, directed and controlled the acts and practices of the corporate respondent and other entities

of which they were officers or employees, including the acts and practices found herein, and are responsible, individually for such acts and practices.

4. Respondents have disseminated unfair, false, misleading and deceptive advertisements and sales promotional materials in the promotion, marketing and sale of the Ball-Matic Valve and the respondents' advertisements and sales promotional material constitute "false and deceptive" advertisements as those terms are defined in the Federal Trade Commission Act.

5. At the time respondents made the false representations about the fuel economy that could be expected to result from use of the Ball-Matic Valve, they did not possess a "reasonable basis" on which to make such claims. Failure to have such a [39] "reasonable basis" is a violation of Section 5 of the Federal Trade Commission Act.

6. Respondents' dissemination of such false and deceptive advertisements had the tendency and capacity to mislead and deceive the public and constitute unfair methods of competition and unfair and deceptive acts and practices in commerce or affecting commerce in violation of the Federal Trade Commission Act.

#### REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to insure discontinuance of the unlawful practices found. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). The Commission's discretion is limited only by 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); *Warner-Lambert Co. v. Federal Trade Commission*, 562 F.2d 749, 762 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); *Niresk Industries Inc. v. Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883. The Commission is not limited to prohibiting the illegal practices in the exact form in which they were found to have been employed in the past and may close all roads to the prohibited goal. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 473 (1952); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419 (1957).

Complaint counsel's proposed order is identical to the notice order that accompanied the complaint. Except for the two provisions relating to challenged representations concerning the testimonials that I have found not to be false on the basis of this record, and the scope of one of the ministerial provisions of the proposed order, the proposed order is "reasonably related" to the violations found and meets the requirements of the case law.

Respondents challenge Part II of the proposed order as presenting them with an impossible situation. They contend that if they rely upon an engine dynamometer test, as complaint counsel relied on Dr. Patterson's test, they could not use it as support for fuel economy claims because the order requires either an appropriate EPA test chassis dynamometer test or an appropriate track test. They also contend that if they used an EPA chassis dynamometer test they would still be precluded from using the test results for advertising because, as is reflected [40] on the record in this case, such results cannot be represented as being achievable by typical drivers under typical conditions, such results being useful only for comparative purposes as between cars of different manufacture.

I do not read the proposed order as being so restrictive. The record shows that there are procedures for testing retro-fit devices or other fuel saving devices such as additives which require "before" and "after" test results for comparisons (*see* CX 57B; n. 1; RX 227). The tests described in the order are examples. The point of the order is to require respondents to have a reasonable basis for fuel economy claims founded on "a competent and reliable test that is one in which persons qualified to do so conduct the test and evaluate its results in an objective manner using procedures that insure accurate and reliable results" (*see* Part II, order *infra* p. 43). I do not agree with respondents that the tests detailed in the proposed order would be less of a reasonable basis for substantiation of fuel economy representations than the consumer type tests upon which they did rely.

I agree with respondents that Part IV of the order must be limited to "gas saving products". To require the file retention of post-purchase materials of all advertised products is beyond the scope of this case and would impose an undue burden on respondents.

Part VII of the order, which requires respondent to notify the Commission, for a period of 10 years, of the discontinuance of any past employment and affiliation with any new business, is entirely proper.

## ORDER

### PART I

*It is ordered*, That respondents Cliffdale Associates, Inc., a corporation, its successors and assigns, Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection [41] with the advertising, offering for sale, sale or distribution of the automobile retrofit device variously known as

the Ball-Matic, the Ball-Matic Valve, the Ball-Matic Gas Saver Valve and the Gas Save Valve, or of any other automobile retrofit device (as "automobile retrofit device" is defined in Section 511 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 2011) having substantially similar properties, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

- a. representing, directly or by implication, that such device is a unique product or new invention; and
- b. representing, directly or by implication, that such device is needed on every vehicle except Volkswagens, diesel vehicles and fuel injection vehicles. [42]

#### PART II

*It is further ordered,* That respondents Cliffdale Associates, Inc., a corporation, its successors and assigns, and its officers, and Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any automobile gasoline additive, engine oil additive, or automobile retrofit device (as "automobile retrofit device" is defined in Section 511 of the Motor Vehicle Information and Cost Savings Act, 15 U.S.C. 2011), in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that such device will or may result in fuel economy improvement when installed in an automobile, truck, recreational vehicle, or other motor vehicle unless, and only to the extent, respondents possess and rely upon a reasonable basis which substantiates such representation at the time of its initial and each subsequent dissemination. This reasonable basis shall consist of competent and reliable tests, such as:

- a. chassis dynamometer tests done according to procedures that simulate typical [43] urban and highway driving patterns, such as the then current urban and highway driving test schedules established by the Environmental Protection Agency; or
- b. track or road tests done according to procedures that simulate urban and highway driving patterns, such as the then current procedures established in the Society of Automobile Engineers' J1082b test protocol.

A competent and reliable test means one in which persons qualified

to do so conduct the test and evaluate its results in an objective manner using procedures that insure accurate and reliable results.

Respondents shall, when using the results of any tests required by this Part, clearly and conspicuously disclose any limitations upon the applicability of the results to any automobile, truck, recreational vehicle, or other motor vehicle. Where the results of such tests are used in connection with a representation of fuel economy improvement expressed in miles per gallon (or liter), miles per tankful, or percentage, [44] or where the representation of the benefit is expressed as a monetary saving in dollars or percentages, all advertising and other sales promotional materials that contain the representation must also clearly and conspicuously disclose the following disclaimer: "REMINDER: Your actual saving may vary. It depends on the kind of driving you do, how you drive and the condition of your car."

### PART III

*It is further ordered,* That respondents Cliffdale Associates, Inc., a corporation, its successors and assigns, and its officers, Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any product or service in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

a. using, publishing, or referring to any endorsement unless respondents have good reason to believe that at the time of [45] such use, publication, or reference, the person or organization named subscribes to the facts and opinions therein contained;

b. representing, directly or by implication, any energy savings or energy consumption characteristics of any product, other than any gasoline additive, engine oil additive, or automobile retrofit device (as "automobile retrofit device" is defined in the Automobile Information and Cost Savings Act, 15 U.S.C. 2011), unless, at the time of making the representation, respondents possess and reasonably rely upon competent and reliable evidence that substantiates such representation;

c. representing, directly or by implication, that any consumer endorsement of a product or service represents the typical or ordinary [46] experience of members of the public who use the product unless this is the case;

d. misrepresenting, in any manner, the purpose, procedure, results,

or conclusion of any test or survey pertaining to the energy saving or energy consumption characteristics of any product.

PART IV

*It is further ordered,* That respondents Cliffdale Associates, Inc., a corporation, its successors and assigns, and its officers, and Jean-Claude Koven, individually and as an officer of Cliffdale Associates, Inc., and Arthur N. Sussman, an individual, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale or distribution of any fuel saving product in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to maintain accurately the following records which may be inspected by Commission staff members upon fifteen (15) days' [47] notice: copies of dissemination schedules for all advertisements, sales promotional materials, and post-purchase materials; documents relating to the use or publication of endorsements; records of the number of pieces of direct mail advertising sent in each direct mail advertisement dissemination; documents which substantiate, contradict, or otherwise relate to any claim which is a part of the advertising, sales promotional materials, or post-purchase materials disseminated by respondents directly or through any business entity. Such documentation shall be retained by respondents for a period of three (3) years from the last date any such advertising, sale promotional materials, or post-purchase material is disseminated.

PART V

*It is further ordered,* That the corporate respondent shall forthwith distribute a copy of this order to all operating divisions of said corporation, and to all present and future personnel, agents, or representatives having sales, advertising or policy responsibilities with respect to the subject matter of this order and that the corporate respondent shall secure from each such person a signed statement acknowledging receipt of the order. [48]

PART VI

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

## PART VII

*It is further ordered,* That the individual respondents named herein promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with each new business or employment for a period of ten years from the effective date of this order. Each such notice shall include the respondents' new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order. [49]

## PART VIII

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

## OPINION OF THE COMMISSION

By MILLER, *Chairman*:

Cliffdale Associates, Jean-Claude Koven, and Arthur N. Sussman were charged with unfair methods of competition and unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act.<sup>1</sup> Specifically, the complaint charged that respondents misrepresented the value and performance of an automobile engine attachment known as the Ball-Matic Gas Saver Valve ("Ball-Matic"). (Complaint ¶¶ 5,6.) The complaint also charged that respondents lacked a reasonable basis [2] for their performance claims for the Ball-Matic. (Complaint ¶¶ 7, 8.)

Administrative Law Judge Miles J. Brown held that respondents had engaged in false and deceptive advertising and had lacked a reasonable basis for the claims made in their advertisements and promotional materials, in violation of Section 5 of the FTC Act. (ID 38-9.)<sup>2</sup> Both sides appeal from the ALJ's initial decision. We generally

<sup>1</sup> 15 U.S.C. 45.

<sup>2</sup> The following abbreviations are used in this opinion:

ID - initial decision page number  
 IDF - initial decision finding number  
 Tr. - transcript of testimony page number  
 CX - complaint counsel's exhibit number  
 CAP - complaint counsel's appeal brief page number  
 CAB - complaint counsel's answering brief page number

(footnote cont'd)

agree with the ALJ's findings and conclusions and, except as noted in this opinion, we adopt them as our own.

#### I. BACKGROUND

##### A. *The Respondents*

###### 1. Cliffdale Associates

Cliffdale is a Connecticut corporation headquartered in Westport, Connecticut. The company is engaged in mail order marketing of different products, including the Ball-Matic. Company sales for the year ending December 31, 1979, were \$692,998.

###### 2. Jean-Claude Koven and Arthur N. Sussman

Jean-Claude Koven and his wife own 100% of Cliffdale's [3] stock. Koven has been president of the company since its incorporation. He directed the marketing and advertising activities of Cliffdale and shared the administrative duties with his wife. Koven has been engaged in a number of mail order businesses since 1970.

Arthur N. Sussman has been involved in various mail order businesses since 1971. Sussman was a consultant to Cliffdale from January 6, 1979, to July 1, 1979. Sussman was to find new products to be sold by Cliffdale, and it was Sussman who brought the Ball-Matic to the company. Both Koven and Sussman were actively involved in marketing the Ball-Matic and were responsible for placing the advertisements at issue in this proceeding.

##### B. *The Product*

The Ball-Matic was marketed as a gasoline conservation automobile retrofit device. The Ball-Matic is one of a number of "air bleed" devices designed to allow additional air to enter a car's engine in order to improve gasoline mileage.<sup>3</sup>

##### C. *The Allegations*

The complaint charges respondents with ten law violations arising from their placement of advertisements and distribution of sales materials that made false and misleading claims concerning the performance and value of the Ball-Matic. The charges can be divided into four classes. [4]

a. The first class relates to claims descriptive of the Ball-Matic and its performance. The claims are:

CMF- complaint counsel's memorandum supporting proposed findings of fact and conclusions of law page number

RX - respondents exhibit number

<sup>3</sup> A more detailed discussion of air bleed devices can be found at IDF 8-11.

1. the Ball-Matic is an important, significant, and unique new invention;

2. the Ball-Matic is needed on every motor vehicle except Volkswagens, diesel vehicles, or fuel injected vehicles;

3. the Ball-Matic, when installed in a typical automobile and used under normal driving conditions, will significantly improve fuel economy; and

4. under normal driving conditions, a typical driver can usually obtain a fuel economy improvement of 20 percent (or more) or an improvement that will approximate or equal four miles per gallon when the Ball-Matic is installed in an automobile.

(Complaint ¶5.)

- b. The second class arises from respondent's claims that competent scientific tests establish the fuel economy claims made for the Ball-Matic. (*Id.*)

- c. The third class relates to the use of consumer endorsements that appeared in ads and sales materials. According to the complaint, the advertisements represented that the endorsements:

1. prove that the Ball-Matic significantly improves fuel economy;

2. were obtained from individuals or other entities who, at the time of providing their endorsements, were independent from all of the individuals and entities that have marketed the Ball-Matic;

3. are statements of persons who have recently used or are currently using the Ball-Matic; and

4. reflect the typical or ordinary experience of members of the public who have used the Ball-Matic.

(*Id.*) [5]

- d. Finally, the complaint charges that respondents lacked a reasonable basis for making the advertised performance claims for the Ball-Matic. (Complaint ¶8.)

#### D. *The Issues Raised on Appeal*

The ALJ held that respondents' claims constituted unfair or deceptive acts or practices and entered an order requiring respondents to cease and desist from making them unless they have a reasonable basis for such claims. Pursuant to the order, a reasonable basis must consist of competent empirical tests, such as chassis dynamometer tests or road tests, performed under established test protocols. The ALJ also prohibited respondents from making misrepresentations through consumer endorsements in future advertisements.

Respondents appeal from the ALJ's findings as to liability, submitting their proposed findings of fact and law as their appeal brief. Complaint counsel appeal from the ALJ's holding that respondents'

failure to disclose their relationship to endorsers of the product was not deceptive. Complaint counsel also appeal from the ALJ's decision not to require retention of certain business records to insure compliance with the order. Finally, complaint counsel appeal from a number of specific ALJ findings, that they believe inadequately address the nature of respondents' conduct.

With respect to complaint counsel's appeal from specific findings of the ALJ, except as noted in the opinion below, we reject all but their proposed finding Nos. 45 (a), (b), and (c), which correct erroneous record citations and tabulations by the [6] ALJ. We also reject complaint counsel's appeal with respect to the retention of business records. We agree with the ALJ that such a requirement would impose an undue burden on respondents. (ID 40.)

At trial, the charge of unfair methods of competition was not specifically addressed. The ALJ ruled there was liability but made no separate findings supporting this conclusion. Our review of the record reveals that it does not contain sufficient evidence to support a finding of liability on this charge. Accordingly we reverse those portions of the ALJ's decision that relate to unfair methods of competition, and dismiss that count of the complaint. We reject all of respondents' other contentions.

## II. LEGAL STANDARD FOR DECEPTION

The complaint pleads both an unfairness and a deception theory for each alleged violation of Section 5. (Complaint ¶¶ 6, 7, 8, 11.) However, deception was the standard under which the claims were actually tried, and it is the Commission's view that this was the appropriate approach.

In finding the representations in respondents' advertisements to be deceptive the ALJ accepted complaint counsel's articulation of the standard for deception. He concluded that "any advertising representation that has the tendency and capacity to mislead or deceive a prospective purchaser is an unfair and deceptive practice which violates the Federal Trade Commission Act." (ID 35, citing *Chrysler Corp. v. FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977); *Charles of the Ritz [7] Distributors Corp. v. FTC*, 143 F.2d 676, at 679-80 (2d Cir. 1944).) We find this approach to deception and violations of Section 5 to be circular and therefore inadequate to provide guidance on how a deception claim should be analyzed. Accordingly, we believe it appropriate for the Commission to articulate a clear and understandable standard for deception.

Consistent with its Policy Statement on Deception, issued on October 14, 1983,<sup>4</sup> the Commission will find an act or practice deceptive

<sup>4</sup> Commission letter on deception to Hon. John D. Dingell, Chairman, Subcommittee on Oversight and Investigation, (footnote cont'd)

if, first, there is a representation, omission, or practice that, second, is likely to mislead consumers acting reasonably under the circumstances, and third, the representation, omission, or practice is material. These elements articulate the factors actually used in most earlier Commission cases identifying whether or not an act or practice was deceptive, even though the language used in those cases was often couched in such terms as "a tendency and capacity to deceive".<sup>5</sup>

The requirement that an act or practice be "likely to mislead", for example, reflects the long established principle that the Commission need not find *actual* deception to hold that a [8] violation of Section 5 has occurred.<sup>6</sup> This concept was explained as early as 1964, when the Commission stated:

In the application of [the deception] standard to the many different factual patterns that have arisen in cases before the Commission, certain principles have been well established. One is that under Section 5 actual deception of particular consumers need not be shown.<sup>7</sup>

Similarly, the requirement that an act or practice be considered from the perspective of a "consumer acting reasonably in the circumstances" is not new. Virtually all representations, even those that are true, can be misunderstood by some consumers. The Commission has long recognized that the law should not be applied in such a way as to find that honest representations are deceptive simply because they are misunderstood by a few.<sup>8</sup> Thus, the Commission has noted that an advertisement would not be considered deceptive merely because it could be "unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the [9] representation is addressed."<sup>9</sup> In recent cases, this concept has been increasingly emphasized by the Commission.<sup>10</sup>

The third element is materiality. As noted in the Commission's policy statement, a material representation, omission, act or practice involves information that is important to consumers and, hence, likely to affect their choice of, or conduct regarding, a product. Consumers

tions, Committee on Energy and Commerce, October 14, 1983, hereinafter cited as "DS". The letter to Chairman Dingell is attached as an appendix to this opinion.

<sup>5</sup> *Sears Roebuck and Co.*, 95 F.T.C. 406 (1980), *aff'd*, 676 F.2d 385 (9th Cir. 1982).

<sup>6</sup> See generally, DS 4-7 and cases cited therein for a more detailed discussion of the "likely to mislead" principle.

<sup>7</sup> Statement of Basis and Purpose, *Cigarette Advertising and Labeling Rule*, p. 84, 29 FR 8324 (1964).

<sup>8</sup> *Heinz W. Kirchner*, 63 F.T.C. 1282 (1963). However, if there is an affirmative showing that a representation or practice is directed at a distinctive target group, the Commission will determine the effect of the representation on a reasonable member of that group. *Ideal Toy Co.*, 64 F.T.C. 297, 310 (1964). See DS 7-14.

<sup>9</sup> *Heinz W. Kirchner*, at 1290.

<sup>10</sup> See, e.g., *American Home Products*, D. 8918 (1981) [98 F.T.C. 136]; *Sterling Drug*, D. 8919 (July 5, 1983) [102 F.T.C. 395]; *Bristol-Myers*, D. 8917 (July 5, 1983) [102 F.T.C. 21], appeal docketed, No. 83-4167 (2d Cir. Sept. 12, 1983). This concept also is discussed at DS 7-15 and the cases cited therein.

thus are likely to suffer injury from a material misrepresentation.<sup>11</sup> A review of past Commission deception cases shows that one of the factors usually considered, either directly or indirectly, is whether or not a claim is material.<sup>12</sup>

Although the ALJ in this case used the phrase "tendency and capacity to deceive" in his initial decision, we find after reviewing the record that his underlying analysis shows that the three elements necessary for a finding of deception are present in this case.

### III. THE QUESTION OF LIABILITY

The obvious first step in analyzing whether a claim is [10] deceptive is for the Commission to determine what claim has been made. When the advertisement contains an express claim, the representation itself establishes its meaning.<sup>13</sup> When the claim is implied, the Commission will often be able to determine the meaning through an examination of the representation, including an evaluation of such factors as the entire document, the juxtaposition of various phrases in the document, the nature of the claim, and the nature of the transaction.<sup>14</sup>

In other situations, the Commission will require extrinsic evidence that reasonable consumers interpret the implied claims in a certain way.<sup>15</sup> The evidence can consist of expert opinion, consumer testimony, copy tests, surveys, or any other reliable evidence of consumer interpretation. In all instances, the Commission will carefully consider any extrinsic evidence that is introduced.<sup>16</sup> [11]

#### A. Descriptive Claims

##### 1. Important New Invention

###### a. *Were the Claims Made?*

Most of respondents' advertisements refer to the Ball-Matic as an "amazing automobile discovery." (CX 2-6, 10, 13-15.) The same advertisements also describe the product as "the most significant automotive breakthrough in the last ten years." Other ads term the Ball-Matic an "important automobile invention" and a "unique, patented" valve. The Ball-Matic is even compared to a "mini-computer brain." (CX 2-4, 6, 8, 10-12.)

The ALJ found these advertisements expressly claim that the Ball-

<sup>11</sup> The policy statement specifically recognized that an act or practice need only be likely to cause injury to be considered deceptive. Actual injury is not required. DS 16.

<sup>12</sup> *American Home Products; Ford Motor Co.*, 84 F.T.C. 729 (1974) (consent), modified, 547 F.2d 954 (6th Cir. 1976), reissued, May 16, 1977 (slip opinion). See Statement of Basis and Purpose, *Cigarette Advertising and Labeling Rule*, DS 15.

<sup>13</sup> *Bristol-Myers, Sterling Drug*.

<sup>14</sup> *Bristol-Myers; National Dynamics*, 82 F.T.C. 488, 548 (1972), *aff'd*, 492 F.2d 1333 (2d Cir.), *cert denied*, 419 U.S. 993 (1974).

<sup>15</sup> *E.g., Pfizer, Inc.* 81 F.T.C. 23, 59 (1972); *Sears, Roebuck & Co.*, 95 F.T.C. 406, 510-11 (1980).

<sup>16</sup> *Cinderella Career and Finishing Schools, Inc. v. FTC*, 425 F.2d 583, 588 (D.C. Cir. 1970).

Matic is an important, significant, and unique new invention (IDF 15.) We agree.

b. *Needed in Every Car*

Respondents' advertisements also state that "EVERY CAR NEEDS ONE." (CX 1, 5, 15, 17.) Most ads state that each and every car owner, truck owner, etc. can save up to 20 percent in gasoline costs by using the Ball-Matic. (CX 2-4, 6, 7, 8, 10, 11, 12-15.) All of the advertisements and promotional materials include a disclaimer that Volkswagens, diesels, and fuel injected vehicles cannot profit from the Ball-Matic. As the ALJ concluded, these are express claims and their meaning is clear from the ads themselves.

c. *Enhanced Efficiency*

The alleged claims for "significant" fuel economy and specific levels of improvement are less direct. Most of respondents' advertisements state that consumers will "get up to [12] . . . four extra miles per gallon," or "up to . . . 100 extra miles between fillups." (CX 2-4, 6-9, 12-15.) The ads claim that significant savings will start with the first tankful. (CX 1-8, 10-12.) Savings of up to 20 percent and more are promised. (CX 1-8, 10-15.) Other advertisements present test results claiming savings of 8 to 40 percent or provide consumer testimonials of savings from 2 to 6 miles per gallon. (CX 1-8, 10-15.)

We find, as did the ALJ, that respondents expressly claimed a "significant improvement of fuel economy" and that under normal driving conditions a typical driver could usually obtain a fuel economy improvement of 20 percent (or more) or an improvement that would approximate four miles per gallon. (IDF 19.) We do not conclude that a consumers would interpret these ads as claiming a specific fuel savings from use of the Ball-Matic.<sup>17</sup> Nor do we conclude that consumers would believe that by using the Ball-Matic they would be assured of savings close to the higher end of the spectrum. We do find that a consumer would be reasonable in expecting the average savings from the Ball-Matic to be within the stated range, and, together with the claims of universal applicability of the device, expect the variance from that average to be relatively small.

2. Were The Claims Deceptive?

[13] Having determined that respondents made the claims as charged, we must next determine whether the claims were false in a material respect, and thus likely to injure consumers.

<sup>17</sup> Evidence as to how consumers actually interpreted these advertisements was not introduced into the record. While such evidence would have been useful, the Commission believes it can, in this case, interpret the claims as a reasonable consumer would have.

