

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act, 15 U.S.C. 45 *et seq.*; and

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

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

1. Respondent 1554 Corporation is a California corporation, with its office and principal place of business located at 6100 Variel Ave., Woodland Hills, CA. Respondent 1554 Corporation has traded and done business as The Mellinger Company. Respondent Brainerd L. Mellinger, III, is president of the corporate respondent. Individually, or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in the draft complaint. His principal office or place of business is the same as that of the corporate respondent.

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

Decision and Order

123 F.T.C.

ORDER

DEFINITIONS

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

1. "*Mellinger Plan*" shall mean the Mellinger World Trade Mail Order Plan.

2. "*Business opportunity*" shall mean an activity engaged in for the purpose of making a profit.

3. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondents 1554 Corporation, a corporation, its successors and assigns, and its officers, and Brainerd L. Mellinger, III, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of the Mellinger Plan, or any other product or service concerning business opportunities, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making any representation, in any manner, directly or by implication:

A. That consumers who use such product or service typically succeed in readily starting and operating profitable businesses;

B. That consumers who use such product or service typically earn substantial income; or

C. Otherwise concerning the performance, benefits, efficacy or success rate of any such product or service,

unless, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

II.

It is further ordered, That respondents 1554 Corporation, a corporation, its successors and assigns, and its officers, and Brainerd L. Mellinger, III, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with 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 (as "endorsement" is defined in Section 255(b), Part 255, Title 16, Code of Federal Regulations) unless respondents have good reason to believe that at the time of such use, publication, or reference, the endorsement reflects the honest opinions, findings, beliefs, or experience of the endorser and contains no express or implied representations which would be deceptive or unsubstantiated if made directly by the respondents; or

B. Representing, directly or by implication, that any endorsement of the product or service represents the typical or ordinary experience of members of the public who use the product or service unless such representation is true and unless, at the time of making the representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates such representation. Provided, however, respondents may use such endorsements if the statements or depictions that comprise the endorsements are true and accurate, and if respondents disclose clearly, prominently, and in close proximity to the endorsement:

1. What the generally expected performance would be in the depicted circumstances; or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve; *i.e.*, that consumers should not expect to experience similar results.

III.

It is further ordered, That, for five (5) years after the last date of dissemination of any representation covered by this order, respondents, their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

1. All advertisements and promotional materials setting forth any representation covered by this order;
2. All materials that were relied upon to substantiate any representation covered by this order; and
3. All test reports, studies, surveys, demonstrations or other evidence in their possession or control, or of which they have knowledge, that contradict, qualify, or call into question such representation or the basis upon which respondents relied for such representation, including complaints from consumers or governmental entities.

IV.

It is further ordered, That:

A. Respondent 1554 Corporation shall notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising under this order; and

B. Respondent Brainerd L. Mellinger, III, shall, for a period of three (3) years from the date of service of this order, promptly notify the Commission of the discontinuance of his present business or employment, or his affiliation with a new business or employment, with each such notice to include his 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 the respondent's duties and responsibilities in connection with the business or employment.

V.

It is further ordered, That respondents, their successors and assigns, shall forthwith distribute a copy of this order to each of their operating divisions and to each of their officers, agents, representatives, or employees engaged in the preparation and placement of advertisements, promotional materials, product labels or other such sales materials covered by this order, and shall obtain from each such person or entity a signed statement acknowledging receipt of the order.

VI.

It is further ordered, That this order will terminate on April 14, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

VII.

It is further ordered, That respondents, their successors and assigns, shall, within sixty (60) days after service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied or intend to comply with this order.

Complaint

123 F.T.C.

IN THE MATTER OF

HERB GORDON AUTO WORLD, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT, THE TRUTH IN LENDING ACT, REGULATION Z, THE CONSUMER LEASING ACT AND REGULATION M

Docket C-3734. Complaint, April 15, 1997--Decision, April 15, 1997

This consent order prohibits, among other things, the Maryland company and its seven dealerships from obscuring important cost information in fine or unreadable print, from advertising financed purchase or leasing terms that are not available to consumers, and from misrepresenting the terms of financing or leasing any vehicle, the existence of the amount of any balloon payment, or the existence, number or amount of payments for financed purchases. The consent order requires the respondents to make all the disclosures required by the Truth in Lending Act, Regulation Z, Consumer Leasing Act, and Regulation M, and to ensure that the disclosures are noticeable, readable, and comprehensible to an ordinary customer.

Appearances

For the Commission: *Carole L. Reynolds.*

For the respondents: *Charles M. English, Jr., Ober, Kaler, Grimes & Shriver, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Herb Gordon Auto World, Inc. dba Herb Gordon Auto World, Herb Gordon Dodge, Herb Gordon Mercedes-Benz, Herb Gordon Nissan, Herb Gordon Oldsmobile, Herb Gordon Volvo, and Herb Gordon Used Cars, a corporation, ("respondent") has violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR 226, as amended, the Consumer Leasing Act ("CLA"), 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, and the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint and alleges:

PARAGRAPH 1. Herb Gordon Auto World, Inc. dba Herb Gordon Auto World, Herb Gordon Dodge, Herb Gordon Mercedes-Benz, Herb Gordon Nissan, Herb Gordon Oldsmobile, Herb Gordon

Volvo, and Herb Gordon Used Cars, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3121-3161 Automobile Blvd., Silver Spring, Maryland.

PAR. 2. In the ordinary course and conduct of its business, and at least since January 1, 1994, respondent has been engaged in the dissemination of advertisements that promote, directly or indirectly, credit sales and other extensions of other than open end credit in consumer credit transactions, as the terms "advertisement," "credit sale," and "consumer credit," are defined in the TILA and Regulation Z. In the ordinary course and conduct of its business, and at least since January 1, 1994, respondent has been engaged in the dissemination of advertisements that promote, directly or indirectly, consumer leases, as the terms "advertisement," and "consumer lease," are defined in the CLA and Regulation M.

PAR. 3. The acts and practices of respondent alleged in this complaint have been and are in or affecting commerce, as "commerce" is defined in the FTC Act.

COUNT ONE

PAR. 4. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibit A, has disseminated or caused to be disseminated print advertisements that state initial, low monthly payment amounts, such as "\$163" per month, and promote the "luxury of low payments" ("Gold Key Plus advertisements"). In fine print, respondent's Gold Key Plus advertisements, *inter alia*, state an initial number of payments, a downpayment and another amount described as a "purchase option." Respondent's Gold Key Plus advertisements misrepresent that the additional amount is optional and fail to disclose that the financing to be signed at purchase requires the consumer to make a substantial balloon payment at the conclusion of the initial payments, which is a mandatory obligation.

PAR. 5. Respondent's aforesaid practice constitutes a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

Complaint

123 F.T.C.

COUNT TWO

PAR. 6. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibit A, has disseminated or caused to be disseminated Gold Key Plus advertisements that state initial, low monthly payment amounts and promote the "luxury of low payments." In fine print, respondent's Gold Key Plus advertisements, *inter alia*, state an initial number of payments, a downpayment and another amount described as a "purchase option." Respondent's Gold Key Plus advertisements fail to accurately state the terms of repayment, by failing to disclose that the additional amount is a final payment and by inaccurately stating that the amount is optional when, in fact, it is mandatory, based on the financing to be signed at purchase.

PAR. 7. Respondent's aforesaid practice violates Section 144(d) of the TILA, 15 U.S.C. 1664(d), and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT THREE

PAR. 8. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibit A, has disseminated or caused to be disseminated Gold Key Plus advertisements, *inter alia*, that state initial, low monthly payment amounts and promote the "luxury of low payments." Respondent's Gold Key Plus advertisements fail to disclose the annual percentage rate for the financing, using that term or the abbreviation "APR."

PAR. 9. Respondent's aforesaid practice constitutes a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a), and a violation of Section 144(d) of the TILA, 15 U.S.C. 1664(d) and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT FOUR

PAR. 10. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibit A, has disseminated or caused to be disseminated Gold Key Plus advertisements that state initial, low monthly payment amounts and boldly promote the "luxury of low payments." In fine print, respondent's Gold Key Plus advertisements, *inter alia*, state an initial number of payments, a downpayment and another amount described as a "purchase option" (the "disclaimer"). The disclaimer in

1172

Complaint

respondent's Gold Key Plus advertisements is virtually unreadable and incomprehensible to ordinary consumers because of the extremely small typesize and is not clear and conspicuous.

PAR. 11. Respondent's aforesaid practice constitutes a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a) and a violation of Section 226.24 of Regulation Z, 12 CFR 226.24, as more fully set out in Section 226.24-1 of the Federal Reserve Board's Official Staff Commentary to Regulation Z ("Commentary"), 12 CFR 226.24-1, Supp. 1.

COUNT FIVE

PAR. 12. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibits B-1, B-2 and B-3, has disseminated or caused to be disseminated print advertisements that boldly state "\$95 down with low monthly payments for the first 12 months" and radio and televised advertisements that boldly state "\$95 down and payments as low as \$155 a month for the first 12 months" ("Drive For 95 advertisements"). Respondent's Drive For 95 print, radio and televised advertisements also state various initial, low monthly payment amounts, such as "\$155" a month. Thereafter, respondent's Drive For 95 print, radio and televised advertisements, *inter alia*, state "balance of 48 payments will be higher than 1st 12 months" and "cost per \$1,000 borrowed \$20.52." Respondent's Drive For 95 advertisements misrepresent and fail to accurately disclose the amount of the second series of installment payments required at the conclusion of the initial payments, based on the financing to be signed at purchase.

PAR. 13. Respondent's aforesaid practice constitutes a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT SIX

PAR. 14. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibits B-1, B-2 and B-3, has disseminated or caused to be disseminated Drive For 95 print advertisements that state "\$95 down with low monthly payments for the first 12 months" and Drive For 95 radio and televised advertisements that state "\$95 down and payments as low as \$155 a month for the 1st 12 months." Respondent's Drive For 95 print, radio

and televised advertisements also state various initial, low monthly payment amounts, such as "\$155" a month. Thereafter, respondent's Drive For 95 print, radio and televised advertisements, *inter alia*, state "balance of 48 payments will be higher than 1st 12 months" and "cost per \$1,000 borrowed \$20.52." Respondent's Drive For 95 advertisements fail to accurately disclose the terms of repayment, by failing to accurately state the amount of the second series of installment payments required at the conclusion of the initial payments, based on the financing to be signed at purchase.

PAR. 15. Respondent's aforesaid practice violates Section 144(d) of the TILA, 15 U.S.C. 1664(d), and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT SEVEN

PAR. 16. Respondent, in the course and conduct of its business, in numerous instances including but not limited to Exhibits B-1, B-2 and B-3, has disseminated or caused to be disseminated Drive For 95 print advertisements that state "\$95 down with low monthly payments for the first 12 months" and Drive For 95 radio and televised advertisements that state "\$95 down and \$155 a month for the 1st 12 months." Respondent's Drive For 95 print, radio and televised advertisements also state various initial, low monthly payment amounts. In fine print in the print advertisements, in fine print for a short duration in the televised advertisements, and orally for a short duration in the radio advertisements, respondent's Drive For 95 advertisements, *inter alia*, state "balance of 48 payments will be higher than 1st 12 months," "cost per \$1,000 borrowed \$20.52," and an annual percentage rate (the "disclaimer"). The disclaimer in respondent's Drive For 95 advertisements is virtually incomprehensible to ordinary consumers and is not clear and conspicuous because of the small typesize in the print and televised advertisements and because of the short duration in the radio and televised advertisements.

PAR. 17. Respondent's aforesaid practice constitutes a deceptive act or practice, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a), and a violation of Section 226.24 of Regulation Z, 12 CFR 226.24, as more fully set out in Section 226.24-1 of the Commentary, 12 CFR 226.24-1, Supp. 1.

1172

Complaint

COUNT EIGHT

PAR. 18. Respondent, in the course and conduct of its business, in numerous instances has disseminated or caused to be disseminated advertisements that state the amount or percentage of any downpayment, the number of payments or period of repayment, or the amount of any payment, but fail to state all of the terms required by Regulation Z, as follows: the amount or percentage of the downpayment, the terms of repayment, and the annual percentage rate, using that term or the abbreviation "APR."

PAR. 19. Respondent's aforesaid practice violates Section 144(d) of the TILA, 15 U.S.C. 1664(d), and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c).

COUNT NINE

PAR. 20. Respondent, in the course and conduct of its business, in numerous instances has disseminated or caused to be disseminated advertisements that state the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at consummation of the lease, but fail to state all of the terms required by Regulation M, as applicable and as follows: that the transaction advertised is a lease; the total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease or that no such payments are required; the number, amount, due dates or periods of scheduled payments, and the total of such payments under the lease; a statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price); and a statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term.

PAR. 21. Respondent's aforesaid practice violates Section 184 of the CLA, 15 U.S.C. 1667c, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c).

EXHIBIT A

EXHIBIT A

G44 SATURDAY, JANUARY 29, 1994 THE WASHINGTON POST

1465 Automobiles, Domestic 1465 Automobiles, Domestic 1465 Automobiles, Domestic 1465 Automobiles, Domestic

HERB GORDON DODGE

(301) 890-3040

Say 'Hello to **NEON**

In Stock Now Starting At **\$8975***

PRIDE of OWNERSHIP—Luxury of LOW PAYMENTS

<p>'94 CARAVAN</p>  <p>7 Pass., Dual Air Bags, A/C, Inconel, Cassette & Luggage Rack.</p> <p>\$259 Mo. 48 Months (Two)</p>	<p>'94 GRAND CARAVAN</p>  <p>V6, 7 Pass., Dual Air Bags, A/C, TR, Cruise, Cassette & Luggage Rack.</p> <p>\$284 Mo. 48 Months (Two)</p>	<p>'94 RAM PICKUP</p>  <p>4x4, X-Ton, 1500 Sales, Magnum V8, Skid Plates, Tires, Cooler, Side Rear Windows & Stereo.</p> <p>\$298 Mo. 48 Months (One)</p>
<p>'94 SHADOW</p>  <p>5 Spd., A/C, Air Bag, Dual Mirrors, Rear Defroster & Cassette.</p> <p>\$163 Mo. 48 Months (Two)</p>	<p>'94 SHADOW ES</p>  <p>8 Spd., V6, Air Bag, A/C, Power Door Locks & Mirrors, Mags, Rear Spoiler, Rear Defroster & Cassette.</p> <p>\$196 Mo. 48 Months (Two)</p>	<p>CONVERSION VANS</p>  <p>DL 4948</p>
<p>'94 INTREPID</p>  <p>V8, Dual Air Bags, A/C, Pwr. Winds. & Locks, Anti Lock Brakes, Full Spare Tire, Trunk Release, Cassette, TR & Cruise.</p> <p>297 Mo. 48 Months (Two)</p>	<p>'94 DAKOTA CLUB</p>  <p>4x4, V6, A/C, Air Bag, TR, Cruise, Rear Seat, LE Decor Pkg. & Pwr. Mirrors.</p> <p>\$293 Mo. 48 Months (Two)</p>	<p>GREAT SELECTION STARTING AT PRICE \$20,489 LESS BACK - \$1500</p> <p>\$18,989 (One)</p>

*Price based on 48 months Old Car Plan. Tax, Title, Freight and \$1000 cash or trade-in included. (\$1400 on Ram Pickup). Total of payments over 48 months: Grand Caravan \$12,864; Shadow ES \$12,864; Intrepid \$14,280; Dakota Club \$14,280; Ram Pickup \$18,304. Payment per month: \$264.44; Shadow \$241; Caravan \$288; Grand Caravan \$272; Intrepid \$295; Dakota Club \$295; Ram Pickup \$315. \$1000 cash or trade-in. 100 per mile over due at end. Subject to credit approval. In the US only. Price in the US only. Includes all tax, title, license fees.

HILL

REPEAT LAST PAID OFF

PAID OFF

& DEDUCTIBLE 7 95 1993

4 Festiva
15 Escort
10 Tempo

Hill's to Buy
Other Cars 1/1/94

1994 RANGELER XLT

Selling \$10,600

\$10,300 - \$1,100

Our 77 Year

(Exhibit B2 is an audio tape, and Exhibit D3 is a videotape)
EXHIBIT D1

HERB GORDON AUTO WORLD
PRESENTS
THE DRIVE FOR
\$9500 DOWN
HUGE 20 MILLION DOLLAR INVENTORY
WITH
LOW MONTHLY PAYMENTS
THIS IS NOT A LEASE
THIS IS YOUR CHANCE TO BUY

For The First 12 Months* . . .

 ANY NISSAN	\$155.00 PER MONTH 1ST 12 MONTHS
 ANY DODGE	\$155.00 PER MONTH 1ST 12 MONTHS
 ANY OLDSMOBILE	\$165.00 PER MONTH 1ST 12 MONTHS
 ANY VOLVO	\$195.00 PER MONTH 1ST 12 MONTHS
 ANY MERCEDES BENZ C220	\$295.00 PER MONTH 1ST 12 MONTHS

DO NOT WRITE ON THIS COUPON. RETURN IT WITH THREE COPIES TO ORIGINALING OFFICE.

Montgomery Auto Sales Park
Route 29 & Briggs
Chaney Road
Silver Spring, Maryland

HERB GORDON AUTO WORLD

MONDAY THRU FRIDAY 9:00 AM - 9:00 PM
SATURDAY 9:00 AM - 6:00 PM
301-890-8200

DO NOT WRITE
RETURN IT

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and that, if issued by the Commission, would charge the respondent with violation of the Truth in Lending Act, 15 U.S.C. 1601 *et seq.* and its implementing Regulation Z, 12 CFR 226, the Consumer Leasing Act, 15 U.S.C. 1667 *et seq.* and its implementing Regulation M, 12 CFR 213 and the Federal Trade Commission Act, 15 U.S.C. 45 *et seq.*; and

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

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

1. Respondent Herb Gordon Auto World, Inc. dba Herb Gordon Auto World, Herb Gordon Dodge, Herb Gordon Mercedes-Benz, Herb Gordon Nissan, Herb Gordon Oldsmobile, Herb Gordon Volvo, and Herb Gordon Used Cars, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 3121-3161 Automobile Blvd., Silver Spring, Maryland.

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

1172

Decision and Order

ORDER

DEFINITIONS

"Clearly and conspicuously" as used herein shall mean:

(a) In a television or videotaped advertisement, the required disclosures made in the audio portion of the advertisement shall be delivered in a volume, cadence and location, and for a duration, as to be readily noticeable, hearable and comprehensible to an ordinary consumer. The required disclosures made in the video portion of the advertisement shall appear on the screen in a size, shade, contrast, prominence and location, and for a duration, as to be readily noticeable, readable and comprehensible to an ordinary consumer.

(b) In a radio advertisement, the required disclosures shall be delivered in a volume, cadence and location, and for a duration, as to be readily noticeable, hearable and comprehensible to an ordinary consumer.

(c) In a print advertisement (including but not limited to mail solicitations), the required disclosures shall appear in a size, shade, contrast, prominence and location as to be readily noticeable, readable and comprehensible to an ordinary consumer.

Nothing contrary to, inconsistent with or in mitigation of the required disclosures shall be used in any advertisement.

I.

It is ordered, That respondent Herb Gordon Auto World, Inc. dba Herb Gordon Auto World, Herb Gordon Dodge, Herb Gordon Mercedes-Benz, Herb Gordon Nissan, Herb Gordon Oldsmobile, Herb Gordon Volvo, and Herb Gordon Used Cars, a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to promote directly or indirectly any extension of consumer credit, as "advertisement" and "consumer credit" are defined in the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR 226, as amended, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the terms of financing the purchase of a vehicle, including but not limited to whether there may be a balloon payment or second series of installment payments, and the amount of any balloon payment or the number and amount of any second series of installment payments.

B. Stating any number or amount of payment(s) required to repay the debt, without stating accurately, clearly and conspicuously, all of the terms required by Regulation Z, as follows, and as amended:

- (1) The amount or percentage of the downpayment;
- (2) The terms of repayment, including the amount of any balloon payment, or the number and amount of any second series of installment payments; and
- (3) The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction that fact must also be disclosed.

(Section 144(d) of the TILA, 15 U.S.C. 1664(d), as amended, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c), as amended, as more fully set out in Section 226.24(c) of the Federal Reserve Board's Official Staff Commentary to Regulation Z (hereinafter referred to as "Commentary"), 12 CFR 226.24(c), Supp. 1, as amended).

C. Stating the amount or percentage of any downpayment, the number of payments or period of repayment, the amount of any payment or the amount of any finance charge, without stating, clearly and conspicuously, all of the terms required by Regulation Z, as follows, and as amended:

- (1) The amount or percentage of the downpayment;
- (2) The terms of repayment, and
- (3) The annual percentage rate, using that term or the abbreviation "APR." If the annual percentage rate may be increased after consummation of the credit transaction, that fact must also be disclosed.

(Section 144(d) of the TILA, 15 U.S.C. 1664(d), as amended, and Section 226.24(c) of Regulation Z, 12 CFR 226.24(c)), as amended, as more fully set out in Section 226.24(c) of the Commentary, 12 CFR 226.24(c), Supp. 1, as amended).

D. Stating a rate of finance charge without stating the rate as an "annual percentage rate" using that term or the abbreviation "APR," as required by Regulation Z. If the annual percentage rate may be increased after consummation, the advertisement shall state that fact. The advertisement shall not state any other rate, except that a simple annual rate or periodic rate that is applied to an unpaid balance may be stated in conjunction with, but not more conspicuously than, the annual percentage rate.

(Section 144(c) of the TILA, 15 U.S.C. 1664(c), as amended, and Section 226.24(b) of Regulation Z, 12 CFR 226.24(b), as amended, as more fully set out in Section 226.24(b) of the Commentary, 12 CFR 226.24(b), Supp. 1, as amended).

E. Failing to state only those terms that actually are or will be arranged or offered by the creditor, in any advertisement for credit that states specific credit terms, as required by Regulation Z.

(Section 142 of the TILA, 15 U.S.C. 1662, as amended, and Section 226.24(a) of Regulation Z, 12 CFR 226.24(a), as amended).

F. Failing to comply in any other respect with Regulation Z and the TILA.

(Regulation Z, 12 CFR 226, as amended, and the TILA, 15 U.S.C. 1601-1667, as amended).

II.

It is ordered, That respondent, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division, or any other device, in connection with any advertisement to aid, promote or assist directly or indirectly any consumer lease, as "advertisement" and "consumer lease" are defined in the Consumer Leasing Act ("CLA"), 15 U.S.C. 1667-1667e, as amended, and its implementing Regulation M, 12 CFR 213, as amended, do forthwith cease and desist from:

A. Misrepresenting in any manner, directly or by implication, the costs or terms of leasing a vehicle.

B. Stating the amount of any payment, the number of required payments, or that any or no downpayment or other payment is required at consummation of the lease, unless all of the following items are disclosed, clearly and conspicuously, as applicable, as required by Regulation M, as amended:

(1) That the transaction advertised is a lease;

(2) The total amount of any payment such as a security deposit or capitalized cost reduction required at the consummation of the lease, or that no such payments are required;

(3) The number, amounts, due dates or periods of scheduled payments and the total of such payments under the lease;

(4) A statement of whether or not the lessee has the option to purchase the leased property and at what price and time (the method of determining the price may be substituted for disclosure of the price); and

(5) A statement of the amount or method of determining the amount of any liabilities the lease imposes upon the lessee at the end of the term and a statement that the lessee shall be liable for the difference, if any, between the estimated value of the leased property and its realized value at the end of the lease term, if the lessee has such liability.

For all lease advertisements, respondent may comply with the requirements of this subparagraph by utilizing Section 184(a) of the CLA, 15 U.S.C. 1667c(a), as amended by Title II, Section 2605 of the Omnibus Consolidated Appropriations Act for Fiscal Year 1997 ("Omnibus Act"), Pub. L. No. 104-208, 110 Stat. 3009, 3009-473 (Sept. 30, 1996) (to be codified at 15 U.S.C. 1667c(a)) ("Section 184(a) of the revised CLA"), as amended, or by utilizing Section 213.7(d) of revised Regulation M, 61 Fed. Reg. 52246, 52261 (Oct. 7, 1996) (to be codified at 12 CFR 213.7(d)) ("revised Regulation M"), as amended. For radio lease advertisements, respondent may also comply with the requirements of this subparagraph by utilizing Section 184(b) of the CLA, 15 U.S.C. 1667c(b), as amended by Title II, Section 2605 of the Omnibus Act (to be codified at 15 U.S.C. 1667c(c)) ("Section 184(c) of the revised CLA"), as amended, or by utilizing Section 213.7(f) of revised Regulation M (to be codified at 12 CFR 213.7(f)), as amended. For television lease advertisements, respondent may also comply with the requirements of this subparagraph by utilizing Section 213.7(f) of revised Regulation M, as amended.

(Sections 184(a)-(b) of the CLA, 15 U.S.C. 1667c(a)-(b), as amended, and Section 213.5(c) of Regulation M, 12 CFR 213.5(c), as amended).

C. Stating that a specific lease of any property at specific amounts or terms is available unless the lessor usually and customarily leases

1172

Decision and Order

or will lease such property at those amounts or terms, as required by Regulation M.

(Section 213.5(a) of Regulation M, 12 CFR 213.5(a), as amended).

D. Failing to comply in any other respect with Regulation M and the CLA.

Respondent may comply with the requirements of this subparagraph by utilizing revised Regulation M, 61 Fed. Reg. 52246 (Oct. 7, 1996) (to be codified at 12 CFR 213), as amended.

(Regulation M, 12 CFR 213, as amended, and the CLA, 15 U.S.C. 1667-1667e, as amended).

III.

It is further ordered, That respondent, its successors and assigns shall distribute a copy of this order to any present or future officers, agents, representatives, and employees having responsibility with respect to the subject matter of this order and secure from each such person a signed statement acknowledging receipt of said order.

IV.

It is further ordered, That respondent, its successors and assigns shall promptly notify the Commission at least thirty (30) days prior to any proposed change in the corporate entity 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.

V.

It is further ordered, That for five years after the date of service of this order respondent, its successors and assigns shall maintain and upon request make available all records that will demonstrate compliance with the requirements of this order.

VI.

It is further ordered, That respondent, its successors and assigns shall, within sixty (60) days of the date of service of this order, file

with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

VII.

It is further ordered, That this order will terminate on April 15, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

IN THE MATTER OF

THE MONEY TREE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT,
THE TRUTH IN LENDING ACT AND THE FAIR CREDIT REPORTING ACT

Docket C-3735. Complaint, April 28, 1997--Decision, April 28, 1997

This consent order requires, among other things, the Georgia company and its officer to offer customers the chance to cancel the credit-life, credit-disability, or accidental death and dismemberment insurance they purchased, and to obtain cash refunds or credit which could amount to as much as \$1.2 million. The consent order prohibits the respondents from requiring consumers to sign statements that such purchases are voluntary, if they are required to obtain the loan; from referring to credit-related insurance or auto club membership without telling consumers their loan applications have been approved and the amount of the approved loans; and requires the respondents to disclose to consumers that such coverage is optional and to have those consumers sign a form acknowledging that fact and the amount the extras will cost if they choose to purchase them. The consent order also prohibits violations of the Fair Credit Reporting Act provisions regarding disclosures to consumers when their credit reports influence the denial of credit.

Appearances

For the Commission: *Thomas Kane, Rolando Berrelez and William Haynes.*

For the respondents: *Sheldon Feldman, Weil, Gotshal & Manges, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Money Tree, Inc., a corporation, and Vance R. Martin, individually and as an officer of The Money Tree, Inc. ("respondents"), have violated the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. 45-58, as amended, and the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. 1681-1681t, as amended, and that The Money Tree, Inc. has violated the Truth in Lending Act ("TILA"), 15 U.S.C. 1601-1667, as amended, and its implementing Regulation Z, 12 CFR Part 226, as amended, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

1. Respondent The Money Tree, Inc., which also does business as Money To Lend, Inc. and Money To Lend, is a Georgia corporation, with its office and principal place of business located at 114 South

Broad Street, Bainbridge, Georgia, and operates offices throughout Georgia and Alabama.

2. Respondent Vance R. Martin is the sole owner and president of The Money Tree, Inc. Individually, or in concert with others, he formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal place of business is the same as that of the corporate respondent.

3. Respondent The Money Tree, Inc. has engaged in the business of offering "consumer credit" to the public and is a "creditor" as those terms are defined in the Truth in Lending Act and Regulation Z.

4. Respondent The Money Tree, Inc. makes short-term installment loans to primarily low-income consumers. The loans are often for amounts between \$150 and \$400.

5. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

COUNT I: TRUTH IN LENDING ACT

6. Respondent The Money Tree, Inc., in the course and conduct of its business, has, on numerous occasions, required consumers to purchase a combination of credit-life, credit accident and health, credit accident and sickness, or accidental death and dismemberment insurance and/or an auto club membership (collectively referred to as "the extras") in connection with an extension of credit. On average, The Money Tree, Inc.'s customers paid approximately \$80.00 for the extras, plus interest.

7. Respondent The Money Tree, Inc. has not included the cost of the extras in the finance charge and the annual percentage rate disclosed to consumers, and has wrongfully included the cost of the extras in the amount financed disclosed to consumers.

8. Respondent The Money Tree, Inc.'s aforesaid acts and practices violate Sections 106, 107, and 128 of the TILA, 15 U.S.C. 1605, 1606, and 1638, as amended, respectively, and Sections 226.4, 226.4(d), 226.22 and 226.18(b), (d) and (e) of Regulation Z, 12 CFR 226.4, 226.4(d), 226.22 and 226.18(b), (d) and (e), respectively, and constitute unfair and deceptive acts or practices in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT II: SECTION 5 OF THE FTC ACT

9. Respondents The Money Tree, Inc. and Vance R. Martin, in the course and conduct of their business, have, on numerous occasions, in connection with extensions of credit, induced consumers to execute statements indicating that they have voluntarily chosen certain "extras" when, in fact, the purchase of some combination of such extras was required to obtain credit with The Money Tree, Inc. The "extras" consisted of credit-life insurance, credit accident and health insurance, credit accident and sickness insurance, accidental death and dismemberment insurance, and an auto club membership.

10. Respondents' aforesaid acts and practices have caused substantial injury to consumers that is not outweighed by countervailing benefits to consumers or competition and is not reasonably avoidable by consumers.

11. Therefore, the acts and practices of respondents alleged in paragraph ten were, and are, unfair or deceptive in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

COUNT III: FAIR CREDIT REPORTING ACT

12. For purposes of this count, the terms "consumer," "consumer report," and "consumer reporting agency" are defined as set forth in Sections 603(c), (d) and (f), respectively, of the Fair Credit Reporting Act, 15 U.S.C. 1681a(c), (d) and (f).

13. Respondents The Money Tree, Inc. and Vance R. Martin, in the course and conduct of their business, have, on numerous occasions when respondents have denied credit to a consumer either in whole or in part because of information contained in a consumer report from a consumer reporting agency, failed to:

- a. Advise the consumer, at the time when the consumer was informed of such adverse action, that the adverse action was based in whole or in part on information contained in a consumer report; and
- b. Supply the consumer with the name and address of the consumer reporting agency that furnished the consumer report.

14. Respondents' aforesaid acts and practices violate Section 615(a) of the FCRA, 15 U.S.C. 1681m(a). Pursuant to Section 621 of the FCRA, 15 U.S.C. 1681s, respondents' violations of the FCRA constitute unfair or deceptive acts and practices, in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of the complaint that the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge the respondents with violation of the Federal Trade Commission Act, the Truth in Lending Act and its implementing Regulation Z, and the Fair Credit Reporting Act; and

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

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

1. Respondent The Money Tree, Inc., which also does business as Money To Lend, Inc. and Money To Lend, is a Georgia corporation, with its office and principal place of business located at 114 South Broad Street, Bainbridge, Georgia, and operates offices throughout Georgia and Alabama.

2. Respondent Vance R. Martin is the sole owner and president of The Money Tree, Inc. He formulates, directs, and controls the policies, acts and practices of said corporation, and his principal office and place of business is the same as that of The Money Tree, Inc.

3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the FTC Act.

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

ORDER

I.

It is ordered, That respondent The Money Tree, Inc., its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporate or other device, in connection with any closed-end credit transaction originated by respondent, shall:

A. Make all disclosures, determined in accordance with Sections 106 and 107 of the Truth in Lending Act, 15 U.S.C. 1605 and 1606, and Sections 226.4 and 226.22 of Regulation Z, 12 CFR 226.4 and 226.22, in the manner, form and amount required by Sections 226.17, 226.18, 226.19 and 226.20 of Regulation Z, 12 CFR 226.17, 226.18, 226.19 and 226.20.

B. Include in the finance charge and the annual percentage rate disclosed to the consumer, as required by Sections 106, 107 and 128 of the Truth in Lending Act, 15 U.S.C. 1605, 1606 and 1638, and Sections 226.4(d), 226.22 and 226.18(d) and (e) of Regulation Z, 12 CFR 226.4(d), 226.22, and 226.18(d) and (e), the premiums for credit-life, credit accident and health, credit accident and sickness, or accidental death and dismemberment insurance (hereinafter referred to collectively as "credit-related insurance") or auto club memberships that consumers are required to purchase in connection with an extension of credit.

C. Exclude from the amount financed disclosed to the consumer, as required by Section 128 of the Truth in Lending Act, 15 U.S.C. 1638, and Section 226.18(b) of Regulation Z, 12 CFR 226.18(b), credit-related insurance premiums or auto club membership fees that consumers are required to purchase in connection with an extension of credit.

II.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and its officers, and respondent Vance R. Martin, individually and as an officer of the corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with any closed-end credit transaction originated by respondents:

A. Shall not require consumers to sign or initial a statement that credit-related insurance, auto club membership, or any other ancillary product or service has been voluntarily chosen if the consumer's purchase of such insurance, auto club membership, or ancillary product was required;

B. Shall not misrepresent, orally or otherwise, directly or indirectly, that consumers who obtain a loan from respondents will receive credit-related insurance or an auto club membership at no additional cost to the consumer; and

C. Shall not misrepresent, orally or otherwise, directly or indirectly, that the consumer's failure to elect credit-related insurance or auto club membership will result in delay in processing the loan or distributing the proceeds.

III.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and its officers, and respondent Vance R. Martin, individually and as an officer of the corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with any closed-end credit transaction originated by respondents:

A. Shall not, when credit-related insurance premiums and/or auto club membership fees are not included in the finance charge, refer in any way to the availability of such coverage, either orally or in writing, without at the same time disclosing orally:

(1) That the consumer has already been approved for the loan and the amount of the loan;

(2) That credit-related insurance and/or auto club memberships are optional;

(3) That the consumer's decision about insurance or auto club membership does not affect the amount of the consumer's loan or whether the consumer receives a loan;

(4) The amount of the premium or fee for each credit-related insurance or auto club membership; and

(5) That respondents will add the premiums and fees for the credit-related insurance and auto club membership to the consumer's loan amount.

B. Shall, when credit-related insurance premiums and/or auto club membership fees are not included in the finance charge:

(1) Present to the consumer as the first document at the time of closing, a separate, voluntary insurance election form ("Voluntary Insurance Election Form") that sets forth clearly and prominently the following information:

(a) A statement that the consumer has already been approved for the loan;

(b) A statement that the consumer does not have to purchase credit-related insurance or auto club membership to obtain the loan;

(c) A statement that the consumer's decision about credit-related insurance or auto club membership will not affect the amount of the consumer's loan or whether the consumer receives a loan;

(d) Each option (*i.e.*, type of credit-related insurance or auto club membership) available to the consumer;

(e) The amount of the premium or fee for each credit-related insurance or auto club membership;

(f) A statement that, if the consumer decides to buy credit-related insurance or an auto club membership, the consumer will have to pay the amounts listed in (e) above;

(g) A statement that, if the consumer decides to buy credit-related insurance or an auto club membership, respondents will add the insurance premiums and membership fees to the consumer's loan amount;

(h) A signature and date line for each option set forth in (d) above for the consumer to indicate his/her election; and

(i) A statement that, if the consumer does not want to buy one of the products listed on the document described in this section, they should not place their signature on the line next to the product.

(2) Make the disclosures required by paragraph III(B)(1) on a separate document entitled "Voluntary Insurance Election Form" that contains no other printed or written material. The disclosures required by subparagraphs III(B)(1)(a) through (c) shall not be smaller than 12-point type. A form substantially in conformance with Appendix A herein will be considered to be in compliance with the provisions of this paragraph and paragraph III(B)(1). Respondents shall maintain the original form for two years following its execution and provide the consumer with an executed copy thereof.

(3) Provide, without marking or otherwise instructing a consumer where to sign or date the form, the separate Voluntary Insurance Election Form required by paragraph III(B)(1) in advance of the consumer's free and independent choice for such insurance.

IV.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and respondent Vance R. Martin shall, on an annual basis, submit a written report, stating, for each branch office of The Money Tree, Inc., the penetration rate for direct loans of each product or service sold to loan applicants and purchased in connection with any credit transaction, including: credit-life insurance, credit accident and health insurance, credit accident and sickness insurance, accidental death and dismemberment insurance, and auto club memberships.

Such reports shall be submitted each year to the Commission's Division of Enforcement, Bureau of Consumer Protection, on the anniversary of the date this order is entered, for a period of five (5) years following the effective date of this order and thereafter upon request. The reports shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Avenue, N.W., Washington, D.C.

For purposes of this section, the term "penetration rate" means the percentage of all loans or contracts eligible for credit-related insurance or auto club membership on which charges for such insurance or auto club membership are made. In reporting penetration rates the respondents must state separately the total number and dollar amount of loan contracts entered into which were eligible for credit-related insurance or auto club membership, stated separately for credit-life, credit accident and health, credit accident and sickness,

and accidental death and dismemberment insurance, and auto club membership.

V.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and respondent Vance R. Martin shall, for five (5) years from the date of issuance of this order, maintain and upon request immediately make available to the Federal Trade Commission for inspection and copying, all documents demonstrating compliance with this order.

VI.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and its officers, and respondent Vance R. Martin, individually and as an officer of the corporation, and respondents' agents, representatives, and employees, directly or through any corporate or other device, shall comply with all provisions of the Consumer Redress Program as described in Appendices B, C, D, E, F, G and H.

VII.

It is further ordered, That during the sixty (60) day period described in Appendix B during which consumers are given the opportunity to cancel credit-related insurance, respondent The Money Tree, Inc., a corporation, respondent Vance R. Martin, or their employees or agents, and staff of the Federal Trade Commission shall not otherwise communicate directly with the consumers on the List, orally or in writing, concerning the redress program, except to refer such consumers to a taped 800-number message provided by the independent agent, which shall not deviate in substance from the document attached hereto as Appendix G, entitled "Script to Be Read Into 800-Number Voice Message."

VIII.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and its officers, and respondent Vance R. Martin, individually and as an officer of the corporation, and respondents' agents, representatives, and employees,

in connection with any closed-end credit transaction originated by respondents, shall, when respondents deny credit to a consumer or the charge for such credit is increased either in whole or in part because of information contained in a consumer report from a consumer reporting agency:

A. Advise the consumer, at the time when the consumer is informed of the adverse action, that such action is based in whole or in part on information contained in a consumer report; and

B. Supply the consumer with the name and address of the consumer reporting agency that furnished the consumer report.

IX.

It is further ordered, That respondent The Money Tree, Inc., its successors and assigns, and respondent Vance R. Martin shall, for a period of five (5) years following the date of service of this order, deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future agents, representatives, and employees having responsibility with respect to the subject matter of this order and shall secure from each such person a signed statement acknowledging receipt of the order. Respondents shall maintain and make available upon reasonable request by representatives of the Federal Trade Commission copies of said signed statements. Respondents shall deliver this order to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

X.

It is further ordered, That respondent The Money Tree, Inc., its successors and assigns, and respondent Vance R. Martin shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondents

1187

Decision and Order

learn less than thirty (30) days prior to the date such action is to take place, respondents shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th and Pennsylvania Avenue, N.W., Washington, D.C.

XI.

It is further ordered, That respondent Vance R. Martin, for a period of ten (10) years after the date of issuance of this order, shall notify the Commission of the discontinuance of his current business or employment, or of his affiliation with any new business or employment relating to the extension of consumer credit. The notice shall include respondent's new business address and telephone number and a description of the nature of the business or employment and his duties and responsibilities. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, 6th & Pennsylvania Avenue, Washington, D.C.

XII.

It is further ordered, That respondent The Money Tree, Inc., a corporation, its successors and assigns, and its officers, and respondent Vance R. Martin shall, within one hundred and eighty (180) days of the date of service of this order, and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

XIII.

This order will terminate on April 28, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that respondents did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint has never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

APPENDIX A

VOLUNTARY INSURANCE ELECTION FORM

YOU HAVE ALREADY BEEN APPROVED FOR THIS LOAN.

YOU DO NOT HAVE TO PURCHASE CREDIT-LIFE, CREDIT-DISABILITY ("ACCIDENT AND HEALTH," "ACCIDENT AND SICKNESS," OR "UNEMPLOYMENT"), ACCIDENTAL DEATH AND DISMEMBERMENT INSURANCE, OR AN AUTO CLUB MEMBERSHIP TO OBTAIN THIS LOAN.

YOUR DECISION ABOUT INSURANCE OR AUTO CLUB MEMBERSHIP DOES NOT AFFECT THE AMOUNT OF YOUR LOAN OR WHETHER YOU WILL RECEIVE A LOAN.

Your choices are shown below. If you decide to buy insurance or an auto club membership, you will pay the amounts listed below. The Money Tree, Inc. will add the premiums and membership fee to your loan amount.

IF YOU DO NOT WANT TO BUY ONE OF THESE PRODUCTS, DO NOT PLACE YOUR SIGNATURE NEXT TO THAT PRODUCT ON THE LINES BELOW.

I/We have chosen the following option(s)

DATE: _____

Type	Cost to You	Signature
Credit-Life Insurance	\$ _____	I want credit-life insurance _____ Signature _____ Co-borrower
Credit-Disability Insurance	\$ _____	I want credit-disability insurance _____ Signature _____ Co-borrower

Accidental Death and Dismemberment ("AD&D") Insurance	\$ _____	I want AD&D insurance _____ Signature _____ Co-borrower
Auto Club Membership	\$ _____	I want auto club membership _____ Signature _____ Co-Borrower

APPENDIX B

Consumer Redress Program

1. Within 5 days after the date the order is issued, Money Tree shall deliver to the independent agent on magnetic tape or some other electronic medium the following loan data concerning all consumers who are obligated to make monthly payments to Money Tree as of the date the order is issued and whose loans were consummated during the two-year period ending on the date the order is issued ("open loan customers"):

- a. Data pertaining to the first consumer named on the loan contract ("primary borrower"):
 - Date of Loan Closing
 - Account Number
 - Contract Number
 - Branch Number
 - Branch State
 - First Name and Middle Initial
 - Last Name
 - Address
 - City
 - State
 - Zip
 - Amount Financed
 - Credit-Life Insurance Premium Amount
 - Credit-Disability Insurance Premium Amount
 - Accidental Death & Disability Insurance Premium Amount
 - Date Loan Is Expected to Terminate
 - Monthly Payment Amount
 - Number of Monthly Payments
- b. Data pertaining to all subsequent consumers named on the loan contract ("co-borrowers"):
 - Account Number
 - Contract Number
 - Branch Number
 - Branch State
 - First Name and Middle Initial
 - Last Name
 - Address

- City
- State
- Zip
- c. Data pertaining to co-signers:
 - Account Number
 - Contract Number
 - Branch Number
 - Branch State
 - First Name and Middle Initial
 - Last Name
 - Address
 - City
 - State
 - Zip
- d. Data pertaining to consumers who have canceled or received a benefit from one or more insurance products:
 - Account Number
 - Contract Number
 - Branch Number
 - Branch State
 - Insurance Type (L/A/D) (representing "Life," "Accident & Health," and "Accidental Death & Dismemberment" insurance)
 - Benefit/Canceled (B/C)

Money Tree will also provide as soon as possible any additional information that the independent agent reasonably needs to carry out the redress program described in this Appendix. Money Tree shall deliver all data and information described in this paragraph to the independent agent in a clean format compatible with the independent agent's computers.

2. During the period when the order is published in the Federal Register for notice and comment, Money Tree shall cooperate fully with the independent agent to conduct a test run that permits the independent agent to mail the letters described later in this Appendix as soon as possible.

3. After receiving from Money Tree all the data and other information described in Paragraph 1, the independent agent shall create a list ("the List") of eligible consumers who meet the following criteria:

a. Purchased one or more of the three types of credit-related insurance (as "credit-related insurance" is defined in the order) through Money Tree, the charge for which was not included in the finance charge computed for that loan; and

b. Have not voluntarily canceled the coverage ("canceled") or had an insurance claim paid to them or paid on their behalf ("received a benefit") from each policy written through Money Tree. For purposes of this subsection, consumers who obtained more than one credit-related insurance policy from Money Tree shall not be excluded from the List unless they canceled or received a benefit from each of those policies.

4. For each consumer excluded from the List because they either canceled or received a benefit from one or more of their credit-related insurance policies, Money Tree shall provide to the Associate Director for Credit Practices, within

sixty (60) days of the date the order is issued, the consumer's name, the consumer's address, the Money Tree account number, the Money Tree contract number, and the claim number assigned by the independent agent. At the same time, Money Tree shall provide a copy of the front of the check from the insurance company made payable to the consumer (in the case of the accidental death & dismemberment insurance) or made payable to the consumer and Money Tree (in the case of credit life insurance and credit disability insurance), to be accompanied by an affidavit from Money Tree authenticating such copies.

5. For each consumer on the List, the independent agent shall apply the formula in the document attached to the order as Appendix C to determine the amount of the premiums and related finance charges that were charged to the consumer's account for each credit-related insurance purchased through Money Tree ("amounts paid by the consumer").

6. For each consumer on the List, the independent agent shall create the Money Tree Insurance Cancellation Form ("Cancellation Form"), a copy of which is attached as Appendix D. The Cancellation Form shall include (a) the consumer's name and address, (b) the consumer's Money Tree account number, (c) the consumer's Money Tree contract number, (d) the claim number assigned to the consumer by the independent agent, (e) the date the letter was mailed, (f) the "return deadline" date, and (g) the amounts paid by the consumer for any of the three insurance products.

7. If the independent agent has no difficulty translating the data described in paragraph 1 that it receives from Money Tree, the independent agent shall mail, as soon as possible and no later than thirty (30) calendar days after receiving all the data described in paragraph 1 above, to all or nearly all consumers on the List by first class mail through the U.S. Postal Service, a Cancellation Form and the letter explaining the Cancellation Form attached to this order as Appendix E ("Redress Letter"), unless this deadline cannot be met due to unforeseen occurrences (*e.g.*, fire in the independent agent's plant) ("the First Mailing"). The independent agent shall include with the Cancellation Form and the Redress Letter a return envelope addressed to the independent agent. If the independent agent is unable to mail Cancellation Forms and Redress Letters to a small percentage of consumers on the List by the 30-day deadline, the independent agent shall send the Cancellation Form and the Redress Letter to those consumers within five (5) additional days, *i.e.*, thirty-five (35) days after the independent agent receives all data described in paragraph 1 ("the Second Mailing").

8. The Cancellation Form must be signed by all borrowers before the credit-related insurance shall be canceled. On any transaction with two or more borrowers where the borrowers reside at different addresses, the independent agent shall mail the Cancellation Form and the Redress Letter to each borrower's address by first-class mail through the U.S. Postal Service.

9. For any transactions for which a co-signer was involved, the independent agent shall mail a copy of the corresponding Cancellation Form and the Redress Letter to the co-signer(s) with the word "COPY" stamped in red on the Cancellation Form and the Redress Letter.

10. If any Cancellation Form, other than a copy to a co-signer, is returned as undeliverable, the independent agent shall request that Money Tree provide the independent agent with any current information in Money Tree's possession that may be needed to send a follow-up Redress Letter to the consumer. The

independent agent will send one additional Cancellation Form and Redress Letter to the consumer's place of business, relatives, or any other location at which the consumer may be contacted ("the Re-Mailing"). If Money Tree is unable to provide an additional address, the independent agent, or a sub-contractor of the independent agent, shall perform an address search to attempt to locate the consumer. The one additional Cancellation Form and Redress Letter that the independent agent sends in the Re-Mailing shall include the date of the Re-Mailing and the new return deadline date, which shall be thirty (30) days after the date of the Re-Mailing, or the original return deadline date, whichever is later.

11. All consumers who meet the following criteria shall be entitled to a credit toward their outstanding loan balance:

a. Return the Cancellation Form in an envelope with a postmark date before the return deadline date stated on their Cancellation Form, or if the postmark is illegible, the Cancellation Form is received by the independent agent no later than five (5) days after the return deadline date; and

b. Indicate by a signature or signatures that they did not wish to purchase one or more credit-related insurance coverage and would like their insurance canceled and their account credited.

12. If a co-borrower fails to sign the Cancellation Form before it is returned to the independent agent, the deadline date for that co-borrower shall be extended by thirty (30) days. The independent agent shall re-mail the Cancellation Form and the Redress Letter to the co-borrower as soon as possible ("Co-Borrower Re-Mailing") with a copy of the letter attached to this order as Appendix F ("Notice to Co-Borrowers"). If the co-borrowers do not reside at the same address, the independent agent shall send the Co-Borrower Re-Mailing to the address of each co-borrower.

13. The independent agent shall determine the amount of the credit that Money Tree shall pay to each consumer ("credit amount") by adding together the amounts for those items listed on the Cancellation Form that the consumer has indicated he or she did not wish to purchase.

14. The independent agent shall transmit to Money Tree a list ("Credit List") containing the names of all consumers eligible to receive a credit under this Consumer Redress Program and all data necessary for Money Tree to apply the credit amount to the consumers' outstanding loan balances. For each consumer, the data shall include the consumer's full name, address, Money Tree branch number, Money Tree account number and contract number, claim number assigned by the independent agent, insurance product(s) to be canceled, and total amount to be credited to the consumer's account. The independent agent shall deliver the Credit List to Money Tree in five (5) installments, each delivery separated by fourteen (14) days. The independent agent shall deliver the first installment so that it is received by Money Tree fourteen (14) days after the independent agent sends the First Mailing. The second installment shall be received by Money Tree twenty-eight (28) days after the independent agent sends the First Mailing. The third installment shall be received forty-two (42) days after the First Mailing; the fourth installment shall be received fifty-six (56) days after the First Mailing; and the fifth installment shall be received seventy (70) days after the First Mailing. The first installment shall include the names of all eligible consumers whose Cancellation Forms were received by the independent agent between the date of the First

Mailing and the date the first installment is due. Each successive installment shall include the names of all eligible consumers whose Cancellation Forms were received by the independent agent since the previous installment.

15. For any consumer who has neither paid off nor refinanced his or her loan between the date the order is issued and the date Money Tree receives the Credit List installment on which the consumer's name is listed, Money Tree shall reduce the consumer's last monthly payment by the credit amount or, if the credit amount exceeds the last monthly payment, all payments necessary to accommodate the credit. If the credit amount exceeds the outstanding loan balance, Money Tree shall, within fifteen (15) days of the date Money Tree receives the Credit List installment on which the consumer's name is listed, refund the excess in one lump sum payment by delivering a check to the consumer either in person or by first-class mail through the U.S. Postal Service. No payment checks shall have a void date earlier than ninety (90) days after the date the check was issued.

16. For any consumer who makes his or her last loan payment between the date the order is issued and the date Money Tree receives the Credit List installment on which the consumer's name is listed, Money Tree shall, within fifteen (15) days after receiving that Credit List installment, refund the credit amount, less any refund already made by virtue of the prepayment of the loan that was current on the date the order was issued, in one lump sum payment by delivering a check for the credit amount either in person or by first-class mail through the U.S. Postal Service. No payment checks shall have a void date earlier than ninety (90) days after the date the check was issued. Money Tree shall document any deductions from the credit amount for refunds already made.

17. For any consumer who refinances his or her loan between the date the order is issued and the date Money Tree receives the Credit List installment on which the consumer's name is listed, Money Tree shall reduce the consumer's last monthly payment on the new, refinanced loan by the credit amount, less any refund already made by virtue of the prepayment of the loan that was current on the date the order was issued, or, if the credit amount exceeds the last monthly payment, all payments necessary to accommodate the credit. If the credit amount exceeds the outstanding loan balance on the refinanced loan as of the date Money Tree receives the Credit List from the independent agent, Money Tree shall, within fifteen (15) days after receiving the Credit List, refund the excess in one lump sum payment by delivering a check to the consumer either in person or by first-class mail through the U.S. Postal Service. No payment checks shall have a void date earlier than ninety (90) days after the date the check was issued. Money Tree shall document any deductions from the credit amount for refunds already made by providing a copy of the loan contract for the refinanced loan.

18. Within fifteen (15) calendar days after receiving each Credit List installment from the independent agent, Money Tree shall send a notice with language identical to that in the document entitled "Notice to Customers" (attached to the order as Appendix H) to all consumers listed on the Credit List installment who refinanced between the date the order was issued and the date Money Tree received the Credit List installment that includes their name. All blank lines on the Notice to Consumers shall be filled in by Money Tree. Money Tree shall deliver the Notice to Consumers either in person or by first-class mail through the U.S. Postal Service.

19. For any consumer who refinances his or her loan once between the date the order is issued and the date Money Tree receives the Credit List installment on which the consumer's name is listed, and then a second time after Money Tree receives that Credit List installment, Money Tree shall give the consumer a check for the credit amount during the loan closing of the second refinancing.

20. For any consumer who refinances his or her loan twice between the date the order is issued and the date Money Tree receives the Credit List installment on which the consumer's name is listed, Money Tree shall, within fifteen (15) days after receiving that Credit List installment, refund the credit amount in one lump sum payment by delivering a check for the credit amount either in person or by first-class mail through the U.S. Postal Service. No payment checks shall have a void date earlier than ninety (90) days after the date the check was issued.

21. Within thirty (30) days after receiving each Credit List installment, Money Tree shall deliver to the independent agent a list of consumers on that Credit List installment to whom Money Tree delivered a check pursuant to paragraphs 15, 16, 17, 19 and 20 of this Appendix. The list of consumers shall include the consumer's name, the consumer's address, the Money Tree account number and contract number, the claim number assigned by the independent agent, the number of the check Money Tree issued, and the amount of the check.

22. Money Tree shall not cancel the insurance of any consumer until Money Tree has received the Credit List installment stating which insurance products the consumer wishes to cancel. If a consumer refinances the loan that is open at the time the order is issued, Money Tree shall cancel only the insurance paid for with the loan that is open at the time the order is issued. If the consumer pays for insurance in connection with the refinanced loan, that insurance shall remain in force.

23. Between 10 and 13 months after the date the order is issued, Money Tree shall provide the independent agent with a report that includes the following (all computerized lists described in this section shall include Money Tree account numbers, Money Tree contract numbers, and the claim numbers assigned by the independent agent):

a. A computerized list of all consumers who received credit toward their outstanding loan balance; the amount of credit each of these consumers received; the amount that each of these consumers received, if any, in the form of a check; and the check number of that check;

b. A computerized list of all consumers who received a check and the check number and amount that each of these consumers received, including check number, name and address;

c. Check registers that include name, address, check numbers, Money Tree account numbers, Money Tree contract numbers, and the amount of the check for each consumer to whom Money Tree delivered a check, either in person or by mail;

d. Checking account statements documenting all checks cashed by consumers; and

e. A computerized list of consumers who, despite returning their Cancellation Form to the independent agent and indicating that they did not wish to purchase one or more of the three types of insurance, received neither a credit nor a check from Money Tree. For each of these consumers, Money Tree shall state on the list why the consumer did not receive a credit or a check.

1187

Decision and Order

24. Money Tree shall bear all costs for the administration of the redress program described in this Appendix.

APPENDIX C

Formula for Calculating Redress

Terms Used

- ToP = "Total of payments" stated on loan note or Truth in Lending disclosure statement (collectively referred to as "TILA disclosure")
- AF = "Amount financed" stated on TILA disclosure
- CL = Premium for credit-life insurance stated on TILA disclosure
- CD = Premium for credit-disability insurance (referred to on TILA disclosure forms as "credit A&S" for Georgia loans and "credit A&H" for Alabama loans) stated on TILA disclosure
- AD = Premium for accidental death & dismemberment ("AD&D") insurance (designated by the name "Thomas Jefferson" or the name of some other insurance company) stated on TILA disclosure

Performing the Calculations

The amount that the independent agent shall include in the Money Tree Insurance Cancellation Form for each of the three insurance products (credit-life, credit-disability, and accidental death & dismemberment insurance) shall be determined as follows:

1. Using the TILA disclosure, identify premiums and fees charged to the consumer for CL, CD, and AD ("insurance products");
2. Determine the "repayment factor" by dividing ToP by AF;
3. For each of the insurance products listed on the consumer's TILA disclosure, multiply the charge for the insurance product by the repayment factor to obtain the amount to include for that insurance product.

Thus, if a consumer's TILA disclosure indicates a charge for credit-life insurance, the amount that the independent agent should include in the Money Tree Insurance Cancellation Form for that product equals the following:

$$CL \times (ToP / AF)$$

EXAMPLE:

TILA disclosure included the following data:

$$ToP = \$850.00$$

$$AF = \$703.63$$

$$CL = \$10.37$$

$$AD = \$156.00$$

$$\text{Repayment factor} = 850.00 \div 703.63 = 1.208$$

$$\text{Amount to include for credit-life} = 10.37 \times 1.208 = \$12.53$$

$$\text{Amount to include for AD\&D} = 156.00 \times 1.208 = \$188.45$$

Because the TILA disclosure included no charges for credit-disability insurance, the Money Tree Insurance Cancellation Form would not mention that product.

Decision and Order

123 F.T.C.

APPENDIX D

[Name and Address of
Independent Agent]

[Borrower's Name] Claim Number: _____
 [Address] Mailing Date: _____
 [City, State and Zip Code] Account Number: _____
 Contract Number: _____ Return Deadline: _____

Money Tree Insurance Cancellation Form

If you want to cancel any of the following insurance products because you did not want them when you got the loan from The Money Tree, sign this form above your printed name and make sure that your co-borrower, if any, also signs the form. This form must be returned with a postmark no later than _____ [the Return Deadline]. [Form will include only those insurance products for which the consumer was charged.]

Credit-Life Insurance

You paid \$_____ for credit-life insurance.

I did not want credit-life insurance. Please cancel my credit-life insurance and credit my account for the amount listed above.

Joseph Smith_____
Date_____
Mary Smith_____
Date

Credit-Disability Insurance

You paid \$_____ for credit-disability insurance (called "Credit A&H" or "Credit A&S" on your loan contract).

I did not want credit-disability insurance. Please cancel my credit-disability insurance and credit my account for the amount listed above.

Joseph Smith_____
Date_____
Mary Smith_____
Date

Accidental Death and Dismemberment Insurance

You paid \$_____ for accidental death and dismemberment insurance.

1187

Decision and Order

I did not want accidental death and dismemberment insurance. Please cancel my accidental death and dismemberment insurance and credit my account for the amount listed above.

Joseph Smith

Date

Mary Smith

Date

APPENDIX E

[Money Tree Letterhead]

Dear Money Tree Customer:

When you got your loan from us, you bought one or more of the following insurance products:

1. Credit-life insurance
2. Credit-disability insurance (called "Credit A&H" or "Credit A&S" on your loan contract)
3. Accidental death and dismemberment insurance

The amount(s) you paid for the product(s) are shown on the enclosed Money Tree Insurance Cancellation Form ("Cancellation Form").

In settlement of an action brought by the Federal Trade Commission, The Money Tree, Inc. is offering you an opportunity to cancel one or all of the types of insurance if you did not want them when you got the loan from us.

If you cancel any of the insurance, your last monthly payment will be reduced by the amount listed shown on the attached Cancellation Form for any insurance you choose to cancel. If the amount you would receive as a credit is larger than your last monthly payment, you will not have to make the last monthly payment, and your second-to-last payment will be reduced. If you have already made your last payment on this loan but did not want one or more of the insurance products listed above that you paid for, and if you do not have a new loan with us at the time, we will send you a refund check for that amount. If you have refinanced your loan and still owe Money Tree on the new, refinanced loan, the credit described above will be applied at the end of your refinanced loan.

What is credit-life insurance, and what happens if I cancel it?

It depends on whether you got your loan from one of our offices in Alabama or from one of our offices in Georgia or Louisiana. In Alabama, if you have credit-life insurance with your loan and you die before your loan is paid off, the insurance company will pay Money Tree the part of the loan amount that you have not yet paid. In Georgia and Louisiana, if you have credit-life insurance with your loan and you die before your loan is paid off, the insurance company will pay Money Tree the amount that you have not yet paid and give the remainder of the payoff amount, if there is any, to the person you named as your beneficiary when you got the loan.

If you cancel your insurance now and die before your Money Tree loan is paid off, the insurance company will not finish paying off the loan.

What is credit-disability insurance, and what happens if I cancel it?

If you have credit-disability insurance with your loan and become disabled and unable to work before your loan is paid off, the insurance company will make your monthly loan payments to Money Tree, based on the number of days you are disabled. If you cancel your credit-disability insurance now, you will have to make the monthly payments.

What is accidental death and dismemberment insurance, and what happens if I cancel it?

If you paid for accidental death and dismemberment insurance when you got your loan with us, the insurance company will pay the person you named as a beneficiary on the insurance forms if you die accidentally. If, instead of dying, you lose a body part (such as an eye, arm or leg), the insurance company will pay you the amount of money stated in the insurance policy. If you cancel the insurance now, you will not be covered if you die accidentally or are dismembered accidentally.

If you want to keep all the insurance products that you bought, you do not have to do anything. Your insurance coverage will continue as before.

If you did not want one or more of the insurance products when we made the loan to you and you want to cancel one or more of the insurance products, please sign and date the enclosed Money Tree Insurance Cancellation Form next to any product you want to cancel. Then return it to [Independent Agent] in the return envelope provided. If you want to cancel one insurance product but keep another one, you should sign your name next to only the one(s) that you want to cancel. The Cancellation Form must be put in the mail and postmarked by the Return Deadline shown on the Cancellation Form. **THIS IS THE ONLY CHANCE YOU WILL HAVE TO RESPOND TO THIS OFFER.**

If there is more than one borrower on your loan, make sure that each borrower signs the Cancellation Form. (This does not include people who co-signed -- or guaranteed -- the loan.) Unless all borrowers sign the form, the insurance will not be canceled and the cost of the insurance will not be credited toward your account.

If you have any questions concerning this letter, please contact [Independent Agent] at this toll-free number: 1- 800-xxx-xxxx. Please do not contact us.

You must keep paying your monthly installments on your loan from us, even if you cancel the insurance and request a credit toward your account. We value you as a customer and hope to serve your financial needs in the future.

Sincerely,

Vance R. Martin, President
The Money Tree, Inc.

1187

Decision and Order

APPENDIX F

[Money Tree Letterhead]

[Borrower's Name] Claim Number: _____
 [Address] Mailing Date: _____
 [City, State and Zip Code] Account Number: _____
 Contract Number: _____ Return Deadline: _____

Notice to Co-Borrower

Dear [Co-Borrower's Name]:

Our records show that you and [__ Name of Other Co-Borrower __] are co-borrowers on a loan with The Money Tree. Your co-borrower requested that we cancel the credit-life [and/or credit-disability, accidental death and dismemberment] insurance listed on the enclosed Money Tree Insurance Cancellation Form and give you a credit toward your loan balance because you and the co-borrower did not want the insurance when you took out a loan with us.

Before we can cancel the insurance and credit your loan balance for the amount you paid, we need your signature on the Cancellation Form also. If you did not want the insurance products listed on the Cancellation Form and you wish to cancel the insurance and receive a credit toward your loan balance, please sign the Cancellation Form and return it to [__ Independent Agent __] in the return envelope provided. The return envelope must be postmarked by [__ Return Deadline date __] or the insurance will not be canceled and you will not receive a credit.

If you have any questions concerning this letter, please contact [__ Independent Agent __] at this toll-free number: xxx-xxx-xxxx. Please do not contact us.

You must keep paying your monthly installments on your loan from us, even if you cancel the insurance and request a credit toward your account. We value you as a customer and hope to serve your financial needs in the future.

Sincerely,

Vance R. Martin, President
 The Money Tree, Inc.

APPENDIX G

Script to Be Read Into 800-Number Voice Message

You have reached the toll-free, question-and-answer line for Money Tree and Money To Lend customers. If you have questions about the letter you recently received from Money Tree, please remain on the line and listen to the following taped series of questions and answers. Listening to the entire series will take approximately five minutes. You are free to hang up at any time, of course, if your question, or questions, are answered before the end of the tape. There will not be an opportunity to speak to a live operator at the end of the tape.

1. Q. Why did I get this letter?
A. It was sent to all recent customers of Money Tree who were charged for the insurance mentioned in the letter. Money Tree agreed to send the letter to settle an action brought by the Federal Trade Commission, a federal agency in Washington, D.C. Money Tree denies any wrongdoing.
2. Q. What was the action about?
A. The FTC alleged that Money Tree violated the Truth in Lending Act by requiring its customers to purchase certain types of insurance but failing to include the cost of the insurance in the finance charge and the annual percentage rate as required by the Act. Money Tree's position is that all such charges were voluntary.
3. Q. What is credit-life insurance?
A. If you got your loan in Alabama and you die before your loan is paid off, the insurance company will pay Money Tree the part of the loan amount that you have not yet paid. If you got your loan in Georgia or Louisiana and you die before your loan is paid off, the insurance company will pay Money Tree the amount you still owe and pay your beneficiary the difference between the coverage amount and the payoff amount of your loan.
4. Q. I don't understand.
A. For example, if you died when the balance due on your loan was \$500, the insurance company would pay Money Tree \$500. Your estate would not owe Money Tree any more money.
5. Q. What if I already have a life insurance policy?
A. Your life insurance benefits may be large enough to cover your loan with Money Tree. The credit-life insurance purchased through Money Tree is in addition to any other life insurance you may have.
6. Q. What is credit-disability insurance?
A. It is insurance that provides financial protection in case you become sick or injured. If you become totally disabled and cannot work for some period (more than three days in a row in Georgia or more than two weeks in a row in Alabama and Louisiana), the insurance company will make your monthly payments to Money Tree for you, based on the number of days you are out of work due to illness. Of course, once you are able to return to work, the insurance company no longer makes these payments.
7. Q. What is accidental death and dismemberment insurance?
A. If you have this insurance and you die accidentally, the insurance company will pay the face amount of the policy to the beneficiary. If you are injured and lose the use of some part of your body (such as an eye, arm, or leg), the insurance will pay you an amount specified in the policy.
8. Q. What does this letter mean? Why am I being given the chance to cancel my insurance?
A. Money Tree states that it does not require borrowers to buy insurance. This opportunity to cancel is being offered to you in case you did not wish to buy insurance when you got the loan.
9. Q. What should I do if I want to cancel the insurance?
A. Sign the Cancellation Form on the lines next to whichever type(s) of insurance you wish to cancel. Then place the Cancellation Form in the return envelope provided, place a stamp on the envelope, and put it in the

1187

Decision and Order

- mail by the Return Deadline printed on the Cancellation Form. If there was more than one borrower on the loan, each of you must sign the Form.
10. Q. What should I do if I want to keep the insurance?
A. You do not have to do anything. Your insurance coverage will remain in force.
11. Q. What happens to my loan if I cancel the insurance?
A. If you cancel, your last monthly payment will be reduced by the amount shown on the Cancellation Form for any insurance you choose to cancel. If you have already made your last payment and you do not have a loan with Money Tree right now, Money Tree will send you a refund check for the amount on the Cancellation Form. If you have refinanced your loan, you will receive a credit on your new, refinanced loan.
12. Q. If I cancel the credit-life insurance and then die before the loan is paid in full, what will happen?
A. If you are the principal borrower, you will not have credit-life insurance through Money Tree to pay off your loan.
13. Q. If I cancel the credit-disability insurance and then get sick or become disabled before the loan is paid in full, what will happen?
A. If you are the principal borrower and you cannot work because of sickness or disability for some specified period of time (more than three days in a row in Georgia or more than two weeks in a row in Alabama), you will not have insurance through Money Tree to make your monthly payments and you would still have to make the monthly payments.
14. Q. If I cancel the accidental death and dismemberment policy, what will happen?
A. The insurance company will not pay the person named in the policy as your beneficiary if you die accidentally. Also, if you are injured and lose the use of a body part, you will not receive the payment specified in the policy.
15. Q. If I cancel the insurance, will Money Tree be willing to lend to me in the future?
A. Canceling the insurance will not affect your ability to get credit from Money Tree in the future.

You have reached the end of the question-and-answer line for Money Tree and Money Tree customers. We hope you found it helpful. Thank you for calling.

APPENDIX H

[Money Tree Letterhead]

[Consumer's Name]

[Address]

[City, State and Zip Code]

Claim Number: _____

Account Number: _____

Contract Number: _____

Notice to Customers

Dear Money Tree Customer:

Decision and Order

123 F.T.C.

In response to a letter from us, you recently sent a Money Tree Insurance Cancellation Form to [__ Independent Agent __]. On that Cancellation Form you indicated that you did not want one or more of the following insurance products when you got your former loan from us, which has now been refinanced:

1. Credit-life insurance
2. Credit-disability insurance (called "Credit A&H" or "Credit A&S" on your loan contract)
3. Accidental death and dismemberment insurance

On the Cancellation Form, you requested that we cancel one or more of the insurance products and give you a credit toward your outstanding loan balance. Since that loan was paid off when you refinanced, we have applied the credit to your new, refinanced loan.

The amount for which we have credited your loan balance is the following:

\$ _____

Because of this credit, your final loan payment will be smaller. You will pay this amount:

\$ _____

If the credit amount is larger than the amount of your final loan payment, you will not have to make your final loan payment at all, and your next-to-last payment will also be smaller. You will pay this amount for your next-to-last payment:

\$ _____

If your credit amount is larger than your last two monthly payments combined, this is the number of monthly payments you may skip:

You do not have to pay the final ____ monthly payments.

Even though you have canceled one or more of your insurance coverages, you must keep making your monthly installments on your loan until the loan is fully paid. If this notice states that you owe nothing for one or more of your final payments, you do not have to make those payments, but you do have to make all earlier payments.

We hope this explanation has been helpful. We value you as a customer and hope to serve your financial needs in the future.

Sincerely,

Vance R. Martin, President
The Money Tree, Inc.

IN THE MATTER OF

NATIONWIDE SYNDICATIONS, INC., ET AL.

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

Docket C-3736. Complaint, April 28, 1997--Decision, April 28, 1997

This consent order prohibits, among other things, the Illinois company and its president from representing that NightSafe Glasses or any substantially similar product makes driving safer or improves night vision, and requires them to have competent and reliable scientific evidence to substantiate claims about the efficacy, performance, benefits or safety of such products. The consent order also prohibits the use of the trade name "NightSafe" or any other trade name that implies the use of such product makes night driving safer. In addition, the respondents will pay \$125,000 in consumer redress.

Appearances

For the Commission: *Karen Dodge.*

For the respondents: *David A. Clanton, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Nationwide Syndications, Inc., a corporation, and Thomas W. Karon, individually and as an officer of said corporations, ("respondents"), have violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent Nationwide Syndications, Inc. is an Illinois corporation with its principal office or place of business at 223 Applebee St., Barrington, Illinois.

Respondent Thomas W. Karon is an officer of Nationwide Syndications, Inc. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Nationwide Syndications, Inc.

PAR. 2. Respondents have advertised, labeled, offered for sale, sold, and distributed night driving glasses, including NightSafe Glasses, and other products to consumers. This product is a "device"

Complaint

123 F.T.C.

within the meaning of Sections 12 and 15 of the Federal Trade Commission Act.

PAR. 3. The acts and practices of respondents alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

PAR. 4. Respondents have disseminated or have caused to be disseminated advertisements, including product labeling, for NightSafe Glasses, including but not necessarily limited to the attached Exhibits A through C. These advertisements and product labeling contain the following statements and depictions:

A. DRIVE SAFER AT NIGHT, IN RAIN, SNOW, SLEET, EVEN FOG.
Order your NightSafe Glasses Today!

* * *

WITH...

NightSafe Glasses, your night vision actually improves! . . .

[Photograph of front end of vehicle in sharp focus.]

WITHOUT...

[Photograph of front end of vehicle out of focus.]

* * *

WHAT A DIFFERENCE! Experience an incredible improvement in your night vision with NightSafe Glasses--the glasses that make driving safer and more relaxing. Thousands of drivers find them welcome traveling companions. You will too--objects appear sharper and better defined No matter what the weather--rain, snow, sleet, fog or haze--you'll feel safer and more confident with NightSafe Glasses.

. . . . ADVANCED OPTICAL TECHNOLOGY. NightSafe Glasses were perfected after years of optical experimentation and laboratory testing. The UV400 lenses block harmful ultraviolet rays and bring incredible clarity and sharpness to otherwise distorted images. (Exhibit A).

B. SEE THE DIFFERENCE FOR YOURSELF!

[Photograph of oncoming traffic in sharp focus.]

With NightSafe Glasses.

[Photograph of oncoming traffic out of focus.]

Without NightSafe Glasses.

NightSafe Glasses help improve night vision instantly. . . . You'll see better in rain, snow, sleet and fog, and drive more safely. With NightSafe Glasses everything appears sharper, clearer and brighter. Contrast is enhanced. Actually helps you see better at night--no matter what the weather!

* * *

NIGHTSAFE GLASSES DRIVE SAFER AT NIGHT--NO MATTER WHAT THE WEATHER!

* * *

A remarkable difference...NightSafe Glasses improve your vision instantly Everything appears sharper, clearer, brighter, with more definition. You'll see better than you ever thought possible.

1213

Complaint

. . . Laboratory tested and proven NightSafe Glasses really work. The innovative UV400 lenses block harmful ultraviolet rays and cut through dense haze. . . . NightSafe helps improve your night vision

You won't believe your eyes...NightSafe lets you drive at night as confidently as during the day. Just slip them on and you'll notice an immediate difference. Hazy objects appear crisp and clear. And bright, blinding lights will be a thing of the past. You will drive relaxed with renewed confidence. (Exhibit B).

C. Enhance your night vision with NightSafe Glasses.

* * *

[Photograph of oncoming traffic out of focus.]

Without NightSafe Glasses...

[Photograph of oncoming traffic in sharp focus.]

With NightSafe Glasses!

* * *

NightSafe Glasses give you clearer, sharper images...especially in rain, sleet or snow when driving is most hazardous. That's why professional drivers, pilots and other who rely on their vision, rely on NightSafe Glasses. And why you should, too. Protect yourself and your passengers with NightSafe. (Exhibit C).

PAR. 5. Through the use of the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through C, respondents have represented, directly or by implication, that:

- A. NightSafe Glasses improve night vision.
- B. Laboratory tests prove that NightSafe Glasses improve night vision.

PAR. 6. In truth and in fact:

- A. NightSafe Glasses do not improve night vision.
- B. Laboratory tests do not prove that NightSafe Glasses improve night vision.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the trade name NightSafe Glasses and the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through C, respondents have represented, directly or by implication, that NightSafe Glasses make night driving safe or safer.

PAR. 8. In truth and in fact, NightSafe Glasses do not make night driving safer. Therefore, the representation set forth in paragraph seven was, and is, false and misleading.

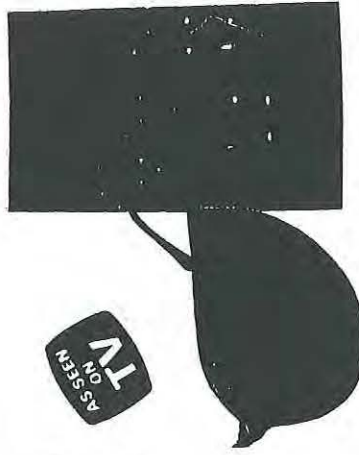
PAR. 9. Through the use of the trade name and the statements and depictions contained in the advertisements referred to in paragraph four, including but not necessarily limited to the advertisements attached as Exhibits A through C, respondents have represented, directly or by implication, that at the time they made the representations set forth in paragraphs five and seven, respondents possessed and relied upon a reasonable basis that substantiated such representations.

PAR. 10. In truth and in fact, at the time they made the representations set forth in paragraphs five and seven, respondents did not possess and rely upon a reasonable basis that substantiated such representations. Therefore, the representation set forth in paragraph nine was, and is, false and misleading.

PAR. 11. The acts and practices of respondents as alleged in this complaint constitute unfair or deceptive acts or practices, and the making of false advertisements, in or affecting commerce in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

Complaint

EXHIBIT A



THE BEST OF

NightSafe

REDUCE the DANGEROUS, BLINDING GLARE of oncoming lights!

GUARANTEED FOR A LIFETIME!

0721 Road Creative - 1993 (Testimonials)

FIRST CARD



NO POSTAGE NECESSARY IF MAILED IN THE UNITED STATES

BUSINESS REPLY MAIL
FIRST CLASS MAIL PERMIT NO. 350 DES PLAINES, IL

POSTAGE WILL BE PAID BY ADDRESSEE

FIRST CARD®
125 ARMSTRONG ROAD
DES PLAINES IL 60019-9934



YES! Please send the merchandise I have indicated below. Underlined items that are marked with a checkmark (✓) are shipping and handling, and state and local taxes, if applicable, will be added to the total. In a check and account number to accompany this order. I am not responsible for any return merchandise unless otherwise indicated at any time.

Please allow 4-6 weeks for delivery. Postage included.

Please allow 4-6 weeks for delivery. Postage included.

Item	Description	Price Each	Quantity	Total Price
101	English-Style Glasses	19.95	1	19.95
102	English-Style Clip-Ons	19.95	1	19.95
103	English-Style Clip-Ons	19.95	1	19.95
104	English-Style Glasses	19.95	1	19.95
105	English-Style Clip-Ons	19.95	1	19.95
106	English-Style Glasses	19.95	1	19.95
107	English-Style Clip-Ons	19.95	1	19.95

REQUIRED - Please Print And Fill In All Information

Name _____

Address _____

City _____ State _____ Zip _____

Phone _____

Signature _____

NO POSTAGE NECESSARY IF MAILED IN THE UNITED STATES

DRIVE SAFER AT NIGHT, IN RAIN, SNOW, SLEET, EVEN FOG.

Order your NightSafe® Glasses Today!



Sleek style looks great on men or women.

WITH...

NightSafe lenses give you clear, sharp, undistorted vision...they reduce the blinding glare from headlights, electric signs, street lamps and rain-slick pavements. Remarkable!



WITHOUT...

The glare of headlights, street lamps and electric signs...you're subject to blinding glare...plus the constant glare of ultraviolet rays. Oh yes, it's hot!



WHAT A DIFFERENCE! Experience an incredible improvement in your night vision with NightSafe Glasses—the glasses that make driving safer and more relaxing. Thousands of drivers find them welcome traveling companions. You will too—objects appear sharper and better defined...with less of the distortion caused by glare and harsh reflections. No matter what the weather—rain, snow, sleet, fog or haze—you'll feel safer and more confident with NightSafe Glasses.

SLEEK HIGH-FASHION PLUS ADVANCED OPTICAL TECHNOLOGY. NightSafe Glasses were perfected after years of optical experimentation and laboratory testing. The UV400™ lenses block harmful, ultraviolet rays and bring incredible clarity and sharpness to otherwise distorted images. Dramatically cuts down on blinding glare from approaching headlights, electric signs, street lamps and rain-slick pavements. With the look of the most expensive designer glasses, NightSafe Glasses are manufactured under the strictest laboratory standards using the latest and highest quality materials. Made in Taiwan.

ALSO AVAILABLE IN CLIP-ON STYLE. If you wear prescription glasses, you'll want to order NightSafe Glasses in the Clip-On style for the same great night driving protection.

GLASSES OR CLIP-ONS, BUY ANY 2 AND SAVE \$5!

ITEM	PRICE	SHIPPING/HANDLING
1 PAIR NIGHTSAFE GLASSES OR CLIP-ONS	19 95	3 85
2 PAIR NIGHTSAFE IN EITHER STYLE	34 90	7 95

GUARANTEED FOR A LIFETIME! You'll never have to be without the clear night vision of NightSafe Glasses. We guarantee to replace them, FOR ANY REASON, without question! Complete cases included with your order.

MANUFACTURER'S WARRANTY GUARANTEE: A copy of the manufacturer's warranty will be mailed with the glasses. See how clear a difference there is in your night vision. If you're not satisfied, we'll refund your money. No questions asked. 24 hours a day. 365 days a year. 277-7771. 11/81. BAHAMONDA A 8020.



Read what NightSafe owners have to say:

"I have waited a long time to be able to drive at night without the 'glare' from other headlights hurting my eyes and usually giving me an inevitable headache! You've got a great product here, and the design of the glasses looks great too!"
— R.L., Spokane, WA

"Thank you for the glasses that you sent us. After using them for a couple of weeks, our drivers loved them, because they really helped them when driving at night."
— S.S., Edison, NJ

"Thanks for inventing such an ingenious product that will make my nighttime driving ventures so much less stressful and much safer too! You're great!"
— K.H., Mission Viejo, CA

"We love the NightSafe glasses we just received. Would like more for gifts..."
— C.C., Clovis, CA

EXHIBIT A
Complaint

1213

Complaint

EXHIBIT B

DRIVE SAFER AT NIGHT - NO MATTER WHAT THE WEATHER!

NIGHTSAFE GLASSES

NightSafe Glasses help improve night vision by eliminating glare from oncoming headlights, wet pavement, and the dazzling effects of ultraviolet light. You'll see better in rain, snow, sleet and fog, and drive more safely.

With NightSafe Glasses everything appears

TRY THEM FREE FOR 15 DAYS

TV NO AS SEEN



NO POSTAGE
NECESSARY
IF MAILED
IN THE
UNITED STATES

BUSINESS REPLY MAIL
FIRST CLASS MAIL PERMIT NO. 356 DES PLAINES IL

POSTAGE WILL BE PAID BY ADDRESSEE

MARATHON OIL COMPANY
MERCHANDISE HEADQUARTERS
125 ARMSTRONG ROAD
DES PLAINES IL 60019-9934

U S P S MAIL PERMIT NO 356 DES PLAINES IL

Complaint

EXHIBIT B

DRAMATICALLY REDUCE NIGHTTIME GLARE!

TRY NIGHTSAFE JUST ONCE.
DRIVE WITH NEW CONFIDENCE AFTER DARK.

A remarkable difference...NightSafe Glasses improve your night vision instantly, by reducing the glare from auto headlights, electric signs, street lamps and wet, slick pavements. No more squinting or straining to see. Everything appears sharper, clearer, brighter, with more definition. You'll see better than you ever thought possible. Advanced optics cut through dangerous glare... Laboratory tested and proven NightSafe Glasses really work. The innovative UV400™ lenses block harmful ultraviolet rays and cut through dense haze. NightSafe also blocks dangerous glare from oncoming headlights, electric signs, street lamps, and rain soaked streets. NightSafe helps improve your night vision and reduces eye fatigue and strain. You won't believe your eyes...NightSafe lets you drive at night as confidently as during the day. Just slip them on and you'll notice an immediate difference. Hazy

objects appear crisp and clear. And bright, blinding lights will be a thing of the past. You will drive relaxed with renewed confidence.

Also available in Clip-On style...If you wear prescription glasses, you'll want to order NightSafe Glasses in the Clip-On style for the same great night driving protection.

Guaranteed for life...You'll never have to be without NightSafe Glasses. We guarantee to replace them FREE for any reason, without question. So why not try NightSafe Glasses and join the thousands of satisfied users.

Try them and see...Order your NightSafe Glasses today and see how they dramatically improve your night vision, even in the worst, most dangerous driving conditions. We think you'll agree that NightSafe Glasses are a real breakthrough in night vision.



GLASSES OR CLIP-ONS, BUY ANY 2 AND SAVE \$30

Description	Monthly		No. of Months	2-2 Total Price	
	Payment*	SAV*		Product	S&P*
1 Pair NightSafe Glasses or Clip-Ons	\$3.99*	\$ 7.99*	5	\$19.95*	\$3.99*
2 Pair NightSafe in Either Style	\$5.99*	\$1.50*	5	\$34.95*	\$7.99*

*Plus any applicable sales and use tax. †Made in Japan.

LIFETIME WARRANTY

A copy of the warranty will be packed with the merchandise when it is shipped. If you wish you may obtain a free copy in advance by writing to: Marathon Merchandise Center, 223 Appleton Street, Barnstable, MA 02530.

Marathon Oil Company NightSafe Glasses Mail Today for your 15-Day Free Home Trial

YES! Please send me the merchandise indicated below. I must be completely satisfied or I may return the merchandise by Insured Parcel Post or UPS within 15 days and owe nothing. My return postage and insurance costs will be refunded. The purchases will be charged to your Marathon Oil Company credit card account and unless a single payment is requested, I will be set-up on interest-free monthly installments.

SEND NO MONEY NOW!

Check here if you prefer a single payment of the total deferred price plus applicable sales and use taxes.

Quantity/Choice	Item No.	Description
1	323	1 NightSafe Glasses
1	324	1 NightSafe Clip-Ons
1	325	2 NightSafe Glasses - SAVE \$5.00*
1	326	2 NightSafe Clip-Ons - SAVE \$5.00*

Please enter your Marathon Credit Card Number here

_____|_____|_____|_____|_____|_____|

Name _____ (Please Print)

Address _____ Apt. No. _____

City _____ State _____ Zip _____

Signature _____ (Not valid without full signature)

15-Day Home Trial Offer: Examine the NightSafe Glasses your own home for 15 days, no obligation. If within the 15 days you are not completely satisfied, return it by Insured Parcel Post or UPS and owe absolutely nothing. We'll even refund your postage and insurance costs.

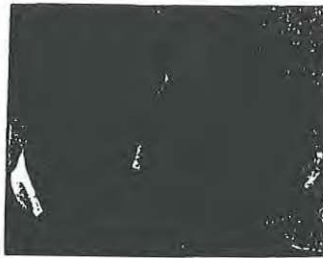
1213

Complaint

EXHIBIT C



Read what NightSafe owners have to say:

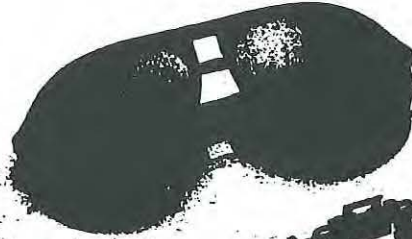


- "I have waited a long time to be able to drive at night without the "glare" from other headlights hurting my eyes and usually giving me an inevitable headache! You've got a great product here, and the design of the glasses looks great too!"
-R.L., Spokane, WA
- "Thank you for the glasses that you sent us. After using them for a couple of weeks, our driver's loved them, because they really helped them when driving at night."
-S.S., Edison, NJ
- "Thanks for inventing such an ingenious product that will make my nighttime driving ventures so much less stressful and much safer too! You're great!"
-K.H., Mission Viejo, CA
- "We love the NightSafe glasses we just received. Would like more for gifts..."
-C.C., Clovis, CA

Order your NightSafe Glasses Today!
 FOR FASTER DELIVERY, CALL TOLL-FREE 1-800-222-6161. Open 24 hours!

EXHIBIT C

Enhance your night vision with NightSafe® Glasses.



It's Incredible!

These sleek NightSafe Glasses actually enhance your night vision by reducing the glare from headlights, electric signs, street lamps and rain-slick pavement. No more squinting or straining to see. NightSafe

gives you sharper images, reducing the "halo" effect of oncoming lights and bright



Without NightSafe Glasses... With NightSafe Glasses!
Helps eliminate confusing and dangerous "halo" effects of oncoming lights.

NightSafe Glasses give you clearer, sharper images... especially in rain, sleet or snow when driving is most hazardous. That's why professional drivers, pilots and others who rely on their vision, rely on NightSafe Glasses. And why you should, too. Protect yourself and your passengers with NightSafe.

Order your NightSafe Glasses today!

DECISION AND ORDER

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

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

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

1. Respondent Nationwide Syndications, Inc. is an Illinois corporation with its principal office or place of business at 223 Applebee Street, Barrington, Illinois.

2. Respondent Thomas W. Karon is an officer of Nationwide Syndications, Inc. Individually or in concert with others, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in this complaint. His principal office or place of business is the same as that of Nationwide Syndications, Inc.

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

Decision and Order

123 F.T.C.

ORDER

DEFINITIONS

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

1. The term "*substantially similar product*" means any eyeglasses with tinted lenses.

2. The term "*competent and reliable scientific evidence*" means tests, analyses, research, studies or other evidence based on the expertise of professionals in the relevant area, that has been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

I.

It is ordered, That respondents, Nationwide Syndications, Inc., a corporation, its successors and assigns, and its officers, and Thomas W. Karon, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of NightSafe Glasses or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, in any manner, directly or by implication, that:

- A. Such product makes night driving safe or safer; or
- B. Such product improves night vision.

II.

It is further ordered, That respondents, Nationwide Syndications, Inc., a corporation, its successors and assigns, and its officers, and Thomas W. Karon, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of NightSafe Glasses or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist

from misrepresenting, in any manner, directly or by implication, the efficacy, performance, safety, or benefits of such product, unless such representation is true and, at the time of making such representation, respondents possess and rely upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

III.

It is further ordered, That respondent, Nationwide Syndications, Inc., a corporation, its successors and assigns, and its officers, and Thomas W. Karon, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of any product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting, in any manner, directly or by implication, the existence, contents, validity, results, conclusions, or interpretations of any test or study.

IV.

It is further ordered, That respondent, Nationwide Syndications, Inc., a corporation, its successors and assigns, and its officers, and Thomas W. Karon, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the labeling, advertising, promotion, offering for sale, sale, or distribution of NightSafe Glasses or any substantially similar product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from using the name "NightSafe," or any other name, in a manner that represents, directly or by implication, that such product makes night driving safe or safer.

V.

It is further ordered, That respondents, Nationwide Syndications, Inc., its successors and assigns, and Thomas W. Karon, shall pay to the Federal Trade Commission, by cashier's check or certified check made payable to the Federal Trade Commission and delivered to the

Director of the Chicago Regional Office, Federal Trade Commission, 55 East Monroe, Suite 1860, Chicago, Illinois, the sum of one hundred and twenty five thousand dollars (\$125,000). This payment shall constitute full and complete satisfaction of all claims for redress by the Commission, under the Federal Trade Commission Act or any other applicable rule of law, for conduct covered by the order which occurred prior to the date of service of this order. Respondents shall make this payment no later than ten (10) days following the date of service of this order. In the event of any default on any obligation to make payment under this section, interest, computed pursuant to 28 U.S.C. 1961(a), shall accrue from the date of default to the date of payment. The funds paid by respondents shall, in the discretion of the Federal Trade Commission, be used by the Commission to provide direct redress to purchasers of NightSafe Glasses in connection with the acts or practices alleged in the complaint, and to pay any attendant costs of administration. If the Federal Trade Commission determines, in its sole discretion, that redress to purchasers of this product is wholly or partially impracticable or is otherwise unwarranted, any funds not so used shall be paid to the United States Treasury. Respondents shall be notified as to how the funds are distributed, but shall have no right to contest the manner of distribution chosen by the Commission. No portion of the payment as herein provided shall be deemed a payment of any fine, penalty, or punitive assessment.

VI.

It is further ordered, That respondents shall provide the names and addresses of each individual who purchased NightSafe Glasses or any substantially similar product (hereafter "NightSafe Glasses") from Nationwide Syndications, Inc., or each individual who purchased NightSafe Glasses from any of the retailers, credit card companies, or any other person, partnership or corporation to whom Nationwide Syndications, Inc. sold NightSafe Glasses for resale, and whose names and addresses are in the possession of Nationwide Syndications, Inc. or Thomas W. Karon or can reasonably be obtained from the agents or representatives involved in fulfilling orders on behalf of Nationwide Syndications, Inc., to the Federal Trade Commission no later than ten (10) days after the date of service of this order. The respondents shall provide these names and addresses to the Commission in a format consistent with the Commission's Standards for Production/Acceptance of Magnetically

Recorded Information as set forth in Appendix A. The Commission may, in its sole discretion, provide notification to the purchasers of NightSafe Glasses to inform the purchasers of the safety information contained in Appendix B. The funds paid by respondents, pursuant to paragraph V of this order, may, in the discretion of the Commission, be used by the Commission to pay any of the costs associated with providing this notification to purchasers of NightSafe Glasses.

VII.

It is further ordered, That for five (5) years after the last date of dissemination of any representation covered by this order, respondents, or their successors and assigns, shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials that were relied upon in disseminating such representation; and

B. All tests, reports, studies, surveys, demonstrations, or other evidence in its possession or control that contradict, qualify, or call into question such representation, or the basis relied upon for such representation, including complaints from consumers.

VIII.

It is further ordered, That respondents Nationwide Syndications, Inc. shall:

A. Within thirty (30) days after the date of service of this order, deliver a copy of this order to each of the corporate respondent's officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials, product labels or other such sales materials covered by this order.

B. For a period of ten (10) years after the date of service of this order, deliver a copy of this order to each of the corporate respondent's future officers, agents, representatives, and employees who are engaged in the preparation or placement of advertisements, promotional materials, product labels or other such sales materials covered by this order, within three (3) days after the person assumes such position.

IX.

It is further ordered, That respondents Nationwide Syndications, Inc. shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as a 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 under this order.

X.

It is further ordered, That respondent Thomas W. Karon shall, for a period of ten (10) years after the date of issuance of this order, notify the Commission within thirty (30) days of discontinuance of his present business or employment and of each affiliation with a new business or employment. Each notice of affiliation with any new business or employment shall include his new business address and telephone number, current home address, and a statement describing the nature of the business or employment and the duties and responsibilities.

XI.

This order will terminate on April 28, 2017, or twenty years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any paragraph in this order that terminates in less than twenty years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this paragraph.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this paragraph as though

the complaint was never filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

XII.

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

APPENDIX A

Federal Trade Commission Standards for Production/Acceptance of Magnetically Recorded Information

The Federal Trade Commission utilizes standards for information transfer adopted by the National Institute for Standards and Technology and in compliance with the International Standards Organization guidelines for information exchange.

The Commission encourages the use and exchange of magnetic media as a cost-effective, resource conscious alternative to printed materials.

The Commission will accept magnetic media in the following formats:

- (A) Magnetic storage media:
- (1) 9-track computer tapes recorded in ASCII or EBCDIC format at either 1600 or 6250 BPI. No internal labels should be written.
 - (2) 5.25 inch IBM-compatible format diskettes.
 - (3) 3.5 inch IBM-compatible format micro floppy diskettes.
 - (4) Local Area Network backup cassettes or cartridges by pre-authorization only. (Contact (202)326-2280 for authorization.)

(B) File structures: (1) Sequential Access Method (SAM) files only. All indexed file structures must be dumped down into SAM format in primary-key order. Micro-computer (IBM-compatible) file structures should be in ASCII-comma-separated format.

(C) Record structures: Fixed length records only. Maximum block size for data is 32,000 bytes for data submitted on 9-track tapes. All data in the record is to be provided as it would appear in printed format: (*e.g.*) unpacked, printed decimal points, signed if relevant.

(D) Documentation: Brief documentation of each file on the tape or diskette must be provided. This information should include the following: (1) File name, (2) What tape/diskette file resides on, (3) Position of file on tape or diskette, (4)

Number of records contained in the file, (5) The length of each record, (6) The record layout: (a) field name

(b) field size in bytes

(c) field data type (numeric/alpha-numeric/dollar/logical/date/etc.)

File layout documentation should be included in the same package as the tape/diskettes when sent.

(E) Shipping: Magnetic media must be shipped clearly marked: MAGNETIC MEDIA DO NOT X-RAY. Data received unmarked can not be accepted by our computer center. Media should be sent to the following address:

Federal Trade Commission

Computer Operations Center, Room-192

6th & Pa. Ave. N.W.

Washington, DC 20580

Attn: Litigation & Customer Support

(F) Technical Support: The Litigation & Customer Support Consulting staff is available at (202) 326-2200 to answer your technical questions regarding production of data for the Commission from 8:30 am to 6:00 pm EST.

APPENDIX B

Please note this important safety information:

The NightSafe Glasses you purchased do not improve your vision while driving at night. In fact, these glasses may impair your vision while driving at night. This means that you should not wear NightSafe Glasses while driving at night.

Although NightSafe Glasses may impair your vision while driving at night, they may be used during the daytime as sunglasses.

IN THE MATTER OF

SPLITFIRE, INC.

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

Docket C-3737. Complaint, April 28, 1997--Decision, April 28, 1997

This consent order prohibits, among other things, the Illinois spark plugs manufacturer from making fuel economy, emissions, horsepower, or cost savings claims without competent and reliable scientific evidence to support them. The consent order also prohibits misrepresentations regarding the existence, contents, validity, results, conclusions or interpretations of any test or study. In addition, the consent order requires the respondent to possess competent and reliable scientific evidence to substantiate claims in endorsements or testimonials.

Appearances

For the Commission: *Laura Fremont and Matthew Gold.*

For the respondent: *Edward Geltman, Squire, Sanders & Dempsey, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that SplitFire, Inc., a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

1. Respondent SplitFire, Inc. is an Illinois corporation with its principal office or place of business at 4065 Commercial Avenue, Northbrook, Illinois.

2. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed automotive products to the public, including the "SplitFire Spark Plug," an internal combustion engine spark plug with one split or forked electrode.

3. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

4. Respondent has disseminated or has caused to be disseminated advertisements for SplitFire Spark Plugs, including but not necessarily limited to the attached Exhibits A through D. These advertisements contain the following statements and depictions:

A. "Good [Depiction of a conventional spark plug]
Conventional Plugs

...
Better [Depiction of a platinum-tipped spark plug]
Platinum Plugs

...
BEST [Depiction of a SplitFire Spark Plug]
SplitFire Plugs

...
Experts say improved combustion of the fuel/air mixture results in:
MORE POWER · MORE MILEAGE · LOWER EMISSIONS

The SplitFire Advantage

'It Only Costs More Until You Use It!'TM

Equipped with conventional spark plugs, up to 15% of the combustion cycles in a modern engine end up in 'partial misfires.' SplitFire's larger flame kernel helps reduce partial misfires, and experts say it helps improve:

PERFORMANCE

ECONOMY

EMISSIONS

* More horsepower

* More M.P.G.

* Lower emissions

...
Improved combustion efficiency means that a higher percentage of fuel is converted to power, not partially-burned exhaust. Higher efficiency means you get more out of every ounce of fuel, so you use less of it."

(Exhibit A, consumer brochure)

B. "CONSUMER RESEARCH RESULTS

SplitFire conducts continuous consumer surveys to constantly monitor 'real life' performance in all vehicle types, coast-to-coast.

...
Of all users (regardless of vehicle type, age, condition, and use) responding:

...
70% reported a gas mileage increase of from 1 to 6 more miles per gallon."

(Exhibit B, product catalog)

C. Consumer Endorser: "Yeah, I went from probably 300 miles on a full tank to almost 400."

...
Consumer Endorser: "I probably was getting, I would say about 20 miles more per tankful, and that's a lot for me!"

...
Consumer Endorser: "And when you're driving a four-wheel drive vehicle, you need all the extra gas mileage you can get."

(Exhibit C, television ad)

D. "SplitFire. At \$5.99, America knows it only costs more 'til you use it!

...
Consumer Endorser: 'I can say I've saved at least \$3 - \$4 a week.'

...
Consumer Endorser: 'They'll pay for themselves, basically, in the first 6 months you own 'em.'"

(Exhibit D, television ad)

5. Through the means described in paragraph four, respondent has represented, expressly or by implication, that:

A. Use of SplitFire Spark Plugs will result in significantly better fuel economy than will use of either conventional spark plugs or platinum-tipped spark plugs.

B. Use of SplitFire Spark Plugs will result in significantly lower emissions than will use of either conventional spark plugs or platinum-tipped spark plugs.

C. Use of SplitFire Spark Plugs will result in significantly greater horsepower than will use of either conventional spark plugs or platinum-tipped spark plugs.

D. Use of SplitFire Spark Plugs will result in significant cost savings over use of either conventional spark plugs or platinum-tipped spark plugs.

E. The testimonials or endorsements from consumers appearing in advertisements and promotional materials for SplitFire Spark Plugs reflect the typical or ordinary experience of members of the public who use SplitFire Spark Plugs.

F. 70% of SplitFire Spark Plug users achieve a gas mileage increase of from 1 to 6 more miles per gallon.

6. Through the means described in paragraph four, respondent has represented, expressly or by implication, that it possessed and relied upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made.

7. In truth and in fact, respondent did not possess and rely upon a reasonable basis that substantiated the representations set forth in paragraph five, at the time the representations were made. Therefore, the representation set forth in paragraph six was, and is, false or misleading.

8. Through the means described in paragraph four, respondent has represented, expressly or by implication, that competent and reliable studies or surveys show that 70% of SplitFire users achieve a gas mileage increase of from 1 to 6 more miles per gallon.

9. In truth and in fact, competent and reliable studies or surveys do not show that 70% of SplitFire users achieve a gas mileage increase of from 1 to 6 more miles per gallon. Therefore, the representation set forth in paragraph eight was, and is, false or misleading.

10. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

**SplitFire...
"IT ONLY COSTS MORE
UNTIL YOU USE IT!"**



Conventional Plug
1700000 revolutions plug
produces a "top"

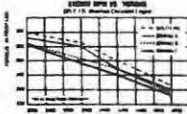


SplitFire Plug
1700000 revolutions plug
produces a "FRESH" tip

Improved combustion efficiency means that a higher percentage of fuel is converted to power, not partially-burned exhaust. Higher efficiency means you get more out of every ounce of fuel, so you use less of it. The SplitFire Spark Plug design has earned a United States patent. SplitFire doesn't look like any other spark plug, it doesn't look like any other spark plug.

MORE POWER AT ANY RPM!

SplitFire produced more torque at all RPMs in dyno tests conducted by racing champion Doug Resper and SplitFire powered racing machines have been breaking records, in all classes, coast-to-coast!



PHOTOGRAPHIC PROOF!



Under the GM spark plug 335 hour torture test... standard plugs usually require replacement every 100 to 200 hours; the SplitFire plugs lasted 1400 hours without a misfire. The SplitFire plugs also kept the combustion chamber cleaner (right) compared to standard plugs (left).
— HOT ROD

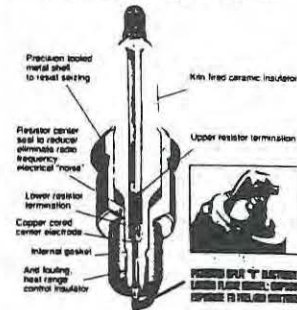
COMBUSTION VARIABLES AND PARTIAL MISFIRES

What causes partial misfires? It can be any one - or a combination - of factors. Among the most common:

- Fuel/air ratio too rich/too lean
- Incomplete mixture of fuel and air
- Contaminated fuel
- Worn mechanical parts
- Carbon build-up
- Oil fouling

Modern engines with high energy ignition systems and electronic fuel injection typically have a misfire rate below 5 percent. Insignificant? Hardly. Even a 2.5 percent misfire rate means one partial misfire every single second. And all engines worsen with time. Older cars, with point and condenser ignition systems, carburetors and less sophisticated combustion chambers, can show a partial misfire rate approaching 15 percent (that's six per second at 2500 RPM).

The First Major Breakthrough Over Conventional Spark Plugs in 75 Years.



POWER UP TO BURNER FOR LOWER FUEL COSTS. SPLITFIRE SPARK PLUG HELPS BURN.

THIS IS THE ENEMY: A POWER-ROBBING, FUEL-WASTING, EMISSION-CAUSING PARTIAL MISFIRE. Equipped with conventional spark plugs, up to 15 percent of the combustion cycles in a modern engine end up in "partial misfires". The spark plug actually fires, but the resulting flame does not cause total ignition.

Here is a typical example:



Hot oil of the exhaust (from the previous cycle) has left the combustion chamber.

There may be tiny particles of oil in two cycle engines (there will be particles of oil).



Low turbulence inside the chamber may leave the air (drawn by exhaust) and fuel too thin completely mixed - and far from the perfect 14.7 to 1 ratio.

The conventional spark plug fires, but its small flame kernel cannot transfer enough heat and flame energy to cause complete combustion in time.



THIS IS A PARTIAL MISFIRE. POWER WAS LOST because combustion was late and incomplete. Maximum explosive force on the piston was never achieved.



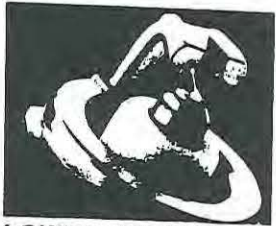
FUEL WAS WASTED. Incomplete combustion means that a portion of the fuel that reached the chamber was never converted to energy.

Emissions were caused by the unburned fuel being forced out of the engine on the exhaust stroke. Fuel residue leads to carbon build-up or fouling.

The SplitFire Advantage:



SplitFire's open "Y" and twin spiral steel help spread the flame kernel to the air/fuel mixture to create a much larger and more aggressive flame, reducing misfires and producing a more effective and complete combustion cycle.



LOWER OCTANE NEEDS - THE SplitFire ADVANTAGE

It's a fact that only a very small percentage of cars are produced with a manufacturer's requirement for any thing more than regular unleaded 87 octane fuel.

Many motorists, however, in response to an ever increasing loss of power - or preignition - or detonation - decide to ignore the owner's manual. They decide their cars "need" premium fuel - resulting in a continuous additional expense of approximately 20 cents per gallon.

There's an easy, economical alternative.

As the HOT ROD photographs clearly show, SplitFire causes a more complete burn - which leaves the combustion chamber cleaner and virtually free of unburned fuel and carbon build-up that can cause preignition. That same combustion efficiency reduces the unburned fuel - And with it, the source of detonation.

Results, obviously, vary depending upon each car's condition, age, and operation, but read these reviews and check that first period again. They're on the side this.

90 percent of SplitFire users surveyed reported equal or better performance with lower octane fuel!

EXHIBIT A p. 1

WHETHER YOU'RE PASSING CARS...OR GAS PUMPS...OR EMISSIONS CONTROL CHECKS —WITH SplitFire, YOU'LL WIN. OR YOU'LL GET YOUR MONEY BACK!*

SplitFire is The Most-Tested, Most-Talked-About, Most-Praised New Automotive Product In The Past 75 Years!



HOT ROD "Overall gas mileage over a 4,000-mile test...a 4.78 percent gain."

MIATA "We recommend this plug for all Miata owners, even in new cars."

TRUCKIN' "It seems too simple, but elapsed times at the dragstrip have been lowered by a tenth of a second and five extra horsepower in the dyno room have been accomplished by merely installing these plugs."

SUPER FORD "A mostly stock '89 5.0-liter Mustang ran 10 quicker in the quarter mile..."

MOPAR MUSCLE "In street applications the plugs are less prone to fouling and deposit build-up, resulting in better performance and longer life."

MUSTANG ILLUSTRATED "We found that the hydrocarbon (emissions) rate was reduced over 50 percent."

SUPER FORD "Ran 10 quicker in the quarter mile. Mileage, Power and Emissions gains!"

CHRYSLER POWER "It's so unique and advanced that all OEM vehicles will use the SplitFire patent..."

FREQUENTLY ASKED QUESTIONS — WITH ANSWERS YOU'LL LIKE.

Q. Are SplitFire Spark Plugs restricted to high performance engines?

A. No. SplitFire plugs are made to replace conventional plugs in virtually all gasoline engines. Owners of older and less efficient cars who simply switched to SplitFire Spark Plugs reported dramatic performance improvement.

Q. Does the installation of SplitFire Spark Plugs require a change in ignition timing?

A. No. Timing should not be altered from your vehicle manufacturer's specification.

Q. Do I need to gap SplitFire Spark Plugs prior to installation?

A. Yes. The gap of the SplitFire Spark Plugs should be set to your vehicle manufacturer's specification. (Do not use bevel-type gapping tool.)

Q. Do SplitFire Spark Plugs come in resistor and non-resistor types? What about heat ranges?

A. SplitFire plugs are made to replace conventional plugs of all types, from automotive to motor-cycles to marine and small engines; use the SplitFire Spark Plug Application Catalog for the correct SplitFire plug.

Q. Will SplitFire work with fuels containing ethanol?

A. Yes.

Q. What if my car has an on-board computer?

A. An increasing percentage of vehicles are equipped with a variety of sensors which "report" to an on-board computer. Cars with this equipment generally require a 200 to 500 mile "burn in" period to allow the computer to adjust to the improved combustion efficiency.

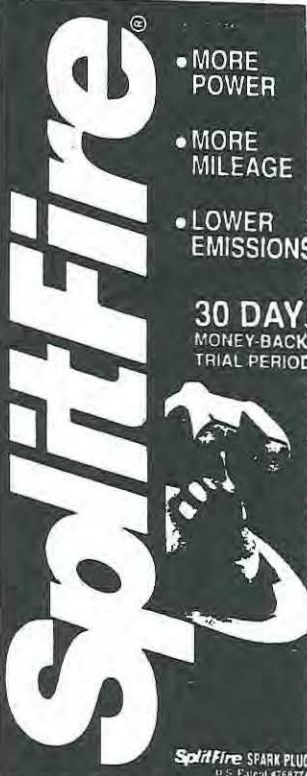
Q. Why do SplitFire Spark Plugs cost more than a standard plug?

A. The ultra premium design of our SplitFire Spark Plug, with its exclusive patented ground electrode, requires the highest manufacturing technology available today. And as the experts point out, SplitFires can deliver increased fuel economy along with the ability to purchase lower octane fuel. "It only costs more until you use it!"

Good	Better
	
Conventional Plugs • Proven performance • Same basic design from the 1950's • Spark gap the forward torch of plug • Flame heated & fouled by the ground electrode	Platinum Plugs • Heavier design spark more open • Beveled front of plug • Same performance gains • Larger gap • Flame heated and fouled by ground electrode
BEST	SplitFire Plugs
	
SplitFire Plugs • Spark open towards front and top of plug • Patented design allows larger and quicker flame development • Flame heated not blocked by ground electrode • Experts say improved combustion of the air/fuel mix leads results in: MORE POWER • MORE MILEAGE • LOWER EMISSIONS	SplitFire Plugs • Spark open towards front and top of plug • Patented design allows larger and quicker flame development • Flame heated not blocked by ground electrode • Experts say improved combustion of the air/fuel mix leads results in: MORE POWER • MORE MILEAGE • LOWER EMISSIONS

The SplitFire Advantage
"It Only Costs More Until You Use It!"
Equipped with conventional spark plugs, up to 15% of the combustion cycle is a modern engine and up to 10% of the combustion cycle is a waste of energy. SplitFire's larger flame kernel helps reduce partial mixtures, and experts say it helps improve:
PERFORMANCE
• More horsepower, more torque
• Crisper throttle response
• Works with any type of ignition system
• Works with any racing fuel
EMISSIONS
• Lower emissions
• Cleans up dirty cylinders
• Break in period 200-500 miles
ECONOMY
• More M.P.G.
• Lower octane needs
• Less prone to fouling longer life
• Keeps cylinders cleaner
RELIABILITY
• Quicker starts
• Smoother idle
• Reduces hesitation
30 DAY* MONEY-BACK TRIAL PERIOD
2 YEAR LIMITED WARRANTY AGAINST DEFECTS**
Every SplitFire comes with a 110 questions asked, money back 30 day trial period.

For SplitFire Technical Assistance, please call: 1-800-477-5847
St. St. 1190 © 1991, 92, 93 SplitFire, Inc.
*USA Only **1 year warranty on automotive plugs only



MORE POWER
MORE MILEAGE
LOWER EMISSIONS
30 DAY MONEY-BACK TRIAL PERIOD
2 YEAR LIMITED WARRANTY AGAINST DEFECTS**
SplitFire SPARK PLUGS
U.S. PAT. # 4,687,774

EXHIBIT A p. 2

Complaint

123 F.T.C.

EXHIBIT B

**CONVENTIONAL PLUGS COST CONSUMERS MORE—
MUCH MORE—THAN SPLITFIRES!**

Patented SplitFire Spark Plugs only cost more than conventional spark plugs . . . until you start to use them.

Let's talk money:

FUEL SAVINGS

If you drive 12,000 miles a year in a 6-cylinder car—and you get half the miles per gallon increase ("4 extra miles per gallon") reported by TRUCKIN' Magazine . . .

Over two years, if your mileage increased from 18 MPG to 18 MPG . . . your savings on fuel (at \$1.25 per gallon) would not only completely pay for the SplitFires—it would also give you an additional cash savings of \$129.25!

This example assumes that you pay \$36 dollars for your set of SplitFires—and, to repeat, assumes that you get half the mileage increase reported by TRUCKIN' Magazine.

Because no two cars are the same, you might save less—or much, much more!

There's no risk to see how much you'll save: Every SplitFire comes with a no-questions-asked, 30-day money-back guarantee!

EMISSIONS TEST SAVINGS

None of us want our vehicles to pollute the environment—and an ever-growing number of cities and states are passing strict emissions control tests to make sure no one does.

Until SplitFire, the corrective options for a vehicle that fails an emissions control test were financially costly and time consuming: Major tune-ups and timing readjustments; new sensors and/or onboard computer controls; new catalytic converters . . . and on and on.

What's the quick, easy, money-saving alternative? The pros know:

MUSTANG ILLUSTRATED: "We found (that by installing SplitFire Spark Plugs) the hydrocarbon (emissions) rate was reduced over 50 percent . . ."

HOT ROD: "The emissions reduction alone warrants using SplitFire Spark Plugs in those cars having trouble passing local emissions checks."

Those aren't claims, those are quotes. Simply replacing conventional spark plugs with SplitFires can not only help save the environment—they could save you substantial corrective repair money too!

There's no risk to see how much you'll save: Every SplitFire comes with a no-questions-asked, 30-day money-back guarantee!

OCTANE SAVINGS

Only a very small percentage of cars are produced with a manufacturer's requirement for "premium" or even "mid-range" gasoline.

Many motorists, in response to an ever-increasing loss of power and/or decreased "drivability" (rough idle, hard starts and "run on") decide they "need" premium fuel.

Using conventional plugs costs them a penalty of approximately 20 cents on every gallon of gas they buy! 90 percent of SplitFire owners surveyed reported equal or better performance on their octane test.

At 12,000 miles per year and 18 MPG (the same example from "Fuel Savings" above), saving 20 cents per gallon would save \$133.23 per year. That's in addition to the miles per gallon savings!

With SplitFires, the more you drive the more you save!

There's no risk to see how much you'll save: Every SplitFire comes with a no-questions-asked, 30-day money-back guarantee!

CONSUMER RESEARCH RESULTS

In addition to on-going technical testing in engineering labs, SplitFire conducts continuous consumer surveys to constantly monitor "real life" performance in all vehicle types, coast-to-coast.

These surveys are not restricted to any one area or type of vehicle or type of use. While primary reasons for initial purchase ("want more power" . . . "want better mileage" . . . "have to cut emissions") vary significantly, the degree of overall user satisfaction rate did not. Of all users (regardless of vehicle type, age, condition, and use) responding:

- 82% reported an increase in power with SplitFire
- 70% reported a gas mileage increase of from 1 to 6 more miles per gallon
- 100% experienced "no spark plug fouling"
- 91% said they would buy SplitFires for other vehicles and/or equipment they own
- 94% intend to replace their current set of SplitFires with a new set of SplitFires.

1231

Complaint

EXHIBIT C

Tape labeled:

Splitfire Spark Plugs
 "Economy #1"
 SFE-101193 (:30)

Yeah I went from probably 300 miles on a full tank to almost 400.

(on screen: Splitfire - the Patented Performance Spark Plug)

America is talking about Splitfire.

I probably was getting, I would say about 20 miles more per tankful, and that's a lot for me!

And when you're driving a four wheel drive vehicle, you need all the extra gas mileage you can get.

I have them on my motorcycle, my boat, and my car. I love 'em.

(Splitfire: The Patented Performance Spark Plug -

In [sic] only costs more until you use it)

Splitfire, at \$5.99 it only costs more 'till you use it.

EXHIBIT D

Splitfire Spark Plugs/Wire Set
 "Testimonial"

SFT-94-803WS (:50/:10)

My truck has 99,000 miles on it, and it's like a brand new engine.

(onscreen: America is taling [sic] about Splitfire. The patented performance spark plug)

America is talking about Splitfire. I feel like I have a new engine.

No hesitation. You hit your passing gear, you're gone! Right now!

("U.S. patent #4268774")

Splitfire won a United States patent. It doesn't look like any other sparkplug, it doesn't work like any other sparkplug.

(conventional spark plug - U.S. patented Splitfire)

I love 'em. I have them on my motorcycle, my boat, and my car. I love them. I love them.

(Splitfire - the patented performance spark plug)

Splitfire, at \$5.00, America knows it only costs more, 'till you use it!

(It only costs more until you use it.)

I can say I've saved at least \$3 - \$4/week.

Probably getting, I would say about 20 miles more per tankful. And that's a lot for me! They'll pay for themselves, basically, in the first 6 months you own 'em!

(Splitfire - the patented performance spark plug - It only costs more until you use it.)

Splitfire -- it only costs more, 'till you use it!

Here's another Splitfire breakthrough! Twin coil wire sets -- with a dual firing path to every plug.

(Box shown. More power! More mileage! 30-day money back guarantee! Details in store.)

More power, and more mileage, or your money back!

DECISION AND ORDER

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

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

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

1. Respondent SplitFire, Inc. is an Illinois corporation with its principal office or place of business at 4065 Commercial Avenue, Northbrook, Illinois.

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

ORDER

DEFINITIONS

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

1. "*Competent and reliable scientific evidence*" shall mean tests, analyses, research, studies, or other evidence based on the expertise of professionals in the relevant area, that have been conducted and evaluated in an objective manner by persons qualified to do so, using procedures generally accepted in the profession to yield accurate and reliable results.

2. Unless otherwise specified, "*respondent*" shall mean SplitFire, Inc., a corporation, its successors and assigns, and its officers, agents, representatives and employees. For purposes of this order, "successors" shall include, but not be limited to:

(a) Any person who

(1) Markets the SplitFire spark plug, any split-electrode spark plug, or any spark plug with more than two electrodes; and

(2) Holds or has held an ownership interest in and/or serves or has served as an officer of respondent SplitFire, Inc.; and

(b) Any entity that

(1) Markets the SplitFire spark plug, any split-electrode spark plug, or any spark plug with more than two electrodes; and

(2) Is owned or controlled, wholly or in part, by any person who holds or has held an ownership interest in respondent SplitFire, Inc. and/or serves or has served as an officer of respondent SplitFire, Inc.

3. "*In or affecting commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of the "SplitFire Spark Plug," or any other motor vehicle product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about:

A. The effect of such product on a vehicle's fuel economy;

B. The effect of such product on a vehicle's level of emissions;

C. The effect of such product on a vehicle's horsepower; or

D. The comparative or absolute cost savings that such product will contribute to or achieve,

unless, at the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any motor vehicle product, in or affecting commerce, shall not misrepresent, in any manner, expressly or by implication, the existence, contents, validity, results, conclusions or interpretations of any test, study, or research.

III.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any motor vehicle product, in or affecting commerce, shall not represent, in any manner, expressly or by implication, that the experience represented by any user testimonial or endorsement of the product represents the typical or ordinary experience of members of the public who use the product, unless:

A. At the time it is made, respondent possesses and relies upon competent and reliable scientific evidence that substantiates the representation; or

B. Respondent discloses, clearly and prominently, and in close proximity to the endorsement or testimonial, either:

1. What the generally expected results would be for users of the product, or

2. The limited applicability of the endorser's experience to what consumers may generally expect to achieve, that is, that consumers should not expect to experience similar results.

For purposes of this Part, "endorsement" shall mean as defined in 16 CFR 255.0(b).

IV.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any motor vehicle product, in or affecting commerce, shall not make any representation, in any manner, expressly or by implication, about the benefits, performance, or efficacy of such product, unless, at the time the representation is made, respondent possesses and relies upon competent and reliable evidence, which when appropriate must be competent and reliable scientific evidence, that substantiates the representation.

V.

It is further ordered, That respondent SplitFire, Inc. and its successors and assigns shall, for five (5) years after the last date of dissemination of any representation covered by this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All advertisements and promotional materials containing the representation;

B. All materials that were relied upon in disseminating the representation; and

C. All tests, reports, studies, surveys, demonstrations, or other evidence in their possession or control that contradict, qualify, or call into question the representation, or the basis relied upon for the representation, including complaints and other communications with consumers or with governmental or consumer protection organizations.

VI.

It is further ordered, That respondent SplitFire, Inc. and its successors and assigns, shall deliver a copy of this order to all current and future principals, officers, directors, and managers, and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order, and shall secure from each such person a signed and dated statement acknowledging receipt of the order. Respondent shall deliver this order to current personnel within thirty (30) days after the date of

service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VII.

It is further ordered, That respondent SplitFire, Inc., and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

VIII.

It is further ordered, That respondent SplitFire, Inc., and its successors and assigns, shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

IX.

This order will terminate on April 28, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

Complaint

123 F.T.C.

IN THE MATTER OF

ZALE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3738. Complaint, April 28, 1997--Decision, April 28, 1997*

This consent order prohibits, among other things, the Texas-based chain of retail jewelry stores from misrepresenting the composition or origin of any imitation, cultured or natural pearl product. The consent order requires the respondent to include a word such as "artificial," "imitation," or "simulated" in close proximity to any representation that an imitation pearl product contains pearls; and to include a word such as "cultured" or "cultivated" in close proximity to any representation that a cultured pearl product contains pearls. In addition, the consent order requires the respondent, for three years, to make available to consumers in their stores an information sheet that describes the origin of imitation, cultured or natural pearls.

*Appearances*For the Commission: *Matthew Gold.*For the respondent: *Alan P. Shor*, in-house counsel, Irving, TX.

COMPLAINT

The Federal Trade Commission, having reason to believe that Zale Corporation, a corporation ("respondent"), has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

1. Respondent Zale Corporation is a Delaware corporation with its principal office or place of business at 901 W. Walnut Hill Lane, Irving, Texas.

2. Respondent operates the country's largest chain of retail jewelry stores with more than 1,200 locations throughout the United States, Guam, and Puerto Rico.

3. Respondent has manufactured, advertised, labeled, offered for sale, sold, and distributed the "Ocean Treasures" line of imitation pearl jewelry, and numerous other lines of cultured pearl jewelry, to the public. These lines of jewelry have included bracelets, earrings, pendants, rings and strands. None of respondent's jewelry products has included natural pearls.

4. Federal Trade Commission industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. The Federal Trade Commission's Guides for the Jewelry, Precious Metals, and Pewter Industries, 16 CFR Part 23, 61 F.R. 27212 (May 30, 1996), state as follows:

A. Section 23.2 Misleading Illustrations. It is unfair or deceptive to use, as part of any advertisement, packaging material, label, or other sales promotion matter, any visual representation, picture, televised or computer image, illustration, diagram, or other depiction which, either alone or in conjunction with any accompanying words or phrases, misrepresents the type, kind, grade, quality, quantity, metallic content, size, weight, cut, color, character, treatment, substance, durability, serviceability, origin, preparation, production, manufacture, distribution, or any other material aspect of an industry product.

B. Section 23.20 Misuse of terms such as "cultured pearl," "seed pearl," "Oriental pearl," "natura," "kultured," "real," "gem," "synthetic," and regional designations. It is unfair or deceptive to use the term "cultured pearl," "cultivated pearl," or any other word, term, or phrase of like meaning to describe, identify, or refer to any imitation pearl.

C. Section 23.19 Misuse of the word "pearl." (c) It is unfair or deceptive to use the word "pearl" to describe, identify, or refer to an imitation pearl unless it is immediately preceded, with equal conspicuousness, by the word "artificial," "imitation," or "simulated," or by some other word or phrase of like meaning, so as to indicate definitely and clearly that the product is not a pearl.

5. The acts and practices of respondent alleged in this complaint have been in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act.

6. Respondent has disseminated or has caused to be disseminated advertisements for its Ocean Treasures imitation pearl jewelry products, including but not necessarily limited to the attached Exhibits A through B. These advertisements contain the following statements and depictions:

1. "ZALES THE DIAMOND, SEMI-PRECIOUS AND PEARL STORE™
Ocean Treasures™ Fine Jewelry
Created by nature, enhanced by man."
[Depictions of necklace, earrings, rings, and pendants, all of which appear to contain pearls or cultured pearls](Exhibit A)

2. "Ocean Treasures™ Fine Jewelry
Created by nature, enhanced by man."
[Depictions of necklace, earrings, and pendant, all of which appear to contain pearls or cultured pearls] (Exhibit B)

7. Through the means described in paragraph six, respondent has represented, expressly or by implication, that the Ocean Treasures line of jewelry is composed of cultured pearls.

8. In truth and in fact, the Ocean Treasures line of jewelry is not composed of cultured pearls, but rather is composed exclusively of imitation pearls. A cultured pearl is a pearl formed by a mollusk as a result of an irritant placed in the mollusk's shell by humans. An imitation pearl is a manufactured product that is designed to simulate in appearance a pearl or cultured pearl. Therefore, the representation set forth in paragraph seven was, and is, false or misleading.

9. The acts and practices of respondent as alleged in this complaint constitute unfair or deceptive acts or practices in or affecting commerce in violation of Section 5(a) of the Federal Trade Commission Act.

1244

Complaint

EXHIBIT A

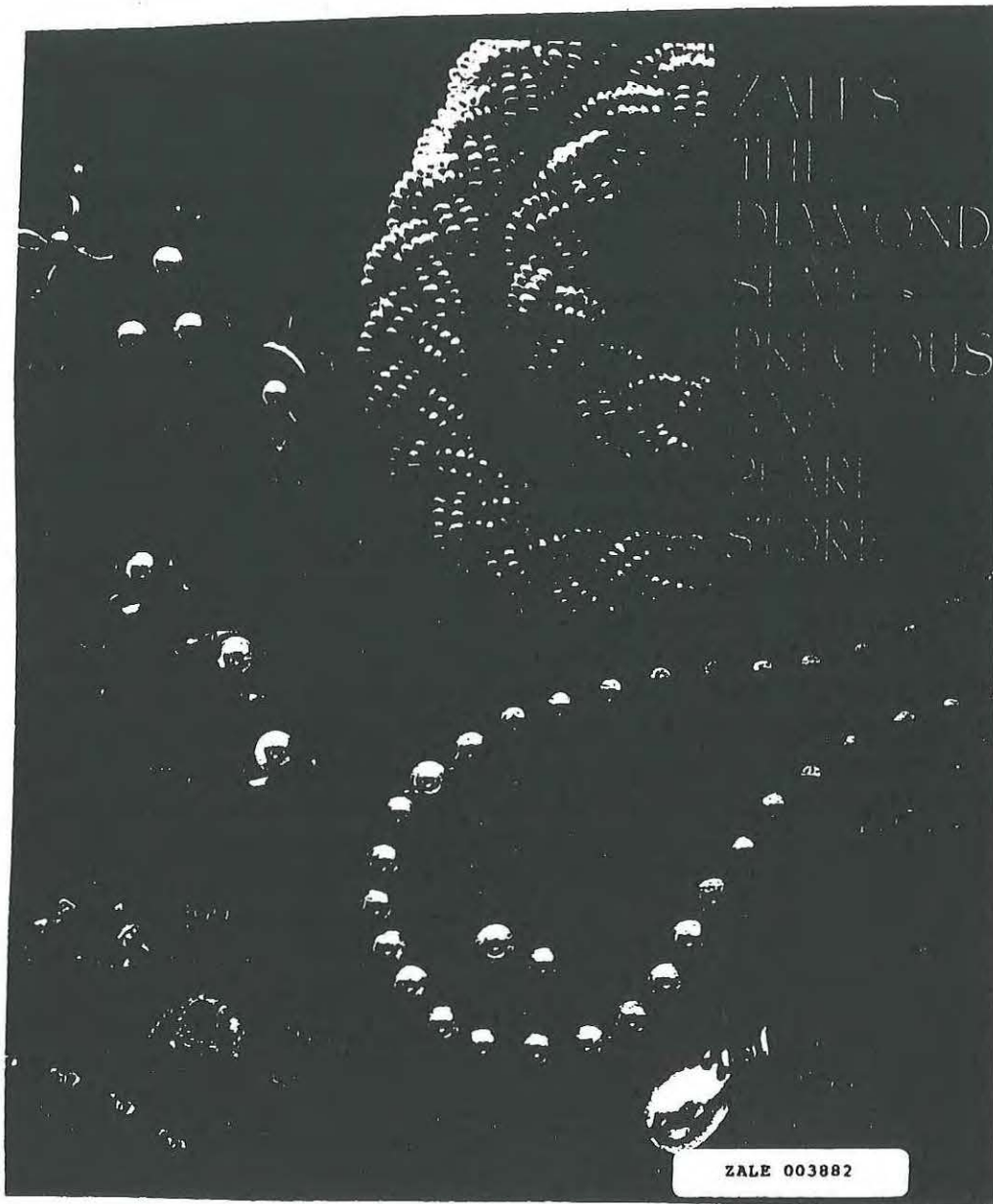


EXHIBIT A

Complaint

123 F.T.C.

EXHIBIT B

03/94

03/94

BRIDE.

109
\$25 a month

NEW!
109
\$25 a month

109
\$25 a month

1100
\$25 a month

249
\$25 a month

100
\$25 a month

300
\$25 a month

709
\$25 a month

1199
\$36 a month

709
\$25 a month

1199
\$36 a month

ZALES DIAMOND PASSPORT®
Exclusively ours at an
Incredible value for you!
• 1/4 Carat Round for \$795
• 1/3 Carat Round for \$1195 or
• 1/2 Carat Round for \$2295
Your Zales Diamond Passport®
purchase will include an official
International Gemological
Institute Appraisal Certificate
and is backed by Zales
Lifetime Diamond Commitment.

ZALE 003871

EXHIBIT B

DECISION AND ORDER

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

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

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

1. Respondent Zale Corporation is a Delaware corporation with its principal office or place of business at 901 W. Walnut Hill Lane, Irving, Texas.

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

ORDER

DEFINITIONS

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

1. "*Clearly and prominently*" shall mean as follows:

A. In a television or video advertisement, the disclosure shall be presented simultaneously in both the audio and video portions of the advertisement. The audio disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it. The video disclosure shall be of a size and shade, and shall appear on the screen for a duration, sufficient for an ordinary consumer to read and comprehend it.

B. In a radio advertisement, the disclosure shall be delivered in a volume and cadence sufficient for an ordinary consumer to hear and comprehend it.

C. In a print advertisement, or on any in-store sign or display, the disclosure shall be in a type size, and in a location, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears. In multipage documents, the disclosure shall appear on the cover or first page.

D. On a product label, the disclosure shall be in a type size, and in a location on the principal display panel, that are sufficiently noticeable so that an ordinary consumer will see and read it, in print that contrasts with the background against which it appears.

Nothing contrary to, inconsistent with, or in mitigation of the disclosure shall be used in any advertisement or on any label.

2. "*Natural Pearl*" shall mean a calcareous concretion consisting essentially of alternating concentric layers of carbonate of lime and organic material formed within the body of certain mollusks, the result of an abnormal secretory process caused by an irritation of the mantle of the mollusk following the intrusion of some foreign body inside the shell of the mollusk, or due to some abnormal physiological condition in the mollusk, neither of which has in any way been caused or induced by humans.

3. "*Cultured Pearl*" shall mean the composite product created when a nucleus (usually a sphere of calcareous mollusk shell) planted by humans inside the shell or in the mantle of a mollusk is coated with nacre by the mollusk.

4. "*Imitation Pearl*" shall mean a manufactured product composed of any material or materials that simulate in appearance a natural pearl or cultured pearl.

5. Unless otherwise specified, "*respondent*" shall mean Zale Corporation, a corporation, its successors and assigns, and its officers, agents, representatives and employees.

6. "*Commerce*" shall mean as defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. 44.

I.

It is ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of imitation pearl jewelry, in or affecting commerce, shall not represent that imitation pearls are cultured pearls.

II.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of imitation pearl jewelry, in or affecting commerce, shall not represent that such product is or contains one or more pearls unless respondent discloses, clearly and prominently, and in close proximity to such representation, that the product is comprised of one or more imitation pearls, by describing such product as "artificial," "imitation," or "simulated," or with another word or phrase of like meaning.

III.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of cultured pearl jewelry, in or affecting commerce, shall not represent that such product is or contains one or more pearls unless respondent discloses, clearly and prominently, and in close proximity to such representation, that the product is comprised of one or more cultured pearls, by describing such product as "cultured" or "cultivated," or with another word or phrase of like meaning.

IV.

It is further ordered, That respondent, directly or through any corporation, subsidiary, division, or other device, in connection with the manufacturing, labeling, advertising, promotion, offering for sale, sale, or distribution of any jewelry product composed partially or entirely of natural pearls, cultured pearls, or imitation pearls, shall not misrepresent the composition or origin of such product.

V.

It is further ordered, That, for a period of three (3) years from the date of service of this order, respondent, directly or through any corporation, subsidiary, division, or other device, shall make available, in a place and manner calculated to attract the attention of consumers, an information sheet in the form set forth in Appendix A to this order at each store that offers for sale any jewelry product composed partially or entirely of natural pearls, cultured pearls, or imitation pearls.

VI.

It is further ordered, That respondent, and its successors and assigns, shall, for five (5) years after the date of issuance of this order, maintain and upon request make available to the Federal Trade Commission for inspection and copying, business records demonstrating its compliance with the terms and provisions of this order, including but not limited to:

A. All advertisements and promotional materials for jewelry containing one or more natural pearls, cultured pearls, or imitation pearls;

B. All brochures, hang tags or other in-store displays relating to jewelry containing one or more natural pearls, cultured pearls, or imitation pearls; and

C. All invoices and order forms relating to jewelry containing one or more natural pearls, cultured pearls, or imitation pearls.

VII.

It is further ordered, That respondent, and its successors and assigns, shall deliver a copy of this order, or a summary in the form

set forth as Appendix B to this order, to all current and future principals and directors; to all current and future officers and managers with responsibilities or duties affecting compliance with the terms of this order; and to all current and future employees, agents, and representatives having responsibilities with respect to the subject matter of this order. Respondent shall deliver this order, or a summary in the form set forth as Appendix B to this order, to current personnel within thirty (30) days after the date of service of this order, and to future personnel within thirty (30) days after the person assumes such position or responsibilities.

VIII.

It is further ordered, That respondent, and its successors and assigns, shall notify the Commission at least thirty (30) days prior to any change in the corporation that may affect compliance obligations arising under this order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent or affiliate that engages in any acts or practices subject to this order; the proposed filing of a bankruptcy petition; or a change in the corporate name or address. Provided, however, that, with respect to any proposed change in the corporation about which respondent learns less than thirty (30) days prior to the date such action is to take place, respondent shall notify the Commission as soon as is practicable after obtaining such knowledge. All notices required by this Part shall be sent by certified mail to the Associate Director, Division of Enforcement, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C.

IX.

It is further ordered, That respondent shall, within sixty (60) days after the date of service of this order, and at such other times as the Federal Trade Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

X.

This order will terminate on April 28, 2017, or twenty (20) years from the most recent date that the United States or the Federal Trade

Commission files a complaint (with or without an accompanying consent decree) in federal court alleging any violation of the order, whichever comes later; provided, however, that the filing of such a complaint will not affect the duration of:

A. Any Part in this order that terminates in less than twenty (20) years;

B. This order's application to any respondent that is not named as a defendant in such complaint; and

C. This order if such complaint is filed after the order has terminated pursuant to this Part.

Provided further, that if such complaint is dismissed or a federal court rules that the respondent did not violate any provision of the order, and the dismissal or ruling is either not appealed or upheld on appeal, then the order will terminate according to this Part as though the complaint had never been filed, except that the order will not terminate between the date such complaint is filed and the later of the deadline for appealing such dismissal or ruling and the date such dismissal or ruling is upheld on appeal.

APPENDIX A

Your Guide to

Pearls

Natural Pearls

A pearl formed in the wild by the random intrusion of a natural irritant into a mollusk's shell, without the intervention of man. There are few natural pearls on the general consumer jewelry market today.

Cultured Pearls

A cultured pearl is also grown by nature but with the assistance of man. This patented process involves the insertion of a "nucleus" into the oyster. The oyster is then carefully nurtured for the desired type of pearl. The quality of cultured pearls varies and is judged by the pearl's lustre, surface, shape, color and size.

Imitation Pearls

A manufactured product composed of any material or materials that simulate in appearance a natural pearl or cultured pearl.

Decision and Order

123 F.T.C.

APPENDIX B

[To be printed on Zale Corporation letterhead]

[date]

Dear Zale employee:

This letter is to inform you that Zale Corporation recently settled a civil dispute with the Federal Trade Commission ("FTC") regarding certain alleged claims for our "Ocean Treasures" line of imitation pearl jewelry. We deny the FTC's allegations, but in order to avoid protracted litigation we have entered into a settlement agreement. As part of that settlement, we are required to summarize the requirements of the settlement for our directors and officers, and for employees and others who sell our products to consumers.

The FTC alleged that Zale advertisements falsely claimed, expressly or by implication, that Ocean Treasures jewelry was composed of cultured pearls. Our settlement with the FTC contains the following requirements:

1. Zale may not represent that imitation pearls are cultured pearls.
2. Zale may not represent that imitation pearl jewelry contains pearls unless we specifically describe the jewelry as "artificial," "imitation," "simulated," or with another word or phrase of like meaning.
3. Zale may not represent that cultured pearl jewelry contains pearls unless we specifically describe the jewelry as "cultured" "cultivated," or with another word or phrase of like meaning.
4. Zale may not misrepresent the composition or origin of any jewelry product composed partially or entirely of natural pearls, cultured pearls, or imitation pearls.
5. Zale must make available to consumers for a period of three years, in each store that offers for sale natural pearl, cultured pearl, or imitation pearl jewelry, an information sheet that describes the difference among natural pearls, cultured pearls, and imitation pearls. This information sheet, which we are providing to each store, must be made available in a place and manner that is calculated to attract the attention of consumers.

Requirements 1-4, above, apply to all representations made in advertising, labeling, promotion, offering for sale, sale and distribution, including individual sales transactions.

Thank you for your assistance. If you have any questions about the requirements contained in this letter, please call _____.

Sincerely,

[Zale Official]

[Title]

1257

Complaint

IN THE MATTER OF

AMERICAN CYANAMID COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3739. Complaint, May 12, 1997--Decision, May 12, 1997*

This consent order prohibits, among other things, a New Jersey-based distributor of agricultural herbicides and insecticides from conditioning the payment of rebates or other incentives on the resale prices its dealers charge for their products, and from agreeing with its dealers to control or maintain resale prices. The consent order requires the respondent, for three years, to post clearly and conspicuously a statement, on any price list, advertising or catalogue that contains a suggested resale price, that dealers remain free to determine on their own the prices at which they sell the company's products. In addition, the respondent must mail a letter containing this statement to all current dealers, distributors, officers, management employees and sales representatives.

Appearances

For the Commission: *Michael Antalics and Sarah O. Allen.*

For the respondent: *Daniel K. Mayers, Wilmer, Cutler & Pickering, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Cyanamid Company, a corporation (hereinafter "Am Cy" or "respondent"), has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint, stating its charges as follows:

PARAGRAPH 1. Respondent American Cyanamid Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maine, with its principal office and place of business at One Campus Drive, Parsippany, New Jersey. Respondent is a wholly-owned subsidiary of American Home Products Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at Five Giralda Farms, Madison, New Jersey.

PAR. 2. Respondent is now, and for some time has been, engaged in the offering for sale, sale, and distribution of crop protection chemicals, such as herbicides and insecticides used in commercial agriculture, to over 2500 retail dealers located throughout the United States. In 1995, Am Cy sold at retail more than \$1 billion of its crop protection chemicals.

PAR. 3. In 1995, Am Cy was the market share leader in three domestic crop protection chemical markets: soybean broadleaf herbicides, soybean grass herbicides, and corn soil insecticides. In addition, Am Cy had the second-largest share of the domestic cotton grass herbicide market.

PAR. 4. Respondent's acts and practices, including the acts and practices alleged herein, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. For approximately five years beginning in 1989, Am Cy operated two rebate programs for its retail dealers. From 1989-1992, the plan was called the "Cash Reward on Performance" ("C.R.O.P.") program, and was renamed the "Award for Performance Excellence" ("A.P.E.X.") program in late 1992 through August 1995. Pursuant to the written agreements respondent entered into with its dealers under these programs, Am Cy offered to pay the dealers substantial rebates on each sale if the dealers sold Am Cy's crop protection chemicals at or above specified minimum resale prices. The specified minimum resale prices were equal to the wholesale prices paid by the dealers for the crop protection chemical products. Under the terms of the agreements, a dealer was not entitled to, and did not receive, any rebate on sales made below the specified minimum price; therefore, sales below Am Cy's specified minimum resale prices were made at a loss to the dealer. The dealers overwhelmingly accepted Am Cy's offer by selling at or above the specified minimum prices.

PAR. 6. Am Cy also included certain nonprice performance criteria in its C.R.O.P. and A.P.E.X. programs that could increase the amount of the rebate, but compliance with those performance criteria was neither necessary nor, by itself, sufficient to obtain rebates. For example, if the dealer did not meet any of Am Cy's performance criteria, but sold the product at or above the specified minimum resale price, the dealer nonetheless received a rebate on that sale. On the other hand, if the dealer met all of the performance criteria, but sold the product below Am Cy's specified minimum resale price, the dealer received no rebate on that sale.

PAR. 7. The purpose, effects, tendency, or capacity of the acts and practices described in paragraphs five and six are and have been to restrain trade unreasonably and hinder competition in the provision of crop protection chemicals in the United States.

PAR. 8. The aforesaid acts and practices of the respondent were and are to the prejudice and injury of the public. These acts and practices constitute unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. These acts and practices may recur in the absence of the relief requested.

Commissioner Starek dissenting.

DECISION AND ORDER

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

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

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

1. Respondent American Cyanamid Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maine, with its principal office and place of business at One Campus Drive, Parsippany, New Jersey. Respondent is a wholly-owned subsidiary of American Home Products Corporation, a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business at Five Giralda Farms, Madison, New Jersey.

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

ORDER

I.

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

(A) "*Respondent*" or "*Am Cy*" means American Cyanamid Company, its directors, officers, employees, agents and representatives, predecessors, successors (including American Home Products Corporation) and assigns, and its subsidiaries, divisions, groups, and affiliates controlled, directly or indirectly, by American Cyanamid Company, and the respective directors, officers, employees, agents and representatives, successors and assigns of each.

(B) "*Commission*" means the Federal Trade Commission.

(C) "*Product*" or "*Products*" means any crop protection chemicals, such as herbicides and insecticides used in commercial agriculture, that are manufactured, offered for sale, sold, or distributed by Am Cy to retail dealers or consumers located in the United States of America.

(D) "*Dealer*" means any person, corporation or entity not owned by Am Cy that in the course of its business purchases from Am Cy or a distributor and sells any Product in or into the United States of America.

(E) "*Resale price*" means any price, price floor, minimum price, maximum discount, price range, or any mark-up formula or margin of profit used by any dealer for pricing any Product. "Resale price" includes, but is not limited to, any established or customary resale price.

II.

It is ordered, That Am Cy, directly or indirectly, or through any corporate or other device, in connection with the manufacturing, offering for sale, sale, or distribution of any Product in or into the United States of America in or affecting "commerce," as defined by the Federal Trade Commission Act, forthwith cease and desist from:

(A) Conditioning the payment of any rebate or other incentive to any dealer, in whole or in part, directly or indirectly, on the resale price at which the dealer offers for sale or sells any Product; and

(B) Otherwise agreeing with any dealer to control or maintain the resale price at which the dealer may offer for sale or sell any Product.

III.

It is further ordered, That, for a period of three (3) years from the date on which this order becomes final, Am Cy shall clearly and conspicuously state the following on any list, advertising, book, catalogue, or promotional material where it has suggested any resale price for any Product to any dealer:

ALTHOUGH AMERICAN CYANAMID MAY SUGGEST RESALE PRICES FOR PRODUCTS, DEALERS ARE FREE TO DETERMINE ON THEIR OWN THE PRICES AT WHICH THEY WILL SELL AMERICAN CYANAMID PRODUCTS.

IV.

It is further ordered, That respondent shall:

(A) Within thirty (30) days after the date on which this order becomes final, mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to all of its officers, management employees, dealers, distributors, and agents or representatives having sales or policy responsibilities with respect to Am Cy's Products sold in or into the United States of America;

(B) For a period of three (3) years after the date on which this order becomes final, mail by first class mail the letter attached as Exhibit A, together with a copy of this order, to each person who becomes an officer, management employee, or agent or representative having sales or policy responsibilities with respect to Am Cy's Products sold in or into the United States of America, within thirty

(30) days of the commencement of such person's employment or affiliation with Am Cy; and

(C) For a period of three (3) years after the date on which this order becomes final, require each of its officers, management employees, and agents or representatives having sales or policy responsibilities with respect to Am Cy's Products sold in or into the United States of America, to sign and submit to Am Cy within thirty (30) days of the receipt thereof a statement that: (1) acknowledges receipt of the order; (2) represents that the undersigned has read and understands the order; and (3) acknowledges that the undersigned has been advised and understands that non-compliance with the order may subject American Cyanamid Company to penalties for violation of the order.

V.

It is further ordered, That respondent shall:

(A) Within sixty (60) days after the date on which this order becomes final, and annually thereafter for three (3) years on the anniversary of the date this order becomes final, and at such other times as the Commission shall request, file with the Commission a verified written report setting forth in detail the manner and form in which Am Cy has complied and is complying with this order;

(B) For a period of three (3) years after the order becomes final, maintain and make available to Commission staff for inspection and copying, upon reasonable notice, all records of communications with dealers, distributors, and agents or representatives having sales or policy responsibilities with respect to Am Cy's Products sold in or into the United States of America relating to any aspect of retail pricing in the United States of America, and records pertaining to any action taken in connection with any activity covered by paragraphs II, III, IV, and V of this order; and

(C) Notify the Commission at least thirty (30) days prior to any proposed changes in Am Cy 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 that may affect compliance obligations arising out of this order.

1257

Decision and Order

VI.

It is further ordered, That this order shall terminate on May 12, 2017.

Commissioner Starek dissenting.

EXHIBIT A

[AMERICAN CYANAMID LETTERHEAD]

Dear Dealer:

The Federal Trade Commission has conducted an investigation into American Cyanamid's sales policies, and in particular, American Cyanamid's C.R.O.P. and A.P.E.X. rebate programs, which were in effect from mid-1989 through August 1995. To expeditiously resolve the investigation and to avoid disruption to the conduct of its business, American Cyanamid has agreed, without admitting any violation of the law, to the entry of a Consent Order by the Federal Trade Commission prohibiting certain practices relating to resale prices. A copy of the order is enclosed. This letter and the accompanying order are being sent to all of our dealers, distributors, sales personnel and representatives.

The order spells out our obligations in greater detail, but we want you to know and understand that you can sell our products at any price you choose. While we may send materials to you which contain suggested retail prices, you remain free to sell those products at any price you choose.

We look forward to continuing to do business with you in the future.

Sincerely yours,

President

STATEMENT OF CHAIRMAN ROBERT PITOFSKY AND
COMMISSIONERS JANET D. STEIGER AND CHRISTINE A. VARNEY

The Commission today enters a consent order with American Cyanamid prohibiting it from engaging in conduct designed to prevent its dealers from making discounted sales below the minimum price that American Cyanamid specified. American Cyanamid entered into written agreements with its dealers that provided dealers with "rebates" each time they sold their product at or above a certain resale price (the floor transfer price). For dealers who sold at the specified price, this rebate constituted their entire profit margin. The Commission believes that this conduct amounted to an illegal resale price maintenance agreement.

Commissioner Starek, in his dissent, criticizes this enforcement action for a number of reasons. As explained below, we disagree with Commissioner Starek's reasoning.

First, the dissenting statement appears to conclude that a situation where a manufacturer and a dealer enter into an express agreement that the manufacturer will pay the dealer to adhere to the manufacturer's specified resale price, is not an "agreement on resale prices" but rather some form of voluntary behavior. Judge Posner responded to similar arguments in *Khan v. State Oil*.¹

In *Khan*, the court declared a maximum resale price arrangement *per se* illegal where the manufacturer permitted dealers to charge above a maximum price, but required them in such case to provide any resulting profit above the maximum price to the manufacturer. The "voluntary" nature of the arrangement did not detract from the finding that there was an agreement. Judge Posner noted that the arrangement was indistinguishable from an agreement not to exceed the maximum price, because the dealer was sanctioned for violating the agreement by having to remit any resulting profit to the manufacturer. In responding to *State Oil*'s argument that there was no price fixing agreement, Judge Posner observed: "The purely formal character of the distinction that it urges can be seen by imagining that the contract had forbidden *Khan* to exceed the suggested resale price and had provided that if he violated the prohibition the sanction would be for him to remit any resulting profit to *State Oil*."²

¹ 93 F.3d 1358 (7th Cir.), cert. granted, ___ S. Ct. ___ (1996).

² *Id.*, at 1361. See also *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987) (in finding a violation based on economic coercion, Judge Posner noted, "It is as if Vermont Castings had told Isaksen that it would reduce its wholesale price to him if he raised his retail price, and Isaksen had accepted the offer by raising his price.").

We agree with Judge Posner. In this case, the sanction was loss of the rebate for sales made below the floor transfer price. If an agreement to forego one's entire profit margin if one departs from the specified price does not constitute a price maintenance agreement, then nothing remains of the *per se* rule.

Second, the dissent seems to suggest that this case is one where agreement is being inferred from unilateral conduct. We cannot concur. American Cyanamid entered into written agreements which offered financial incentives for adherence to a minimum price schedule. Courts, both before and after Sharp,³ have held such arrangements unlawful where adherence to a suggested price was the *quid pro quo* for the financial inducements. Judge Posner's decision in Khan is consistent with this approach.⁴

Third, the dissenting statement, relying in large part on recent economic literature, argues that American Cyanamid's program should not be condemned without proof of a supplier cartel, dealer cartel, or market power.⁵ That view is inconsistent with the Supreme Court's view that resale price maintenance continues to be illegal *per se* and we reject the idea that the Supreme Court can be overruled by scholarly contributions to economic journals.

Finally, we cannot agree with the suggestion that this enforcement action somehow creates uncertainty about the Commission's treatment of pass through rebates or cooperative advertising programs. As the analysis to aid public comment explains, pass through programs have always been permitted, as long as the dealer is free to discount to an even greater extent than the pass through amount. Similarly, both the courts and the Commission have judged cooperative advertising cases under the rule of reason, as long as the arrangements do not limit the dealer's right: (1) to discount below the advertised price, and (2) to advertise at any price when the dealer itself pays for the advertisement. Unlike those programs, American Cyanamid's rebate program controlled the actual prices charged and was structured to prevent dealers from pricing below the floor transfer price.

³ *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

⁴ 93 F.3d at 1362.

⁵ Although we do not fully detail our disagreement with the description of the facts in the dissent, we believe that a full trial would have shown that an overwhelming portion of sales were made at or above the minimum resale price. Moreover, a dealer's advisory council voted to advise American Cyanamid to retain the program in order to protect its margins.

Attachment to Statement of Chairman Pitofsky,
Commissioner Steiger, and Commissioner Varney

ANALYSIS TO AID PUBLIC COMMENT ON
THE PROPOSED CONSENT ORDER

The Federal Trade Commission ("the Commission") has accepted an agreement to a proposed consent order from American Home Products Corporation ("AHP"), through its wholly-owned subsidiary, American Cyanamid Company ("American Cyanamid"), located in Parsippany, New Jersey. The agreement would settle charges by the Commission that American Cyanamid violated Section 5 of the Federal Trade Commission Act by engaging in practices that restricted competition in the domestic markets for crop protection chemicals, which are herbicides and insecticides widely used in commercial agriculture.

The proposed consent order has been placed on the public record for sixty (60) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After sixty (60) days, the Commission will again review the agreement and the comments received and will decide whether it should withdraw from the agreement or make final the agreement's proposed order.

The purpose of this analysis is to invite public comment concerning the consent order and any other aspect of American Cyanamid's alleged anticompetitive conduct relating to its C.R.O.P. and A.P.E.X. rebate programs. This analysis is not intended to constitute an official interpretation of the agreement and order or to modify its terms in any way.

The Complaint

The complaint prepared for issuance by the Commission along with the proposed order alleges that American Cyanamid has engaged in acts and practices that have unreasonably restrained competition in the sale and distribution of crop protection chemicals in the United States. In 1995, the Commission's proposed complaint alleges, American Cyanamid sold at retail more than \$1 billion of its crop protection chemicals and was the market share leader in three domestic crop protection chemical markets: soybean broadleaf herbicides, soybean grass herbicides, and corn soil insecticides, as well as being the second-largest domestic producer of cotton grass herbicides.

According to the complaint, American Cyanamid operated two cash rebate programs for its retail dealers for approximately five years. From 1989-1992, the plan was called the "Cash Reward on Performance" ("C.R.O.P.") program, and was renamed the "Award for Performance Excellence" ("A.P.E.X.") program in late 1992 through August 1995. The complaint states that American Cyanamid entered into written agreements with its dealers under these programs, pursuant to which American Cyanamid offered to pay its dealers substantial rebates on each sale of its crop protection chemicals that was made at or above specified minimum resale prices. According to the complaint, the dealers overwhelmingly accepted American Cyanamid's rebate offer by selling at or above the specified minimum resale prices.

The complaint further alleges that the wholesale prices in the agreements were set at a level equal to the specified minimum resale prices, and because a dealer received no rebate on sales below the specified prices, those sales were made at a loss to the dealer.

The complaint further states that although American Cyanamid included certain non-price performance criteria in its rebate programs that could increase the amount of the rebate, a dealer's compliance with these performance criteria was neither necessary nor, by itself, sufficient to obtain rebates. As examples, the complaint alleges that if a dealer met all of American Cyanamid's performance criteria, but sold the product for less than American Cyanamid's specified minimum resale price, that dealer received no rebate on the sale. On the other hand, if the dealer met none of the performance criteria, but sold the product at or above American Cyanamid's specified minimum resale price, the dealer nonetheless received a rebate on that sale.

American Cyanamid's conditioning of financial payments on dealers' charging a specified minimum price amounted to the *quid pro quo* of an agreement on resale prices. In cases where this issue has arisen, both before and after the Supreme Court examined the *per se* rule against resale price maintenance in *Monsanto and Sharp*,¹ courts have treated such agreements as *per se* illegal. *See Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 39, 40 (5th Cir.), *cert denied*, 409 U.S. 1077 (1972) (stating that ". . . adherence to a suggested price schedule was the *quid pro quo* for Lehrman's receiving Gulf's TCAs [temporary competitive allowances]" and "there is no comparable justification for

¹ *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

conditioning wholesale price support upon adherence to a schedule of minimum retail prices." (emphasis in original)); *Butera v. Sun Oil Co., Inc.*, 496 F.2d 434, 437 (1st Cir. 1974). By offering financial inducements in return for selling at specified minimum prices, a manufacturer seeks the "acquiescence or agreement" of its dealers in a resale price-fixing scheme. *Monsanto*, 465 U.S. at 764 n. 9. The dealer, in turn, accepts the manufacturer's offer by selling at or above the specified minimum prices. *See Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1164 (7th Cir. 1987) (Posner, J.) (an "obvious" resale price-fixing agreement is found" . . . if [the manufacturer] had told [the dealer] that it would reduce its wholesale price to him if he raised his retail price, and [the dealer] had accepted the offer by raising his price."). *See also Khan v. State Oil Co.*, 93 F.3d 1358, 1360-61 (7th Cir. 1996) (Posner, J.), *petition for cert. pending* (No. 96-871) (agreement on price found where dealership agreement on its face allowed dealer to charge any resale price it wished, but distributor tied financial consequences to dealers' not charging the resale prices it suggested). As a result, incentives to reduce price below the specified level were substantially affected by American Cyanamid's rebate scheme.

The rebate programs challenged in this case are unlike situations where manufacturers are permitted to condition a discount or other incentive on that discount being "passed through" to consumers, which prevents a dealer from simply "pocketing" the discount. In these types of cases, the dealer is free to sell at even lower prices than the amount of the direct "pass through" of the discount or other incentive. Discounts cannot be conditioned, therefore, on the dealers' adherence to specified minimum prices. *See AAA Liquors, Inc. v. Joseph E. Seagram and Sons, Inc.*, 705 F.2d 1203, 1206 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983) (Seagram's requirement of passing through its discount "[did] not prohibit the wholesaler from making greater reductions in price than the discount provides."). *See also Acquaire v. Canada Dry Bottling Co.*, 24 F.3d 401, 409-10 (2d Cir. 1994); *Lewis Service Center, Inc. v. Mack Trucks, Inc.*, 714 F.2d 842, 845-47 (8th Cir. 1983) (because dealers could discount more than Mack's sales assistance, the court found that "the purpose of Mack's discount program [was] not to force adherence to any particular price scheme of Mack's.").

The Proposed Consent Order

Part I of the proposed order covers definitions. These definitions make clear that the consent order applies to the directors, officers, employees, agents and representatives of American Cyanamid. The order also defines the terms product, dealer and resale price.

Part II of the order contains two major operative provisions: Part II(A) deals with the specific conduct at issue in this case. It prohibits American Cyanamid from conditioning the payment of rebates or other incentives on the resale prices its dealers charge for its products. Part II(B) prevents American Cyanamid from otherwise agreeing with its dealers generally to control or maintain resale prices.

Neither of these provisions should be construed to prohibit lawful cooperative advertising programs or "pass through" discount programs that are not otherwise part of an unlawful resale price maintenance scheme. The Commission has previously determined that order provisions prohibiting agreements on resale prices do not restrict a company's ability to implement otherwise lawful cooperative advertising and "pass through" rebate plans because such programs do not, in themselves, constitute agreements on resale prices. *See, e.g., In Re Magnavox Co.*, 113 FTC 255, 263, 269-70 (1990).

Part III of the order requires that for a period of three (3) years from the date on which the order becomes final, American Cyanamid shall include a statement, posted clearly and conspicuously, on any price list, advertising, catalogue or other promotional material where it has suggested a resale price for any product to any dealer. The required statement explains that while American Cyanamid may suggest resale prices for its products, dealers remain free to determine on their own the prices at which they will sell American Cyanamid's products.

Part IV of the order requires that for a period of three (3) years from the date on which the order becomes final, American Cyanamid shall mail the letter attached to the order as Exhibit A and a copy of this order to all of its current dealers, distributors, officers, management employees, and agents or representatives with sales or policy responsibilities for American Cyanamid's products. American Cyanamid also must mail the letter and order to any new dealer, distributor or employee in the above positions within thirty (30) days after the commencement of that person's affiliation or employment with American Cyanamid. All of the above dealers, distributors and employees must sign and return a statement to American Cyanamid

within thirty (30) days of receipt that acknowledges they have read the order and that they understand that non-compliance with the order may subject American Cyanamid to penalties for violation of the order.

Part V of the order requires that American Cyanamid file with the Commission an annual verified written report giving the details of the manner and form in which American Cyanamid is complying and has complied with the order. In addition, Part V of the order also requires American Cyanamid to maintain and make available to the Commission upon reasonable notice all records of communications with dealers, distributors, and agents or representatives relating to resale prices in the United States, as well as records of any action taken in connection with activities covered by the rest of the order. Finally, American Cyanamid must inform the Commission at least thirty (30) days before any proposed changes in the corporation, such as dissolution or sale.

CONCURRING STATEMENT OF COMMISSIONER MARY L. AZCUENAGA

I concur in the decision to issue the consent order, but decline to join the separate statement of Chairman Pitofsky and Commissioners Steiger and Varney. The consent agreement, which includes the consent order and the complaint on which it is based, constitutes the decisional document of the Commission. My substantive views on this matter are contained entirely within the four corners of the decisional document. If the majority wants to revise or expand its decision, the proper course is to revise the decisional document. *See* Dissenting Statement of Commissioner Mary L. Azcuenaga in Dell Computer Corp. at 21-23 (Docket No. 3658, May 20, 1996).

DISSENTING STATEMENT OF COMMISSIONER ROSCOE B. STAREK, III

I respectfully dissent from the Commission's decision to issue a consent order against American Cyanamid Company ("AmCy"), a producer of agricultural chemicals. The complaint claims that certain aspects of AmCy's compensation arrangement with its dealers constitute *per se* illegal resale price maintenance ("RPM"), in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45. I do not agree that AmCy's dealer rebate policies constitute the functional and legal equivalent of RPM agreements. Consequently, I conclude that the decision to challenge AmCy's distribution policies would expand substantially the range of activities

condemned by the Commission as illegal *per se*. This policy is ill-advised and runs contrary to twenty years of case law in which the scope of vertical arrangements subject to *per se* condemnation has been steadily narrowed. This case is an especially poor vehicle for expanding the scope of the *per se* rule, for it would be difficult to find conduct that better exemplifies the economic deficiencies of that standard.

Condemning certain conduct as illegal *per se* normally is rationalized by the belief that the conduct in question is so frequently pernicious that one cannot justify the cost of attempting to identify the few instances in which it is not. Whether RPM warrants characterization as *per se* illegal conduct has increasingly been called into question by antitrust scholars,¹ indeed, it would be difficult to find an antitrust economist who would defend this enforcement standard.² RPM remains illegal *per se*, however, and, consistent with this standard, I have voted to support enforcement actions against RPM agreements when I have been convinced that (1) the conduct in question plainly constituted an illegal agreement on price (as construed by contemporary case law), and (2) the relief was appropriately tailored to deter future illegal conduct.

Notwithstanding the continued *per se* treatment of RPM -- and my willingness to support RPM cases in the limited circumstances identified above -- I cannot ignore the persistent accumulation of economic evidence demonstrating the potentially procompetitive (or, at worst, economically neutral) nature of RPM agreements. At minimum, this evidence counsels against expanding the boundaries

¹ There is a substantial body of economic literature demonstrating that RPM frequently can be socially beneficial. See, e.g. Michael L. Katz, "Vertical Contractual Relations," in Richard Schmalensee and Robert D. Willig, 1 Handbook of Industrial Organization 655 (1989). The existing empirical literature fails to find evidence supporting an anticompetitive characterization of RPM. See, e.g., Pauline M. Ippolito & Thomas R. Overstreet, Jr., "Resale Price Maintenance: An Economic Assessment of the Federal Trade Commission's Case Against the Corning Glass Works," 39 J.L. & Econ 285 (1996) (evidence convincingly rejects anticompetitive theories and suggests instead that RPM increased sales of Corning's products); Pauline M. Ippolito, "Resale Price Maintenance: Empirical Evidence from Litigation," 34 J.L. & Econ. 263 (1991) (empirical evidence cannot support a collusive explanation for the use of RPM).

² I also emphasize that in none of the RPM actions brought by the Commission during my tenure could one have plausibly characterized the condemned conduct as having an anticompetitive effect (indeed, in several instances, procompetitive rationales for the restrictions were plainly evident). In only one instance, *Nintendo of America Inc.*, 114 FTC 702 (1991), could one have plausibly ascribed market power to the manufacturer that was party to the agreement. Without manufacturer market power, RPM agreements between a single manufacturer and its dealers cannot harm consumers. Of course, it cannot be overemphasized that market power is only a necessary, but not a sufficient, condition for vertical restraints to reduce consumer welfare; by itself, market power does not establish that the conduct is anticompetitive. Even when a manufacturer possesses substantial market power, all of the procompetitive rationales for vertical restraints remain potentially valid.

of *per se* illegal conduct to envelop activities that (at best) only weakly satisfy the legal criteria for finding the existence of an "agreement" and, more important, appear to be procompetitive in both purpose and effect. Under these evaluative criteria, the present matter is a poor candidate for an enforcement action.

The Supreme Court set forth the legal standard for finding an illegal RPM "agreement" in *Monsanto Co. v. Spray-Rite Service Corporation*.³

The correct standard is that there must be evidence that tends to exclude the possibility of independent action by the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Monsanto, 465 U.S. at 768. The court stated further that the "concept of 'a meeting of the minds' or 'a common scheme' . . . includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer." *Id.* at 764 n. 9 (emphasis added).

While it is true that AmCy entered into contracts with its distributors providing for compensation for sales at or above the wholesale purchase price, it is clear that there was no "meeting of the minds" or "common scheme," and thus no illegal agreement, to maintain resale prices. At no time did AmCy tell its distributors that they must sell agricultural chemicals at specific prices or risk losing supplies; AmCy did not attempt to coerce or intimidate its distributors into selling at specific price levels; distributors did not communicate an agreement to sell at specific prices; no distributors were ever terminated for selling at prices below the wholesale price; and distributors remained free (as explicitly provided by contract) to resell products at any price of their choosing. That distributors sometimes sold at prices below the wholesale level without loss of supply or termination is testament to the unilateral nature of the distributors' pricing decisions and to the absence of any agreement to

³ 465 U.S. 752 (1984).

maintain resale prices.⁴ In this instance, all of the hallmarks of a *per se* illegal RPM agreement are lacking.

Evidence that dealers did in fact resell AmCy products at or above the wholesale purchase price does not relieve the Commission of its obligation to demonstrate the existence of an illegal agreement. As made clear by *Colgate*,⁵ a unilateral, self-motivated decision by a distributor to accept a manufacturer's pricing policies, and thus sell products at a suggested retail price, does not constitute an illegal RPM agreement. In *Monsanto*, the Supreme Court stated: "Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer's demand in order to avoid termination." 465 U.S. at 761. As *Monsanto* and *Colgate* make clear, something more than mere acquiescence by a distributor in a manufacturer's pricing policies is necessary to convert a unilateral decision by a distributor into an agreement to maintain resale prices.

I am therefore puzzled why the majority is so quick to infer the existence of a *per se* illegal RPM agreement from evidence that many distributors found it in their self-interest unilaterally to sell at or above the wholesale price and thereby receive rebates from AmCy. To infer the existence of a *per se* illegal RPM agreement in this context, when AmCy never announced minimum resale prices nor sought a commitment from distributors to sell at or above certain price levels, violates the fundamental principle of RPM law announced in *Colgate*. How can the majority find a *per se* illegal agreement here -- under arguably weaker factual circumstances than existed in *Colgate* -- and believe that it still seeks to enforce the rule announced in *Colgate*, and reiterated in *Monsanto*, that mere acquiescence by a distributor in the pricing policies of a manufacturer

⁴ Evidence suggests that distributors in fact sold specific products covered by the AmCy program at retail prices both above and below the wholesale transfer price. Wide variation in distributor resale prices runs contrary to usual evidence of a minimum resale price fixing agreement. As Chairman Pitofsky has stated: "The one point that emerges clearly in any debate concerning the *per se* rule is that minimum vertical price agreements lead to higher, and usually uniform, resale prices." Robert Pitofsky, "In Defense of Discounters: The No-Frills Case for a *Per Se* Rule Against Vertical Price Fixing," 71 *Geo. L.J.* 1487, 1488 (1983). The Commission's complaint does not allege, nor does it provide supporting evidence, that the rebate program resulted in higher retail prices for AmCy's products. Moreover, the wide dispersion in resale prices demonstrates the absence of the type of uniformity believed to be an indicator of a minimum resale price agreement. This dispersion in retail prices suggests that distributors were engaging in loss-leader programs out of a desire to increase future sales of AmCy products. In addition to encouraging distributors to provide valuable pre-sale services, AmCy's rebate program may have encouraged distributors to engage in loss-leader programs as a means of persuading customers to switch to AmCy products.

⁵ *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

is insufficient as a matter of law to warrant inference of the existence of a *per se* illegal RPM agreement?⁶

The majority's finding that AmCy entered into illegal RPM agreements with its distributors is nothing less than a retreat from the principles of vertical restraints analysis laid down by the Supreme Court in *Colgate*, *Monsanto*, *Sylvania*,⁷ and *Sharp*.⁸ In cases involving allegations of concerted price fixing, "the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was such an agreement. If an interference of such an agreement may be drawn from highly ambiguous evidence, there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded." *Monsanto*, 465 U.S. at 763. I concluded that the standard set forth by Supreme Court for the finding of a price-fixing agreement has not been met. That the majority is willing to infer the existence of an agreement in this instance on the basis of such ambiguous evidence, and to rely primarily on pre-*Sharp* case law and post-*Sharp* dicta and one case not on point⁹ to justify its conclusion, represents an effort to

⁶ Although the majority's reply emphasizes "written agreements" pursuant to which dealers were offered compensation for sales at prices above the wholesale transfer price (Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney in the Matter of American Cyanamid, at 2), the complaint in this case indicates that the Commission is willing -- despite the clear warnings of *Colgate* and *Monsanto* to the contrary -- to infer the existence of *per se* illegal RPM "agreements" solely from the dealers' unilateral response to AmCy's "offer." Complaint, at ¶ 6 ("The dealers overwhelmingly accepted AmCy's offer by selling at or above the specified minimum prices.").

⁷ *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

⁸ *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988).

⁹ The majority relies heavily on Judge Posner's opinion in *Khan v. State Oil Co.*, 93 F.3d 1358 (7th Cir. 1996), *cert. granted*, 117 S. Ct. 941 (1997). Besides the obvious difference that *Khan* deals with maximum rather than minimum RPM, the facts of *Khan* are fundamentally different. The contract between State Oil (the supplier) and *Khan* (the dealer) provided that State Oil would announce a suggested retail price for gasoline and sell it to *Khan* for 3.25 cents per gallon less. The contract further required *Khan* to rebate to State Oil any profit received for sales above the suggested retail price. As Judge Posner noted, the contract eliminated any incentive for *Khan* to charge above the suggested retail price. Since absolute compliance was thus guaranteed under the facts of *Khan*, it is not surprising that a dealer challenged the program. AmCy, on the other hand, never announced suggested retail prices to its dealers, never established an explicit mark-up, and never required dealers to seek permission before lowering their price. The fact that AmCy's dealers frequently lowered retail prices below the wholesale purchase price indicates that AmCy did not implement its rebate program in order to eliminate dealers' incentives to reduce prices (*e.g.*, to develop new customers, to increase business with existing customers, or to encourage switching by customers from other manufacturers' agricultural products to AmCy's products). The majority's reliance on *Khan* is therefore of doubtful relevance to this case, particularly in light of the Supreme Court's recent decision to review *Khan* and the Commission's decision to join with the Antitrust Division of the Justice Department in the filing of an amicus brief in that Court that seeks to overrule the precedent on which *Khan* relies, *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), and bring an end to the *per se* rule against maximum RPM. See Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Reversal, *State Oil v. Khan*, No. 96-871 (April 1997).

circumvent the law of RPM (and of vertical restraints in general) laid down by the Supreme Court over the last twenty years.¹⁰

The majority's decision to issue a consent order here also cannot be supported on economic grounds. The *per se* treatment of RPM usually is justified by the assertion that such agreements almost invariably are used to support collusion, either among manufacturers or among distributors.¹¹ RPM could support manufacturer collusion for two reasons.¹² First, RPM may make it easier to detect cheating on a cartel agreement, because resale prices (presumably) are easier to observe than wholesale prices, and successful monitoring of prices is necessary for any successful collusive price agreement to work.¹³ Second, RPM may reduce the incentive to cheat on a cartel because a manufacturer cutting its wholesale price will not increase sales by very much if the corresponding resale price cannot fall.¹⁴ If RPM is being used to facilitate manufacturer collusion, we would expect to see other manufacturers adopting similar price restrictions; collectively, these manufacturers would have to account for sufficient total output to give them power over price.¹⁵

As far as I can tell, the "manufacturer cartel" theory is not relevant to the present case. The Commission's complaint does not allege, let alone provide supporting evidence, that AmCy attempted to collude with other agricultural chemical makers, such as DuPont, Monsanto, Ciba-Geigy, or BASF. There is also no evidence that these other firms used RPM, as is required for the theory to work. But even

¹⁰ Today's action by the Commission has by no means established a clearer and more certain legal rule for RPM cases than exists under the rule of *Colgate* and other Supreme Court decisions. Whereas a supplier before today's order might know with certainty that mere voluntary adherence by a distributor to a unilaterally announced resale price policy does not constitute illegal RPM, this same supplier must now worry that the Commission may henceforth use such voluntary adherence as evidence of a *per se* illegal agreement to maintain resale prices. Moreover, as a result of today's decision, the business community may be left wondering how the Commission can -- and whether it will -- maintain the functional distinction it currently draws between, on the one hand, rebate-pass-through provisions and cooperative advertising programs -- programs that the Commission generally does not consider to be *per se* illegal -- and, on the other hand, other types of rebate programs that similarly impose restrictive conditions on the buyer.

¹¹ Of course, much of the empirical literature on the actual uses of RPM (*see* note 1, *supra*) casts serious doubt upon the validity of this proposition.

¹² *See* Lester G. Telser, "Why Should Manufacturers Want Fair Trade?," 3 J.L. & Econ. 86 (1960).

¹³ *See* George J. Stigler, "A Theory of Oligopoly," in *The Organization of Industry* 39, 43 (1968) ("In general the policing of a price agreement involves an audit of the transactions prices.").

¹⁴ This argument is subject to the obvious limitation that a manufacturer wishing to cheat on the collusive arrangement would have little incentive to enforce the RPM agreement.

¹⁵ Of course, all of the standard factors used to analyze market power and the ability to implement and maintain collusive pricing (*e.g.*, ease of entry, heterogeneity of the products, and so forth) would also be relevant to judging the likelihood of successful supplier collusion.

putting aside the absence of such evidence, it is difficult to imagine an arrangement less suited to cartel stability than that which existed between AmCy and its distributors. Specifically, under the terms of AmCy's C.R.O.P.[™] and A.P.E.X.[™] programs, a dealer's compensation was tied explicitly to the share of chemical sales accounted for by AmCy's products. Given that a crucial element of cartel enforcement is the discovery of some means by which each member can commit credibly to maintaining -- but not increasing -- its market share,¹⁶ how could a program that explicitly rewards market share expansion plausibly be characterized as a cartel enforcement tool?

Furthermore, the available evidence suggests that the C.R.O.P.[™] and A.P.E.X.[™] programs were extraordinarily successful in expanding AmCy's sales and market share, which grew substantially while the program was in use. Certainly, other factors (*e.g.*, the successful introduction of several new product lines) may have accounted for a portion of this increase,¹⁷ nevertheless, it is difficult (if not impossible) to reconcile the behavior of AmCy's output -- or of total market output -- during this period with any coherent theory of competitive harm involving collusion with other chemical makers.

In the alternative, *per se* treatment sometimes is predicated on the characterization of RPM as an aid to dealer collusion. Under such a scenario, a group of dealers pressures the supplier to adopt RPM to achieve and maintain a collusive resale price arrangement among the dealers. When RPM is used for this purpose, we would expect to see coordinated pressure on the manufacturer to adopt RPM from a group of dealers with sufficient market power to credibly threaten the manufacturer. Moreover, to be effective, the dealer cartel must enter into similar arrangements with enough manufacturers to be able to affect market price; otherwise, the collusive retail price of price-maintained products would be undermined by competition from products not subject to RPM agreements. Under such conditions, we would expect the manufacturer to be a reluctant participant in the scheme, though it would enforce the RPM agreement if the dealer threats were credible. Finally, it is unlikely that the colluding dealers would carry competing products not subject to RPM agreements, as

¹⁶ As Stigler (*supra* note 13, at 42) noted, "[f]ixing market shares is probably the most efficient of all methods of combating secret price reductions."

¹⁷ The likelihood of successfully maintaining collusion in the face of product innovation (as was occurring in this instance) is, of course, quite small. Collusion is more likely to be successful, the greater the degree of similarity (*e.g.*, in terms of cost, demand, and product characteristics) among the parties to the agreement.

that would be equivalent to cheating on the collusively-determined resale margin.

This second anticompetitive theory fits the facts of this case no better than the first. The Commission's complaint does not allege that AmCy is the victim of a dealer cartel. As I already have noted, it does not appear that other manufacturers had similar arrangements with the members of any putative "dealer cartel," or that this "cartel" eschewed the products of rival manufacturers.¹⁸ Had AmCy been the victim of a cartel, its attitude toward the Commission and numerous state investigations should have been one of grateful acquiescence, because the enforcement agencies would be rescuing it from the clutches of its rapacious dealers. In fact, of course, AmCy unilaterally terminated the challenged provisions of the C.R.O.P.[™] and A.P.E.X.[™] programs several years ago. So much for "dealer coercion,"¹⁹

Given that neither of the two traditional anticompetitive theories can be reconciled with the terms of the AmCy program, could the Commission's action be justified on some other basis? The Commission might attempt to seek refuge in some unilateral theory of market power, under which a manufacturer with substantial pre-existing market power is hypothesized to use vertical restraints because, for some reason, it cannot extract the full value of its market power simply by raising its wholesale price. The economics literature certainly acknowledges such possibilities, but these theories provide a fragile basis for antitrust enforcement.²⁰ As such models show, vertical restraints often can improve consumer welfare even when adapted by firms with substantial market power,²¹ the models fail, however, to provide empirical criteria by which enforcers can

¹⁸ This is unsurprising, because over 2500 dealers participated in the C.R.O.P.[™] and A.P.E.X.[™] programs. It is fanciful to believe that a cartel could have been formed from among such a large number of dealers. If such a cartel exists, one might reasonably ask why the dealers that belong to it are not also named in the Commission's complaint.

¹⁹ In its reply, the majority appears to suggest that the existence of a dealer cartel can be inferred from the allegation that "a dealer's advisory council voted to advise American Cyanamid to retain the program in order to protect its margins." Statement of Chairman Robert Pitofsky and Commissioners Janet D. Steiger and Christine A. Varney in the Matter of American Cyanamid, at note 5. Even if an advisory council furnished this advice to AmCy, communications of this nature between dealers and manufacturers do not establish that the dealers acted collusively. Moreover, the fact that dealers may have communicated this advice says nothing about the competitive effects of AmCy's rebate program. One would expect dealers to provide this same "advice" if AmCy's program were designed to prevent discounters from free-riding on the pre-sale services provided by other dealers.

²⁰ See, e.g., Remarks of Commissioner Roscoe B. Starek, III, "Reinventing Antitrust Enforcement? Antitrust at the FTC in 1995 and Beyond," before a conference on "A New Age of Antitrust Enforcement: Antitrust in 1995" (Marina del Rey, California, Feb. 24, 1995).

²¹ As I noted earlier (*supra* note 2), market power is a necessary, but not a sufficient, condition for vertical restraints to reduce consumer welfare.

distinguish anticompetitive from procompetitive effects.²² Thus, the practical utility of these theories is questionable even for conduct judged under the rule of reason; their inability to justify a policy of *per se* illegality appears self-evident.

On several grounds, therefore, issuance of the complaint and consent order in this matter represents a poor policy choice by the Commission. From a legal perspective, AmCy's conduct does not constitute an illegal agreement to maintain resale prices; from an economic perspective, the evidence points to the conclusion that AmCy's conduct was procompetitive; and from a policy perspective, the Commission's decision hardly delineates a clearer distinction (and in fact seriously blurs the line) between conduct likely to be subject to *per se* condemnation and conduct that is not. Instead of reaching for ways to expand the application of the *per se* rule to conduct that is plainly procompetitive, enforcers should reserve their heavy hand for conduct that falls within standards for *per se* illegality clearly enunciated by the Supreme Court.

²² As Katz (*supra* note 1, at 713-14) notes, "[much of the literature on vertical restraints has been conducted with the express aim of deriving policy conclusions. But in many, if not most, instances there is no widespread agreement on whether a particular vertical practice is socially beneficial or harmful. This unhappy state of affairs is due, in part, to the fact that all of the practices can be beneficial in some instances and harmful in others, and it may be extremely difficult to distinguish between the two cases."

1279

Complaint

IN THE MATTER OF

AMERICAN HOME PRODUCTS CORPORATION

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

Docket C-3740. Complaint, May 16, 1997--Decision, May 16, 1997

This consent order requires, among other things, American Home Products Corporation ("AHP"), a New Jersey-based manufacturer of animal vaccines, to divest Solvay's U.S. and Canada rights to three types of vaccines to the Schering-Plough Corporation; to assist Schering-Plough in obtaining U.S. Department of Agriculture ("USDA") certifications; and to manufacture and supply the three vaccines to Schering-Plough for 24 to 36 months or until Schering-Plough obtains USDA approvals. The consent order also prohibits AHP from suing Schering-Plough for patent infringements relating to the vaccines.

Appearances

For the Commission: *Casey Triggs, Ann Malester and William Baer.*

For the respondent: *Michael Sohn, Arnold & Porter, Washington, D.C.*

COMPLAINT

The Federal Trade Commission ("Commission"), having reason to believe that respondent, American Home Products Corporation ("AHP"), a corporation subject to the jurisdiction of the Commission, has agreed to acquire the animal health business of Solvay S.A. ("Solvay"), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. DEFINITIONS

1. "*Canine Lyme Vaccines*" means all vaccines used to create and maintain antitoxin levels in dogs to prevent lyme disease.

2. "*Canine Corona Virus Vaccines*" means all combination vaccines used to create and maintain antitoxin levels in dogs to

prevent corona virus, including the single antigens contained therein, individually, or in any combination.

3. "*Feline Leukemia Vaccines*" means all combination vaccines used to create and maintain antitoxin levels in cats to prevent feline leukemia, including the single antigens contained therein, individually, or in any combination.

4. "*Respondent*" means AHP.

II. RESPONDENT

5. Respondent AHP is a corporation organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its principal place of business located at Five Giralda Farms, Madison, New Jersey.

6. Respondent is engaged in, among other things, the research, development, manufacture and sale of Canine Lyme Vaccines, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines.

7. Respondent is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. THE ACQUIRED COMPANY

8. Solvay is a corporation organized, existing, and doing business under and by virtue of the laws of Belgium, with its principal place of business located at Rue du Prince Albert, 33, 1050 Brussels, Belgium.

9. Solvay is engaged in, among other things, the research, development, manufacture and sale of Canine Lyme Vaccines, Canine Corona Virus Vaccines, and Feline Leukemia Vaccines.

10. Solvay is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affects commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

1279

Complaint

IV. THE ACQUISITION

11. On October 31, 1996, AHP entered into a Purchase Agreement with Solvay to purchase Solvay's entire animal health business for approximately \$463 million ("Acquisition").

V. THE RELEVANT MARKETS

12. For purposes of this complaint, the relevant lines of commerce in which to analyze the effects of the Acquisition are:

A. The research, development, manufacture and sale of Canine Lyme Vaccines;

B. The research, development, manufacture and sale of Canine Corona Virus Vaccines; and

C. The research, development, manufacture and sale of Feline Leukemia Vaccines.

13. For purposes of this complaint, the United States is the relevant geographic area in which to analyze the effects of the Acquisition in the relevant lines of commerce.

VI. STRUCTURE OF THE MARKETS

14. The market for the research, development, manufacture and sale of Canine Lyme Vaccines is highly concentrated as measured by the Herfindahl-Hirschmann Index ("HHI"). The post merger HHI is 8,042 points, which is an increase of 1,976 points over the premerger HHI level. AHP and Solvay are two of only three suppliers of Canine Lyme Vaccines in the United States.

15. AHP and Solvay are actual competitors in the relevant market for the research, development, manufacture and sale of Canine Lyme Vaccines in the United States.

16. The market for the research, development, manufacture and sale of Canine Corona Virus Vaccines is highly concentrated as measured by the HHI. The post merger HHI is 5,496 points, which is an increase of 809 points over the premerger HHI level. AHP and Solvay are two of only a small number of suppliers of Canine Corona Virus Vaccines in the United States. With the exception of Solvay, other suppliers of Canine Corona Virus Vaccines license from AHP the right to manufacture and sell their vaccines.

17. AHP and Solvay are actual competitors in the relevant market for the research, development, manufacture and sale of Canine Corona Virus Vaccines in the United States.

18. The market for the research, development, manufacture and sale of Feline Leukemia Vaccines is highly concentrated as measured by the HHI. The post merger HHI is 6,980 points, which is an increase of 3,353 over the premerger HHI level. AHP and Solvay are two of only three suppliers of Feline Leukemia Vaccines in the United States.

19. AHP and Solvay are actual competitors in the relevant market for the research, development, manufacture and sale of Feline Leukemia Vaccines in the United States.

VII. BARRIERS TO ENTRY

20. Entry into the research, development, manufacture and sale of Canine Lyme Vaccines and Canine Corona Virus Vaccines is difficult and time consuming, requiring the expenditure of significant resources over a period of many years with no assurance that a viable commercial product will result. The existence of broad patents governing the manufacture of such products compounds the difficulty of new entry.

21. Entry into the research, development, manufacture and sale of Feline Leukemia Vaccines is difficult and time consuming, requiring the expenditure of significant resources over many years with no assurance that a viable commercial product will result.

22. The need to obtain approvals by the United States Department of Agriculture to manufacture and sell animal vaccines in the United States further lengthens the time required to enter the relevant markets.

VIII. EFFECTS OF THE ACQUISITION

23. The effects of the Acquisition, if consummated, may be substantially to lessen competition and to tend to create a monopoly in the relevant markets in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45, in the following ways, among others:

A. By eliminating actual, direct, and substantial competition between AHP and Solvay in the relevant markets;

B. By increasing the likelihood that AHP will unilaterally exercise market power in the relevant markets; and

C. By increasing the likelihood of collusion or coordinated action among the remaining firms in the relevant markets.

IX. VIOLATIONS CHARGED

24. The Acquisition agreement described in paragraph eleven constitutes a violation of Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

25. The Acquisition described in paragraph eleven, if consummated, would constitute a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the FTC Act, as amended, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition by respondent of Solvay S.A., ("Solvay") and the respondent having been furnished thereafter with a copy of a draft of complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and

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

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