offering for sale of such supplier's products, where respondent solicits such promotional allowances and payments and knows or should know that such promotional allowances or payments are not being offered or otherwise made available by such supplier on proportionally equal terms to all of such supplier's other customers, including retail customers who do not purchase directly from such supplier, who compete with respondent in the offering for sale or sale of such supplier's products.

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

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

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

Commisioner MacIntyre concurs in the result.

IN THE MATTER OF

UNIVERSE CHEMICALS, INC., ET AL.

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

Docket 8752. Complaint, December 5, 1967—Decision, May 13, 1970*

Order requiring a Chicago, Ill., distributor of water-repellent paints and coatings under the trade names "Kleer-Kote" and "Kolor-Kote" to cease misrepresenting that it is affiliated in any way with Union Carbide Company or any other well-known company or laboratory, using deceptive guarantees, exaggerating the waterproofing and rust resistant qualities of its products, misrepresenting the return privileges and earnings of its dealers, and furnishing others with means to mislead prospective purchasers.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal

*Reported as amended by hearing examiner's order of July 10, 1968, by amending subparagraph 12 of paragraph 6 and subparagraph 12 of paragraph 7.

Trade Commission, having reason to believe that Universe Chemicals, Inc., a corporation, and Raymond L. Rosen and Jordan L. Lichtenstein, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Universe Chemicals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 919 North Michigan Avenue, Chicago, Illinois.

Respondents Raymond L. Rosen and Jordan L. Lichtenstein are officers and sole stockholders of the corporate respondent and their business address is the same as that of said corporate respondent. The individual respondents formulate, direct and control the acts, policies and practices of the corporate respondent, including the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of water repellent paints and coatings to dealers for resale to the public under the trade names of "Kleer-Kote" and "Kolor-Kote."

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped and transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintain, and at all times hereinafter mentioned have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the conduct of their business and at all times mentioned herein respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by the respondents.

PAR. 5. In the course and conduct of their business, respondents have operated, and continue to operate, a sales plan to market their products by establishing dealerships under "Exclusive Dealership Agreements." These exclusive dealership agreements assign to individual dealers a particular territory within which they may operate and resell the respondents' products to the purchasing public. Salesmen, designated "regional managers," are employed and trained by the repondents to solicit and secure these dealers. The salesmen

induce the dealers to enter into the agreements with which they combine initial orders for the respondents' products. The dealers have the option of paying for the merchandise in full at the time of purchase or of paying twenty-five percent down and of paying the remainder by executing three negotiable trade acceptances payable in thirty, sixty and ninety days.

During the course of their sales presentations, the respondents' salesmen use physical demonstrations to portray the waterproof properties of their products. The equipment for these demonstrations is supplied to the salesmen by the respondents. In many cases, the products delivered to the dealers are found to lack the properties of the products used by the salesmen in their demonstrations and the dealers are unable to perform the same demonstrations for their customers as did the salesmen.

PAR. 6. In the course and conduct of their business, as described above, and for the purpose of inducing sales of their products by and through oral statements and representations of respondents or their salesmen and representatives and by means of brochures and other written and printed material, respondents represent, and have represented, directly or by implication, to prospective purchasers, that:

1. The corporate respondent, Universe Chemicals, Inc., is a subsidiary of, a division of, an exclusive licensee of, or is affiliated with the Union Carbide Company.

2. The respondents' products are manufactured, or have been developed, by the Union Carbide Company.

3. The respondents' products have been successfully tested by the Union Carbide Company, by the corporate respondent, or by an independent testing laboratory.

4. The respondents' products are unconditionally guaranteed for ten years.

5. The respondents' product, Kleer-Kote, contains fourteen percent silicones.

6. The respondents' dealers will realize various profits up to $18,000 per year from the resale of the respondents' products.

7. The supply of the respondents' products purchased by the dealer will be sold out before the trade acceptances which the dealer has given in payment on his supply become due and payable.

8. The respondents' dealers may return to the respondents any unsold quantities of the respondents' products or the respondents will transfer the unsold quantities to another dealer and a refund will be made to the dealer.

9. The respondents' products are waterproof.

10. The respondents' products prevent rust.

11. The respondents' products are suitable for both the inside and the outside of a building.

12. One coat of respondents' products will be sufficient to produce all of the results claimed for such products by respondents or by their salesmen or representatives.

PAR. 7. In truth and in fact:

1. Respondent Universe Chemicals, Inc., is not a subsidiary of, a division of, an exclusive licensee of, and is not affiliated with the Union Carbide Company.

2. The respondents' products are neither manufactured nor have they been developed by the Union Carbide Company, although one of the ingredients in their products may have been manufactured by the Union Carbide Company and is placed in combination by the respondents with other ingredients not manufactured by the said company.

3. The respondents' products have never been tested or evaluated by the Union Carbide Company, or by any independent laboratory or any other person or organization qualified to test or evaluate such products nor have such products been tested by respondents.

4. The products sold by the respondents are not unconditionally guaranteed for a period of ten years, but only guaranteed in a limited way and not unconditionally.

5. The respondents' product, Kleer-Kote, does not contain fourteen percent silicones, but a substantially lesser amount.

6. Few, if any, dealers earn $18,000 per year from the resale of respondents' products or whatever lesser amount was represented to them at the time of the purchase and in many cases make no profit at all, but sustain a substantial loss.

7. The supply of respondents' products purchased by the dealers is seldom if ever sold out before the trade acceptances which the dealer has given in payment on his supply become due and payable.

8. The respondents' dealers are not permitted to return to the respondents any unsold quantities of the respondents' products and the respondents will not transfer them to another dealer nor is any refund made to the dealer for unsold merchandise.

9. Respondents' products are not waterproof, but only water repellent to a limited extent.

10. Respondents' products do not prevent rust.

11. Respondents' products are not suitable for use on the inside of a structure.

12. One coat of respondents' products is not sufficient to produce all of the results claimed for such products by respondents or by their salesmen or representatives.

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

PAR. 8. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of the respondents, as herein alleged, were and are all to the prejudice and injury of the public and of the respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Roy Pope, *Mr. Edward D. Means*, *Jr.*, and *Mr. Donald L. Bachman* supporting the complaint.

Mr. Franklin M. Lazarus, Chicago, Ill., for respondents.

INITIAL DECISION BY WALTER K. BENNETT, HEARING EXAMINER

FEBRUARY 6, 1970

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PRELIMINARY STATEMENT

This matter concerns alleged unfair methods of competition and unfair and deceptive acts and practices in interstate commerce in paints and coatings, claimed to be in violation of Section 5 of the Federal Trade Commission Act.[1]

Respondents are: Universe Chemicals, Inc., an Illinois Corporation, and two of its officers and its sole stockholders: Raymond L. Rosen and Jordan L. Lichtenstein.

The Pleadings

The complaint dated December 5, 1967, after identifying respondents, states the nature of their business and the responsibilities of the individual respondents, and charges that they are engaged in commerce and have substantial competition in commerce. The complaint then charges (par. 5) that respondents have operated a sales plan which involves selling exclusive dealerships through salesmen who make demonstrations. These demonstrations according to the charge cannot be duplicated with respondents' products. The complaint further charges (par. 6 and 7) false representations in regard to the affiliations of the corporate respondent and the manufacturer of its product; the testing of its product; its guarantee; the content of the product; prospective profits; speed of sale; right of return or exchange, and specific qualities including: waterproofing, rust-proofing, inside or outside useability, and one-coat coverage.

By answer filed January 10, 1968, respondents deny the charges but admit the identity of respondents, the responsibility of the individual

[1] Sec. 5(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. (15 U.S.C. 45.)

respondents, the interstate nature of the business and the fact that there is some competition. The answer also alleges four affirmative defenses: (1) meeting competition, (2) lack of control over the persons making representations, (3) discrimination against respondents in the bringing of the proceeding before the Commission which tends to reduce competition, (4) vagueness of proposed order and, (5) interference with freedom of speech and publication.

Previous Trial

This proceeding was initially assigned to Honorable Donald R. Moore and after extensive prehearing procedures, including a request for leave to appeal to the Commission from an order for hearings in more than one location which was denied, was heard by him at four different locations during the summer of 1968. The initial decision based upon the first trial was issued September 27, 1968. Respondents appealed the initial decision and the Commission reversed and by order, dated April 2, 1969, remanded the proceedings for a trial *de novo* principally on the ground that in denying leave to appeal from the hearing examiner's order to hold hearings in several locations the Commission had violated its own rules. During the pendency of this proceeding and before the issuance of the first initial decision, the hearing examiner, by order dated July 10, 1968, amended the complaint to expand the alleged false representations of the products' characteristics beyond those originally specified.

Following the remand, counsel for respondents moved to disqualify the hearing examiner. This motion was denied, by order dated June 5, 1969; and the Commission left the matter of designating a hearing examiner to the Director.

Trial De Novo

On June 10, 1969, the undersigned was designated hearing examiner to conduct the trial *de novo*, and after conducting two prehearing conferences at Chicago, Illinois, commenced hearings there on August 4, 1969. Hearings continued until August 11, 1969. They were then suspended by the undersigned so that he might certify to the Commission the question whether or not the hearings should be suspended until respondents' motion for leave to appeal from the undersigned's ruling that a mistrial should not be ordered was decided. The matter was certified to the Commission on August 12, 1969, and the Commission on August 15, 1969, ordered hearings sus-

pended pending its decision on respondents' motion for leave to appeal. That motion was filed August 18, 1969.

On September 19, 1969, the Commission denied respondents' motion for leave to appeal and hearings were resumed on October 6, 1969, and continued to October 11, 1969.

At the hearings, counsel supporting the complaint called the individual respondents who both testified with respect to the business of respondent corporation and their respective functions. Both testified that Mr. Rosen was primarily concerned with the out-of-the-office operation and Mr. Lichtenstein concerning the office work. Administrative and instructional material and employment contracts with "independent contractors" were identified and an explanation was given concerning the answers to requests for admissions submitted.

Then followed a large number of exclusive-dealer witnesses who described the activities of respondents' so-called "independent contractors" in making representations and demonstrating respondents' products Kleer–Kote and Kolor–Kote to them through the use of visual aids purporting to establish the waterproofing qualities of the products. Such witnesses also described the execution of contracts; payment of substantial downpayments, then the witnesses' disappointment with the performance of the products and in several cases their complaints to respondent corporation and discussion with one or the other of the individual respondents. Incidents occurring subsequent to the first trial were related by some witnesses. Two so-called "independent contractor" witnesses testified with regard to employment and training, and concerning the demonstration kits furnished to aid in their sales effort. Two laboratory technicians related tests made on the product indicating a wide discrepancy between the representations of silicone content and the actual test amounts found in the product Kleer–Kote and a representative of Union Carbide denied that that company had any connection with respondents.

The two individual respondents were the only witnesses for the respondents. They claimed lack of responsibility for the representations made by the so-called "independent contractors," and for the quality of the paint manufactured for them. They claimed also that the advertising material was copied from that used by a former employer, the paint mixture was made as the former employer's was made and that the Federal Trade Commission had investigated the former employer but had brought no proceeding against him. Although complaints were made to the paint manufacturer no laboratory tests were conducted. Some of the "independent contrac-

tors" had their association terminated and the first paint manufacturer also had its contract terminated. Another manufacturer now makes the paint.

Denial of Motion to Dismiss

At the conclusion of complaint counsel's case-in-chief a motion to dismiss was made. Decision was then reversed. The motion is now denied.

Post Hearing Procedures

Due to the illness of complaint counsel the time to file proposed findings and conclusions and proposed orders and briefs was extended to January 5, 1970, and the Commission extended the hearing examiner's time to file the initial decision until February 12, 1970.

Respondents filed their proposed findings of fact, conclusions and order on January 5, 1970. In a footnote to the Introduction respondents claim that they have been denied due process of law because they were not provided by the Commission with a copy of the transcript for which they cannot afford to pay. They also claim that the nineteen persons who testified with respect to respondents' alleged misleading activities were too small a segment of its dealers to constitute substantial evidence and that there was a lack of substantial evidence to prove the allegations of the complaint by a preponderance of evidence except insofar as the guarantee of respondents' products is concerned. As exhibits to their proposals respondents filed two letters from Official Reporters Ward & Paul showing an aggregate cost of $888 for the transcript. No evidence was submitted that the individual respondents were indigent within the meaning of *Williams* v. *Oklahoma City*, 395 U.S. 458 (1969).

Complaint counsel also filed their proposed findings of fact, conclusions of law and order on January 5, 1970, accompanied by a brief in support thereof.

In each instance the proposed findings by complaint counsel were followed by reasons therefor, including transcript, admission and exhibit citations. When reference herein is made to a proposed finding such reference is intended to include the citations supplied. Complaint counsel also recommended a change in the language of the proposed order to conform with recent Commission policy and a court decision.

The hearing examiner on January 8, 1970, on his own motion offered each of the individual respondents an opportunity to file an *in forma pauperis* affidavit and to make appropriate motions on or before January 19, 1970.

Respondents declined so to do in an "Explanatory Statement Regarding Allegations by Respondents to the effect that they are being and have been denied due process of Law" dated January 19, 1970 and filed by counsel. This paper enlarged upon the claim that the Commission abused its discretion by not proceeding against respondents' competitor Hydralum Industries, Inc.

Basis For Decision

On the basis of the entire record in the trial *de novo* [2] and having considered the demeanor and credibility of the witnesses, the hearing examiner makes the following findings of fact, conclusions and order.[3] Proposed findings and conclusions not adopted in form or in substance are denied.

FINDING OF FACT

The Respondents

1. Respondent Universe Chemicals, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 919 North Michigan Avenue, Chicago, Illinois, at the time of filing the answer (C.A.).[4] It subsequently moved to 1306 Sherman Avenue, Evanston, Illinois, and later to 2909 West Peterson Avenue, Chicago, Illinois. (Tr. 9, 16, 162; CX 16a-b, CX 95; RX 15.)

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[2] The hearing examiner has not examined the record in the first trial but some of the exhibits marked in the first trial were reoffered and received and prior testimony was exhibited to a few witnesses to refresh their recollection.

[3] In compliance with Rule 3.51(b), specific page or exhibit references are made to the principal supporting items of evidence but the citation to particular items does not purport to be exhaustive. The impact of the record as a whole has been controlling. Due to the requirements of Rule 3.51(a) reliance has necessarily been placed on references made by counsel but the findings of fact are based on the recollection of and study of the evidence by the undersigned. The hearing examiner has been handicapped by the fact that counsel for respondent was not supplied by his clients with a copy of the transcript. Counsel endeavored to secure the loan of the Commission's transcript without success. Accordingly, the hearing examiner relaxed his usual rule that citations be supplied in respondents' proposed findings, and requested that references be made to statements of witnesses and dates from counsel's notes. Attached as Exhibit A is an index to testimony and exhibits. This supplies the page references to the testimony of witnesses and shows which witnesses identified the exhibits received in evidence. This index without the descriptions of the witnesses was supplied to both counsel.

[4] The following abbreviations and references will hereafter sometimes be used:

C. Complaint

A. Answer

CX. Commission Exhibit

RX. Respondent Exhibit

Tr. Transcript page. The page numbers refer to the transcript in the second trial commencing August 4, 1969.

CF. Complaint counsel's proposed findings.

RF. Respondents' proposed findings.

RA. Admissions numbered by request.

2. Respondents Raymond L. Rosen [5] and Jordan L. Lichtenstein are officers and sole stockholders of the corporate respondent and their business address is the same as that of said corporate respondent. The individual respondents formulate, direct and control the acts, policies and practices of the corporate respondent, including the acts and practices hereinafter set forth. (C., A., CF. 2, 3, Entire Record.)

Jurisdictional Findings

3. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of water-repellent paints and coatings to dealers for resale to the public under the trade names of "Kleer–Kote" and "Kolor–Kote." [5a] (C., A.) Respondents have been in substantial competition in commerce with persons, firms and corporations in the sale of products of the same general kind and nature as those sold by respondents. (Tr. 32, 33, 40–44, 117; CF 8.)

4. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped and transported from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintain, and at all times hereinafter mentioned have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. Respondents' gross sales for the fiscal years ending January 31 have been approximately as follows:

1966	$320,000
1967	452,000
1968	398,000
1969	400,000–500,000

(C., A., CF. 5, 6; Tr. 36–44; RA 50–56.)

Method of Doing Business

5. Respondents have adopted a method of doing business that they had learned from a former employer of the individual respondents. (Tr. 121, 122, 1101.)

This method consists of (see CF 9–12):

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[5] The name Rosen is mispelled Rosin in substantially all of the record following the August 11 recess. There is, however, no question about the identity of the person referred to [Tr. 1059]; hence, correction of the record is deemed unnecessary.

[5a] These names are sometimes misspelled in the record—*e.g.*, an initial letter C being used instead of K. Since there is again no question of identity of the product no record correction is deemed necessary.

(a) arranging with a paint manufacturer to formulate Kleer–Kote and Kolor–Kote to their specifications and to ship it directly to respondents' dealers. (Tr. 118.)

(b) selecting salesmen who sign an "independent contractor" agreement (*e.g.*, CX 19a-b) and who are trained in a method of demonstrating the product and sell merchandise to and execute exclusive-dealer agreements on behalf of respondents (*e.g.*, CX 40) with small businessmen.

(c) supporting the efforts of "independent contractors" and the "exclusive dealers" with advertising and promotional material, demonstration equipment and samples, and arranging for delivery of the Kleer–Kote and Kolor–Kote to the dealers. Respondents copied with few changes the advertising literature that they supplied to the "independent contractors" and "exclusive dealers" from material utilized by a former employer of the individual respondents (see *e.g.*, Tr. 33, 96, 121, 122, 1101). A number of the "independent contractors" had previously been engaged in selling materials for such former employer and had left that employer to join the individual respondents in the corporate-respondent enterprise. (Tr. 161, 1125, 1165.)

6. Respondent clothed the "independent contractors" with apparent authority to act for them and ratified their activity (see CF 10). For example, they supplied in some cases business cards bearing the corporate respondents' name and describing the "independent contractors" as "regional manager" (*e.g.*, Tr. 19; CX 45, 67). They supplied forms for exclusive-dealer contracts that the "independent contractors" signed on their behalf as "regional manager" and approved such contracts and they supplied promotional material (Tr. 19), samples, sales aids (CX 62), brochures and blank forms (Tr. 20), that bore the name of the corporate respondent. Respondents took no effective steps to repudiate the representations made by such "independent contractors" when complaints were made concerning the performance of the product and the "independent contractors" representations. (*e.g.*, CX 51c.)

Respondents' proposed findings suggest that respondents took prompt and effective action to admonish and indeed to terminate the relationship of independent contractors whose representations were unacceptable (RF 5, 6, par. 4). However, the testimony given by respondents on the subject is so conflicting that it cannot be credited. On complaint counsel's direct case and in the prehearing admissions, both Mr. Lichtenstein and Mr. Rosen made it clear that the relationship with independent contractors just terminated. (Tr. 116, 117.)

After complaint counsel's case was in and the testimony concerning the recent activity of salesman Shelton had been adduced from the dealers, Rosen testified that he had fired Shelton officially (Tr. 1067). However, the emphasis seemed to be on Shelton's promise to give bonuses in the form of lighters (Tr. 1061). The representation about the connection with Union Carbide appeared as an afterthought (Tr. 1062). Later Rosen "apologize[d]" for using the word "fired" (Tr. 1083). Since Lichtenstein testified that Rosen dealt with the independent contractors (Tr. 113) and that he, Lichtenstein, didn't know how a sale was made his testimony concerning the relationship between (Tr. 1139) the company and the independent contractors can be given little or no weight. Hence we find that there was no effective action by respondents to prevent the misrepresentations of respondents' product by the independent contractors. Indeed by approving the contracts presented, the respondents effectively ratified their salesmen's actions (*e.g.*, CX 54, 57, 83).

7. Individual respondent Raymond Rosen, the president of the corporate respondent, as the "outside" man for the enterprise, hired or approved the "independent contractors" who conducted the sales of the exclusive franchise to dealers and in some instances he delegated to one of the "independent contractors" the job of hiring others and training them in their duties (Tr. 15, 1078).

8. Individual respondent Jordan L. Lichtenstein was the office man with the title vice president (CX 95) and secretary of the corporate respondent. (Tr. 9.)

He handled the correspondence relating to the business, often using the pseudonym J. L. Jordan (Tr. 115), dealt with the banks and the supplier. He also supplied the promotional literature and business cards (Tr. 19, 20) to the independent contractors and handled the acceptance of contracts and telephone communications from "exclusive dealers" including some complaints regarding the performance of the product supplied. (*E.g.*, Tr. 243–45, 640.)

9. There is some conflict in the testimony about what was supplied the "independent contractors" by way of sales aids and by way of training. Respondent Lichtenstein admitted that CX 3–7 were sent to "independent contractors" and some also to "exclusive dealers." (Tr. 55–71.) But most he would say about the use to which they were put was "for what ever purpose the independent contractors want to make of it in his [sic] sales presentation, I assume." (Tr. 67.) At an earlier point he testified that he understood "90 percent of the stuff is thrown away anyway." (Tr. 63.) Contrasted with the latter statement was testimony by several exclusive dealers that the