

FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

REVLON, INC., ET AL.

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

*Dockets C-2868 and C-2869. Complaints, Jan. 3, 1977 — Decisions, Jan. 3,
1977*

Consent order requiring a New York City manufacturer, seller and distributor of cosmetics and ethical drugs, and its Cincinnati, Ohio, and Chicago, Ill., subsidiaries, among other things, to cease misrepresenting the safety, efficacy and content of hair straightening products and making unsubstantiated product claims. Further, the order requires respondents to make specific warning disclosures in advertising and on package labeling and requires the destruction of all displays and packaging which does not include the appropriate warning disclosures.

Appearances

For the Commission: *Sharon S. Armstrong.*

For the respondents: *Sidney S. Rosdeitcher, Paul, Weiss, Rifkind, Wharton & Garrison, New York City.*

COMPLAINT AS TO REVLON, INC., DOCKET C-2868

The Federal Trade Commission, having reason to believe that Revlon, Inc. and Revlon-Realistic Professional Products, Inc., corporations, hereinafter sometimes referred to as respondents, have violated Sections 5 and 12 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Revlon, Inc. (Revlon) is a Delaware corporation with its office and principal place of business located at 767 Fifth Ave., New York, New York.

Respondent Revlon-Realistic Professional Products, Inc. (Realistic) is an Ohio corporation with its offices and principal place of business located at 3274 Beekman St., Cincinnati, Ohio.

All allegations in this complaint stated in the present tense include the past tense.

PAR. 2. Respondent Revlon manufactures, advertises, offers for sale, sells and distributes cosmetics and ethical drugs. It controls the

business operations and policies of Realistic, its wholly-owned subsidiary, and is responsible for the acts and practices of Realistic.

Respondent Realistic, a wholly-owned subsidiary of respondent Revlon, manufactures, advertises, offers for sale, sells and distributes Revlon Realistic Protein Permanent Creme Relaxer (Realistic Relaxer), a cosmetic, as that term is defined in the Federal Trade Commission Act, as amended. Realistic relaxer is an emulsion which contains as its active ingredient sodium hydroxide, commonly known as lye. The emulsion is applied to the hair, rinsed from the hair, and neutralized with a shampoo. Realistic relaxer is sold separately and in kits with shampoo. Realistic relaxer is used by professional beauticians for the purpose of straightening curly hair.

PAR. 3. Revlon, through its wholly-owned subsidiary Realistic, and Realistic, cause Realistic relaxer, when sold, to be sent from Realistic's place of business in Ohio to beauty salons and other purchasers located in various other States of the United States and the District of Columbia. Thus, Revlon and Realistic maintain a substantial course of trade in said product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their business, respondents disseminate and cause to be disseminated certain advertisements concerning Realistic relaxer (1) by United States mail, magazines of interstate circulation and by various other means in or having an effect upon commerce, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Realistic relaxer; (2) by various means, for the purpose of inducing, or which are likely to induce, the purchase in or having an effect upon commerce of Realistic relaxer, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. Typical and illustrative of the statements and representations made in respondents' advertisements, but not all inclusive thereof, are the following:

Mild and safe.

It contains protein protectors to help prevent scalp irritation, cuticle and unnecessary hair damage.

Our exclusive Protein Formula actually helps restore lost protein and helps strengthen hair.

It has a special proteinized creme formula that achieves permanent hair relaxation and helps protect the condition of your hair.

Built in organic protein conditioning enrichens and silkens hair like never before.

PAR. 6. Through the use of the above-quoted statements and representations, and others of similar import and meaning not expressly set forth herein, respondents represent, directly or by implication, that:

- A. Realistic relaxer is safe and is mild to scalp and skin.
- B. Realistic relaxer helps strengthen hair.
- C. Realistic relaxer contains protein which
 - 1. helps prevent scalp irritation; and
 - 2. helps prevent hair damage.

PAR. 7. In truth and in fact:

A. Realistic relaxer is not safe nor is it mild to scalp and skin. Sodium hydroxide, the active ingredient in Realistic relaxer, is a primary skin irritant. It is caustic to skin and breaks down the cells which form the epidermis. Realistic relaxer in some instances causes skin and scalp irritation and burns. It can also cause eye irritation and may impair vision temporarily.

B. Realistic relaxer does not strengthen hair. The sodium hydroxide in Realistic relaxer straightens hair by breaking down the cells of the hair shaft. The relaxing process weakens hair, and, in some instances, makes it brittle and causes partial or total hair loss.

C. Realistic relaxer does not contain protein to help prevent scalp irritation or hair damage. The ingredient used is Maypon 4c, a detergent derived from protein which has been altered so that it no longer retains the chemical or physical properties of protein. Therefore, at the time the relaxer is used, it contains no protein to help prevent scalp irritation or hair damage.

Therefore, the advertisements, statements and representations referred to in Paragraphs Five and Six are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, as amended, and are false, misleading and deceptive.

PAR. 8. At the time the representations set forth in Paragraph Six were made, respondents had no reasonable basis from which to conclude that such representations were true. Therefore, the advertisements and representations set forth in Paragraphs Five and Six are deceptive and unfair.

PAR. 9. Respondents advertise Realistic relaxer without disclosing that:

- A. Realistic relaxer can cause skin and scalp irritation, hair breakage and eye injury.
- B. Directions must be followed carefully.

Such facts are material and, if known to potential customers who a

professional beauticians, would be likely to affect their decision to purchase Realistic relaxer for professional use. Similarly, such facts, if known to potential customers who purchase hair straightening services from professional beauticians, would be likely to affect their decision to have their hair straightened with Realistic relaxer.

Therefore, respondents' advertisements of said product are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, as amended, and are false, misleading and deceptive.

PAR. 10. In the further course and conduct of their business, respondents Revlon and Realistic utilize the product name "Revlon Realistic Protein Creme Relaxer." The use of said product name has the tendency and capacity to lead potential purchasers to believe such relaxer contains protein at the time the relaxer is applied to the hair.

In truth and in fact, the ingredient used is Maypon 4c, a detergent derived from protein which has been altered so that it no longer retains the chemical or physical properties of protein. Therefore, said respondents' use of the word "protein" in their product name is deceptive and unfair.

PAR. 11. In the further course and conduct of their business, respondents offer for sale, sell and distribute Realistic relaxer without disclosing on the retail product package of said product the following information:

A. The product contains sodium hydroxide (lye). It can cause skin and scalp burns, hair loss, and eye injury. Directions must be followed carefully.

B. The product should not be used if scalp is irritated or injured.

C. The product should not be used on bleached or permanently colored hair. If hair has been relaxed, the relaxer should be applied only to new growth, as described in the directions.

D. If the relaxer causes skin or scalp irritation, it should be rinsed out immediately and washed with a shampoo in the kit. If irritation persists, a physician should be consulted.

E. If the relaxer gets into eyes, eyes should be rinsed immediately and a physician should be consulted.

Such facts are material and, if known to potential customers who are professional beauticians, would be likely to affect their decision to purchase Realistic relaxer for professional use. Therefore, failure to disclose said material facts on the product package is an unfair and deceptive act or practice.

PAR. 12. The use by respondents of the aforesaid false, misleading

and deceptive and unfair statements, representations, acts and practices and the dissemination of the aforesaid "false advertisements" has the capacity and tendency to mislead members of the consuming public and professional beauticians into the erroneous and mistaken belief that said statements and representations are true, and into the purchase of substantial quantities of Realistic relaxer by reason of said erroneous and mistaken belief.

PAR. 13. In the course and conduct of their business, respondents are in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of products of the same general kind and nature as sold by respondents.

PAR. 14. The aforesaid acts and practices of respondents, including the dissemination of "false advertisements," are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

COMPLAINT AS TO DELUXOL LABORATORIES, INC.,
DOCKET C-2869

The Federal Trade Commission, having reason to believe that Deluxol Laboratories, Inc. and Revlon, Inc., corporations, hereinafter sometimes referred to as respondents, have violated Sections 5 and 12 of the Federal Trade Commission Act, as amended, and that a proceeding in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. Respondent Deluxol Laboratories, Inc. (Deluxol) is an Illinois corporation with its office and principal place of business located at 1130 E. 95th St., Chicago, Illinois.

Respondent Revlon, Inc. (Revlon) is a Delaware corporation with its office and principal place of business located at 767 Fifth Ave., New York, New York.

All allegations in this complaint stated in the present tense include the past tense.

PAR. 2. Respondent Deluxol, a wholly-owned subsidiary of respondent Revlon, manufactures, advertises, offers for sale, sells and distributes French Perm Creme Hair Relaxer (French Perm), a cosmetic, as that term is defined in the Federal Trade Commission Act, as amended. French Perm is an emulsion which contains as its active ingredient sodium hydroxide, commonly known as lye. The emulsion is applied to the hair, rinsed from the hair, and neutralized with a shampoo. French Perm is sold separately and in kits with

shampoo and setting lotion. French Perm is used by consumers and professional beauticians for the purpose of straightening curly hair.

Respondent Revlon manufactures, advertises, offers for sale, sells and distributes cosmetics and ethical drugs. It controls the business operations and policies of Deluxol, its wholly-owned subsidiary, and is responsible for the acts and practices of Deluxol.

PAR. 3. Revlon, through its wholly-owned subsidiary Deluxol, and Deluxol, cause French Perm, when sold, to be sent from Deluxol's place of business in Illinois to beauty salons and other purchasers located in various other States of the United States and the District of Columbia. Thus, Revlon and Deluxol maintain a substantial course of trade in said product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their business, respondents disseminate and cause to be disseminated certain advertisements concerning French Perm (1) by United States mail, magazines of interstate circulation and by various other means in or having an effect upon commerce, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of French Perm; (2) by various means, for the purpose of inducing, or which are likely to induce, the purchase in or having an effect upon commerce of French Perm, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. Typical and illustrative of the statements and representations made in respondents' advertisements, but not all inclusive thereof, are the following:

Why has French Perm been the standard of excellence in Salon Hair Relaxers since 1962? The secret is its special *buffering ingredients* that provide three superior processing advantages. (1) Gets the right working speed for efficiency, control and confidence — not too fast, not too slow. (2) Its *buffered action* pampers the hair shaft during processing. It's blended with protein and other mellowing ingredients to leave hair feeling like *hair*: lively, soft and shining! (3) Allows exceptional patron comfort. (Hurray!)

PAR. 6. Respondents further promote the sale of French Perm through statements and representations made by various other means, including labeling. Typical and illustrative of the statements and representations made in respondents' labeling, but not all inclusive thereof, are the following:

Contains protein for superior hair condition.

You'll love its gentle "buffered action" that leaves hair lively, gleaming, easy to style.

No burn.

So gentle, needs no protective base!

PAR. 7. Through the use of the above-quoted statements and representations, and others of similar import and meaning not expressly set forth herein, respondents represent, directly or by implication, that:

A. French Perm is gentle and does not irritate or burn scalp or skin.

B. French Perm contains protein which protects hair during the relaxing process and which produces superior hair condition.

PAR. 8. In truth and in fact:

A. French Perm is not gentle, and in some instances it causes scalp and skin irritation and burns. Sodium hydroxide, the active ingredient in French Perm, is a primary skin irritant. It is caustic to skin and breaks down the cells which form the epidermis. It can also cause eye irritation and may impair vision temporarily.

B. French Perm does not contain protein which protects hair or produces superior hair condition. The ingredient used is Maypon 4c, a detergent derived from protein which has been altered so that it no longer retains the chemical or physical properties of protein. Therefore, at the time the relaxer is used, it contains no protein to protect hair or produce superior hair condition.

Furthermore, the sodium hydroxide in French Perm straightens hair by breaking down the cells of the hair shaft. The relaxing process weakens hair, and, in some instances, makes it brittle and causes partial or total hair loss.

Therefore, the advertisements, statements and representations referred to in Paragraphs Five and Seven are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, as amended. The advertisements, statements and representations referred to in Paragraphs Five, Six and Seven are false, misleading and deceptive.

PAR. 9. At the time the representations set forth in Paragraph Seven were made, respondents had no reasonable basis from which to conclude that such representations were true. Therefore, the advertisements and representations set forth in Paragraphs Five, Six and Seven are deceptive and unfair.

PAR. 10. Respondents advertise French Perm without disclosing that:

A. French Perm can cause skin and scalp irritation, hair breakage and eye injury.

B. Directions must be followed carefully.

Such facts are material and, if known to potential customers, would be likely to affect their decision to purchase French Perm. Similarly, such facts, if known to potential customers who purchase hair straightening services from professional beauticians, would be likely to affect their decision to have their hair straightened with French Perm.

Therefore, respondents' advertisements of said product are misleading in material respects and constitute "false advertisements" as that term is defined in the Federal Trade Commission Act, as amended, and are false, misleading and deceptive.

PAR. 11. In the further course and conduct of their business, respondents offer for sale, sell and distribute French Perm without disclosing on the retail product package of said product the following information:

A. The product contains sodium hydroxide (lye). It can cause skin and scalp burns, hair loss, and eye injury. Directions must be followed carefully.

B. The product should not be used if scalp is irritated or injured.

C. The product should not be used on bleached or permanently colored hair. If hair has been relaxed, the relaxer should be applied only to new growth, as described in the directions.

D. If the relaxer causes skin or scalp irritation, it should be rinsed out immediately and washed with a shampoo in the kit. If irritation persists, a physician should be consulted.

E. If the relaxer gets into eyes, eyes should be rinsed immediately and a physician should be consulted.

Such facts are material and, if known to potential customers, would be likely to affect their decision to purchase French Perm. Therefore, failure to disclose said material facts on the product package is an unfair and deceptive act or practice.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive and unfair statements, representations, acts and practices and the dissemination of the aforesaid "false advertisements" has the capacity and tendency to mislead members of the consuming public and professional beauticians into the erroneous and mistaken belief that said statements and representations are true, and into the purchase of substantial quantities of French Perm by reason of said erroneous and mistaken belief.

PAR. 13. In the course and conduct of their business, respondents are in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of products of the same general kind and nature as sold by respondents.

PAR. 14. The aforesaid acts and practices of respondents, including the dissemination of "false advertisements," are all to the prejudice and injury of the public and of respondents' competitors and constitute unfair and deceptive acts or practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

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

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

A. Respondent Revlon, Inc. (Revlon) is a Delaware corporation with its office and principal place of business located at 767 Fifth Ave., New York, New York.

Respondent Revlon-Realistic Professional Products, Inc. (Realistic) is an Ohio corporation with its office and principal place of business located at 3274 Beekman St., Cincinnati, Ohio.

Respondent Deluxol Laboratories, Inc. (Deluxol) is an Illinois corporation with its office and principal place of business located at 1130 E. 95th St., Chicago, Illinois.

B. 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 respondents Revlon, Realistic and Deluxol, corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of Revlon Realistic Protein Permanent Creme Relaxer (Realistic Relaxer), French Perm Creme Hair Relaxer (French Perm relaxer) or any hair care product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing in writing, orally, visually, or in any other manner, directly or by implication, that:

1. Any hair straightening product is comfortable, gentle or safe.

2. Any hair straightening product is mild, *provided, however,* that respondents may use the words "mild strength" or "mild formula" to designate those hair straightening products which contain a smaller percentage of the active ingredient or ingredients than other hair straightening products manufactured by respondents.

3. Any hair straightening product helps improve hair strength.

4. Any hair straightening product conditions or helps condition hair or improves the condition of hair, *provided, however,* that respondents may represent that such products make or help make hair more manageable, if at the time the representation is made, respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representations.

5. Any hair care product contains protein, unless, at the time the representation is made, respondents have a reasonable basis, consisting of competent and reliable controlled tests, to establish that at the time it is used, such product contains protein or partially hydrolyzed animal or vegetable protein having at least a mean molecular weight of 1000. This definition does not include any derivative of protein or partially hydrolyzed animal or vegetable protein obtained through the condensation reaction process of protein or partially hydrolyzed animal or vegetable protein with other chemicals.

B. Representing, in any manner, directly or by implication, the efficacy of any hair straightening product or the ingredients therein,

unless, at the time such representation is made, respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body:

C. Representing, in any manner, directly or by implication, the safety of any hair care product or the ingredients therein, unless at the time such representation is made, respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation. For purposes of this provision, failure to disclose facts shall not constitute a representation.

D. Disseminating or causing to be disseminated any advertisement of Realistic relaxer, French Perm relaxer, or any hair straightening product of similar composition, which fails to disclose, clearly and conspicuously with nothing to the contrary or in mitigation thereof, the following statement exactly as it appears below:

“WARNING: Follow directions carefully to avoid skin and scalp irritation, hair breakage and eye injury.”

II

It is further ordered, That respondents Revlon, Realistic, and Deluxol, corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of Realistic relaxer, French Perm relaxer, or any hair care product, do forthwith cease and desist from:

A. Disseminating or causing to be disseminated by United States mail or by any means in or having an effect upon commerce, as “commerce” is defined in the Federal Trade Commission Act, as amended, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of any such product, any advertisement which contains a representation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

B. Disseminating or causing to be disseminated by any means, for the purpose of inducing or which is likely to induce, directly or indirectly, the purchase of any such product in or having an effect on commerce, as “commerce” is defined in the Federal Trade Commission Act, as amended, any advertisement which contains a represen-

tation prohibited by Paragraph I of this order or which omits a disclosure for such product required by Paragraph I of this order.

III

It is further ordered, That respondents Revlon, Realistic, and Deluxol, corporations, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale, or distribution of Realistic relaxer, French Perm relaxer, or any hair straightening product of similar composition in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from failing to include clearly and conspicuously on the information panel of the product package, on the package insert, and on the label of the relaxer container of any such product, with nothing to the contrary or in mitigation thereof, the following disclosures exactly as they appear below:

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

Provided, however, that if such hair straightening product is offered for sale, sold or distributed without a neutralizing shampoo, respondents will disclose the following in place of Warning No. 5 above:

5. If the relaxer causes skin or scalp irritation, rinse out immediately and wash with a non-alkaline shampoo (pH below 7). If irritation persists, or if hair loss occurs, consult a physician.

IV

It is further ordered, That respondents Revlon, Realistic, and Deluxol shall cease and desist from using the work "protein" in the trade name Revlon Realistic Protein Creme Relaxer and the trade names of any hair care product, unless at the time the representation

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Decision and Order

is made, respondents have a reasonable basis, consisting of competent and reliable controlled tests, to establish that at the time it is used, such product contains protein or partially hydrolyzed animal or vegetable protein having at least a mean molecular weight of 1000. This definition does not include any derivative of protein or partially hydrolyzed animal or vegetable protein obtained through the condensation reaction process of protein or partially hydrolyzed animal or vegetable protein with other chemicals.

V

It is further ordered, That respondents shall instruct each customer to whom they sell Realistic relaxer or French Perm relaxer, to destroy all display advertisements for Realistic relaxer and French Perm relaxer which contain any of the words or representations prohibited by Paragraph I of this order or which fail to made the affirmative disclosures for such products required by Paragraph I of this order. Respondents shall also instruct each of their customers which is a wholesaler to instruct beauty salons and retail stores which may have received such display advertisements to destroy them.

VI

It is further ordered, That respondents shall distribute a copy of this order to their present and future officers, directors, and operating divisions and that respondents secure from each such person a signed statement acknowledging receipt of the order.

VII

It is further ordered, That respondents maintain complete business records relative to the manner and form of their continuing compliance with the terms and provisions of this order. Each record shall be retained by respondents for at least three years after it is made.

VIII

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

IX

It is further ordered, That the respondents herein shall, within 120 days after service of this order, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order.

IN THE MATTER OF
CALIFORNIA AND HAWAIIAN SUGAR COMPANY,
ET AL.

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

Docket C-2858. Complaint, Jan. 6, 1977 — Decision, Jan. 6, 1977

Consent order requiring a San Francisco, Calif., seller of granulated sugar, and its advertising agency, Foote, Cone and Belding/Honig, Inc., among other things, to cease misrepresenting or making unsubstantiated claims regarding the superiority of their products over that of competing brands.

Appearances

For the Commission: *Ben Aliza and Alfred Lindeman.*

For the respondents: *George Link, Brobeck, Phlegge & Harrison, Los Angeles, Calif. and Quincy, White, Sidley & Austin, Chicago, Ill.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that California and Hawaiian Sugar Company, a corporation, and Foote, Cone & Belding/Honig, Inc., a 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 California and Hawaiian Sugar Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 1 California St., San Francisco, California.

PAR. 2. Respondent Foote, Cone & Belding/Honig, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 55 Francisco St., San Francisco, California.

PAR. 3. Respondent California and Hawaiian Sugar Company is now, and for some time last past has been, engaged in the manufacture, sale and distribution of refined sugars which come within the classification of a "food," as said term is defined in the Federal Trade

Commission Act. Its refined sugars are usually sold for household use under the "C&H" brand.

PAR. 4. Respondent Foote, Cone & Belding/Honig, Inc. is now, and for some time last past has been, the advertising agency of California and Hawaiian Sugar Company, and now and for some time last past, has prepared and placed for dissemination and has caused the dissemination of advertising material, including but not limited to the advertising referred to herein, to promote the sale of California and Hawaiian Sugar Company's refined sugars, which come within the classification of "food," as said term is defined in the Federal Trade Commission Act.

PAR. 5. Respondent California and Hawaiian Sugar Company causes the said products, when sold, to be transported from its place of business in one State of the United States to purchasers located in various other States of the United States. Respondent California and Hawaiian Sugar Company maintains, and at all times mentioned herein has maintained, a course of trade in said products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PAR. 6. In the course and conduct of their said businesses, respondents have disseminated, and caused the dissemination of certain advertisements concerning the said refined sugars by various means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, including but not limited to, television and radio broadcasts transmitted by television and radio stations located in various States of the United States, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which are likely to induce, directly or indirectly, the purchase of said product; and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including but not limited to the aforesaid media, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said refined sugars in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 7. Typical of the statements and representations in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are the following television and radio commercials¹ purporting to be recorded on the scene in supermarkets:

¹ In the scripts of said commercials, the following abbreviations are used:

A = announcer

I = interviewer

(Continued)

FOOTE, CONE & BELDING/HONIG

RADIO COPY

CLIENT C and H Sugar Company PRO-
GRAM
PROD- DA Radio Interview #5 - Joyce STA/CITY
UCT Pavlovsky
TIME :60 DATE May 12, 1975

- A: Why do women pick *one* brand over *another*? Mrs. Joyce Pavlovsky spelled it out for us in this supermarket interview. . . .
- I: You picked C and H Sugar and I'm curious: Why do you buy C and H?
- R: I buy C and H all the time because it's the finest quality sugar that I can find and this is what I want for my family.
- I: What is it about C and H that you like? What does it say for you that makes it different?
- R: Well, I know it's a pure product. Pure cane sugar from Hawaii. So I believe it and so I buy it and it's always worked well for me.
- I: To me sugar is sugar. All brands are the same.
- R: No! To me sugar isn't sugar. 'Cause I've tried other brands.
- I: Isn't this other brand pure cane sugar from Hawaii?
- R: I don't know because I don't think it says it. And this says it! And I believe it because they wouldn't be allowed to put it on the package unless it were so. Pure cane sugar. So I buy C and H.
- I: If you want pure cane sugar from Hawaii, you're sure of getting it with C and H. It says so. . . .
- R: On the package!

FOOTE, CONE & BELDING/HONIG

RADIO COPY

CLIENT C and H Sugar Company PRO-
GRAM
PROD- DA Radio Interview #3 - STA/CITY
UCT Joanne Wickley
TIME :60 DATE 5/12/75

- A: Does the information on food labels really influence women? Mrs. Joanne Wickley feels pretty strongly about it, as this supermarket interview will show you. . . .
- I: You picked C and H Sugar. My question is "why?"
- R: Well, you know that it's pure cane sugar. Says so right on the package.
- I: Aren't all sugars the same? I mean, really, sugar is sugar. Now, there's other brands on the shelf. I mean, isn't that pure cane sugar from Hawaii?
- R: I don't know. It doesn't say that on there.
- I: And what about C and H? What does that do that makes it different?
- R: It tells us where it's from. It tells us that it's pure cane sugar.
- I: And really, this impresses you?

R = respondent-consumer
DA = devil's advocate

Complaint

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R: Yes! People read labels these days. They like to know what's in it, where it comes from and we can depend upon it's . . . what it says right here.

I: And you're honestly telling me that there is a difference between brands of sugar?

R: There really is.

I: If you want pure cane sugar from Hawaii, you're sure of getting it with C and H.

R: Right.

FOOTE, CONE & BELDING/HONIG

TV SCRIPT

CLIENT C and H Sugar Company TIME :30
 PROD. Pure Cane Sugar DATE June 23, 1975
 UCT
 SPOT "PACKAGE INFO" Final - Short form - legal
 NO.

1. MAN WITH SHOPPING CART FULL OF PACKAGES (NO BRAND NAMES). HE WHEELS DOWN AISLE TOWARD CAMERA, STOPS AT SUGAR SECTION. (SILENT, EXCEPT POSSIBLY FOR MUTED STORE SOUNDS.)
2. CU. HE TAKES GENERIC PACKAGE FROM SHELF. TURNS IT OVER AND OVER IN HIS HAND, LOOKING FOR SOMETHING ON THE LABEL. *ON CAMERA ANNOUNCER (TO HIMSELF, IN A RATHER DRY, WRY, FLAT VOICE.)*
It doesn't say. It just doesn't say. (TO VIEWER) Did you ever notice, many sugar packages don't tell you *what* the sugar is made from. They just say "granulated." On the other hand - most people who make cane sugar - like C and H - proudly . . . put the word "cane" on every label. Besides that . . . they tell you *where* it comes from. Hawaii.
3. HE SHAKES HIS HEAD IN RESIGNATION, SHRUGS AND PUTS PACKAGE BACK. *So, if you want pure cane sugar from Hawaii, you can be sure you're getting it with C and H.*
4. HE TAKES DOWN A C AND H PACKAGE. *Says so right on the label.*
5. SHOW CU LABEL WITH WORDS "PURE CANE SUGAR" AND "HAWAII."
6. MEDIUM. HOLDS C AND H PACKAGE. THEN ANOTHER CU OF PACKAGE.
7. IN TO CU OF C AND H.

PAR. 8. Through the use of said advertisements and others similar thereto not specifically set out herein, disseminated as aforesaid, respondents have represented, directly and by implication, that:

1. There are differences in granulated sugars.
2. C&H brand granulated sugar derived from Hawaiian sugar cane is different from and superior to other granulated sugars in quality and purity.

In making said representations, respondents have failed to specify any consumer use of said sugar with respect to which C&H brand sugar is significantly different from or superior to other sugar.

PAR. 9. In truth and in fact, with respect to the uses for which consumers generally purchase such sugar:

1. There are no differences in granulated sugars. They are all 99.9 percent sucrose, $C_{12}H_{22}O_{11}$, a carbohydrate.
2. C&H brand granulated sugar derived from Hawaiian sugar cane is not different from or superior to other granulated sugars in quality or purity.

Therefore, the advertisements referred to in Paragraph Seven were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act, and the statements and representations set forth in Paragraphs Seven and Eight were, and are, false, misleading and deceptive.

PAR. 10. In certain commercials, disseminated as aforesaid, respondents have represented, directly and by implication, that certain brands of sugar other than C&H do not disclose what their sugar is made from or where it comes from, and that such nondisclosure is a material fact which implies such competitive brands come from an inferior source of sugar. In truth and in fact, with respect to the uses for which consumers generally purchase such sugar, it is not a material fact that competitive brands of sugar do not disclose what their sugar is made from or where it comes from, and such nondisclosure does not imply that such competitive brands come from an inferior source of sugar. For consumer uses, all granulated sugars are substantially the same regardless of sugar source. They are all 99.9 percent sucrose, $C_{12}H_{22}O_{11}$, a carbohydrate.

Therefore, the advertisements referred to in Paragraph Seven were and are misleading in material respects and constituted, and now constitute, "false advertisements" as that term is defined in the Federal Trade Commission Act, and the statements, representations and practices set forth in Paragraphs Seven and Ten were, and are, false, misleading and deceptive to consumers, and unfair acts and practices to competitors.

PAR. 11. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent California and Hawaiian Sugar Company has been, and now is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of food products of the same general kind and nature as that sold by respondent.

PAR. 12. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent Foote, Cone & Belding/Honig, Inc. has been, and now is, in substantial competition in commerce with other advertising agencies.

PAR. 13. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices and the dissemination of the aforesaid "false advertisements" has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent California and Hawaiian Sugar Company's refined sugars by reason of said erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents including the dissemination of "false advertisements," as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices in or affecting commerce and unfair methods of competition in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

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

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

1. Respondent California and Hawaiian Sugar Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1 California St., San Francisco, California.

Respondent Foote, Cone & Belding/Honig, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 55 Francisco St., San Francisco, California.

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

ORDER

It is ordered. That respondents California and Hawaiian Sugar Company, a corporation, and Foote, Cone & Belding/Honig, Inc., a corporation, their successors and assigns, and their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of granulated sugar packaged for retail consumption, forthwith cease and desist from:

1. Disseminating or causing the dissemination of any advertisement by means of the United States mail or in or having an effect upon commerce by any means, as "commerce" is defined in the Federal Trade Commission Act, which represents, directly or by implication:

(A) (i) That there are differences in granulated sugars, or that C&H granulated sugar derived from Hawaiian sugar cane is superior to or different from sugar derived from sugar beets or sugar cane from places other than Hawaii, unless (a) such represented difference or superiority relates to a consumer use of such sugar which is specified in the advertisement, (b) the difference or superiority is substantiated by competent and reliable evidence prior to making the representation, and (c) such substantiation includes competent and reliable evidence that the difference or superiority is discernible to or of benefit to the class of consumers to whom the representation is directed.

(ii) *Provided, however,* that it shall not be a violation of this order to use the phrase "pure cane sugar from Hawaii" as a means of identifying the geographic origin and type of granulated sugar marketed under the C&H brand name in any context wherein the quality of the sugar marketed under the C&H brand is not expressly or implicitly compared with the quality of any other sugar. Where an

advertisement contains the phrase "pure cane sugar from Hawaii" and a depiction of C&H sugar, without any representation referring to any competitor's sugar product, or any representation that C&H sugar possesses a depicted characteristic or quality to a degree different from competitive brands of sugar, the advertisement will not be deemed to contain an implied comparison.

(iii) *It is further provided*, that if an advertisement makes a positive or absolute and truthful representation concerning C&H sugar without any representation concerning any competitor's sugar product, or without any representation that C&H sugar possesses a depicted characteristic or quality to a degree different from competitors' brands of sugar, the advertisement will not be deemed to contain an implied comparison under this order.

(B) That the label, advertising or packaging of any brand of granulated sugar other than C&H does not disclose the source or origin of its sugar, unless the advertisement specifies a consumer use of sugar with respect to which C&H sugar is different from such other sugar and such difference is substantiated by competent and reliable evidence prior to making the representation.

2. Disseminating, or causing the dissemination of, any advertisement by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of any such product, in or having an effect upon commerce, as "commerce" is defined in the Federal Trade Commission Act, which contains any of the representations prohibited in Paragraph 1 above.

Provided, however, that it shall not be considered a violation of this order for Foote, Cone & Belding/Honig, Inc. to make what would otherwise be a false or misleading claim or representation concerning the qualities of C&H sugars or competitive sugars if that respondent shows that it neither had any knowledge of the falsity of or misleading character of such representation nor had any reason to know, nor upon reasonable inquiry could have known its false, deceptive or misleading nature.

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

It is further ordered, That respondents notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, 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 the respondents herein shall within sixty

(60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF

SALOMON/NORTH AMERICA, INC.

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

Docket C-2859. Complaint, Jan. 6, 1977 — Decision, Jan. 6, 1977

Consent order requiring a Peabody, Mass., manufacturer and distributor of ski bindings and related ski equipment, among other things, to cease establishing and maintaining resale prices; soliciting the identities of dealers failing to observe respondent's sales policy; threatening the termination of those dealerships; and restricting product sales only to authorized dealers. Additionally, the order requires respondent to indicate on each page of disseminated material containing retail prices, that these prices are suggested or approximate; and to maintain a five-year file containing correspondence and explanations of refusals to deal.

Appearances

For the Commission: *David W. DiNardi.*

For the respondent: *Blair L. Perry and John H. Morton, Hale & Dorr, Boston, Mass.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Salomon/North America, Inc., a corporation, hereinafter referred to as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U.S.C. 45), 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 with respect thereto as follows:

PARAGRAPH 1. Respondent Salomon/North America, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 7 Dearborn Road, Peabody, Massachusetts.

PAR. 2. Respondent has been and is now engaged in the manufacture, sale and distribution of ski bindings and related items, hereinafter referred to as said products. Respondent's products are subsequently distributed and sold to authorized dealers throughout the United States for resale to the general public.

PAR. 3. In the course and conduct of its business as aforesaid,

respondent has been and is now engaged in commerce or its acts and practices affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, in that respondent has sold and caused and now causes said products to be shipped from the state in which they are manufactured or warehoused to other states of the United States for resale and distribution through authorized dealers to the general public.

PAR. 4. Except to the extent that competition has been hampered or restrained as set forth in this complaint, respondent has been and is now in competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of said products.

PAR. 5. Respondent, in combination, agreement or arrangement with certain of its authorized dealers, or with the cooperation or acquiescence of other dealers, has for the last several years been engaged in a planned course of action to fix, establish and maintain certain specified uniform prices at which said products are resold. In furtherance of said planned course of action, respondent has for the past several years engaged in the following acts and practices, among others:

(a) Regularly furnishing its dealers with price lists and necessary supplements thereto containing certain resale or retail prices;

(b) Establishing contracts, agreements and arrangements with its dealers, one or more of whom are located in states which do not have fair trade laws, as a condition precedent to the granting of a dealership, that such dealers will maintain certain resale or retail prices;

(c) Informing its dealers, by direct and indirect means, that respondent expects and requires such dealers to maintain and enforce certain resale or retail prices, or such dealerships will be terminated;

(d) Requiring its dealers to agree not to sell or otherwise supply or furnish said products to anyone who is not an authorized dealer of the respondent;

(e) Soliciting and obtaining from its dealers, cooperation and assistance in identifying and reporting any dealer who advertises, or offers to sell, or sells said products at prices lower than certain resale or retail prices; and

(f) Directing its salesmen, representatives and other employees to secure and report information identifying any dealer who fails to adhere to and maintain certain resale or retail prices.

PAR. 6. By means of such acts and practices, including but not limited to the foregoing, respondent, in combination, agreement, or arrangement with certain of its authorized dealers and with the

acquiescence of other authorized dealers, has established, maintained and pursued a planned course of action to fix and maintain certain resale or retail prices at which said products will be resold.

PAR. 7. The aforementioned acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of said products, and constitute unfair methods of competition in or affecting commerce, all in derogation of the public interest and in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge 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 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 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, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Salomon/North America, Inc. (Salomon), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business at 7 Dearborn Road, Peabody, Massachusetts.

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

It is ordered. That Salomon/North America, Inc., a corporation (hereafter Salomon), its subsidiaries, successors and assigns, and its officers and directors and Salomon's agents, representatives and employees, individually or in concert, directly or through any corporation, subsidiary, division or other device, in connection with the manufacture, distribution, offering for sale or sale of ski bindings, ski equipment and related items or any other product (hereinafter the "Products") in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Making or enforcing any oral or written contract, agreement or arrangement pursuant to which such dealer, distributor or retailer agrees not to sell the Products at prices less than minimum retail prices established by Salomon.

B. Making or enforcing any oral or written contract agreement or arrangement which restricts the class or type of customer to whom such dealer, distributor or retailer may sell the products.

C. Making or enforcing any oral or written contract, agreement or arrangement which restricts the site or location at which such dealer, distributor or retailer may sell the Products.

D. Making or enforcing any oral or written contract, agreement or arrangement which prohibits such dealer, distributor or retailer from advertising, promoting or offering for sale any of the Products at less than minimum prices specified by Salomon.

E. Requesting or requiring any dealer or prospective dealer, either directly or indirectly, to report any dealer, person or firm who does not adhere to any suggested retail price for any of said Products, or acting on reports so obtained by refusing or threatening to refuse sales of the Products to any dealer, person or firm so reported.

F. Publishing, disseminating or circulating any pricelist, price book, price tag, advertising or promotional material, or other document ("Promotional Material") indicating any resale or retail prices for the Products without stating on each page of such Promotional Material which includes a list or statement of the suggested retail prices of any or all of the Products that the price is a suggested or an approximate retail price.

II

Nothing contained in this order shall be construed as limiting or restricting the rights of Salomon (a) to require that each dealer or retailer who sells the Products at retail shall be fully qualified to perform Proper Fitting Services (as that term is hereafter defined); and (b) to require that each dealer or retailer who sells the Products at retail actually shall provide Proper Fitting Services to retail customers who purchase the Products; and (c) to require that distributors, dealers and retailers refrain from reselling the Products to dealers or retailers who are not fully qualified and willing to provide Proper Fitting Services to retail customers; *provided* that Salomon shall make available to all present and prospective dealers an opportunity for instruction in performing Proper Fitting Services, except where Salomon has lawful business reasons (other than the inability to perform Proper Fitting Services) for not selling the Products to any particular dealer. As used in this paragraph II, the term "Proper Fitting Services" means the mounting and installing of the Products upon the skis of a retail or rental customer, and the fitting and adjustment of the Products to the boots of such customer, in a workmanlike and proper manner, having due regard for the physical qualifications and skiing abilities of such customer, in order to minimize the risk of injury to such customer and other persons and property and to minimize the potential liabilities of Salomon and its distributors, dealers and retailers.

III

It is further ordered. That Salomon shall, within fifty-nine (59) days after service upon it of this order, mail a copy of this order to each of its dealers in the Commonwealth of Puerto Rico, the District of Columbia and in those states which as of February 28, 1975, did not permit fair trade contracts, under cover of the letter annexed hereto as Exhibit A, and furnish the Commission proof of the mailing thereof.

IV

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

V

It is further ordered, That Salomon shall forthwith distribute a copy of this order to each of its operating divisions and to all of its sales personnel and shall instruct each sales person employed by it now or in the future to read this order and to be familiar with its provisions and to comply with it. The failure of such sales person to comply with this order shall be grounds for immediate dismissal.

VI

It is further ordered, That Salomon herein for a period of five (5) years from the date of this signing establish and maintain a file of all records referring or relating to Salomon's refusal to sell the Products to any dealer, which file shall contain a copy of any written communication to any such dealer explaining Salomon's refusal to sell, and which file will be made available for Commission inspection on reasonable notice.

VII

It is further ordered, That Salomon 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.

EXHIBIT A

Letterhead of Salomon/North America, Inc.)

Dear Dealer:

Enclosed is a copy of a consent order which Salmon/North America, Inc. has signed with the Federal Trade Commission. The consent order concerns our pricing policies and distribution activities.

Salomon has entered into this agreement solely to settle a dispute with the Commission and to avoid the expense and delays of litigation. The agreement and enclosed consent order should not be considered as an admission that we have violated any of the laws administered by the Commission. Moreover, you should not assume that any of the allegations in the complaint are true or that any statements in the consent order reflect prior pricing or marketing practices of Salomon. Instead, the order merely reflects the terms of Salomon's agreement with the Federal Trade Commission and relates to Salomon's activities in the future.

It is important that you read and understand the terms of the enclosed consent order. There are, however, three essential points for you to remember:

- (1) You are free to set your own retail or resale prices for Salomon products.

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(2) We will not solicit, invite or encourage any dealer, or any other person to report any dealer not following any retail or resale price for any Salomon products. Furthermore, we will not act on any such reports sent to us.

(3) We will not require or induce any dealer to refrain from advertising Salomon products at any price or from offering or selling our products at any price to any person.

You must realize, however, that the consent order itself is controlling rather than our summary of its essential points. If you should have any questions, please call me or John O'Malley at 800-225-6818 (Northeast) or 800-225-6850 (Other).

Growth and Happiness,

Fred Schaeffer
President

Enc.

IN THE MATTER OF

IDEA RESEARCH AND DEVELOPMENT, INC., ET AL.

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

Docket 9032. Complaint, May 6, 1975 — Decision, Jan. 11, 1977

Consent order requiring a Mesquite, Tex., idea promotion firm, among other things, to cease misrepresenting the nature and value of its services; misrepresenting its ability to successfully promote ideas, inventions, or products; to its clients. Further, respondents are required to disclose, in contracts and promotional material, the lack of confidentiality afforded its clients' ideas, the ramifications of contracting with respondents prior to contacting an independent patent attorney, and the amount of monies earned by previous clients through respondents' endeavors. The order additionally requires a ten-day cooling-off period before the execution of contracts and prohibits respondents from accepting any fee other than a percentage of royalties resulting from its efforts.

Appearances

For the Commission: *Paul W. Turley, John J. Hemrick and Richard H. Gateley.*

For the respondents: *Melvyn Carson Bruder and Jack Kanz, Dallas, Tex.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Idea Research and Development, Inc., a corporation, and Kellis Blakely Shanks and Jack Earnest Trout, individually and as officers of said corporation, and Walter Glenn Ford, individually and as an employee of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

I. DEFINITIONS

PARAGRAPH 1. For purposes of this complaint the following definitions shall apply:

A. "Idea" shall mean any idea, invention or product;

B. "Client" shall mean any party that has entered into an agreement with respondents for the "promotion" of an "idea;"

C. "Financial gain" shall mean an amount of money greater than the amount of money paid by a "client" to respondents.

D. "Promotion" shall mean the evaluation, development, manufacturing, marketing or otherwise contributing to the success or growth of an "idea."

II. RESPONDENTS

PAR. 2. Respondent Idea Research and Development, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 3318 Interstate 30 East, Mesquite, Texas.

Respondent Kellis Blakely Shanks is an individual and an officer of corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is 10347 Plummer, Dallas, Texas.

Respondent Jack Earnest Trout is an individual and an officer of corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is 9033 Thornton Freeway East, Mesquite, Texas.

Respondent Walter Glenn Ford is an individual and an employee of corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is 821 Vinecrest Lane, Richardson, Texas.

III. NATURE OF TRADE AND COMMERCE

PAR. 3. Respondents are now and have been engaged in the advertising, offering for sale and sale of contracts for future services in connection with the evaluation, development, manufacturing and marketing of ideas. The consideration required by respondents is and has been generally between \$750.00 and \$1,200.00.

IV. JURISDICTION

PAR. 4. In the course and conduct of their business as aforesaid, respondents now cause, and have caused, their advertising materials, contracts, and various business papers to be transmitted through the United States mail and other interstate instrumentalities from their place of business in the State of Texas to their places of business,

agents, representatives, employees, clients and prospective clients in various other States of the United States and the District of Columbia, and now maintain and operate and have maintained and operated, places of business and have made substantial sales of their agreements to clients in various States of the United States, and maintain and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents are, and have been, in substantial competition, in commerce, with corporations, firms and individuals offering contracts for future services in connection with the evaluation, development, manufacturing and marketing of ideas.

V. ACTS AND PRACTICES

PAR. 6. In the further course and conduct of their aforesaid business, respondents now cause and have caused the dissemination of advertisements in various publications of general circulation, the broadcast of radio and television advertisements, the distribution of advertising materials to members of the public, and are now making and have made sales presentations by means of oral and written statements. By and through such means, respondents have made and are making representations that:

A. Respondents possess the ability to recognize ideas which may result in financial gains;

B. Respondents possess engineering and marketing expertise necessary for the development and promotion of ideas.

C. Respondents possess adequate knowledge to provide legal protection for clients' ideas.

D. Respondents have the ability to obtain manufacturing contracts for their clients;

E. Respondents have the ability to obtain financial gains for their clients, including but not limited to potential income to be derived by their clients from sales, licensing or royalty agreements.

PAR. 7. By and through the statements and representations alleged in Paragraph 6 herein, respondents have represented and are now representing, directly or by implication, that clients will have their ideas reviewed and evaluated by qualified and appropriately licensed persons; that clients receive legal protection for their ideas; that clients' ideas will be manufactured and marketed; and as a result of contracting with respondents, clients will receive a financial gain.

PAR. 8. In truth and in fact, few, if any, of respondents' clients have their ideas reviewed and evaluated by qualified and appropriately

licensed persons; receive legal protection for their ideas; have their ideas manufactured or marketed; or receive a financial gain as a result of contracting with respondents. Therefore, the acts and practices alleged in Paragraph 7 herein are deceptive, false, misleading and unfair.

PAR. 9. In the further course and conduct of their aforesaid business, respondents have failed to protect clients' investments and have failed to disclose facts concerning the probability that such clients will receive a financial gain as a result of contracting with respondents.

Since few, if any, of respondents' clients receive or have received financial gains as a result of contracting with respondents, respondents know or should have known that their clients' investments are unprotected and that their clients will not obtain financial gains.

Therefore, respondents, by inducing their clients to pay substantial sums of money without adequate protection for such clients' investments and without a disclosure of facts concerning the probability of a client receiving a financial gain which if known to certain prospective clients, would likely affect their decision of whether to execute contracts with respondents, are engaging in unfair acts or practices constituting a continuing violation of Section 5 of the Federal Trade Commission Act (15. U.S.C. 45).

PAR. 10. In the further course and conduct of their aforesaid business, respondents have represented, directly or indirectly, that their clients' ideas have adequate legal protection. Respondents have failed to disclose to their clients the degree of legal protection being afforded the clients' ideas and the risk involved in contracting with respondents concerning potential patent rights. Such disclosures include, but are not limited to:

A. Respondents fail to disclose that they afford no legal protection recognized by the United States Patent Office.

B. Respondents fail to disclose that the ordinary course of conduct of their business may be construed by the United States Patent Office to constitute publication of the clients' idea.

C. Respondents fail to disclose that publication of an unprotected idea for a period of one year or more may constitute a waiver of any patentable rights the client may have.

D. Respondents fail to disclose that their clients must maintain the confidentiality of their ideas.

Respondents' failure to disclose such consequences in language calculated to be readily understood by their clients is a failure to disclose material facts which if known to prospective clients would likely affect their decision of whether to execute contracts with

respondents. Respondents' aforesaid failure to disclose material facts is an unfair act or practice in violation of Section 5 of the Federal Trade Commission Act.

PAR. 11. Respondents as aforesaid have been and are now failing to disclose material facts while using other false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money for contracts whose value to the said persons for services by respondents was and is virtually worthless. Respondents have received the said sums and have failed to offer to refund and refuse to refund such money to such persons.

The use by respondents of the aforesaid practices and their continued retention of the said sums, as aforesaid, is an unfair act or practice and a continuing violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

PAR. 12. The use by respondents of the aforementioned unfair, false, misleading and deceptive acts, practices, statements or representations has had and now has, a capacity and tendency to mislead and deceive a substantial portion of the purchasing public into erroneous and mistaken beliefs and into the execution of contracts with respondents by reason of said erroneous and mistaken beliefs.

PAR. 13. The aforementioned acts and practices, as herein alleged, have caused and are now causing substantial pecuniary losses to persons contracting with respondents and are all to the prejudice and injury of the public and respondents' competitors and have 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.

DECISION AND ORDER

The Commission having issued its complaint on May 6, 1975, charging respondents named in the caption hereof with violation of the Federal Trade Commission Act, and respondents having been served with a copy of that complaint; and

The Commission having withdrawn the matter from adjudication pursuant to Section 3.25 of the Commission's Rules of Practice for the purpose of negotiating a settlement by entry of a consent order; and

Respondents and counsel for the complaint having thereafter executed an agreement containing a consent order, an admission by respondents of all jurisdictional facts set forth in the complaint, and waivers and an understanding that the agreement does not affect the Commission's right to seek consumer redress and provisions as required by the Commission's Rules; and

The Commission having thereafter considered the aforesaid agree-

ment and having determined that it provides an adequate basis for appropriate disposition of this proceeding, and having accepted said agreement, and the agreement containing consent order having placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 3.25(d) of its Rules, now, in further conformity with the procedure prescribed in its Rules, the following findings, are made, and the following order is entered:

Respondents have waived, without admitting, any rights to contest in the administrative proceeding the findings of fact and conclusions of law made herein. It is expressly provided that said findings shall not be conclusive in any action which may be brought under Section 19(a)(2) of the Federal Trade Commission Act, as amended (15 U.S.C. 57b(a)(2)).

FINDINGS OF FACT

1. Respondent Idea Research and Development, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 3318 Interstate 30 East, Mesquite, Texas.
2. Respondent Kellis Blakely Shanks is an individual and an officer of corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is P. O. Box 28502, Dallas, Texas.
3. Respondent Jack Earnest Trout is an individual and an officer of corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is 1427 Lancelot, Borger, Texas.
4. Respondent Walter Glenn Ford is an individual and is a former employee of corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent including the acts and practices hereinafter set forth. His address is 2202 Delwin Circle, Killeen, Texas.
5. Respondents are now and have been engaged in the advertising, offering for sale and sale of contracts for future services in connection with the evaluation, development, manufacturing and marketing of ideas. The consideration required by respondents is and has been generally between \$750 and \$1,200.
6. In the course and conduct of their business as aforesaid, respondents now cause, and have caused, their advertising materials, contracts, and various business papers to be transmitted through the

United States mail and other interstate instrumentalities from their place of business in the State of Texas to their places of business, agents, representatives, employees, clients and prospective clients in various other States of the United States and the District of Columbia, and now maintain and operate and have maintained and operated, places of business and have made substantial sales of their agreements to clients in various States of the United States, and maintain and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce, as defined in the Federal Trade Commission Act.

7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents are, and have been, in substantial competition, in commerce, with corporations, firms and individuals offering contracts for future services in connection with the evaluation, development, manufacturing and marketing of ideas.

8. In the further course and conduct of their aforesaid business, respondents now cause and have caused the dissemination of advertisements in various publications of general circulation, the broadcast of radio and television advertisements, the distribution of advertising materials to members of the public, and are now making and have made sales presentations by means of oral and written statements. By and through such means, respondents have made and are making representations that:

A. Respondents possess the ability to recognize ideas which may result in financial gains;

B. Respondents possess engineering and marketing expertise necessary for the development and promotion of ideas;

C. Respondents possess adequate knowledge to provide legal protection for clients' ideas;

D. Respondents have the ability to obtain manufacturing contracts for their clients;

E. Respondents have the ability to obtain financial gains for their clients, including but not limited to potential income to be derived by their clients from sales, licensing or royalty agreements.

9. By and through the statements and representations alleged in Paragraph 8 herein, respondents have represented and are now representing, directly or by implication, that clients will have their ideas reviewed and evaluated by qualified and appropriately licensed persons; that clients receive legal protection for their ideas; that clients' ideas will be manufactured and marketed; and as a result of contracting with respondents, clients will receive a financial gain.

10. In truth and in fact, few, if any, of respondents' clients have their ideas reviewed and evaluated by qualified and appropriately

licensed persons; receive legal protection for their ideas; have their ideas manufactured or marketed; or receive a financial gain as a result of contracting with respondents.

11. In the further course and conduct of their aforesaid business, respondents have failed to protect clients' investments and have failed to disclose facts concerning the probability that such clients will receive a financial gain as a result of contracting with respondents.

12. Since few, if any, of respondents' clients receive or have received financial gains as a result of contracting with respondents, respondents know or should have known that their clients' investments are unprotected and that their clients will not obtain financial gains.

13. In the further course and conduct of their aforesaid business, respondents have represented, directly or indirectly, that their clients' ideas have adequate legal protection. Respondents have failed to disclose to their clients the degree of legal protection being afforded the clients' ideas and the risk involved in contracting with respondents concerning potential patent rights. Such disclosures include, but are not limited to:

A. Respondents fail to disclose that they provided no greater protection than that provided by compliance with the document disclosure program of the United States Patent Office.

B. Respondents fail to disclose that the ordinary course of conduct of their business may be construed by the United States Patent Office to constitute publication of the clients' idea.

C. Respondents fail to disclose that publication of an unprotected idea for a period of one year or more may constitute a waiver of any patentable rights the client may have.

D. Respondents fail to disclose that their clients must maintain the confidentiality of their ideas.

14. Respondents' failure to disclose such consequences in language calculated to be readily understood by their clients is a failure to disclose material facts which if known to prospective clients would likely affect their decision of whether to execute contracts with respondents.

15. Respondents as aforesaid have been and are now failing to disclose material facts while using other false, misleading, deceptive or unfair acts or practices, to induce persons to pay over to respondents substantial sums of money for contracts whose value to the said persons for services by respondents was and is virtually worthless. Respondents have received the said sums and have failed to offer to refund and refuse to refund such money to such persons.

16. The use by respondents of the aforementioned unfair, false, misleading and deceptive acts, practices, statements or representations has had and now has, capacity and tendency to mislead and deceive a substantial portion of the purchasing public into erroneous and mistaken beliefs and into the execution of contracts with respondents by reason of said erroneous and mistaken beliefs.

CONCLUSIONS OF LAW

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

2. The aforementioned acts and practices have caused and are now causing substantial pecuniary losses to persons contracting with respondents and are all to the prejudice and injury, of the public and respondents' competitors and have constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

I

Definitions

For purposes of this order the following definitions shall apply:

- A. "Idea" shall mean any idea, invention or product;
- B. "Client" shall mean any party that has entered into an agreement with respondents for the "promotion" of an "idea;"
- C. "Financial gain" shall mean an amount of money derived by a "client," from a respondent's "promotion" of the client's "idea."
- D. "Promotion" shall mean the evaluation, development, manufacturing, marketing or otherwise contributing to the success or growth of an "idea."
- E. "Future services," shall include any arrangement whereby one party pays or contracts to pay a sum of money in the belief that he may receive, as a result of such arrangement, the delivery or performance, at least partly in the future, of any service, benefit, promotion, sum of money, or similar thing of value; the term shall include, but shall not be limited to, any arrangement whereby one party pays or contracts to pay a sum of money in the belief that he may receive a financial gain as a result of such arrangement.

II

It is ordered. That respondents, Idea Research and Development, Inc., a corporation, and its officers, and Kellis Blakely Shanks and Jack Earnest Trout, individually and as officers of said corporation and Walter Glenn Ford, individually and as a former employee of said corporation, their successors and assigns, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale or sale of contracts for future services in the promotion of ideas, or any other future services, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or indirectly, by any means, that:

A. Respondents possess ability in the field of engineering unless they retain a licensed engineer who shall provide a written evaluation of each client's idea. Respondents shall provide a copy of said evaluation which the client may retain.

B. A client may or can obtain legal protection for his idea unless respondents retain an attorney or agent licensed by the United States Patent Office who renders a written opinion on such client's idea. Respondents shall provide a copy of said opinion which the client may retain.

C. Any party may or will receive a financial gain as a result of contracting with respondents except as allowed by Subparagraphs A and B of Paragraph 4 of this order.

2. Representing, directly or indirectly, by any means, that respondents possess the ability to promote ideas that will or may result in financial gains for their clients.

3. Failing to prominently display the following notice in two or more locations in those portions of respondents' business premises most frequented by prospective clients and in each location where clients sign contracts or other binding instruments. Such notice shall be considered prominently displayed only if so positioned as to be easily observed and read by respondents' clients and prospective clients:

NOTICE

BY PROCEEDING WITHOUT THE ADVICE OF AN INDEPENDENT PATENT ATTORNEY, YOU MAY LOSE ANY RIGHTS YOU MIGHT HAVE IN YOUR IDEA, INVENTION OR PRODUCT OR EXPOSE YOURSELF TO A COSTLY PATENT INFRINGEMENT LAWSUIT. THEREFORE, PRIOR TO SIGNING ANY AGREEMENT WITH US YOU SHOULD AND ARE ENCOURAGED TO CONSULT AN INDEPENDENT PATENT ATTORNEY.

4. Failing to make the following disclosures on the contract or other binding instrument to be executed by prospective clients. Said disclosures shall be in more conspicuous print than all other language in said instrument, but in no case shall they be smaller than 12 point upper case type. Said disclosures and instrument shall be delivered to prospective clients at least 10 days prior to the time prospective clients execute said instrument. The disclosures shall be in the following form set off from the text of the instrument by a black border and immediately above the line for the prospective clients' signatures:

NOTICE

(A) SINCE WE BEGAN DOING BUSINESS, WE HAVE CONTRACTED TO PROMOTE IDEAS, INVENTIONS, OR PRODUCTS FOR (Number) CLIENTS. SINCE JULY 1, 1975, WE HAVE CONTRACTED WITH (Number) CLIENTS. AS A RESULT OF OUR SERVICES:

1. (Number) OF OUR CLIENTS EARNED NOTHING.
2. (Number) OF OUR CLIENTS EARNED \$100-\$499.
3. (Number) OF OUR CLIENTS EARNED \$500-\$1000.
4. (Number) OF OUR CLIENTS EARNED OVER \$1000.

(B) WITHOUT PATENT PROTECTION RECOGNIZED BY THE UNITED STATES PATENT OFFICE, YOU MAY LOSE THE OPPORTUNITY TO OBTAIN FINANCIAL BENEFIT FROM YOUR IDEA. WE DO NOT PROVIDE ANY LEGAL PROTECTION RECOGNIZED BY THE UNITED STATES PATENT OFFICE.

(C) BECAUSE THERE WILL BE NO PATENT PROTECTION FOR YOUR IDEA, SERIOUS CONSEQUENCES COULD RESULT FROM YOUR CONTRACTING WITH US, INCLUDING:

- (1) When we disclose information concerning your idea to persons/manufacturers/marketers outside our company, such disclosure may be interpreted by the United States Patent Office as a "publication" of your idea.
- (2) "Publication" for a period of one year or more of an idea which has no legal protection recognized by the United States Patent Office will result in the loss of any patentable rights you may have.

(D) YOU SHOULD TREAT YOUR IDEA AS A CONFIDENTIAL SUBJECT IN ORDER TO AVOID LOSING ANY PATENT RIGHTS YOU MAY HAVE.

(E) BY PROCEEDING WITHOUT THE ADVICE OF AN INDEPENDENT PATENT ATTORNEY YOU MAY LOSE ANY RIGHTS YOU MIGHT HAVE IN YOUR IDEA, INVENTION OR PRODUCT OR EXPOSE YOURSELF TO A COSTLY PATENT INFRINGEMENT LAWSUIT. YOU SHOULD AND ARE ENCOURAGED TO CONSULT AN INDEPENDENT PATENT ATTORNEY BEFORE YOU SIGN THIS AGREEMENT.

(F) TODAY IS (Date) WE CANNOT ASK YOU TO SIGN AN AGREEMENT UNTIL 10 BUSINESS DAYS HAVE ELAPSED WHICH WILL BE ON (Month/Day/Year).

I, (Name of Customer), hereby acknowledge receipt of a copy of this agreement on the date specified below.

FEDERAL TRADE COMMISSION DECISIONS

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Customer's Signature

Date

5. Executing contracts or other agreements with a client prior to expiration of the 10-day period disclosed in accordance with Paragraph 4 herein.

6. Failing to retain executed copies of all disclosures required by Paragraph 4 of this order for a period of three (3) years after such disclosure is made regardless of whether prospective clients ultimately execute contracts. Respondents shall make accurate statistical disclosures required by this paragraph and maintain records for a period of five (5) years sufficient to verify the accuracy of each disclosure. Accurate disclosures, given without comment, as required by Paragraph 4 of this order, shall not be deemed a violation of Paragraph 1 of this order.

7. Failing, in all pamphlets, brochures and other promotional materials to make the following disclosures in the manner and form provided for herein.

A. In all printed advertisements, the notice shall be conspicuously placed in print at least as large as the largest print in the advertising material other than respondent's name and shall state:

(Number) % of our clients have earned at least \$100 as a result of our efforts to promote their ideas.

B. In all advertisements broadcast by radio, or television, the above-required notice shall be read at the end of the advertisement at a rate of speed at least as slow as the slowest part of the advertisement.

C. At the time respondents submit advertising to any newspaper or other written medium, they shall provide a copy of the following notice to each such medium:

NOTICE

(Name of Respondent) has entered into a Consent Agreement with the Federal Trade Commission. A copy of the Commission's News Release is available from (Name of Respondent) upon request.

D. At the time respondents submit advertising to any radio or television station, they shall provide a copy of the following notice to each such station:

NOTICE

(Name of Respondent) has entered into a Consent Agreement with the Federal

Trade Commission. A copy of the news release is available on request. Your attention is directed to an agreement between the Federal Trade Commission and the Federal Communications Commission dated April 27, 1972.

8. Failing to maintain for a period of three (3) years after any of their advertisements are disseminated:

(A) records disclosing the date or dates each such advertisement was published;

(B) records disclosing the name and address of the newspapers, other publications or broadcast media disseminating said advertisement; and

(C) copies or scripts of all of their advertisements published or disseminated by any media.

9. Failing to utilize one written contract or other binding instrument which shall constitute the entire agreement between the parties. In addition to the disclosures required under Paragraph 4 herein each such instrument shall contain the following provision:

(Name of Respondent) agrees to present to the client all materials due to the client pertaining to the promotion of said client's idea within 90 days of the date this agreement is executed, and it is hereby further agreed that time is of the essence. If such materials are not presented to the client within the 90 day period it is hereby mutually agreed between *(Name of Respondent)* and the client whose signature appears below that this agreement is rescinded in its entirety.

10. *It is further ordered*, That respondents cease and desist from:

A. Including in any contract or other document any waiver, limitation or condition on the right of a client to rescind an agreement under any provision of this order.

B. Misrepresenting the right of a client to rescind an agreement under any provision of this order or any applicable statute or regulation.

C. Making any representations or taking any action which is inconsistent with or detracts from the effectiveness of this order.

11. *It is further ordered*, That respondents shall make all disclosures required by this order accurately, making such disclosures or copies thereof available to the Federal Trade Commission on request, and comply with all contract provisions required by this order.

12. *It is further ordered*, That neither the corporate respondent nor the individual respondents engage in any course of conduct which contravenes the rights of clients or prospective clients provided by this order.

13. *It is further ordered*, That respondents, upon receipt of a complaint from a client alleging facts that indicate this order may have been violated, rescind the contract where respondents determine, after a good faith investigation, that one or more of the

paragraphs of this order may have been violated in connection with such client's transaction with respondents.

14. *It is further ordered:*

A. That respondents deliver, by hand or by certified mail, a copy of this order to each of their present or future salesmen, independent brokers, employees or any other person who sells or promotes the sale of respondents' contracts;

B. That respondents provide each person so described in sub-paragraph A above with a form returnable to respondents, clearly stating an intention to conform sales practices to the requirements of this order and retain such form for a period of three (3) years after it is executed by said persons;

C. That respondents inform each person described in sub-paragraph A above that respondents shall not use any such person, or the services of any such person, until such person agrees to and files notice with respondents to be bound by the provisions contained in this order;

D. That in the event such person will not agree to file such notice with respondents and be bound by the provisions of this order, respondents shall not use such person, or the services of such person;

E. That respondents institute a program of continuing surveillance adequate to reveal whether the sales practices of each of said persons described in sub-paragraph A conform to the requirements of this order; and

F. That respondents discontinue dealing with any person described in sub-paragraph A of this order who engages in the acts or practices prohibited by this order.

15. *It is further ordered,* That any respondent may accept compensation from a client for the promotion of the client's idea only as a percentage of royalties or other financial gain derived through a respondent's efforts. A respondent may not accept any other fee or monetary consideration from a client.

16. *It is further ordered,* That no respondent sell, lease, exchange or otherwise alienate a client's idea or disclose a client's name, address, telephone number or other personal data to any party which will or may request such client to pay a fee or other monetary consideration for the promotion of that client's idea.

17. *It is further ordered,* That in the event the Federal Trade Commission promulgates a Trade Regulation Rule applicable to respondents' business that this order shall be deemed modified to the extent it contravenes said Rule.

18. *It is further ordered,* That in the event that corporate respondent merges with another corporation or transfers all or a

substantial part of its business, respondents shall require said successor or transferee to file within thirty (30) days with the Commission a written agreement to be bound by the terms of this order; provided that if respondents wish to present to the Commission any reason why said order should not apply in its present form to said successor or transferee, they shall submit to the Commission a written statement setting forth said reasons prior to the succession or transfer.

19. *It is further ordered.* That the individual respondents named herein promptly notify the Commission of the discontinuance of their employment with Idea Research & Development, Inc., and of their affiliation with a new business or employment. In addition, the individual respondents named herein shall promptly notify the Commission of their affiliation with a new business or employment whose principal activities include the advertising, offering for sale or sale of contracts for future services and their affiliation with a new business or employment in which their own duties and responsibilities involve the advertising, offering for sale or sale of contracts for future services in the promotion of ideas, or any other future services. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

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

21. *It is further ordered.* That each respondent shall, within sixty (60) days after service of this order upon it, file with the Commission a report in writing setting forth in detail the manner and form of its compliance with the order to cease and desist.

Initial Decision

89 F.T.C.

IN THE MATTER OF
KRAFTCO CORPORATION, ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 8 OF
THE CLAYTON ACT

Docket 9035. Complaint, June 17, 1975 — Order, Jan. 11, 1977*

Order requiring SCM Corporation, a New York City producer of margarine, edible oils and barbecue sauce, among other things, to cease seating on its board of directors, individuals who simultaneously serve as directors of Kraftco Corporation, or any other companies with whom respondent is in competition.

Appearances

For the Commission: *Ronald A. Bloch, Clinton R. Batterton and Joseph Tasker, Jr.*

For the respondents: *William E. Willis and Marcia B. Paul, Sullivan & Cromwell, New York City.*

INITIAL DECISION BY MORTON NEEDELMAN,
ADMINISTRATIVE LAW JUDGE

JUNE 17, 1976

I

[1] STATEMENT OF THE CASE

The Commission's complaint in this proceeding issued on June 17, 1975. It charges Kraftco Corporation¹ (hereinafter "Kraftco"), SCM Corporation (hereinafter "SCM"), and an individual, Richard C. Bond (hereinafter "Bond") with violating Section 8 of the Clayton Act (15 U.S.C. 19),² and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45)³ by reason of an unlawful interlocking directorate. According to the complaint, Bond served simultaneously on the Boards of Directors of Kraftco and SCM which compete in the sale of margarine, edible oils, and barbecue sauce. The complaint further

* Complaint in Docket 9035 and consent order as to individual respondent, Richard C. Bond, appear at 87 F.T.C. 809; consent order as to corporate respondent, Kraftco Corporation, appears at 88 F.T.C. 362.

¹ Incorrectly captioned "Kraftco, Inc." in the complaint. See Answer of Kraftco Corporation, ¶ 2.

² Section 8 provides as follows with respect to interlocking directorates:

* * * [N]o person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination, of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws.

³ Section 5 of the Federal Trade Commission Act prohibits unfair methods of competition and unfair and deceptive acts or practices.

alleges that each corporate respondent has capital, surplus, and undivided profits aggregating more than one million dollars.

Kraftco and Bond have entered into consent settlements.⁴ The remaining issue in this case is the liability of SCM.

[2] SCM's answer, dated November 17, 1975, admits certain complaint allegations respecting corporate identity. The answer also admits that SCM's capital, surplus, and individual profit aggregate more than one million dollars and that it is engaged in commerce, as "commerce" is defined in both the Clayton Act and the Federal Trade Commission Act. SCM's answer denies that Bond was a member of its Board of Directors at the time the answer was filed, but admits that prior to August 1, 1975, he was on SCM's Board. SCM's answer also admits the sale of certain food products, but denies knowledge sufficient to form a belief as to the allegations of the complaint respecting competition between it and Kraftco. SCM's answer then asserts several affirmative defenses, to wit: 1) the complaint fails to state a claim upon which relief could be granted, 2) Bond's resignation from SCM's Board renders the case moot, 3) competition, if any, between Kraftco and SCM is *de minimis* and not within the statutory purpose of the anti-interlock law, 4) the Commission lacks jurisdiction over SCM because Section 8 applies only to individuals and not to the corporations themselves, and 5) respondent's due process and equal protection rights have been violated by the Commission's uneven and discriminatory enforcement of Section 8. Concurrently with the filing of its answer, SCM moved for summary decision on the same grounds as those asserted as affirmative defenses. On December 1, 1975, complaint counsel filed a cross-motion for summary decision.⁵

A prehearing conference was held on December 19, 1975. After hearing oral argument on cross-motions for summary judgment, the administrative law judge suggested that the basic facts of the case should be stipulated and a decision could then be rendered on the basis of the stipulation. The parties agreed to follow this course of action, and on April 29, 1976, a factual stipulation was filed. On May 10, 1976, proposed findings and supporting briefs were filed by both parties, and replies were filed on June 3, 1976.

[3] On the basis of the factual stipulation, uncontroverted affidav-

⁴ The Commission accepted a consent settlement from Bond on April 26, 1976. Kraftco's consent agreement was provisionally accepted by the Commission and placed on the public record for 60 days comment on May 6, 1976.

⁵ Complaint counsel renewed this motion in its Supplementary Memorandum of Law in Support of Complaint Counsel's Motion for Summary Decision and in Opposition to SCM's Motion To Dismiss (May 10, 1976). In view of my disposition of this matter on the merits by relying on a stipulated record, I need not address the summary decision question.

its submitted with the cross-motions for summary decision, and the pleadings, I make the following findings of fact:⁶

ii

FINDINGS OF FACT

1. SCM is a New York corporation with its principal office and place of business located at 299 Park Ave., New York, New York. (SCM Ans., ¶ 2.)

2. SCM is a diversified industrial company which manufactures and distributes various products, including typewriters, business equipment, home appliances, paints, resins, food, chemicals, and paper. In fiscal 1975, SCM had total sales of \$1,287,000,000. (Stip., § 1; Sexton, Aff. 1, ¶ 4.)

3. SCM has capital, surplus, and undivided profits aggregating more than one million dollars. (SCM Ans., ¶ 2.)

[4] 4. SCM is engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act. (SCM Ans., ¶ 2.)

5. SCM's business includes the manufacture and sale in commerce of margarine, edible oils, and barbecue sauce. (SCM Ans., ¶ 5; Stip. ¶'s 2, 3, 4.)

6. Kraftco, a corporation engaged in commerce as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, has capital, surplus, and undivided profits aggregating more than one million dollars. (Kraftco Ans., ¶ 2) Total Kraftco sales in 1974 were approximately \$4,500,000,000. (Sexton Aff. 1, ¶ 4.)

7. SCM competes with Kraftco in the sale of margarine, edible oils, and barbecue sauce. Sales by SCM in fiscal 1975 of products sold in competition with Kraftco products were approximately \$83 million.⁷ During the same period, Kraftco had sales of products in competition

⁶ The following abbreviations are used throughout this initial decision:

"Stip." - Stipulation of April 29, 1976, with ¶ references.

"SCM Ans." - SCM's Answer to Complaint, with ¶ references.

"Kraftco Ans." - Kraftco's Answer to Complaint, with ¶ references.

"Sexton Aff. 1" - Affidavit of Richard Sexton, Vice President and General Counsel of SCM, dated November 11, 1975 and filed with SCM's Motion for Summary Decision Dismissing the Complaint, with ¶ references.

"Sexton Aff. 2" - Affidavit of Richard Sexton, Vice President and General Counsel of SCM, dated December 12, 1975 and filed with SCM's Memorandum of Law in Opposition to Motion by Counsel Supporting the Complaint and in Further Support of Motion by Respondent SCM, with ¶ references.

⁷ SCM's total sales of these products in 1975 were approximately \$123,552,000, broken down as follows:

\$ 643,500 - Sales of margarine to industrial bakers

386,100 - Sales of margarine to wholesalers

25,740,000 - Sales of edible oil to industrial manufacturers of fried snacks

25,740,000 - Sales of edible oil to industrial manufacturers of prepared mixes and industrial bakeries

64,350,000 - Sales of edible oil to food service industry

6,435,000 - Sales of barbecue sauce to retail grocery trade

257,400 - Sales of barbecue sauce to food service industry. (Stip., ¶'s 2, 3, 4.)

with SCM of approximately \$258 million. (Stip., ¶ 1.) Specifically, SCM and Kraftco competed as follows in 1975:

(a) SCM sold margarine in 41 states in competition with Kraftco. (Stip., ¶ 2.)

(b) SCM sold edible oils in competition with Kraftco in all states. (Stip., ¶ 3.)

[5] (c) SCM competed with Kraftco west of the Mississippi River in the sale of barbecue sauce. (Stip., ¶ 4.)

(d) SCM and Kraftco have placed advertisements for edible oils, margarine, and barbecue sauce in the same trade publications. (Stip., ¶ 5.)

8. Bond became a member of SCM's Board of Directors in 1967 and continued as a director until he submitted his resignation on August 1, 1975. (Sexton Aff. 1, ¶ 6.) This resignation was accepted by SCM at the August 21, 1975 meeting of the SCM Board of Directors. (Sexton Aff. 2, ¶ 3.) Bond joined the Board of Directors of Kraftco sometime in 1957, and he continues to this day to serve on the Kraftco Board. (Sexton Aff. 1, ¶ 6.) SCM does not intend to reappoint Bond to its Board of Directors so long as he is a director of Kraftco or any corporation which competes or might compete in any line of commerce with SCM. (Sexton Aff. 1, ¶ 10.)

III

DISCUSSION⁸

On the basis of the factual stipulation submitted by the parties, there is no question that (1) Bond served simultaneously on the Board of Directors of both SCM and Kraftco;⁹ (2) both corporations are engaged in "commerce" and have capital, surplus, and undivided profits aggregating more than \$1,000,000;¹⁰ and [6] (3) the two corporations compete.¹¹ Respondent SCM, however, contends that there are several defenses to what appears to be an obvious violation of Section 8.

First, respondent says that the Commission lacks jurisdiction over SCM because the prohibitions of Section 8 of the Clayton Act are directed exclusively to individuals. According to respondent, there is nothing in Section 8 which says it is illegal for corporations to have

⁸ References in this section are to the briefs and reply briefs as follows:

"SCM Main Brief" - Memorandum of Law of Respondent SCM Corporation (May 10, 1976).

"SCM Reply Brief" - Reply Memorandum of Law of Respondent SCM Corporation (June 3, 1976).

⁹ Finding 8.

¹⁰ Findings 3, 4, and 6.

¹¹ Finding 7.

interlocking directors; the statute, respondent asserts, is directly solely to individuals serving on two interlocking corporations. SCM Main Brief, pp. 16-23; SCM Reply Brief, p. 8.

While corporations have been held liable in Section 8 proceedings, See, *eg.*, *United States v. Sears, Roebuck and Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953), it is true that in the only Supreme Court decision on the anti-interlock provisions of the Clayton Act, the Supreme Court specifically reserved judgment on the question of corporate liability.¹² Notwithstanding the lack of a definitive Supreme Court holding or the absence of legislative history directly in point, I believe that the language of Section 11(b) of the Clayton Act disposes of respondent's argument. This section says that the Commission shall issue orders requiring a "person" (defined in Section 1 of the Clayton Act as including corporations) to cease and desist from violations of the Act, including Section 8, and to "rid itself of the directors chosen contrary to the provisions of * * * section 8." Since the only "person" that could logically "rid itself" of directors is a corporation, by its terms, the statute gives the Commission jurisdiction over corporations.¹³ [7] Despite the clear language of Section 11 respecting the powers of the Commission, respondent argues that this section is merely "procedural" and that only Section 8 "defines" the offense. SCM Main Brief, p. 20. Such a bifurcated reading of this legislation, which would effectively eliminate most of Section 11, conflicts with the accepted principles of construction that separate parts of a single statute should be harmonized and construed together (See *Clark v. Uebersee Finanz-Korp.*, 332 U.S. 480, 488 (1947)) and that no parts of a statute are to be denied significance and effect. *Ex Parte Public Bank*, 278 U.S. 101, 104 (1928).

As for respondent's argument that the subject language in Section 11 is a "vestigial" carry-over from the pre-1935 version of Section 8 which expressly prohibited banks from having interlocking directorates (SCM Main Brief, p. 21), not only is this a strained interpretation of inapposite legislative history, but also a strong argument could be made that the 1935 amendments, which were intended to strengthen rather than weaken Section 8 by removing the discretion of the Governors of the Federal Reserve System to allow interlocks (See, STAFF OF ANTITRUST SUBCOMM. OF HOUSE COMM. ON THE JUDICIARY, 89th Cong., 1st Sess., Report on Interlocks in Corporate Management

¹² *United States v. W. T. Grant Co.*, 345 U.S. 629 at 634, n. 9 (1953).

¹³ The section reads, in pertinent part, as follows:

"If * * * the Commission * * * shall be of the opinion that any of the provisions of said sections [including Section 8] have been or are being violated, it shall * * * issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order." 15 U.S.C. 21 [Emphasis added.]

23-24 (Comm. Print 1965)), left intact the power of the Federal Reserve System, as indicated in Section 11, to continue to prohibit banks from having interlocks. In any event, whatever the reach of the Federal Reserve System after the 1935 amendments may or may not be over banks, there is no legislative history cited by respondent which can be even remotely interpreted as saying that one should ignore what Congress expressly said in Section 11 about the jurisdiction of the Federal Trade Commission to enforce Section 8 against corporations.

Moreover, going beyond its plain language, Section 11 cannot be interpreted in such a way as to frustrate the very purpose and objective of Section 8.¹⁴ But this is precisely what would happen if corporations, as respondent urges, could not be held accountable for Section 8 violations. Congress intended by Section 8 [8] "to nip in the bud incipient violations of the anti-trust laws by removing the opportunity or temptation to such violations through interlocking directorates." *United States v. Sears, Roebuck and Co.*, 111 F. Supp. 614, 616 (S.D.N.Y. 1953). An interpretation of Sections 8 and 11 which allows corporations to seat interlocking directorates, reap the anticompetitive benefits, and then possibly appoint new interlocking directors after each violation is uncovered would transform a statute aimed at preventing full-blown antitrust violations into a license giving corporations multiple opportunities for achieving actual anti-competitive results.

Respondent further contends that even if Section 11 does give the Commission jurisdiction over a corporation, the same section limits relief to an order requiring the corporation to rid itself of the director chosen contrary to the provisions of Section 8 of the Act. SCM Main Brief, p. 20. Respondent then argues that since no unlawful interlocking directorate now exists (Bond resigned from the SCM Board after complaint issued), Section 11 cannot be invoked as the basis for a cease and desist order. This contention also totally ignores the clear language of Section 11 which not only allows the Commission to require a corporation to rid itself of the offending directors, but also authorizes the Commission to issue "an order requiring such person [including a corporation] to cease and desist from such violations." Thus, Section 11 relief is *not* limited to orders simply requiring removal of the director who was a participant in the unlawful interlock, and even if the director *has* been removed, an appropriate order to cease and desist may be entered. In addition, it has been held

¹⁴ A statute should be construed by looking to its object and underlying policy. As the Supreme Court recently said, "Our objective * * * is to ascertain the Congressional intent and give effect to the legislative will." *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

that Commission's remedial powers under Section 11 to issue a cease and desist order governing future conduct are as broad as its general equitable powers under Section 5 of the Federal Trade Commission Act, and "the question to be asked in fashioning a remedy should be: What kind of order, within the broad range of an equity court's remedial powers, would, in the particular circumstances, be most effective to 'cure the ill effects of the illegal conduct, and assure the public freedom from its continuance.'" *Ecko Products Co.*, 65 F.T.C. 1163, [9] 1215 (1964), *aff'd.*, 347 F.2d 745 (7th Cir. 1965).¹⁵

Next, respondent argues that issuance of an order in this case is not required because the "nature and magnitude of the competition, such as it is, between SCM and Kraftco, is not 'actual and substantial' as that term has been repeatedly used in the antitrust laws" and that an interlock between SCM and Kraftco, "in no material manner adversely affects [the] public interest." SCM Main Brief, pp. 35-36; SCM Reply Brief, p. 5. This argument misconceives the purpose of Section 8 while at the same time ignoring the stipulated facts.

Given the fact that the parties have stipulated to a competitive overlap between Kraftco and SCM in the sale of margarine, edible oils, and barbecue sauce, the issue of competition has been removed from the case. The statute is violated whenever the technical requirements of "commerce" and jurisdictional amount are met, and the companies are in a competitive relationship where there is a *potential* for an agreement between them which would violate *any* of the antitrust laws, for example, a division of territory or a price-fix relating to the sale of edible oil. There is no need under this statute to have an elaborate market analysis, and evidence of actual effects on competition is unnecessary. *Protectoseal Company v. Barancik*, 484 F.2d 585 (7th Cir. 1973); *United States v. Sears, Roebuck and Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953).

[10] On the question of the substantiality of the competitive overlap, the court noted in *Sears, Roebuck* that Congress had provided Section 8 with "its own substantiality standard in the form of the one million dollar size requirement."¹⁶ But even assuming that

¹⁵ While *Ecko* dealt specifically with the question of the power of the Commission to ban future acquisitions under Section 11 after a Section 7 violation has been proven, the decision touched generally on the similarity between a Section 11 cease and desist order (including orders aimed at interlocks) and the remedial scope of Section 5 (See 65 F.T.C. 1215, footnote 9). The decision indicates that *both* statutes are now to be read broadly, not only because of the 1950 amendments to the merger law, but also for the reason that *FTC v. Eastman Kodak Co.*, 274 U.S. 619 (1927), which limited the scope of cease and desist orders, has for all practical purposes been overruled by *Pan American World Airways v. United States*, 371 U.S. 296, 312 and notes 17, 18 (1963).

¹⁶ 111 F. Supp. at 619.

there may be some minimum amount of competitive overlap below which no violation should be found,¹⁷ the issue simply does not arise in this case. SCM and Kraftco do not come within any conceivable application of a *de minimis* rule, even if one were applicable here, since the competitive overlap between respondent and Kraftco was approximately \$340 million in 1975. SCM's share of those sales, \$83 million, is substantial by any measure.¹⁸

[11] Respondent next argues that its constitutional rights to due process and equal protection of the laws have been violated by the Commission's departure from an established procedure generally taken with regard to Section 8. Respondent says that the Commission's prior practice has been to seek voluntary termination of interlocking directorates and then to dismiss the action after resignation of the challenged director. According to respondent, the Commission's failure to follow this procedure here is arbitrary and discriminatory. SCM Main Brief, pp. 23-34; SCM Reply Brief, pp. 8-9. This argument, too, is without merit.

The facts of the matter are that the Commission has used various methods in enforcing Section 8. It is true that between 1960 and 1966, the Commission closed eleven Section 8 investigations after termination of the offending interlocks, and that in none of the pre-1966 cases was a formal consent order executed.¹⁹ But apparently this policy did not accomplish what Congress set out to do. As a result, in all formal complaint proceedings initiated since 1972, *corporate* respondents have routinely been required to enter into consent agreements even though the interlocks have been terminated.²⁰ Clearly, the Commission has the right, even the duty, to change procedures if it finds that informal settlements are not producing an adequate level of compliance. In any event, respondent's bald assertion that the Commission's practice is to dismiss actions after termination of the interlocks is in

¹⁷ A strong argument can be made that there is no *de minimis* defense in a Section 8 case because the statute prohibits interlocks where the competitive relationship is such that elimination of competition by agreement would violate any of the provisions of any of the antitrust laws. Such an agreement would include price-fixing which is illegal regardless of the amount involved. Kramer, *Interlocking Directorships and the Clayton Act After 35 Years*, 59 Yale L.J. 1266 at 1269 (1950). But see *Paramount Pictures Corp. v. Baldwin-Montrose Chemical Co.*, 1966 Trade Cases, ¶ 71,678 (S.D.N.Y. 1966) which speaks of "*de minimis* competition" in the context of a Section 8 case where the competitive overlap was not only small, but also would not readily lend itself to a possible price-fix or a market allocation.

¹⁸ As the court said in *Sears, Roebuck* "Surely, the sales of \$80,000,000 do not come within the *de minimis* principle," 111 F. Supp. 614 at 621, and "The fact that this volume of sales may represent but a small percentage of either or both of the corporate defendants' annual sales, or a fraction of the annual retail sales of all distributors in the country of those commodities, does not militate against the undesirability of directorates common to both corporations." *Id.* at 620.

¹⁹ Exhibit "A" to Stip. One formal complaint issued during this period, *Dierks Forests*, 58 F.T.C. 304 (1961). The complaint was dismissed after the interlocking director resigned.

²⁰ Between 1972 and 1975, the Commission issued 19 formal complaints charging corporations with violation of Section 8. Each of these cases resulted in a consent settlement directed at *corporate* responsibility for compliance with Section 8. (Exhibit "A" to Stip.)

error since this has *not* been the Commission policy as revealed in the stipulated facts.

As for respondent's argument that SCM was discriminated against because it received "no notice whatsoever of the Commission's intention to file a complaint prior to issuance thereof" (SCM Main Brief, p. 27), there has never been a requirement in the Commission's rules that [12] any such advance notice be given.²¹ But, as it happens, SCM did receive notice of the Commission's interest in a possible illegal interlock prior to issuance of the complaint.²² There is no indication, however, that this notice, which SCM now regards as so imperative, inspired any pre-complaint action on the part of respondent to rid itself of Mr. Bond, or to prevent reoccurrence of Section 8 violations.

Finally, respondent maintains that this action has been rendered moot by the "voluntary" resignation of Bond from the Board of Directors of SCM after the complaint was issued. Although respondent itself recognizes that the mere discontinuance of an illegal act, particularly discontinuance after an investigation or formal action has begun, does not render a case moot, SCM contends that the surrounding facts demonstrate that no relief is necessary and the action must be dismissed as moot. SCM Main Brief, pp. 6-16.

[13] On the general question of mootness (and in the *very* context of a Section 8 case) the Supreme Court said in *United States v. W.T. Grant*, 345 U.S. 629 (1953), that "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, *i.e.*, does not make the case moot." *Id.* at 632. The Supreme Court added, however, that an action can be moot if the defendant can demonstrate "there is no reasonable expectation that the wrong will be repeated," but the burden of doing so "is a heavy one." *Id.* at 633.

In the instant case, the points cited by SCM to meet this "heavy" burden are: (1) Bond's immediate "voluntary" resignation and his assurance that he does not intend to serve on respondent's Board while a director of Kraftco; (2) respondent's assurance (by affidavit)

²¹ Prior to April 4, 1975, the Commission issued, but was not required to do so, "proposed complaints" under Part 2 of its rules for the purpose of encouraging consent settlements before a formal complaint was issued. After April 4, 1975, all complaints (including this one) were issued under Part 3. If a consent settlement is negotiated in the investigation stage, the complaint and consent settlement may be issued simultaneously. See 40 Fed. Reg., No. 60, p. 15235 (April 4, 1975). Respondent seems to be suggesting that under the new rules, which abolished Part 2, it has been treated differently than other Section 8 respondents because it has not been given an opportunity to have its complaint and consent order entered simultaneously. SCM Main Brief, pp. 27-28. In the first place, and contrary to respondent's representation, in *Kane-Miller*, Dkt. 9034, the Part 3 complaint alleging a Section 8 violation (issued on June 17, 1975 and *not* on July 17, 1975 as respondent asserts) was not accompanied by consent settlements. The matter was withdrawn from adjudication on December 19, 1975 for the purpose of considering consent agreements signed in October and November, 1975. Secondly, respondent's argument on this point is obscure, to say the least, since there is no indication that it wished to enter into a consent settlement at any stage of this proceeding.

²² On March 7, 1975. (Sexton Aff. 1, ¶ 8.)

that Bond will not be re-elected to SCM's Board while he is a director of Kraftco or any other competitor of respondent; and (3) the lack of evidence of prior Section 8 or related violations by SCM. *W. T. Grant* establishes, however, that such grounds are insufficient to meet respondent's "heavy" burden in making a mootness defense. In that case, too, the defendant showed that the offending interlock no longer existed and it disclaimed any intention to revive the relationship. But the Supreme Court said that, "such a profession does not suffice to make a case moot although it is one of the factors to be considered in determining the appropriateness of granting an injunction against the now-discontinued acts." *Id.* at 633.

Despite the clear holding in *W. T. Grant* that a mootness defense ordinarily will not arise from the mere fact that the director has resigned and the respondent says it will not re-elect the offending director, SCM seeks refuge in the Supreme Court's refusal in that case to interfere with the District Court's denial of injunctive relief. In reviewing the discretionary power of the District Court with respect to injunctive relief, the Supreme Court said in *W. T. Grant* that it found no abuse of discretion on the facts of that case. But the Supreme Court indicated that the standard for injunctive relief — "some cognizable danger of recurrent violation, something more than a mere possibility * * *." (*Id.* at 633) remains nevertheless, a matter of discretion with the trier of the facts. Thus in subsequent cases the Court has said "[whether] further-violations [are] sufficiently remote to make injunctive relief unnecessary * * * is [14] a matter for the trial judge." *United States v. Phosphate Export Assn.*, 393 U.S. 199, 203-204 (1968).²³

The determination of how the trier of the facts — the administrative law judge, in the first instance, and later the Commission upon review of the record — should exercise this discretion is not materially advanced by respondent's mere repetition (in various versions) of the refrain "there is no cognizable danger of recurrent violation" (SCM Main Brief, pp. 7, 9, 10, 11, 15, 16; SCM Reply Brief, pp. 2, 3, 4, 10, 13; Sexton Aff. 2, ¶ 8): such self-serving declarations are entitled to no weight, especially when SCM is silent on what steps it has taken to avoid the danger of other unlawful interlocks.²⁴ In any event, if respondent's assessment of the danger of recurrence of a violation were the test, then, presumably, the Commission could

²³ See also *Treves v. Servel, Inc.*, 244 F. Supp. 773 at 777 (S.D.N.Y. 1965) where the court relying on *W. T. Grant* said "Beyond the mootness area lies the more difficult issue whether, as a matter of discretion, the court ought to dismiss plaintiff's request for injunctive relief."

²⁴ This is not to say that a mere voluntary undertaking by respondent to comply with the law would be an adequate safeguard for the future. *Clinton Watch Co. v. FTC*, 291 F.2d 838, 841 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962).

never issue a cease and desist order in any case. See *Hershey Chocolate Corp. v. FTC*, 121 F.2d 968, 971 (3d Cir. 1941).

By the same token, respondent does not demonstrate the absence of a danger of recurrence by asserting that it may be caught again if it violates the law. SCM seems to be suggesting that because its selection of directors is a matter of public information and must be reported to the SEC and the New York Stock Exchange that this somehow guarantees against recurrence of the violation. SCM Main Brief, pp. 9, 15-16. The cogency of this argument is somewhat less than compelling since neither these reporting requirements nor public disclosure of Bond's membership on SCM's Board (presumably to SCM's stockholders) prevented the very violation which is the subject of this complaint. Moreover, respondent's position on this point seems to assume it is the function of the public, or its stockholders, or the New York Stock Exchange, or the SEC, or the F.T.C. to protect SCM from [15] violating the law. To the contrary, the obligation to comply with Section 8 falls squarely on every corporation which meets the statutory requirements.

It is also apparent that neither *W. T. Grant* nor any other decision relating to the discretionary power of the trier of facts to issue a cease and desist order can be read as meaning that no substantive violation can be found and no order can be issued unless complaint counsel comes forward with proof that respondent is a corporate recidivist.²⁵ Such a cavalier approach to Section 8, allowing one or more excused violations, would mean that in administering the antitrust laws one has to assume, contrary to fact, that Congress intended a high level of permissiveness.

As for the language in *W. T. Grant* that the moving party must persuade the trier of the facts of the need for injunctive relief, this does not mean that once a violation is proven, complaint counsel must then undertake a protracted second trial relating to the remedy. It is significant that on the limited facts before it in *W. T. Grant* — the failure of the director to terminate the interlocks despite five years of fruitless negotiation with the Government, the refusal by the director to concede illegality, and his failure to promise not to commit similar violations in the future — the Supreme Court said "Were we sitting as a trial court, this showing might be persuasive." *Id.* at 634. That the Supreme Court did not overturn a contrary conclusion by the lower court — that is, that the District Court was *not* persuaded — represents no more than the usual deference, in the absence of a clear showing of abuse, which the

²⁵ As the Supreme Court said in *W. T. Grant*, "The purpose of an injunction is to prevent future violations * * * and, of course, it can be utilized even without a showing of past wrongs." 345 U.S. 629 at 633.

appellate body (*W. T. Grant* was a direct appeal to the Supreme Court) gives to the discretionary injunctive rulings of the trial court. See *Brown v. Chote*, 411 U.S. 452, 457 (1973).

From the lower court opinion, it is not possible to tell what would have persuaded the District Court in *W. T. Grant* that an order was indeed required, or how as a practical matter, the Government can hope to show any more than it actually did. Proof on the subject of the likelihood of future violations is bound [16] to be elusive at best since we are dealing with slippery issues of predictability of conduct and how assiduously a company will comply with the law when it is not compelled to do so by an order. To read *W. T. Grant*, however, as imposing a substantial burden in this respect would effectively frustrate enforcement of Section 8 which was specifically designed by Congress to avoid complex litigation. See *Protectoseal v. Barancik*, 485 F.2d 585, 589 (7th Cir. 1973). It would also be contrary to the clear holding of the Supreme Court that "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States v. du Pont & Co.*, 366 U.S. 316, 334 (1961).

I believe *W. T. Grant* is properly read as leaving undisturbed what the Supreme Court has consistently said about the broad discretion which the Commission has to determine whether a cease and desist order is needed in order to make certain that an unfair method of competition or illegal trade practice is stopped and not resumed. *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946); *FTC v. Mandel Bros.*, 359 U.S. 385, 392 (1959). The Commission has traditionally exercised this discretion in favor of issuing orders enjoining future violations even where it is certain that the precise acts involved in a case could not be repeated because of statutory revisions or abandonment of the business. See discussion and cases cited in *Rubbermaid Inc.*, Dkt. 8939, 3 CCH Trade Reg. Rep. ¶ 21,131 at pp. 20,985-20, 987 (April 13, 1976) [87 F.T.C. 676, 704-708].

In this case there are no extenuating circumstances or other persuasive reasons for departing from overwhelming Commission precedent in favor of a cease and desist order. Here, as far as one can tell, nothing has been discontinued by SCM (Bond resigned of his own accord when he, too, was named as a respondent) and there is no basis for assuming that meaningful changes in procedures will be made unless respondent is ordered to do so. SCM has insisted all along that as a corporation it is not subject to the prohibitions of Section 8, and it has not even given adequate assurances of voluntary compliance with the law in the selection of directors other than Bond. Surely, whatever SCM did to comply with the law prior to complaint

(assuming it did anything) was inadequate since it did not detect or prevent an unlawful interlock with its competitor Kraftco. In sum, I fail to see how the public interest is protected in any way unless SCM is compelled to take positive steps to prevent future recurrence of the same practice.

[17] As for the scope of the order, this is not a case where the remedy proposed by complaint counsel is only loosely connected to the illegal conduct and could only be justified under the "fencing in" rubric of *FTC v. National Lead Co.*, 352 U.S. 419, 431 (1957). The order which follows covers the *exact* same illegal practice as that charged in the complaint, and merely imposes a monitoring procedure which requires SCM to take certain minimal precautions in selecting directors to avoid interlocks. This is relief which is reasonably related to the unlawful practice which has been alleged and proven. *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946).

IV

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding, and over respondent SCM.

2. Respondent SCM was at all times material herein engaged in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act.

3. Respondent SCM Corporation has violated Section 8 of the Clayton Act, 15 U.S.C. 19, and Section 5²⁶ of the Federal Trade Commission Act, 15 U.S.C. 45, by reason of the following:

(a) Respondent SCM and Kraftco are corporations which each have capital, surplus, and undivided profits aggregating more than \$1,000,000.

(b) Respondent SCM and Kraftco are competitors in the sale of margarine, edible oils, and barbecue sauce.

(c) The elimination of competition with respect to the products cited in (b), above, by agreement between SCM and Kraftco would constitute a violation of the provisions of the antitrust laws.

(d) Richard C. Bond served on the Board of Directors of respondent SCM and Kraftco between 1967 and August 1, 1975.

4. This proceeding is not moot, and an order to cease and desist

²⁶ The complaint alleges a violation of both Section 8 and Section 5 of the Federal Trade Commission Act. I need not decide whether the substantive standard for judging an interlock may be different under Section 5 or whether Section 5 may reach an interlock which violates the policy of the Clayton Act although technically not within the four corners of Section 8. All the requirements of Section 8 have been met in this case, and my conclusion that Section 5 has been violated rests solely on the rule that the Federal Trade Commission Act registers all violations of the Clayton and Sherman Acts. *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392, 394-5 (1953).

against SCM is both appropriate and necessary for the protection of the public interest.

Accordingly, the following order will issue:

--ORDER

1. *It is ordered.* That upon this order becoming final respondent SCM Corporation and its successors and assigns, shall forthwith cease and desist from having, and in the future shall not have, on their board of directors any individual who either:

(a) serves at the same time as a director of Kraftco Corporation, its successors or assigns, or any other corporation which competes with SCM Corporation in the production or sale of any product or service; or

(b) fails to submit to SCM Corporation any statement required by Paragraph Two of this order.

2. *It is further ordered.* That within thirty (30) days of the date of service of this order and prior to each election of directors or to the solicitation of proxies for such election, whichever is earlier, hereafter, SCM Corporation shall obtain a written statement from each member of its board of directors (except directors whose terms expire at the next election and who are not standing for re-election) and from each nominee for a directorship (who is not then a director) showing:

(a) the name and home mailing address of each director or nominee; and

(b) the name and principal office mailing address of, and a description of each product or service produced or sold by, each corporation which the director or nominee then serves as a director of, or at the time of the statement, has been nominated to serve.

Nothing in this paragraph shall be construed to relieve respondent of its obligation under Paragraph 1(a) hereof due to any error or omission contained in any written statement received pursuant to this paragraph.

3. *It is further ordered.* That within forty-five (45) days of the date of service of this order and annually for a period of ten (10) years thereafter, SCM Corporation shall file with the Commission a written report setting forth in detail the manner and form in which it has complied with this order. Copies of the statements obtained pursuant to Paragraph Two of this order shall be submitted to the Commission as part of the reports of compliance required by this paragraph. Nothing in this paragraph shall relieve SCM Corporation of its obligation to comply with Paragraphs One, Two, and Four of this

order once it is no longer required to submit reports of compliance to the Commission.

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

CONCURRING STATEMENT BY CHAIRMAN COLLIER

I concur in the Commission's Opinion, Findings of Fact, Conclusions of Law, and Order, except that I find it unnecessary to reach the question whether the director interlock in question violated Section 5 of the Federal Trade Commission Act. I conclude that a violation of Section 8 of the Clayton Act has been proven here, and that the order entered by the Commission is fully supported by that conclusion.

[1] OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

Complaint in this matter was issued on June 17, 1975, charging Kraftco Corporation ("Kraftco"), SCM Corporation ("SCM") and an individual, Richard C. Bond ("Bond") with violating Section 8 of the Clayton Act (15 U.S.C. 19) and Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by virtue of Bond's simultaneous presence on the boards of directors of the two corporations.

The case was assigned for hearing to Administrative Law Judge ("ALJ") Morton Needelman. Subsequently the matter was withdrawn from adjudication with respect to Bond and [2] Kraftco, consent agreements with these parties were signed, and consent orders against them were issued on April 26 and May 6, 1976, respectively. The case against SCM was tried pursuant to a stipulated record, and Judge Needelman entered an initial decision sustaining the complaint and recommended entry of an order to cease and desist. The case is before us on respondent SCM's appeal from the ALJ's decision.

INITIAL DECISION

It was not disputed, and Judge Needelman so found, that Bond served simultaneously on the Boards of Directors of SCM and Kraftco, that both corporations are engaged in commerce and have capital, surplus, and undivided profits aggregating more than \$1,000,000, and

that the two corporations competed with each other in the sale of margarine, edible oils, and barbecue sauce. (I.D. 3-8.)¹ Sales by SCM in fiscal 1975 of products sold in competition with Kraftco were roughly \$83 million, while Kraftco's sales in the same category approximated \$258 million. (I.D. 7.)

The ALJ concluded that respondent had violated Section 8 of the Clayton Act and Section 5 of the F.T.C. Act. The Judge further concluded that the need for an order to cease and desist was not rendered moot by Bond's voluntary resignation from SCM's Board or by any other circumstances, and that entry of an order corresponding to the "Notice of Contemplated Relief" initially served with the complaint was necessary to prevent recurrence of Section 8 violations and protect the public interest.

[3] On appeal respondent argues that it has committed no violation of law; that if it has committed a violation there is nonetheless no necessity for the imposition of a remedial order; and that if there is a need for the imposition of a remedial order it should be no different from the consent order negotiated by co-respondent Kraftco.

LIABILITY OF CORPORATE RESPONDENT

(a) Clayton Act, Section 8

Respondent does not question that a violation of Section 8 has occurred, but it contends that only an individual director may be held liable for such a violation.

Respondent places its principal reliance upon the language of the Section which states in relevant part that:

* * * no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than \$1,000,000, engaged in whole or in part in commerce * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination, or competition by agreement between them would constitute a violation of any of the provisions of the antitrust laws.

[4] Respondent contends that Section 8, by its terms, merely forbids *individuals* to be joint directors; it does not render *corporations* liable to suit for the use of interlocking directorates.²

[5] While the language of Section 8 read *in vacuo* perhaps leaves

¹ The following abbreviations are used throughout this opinion:

I.D. - Initial Decision, Finding No.

I.D. p. - Initial Decision, Page No.

² Our own review of the legislative history reveals no sign that this question was directly addressed during the course of Congressional debate over the Clayton Act. Respondent cites a statement of Rep. Nelson, at p. 21 of its brief, which it argues implies that he understood Section 8 to cover only individuals. Whether this is a valid or relevant inference, the opposite inference can plausibly be drawn from other comments in the Congressional debates, like

some doubt as to the entities its proscription is intended to cover, the language of Section 11, [15 U.S.C. 21] which provides for enforcement of Section 8, leaves none. In relevant part Section 11 provides that the Commission shall, upon a finding that any "person" (defined in 15 U.S.C. 12 to include corporations) has violated Section 8.

* * * issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or *rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act*, if any there be, in the manner and within the time fixed by said order * * *. [emphasis added]

Needless to say, only a corporation may "rid itself" of directors. SCM suggests that the underlined words are a vestigial remnant intended only to cover banks and the Federal Reserve Board, but there is nothing in the wording of the statute or in its legislative history to support this distinction. (I.D. p. 7.) Rather, Section 11 by its plain terms empowers the Commission to remedy violations of Section 8 by entering an order to cease and desist against *corporations*, and this Section would be robbed of meaning by a construction that excluded corporations from the entities covered by Section 8. We believe, instead, that when Section 8 forbids the presence of a director on the boards of competing corporations, it [6] speaks both to the director and to the competing corporations, and all may be held accountable for ignoring its dictates.

Respondent correctly points out that the Supreme Court reserved judgment on this issue in a case in which it arose, *United States v. W.T. Grant Co.*, 345 U.S. 629, 634n.9 (1953). However, at least one lower court has enjoined a corporation from Section 8 violations in a case brought to enforce that Section, *United States v. Sears, Roebuck and Co.*, 111 F. Supp. 614 (S.D.N.Y. 1953), *decree construed*, 165 F. Supp. 356 (S.D.N.Y. 1958), a second court has recently asserted the same authority³, and the imposition of corporate liability in accord with decades of Justice Department and Federal Trade Commission

Rep. Nelson's not directed to the precise issue here, which seem to treat Section 8 as though it had obligations on corporations. For example:

"In drafting the provisions of Section 9 [now Section 8] your committee has endeavored to carry out the recommendations of the President. In order that the corporations affected may have time to readjust their boards of directors in keeping with the requirements of the act [a two year period is allowed]

* * * H.R. No. 627, H.R. 15656, p. 18, Part 1, 63 Cong., 2d Session (1914).

"This section will be full of difficulty and peril for small corporations, and will affect them in far greater degree than it will large ones, against which the legislation is presumed to be aimed.

"The use of interlocking directorates serves many useful purposes, and because in some instances it has been used to foster monopoly or create a restraint of trade, does not furnish a good reason why the use of interlocking directorates generally should be forbidden." *Ibid.*, Part 2, p. 8.

On balance we think comments such as these, or those allegedly to the opposite effect cited by respondent, shed little light on the question here in issue.

³ *United States v. Crocker National Corp.*, No. C-75-2108, *United States v. BankAmerica Corp.*, No. C-75-2109 (N.D. Cal., 8/27/76), [1976] 5 Trade Reg. Rep. (1976-2 CCH Trade Cases) ¶ 61,044. After noting that the corporate

(Continued)

enforcement of the Clayton Act, via voluntary action, consent agreements, and litigation. To absolve corporations of liability for sharing directors with competitors would, without question, severely undermine enforcement of the law, since any corporation could maintain such an interlocking directorate and, if detected, simply replace the ousted director with another interlocking board member, again without fear that detection could lead to anything more than the director's resignation. Sanctions [7] against individuals alone are likely to be of limited effect, because there are hundreds of thousands of potential corporate directors at any given time. Sanctions against a much smaller number of corporations are far likelier to effectuate the purposes of Section 8, since an order against a corporation will prevent a far larger number of potential interlocks than one against an individual.

For the foregoing reasons we conclude that respondent's conduct violates the Clayton Act and may be proscribed by this Commission. We do not quarrel with respondent's proposition that the "plain meaning" of a statute may not be disregarded in order to effect its purpose. All that is "plain" in this instance, however, is that the Clayton Act authorizes the Commission to enter an order to remedy what respondent has done. Read in this light, we think Section 8 is properly construed to prohibit corporations as well as individuals from effecting interlocking directorates. The fact that this interpretation is most likely to effectuate the Congressional purpose is only a further reason to favor it.

(b) *Federal Trade Commission Act, Section 5*

We also conclude that respondent's conduct runs afoul of Section 5 of the Federal Trade Commission Act, which prohibits, *inter alia*, unfair methods of competition. It is well established that the prohibitions of Section 5 extend to practices which offend the underlying spirit and policy, as well as the letter, of the antitrust laws, *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239-244 (1972); *FTC v. Brown Shoe*, 384 U.S. 316 (1966); *FTC v. Motion Picture Advertising Service Co.*, 344 U.S. 392 (1953). Assuming *arguendo* that illegally interlocked corporations must be allowed to escape liability

defendants in these interlock cases had argued that Section 8 applied only to individuals, Judge Peckham observed that:

"[r]egardless of whether this contention is correct, it is clear, and the defendants conceded at oral argument, that were this court to decide that injunctive relief were appropriate in these cases, this court could, if it chose to, enjoin the defendant corporations, as well as the individual defendants from further violating Section 8. See e.g., 15 U.S.C. § 25." (p. 69,673, footnotes omitted)

15 U.S.C. 25 is Section 15 of the Clayton Act (the Justice Department/Federal Court analog to Section 11), which empowers the district courts to "prevent and restrain violations of this Act."

through the allegedly porous wording of Section 8, no better illustration of a practice offensive to the spirit and policy of the antitrust laws if not their letter can be imagined than the employment and retention by a corporation of a director whose presence on the board itself violates the law. Application of Section 5 in such a case does no more than effectuate the clear purpose of the Clayton Act.

Section 5 has been similarly applied in an earlier case also arising under the Clayton Act. In *Grand Union Co. v. FTC*, 300 F. 2d 92 (2d Cir. 1962), the court sustained the [8] Commission's conclusion that Grand Union in its role as a buyer had violated Section 5 by knowingly soliciting and receiving payments made by suppliers in violation of Section 2(d), 15 U.S.C. 13(d). The court so found despite the fact that Section 2(d) did not expressly mention buyers. In rejecting the argument that the Commission had applied Section 5 to effect an unwarranted expansion of the Clayton Act the Court reasoned:

Nor can we accept the notion that the Commission is here legislating a "new antitrust prohibition." The practice itself is clearly proscribed * * * The Commission is not upsetting specific Congressional policies; the proceedings did not "circumvent the essential criteria of illegality prescribed by the express prohibitions of the Clayton Act." No economic activity, once lawful, has been suddenly brought within the prohibition of the antitrust laws. Jurisdiction, perhaps, has been expanded from * * * technical confines * * * but only fully to realize the basic policy of the * * * Act * * *. 300 F.2d at 98 (footnotes omitted).

Here, as well, the application of Section 5 does no more than permit the effectuation of a Congressional policy by applying that policy to the entities in the best position to ensure its success.

That Congress specifically contemplated the application of Section 5 to interlocking directorates is, moreover, suggested by some of the legislative history cited by complaint counsel. In explaining the language of Section 5, for example, the Senate Interstate Commerce Committee reported that:

[9] The Committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous *unfair practices, such as local price cutting, interlocking directorates, and holding companies intended to restrain substantial competition.* [emphasis added]⁴

For these reasons, then, we conclude that respondent's conduct runs afoul of Section 5 of the Federal Trade Commission Act.

⁴ S. Rep. No. 597, 63rd Congress, 2d Sess. 13 (1914) See also the remarks of Senator Newlands, Chairman of the Committee, on the floor, 51 Cong. Rec. 11106, 11537, 12980 (1914).

[10] NECESSITY FOR AN ORDER

Respondent argues that even assuming it has been found to have violated the law, it should nevertheless not be ordered to desist from future violations, since it has halted the prior infraction and promises never to repeat it.⁵ The administrative law judge rejected this argument and we fully concur in his conclusion and in his reasoning, at I.D. pp. 12-16.

The violation which occurred here continued for several years and was terminated only when pointed out by the Commission. It was, moreover, not an insignificant, trivial, or technical infraction. In 1975, SCM and Kraftco competed with respect to more than \$300 million worth of business, of which more than \$80 million were sales by SCM. While these figures are only a small fraction of the total sales of the companies, \$300 million or \$80 million is by any measure a great deal of trade to be jeopardized by the sorts of anticompetitive agreements which interlocking directorates facilitate, and which Congress meant to stop before they got started when it imposed its ban on interlocks between competitors, cf. *Sears, Roebuck, supra*. 111 F. Supp. 614 at 621. If one regards the antitrust laws seriously, and we do, this was a serious violation.

It may be that respondent does not intend to utilize illegally interlocked directorates in the future. But it probably did not intend to use them when it hired Mr. Bond either. We cannot, however, resist the conclusion that SCM paid inadequate attention to whether it acted [11] permissibly or not, and there is nothing whatsoever in the record to suggest it will not continue to pay insufficient attention in retaining future directors unless ordered to do so.⁶

Under these circumstances we find nothing to challenge the ALJ's conclusion that an order is appropriate here. The *W.T. Grant* case, *supra*, cited by respondent held no more than that it was within the discretion of a trial court judge to withhold injunctive relief where a violation had been halted. The Court strongly suggested that it would not have quarreled with the imposition of injunctive relief in the same case, and obviously did not intend to disturb a long line of cases, prior and subsequent, holding that discontinuance of a violation is not proper grounds for omission of a Commission order, e.g., *Fedders*

⁵ SCM promises never to rehire Bond so long as he directs Kraftco or any other corporation competing with SCM (Appeal Brief, p. 16). It does not promise to avoid other unlawful interlocks with Kraftco or anyone else.

⁶ SCM argues there is nothing which requires it to announce what steps it will take or has taken to avoid interlocks. (Appeal Brief, p. 18). We completely agree, and if those undisclosed procedures it uses to comply with the law had proven adequate to prevent this violation their identity would be no concern of ours. However, since a violation involving a large amount of commerce did occur and persist for several years, and since the record discloses nothing of the procedures used by respondent to prevent such occurrences, we are hard pressed to see what other conclusion can be reached than that SCM's procedures are inadequate to ensure nonrepetition of future violations.

Co. v. FTC, 529 F.2d 1398 (2d Cir.), *cert. denied*, 45 U.S.L.W. 3244 (Oct. 5, 1976); *Coro Inc. v. FTC*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Clinton Watch Co. v. FTC*, 291 F.2d 838, 841 (7th Cir. 1961), *cert. denied*, 368 U.S. 952 (1962); [12] *Galter v. FTC*, 186 F.2d 810, 813 (7th Cir.), *cert. denied*, 342 U.S. 818 (1951); *Eugene Dietzgen v. FTC*, 142 F.2d 321, 330 (7th Cir.), *cert. denied*, 323 U.S. 730 (1944). *See also*, *United States v. Newmont Mining Corp.*, 34 F.R.D. 504, 505 (S.D.N.Y. 1964): "It is plain that mere resignation of a directorship allegedly held in violation of §8 of the Clayton Act does not render an action for violation of that Section moot. The *Grant* case expressly so holds."

Respondent's position here would necessitate that having shown a violation, complaint counsel then demonstrate by affirmative evidence the likelihood of future additional violations. To the contrary, we think the violation is itself the best evidence of the possibility of future such occurrences, and that the burden rests with respondent to demonstrate that violations will not recur before consideration may be given to omitting an order, *United States v. W.T. Grant Co.*, *supra* at 633.

[13] THE ORDER

The administrative law judge entered an order corresponding generally to the provisions of the "Notice of Contemplated Relief" served upon the parties at the time the complaint was issued. Basically this order forbids SCM to violate Section 8 in the future (Par. 1), and establishes a mechanism for implementing and monitoring such compliance by requiring that future candidates for director provide a list of the products manufactured by companies which they already direct (Par. 2.) Copies of these reports shall be filed with the Commission periodically, for a period of 10 years, and SCM may not hire a director who has not provided the required report.

SCM argues generally that its order should be no broader than that consented to by Kraftco and directs particular objection to Paragraph 2, contending that the requirement that prospective directors list all products manufactured by companies of which they are presently directors may prove unduly burdensome in cases of companies which manufacture numerous products.

Having reviewed the order recommended by the ALJ, we believe it is a generally appropriate disposition of this matter, narrowly tailored to prevent recurrence of the type of infraction that gave rise to this proceeding, *i.e.*, the use of an interlocking directorate violative of Section 8 of the Clayton Act and Section 5 of the F.T.C. Act. We believe that Paragraph 2 is necessary, initially, to provide a ready

means by which SCM may effect compliance by itself and its directors and prospective directors with Section 8, and also a means by which the Commission may check on SCM's compliance since it will review the product lists submitted by SCM directors. We have changed the necessity for "product description" to "product list" and as modified we do not believe this requirement should be unnecessarily burdensome. We believe that even large corporations have readily available a list or lists of the products they manufacture. However, we believe there is no necessity that this requirement exist in perpetuity, and we shall instead limit its duration to a period of five years. During this time it will provide a mechanism for SCM to comply with the law and for the Commission to monitor its compliance. Thereafter, SCM will [14] remain under obligation to adhere to Section 8, but it will be at liberty to adopt alternative methods by which to do so, as its experience dictates.

We have also modified Paragraph 1(a) to make clear that its prohibition on interlocks with Kraftco Corporation applies only while SCM and Kraftco are competitors. In addition we have modified the class of competitors with which SCM may not interlock to exclude any "subsidiaries," "sisters," or "parents" as defined in the order, and amended the reporting requirement accordingly. In all other respects we have retained the order recommended by the administrative law judge, and conclude that it is in the public interest that such an order be entered.

Respondent argues, as noted above, that if an order must be entered it should be no different, or at least no more stringent, than the consent order to which co-respondent Kraftco earlier agreed. Any more comprehensive order, protests respondent, would be discriminatory and tantamount to punishing it for having exercised its constitutional right to contest the charges against it.⁷ SCM seeks to bolster its argument with the following syllogism: In accepting a consent order the Commission certifies that it is in the public interest; a litigated order must similarly be in the public interest; therefore the Kraftco consent order is a sufficient disposition of this proceeding and anything in excess of its provisions must amount to punishing SCM for litigating.

[15] An unstated premise of this argument is, of course, that

⁷ Respondent also makes certain other charges of discrimination which are patently frivolous. It cites the Commission's past practice of forbearing to obtain an order where the interlock was dissolved. But it does not deny that this enforcement strategy was modified well in advance of the instant matter, since which time the Commission has sought cease and desist orders from many alleged Section 8 violators. (I.D. p. 11) Respondent also argues that it was discriminated against by being sued without being previously notified of the charges against it. Assuming *arguendo* that this was the case (there is some dispute as to whether it was, I.D. pp. 11-12) we can apprehend no prejudice since respondent was subsequently given an opportunity to negotiate a consent settlement but evinced no apparent interest (I.D. p. 12, n. 21).

