

Interlocutory Order 96 F.T.C.

IN THE MATTER OF
GROLIER, INCORPORATED, ET AL.*Docket 8879. Interlocutory Order, Sept. 12, 1980*ORDER REOPENING PROCEEDING AND DIRECTING SUBMISSION OF
FURTHER INFORMATION

On January 24, 1980, the United States Court of Appeals for the Ninth Circuit remanded this case to the Commission.¹ *Grolier, Inc. v. FTC*, 615 F.2d 1215, 1222 (9th Cir. 1980). The purpose of the remand was to allow us to reconsider our denial of discovery "and in light of the results of that reconsideration, the disqualification motion" filed by Grolier. 615 F.2d at 1222. The Court did not require us to grant discovery but instead authorized the use of affidavits to show "the existence and extent of ALJ von Brand's involvement with the Grolier case while he served as attorney-advisor." *Id.* Under the procedure established by the Court, Grolier then has the burden of offering evidence to contradict these sworn statements or show any deficiency in them before it will be permitted to subpoena agency records. *Id.*

The Court mandated this course of action to us because it believed that our order denying discovery (87 F.T.C. 179, 181 (1976)) was an improper "flat refusal" (615 F.2d at 1222) to disclose anything at all about Judge von Brand's participation in the Grolier case while he was an attorney-advisor to Commissioner MacIntyre.

Since we denied the combined disqualification and discovery motion, however, Grolier has gained access to most of the information sought in its discovery request by virtue of a Freedom of Information Act ("FOIA") request that repeated the discovery request *in haec verba*. Indeed, most of the documents sought and an index of the few documents withheld have been available to Grolier since before Judge von Brand issued his Initial Decision. We note that the record of the district court proceeding contains much information, in affidavit form, which may make the discovery request moot. *Grolier, Inc. v. FTC*, No. 76-1559 (D.D.C.), *appeal pending*, D.C. Cir. No. 79-2263. We invite the parties to address this issue in the filings required by this order.

Because our earlier view was that attorney-advisors do not perform investigative or prosecutive functions there was no need for us to determine which of the twenty documents Grolier appended to the disqualification motion actually reached the Commission or

¹ A petition for rehearing was denied but the opinion was amended on April 17, 1980.

whether they involved this "or a factually related case." See 5 U.S.C. 554(d). The need for this type of analysis is apparent in view of the Ninth Circuit's ruling. We believe the parties should address these questions in their submissions.²

A related concern is what effect, if any, Grolier's failure to use documents in its possession before the Initial Decision issued should have on its ability to augment the record now. Some courts have held that the failure of a party to use information in its possession (from whatever source) renders a belated disqualification challenge untimely. See, e.g., *Marquette Mfg. Co. v. FTC*, 147 F.2d 589, 592 (7th Cir. 1945), *aff'd.*, 333 U.S. 683 (1978); *Safeway Stores, Inc. v. FTC*, 336 F.2d 795, 802 (9th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967). See also *Marcus v. Director, Office of Wkrs' Comp. Prog.*, 548 F.2d 1044, 1050-57 (D.C. Cir. 1976). We urge the parties to address this issue also.

To provide a complete record on review and to minimize delay Grolier is directed to supplement the record of this proceeding, within five days of the receipt of this order, with: (1) the complaint (and attachments) filed in its FOIA suit *Grolier, Inc. v. FTC*, C.A. No. 76-1559 (D.D.C.); (2) the affidavit and index of documents filed by the Commission in response thereto; (3) the Commission's sworn answer to Plaintiffs' Interrogatories to Defendants—Second Set; (4) the affidavit of Carol M. Thomas dated September 15, 1977; (5) all memoranda, orders and judgments of the District Court in No. 76-1559 (D.D.C.); and (6) the affidavit of Carol M. Thomas dated March 21, 1979.

Thereafter Grolier will be allowed 25 days to renew its motion to disqualify Judge von Brand. At that time we expect Grolier to present evidence on: (1) the question of timeliness; (2) Judge von Brand's involvement with *ex parte* matters; (3) the specific documents, and the portions thereof (and the date Grolier received them), which show Judge von Brand could have had access to "information received outside of the controlled adjudicative setting" (615 F.2d at

² The Attorney General's Manual on the Administrative Procedure Act (1947), characterized by the Court of Appeals (615 F.2d at 1219) as an authoritative guide to the APA states (p. 54, n.6):

The limitation of the prohibition against consultation to those who perform investigative or prosecuting functions "in that or a factually related case", should be construed literally. * * *

The phrase "factually related case" connotes a situation in which a party is faced with two different proceedings arising out of the same or a connected set of facts * * * [as distinguished from cases that] may form a pattern similar to those which [the staff person] had theretofore investigated or prosecuted.

See also *Cisternas-Estay v. INS*, 531 F.2d 155, 161 n.4 (3d Cir.) (Gibbons, J., dissenting), *cert. denied*, 429 U.S. 853 (1976).

1220); and (4) whether the information involves this or a factually related case.

We also direct complaint counsel to review the 28 documents withheld from Grolier in the FOIA suit and ascertain what connection, if any, they have to the facts of this case. The results of this review shall be set forth in an affidavit to be filed and served (by express mail) within 15 days of this order.

Within a like period we request that Judge von Brand execute an affidavit recording his efforts to ascertain the extent, if any, of his involvement with Grolier matters while he was an attorney-advisor. The Secretary shall expeditiously serve the affidavit on the parties.

Complaint counsel may respond to Grolier's renewed motion within 20 days of being served with it. At that time the Commission will determine if any further proceedings are warranted.

Commissioner Pitofsky did not participate.

IN THE MATTER OF
totes incorporated

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

Docket C-3040. Complaint, Sept. 12, 1980—Decision, Sept. 12, 1980

This consent order requires, among other things, a Loveland, Ohio manufacturer of umbrellas and related rainwear, to cease withholding cooperative advertising credits or allowances, or in any way limiting or restricting dealers from participating in any cooperative advertising program because of the resale price at which the dealer has advertised or sold a product or because the dealer has used price comparisons in the advertising and sale of a product.

Appearances

For the Commission: *Jeffrey A. Klurfeld.*

For the respondent: *William Baskett and Foston Jacobs, Cincinnati, Ohio.*

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 totes incorporated, a corporation, hereinafter sometimes referred to as respondent, has 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 as follows:

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

“Product” is defined as any item which is manufactured, offered for sale or sold by respondent.

“Dealer” is defined as any person, partnership, corporation or firm which is authorized by respondent to purchase any product.

“Resale Price” is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any retail price suggested or established by respondent, any customary resale price, or the retail price in effect at any dealer.

PARAGRAPH 1. Respondent totes incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 10078 East Kemper Road, Loveland, Ohio.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of rubber footwear, umbrellas, hats, scarfs and other wearing apparel.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent sells and distributes its products directly to more than 3,000 retail dealers located throughout the United States who in turn resell respondent's products to the general public.

PAR. 5. In the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale, sale and distribution of merchandise of the same general kind and nature as merchandise manufactured, advertised, offered for sale, sold and distributed by respondent.

PAR. 6. In the course and conduct of its business as above described, respondent has for some time last past administered and conducted cooperative advertising programs which contain a limitation or restriction denying cooperative advertising credits or allowances to dealers for advertisements which do not feature respondent's suggested retail prices.

PAR. 7. The administering or conducting by respondent of cooperative advertising programs with the limitation or restriction described in Paragraph Six hereinabove has the capacity, tendency and effect of establishing, maintaining, stabilizing or otherwise illegally influencing the resale prices of dealers in respondent's products, and has had and still has the capacity, tendency and effect of hindering, suppressing or eliminating competition between or among those dealers selling respondent's products.

PAR. 8. The aforesaid acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of respondent's products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act. The acts and practices of respondent as herein alleged, are continuing and will continue in the absence of the relief herein requested.

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 San Francisco 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 attorney, 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, 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 totes incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 10078 East Kemper Road, in the City of Loveland, State of Ohio.
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

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

"Product" is defined as any item which is manufactured, offered for sale or sold by respondent.

"Dealer" is defined as any person, partnership, corporation or firm which is authorized by respondent to purchase any product.

"Resale Price" is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any

dealer for pricing any product. Such term includes, but is not limited to, any retail price suggested or established by respondent, any customary resale price, or the retail price in effect at any dealer.

It is ordered. That respondent totes incorporated, a corporation, its successors and assigns; and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the designing, implementing, conducting, administering or auditing of any cooperative advertising program, or portion thereof, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

I

1. Threatening to withhold or withholding cooperative advertising credits or allowances from any dealer, or limiting or restricting the right of any dealer to participate in any cooperative advertising program for which it would otherwise qualify, because of the resale price at which said dealer advertises or sells any product, or proposes to advertise or sell any product.

2. Threatening to withhold or withholding cooperative advertising credits or allowances from any dealer, or limiting or restricting the right of any dealer to participate in any cooperative advertising program for which it would otherwise qualify, because said dealer has advertised or sold, or proposes to advertise or sell, any product using or featuring any resale price comparison.

II

It is further ordered. That respondent shall within thirty (30) days after service of this Order, mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to each of its present accounts. Respondent, however, need not send said enclosure to any account of its "XIIX Karat," A.J. Bergren, Eastman Products, or L. P. Henryson divisions. An affidavit shall be sworn to by an official of respondent verifying that the attached Exhibit A was so mailed.

III

It is further ordered. That respondent shall forthwith distribute a copy of this Order to each of its operating divisions; and, for a period of three (3) years from the date of service of this Order, to each of its personnel, agents or representatives having sales, advertising or

policy responsibilities with respect to the subject matter of this Order.

IV

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the 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.

V

It is further ordered, That respondent 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

Dear Retailer:

totes incorporated, without admitting any violation of the law, has agreed to the entry of an Order by the Federal Trade Commission regulating its cooperative advertising programs. In connection therewith, the Company has agreed to send you this letter describing the Order.

The Order provides, among other things, as follows:

You are free to participate in, and receive reimbursement under, any totes incorporated cooperative advertising program regardless of the retail price you feature in otherwise qualifying advertisements.

If you have any questions regarding the Order or this letter, please call _____ at totes.

for totes incorporated

IN THE MATTER OF
TINGLEY RUBBER CORP.

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

Docket C-3041. Complaint, Sept. 12, 1980—Decision, Sept. 12, 1980

This consent order requires, among other things, a South Plainfield, N.J. manufacturer of molded rubber footwear to cease withholding cooperative advertising credits or allowances, or in any way limiting or restricting dealers from participating in any cooperative advertising program because of the resale price at which the dealer has advertised or sold a product; or because the dealer has used price comparisons in the advertising and sale of a product.

Appearances

For the Commission: *Jerome S. Lamet.*

For the respondent: *Allan J. Weinschel, Weil, Gotschal & Manges,*
New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, 15 U.S.C. 41, *et seq.*, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Tingley Rubber Corp., hereinafter sometimes referred to as respondent, a corporation, has 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 as follows:

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

“Product” is defined as any item which is manufactured, offered for sale or sold by respondent.

“Dealer” is defined as any person, partnership, corporation or firm which purchases any product for retail sale.

“Resale Price” is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any retail price suggested or established by respondent, any customary resale price or the retail price in effect at any dealer.

“Cooperative Advertising” is defined as advertising which invites the public to purchase respondent’s products at dealer’s place of

business, whether the cost of the advertising is borne by respondent alone or shared by dealer and/or wholesaler and respondent.

PARAGRAPH 1. Respondent Tingley Rubber Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business at 200 South Ave., South Plainfield, New Jersey.

PAR. 2. Respondent is now, and for some time last past, has been engaged in the manufacture, advertising, offering for sale, sale and distribution of molded rubber footwear for men, women and children. Sales by respondent for fiscal year 1978 exceeded twelve million dollars.

PAR. 3. Respondent maintains, and has maintained, a substantial course of business, including the acts and practices as hereinafter set forth, which are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent sells and distributes its products to more than one hundred footwear wholesalers located throughout the United States who in turn resell respondent's products to dealers.

PAR. 5. Except to the extent that competition has been hindered, frustrated, lessened and eliminated, as set forth herein, in the course and conduct of its business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the manufacture, advertising, offering for sale, sale and distribution of merchandise of the same general kind and nature as merchandise manufactured, advertised, offered for sale, sold and distributed by respondent.

PAR. 6. In the course and conduct of its business, as above described, respondent has for some time administered cooperative advertising programs which limit or restrict the rights of dealers to obtain cooperative advertising credits or allowances for any merchandise which has been:

- a. Advertised at a sale price, at a discount price, at a promotional price, at a reduced price, at an off-price, or at a mark-down.
- b. Advertised at less than the suggested retail price, or at less than any minimum resale price.
- c. Advertised using a price comparison.

PAR. 7. The administering by respondent of cooperative advertising programs or plans with any of the limitations or restrictions described in Paragraph Six hereinabove has the capacity, tendency and effect of establishing, maintaining, fixing, stabilizing or otherwise illegally influencing the resale prices of dealers in respondent's

products, and has had and still has the capacity, tendency and effect of hindering, suppressing or eliminating competition between or among those dealers selling respondent's products.

PAR. 8. The aforesaid acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of respondent's products, and, thus, are to the prejudice and injury of the public, and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

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 Chicago 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, 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 Tingley Rubber Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 200 South Ave., in the City of South Plainfield, State of New Jersey.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

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

"Product" is defined as any item which is manufactured, offered for sale or sold by respondent.

"Dealer" is defined as any person, partnership, corporation or firm which purchases any product for retail sale.

"Resale Price" is defined as any price, price floor, price ceiling, price range, or any mark-up, formula or margin of profit used by any dealer for pricing any product. Such term includes, but is not limited to, any retail price suggested or established by respondent, any customary resale price or the retail price in effect at any dealer.

"Cooperative Advertising" is defined as advertising which invites the public to purchase respondent's products at dealer's place of business, whether the cost of the advertising is borne by respondent alone or is shared by dealer and/or wholesaler and respondent.

I

It is ordered. That respondent Tingley Rubber Corp., a corporation, its successors and assigns; and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the designing, implementing, conducting, administering or auditing of any cooperative advertising program or any other promotional assistance program, or portion thereof, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

1. Threatening to withhold or withholding cooperative advertising credits or allowances or any other promotional assistance payments from any dealer, or limiting or restricting the right of any dealer to participate in any cooperative advertising program or any other promotional assistance program for which it would otherwise qualify, because of the resale price at which said dealer advertises or sells any product, or proposes to advertise or sell any product.

2. Threatening to withhold or withholding cooperative advertising credits or allowances or any other promotional assistance payments from any dealer, or limiting or restricting the right of any dealer to participate in any cooperative advertising program or any other promotional assistance program for which it would otherwise

qualify, because said dealer has advertised or sold, or proposes to advertise or sell, any product using or featuring any resale price comparison.

II

It is further ordered, That respondent shall:

1. Within thirty (30) days after service of this Order, mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to each of its present wholesalers and to all publications soliciting advertising for respondent's products. An affidavit shall be sworn to by an official of respondent verifying that the attached Exhibit A was so mailed.

2. Mail under separate cover a copy of the enclosure set forth in the attached Exhibit A to any person, partnership, corporation or firm that becomes a new wholesaler or solicits advertising for respondent's products within three (3) years after service of this Order.

III

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

IV

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

V

It is further ordered, That respondent 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

Dear Wholesale Distributor/Publisher:

Tingley Rubber Corp., without admitting any violation of the law, has agreed to the entry of an Order by the Federal Trade Commission regulating its cooperative advertising programs. In connection therewith, the Company has agreed to send you this letter describing the Order.

The order provides, among other things, as follows:

1. Dealers are free to participate in any cooperative advertising program or any other promotional assistance program conducted by Tingley Rubber Corp. regardless of the retail price at which they advertise or sell any Tingley product.
2. Dealers will receive reimbursement under any Tingley cooperative advertising program or any other promotional assistance program regardless of the retail price featured in otherwise qualifying advertisements.

If you have any questions regarding the Order or this letter, please call _____ at Tingley.

for Tingley Rubber Corp.

FEDERAL TRADE COMMISSION DECISIONS

Interlocutory Order 96 F.T.C.

IN THE MATTER OF

TENNECO, INC.

Docket 9097. Interlocutory Order, Sept. 22, 1980

ORDER DENYING RESPONDENT'S MOTION FOR RELIEF NECESSITATED BY CONTACT WITH THE COMMISSION AND RESPONDENT'S EX PARTE MOTION TO DISQUALIFY COMMISSIONER PITOFSKY

On August 12, 1980, respondent, Tenneco, Inc., filed two motions alleging due process violations and procedural irregularities arising out of Commission consideration of a separate staff investigation of certain acquisitions by respondent, acquisitions that are not at issue in the present adjudicative matter. Because the issues raised by respondent in those two motions are so closely related, as are our conclusions, we find it appropriate to respond to both motions in a single order.

In one motion, respondent seeks alternative forms of relief occasioned by what it describes as improper *ex parte* contacts with the Commission by complaint counsel involving factual issues yet to be decided in the present proceeding.¹ In another, respondent moves that Commissioner Pitofsky be disqualified from participation in the decision of this appeal because, in presenting the facts of that separate merger investigation to the Commission, he allegedly prejudged certain issues in the present adjudication.² Complaint counsel have responded to each of these motions,³ and Commissioner Pitofsky has submitted a response to the disqualification motion.⁴

Background

The issue central to this controversy is whether the investigation of a series of foreign acquisitions by Tenneco distinct from the acquisition in adjudication here was conducted as, and was in fact, a "separate" investigation as that term is used in Rule 4.7(f) of the Commission's Rules of Practice. Briefly, these are the relevant facts. Respondent contends that in December 1976, in response to a letter of inquiry from the Bureau of Competition, issued in order to

¹ Respondent's Motion for Relief Necessitated by Complaint Counsel's *Ex Parte* Contact with the Commission, August 12, 1980 (hereinafter "*Ex Parte* Motion").

² Respondent's Motion To Disqualify Commissioner Pitofsky, August 12, 1980 (hereinafter "*Disqualification Motion*").

³ Opposition to Respondent's Motion for Relief Necessitated by Complaint Counsel's *Ex Parte* Contact with the Commission, September 12, 1980; Opposition To Respondent's Motion To Disqualify Commissioner Pitofsky, September 12, 1980.

⁴ Decision of Commissioner Pitofsky in Response to Motion of Tenneco, Inc. To Disqualify Him from Participation in This Proceeding, September 9, 1980.

investigate whether Tenneco's acquisition of Monroe Auto Equipment Company ("Monroe") violated Section 7 of the Clayton Act and Section 5 of the FTC Act, it provided documents relating to its acquisition of five European companies involved in production and sale of exhaust system parts. In March, 1977, the Commission issued a complaint challenging Tenneco's acquisition of Monroe because of its alleged effects upon competition in replacement markets for shock absorbers and exhaust system parts. It is undisputed that that complaint did not challenge Tenneco's five foreign acquisitions. The issue is whether the five foreign acquisitions were investigated separately as a suspected violation of Section 7.

By complaint counsel's account, the file of documents regarding those foreign acquisitions was kept separate from the documents relating to the Tenneco/Monroe matter and, after separate clearance by the Department of Justice on the matter, the foreign acquisitions were investigated *separately* from the Tenneco/Monroe matter, with separate Bureau of Competition designation. Even so, certain factual information about the foreign acquisitions originally came from the Tenneco documents submitted pursuant to the letter of inquiry issued in the Tenneco/Monroe investigation. After further investigation, and during the trial of the Tenneco/Monroe acquisition, the staff recommended that the Commission issue a complaint alleging that Tenneco's acquisition of the five foreign exhaust system parts firms violated Section 7 of the Clayton Act and Section 5 of the FTC Act. It was in the normal course of presentation of that matter to the Commission for consideration that Commissioner Pitofsky made the written and oral statements about facts relating to replacement markets for shock absorbers and exhaust system parts that respondent claims prejudged similar questions of fact at issue in this adjudication. A complaint challenging the five foreign acquisitions was not issued by the Commission and the matter was closed.

The Ex Parte Communications

Respondent contends that the *ex parte* communications by staff detailed in its motions necessitate drastic forms of relief, including a) dismissal of the instant complaint *or* b) preclusion of any finding or conclusion that was the subject of improper *ex parte* communication *and* disclosure of the entire file of the now-closed investigation of the foreign acquisitions *and* c) disqualification of Commissioner Pitofsky.⁵

⁵ Respondent brings this motion to the Commission, it says, in the event that the ALJ's dismissal is not affirmed. But the contentions presented raise such important and, we think, clear-cut questions going to the lawful, constitutional functioning of the Commission that we hereby dispose of them, prior to the oral argument.

We find that no relief whatsoever is necessitated, for we find in the first instance that no improper *ex parte* communications have occurred. The communications that undoubtedly occurred were quite proper and complied precisely with the Commission's procedures for treatment of such communications which themselves conform to the standards of the Administrative Procedure Act, 5 U.S.C. 552(a), 554(d), and the Due Process Clause. We also find that Commissioner Pitofsky, who has removed himself from the decision of these immediate questions, has not prejudged any issue of fact or law in this appeal and therefore should not be disqualified from participation.

Respondent argues too broadly when it says that, in the course of the Commission's consideration of the proposed complaint against Tenneco for its foreign acquisitions, "extensive" presentations were made concerning the manufacture and sale of exhaust system parts. But, in any event, it admits that presentations of this nature are not "improper" under Commission Rule 4.7(f) if they involve, *inter alia*, "the initiation, conduct or disposition of a separate investigation." Rules of Practice, Section 4.7(f). In the event of an *ex parte* communication described in Rule 4.7(b), but made in the context of a separate investigation, Rule 4.7(f) provides that the portion of the communication that relates to a fact in issue in an adjudicative proceeding is to be placed in the docket binder of the adjudicative proceeding to which it pertains. We find that the prescribed procedure was followed assiduously here.⁶

Turning to the central issue before us, we reject respondent's assertion that this adjudication and the investigation of the legality of the foreign acquisitions were the same proceeding. They were not. Respondent makes much of the similarity or even identity of some of the arguments about product and geographic markets that appear in both complaint counsel's brief in this case and the staff's memorandum to the Commission in the other investigation, but this argument is not persuasive or controlling. As we also discuss in the context of the disqualification argument, the common facts and arguments cited by respondent simply relate to fundamental and threshold determinations that arise in any antitrust matter—the relevant geographic and product markets.⁷ The fact that one or more of the

⁶ We note that Rule 4.7(f) does not call for the parties to the adjudicative proceeding in question to be notified that the material is in the docket binder.

⁷ Respondent also cites two findings by the Administrative Law Judge (IDF 395, 465) that purportedly demonstrate that the foreign acquisitions are an issue of fact in the instant adjudication. But both of those findings relate solely to Tenneco's exploration of the possibility of acquisition of a British shock absorber manufacturer (not one of the five foreign firms) that the law judge mentions in the context of available toehold acquisition for Tenneco or Monroe. *Ex Parte* Motion, p. 20 n. 9. The five foreign acquisitions are not mentioned in those findings.

markets is involved in adjudication does not immunize the markets or the firms in them from further law enforcement scrutiny.

Respondent concedes that it does not obtain immunity from a separate Commission investigation of its conduct or its industry just because it is a party to adjudication. Its complaint is that Rule 4.7 has been violated because there has never been a "finding" that the investigation of the foreign acquisitions was "separate." But we find ample support in the record to establish that the investigation of whether Tenneco's acquisition of the five firms independently violated Section 7 and Section 5 was a separate investigation. That record evidence includes the separate staffing, separate Justice Department clearance, separate file number, separate document management, separate subject matter and the manner of compliance with Rule 4.7 itself, involving the release of factual portions of staff papers and Commission memoranda bearing on this adjudication.

The Prejudgment Argument

In addition to the foregoing, we find it unassailable that the combined functions of investigator and decisionmaker in the office of the Federal Trade Commissioner do not give rise to a denial of due process. It is the duty of the commissioners to weigh the facts of investigations of acts or practices which may violate the laws entrusted to them, in order to determine whether there is reason to believe that such a violation has occurred, in contemplation of the issuance of a complaint. Because the commissioners are purposefully appointed to terms sufficiently long to allow them to accumulate and bring to bear expertness in industries as well as in the law, *FTC v Cement Institute*, 333 U.S. 683, 701-02 (1948), it is neither unusual nor improper that they may have occasion to perform reason-to-believe analysis of a potential violation involving a company, industry or market that is the subject of on-going litigation. When this occurs, i.e., when a commissioner has ruled on a previous complaint involving certain facts or firms, he or she is not precluded from performing further statutory duties of investigation merely because a subsequent investigation involves some of those facts or firms. *Withrow v Larkin*, 421 U.S. 35 (1974); *FTC v Cement Institute*, 333 U.S. 683 (1948).

This investigative analysis of reason-to-believe is based upon *ex parte* presentation of facts, and, as noted above, Commission rules provide for disclosure of such facts where appropriate. This reason-to-believe function also necessitates tentative and preliminary conclusions, and in antitrust matters preliminary conclusions about

geographic and product markets are essential and inescapable. Prior contact with such market-related facts does not preclude the Commission from further investigations involving them. As the Supreme Court has said by way of an example more extreme than the issue before us,

No decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involve questions both of law and fact. *Withrow v Larkin*, 421 U.S. at 48-49.

The Supreme Court has specifically upheld the constitutionality of the combination of investigative and decision-making functions in the FTC, *FTC v Cement Institute*, and has directly addressed the issue of prior Commission contact with facts that are subsequently adjudicated:

The fact that the Commission had entertained such views as the result of its prior *ex parte* investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondent's basing point practices. . . . *Id.* at 701.⁸

It is clear from the cautious and qualified language he used in presenting the matter of Tenneco's foreign acquisitions to the Commission that Commissioner Pitofsky was reaching only the preliminary conclusions appropriate to the reason-to-believe function. For example, he stated a) that the proposed product market "may be an appropriate one," that the foreign and domestic sales of exhaust system parts were joined "in the complaint in Tenneco I," that "it does appear that there is a strong argument in favor," and that evidence "would seem to support" the market proposal before the Commission.⁹ Furthermore, the transcript of the Commission meeting on the investigation of the foreign acquisitions, which has been released and appended to Commissioner Pitofsky's response,¹⁰ shows that he has not prejudged any issue of fact in the current adjudication.

Conclusion

For the foregoing reasons, we conclude that the discovery of

⁸ Even where an agency conducted two separate, sequential investigations of an identical set of facts for two separate legal determinations, the court found no due process violation in the agency's conduct of the second hearing after reaching conclusions in the first. *Pangburn v C.A.B.*, 311 F.2d 349 (1st Cir. 1962).

⁹ Respondent's Disqualification Motion, pp. 3-4.

¹⁰ Appendix C, Decision of Commissioner Pitofsky in Response to Motion To Disqualify Him.

information about the foreign acquisition during the course of the investigation of the Tenneco/Monroe acquisition did not violate due process or any rule of the Commission, that the record establishes the separateness of the foreign-acquisitions investigation, that the presentation of the separate investigative matter to the Commission by the staff involved *ex parte* communications of the type described by subsection (f) of Rule 4.7, that such *ex parte* communications are not prohibited so long as proper procedures for their treatment are followed, that such procedures were followed, that those procedures satisfy the standards of due process and fairness under the Administrative Procedure Act, that the presentation of the subsequent matter to the Commission by Commissioner Pitofsky was proper and constitutional and that it involved no prejudgment of issues in this adjudication. Having reached these conclusions, we find that the relief requested by respondent is not warranted and is hereby denied.

Commissioner Pitofsky did not participate.

Complaint 96 F.T.C.

IN THE MATTER OF
THE BENDIX CORPORATION

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

Docket C-3042. Complaint, Sept. 23, 1980—Decision, Sept. 23, 1980

This consent order requires, among other things, a Southfield, Mich. industrial firm engaged in four major business segments: automotive, aerospace-electronics, forestry and industrial-energy, to divest itself of the Warner & Swasey Rotating Toolholder Business and the Bendix Crush-Form Grinder Business within one year of the effective date of the order to a Commission-approved firm. Further, the order requires Bendix to maintain the businesses as viable business entities, and prohibits any diminishing of their value prior to their divestiture. The order also places a ten-year ban on the purchase of any concerns engaged in the rotating toolholder market or in the external cylindrical grinding machine market without prior Commission approval.

Appearances

For the Commission: *Robert Doyle and Richard Rosen.*

For the respondent: *Abe Krash, Arnold & Porter, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent, The Bendix Corporation ("Bendix"), a corporation subject to the jurisdiction of the Commission, has made a tender offer and has entered into a merger agreement either of which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18 and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I.

DEFINITIONS

1. For purposes of this Complaint, the following definitions apply:
 - (a) "Machine tool" means a stationary, power-driven machine,

falling within codes 3541 and 3542 of the 1972 Standard Industrial Classification Manual, used to cut or form metal.

(b) "Rotating toolholder" means a device in which a cutting tool is secured to a machine tool for purposes of cutting excess material in the form of chips from a metal workpiece by rotation of the cutting tool against the workpiece.

(c) "External cylindrical grinding machine" means a machine tool used for shaping a cylindrical metal workpiece by bringing the exterior of the workpiece into contact with a rotating abrasive wheel, called a grinding wheel, in order to remove excess metal.

(d) "Computer numerical control unit" means an electronic unit that directs the operation of a machine tool through a series of coded instructions from a programmed computer system, and does not include programmable controllers.

(e) "Numerically controlled machine tool" means a machine tool that is operated by instruction provided by a computer numerical control unit.

II.

THE BENDIX CORPORATION

2. Bendix is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices at Bendix Center, Southfield, Michigan.

3. Bendix is a publicly traded company (NYSE) which in 1979 had sales of \$3.8 billion and net assets of \$2.3 billion. Bendix and its subsidiaries are engaged in four major business segments: automotive, aerospace-electronics, forest products, and industrial-energy.

4. At all times relevant herein, Bendix has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

III.

THE WARNER & SWASEY COMPANY

5. The Warner & Swasey Company ("Warner & Swasey") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio with its principal executive offices at 11000 Cedar Ave., Cleveland, Ohio.

6. Warner & Swasey is a publicly traded company (NYSE) which

in 1978 had sales of \$245 million and net assets of \$223 million. Warner & Swasey is one of the largest producers of machine tools in the United States.

7. At all times relevant herein, Warner & Swasey has been and is now engaged in commerce within the meaning of the Clayton Act, as amended, and is a corporation whose business is in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

IV.

ACQUISITION

8. On December 11, 1979, Bendix and Warner & Swasey entered into an agreement providing for the merger of the two companies. Pursuant to the agreement, on December 13, 1979, Bendix offered to purchase up to 45 percent of Warner & Swasey's common stock. Following the tender offer, according to the agreement, Warner & Swasey will be merged into a subsidiary of Bendix with Warner & Swasey common stock being exchanged for Bendix preferred stock. The entire transaction is valued at approximately \$300 million.

V.

TRADE AND COMMERCE

9. The relevant geographic market is the United States as a whole.

10. The relevant product markets are:

(a) The manufacture and sale of computer numerical control units and submarkets thereof;

(b) The manufacture and sale of numerically controlled machine tools and submarkets thereof;

(c) The manufacture and sale of external cylindrical grinding machines and submarkets thereof;

(d) The manufacture and sale of rotating toolholders and submarkets thereof.

11. Concentration in the manufacture and sale of the relevant products is high.

12. Barriers to entry into the manufacture and sale of the relevant products are high.

13. Bendix is and for many years has been a significant supplier of computer numerical control units to actual and potential competi-

tors of Warner & Swasey and other producers of numerically controlled machine tools.

14. Warner & Swasey is a significant purchaser of computer numerical control units.

15. The market for computer numerical control units in the United States in 1978 was approximately \$105 million.

16. Bendix and Warner & Swasey are and for many years have been substantial and actual competitors in the sale of external cylindrical grinding machines.

17. In 1978, the United States market for external cylindrical grinding machines was approximately \$110 million.

18. Bendix and Warner & Swasey are and for many years have been substantial and actual competitors in the sale of rotating toolholders.

19. In 1979, the United States market for rotating toolholders was approximately \$35 million.

VI.

EFFECTS OF THE ACQUISITION

20. The effects of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly in the relevant markets enumerated in Paragraphs 9 and 10 of this complaint in the following ways, among others:

(a) actual and potential producers of computer numerical control units other than Bendix may be foreclosed from selling to a significant purchaser of computer numerical control units;

(b) actual and potential machine tool producers other than Warner & Swasey may be foreclosed from a significant source of supply of computer numerical control units;

(c) barriers to entry into each of the relevant markets will be raised;

(d) substantial actual and potential competition between Bendix and Warner & Swasey and other firms in the manufacture and sale of external cylindrical grinding machines will be eliminated;

(e) concentration in the manufacture and sale of external cylindrical grinding machines will be increased to the detriment of actual and potential competition, and the possibilities for eventual deconcentration may be diminished;

(f) substantial actual and potential competition between Bendix and Warner & Swasey and other firms in the manufacture and sale of rotating toolholders will be eliminated;

(g) concentration in the manufacture and sale of rotating toolholders will be increased to the detriment of actual and potential competition, and the possibilities for eventual deconcentration may be diminished.

VII.

VIOLATIONS CHARGED

21. The proposed acquisition set forth in Paragraph 8, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and would violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

22. The merger agreement described in Paragraph 8 violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45.

Commissioners Pitofsky and Bailey did not participate.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the proposed acquisition of The Warner & Swasey Company (hereinafter "Warner & Swasey") by The Bendix Corporation (hereinafter "Bendix"), and Bendix having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Bendix with violations of the Federal Trade Commission Act and the Clayton Act, and

Bendix, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by Bendix 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 Bendix 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 Bendix has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission

hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Bendix is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal executive offices at Bendix Center, in the City of Southfield, State of Michigan.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Bendix, and the proceeding is in the public interest.

ORDER

I

It is ordered, That the following definitions shall apply herein:

(1) "Machine Tool" means a stationary, power-driven machine, falling within codes 3541 and 3542 of the 1972 Standard Industrial Classification Manual, used to cut or form metal.

(2) "Rotating Toolholder" means a device in which a cutting tool is secured to a machine tool for purposes of cutting excess material in the form of chips from a metal workpiece by rotation of the cutting tool against the workpiece.

(3) "Warner & Swasey Rotating Toolholder Business" means that part of the Balas Division of Warner & Swasey presently owned or operated by Warner & Swasey for the manufacture of rotating toolholders and includes all assets, properties, titles to property, interests, rights, and privileges of whatever nature, tangible and intangible, including, but not limited to, all real property, buildings, machinery, equipment, tools, raw materials, inventory, customer lists, trade names, patents, patent applications, trademarks and all other property of whatever description that are unique to, or necessary for, the manufacture of rotating toolholders and which are currently in existence, together with all additions, replacements, and improvements hereafter made by Warner & Swasey or Bendix prior to divestiture.

(4) "External Cylindrical Grinding Machine" means a machine tool used for shaping a cylindrical metal workpiece by bringing the exterior of the workpiece into contact with a rotating abrasive wheel, called a grinding wheel, in order to remove excess metal.

(5) "Bendix Crush Form Grinder Business" means that part of the Automation and Measurement Division of Bendix presently owned or operated by Bendix for the manufacture of crush form grinding machines and includes all assets, properties, titles to property, interests, rights, and privileges of whatever nature, tangible and

intangible, including, but not limited to, all real property, buildings, machinery, equipment, tools, raw materials, inventory, customer lists, trade names, patents, patent applications, trademarks (excluding the trade name and trademark "Bendix"), and all other property of whatever description that are unique to, or necessary for, the manufacture of crush form grinding machines and which are currently in existence together with all additions, replacements, and improvements hereafter made by Bendix prior to divestiture.

(6) "Computer Numerical Control Unit" means an electronic unit that directs the operation of a machine tool through a series of coded instructions from a programmed computer system, and does not include programmable controllers.

(7) "Numerically Controlled Machine Tool" means a machine tool that is operated by instruction provided by a computer numerical control unit.

(8) "Bendix" means The Bendix Corporation and any successor to the business of The Bendix Corporation.

(9) "Warner and Swasey" means The Warner & Swasey Company and any successor to the business of The Warner & Swasey Company.

II

It is further ordered, That Bendix, its officers, directors, agents, representatives and employees shall:

(1) Within twelve (12) months from the date this order becomes final, divest absolutely, or cause Warner & Swasey to divest absolutely, to an acquirer which meets with the prior approval of the Federal Trade Commission, the Warner & Swasey Rotating Toolholder Business, as a viable going business of the acquirer; and

(2) Within twelve (12) months from the date this order becomes final, divest absolutely, to an acquirer which meets with the prior approval of the Federal Trade Commission, the Bendix Crush Form Grinder Business, as a viable going business of the acquirer.

III

It is further ordered, That, pending the divestiture of the Warner & Swasey Rotating Toolholder Business and the Bendix Crush Form Grinder Business required by Paragraph II of this order, Bendix shall not take any action (other than sales of products in the ordinary course of business), without the consent of the Federal Trade Commission, to diminish the value of the Warner & Swasey

Rotating Toolholder Business or the Bendix Crush Form Grinder Business.

IV

It is further ordered. That, without the prior approval of the Federal Trade Commission:

(1) For the two (2) years following the date this order becomes final, Bendix shall not equip with its computer numerical control units more than ten (10) percent of the numerically controlled machine tools manufactured by Warner & Swasey; and

(2) In the third and fourth years following the date this order becomes final, Bendix shall not equip with its computer numerical control units more than twenty-five (25) percent of the numerically controlled machine tools manufactured by Warner & Swasey.

V

It is further ordered. That:

(1) Bendix shall treat in confidence and not transfer or reveal to Warner & Swasey information which any other customer for computer numerical control units transmits to Bendix, and designates as proprietary, for such period as the customer shall specify; *provided*, that Bendix shall not have any such obligation if the proprietary information (a) has already been transmitted to Bendix and Warner & Swasey by a party other than the customer, (b) is developed by Bendix or Warner & Swasey independently, (c) is already available to the general public, or (d) becomes available to the general public through no act or fault of Bendix;

(2) Warner & Swasey shall treat in confidence and not transfer or reveal to Bendix information which any other supplier of computer numerical control units transmits to Warner & Swasey, and designates as proprietary, for such period as the supplier shall specify; *provided*, that Warner & Swasey, shall not have any obligation if the proprietary information (a) has already been transmitted to Bendix or Warner & Swasey by a party other than the supplier, (b) is developed by Bendix or Warner & Swasey independently, (c) is already available to the general public, or (d) becomes available to the general public through no act or fault of Warner & Swasey; and

(3) Bendix shall enter into an agreement in writing with each of its customers for computer numerical control units, and Warner & Swasey shall enter into an agreement in writing with each of its suppliers of computer numerical control units, embodying the

undertakings of confidentiality set forth in subparagraphs (1) and (2) of this Paragraph.

VI

It is further ordered, That, for a period of ten (10) years following the date this order becomes final:

(1) Bendix shall maintain its business in computer numerical control units as an organization and profit center separate from the machine tool business of Warner & Swasey; and

(2) In order to assure the availability of Bendix as a significant supplier of computer numerical control units to actual and potential competitors of Warner & Swasey and other manufacturers of numerically controlled machine tools, Bendix shall not offer or sell computer numerical control units to Warner & Swasey on preferential terms regarding price, delivery, service, or any other terms or conditions of sale; nor shall Bendix offer or sell new computer numerical control units to Warner & Swasey, nor offer to develop new computer numerical control units for Warner & Swasey, on a basis inconsistent with Bendix' business practices with respect to other customers for computer numerical control units.

VII

It is further ordered, That Bendix shall announce generally to the trade the provisions of Paragraphs V and VI, and shall deliver a copy of this order to each of its customers for computer numerical control units and to each of Warner & Swasey's suppliers of computer numerical control units.

VIII

It is further ordered, That Bendix shall cease and desist, for a period of ten (10) years from the date this Order becomes final, from acquiring, directly or indirectly, through subsidiaries or otherwise, without the prior approval of the Federal Trade Commission, the whole or any part of the stock, share capital, or assets (other than products acquired for use or resale in the ordinary course of Bendix' business) of any corporate or noncorporate concern organized in the United States and engaged in, or the assets of which are utilized in, the manufacture or sale in the United States of

- (a) rotating toolholders;
- (b) external cylindrical grinding machines; or

(c) numerically controlled machine tools;

provided, that nothing in this Paragraph shall prohibit Bendix from acquiring the stock, share capital, or assets of any corporate or noncorporate concern engaged in the manufacture of numerically controlled machine tools, whose assets devoted to the manufacture of numerically controlled machine tools at the end of the year preceding such acquisition, or whose sales thereof during the year preceding such acquisition, were not in excess of ten million dollars (\$10,000,000).

IX

It is further ordered, That Bendix shall, within ninety (90) days from the date this order becomes final, and every ninety (90) days thereafter until Bendix has accomplished the divestitures required by Paragraph II of this order, submit in writing to the Federal Trade Commission a report setting forth in detail the manner and form in which Bendix intends to comply or has complied with Paragraphs II and III of this order. All such reports shall include a summary of contacts or negotiations with respect to the sale of the Warner & Swasey Rotating Toolholder Business or the Bendix Crush Form Grinder Business, the identities of all parties to such contacts or negotiations, and copies of all written communications to and from such parties.

X

It is further ordered, That annually on the anniversary of the date this order becomes final, for a period of ten (10) years, Bendix shall submit in writing to the Federal Trade Commission a verified report setting forth in detail the manner and form in which Bendix intends to comply or has complied with Paragraphs IV, V, VI, VII, and VIII of this order.

XI

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

Commissioners Pitofsky and Bailey did not participate.

Complaint

96-F.T.C.

IN THE MATTER OF
FORD MOTOR COMPANY

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

Docket 9105. Complaint, Jan. 10, 1978—Decision, Oct. 2, 1980

This consent order requires, among other things, a Dearborn, Mich. motor vehicle manufacturer to cease failing to supply consumers, on request, with "Technical Service Bulletins" which clearly describe engine or transmission problems that could cost over \$125; preventative maintenance steps to take; and the extent of any reimbursements or free repairs. The company is required to establish a toll-free number and mail to all requesting consumers bulletins that affect their cars. Each car owner must be notified by mail whenever warranty protection covering engine, transmission or other significant problems is extended. Respondent is further required to announce the existence of its automobile information program in various national publications, and copy test all ads before publication to ensure that the required information is communicated as effectively as their regular product advertising. Additionally, the order requires that consumers be advised of the availability of the repair information and possible post-warranty reimbursement for repairs through warranty and owner manuals, dealer showroom posters, and individual mailings to all 1979 and 1980 Ford car owners. Under the terms of the order, the company is required to follow procedures to ensure reimbursement of each owner who incurred expenses for repairs prior to notification of adjustment programs; make replacement parts available to dealers; and pay all costs for parts and labor incurred by dealers in repairing specified conditions.

Appearances

For the Commission: *Richard H. Gateley, Barbara Arnold Maier, Paul D. Gandola, Robert P. Weaver, Noble F. Jones and David V. Plottner.*

For the respondent: *Lloyd T. Williams, Jr. and David R. Larrouy, Dearborn, Mich.; Robert L. Wald, Wald, Harkrader & Ross, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Ford Motor Company, a corporation, hereinafter sometimes referred to as respondent, has 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. For the purpose of this complaint, the following definitions shall apply:

"Piston scuffing" is metal to metal contact between the pistons and the cylinder walls.

A "defect" in a motor vehicle or component thereof occurs if the motor vehicle or component thereof is subject to or potentially subject to a significant number of failures in normal operation, including failures occurring under operating conditions that either are within the parameters specified by the manufacturer or reflect reasonably expected ordinary vehicle abuse or failures to maintain. For purposes of this definition, failures attributable to normal deterioration of a component as a result of age and wear are excluded.

PAR. 2. Respondent Ford Motor Company is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at The American Road, Dearborn, Michigan.

PAR. 3. Respondent is now, and has been, engaged in the manufacture, advertising, offering for sale, sale, and distribution of various motor vehicles.

PAR. 4. In the course and conduct of its aforesaid business, respondent causes the said motor vehicles, when sold, to be transported from its places of business located in various States of the United States to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. On or about February 3, 1976, if not before, respondent received information by which it knew, or had reason to believe that there was a defect, later identified as piston scuffing, in several engines manufactured by respondent, including the engine described as the 4-cylinder, 2.3-liter engine, and the engine described as the 6-cylinder, 250 c.i.d. engine.

PAR. 6. Respondent verified in or about August, 1976, if not sooner, that piston scuffing was due to inadequate lubrication of internal parts of such engines. Respondent subsequently modified said

engines, by drilling oil squirtheroles to help ensure adequate lubrication.

PAR. 7. Between May 9, and July 20, 1977, respondent initiated programs to compensate purchasers whose engines developed piston scuffing. However, in many instances purchasers are not compensated. In most, if not all, instances such purchasers are not compensated because they are not aware of respondent's programs, or because of limitations upon the programs such as model year or mileage of the motor vehicle, or because dealers do not abide by the program.

PAR. 8. In the course and conduct of its business, respondent has disseminated and caused the dissemination of advertisements and other promotional materials concerning its motor vehicles in or affecting commerce by means of advertisements printed in magazines and newspapers and advertisements transmitted by television and radio stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, and through various other outlets, including point of sale displays and materials for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said motor vehicles.

PAR. 9. Respondent has represented, directly or by implication, through representations contained in said advertisements and other promotional materials, that its motor vehicles are durable and reliable and are built to perform well under tough operating conditions.

PAR. 10. In truth and in fact, certain models of respondent's motor vehicles or the component parts thereof are not durable and reliable and suffer or may suffer from piston scuffing, which substantially affects or may substantially affect the reliability, durability, or performance of such motor vehicles. Therefore, said representations were and are false, misleading, or deceptive.

PAR. 11. Respondent has represented, directly or by implication, by and through the offering for sale of its motor vehicles, that its motor vehicles do not have any latent defect which substantially affects the reliability, durability, or performance of such motor vehicles.

PAR. 12. In truth and in fact, in a significant number of instances, respondent's motor vehicles suffer or may suffer from piston scuffing and other latent defects which substantially affect or may substantially affect the reliability, durability, or performance of such motor vehicles. Therefore, said representations were and are unfair or deceptive.

PAR. 13. Notwithstanding its knowledge of piston scuffing, respondent is failing and has failed to disclose to prospective purchasers

and purchasers of motor vehicles with said engines information concerning the possibility of substantial damage to the engines through piston scuffing in said engines, and the nature and extent of repairs which may be necessary to correct piston scuffing. Respondent therefore is failing and has failed to disclose material facts which, if known to prospective consumers, would be likely to affect their consideration of whether to purchase a motor vehicle from respondent. Failure to disclose the aforesaid facts to present owners of affected vehicles may cause them substantial economic harm due to inability on their part to avoid or prevent substantial damage to the engines of their vehicles. Such failures to disclose are deceptive or unfair acts or practices.

PAR. 14. Respondent is failing and has failed to disclose to prospective purchasers and purchasers of motor vehicles with said engines the existence of its adjustment program and limitations thereto described in Paragraph Seven, above. Respondent therefore is failing and has failed to disclose material facts which, if known to prospective consumers, would be likely to affect their consideration of whether to purchase a motor vehicle from respondent. Failure to disclose the aforesaid facts to present owners of affected vehicles may cause them substantial economic harm. Such failures to disclose are deceptive or unfair acts or practices.

PAR. 15. The use by respondent of the aforesaid acts and practices has had, and now has, the capacity and tendency to mislead members of the consuming public who are purchasing or who have purchased substantial quantities of motor vehicles equipped with the engines described in Paragraph Five.

Therefore, the aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondent having been served with a copy of the complaint, amended thereafter by the administrative law judge, together with a notice of contemplated relief; and

The respondent, its counsel, 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 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter, 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 by interested persons pursuant to Section 3.25 of its Rules; and respondent having submitted a proposed modification of the definition appearing at paragraph I.10 of said consent agreement, which proposed modification was duly placed on the public record as a comment pursuant to Section 3.25(f) of the Rules and duly considered as such comment by the Commission; and respondent and Commission counsel having agreed to said proposed modification, which has been duly incorporated into the Order appearing below; now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Ford Motor Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business located at The American Road, Dearborn, Michigan.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

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

1. "Piston scuffing" is metal-to-metal contact between the pistons and cylinder walls of the engine block in: (a) 2.3 liter engines used in 1974 through 1977 model year vehicles and built by respondent prior to March 1, 1977, and (b) 200/250 CID engines used in 1975 through 1977 model year vehicles and built by respondent between September 9, 1974 and July 2, 1977.

2. "Camshaft/rocker arm wear" is surface scratching or scoring which results from metal-to-metal contact between the camshaft and rocker arms in 2.3 liter engines used in 1974 through 1978 model year vehicles and built by respondent prior to March 1, 1978.

3. "Cracked engine block" is an engine block cracking condition which results in a hairline crack in the tappet valley wall in: (a) 400-W CID engines used in respondent's 1974 through 1977 model year vehicles and containing blocks made prior to March 1, 1977, and (b) 351-M/400-C CID engines used in respondent's 1976 and 1977 model year vehicles containing blocks made prior to March 1, 1977, cast at the Michigan Casting Center.

4. "Vehicle" is a passenger car or a truck with a gross vehicle weight rating no greater than 8,500 pounds.

5. "Affected vehicles" are those which are subject to piston scuffing, camshaft/rocker arm wear, or cracked engine block, as these terms are defined in paragraphs 1, 2 and 3.

6. "Extended policy programs" are, for piston scuffing, the Ford program codes A52, A53, A56 and A57; for camshaft/rocker arm wear, Ford program codes A54 and A55; and for cracked engine block, Ford program codes A60, A61 and A62.

7. "Adjustment program" refers to extended policy programs such as those referenced in paragraph 6 or any other program under which respondent undertakes, on a uniform basis and with eligibility defined in terms of specified time-in-service and/or specified mileage limits and/or specified other terms beyond those stated in respondent's applicable warranty or warranties, to pay for all or any part of the cost of repairing, or to reimburse owners for all or any part of the cost of repairing, any engine or transmission condition, or any condition other than an engine or transmission condition that may substantially affect vehicle durability, reliability or performance, other than service provided under a safety or emission-related recall campaign. This term does not include *ad hoc* adjustments made by respondent on a case-by-case basis and not pursuant to a general commitment to pay for specified services.

8. "Engine" refers to the engine block, cylinder head, all internal engine parts, intake and exhaust manifolds.

9. "Transmission" refers to the transmission case and all internal transmission parts other than the clutch and related parts.

10. "Technical Service Bulletin(s)" is (are) the document(s) or excerpt(s) therefrom issued by the Ford Parts and Service Division pertaining to (a) repair procedures for engine or transmission conditions as to which the cost of repair exceeds the reference cost, or (b) maintenance procedures designed to avoid engine or transmis-

sion conditions as to which the cost of repair would exceed the reference cost; or, should the designation "Technical Service Bulletin(s)" to identify such document(s) or excerpt(s) be discontinued or changed, any such document(s) or excerpt(s) issued thereafter which is (are) substantially the same in content and purpose.

11. "Explanatory material" refers to a document written in a manner reasonably designed to be clear and comprehensible to prospective purchasers and owners generally, containing the following information regarding the repair or maintenance procedures described in the related Technical Service Bulletin, to the extent such information is known to respondent:

- (a) a description of the condition;
- (b) a description of the symptoms indicating the condition;
- (c) the possible consequences of not effecting the indicated procedures for the condition, including the possible consequences of not effecting such procedures in a timely manner;
- (d) the estimated cost to the consumer of any such procedures (per respondent's applicable National Average Warranty Labor Rate, respondent's Labor Time Standards Manual and respondent's suggested retail prices for parts or a national mean price for parts);
- (e) the steps or possible steps that can be taken to minimize or avoid the condition, including but not limited to maintenance procedures which are specified in the owner's manual but which might otherwise be omitted by the owner;
- (f) the proper repair procedure, including the use of upgraded parts, if any; if no upgraded parts exist, a statement that the procedure may have to be repeated if such is the case; and
- (g) the terms of any applicable adjustment program.

12. "Dealer" or "dealers" refers to any person, partnership or corporation which, pursuant to a sales and service agreement with respondent, purchases, or receives on consignment, vehicles from respondent for resale or lease to the public, including persons, partnerships, firms or corporations owned or operated by respondent.

13. "Reference cost" means (a) for the first year after service of this order, \$125.00; (b) for each succeeding year during which this order or any part thereof remains in effect, \$125.00 adjusted by a ratio, the numerator of which is the most recently published monthly Consumer Price Index, and the denominator of which is the Consumer Price Index for the month in 1980 corresponding to the month of service of this order, such adjustment to be rounded to the

nearest dollar. For purposes of paragraph B(1) of section IX, the reference cost is zero.

14. "Cost of repair" refers to a calculation of expected cost to the consumer derived by adding respondent's suggested retail prices for parts or a national mean retail price for parts which are or may be required to accomplish a specified repair and respondent's applicable National Average Warranty Labor rate charges for accomplishing that repair multiplied by the time required to effectuate the repair as determined by respondent's Labor Time Standards Manual.

15. Whenever this order requires that an action be taken within a specified period of time, the month of December shall not be included in the calculation of the specified time.

II

It is ordered, That respondent, Ford Motor Company, its successors and assigns, its officers, agents, representatives, and employees, directly or indirectly or through any corporation, subsidiary, division, or device through which respondent acts in the United States, in connection with the advertising, offering for sale, sale or distribution, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any vehicle, do forthwith cease and desist from:

A. Failing to disclose, in a clear and conspicuous manner, in vehicle warranty information booklets, vehicle owner guides, the full-line point-of-sale catalog published by respondent for each of its vehicle divisions, and the point-of-sale catalog published by respondent for each of its vehicle lines, the following two statements:

FORD-PAID REPAIR PROGRAMS AFTER THE WARRANTY PERIOD

Sometimes Ford offers adjustment programs to pay all or part of the cost of certain repairs. These programs are intended to assist owners and are in addition to the warranty or to required recalls. Ask Ford or your dealer about such programs relating to your Ford or Lincoln-Mercury vehicle.

To get copies of any adjustment program for your vehicle or the vehicle of interest to you:

Call Ford toll-free at 1-800-000-0000

Or write Ford at:

Ford Parts & Service Division
Post Office Box ----
Dearborn, Michigan 48121

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We'll need your name and address; year, make, and model vehicle, as well as engine size; and whether you have a manual or automatic transmission.

TECHNICAL SERVICE BULLETINS

All vehicles need repairs during their lifetime. Sometimes Ford issues Technical Service Bulletins (TSBs) and easy-to-read explanations describing unusual engine or transmission conditions which may lead to costly repairs, the recommended repairs, and new repair procedures. Often a repair now can prevent a more serious repair later. Ask Ford or your dealer for any such TSBs and explanations relating to your Ford or Lincoln-Mercury vehicle.

To get copies of these Technical Service Bulletins and explanations for your vehicle or the vehicle of interest to you:

Call Ford toll-free at 1-800-000-0000

Or write Ford at:

Ford Parts & Service Division
Post Office Box ----
Dearborn, Michigan 48121

We'll need your name and address; year, make, and model vehicle, as well as engine size; and whether you have a manual or automatic transmission.

* * * * *

B. Failing to mail or cause to be mailed, either upon written request or upon oral request received pursuant to the toll-free telephone procedure described in paragraph B of section III, to requesters in a form which may be retained:

1. information concerning any adjustment programs applicable to the vehicle(s) identified in the request;
2. Technical Service Bulletins and related explanatory material issued during the then-current model year and the two preceding model years and applicable to the vehicle(s) identified in the request; and
3. information disclosing respondent's subscription program described in paragraph A of section III.

C. Failing to furnish dealers with the information, Technical Service Bulletins and explanatory material described in paragraph B, along with a means of indexing all such materials by vehicle make, engine size and transmission type in a manner designed to facilitate access to such materials by prospective purchasers and owners on the dealers' premises.

D. Failing to recommend and urge, in writing, that dealers:

1. place the display posters referenced in paragraph F of section IV in conspicuous and accessible locations within the dealer's showroom and service payment area;
2. upon request, provide in a form which may be retained the information, Technical Service Bulletins and material described in paragraph B to the extent applicable to the vehicle(s) of interest to the requester, subject to a reasonable charge for duplication; and
3. provide ready access to all materials described in paragraph B indexed in the manner provided by respondent pursuant to paragraph C.

E. Failing to include in one of respondent's Dealer Personnel Training Tapes each model year information regarding disclosures of adjustment programs, Technical Service Bulletins and explanatory material pursuant to paragraphs A-D, advice regarding the role of dealer personnel in making such disclosures, and the importance of following such advice.

F. Failing to include in an all-dealer letter once in each 6-month period a clear and conspicuous reminder to dealers regarding disclosures of adjustment programs, Technical Service Bulletins and explanatory material pursuant to paragraphs A-D, respondent's recommendations pursuant to paragraph D, and the importance of following such recommendations.

G. Failing to continue respondent's program of issuing Technical Service Bulletins in a manner comparable to the program as it existed in the period 1977 through 1979.

H. Failing to prepare explanatory material.

III

It is further ordered, That:

A. Respondent shall implement a program, and shall disclose such program in its vehicle owner guides, whereby persons may purchase a subscription to Technical Service Bulletins and explanatory material applicable to a specified vehicle. Such subscriptions shall be offered at a price not to exceed reasonable costs.

B. Respondent shall establish and maintain a toll-free telephone system designed to accommodate the volume of calls which result from the disclosures made pursuant to this order. The system shall provide that after obtaining a caller's name, address, vehicle year, make and model, engine size and type of transmission, the personnel receiving the call shall offer to mail (and, if requested, shall then

cause to be mailed) to the caller the information, Technical Service Bulletins and material described in paragraph B of section II.

IV

It is further ordered, That:

A. Respondent shall (a) within 30 days of the adoption of any new adjustment program, notify all dealers and (b) within 120 days of the adoption of said program, subject to priority for safety or emission-related recalls, notify by first-class mail all owners of vehicles within or potentially within said program of the condition and circumstances giving rise to, and the principal terms and conditions of, said program. The notification shall include (to the extent known to respondent) the following information:

- (1) a description of the condition;
- (2) a description of the symptoms indicating the condition;
- (3) the possible consequences of not having the condition repaired, including the possible consequences of not having the condition repaired in a timely manner;
- (4) the steps or possible steps (if any) that can be taken to minimize or avoid the condition, including but not limited to maintenance procedures which are specified in the owner's manual but which might otherwise be omitted by the owner; and
- (5) the principal terms and conditions of the program.

B. Respondent shall include, in all mailings to owners pursuant to paragraph A, the disclosure statements, set forth clearly and conspicuously, required in paragraph A of section II, or the substantial equivalents thereof covering the same information.

C. Within 60 days of the date of service of this order, subject to priority for safety or emission-related recalls, respondent shall mail to all owners of 1979 and 1980 model year Ford and Lincoln-Mercury vehicles, determined from respondent's North American Vehicle Information Systems (NAVIS) records, a letter explaining and promoting the existence, availability, and benefits of respondent's adjustment program and Technical Service Bulletin information systems provided for in sections II and III. Such letter shall include the disclosure statements, set forth clearly and conspicuously, required in paragraph A of section II or the substantial equivalents thereof covering the same information. A further mailing will be made, if necessary, to cover additional owners purchasing 1980 model year Ford and Lincoln-Mercury vehicles after the date of

service of this order and reported in respondent's NAVIS records prior to November 1, 1980. This further mailing will be completed by December 31, 1980, subject to priority for safety or emission-related recalls.

D. In each issue of "Ford Times" beginning with an issue published no later than 6 months after the date of service of this order, respondent shall include a full-page advertisement containing the disclosure statements set forth in paragraph A of section II or the substantial equivalents thereof concerning the same information. In one such issue published during each 6-month period following the first issue that contains said advertisement, respondent shall include an article on service and maintenance tips that include information regarding any adjustment programs and Technical Service Bulletins adopted or published during the preceding 6-month period.

E. At least 5 times in the first year after the date of service of this order, at least 3 times in the second year and at least once in each year thereafter, respondent shall place and cause to be disseminated, in the national full-circulation editions of *Time*, *Newsweek*, *U.S. News & World Report*, *Sports Illustrated*, *People* and *Reader's Digest* magazines, full-page advertisements devoted to explaining and promoting the existence, availability and benefits of respondent's adjustment program and Technical Service Bulletin information systems provided for in sections II and III. Such advertisements shall include the toll-free telephone number required by paragraph B of section III.

Prior to placement of the first such advertisement, respondent shall conduct, or cause to be conducted, copy testing of said advertisement using a population representative of potential purchasers of Ford vehicles and employing the so-called "Group Depth Interview" or "Focus Group" method of copy testing, designed and implemented in accordance with respondent's usual procedures for such research under the direction of an outside research organization or consultant generally recognized as competent and experienced in this field and used by respondent for other advertising research. Said organization or consultant shall submit to respondent a report on the effectiveness of the tested advertisement, and said advertisement shall meet respondent's obligations under this paragraph if, on the basis of said report and applying criteria customarily applied to respondent's product advertising, the advertisement effectively communicates (a) that Ford makes information available which tells consumers about unexpected repairs or repair procedures which might save a consumer money, (b) how consumers can get information on programs and bulletins, and (c) that Ford sometimes

has programs after the warranty expires under which it pays all or part of the costs of certain repairs. In the event any subsequent advertisement prepared pursuant to this paragraph differs significantly from the first advertisement disseminated in accordance with this paragraph, respondent shall conduct or cause to be conducted copy testing of such subsequent advertisement in the same manner and for the same purpose as described above.

F. Within 120 days of the date of service of this order and each 24 months thereafter, respondent shall furnish to its dealers display posters at least 30" x 40" in size explaining and promoting the existence, availability and benefits of respondent's adjustment program and Technical Service Bulletin information systems provided for in sections II and III, and including the disclosure statements, set forth clearly and conspicuously, required in paragraph A of section II or the substantial equivalents thereof covering the same information.

V

It is further ordered, That under the terms and conditions of each adjustment program respondent shall implement and follow procedures to insure reimbursement of each owner who incurred expenses for repair of the condition subject to the program prior to notification thereof, comparable to the procedures for reimbursement included in respondent's extended policy programs for piston scuffing, camshaft/rocker arm wear, and cracked engine blocks, adjusted to fit the circumstances, terms and conditions of the particular program in question.

VI

It is further ordered, That respondent shall comply with the terms of the extended policy programs for the conditions known as piston scuffing, camshaft/rocker arm wear, and cracked engine block, as such programs were in effect on January 9, 1980, and shall pay one hundred percent of the cost of parts and labor incurred by dealers to repair those conditions in affected vehicles in accordance with the procedures and subject to the terms set forth in the applicable extended policy programs for those conditions.

VII

It is further ordered, That respondent shall make upgraded replacement parts available to all dealers in quantities adequate to

meet the reasonably anticipated need for such parts to enable dealers to perform repairs pursuant to section VI and the extended policy programs referenced therein, and also pursuant to any future adjustment programs within the terms of paragraph A of section IV, subject to *force majeure*, labor disruptions, lack of productive capacity, and other causes outside respondent's control.

VIII

It is further ordered, That sections II, III, IV, V and VII shall expire 8 years after the date of service of this order; *provided*, that if at any time during which said sections remain in effect the Commission issues a final trade regulation rule imposing obligations on the automobile industry comparable to those imposed under any such section(s), such section(s) shall terminate upon the effective date of such rule, and in such event respondent shall advise the Commission of its intention to rely on any such rule as having terminated and superceded such section(s) of this order 30 days in advance of reliance thereon; *provided further*, that if at any time during which said section(s) remain in effect the Commission issues a final guide under Sections 1.5 and 1.6 of the Commission's Rules of Practice imposing obligations on the automobile industry comparable to those imposed under any such section, then the Commission shall, upon respondent's motion or upon its own motion, reopen this proceeding within 120 days of such motion and within a reasonable time thereafter vacate any such section(s) of this order unless the Commission finds that such action is not in the public interest; and *provided further*, that nothing herein shall preclude respondent at any time from moving the Commission to alter, modify, or set aside this order under the Commission's Rules of Practice.

IX

It is further ordered, That:

A. Respondent shall, within 120 days after the date of service of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

B. During the time that sections II, III, IV, V, and/or VII remain(s) in effect, respondent shall transmit to the Commission upon request:

(1) a copy of each Technical Service Bulletin, together with any

accompanying explanatory material required by paragraph H of section II;

(2) a copy of each communication to dealers or owners regarding an adjustment program;

(3) tearsheets, together with any copy test results, of each advertisement disseminated pursuant to paragraph E of section IV; and

(4) a copy of each poster furnished to dealers pursuant to paragraph F of section IV.

C. Respondent shall, 1 year after the date of service of this order and each year thereafter that sections II, III, IV, V, and/or VII remain(s) in effect, file with the Commission a report, in writing, setting forth the following:

(1) For each condition subject to a Technical Service Bulletin:

(a) To the extent known to respondent, a description of the nature and extent of the condition, the causes of the condition, and the parts necessary to repair the condition, identifying each part by generic name and service part number.

(b) The identification of vehicles and components thereof potentially subject to each condition:

i. vehicles shall be identified by model year, car line, the inclusive dates (month and year) of manufacture, and any other information necessary to describe the vehicles.

ii. components shall be identified by generic name (*e.g.*, cylinder block), service part number, and, if applicable, the inclusive dates (month and year) of manufacture, and any other information necessary to describe the component.

(c) The total number of vehicles stated by model year and vehicle line potentially subject to each condition.

(2) For each model year and vehicle line identified pursuant to paragraph C, disclose the total number of vehicles manufactured.

(3) Unit sales of replacement parts for each component identified pursuant to paragraph C, for the affected model year(s), and for the preceding 3 model years.

D. Once during the term of this order respondent shall file with the Commission a report setting forth in good faith its best estimates of (a) the costs and benefits, to respondent and to the public, of the obligations imposed by this order, and (b) the extent to which dealers

have displayed posters furnished to dealers pursuant to paragraph F of section IV and have provided access to Technical Service Bulletins and related explanatory material furnished by respondent as required by paragraph C of section II. Said report shall be filed within 6 months of respondent's receipt of a request therefor from the Commission or its staff and said report shall cover the period from the date of service of this order until the date of this request. Respondent shall make all underlying documents and data relating to the "cost and benefits" part of said report and used in the preparation of said report available for inspection on reasonable notice by authorized representatives of the Federal Trade Commission. If copies of any such materials are requested by such representatives, respondent may, at its option, either make such materials available to such representatives for copying purposes or provide copies at either (i) rates the Commission charges for copies of materials released pursuant to the Freedom of Information Act or (ii) respondent's costs, whichever is lower.

E. Respondent shall:

(1) for 2 years after sections II, III, IV, V and VII cease to be effective, retain records that contain the information described in paragraphs B and C; and

(2) retain records relative to the manner and form of its continuing compliance with sections II, III, IV, V, VI and VII for a period of 3 years and make said records available for inspection on reasonable notice by authorized representatives of the Federal Trade Commission.

If copies of any such records are requested by such representatives, respondent may, at its option, either make such records available to such representatives for copying purposes or provide copies at either (a) rates the Commission charges for copies of records released pursuant to the Freedom of Information Act, or (b) respondent's costs, whichever is lower.

F. During the time that sections II, III, IV, V and/or VII remain in effect, respondent shall notify the Commission prior to any change in its corporate structure, 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.

G. Respondent shall forthwith distribute a copy of this order to its Ford, Lincoln-Mercury, Ford Parts and Service Divisions and dealers.

It is further ordered. That the provisions of this order shall be limited in their application to the United States.

CONCURRING STATEMENT OF COMMISSIONER ROBERT PITOFSKY

Last February, I withheld a vote on acceptance of this proposed consent order in order to have the benefit of public comments. I noted then that the order was unusual and innovative in the way in which it dealt with Ford's future responsibility to notify purchasers of any serious defects that might arise in Ford cars.

The approach of the order requires Ford to make available in the marketplace a good deal of mechanical information which consumers can use to discover their automotive problems. Magazine ads would tell consumers that the mechanical information is available in the form of technical bulletins and the bulletins would be sent to those consumers who requested them. Consumers would then have to know enough to diagnose their own mechanical problems and complain to Ford if the problem is a design defect. The order does not require direct mail notification to owners of particular models and makes of cars that they may have certain described problems—a form of consumer alert which I said in February should be more effective in notifying consumers about defects. It was recognized, however, that direct mail notification can be expensive.

All knowledgeable parties who commented on the issue of the method of future notification of serious defects—including the Center for Auto Safety and two state Attorney General's offices—thought the notification method described in the order would not work.

I continue to be skeptical that consumers will seek out the kind of mechanical information that Ford will make available and that they would be likely to understand and use that kind of technical information. Nevertheless, Ford has agreed to make technical service bulletins available on an enhanced basis and the information system could have some significant pro-consumer effects. I am therefore voting in favor of acceptance of this order largely because I think the notification system it requires might be of some value, and because the Commission should learn something about automobile defect problems in implementing and studying this order. Finally, acceptance of the other provisions of the order allows the Commission to make available immediately some important benefits to consumers. For the future, however, I continue to believe that direct mail notification to consumers will probably be essential if automo-

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ble companies are to discharge their responsibility to make known the existence of serious defects in the products they sell.

IN THE MATTER OF
STANDARD OIL COMPANY OF CALIFORNIA, ET AL.

MODIFIED ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 8827. Decision, Nov. 26, 1974—Modified Order, Oct. 7, 1980

In compliance with the decision rendered by the Court of Appeals for the Ninth Circuit on July 3, 1978, 577 F.2d 653 (1978), this modified order amends the Commission's cease and desist orders issued against an oil company and its advertising agency on November 26, 1974, 40 FR 13488, 84 F.T.C. 1401, so that they refer only to future advertising of F-310, a gasoline additive product, rather than to "any product."

MODIFIED ORDER TO CEASE AND DESIST

Respondents having filed in the United States Court of Appeals for the Ninth Circuit petitions for review of the Commission's cease and desist order issued herein on November 26, 1974; and the Court having rendered its decision modifying the Commission's order and, as so modified, affirming and enforcing the order; and the time for filing a petition for certiorari having expired and no petition for certiorari having been filed:

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and hereby is, modified in accordance with the decision and judgment of the Court of Appeals to read as follows:

I.

It is ordered, That respondent Standard Oil Company of California, a corporation, its successors and assigns, its officers, representatives, agents, employees, directly or through any corporate or other device, in connection with the advertising of the additive F-310, forthwith cease and desist from:

1. Representing directly or by implication that such product:

- (a) Will produce or result in motor vehicle exhaust which is pollution free or generally pollution free; or
 - (b) Will eliminate or reduce air pollution caused by motor vehicles;
- or
- (c) Will eliminate or reduce emissions from all or any number or group of motor vehicles in which it is used;
- or that:

(d) Such gasoline additive product has any other quality, performance ability or other characteristic; or

(e) Tests, demonstrations, research or experiments have been conducted which prove or substantiate any of said representations;

Unless and only to the extent that each and every such representation is true and has been fully and completely substantiated by competent scientific tests. The results of said tests, the original data collected in the course thereof and a detailed description of how said tests were performed shall be kept available in written form for at least three years following the final use of the representation.

2. Representing directly or by implication that:

(a) Automotive exhaust has certain observable or measurable characteristics in all or any number or group of motor vehicles when such is not the fact; or

(b) Any machines, measuring devices or technical instruments have particular characteristics or capacities when such is not the fact; or

(c) Such product has any effectiveness in reducing air pollution or any air pollutant or air pollutants without at the same time, in the same advertisement or other form of communication, conspicuously disclosing that not all of the harmful pollutants in automotive exhaust are affected by said product; or

(d) Such product will reduce any emissions of pollutants from automobile exhaust by any percentage or numerical quantity unless in connection therewith there is a clear, accurate and conspicuous disclosure of the type of vehicle which can expect to achieve reductions of such magnitude and the approximate percentage of such vehicles in the general car population.

II.

It is ordered, That respondent Standard Oil Company of California, a corporation, its successors and assigns, its officers, representatives, agents, employees, directly or through any corporate or other device, in connection with the advertising of the additive F-310, forthwith cease and desist directly or indirectly from:

1. Advertising by or through the use of or in conjunction with any test, experiment, or demonstration, or the result thereof, or any other information or evidence that appears or purports to confirm or prove, or is offered as confirmation, evidence, or proof of any fact, product characteristic or the truth of any representation, which does

not accurately demonstrate, prove, or confirm such fact, product characteristic, or representation.

2. Using any pictorial or other visual means of communication with or without an accompanying verbal text which directly or by implication creates a misleading impression in the minds of viewers as to the true state of material facts which are the subject of said pictures or other visual means of communication.

3. Misrepresenting in any manner or by any means any characteristic, property, quality, or the result of use of such gasoline additive product.

III.

It is ordered, That respondent Batten, Barton, Durstine & Osborn, Inc., a corporation, its successors and assigns, its officers, representatives, agents, employees, directly or through any corporate or other device, in connection with the advertising of the additive F-310, forthwith cease and desist from:

1. Representing directly or by implication that such product:

(a) Will produce or result in motor vehicle exhaust which is pollution free or generally pollution free; or

(b) Will eliminate or reduce air pollution caused by motor vehicles;
or

(c) Will eliminate or reduce emissions from all or any number or group of motor vehicles in which it is used;

or that:

(d) Such gasoline additive product has any other quality, performance ability or other characteristic; or

(e) Tests, demonstrations, research or experiments have been conducted which prove or substantiate any of said representations;

Unless and only to the extent that respondent has a reasonable basis for such representation based upon competent scientific tests. The results of said tests and the data collected in the course thereof relied upon by respondent shall be kept available in written form for at least three years following the final use of the representation.

2. Representing directly or by implication that:

(a) Automotive exhaust has certain observable or measurable characteristics in all or any number or group of motor vehicles when such is not the fact; or

(b) Any machines, measuring devices or technical instruments have particular characteristics or capacities when such is not the fact; or

(c) Such product has any effectiveness in reducing air pollution or any air pollutant or air pollutants without at the same time, in the same advertisement or other form of communication, conspicuously disclosing that not all of the harmful pollutants in automotive exhaust are affected by said product; or

(d) Such product will reduce any emissions of pollutants from automobile exhaust by any percentage or numerical quantity unless in connection therewith there is a clear, accurate and conspicuous disclosure of the type of vehicle which can expect to achieve reductions of such magnitude and the approximate percentage of such vehicles in the general car population.

IV.

It is ordered, That respondent Batten, Barton, Durstine & Osborn, Inc., a corporation, its successors and assigns, its officers, representatives, agents, employees, directly or through any corporate or other device, in connection with the advertising of the additive F-310, forthwith cease and desist directly or indirectly from:

1. Advertising by or through the use of or in conjunction with any test, experiment, or demonstration, or the result thereof, or any other information or evidence that appears or purports to confirm or prove or is offered as confirmation, evidence or proof of any fact, product characteristic, or of the truth of any representation which does not accurately demonstrate, prove, or confirm such fact, product characteristic, or representation unless the respondent can establish it neither knew, nor had reason to know, nor upon reasonable inquiry could have known that such was the case.

2. Using any pictorial or other visual means of communication with or without an accompanying verbal text which directly or by implication creates a misleading impression in the minds of viewers as to the true state of material facts which are the subject of said pictures or other visual means of communication unless the respondent can establish it neither knew nor had reason to know nor upon reasonable inquiry could have known the true facts.

3. Misrepresenting in any manner or by any means any characteristic, property, quality, or the result of the use of such gasoline additive product unless the respondent can establish it neither knew nor had reason to know nor upon reasonable inquiry could have known that such representations are false.

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

It is further ordered, That respondents herein shall notify the Commission at least thirty (30) days prior to any proposed change in any of 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 respondents shall, within sixty (60) days after service of this order upon them, file with the Commission a written report, signed by the respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

Commissioner Pitofsky did not participate.