

Complaint

85 F.T.C.

IN THE MATTER OF

FEDDERS CORPORATION

ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 8932. Complaint, June 11, 1973* - Final Order, Jan. 14, 1975*

Order requiring an Edison, N.J., distributor of Fedders air conditioners, among other things to cease making false uniqueness claims and false and unsubstantiated claims as to certain performance characteristics for its product and failing to maintain accurate records.

Appearances

For the Commission: *Heidi P. Sanchez* and *Paul G. Foldes*.

For the respondent: *Sydney B. Wertheimer, Weisman, Celler, Spett, Modlin & Wertheimer, N.Y., N.Y.*

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 Fedders Corporation, a corporation, hereinafter 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. Respondent Fedders Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Edison, N.J.

PAR. 2. Respondent Fedders Corporation is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders room air conditioners, including Fedders Model ACL20E3DX Room Air Conditioners.

PAR. 3. In the course and conduct of its aforesaid business, respondent Fedders Corporation now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various States of the United States, and in the District of Columbia. Respondent Fedders Corporation therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air

* Complaint reported as amended by Administrative Law Judge's order of January 10, 1974.

conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders Corporation has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent.

PAR. 5. In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of the said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of said room air conditioners, including but not limited to, advertisements printed in newspapers located in various States of the United States and in the District of Columbia, which newspapers are disseminated across states lines.

PAR. 6. Typical of the statements and representations contained in said advertisements, but not all inclusive thereof, is the following segment of the print advertisement for Fedders room air conditioners:

RESERVE Cooling Power - - only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days.

PAR. 7. By and through the use of the aforesaid statements and representations, respondent has represented, directly or by implication, that reserve cooling power is a unique feature of Fedders room air conditioners, not found in other room air conditioners.

PAR. 8. In truth and in fact, "reserve cooling power," referring to an increased cooling capacity at high loading conditions, is not a unique feature of Fedders room air conditioners. In fact, comparable room air conditioners made by other companies provide an increase in cooling capacity at high loading conditions.

Therefore, the statements and representations referred to in Paragraphs Six and Seven were and are false, misleading, and deceptive, and the advertisements referred to in Paragraphs Five, Six, and Seven were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 9. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use.

PAR. 10. In truth and in fact, at the time the aforesaid statements and

representations were made, respondent had no reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use.

Therefore, the statements and representations referred to in Paragraphs Six, Nine, and Ten were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Five and Six were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 11. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, respondent had no reasonable basis from which to conclude that such was the fact.

Therefore, the statements and representations referred to in Paragraphs Six and Eleven were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Five and Six were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 12. The use by respondent of the aforesaid unfair or deceptive acts or practices has had, and now has, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts or practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

The following is the form of order which the Commission has reason to believe should issue if the facts are found as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Fedders Corporation might be inadequate fully to protect the consuming public or the competitive conditions of the air conditioning industry, the Commission may order such other relief as it finds necessary or appropriate.

ORDER

I

It is ordered, That respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of the respective products hereinafter referred to, do forthwith cease and desist from:

1. representing, directly or by implication, that an increase in cooling capacity at high loading conditions of Fedders room air conditioners is a unique feature of such air conditioners;

2. representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any other material respect, unless such is the fact;

3. representing, directly or by implication, that Fedders room air conditioners, compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions of use, unless at the time such representation is made, respondent has a reasonable basis for such representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

4. making, directly or indirectly, any other statement or representation in any advertising or sales promotional material as to the performance characteristics of any Fedders air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

5. failing to maintain and produce accurate records which may be inspected by Commission staff members upon reasonable notice:

- (a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the performance characteristics of, or the uniqueness of any feature of, any Fedders air conditioning product or system; and

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of paragraph 5 shall be in effect for a period of ten (10) years from the date this order becomes final.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

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 any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days and at the end of six (6) months after the effective date of the order served upon it, file with the Commission a report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with the order to cease and desist.

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW
JUDGE

JULY 15, 1974

PRELIMINARY STATEMENT

Respondent Fedders Corporation, a corporation, is charged with violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). The complaint issued by the Commission on June 11, 1973, alleges that respondent, in connection with the advertising, offering for sale, sale and distribution of its room air conditioners to purchasers thereof, has represented, directly or by implication, through statements and representations in advertisements placed in newspapers of interstate circulation, that "reserve cooling power" (hereinafter sometimes referred to as "RCP") is a unique feature of its room air conditioners, not found in other room air conditioners. However, in truth and in fact, the complaint alleges, RCP,

referring to an increased cooling capacity at high loading conditions, is not a unique feature of Fedders room air conditioners, but that, in fact, comparable room air conditioners made by other companies provide an increase in cooling capacity at high loading conditions.

The complaint further alleges that respondent has also represented that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that the Fedders room air conditioners, compared with other room air conditioners, had a significantly increased cooling capacity at high loading conditions under customary conditions of use. In truth and in fact, the complaint alleges, at the time the said statements and representations were made, respondent had no reasonable basis for such statements and representations.

The complaint also alleges that by and through the use of the aforesaid statements and representations in respect to RCP, respondent has represented, directly or by implication, that the Fedders room air conditioners, compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, the complaint alleges, respondent had no reasonable basis from which to conclude that such was the fact.

In brief, the complaint alleges that respondent has (1) made a uniqueness claim for its room air conditioners when such is not a fact, (2) has represented that it had a reasonable basis for making a uniqueness claim for its room air conditioners when it had no reasonable basis for making such a claim, and (3) has represented that its room air conditioners, when compared with other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use when it had no reasonable basis from which to conclude that such was the fact.

The above practices are alleged to have the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and into the purchase of substantial quantities of said products by reason of such erroneous and mistaken belief. The said practices are alleged to be false, misleading and deceptive, and constitute unfair methods of competition and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Respondent's Answer, filed Aug. 14, 1973, generally admitted the practices alleged in the complaint, but denied that such conduct was unlawful. Respondent also interposed an affirmative defense, asserting that respondent, "in good faith, many months prior to the issuance of

notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to 'reserve cooling power' and has not since resumed the dissemination of any such material." Respondent's Answer also alleges "as and for mitigating circumstances * * * in framing any order" that its claim as to the uniqueness of the RCP feature of its room air conditioners is the only advertising claim of respondent alleged in the complaint to be false, misleading or deceptive, and was one of approximately ten advertising claims made by respondent as to which it was required, by Commission order of Oct. 13, 1971, to furnish supporting material. Respondent's Answer asserts that it "duly furnished such material in response to all the other advertising claims above referred to, and none of such other claims has been challenged by the Commission."

Thereafter, on Aug. 17, 1973, complaint counsel filed a Motion to Strike Affirmative Defenses on the grounds that they are without merit, do not constitute an affirmative defense, and are appropriately denials. On Aug. 24, 1973, Motion of Complaint Counsel for Summary Decision was filed.

At a prehearing conference held on Aug. 27, 1973, it was agreed that complaint counsel would file a motion to amend the complaint, and on that date Motion of Complaint Counsel to Amend Complaint and to Amend Motion for Summary Decision was filed. Thereafter, on Sept. 6, 1973, the undersigned issued an order granting an extension of time until Sept. 21, 1973 for respondent to file an answer to the amended complaint, which time to answer was subsequently extended until Nov. 12, 1973.

At a further prehearing conference held on Nov. 30, 1973, respondent's Answer to Amended Complaint filed on Nov. 12, 1973, was discussed. In its Answer, respondent generally admitted the factual allegations of the complaint (see PHC Tr. 56-60), but denied those paragraphs which allege the respondent's conduct to be unlawful. At the said prehearing conference, the complaint was further amended on the record by the undersigned as follows (PHC Tr. 74):

I think the two major points were that the complaint is concerned with all Fedders room air conditioners, and is concerned with all advertisements which made the claim that reserve cooling power was unique, and in paragraphs 9 through 12, we are reading into the complaint, "compared with all other room air conditioners." Those are the amendments, and I think making them on the record here is sufficient.

Respondent, in response to the amendments made orally at the prehearing conference, filed an Answer to Further Amended Complaint on Dec. 28, 1973. So that the public record would reflect these amendments to the complaint made at the prehearing conference, an Order Further Amending Complaint was issued by the undersigned on

Jan. 10, 1974. Respondent was given until Jan. 21, 1974 to further amend its Answer, if necessary. No further answer was filed.

The First Stipulation of the Parties was filed on Mar. 19, 1974. This Stipulation provides that the term "reserve cooling power" shall refer to the description of that term which is stated in Paragraphs 5 and 8 through 11 of respondent's Answer to Further Amended Complaint, complaint counsel thereby in effect adopting respondent's definition of RCP in lieu of the definition of that term set forth in the complaint. The Second Stipulation of the Parties, also filed on Mar. 19, 1974, is an agreement that the information contained therein is a fair and accurate description of the extent of dissemination of Fedders room air-conditioner advertising in four sample areas over a two-year period.

A further prehearing conference scheduled for Mar. 27, 1974 was cancelled and rescheduled for Mar. 29, 1974 because of the illness of counsel for respondent. Due to the continued illness of counsel for respondent, the prehearing conference scheduled for Mar. 29, 1974 was cancelled, and a formal hearing was scheduled by the undersigned for Apr. 16, 1974.

At the formal hearing held on Apr. 16, 1974, no witnesses were called; respondent's exhibits 1 A-Z-55, 2 A-B, and Joint Exhibit 1 A-I were received in evidence; complaint counsel's Motion to Strike Affirmative Defenses and Motion for Summary Decision were denied on the record; the record was closed for the reception of evidence; and, upon request of counsel for respondent, the filing of simultaneous proposed findings was postponed from May 16, 1974 to May 30, 1974, and the filing of replies thereto postponed from May 30, 1974 to June 10, 1974 (Tr. 99-101). Respondent's time in which to submit a reply was subsequently extended to June 12, 1974.

A Stipulation of the Parties, dated Apr. 10, 1974, referring to the term "reserve cooling power," was filed on Apr. 12, 1974. On Apr. 24, 1974, an Order Incorporating into the Record Stipulation of the Parties, dated Apr. 19, 1974, was issued by the undersigned. By this Stipulation, the parties accepted respondent's definition of "reserve cooling power" for all purposes of this proceeding.

The parties have submitted proposed findings, supporting memoranda, and proposed orders. Respondent has also filed a reply brief. This proceeding is therefore before the undersigned based upon the complaint, as amended, the answers filed by respondent, the stipulations of the parties, the joint exhibit of the parties, the proposed findings and memoranda submitted by the parties, and respondent's reply brief. No witnesses were called to testify, and the exhibits of record are by stipulation. Thus, the basic facts herein are undisputed.

The submissions by the parties have been given careful consideration

and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and include references to the principal supporting evidence in the record. Such references are intended to serve as convenient guides, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are set forth in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CPF - Proposed Findings of Fact, Conclusions of Fact And Law, And Order submitted by Complaint Counsel.

CM - Memorandum in Support of the Proposed Findings of Fact, Conclusions of Fact and Law, and Order submitted by Complaint Counsel.

RAFAC - Respondent's Answer to Further Amended Complaint.

RPF - Respondent's Proposed Findings of Fact and Conclusions of Law.

RB - Respondent's Brief to the Administrative Law Judge.

RO - Proposed Order submitted by Respondent.

RX - Respondent's Exhibits.

Jt. Stip. - Joint stipulation submitted by the parties. (This abbreviation will be followed by the number of the stipulation and the page number upon which the evidence being cited appears.)

Jt. Ex. - Joint Exhibit of the parties.

PHC Tr. - Transcript of the prehearing conferences, followed by the page number being referenced.

Tr. - Transcript of the formal hearing, followed by the page number being referenced.

FINDINGS OF FACT

Identity and Business of Respondent

1. Respondent Fedders Corporation, hereinafter sometimes referred to as "Fedders," is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at Edison, N.J. (Admitted, RAFAC, Par. 1).

2. Respondent Fedders is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders air conditioners, including Fedders room air conditioners (Admitted, RAFAC, Par. 1).

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

Fedders now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various States of the United States, and in the District of Columbia. Respondent Fedders therefore maintains, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted, RAFAC, Par. 1).

4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent (Admitted, RAFAC, Par. 1).

5. In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of its said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of its room air conditioners, including but not limited to, advertisements printed in newspapers located in various States of the United States and in the District of Columbia, which newspapers are disseminated across state lines (Admitted, RAFAC, Par. 1).

The Challenged Advertisements

6. Pursuant to a resolution of the Federal Trade Commission dated June 9, 1971, and amended July 7, 1971, entitled "Resolution Requiring Submission of Special Reports Relating to Advertising Claims and Disclosure Thereof by the Commission in Connection with a Public Investigation", 36 Fed. Reg. 12,058 (June 9, 1971), as amended, 36 Fed. Reg. 14,680 (July 7, 1971) (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 1, Appendix B, p. 1), on Sept. 30, 1971, the Commission ordered respondent Fedders to file a Special Report on specific advertising claims. One of the advertising claims for which the Commission requested documentation and other substantiation by Special Report was:

RESERVE Cooling Power - only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days.

The information demanded was:

All documentation and other substantiation for the claim that only the Fedders room air conditioner has extra cooling power that assures cooling on extra hot, extra humid days. (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 4.)

The specific advertisement questioned by the Commission's Special Report appeared in *The Monroe Morning World*, Monroe, Louisiana, June 10, 1971 (Motion of Complaint Counsel For Summary Decision, Appendix A, p. 3).

7. Respondent filed its response to the Commission's Special Report on Dec. 22, 1971. In its response, Fedders admitted the lack of

substantiation for the claim that RCP was unique to Fedders. Respondent stated:

As to claim that *only* Fedders has this reserve cooling power feature, we have found that this claim is not substantiated and do not propose to include it in any further advertising copy which we may promulgate. (Motion of Complaint Counsel For Summary Decision, Appendix B, p. 3.)

8. The advertisement set forth in the Commission's Special Report was incorporated in Paragraph Six of the complaint herein and was alleged in Paragraphs Seven and Eight of the complaint to be a uniqueness claim for Fedders room air conditioners, which is false and deceptive. Respondent has admitted that this advertisement represented, directly or by implication, that RCP is a unique feature of Fedders room air conditioners. Respondent further admitted that RCP, referring to ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners and that comparable room air conditioners made by some other companies have such ability and feature (RAFAC, pp. 1-2).

The complaint in Paragraph Eight alleges that RCP refers to "an increased cooling capacity at high loading conditions." The parties have stipulated that RCP refers to the "ability to function satisfactorily under conditions of extreme heat and humidity" (First Stipulation of the Parties; RAFAC, p. 2; Stipulation of the Parties dated Apr. 19, 1974). These meanings are essentially equivalent and any distinction between the two definitions is without significance in this proceeding.

9. By and through the use of the aforesaid statements and representations, respondent has represented, directly or by implication, that RCP is a unique feature of Fedders room air conditioners, not found in other room air conditioners (Admitted, RAFAC, p. 1). In truth and in fact, RCP, referring to an ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners. In fact, comparable room air conditioners made by some other companies function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, p. 2). Therefore the statements and representations that RCP is a unique feature of Fedders room air conditioners is false, misleading and deceptive.

10. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, Par. 5). In truth and in fact, at the time the

aforesaid statements and representations were made, respondent had no reasonable basis to support the representation that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity (Admitted, RAFAC, Par. 5). Therefore, the statements and representations were and are false, misleading and deceptive.

11. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly increased cooling capacity at high loading conditions under customary conditions of use. At the time said statements and representations were made, respondent had no reasonable basis from which to conclude that such was the fact (Admitted, RAFAC, Par. 5). Therefore, the statements and representations were and are false, misleading and deceptive.

12. The use by respondent of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

Respondent's Defenses

13. In its answers filed herein, including its Answer to Further Amended Complaint, respondent, as and for an affirmative defense, alleges that it, in good faith, many months prior to the issuance of notice by the Commission of a proposed adjudicative proceeding against respondent in respect to the facts alleged in the complaint, ceased disseminating all advertising material relating to RCP and has not since resumed the dissemination of any such material. Respondent further alleged, as and for mitigating circumstances if the allegations in the complaint are sustained, that the advertising claim alleged in the complaint to be false, misleading or deceptive is only one of approximately ten advertising claims made by respondent as to which it was required by the Commission to furnish supporting material. Respondent furnished such material in respect to the other advertising claims in response to the Commission's order, and none of the other claims have been challenged by the Commission (RAFAC, pp. 3-4). Respondent further affirmatively averred in its Answer to Further Amended Complaint that the challenged statements and representations of uniqueness of RCP were so infrequently made and constituted

so small a percentage of respondent's advertising expenditures that its impact upon the purchasing public was insignificant (RAFAC, pp. 1-2).

Respondent's Expenditures for RCP Advertisements

14. In view of respondent's contentions concerning the insubstantiality of advertisements claiming uniqueness for RCP, the administrative law judge suggested there should be submitted for the record the total advertising expenditures, the total number of advertisements which utilized the term "reserve cooling power," the expenditures for those advertisements, the total number of advertisements which utilized a claim of uniqueness for "reserve cooling power," the total expenditures for those advertisements, as well as sample advertisements of both types. It was further suggested by the administrative law judge that such information could be based on a sample area (PHC, Tr. 70).

15. The sample areas agreed upon by the parties for the above purposes are as follows:

(1) The Florida Area:

This area, serviced during the years involved by Cain & Bultman, as distributor, comprised the entire State of Florida (except the extreme northwest portion thereof), and the eleven southeasternmost counties of the State of Georgia.

(2) The Washington, D.C. Metropolitan Area:

This area, serviced during the years involved by American Appliance Wholesalers, as distributor, consisted of the District of Columbia, together with thirteen Virginia counties and five Maryland counties in the surrounding area.

(3) The Philadelphia Metropolitan Area:

This area, serviced during the years involved by Samuel Jacobs Distributors, Inc. and its subsidiaries and affiliates, as distributors, consisted of the city of Philadelphia and nearby counties, of which twenty-one were in the State of Pennsylvania, eight in the State of New Jersey, and two in the State of Delaware.

(4) The New York Metropolitan Area:

This area, serviced during the years involved by L & P Electric Co., Inc. and its subsidiaries and affiliates, as distributors, consisted of New York City, Long Island, the eight southernmost counties of New York adjacent to New York City, thirteen counties in eastern and northern New Jersey, six counties in western and central Connecticut, and three counties in the southernmost part of Massachusetts (respondent's Response to Commission's Motion for Summary Decision, Exhibit 1 of the Pochick Affidavit; Tr. 88-90).

16. The time period agreed upon for the sample areas was the two

fiscal years of respondent ending Aug. 31, 1970 and Aug. 31, 1971, respectively (Second Stipulation of the Parties, p. 1; RFP, p. 9).

17. The parties stipulated that Fedders' total advertising expenditures for each fiscal year in each sample area for Fedders air conditioners of all types were approximately as follows (Second Stipulation of the Parties):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	\$176,000	\$245,000
Washington, D.C.	\$35,000	\$24,000
Philadelphia	\$180,000	\$118,000
New York	\$860,000	\$846,000

Of the above total, the following represents total advertising expenditures for each year in each sample area for cooperative newspaper advertising of Fedders room air conditioners (Second Stipulation of the Parties; Tr. 90):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	\$90,036.04	\$77,857.76
Washington, D.C.	\$28,760.87	\$6,717.95
Philadelphia	\$99,810.15	\$44,388.59
New York	\$247,403.62	\$142,313.53

The parties have stipulated that the total number of insertions of cooperative newspaper advertisements in each sample area were as follows (Second Stipulation of the Parties):

	Fiscal 1969-1970	Fiscal 1970-1971
Florida	1229	920
Washington, D.C.	163	85
Philadelphia	985	309
New York	1997	1202

Further, the parties stipulated that the following represents the total number of cooperative newspaper advertisements claiming RCP and the total expenditures for such advertisements (Second Stipulation of the Parties; Stipulation of the Parties dated Apr. 19, 1974):

	Fiscal 1969-1970		Fiscal 1970-1971	
	Inser- tions	Expendi- tures	Inser- tions	Expendi- tures
Florida	252	\$29,002.72	111	\$15,067.38
Washington, D.C.	73	\$10,987.70	25	\$2,236.24
Philadelphia	291	\$29,940.69	132	\$17,409.14

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New York	1487 \$129,131.33	738 \$48,266.75

The parties have stipulated that, of the above number of cooperative newspaper advertisements, the following number claimed uniqueness to Fedders of RCP followed by the expenditure for such advertisements:

	Fiscal 1969-1970		Fiscal 1970-1971	
	Inser- tions	Expendi- tures	Inser- tions	Expendi- tures
Florida	37	\$2,899.38	35	\$5,946.05
Washington, D.C.	9	\$826.91	8	\$371.93
Philadelphia	33	\$4,876.74	9	\$896.74
New York	33	\$1,750.06	9	\$701.90

18. On the basis of the above stipulated figures, respondent's expenditures for cooperative advertisements claiming uniqueness for RCP constitute the following ratio to total advertising expenditures and to total cooperative advertising expenditures:

	Total 2-yr. Expenditures	Total 2-yr. Expenditures For Advertising Claiming Uniqueness For Reserve Cooling Power	Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power To Total Advertising Expenditures
Florida	\$421,000	\$8,845.43	2.1%
Washington, D.C.	59,000	1,198.84	2.03%
Philadelphia	298,000	5,773.48	1.94%
New York	1,706,000	2,451.96	.143%
	<u>\$2,484,000</u>	<u>\$18,269.71</u>	<u>.736%</u>

	Total 2-yr. Cooperative Advertising Expenditures	Total 2-yr. Expenditures For Advertising Claiming Uniqueness For Reserve Cooling Power	Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power To Total Cooperative Advertising Expenditures
Florida	\$167,893.80	\$8,845.43	5.27%
Washington, D.C.	\$35,478.82	1,198.84	3.38%
Philadelphia	144,198.74	5,773.48	4.04%
New York	389,717.15	2,451.96	.63%
	<u>\$737,288.51</u>	<u>\$18,269.71</u>	<u>2.47%</u>

19. On the basis of the above stipulated figures, respondent's advertisements claiming uniqueness for reserve cooling power and advertisements not claiming uniqueness for reserve cooling power, and

the expenditures therefor, constitute the following ratio to the total number of cooperative advertisements utilized by respondent and the following ratio for the expenditures for such advertisements:

	Total Number Cooperative Advertisements 1969-1971	Total Number Cooperative Advertisements 1969-1971 Claiming Reserve Cooling Power	Total Number Cooperative Advertisements Claiming Unique- ness For Reserve Cooling Power
Florida	2149	363	72
Washington, D.C.	248	98	17
Philadelphia	1294	423	42
New York	3199	2225	42
TOTAL	6890	3109	173

	Ratio Advertisements Claiming Uniqueness For Reserve Cooling Power To All Reserve Cooling Power Adver- tisements 1969-1971
All Areas	5.56%

	Total Expenditures For Advertisements Claiming Reserve Cooling Power 1969-1971	Total Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power 1969-1971
Florida	\$ 44,070.10	\$8,845.43
Washington, D.C.	13,223.94	1,198.84
Philadelphia	47,349.83	5,773.48
New York	177,398.08	2,451.96
	\$282,041.95	\$18,269.71

	Ratio Expenditures For Advertisements Claiming Uniqueness For Reserve Cooling Power To All Reserve Cooling Power Advertisements 1969-1971
All Areas	7.8%

20. In the Florida subarea, the majority of the advertisements with unique RCP claims were in newspapers with circulations of less than 50,000. However, there were several advertisements placed in newspa-

pers with daily circulation figures in excess of 170,000. In the Washington, D. C. subarea, most of such insertions were in small publications, none with a circulation of over 30,000 and most under 12,000. In the Philadelphia subarea, roughly one-half of the insertions were in small town or small city publications, with circulations of under 100,000. Several advertisements appeared in the *Philadelphia Inquirer* with a daily circulation of over 450,000. In the New York City subarea, all of the insertions were in small town or small city newspapers, the largest with a circulation of 66,000. Examination of the texts of these advertisements discloses that the unique RCP claim was featured in only a minority of the advertisements (RX 1).

21. The parties hereto have further stipulated that respondent's expenditures for advertising which claimed "reserve cooling power" were, with insignificant exceptions (the cost of certain store display cards and the imprints on certain factory cartons), confined to the aforesaid cooperative advertisements (Stipulation of the Parties dated Apr. 19, 1974).

Respondent's Advertisements Not Claiming Uniqueness For Reserve Cooling Power

22. Complaint counsel contend that Fedders' advertisements, referring to RCP without claiming uniqueness, suggested the superiority of the feature with language similar to that used in the uniqueness claims. Samples of advertisements selected by complaint counsel and respondent as representative of such advertisements are contained in the record (Second Stipulation of the Parties, Attachment A). These advertisements, while not claiming uniqueness for "reserve cooling power," state the following with respect to "reserve cooling power:"

RESERVE COOLING POWER * * * it's Fedders engineering "extra" which gives maximum cooling even when sunload reaches 115 degrees* * * and other units fail!

Fedders Sound Barrier models - as close to perfect as an air conditioner can get * * * plus Reserve Cooling Power for extra cooling strength.

You get Reserve Cooling Power for extra hot, extra humid days.

PLUS RESERVE COOLING POWER, TOO (for extra hot, humid days).

And you get: Reserve Cooling Power for extra hot, humid days; * * *.

23. Complaint counsel introduced no evidence to establish consumer perception of the representations contained in respondent's advertisements, or that there were latent or implied messages in the statements. The administrative law judge must therefore exercise his own judgment as to the representations, express or implied, contained in respondent's advertisements.

24. These advertisements, which state that "reserve cooling power"

is an "extra" or is a feature designed for extra hot, humid days, or gives extra cooling strength, do not claim such feature is *unique* with Fedders room air conditioners. The only advertisement which contains a comparative claim is the first representation set forth above, which states that "reserve cooling power" is a Fedders engineering "extra" which gives maximum cooling even when sunload reaches 115 degrees, and other units fail. This is a comparative representation, but it does not compare Fedders room air conditioners with *all* other room air conditioners.

25. The complaint challenges as unlawful Fedders' statements and representations that "reserve cooling power" is "a unique feature of Fedders room air conditioners" when such was not a fact (Paragraphs Seven and Eight); that, by and through the uniqueness claim, Fedders represented, directly or by implication, that Fedders had a reasonable basis from which to conclude the Fedders room air conditioners had a significantly increased ability to function satisfactorily under conditions of extreme heat and humidity when compared with all other room air conditioners, when in fact Fedders had no reasonable basis for making such claim (Paragraphs Nine and Ten); and that, by and through the use of the uniqueness claim, Fedders also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly increased ability to function satisfactorily under conditions of extreme heat and humidity when Fedders had no reasonable basis to conclude that such was the fact (Paragraph Eleven). Thus, the unlawful representations made by Fedders, which are challenged in the complaint, arise from the "uniqueness" claim for Fedders air conditioners, as set forth in Paragraph Six of the complaint.

26. A "uniqueness" claim necessarily connotes a comparison with all other air conditioners, unless the literal wording of the complaint warrants some other interpretation (see *ITT Continental Baking Company, Inc., et al.*, Docket No. 8860, Opinion of the Commission, dated Oct. 19, 1973, Slip Op., pp. 14-15 [83 F.T.C. 947, 957]). In fact, the administrative law judge amended the complaint allegations in this matter to specifically state that the uniqueness representations of superiority were to be measured against all other room air conditioners (PHC Tr. 48-49; Order Further Amending Complaint, Jan. 10, 1974). The administrative law judge therefore concludes that the representative advertisements of Fedders room air conditioners, which utilize "reserve cooling power," but which do not claim uniqueness for this feature, are not challenged in the complaint.

27. The stipulated advertising figures in the record establish that 45.1 percent of respondent's cooperative advertisements utilize RCP

representations, and 2.51 percent of respondent's cooperative advertisements claim uniqueness for RCP. Of all advertisements claiming RCP, 5.56 percent thereof claim uniqueness. As far as expenditures are concerned, 2.47 percent of total cooperative advertising expenditures were for advertisements claiming RCP. Of expenditures for advertisements claiming RCP, 7.8 percent thereof was expended for advertisements claiming uniqueness for RCP. In view of the small percentage of advertisements claiming uniqueness for RCP and the small percentage of expenditures for advertisements claiming uniqueness for RCP in relation to respondent's total advertising program involving RCP claims, the administrative law judge concludes, in the absence of any evidence presented by either party bearing on this issue, that there was no carry-over effect on consumers from advertisements claiming uniqueness for RCP to advertisements merely claiming RCP. The record is silent as to the type of in-store display cards utilized, or the extent of their use (see Finding 21).

Respondent's Discontinuance Defense

28. When Fedders responded to the Commission's Special Report on Dec. 22, 1971, it stated as follows:

As to the claim that *only* Fedders has this reserve cooling power feature, we have found that this claim is not substantiated and do not propose to include it in any further advertising copy which we may promulgate (Motion of Complaint Counsel for Summary Decision, Appendix B, p. 3; Jt. Ex. 1).

Also, on Dec. 22, 1971, Fedders sent a bulletin to all of its distributors advising that "Old powerful selling friends like 'Reserve Cooling Power,' 'multi-room cooling,' 'cools three rooms, even a small home,' 'installs in minutes,' 'germicidal filter' are no longer." Distributors were further advised that they are not to use any of the advertisements provided in 1971 and earlier years. Distributors are requested to advise dealers that advertisements must not make any claims for the Fedders product that are not made in Fedders' supplied 1972 materials (Jt. Ex. 1 H).

This bulletin does not acknowledge that "reserve cooling power" claims were untrue, or were capable of misleading customers, or could not be proved or substantiated. Instead, the bulletin states that Fedders is "eliminating every phrase that could possibly be questioned by the FTC" (Jt. Ex. 1 H). The bulletin also indicates that "reserve cooling power," along with the other advertising representations, are being eliminated "not that they are not provable or that they are misleading, but simply because the explanation and qualifications that would have to be included in each ad would take up too much space" (Jt. Ex. 1 H).

29. An affidavit by Harold Boxer, Director of Merchandising of Fedders, which is attached to respondent's Response to Commission's

Motion for Summary Decision, stated that the Fedders advertising department in or about 1964 or 1965 coined the phrase "reserve cooling power" as an expression of the operating characteristics under extreme temperatures of Fedders room air conditioners, and the words had been featured in Fedders' advertising through 1971.

30. In an affidavit attached to respondent's Response to Commission's Motion for Summary Decision, Paul C. Anderson, Advertising Manager for room air conditioners of Fedders, stated that all references to "reserve cooling power" were completely dropped from Fedders' advertising in Dec. 1971 and that those words have not been used by Fedders in the preparation of further advertising matter.

31. Sam Muscarnera, House Counsel for Fedders, has submitted an affidavit dated Apr. 15, 1974, which has been received into the record by stipulation of counsel for the parties (Jt. Ex. 1 C-G). Mr. Muscarnera has set forth the steps taken by Fedders in order to maintain firmer control, insofar as possible, over advertising. Mr. Muscarnera also stated that "the likelihood of Fedders' repetition of the offending practices charged is exceedingly remote" (Jt. Ex. 1 G).

32. The Commission served its Order to File Special Report calling for advertising substantiation on respondent on Oct. 15, 1971; notice of a proposed adjudicative hearing was served on respondent on Oct. 12, 1972; and the formal complaint herein issued on June 11, 1973 (RPF, p. 7).

33. There is no evidence in the record indicating that any claims for "reserve cooling power" have been disseminated since Dec. 22, 1971 (Jt. Ex. 1 A-E).

34. "Climatrol" brand room air conditioners are manufactured by Fedders, and marketed through a wholly-owned subsidiary known as Mueller Climatrol Corp. An advertisement for "Climatrol" central air conditioners appeared in the Mar. 4, 1974 issue of *Newsweek* magazine which claimed, among other things, that the rotary compressor of the unit was "exclusive." This advertisement was called to Fedders' attention by complaint counsel, who questioned the use of the word "exclusive" by Climatrol in light of the fact that similar products are manufactured and marketed by Fedders under the "Fedders" brand. Fedders has maintained, in an affidavit submitted by Mr. Muscarnera, that Mueller Climatrol Corp., in contrast to the great majority of Fedders' subsidiaries and divisions, is semi-autonomous, and its sales and advertising staff operate independently of the advertising organization and personnel of Fedders. Consequently, up to the time the above advertisement appeared, Mueller Climatrol Corp., had not cleared its advertising through Fedders, as had other Fedders divisions. Mueller Climatrol had previously been advised by Fedders to

avoid the use of the word "exclusive" in any context whenever possible, and, accordingly, as early as Oct. 15, 1973, had substituted the word "exciting" for the word "exclusive" as applied to the rotary compressor (Jt. Ex. 1 F).

35. While the exclusivity of the rotary compressor in the residential central air conditioning field is not challenged in this proceeding, the use of the word "exclusive" as to "Climatrol" brand units could, from a technical standpoint, create confusion in consumers' minds unless accompanied by appropriate explanatory material (Jt. Ex. 1 F). This incident is of significance to this proceeding in view of respondent's discontinuance argument, since it clearly indicates that Fedders had not taken appropriate steps, at least as of Oct. 1973, to prevent the promulgation of false or deceptive advertisements by all its subsidiaries and divisions because Climatrol advertisements were not cleared through Fedders as of that date. In fact, it appears that as late as Mar. 1974, Fedders' divisions and subsidiaries were utilizing advertisements containing representations which had not been reviewed and cleared by responsible Fedders officials.

CONCLUSIONS

The complaint, as amended by the administrative law judge, charges that respondent represented that reserve cooling power is a unique feature of Fedders room air conditioners, not found in other room air conditioners, and that, in fact, reserve cooling power is not unique as to Fedders room air conditioners. The complaint, as amended, also charges respondent with representing that it had a reasonable basis for the claim that reserve cooling power is unique with Fedders room air conditioners and that, in fact, respondent had no such reasonable basis for such representation. The amended complaint further charges that by use of the uniqueness claim, respondent represented that its room air conditioners operated in a way superior to the functioning of other room air conditioners, and that such is not a fact.

In its Answer to Amended Complaint, respondent admitted making these representations, that it had no reasonable basis therefor, and that there was no basis in fact for the representations. Therefore, all allegations of unlawful conduct charged in the complaint have been admitted. Under the doctrine pronounced by the Commission in *Pfizer*, "* * * it is an unfair practice in violation of the Federal Trade Commission Act to make an affirmative product claim without a reasonable basis for making that claim." *Pfizer, Inc.*, Docket 8819, Opinion of the Commission, 81 F.T.C. 23, 62 (1972).

Thus, the only issues remaining after the pleadings are whether these admittedly unlawful acts and practices have the tendency and

capacity to mislead a substantial portion of the purchasing public; whether discontinuance is a defense to an order in this proceeding; and whether respondent's conduct was sufficiently serious to support an order.*

DISCONTINUANCE

It is undisputed that claims relating to reserve cooling power have been discontinued. The circumstances surrounding discontinuance, set forth hereinafter, are likewise undisputed.

The advertising campaign for reserve cooling power was of lengthy duration, beginning at least in the mid-sixties and continuing until late 1971, the date of the discontinuance. The extended usage of the claims is a strong indication of the importance of said claims to the advertising strategy followed by respondent. Respondent has referred to the reserve cooling power advertising claims as an "[O]ld powerful selling friend(s)" (Jt. Ex. 1 H).

The discontinuance of reserve cooling power claims in late 1971 cannot be considered to have been a voluntary action. The record establishes that the discontinuance occurred as a direct result of respondent's awareness of the Commission's investigation of its advertising. The record clearly demonstrates that it was only during the preparation of the response to the Commission's Special Report that respondent made the decision to discontinue the uniqueness claim, as well as the more general claim regarding reserve cooling power. It was not until the same date that respondent filed its response to the Special Report with the Commission that it warned its distributors to stop making any reserve cooling power claims. "In other words, respondent stopped violating the law when it learned that the law's hand was already on its shoulder, * * *." *Coro, Inc., et al.*, Docket 8346, Opinion of the Commission, 63 F.T.C. 1164, 1201 (1963).

"That discontinuance of an unlawful practice, of itself, does not necessarily preclude the issuance of a cease and desist order is so well settled as to preclude further argument." *Giant Food, Inc.*, Docket 7773, Opinion of the Commission, 61 F.T.C. 326, 356 (1962), citing *Marlene's Inc. v. F.T.C.*, 216 F.2d 556, 559 (7th Cir. 1954). Further, the courts have consistently recognized the propriety of a cease and desist order when, as in this case, the discontinuance was not entirely voluntary. *Galter v. F.T.C.*, 186 F.2d 810, 812, 813 (7th Cir. 1951), *cert. den.* 342 U.S. 818 (1951); *Eugene Dietzgen Co. v. F.T.C.*, 142 F.2d 321, 330 (7th Cir. 1944), *cert. den.* 323 U.S. 730 (1944). Thus, the fact that respondent's discontinuance is directly attributable to the Commis-

* In its reply brief respondent states: "The central issues are two: first, whether under all the circumstances here involved, the complaint should be dismissed by reason of Respondent's discontinuance of the offending practice, and second, if the complaint is not dismissed, whether Complaint Counsel's Proposed Order * * * is impermissibly broad" (Reply Brief, pp. 1-2).

sion's investigation must be given substantial weight when judging the merits of respondent's discontinuance.

The First Circuit in *Coro, Inc. v. F.T.C.*, 338 F.2d 149, 153 (1964), *cert. den.* 380 U.S. 954 (1965), in upholding a Commission cease and desist order based on a showing of unfair and deceptive practices used in only one percent of the business solicited by a respondent which had no prior record of violations of the Federal Trade Commission Act, found the following circumstances which it said negated the respondent's defense of discontinuance:

But Coro gave the line of business up only after the Commission had started to investigate its practices therein and only a few months before the Commission filed its complaint, and we have only the current corporate officers' expression of intention not to resume the business. Coro has not disposed of its plant. It is still in the costume jewelry business and there is nothing to suggest that it does not intend to continue in that general industry.

The facts in the present case closely resemble the circumstances found by the Court in *Coro*. Respondent continues to sell air conditioners, continues to advertise air conditioners, and could resume making deceptive advertising claims at any time in the future. The only special circumstance demonstrated by respondent is affidavits submitted by corporate officials.

The steps taken by respondent's officials to insure that future advertising violations will be avoided appear less than satisfactory. The record shows that one of respondent's subsidiaries has as recently as Mar. 1974, long after the complaint herein had issued, widely disseminated a questionable uniqueness claim for an important performance characteristic of an air conditioner. In a joint exhibit, Mr. Muscarnera, respondent's in-house counsel, stated in an affidavit that a recent advertisement in a national news weekly magazine for a central air conditioner manufactured by Fedders, but sold under the Climatrol label, made a claim of exclusivity for Climatrol's rotary compressor, when central air conditioners sold under the Fedders label also have the exact same feature. Most importantly, Mr. Muscarnera admitted that he was unaware of the dissemination of this particular advertisement until it was recently brought to his attention by complaint counsel.

The philosophy on which the Commission's Ad Substantiation Program is based, is that corporations must strive to exercise a higher level of responsibility than previously, by *assuring* themselves that *before* they disseminate an advertising claim, sufficient substantiation exists to constitute a reasonable basis as to the validity of such claim. *Pfizer, Inc., supra*. The administrative law judge is definitely in accord with the holding in *Pfizer*. Clearly, respondent's admission of dissemination of a performance claim for its room air conditioners over a

period of several years without having a reasonable basis therefor demonstrates a deficiency in the maintenance of the required standard of corporate responsibility in the past. Moreover, despite respondent's assurances of future discontinuance of this type of objectionable conduct, and recitation of precautions taken to prevent such future recurrences, the Mar. 1974 Climatrol advertisement suggests that respondent's officers have failed to exercise adequate precautions to prevent respondent's unsubstantiated advertising claims.

Therefore, the administrative law judge is of the opinion that a cease and desist order is both necessary and proper in this proceeding. Without an order, the public has no definite assurance that the unlawful practices will not be resumed at some time in the future. *Fairyfoot Products Co. v. F.T.C.*, 80 F.2d 684, 686-687 (7th Cir. 1935).

Respondent's Defense Based on Insubstantiality

Respondent argues that the impact of the offending advertising claims upon the purchasing public could not have been substantial, in light of the limited circulation of the media in which the advertisements containing such claims were placed, the relatively few insertions involved, the small expenditures involved and their insignificance in relation to respondent's total advertising effort, and the fact that in most instances such claims were not featured in the advertisements in which they appeared, but were included merely as one of a considerable number of other claims (RB, p. 8).

In the present case, respondent considered the claims for reserve cooling power as a significant selling device—an old powerful selling friend (Jt. Ex. 1 H). The representation was utilized for several years, and was discontinued only when questioned by the Commission. The advertisement represented that *only* Fedders gives assurance of cooling on extra hot, extra humid days. Such a representation is the *raison d'être* for an air conditioning unit—it is an extremely material representation. Thus, there can be no question that the challenged claims for this major feature were material.

Even when a claim is material, the Commission has at times chosen not to issue an order when it has found the violation to be so minor as to be *de minimis*. The doctrine is usually applied, however, where it appears the violation was an isolated, unintentional act, unlike the offender's usual practices. The Commission has been reluctant to invoke the *de minimis* doctrine, particularly in the case of advertising violations, and has in the past held one or a few advertisements to be sufficiently serious to justify the issuance of an order in the public interest (see *F.T.C. v. Colgate-Palmolive Co., et al.*, 380 U.S. 374, 395 (1965) (3 advertisements); *Gimbel Bros., Inc. v. F.T.C.*, 116 F.2d 578, 579

(2d Cir. 1941) (advertisements published twice); *Gimbel Bros.*, 60 F.T.C. 359 (1962) (one advertisement), *appeal dismissed*, 7 S.&D. 549 (3d Cir. 1962); and *Baldwin Bracelet Corp., et al.*, 61 F.T.C. 1345, 1363 (1962), *aff'd* 325 F.2d 1012 (D.C. Cir. 1963), *cert. den.* 377 U.S. 923 (1964)).

As the following figures show, this case deals not with an isolated incident, but with many different advertisements, each containing a deceptive representation, inserted in many newspapers, presumably on a national scale. Considering only the sample areas over the designated period of two years, there were the following numbers of insertions of advertisements claiming uniqueness of reserve cooling power: 72 insertions in Florida, 17 in Washington, D.C., 42 in Philadelphia, and 42 in New York, for a total of 173 insertions.

Respondent emphasizes that only 3/4 of 1 percent of its total advertising expenditures in the sample areas was spent on reserve cooling power uniqueness claims, and of that total the expenditures for cooperative advertising bearing uniqueness claims in relation to total cooperative advertising expenditures had a ratio of only 2 1/2 percent; and that only \$18,269 was spent on cooperative advertising utilizing uniqueness claims during the two-year period in the sample areas (RPF, pp. 8-16). Respondent would thus conclude that the offending claims did not have the tendency and capacity to mislead a substantial portion of the purchasing public (RPF, p. 16).

The record does not show what proportion of national sales or advertising the sample areas constitute. Therefore, an accurate projection of the total number of insertions of offending advertisements is impossible. The record does show that reserve cooling power claims were run over a period of several years, although the record does not show what form the advertisements took or whether uniqueness claims were utilized. However, if the two-year period examined were typical of what occurred on a national scale, which the sampling device presupposes, we can safely speculate that the total numbers of deceptive uniqueness advertisements may have run well into the thousands and expenditures therefor into the hundreds of thousands of dollars.

Respondent's argument merely establishes that the challenged advertising constituted a small portion of respondent's total advertising program; it does not establish that the false advertising claims were without impact on the public. Clearly, the violation, concerning a material claim broadly disseminated, involving hundreds, perhaps thousands of newspaper advertisements, cannot be regarded as *de minimis*. The administrative law judge finds the language of the Commission in the *Baldwin Bracelet* matter particularly appropriate: "** * ** we are not prepared to say that deception is all right if practiced

in moderation." (61 F.T.C. 1363). Nor is deception permissible if practiced in small town newspapers of limited circulation (Reply Brief, p. 17). The Act also includes within its protection residents of small towns (see *Charles Of The Ritz Dist. Corp. v. F.T.C.*, 143 F.2d 676, 679 (2d Cir. 1944)).

The administrative law judge concludes, therefore, that respondent's dissemination of uniqueness representations for reserve cooling power, which were not in fact true and substantiated, constituted a substantial practice involving a material performance claim. Accordingly, these representations had the tendency and capacity to mislead a substantial portion of the purchasing public and are of such a magnitude as to warrant a cease and desist prohibition.

THE REMEDY

It is well settled that the Commission may, and should, enter an order of sufficient breadth to insure that a respondent will not engage in future violations of the law. To this end the Commission has wide discretion in fashioning an appropriate order. See *Jacob Siegel Co. v. F.T.C.*, 327 U.S. 608, 611-13 (1946); *F.T.C. v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *F.T.C. v. National Lead Co.*, 352 U.S. 419, 428-30 (1957); *F.T.C. v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). Commission orders have been consistently upheld whenever the orders are reasonably related to the unlawful practices found to exist and are clear and precise so that they may be understood by those against whom they are directed. *Jacob Siegel*, *supra*, at 611-13; *Ruberoid*, *supra*, at 473; *F.T.C. v. Cement Institute*, 333 U.S. 683, 726 (1948).

The Commission, within this framework, may reasonably ban the precise practice found to violate the Federal Trade Commission Act, and may enjoin "like and related" practices. *F.T.C. v. Mandel Bros., Inc.*, 359 U.S. 385, 392-393 (1959); *Niresk Industries, Inc. v. F.T.C.*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. den.* 364 U.S. 883 (1960); *Consumers Products of America, Inc., et al. v. F.T.C.*, 400 F.2d 930, 933 (3d Cir. 1968), *cert. den.* 393 U.S. 1088 (1969). Further, a respondent "caught violating the Act must expect some fencing in." *F.T.C. v. National Lead Co.*, *supra*, at 510. While recognizing that it would be inappropriate to narrow the scope of the order to the precise misrepresentation made (uniqueness of a single characteristic, namely, "reserve cooling power"), respondent submits that it is entirely fitting and proper for the order to be confined to unfounded claims of uniqueness of any attribute or characteristic. Respondent contends that the notice order, embracing as it does all "performance characteristics" of any Fedders air conditioners, "is completely impermissible" (RB, pp. 14-15).

The form of order served with the complaint would prohibit

uniqueness claims of any kind and misrepresentations of performance characteristics of any kind. The notice order also provides for record keeping. Complaint counsel have made minor changes in their proposed form of order from the form of order served with the complaint.

The order entered by the administrative law judge herewith prohibits respondent from making any uniqueness claims. It would also prohibit the making of any representation as to a performance characteristic of any air conditioner unless, at the time of the making of the representation, respondent had a reasonable basis for such representation. The order entered herewith also requires that records of the documentation in support of performance claims be maintained for three (3) years after such claims are made and that such records be made available to the Commission upon reasonable notice. The record-keeping provision is limited to ten (10) years from the date the order becomes final. Thus, the administrative law judge has basically adopted the proposed order served with the complaint and recommended by complaint counsel, with minor changes which are without substantial substance such as combining specific prohibitions into the broader prohibition.

Respondent has admitted disseminating a false performance claim for its room air conditioners relating to the uniqueness of the ability of its room air conditioners to function satisfactorily at conditions of extreme heat and humidity. Respondent seems to acknowledge (RB, p. 15) that the order may properly extend beyond the confines of this one misrepresentation. The administrative law judge is of the opinion the order should prohibit respondent from making *any* performance claim for its air conditioners unless it possesses adequate substantiation for the claim at the time the representation is made. The Commission has recognized the propriety of orders governing all performance characteristics. *The Firestone Tire and Rubber, Co.*, Docket 8818, 81 F.T.C. 398, 475 (1972) *aff'd* F.2d 246, 250 (6th Cir. 1973), *cert. den.* 42 U.S.L.W. 3362 (Dec. 18, 1973). This provision of the order simply states explicitly the requirement already recognized by *Pfizer*: the possession of a reasonable basis for any material claim at the time the claim is disseminated. Because this provision simply sets forth a presently-existing obligation, it imposes little additional burden upon respondent, even extending it to all air conditioners.

The recordkeeping provision requires respondent to keep, and make available to the Commission, those materials which constitute substantiation for any performance claims which may be made. These are the same materials which the Commission is presently empowered to demand in Section 6(b) Orders to File Special Reports. Consequently, the recordkeeping provision, also an existing duty, reasonably incorpo-

rates all air conditioners. The only requirement included in this provision not previously spelled out by the Commission is that respondent retain such substantiation materials for three years, and this specific time requirement is not burdensome.

The requirement of record retention is the best possible method of preventing the recurrence of unsubstantiated claims. The requirement imposes little additional burden upon a respondent, which must, according to *Pfizer*, possess the materials at the time the claim is disseminated. At the same time, the retention will expedite Commission examination of the materials as soon as it suspects an unsubstantiated claim may have been or is about to be disseminated (after reasonable notice to respondent).

The Commission, as affirmed by the Sixth Circuit Court of Appeals, recognized the usefulness of a record retention provision in the recent case, *Firestone Tire and Rubber Co.*, *supra*, 481 F.2d at 250. In that case, the identical three-year retention provision as proposed herein, was ordered and affirmed.

Accordingly, the order entered herewith is believed to be both appropriate and necessary to prevent future violations of the law.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the respondent and this proceeding is in the public interest.

2. Respondent Fedders Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Edison, N.J.

3. Respondent Fedders Corporation is now and has been engaged in the advertising, offering for sale, sale and distribution of Fedders room air conditioners. In the course and conduct of its aforesaid business, respondent Fedders Corporation now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of New Jersey to purchasers thereof located in various States of the United States, and in the District of Columbia. Respondent Fedders Corporation therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act.

4. In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Fedders Corporation has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent.

5. In the course and conduct of its business as aforesaid, and for the purpose of inducing the sale of the said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondent has disseminated, and caused to be disseminated, certain advertisements of said room air conditioners, including but not limited to, advertisements printed in newspapers located in various States of the United States and in the District of Columbia, which newspapers are disseminated across state lines. Typical of the statements and representations contained in said advertisements is the following segment of the print advertisement for Fedders room air conditioners:

RESERVE Cooling Power - only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days.

6. By and through the use of the aforesaid statements and representations, respondent has represented, directly or by implication, that reserve cooling power is a unique feature of Fedders room air conditioners, not found in other room air conditioners. In truth and in fact, "reserve cooling power," referring to the ability to function satisfactorily under conditions of extreme heat and humidity, is not a unique feature of Fedders room air conditioners. In fact, comparable room air conditioners made by other companies function satisfactorily under conditions of extreme heat and humidity. Therefore, such statements and representations were and are false, misleading and deceptive.

7. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that, at the time the aforesaid statements and representations were made, respondent had a reasonable basis from which to conclude that the Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. In truth and in fact, at the time the aforesaid statements and representations were made, respondent had no reasonable basis from which to conclude that Fedders room air conditioners, compared with all other room air conditioners, had a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. Therefore, the statements and representations were and are false, misleading and deceptive.

8. By and through the use of the aforesaid statements and representations, respondent has also represented, directly or by implication, that Fedders room air conditioners, compared with all other room air conditioners, have a significantly superior ability to function satisfactorily under conditions of extreme heat and humidity. At the time said statements and representations were made, respon-

dent had no reasonable basis from which to conclude that such was the fact. Therefore, the statements and representations were and are false, misleading and deceptive.

9. The use by respondent of the aforesaid false, misleading and deceptive acts and practices have had, and now have, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

10. The aforesaid acts or practices of respondent, as herein found, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

ORDER

It is ordered, That respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of air conditioners do forthwith cease and desist from:

1. Representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any material respect, unless such is the fact;

2. Making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to the performance characteristics of any air conditioner including, but not limited to, air cooling, heating, cleaning, circulation, dehumidification or humidification, efficiency and quietness of operation, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which may consist of competent scientific, engineering, or other similar objective material, or industry-wide standards based on such material.

3. Failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

- (a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising

agency engaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the performance characteristics (including but not limited to air cooling, heating, cleaning, circulation, dehumidification or humidification, efficiency and quietness of operation) of, or the uniqueness of any feature of, any of respondent's air conditioners;

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of Paragraph 3 hereof shall be in effect for a period of ten (10) years from the date this order becomes final.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of 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 any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after the effective date of the order, file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with this order.

FINAL ORDER

JANUARY 14, 1975

This matter having been heard by the Commission upon the appeal of respondent's counsel from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having denied the appeal:

It is ordered, That the initial decision of the administrative law judge, pages 1-30 [pp. 42-65 herein], is adopted as the Findings of Fact and Conclusions of Law of the Commission, except insofar as certain comments on pages 29-30 [pp. 63-65 herein] are inconsistent with the

conclusions on pages 5-6 [pp. 73-74 herein] of the accompanying opinion, and subject to the following changes:

P. 2, line 4, [p. 43, line 2 herein] omit "that"

P. 3, line 9, [p. 43, fifth paragraph herein] word 4 "asserting"

P. 15, [p. 53 herein] substitute 6.5 percent for 7.8 percent

P. 18, line 36, [Finding No. 27, pp. 55-56 herein] substitute 6.5 percent for 7.8 percent

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order be entered:

ORDER

It is ordered, That respondent Fedders Corporation, its successors and assigns, officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution in commerce as "commerce" is defined in the Federal Trade Commission Act, of air conditioners, do forthwith cease and desist from:

1. Representing, directly or by implication, that any air conditioner, on the basis of a comparison thereof with the air conditioners of other manufacturers then being marketed in the United States in commercial quantities, is unique in any material respect, unless such is the fact;

2. Making, directly or indirectly, any statement or representation in any advertising or sales promotional material as to the air cooling, dehumidification, or circulation characteristics, capacity or capabilities of any air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation, which shall consist of competent scientific, engineering or other similar objective material or industry-wide standards based on such material;

3. Failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) which consist of documentation in support of any claim included in advertising or sales promotional material disseminated by respondent, insofar as the text of such claim is prepared, or is authorized and approved, by any person, who is an officer or employee of respondent, or of any division or subdivision of respondent, or by any advertising agency engaged for such purpose by respondent or by any such division or subsidiary, which claim concerns the air cooling, dehumidification, or circulation characteristics, capacity, or capability of, or the uniqueness of any feature of, any of respondent's air conditioners;

(b) which provided the basis upon which respondent relied as of the time the claim was made; and

(c) which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by respondent or any division or subsidiary of respondent.

The provisions of paragraph 3 hereof shall be in effect for a period of ten (10) years from the date this order becomes final.

It is further ordered, That respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions and to each of its officers, agents, representatives or employees who are engaged in the preparation or placement of advertisements.

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to the effective date of 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 any subsidiaries engaged in the manufacture and/or sale in commerce of air conditioning products or systems, or any other changes in the corporation which may materially affect compliance obligations arising out of the order.

It is further ordered, That respondent shall, within sixty (60) days after the effective date of the order, file with the Commission a report, in writing, setting forth in detail the manner and form of its compliance with this order.

OPINION OF THE COMMISSION

JANUARY 14, 1975

BY DIXON, Commissioner:

The complaint in this matter was issued on June 11, 1973, and charged respondent with dissemination of false and misleading advertisements in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). In particular the complaint alleged that respondent had represented through advertisements in newspapers of interstate circulation that (1) "reserve cooling power"¹ is a unique feature of its room air conditioners, not found in other room air conditioners; (2) Fedders' room air conditioners compared with all other room air conditioners have a significantly increased cooling capacity at high loading conditions under customary conditions of use; and (3) Fedders had a reasonable basis for concluding that its product

¹ Hereinafter sometimes "RCP," stipulated by the parties to mean "ability to function satisfactorily under conditions of extreme heat and humidity." (I.D. 8)

The following abbreviations are used herein:

I.D.-Initial Decision (Finding No.)

I.D. p.-Initial Decision (Page No.)

RB-Respondent's Appeal Brief (Page No.)

compared with all other room conditioners has said increased cooling capacity. Drawing on a brief record consisting of stipulations, joint exhibits, and a few respondent's exhibits,² the administrative law judge sustained the complaint and recommended entry of an order. On appeal respondent has taken essentially the same position as it took before the administrative law judge, conceding the falsity of, and absence of reasonable basis for, the challenged representations but raising so-called affirmative defenses of "abandonment" and "insubstantiality," and arguing in the alternative that the order should be diminished in scope. We find the affirmative defenses to be patently without merit, as did the administrative law judge, but we believe that a slight modification of the order he has proposed is appropriate.

I. Insubstantiality

Respondent argues that it should be absolved from any liability in this matter because the number of offending advertisements constituted only a small percentage of respondent's total advertising expenditures. Evidence submitted by respondent indicated that in four sample areas, New York, Philadelphia, Washington, D.C., and Florida, during the sample two-year period ending Aug. 31, 1971, the number of untruthful advertisements totaled 173 or 5.8 percent of all advertisements for reserve cooling power, and expenditures on such advertisements were \$18,269 or 6.5 percent of all expenditures for advertisements touting RCP. (I.D. 17, 18) Respondent asserts in its appeal brief that the sample area accounted for "at least 35 percent" of its total United States' sales and advertising expenditures for the sample period.³ Whatever the total number of offending advertisements may have been, it is clear to us that evidence from the sample area alone was quite sufficient to destroy whatever weight might be accorded respondent's defense of insubstantiality.

The Commission has previously issued orders in cases involving no more than one or a few deceptive advertisements. [See *Gimbel Bros.*, 60 F.T.C. 359, 368 (1962), *appeal dismissed per stipulation*, No. 14019 (3d Cir. Oct. 8, 1962) *unreported*; *Gimbel Bros., Inc. v. FTC*, 116 F.2d 578, 579 (2d Cir. 1941).] Here, in an area apparently accounting by

² In describing the record in this case, the administrative law judge neglected to make reference to certain exhibits submitted by respondent separately (I.D. p. 5, third full paragraph (p. 45, fifth paragraph)). There is no indication, however, that the administrative law judge did not actually consider these exhibits in fashioning his decision, and in any event the Commission has fully considered said exhibits in its own review of the record.

³ RB 13. The administrative law judge, noting that advertisements for RCP had been run for several years prior to the sample period, concluded that the actual number of offending advertisements may have totaled in excess of 1,000. (I.D. p. 27 [p. 62 herein]) Respondent challenged this extrapolation, though it did agree to use a sampling procedure. The parties apparently disagree as to whether the sample may be taken as representative of Fedders' advertising during the entire period in which RCP advertisements were run, or simply as representative of Fedders' advertising throughout the country for the sample two-year period. Resolution of this disagreement is not necessary for our decision.

respondent's estimate for far less than half of all its sales, 173 separate false advertisements were disseminated over a two-year period. This was 173 more than the law allows, and far more than warrant an appeal to the discretion of the Commission to omit an order in a litigated case. The fact that these advertisements constituted only a small percentage of respondent's total advertising program is wholly irrelevant. It merely demonstrates the truism that a larger advertiser inevitably has more opportunities than a smaller one to engage in deceptive practices. Similarly, we are entirely unimpressed with the fact that the offending advertisements appeared in non-urban newspapers with less circulation than metropolitan dailies. We are pleased to note, however, that respondent does not maintain that "deception is all right if practiced in moderation" nor that "deception is permissible if practiced in small town newspapers of limited circulation" (RB 13-14), though the learned administrative law judge may be excused for having received the contrary impression. (I.D. p. 27 [pp. 62-63 herein]) In all events the magnitude of the false advertising in this case cannot constitute an affirmative defense to the allegations of the complaint, nor does it give any reason to think that an order is not required to remedy the violation.

II. Abandonment

Respondent further argues that it abandoned the offending practice in late 1971. It was stipulated at trial that RCP advertising was discontinued at this time, following determination by respondent, in response to an advertising substantiation order served on it by the Commission, that claims for the uniqueness of RCP could not be substantiated. The Commission has been properly parsimonious, if not totally unyielding, in its adjudicative recognition of the defense of abandonment, and courts have been reluctant to vacate Commission orders on those grounds except in the most extreme circumstances not present here, such as where a corporate respondent had exited from the relevant line of business under circumstances in which reentry seemed improbable. *National Lead Co. v. FTC*, 227 F.2d 825, 839, *et seq.* (7th Cir. 1955), *reversed in other respects*, 352 U.S. 419 (1957). Certainly the mere discontinuance of an offending practice in the face of inquiry by a law enforcement agency can under no circumstances be argued to amount to a defense. It is undisputed that respondent did not discontinue the challenged advertising until it had received an Order to File Special Report, requesting substantiation for the false representation. The situation is in essence no different from that in *Coro, Inc.*, 63 F.T.C. 1164 (1963), *aff'd* 338 F.2d 149 (1st Cir. 1964), *cert. denied* 380 U.S. 954 (1965), upon which the administrative law judge relied. While

it is true that the mere issuance by the Commission of an advertising substantiation order is not meant to imply that the recipient is suspected of wrongdoing, it is also clear that an order to file this special report pursuant to Section 6(b) of the F.T.C. Act is an investigatory tool of the Commission, just as much as a subpoena issued pursuant to Section 9 of the Act, and having received such an order Fedders' subsequent discontinuance can hardly be viewed as being borne of spontaneous recognition of the error of its ways. Respondent disseminated plainly false advertisements for at least two years, discontinuing them only upon discovering that at long last the government would be reviewing the claims. These circumstances are not such as can breed confidence that respondent may be relied upon in the future to regulate its own advertising when the government may again not be looking over its shoulder, without the encouragement of an order. And we find without merit the contention that the circumstances of discontinuance in this case should be considered an affirmative defense to an otherwise plain violation of law.⁴

III. Order

The argument put forth most seriously by respondent concerns the scope of the order entered by the administrative law judge. Respondent objects to paragraph II of the order, which prohibits false performance claims, and to paragraph III, to the extent it requires maintenance of substantiating materials for performance claims. Respondent contends that the representation challenged in this case was not a performance claim at all, but only a uniqueness claim, and that the order should be no broader than paragraph I, which prohibits false uniqueness claims, while paragraph III should be modified to require maintenance of substantiation for uniqueness claims only.

We cannot agree that the false representations here in question dealt only with "uniqueness" and not "performance," nor do we believe that an order dealing only with uniqueness claims would be in the public interest or serve to prevent future occurrences of the sort involved here.

In claiming that only Fedders' air conditioners possessed RCP, respondent was clearly making a statement about the performance of its product, namely that this performance was unmatched. What

⁴ It is also unclear, as the initial decision points out, to what extent respondent has actually managed to eliminate false claims of the sort challenged here from its advertising. (I.D. 34-35, [pp. 57-58 herein]) It appears that in Mar. 1974, an advertisement ran in *Newsweek* claiming "exclusivity" for a feature of respondent's "Climatrol" brand room air conditioner when in fact others of respondent's air conditioners possessed the same attribute. We do not think that this circumstance is essential to our finding that the abandonment defense must fail. It is, however, an additional ground for that conclusion, and suggests that even during the pendency of these proceedings, when respondent has had an unusual interest in avoiding repetition of false claims (to demonstrate the lack of necessity for an order) it has been unable to do so.

Order

85 F.T.C.

rendered these false representations material in the eyes of consumers, and no doubt what led respondent to make them, was the message they conveyed about the relative performance of the product, and not merely the message of "uniqueness" in some disembodied sense.⁵ An order addressed only to uniqueness claims and not to performance claims would be inadequate to insure that the same species of misrepresentation as has here occurred will not happen again.

It remains then to consider the scope of the prohibition on false characterizations of performance. The administrative law judge and complaint counsel recommend a prohibition on misrepresentation of all performance characteristics. The performance characteristic in this case which was untruthfully and without reasonable basis represented to be unique involved air cooling capacity under conditions of extreme heat and humidity. In view of all the circumstances of this case, including the fact that only one performance characteristic was misrepresented, we believe that the order should be narrowed slightly to forbid only misrepresentations of performance characteristics of the general sort involved in the offending advertisements. An appropriate order is appended.

IN THE MATTER OF

MOTA-NU, INC., ET AL.

Docket C-2503. Order, Jan. 14, 1975

Denial of corporate respondent's petition to reopen proceedings.

Appearances

For the Commission: *Joseph Hickman.*

For the respondents: *James T. Blanton*, Fort Worth, Tex. and *Stein, Mitchell & Mezines*, Wash., D.C.

ORDER DENYING RESPONDENT'S PETITION TO REOPEN
PROCEEDINGS

After having fully considered the Petition to Reopen Proceedings filed on behalf of respondent corporation MOTA-NU, Inc., and the

⁵ Consider an advertisement for air conditioners that represented them to be unique because of being painted with red, white, and green stripes. Certainly the consumer would be left thinking that the advertised air conditioner was "unique," but the Commission might be at pains to show that such a claim was material, nor can we imagine a sane advertiser spending money to make it. Uniqueness is obviously both an attribute in itself and one facet of broader categories of product characteristics, such as price, performance, and warranty terms.