

IN THE MATTER OF
SHAKLEE CORPORATION

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

Docket C-2790. Complaint, Feb. 18, 1976—Decision, Feb. 18, 1976

Consent order requiring an Emeryville, Calif., manufacturer and distributor of food supplements, cosmetics and cleaners, among other things to cease requiring, coercing, threatening or otherwise exerting pressure on any distributor to observe, maintain or advertise established or suggested retail prices. Further, respondent is required to conspicuously state that all pricelists are suggested only and that dealers are permitted to sell Shaklee products to any retail outlets they wish.

Appearances

For the Commission: *Jeffrey Klurfeld.*

For the respondent: *Harvey Applebaum, Covington & Burling,*
Washington, D.C. and *Paul Greenberg,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Shaklee Corporation, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Shaklee Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal office and place of business located at 1900 Powell St., Emeryville, California.

PAR. 2. Respondent is now, and for some time last past has been engaged in the manufacture, distribution, offering for sale and sale to distributors located throughout the United States of the following products: food supplements, including proteins, vitamins and minerals; cosmetics, toiletries and fragrances; and household and industrial cleaners. In 1973, respondent had sales revenues of approximately \$75 million.

PAR. 3. In the course and conduct of its business as aforesaid, respondent ships or causes such products to be shipped from the State in which they are manufactured and/or warehoused to distributors

located in various other States throughout the United States who engage in resale to other distributors and to members of the general public. At all times relevant herein, respondent has maintained a constant, substantial and increasing flow of such products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act as amended.

PAR. 4. Except to the extent that actual and potential competition has been lessened, hampered, restricted and restrained by reason of the practices hereinafter alleged, respondent's distributors, in the course and conduct of their business of distributing, offering for sale and selling Shaklee products, are in substantial competition in commerce with one another, and respondent and its distributors are in substantial competition in commerce with other firms or persons engaged in the manufacture or distribution of similar products.

PAR. 5. Respondent markets its products through the direct selling method. Sales are made to the general public by over 100,000 independent distributors. These persons are organized into a distribution system involving three levels. Respondent sells its products directly to "Supervisors," the highest level in the distribution network. In turn, Supervisors resell to Assistant Supervisors, who in turn resell to Distributors. The wholesale prices charged by the Supervisor to his Assistant Supervisor, and by the Assistant Supervisor to his Distributor, are substantially identical to those prices charged by respondent to the Supervisor.

Retail sales to the general public may be made by the Distributor, Assistant Supervisor or Supervisor. The difference between the wholesale prices these persons pay and the retail prices the consumer pays represents the gross profit made on sales to the public. In addition, cash bonuses are paid to these persons calculated as a percentage of the purchases made by the person receiving the bonuses and by persons whom he, or persons sponsored by him, have sponsored.

PAR. 6. To become a Distributor, Assistant Supervisor or Supervisor, respondent has required, and may still require, that such persons enter into written agreements with it which impose, among others, the following terms and conditions:

(1) Under no condition may any Distributor, Assistant Supervisor or Supervisor sell Shaklee products to any retail store or through any fixed retail location which he himself may operate.

(2) Distributors, Assistant Supervisors and Supervisors must resell Shaklee products to the public at established retail prices only.

PAR. 7. All Distributors, Assistant Supervisors and Supervisors are independent contractors. They are required to abide by all the rules

and regulations established by respondent, agree to do so and may be terminated for failure to do so.

PAR. 8. Respondent has published and distributed to all new Supervisors a document entitled "Supervisor's Handbook, a Complete Handbook on Privileges, Policies and Responsibilities," which imposes upon such persons the following terms and conditions, among others:

SECTION FIVE

NO PRODUCTS MAY BE SOLD OR DISPLAYED BY STORES OF ANY KIND.

Any Shaklee salesperson willfully violating this rule forfeits all rights to bonuses and will be subject to cancellation by the Home Office upon the recommendation of his Supervisor and at the discretion of the Home Office. Written notice of forfeiture will be sent to the involved salesperson by his Supervisor, stating PV (Purchase Volume) and bonus affected. A copy of this notice must be filed by the Supervisor with the Home Office, together with a check covering the amount of bonus withheld.

Nothing in this section shall be construed as prohibiting the proper operation of a Shaklee Supervisor's business office.

OPERATING A BUSINESS OFFICE

Every Shaklee Supervisor is encouraged to establish a business office. Such an office enhances his prestige in the eyes of his Distributors, and helps him provide better, more professional service to them. This step, though, should not be taken until one reaches the rank of Supervisor.

Establishing an office places a demanding obligation upon the Supervisor. He must stringently avoid any appearance or suggestion of retail activity.

In fact * * * ABSOLUTELY NO RETAIL SALES ARE PERMITTED FROM A SHAKLEE SUPERVISOR'S BUSINESS OFFICE.

This rule is essential and stringent. It must be observed. The Home Office cannot emphasize this point too strongly.

A business office must be designed for Distributor service, NOT for attracting walk-in retail trade. A window display of product or product literature, for instance, is obviously aimed at walk-in retail trade. No such display should be used. A window display aimed at recruiting new Distributors might be proper, providing it was in good taste.

PAR. 9. Respondent publishes and distributes to all Distributors, Assistant Supervisors and Supervisors a bimonthly periodical entitled *Survey*. In the January 1974 edition, respondent answered questions submitted by its distributors in an article entitled "Most Asked Questions." Among the questions and responses were the following:

Q. Does the company monitor retail store sales?

A. Yes, if you can provide us with a sales receipt accompanied by store name and address, we will contact, either by mail or phone, the business in question. Sales by a Distributor from a retail outlet may result in immediate termination upon receipt of proof.

Q. Does the company monitor unethical selling such as price-cutting, etc.?

A. Yes, if you will provide us with a sales receipt accompanied by the seller's name and address, we will take appropriate action according to the Sales Plan.

COUNT 1

Alleging violation of Section 5 of the Federal Trade Commission Act, as amended, by respondent.

PAR. 10. The allegations of Paragraphs One through Nine are incorporated by reference in Count 1 as if fully set forth verbatim.

PAR. 11. The acts, practices, terms and conditions described above are unfair methods of competition because of their tendency to, and the actual practice of, restricting the customers to whom respondent's Distributors, Assistant Supervisors or Supervisors may sell their products; restricting the sources from which respondent's Distributors, Assistant Supervisors or Supervisors may obtain their products; and restricting and preventing Distributors, Assistant Supervisors or Supervisors from reselling or allowing their products to be resold in retail stores or through fixed retail locations.

Said acts, practices, terms and conditions constitute unreasonable restraints of trade and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging further violation of Section 5 of the Federal Trade Commission Act, as amended, by respondent.

PAR. 12. The allegations of Paragraphs One through Nine are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 13. The acts, practices, terms and conditions described above are unfair methods of competition because of their tendency to, and the actual practice of, fixing, maintaining or otherwise controlling the prices and terms or conditions of sale at which respondent's products are sold in both the wholesale and retail market, and fixing, maintaining or otherwise controlling various fees, bonuses, discounts or rebates required to be paid by one Supervisor, Assistant Supervisor or Distributor to another Supervisor, Assistant Supervisor or Distributor.

Said acts, practices, terms and conditions constitute unreasonable restraints of trade and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the San Francisco Regional Office

proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

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

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

1. Respondent Shaklee Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 1900 Powell St., Emeryville, California.

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

ORDER

A "distributor," as that term is used throughout this order, is defined as any present or future "Supervisor," "Assistant Supervisor," "Distributor," or any other independent contractor, howsoever denominated, who sells any Shaklee product at wholesale and/or retail.

It is ordered, That respondent Shaklee Corporation, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or indirectly, or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of goods or commodities in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

I

1. Requiring, contracting with, or coercing, directly or indirectly, any distributor to refrain from selling any merchandise in any quantity to or through any specified person, class of persons, business or class of businesses.

2. Requiring, contracting with, or coercing, directly or indirectly, any distributor to refrain from establishing a fixed retail location for the sale or distribution of any merchandise in any quantity.

3. Requiring or requesting any distributor, directly or indirectly, to report to respondent or to any person it designates, any person or firm who sells any of respondent's merchandise to a retail store or from a fixed retail location, or acting upon reports so obtained by refusing or threatening to refuse sales to the distributor so reported.

4. Fixing, establishing, maintaining or otherwise controlling, directly or indirectly, the prices and to the extent, if at all, they relate to the pricing of merchandise for resale, discounts, rebates, overrides, commissions, fees or bonuses or other terms or conditions of sale; *provided*, that from the date this order becomes final for a period of three years:

(a) If respondent suggests to its distributors prices for resale of its merchandise, it must state clearly and conspicuously in conjunction therewith the following statement:

The prices quoted herein are suggested only. You are free to determine for yourself the prices you charge.

(b) If respondent suggests to its distributors discounts, rebates, overrides, commissions, fees or bonuses or other terms or conditions of sale to the extent, if at all, they relate to pricing of merchandise for resale, it must state clearly and conspicuously in conjunction therewith the following statement:

The (*e.g.*) discounts quoted herein are suggested only. You are free to determine for yourself the discount you grant.

5. Requiring, coercing, threatening or otherwise exerting pressure on any distributor, directly or indirectly, to observe, maintain or advertise established or suggested retail prices.

6. Requiring or requesting any distributor, directly or indirectly, to report any person or firm who does not observe the retail prices established or suggested by respondent, or acting upon reports so obtained by refusing or threatening to refuse sales to the distributor so reported.

II

Nothing contained herein shall prevent respondent from availing itself of the benefits, if any, accruing to it by virtue of the Act of Congress of August 17, 1937, commonly called the Miller-Tydings Act, or the Act of Congress of July 14, 1952, commonly known as the McGuire Act.

III

It is further ordered, That respondent within thirty (30) days from the date this order becomes final, shall mail a copy of the letter, attached hereto as Exhibit A, without additional enclosures to all distributors.

It is further ordered, That respondent shall for a period of three (3) years from the date this order becomes final, mail a copy of the letter, attached hereto as Exhibit A without additional enclosures, to any future distributor within thirty (30) days of that person's association with respondent.

IV

It is further ordered, That, within thirty (30) days from the date this order becomes final, respondent:

Deliver, or cause to be delivered, a copy of this order, which may exclude Exhibit A, to each of respondent's supervisors and assistant supervisors; and inform each of respondent's supervisors and assistant supervisors that respondent is obligated by this order, to discontinue dealing with any supervisor or assistant supervisor who engages in any conduct which, if engaged in by respondent, would constitute a violation of Paragraph I of this order (hereinafter referred to as "conduct"), under the circumstances set forth in subparagraph 2 of Paragraph V of this order.

V

It is further ordered, That, for a period of three (3) years from the date this order becomes final, respondent:

1. Deliver, or cause to be delivered, a copy of this order to each of respondent's future supervisors and assistant supervisors, within thirty (30) days of that person's becoming either a supervisor or assistant supervisor, unless such person has already received a copy of this order; and inform all such future supervisors and assistant supervisors within the same thirty (30) days that respondent is obligated by this order to discontinue dealing with any supervisor or

assistant supervisor who engages in any "conduct" under the circumstances set forth in subparagraph 2 of this paragraph.

2. Upon receiving written information from any identifiable source(s) indicating an instance of "conduct," as hereinabove defined, by any supervisor or assistant supervisor, promptly investigate the "conduct" to ascertain whether it has in fact occurred. If it is determined after a good faith investigation that such "conduct" has in fact occurred, respondent shall forthwith notify said supervisor or assistant supervisor by certified mail, return receipt requested, that such "conduct" has occurred (hereinafter referred to as "Notice"), and that respondent will discontinue dealing with him upon confirmation by respondent of two (2) further instances of "conduct" within one (1) year. For purposes of determining whether three (3) instances of confirmed "conduct" have occurred within one (1) year, each instance of "conduct" shall be deemed to have occurred on the date when respondent first receives written information indicating the possibility of such "conduct." Upon receiving written information from any identifiable source(s) indicating a total of three (3) instances of "conduct" by the same supervisor or assistant supervisor within any one (1) year period, as hereinabove computed, and after determining that said instances of "conduct" have occurred, respondent shall immediately discontinue dealing with said supervisor or assistant supervisor.

Provided, however, That for purposes of subparagraphs 1 and 2 of this paragraph, only one instance of "conduct" shall be deemed to have occurred for the simultaneous or contemporaneous dissemination of any identical violative writings to different persons, or the simultaneous or contemporaneous making of any violative oral communication to different persons.

VI

It is further ordered, That respondent:

Maintain complete records of any written information which indicates the possibility of an instance of "conduct" by any supervisor or assistant supervisor; and maintain complete records of all "Notices" as required by subparagraph 2 of Paragraph V of this order, and of the supervisor's or assistant supervisor's acknowledgment of receipt of said "Notices." These records shall be retained for a total period of six (6) years from the date this order becomes final and shall be available upon request to representatives of the Federal Trade Commission.

VII

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

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

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

EXHIBIT A

Dear Shaklee Distributor:

On-----Shaklee entered into a consent order with the Federal Trade Commission. The consent order was entered into for settlement purposes only and by no means constitutes an admission that we violated any law. The order was, however, precipitated by an FTC complaint against the company that would have required lengthy, complex, and debilitating litigation. We are obligated to observe and enforce the provisions of the consent order.

The consent order provides, among other things, as follows:

1. You are free to sell Shaklee products to any type of retail store or from your own home or place of business.
2. You are free to sell Shaklee products at prices of your own choosing.
3. If you previously executed an agreement with Shaklee that obligated you to resell Shaklee products at stated prices, that provision is not binding.
4. Any customer restrictions in any prior agreement with Shaklee, or in the Privileges and Responsibilities, including those regarding sales to or from retail stores, are not binding.
5. If you decide to sell Shaklee products at prices different from our suggested prices or from your own home or place of business or to classes of businesses (*e.g.* such as retail stores) that we do not suggest, nothing will happen to you. You will not forfeit any bonus or override to which you are entitled.
6. When Shaklee suggests retail prices and/or various merchandising methods you should understand that these "suggested" prices and/or merchandising methods are just that. You are under no obligation to sell Shaklee products at the suggested prices or in the manner suggested.
7. The consent order obligates Shaklee, upon receipt of written complaints subsequently verified by Shaklee, to terminate any supervisor or assistant supervisor who, after fair warning, continues to engage in conduct contrary to any of the FTC order provisions stated above. If you believe that your supervisor or assistant supervisor has engaged in such conduct, you can report this in writing to Supervisor Counseling at the Home Office.

* * * * *

Decision and Order

87 F.T.C

The consent order does not prohibit Shaklee from continuing to recommend that its products be merchandised on a direct selling basis, and we will, accordingly, continue to recommend various methods of merchandising Shaklee products on the basis of the direct selling philosophy. We want to make clear, however, that Shaklee can do nothing to you if you decide not to sell by the direct selling method.

If you have any questions regarding the Order, please contact Shaklee Supervisor Counseling (415) 428-8000.

Officer

IN THE MATTER OF

MARJO SYSTEMS, INC. T/A THERMAL-GARD, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-2791. Complaint, Feb. 19, 1976—Decision, Feb. 19, 1976*

Consent order requiring a Rahway, N.J., seller and distributor of thermal replacement windows, with and without burglar alarms, among other things to cease misrepresenting the qualities of their products; misrepresenting that usage of their windows will result in specific fuel cost savings; misrepresenting that their windows contain an electric system making them burglar-proof; and misrepresenting that their windows cannot be jimmied.

*Appearances*For the Commission: *Phyllis Kane.*For the respondents: *Kaplowitz & Wise*, Linden, N.J.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Marjo Systems Inc., a corporation, formerly named Weather-Shield Enterprises, Inc., d/b/a Thermal-Gard, and Joseph Di Giacomo and Martin L. Waldman, Sr., individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Marjo Systems Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey with its principal office and place of business located at 1401 Witherspoon St., Rahway, New Jersey. Said corporation does business under the name Thermal-Gard.

Respondents Joseph Di Giacomo and Martin L. Waldman, Sr. are individuals and officers of the corporate respondent. They formulate, direct and control the policies, acts and practices of the corporate respondent including the policies, acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the purchasing, advertising, offering for sale, sale and