

Complaint

IN THE MATTER OF

UNION CARBIDE CORPORATION

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT AND SECS. 3 AND 7 OF
THE CLAYTON ACT

Docket C-2902. Complaint, Sept. 28, 1977 — Decision, Sept. 28, 1977

This consent order, among other things, requires a New York City producer of industrial gases and gas welding apparatus, for a 20-year period, to cease using any tying arrangement, or employing any exclusive dealing contract that is not for one year or less, or which fails to provide a 90-day or less period for notice of termination. Additionally, the firm is prohibited for a ten-year period from acquiring distributors of industrial gases or gas welding equipment without prior Commission approval, except where any of the prescribed conditions exist. Further, in those instances where prior approval is not required, Union Carbide must furnish the Commission with sufficient data so as to enable it to determine whether such acquisition violates the terms of the order.

Appearances

For the Commission: *Gordon Youngwood, Roger S. Leifer and Geoffrey S. Walker.*

For the respondent: *George A. Avery, Wald, Harkrader & Ross, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Union Carbide Corporation ("Union Carbide"), respondent herein, has violated the provisions of Section 3 of the Clayton Act, as amended (15 U.S.C. 14), and Section 7 of the Clayton Act, as amended (15 U.S.C. 18), and the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and that a proceeding in respect thereof would be in the public interest, issues this complaint, stating its charges as follows:

DEFINITIONS

1. For the purpose of construing this complaint, the following definitions will apply:

(a) "Industrial Gases" shall mean the following gases: Oxygen, Nitrogen, Argon, Acetylene, Hydrogen and Helium.

(b) "Welding Products" shall mean equipment, supplies and consumable items used to fuse or cut metals.

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(c) "Gas Welding Apparatus" shall mean the equipment used to fuse or cut metals by means of heat produced by a gas flame.

(d) "Distributor" shall mean a business firm whose primary function in the Industrial Gas and Welding Products business is the purchase of Industrial Gases and Welding Products for the purpose of resale, but shall not include any business firm whose primary function in the resale of Industrial Gases and Welding Products is the distribution of Industrial Gases and Welding Products to entities engaged in the plumbing, heating or air conditioning trade.

RESPONDENT

2. Respondent Union Carbide is a publicly owned New York corporation with its principal place of business at 270 Park Ave., New York, New York.

3. Union Carbide is engaged in the manufacture and sale of chemicals, plastics, industrial gases and related products, welding equipment, metals, carbon products and such consumer oriented products as batteries and antifreeze.

4. For 1975 Union Carbide had net sales of \$5.7 billion and a net income of \$382 million.

5. Union Carbide, the nation's leading producer of industrial gases, sells industrial gases and welding products through its Linde Division. During 1972, Union Carbide had the largest volume of domestic sales of acetylene, argon, helium, nitrogen and oxygen to distributors, and the third largest volume of domestic sales of hydrogen to distributors. During 1972, it was one of the nation's leading manufacturers of welding products.

6. At all times relevant herein Union Carbide sold and shipped its products in interstate commerce and engaged in commerce within the meaning of the Clayton Act, as amended, and was a corporation whose business was in or affected commerce within the meaning of the Federal Trade Commission Act, as amended.

COUNT I

TRADE AND COMMERCE

7. The relevant lines of commerce affected by the actions of Union Carbide are the sales to distributors of each of the following relevant industrial gases: acetylene, argon, helium, hydrogen, nitrogen and oxygen.

8. The relevant geographic market for each line of commerce is the United States.

9. During 1972, there were substantial sales by Union Carbide to

distributors of acetylene, argon, helium, hydrogen, nitrogen, and oxygen. Union Carbide is one of the major sellers of those six gases to distributors.

ACTS AND PRACTICES

10. In the course of interstate commerce, Union Carbide, a leading company in each relevant line of commerce alleged herein, has engaged and is engaging in acts and practices which may foreclose competition in the sale of relevant industrial gases to distributors. Among the acts and practices in which Union Carbide has engaged and is continuing to engage, in the course of interstate commerce, are the following:

- (a) Requiring distributors, pursuant to a contract, agreement or understanding, to purchase from Union Carbide their total requirements of each of the relevant industrial gases;
- (b) Requiring distributors to purchase their total requirements of the relevant industrial gases from Union Carbide as a condition to their purchasing any relevant industrial gas from Union Carbide;
- (c) Requiring distributors to purchase their total requirements of the relevant industrial gases from Union Carbide as a condition to their purchasing welding products from Union Carbide.
- (d) Leasing or otherwise making available to customers of distributors who have ceased purchasing one or more Union Carbide industrial gases, industrial gas cylinders at rates set for the purpose of destroying a competitor or eliminating competition.

EFFECTS

11. The acts and practices identified in Paragraph 10 have or may have the following effects among others:

- (a) Substantially lessening competition for the sale of relevant industrial gases to distributors;
- (b) Substantially lessening competition for the sale of relevant industrial gases to consumers;
- (c) Increasing entry barriers into each line of commerce alleged herein;
- (d) Depriving distributors of the opportunity of competing for sales of relevant industrial gases to certain classes of customers.

VIOLATIONS

12. The acts and practices alleged herein constitute tying arrangements, exclusive dealing arrangements or total requirements

contracts in violation of Section 3 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

13. The acts and practices alleged herein constitute unfair methods of competition or unfair acts and practices by Union Carbide in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

14. The charges of Paragraphs 1 through 6 are incorporated by reference herein as if set forth verbatim.

PLAN AND PATTERN OF ACQUISITIONS

15. Since 1969, Union Carbide, pursuant to a plan or plans, has acquired an interest of 50 percent or more in at least 22 distributors. The total dollar amount expended for these acquisitions was approximately \$18 million.

16. The sales of the acquired distributors for the year prior to their acquisition ranged from \$309,000 to \$4,835,000.

17. As part of its continuing plan of acquisitions, Union Carbide expects to acquire additional distributors within the next five years.

18. At all times relevant herein, each of the acquired distributors was engaged in the purchase or sale of products in interstate commerce, was engaged in commerce as commerce is defined in the Clayton Act, as amended, and operated a business in or affecting commerce within the meaning of the Federal Trade Commission Act, as amended.

TRADE AND COMMERCE

19. The manufacture and sale of gas welding apparatus constitutes a relevant line of commerce. Union Carbide accounted for a substantial share of the domestic gas welding apparatus market in 1972.

20. The manufacture and sale of each of the following relevant industrial gases: acetylene, argon, helium, hydrogen, nitrogen and oxygen, constitutes a relevant line of commerce.

21. During 1972, there were substantial sales by Union Carbide of acetylene, argon, helium, hydrogen, nitrogen and oxygen to distributors. Union Carbide is one of the major sellers of these six gases to distributors.

22. The United States and certain sections thereof constitute geographic markets or sections of the country for each relevant line of commerce.

23. Barriers to entry are high for a new distributor of relevant industrial gases and gas welding apparatus.

24. Barriers to entry are high for a new supplier of relevant industrial gases and gas welding apparatus.

25. The purchases by those distributors in which Union Carbide has acquired an interest are and have been substantial in each relevant line of commerce.

EFFECTS OF THE ACQUISITIONS AND THE PLAN AND PATTERN OF
ACQUISITIONS

26. The effect of Union Carbide's acquisitions of stock or assets of the distributors described in Paragraph 15 individually and collectively may be substantially to lessen competition or to tend to create a monopoly in the sale of relevant industrial gases to distributors and the manufacture and sale of gas welding apparatus in the United States and certain sections thereof; and the effects arising from the past and planned future acquisitions of distributors may be unreasonably to restrain trade in the sale of relevant industrial gases to distributors and the manufacture and sale of gas welding apparatus in the United States and certain sections thereof, thus constituting an unreasonable restraint of trade, an unfair method of competition and an unfair act or practice in the following ways among others:

(a) Union Carbide's competitors have been or may be foreclosed from a substantial segment of the relevant lines of commerce;

(b) The ability of nonintegrated suppliers to compete in the relevant lines of commerce has been or may be impaired;

(c) The ability of nonintegrated distributors to compete for the sale of products in the relevant lines of commerce has been or may be impaired;

(d) Barriers to entry into the sale of relevant industrial gases to distributors and the manufacture and sale of gas welding apparatus have been raised;

(e) Barriers to entry into the distribution of relevant industrial gases by potential distributors have been raised;

(f) A trend toward vertical integration between such suppliers of relevant industrial gases and gas welding apparatus and distributors of those products may be accelerated;

(g) A dangerous probability has been created that, if not curtailed, the acquisition will enable Union Carbide to enhance its position in the relevant lines of commerce;

(h) Union Carbide has been eliminated as a potential entrant through internal expansion into the retail sale of relevant industrial

gases and gas welding products in the geographic areas where it acquired an interest in distributors.

VIOLATIONS

27. Union Carbide's acquisition of at least twenty-two distributors violates Section 7 of the Clayton Act, as amended, and Section 5 of the Federal Trade Commission Act, as amended.

28. Union Carbide's plan pursuant to which it has acquired at least twenty-two distributors and will acquire more distributors violates Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all 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 respondents have violated the said Acts, and that complaint issue stating its charges in that respect, and having thereupon accepted the executed 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(b) 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 findings and enters the following order:

1. Respondent Union Carbide 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 place of business at 270 Park Ave., New York, New York.

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

ORDER

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

1. "Industrial Gases" shall mean the following gases: Oxygen, Nitrogen, Argon, Acetylene, Hydrogen and Helium.

2. "Welding Products" shall mean equipment, supplies and consumable items used to fuse or cut metals.

3. "Gas Welding Apparatus" shall mean equipment used to fuse or cut metals by means of heat produced by a gas flame.

4. "Distributor" shall mean a business firm whose primary function in the Industrial Gas and Welding Products business is the purchase of Industrial Gases and Welding Products for the purpose of resale, but shall not include any business firm whose primary function in the resale of Industrial Gases and Welding Products is the distribution of Industrial Gases and Welding Products to entities engaged in the plumbing, heating or air conditioning trade.

5. "Location" shall mean a bona fide sales and distribution facility operated by a Distributor as a receiving or distribution point for Industrial Gases, which facility ordinarily carries an inventory of Industrial Gases and Welding Products and is staffed with a bona fide sales force and operating and/or distribution personnel. Two or more facilities that are staffed by common sales and operating and/or distribution personnel shall be deemed to comprise a single Location.

6. "Requirements" of any Distributor for any Industrial Gas at any Location shall mean such Distributor's total requirements for such Industrial Gas either delivered to such Location or delivered direct by the Distributor to using customers which are generally served by sales or distribution personnel assigned to such Location.

I

It is ordered and directed, That for a period of twenty (20) years from the date of service of this Order, respondent Union Carbide Corporation (hereinafter Union Carbide), its subsidiaries, divisions, affiliates, successors, and assigns, in connection with the distribution, offering for sale, or sale of Industrial Gases or Welding Products to Distributors in which it owns less than a majority interest, shall:

A. Not offer, renew, extend or enter into any contracts or agreements, or enforce directly or indirectly those provisions of any contract or agreement, which require any Distributor:

1. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas unless (a) the initial term of such contract or agreement is one year or less, and (b) such contract or agreement may be terminated by either party effective on any anniversary date upon written notice given some minimum period in advance of such date as set forth in such contract, such minimum period to be not more than ninety (90) days; or

2. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas at one or more Locations as a condition to being permitted to purchase from Union Carbide such Industrial Gas at another Location; or

3. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas at any Location as a condition to being permitted to purchase from Union Carbide any other Industrial Gas at the same or any other Location; or

4. to purchase from Union Carbide all or any part of its requirements of any Industrial Gas at any Location as a condition to being permitted to purchase from Union Carbide any Welding Products.

B. Not refuse to sell, subject to paragraph A1 above, Industrial Gases or Welding Products to a Union Carbide Distributor because that Distributor refuses (1) to purchase all or a designated part of its requirements of Industrial Gases from Union Carbide; or (2) to purchase from Union Carbide all or any part of its requirements of Industrial Gases at more than one of its Locations.

II

It is further ordered, That for a period of twenty (20) years from the date of service of this Order, Union Carbide shall not, either directly or indirectly through subsidiaries in which Union Carbide owns a majority interest, (i) lease or otherwise make available to customers of any Distributor who has ceased purchasing one or more Union Carbide Industrial Gases within the preceding two years, Industrial Gas cylinders at rental or demurrage rates set for the purpose of destroying a competitor or eliminating competition, or (ii) lease or otherwise make available to competitors of any Distributor who has ceased purchasing one or more Union Carbide Industrial Gases within the preceding two years, Industrial Gas cylinders at rental or demurrage rates lower than the standard rental or demurrage rate for such cylinders then in effect for Union Carbide Industrial Gas Distributors, for the purpose of destroying a competitor or eliminating competition; *provided, however,* that if either a standard cylinder

rental rate schedule to Union Carbide Industrial Gas Distributors or a standard cylinder demurrage rate schedule to such Distributors, but not both, is in effect, then, for the purpose of this Part II, one shall be deemed to be equivalent to the other on the basis of the revenue that would be generated by a single cylinder during a two-month period of continuous usage, rounded to the nearest cent; and *provided, further*, that for the purpose of this Part II, a standard cylinder rental or demurrage rate shall be a rate which is available to all Union Carbide Industrial Gas Distributors; and *provided, further*, that the purpose of destroying a competitor or eliminating competition must be established by proof of intent on the part of Union Carbide to destroy the Industrial Gas business of, or eliminate as a competitor, a Distributor who has ceased to distribute one or more Union Carbide Industrial Gases; and evidence that Union Carbide has engaged in price competition with such Distributor or that Union Carbide intends to seek or obtain the trade of particular customers then being served by such Distributor shall not, by itself, be sufficient to establish such intent; and *provided, further*, that Union Carbide may set rental or demurrage rates for customers or competitors of such Distributor lower than those in effect for Union Carbide Industrial Gas Distributors in good faith response to competitive conditions in the area served by such Distributor; and *provided still further*, that Union Carbide shall have all defenses which would be available in law, including, but not limited to, the defenses of meeting competition and cost justification.

III

A. *It is further ordered*, That for a period of ten (10) years from the date of service of this order, Union Carbide shall not without prior approval of the Commission, except as otherwise provided in paragraph B of this Part III, acquire, directly or indirectly, the whole or any part of the assets, stock, share capital of, or other equity interest in, any Distributor of Industrial Gases and/or Gas Welding Apparatus.

B. No prior approval shall be required under this order for any acquisition by Union Carbide of any assets, stock, share capital of, or other equity interest in, any Distributor of Industrial Gases or Gas Welding Apparatus if such acquisition meets any of the following standards:

1. the acquisition involves only a change in the equity interest of Union Carbide in a Distributor in which Union Carbide already holds an equity interest; or
2. except to the extent such acquisition is covered by clause 3

of this paragraph B, the consummation of the acquisition does not result in Union Carbide owning an equity interest, obtained by acquisition, in Distributors to whom, in the calendar year prior to the calendar year in which such acquisition is consummated, Union Carbide sold in excess of 16 percent of its total sales of Industrial Gases or 16 percent of its total sales of Gas Welding Apparatus sold in such year to all acquired and independent Distributors; *provided, however*, that no acquisition of a Distributor shall be exempt from prior approval under this clause 2 unless the Distributor to be acquired purchased from Union Carbide more than 50 percent of its total purchases of industrial gases in the calendar year prior to the calendar year in which such acquisition is consummated; or

3. the acquisition is not covered by clause 2 of this paragraph B, but within twelve (12) months prior to the consummation of such acquisition Union Carbide has divested absolutely and in good faith by sale or spin-off its equity interests in one or more Distributors the aggregate dollar value of whose purchases of Industrial Gases and Gas Welding Apparatus, respectively, in the calendar year in which such acquisition is consummated was equal to or in excess of the aggregate dollar value of purchases of Industrial Gases and Gas Welding Apparatus, respectively, in such prior calendar year, by the Distributor so acquired; *provided, however*, that, to the extent that any purchases by a divested Distributor are utilized by Union Carbide in a determination that an acquisition falls within the provisions of clause 2 or 3 of this paragraph B, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of this clause 3; or

4. the transaction involves only (a) the purchase of products from a Distributor in the normal course of business, or (b) the purchase of fixed assets from an independent Distributor in a transaction in which the Distributor will continue thereafter to carry on its function as an independent Distributor in which Union Carbide has no equity interest; or

5. but for the acquisition by Union Carbide, the Distributor would have ceased business operations as an Industrial Gas Distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

C. During the period that this Part III is in effect, Union Carbide shall advise the Commission, prior to consummation thereof, of each acquisition of the type described in paragraph A of this Part III as to

which prior approval is not required because of the provisions of paragraph B2 or B3 of this Part III.

D. During the period that this Part III is in effect, Union Carbide shall, within ninety (90) days from the date of each acquisition described in paragraph B5 of this Part III, provide information sufficient for the Commission to determine whether, but for the acquisition by Union Carbide, the Distributor would have ceased business operations as an Industrial Gas Distributor as a result either of its financial condition or of the death or physical or mental incapacity of essential management personnel.

IV

It is further ordered. That if, during the ten (10) year period beginning on the date of service of this order, any Distributor of Industrial Gases and/or Gas Welding Apparatus in which Union Carbide holds an equity interest acquires, without the prior approval of the Commission to the extent such approval would be required under Part III of this order if such acquisition were made directly or indirectly by Union Carbide, the whole or any part of the assets, stock, or share capital of, or other equity interest in, any Distributor of Industrial Gases and/or Gas Welding Apparatus, then Union Carbide shall within six (6) months thereafter divest absolutely and in good faith by sale or spin-off its equity interests in one or more Distributors, the aggregate dollar value of whose purchases of Industrial Gases and Gas Welding Apparatus, respectively, in the prior calendar year was equal to or in excess of the aggregate dollar value of purchases of Industrial Gases and Gas Welding Apparatus, respectively, in such prior calendar year by the Distributor so acquired; *provided, however*, that to the extent that any purchases by a divested Distributor are utilized by Union Carbide in determining compliance with the divestiture provisions of this Part IV, the purchases so utilized shall not again be utilized by Union Carbide in determining whether any other acquisition falls within the provisions of Paragraph III B3 of this order.

V

It is further ordered:

A. That if the Commission does not seek against Airco, Inc., an order to cease and desist from engaging in practices set forth in paragraph 10 of the complaint here attached, similar to that provided in Parts I and II of this order, in a complaint arising out of the investigation conducted under FTC File No. 751 0010 and issued not

later than one year from the effective date of this order, then Parts I and II of this order shall be of no further force and effect after such anniversary date.

B. That if the Commission issues on or before the first anniversary of the effective date of this order a complaint against Airco, Inc. arising out of the investigation conducted under FTC File No. 751 0010 and at any time after issuance such complaint is dismissed on the motion of, or without objection by, the Commission staff, then Parts I and II of this order shall be of no further force and effect after the effective date of such dismissal.

C. That if a consent order is entered against Airco, Inc. in settlement of a proceeding arising out of the investigation conducted under FTC File No. 751 0010 which contains any provisions that differ from any provisions of Part I or II of this order, then Union Carbide may apply to the Commission for modification of, or relief from, any such different provisions in this order, and upon such application the Commission shall grant such modification or relief in the provisions covered by such application as are necessary to conform such provisions in this order with the corresponding provisions of such Airco, Inc. consent order.

VI

It is further ordered, That Union Carbide shall within twenty-one (21) days after service upon it of this order forward a copy of this order and the complaint issued herein along with a copy of the attached letter (Attachment A) on respondent's official company stationery and signed by a responsible official of Union Carbide to Distributors of Union Carbide Industrial Gases and/or Gas Welding Apparatus.

VII

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

VIII

It is further ordered, That Union Carbide shall within sixty (60) days after service upon it of this order file with the Commission a report in writing setting forth in detail the manner in which it has complied with this order, and shall file such other reports as may

from time to time be required to assure compliance with the terms and conditions of this order.

ATTACHMENT A

(Official Stationery of Union Carbide Corporation)

Dear

Date

Please be advised that Union Carbide Corporation has entered into a Consent Order with the Federal Trade Commission which obligates the company not to impose certain restrictions upon Industrial Gases* and Welding Products* Distributors* or to engage in certain other practices. A copy of the Consent Order is enclosed herewith.

Union Carbide has agreed not to enforce those provisions of any existing contract for the purchase of Industrial Gases or Welding Products which are inconsistent with Paragraph IA of this Order. Thus, you will not be required to purchase from Union Carbide any part of your requirements of any Industrial Gas at any Location* as a condition to being permitted to purchase from Union Carbide the same Industrial Gas at another Location or any other Industrial Gas at the same or any other Location or any Welding Products. Union Carbide has agreed that you may terminate any existing contract for Industrial Gases or Welding Products either in its entirety, or as to any individual Industrial Gas at any Location, upon ninety (90) days prior written notice to Union Carbide.

Union Carbide will submit to you new contracts consistent with the Consent Order discussed above no later than six (6) months from the date of service of the Order. These new contracts will replace all current contracts no later than the first anniversary of the date of service of the Order and notice of termination will be given by Union Carbide not later than ninety (90) days prior to that date. If, at any earlier date, you choose to terminate any existing contract, either in its entirety or as to a particular Industrial Gas at a particular Location, you will be offered this new contract in its place. In any event, these new contracts will replace all current contracts for Industrial Gases not later than the first anniversary of the date of service of the Order.

Please note that, pursuant to the terms of Part V of the Order, certain provisions of the Order shall no longer be effective if the Commission does not issue, or consents, on the motion of, or without objection by, the Commission staff, to the dismissal of, a complaint against Airco, Inc. Further, if the Commission consents to an order with Airco which differs from this Order, Union Carbide may obtain a corresponding modification of this Order. If any such eventualities occur, we will notify you by letter of the applicable changes.

If, in the future, you believe that any of the terms of the enclosed Consent Order have been violated, you may report the details in writing to:

Federal Trade Commission Bureau of Competition Washington, D.C. 20580

We welcome the opportunity to do business with you on terms which are in accordance with the letter and spirit of the Federal Trade Commission Order.

Very truly yours, (Name and Title of Responsible
Official) Union Carbide Corporation

Enclosure

* The terms "Industrial Gases," "Welding Products," "Distributor" and "Location" are defined in the enclosed order.

Modifying Order

90 F.T.C.

IN THE MATTER OF
SOFT SHEEN COMPANY, INC., ET AL.

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

Docket C-2786. Complaint, Jan. 27, 1976 — Modifying order, Sept. 30, 1977

This order modifies a cease and desist order issued January 27, 1976, 41 FR 7939, 87 F.T.C. 164 to conform with obligations of a consent order issued against a competitive firm, by limiting substantiation requirements for safety claims in Provision I.B., and revising the third warning, pertaining to hair relaxers, in Provision III.

Appearances

For the Commission: *Sharon S. Armstrong.*

For the respondents: *John O. Nelson, Molinair, Allegretti, Newitt & Witcoff and Rickey J. Ament, Chicago, Ill.*

ORDER MODIFYING ORDER TO CEASE AND DESIST

On October 28, 1976, respondent Soft Sheen Co., Inc. petitioned the Commission to reopen this proceeding to modify the third warning in Provision III of the consent order issued January 28, 1976 against respondents in this matter. The third warning, which is to be made in connection with the sale and distribution of respondents' hair relaxer and which is to appear on the packaging, package inserts and the labels of the product, reads, "Do not use on bleached, dyed or tinted hair. If you have previously relaxed your hair, relax only the new growth, as described in the directions." Respondent objects to the inclusion of tinted hair in the warning.

On March 18, 1976, Soft Sheen requested by letter that the order's product coverage be limited to hair relaxers. Our request is incorporated into the October 28, 1976, petition to reopen.

Complaint counsel support the petition and recommend that the warning be modified to read:

3. Do not use on bleached hair. Do not use on permanently colored hair which is breaking, splitting or otherwise damaged. For hair that has been permanently colored and shows no sign of damage, use only mild strength formula.
4. If you have previously relaxed your hair, relax only the new growth, as described in the directions.

We agree that the petition should be granted. Most if not all, of the products manufactured and sold by Soft Sheen are hair care products, and a substantial portion of the firm's revenues is derived