

IN THE MATTER OF

J. WALTER THOMPSON COMPANY

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

Docket 9104. Complaint, Nov. 4, 1977 — Decision, Aug. 23, 1979

This consent order, among other things, requires a New York City advertising agency to cease disseminating advertisements which contain unsubstantiated performance claims for any "product," as the term "product" is defined in the order.

Appearances

For the Commission: *Robert Barton, Ronald Bogard, L. Hahn, Louise Kotoshirodo and Mitchell Paul.*

For the respondent: *Arthur Medow, Chicago, Ill., Donald Green, Wald, Harkrader & Ross, Washington, D.C., Howard Abrahams, New York City and Burton Y. Weitzenseld, Arnstein, Gluck, Weitzenseld & Minow, Chicago, Ill.*

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 Sears, Roebuck and Co., and J. Walter Thompson Company, 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 Sears, Roebuck and Co. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of New York, with its executive office and principal place of business located at Sears Tower, Chicago, Illinois.

PAR. 2. Respondent J. Walter Thompson Co. is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its executive office and principal place of business located at 420 Lexington Ave., New York, New York.

PAR. 3. Respondent Sears, Roebuck and Co., now, and for some time last past has been, engaged in the distribution, sale, and advertising of portable and undercounter dishwashers and other consumer products to the public.

PAR. 4. Respondent Sears, Roebuck and Co. causes the said products, when sold, to be transported from its places of business in various

States of the United States to purchasers located in various other States of the United States and in the District of Columbia. Respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondent Sears, Roebuck and Co. at all times mentioned herein has been and now is in substantial competition in commerce with individuals, firms and corporations engaged in the sale and distribution of dishwashers and other consumer products.

PAR. 6. Respondent J. Walter Thompson Co. is now, and for some time last past has been, an advertising agency of respondent Sears, Roebuck and Co., and now and for some time past has prepared and placed for dissemination, advertising material to promote the sale of various consumer products including Sears dishwashers.

PAR. 7. Respondent J. Walter Thompson Co. at all times mentioned herein has been, and is now, in substantial competition in or affecting commerce with other advertising agencies.

PAR. 8. In the course and conduct of their businesses, and for the purpose of inducing the sale of Sears dishwashers and other consumer products of respondent Sears, Roebuck and Co., respondents have disseminated and caused the dissemination of advertising in national magazines distributed by the mail and across state lines, and in television broadcasts transmitted by television stations located in various States of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines. In addition, respondent Sears has disseminated across state lines advertising in newspapers and in catalogs distributed by the mail, and by other means, and through various other outlets including point of sale.

PAR. 9. Typical of advertisements so disseminated or caused to be disseminated by respondents are the advertisements attached as Exhibits A (print ad) and B (television ad).

PAR. 10. Said Exhibits A and B and others, represent, directly or by implication, that the Sears Lady Kenmore dishwasher will completely remove, without prior rinsing or scraping, all residue and film from dishes and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers, when such dishes, pots and pans are placed in the bottom rack of the dishwasher for one complete set of washing and rinsing cycles.

PAR. 11. At the time that respondents made the representations alleged in Paragraph Ten, they did not possess and rely on a reasonable basis for such representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 12. In truth and in fact, contrary to respondents' representations in Paragraph Ten, the Sears Lady Kenmore dishwasher will not completely remove, without prior rinsing or scraping, all residue and film from all dishes, and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers, when such dishes, pots and pans are placed in the bottom rack of the dishwasher for one complete set of washing and rinsing cycles. Therefore, said advertisements are deceptive or unfair.

PAR. 13. Said Exhibit A, and others represent directly or by implication, that dishes in the top rack of the dishwasher will get as clean as those on the bottom rack after one complete set of washing and rinsing cycles, without prior rinsing or scraping.

PAR. 14. In truth and in fact, at the time respondents made the representations as alleged in Paragraph Thirteen, the respondents had no reasonable basis for making said representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 15. Said Exhibit A and others, by stating that the "Sani-Wash" cycle gets dishes, pots and pans hygienically clean by giving them an extra hot 155° final rinse, represents, directly or by implication, that this cycle destroys all harmful and other bacteria and microorganisms on the dishes, pots and pans.

PAR. 16. At the time respondents made the representations alleged in Paragraph Fifteen, they did not possess and rely on a reasonable basis for such representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 17. In truth and in fact, contrary to respondents' representations in Paragraph Fifteen, the "Sani-Wash" cycle does not destroy all harmful and other bacteria and microorganisms on dishes, pots and pans. Therefore, the said advertisements are deceptive or unfair.

PAR. 18. Said Exhibits A and B and others represent directly or by implication, that the demonstrations depicted and referred to in Exhibit A and Exhibit B prove that Sears Lady Kenmore dishwashers will completely remove, without prior rinsing or scraping, all residue and film remaining on all dishes, pots and pans after cooking and baking according to normal consumer recipes and under other circumstances normally and expectably encountered by consumers.

PAR. 19. In truth and in fact, the said demonstrations do not prove that the Sears Lady Kenmore will completely remove, without prior rinsing or scraping, all residue and film from all dishes, and from pots and pans used in cooking and baking according to normal consumer recipes and under other circumstances normally and expectably

encountered by consumers. Therefore, the said advertisements are deceptive or unfair.

PAR. 20. As alleged in Paragraph Ten of this complaint, said Exhibits A and B and others represent, directly or by implication, that it is unnecessary to scrape or rinse dishes, pots or pans prior to washing them in the Sears Lady Kenmore. In contrast, the Sears owners manual, which is provided to consumers after they purchase a Sears dishwasher, instructed the user to pre-soak or scour firmly cooked or baked-on foods.

PAR. 21. (a) Such instructions are a material fact in light of the representation made in advertising as set forth in Paragraph Ten. Said advertisements fail to reveal a fact material in light of the representation made, and are therefore deceptive or unfair. (b) Such instructions are materially inconsistent with the advertising representation set forth in Paragraph Ten. Therefore, the said advertisements are deceptive or unfair.

PAR. 22. Said Exhibits A and B and others, represent directly or by implication, that respondent had a reasonable basis for making, at the time they were made, the representations as alleged in Paragraphs Ten, Thirteen and Fifteen whereas in truth and in fact respondent had no reasonable basis for such representations. Therefore, the said advertisements are deceptive or unfair.

PAR. 23. The use by respondents of the aforesaid false, misleading, deceptive or unfair statements, representations, and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of dishwashers sold by respondent Sears by reason of said erroneous and mistaken belief.

PAR. 24. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair or deceptive acts or practices in commerce and unfair methods of competition, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

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Exhibit A

This demonstration represents the powerful cleaning power of Sears Lady Kenmore.

Certified by the National Consumer Testing Institute.



Sears Lady Kenmore. The do-it-itself dishwasher.

No scraping. No pre-rinsing. Lady Kenmore has 6 powerful hot water jets for the bottom rack, surging hot water with enough force to scrub every dish, pot and pan really clean. Even baked-on food comes off.

And the dishes on top get as clean as those on the bottom. Because every cup and glass is scoured inside and out by a field of eight upper jets.

Then there's Lady Kenmore's protected pulverizer for leftovers. It's kind of a mini-grinder with 12 stainless steel teeth that grind soft foods into tiny particles that wash right down the drain. (Of course, water is always

fresh and clean—the water that rinses your dishes hasn't washed them.)

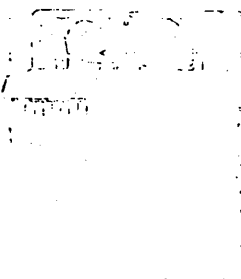
And our 8 different cycles include Sani-wash, which gives your dishes an extra-hot 155° final rinse. So everything is hygienically clean.

What's more, Sears Lady Kenmore is built to perform. But if you ever do have a problem, you can rely on Sears service.

Sears Lady Kenmore does just about everything, itself. So you really do have freedom from scraping and pre-rinsing. That's why we call it The Freedom Maker. The Freedom Maker, both built-in and portable, is

available at Sears, Roebuck and Co. stores and through the catalog.

Sears



The Freedom Maker



THE LITTLE THOMSON COMPANY
675 NORTH MICHIGAN AVENUE CHICAGO, ILLINOIS 60611

TELEVISION COMMERCIAL

FILM CODE: 2694 CLIENT: SEARS, ROEBUCK AND COMPANY PRODUCT: LADY KENMORE DISHWASHER DATE: "A" 6/5/72	Exhibit B TITLE: "BIRTHDAY CAKE" LENGTH: 30 SECONDS STATUS: AS FILMED SEARS #: N6-1072-6530
<u>VIDEO</u> MOTHER FINISHES FROSTING A CAKE. LITTLE GIRL LICKS FROSTING BOUL. CU DISHES GOING INTO DISHWASHER. INSIDE SHOT OF DISHWASHER CLEANING. SUPER: DEMONSTRATION CERTIFIED BY NATIONWIDE CONSUMER TESTING INSTITUTE. CU DISHWASHER, SUPER: THE FREEDOM MAKER CU MOTHER, LITTLE GIRL AND CAKE.	<u>AUDIO</u> (MUSIC) <u>ANNCR (VO):</u> Sears Lady Kenmore Dishwasher gives you freedom from scraping and freedom from pre-rinsing. Because it has two hot water jets that scour dishes and a stainless steel pulverizer for soft food waste. We call Sears Lady Kenmore THE FREEDOM MAKER. Because it gives you freedom to do more important things.

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DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission issued, together with a proposed form of order; 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 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 considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(c) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent J. Walter Thompson Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and a principal place of business located at 420 Lexington Ave., New York, New York.

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

PART I

It is ordered, That respondent J. Walter Thompson Company (hereafter "J. Walter Thompson" or "JWT"), a corporation, its successors and assigns, either jointly or individually, and its officers, representatives, and agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with advertising, offering for sale, distribution or sale of the products as defined in Part II, paragraph 3 of this order, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing directly or by implication that any product will clean, without prior rinsing or scraping, all dishes, pots and pans used

in cooking and baking according to normal consumer recipes and under circumstances normally and expectably encountered by consumers, unless JWT has a reasonable basis for such representation.

2. Making any statement or representation directly or by implication concerning the performance of the product, unless JWT has a reasonable basis for such statement or representation.

It shall be an affirmative defense to any compliance action alleging a violation of paragraphs 1 or 2 of Part I of the order for JWT to show that, prior to disseminating an advertisement containing the statement or representation challenged in such compliance action, JWT submitted to its client in writing all the performance claims which it reasonably believed were contained in the advertising prepared by it and exercised due care to assure itself that the advertiser possessed and relied upon a reasonable basis for those claims.

3. Advertising any such product by referring to or presenting evidence, including a test, experiment, demonstration, study, survey or report, which evidence is represented, directly or by implication, as showing or proving the performance of the product, when such evidence does not show or prove such performance.

It shall be an affirmative defense to any compliance action alleging a violation of paragraph 3 of Part I of this order for JWT to show that, prior to disseminating an advertisement containing the reference or presentation of evidence challenged in such compliance action, JWT submitted to its client in writing all the performance claims which it reasonably believed were shown or proven by the reference or presentation of such evidence in advertising prepared by it and exercised due care to assure itself that this evidence did show or prove such performance claims.

4. Making any statement or representation, directly or by implication, in connection with the advertisement of any such product which it knows or has reason to know is inconsistent in any material respect with any statement or representation concerning the performance of the product made, directly or by implication, in post-purchase material(s) supplied to the purchaser of such product. For purposes of this order, post-purchase material(s) is defined as any product operating manuals and other written material typically made available by JWT's client to an individual who purchase the model of product identified in the advertising prepared by JWT; provided that this paragraph shall only appeal to JWT during the time the advertisement is created and first placed by JWT.

Provided, however, that nothing in this order shall be deemed to deny or limit JWT with respect to any right, defense, or other affirmative

defense to which JWT may otherwise be entitled by law in a compliance action or any other action; nor shall any inference adverse to JWT be drawn in any case from its failure to invoke the affirmative defenses provided in this Part or to rely on the procedures provided herein.

PART II

For purposes of this order, each of the terms listed below, as applied to an advertising agency, is defined as follows:

1. A "reasonable basis" shall consist of a competent and reliable scientific test or tests, or other competent and reliable evidence including competent and reliable opinions of scientific, engineering, or other experts who are qualified by professional training and experience to render competent judgments in such matters.

2. A competent and reliable "scientific test" is one in which one or more persons, qualified by professional training, education and experience, formulate and conduct a test and evaluate its results in an objective manner using testing procedures which are generally accepted in the professions to attain valid and reliable results. The test may be conducted or approved by (a) a reputable and reliable organization which conducts such tests as one of its principal functions, (b) by an agency or department of the government of the United States, or (c) persons employed or retained by JWT's client if they are qualified (as defined above in this paragraph) and can conduct and evaluate the test in an objective manner.

3. The term "product" shall be defined as follows:

(a) dishwashers; and

(b) for paragraphs 2, 3 and 4 of Part I, and for Part II and Part III, the major home appliances identified in the Stipulation of Fact attached hereto, entered on June 7, 1978 (and incorporated herein by reference), but only in the event and to the extent that the Commission hereafter enters an order to cease and desist against Sears in this matter covering each of these products and said order becomes final.

4. The term "performance of the product" shall be defined as follows:

(a) cleaning performance; and

(b) for paragraphs 2, 3 and 4 of Part I, and for Part II and Part III, all other performance claims of the major home appliances identified in the Stipulation of Fact attached hereto, entered on June 7, 1978 (and incorporated herein by reference), but only in the event and to the extent that the Commission hereafter enters an order to cease and

Stipulation of Fact

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desist against Sears in this matter covering such other performance claims of these products and said order becomes final.

PART III

It is further ordered, That:

For the period of three years after JWT last placed the advertisements for dissemination, JWT shall retain all tests results, data, and other documents on which it relied for advertisements of products covered by this order which were in its possession during either creation or placement by JWT of the advertisements.

JWT shall 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.

JWT shall forthwith distribute a copy of this order to each of its operating divisions, and to each of its officers, agents, representatives, or employees engaged in the preparation and placement of advertisements of the products covered by this order.

JWT shall, within sixty (60) days after service upon it of this order, file with the Commission a written report setting forth in detail the manner and form of its compliance with this order.

STIPULATION OF FACT

Undersigned complaint counsel and counsel for J. Walter Thompson Company ("JWT") stipulate as follows:

(1) Between January 1, 1971 and December 31, 1975 J. Walter Thompson prepared and disseminated advertisements for Sears, Roebuck and Co. ("Sears") featuring the following major home appliances: air conditioning units (room or built-in), disposers, dishwashers and trash compactors.

(2) JWT was not involved in the preparation or dissemination of any other advertisement featuring any other Sears major home appliance between January 1, 1971 and December 31, 1975.

(3) For purposes of Part II, paragraph 3(b) of the Agreement Containing Consent Order To Cease And Desist, covering JWT in this proceeding, the major home appliances are all makes of air conditioning units (room or built-in), disposers, dishwashers and trash compactors.

The above Stipulation Of Fact is entered solely and exclusively for purposes of this proceeding and for any Federal Trade Commission order that may issue in this proceeding.

/s/ Robert Barton
Complaint Counsel

/s/ Mark Schattner
Counsel for
J. Walter Thompson Company

Dated: June 7, 1978

IN THE MATTER OF
LONE STAR INDUSTRIES, INC., ET AL.

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

Docket 9122. Complaint, Jan. 25, 1979 — Decision, Aug. 23, 1979

This consent order requires a Greenwich, Conn. manufacturer of portland cement and masonry cement, and the Keystone Portland Cement Co., an Allentown, Pa. competitor, among other things, to provide the Commission with evidence that their acquisition agreement has been terminated, and all non-public documents exchanged during negotiations returned. Respondents are also required to provide the Commission with 60 days' advance notice and liberal discovery rights, should merger plans be resumed before Dec. 31, 1981.

Appearances

For the Commission: *Bert L. Slonim* and *Nicholas P. Kostopoulos, Jr.*

For the respondents: *Melvin C. Garbow* and *D. Bonderman*, *Arnold & Porter*, Washington, D.C. for Lone Star Industries, Inc. and *Ralph W. Brenner* and *T. Michael Mather*, *Montgomery, McCracken, Walker & Rhodes*, Philadelphia, Pa. for Keystone Portland Cement Co.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondents, each subject to the jurisdiction of the Commission, have entered into a merger agreement, which, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; that said agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. 45; and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, pursuant to Section 11 of the Clayton Act, 15 U.S.C. 21, and Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. 45(b), stating its charges as follows:

I. DEFINITIONS

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

a. The term "portland cement" means Types I through V of portland cement as specified by the American Society for Testing Materials.