

Complaint

97 F.T.C.

IN THE MATTER OF

SHALLER RUBIN ASSOCIATES, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECTIONS 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3056. Complaint, March 4, 1981—Decision, March 4, 1981*

This consent order requires, among other things, a New York City advertising agency to cease, in connection with the advertising and sale of Encare or any similar over-the-counter vaginal contraceptive suppository product, misrepresenting or failing to substantiate claims relating to the product's effectiveness, safety and performance characteristics. The firm is further prohibited from disseminating advertisements using performance or quality heightening modifiers such as "highly," or "extremely," in conjunction with words like "effective" or "reliable." Additionally, the order requires the company to disclose in print, radio and TV consumer advertising, certain facts material to contraceptive suppository use; and maintain business records for a period of three years.

Appearances

For the Commission: *Shirley Sarna and Paula Steiner.*

For the respondent: *Ellis Ratner, Davis & Gilbert, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that Shaller Rubin Associates, Inc., a corporation (hereinafter "respondent"), has violated Sections 5 and 12 of the Federal Trade Commission Act, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

PARAGRAPH 1. Shaller Rubin Associates, Inc. is a New York corporation with its principal place of business at 909 Third Ave., New York, New York.

Allegations stated in the present tense include the past tense.

PAR. 2. For purposes of this complaint the following definitions shall apply:

(1) A "vaginal contraceptive suppository" is a spermicidal contraceptive product which is inserted into the vagina prior to coitus. Body temperature or vaginal secretions dissolve the suppository and spread its sperm killing agent through the vaginal cavity.

(2) "Use effectiveness" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of

subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

(3) "*Commerce*" means commerce as defined in the Federal Trade Commission Act, as amended.

PAR. 3. Respondent Shaller Rubin Associates, Inc. is a former advertising agency for Morton-Norwich Products, Inc. and Eaton-Merz Laboratories, Inc. In such capacity respondent Shaller Rubin Associates, Inc. has prepared and placed advertising for publication and has caused the dissemination of advertising, including the advertising referred to herein, to promote the sale of a vaginal contraceptive suppository product named "Encare" or "Encare Oval" (hereinafter "Encare") a "drug" within the meaning of Section 15 of the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its business respondent has disseminated or caused the dissemination of certain advertisements concerning Encare (1) by United States mail, or by various means in or having an effect upon commerce, including but not limited to insertion in newspapers or magazines of interstate dissemination and radio broadcasts of interstate transmission for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Encare; or (2) by various means, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of Encare in or having an effect upon commerce.

PAR. 5. Among the advertisements and other sales promotion materials, and typical of the statements and representations made in respondent's advertisements but not all inclusive thereof, is the advertisement identified as Attachment 1 which is incorporated by reference herein.

PAR. 6. Through the use of this advertisement, and others not specifically set forth herein, respondent represents, directly or by implication, that:

1. Encare has an extremely high use effectiveness, approaching the level of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD").
2. Encare has novel contraceptive performance characteristics.

PAR. 7. In truth and in fact:

1. Encare's use effectiveness is approximately that of other vaginal contraceptive products. It is not considered to have a use effectiveness on the level of the pill or IUD.
2. Encare does not have novel contraceptive performance charac-

teristics except as to the characteristics associated with its method of delivery. Its sperm killing ingredient, nonoxynol 9, has been in use for many years in various contraceptive products.

Therefore, the advertisements and representations referred to in Paragraphs Five and Six are false, deceptive or misleading.

PAR. 8. At the time respondent made the representations alleged in Paragraph Six, respondent had no reasonable basis for making those representations. Therefore, the making and dissemination of such representations constitute deceptive or unfair acts or practices in or affecting commerce.

PAR. 9. Through dissemination of the advertisement identified as Attachment 1, respondent advertises Encare without disclosing to the purchasing public through the advertising that:

1. Women for whom pregnancy presents a special health risk should make a contraceptive choice in consultation with their physician.
2. Some Encare users experience irritation in using the product.
3. Encare requires a waiting period of ten minutes before intercourse.

PAR. 10. Furthermore, respondent advertises Encare without disclosing to the purchasing public through the advertising that:

Encare is approximately as effective as vaginal foam contraceptives in actual use.

PAR. 11. The facts described in Paragraphs Nine and Ten are material with respect to the consequences which may result from use of Encare as a contraceptive under such conditions as are customary or usual. Respondent's failure to disclose these material facts renders the advertisements referred to in Paragraphs Four and Five false, deceptive or misleading.

PAR. 12. Furthermore, through the use of the advertisements referred to in Paragraphs Four and Five, respondent, directly or by implication, favorably compares some characteristics of Encare to the pill or the IUD and represents in the same advertisement that Encare has an extremely high use effectiveness. Favorable comparison of Encare to certain characteristics of the pill or IUD has the tendency and capacity to lead members of the public into the erroneous and mistaken belief that Encare's use effectiveness is equal to that of the pill or IUD. Respondent fails to disclose the material fact that Encare has a use effectiveness below that of the pill or IUD and approximately the same as other vaginal foam contraceptive products.

PAR. 13. The fact described in Paragraph Twelve is material in light of the comparative representations made in respondent's advertisements. Respondent's failure to disclose this material fact in advertisements containing such comparative representations renders the advertisements referred to in Paragraphs Four and Five false, misleading or unfair.

PAR. 14. In the course and conduct of its business, and at all times mentioned herein, respondent is in substantial competition in or affecting commerce with corporations, firms and individuals engaged in the sale of services of the same general kind and nature as are sold by respondent.

PAR. 15. The use by respondent of the aforesaid false, misleading, deceptive or unfair statements, representations, acts or practices and the dissemination of the aforesaid false advertisements has the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations are true and into the purchase of substantial quantities of respondent's products or services by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondent as herein alleged, including the dissemination of false advertising, are all to the prejudice and injury of the public and of respondent's competitors and constitute unfair methods of competition or unfair or deceptive acts or practices in or affecting commerce in violation of Sections 5 and 12 of the Federal Trade Commission Act. The acts and practices of respondent, as herein alleged, are continuing and will continue in the absence of the relief herein requested.

Commissioner Pitofsky did not participate.

THE FACTS:

1 HUNDREDS OF THOUSANDS OF AMERICAN WOMEN ARE ALREADY USING ENCORE OVAL™

Encore Oval™ was introduced in the U.S. to doctors in November 1977, and has drawn the attention of both the medical profession and the public to a greater extent than any contraceptive product since the pill. Gynecologists have been recommending it with high frequency. And Encore Oval already has become the vaginal contraceptive most often recommended by pharmacists.

Today, Encore Oval is being used by hundreds of thousands of women, and users surveyed report overwhelming satisfaction. Encore Oval™ users say they find it an answer to their concerns about the pill, IUDs, diaphragms, and aerosol foams.



the potent sperm-killing agent, nonoxynol 9. Once properly inserted, Encore Oval melts and gently effervesces, dispersing the protective, sperm-killing agent within the vagina.

It is known that the success of any contraceptive method depends on consistent and accurate use. Encore Oval™ has been designed to be so convenient, you won't be tempted to forget it. And so simple to insert, it's hard to make a mistake.

If you've been advised not to become pregnant for reasons of health, a decision about any contraceptive method should be made after consultation with your doctor.

3 UNLIKE THE PILL, ENCORE OVAL HAS NO HORMONAL SIDE EFFECTS.

Encore Oval™ is free of hormones, so you're sure it won't disrupt your hormonal chemistry. Encore Oval™ cannot create hormone-related health problems—like strokes and heart attacks—that have been linked to the pill.

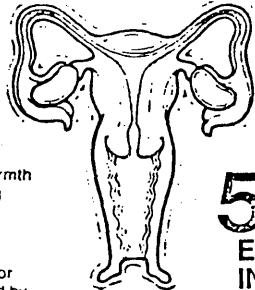
And because you don't take the pill, there's none of the associated weight gain, bloating, or breast enlargement. Since there is no hormonal disruption of your

2 ITS EFFECTIVENESS HAS BEEN ESTABLISHED IN CLINICAL TESTS.

In a recent U.S. clinical study, Encore Oval was subjected to one of the most rigorous tests ever conducted for a vaginal contraceptive. It showed that Encore Oval provides consistent and extremely high sperm-killing protection. These excellent results support earlier studies in European laboratories and clinics. Each Encore Oval insert contains a precise, premeasured dose of



The most contraceptive



menstrual cycle your periods should remain normal.

In some cases a feeling of warmth has been reported when using Encare Oval. This is usually no cause for concern.

In a limited number of cases, however, a burning sensation or irritation has been experienced by either or both partners. This can occur in varying degrees with virtually all vaginal contraceptives.

In these instances, use should be discontinued.

4 ENCARE OVAL IS EASIER TO INSERT THAN A TAMPON.

The Encare Oval is smooth and small, so it inserts quickly and easily—without an applicator. Simply use as directed.

There's none of the bother of aerosol foams and diaphragms. Just insert an Encare Oval when you need protection. There's nothing to wear. No device inside you to slip out of place. No pill to remember every day.

Each Encare Oval provides maximum protection during the period from 10 minutes to 1 hour after insertion.

You can buy Encare Oval whenever you need it...it's available without a prescription. And each Encare Oval

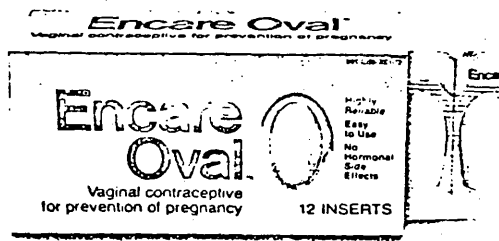
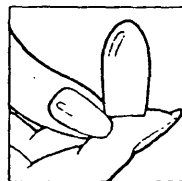
is individually wrapped to fit discreetly into your pocket or purse.

5 BECAUSE ENCARE OVAL IS INSERTED IN ADVANCE, IT WON'T INTERRUPT LOVEMAKING.

Since there's no fuss or bother, Encare Oval encourages spontaneity, providing a measure of freedom many other contraceptives can't match.

The hormone-free Encare Oval. Safer for your system than the pill or IUD. Neater and simpler than traditional vaginal contraceptives. So effective and easy to use that hundreds of thousands have already found it—quite simply—the preferred contraceptive.

© 1978 Eaton-Merz Laboratories, Inc.
Norwich, New York 13815 EA-1615



talked about since the pill.

Decision and Order

97 F.T.C.

DECISION AND ORDER

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

The respondents, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order and admission by the respondents 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 respondents 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 Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons 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 Shaller Rubin Associates, Inc. is a New York corporation with its principal place of business at 909 Third Ave., New York, New York.
2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

This Order applies to respondent Shaller Rubin Associates, Inc. its successors, assigns, officers, agents and employees, whether acting directly or through any corporation, subsidiary, division or other device. Except as otherwise provided, order provisions apply to any act taken in connection with respondent's advertising, offering for sale, sale or distribution of Encare or any OTC (over-the-counter) contraceptive product in or affecting commerce within the United

States, including the Commonwealth of Puerto Rico and any territory or possession of the United States. The reasonable basis standards used in this Order are not intended to set a standard for drug products other than OTC contraceptives.

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

1) "*Use effectiveness*" or effectiveness "in actual use" means that level of effectiveness which is obtained when the contraceptive method is used by large numbers of subjects not all of whom follow the instructions accurately or use the contraceptive method each time they have sexual relations.

2) "*Encare*" means the vaginal contraceptive suppository product marketed under the tradename Encare or Encare Oval, or any vaginal contraceptive suppository product of substantially the same chemical formulation.

3) "*Advertisement*" means any written, verbal or audiovisual statement, illustration, depiction or presentation, which is designed to effect the sale of any OTC contraceptive product, or to create interest in the purchasing of such products (except a package or package insert) whether same appears in a brochure, newspaper, magazine, leaflet, circular, mailer, book insert, catalog, billboard, public transit card, point-of-sale display, film strip, video presentation, or in a radio or television broadcast or in any other media, regardless of whether such statement, illustration, depiction or presentation is characterized as promotional, educational or informative; provided, however, that the term advertisement does not include material which solely refers to the product without making any claims for the product.

4) "*Product or use characteristic*" includes but is not limited to efficacy, safety or convenience.

I

It is ordered, That respondent cease and desist from:

A. Making in consumer (lay) advertisements any contraceptive effectiveness claims regarding Encare which use the words "effective" or "reliable" in conjunction with any performance or quality heightening modifiers such as "highly", "extremely" and the like.

B. Misrepresenting, directly or by implication, the effectiveness of any OTC contraceptive product; unless respondent neither knew nor should have known that the representation was false, deceptive or misleading.

C. Representing, directly or by implication, that Encare has

novel contraceptive performance characteristics except as to the characteristics associated with its method of delivery.

D. Making any representation, directly or by implication, concerning the effectiveness of any OTC contraceptive product unless respondent has a reasonable basis for such representation consisting of a consistent body of valid and reliable scientific evidence; provided, however, that respondent may represent that Encare is effective or reliable or make other effectiveness claims as permitted by this Order (for example, "Encare provides reliable protection against pregnancy").

II

It is further ordered, That respondent make the following affirmative disclosures in any consumer (lay) print advertisement for Encare:

A. For best protection against pregnancy, it is essential to follow package instructions.

B. If your doctor has told you that you should not become pregnant, you should ask your doctor which contraceptive method, including Encare, is best for you.

C. Some Encare users experience irritation in using the product.

D. It is essential that you insert Encare at least ten minutes before intercourse.

E. Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above affirmative disclosures shall be made clearly and conspicuously. Disclosures C, D and E shall be made in the exact language indicated above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure D consistent with such reasonable basis. Disclosures D and E shall be made in type at least as large as the type face of the major portion of the text of the advertising copy. Disclosures D and E shall be separate and distinguishable from the main body of the advertisement for a period of 24 months following the date of service of this Order or 27 months from the date of signing of this Order, whichever expires earlier.

III

It is further ordered, That respondent make the following affirma-

tive disclosure in any consumer (lay) print advertisement for Encare in which any product or use characteristic of Encare is compared, directly or by implication, to any product or use characteristic of oral contraceptives (hereinafter "the pill") or intrauterine devices (hereinafter "IUD"):

Encare is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

or

Encare is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Either above affirmative disclosure shall be made, where required, in lieu of Disclosure II.E above. The disclosure shall satisfy the requirements regarding exact language, size of type and relation to the main body of the advertisement specified for Disclosure II.E.

IV

It is further ordered, That respondent make the following disclosures in any consumer (lay) TV advertisements for Encare:

A. Follow directions exactly, including the ten minute waiting period.

B. Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above disclosures shall be made clearly and conspicuously as video supers and in the exact language indicated above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure IV.A consistent with such reasonable basis.

V

It is further ordered, That respondent make the following disclosure in any consumer (lay) radio advertisements for Encare:

Encare is approximately as effective as vaginal foam contraceptives in actual use.

The above disclosure shall be made clearly and conspicuously and in the exact language indicated above.

VI

It is further ordered, That respondent shall make the following disclosures in ethical (professional) advertisements for Encare.

- A. Irritation accompanies use of the product in some instances.
- B. Encare must be inserted according to product instructions and at least ten minutes before intercourse.
- C. Encare is approximately as effective as vaginal foam contraceptives in actual use, but is not as effective as the pill or IUD.

or

Encare is not as effective as the pill or IUD in actual use, but is approximately as effective as vaginal foam contraceptives.

Affirmative Disclosures A and B shall be made in language the same as or substantially similar to the language set forth above; *provided, however,* that if respondent has a reasonable basis, consisting of valid scientific test(s) or study(ies), respondent may modify the words "ten minutes" in Disclosure B consistent with such reasonable basis. Disclosure C shall be made in the exact language indicated above, in typeface at least as large as the typeface of the major portion of the text of the advertising copy.

VII

It is further ordered, That respondent cease and desist from:

- A. Disseminating or causing the dissemination of any advertisement, by means of the United States mail or by any means in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, which contains any of the representations prohibited in Paragraph I.A-C of this Order or, with respect to Encare, fails to include any of the disclosures required by this Order.
- B. Disseminating, or causing to be disseminated, by any means for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of Encare or any OTC contraceptive product in or affecting commerce within the United States, including the Commonwealth of Puerto Rico and any territory or possession of the United States, any advertisement which contains any of the representations prohibited in Paragraph I.A-C of this Order or, with respect to Encare, fails to include any of the disclosures required by this Order.

VIII

It is further ordered, That respondent maintain complete business records relative to the manner and form of its compliance with this Order. Such records shall include, but not be limited to, copies of and dissemination schedules for all advertisements; and documents which substantiate or contradict any claim made in advertising, promoting or selling the product. Such records shall be retained for at least three (3) years beyond the last dissemination of any relevant advertisement. Upon thirty (30) days notice respondent shall make any and all such records available to Commission staff for inspection or photocopying.

IX

It is further ordered, That respondent forthwith deliver a copy of this Order to each operating division and to all employees or agents now or hereafter engaged in the sale or offering for sale of Encare or in any aspect of the preparation, creation or placing of advertising for Encare on behalf of respondent. A statement acknowledging receipt of this Order shall be obtained in each case.

X

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in corporate respondent in which the respondent is not a surviving entity, such as dissolution, assignment or sale resulting in the emergence of any successor corporation or corporations, or any other change in said corporation which may affect compliance obligations arising out of this Order.

XI

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

Commissioner Pitofsky did not participate.

IN THE MATTER OF
CITICORP FINANCIAL, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND TRUTH IN LENDING
ACTS

Docket C-3057. Complaint, April 18, 1973—Decision, March 4, 1981*

This consent order requires, among other things, a Towson, Md. financial organization to cease issuing any unsolicited credit card, except in renewal of or in substitution for an accepted credit card. Respondent is additionally required to maintain prescribed records for specified periods.

Appearances

For the Commission: *Frederick D. Clements.*

For the respondent: *Lucian C. Jones, Shearman & Sterling, New York City.*

DECISION AND ORDER

The Commission having heretofore issued its decision and order in Docket No. C-2383 in the matter of Arlen Realty & Development Corp., a corporation, also doing business as Korvettes, a division, and NAC Credit Corporation, a corporation, on April 18, 1973, which provides that said order shall apply to "successors and assigns" of said respondents; and

Citicorp Financial, Inc., having succeeded to a substantial part of the assets of NAC Credit Corporation, a corporate respondent in Docket No. C-2383, and to the management and operation of the NAC Charge Plan formerly managed and operated by NAC Credit Corporation; and

Citicorp Financial, Inc., and counsel for the Commission having executed an agreement containing a consent order, an admission by Citicorp Financial, Inc., of the jurisdiction of the Federal Trade Commission of the subject matter of this proceeding and of Citicorp Financial, Inc., as a successor of NAC Credit Corporation, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by Citicorp Financial, Inc., that it has violated the law as alleged in the Arlen Realty & Development Corp., *et al.* Complaint (Docket No. C-2383),

* Complaint previously published at 82 F.T.C. 1234.