

369

Complaint

IN THE MATTER OF

SUPERMARKET DEVELOPMENT CORPORATION, ET AL.

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

Docket C-3224. Complaint, Mar. 17, 1988—Decision, Mar. 17, 1988

This consent order requires, among other things, Furr's, a wholly owned subsidiary of Supermarket Development Corporation, to divest supermarkets in 12 towns and cities in Texas and New Mexico, to obtain prior Commission approval for future acquisitions by Furr's of grocery stores located in the geographic area covered by the El Paso division, and to hold separate the El Paso division until the required divestitures are completed.

Appearances

For the Commission: *Joan Greenbaum.*

For the respondents: *Joseph A. DeFrancis, Latham & Watkins, Washington, D.C. Joushua F. Greenberg and Michael Malina, Kay, Scholer, Fierman, Hays & Handler, New York City.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that respondents, Supermarket Development Corp. ("SDC" or "Furr's") and SSI Associates, L.P. ("Safeway"), entities subject to the jurisdiction of the Federal Trade Commission, have entered into an agreement, described in paragraph 10 herein, that, if consummated, would violate the provisions of Section 7 of the Clayton Act, as amended, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45; that said agreement and the actions of the respondents to implement that agreement constitute violations of Section 5 of the FTC Act, 15 U.S.C. 45; 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 as follows:

I. DEFINITIONS

1. For the purposes of this complaint, the following definition shall apply:

Supermarket means any full-line retail food store with annual sales

of not less than \$1.5 million, and which sells primarily a wide variety of canned or frozen foods; dry groceries; non-edible grocery items; fresh meat, poultry and produce (vegetables and fruits). In addition, these stores often sell delicatessen items, bakery items, fresh fish, or other specialty items.

II. SUPERMARKET DEVELOPMENT CORP.

2. Respondent, Supermarket Development Corp., is a corporation organized and existing under the laws of the State of Texas, with executive offices located in Dallas, Texas.

3. SDC owns one hundred percent of the voting securities of Furr's, Inc. and controls the operations of Furr's, Inc.

4. Furr's, Inc. is a corporation organized and existing under the laws of the state of Texas, with its principal place of business in Lubbock, Texas.

5. For the year ending December 31, 1986, SDC had net sales of \$906,331,507.

6. Furr's is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

III. SSI ASSOCIATES, L.P.

7. SSI Associates, L.P. ("Safeway"), is a limited partnership organized and existing under the laws of the State of Delaware, with its principal place of business in San Francisco, California.

8. Safeway owns 96.4 percent of the voting securities of Safeway Stores, Inc. and controls the operations of Safeway Stores, Inc.

9. Safeway Stores, Inc. is a corporation organized and existing under the laws of the state of Delaware, with its principal place of business in Oakland, California.

10. For the year ending January 3, 1987, Safeway had net sales of \$20,311,480,000.

11. Safeway is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

IV. THE ACQUISITION

12. On or about April 9, 1987, SDC entered into an agreement with Safeway whereby SDC will purchase the El Paso Division of Safeway ("El Paso Division"), which comprises one closed and 59 open conven-

tional supermarkets; one food warehouse; a milk plant; and an ice cream plant. Almost half of the El Paso Division's stores are in Albuquerque, New Mexico, and El Paso, Texas. The rest of the Division's stores are in smaller metropolitan areas and towns in New Mexico and Texas. All are operated under the "Safeway" trade name and are conventional supermarkets. In 1986, the El Paso Division had grocery sales of \$530 million. There are nineteen cities and towns in which SDC's Furr's stores and Safeway both operate grocery stores.

V. TRADE AND COMMERCE

A. *Relevant Line of Commerce*

13. A relevant line of commerce in which to analyze Furr's acquisition of the El Paso Division is the retail sale and distribution of food and grocery items in supermarkets.

B. *Relevant Section of the Country*

14. Relevant sections of the country are individual cities and towns in the portions of West Texas and New Mexico served by the El Paso Division.

VI. MARKET STRUCTURE

15. Retail sale and distribution of food and grocery items in supermarkets in each of the following relevant sections of the country is extremely concentrated, whether measured by Herfindahl-Hirschman Indices ("HHI") or by two-firm and four-firm concentration ratios: Fort Stockton and Pecos in Texas; and Alamogordo, Artesia, Clovis, Espanola, Hobbs, Las Vegas, Lovington, Portales, Roswell and Silver City in New Mexico.

VII. BARRIERS TO ENTRY

16. Entry into the markets set out in paragraph 15 herein, in the event of substantial price rises, is unlikely.

VIII. ACTUAL COMPETITION

17. SDC and Safeway are actual competitors in the markets alleged herein.

IX. EFFECT

18. The effect of the acquisition, if consummated, may be substantially to lessen competition in relevant product markets in relevant sections of the country in violation of Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, in the following ways, among others:

- a. by eliminating direct competition between SDC and Safeway;
 - b. by increasing the likelihood that SDC will unilaterally exercise market power; and
 - c. by increasing the likelihood of, or facilitating, collusion where the acquisition would significantly increase already high concentration;
- all of which increase the likelihood that firms will increase prices and restrict the output of food and groceries both in the near future and for a longer period of time.

X. VIOLATIONS CHARGED

19. The proposed acquisition of Safeway stores in the twelve markets described above in paragraph 15 would, if consummated, violate Section 7 of the Clayton Act, 15 U.S.C. 18, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

20. The Acquisition agreement set forth in paragraph 12 herein constitutes a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of the acquisition of certain assets of SSI Associates, L.P. ("Safeway") by Furr's, Inc., a wholly owned subsidiary of Supermarket Development Corporation (hereinafter collectively "Furr's"), and Furr's and Safeway, having been furnished with a copy of a draft complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge Furr's and Safeway with violations of the Clayton Act and Federal Trade Commission Act; and

Respondents Furr's and Safeway, their attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by 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 Acts, 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 com-

ments 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:

SDC, which owns 100 percent voting securities and controls Furr's, Inc., is a corporation organized and existing under the laws of the State of Texas with its executive offices located at 1500 Diamond Shamrock Tower, Dallas, Texas;

Furr's, Inc., is a corporation organized and existing under the laws of the State of Texas with its executive offices located at 1708 Avenue G., Lubbock, Texas (hereinafter, SDC and Furr's will be referred to as "Furr's");

SSI Associates, L.P., which owns 96.4 percent of the voting securities of Safeway and controls Safeway, is a limited partnership organized and existing under the laws of the State of Delaware with its executive offices located c/o Kohlberg Kravis Roberts & Company, 101 California Street, San Francisco, California;

Safeway is a corporation organized and existing under the laws of the State of Delaware, with its executive offices located at 201 Fourth Street, Oakland, California (hereinafter, SSI and Safeway will be referred to as "Safeway").

The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Furr's and Safeway, and the proceeding is in the public interest.

ORDER

I.

As used in this order, the following definitions shall apply:

(A) "*Furr's*" means Furr's, Inc., its predecessors, subsidiaries, divisions, groups and affiliates controlled by Furr's and their respective directors, officers, employees, agents and representatives and their respective successors and assigns, and Supermarket Development Corporation, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Supermarket Development Corporation and their respective directors, officers, employees, agents and representatives and their respective successors and assigns.

(B) "*Safeway*" means Safeway, its predecessors, subsidiaries, divisions, groups and affiliates controlled by Safeway and their respective directors, officers, employees, agents and representatives and their respective successors and assigns and SSI Associates, L.P., its prede-

cessors, subsidiaries, divisions, groups and affiliates controlled by SSI Associates, L.P. and their respective directors, officers, employees, agents and representatives and their respective successors and assigns.

(C) "*Acquisition*" means Furr's acquisition of the assets of Safeway's El Paso Division.

(D) "*El Paso Division*" means the sixty grocery stores of Safeway in its El Paso Division, inventory, an administrative building, a distribution center and all related real property and facilities, excluding the dairy and ice cream plants.

(E) "*Assets to be divested*" means the assets described in paragraph II (A), also known as "*II (A) properties*."

(F) "*To be acquired store*" means a retail grocery store in the El Paso Division.

II.

It is ordered, That:

(A) Furr's shall divest, absolutely and in good faith, within nine months from the date this order becomes final, either a store to be acquired or a grocery store presently operated by Furr's in each of the following locations: (a) Alamogordo, New Mexico; (b) Artesia, New Mexico; (c) Clovis, New Mexico; (d) Espanola, New Mexico; (e) Fort Stockton, Texas; (f) Hobbs, New Mexico; (g) Las Vegas, New Mexico; (h) Lovington, New Mexico; (i) Pecos, Texas; (j) Portales, New Mexico; (k) Roswell, New Mexico; and (l) Silver City, New Mexico.

(B) Furr's and Safeway shall maintain the viability and marketability of the assets required to be divested and shall not cause or permit the destruction, removal or impairment of any assets or business to be divested except in the ordinary course of business and except for ordinary wear and tear.

(C) The divestitures required by paragraph II (A) shall be divested to an acquirer or acquirers, and only in a manner, that receives the prior approval of the Commission. The purpose of the divestiture and agreements is to ensure the continuation of the assets as ongoing, viable enterprises engaged in the retail sale of groceries and to remedy the lessening of competition resulting from the acquisition as alleged in the Commission's complaint.

(D) If Furr's has not secured approval from the Commission of a divestiture of all the properties within the nine-month period specified in paragraph II (A), Furr's consents to the appointment by the Commission of a trustee to divest the properties. In the event that the Commission brings an action pursuant to Section 5 (l) of the Federal

Trade Commission Act, 15 U.S.C. 45(l), or any other statute enforced by the Commission, Furr's consents to the appointment of a trustee in such action. The appointment of a trustee shall not preclude the Commission from seeking civil penalties and other relief available to it for any failure by Furr's to comply with this order.

(E) If a trustee is appointed by the Commission or a court pursuant to paragraph II (D) of this order, Furr's consents to the following terms and conditions regarding the trustee's duties and responsibilities:

1. The Commission shall select the trustee, subject to Furr's consent, which shall not be unreasonably withheld. The trustee shall be a person with experience and expertise in acquisitions and divestitures.

2. The trustee shall have the power and authority to divest any properties listed in paragraph II (A) in any location listed therein in which a store has not been divested or for which a contract of sale has not been approved by the Commission within the time period for divestiture in paragraph II (A). The trustee shall have six months from the date of appointment to accomplish the divestiture, which shall be subject to the prior approval of the Commission and, if the trustee is appointed by a court, subject also to the prior approval of the court.

3. If, at the end of the six-month period, the trustee has not secured approval of divestiture as required by paragraph II (A), the trustee may, if the Commission requires in order to accomplish the divestiture, add such other assets acquired pursuant to the acquisition as are required to effectuate the divestiture of the II (A) properties.

4. The trustee shall have full and complete access to the personnel, books, records and facilities of any store that the trustee has the duty to divest, and Furr's shall develop such financial or other information relevant to the assets to be divested as such trustee may reasonably request. Furr's shall cooperate with the trustee, and shall take no action to interfere with or impede the trustee's accomplishment of the divestiture.

5. The power and authority of the trustee to divest shall be at the most favorable price and terms available consistent with the order's absolute and unconditional obligation to divest and the purposes of the divestiture as stated in paragraph II (C).

6. The trustee shall serve at the cost and expense of Furr's on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall account for all monies derived from the sale and all expenses incurred. After approval by the Commission or the court of the account of the trustee, including fees for his or her

services, all remaining monies shall be paid to Furr's and the trustee's power shall be terminated. The trustee's compensation shall be based at least in significant part on a commission arrangement contingent on the trustee divesting the trust property.

7. Within 20 days of the appointment of the trustee, Furr's shall, subject to the Commission's prior approval, and consistent with provisions of this order, transfer to the trustee all rights and powers necessary to permit the trustee to cause divestiture and sign agreements for the divestiture of the trust properties.

8. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed.

9. The trustee shall report in writing to the Commission and Furr's every sixty days concerning the trustee's efforts to accomplish divestiture.

(F) The Agreement to Hold Separate shall continue in effect until such time as a store in each of the locations listed in paragraph II (A) has been divested either by Furr's or a trustee.

III.

It is further ordered, That within sixty days after the date of service of this order, and every sixty days thereafter until Furr's and Safeway have fully complied with the provisions of paragraph II of this order, Furr's and Safeway shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying with, or have complied with that provision. Furr's and Safeway shall include in compliance reports, among other things that are required from time to time, a full description of contacts or negotiations for the divestiture of the II (A) properties, including the identity of all parties contacted. Furr's and Safeway also shall include in compliance reports copies of all written communications to and from such parties, and all internal memoranda, reports and recommendations concerning divestiture.

IV.

It is further ordered, That for a period commencing on the date of service of this order and continuing for ten years from and after the date of service of this order, Furr's shall cease and desist from acquiring, without the prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, any retail grocery store, including any facility that has been operated as a retail grocery store within six months of the date of the offer to purchase the facility, or any interest in a retail grocery store or any interest in

any individual, firm, partnership, corporation or other legal or business entity that directly or indirectly owns or operates a retail grocery store in the following cities or towns: Albuquerque, New Mexico; Alamogordo, New Mexico; Artesia, New Mexico; Carlsbad, New Mexico; Clovis, New Mexico; El Paso, Texas; Espanola, New Mexico; Fort Stockton, Texas; Hobbs, New Mexico; Las Cruces, New Mexico; Las Vegas, New Mexico; Lovington, New Mexico; Midland, Texas; Odessa, Texas; Pecos, Texas; Portales, New Mexico; Roswell, New Mexico; Santa Fe, New Mexico; and Silver City, New Mexico.

Provided, however, That these prohibitions shall not relate to the construction of new facilities by Furr's or the leasing of a facility by Furr's not presently a grocery store in those locations.

One year from the date of service of this order and annually thereafter, Furr's shall file with the Commission a verified written report of its compliance with this paragraph.

V.

For the purposes of determining or securing compliance with this order, and subject to any legally recognized privilege, upon written request and on reasonable notice to Furr's or Safeway made to their principal offices, Furr's and Safeway shall permit any duly authorized representatives of the Commission:

1. Access, during office hours and in the presence of counsel, to inspect and copy all books, ledgers, accounts and correspondence, memoranda and other records and documents in the possession or under the control of Furr's or Safeway relating to any matters contained in this order; and

2. Upon five days' notice to Furr's or Safeway and without restraint or interference from them, to interview officers or employees of Furr's or Safeway, who may have counsel present, regarding such matters.

It is further ordered, That Furr's shall notify the Commission at least thirty days prior to any change in its corporate structure that may affect compliance obligations arising out of this order including but not limited to dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change.

CONCURRING STATEMENT OF CHAIRMAN DANIEL OLIVER

This case concerns an effort by Supermarket Development Corporation—and Furr's, a wholly owned subsidiary—to acquire the El Paso Division of Safeway Stores, including sixty grocery stores and a vari-

ety of other assets. The order the Commission has accepted requires Furr's, *inter alia*, to divest one store in each of twelve towns in Texas and New Mexico, and creates an elaborate mechanism to ensure that those divestitures are made. In particular, the order requires Furr's to hold the entire Safeway El Paso Division separate from its own operations until it makes the twelve divestitures. Moreover, if Furr's fails to make the divestitures within nine months, a trustee will be appointed to assume that responsibility. The order also requires Furr's to seek Commission approval—over a ten year period—of any acquisition of a retail grocery store in any of nineteen areas in Texas and New Mexico, including Albuquerque and Santa Fe, New Mexico; and El Paso, Odessa, and Midland, Texas.¹

As a consequence of these provisions, the consent order process has prevented Furr's from immediately integrating the El Paso Division into its own operations. As a result, Furr's has not yet been able to take advantage of the efficiencies associated with the acquisition, and consumers have not yet received the benefits of the acquisition, in the form of lower prices, better service, and other advantages.

Consent orders frequently have adverse effects of this sort, but those effects are usually outweighed by the need to prevent or undo the anticompetitive aspects of the mergers they address. In this matter, however, there is good reason to think that the order need not have been imposed. In its earlier consultations with the Commission staff, Furr's evinced a willingness to remedy all of the possibly anticompetitive aspects of the acquisition *prior* to its consummation. If the Commission had accepted that approach, the consent order would not have been necessary. Moreover, Furr's would have been able to take advantage of the efficiencies the acquisition offers immediately, and to begin offering lower prices and other advantages to consumers immediately, instead of many months later. In short, in my view, the public interest would have been better served by accepting the Furr's "fix-it-first" approach.

I regret that the Commission chose instead—in July 1987—to authorize our staff to seek to enjoin the entire acquisition. I opposed that decision because I felt that it was premature in light of the proposals that Furr's had made. I have nevertheless voted to accept the consent order because that course is preferable to the litigation alternative.

¹ In addition to the concerns with the consent order noted in the text, I do not believe that the prior approval provision in the order should apply to any markets other than the twelve in which divestitures are required. The Commission has determined that the appropriateness of prior approval provisions depends on "industry market structure and market conditions." *American Medical International*, 104 FTC 1, 224 (1984); accord, *Hospital Corp. of America*, 106 FTC 361, 514-15 (1985), *aff'd*, 807 F.2d 1381 (7th Cir. 1986), *cert. denied*, No. 86-1492 (U.S. May 3, 1987). It is not clear from the record that "market conditions and market structure in [the seven additional markets] are such that all such acquisitions . . . necessarily [would be] anticompetitive." See *American Medical International*, 104 FTC at 225; see also *Hospital Corp. of America*, 106 FTC at 513-17.

379

Interlocutory Order

IN THE MATTER OF

DETROIT AUTO DEALERS ASSOCIATION, INC., ET AL.

Docket 9189. Interlocutory Order, April 8, 1988

ORDER

Counsel for General Motors respondents, having informed the Commission of the death of respondent William M. Packer, Jr., moved for dismissal of the complaint against Mr. Packer. Complaint counsel had no objection to the motion. Therefore,

It is ordered, That the complaint against Mr. Packer be, and it hereby is, dismissed.

Commissioner Bailey not participating.

Complaint

110 F.T.C.

IN THE MATTER OF

THE SILVER GROUP, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SECS. 5 &
12 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3225. Complaint, April 13, 1988—Decision, April 13, 1988*

This consent order prohibits, among other things, a San Francisco-based marketer of artificial tanning devices from misrepresenting that its devices do not pose for users a risk of any harmful side effect associated with sun exposure. Respondent is required to have reliable and competent scientific evidence for any health or safety claim it makes in any advertisement.

Appearances

For the Commission: *Brinley H. Williams.*

For the respondent: *Eugene I. Lambert, Covington & Burling, Washington, D.C.*

COMPLAINT

The Federal Trade Commission, having reason to believe that The Silver Group, Inc., a corporation, ("respondent") has violated the provisions of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. Respondent is a California corporation, with its office and principal place of business located at 379 Oyster Point Boulevard, South San Francisco, California.

PAR. 2. Respondent has advertised, offered for sale, sold and distributed tanning devices and related products for the artificial tanning of humans, including tanning beds, facial units, and overhead lamp systems, and other products to the public. Respondent's tanning devices are marketed under such trade names as Silver Solarium.

PAR. 3. The acts or practices of respondent alleged in this complaint have been in or affecting commerce.

PAR. 4. Respondent has disseminated and caused the dissemination of advertisements and promotional materials for its tanning devices published in magazines and broadcasted on television across state lines, and disseminated in product brochures and other sales literature directly to consumers or to distributors for display or distribution to consumers. Typical of respondent's advertisements, but not neces-

sarily all - inclusive thereof, are the attached Exhibits A through D. The aforesaid advertisements contain the following statements or depictions:

1. "new way to tan indoors with absolutely no harmful side effects associated with the sun." (Exhibit A)
2. "absolutely no burning, no drying and no sun damage." (Exhibit A)
3. "Silver system will tan you deeper and more safely than anything under the sun." (Exhibit B)
4. "SILVER SOLARIUM bans burns and sun damage to deliver the perfect tan." (Exhibit C)
5. "For the perfect tan, get the perfect solution to the sun, SILVER SOLARIUM." (Exhibit C)
6. "Safer Than The Sun!" (Exhibit A)
7. "Will my skin age faster? No. Unlike the sun, the harmful rays that cause elastosis are not present in the Silver System." (Exhibit D).

PAR. 5. Through the use of the statements and depictions referred to in paragraph four and others in advertisements not specifically set forth herein, respondent has represented, directly or by implication, that:

1. Use of respondent's tanning devices cannot contribute to skin aging.
2. Respondent's tanning devices can be used without the risk of any harmful side effect associated with the sun.
3. Use of respondent's tanning devices cannot increase the risk of skin cancer.

PAR. 6. In truth and in fact:

1. Use of respondent's tanning devices can contribute to skin aging.
2. Respondent's tanning devices cannot be used without the risk of any harmful side effect.
3. Use of respondent's tanning devices can increase the risk of developing skin cancer.

Therefore, the representations set forth in paragraph five were, and are, false and misleading.

PAR. 7. Through the use of the representations referred to in paragraphs four and five and others not specifically set forth herein, respondent has represented, directly or by implication, that at the time it made the representations it possessed and relied upon a reasonable basis consisting of competent and reliable scientific evidence for said representations.

PAR. 8. In truth and in fact, respondent did not possess and rely upon a reasonable basis for making such representations. Therefore,

respondent's representations as set forth herein were and are false and misleading.

PAR. 9. In the advertising and sale of its tanning devices, respondent has, as alleged in paragraph four, used terms such as "safer than the sun" and "no harmful side effects" without disclosing that the use of such devices poses an increased risk of skin cancer and skin aging. These facts would be material to consumers. The failure to disclose these facts, in light of the representations made as alleged in paragraph five, is a deceptive practice.

PAR. 10. The acts and practices of respondent as alleged in this complaint, and the placement in the hands of others of the means and instrumentalities by and through which others may have used said acts and practices, constitute unfair or deceptive acts or practices in or affecting commerce and the dissemination of false advertisements in violation of Sections 5(a) and 12 of the Federal Trade Commission Act.

380

Complaint

EXHIBIT A

TRAINING TRAINING TRAINING

For Immediate Release

Safer Than The Sun!

We've waged war on the sun and won! It's no longer necessary to spend long hours in the sun to tan. Silver Solarium's innovative tanning center introduces an entirely new way to tan indoors with absolutely no harmful side effects associated with the sun.

Consider the facts: Doctors world-wide are against the dangers of direct exposure of skin to sunlight. Too much sun burns, dries out and permanently damages the skin. The damage is done by ultraviolet rays emitted by the sun, particularly UV-B rays. UV-B rays work with UV-A rays to tan you by stimulating the melanin (pigmentation) in your skin. Too many UV-B rays cause burning and ultimately damage your skin. The problem is how to control the amount of UV-B rays while allowing the gentle UV-A rays to tan you.

The solution is to block out the burning UV-B rays. Sunscreens do it to a limited extent but skin damage still occurs. Silver Solarium's state-of-the-art tanning beds effectively filter out the burning UV-B rays while intensifying the healthful UV-A tanning rays. You'll tan faster and darker with absolutely no burning, no drying and no sun damage! Your tan will look better longer and so will your skin!

For more information visit the Silver Tanning Center nearest you:

0000555

Complaint

110 F.T.C.

EXHIBIT B

TRAINING TRAINING TRAINING

**Radio Ad
Silver Tanning Center**

:60

Here's something you really should know if you're searching for that perfect suntan! Doctors the world over warn constantly against over exposing your skin to sunlight! The sun sears, bakes and burns the skin. It adds wrinkles and creases, and even the finest sunscreens can't protect you from that! So how do you avoid skin damage? Drop into NAME. NAME takes you out of the sun and tans you in minutes, not hours! NAME, using the Silver system, will tan you deeper and more safely than anything under the sun. The Silver tanning system filters out the UV-B rays the sun emits, the rays that scorch the skin, and intensifies the UV-A rays that tan the skin! Want the perfect tan? Introduce yourself to the Silver tanning system at NAME! Or call NAME at PHONE NUMBER! That's NAME! There's nothing like it under the sun!

0000557

EXHIBIT C

FACE FACTS

Silver Solarium works! It works better, safer and faster than the most sophisticated and effective sunscreens. Tanning in the sun without a sunscreen causes damage. Burning UVB rays tear the skin resulting in painful sunburns and premature aging and wrinkling. Sunscreens can help block (reflect) the burning rays but skin damage still occurs. SILVER SOLARIUM bans burns and skin damage to deliver the perfect tan. SILVER effectively screens out the burning UVB rays inside the tubes. At the same time the gentle UVA tanning rays are provided for the deepest, richest tan ever! For the perfect tan, get the perfect solution to the sun, SILVER SOLARIUM.

**HOW IT WORKS**

You'll see the results after your first session, and after six to eight half hour sessions you'll be sporting a glorious tan. Now, it's important to remember this is not an artificial tan. The light from the machine is stimulating your body's natural tanning ability. Each person has a different amount of pigmentation in their skin. You'll find yourself tanning at a different rate than your friends or spouse. This is quite normal. People with dark complexions will tan faster than those who have a fair complexion. However, even most people with red hair and freckles will tan, many times it's their first tan ever! To maintain your tan, one to two sessions weekly should suffice. Depending on how dark you want to be, more or fewer sessions may be taken.

THE SILVER SYSTEM AND YOU**1. Will I burn?**

No. The system is designed to stimulate your body's natural tanning ability without causing any burning.

2. Will all people get the same tan in the same number of sessions?

No. Skin tans at its own rate and all skin types are different. Generally the fairer your complexion the longer it takes to tan. However, feel comfortable, you will not burn. For many people it is the first tan of their life. With olive skin you'll look fabulous.

3. Do I need to use sunscreens, oils or moisturizer?

No, it's not necessary. Just maintain your regular skin care routine. Do not under any circumstances use sunscreens, it serves no purpose and only damage the tanning equipment.

4. How long will it take to get a tan?

You'll see the results after your first session. To get a good base tan schedule 4-6 consecutive sessions. Then 1 or 2 sessions weekly will maintain your tan.

5. How long does a session last?

An average of 20-25 minutes. Scheduling for your session is very important. Please be on time to utilize your entire session.

6. Will it help my holiday tan if I use it before I go on holiday?

Yes, because you will go with a tan, instead of milky white skin. However, we strongly encourage you to use a very good sunscreen to protect your skin from sun damage while outdoors.

7. Will my skin get an aged weathered look like it does in the sun?

Sunscreens are designed to control the damaging effects of sun can cause. And Silver Solarium is more effective than sunscreens. It is considered the ultimate sunscreen.

8. Can I take medications in conjunction with tanning?

There are some medications which are considered to be photo sensitive. For complete listing consult your physician. Common light sensitive drugs include Tetracyclines, Phenytoins, and heart medications.

Money Back Guarantee.

Join any of the different plans available. And if you are not completely satisfied after your session, your money will be refunded.

EXHIBIT D



silver solarium

110135

Your skin deserves careful attention and protection. That's why you should know all about the tanning effects of ultraviolet rays - those of the sun as well as those of man-made light. Both can be either harmful or very beneficial.

We feel confident that the more you know, the better you'll feel about the Silver Solarium.

The Silver System, Ultraviolet Light, and Your Health

The life-sustaining sun dispenses light, heat and ultra-violet rays to every living thing on earth. The light controls life's rhythm - day and night. Heat rays create the vital temperature changes that make up our climate, and stimulate the metabolic functions. And the UV rays stimulate the life processes and, in men, if the combination is right, produces a healthful, aesthetic tan.

All living creatures need the energy of the sun. A lack of sun can lead to illness in man and an unhealthy degenerative appearance. But too much sun is also damaging. Who has not experienced a red, uncomfortable sunburn? The UV-B rays (short as well as made longer) are responsible for this condition. UV-B rays do have numerous positive features - they stimulate the metabolic functions, improve the quality of the blood through increased production of red corpuscles, make a respiration more efficient and make one more resistant to infection. For these health supporting effects, a minimal dosage of UV-B is mandatory and sufficient. What overdose leads to sunburn is a drying of the skin, a small amount of UV-B is essential to life and to obtaining a tan. The trick, up to now, has been how to get just the right amount of UV-B to the body - enough for the benefits of health and tanning but not enough to burn. The Silver System has achieved this goal.

How Tanning Occurs

In the skin, composed of epidermis, dermis and endodermis there are special cells called melanocytes. These cells are unevenly distributed over the body and are activated by the short UV-B rays to produce pigmentation - melanin. It is these particles of UV-A light, oxidize and produce the desired brown color for a tan.

Therefore, it takes a small amount of UV-B to start the process of tanning and a far greater amount of UV-A to produce the tan. This is exactly the output of the Silver UV-A Tanning System. The long UV-A rays are gentle. They tan without burning. Only an extremely high dosage of UV-A, a dosage that is practically impossible with our system, could result in even a mild sunburn. It is natural for a tan to fade. The pigment particles naturally rise to the surface and are shed with the skin's cells. To maintain a tan permanently UV exposure must be repeated at certain intervals. Depending on the individual one or two times a week. The Silver Tanning System does this.

The Silver System vs. The Sun

The Silver System emits the same type of rays as the sun, and we've improved on nature's own tanning process.

Due to its energy spectrum, natural sunlight is unable to tan the skin without the risk of sunburn. For every part UV-B (burning rays) about 100 parts UV-A (tanning rays) reach the same area.

The Silver vs. The Tanning Booth

Until now the only way to get an indoor "tan" was the sunbath. These systems give off 60 times more UV-B than the Silver System. If you stand in a booth too long, even a couple of minutes, it means the difference between a healthy "tan" and a painful sunburn.

With the Silver Tanning System you lie down. The subtle warmth from our lamps soothes your body. Within a few short treatments, you'll have a beautiful golden tan, without the fear of sunburn.

Pre-Vacation Skin Protection

The Silver System will also help you enjoy a sun-filled vacation because pre-tanned skin is its own best protection. No need to arrive pale and then suffer through the first week with the discomfort of sunburn. As few as four 20 minute sessions will prepare you and are probably the best insurance for a truly pleasurable vacation.

Money Back Guarantee

Join any of the different plans available. And, after your first session if "not-and-not-completely" satisfied your money will be refunded.

The Silver System, and You

1. Will the Silver System cause sunburn under normal use?
No.
2. Will all skin types react the same?
Sun types tan at different rates.
3. Do I need to use oils or moisturizers?
No, it's not necessary.
4. How long does a treatment last?
20-25 minutes depending on your complexion.
5. How often can I use the machine?
One treatment a day for 4 days, then 1 or 2 times per week to maintain your tan.
6. Will it help my holiday tan if I use it before I go on vacation?
Yes. Avoid painful sunburn during the first days of vacation in the sun.
7. Will it help me keep my vacation tan after I'm back?
Yes. A one or two treatment per week maintenance program will help you keep your tan.
8. Do I have to protect my eyes?
We recommend that you do.
9. Will my skin age faster?
No. Unlike the sun, the harmful rays that cause discoloration are not present in the Silver System.

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 Consumer Protection 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; and

The respondent, its attorney, 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 thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent The Silver Group, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. The Silver Group has its offices and principal place of business at 379 Oyster Point Boulevard, South San Francisco, 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

DEFINITION

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

"Tanning device" means any product designed to incorporate one or more ultraviolet lamps and intended for irradiation of any part of the living human body by ultraviolet radiation to induce skin tanning.

I.

It is ordered, That respondent The Silver Group, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from misrepresenting directly or by implication that:

- a. Use of any such device does not pose a risk of the harmful side effects associated with exposure to the sun's radiation;
- b. Use of any such device does not increase the risk of developing skin cancer;
- c. Use of any such device does not contribute to skin aging.

II.

It is further ordered, That for one year after the date of service of this order respondent The Silver Group, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from failing to prominently disclose in any print advertisement, film, video tape or any other promotional material the following statement:

NOTICE - Read the mandatory FDA warning label found on every tanning machine for important information on potential eye injury, skin cancer, skin aging and photosensitive reactions.

The above-required language shall be included in printed material printed in a typeface and color that are clear and conspicuous, and, in multipage documents, shall appear on the cover or first page; and in any film, video tape, or slide promotional material shall be included either orally or visually in a manner designed to ensure clarity and prominence; provided, further, that nothing contrary to, inconsistent with, or in mitigation of the above-required statement shall be used in any advertising or promotional materials.

III.

It is further ordered, That commencing one year after the date of service of this order respondent The Silver Group, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of any tanning device, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making in any print advertisement, film, video tape or any other promotional material any representation, directly or by implication, that the tanning device is safe or safer than other devices or methods of tanning or that the device has health benefits unless the following statement is given:

NOTICE - Read the mandatory FDA warning label found on every tanning machine for important information on potential eye injury, skin cancer, skin aging and photosensitive reactions.

The above-required language shall be included in printed material printed in a typeface and color that are clear and conspicuous, and, in multipage documents, shall appear on the cover or first page; and in any film, video tape, or slide promotional material shall be included either orally or visually in a manner designed to ensure clarity and prominence; provided, further, that nothing contrary to, inconsistent with, or in mitigation of the above-required statement shall be used in any advertising or promotional materials.

IV.

It is further ordered, That respondent The Silver Group, Inc., its successors and assigns and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, or distribution of any product for personal or household use, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from making directly or by implication, any health or safety representation, unless, at the time of such representation, respondent possesses and relies upon a reasonable basis for each such representation, consisting of reliable and competent scientific evidence that substantiates such representation; provided however, that to the extent such evidence of a reasonable basis consists of scientific or professional tests, analyses, research, studies or any other evidence based on expertise of profes-

sionals in the relevant area, such evidence shall be "reliable and competent" only if those tests, analyses, research, studies, or other evidence are conducted and evaluated in an objective manner by persons qualified to do so, and using procedures generally accepted in the profession to yield accurate and reliable results.

V.

It is further ordered, That respondent shall distribute a copy of this order to each current officer, employee, agent and or representative having sales or promotional responsibilities with respect to the subject matter of this order, and to each current dealer, distributor and purchaser or lessee for commercial use, of its tanning devices, such as health clubs, tanning salons, beauty salons, catalogue houses, and tanning device retailers. A dealer, distributor, purchaser, or lessee is "current" for purposes of this paragraph if it holds a device on consignment for sale; purchased a device for resale or other commercial purpose within the two-year period preceding service of this order; received from respondent, within that two-year period, either directly or indirectly, any promotional or advertising material for the sale or other commercial use of the devices or to whom respondent directly or indirectly provided financial advertising support; or leases a device for commercial purposes from respondent.

VI.

It is further ordered, That for three (3) years from the date that the representations to which they pertain are last disseminated, respondent, its successors and assigns shall maintain and upon request make available to the Federal Trade Commission for inspection and copying:

A. All materials relied upon to substantiate any claim or representation covered by this order; and

B. All test reports, studies, surveys, or other materials in its possession or control or of which it has knowledge that contradict, qualify, or call into question such representation or the basis upon which respondent relied for such representation, including complaints from consumers.

VII.

It is further ordered, That for ten (10) years after the date of service of this order respondent, its successors and assigns shall maintain for

three (3) years from the last date of dissemination of the material a copy of each nonidentical form of promotional and training material disseminated by respondent and upon request make such material available to the Federal Trade Commission or its staff for inspection and copying.

VIII.

It is further ordered, That for ten (10) years after the date of service of this order respondent, its successors and assigns shall maintain for three (3) years and upon request make available to the Federal Trade Commission for inspection and copying records of the name and last known address of each dealer, distributor and purchaser or lessee for commercial use of respondent's tanning devices to whom respondent provided, directly or indirectly through a distributor or other representative, any promotional or advertising material for the sale or other commercial use of the devices or to whom respondent directly or indirectly provided financial advertising support.

IX.

It is further ordered, That respondent, its successors and assigns, 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.

X.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon it and at such other times as the Commission may require, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied or intends to comply with this order.

Commissioner Bailey not participating.

Complaint

110 F.T.C.

IN THE MATTER OF

VOLKSWAGEN OF AMERICA, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF
THE FEDERAL TRADE COMMISSION ACT*Docket 9154. Complaint, April 1, 1981—Decision, April 13, 1988*

This consent order requires, among other things, a Troy, Mich. automobile company to offer an arbitration program to owners of certain Volkswagen and Audi automobiles with faulty valve seals and other oil consumption-related problems.

*Appearances*For the Commission: *Robert M. Doyle.*For the respondents: *Herbert Rubin, Herzfeld & Rubin, P.C., New York City.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Volkswagen of America, Inc., a corporation subject to the Commission's jurisdiction, hereinafter sometimes referred to as respondent VWoA, and Volkswagenwerk Aktiengesellschaft, a corporation subject to the Commission's jurisdiction, hereinafter sometimes referred to as respondent VWAG, 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 Volkswagen of America, 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 27621 Parkview Road, Warren, Michigan. Respondent VWoA is a subsidiary of respondent VWAG.

Respondent Volkswagenwerk Aktiengesellschaft is a corporation organized, existing and doing business under and by virtue of the laws of the Federal Republic of Germany, with its principal office and place of business located at 3180 Wolfsburg, West Germany. VWAG dominates or controls the acts and practices of its subsidiary, respondent VWoA.

PAR. 2. Respondent VWoA is now and has been engaged in the

production, distribution, offering for sale or sale of vehicles or vehicle parts.

PAR. 3. Respondent VWAG is now and has been engaged in the production, distribution, offering for sale or sale of vehicles or vehicle parts delivered to purchasers in the United States. [2]

PAR. 4. Respondent VWAG, directly or through its subsidiaries, maintains and has maintained a substantial course of business, including some of the acts and practices alleged in this complaint, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

Respondent VWoA maintains and has maintained a substantial course of business, including some of the acts and practices alleged in this complaint, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Respondents cooperate and act together in effecting some of the acts and practices as hereinafter set forth.

PAR. 6. An abnormally high number of Volkswagen and Audi vehicles sold in the United States beginning in the 1974 model year and continuing at least through the 1979 model year and equipped with water-cooled engines have experienced, are experiencing, or are likely to experience one or more of the following conditions:

a. engine problems which may require expensive engine repairs when high rates of oil consumption are experienced; these repairs may include, but are not limited to, replacement of valve stem seals, replacement of cylinder heads, or other valve repairs;

b. engine failures related to lack of oil;

Such conditions are costly to correct or may significantly affect the quality, reliability, durability, or performance of the vehicles.

PAR. 7. Respondents knew or should have known that the conditions described in paragraph six above exist.

PAR. 8. Respondents have failed and are failing to disclose to owners or to prospective purchasers of Volkswagen and Audi vehicles equipped with water-cooled engines facts which relate to the existence, nature, extent, prevention, diagnosis, or proper repair of the conditions described in paragraph six above.

PAR. 9. The facts described in paragraph eight above are material to many prospective purchasers because such facts, if known, would be likely to affect their decisions concerning the purchase of Volkswagen and Audi vehicles.

PAR. 10. The facts described in paragraph eight above are material to many owners because such facts, if known, would be likely to affect their decisions concerning the maintenance, repair, use or care of Volkswagen and Audi vehicles.

PAR. 11. Respondents have failed and are failing to disclose material facts to prospective purchasers and to owners of Volkswagen and Audi vehicles. [3]

PAR. 12. The acts and practices of respondents in failing to disclose material facts have had and continue to have the capacity and tendency to mislead many members of the public, particularly those who may consider purchasing, or who own, Volkswagen and Audi vehicles.

PAR. 13. The acts and practices of respondents also have caused or continue to cause substantial economic harm to many members of the public who have paid or continue to pay for goods and services which they might not otherwise have purchased if respondents had adequately disclosed such material facts. The goods and services may include, but are not limited to, those sold by respondents for the repair or replacement of components installed in Volkswagen and Audi vehicles.

PAR. 14. The acts and practices of respondents have caused or continue to cause substantial economic harm to many members of the public who do not take preventive measures which they might take if such material facts were adequately disclosed.

PAR. 15. The acts and practices of respondents in failing to disclose material facts as alleged herein were and are all to the prejudice and injury of the public and constitute unfair or deceptive acts or practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

The respondents, their attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by respondent Volkswagen of America, [2] Inc., 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 Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having there-

upon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure described in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Volkswagen of America, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its office and principal place of business located at 888 West Big Beaver, in the City of Troy, State of Michigan. [3]

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

ORDER

DEFINITIONS

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

A. "VWoA" - Volkswagen of America, Inc., and its successors and assigns, and their officers, representatives, agents, and employees.

B. "Covered Vehicle" - A 1974-1979 model year gasoline powered Volkswagen or Audi vehicle equipped with a water-cooled engine, that was:

1) distributed for sale in the United States by VWoA,

2) warranted in writing by VWoA, or [4]

3) certified by the manufacturer to the National Highway Traffic Safety Administration and Environmental Protection Agency as meeting Federal safety and emissions standards.

C. "Specified Claims" - Claims made at any time prior to the expiration date of this order by present or former owners or lessees (unless the lessor bore the cost of the claim) of covered vehicles concerning excessive oil consumption or engine damage due to lack of lubrication in covered vehicles other than claims for personal injury, damage to property other than the vehicle itself, or consequential damages such as lost value, profits, wages, or business opportunities. Specified claims do not include claims for which the owner or lessee has executed a release in consideration of settlement of an individual lawsuit. Specified claims also do not include claims that are covered by a binding final judgment on the merits in an individual lawsuit.

D. "Dealer" - Any person, partnership, firm or corporation which, pursuant to a Volkswagen or Audi Dealer Agreement with VWoA or any of its independent distributors, purchases or receives on consign-

ment from VWoA or its independent distributors vehicles for resale or lease to the public, [5] including persons, partnerships, firms, or corporations owned or operated by VWoA or its independent distributors.

E. "*Internal engine components*" - All gasoline and diesel engine parts, components, and subassemblies included within the complete short block and cylinder head assemblies, including short blocks and cylinder heads, camshafts, valve train components, timing gears, flywheels, pistons, piston rings, crankshafts, connecting rods, and bearings, oil pumps, and associated fasteners, seals and gaskets.

F. "*Product Service Publication*" ("*PSPs*") - "Product Circulars," "Service Circulars," "Technical Bulletins," and other documents substantially the same in content and purpose issued from time to time by VWoA to dealers, to regional offices or to independent distributors, or individual articles, notices, entries or the like in such documents, which describe, or recommend or discuss:

- (1) diagnostic, repair, or maintenance procedures; or
- (2) additional parts or upgrades or different replacement parts; or [6]
- (3) non-repair information regarding the use and care of vehicles.

If a publication contains more than one subject which is considered a PSP, then each such subject shall be considered to be an individual PSP. PSPs do not include publicly available repair manuals, parts catalogs, price lists or supplements thereto.

G. "*Product Condition*" - The condition of a vehicle that gives rise to any repair, maintenance, use and care or diagnostic procedures or the use of additional, upgraded or different parts, that is or would be described in PSPs.

H. "*PSP Index*" - A document, clear and comprehensible to prospective purchasers and vehicle owners, which contains entries for all PSPs published during the term of this order by VWoA.

(1) Each index shall contain an introductory section, which shall include the following information clearly and conspicuously stated:

- (a) an explanation of the PSP Index and the "PSP [7] Highlights" section;
- (b) how to obtain PSPs from VWoA and how to review PSPs at VWoA's dealers;
- (c) how to locate the "PSP Highlights" section; and
- (d) the PSP prepared and issued pursuant to paragraph G(1) of section V.

(2) For each entry in the PSP Index, the following information will be clearly and conspicuously stated:

(a) the particular model(s), model year(s), and Vehicle Identification Numbers (if the PSP does not apply to the entire model year) to which the entry applies or potentially applies;

(b) the subject of the PSP;

(c) the major component or system of components to which the PSP relates;

(d) the identifying number of the PSP to which the entry relates; and [8]

(e) whether there is an entry in the "PSP Highlights" section of the PSP index for the PSP;

(3) The PSP Index shall contain a separate section, readily accessible, entitled "PSP Highlights."

I. "PSP Highlights" - Information related to a particular PSP, that includes all of the following items as applicable:

(1) a description of the product condition;

(2) a description of the principal symptoms of the product condition;

(3) the steps or possible steps that can be taken to minimize or avoid the product condition;

(4) a statement that additional, upgraded or different parts are called for to address the product condition;

(5) a statement that the diagnostic, repair or maintenance procedure discussed in the PSP has to be repeated; [9]

(6) a statement of the immediate and long-range performance consequences of the product condition; and, if avoidance of repair costs is a reason for undertaking the procedure, a statement of the estimated repair costs, if known, or, if not known, a characterization of such costs of not performing the procedures in a timely manner;

(7) the following statement: "The estimated cost of repairing this condition is [less than \$150][approximately \$150-\$250][approximately \$250-\$400][approximately \$400-\$800][more than \$800]." The cost range included shall be based on the cost calculated according to the formula set forth in Definition J(2);

(8) a description of the underlying PSP(s) sufficient to permit an interested person to identify and order the PSP(s) from VWoA or review it at a dealer; and

(9) to the extent not apparent from the foregoing, a disclosure of the primary intended benefit(s) of this information. [10]

J. "Costs" -

(1) "Reference cost" in paragraph D of section I means one hundred sixty-five dollars (\$165), adjusted in the month when this order is served and annually thereafter, by a ratio, the numerator of which is the most recently published quarterly "Implicit Price Deflator" (IPD) for the Gross National Product, and the denominator of which is the

IPD for the second quarter of 1985, adjustments to be rounded to the nearest dollar. IPDs used in these annual adjustments shall have been computed using the same base year.

(2) "Cost(s)" other than "reference cost" in paragraph D of section I shall be calculated by adding the suggested retail price for parts which are or may be required and the applicable national average dealer warranty labor rate charges multiplied by the time required to effectuate the repair, replacement, diagnosis or maintenance as determined by the applicable Suggested Repair Times Manual or other labor time guide used by VWoA in the calculation of warranty reimbursement rates.

K. "*Background Statements*" - The documents attached hereto as Attachments A, and A100, B, and B100. [11]

L. "*Claimant*" - Any person, partnership, corporation, or other entity, other than

(1) a dealer, or

(2) any other entity which is engaged in the business of repairing, servicing, selling, leasing or trading motor vehicles or motor vehicle engines, or

(3) a commercial enterprise which operates a fleet of more than fifteen vehicles.

M. "*United States*" - The fifty states, the District of Columbia, and all commonwealths, territories, and possessions.

N. "*Independent distributor*" - World-Wide Volkswagen, Inc., Riviera Motors, Inc., Volkswagen Mid-America, Inc., and any other person, partnership, firm or corporation that distributes VWoA's vehicles to dealers on a regular basis.

O. "*Engine damage due to lack of lubrication*" - Claims of damage to internal engine components caused by insufficient lubrication. [12]

P. "*MQ Service Action Program*" - The recall and reimbursement campaign initiated by VWoA beginning in February 1982 which included offers to replace valve stem seals and to reimburse prior valve stem seal replacement up to \$125 in 1977 through 1979 Volkswagen Rabbit and Scirocco vehicles equipped with gasoline engines.

Q. "*Arbitration agreement*" - The form that sets out issues to be arbitrated concerning claims relating to internal engine components as described in Rule 4 of Attachment C.

I.

It is ordered, That respondent Volkswagen of America, Inc., its successors and assigns, and their officers, representatives, agents, and employees, acting directly or through any subsidiary, division, or

other device in connection with the advertising, offering for sale, sale, or distribution of any vehicle in or affecting commerce in the United States, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Failing to continue VWoA's program of issuing PSPs in a manner comparable to the program as it existed in the years 1980 through the date of service of this order, with such [13] program to continue to take into account current criteria used for issuing PSPs, such as the frequency with which the product condition has occurred and is expected to occur, the repair costs to the consumer, and the significance to the consumer of the product condition; and failing to utilize information sources such as internal corporate testing and engineering programs, marketing and other surveys purchased or used by VWoA, information from the manufacturer(s) of affected vehicles or vehicle parts, and reports from customers, dealers, and independent distributors.

B. Within 30 days after the date of service of this order, failing to prepare and issue PSP Indexes for the 1985 model year and thereafter failing to prepare and issue PSP Indexes for PSPs issued in each model year after the 1985 model year.

C. Failing to prepare and issue an entry in the PSP Index for each PSP issued, to include each such entry in an updated PSP Index, and to update cumulatively each quarter all PSP Index entries for all PSPs issued by VWoA, with each such updated PSP index to be forwarded to dealers and be available from VWoA within four months after issuance to dealers of any PSP that was not included in a prior index. [14]

D. Failing to prepare and include an entry in the "PSP Highlights" section of the PSP Index, and reference it appropriately in the PSP Index, whenever:

(1) the PSP describes repair, maintenance, or diagnostic procedures not specifically covered in previously applicable repair manuals, either (i) where the cost of such procedures to a customer is reasonably expected to exceed the reference cost, or (ii) where the procedures are intended and designed to prevent future repair or replacement costs to a customer reasonably expected to exceed the reference cost; or

(2) the PSP describes revisions to repair, maintenance, or diagnostic procedures in an existing repair manual where the revisions are intended and designed either (i) to prevent future repair or replacement costs to a customer reasonably expected to exceed the reference cost, or (ii) to reduce such costs by an amount reasonably expected to exceed the reference cost; or

(3) the PSP describes modified (including additional, different, or

upgraded) parts recommendations, where the modification is intended and designed (i) to prevent future repair or replacement costs to a customer reasonably expected to exceed the reference cost, or (ii) to reduce such costs by an amount reasonably expected to exceed the reference cost; [15] or

(4) the PSP describes (i) information revising or updating information contained in owner's manuals or maintenance schedules or (ii) non-repair information regarding the use and care of vehicles by vehicle owners or operators.

E. Beginning with the next model year commencing after the date of service of this order, failing to disclose for each model year, in a clear and conspicuous manner, in each vehicle owner's manual or warranty booklet (where it shall be itemized in the Table of Contents and Index) for each of its vehicle lines,

(1) the following statement in the exact language set forth below:

Updated Service Information You Can Obtain

Volkswagen of America monitors product performance in the field and regularly sends to dealers the latest service information about [VW] [Audi] vehicles. Now, you too can get these bulletins. [16]

Bulletins cover a wide variety of subjects: the proper use and care of your car; costly repairs; inexpensive repairs or adjustments which, if done early may avoid costly future repairs. Some bulletins describe repairs about new or unexpected conditions. Others describe improved repair procedures or parts improvements. All of this information can also help a qualified mechanic better service your vehicle.

Most bulletins apply to conditions affecting a small number of vehicles. Your dealer or a qualified mechanic may have to determine if a specific bulletin applies to your vehicle.

You can order any or all of these bulletins direct from Volkswagen of America or look at them at a [VW] [Audi] dealer. You can purchase a subscription to the bulletins which apply to a particular model and receive them as they are issued, or you can order an index which lists and identifies these bulletins and summarizes the most important ones. You also can order individual bulletins. However, the index is necessary to identify them.

(2) The above statement shall in addition provide at least the following information in clear and comprehensible [17] language:

(a) concerning indexes -

(i) Indexes list each PSP, provide ordering information for individual PSPs, and are cumulatively updated quarterly.

(ii) Indexes contain plain-language highlights and summaries of PSPs describing costly repairs and designed to help prevent major repairs or containing owner use and care information.

(iii) If there is a charge for PSP indexes, it shall be credited against any charge for PSPs ordered.

(iv) When consumers order any index, they will receive the latest applicable index for the model year of the car unless they request an index for a different model year. [18]

(b) concerning PSPs -

(i) The charge for individual PSPs, if any, and how to order them.

(c) concerning subscriptions -

(i) The charge for subscriptions and how to order them.

(ii) That subscribers are entitled to all PSPs published for a model and model year.

(3) The following statement in the exact language set forth below, which shall be made in conjunction with the statement described above, but which shall not precede disclosure of the information described in paragraphs E (2)(a)(i) and (ii) of section I:

CAUTION:

These bulletins are intended for qualified mechanics. They are not meant for the casual do-it-yourselfer. Qualified mechanics have the equipment, tools, safety instructions, and know-how to do a job properly and safely. Improperly performed repairs or maintenance can adversely affect the safety of your vehicle, possibly [19] leading to accident or injury. They may also impair the economy, durability or reliability of your vehicle and may void the warranty on your car. If you are not sure that you can perform a job properly and safely, you should not risk trying to do so.

F. Beginning with the next model year commencing after the date of service of this order,

(1) failing to include for each model year, in each vehicle owner's manual, warranty booklet, or similar literature provided with the vehicle at the time of delivery to the original retail customer a postage-paid ordering coupon to obtain a properly identified PSP index (including PSP Highlights), a PSP, or subscription; or

(2) failing to maintain a toll-free telephone system, which number shall be clearly and conspicuously disclosed in close proximity to the information set out in paragraph E of section I, to enable members of the public to order PSP indexes (including PSP Highlights, PSPs, or a subscription to PSPs). [20]

G. Failing to furnish each dealer with:

(1) each PSP Index (including PSP Highlights) on paper or through such other medium as approved by designated representatives of the Federal Trade Commission, related to the vehicles represented by that dealership; and

(2) each PSP; and

(3) an adequate supply of postage-paid ordering coupons for PSPs, PSP subscriptions and PSP indexes.

H. Beginning with the date of service of this order, and once in each 6-month period thereafter, failing to recommend and urge, in writing, that each dealer shall:

(1) provide information on how to order PSPs to anyone who requests such information;

(2) provide members of the public with ready access to the PSPs and PSP Indexes (including PSP Highlights) furnished to such dealers, including any equipment needed to enable members of the public to read PSPs at dealerships; and [21]

(3) update PSP Indexes (including PSP Highlights) immediately upon receipt.

I. Beginning with the next model year after the date of service of this order, failing to include the following statement, in the exact language set out below, clearly and conspicuously on the face of the label required by the "Automobile Information Disclosure Act," 15 U.S.C. 1231 *et seq.*, (1980) (as amended) on each vehicle distributed by VWoA in the United States:

"UPDATED SERVICE INFORMATION—NOW YOU CAN GET USEFUL BULLETINS AND EASY-TO-READ SUMMARIES TO SERVICE YOUR CAR BETTER AND HELP AVOID COSTLY REPAIRS. THESE ARE THE SAME BULLETINS WE SEND YOUR DEALER. SEE YOUR DEALER'S INDEX OF PRODUCT CIRCULARS FOR DETAILS."

J. Beginning with the next model year after the date of service of this order, failing to include the following statement, in the exact language set out below, clearly and conspicuously, in each principal point of sale catalog distributed by Volkswagen of America for each of its vehicle lines: [22]

A Word About Updated Service Information

[Volkswagen] [Audi] regularly sends its dealers useful service information about our products. [Volkswagen] [Audi] monitors product performance in the field. We then prepare bulletins for servicing our products better and helping to avoid costly repairs. Now you can get these bulletins, too. To get ordering information, see a local [VW] [Audi] dealer.

K. Failing to include detailed information regarding the third-party arbitration program described in sections III and IV, and the PSP program described in this section, in all ongoing and future training programs and in materials disseminated to dealers on subjects related to customer relations, beginning not later than one hundred eighty (180) days after service of this order and continuing for the duration of this order.

