IN THE MATTER OF

LEVI STRAUSS & CO.

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

Docket 9081. Complaint, May 5, 1976 — Decision, July 12, 1978

This consent order, among other things, requires a San Francisco, Calif. clothing manufacturer to cease establishing and enforcing resale price agreements; soliciting the identities of recalcitrant dealers; and threatening, penalizing or terminating such dealerships. Further, the firm is prohibited from unfairly restricting the use of its trademark; engaging in unlawful tie-in practices; and disseminating any materials suggesting resale prices for five years.

Appearances

For the Commission: *David M. Newman, Paul D. Hodge* and *Jeffrey A. Klurfeld.*

For the respondent: *Heller, Ehrman, White & McAuliffe,* San Francisco, Calif. and *Howrey & Simon,* Washington, D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (U.S.C. Title 15, Section 14, *et seq.,* as amended), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Levi Strauss & Co., a corporation, hereinafter referred to as "respondent," has violated the provisions of Section 5 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 respect thereto as follows:

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

"Product" is defined as any item of wearing apparel and any related accessory which is manufactured, offered for sale, or sold by Levi Strauss & Co.

"Dealer" is defined as any person, partnership, corporation or firm which purchases any product from Levi Strauss & Co. for resale.

"Prospective Dealer" is defined as any person, partnership, corporation or firm which may desire to purchase any product from Levi Strauss & Co. for resale but has not been accepted by Levi Strauss & Co. as a dealer.

PARAGRAPH 1. Respondent Levi Strauss & Co. is a corporation organized, existing and doing business under and by virtue of the

laws of the State of Delaware, with its principal office and place of business at 2 Embarcadero Center, San Francisco, California.

PAR. 2. Respondent is now and has been for many years engaged in the manufacture, sale and distribution of a wide variety of wearing apparel for men, women and children, including but not limited to jeans, slacks, shorts, shirts, jackets and related items. Gross sales by respondent for the 1975 fiscal year exceeded $1,000,000,000. Respondent claims to be the largest apparel manufacturer in the world.

PAR. 3. Respondent sells and distributes its products directly to more than 15,000 retail dealers located throughout the United States who in turn resell respondent's products to the general public.

PAR. 4. Respondent maintains a comprehensive and integrated manufacturing, sales and distribution system throughout the United States. Sales of respondent's products are effectuated through seven regional sales offices located in New York, New York; Atlanta, Georgia; Chicago, Illinois; Dallas, Texas; Los Angeles, California; San Francisco, California, and Seattle, Washington. More than 500 salesmen working under control of these regional sales offices sell respondent's products throughout the United States.

Respondent also maintains manufacturing plants located in the States of California, New Mexico, Texas, Tennessee, Arkansas, Mississippi, Georgia, Virginia, North Carolina, Missouri, and Louisiana. Respondent transports its products, either directly from its manufacturing plants located in the aforementioned States to dealers or from these manufacturing plants to warehouses located in California, Texas and Kentucky, and from there, distributes such products to its dealers located in every State of the United States and the District of Columbia. There is now and has been at all times mentioned in this complaint, a pattern and course of commerce in respondent's products which is in and affects interstate commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Except to the extent that competition has been hindered, frustrated, lessened and eliminated as set forth in this complaint, respondent has been and is now in substantial competition with other corporations, individuals and partnerships engaged in the manufacture, sale and distribution of wearing apparel similar to that listed and described in Paragraph Two hereinabove.

PAR. 6. In the course and conduct of its business as above described, respondent has for some time last past effectuated and pursued a policy throughout the United States, the purpose or effect of which is and has been to fix, control, establish, manipulate and maintain the resale prices at which its dealers advertise, offer for sale and sell its products.

PAR. 7. By various means and methods, respondent has effectuated and enforced the aforesaid practice and policy by which it can and does fix, control, establish, manipulate and maintain the resale prices at which its products are advertised, offered for sale and sold by its dealers. To carry out said practice or policy, respondent adopted and employed, and still employs, the following means and methods among others:

(a) It requires prospective dealers as a condition of becoming dealers, or requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent, or to give oral assurances to respondent, that they will adhere to those resale prices established or suggested by respondent for its products.

(b) It requires prospective dealers as a condition of becoming dealers, or requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent, or to give oral assurances to respondent, that they will not advertise any of respondent's first-line quality products, whether or not in conjunction with any of respondent's trademarks, at resale prices other than those respondent has established or suggested.

(c) It requires prospective dealers as a condition of becoming dealers, or requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent, or to give oral assurances to respondent, that they will not advertise any of respondent's second-line quality or irregular products as having been manufactured by respondent.

(d) It requires prospective dealers as a condition of becoming dealers, or requires dealers as a condition of remaining dealers, to enter into oral agreements or understandings with respondent or to give oral assurances to respondent, that they will not resell respondent's products to any retailer not authorized by respondent to sell its products.

(e) It has established and employed, and still employs, a surveillance system, the purpose of which is to ascertain whether any dealer, prospective dealer, person or firm is engaged in any of the following activities:

(1) offering for sale or selling any product at a price other than that which respondent has established or suggested.

(2) advertising any first-line quality product, whether or not in conjunction with any of respondent's trademarks, at a price other than that which respondent has established or suggested.

(3) advertising any second-line quality or irregular product as having been manufactured by respondent.

(4) reselling any product to any retailer not authorized by respondent to sell its products.

(f) As part of the surveillance system as set forth in subparagraph (e) hereinabove, respondent has:

(1) Solicited and encouraged the cooperation and assistance of dealers to identify and report any dealer, prospective dealer, person or firm who engages in any of the activites set forth in subparagraph (e)(1)-(4) hereinabove.

(2) Shopped retailers not authorized by respondent to sell its products who are selling *any* product in order to ascertain from which dealer said retailers obtained said product.

(g) It warns, intimidates, harasses and uses various forms of coercion and discipline, including but not limited to delaying order shipments, restricting the availability of products, limiting the frequency of salesmen's visits, and threatening termination, against dealers engaged in, or suspected of engaging in, any of the activities set forth in subparagraph (e)(1)-(4) hereinabove.

(h) It terminates dealers engaged in, or suspected of engaging in, any of the activities set forth in subparagraph (e) (1)-(4) hereinabove.

(i) It refuses to deal with certain prospective dealers for the reason that respondent believes that such prospective dealers will engage in any of the activities set forth in subparagraph (e)(1)-(4) hereinabove.

(j) It prohibits any dealer from being reimbursed pursuant to respondent's cooperative advertising program for any advertisement offering any product at a price other than that which respondent has established or suggested.

(k) It misrepresents to dealers that its products are fair traded and that dealers must, as a matter of law, adhere to respondent's established resale prices.

The above are among the various means and methods which have been used, and are now being used, by respondent in the enforcement of its system of maintaining resale prices, all with the result that said prices have been and are generally observed and maintained by dealers handling respondent's products.

PAR. 8. The aforesaid acts and practices have had and still have the capacity, tendency and effect of hindering, suppressing or eliminating competition between or among all dealers selling respondent's products, by requiring them to resell the same at prices fixed or controlled by respondent as aforesaid; such practices prevent dealers from selling these products at prices of their own choosing; hinder and suppress price competition in the resale of such products

in the various States of the United States and the District of Columbia, thus tending to obstruct the free and natural flow of commerce and the freedom of competition in the channels of interstate commerce.

PAR. 9. In the course and conduct of its business as above described, respondent has refused to sell and continues to refuse to sell its blue denim jeans to dealers and prospective dealers desirous of purchasing said products unless said dealers and prospective dealers also purchase certain other products manufactured by the respondent.

Further, through the use of an allocation program, respondent has refused to and continues to refuse to increase the allotments of its blue denim jeans to dealers unless said dealers also purchase or increase their purchases of certain other products manufactured by respondent.

PAR. 10. The aforesaid acts and practices of the respondent have the tendency to unduly hinder competition; have injured, hindered, suppressed, lessened or eliminated actual and potential competition, and thus are to the prejudice and injury of the public; and constitute unfair methods of competition in or affecting commerce or unfair acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having 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 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 an

interested person pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(f) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Levi Strauss & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at Two Embarcadero Center, 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

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

"Product" is defined as any item of wearing apparel and any related accessory which is manufactured, offered for sale or sold by Levi Strauss & Co.

"Dealer" is defined as any person, partnership, corporation, or firm authorized by Levi Strauss & Co. to sell any product.

"Prospective dealer" is defined as any person, partnership, corporation or firm which may desire to purchase any product from Levi Strauss & Co., but has not been accepted as a dealer.

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

I

1. Fixing, establishing, controlling or maintaining, directly or indirectly, the price at which any dealer may advertise, promote, offer for sale or sell any product at retail.

2. Establishing, exacting any assurance to comply with, continuing, enforcing, or announcing the terms of any contract, agreement, understanding, or arrangement with any dealer or prospective dealer which fixes, establishes, maintains or enforces the price at which any product is to be sold or advertised at retail by such dealer or prospective dealer.

3. Securing or attempting to secure any promise or assurance from any dealer or prospective dealer regarding the retail price at which such dealer or prospective dealer will or may advertise or sell any product, or requiring or requesting any dealer or prospective dealer to obtain approval from respondent for any retail price at which such dealer or prospective dealer may or will advertise or sell any product.

4. Threatening to withhold or withholding earned cooperative advertising credits or allowances from any dealer or limiting or restricting the right of any dealer to participate in any cooperative advertising program for which it would otherwise qualify because of the retail price at which said dealer advertises or sells any product.

5. Requiring or soliciting any dealer or prospective dealer to report the identity of any dealer, prospective dealer, person or firm because of the retail price at which such dealer, prospective dealer, person or firm is advertising, offering to sell or selling any product; or acting on any reports or information so obtained by threatening, intimidating or coercing any dealer, prospective dealer, person or firm, or by terminating any dealer.

6. Conducting any surveillance program to determine whether any dealer, prospective dealer, person or firm is advertising, offering for sale or selling any product at a retail price other than that which respondent has established or suggested, where such surveillance program is conducted to fix, maintain, control, or enforce the retail price at which any product is sold or advertised.

7. Terminating or taking any other action to restrict, prevent, or limit the sale of any product by any dealer because of the retail price at which said dealer has sold, is selling, or is suspected of selling such product.

8. Terminating or taking any other action to restrict, prevent, or limit the sale of any product by any dealer because of the retail price at which said dealer has advertised, is advertising, or is suspected of advertising any product, whether or not in conjunction with any of respondent's trademarks.

9. Fixing, establishing, controlling or maintaining the retail price at which any product is advertised, promoted, offered for sale or sold, by means of any of the following:

a. Threatening or coercing any person, firm or prospective dealer because of the retail price at which said person, firm or prospective dealer, has sold, is selling or is suspected of selling any product.

b. Threatening or coercing any person, firm or prospective dealer, because of the retail price at which said person, firm or prospective dealer has advertised, is advertising or is suspected of

advertising any product, whether or not in conjuction with any of respondent's trademarks.

c. Controlling or restricting in any manner, including by termination of any dealer, any customer or class of customers to whom any dealer may sell any product, where such control or restriction is exercised because of the retail price at which the customer or class of customers to whom said product has been resold has advertised, promoted, offered for sale or sold such product.

II

Publishing, disseminating, circulating or providing by any means, any suggested retail price for a period of five (5) years after the date on which this order becomes final; *provided, however,* that, if, after said five (5) year period, respondent suggests any retail price, respondent shall:

a. Clearly and conspicuously state on any material on which such suggested price is stated that such price is suggested only.

b. Mail to all dealers a letter stating that no dealer is obligated to adhere to any suggested retail price and that such suggested retail price is advisory only.

III

1. Restricting any dealer, prospective dealer, person, or firm who purchases any product which respondent had denominated irregular or second quality from offering for sale or advertising such products as "second quality or irregular products manufactured by Levi Strauss & Co."

2. Restricting any dealer, prospective dealer, person or firm who has purchased any product which respondent had denominated "closeout" and which bears any of respondent's trademarks affixed thereto from using any trademark so affixed in the sale or advertising of such product.

3. Nothing contained in Paragraph III of this order shall affect respondent's rights in law and equity respecting the protection of respondent's trademarks in conjunction with the offer for sale or advertising of any product.

IV

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

1. Engaging in any unlawful tie-in selling practice.
2. Establishing or administering an allocation program under

which a dealer's entitlement to any product which such dealer has not previously purchased, is dependent upon the volume of such dealer's purchases of a different product style or a group of different product styles.

V

It is further ordered, That respondent shall:

1. Within thirty (30) days after service of this order, mail under separate cover a copy of this order and a copy of the enclosure set forth in the attached Exhibit A to every present dealer. An affidavit of mailing shall be sworn to by an official of respondent verifying that said mailing of the order and of the enclosure in the attached Exhibit A was completed.

2. Mail under separate cover a copy of this order and a copy of the enclosure set forth in the attached Exhibit A to any person partnership, corporation or firm that within five (5) years after service of this order becomes a new dealer.

3. Within thirty (30) days after service of this order, distribute a copy of this order to each of its operating divisions and subsidiaries and to all officers, sales personnel, sales representatives and advertising agencies retained by respondent and secure from each such entity or person a signed statement acknowledging receipt of said order.

VI

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

VII

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

Commissioner Pitofsky did not participate.

EXHIBIT A

Dear Levi Strauss Retailer:

Levi Strauss & Co. has consented to the entry of an Order by the Federal Trade

Commission. In connection therewith Levi Strauss & Co. has agreed to send you this letter describing the provisions contained in the Order. A copy of the Order is enclosed.

The Order provides, among other things, as follows:

1. With respect to retail prices:

a. You are free to sell and advertise products purchased from Levi Strauss & Co. at any price you choose.

b. Levi Strauss & Co. cannot take any action against you, including termination, because of the retail price at which you sell or advertise its products.

c. Levi Strauss & Co. cannot suggest retail prices for any product until [five years from date on which the Order becomes final].

d. You are free to participate in any cooperative advertising program sponsored by Levi Strauss & Co. for which you otherwise qualify and to recieve any advertising credit or allowance allowed thereunder regardless of the price at which you advertise any product from Levi Strauss & Co.

e. You may use any of Levi Strauss & Co.'s trademarks in a lawful manner in conjunction with the advertising of any first-line products at any price you choose. For example you may advertise any product bearing the "Levi's(r)" trademark as "Levi's(r)."

f. You may sell or advertise any Levi Strauss & Co. irregular or second quality merchandise as "irregular or second quality merchandise manufactured by Levi Strauss & Co." However, Levi Strauss & Co. reserves the right to restrict the use of its trademarks in connection with the sale or advertising of such merchandise.

g. In connection with the advertising or sale of Levi Strauss & Co. "close-outs," you may use, in a lawful manner, the trademarks, if any, affixed to such close-out products. You may also advertise or sell these products as "close-outs manufactured by Levi Strauss & Co."

h. Levi Strauss & Co. cannot control or restrict the customers to whom you or any other dealer may sell any product where such control or restriction is exercised because of the retail price at which the customer to whom said product has been resold is advertising or selling such product.

2. With respect to other sales practices:

a. Levi Strauss & Co. cannot engage in any unlawful tie-in selling practices.

b. If Levi Strauss & Co. places any product style on allocation, your allotment of such product style, other than a product style you have not previously purchased, will not be dependent upon the volume of your purchases of a different product style or a different group of product styles.

If you have any questions regarding the contents of this letter or the attached Order, please contact Mr. ———— at Levi Strauss & Co.

IN THE MATTER OF

TENNECO, INC.

Docket 9097. Interlocutory Order, July 12, 1978

This order sets forth specific provisions to be followed relative to the designation of certain documents as exempt from release.

ORDER REGARDING REQUEST FOR DESIGNATION OF DOCUMENTS AS EXEMPT FROM RELEASE

On March 22, 1978, Sears, Roebuck and Co. ("Sears") filed a motion to quash a third party subpoena duces tecum served upon it, claiming, *inter alia,* that the protective order issued by the administrative law judge ("ALJ") in this proceeding was insufficient to protect it from disclosure under the Freedom of Information Act ("FOIA"), 5 U.S.C. 552 (1970). The ALJ denied the motion to quash from the bench on April 25, 1978, on the assumption that the Commission would not release confidential information covered by the protective order. The transcipt of the ALJ's ruling indicates that he recognized a limitation upon his authority with respect to FOIA disclosure. Sears filed a motion for reconsideration on May 3, 1978, arguing again, *inter alia,* that the protective order was inadequate, and that the ALJ was without authority to bind the Commission with respect to disclosure under the FOIA. Alternatively, Sears asked the ALJ to certify the matter to the Commission under Rule 3.23(b). By order of May 10, 1978, the ALJ denied the motion for reconsideration and found that the matters raised by Sears did not involve a controlling question of law or policy which would justify certification of an immediate appeal under Rule 3.23(b). The ALJ did not address in his order whether the confidentiality issue was within his authority to decide or should be forwarded to the Commission under Rule 3.22(a). By motion of May 22, 1978, directly to the Commission, Sears asks that the Commission enter an order designating documents produced in response to Specifications 5 and 8[1] as confidential and not subject to future release, noting that the ALJ cannot bind the Commission with respect to release of information under the FOIA.

The chronology of actions with respect to the subpoena duces tecum served upon the J. C. Penney Company ("Penney") charts a similar sequence of events. Penney filed a motion to quash on April

[1] Specification 5 requires production of documents showing, by part number, the net purchase price paid by Sears to Maremont, its supplier, for shock absorbers in 1975 and 1976. Specification 8 requests, *inter alia,* production of Sears' Redetermination Audit for 1975 which contains a summary of the price information requested in Specification 5.

25, 1978, claiming that the protective order issued by the ALJ provided insufficient protection for documents responsive to Specifications 1-5 and 7-8 of the subpoena. By order of May 9, 1978, the ALJ denied Penney's motion for the same reasons he rejected Sears' motion to quash. Penney then moved directly before the Commission for designation of the information produced in response to Specification 5 of the subpoena[2] as confidential information exempt from release under the Freedom of Information Act and as not subject to release or disclosure by the Commission.

Normally, the Commission would not entertain an interlocutory appeal on a discovery question in the absence of a certification by the ALJ. However, it is clear in this instance that under Rule 4.10(a)(2) the ALJ does not have authority to bind the Commission with respect to the release of documents[3] and that these motions should have been certified, with the ALJ's recommendation, pursuant to Rule 3.22(a). Because remand of these motions to the ALJ would unnecessarily delay the administrative proceeding, the Commission, in its discretion, has considered both motions and issues the following order:

> Notwithstanding any of the provisions of the protective order issued by the ALJ on January 9, 1978, in the event of a Freedom of Information Act request or an official request from any Congressional committee or subcommittee or from a court pursuant to compulsory process, for disclosure of any document or portion of any document submitted by Sears in response to Specification 5 of the subpoena duces tecum or to Specification 8, to the extent such information summarizes information provided pursuant to Specification 5, and by Penney in response to Specification 5 of the subpoena duces tecum, and which is designated as "Confidential" under said protective order, authorized representatives of the Commission's Office of General Counsel may inspect such document for purposes of considering the request and, where necessary, advising the Commission on the request and defending the Commission's interests in court. Furthermore, the Commission shall provide the party which supplied such "Confidential" document or portion thereof with ten (10) days' notice prior to release of such document or portion thereof in response to such a request or otherwise. *Provided, however,* that in the case of release of such document or portion thereof, designated as "Confidential," in response to

[2] Specification 5 requires production of Penney's net cost per item of shock absorbers and exhaust system parts for 1975 and 1976.

[3] Such authority would be granted to the ALJ under the Commission's proposed confidentiality rules. 43 F.R. 3571 (January 26, 1978).

an official request from a committee or subcommittee of Congress or to a court in response to compulsory process, the Congressional committee or subcommittee or the court will be advised that the party which supplied the document considers the material to be confidential and the party will be provided ten days' prior notice where possible, and in any event as much advance notice as can reasonably be given.

It is so ordered.

IN THE MATTER OF

LUSTRASILK CORPORATION OF AMERICA, INC., ET AL.

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

Docket C-2894. Decision, Jan. 27, 1976 — Modifying Order, July 13, 1978.

This is an order which modifies a cease and desist order issued January 27, 1976, 41 FR 7744, 87 F.T.C. 145, to conform with the product coverage of a consent order issued against a competitive company, by substituting the words "hair straightening products" for the word "cosmetics" in Sections I and II of the original order, and "is " for "are" in the *It is ordered* paragraph in Section I; and by deleting the words "as 'cosmetic' is defined in the Federal Trade Commission Act" in the *It is further ordered* paragraph in Section II.

ORDER MODIFYING ORDER TO CEASE AND DESIST

ORDER*

On April 26, 1977, respondents in this matter requested by letter that the Commission order of January 27, 1976, be modified, first by limiting the product coverage of the order to "hair straightening products" which would replace the broader "cosmetics" products description, and second, by excluding the individually named respondents from the order.

Complaint counsel support the limitation on product coverage and oppose the exclusion of the individually named respondents.

We agree that the product coverage should be limited as requested. After entry of its order in this matter the Commission issued a consent order against Revlon, Inc., a competitor of Lustrasilk in the sale of hair relaxers. The Revlon order's product coverage is identical to that recommended by complaint counsel here. For this reason the Commission believes that it is in the public interest to grant the modification of product coverage sought by Lustrasilk.

We reject respondents' request that the individually named respondents be released from the order. Nothing that respondents have cited indicates a change of facts or law that would warrant the exclusion of the two individually named respondents from the reach of the order, nor does it appear that the public interest would be served by their exclusion. To the contrary, because the corporation is run as the proprietorship of the two named individuals, we find it necessary to continue to hold them responsible under the order. Accordingly,

* Reported as modified by Commission *Order Correcting Order Modifying Order to Cease and Desist* issued August 7, 1978.

It is ordered, That the proceeding be, and it hereby is, reopened.

It is further ordered, That the order to cease and desist be, and it hereby is, modified by substituting the words "hair straightening products" for the word "cosmetics" in Sections I and II of the order, by substituting "is" for "are" in the *It is ordered* paragraph in Section I, and by deleting the words "as 'cosmetic' is defined in the Federal Trade Commission Act" in the *It is further ordered* paragraph in Section II.

It is further ordered That the order to cease and desist be, and it hereby is, modified by substituting "any hair straightening product" for "any such product" in Paragraph I.A.3; by deleting the words "safety or" and substituting "hair straightening product" for "cosmetic" in Paragraph I.B.; and adding a new Paragraph I.C. and renumbering subsequent paragraphs accordingly, as follows:

> "Representing, in any manner, the safety of any hair care product, or the ingredients therein, unless at the time such representation is made respondents have in their possession a reasonable basis, consisting of competent and reliable controlled tests, to support such representation; or misrepresenting in any manner the nature of any such product or its ingredients or the effect of any such product or its ingredients on hair or skin or any other structure of the body."

Commissioner Pitofsky did not participate.

IN THE MATTER OF

MEGO INTERNATIONAL, INC., ET AL.

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

Docket C-2924. Complaint, July 14, 1978 — Decision, July 14, 1978

This consent order, among other things, requires a New York City manufacturer of a "Cher" mannequin doll and other toy products to cease employing any representation that depicts children using electrical toys or appliances near water or other fluids, without adult supervision, or which may induce children to engage in behavior that creates risk of injury.

Appearances

For the Commission: *Robert C. Goldberg.*

For the respondents: *Howard Alterman, Spivack & Lasky,* Chicago, Ill.

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 Mego International, Inc., a corporation, and Mego Corporation, a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mego International, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its office and principal place of business located at 1 Madison Square Plaza, New York, New York.

PAR. 2. Respondent Mego Corporation is a corporation organized, existing and doing business under and by virtue of the place of business located at 1 Madison Square Plaza, New York, New York.

PAR. 3. Respondents are now, and for all times relevant to this complaint have been engaged in the production, distribution, and sale of a variety of toy products, including but not limited to, "Cher", a mannequin doll.

PAR. 4. Respondents have caused to be prepared and placed for publication and have caused the dissemination of advertising material, including, but not limited to, the advertising referred to herein, to promote the sale of Cher.

PAR. 5. In the course and conduct of their aforesaid businesses,

respondents cause and have caused Cher in its package to be transported from its place of business to purchasers thereof located in various other States of the United States and in the District of Columbia. Respondents maintain and at all times mentioned herein have maintained, a substantial course of trade in said product in or affecting commerce.

PAR. 6. In the course and conduct of their aforesaid businesses, respondents have disseminated, and caused the dissemination of, certain advertisements concerning the said product by various means in or affecting commerce including, but not limited to, television advertisements broadcast by television stations located in various States of the United States, and in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product, and have disseminated, and caused the dissemination of, advertisements concerning said product by various means, including, but not limited to, the aforesaid media for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said product in or affecting commerce.

PAR. 7. Typical and illustrative of the statements and representations in respondents' advertisements disseminated by means of television, but not all inclusive thereof, is the "Cher Wash N Dry" advertisement. In this advertisement, as the female narrator states, "You can wash Cher's hair, and ask mom to blow dry it with you. Her hair will be soft and fluffy," a young girl, about six or seven years of age, sits next to a bathroom sink filled with water and washes the doll's hair in the sink. As she holds the doll in her right hand, a woman (presumably her mother) enters the scene and hands the girl an electrical pistol hairdryer which the girl takes with her left hand. The mother withdraws from the scene and the girl proceeds to dry the doll's hair.

PAR. 8. The aforesaid advertisement has the tendency or capacity to influence children to engage in the following behavior with respect to the use of electrical appliances and toys.

A. Using, participating in the use of, or present at the time of the use of a small electrical appliance in close proximity to a pool or body of water or other fluid.

B. Using, participating in the use of, or present at the time of the use of an electrical personal grooming appliance without the close and watchful supervision of an adult.

Therefore, such advertisement has the tendency or capacity to

induce behavior which is harmful or involves an unreasonable risk of harm, and was and is an unfair or deceptive act or practice.

PAR. 9. In the course and conduct of their aforesaid businesses, and at all times mentioned herein, respondents have been and are now, in substantial competition, in or affecting commerce, with other corporations engaged in the manufacture and sale of toy products.

PAR. 10. The aforesaid acts or practices of respondents, as herein alleged as aforesaid, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair methods of competition in or affecting commerce and 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 Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents 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 respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an 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 pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedures prescribed in Section 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mego International, Inc. is a corporation, orga-

nized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 1 Madison Square Plaza, New York, New York.

2. Respondent Mego Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, and with its office and principal place of business located at 1 Madison Square Plaza, New York, New York.

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

Order

1. The term "children" shall mean persons who appear to be or who are in fact twelve (12) years of age or younger.

2. The term "electrical appliance" shall mean all devices and machines which are run on electricity, but shall not include electrical toys. The term "small electrical appliance" shall mean those electrical appliances which are portable. The term "electrical toys" shall mean all toys and games which are run on electricity. These terms do not include devices, machines, toys or games which are operated only by batteries.

3. Terms in the singular shall include the plural and terms in the plural shall include the singular.

I

It is ordered, That respondents Mego International, Inc., a corporation, and Mego Corporation, a corporation, their successors and assigns, and their 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 in or affecting commerce of any product, forthwith cease and desist from directly or indirectly:

A. Representing, through depictions, descriptions or in any other manner, children using, participating in the use of, or present at the time of the use of any electrical hairdryer or other electrical personal grooming appliance, including but not limited to, combs, curlers, brushes and shavers, without the close and watchful supervision of an adult.

B. Representing, through depictions, descriptions or in any other manner, children using, participating in the use of, or present at the time of the use of any electrical toy or small electrical appliance or

toy fascimile thereof in close proximity to any pool or body of water or any other fluid.

C. Representing, through depictions, descriptions, or in any other manner, children using, participating in the use of, or present at the time of use of, any electrical toy or electrical appliance when such representation has the tendency or capacity to influence children to engage in behavior which creates an unreasonable risk of injury to person or property.

It is futher ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions which engage or shall engage in the preparation or dissemination of advertising.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change 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 effect compliance obligations arising out of the order.

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

Commissioner Pitofsky did not participate.

In the Matter of

WARNER-LAMBERT COMPANY

MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8891. Final Order, Dec. 9, 1975 — Modified Order, July 20, 1978

This modified order to cease and desist is issued pursuant to a decision and judgment of the U.S. Court of Appeals for the District of Columbia, 562 F. 2d 749 (1977). The words "(c)ontrary to prior advertising" have been deleted from the disclosure statement required in Part III of the original order to cease and desist issued December 9, 1975, 41 FR 2381, 86 F.T.C. 1398.

Modified Order to Cease and Desist

Respondent, having filed in the United States Court of Appeals for the District of Columbia Circuit a petition for review of the Commission's cease and desist order issued herein on December 9, 1975; and the Court having rendered its decision and judgment on August 2, 1977, affirming and enforcing the Commission's order with modification of Part III; and the Supreme Court of the United States having denied on April 3, 1978, petitions for writs of certiorari filed by the parties:

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court of Appeals to read as follows:

Order

I

It is ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale or distribution of Listerine or any other non-prescription drug product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any such product will cure colds or sore throats;
2. Representing, directly or by implication, that any such product will prevent colds or sore throats;
3. Representing, directly or by implication, that users of any such product will have fewer colds than non-users.

II

It is further ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the labeling, advertising, offering for sale, sale, or distribution of Listerine or any other mouthwash product in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any such product is a treatment for, or will lessen the severity of, colds or sore throats;
2. Representing that any such product will have any significant beneficial effect on the symptoms of sore throats or any beneficial effect on symptoms of colds;
3. Representing that the ability of any such product to kill germs is of medical significance in the treatment of colds or sore throats or the symptoms of colds or sore throats.

III

It is further ordered, That respondent Warner-Lambert Company, a corporation, its successors and assigns, and respondent's officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, do forthwith cease and desist from disseminating or causing the dissemination of any advertisements for the product Listerine Antiseptic unless it is clearly and conspicuously disclosed in each such advertisement in the exact language below that:

> Listerine will not help prevent colds or sore throats or lessen their severity.

In print advertisements, the disclosure shall be displayed in type size which is at least the same size as that in which the principal portion of the text of the advertisement appears and shall be separated from the text so that it can be readily noticed. In television advertisements, the disclosure shall be presented simultaneously in both the audio and visual portions. During the audio portion of the disclosure in television and radio advertisements, no other sounds, including music, shall occur. Each such disclosure shall be presented in the language, *e.g.,* English, Spanish, principally employed in the advertisement.

The aforesaid duty to disclose the corrective statement shall continue until respondent has expended on Listerine advertising a

sum equal to the average annual Listerine advertising budget for the period of April 1962 to March 1972.

IV

It is further ordered, That the allegations of Paragraphs Nine and Ten of the complaint be, and they hereby are, dismissed.

V

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

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in its structure 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 this order.

It is further ordered, That respondent shall, within sixty (60) days after the effective date of this order, file with the Commission a written report, setting forth in detail the manner and form of its compliance with this order.

Commissioner Pitofsky did not participate.

IN THE MATTER OF

AIRCO, INC.

Docket 9098. Interlocutory Order, July 20, 1978

This order grants complaint counsel's motion seeking court enforcement of a subpoena duces tecum issued to a third-party.

ORDER GRANTING COMPLAINT COUNSEL'S MOTION SEEKING COURT ENFORCEMENT OF SUBPOENA DUCES TECUM ISSUED TO AIR PRODUCTS AND CHEMICALS, INC.

The administrative law judge has certified to the Commission, pursuant to Rule 3.38(b), Complaint Counsel's Motion Seeking Court Enforcement of Subpoena Duces Tecum Issued to Air Products and Chemicals, Inc. ("Air Products"), a third party to these proceedings, on September 22, 1977. The specifications as to which there is disagreement are 1(a), (b), 2, 3(b), 3(c), and 7.[1] Air Products contends that these specifications relate to information which is so confidential that it should be made available only to respondent's outside counsel. The administrative law judge, on the other hand, has determined that in addition to outside counsel, Airco's Vice President-Law, Mr. DeWahl, should have access to the information.

The ALJ's position is based on his belief that "a firm facing serious restraint of trade charges was entitled to the assistance of its house counsel familiar with its business and operations, provided he played no role in corporate affairs other than legal counsel." Certification at 3. Moreover, Airco's Vice President-Law has submitted a signed affidavit, at the ALJ's request, which provides that his duties within Airco be limited to the giving of legal advice, and that he not, in any way, participate or make decisions in the operational area. Additionally, Mr. DeWahl would be prohibited from making any notes or copies of the confidential documents.

It is the view of the Commission that the restrictions imposed by the ALJ upon respondent's house counsel represent a reasonable exercise of the law judge's discretion and provide an adequate

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[1] 1. Documents sufficient to show:

(a). total net sales for each year from January 1, 1970 to date, in dollars and in units, of each relevant industrial gas sold by your company to distributors;

(b). for each year, those sales included in the response to specification 1(a) that represent sales to company-owned distributors;

2. Documents sufficient to show total net sales for each year from January 1, 1970 to date, in dollars and in units, of medical or therapy oxygen or other medical gases sold by your company.

3. Documents sufficient to show:

(a). facility fees included in the sales figures;

(b). transportation charges not included in the sales figures;

4. Documents sufficient to show all your company's prices in effect for each relevant industrial gas and the calendar period in which such prices were in effect, stated separately, to each distributor.

safeguard against use of this data in connection with the sale or marketing of Airco's products. Although cases cited by Air Products do draw a distinction between disclosure of confidential information to house counsel as opposed to outside counsel, we find those cases inapposite here in view of the restrictions imposed upon the activities of Mr. DeWahl pursuant to his affidavit. Accordingly,

It is ordered, That Complaint Counsel's Motion Seeking Court Enforcement of Subpoena Duces Tecum Issued to Air Products and Chemicals, Inc., be, and the same hereby is, granted.

IN THE MATTER OF

GOLD BULLION INTERNATIONAL, LTD., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND HOBBY PROTECTION ACTS

Docket 9094. Complaint,[1] Jan. 17, 1977 — Final Order, July 25, 1978

This order, among other things, requires a Syracuse, N.Y. importer of numismatic items and its corporate officers to cease importing, manufacturing, or distributing any numismatic item that is not plainly and permanently marked "Copy", as required by federal regulations.

Appearances

For the Commission: *Justin Dingfelder* and *Ronald G. Issac.*

For the respondent: *James R. Michal, Jackson, Campbell & Parkinson,* Washington, D.C.

INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE LAW JUDGE

FEBRUARY 13, 1978

I. SUMMARY OF PROCEEDINGS

On January 17, 1977, the Federal Trade Commission issued a complaint alleging that Gold Bullion International, Ltd. ("Gold Bullion") and its officers H. Kenneth Costello, [2] Walter N. Thompson, and William H. Bogart violated Section 2(b) of the Hobby Protection Act and Section 5 of the Federal Trade Commission Act. The complaint also named as respondents B.H. Mayer's Kunstprageanstalt of Pforzheim, West Germany, a corporation, and Bernhard H. Mayer, an officer of both Gold Bullion and B.H. Mayer's Kunstprageanstalt.

The complaint alleges that respondents, subsequent to November 29, 1973, imported into the United States for distribution in commerce privately minted copies of German 5, 10 and 20 Reichmark gold coins, Mexican 50 Peso gold coins, Austrian 100 Corona gold coins, and other gold coins. The complaint further alleges that the coins are imitation numismatic items as defined in Section 7 of the Hobby Protection Act and that the coins were not marked "copy" as required by Section 2(b) of the Act.

A prehearing conference was held on March 31, 1977 at the

[1] Complaint previously published at 90 F.T.C. 411.

request of Michael Stachowski, counsel for B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer. Complaint counsel and attorneys representing William H. Bogart, Bernhard H. Mayer and B.H. Mayer's Kunstprageanstalt were present and agreed to file answers to the complaint.

On April 8, 1977, respondent William H. Bogart filed his answer admitting certain allegations of the complaint, denying others and averring that the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States preclude the enforcement of the Hobby Protection Act against the respondents.

On April 12, 1977, respondents B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer filed their answer, generally denying the allegations of the complaint and averring that the Federal Trade Commission lacks both personal and subject matter jurisdiction.

On April 21, 1977, respondents Gold Bullion, H. Kenneth Costello and Walter N. Thompson filed their answers admitting certain allegations of the complaint, denying others and averring that the Treaty of Friendship, Commerce and Navigation between the Federal Republic of Germany and the United States preclude the enforcement of the Hobby Protection Act against them. [3]

On April 28, 1977, complaint counsel served on respondent Gold Bullion a request for admissions of fact to which respondent replied on May 10, 1977.

On May 11, 1977, complaint counsel and counsel for respondents B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer moved to withdraw this matter from litigation with respect to these respondents for the purpose of considering an executed proposed consent agreement. On June 1, 1977, I certified the executed agreement to the Commission, which, on August 9, 1977, voted to accept the modified consent agreement and decision and order as to B.H. Mayer's Kunstprageanstalt and Bernhard H. Mayer. The Commission issued its final decision and order as to these respondents on November 1, 1977.

On June 20, 1977, a subpoena *duces tecum* was served on Gold Bullion for the production of documents relating to its activities with B.H. Mayer's Kunstprageanstalt. In response to my order of July 5, 1977, counsel for Gold Bullion delivered the subpoenaed documents to complaint counsel on August 1, 1977.

A prehearing conference was held on June 23, 1977 to discuss the dates by which lists of potential witnesses and exhibits should be submitted and the date and place of evidentiary hearings. The general round of hearings was set for October 17, 1977 thru October

28, 1977, with a special hearing to be held in August to take the testimony of complaint counsel's witness Bernhard H. Mayer.

On August 22, 1977, the Commission was served with a subpoena *duces tecum* on behalf of respondents for documents relating to Gold Bullion. Complaint counsel responded to the subpoena on August 24, 1977. At the same time complaint counsel filed a request for admissions of genuineness of documents; respondents' counsel did not respond and thereby admitted the request.

Complaint counsel furnished their lists of witnesses and documentary exhibits to respondents' counsel on August 29, 1977. A supplemental list was provided on October 14, 1977. Respondents' counsel provided complaint counsel with their description of witnesses and documentary exhibits on September 30, 1977. Two supplemental lists were received from respondents' counsel on October 5, 1977 and October 14, 1977, respectively. [4]

Hearings were held in complaint counsel's case-in-chief on August 30, 1977 and from October 17 to October 18, 1977. Respondents' hearings in defense were held from October 18 to October 19, 1977. All hearings in the case were held in Washington, D.C. The record was closed on November 1, 1977.

Complaint counsel and respondents filed their proposed findings of fact and conclusions of law on December 1, 1977 and their replies ten days later. The following findings of fact, conclusions of law and order are based upon the record in this case and the proposed findings filed by complaint counsel and respondents. Proposed findings not adopted herein verbatim or in substance are rejected as not supported by the evidence or as immaterial.

II. Findings of Fact[1]

A. Description of the Corporate Respondent

1. Respondent Gold Bullion International, Ltd. is a corporation organized and existing under and by virtue of the laws of the State of New York (Gold Bullion Ans., ¶1), with its principal office and place of business formerly located at Suite 216-A, State Tower Building, Syracuse, New York (CX 45e(4)).

2. Gold Bullion was created and existed for the purpose of importing, selling and distributing gold bullion coins and gold bullion products to coin dealers for resale and to consumers (Tr. 17, 541).

3. Gold Bullion actually engaged in the business of importing,

[1] Abbreviations used in this decision are: Tr. – Transcript of testimony. CX – Commission exhibits. RX – Respondents' exhibits. Ans. – Answer. Adm. – Answers to complaint counsel's requests for admissions.

selling and distributing gold bullion coins from October 1974, when the corporation was formed, until [5] February 1975, when it ceased active business operations after several shipments of coins had been seized by U.S. Customs (Tr. 16, 35, 455–59, 504).

4. Gold Bullion is still in existence for purposes of a pending civil libel action (Tr. 457, 475–76).

B. DESCRIPTION OF THE INDIVIDUAL RESPONDENTS

5. Respondent H. Kenneth Costello has been president of Gold Bullion since its inception (Tr. 489). He took part in the formation of the corporation, contributed $5000 towards the intial capitalization, in exchange for which he received an initial 27 percent ownership interest (subsequently reduced), and agreed to serve as president at a salary which was never drawn (Tr. 488–90, 574–75).

6. Respondent Walter N. Thompson has been the vice-president and treasurer of Gold Bullion since its inception (Tr. 434, 462). He took part in the formation of the corporation, contributed $5000 towards the capitalization, in exchange for which he received a 15 percent ownership interest, and agreed to serve in the above-mentioned capacities (Tr. 434).

7. Respondent William H. Bogart has been secretary of and legal counsel to Gold Bullion since its inception (Tr. 542-43). He took part in the formation of the corporation, contributed $5000 towards the initial capitalization, in exchange for which he received an initial 33 percent ownership interest (subsequently reduced), and agreed to serve in the above-mentioned capacities (Tr. 541–44, 574–75).

8. Bernhard H. Mayer owns and operates B.H. Mayer's Kunstprageanstalt, a family owned mint located in Pforzheim, West Germany, which manufactures coins, medals, and other metallic pieces (Tr. 14).

9. Mr. Mayer has been the major shareholder in Gold Bullion since its inception (Tr. 16). He has also been a director and officer of this respondent since its inception (Tr. 17). [6]

10. The impetus for the formation of Gold Bullion came from Messrs. Bogart and Mayer who discussed business opportunities growing out of the legalization of gold ownership in the United States (Tr. 71–75, 539–41, 569–70). Mr. Bogart recommended Messrs. Costello and Thompson to Mr. Mayer as persons potentially interested in the marketing of gold bullion items (Tr. 542).

11. Messrs. Bogart, Costello, Thompson, and Mayer were the persons responsible for the ownership and operation of Gold Bullion (Tr. 17). There were no other officers besides these four men (Tr. 576).

12. Gold Bullion had only two employees besides its officers–a secretary and a Mr. Carroll. Mr. Carroll was employed by Gold Bullion for only a month or less (Tr. 571).

13. Although Messrs. Costello and Thompson placed orders with B.H. Mayer Kunstprageanstalt for particular gold bullion coins (Tr. 573), Mr. Mayer made the decisions as to the types of coins that Gold Bullion imported, sold and distributed into the United States and did the research regarding whether particular coins were or were not legal tender under German laws and, thus, able to be reproduced (Tr. 80–82, 437–38, 470–71, 491, 496, 502, 544, 550).

14. As legal counsel for Gold Bullion, Mr. Bogart was responsible for determining the legality of marketing gold bullion coins in the United States (Tr. 545–47). He did not actively participate in the daily business operations of Gold Bullion (Tr. 544).

15. Messrs. Costello and Thompson were responsible for the daily operation and management of Gold Bullion (Tr. 437, 572–73). At times, Mr. Thompson personally sold coins to private parties (Tr. 463).

16. After Gold Bullion ceased doing business, Mr. Mayer and the individual respondents formed B.H. Mayer's of America, an American corporation which markets numismatic items such as silver bars and commemorative medals produced by B.H. Mayer's Kunstprageanstalt (Tr. 58, 460–61). There is no evidence, however, that it markets the kinds of coins which are at issue in this case. [7]

17. Mr. Costello is presently employed as a licensed stockbroker (Tr. 487–88). He has not had any involvement with B.H. Mayer's of America (Tr. 507) and he does not intend to engage in the business of marketing and selling gold coin reproductions again (Tr. 505–06).

18. Mr. Thompson is presently employed as a licensed securities dealer (Tr. 435). He was associated with B.H. Mayer's of America from the time Gold Bullion ceased active operation until October 1976 (Tr. 460–61). He does not intend to engage in the business of marketing and selling gold coin reproductions again (Tr. 458–59).

19. Mr. Bogart is presently employed as a private attorney (Tr. 538). He served as president of B.H. Mayer's of America from late fall 1975 until summer 1976 and remained on as legal counsel and as secretary until fall 1977 (Tr. 563–64). He does not intend to engage in the business of marketing and selling gold coin reproductions again (Tr. 566).

C. THE MANUFACTURE AND IMPORTATION OF THE GOLD COIN REPRODUCTIONS

(1) *The Nature of Respondents' Business*

20. The gold coins sold and distributed by Gold Bullion were manufactured by B.H. Mayer's Kunstprageanstalt (Gold Bullion Adm., ¶4; Tr. 24).

21. B.H. Mayer's Kunstprageanstalt did not manufacture and ship coins to Gold Bullion unless they were ordered by Gold Bullion, and invoices were made out only for coins that were actually shipped (Tr. 39, 42).

22. The coins that B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion in the United States were shipped for the account of Gold Bullion International, Ltd., Suite 216-A, State Tower Building, Syracuse, New York (CXs 67a, 68a). Gold Bullion was the actual owner of these coins for Customs purposes (Tr. 342).

23. The gold coins were purchased from B.H. Mayer's Kunstprageanstalt from October 1974 to January 1975 and shipped from West Germany to the United States for sale and distribution in the United States (Gold Bullion Adm., ¶¶2 and 6). [8]

24. The coins that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were not manufactured for any government (Tr. 28, 33-34).

25. The coins that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were not original coins but so-called "restrikes"[2] (Tr. 33).

26. The original coins which B.H. Mayer's Kunstprageanstalt copied for Gold Bullion were German 5 Mark, 10 Mark, and 20 Mark gold coins, Austrian 100 Corona, 1 Ducat, and 4 Ducat gold coins, a French 10 Franc gold coin and a Mexican 50 Peso gold coin (Tr. 23-24; CXs 6, 16, 18, 19, 45e(1)-(4), 48d, 49e, 67a-c, 68a-c).

27. None of the coins that Gold Bullion ordered from B.H. Mayer's Kunstprageanstalt and imported into the United States were marked "copy" (Gold Bullion Adm., ¶8; Tr. 38, 43, 49).

28. On January 7, 1975, B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion a package of gold coin restrikes consisting of one 100 Corona, five 10 Francs, six 50 Pesos, and twenty-nine 5 Reichmarks (Tr. 57; CXs 6, 49(c)). The coins were not marked "copy" (Tr. 47). On February 5, 1975, the shipment of coins was seized by the United States Customs Service for alleged violation of the Hobby Protection Act in that they were not marked "copy" (Tr. 323-27; CX 49(b)-(e)).

[2] This term is used sometimes herein to refer to Gold Bullion's copies of original coins, although the numismatic community gives a narrower definition to that term. See Finding 72, *infra*.

29. On January 29, 1975, B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion a package containing in part ninety 5 Reichmarks and one hundred ten 10 Franc gold coin restrikes (Tr. 37-38; CX 18). On January 30, 1975, B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion 97 copies of the 50 Peso gold coin (Tr. 41; CX 19). The coins were not marked "copy" (Tr. 38). On February 18, 1975, U.S. Customs seized the January 29 and January 30 shipments for suspected violation of the Hobby Protection Act in that the coins were not marked "copy" (CX 48a-d). [9]

(2) *The Date of Manufacture of the Coins*

30. B.H. Mayer's Kunstprageanstalt does not maintain records that would disclose the date of manufacture of the coins shipped to Gold Bullion (Tr. 49, 97, 122-23). However, Mr. Mayer testified that some of the coins shipped to Gold Bullion were manufactured after November 29, 1973 (Tr. 49).[3] The difficulty is in determining precisely when each type of coin was manufactured.

31. In order to mint coins you first have to have a die for each type of coin that is to be minted (Tr. 18).

32. The only original dies that B.H. Mayer's Kunstprageanstalt possessed were the dies for the 5, 10, and 20 Reichmarks (Tr. 19, 76). The dies used to manufacture the 1 Ducat and the 10 Franc were made later on, although before the existence of Gold Bullion (Tr. 76-77, 90). The dies used to manufacture the 100 Corona, the 4 Ducat, and the 50 Peso were made especially for Gold Bullion (Tr. 77-78, 89-90, 98, 122).

33. All of the 50 Pesos and 100 Coronas that B.H. Mayer's Kunstprageanstalt shipped to Gold Bullion were manufactured by B.H. Mayer's Kunstprageanstalt (Tr. 98).

34. Since all of the 50 Pesos, the 4 Ducats, and the 100 Coronas were minted by B.H. Mayer's Kunstprageanstalt from dies made after Gold Bullion was formed (October 1974), they had to have been manufactured after November 29, 1973.

35. The only coins that B.H. Mayer's Kunstprageanstalt had in stock at the time Gold Bullion began doing business were the 5, 10, and 20 Reichmarks, the 1 Ducat, and the 10 Franc (Tr. 96-97, 123). The number of these coins that B.H. Mayer's Kunstprageanstalt had in stock at the time it began shipping to Gold Bullion was very small and did not last more than one or two weeks. Mr. Mayer concluded that his company did not have enough of these coins in stock [10] to

[3] The date when the Hobby Protection Act was enacted. Section 8 of the Act states:

> This Act shall apply only to imitation political items and imitation numismatic items manufactured after the date of enactment of this Act.

account for all the coins that were shipped to Gold Bullion (Tr. 135-36). In light of the small stock of these coins which existed in October of 1974, I conclude that at least some of these coins were manufactured and shipped to Gold Bullion after November 29, 1973.

36. On January 16, 1975, a shipment of gold was delivered to B.H. Mayer's Kunstprageanstalt from Degussa [the processor of the gold sheets from which the coins were manufactured] (Tr. 54-56, 100-01). The date of the shipment was the same as that on the invoice (Tr. 101; CX 55). The invoice indicates that the gold was to be used for the manufacture of coins for Gold Bullion (CX 55). The gold could only have been used to manufacture either 1 or 4 Ducat coins (Tr. 56). Inasmuch as the Degussa firm is located in Pforzheim, West Germany (Tr. 50), it takes only five minutes for the gold to get from Degussa to B.H. Mayer's Kunstprageanstalt (Tr. 100).

37. It normally took between one day and one week for gold received from Degussa to be minted into coins and shipped to Gold Bullion (Tr. 110, 135). About one hundred fifty 1 Ducats were struck from the gold received from Degussa on January 16, 1975 (Tr. 101-02), and on January 21, 1975, ninety-five 1 Ducats were shipped to Gold Bullion (CXs 68b, 68c)—five days later.

38. Because the gold was used only for the production of 1 or 4 Ducat coins and because 1 Ducat coins were actually manufactured and shipped to Gold Bullion shortly after receipt of the gold from Degussa, I find that some 1 Ducats were manufactured after November 29, 1973 and shipped to Gold Bullion.

(3) *The Use of the Original Gold Coins in Exchange*

39. The copies of the German 5 Mark that B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion were dated 1877 with the image of Wilhelm I on their face and were marked with an "A" mint mark (CXs 46a, 47b). An "A" mark indicates the Berlin Mint (Tr. 244).

40. The German Government's Berlin Mint issued a 5 Mark gold coin in 1877 (Tr. 233-34). The coin was minted with the image of Wilhelm I on its face (Tr. 234). [11]

41. B.H. Mayer's Kunstprageanstalt manufactured and shipped to Gold Bullion two different types of German 10 Mark gold coin copies. One type was dated 1888, Berlin mint mark, with the image of Wilhelm II (CXs 46b, 45e(2)); the other type was dated 1887, Berlin mint mark, with the image of Wilhelm I (Tr. 384-85; CX 71c-d).

42. The Berlin Mint did not issue a 10 Mark gold coin in 1888 with the image of Wilhelm II but it did issue a 10 Mark gold coin in 1889 with the image of Wilhelm II (Tr. 244-45; RX 43n).