attention from disclosure of information required to be disclosed by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

6. Failing in any consumer credit transaction to preserve evidence of compliance for a period of not less that two years as required by Section 226.6(i) of Regulation Z.

It is further ordered, That respondents deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit, or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That respondents 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 this order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

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.

IN THE MATTER OF

NATIONAL DYNAMICS CORPORATION, ET AL.

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

Docket 8803. Decision, Feb. 16, 1973 Modified Order June 17, 1975*

Order further modifying order issued Mar. 4, 1975, 40 F.R. 19459, (p. 390 herein), against a New York City seller of battery additive, VX-6, and other products, by eliminating certain "loopholes" in the earlier order, while setting forth in some detail and with greater clarity a wide variety of options available to

* See 82 F.T.C. 488.

respondents for making truthful claims concerning the earnings of their distributors.

Appearances

For the Commission: *Jeffrey Tureck* and *Michael C. McCarey.*
For the respondents: *Solomon H. Friend*, N.Y., N.Y.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

Complaint counsel have filed a "Petition for Reconsideration" of the Commission's order in this matter issued on Mar. 4, 1975. Respondents have replied in opposition. In order to obtain more time within which to consider the petition for reconsideration, the Commission, by order dated May 27, 1975, stayed the effective date of its Mar. 4 order, and thereby, the time within which respondents might appeal it. The order of Mar. 4 modified an earlier cease and desist order of the Commission, pursuant to remand from the United States Court of Appeals for the Second Circuit, which had instructed that the original order be changed.

Having reviewed the arguments made by complaint counsel in their petition for reconsideration, and respondents' arguments in opposition, and after conducting our own review of the order previously entered, we have determined that it must be modified in order to accomplish the purposes intended by the Commission when it issued its opinion and order of Mar. 4. The order as revised is designed to eliminate certain "loopholes" in the earlier order to which complaint counsel have properly objected, while setting forth in some detail and with greater clarity a wide variety of options available to respondents for making truthful claims concerning the earnings of their distributors, consistent with the mandate of the Court of Appeals.

The Commission's original order in this matter, of which the Court of Appeals disapproved, limited respondents essentially to representations of average earnings. The Court of Appeals remanded with the instructions that respondents should not be limited to average earnings. The Court suggested that the Commission consider permitting ranges of earnings to be represented, and implied, by its reference to an earlier assurance of voluntary compliance, that truthful testimonials should also be allowed, though cautioning that respondents must not be allowed to make deceptive use of the unusual earnings of a few.

In fashioning our modified order, we have proceeded on the theory that respondents should be allowed to make a wide variety of simple, truthful, nondeceptive statements concerning the earnings of their distributors. At the same time, they must be prevented from bandying

about high earnings achieved by a minority of purchasers with no indication of the unrepresentativeness of such earnings. If respondents lack evidence that the high reported earnings of a few distributors are in fact representative of the earnings of large numbers of other distributors, then it is clearly deceptive for them to portray the minority results reported to them without a clear indication of their unrepresentativeness. The appended order embodies a general prohibition on representations of past earnings, followed by a detailed enumeration of various broad sorts of earnings claims, in addition to average earnings claims which respondents may make:

(1) *Average or median earnings.* The order makes clear that any true statement of average or median earnings achieved by distributors during any particular stated past time period is permissible. For example;

1. Last year our distributors earned an average of $_____.
2. In 1971 our distributors earned an average of $_____.
3. For all of 1973 our distributors earned an average of $_____ per month.
4. In May, 1973, our distributors earned an average of $_____.

The requirement that respondents provide some indication of the time period upon which a statement of earnings is based is implicit in the requirement that they not misrepresent past earnings, a prohibition sanctioned by the Court of Appeals. Failure to disclose that represented achievements are in fact several years old is clearly misleading, since the assumption of readers is likely to be that they are based on recent information.

(2) *Statement of non-average, non-median earnings achieved by a substantial number of purchasers.* Respondents may wish to advertise that some number of their purchasers have earned some stated figure or more when the stated figure exceeds the average. The order would permit all representations of this sort, provided that a substantial number of purchasers have in fact earned the stated figure or more, and provided that a clear and conspicuous disclosure is made of the percentage of the total number of distributors constituted by those who, according to respondents' representations, have achieved or exceeded the stated amount. The percentage disclosure is necessary in order to avoid the misleading implications of statements such as "Hundreds of our distributors have earned $_____ or more" when the hundreds constitute only a tiny fraction of all purchasers. Examples of the numerous earnings claims permitted by this section would be the following:

1. Last year at least 585 of our distributors (_____% of all our distributors) earned $_____ or more.
2. In 1972, _____% of our distributors earned $_____ or more.
3. In all of 1973, hundreds of our distributors (_____% of all distributors) earned an average of $_____% or more per month.

4. In May, 1973, at least 600 of our distributors (_____% of the total) earned $_____ or more.

(3) *Statements of earnings ranges.* As complaint counsel have pointed out in their petition for reconsideration, statements of ranges may be deceptive if the earnings ranges are too large. A consumer presented with a statement that thousands of distributors have earned from "$_____ to $_____" is likely to assume that the average lies somewhere near the middle of the range, and that substantial numbers of people have achieved results in the top of the range. As complaint counsel point out in their petition for reconsideration, stipulated records in this case show for a particular year that over 99 percent of respondents' distributors earned under $10,000, while a few earned in excess of $25,000. Common sense, moreover, would suggest that in most business opportunity situations one would find a few exceptional individuals performing well above average, rather than an even distribution of earnings results from bottom to top. Thus, the use of an unduly large range which encompasses the exceptional earnings of a few will result in deception, with the extent of deception increasing as the range does.

Complaint counsel's solution to this problem is to require that respondents state figures for each quartile of any earnings range they choose to employ. This solution, however, would not be fair in instances where respondents properly employed narrow ranges in an effort to present an accurate portrayal of their purchasers' earnings, nor would it entirely suffice in instances where respondents chose ranges so large that even quartiles thereof might be unduly broad. We think it is clear that in suggesting that the Commission fashion its order to permit the use of earnings ranges, the Court of Appeals anticipated that respondents would make use of reasonably descriptive ranges. In dealing with this problem in the past the Commission has at times adopted the approach of mandating particular ranges within which disclosures must be made.[1] In an effort to allow respondents maximum flexibility consistent with the nondeceptive use of earnings ranges, we believe the most appropriate solution in this case is to set an outer limit on the size of permissible ranges.

The order as revised will limit the size of permissible ranges to $4,000 for representations of yearly earnings and proportional amounts for other time periods. Stipulated evidence in this case, indicated that for a recent year over 99 percent of respondents' distributors earned $10,000 or less. Thus, if respondents wish to use earnings ranges to give consumers an accurate picture of the earnings achieved by their distributors, it appears they will be able to cover the earnings of over

[1] See *Universal Credit Acceptance Corp., et al.*, 82 F.T.C. 570, 670 (1973), reversed as to another issue, sub nom *Heater* v. *Federal Trade Commission*, 503 F.2d 321 (9th Cir. 1974).

99 percent of their distributors by use of at most three ranges. Even allowing for some measure of inflation and improvement in the performance of respondents' distributors, it would appear that at most four or five $4,000 ranges will, for the foreseeable future, be adequate to permit a description of the earnings of all but a tiny, unrepresentative handful of purchasers.[2] Larger ranges, in light of these considerations, could too easily be used to deceive. In the event that circumstances should change in the future and respondents can demonstrate that the order as drafted would prevent them from describing the earnings of the vast majority of their distributors by means of a small number of ranges, they may petition the Commission to modify its order.

In addition, the order as revised requires that in stating any range, respondents must indicate the percentage of their distributors who have achieved results within the range. As noted with respect to statements of non-average earnings above, this requirement is necessary to avoid the misleading implications of such statements as "Hundreds of our distributors have earned from $_____ to $_____" when in fact the hundreds may constitute only a small fraction of the total. In the event, however, that respondents choose to employ ranges beginning with $0 and proceeding continuously upward, they need only indicate the number *or* percentage of distributors within each range. Under such circumstances a consumer can readily determine the significance of large absolute numbers in the higher ranges.

As in the case of other provisions, the one respecting earnings ranges requires that they must apply to "any stated period of time." Once again, this phrase is intended to require that respondents indicate the year in which stated results were compiled, as well as whether the results are yearly results, monthly averages, the results of one month only, or whatever. We think this is clearly implied in any requirement that respondents not misrepresent earnings. Pursuant to subsection (3) of the order, following are examples of the many sorts of representations which respondents would be able to make:

1. In 1973, (*number*) of our distributors (_____%) of all our distributors) earned from $6-10,000.

2. In April, 1972, _____% of our distributors earned from $350-700.

3. In the first 9 months of 1973, (*number*) of our distributors (_____% of the total) earned from $400-750 each month.

4. In 1972, our distributors achieved the following earnings:

$0-4,000	(number or percentage)
$4-8,000	"
$8-12,000	"

[2] Respondents can, of course, encompass the earnings of all those at the top with a representation in the form "$_____or more," permitted by the order, or by use of testimonials, *infra*.

$12,000 and up

(4) *Earnings testimonials.* Complaint counsel are correct, we believe, in pointing out that even though a consumer may be apprised that an earnings testimonial represents a "better than average" result, the consumer is still likely to assume that testimonial results represent an achievement that is within the realm of reasonable possibility for herself or himself. Thus, if a truthful testimonial represents a performance that has been achieved by only one or a handful of purchasers out of thousands, it is likely to convey a misleading impression even in the presence of a disclosure that it is a "better than average" result. For this reason, we believe it necessary to alter the treatment given to this problem in our order of March 4. One possible solution would be simply to prohibit the use of testimonials which describe a performance which has not been matched or exceeded by a representative fraction of respondents' purchasers. An alternative would be to require a disclosure which adequately apprises the consumer of the full extent of the disparity between the testimonial performance and the performance of others. Under the circumstances of this case we believe an appropriate resolution is to permit all truthful testimonials, provided the following disclosures are made:

1. A statement of the average amount of time per day, week or month spent by the purchaser to achieve the stated performance;

2. The year or years during which, and the geographical area in which the results were achieved;

3. If the results achieved by the purchaser have been accomplished or exceeded by fewer than 10 percent of its distributors, either of the following disclosures, in conspicuous boldface type:

(a) a statement of the average or median achieved by all distributors; or

(b) the following statement in boldface type: IMPORTANT NOTICE: THE RESULTS DESCRIBED ABOVE ARE SUBSTANTIALLY IN EXCESS OF THE AVERAGE RESULTS ACHIEVED BY ALL OUR DISTRIBUTORS. OUR RECORDS SHOW THAT ONLY ____ % OF OUR DISTRIBUTORS HAVE EQUALLED OR EXCEEDED THE PERFORMANCE DESCRIBED ABOVE DURING THE INDICATED TIME PERIOD.

4. If respondents have records to indicate that the results achieved by a purchaser have been matched or exceeded by more than 10 percent of its distributors, either of the following disclosures:

(a) a statement of the average or median achieved by all distributors; or

(b) a statement of the percentage of respondents' distributors who

have equalled or exceeded the performance indicated during the indicated time period.

If the results achieved by the purchaser are in fact those of only an unrepresentative fraction (we have chosen 10 percent for the sake of clarity and precision) of total purchasers, then we believe it is imperative that consumers be placed on notice in the strongest terms of the unrepresentativeness of the stated performance. A disclosure of average earnings should be sufficient to notify viewers of the full extent of the disparity. If respondents do not wish to compile average figures, then they must make a disclosure which warns in the strongest possible terms of the unrepresentativeness of the purchaser. The alternative disclosure provided would not require any additional recordkeeping on respondents' part, since it requires only a disclosure of the fraction of purchasers who, according to whatever records respondents have chosen to keep, have equalled or exceeded testimonial performance.

On the other hand, if, in fact, the testimonial performance has been equalled or exceeded by a significant fraction of all purchasers then a simple indication that it exceeds the average should be sufficient to convey an accurate impression. This can be accomplished by an actual statement of the average, or a statement of the actual fraction of purchasers who, to respondents' knowledge, have equalled or exceeded the represented performance. Examples of the numerous simple, concise, nondeceptive testimonials which would be permitted by this order are as follows:

1. In 1973, Mary Roe earned $\$$_____ selling VX-6 battery additive in the New York Metropolitan area, spending an average of _____ hours per week on the job. The average earnings for all our purchasers during the same period were $\$$_____.

2. In 1972, John Doe earned $\$$_____ selling VX-6 battery additive in the Philadelphia Metropolitan area, spending an average of _____ hours per week on the job. 15% of all our distributors did as well as or better than John that year.

Paragraph 2 of the order has been modified to require maintenance of substantiation for claims made pursuant to paragraph 1. We have not republished paragraphs 3 through 6 of the original order because those paragraphs have previously become final.

As modified, we believe the order entered herein will permit respondents to make a virtually limitless variety of simple, truthful, nondeceptive statements concerning the earnings of their distributors, while at the same time preventing them from passing off the earnings of unrepresentative samples with no disclosure of their unrepresentativeness. If respondents have evidence that impressive fractions of their distributors have earned goodly sums of money, they should be pleased to disclose the facts. On the other hand, if they lack evidence that more than a small fraction of distributors have earned given

amounts, it would be a disservice to consumers to permit the representation of such amounts in advertisements without information to place them in perspective. While absolute clarity and precision in an area of such complexity as that of earnings claims is certainly impossible, we believe the approach adopted herein is in accord with the mandate of the Court of Appeals on remand and sufficient to eliminate the shortcomings of the Commission's order of Mar. 4, 1975.

Because the Commission has modified its earlier order, respondents will, by law, have the full statutory time period within which to appeal the new order. Their request for a 30-day period within which to appeal following our disposition of the motion to reconsider is, therefore, moot.

Order Granting in Part Petition for Reconsideration and Modifying Order to Cease and Desist

Complaint counsel have filed a "Petition for Reconsideration" of the Commission's order in this matter issued on Mar. 4, 1975. Respondents have replied in opposition. The Commission has determined upon review of the matter that paragraphs 1 and 2 of its order of Mar. 4, 1975, must be modified, for reasons indicated in the accompanying opinion. Therefore,

It is ordered, That respondents National Dynamics Corporation, a corporation, and its officers, and Elliott Meyer, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of the battery additive VX-6, or of any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1.(a) Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits, or earnings therefrom;

(b) Misrepresenting in any manner the past, present, or future sales, profits or earnings from the resale of respondents' products, or representing, directly or by implication, the past or present sales, profits or earnings of purchasers of respondents' products except that any or all of the following representations shall not be prohibited:

(1) A true statement of the average or median sales, profits, or earnings actually achieved by all purchasers of respondents' products during any stated time period.

(2) A true statement of any particular amount of sales, profits, or earnings actually achieved or exceeded by a substantial number of purchasers of respondents' products during any stated time period, provided that it is accompanied by a clear and conspicuous disclosure (if

printed, in typesize at least equal to that of the statement of sales, profits, or earnings) of the percentage of the total number of purchasers who have achieved such results.

(3) An accurate representation of any range or ranges of sales, profits, or earnings actually achieved by purchasers of respondents' products for any stated period of time. Ranges describing yearly results shall not exceed $4,000 (*e.g.*, $0-4,000; $2,000-6,000; $4,000-8,000). Ranges describing monthly results shall not exceed $350(*e.g.*, $0-350; $350-700) and ranges describing results for any other time period shall not exceed an amount constituting the same percentage of $4,000 as the time period constitutes of one year. A representation of any range or ranges of sales, profits, or earnings achieved by purchasers of respondents' products must include a clear and conspicuous statement (if printed, in typesize at least equal to that of the statement of the range) of the percentage which purchasers achieving results within the range constitute of the entire number of respondents' purchasers; *Provided, however*, That if the ranges employed begin with $0 and proceed continuously upward, a statement of the number of purchasers within each range may be included in lieu of the percentage.

(4) Truthful testimonials regarding the sales, profits, or earnings achieved by a purchaser of respondents' products, provided that any such testimonial includes or is accompanied by the following clear and conspicuous disclosures (if printed, in boldface type at least equal in size to that of any sales, profits, or earnings figure stated in the testimonial):

(i) An accurate statement of the average amount of time per day, week, or month required by the purchaser to achieve the stated results;

(ii) An accurate statement of the year or years during which, and the georgraphical area(s) in which, the stated results were achieved;

(iii) If the results achieved by the purchaser providing the testimonial have not been achieved by at least 10 percent of all purchasers of respondents' products during the time period covered by the testimonial, a statement of the average or median sales (or profits or earnings, whichever is included in the testimonial) of all purchasers of respondents' products during the time period covered by the testimonial, or the following statement: IMPORTANT NOTICE: THE RESULTS DESCRIBED ABOVE ARE SUBSTANTIALLY IN EXCESS OF THE AVERAGE RESULTS ACHIEVED BY ALL OUR DISTRIBUTORS. OUR RECORDS SHOW THAT ONLY ____ % OF OUR DISTRIBUTORS HAVE EQUALLED OR EXCEEDED THE PERFORMANCE DESCRIBED ABOVE DURING THE INDICATED TIME PERIOD; and

(iv) If the results achieved by the purchaser providing the

testimonial have been achieved by 10 percent or more of all purchasers of respondents' products during the time period covered by the testimonial, but are in excess of the average or median results achieved by all purchasers, a statement of the percentage of all respondents' distributors who, according to respondents' records, have achieved equal or better results during the same time period, or a statement of the average or median results achieved by all purchasers of respondents' products during the same time period.

2. Failing to maintain records which substantiate that any representation made regarding past or present sales, profits, or earnings are accurate. Such records shall be sufficient to substantiate the accuracy of any representations made regarding amounts earned or sold, the number or percentage of purchasers achieving such results, the time period during which such results are achieved, and the amount of time per day, week, or month required to achieve such results.

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

It is further ordered, That respondents shall notify the Commission at least 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.

It is further ordered, That 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.

IN THE MATTER OF

CORNING GLASS WORKS

AMENDED ORDER TO CEASE AND DESIST IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8874. Complaint, Jan. 13, 1972–Amended Decision, June 17, 1975*

Amended final order to cease and desist prohibiting a Corning, N.Y. manufacturer, advertiser, seller and distributor of Pyrex, Corning Ware, and Corelle Livingware brands of glass household products for food preparation, serving, and storage, among other things, from entering into, maintaining or enforcing resale price agreements; and refusing to deal with customers or potential

* Complaint reported in 82 F.T.C. 1675.