(Receipt No. 28107) R. Kelly

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STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

IN THE COURT OF COMMON PLEAS
79-CP-40-0671

State of South Carolina, ex relatione Daniel R. McLeod, Attorney General,

Plaintiff,

-vs-

Richard C. Whiteside, J. Louis Moseley, Jr., and Southeastern Energy Systems, Inc.,

Defendants.

MASTER'S FINAL ORDER

BACKGROUND

This is an action brought by the State of South Carolina, on the relation of its Attorney General, Daniel R. McLeod, alleging that the Defendants have committed unfair trade practices under provisions of §39-5-10 et. seq., 1976 Code of Laws of South Carolina (S.C. Unfair Trade Practices Act) by selling devices, known as Tightwads and Energymizers, representing that they would save energy, without sufficient substantiating basis that the devices would in fact save electrical energy, and that such devices do not in fact save any energy. Further, the Plaintiff alleged in its Complaint that the Defendants operated under false and misleading corporate names and that such conduct also constituted deceptive acts under the South Carolina Unfair Trade Practices Act. Finally, the Plaintiff contends that the Defendant, J. Louis Moseley, Jr., failed to respond to an investigative demand served on him pursuant to §39-5-70, 1976 Code of Laws of South Carolina, and thus it is entitled to relief as provided in §39-5-100, 1976 Code of Laws of South Carolina.

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The Answer of the Defendant, Richard C. Whiteside, generally denies the allegations of the Plaintiff's Complaint. He further claims that he was simply an investor in the Defendant's Southeastern Energy Systems, Inc., and that his liability in this matter is limited to that of a stockholder. The Answer of the Defendants, J. Louis Moseley, Jr., and Southeastern Energy Systems, Inc., essentially amounts to a general denial.

Pursuant to a Rule to Show Cause dated April 26, 1979,

Defendants were ordered to appear before the Honorable William P. Donelan, Special Circuit Judge, to show cause, if any they could, why they should not be enjoined temporarily, pending a hearing on the merits of the case, from continuing the business practices alleged by Plaintiff to be unfair and deceptive trade practices. By Order dated April 26, 1979, Judge Donelan granted Plaintiff's request for a temporary injunction, wherein he enjoined the Defendants from making any representations or otherwise implying that the devices known as the Energymizers and the Tightwads (or any other similar product or transient voltage surge surpressor) are new or unique inventions, or can reduce the amount of electricity consumed, or otherwise save persons money on their electricity bills. These Defendants were also enjoined by said Order from making any solicitations, retail sales, sales of distributorships, or otherwise, doing any business in Energymizers, Tightwads, or any similar product or transient voltgage surge surpressor, and were ordered to retain in their possession, control and custody, all such devices until the further order of the Court.

By an earlier Order, Judge Donelan had required Defendant Moseley to answer in full the Investigative Demand of the Plaintiff Thereafter, a second Order was issued by the Court on May 22, 1979, which again directed Defendant Moseley to produce various records for inspection and copying. The latter Order covered various documents that had not been produced by Defendant Moseley in response to the Civil Investigative Demand.

When the case came before this Court for trial, Plaintiff consented to a voluntary nonsuit as to Defendant Whiteside for its third cause of action. A motion by Plaintiff to amend Paragraph 7 of its Complaint to include the sale of the product known as "Energymizer" was granted by the Court. The Court also granted Defendants' motion to amend their answers to allege that the individual Defendants acted only as agents of Defendant Corporation.

This matter was referred to me by Order of the Honorable Rodney A. Peeples, dated January 14, 1981. Although, such Order of Reference did not refer the matter to me for entry of a final

Order pursuant to §15-31-10, South Carolina Code of Laws for 1976, the parties stipulated at the first reference before me on March 11, 1981, that the undersigned shall enter a final Order in this cause in accordance with above recited Code section.

This matter was heard before me during all or portions of some ten days and if the testimony covering such hearings were typed, it would consist of several hundreds of pages of Transcript. The parties, however, stipulated and agreed at the last reference on May 5, 1981, that the undersigned could enter his Order in this case prior to the transcription of this testimony, pursuant to §15-31-80, South Carolina Code of Laws for 1976.

There were numerous Motions made during the trial by the Defendants to dismiss the action on various grounds, to include, but not limited to the unconstitutionality of the South Carolina Unfair Trade Practices Act; the selective nature of the prosecution of the instant action against the Defendants; the prosecution of instant action violates an agreement by Plaintiff with Defendants that this case would be stayed until the South Carolina Surpreme Court hears a similar action involving different parties arising out of the Greenville, South Carolina, Court of Common Pleas; that the investigation and prosecution of the matter by the South Carolina Attorney General was unfair, unconstitutional and improper, in that the Plaintiff's Office investigated and now prosecutes the matter. All such Motions to Dismiss were denied by the undersigned, except for the question of the constitutionality of the statute. The undersigned reserved ruling on the unconstitutionality question for disposition in this Order.

FINDINGS OF FACT

1. Early in March, 1978, Defendants Moseley and Whiteside, travelled to Greenville, South Carolina, to talk to Mrs. Dottie Irwin and Mr. Leonard Brown, who were owners and/or asscciated with a corporation by the name of Energymizer Systems of America, Inc. As a result of that or subsequent visits, Defendants Moseley and Whiteside entered into an agreement with Energymizer Systems of America, Inc. (hereafter Energymizer Systems) to sell an electrical device known as "Energymizer." This venture was memoralized in a document called a "Franchise Agreement" dated

March 14, 1978. The Agreement gave to Southeastern Energy Systems, Inc., the right to sell the energymizer unit within certain geographical areas of South Carolina for a 5-year period.[1] After execution of this Agreement, Defendants Moseley and Whiteside began selling the energymizer unit, doing business as Southeastern Energy Systems, Inc., the latter part of March 1978.

2. That on or about May 18, 1978, the Defendant, Richard C. Whiteside, incorporated a entity by the name of Southeastern Energy Systems, Inc. (hereafter Southeastern). According to the Corporation's Articles of Incorporation, Mr. Whiteside was the only incorporator, however, the testimony clearly shows that the corporation was owned from its inception by both Defendants, Whiteside and Moseley.

3. One of the initial questions for a determination is the extent of participation of the Defendants, Moseley and Whiteside, in the operation and affairs of the corporation. While Mr. Whiteside contends that he was only an investor in Southeastern, the evidence reflects that he was the only incorporator of the business; that he paid the $5,000.00 franchise fee to Energymizer Systems; that he signed checks on the corporate account and paid certain expenses of the corporation; that he travelled to the home office of Energymizer Systems in Greenville on several occasions to obtain literature and evaluate potential sales of the energymizer unit; that he and Mr. Moseley sold energymizer units prior to the time the corporation, Southeastern became a legal entity; that he got involved in hiring practices and problems associated with salesmen of Southeastern; that he attended the home show and demonstrated the device; that he talked with customers who had complaints relative to units sold; that he discussed dealerships and franchise arrangements with potential dealers, and sub franchisees of Southeastern; that he participated in the decision to commit substantial funds of the corporation to the purchase of an airplane; and engaged in other matters that certainly point beyond a mere investor in the corporation.

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1 Note, while Southeastern Energy Systems, Inc. was not then a valid entity, it was a party to this Agreement.

4. Defendant Moseley testified that while he ran the day-to-day operation of Southeastern and made policy decisions, he made no effort to conceal his activities from Whiteside. In fact, Moseley describes their relationship as being one of mutual trust and confidence. Whiteside admits he knew that Moseley used corporate funds for his personal living expenses. From the admissions of Defendants and the testimony and evidence before me, I am convinced that Whiteside had knowledge of most major corporate decisions and was consulted on them. Therefore, I find as fact that Defendants Moseley and Whiteside were both "controlling persons" of Southeastern and both participated in the policy making and running of the corporation.

5. Initially, the Defendant, Southeastern Energy Systems, Inc., was a territorial franchisee/dealer of the Energymizer for Energymizer Systems. However, Southeastern later became a national distributor for the Energymizer. Thereafter, Southeastern solicited and obtained territorial dealerships for the Energymizer unit.

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6. The focal point of this case is whether the products Energymizer and Tightwad as sold or offered for sale by Defendants were capable of performing as represented in sales and promotional literature. From the large quantity of sales and promotional documents submitted into evidence, the Court has no difficulty determining what representations were made by Defendants as to the performance to be expected by a purchaser. The essence of the claims made by Defendants for their products was that they acted as suppressors of transient voltage surges. The parties to this action are in agreement as to the existence and nature of such surges. They differ as to what effect transient voltages surges have on the watthour meter which measures electricity consumption and whether any such devices can reduce the amount of electricity consumed in a residence.

7. In the course of selling or offering for sale the Energymizer and Tightwad units, I find that the Defendants, their agents, distributors, and sales people made numerous affirmative claims for the products, both directly and indirectly (through the use of brochures, etc.). Specifically, I find that Defendants represented the following:

(a) That "Electrical voltage surges during peak use periods cause electrical heat build-up within the home wiring. Electrical voltage surges are caused by abnormal amounts of high voltage entering the home electrical system. Each time surge voltages pass through the watthour meter, the rotating disk will "jump" or speed up for a short time due to increased current.

TIGHTWAD limits voltage to a maximum of 130 volts on each 230 volt circuit.

In the average home, power surges up to 6,000 volts cause appliances to operate outside their designated tolerance and to burn out.

POWER SURGE (TRANSIENT)--Increase of voltage being transmitted through main power lines and are of a very brief duration, measured by milliseconds.

Each time surge voltage pass through the watt-hour meter, the rotating disk "jumps" or speeds up for a short time due to increased current. Some experts say these surges can range up to 12,000 volts, but normally range up to 6,000 volts, there is no set agreement because voltage varies in all location. There is no established number of voltage surges, however, in some cases they average 16 to 20 per second. (VOLTAGE SURGES INCREASE DURING PEAK USE PERIODS.)

The real "cost" factor does not occur until these surges pass through the junction box and enter into the home wiring system. Remembering that the main power line is normally a very large voltage wire, 6,000 volt surges will not cause a heat resistance; however, the average home is wired normally with 600 volt wire. (Some homes are wired with 300 volt wires.) Electrical surges cause electrical heat build-up or resistance within the home wiring. Since the wiring leading into and out of the watthour meter is a conductive device, this heat build-up or resistance from the smaller home wiring will conduct backward into your watthour meter. Now, knowing that the watthour meter operates on heat and electromagnetism, you can see how transient surges cause the increased consumption of kilowatt hours." Cf. to the Energymizer and Tightwad Brochures.

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(b) That the use of the Energymizer and Tightwad units would result in a savings of 10 to 40 percent reduction on the Tightwad and 15 to 40 percent on the Energymizer in kilowatt hour usage over a 90-day period as compared with the same billing period of the previous year.

(c) That the use of the Energymizer and Tightwad can significantly improve the operating efficiency of electrical appliances and equipment, particularly electrical motors and that this increased efficiency will result in reduced operating costs to the consumer. Defendants further represented that by thus improving the efficiency of electrical equipment, such gadgets will promote electrical system efficiency and reduce the energy normally used by such appliances by fifteen to forty percent.

8. I further find that in addition to saving the home-owner money by removing transient voltage surges from the line, other "Energymizer" products were represented as saving the purchaser money by taking the RF current and static electricity off power lines. Some of the units being sold or offered for sale had timers with them. These timers cut off electricity to appliances such as a hot water heater for a portion of the day. Other units were sold or offered for sale without any such timing device. However, the claims made for devices with timers and without timers were the same.

9. Plaintiff takes issue with all claims by Defendants as to the effect that the removal of transient voltage surges from power lines have on the watt-hour meter and the savings to be realized therefrom. In support of its position Plaintiff called Dr. Rufus Fellers, a professor of electrical engineering at the University of South Carolina, as an expert witness to testify about transient voltage surge suppressors as energy saving devices. During his testimony, he reviewed the representations made for the Energymizer and Tightwad as energy saving devices. He advised the Court in unequivocal terms that such devices do not operate as energy savers. While acknowledging that surge suppressors served a protective function for some household electrical devices, Dr. Fellers stated that surge suppressors are readily available at electrical supply stores for a fraction of the price being asked by Defendants for the Energymizer and Tightwad.

10. Dr. Fellers specifically refuted the representations that transient voltage surges speed up the watt-hour meter to any measurable degree. He stated that the surges are of such short duration (measured in milliseconds) that the watt-hour meter probably is incapable of registering them. Unless registered on the meter, the surges would obviously have no impact upon the amount of electricity consumed for which the consumer is billed. He further testified that even if measured, the surges would increase a household with an average bill of $100.00 per month by about 1 cent. He noted that even if such surges could be registered on the meter, they are already past the meter before the suppressor removes them from the line. Further, according to Dr. Fellers, neither static electricity nor RF current can be measured on a watt-hour meter. Thus, their removal from a power line would have no effect upon the electricity bill of a consumer. Dr. Fellers likewise denied that transient voltage surges cause any heat buildup on wiring in a home that is conducted backward from the home into the meter, as Defendants contend.

11. Dr. Fellers acknowledged that a consumer could achieve some energy savings from those devices which contained

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timers. The savings, however, would come entirely from the timer and not from the surge suppressor itself. Such timers, he stated, are readily available on the market at a fraction of the price being asked for the "Energymizer" and "Tightwad."

12. A demonstrator board used by Defendants in the sale and promotion of the "Energymizer" was admitted into evidence by Plaintiff. This board has mounted on it a watt-hour meter, a control switch, and an electrical outlet connected to a green rectangular box with the "Energymizer" label on it. Dr. Fellers testified that he had examined this board and conducted a test on it. He stated that when connected to electrical current, he found that by turning on the control switch which engaged the box marked "Energymizer", the supply of electric current was cut approximately one-half. Accordingly, the disc in the watt-hour meter would appreciably slow down its revolutions. Operating on only half power, upon being connected to the outlet, any electrical appliances would be destroyed, severely damaged or perform half as efficiently as on full current, according to Dr. Fellers. Such a demonstration would have no relationship to the actual performance of a surge suppressing device such as the "Energymizer" or "Tightwad."

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13. Defendants Whiteside and Moseley concede that they are not electrical engineers, nor, knowledgeable in the make-up and operation of electrical mechanisms. Both Moseley and Whiteside testified that they were verbally told and presented literature by both Ms. Irvin and Mr. Brown that supported the performance claims of the devices. From the admissions, testimony and other evidence before the Court, the Defendant Whiteside appears to have adopted without question the representations made for the products by their inventor and manufacturer, Leonard Brown. It is indeed noteworthy that Mr. Brown appeared at every hearing during the course of the trial, but, never testified for the Defendants. On the other hand, it was evident to the Court that Mr. Brown freely conferred with Defendants and Counsel during trial and materially assisted with the defense.

14. In addition to the representations and literature claimed to have been received by Defendants, Mr. Moseley claims to have also made an independent investigation by talking to several purchasers of the devices; calling a Dr. Hershfield in California,(who purportedly is an advocate of surge suppressors) and reading a lot of literature on surge suppressors. Most of this literature that Mr. Moseley claims he read prior to commencing sale of subject devices was unavailable at trial. Mr. Moseley did attempt to introduce a study into evidence that he relied on, yet the study was dated subsequent to the time Defendants commenced business. The undersigned notes that due to several things that occurred at trial, to include this matter, the credibility of Mr. Moseley is seriously questioned by this Court.

15. Both Plaintiff and Defendants presented the testimony of several lay witnesses, some of which testified that they thought the device saved some energy while others said it didn't. Further, over the objection of the Defendant, the Plaintiff presented to the Court a mail survey conducted by Plaintiff's employees of purchasers of the energymizer device. The Defendants objected to the methods utilized and the persons who conducted the survey and especially pointed out the possible bias of the makers of the survey. Although, there is room to question the results of the survey, the survey showed that at time of taking, few purchasers believed that the energymizer saved energy and generally the survey showed widespread dissatisfaction with the device.

16. I find there are many variables in the average house or business and that it would be difficult for a layman to determine if the Tightwad or Energymizer actually reduced electricity consumption, absent a controlled environment. Thus, I cannot give much credence to the testimony of these lay witnesses, given the non-scientific nature of consumer observations and the failure of their testimony to establish that the effects they observed after installing the devices were in fact caused by use of the devices.

24. There appears to be little, if any, dispute between the parties herein as to the number of sales of "Energymizer" units made by Defendants. While the "Tightwad" was offered for sale, it appears that no actual sales were made. From the admission of Defendants and the testimony and evidence before me, I find as fact that Defendants sold at retail approximately 60 units to individual consumers at a price of approximately $400. I further find as fact that Defendants sold at wholesale some 60 units to Mr. Frank Garner for approximately $11,500. and 13 units to Mr. Ike Oates for approximately $3,000.

25. Sales and promotional literature received into evidence indicate that Defendants used the names "Tightwad Systems of America, Inc." and "Energy Savers of South Carolina, Inc." The Defendants admit the genuineness of this literature and further admit that no such corporations ever existed. It is their contentions that these corporations were going to be chartered, however, Defendants never operated or transacted any business under the names of "Tightwad Systems of America, Inc.," nor "Energy Savers of South Carolina, Inc."

26. Most of the sales efforts involving the Energymizer were conducted by Defendants Moseley and Whiteside under the name Southeastern Energy Systems, Inc. However, the admissions, testimony and evidence before the Court indicate that the corporate Defendant was a corporation in name only. Few corporate records ever appear to have been maintained. Defendant Moseley unconvincingly told the Court that some records had been "stolen out of his car." He is quite vague, however, as to precisely what was taken. He also stated at trial that certain records were in a warehouse, but inspection of that warehouse by Plaintiff's attorneys proved unavailing. In fact, the only corporate records of which there is actual proof are the corporate checkbooks.

27. The individual Defendants also appear somewhat confused and uncertain as to which offices they held in Southeastern. Their testimony is ambiguous as to who held various offices in the corporation and who were the corporate directors. There appears to have never been any formal stockholders or

directors meetings. Accordingly, there are no corporate minutes available. Defendant Moseley acknowledges using the corporate bank accounts to pay bills for which he, and not the corporation, was liable. In fact, a review of the bank records indicate a pronounced pattern of abuse of corporate funds by Mr. Moseley. Therefore, I find as fact that Defendant Moseley operated Southeastern without regard to corporate formalities. As to Defendant Whiteside, the undersigned granted during trial his motion for a non-suit as to allegations relative to piercing the corporate veil and/or personal liability based on a disregard of corporate formalities.

28. Another factual determination required to be made by this Court relates to Defendant Moseley and his alleged failure to respond to a Civil Investigative Demand (CID) issued by the Plaintiff Attorney General. Defendant Moseley does not dispute service of the CID upon him. Rather, he argues that he was given an extension of time in which to respond to it. Plaintiff ackhowledges that an extension was granted from the original due date until January 2, 1979. Correspondence between counsel for Plaintiff and the attorney then representing Moseley verifies this. Mr. Moseley admits that no written extension was given him beyond that date. He insists, however, that Plaintiff's counsel orally granted him an indefinite extension sometime between Christmas of 1978 and New Year's Day of 1979. No credible explanation is given by Moseley as to why any extension beyond January 2, 1979, is not in writing as was the original extension.

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29. This issue was indirectly placed before Judge Donelan in his earlier hearings on the temporary relief being sought by Plaintiff. In his Order of April 26, 1979, he noted the stipulation of the parties that Moseley made no response to the CID until March 20, 1979. He found as fact that Moseley did not petition the Court to review or set aside the CID until after the response was due. The issue was also indirectly before Judge Donelan on May 22, 1979, on a Rule to Show Cause why Defendant Moseley should not be held in contempt of Court for his failure to respond fully to the CID as directed by the Court on March 15, 1979. On May 22, 1979, he ordered Moseley to provide

various records to Plaintiff which had earlier been sought in the CID.

30. The testimony and conduct of Defendant Moseley convinces this Court that he has consistently attempted to evade pre-trial discovery in a most obstinate and obdurate manner. At various times he indicated in the course of this litigation that the corporate records were being held by his accountant, by this Court, by the Attorney General's Office or in a warehouse. None of this proved to be true. Further, even during the course of this trial, Mr. Moseley produced records such as his power bills and a purported study of transient voltage surge suppressors which he had consistently refused to produce in response to the CID or pre-trial discovery. Moseley's flippant attitude towards the Orders of this Court is blatant and obvious. Accordingly, I find as fact that Defendant Moseley knowingly and willfully refused or failed to respond timely to the CID served upon him by the Attorney General.

31. I further find that in March, 1979, and after commencement of this action, Defendant Whiteside sold to Defendant Moseley all his interest in Defendant Southeastern for the sum of $3,000.00.

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CONCLUSIONS OF LAW

1. The South Carolina Unfair Trade Practices Act (UTPA) provides in §39-5-20(a), S.C. CODE, 1976, that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. the UTPA defines "trade" and "commerce" as including:

> "[T]he advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." §39-5-10(b) S.C. CODE, 1976.

Courts are to be guided by interpretations given by the Federal Trade Commission and the Federal Courts as to what constitutes unfair methods of competition and unfair or deceptive acts or practices in the conduct of trade or commerce. §39-5-20(b), S.C. CODE, 1976.

2. Under the FTC Act, as interpreted by federal law, intent to deceive is not necessary to be proven by the Plaintiff. An allegation of the use of an unfair trade practice may be predicated upon the retention of benefits resulting from an innocent misrepresentation. 55 AM. JUR. 2d, MONOPOLIES Restraints of Trade and Unfair Trade Practices §741. It is the capacity to deceive and not actual deception that the Courts look to to determine if the practice was unfair or deceptive. Goodman vs. Federal Trade Commission (CA9) 244 F2d 584.

3. In this action, voluminous testimony has been taken and numerous documents submitted into evidence. Yet, there is no evidence whatsoever of any credible efforts by Defendants to substantiate the capabilities of the "Energymizer" and "Tightwad" to perform as represented. They conducted no tests, compiled no statistics and utilized no independent experts to verify the claims they were making for their products. Under the FTC case law, it is well established that the making of claims which are not substantiated by reasonable proof is an unfair or deceptive act. Firestone Tire and Rubber Co. v. FTC, 481 F. 2d 246 at 249 ff (6th Cir. 1973), cert. denied, 414 U.S. 112 (1973). In Firestone, the Court upheld FTC findings that regardless of the possible truth of claims being made, the failure to substantiate them was an unfair and deceptive act. Further, the argument that there is no deception if unsubstantiated claims are later proved to be true has been rejected by the federal courts. See Jay Norris, Inc. v. FTC, 598 F. 2d 1244 (2nd Cir. 1979), cert. denied, 444 U.S. 980 (1980). In accord with the decision of the federal courts as cited herein, I conclude as a matter of law that the making of unsubstantiated claims of energy savings by Defendants for the "Energymizer" and "Tightwad" is an unfair or deceptive act or practice in trade and commerce.

4. No only were the claims advanced by Defendants for their products unsubstantiated but the testimony and evidence before me showed them to be untrue. The "Energymizer" and "Tightwad" were sold and/or offered for sale to the public as energy saving devices. In an era of ever rising energy costs, the appeal of these products to the consumer is obvious. Yet, the representations made by Defendants have no reasonable basis

in fact. An advertisement of a product has been compared to a passport for the complete truthfulness of the statements contained therein. See Spiegel, Inc. v. FTC, 494 F. 2d 59 at 62 (1974). It is not the duty of the Purchaser to be suspect of the honesty of those with whom he transacts business. Caveat emptor cannot be relied upon to reward deception. See FTC v. Standard Education Society, 302 U.S. 112 at 116 (1937). Accordingly, I conclude as a matter of law that the sale or offering for sale by Defendants of the "Energymizer" and "Tightwad" is an unfair or deceptive act or practice in trade and commerce.

5. Defendants Whiteside and Moseley owned, dominated and managed Southeastern. The only apparent evidence that a corporation ever existed is the corporate charter and checkbook in evidence before the Court. It would indeed be unfair and unjust to immunize the individual Defendants behind a corporation for responsibility for their actions solely because they obtained a corporate charter and opened a bank account prior to engaging in unfair and deceptive trade practices. When individuals behind a corporation act as though no corporation exists, they may properly be held accountable for activities conducted under the corporate name. See FTC v. Standard Education Society, 302 U.S. 112 (1937) and Consumer Sales Corp. v. FTC, 198 F. 2d 404 (2nd Cir. 1975). Further, the controlling persons of a corporation cannot bury their heads in the sand and close their eyes to actions being taken under the corporate name and thus evade liability for actions ostensibly taken by the corporation. See United States v. Bestline Products Corp, et al., 412 F. Supp. 754 (N.D. Cal. 1976). Such persons cannot seek to reap benefits from activities undertaken in the corporation's name and, at the same time, avoid all responsibility for such activities. Therefore, I conclude as a matter of law that Defendants Whiteside and Moseley as controlling persons of Southeastern are individually liable for any unfair trade practices committed under the corporate name of Southeastern.

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6. The UTPA authorizes the Attorney General to bring actions under its provisions in the Court of Common Pleas. Among

the powers granted to the Court is the power to restrain by injunction the use of unfair and deceptive trade practices. The Court is further empowered to make such additional orders or judgments as may be necessary to restore to persons suffering ascertainable loss thrcugh the use of unfair and deceptive trade practices the money or property lost thereby. In addition, the Court issuing any injunction shall award to the State the reasonable costs incurred in bringing the action. §39-5-50, 1976 CODE of Laws of S. C.

7. The UTPA in clear and unambiguous terms gives this Court authority, and the power to not only halt the commission of further unfair and deceptive trade practices, but also the power to remedy injuries sustained by any person from the employment of such practices. I, therefore, conclude as a matter of law that this Court can and should issue a mandatory injunction which will be sufficient in scope to insure that the public will never again be threatened by Defendants engaging in similar unfair and deceptive trade practices, and further conclude that, as a matter of law, this Court in accordance with mandatory provisions of the UTPA must award to the State its reasonable costs.

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8. I conclude that the Court should reject the Plaintiff's request that all purchasers of the devices must be refunded the purchase price of the devices. While §39-5-50(b) would permit the undersigned to enter such an Order, I do not consider it "necessary" in light of §39-5-140, which gives such persons a cause of action for damages for such practices and provides for attorney fees and triple damages, if willfulness is found by the Court. I do conclude that Defendants should be required to furnish Plaintiff's attorneys a complete list of every person that they have ever sold these devices to. Such list to be furnished within 30 days from date of this Order and the Plaintiff shall thereafter, forward to such persons a copy of this Order.

9. The UTPA directs the Courts in construing unfair methods of competition and unfair or deceptive acts or practices in trade or commerce to be guided by the interpretations given to the FTC Act by the Federal Courts to §45(a)(1),of the Federal Trade

Commission Act. (15 U.S.C. 45(a)(1)) This directive relates only to determining the substantive aspects of actions brought under the UTPA. It has no bearing or relationship to the procedural aspects of such actions. Rather, the UTPA specifies its own procedures and remedies in such actions.

10. Defendants argue that this Court must be guided by the FTC Act in determining not only what is an unfair trade practice but also what remedies may be available to the State. In particular, they argue that civil penalties should not be assessed unless a party has violated a cease and desist order or an injunction. Their position is totally without merit. First, the UTPA does not authorize the issuance of cease and desist orders by the Attorney General or any other administrative agency. Secondly, it authorizes the Courts to impose civil penalties of up to $5,000. per violation while at the same time authorizing civil penalties of up to $15,000. for violation of any injunction issued under its provisions. See, §39-5-100 S.C. CODE 1976. Clearly, an order or injunction is not a condition precedent to the levying of civil penalties by the Court.

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11. Before levying a civil penalty, however, the Court must find that any person who used any method, act or practice in violation of the UTPA acted willfully in doing so. See, §39-5-110(a)(b) S.C. CODE 1976. A willful violation is defined as occurring when the party "knew or should have known" that the conduct in question was an unfair or deceptive trade practice. See, §39-5-110(c) S.C. CODE 1976. Willfullness implies the conscious or knowing doing of an act and an absence of good faith. Here I cannot find that Defendant Whiteside did not act in good faith in his participation in the sale of the subject devices and considering his involvement in the sales end of the operation, that he knew or should have known the representation relative to the devices were unfair or deceptive. I find otherwise as to Moseley for the evidence shows that he was intimately involved in the sales and did in fact make misrepresentations himself.

12. While Defendant Moseley testified he conducted his own study of the energymizer, to include reading numerous articles and studies on surge suppressors and calling prior purchasers of

the unit before he began marketing it, his testimony was not credible. Moreover, I conclude that his failure to confirm or substantiate the claims he advanced for the products does not lessen but indeed reflects willfulness and his intent to violate the UTPA. Therefore, I conclude as a matter of law that the Defendant Moseley's conduct was a willful violation of the UTPA and that he should be fined the sum of $2,500.00 for such willful violations.

13. I further conclude as a matter of law that Plaintiff has not shown by credible evidence that Defendant or any one of them violated the UTPA by the use of confusing and misleading corporate names or that the term "Inc" was used to indicate that corporations existed where they didn't to the deception and injury of the public.

14. Defendants seek to rely on their "money-back guarantees" as some sort of proof that no unfair or deceptive acts or practices were involved in the marketing of "Energymizers" and "Tightwads." They are unable to explain why, if this argument is to be accepted, there are purchasers who have not, in spite of their efforts, received any refund. Defendants cannot make false and deceptive claims for their products and remove themselves from liability for the claims simply by offering a money-back guarantee to dissatisfied customers. See, Montgomery Ward and Co. v. FTC, 379 F.2d 666 (1969) and Capon Water Co., et al v. FTC, 107 F.2d 516 (3rd Cir. 1939). To accept such an argument from Defendants would be tantamount to lifting the prohibitions on false and deceptive advertising. Therefore, I conclude as a matter of law that the making of false and deceptive claims for a product is an unfair or deceptive act or practice in trade or commerce even though a money-back guarantee is given with the product.

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15. I have heretofore found as fact that Defendant Moseley knowingly and willfully refused or failed to respond to a Civil Investigative Demand (CID) served upon him. Section 39-5-100 CODE provides that any person served with a CID "shall comply" with the terms thereon unless relieved of such duty by

Court petition and subsequent Court order. No timely petition was made by Defendant Moseley for relief and none was granted. A review of the efforts by the State to enforce compliance with CID makes clear that Moseley did indeed knowingly withhold or conceal relevant information from the Attorney General in the course of the civil investigation being conducted of the Defendants. Accordingly, I conclude as a matter of law that Moseley is subject to and shall be assessed a civil penalty of $500.00.

16. Defendant at trial raised the question of whether Section 39-5-10 et seq., Code of Laws of South Carolina (1976) (hereinafter Code), commonly known as the South Carolina Unfair Trade Practices Act, (hereinafter UTPA) is unconstitutionally vague and indefinite in violation of Article I, Section 3 of the South Carolina Constitution. This Defendant also contends that Section 39-5-10, et seq., also violates the due process clauses of the State and Federal Constitutions and Article I, Section 14 of the State Constitution relative to trial by Jury. [1]

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17. The general power and authority of the legislature to enact legislation regulating the conduct of business is beyond question. See e.g., Gwynette v. Myers, 237 S.C. 17, 115 S.E. 2d 673 (1960); State v. Langley, 236 S.C. 583, 115 S.E. 2d 308 (1960); Rose v. Harllee, 69 S.C. 523, 48 S.E. 541 (1904). Indeed, legislative action completely prohibiting the practice of a profession has been sustained against constitutional attack based on alleged due process and equal protection rights where the public interest is implicated. Dantzler v. Callison, 230 S.C. 75, 94 S.E. 2d 177, appeal dismissed 352 U.S. 939, 77 S. Ct. 263 (1956).

18. A challenge based on vagueness is essentially a question of notice; i.e., whether or not a statute contains language so imprecise that persons will not realize what activities are proscribed. E.g., Carpets By The Carload v. Warren, 368 F. Supp. 1075 (E.D. Wis. 1973). Normally, much greater

1. The Supreme Court has implicitly recognized the constitutionality of the Act in State v. Fritz Waidner, Op. No. 21158, Feb. 25, 1980, Smith's Advance Sheets, No. 5 (1980) and State v. Hornblower, Loeb, Rhoades et al., Op. No. 21253, June 19, 1980, Smith's Advance Sheets No. 24 (1980).

latitude is permitted in remedial, as opposed to penal, statutes, the latter requiring strict construction. E.g., Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973). The mere inclusion of civil penalties does not render a statutory scheme penal. Id. See also, People v. Witzerman, 105 Cal. Reptr. 284 (1972).

19. The UTPA proscribes "unfair or deceptive acts or practices in trade or commerce." Section 39-5-20, Code. This language is taken verbatim from Section 5 of the Federal Trade Commission Act, 15 USC §45(a)(1), and has thus been with us on the federal level since 1938. The federal courts have established a substantial body of caselaw interpreting and giving substance to the practical meaning of those terms. E.g., 55 Am. Jur. 2d Monopolies §§ 696-869 passim. Cf., Department of Legal Affairs v. Lee Rogers d/b/a American Holiday Association, 329 So. 2d 257 (Fla. 1976); State v. Reader's Digest Association, Inc., 501 P. 2d 290 (Wash. 1972). Furthermore, in the regulation of business, the use of ". . .phrases well enough known to enable those expected to use them to correctly apply them. . .will generally be sustained against a charge of vagueness." State v. Reader's Digest Association, Inc., supra, at 300. As the Washington Court in Reader's Digest concluded ". . .the phrases. . .'unfair methods of competition' and 'unfair or deceptive acts or practices have a sufficiently well established meaning in common law and trade law. . .to meet any constitutional challenge of vagueness." Id. at 301. See also, Sears, Roebuck and Company v. FTC, 258 F.3((7th Cir. 1919). In Sears the Seventh Circuit Court of Appeals, addressing the alleged unconstitutional vagueness of the phrase "unfair methods of competition" held

> . . .the phrase is no more indefinite than "due process of law." The general idea of that phrase as it appears in Constitutions and statutes is quite well known; but we have never encountered what purported to be an all embracing schedule or found a specific definition that would bar the continuing processes of judicial inclusion and exclusion based upon accumulating experience. If the expression "unfair methods of competition" is too uncertain for use, then under the same condemnation would fall the innumerable statutes which predicate rights and prohibitions upon "unsound mind", "undue influence", "unfaithfulness,"

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> 'unfair use", "unfit for cultivation", "unreasonable rate"' "unjust discrimination", and the like. This statute is remedial, and orders to cease and desist are civil; but even in criminal law convictions are upheld on statutory prohibitions of "rebates or concessions" or of "schemes to defraud", without any schedule of acts or specific definition of forbidden conduct, thus leaving the Courts free to condemn new and ingenious ways that were unknown when the statutes were enacted. Sears, Roebuck and Company v. FTC, at 311.

Similar considerations inform the legislative condemnation of "unfair and deceptive acts and practices." Broad statutory language is necessary to encompass a dynamic category of conduct. Reference to federal decisions interpreting the terms "unfair" and "deceptive" in connection with the Federal Trade Commission Act demonstrates that while capable of definition, such terms are designed to, and should be permitted to, remain flexible so as to permit inclusion of practices which are unfair or deceptive". . .quite irrespective of whether the specific practices in question have yet been denounced in common law cases." Sears, Roebuck and Company v. FTC, at 311. With regard to definitions of "unfair" and "deceptive", see, e.g., FTC v. Sperry-Hutchinson Co., 405 U.S. 233 (1972) ("unfair"), and U.S. Retail Credit Association v. FTC, 300 F. 2d 212 (4th Cir. 1962). ("deceptive").

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20. Inasmuch as sufficient notice of the conduct proscribed by the UTPA is provided by case law and by the common intelligence required of those affected by such regulations, I conclude that the S.C. Unfair Trade Practices Act is sufficiently definite to withstand an attack based on alleged vagueness or indefiniteness.

21. On the question of trial by jury, Judge Peeples' Order of March 6, 1981, determined that Defendants did not have a right to trial by jury and further found that even if there were such a right, the Defendants have waived that right. No appeal has been taken from Judge Peeples' Order. Clearly, denial of a party a mode of trial to which he is entitled by law is appealable. Alston vs. Limehouse 61 S.C. 1, 39 S.E. 192; Williford vs. Downs, 265 S.C. 319, 218 S.E. 2d 242. Presumably, the parties had the opportunity to argue the constitutionality of the Statute as relates to a jury trial before Judge Peeples. Thus, the failure to appeal Judge Peeples' Order amounts to a

waiver by Defendants of their right to raise the issue at this time. I also concur with Judge Peeples' conclusion that right to a jury trial has been waived by Defendants and, therefore, the Defendants should be precluded from raising the issue at this time.

O R D E R

IT IS HEREBY ORDERED, that the Defendants, J. Louis Moseley, Jr., Richard C. Whiteside, and Southeastern Energy Systems Inc., be enjoined, permanently from making any representations or otherwise implying that the Energymizer, the Tightwad, or any similar product or transient voltage surge suppressor is a new or unique invention, or can reduce the amount of electricity consumed, or otherwise save persons money on their electricity bills.

IT IS FURTHER ORDERED, that the Defendants, J. Louis Moseley, Jr., Richard C. Whiteside, and Southeastern Energy Systems, Inc., be enjoined, permanently from making any solicitations, retail sales, sales of distributorships or from otherwise doing any business in Energymizers, Tightwads, or any other similar product or transient voltage surge suppressor either directly or through their agents, distributors, salespersons or other representatives.

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IT IS FURTHER ORDERED, that the Defendants, J. Louis Moseley, Jr., and Richard C. Whiteside, keep and retain in their possession, control, and custody any Energymizers, Tightwads, or other similar product or transient voltage surge suppressor presently in their possession or control.

IT IS FURTHER ORDERED, that Defendant Moseley shall forfeit and pay to the State of South Carolina a civil penalty of $2500.00 for his willful violation of Section 39-5-20 Code of Laws of S.C., 1976.

IT IS FURTHER ORDERED, that Defendant Moseley pay to the State of South Carolina a civil penalty of $500.00 for his willful failure to comply with the Plaintiff's Civil Investigative Demand.

IT IS FURTHER ORDERED, that Defendants pay to Plaintiff its reasonable costs as provided in Section 39-5-50, 1976 Code of Laws of S.C. to be assessed by the Clerk of Court for Richland County.

IT IS FURTHER ORDERED, that Defendants furnish Plaintiff's attorneys, a complete list of every person or corporation they have sold Energymizers or Tightwads to. Such list to be furnished within 30 days from date of this Order and Plaintiff is Ordered to forward to such persons or corporations, a copy of this Order within 10 days thereafter.

AND, IT IS SO ORDERED.

JASPER M. CURETON, MASTER IN EQUITY
FOR RICHLAND COUNTY

Columbia, South Carolina
July 16, 1981.

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