IN THE MATTER OF

BORDEN, INC.

Docket 8978. Interlocutory Order, Apr. 5, 1977

Order granting motion by Department of Commerce to file brief as *amicus curiae;* accepting brief as filed; and granting counsel 30 days to file responsive briefs.

ORDER

On March 8, 1977, the United States Department of Commerce moved for leave to file a brief as *amicus curiae* in this appeal. The Department's brief was conditionally filed therewith. Complaint counsel and counsel for respondent Borden, Inc. have informally indicated to the Office of the Secretary that they do not intend to file in opposition to the motion.

While the Commission's Rules of Practice do not expressly provide for the filing of *amicus curiae* briefs, we have granted *amicus* treatment to certain filings under section 3.14, which governs intervention in Commission proceedings. See, *e.g., Corning Glass Works,* 82 F.T.C. 1082 (March 22, 1973). Section 3.14 is broadly drafted, providing for orders permitting intervention "to such extent and upon such terms as are provided by law or as otherwise may be deemed proper."

A motion for leave to file a brief *amicus curiae* addresses the discretion of the tribunal. As the term itself and the tradition from which it arises make clear, the role of the *amicus* is not to vindicate its own rights but to clarify for the tribunal the broad implications of the question before it. The brief of the Department of Commerce fits squarely within this role.

It would obviously have been preferable to receive this motion and brief at an earlier stage of the appeal.[1] At this point, all briefs have been filed and oral argument heard. Absent special circumstances, leave to file at this point might well be denied to avoid the disruption and possible delay attendant on granting it. In the present instance, however, the importance of the issue involved and the uniqueness of the Department's perspective outweigh these considerations.

It is therefore ordered, That the motion for leave to file a brief as *amicus curiae* be granted, that the brief be accepted as filed, and that complaint counsel and counsel for respondent Borden, Inc., have thirty days to file responsive briefs, if they so desire.

[1] The U.S. Courts of Appeals, by way of analogy, require generally that an *amicus* brief be filed no later than that of the party the brief will support. Rule 29, Federal Rules of Appellate Procedure.

IN THE MATTER OF

THE RAYMOND LEE ORGANIZATION, INC., ET AL.

Docket 9045. Interlocutory Order, Apr. 5, 1977

Order determing that record does not establish any violations of the code of professional responsibility.

ORDER

The administrative law judge has certified to the Commission certain allegations made by respondents that complaint counsel and other Commission personnel have made improper statements concerning respondents and other members of the idea promotion industry. The Commission, of course, expects counsel appearing before this agency to comply with Disciplinary Rule 7-107 (H).[1]

The Commission has determined that only the alleged comments made by counsel of record ought to be considered in the context of this adjudicative proceeding. The Commission has also determined that the record does not establish any violations of the Code of Professional Responsibility.

It is so ordered.

[1] The rule provides that during the pendency of an administrative proceeding, a lawyer or law firm associated therewith shall not make or participate in making a statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication if it is made outside the official course of the proceeding and relates to: (1) Evidence regarding the occurrence or transaction involved. (2) The character, credibility, or criminal record of a party, witness, or prospective witness. (3) Physical evidence or the performance or results of any examinations or tests or the refusal or failure of a party to submit to such. (4) His opinion as to the merits of the claims, defenses, or positions of an interested person. (5) Any other matter reasonably likely to interfere with a fair hearing.

IN THE MATTER OF

GENERAL ELECTRIC COMPANY

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

Docket 9049. Complaint, July 29, 1975 --- Decision, Apr. 7, 1977

Consent order requiring a Fairfield, Conn., manufacturer of television sets and other electrical household appliances, among other things, to cease misrepresenting the comparative superiority, special features and reliability of their products through use of unsubstantiated advertising claims.

Appearances

For the Commission: *Walter B. Fisherow* and *James H. Skiles.*

For the respondent: *James Bruce,* Fairfield, Conn. and *White & Case,* New York City and Washington, D.C.

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 General Electric Company, a corporation hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent General Electric Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 3135 Easton Turnpike, Fairfield, Connecticut.

PAR. 2. Respondent General Electric Company is now and for some time past, has been engaged in the production, advertising, and sale of consumer electronic products, including color television receivers, which when sold are shipped to purchasers located in various States of the United States. Thus respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in said consumer electronic products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

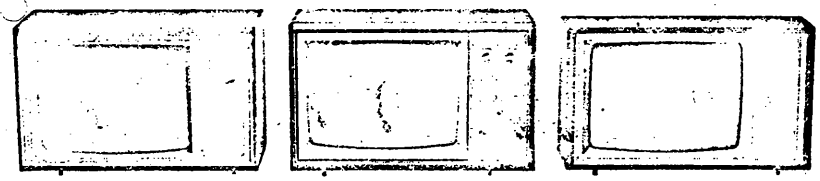
PAR. 3. Respondent General Electric Company at all times mentioned herein has been, and now is, in substantial competition in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, with individuals, firms and corporations engaged in

the sale and distribution of consumer electronic products of the same general kind and nature as those produced and sold by respondent.

PAR. 4. In the course and conduct of its said business, respondent General Electric Company has disseminated or caused the dissemination of, certain advertisements concerning the said products by the United States mail and by various means in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of said products, and has disseminated and caused the dissemination of advertisements concerning said products by various means for the purpose of inducing and which is likely to induce, directly, or indirectly, the purchase of said products in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. Typical of the representations and statements contained in said advertisements, disseminated as aforesaid, but not all inclusive thereof, are the following print advertisements which have been reproduced, attached to this complaint, and made a part hereof:

WHICH COLOR TV REQUIRED LESS SERVICE IN 1973?



RCA GENERAL ELECTRIC ZENITH

In 1973, independent surveys* of recent color TV buyers showed that General Electric color required less service than any other U.S. brand. Not merely an opinion poll, this was a survey of actual TV owners. People like you, who expect the most in reliable TV performance for their money.

To get the kind of picture you expect for your money, go into a store and compare pictures. Ours against any other set.

The best way we know to buy color TV is to compare performance.

To help you compare, get GE's booklet, "How to Buy Color TV in Plain English." For the store nearest you, where you can pick it up free, call this special toll-free number anytime. 800-243-6000. Dial as you normally dial long distance. (In Connecticut, call 1-800-882-6500.)

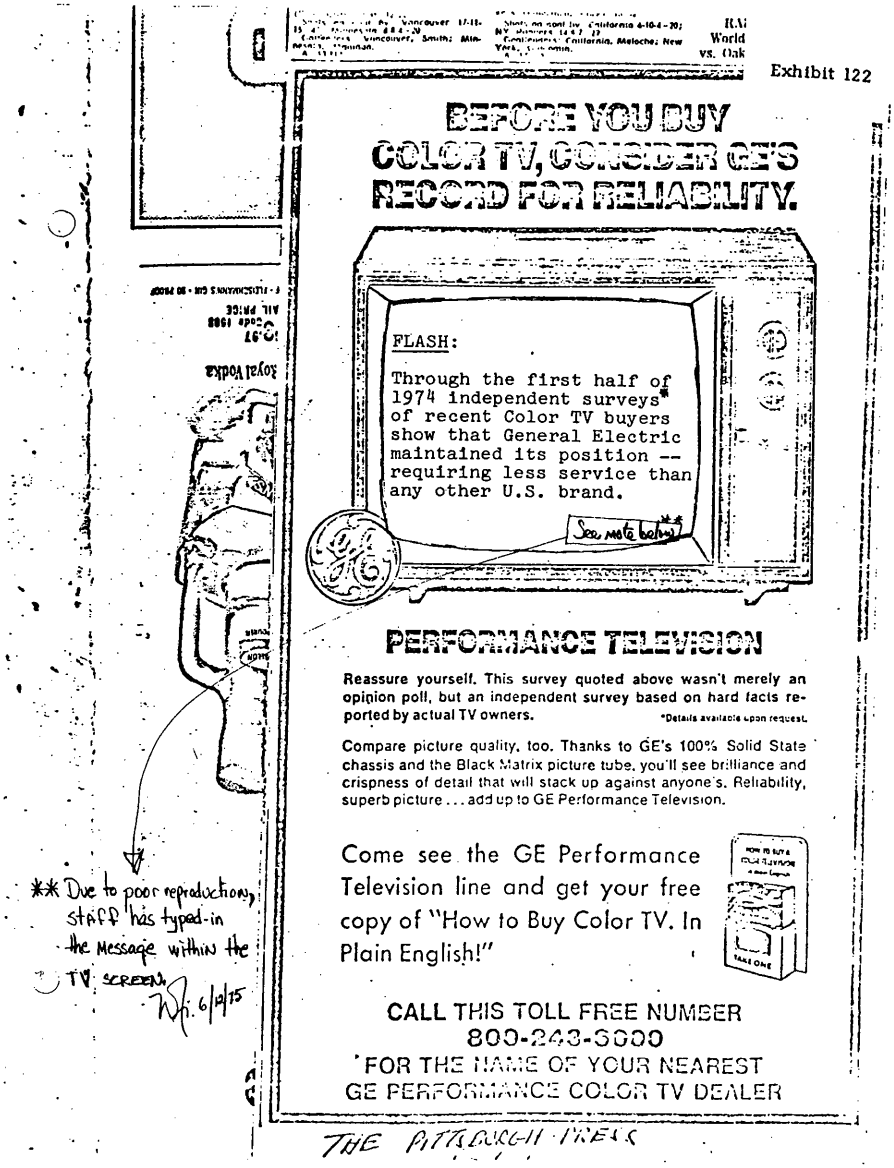
[redacted]

GENERAL ELECTRIC

*Details available on request

US. News 10/7/74.

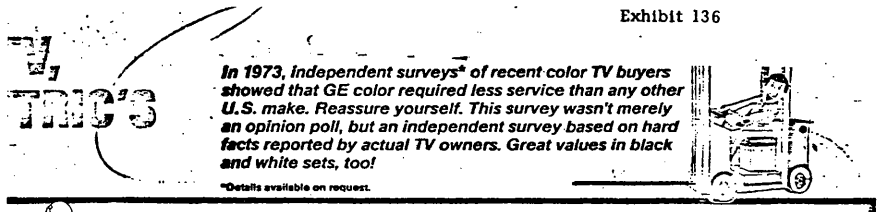
Exhibit 122

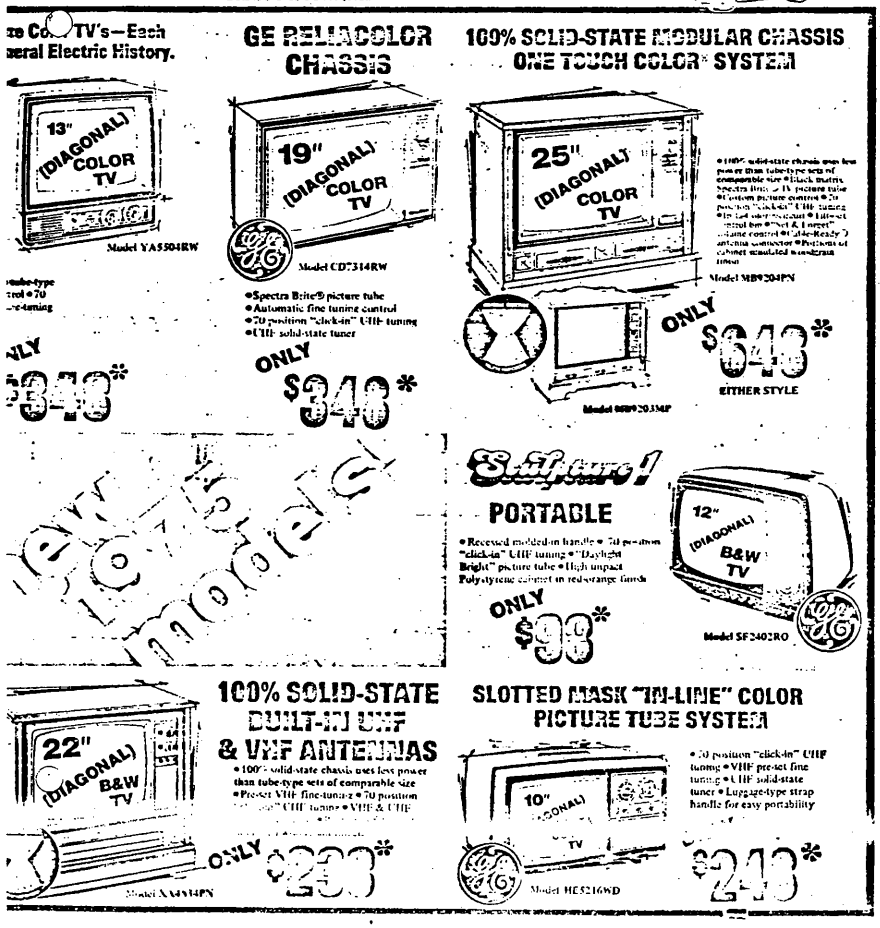


** Due to poor reproduction, staff has typed-in the message within the TV screen.
6/2/75

THE PITTSBURGH PRESS

Exhibit 136





Comm'l 2: "National Sales Days" Tailband — General use Atlanta 2nd Run

PAR. 6. Through the dissemination of these advertisements and others similar thereto not specifically set out herein, respondent has represented directly or by implication that General Electric color television sets purchased or in use in 1973 required less service in that year than Zenith or RCA color television sets.

PAR. 7. At the time of said representation, respondent did not possess and rely upon a reasonable basis for making such representation.

Therefore, the representation set forth in Paragraph Six was, and is, a deceptive or unfair act or practice.

PAR. 8. Through the use of these advertisements and others similar thereto not specifically set out herein, respondent had represented directly or by implication that independent surveys of persons who had bought a color television set in 1973 show that General Electric color television sets bought in that year required less service during the initial period of ownership than all other U.S. brands of color television sets bought in 1973.

PAR. 9. In truth and in fact, independent surveys of persons who had bought a color television set in 1973 did not and do not show that General Electric color television sets bought in that year required less service during the initial period of ownership than all other U.S. brands of color television sets bought in 1973.

Therefore, the representation referred to in Paragraph Eight was and is false, misleading and deceptive.

PAR. 10. Through the dissemination of the aforementioned advertisements and others similar thereto not specifically set out herein, respondent has represented directly or by implication, that independent surveys of persons who had bought a color television set in 1973 show that General Electric color television sets bought in that year will require less service than all other U.S. brands of color television sets bought in 1973.

PAR. 11. In truth and in fact, independent surveys of persons who had bought a color television set in 1973 did not and do not show that General Electric color television sets bought in that year will require less service than all other U.S. brands of color television sets bought in 1973.

Therefore, the representation referred to in Paragraph Ten was and is false, misleading and deceptive.

PAR. 12. Respondent continued to disseminate the aforementioned advertisements, representing that 1973 survey evidence of service levels of General Electric color television sets is a reason to purchase such sets in 1974/75, when respondent knew of and had available to it subsequently acquired evidence of a substantially identical type and

quality which contradicted or was inconsistent with the 1973 survey evidence expressly relied upon.

PAR. 13. Therefore, at the time of the representation referred to in Paragraph Twelve respondent did not possess and rely upon a reasonable basis for making such representation, and the representation set forth in Paragraph Twelve was, and is, an unfair act or practice.

PAR. 14. Furthermore, through its continued dissemination of the aforementioned advertisements, respondent represented, directly or by implication, that it neither knew of nor possessed evidence which contradicted or was inconsistent with the 1973 survey evidence expressly relied upon.

PAR. 15. In truth and in fact, during the time respondent continued to disseminate the aforementioned advertisements, it did know of and possess evidence of an identical type and quality which contradicted or was inconsistent with the 1973 survey evidence expressly relied upon.

Therefore, the representation referred to in Paragraph Fourteen was false, misleading and deceptive.

PAR. 16. Through the use of these advertisements and others similar thereto not specifically set out herein, it was represented directly or by implication that respondent would upon request forward the true and complete details regarding the comparative service information obtained from surveys of recent color television set buyers conducted in 1973.

PAR. 17. In truth and in fact, upon request respondent did not and does not forward the true and complete details regarding the comparative service information obtained from the surveys of recent color television set buyers conducted in 1973.

Therefore, the representation referred to in Paragraph Sixteen was false, misleading and deceptive.

PAR. 18. The use by the respondent of the aforesaid false, misleading, deceptive or unfair statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the consuming public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 19. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted and now constitute, unfair and deceptive acts and practices and unfair methods of

competition, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission issued, together with a proposed form of order; and

The respondent 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 considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 3.25(c) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent General Electric Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and a principal place of business located at 3135 Easton Turnpike, Fairfield, Connecticut.

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

I

It is ordered, That respondent General Electric Company, a corporation, its successors and assigns, either jointly or individually, and respondent's officers, representatives, agents and employees, directly or through any corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, distribution or sale of any and all of the following household products manufactured or marketed by respondent: monochrome (*i.e.,* black

and white) television receivers, color television receivers, clothes washers, clothes dryers, ranges, dishwashers, trash compactors, refrigerators, freezers, room air conditioners, stereophonic consoles and nonportable stereophonic sound systems and components (any or all of which products are hereafter referred to in this Part I as "such product(s)"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Advertising or offering such product(s) for sale by referring to any test, experiment, demonstration, study or survey, or any or all of the results thereof (hereafter "evidence"), which evidence is represented, either directly or by implication, as supporting, showing or proving:

(1) the existence or nature of any fact or product feature respecting such product(s) when such evidence does not support, show or prove such fact or product feature;

(2) that such product(s) is superior to any or all competing products in any respect unless such evidence supports, shows or proves that such product(s) is superior in each respect in which it is represented to be superior, and respondent either:

(a) identifies the particular aspect of such superiority and discloses the nature or extent of such superiority in terms reasonably understandable to the class of persons to whom the representation is directed (*e.g.*, consumers, dealers or others); or

(b) has a reasonable basis for concluding that, in connection with the possession or use of such product(s), the nature or extent of such superiority will be discernible to or of benefit to the class of persons to whom the representation is directed:

(3) that any representation about such product(s) or any competing product applies to each type or model of such product(s) or competing product, when the evidence does not support, show or prove the application of such representation to each type or model of such product(s) or such competing product referred to, either directly or by implication;

(4) that such product(s) requires less service or has any other superior service characteristic when compared to any or all competing products unless the evidence at the time such representation is made supports, shows or proves such representation and:

(a) respondent clearly and conspicuously discloses the particular aspect of such product's(s') superior service characteristic which such evidence supports, shows or proves; or

(b) if respondent represents that such product(s) requires less service and such evidence supports, shows or proves that such product(s)

requires both less frequent and less costly service, then respondent need not make the disclosure required by this subparagraph (4);

or:

(5) that such product(s) is more dependable or more reliable when compared to any or all competing products unless the evidence at the time such representation is made supports, shows or proves such representation and respondent clearly and conspicuously discloses the particular aspect of such product's(s') greater dependability or reliability which such evidence supports, shows or proves.

B. Advertising or offering such product(s) for sale by referring to evidence to support, show or prove any representation covered by Paragraph A of Part I when such evidence is inconsistent with or contradicted by any valid, reliable or substantially identical evidence known to respondent unless at the time such representation is made:

(1) respondent relies on an affidavit by a person qualified by training or experience to evaluate such evidence who, relying on standards generally recognized by qualified experts in that particular field, concludes that the inconsistent or contradictory evidence may be disregarded; and

(2) the affidavit states the qualifications of the affiant and sets forth the generally recognized standards on which he relied in reaching his conclusion.

C. Representing, directly or by implication, that the details of any evidence will be forwarded upon request, unless respondent furnishes a fair and accurate summary of all the details of such evidence as to all products to which such representation extends, including the methodology used and any qualifications respecting the applicability of the results.

D. Representing, directly or by implication:

(1) that such product(s), when compared to any or all competing products:

(a) is or will be more dependable or more reliable; or

(b) has required or does or will require less service or less frequent or less costly service,

Unless and only to the extent that respondent has a reasonable basis for such representation which, for the purpose of this subparagraph D(1), shall consist of competent and reliable studies, surveys or scientific or engineering tests. This definition of "reasonable basis" is subject to this exception: for a reasonable period following the introduction of a new feature or a new model of such product, respondent may make representations encompassed by this subpara-

graph D(1) on the basis of literature or generally recognized scientific or engineering principles, but only if respondent immediately undertakes competent and reliable studies, surveys or scientific or engineering tests relating to such representations. If the results of such studies, surveys or tests do not provide a reasonable basis for such representations with respect to the new feature or new model, respondent shall forthwith cease and desist from making such representations;

(2) that such product(s) when compared to any or all competing products has, had or will have any superior service characteristic other than frequency or cost of service, unless and only to the extent that respondent has a reasonable basis for such representation; or

(3) that such product(s) has, had or will have service needs or requirements, unless and only to the extent that respondent has a reasonable basis for such representation.

II

It is ordered, That respondent General Electric Company, a corporation, its successors and assigns, either jointly or individually, and respondent's officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, distribution or sale of any and all monochrome (*i.e.,* black and white) television receivers and color television receivers manufactured or marketed by respondent (any or all of which products are hereafter referred to in this Part II as "such product(s)"), in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, with respect to the performance or a performance characteristic of such product(s):

(1) the existence or nature of any fact or product feature;

(2) that such product(s) is superior to any or all competing products in any respect; or

(3) that any representation about such product(s) or any competing product applies to each type or model of such product(s) or such competing product referred to, either directly or by implication,

Unless and only to the extent that respondent has a reasonable basis for such representation; *provided, however,* that this Paragraph A of Part II shall not apply to representations encompassed by subparagraph A(2) of Part I or Paragraph D of Part I.

B. Representing, directly or by implication:

(1) that such product(s) is superior to any or all competing products in

any respect unless such product(s) is superior in each respect in which it is represented to be superior, and respondent either:
(a) identifies the particular aspect of such superiority and discloses the nature or extent of such superiority in terms reasonably understandable to the class of persons to whom the representation is directed (*e.g.*, consumers, dealers or others); or
(b) has a reasonable basis for concluding that, in connection with the possession or use of such product(s), the nature or extent of such superiority will be discernible to or of benefit to the class of persons to whom the representation is directed;

or:

(2) that any representation about such product(s) or any competing product applies to each type or model of such product(s) or competing product when such representation does not apply to each type or model of such product or such competing product referred to, either directly or by implication.

III

If the Federal Trade Commission hereafter promulgates any trade regulation rule or guide governing the advertising or offering for sale of any product governed by this order, which rule or guide is less restrictive than the corresponding provision(s) of this order, and respondent files a motion with the Federal Trade Commission to modify this order to correspond to such less restrictive rule or guide, the Federal Trade Commission shall rule upon respondent's motion within 120 days after such motion is filed or, if respondent's motion to modify is filed at least 60 days prior to the effective date of such rule or guide, then the Federal Trade Commission shall rule upon respondent's motion within 60 days after the effective date of such rule or guide. Should the Federal Trade Commission fail to rule upon respondent's motion to modify within such time periods, then such rule or guide shall automatically be deemed to modify and replace the corresponding provision(s) of this order.

IV

The provisions of Parts I and II of this order will not apply for a period of one year from the date of signature of this order to printed materials other than media advertisements and point of purchase displays.

V

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its operating divisions engaged in the preparation or placement of advertisements of any product listed in Part I.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of 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 report, in writing, signed by respondent, setting forth in detail the manner and form of its compliance with this order.

IN THE MATTER OF

NATIONAL SERVICE INDUSTRIES, INC., T/A CERTIFIED LEASING COMPANY

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

Docket C-2876. Complaint, Apr. 7, 1977 --- Decision, Apr. 7, 1977

Consent order requiring an Atlanta, Ga., furniture leasing corporation, among other things, to cease failing to maintain adequate records for three years following the expiration date of leases; and follow prescribed procedures to locate and make proper refunds to qualified customers. Additionally, the order requires respondent to furnish lessees with detailed written notices, and prohibits the use of these notices in the collection of delinquent debts.

Appearances

For the Commission: *Michael E.K. Mpras* and *Robert L. Patterson.*

For the respondents: *Jack L. Lahr* and *Christopher Smith, Arent, Fox, Kintner, Plotkin & Kahn,* Washington, D.C.

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 National Service Industries, Inc., a corporation, doing business as Certified Leasing Company, hereinafter sometimes referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent National Service Industries, Inc., doing business as Certified Leasing Company, 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 located at 1180 Peachtree St., N.E., Atlanta, Georgia.

PAR. 2. Respondent National Service Industries, Inc., through its various subsidiaries and divisions, operates numerous plants, including those engaged in the production or manufacture of furniture, safety and protective products, amusement parks, and is engaged in the leasing or retail selling of furniture, through its unincorporated operating division, Certified Leasing Company, which operates approximately 17 furniture leasing and retail selling stores in seven states.

PAR. 3. Respondent operates and controls retail stores which sell or lease furniture and other merchandise to be shipped and delivered from their warehouses and from the places of business of their various suppliers to their warehouses and retail stores for leasing to and purchase by the general public located in states other than those from which such shipments and deliveries originate. By these and other acts and practices, respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in merchandise and services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the ordinary course and conduct of its aforesaid business, respondent enters into lease agreements with individual customers whereby such customers lease furniture from respondent for a set period of time. Under the terms of the lease agreement, consumer lessees are required to pay to respondent a security deposit which is usually equivalent to the charge of one month's furniture rental. Further, the lease agreement requires consumer lessees to perform other acts or fulfill conditions and covenants, including the return of leased items in the same condition respondent delivered to them, ordinary wear excepted, at the expiration or termination of the lease period. Upon expiration or termination of the lease, respondent determines to what extent a consumer lessee has complied with the conditions of the lease agreement. If all obligations, conditions or covenants have not been met, respondent makes deductions from the consumer lessees' deposited money in amount deemed adequate to cover the expenses or charges incurred because of the consumer lessee's failure to comply with the lease requirements, ordinary wear excepted.

After such deductions, if any, are made from the consumer lessee's security deposit, respondent's records indicate the amount of the consumer lessee's security deposit, if any, which is returnable to the consumer lessee.

PAR. 5. Respondent, seldom, if ever, informs or attempts to inform consumer lessees that there is a portion of the security deposit which is returnable to the consumer lessees. Furthermore, seldom, if ever, does respondent voluntarily return security deposit balances without consumer lessees' specific requests. In those instances where consumer lessees do not specifically request return of their security deposit balance, respondent often, if not always, removes the returnable balances from the consumer lessees' accounts, and transfers said balances into one of its income accounts.

PAR. 6. By failing to attempt to notify consumer lessees that there

is a portion of the security deposit which is returnable to the consumer lessees, by requiring that consumer lessees specifically request the return of the balance of any security deposit balance remaining after legitimate expenses under the lease have been charged against such deposit, and by transferring said returnable balances into one of its income accounts, respondent has caused a substantial number of consumer lessees to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of the respondent as herein alleged, were, and are, all to the prejudice and injury of the public and constituted, and now constitute unfair acts and 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 respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Washington, D. C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has 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, now in further conformity with the procedure 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. Proposed respondent National Service Industries, Inc., doing business as Certified Leasing Company, 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 1180 Peachtree St., N.E., Atlanta, Georgia.

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

It is ordered, That respondent National Service Industries, Inc., a corporation, doing business as Certified Leasing Company, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the leasing to consumers of furniture, related accessories, or any other personal property, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Failing to request, both orally and in writing, at the time the lease agreement is signed with two or more legally unrelated persons, which person will be designated by the joint lessees to be the recipient of the lessees' returnable security deposit in the event that respondent is obligated to return the full security deposit or any portion thereof to such customers.

2. Failing to incorporate on the face of the lease agreement, in bold print, the following notice which shall be given to the lessee at the time the lease agreement is signed.

NOTICE

> You may be entitled to a refund of all or a portion of your security deposit at the termination of this lease agreement. Retain this reminder so that you may send us a forwarding address where you can be reached so that we can promptly forward any balance of the security deposit due you.

3. Failing to request from the lessee, both orally and in writing, at the time the lease agreement is signed, a tentative forwarding address where the security deposit, or any portion thereof which may be returnable to the lessee, can be mailed if no updated forwarding address is received prior to or at the termination of the lease agreement.

4. Failing, when notice of termination of the lease agreement is received telephonically, to request from the lessee at that time a forwarding address.

5. Failing to send written notice by first class mail prior to the expiration of the term of the lease agreement to the lessee's last

known address requesting a forwarding address within five business days after receiving notification of the lessee's intent to terminate the lease agreement, if such forwarding address has not been received.

6. Failing to send by first class mail, with the envelope captioned "PLEASE FORWARD," the security deposit, or any portion thereof which may be returnable to the lessee, including an itemized accounting of respondent's charges against the lessee's security deposit within thirty (30) days from the termination of the lease agreement, to the lessee's updated forwarding address or to the tentative forwarding address obtained at the time the lease agreement was signed if no updated address has been received, or in the absence of the above, to the lessee's last known address; and failing in all other situations to provide within 30 days, by first class mail, such itemized accounting upon the oral or written request of the lessee.

It is further ordered:

A. That respondent attempt to refund all security deposits or portions thereof due lessees whose lease terminated or expired within three months from the effective date of this order. In attempting to refund all returnable deposited money, respondent shall perform the following steps:

1. Determine whether the lessee's file contains an address to which a returnable deposit is to be forwarded. If so, respondent shall forward a check in that amount to the lessee or his designee at the address given.

2. If no forwarding address is given, respondent shall send a notice by first class mail, with the envelope captioned "PLEASE FORWARD," to the lessee's last known address informing such lessee that a refund is due him, and that he should immediately contact the respondent at the address or telephone number given, requesting an address correction.

3. If the letter is returned by the post office as undeliverable, respondent shall:

(a) Determine from information set forth in the lessee's credit application filed by the lessee incident to the consummation of the lease agreement the name and address of the lessee's parents, employer and a listed personal reference of the lessee.

(b) Forward the notice in the form set forth below, entitled "We need your help," to either the parents, employer, or one listed personal reference of the lessee, if such names and addresses are available in the lessee's file.

WE NEED YOUR HELP

The individual listed below recently rented furniture from Certified Leasing Company and placed a security deposit with us. The individual is entitled to a refund of all or a portion of such deposit, which refund will be sent as soon as we can determine a current address.

If you know the individual's current address and/or telephone number, please complete the following form and return it to us. The postage is prepaid.

Thank you for your help.

CERTIFIED LEASING COMPANY

_____
Lessee

_____ _____
Street Apt.

_____ _____ _____
City State Zip Code

( )

Area Code Telephone Number

B. That respondent shall not use the notices described in paragraphs 2. and A. 3.(b) of the order to collect or attempt to collect delinquent accounts.

C. That respondent maintain, for a period of three years from the date the lease was terminated or expired, adequate records including a complete summary of each lessee's file which (1) substantiate that respondent is following the procedures specified in the order, and (2) readily disclose the disposition of the lessee's security deposit and the reasons therefor, including a notation of the specific amount of money due the lessee from his security deposit; any request by such person within three years from the date the lease was terminated or expired for the return of the deposit due shall be honored by mailing the balance of said deposit within thirty (30) days from the date of receipt of such request.

D. That respondent deliver a copy of this order to all present and future administrative and sales employees engaged in any aspect of communicating with customers with respect to the leasing to

consumers of furniture or other personal property, and that respondent secure a signed statement acknowledging receipt of said order from each such person.

E. That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent or its division 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 or its division which may affect compliance obligations arising out of the order.

F. That the respondent herein shall 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.

IN THE MATTER OF

SEARS, ROEBUCK AND CO.

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

Docket 8993. Complaint, Sept. 17, 1974 --- Decision, Apr. 11, 1977

Consent order requiring a Chicago, Ill., merchandising organization, among other things, to cease using bait and switch tactics and other unfair or deceptive strategies in the advertising and sale of major home appliances. The order further requires the firm to conspicuously post copies of advertisements in the proper departments of stores, and to have sufficient quantities of the advertised items available to meet reasonably anticipated demand.

Appearances

For the Commission: *James S. Teborek, James F. Drzewiecki, Robert C. Goldberg, Blanche Stein,* and *Thomas D. Massie.*

For the respondent: *Richard P. Robinson,* Chicago, Ill., *Lloyd S. McClelland,* Chicago, Ill., *Burton Y. Witzenfeld, Arnstein, Bluck, Witzenfeld & Minow,* 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 Sears, Roebuck and Co., a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sears, Roebuck and Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 925 South Homan Ave., Chicago, Illinois.

PAR. 2. Respondent is the largest merchandising organization in the United States. Respondent is now, and has been for some time last past, engaged in the advertising, offering for sale, sale and distribution of a wide variety of consumer products, including sewing machines, washers and dryers, and other major home appliances throughout the United States. The term "major home appliance" is defined herein as any home appliance in which there are two or more models in the product line and the most expensive model has a retail price in excess of ($50.00) fifty dollars. Said respondent conducts said business by mail and telephone sales from catalogs and through its

retail department stores located in each State of the United States. Sales by respondent's retail department stores are its most important source of sales. This complaint concerns respondent's sales of products through its retail department stores.

PAR. 3. In the course and conduct of its business as aforesaid, respondent ships, and causes to be shipped, sewing machines, washers and dryers, and other major home appliances to said retail department stores for sale to the purchasing public. Advertising and promotional material is prepared or caused to be prepared by respondent in Chicago, Illinois, and transmitted to respondent's retail department stores for their use. In the course and conduct of its business as aforesaid, respondent now causes and for some time last past has caused, the publication of said advertising, concerning sewing machines, washers and dryers, and other major home appliances in newspapers of general circulation. Respondent further engages in business, in commerce, consisting of the transmission and receipt of letters, invoices, reports, contracts and other documents of a commercial nature between respondent's headquarters and its retail department stores in the various states, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Typical and illustrative, but not all inclusive, of the major home appliances advertised and the statements made in such advertisements are the following:

Sewing Machine Sale

ZIG ZAG

Portable * * *

Sews zig zag or straight stitches to make fashion clothing or to do everyday mending * * * Sews buttonholes, sews on buttons, monograms.

Your Choice

$58

Cabinet Model

Sews straight stitches forward and reverse, even over seams! * * *

* * * * * * *

Portable Zig Zag Sewing Machine From Sears * * * $58

Sews on buttons, sews buttonholes; Does zig-zag or straight stitching

Mongrams, appliques, other fancy work For household linens, gifts

Sews forward and reverse for her convenience

PAR. 5. Through the use of the aforesaid statements and others not specifically set out herein, respondent has represented, directly and by implication, that the offers set forth in said advertisements are bona fide offers to sell the advertised sewing machines, washers and dryers, and other major home appliances at the prices mentioned in said advertisements.

PAR. 6. In truth and in fact, said offers were not, and are not bona fide offers to sell respondent's sewing machines, washers and dryers, and other major home appliances at the advertised prices, but, to the contrary were, and are, made to induce prospective purchasers to visit respondent's retail department stores.

Therefore, the statements and representations as set forth in Paragraphs Four and Five were, and are, false, misleading and deceptive.

PAR. 7. When prospective purchasers visit respondent's retail department stores in response to respondent's aforesaid advertisements and attempt to purchase the advertised sewing machines, washers and dryers, and other major home appliances at the advertised prices, respondent's salesmen make no effort to sell the advertised major home appliances, but, in fact, disparage the advertised sewing machines, washers and dryers, and other major home appliances in a manner calculated to discourage the purchase thereof, and attempt to, and often do, sell other sewing machines, washers and dryers, and other major home appliances to said prospective purchasers at higher prices. By way of disparaging said major home appliances, respondent's salesmen point out certain features that the advertised major home appliances are lacking without disclosing the absence of these features in respondent's aforesaid advertising. Among and typical, but not all inclusive of the disparaging statements and representations made by respondent's salesmen are the following:

1. The advertised sewing machines are noisy and not quiet running;

2. Certain of the aforesaid sewing machines will not sew straight stitch, zig zag stitch, or in reverse;

3. The advertised sewing machines do not have respondent's standard sewing machine guarantee and are not guaranteed for as long a period of time as respondent's more expensive sewing machine models;

4. Prospective purchasers will find it difficult to adjust the

advertised sewing machines to sew over seams in material on different thicknesses of material;

5. The advertised sewing machine will not sew buttonholes;

6. None of the advertised sewing machines are available for sale; and if the advertised machines are ordered, there will be long delays in delivery.

PAR. 8. In truth and in fact, the aforesaid disparaging statements and representations made by respondent's salesmen have the effect of discouraging prospective purchasers from purchasing the advertised sewing machines, washers and dryers, and other major home appliances and inducing said prospective purchasers to purchase other sewing machines, washers and dryers, and other major home appliances at higher prices.

PAR. 9. Respondent has advertised certain of its lower priced models of sewing machines, washers and dryers, and other major home appliances with the intention that respondent's salesmen will be able to make misleading comparisons between the lower priced models and higher priced models of said appliances.

PAR. 10. Respondent uses a method of compensating its salesmen of sewing machines, washers and dryers, and other major home appliances that rewards said salesmen for selling higher priced sewing machines, washers and dryers, and other major home appliances. At the same time respondent deters said salesmen from selling the advertised sewing machines, washers and dryers, and other major home appliances. This combination of circumstances has forced or encouraged respondent's salesmen of sewing machines, washers and dryers, and other major home appliances to use bait and switch sales tactics such as those described in Paragraphs Seven, Eight and Nine.

PAR. 11. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in commerce, with corporations, firms and individuals, engaged in the sale and distribution of sewing machines, washers and dryers, and other major home appliances of the same general kind and nature as those sold by respondent.

PAR. 12. The use by respondent of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and to induce a substantial number thereof to purchase respondent's said sewing machines, washers and dryers, and other major home appliances at higher prices than said members of the

purchasing public had intended to pay by reasons of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Commissioner Thompson dissenting.

DISSENTING STATEMENT OF COMMISSIONER THOMPSON

Commissioner Thompson believes that, since no effort has been made in this matter to address the question of whether the products the customer is being "switched" *to* are themselves good buys or bad ones in relation to comparable items offered by competing outlets, there has been no showing of probable consumer injury here. In the absence of such a showing, he cannot find, as Section 5(b) of the FTC Act requires, that the "proceeding" instituted by the filing of this complaint "would be to the interest of the public * * *" 15 U.S.C. 45(b). Given a limited budget, an expenditure of resources to stop what the staff apparently concedes is a "victimless crime" necessarily means a comparable reduction in the number of cases this agency can bring that, unlike this one, involve real economic injury to the consuming public.

SEPARATE STATEMENT OF CHAIRMAN ENGMAN

Concurred in by Commissioner Hanford

In contrast to Commissioner Thompson's characterization of the violation alleged in this case, I do not believe, nor do I think the staff concedes, that a blatant bait-and-switch advertising scheme constitutes a "victimless crime." I would consider this to be true even if there were a showing that the products which customers are switched *to* are comparable in price and quality to those offered by competing sellers.

Numerous prior Commission orders and the Commission's *Bait Advertising Guide* make it clear that Section 5 of the Federal Trade Commission Act is violated when a retailer advertises a low priced product to entice customers into his place of business and then, according to a preconceived selling plan, disparages the low priced item in an attempt to push a higher priced product on the customer. Such selling tactics are often accompanied by unreasonably low inventories of advertised items, high pressure sales methods once the customer is in the store, misrepresentations about the real value of

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the advertised items, and, as alleged in this instance, employee discipline and compensation systems which discriminate unfairly against the sale of low priced, advertised merchandise.

The customer is victimized in bait-and-switch schemes because he or she makes the initial choice to patronize the advertiser's store rather than his competitors on the assumption that advertisements of low priced items have been made in good faith. In actuality, of course, the bait-and-switch advertiser has used the advertising as a deceptive gimmick to get the customer in his store first and thus to gain unfair advantage over his competitors. If the allegations of large scale bait-and-switch advertising in this complaint are proved through the adjudicative process, I would consider entry of an appropriate order very much in the public interest.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent with violation of Section 5 of the Federal Trade Commission Act, and the respondent having been served with a copy of the complaint; and

Respondent Sears, Roebuck and Co. 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 respondents that the law has been violated as set forth in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having withdrawn the matter from adjudication for the purpose of considering the agreement containing consent order; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Sears, Roebuck and Co. is a New York corporation with its office and principal place of business located at Sears Tower, Chicago, Illinois.

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

I

For purposes of this consent order, the following definition shall apply:

A. The term "major home appliance" includes (but is not limited to) home appliances within the following product lines sold by respondents: automatic laundry (washers and dryers); sewing machines; vacuum cleaners and sweepers; refrigeration products (refrigerators and chest or upright freezers); stoves, ranges and ovens; room air conditioners; humidifiers and dehumidifiers; televisions; dishwashers; floor polishers; and home audio electronic equipment.

II

It is ordered, That respondent Sears, Roebuck and Co., a corporation, its successors and assigns, and respondent's employees, agents, representatives, including sales representatives, directly or through any corporation subsidiary, division, or other device, in connection with the advertising, offering for sale, sale and distribution of sewing machines, washers and dryers and other major home appliances, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making representations directly or indirectly, orally or in writing, that any major home appliances are offered for sale when such representation is not a bona fide offer to sell such major home appliances.

2. Offering for sale any major home appliance when such offer is not a bona fide offer to sell such major home appliance.

3. Disparaging, in any manner, any major home appliance which is advertised or offered for sale.

4. Utilizing demonstrations or displays of any advertised major home appliance in which said appliance is made to appear defective for the purpose of discouraging its purchase.

5. Making, directly or by implication, orally or in writing, any false, misleading or deceptive comparisons between the advertised major home appliances and other home appliances of the same product line.

6. Failing to have available at each store to which the advertise-

ment applies, or at a warehouse facility serving each such store, quantities of advertised major home appliances sufficient to meet reasonably anticipated demands for such appliances, or failing to take orders for such reasonably anticipated demands from customers desiring to purchase advertised major home appliances or failing to deliver such ordered merchandise within a reasonable period of time after purchase by customers.

It is further ordered, That respondent maintain and produce for inspection and copying by a representative of the Federal Trade Commission for a period of three years following the date of publication of any local advertisement of sewing machines, washers and dryers and other major home appliances adequate records to document for the entire period during which each advertisement was run:

a. the total volume of sales in units of advertised major home appliances at the advertised price by each store to which the advertisement applies;

b. monthly inventory statements for each store to which the advertisement applies of the units of major home appliances featured in each advertisement;

c. the total volume of sales in units of major home appliances by stock or model number within the advertised product line by each store to which the advertisement applies.

The recordkeeping provision of this order shall be limited to major home appliances which have two or more models in the product line with a retail cost of $100 or more, *provided, however,* no records need be created or maintained for any major home appliances sold at a retail price of $35 or less each.

It is further ordered, That respondent shall forthwith cease and desist from disseminating, or causing the dissemination of any printed advertisement which represents that major home appliances are available for sale at a stated price at any of its stores, unless respondent clearly and conspicuously sets forth in each such advertisement:

Each of these advertised items is readily available for sale as advertised.

It is further ordered, That respondent shall post a copy of such advertisement, including a copy of the notice referred to in the previous paragraph, at a conspicuous place in the major home appliance department or departments of each store to which such advertisement applies, throughout the period to which the advertisement applies.

It is further ordered, if the respondent advertises by radio and television and does not advertise in print advertisements during any given period, that major home appliances are available for sale at a stated price at any of its stores, respondent shall post at a conspicuous place in the major home appliance department or departments of each store to which such advertisement applies, throughout the period to which the advertisement applies, a sign not less that 11" by 14", which shall include the full text of said advertisement, together with the legend:

> Each of these advertised items is readily available for sale as advertised.

It is further ordered, That respondent after showing a customer, responding to an advertisement, the advertised model in a reasonable manner and making a bona fide offer to take an order for such advertised major home appliance, may offer to, and if the customer so desires, may show the customer other models of major home appliances within the same product line. This paragraph shall not be construed or interpreted to limit or modify any other paragraph of this order.

It is further ordered, That respondent shall deliver a copy of this order to all present and future managerial personnel and salespersons engaged in the sale of major home appliances or in any aspect of the preparation, creation, or placing of advertisements of such products and secure from each such person a signed statement acknowledging receipt of said order.

It is further ordered, That respondent 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 the respondent shall within sixty (60) days after the 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.

IN THE MATTER OF

CENTURY 21 COMMODORE PLAZA, INC., ET AL.

Docket 9088. Interlocutory Order, Apr. 20, 1977

Denial of complaint counsel's motion to amend complaint by adding a new theory; and remand of remainder of motion to ALJ as being within his authority on which to act.

ORDER

Complaint counsel move to amend paragraphs 14a and 15a of the complaint. These paragraphs now provide in part as follows:

14. In print advertising and elsewhere, respondents, directly or by implication, make and have made numerous representations to prospective purchasers with respect to the facilities and services associated with the purchase of respondents' condominium units, including but not limited to representations that:

a. The water of Morgan Bay was safe and healthy for swimming at the time such representations were made.

15. In truth and in fact:

a. Respondents knew or had reason to know that Morgan Bay was not safe and healthy for swimming.

Complaint counsel request that the following language be substituted:

14. * * *

a.(1) Morgan Bay was, is, and will be safe, healthy, and suitable for swimming and bathing.

(2) At the time of the first dissemination of the representations challenged herein and thereafter, the respondents had and relied upon a reasonable basis for the claim that Morgan Bay was, is, and will be safe, healthy, and suitable for swimming and bathing.

15. * * *

a. (1) Morgan Bay was not, is not, and will not be safe, healthy, and suitable for swimming and bathing.

(2) At the time of the first dissemination of representations challenged herein and thereafter, Respondents did not have and did not rely upon a reasonable basis for the claim that Morgan Bay was, is, and will be safe, healthy, and suitable for swimming and bathing.

According to complaint counsel, the proposed amendments would simply make it clear that the complaint, as it originally issued, alleged that (1) respondents had represented to consumers not only that the water of Morgan Bay was "safe and healthy" for swimming as of the time the representations were made, but also that the bay

would continue to be suitable for swimming; and (2) respondents' representations were unfair and deceptive because respondents lacked a "reasonable basis" for this claim. The administrative law judge concluded that he lacked authority to grant the motion and certified it to the Commission with "the strongest possible recommendation that it be denied."

The law judges have authority to allow an appropriate amendment to pleadings "only if the amendment is reasonably within the scope of the original complaint * * *. Motions for other amendments * * * shall be certified to the Commission." Rules of Practice, Section 3.15(a). The ALJ lacks authority to permit modifications where the effect is an alteration of the underlying theory behind the complaint. He may, however, permit service of an amended pleading that merely clarifies allegations of the complaint or adds examples or practices already alleged to be unlawful. *See, e.g., Cavanagh Communities Corp.*, 87 F.T.C. 143, 144 n. 2, 3 (1976).

We agree with the ALJ that the theory underlying the "lack of reasonable basis" allegation is sufficiently different from the charge already alleged to require certification of this portion of the motion. We also agree that insufficient justification has been offered for adding a new theory at this time.[1] The request is, therefore, denied.

We disagree, however, with the ALJ's decision to certify the portion of complaint counsel's motion to amend the complaint to make it clear that evidence of the recent suitability of Morgan Bay for swimming may be introduced. This proposed amendment is reasonably within the scope of the complaint, *see Cavanagh, supra,* and is, therefore, within the ALJ's authority to order. This portion of the motion is remanded to the ALJ.[2]

It is so ordered.

[1] According to the ALJ, addition of the new theory might delay the presentation of respondents' case for several months.

[2] The ALJ, of course, indicates in his certification order that he would be inclined to deny this amendment.

IN THE MATTER OF

SEARS, ROEBUCK AND CO.

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

Docket C-2885. Complaint, Apr. 20, 1977 --- Decision, Apr. 20, 1977

This consent order, among other things, requires a Chicago, Ill., department store chain, in its capacity of shopping center developer and/or major tenant, to cease entering into and enforcing agreements which exclude particular classes of occupants; control tenants' advertising, goods and prices; or otherwise restrict competitive trade. Additionally, to ensure compliance with the terms of the order, respondent is prohibited from using the same officers and employees in its separate capacities as tenant or shopping center developer.

Appearances

For the Commission: *James D. Tangires, Jerry W. Boykin, Eugene R. Webb,* and *Michael Dershowitz.*

For the respondent: *Lloyd S. McClelland,* Chicago, Ill.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41, *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that the corporation named as respondent in the caption hereof, and more particularly designated and described hereinafter, has violated and is now violating, the provisions of Section 5 of the Federal Trade Commission Act, as amended, and it appearing to the Commission that a proceeding by it in respect thereof is in the public interest, hereby issues its complaint, stating the following:

PARAGRAPH 1. For the purpose of this complaint the following definitions shall apply:

(a) The term "respondent" refers to Sears, Roebuck and Co., its operating divisions, its subsidiaries including but not limited to Homart Development Co., and their respective officers, agents, representatives, or employees.

(b) The term "shopping center" refers to a group of retail outlets in the United States of America planned, developed and managed as a unit and containing (1) a total floor area designed for retail occupancy of 200,000 square feet or more, of which at least 50,000 square feet are for occupancy by tenants other than respondent, (2) at least two tenants other than respondent, (3) at least one major tenant other than respondent, and (4) on-site parking.

(c) The term "tenant" refers to any retail occupant or potential occupant of floor area in a shopping center, whether as a lessee or owner of such space, but the term does not refer to an occupant of space within the store or other area occupied by respondent which occupant operates as a department for respondent pursuant to a license from respondent.

(d) The term "major tenant" refers to a tenant providing primary drawing power in a shopping center. A tenant which occupies at least 50,000 square feet of floor area will be deemed to provide primary drawing power.

(e) The term "retailer" refers to a tenant which sells merchandise or services to the consuming public.

(f) The terms "range of prices," "range of fashions" and "range of quality" refer to such descriptive words as, but not limited to, "popular priced," "medium priced," and "high priced;" "low or popular fashion," "medium fashion," and "high fashion;" "low or popular quality," "medium quality" and "high quality," which identify a tenant as a member of a class of merchants which sell their merchandise within a generally identifiable range of prices.

(g) The term "radius restriction" refers to a limitation which precludes a tenant, directly or indirectly, from engaging in, owning, or operating any business within a specified radius or distance from a shopping center.

(h) The term "developer" means any business entity which plans, constructs, or operates a shopping center and negotiates and executes lease agreements with tenants.

(i) The term "shopping center joint venturer" or "joint venturer" means any shopping center developer who enters into an agreement with Sears, Roebuck and Co. through its subsidiary Homart Development Co. to develop, construct, or operate a shopping center.

(j) The term "Agreement" refers to any Operating Agreement, Reciprocal Easement Agreement (R.E.A.), lease, or other contract of any kind, oral or written, which sets forth a relationship between the parties relating to the occupancy of floor area in a shopping center.

PAR. 2.:

A. Respondent Sears, Roebuck and Co., (hereinafter sometimes referred to as Sears), is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at Sears Tower, Chicago, Illinois. Sears is the largest department store chain in the Nation with stores in all fifty states and the District of Columbia. Its net sales have grown from $4,578,000,000 in 1962 to $12,306,000,000 in 1973. Approximately 900 retail stores generate 78 percent of its

business volume. Sears is also a major tenant in over 265 shopping centers throughout the Nation.

B. Homart Development Co., (hereinafter sometimes referred to as Homart), 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 located also at Sears Tower, Chicago, Illinois. Sears dominates and controls the acts and practices of its wholly-owned, unconsolidated subsidiary, Homart Development Co. Homart has developed and built more than sixteen shopping centers. It sold one in 1972, one in 1973, and now operates nine by itself, one through local Sears retail store management, and five others with shopping center joint venturers. It has several other shopping centers under construction. Sears is a major tenant in all shopping centers in which Homart is a developer. Homart had rents, sales and other revenues from its solely-owned shopping centers of $15,438,000, as of January 31, 1972; $18,543,000, as of January 31, 1973; $21,986,000, as of January 31, 1974. Homart had rents, sales and other revenues from its joint venture shopping centers of $6,174,000, as of December 31, 1971; $20,807,000, as of December 31, 1972; $19,788,000, as of December 31, 1973.

PAR. 3. In the course and conduct of its business, respondent Sears has engaged, and is now engaged in acts and practices in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended. Respondent purchases for resale a great variety of consumer products from a large number of suppliers located throughout the United States. Respondent causes these products to be transported from the place of manufacture or purchase to its business establishments located in all fifty (50) states and the District of Columbia. Such products have been and are advertised and offered for sale by respondent in newspapers circulated among and between the several States of the Nation. In its capacity as shopping center developer, respondent, through its Homart subsidiary, uses the United States mail extensively. Respondent has, and is, engaged in interstate land purchases, lease negotiations and transactions with shopping center joint venturers and tenants. Respondent, in its capacity as shopping center developer, through its subsidiary Homart, has disseminated and is disseminating advertisements and promotional materials concerning shopping centers and the tenants therein, by various communications media in commerce, for the purpose of soliciting tenants in and among the various states. Respondent's shopping centers advertise in newspapers of interstate circulation. Thus respondent's volume of business is substantial, and its acts and practices, as hereinafter set forth, are in or affecting

commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. Except to the extent that competition has been hindered, frustrated and eliminated as set forth in this complaint, respondent, in the course and conduct or its business of offering for sale, and selling, household goods, home furnishings, apparel and services and of developing and operating shopping centers, through its subsidiary Homart, has been, and is in substantial competition with other corporations, individuals and partnerships in the retail sale of the same or comparable types of merchandise and services carried and sold by respondent and also in the ownership, development and operation of shopping centers.

PAR. 5. Respondent Sears, in its capacity as a major tenant or through its subsidiary Homart, has entered into negotiations with various prospective major tenants, shopping center joint venturers, and developers for the purpose of either developing and operating shopping centers, or for the purpose of establishing a retail store in either a Homart or non-Homart shopping center. During the course of such negotiations, the parties thereto have contracted, combined and conspired to include certain provisions in Agreements. These resultant provisions, more fully described hereinafter, authorized Sears, major tenants, shopping center joint venturers, or developers to control and determine the admission of tenants into shopping centers and control conditions affecting tenants. These provisions suppress, restrict, hinder, lessen, prevent and foreclose competition in the retail distribution of goods and services.

PAR. 6. In the course and conduct of its business respondent Sears, in its capacity as a major tenant, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into Agreements with major tenants, shopping center joint venturers, and developers to exclude from shopping centers, certain tenants and categories of tenants, such as discount stores, variety stores, junior department stores and other department stores. Further, it has entered into Agreements or has included provisions therein which confer on respondent, in its capacity as a major tenant, certain rights or afford respondent certain means by which it achieves the exclusion of other tenants. The latter Agreements enable respondent to:

(a) approve or disapprove the entry of tenants or categories of tenants; and

(b) establish and circulate lists of approved tenants and categories of tenants, from which future tenants will be chosen.

Respondent has used the rights or means provided by these Agreements to exclude other tenants.

PAR. 7. The aforesaid Agreements and the actions of respondent pursuant thereto, have had and continue to have the tendency to restrain trade and commerce in shopping centers. Included among the effects of such restraints are the following:

(a) boycotting potential tenants from shopping centers;

(b) allowing respondent to choose its competitors and to exclude actual and potential competitors; and

(c) restricting, hindering and coercing joint venturers or developers in their choice of tenants.

PAR. 8. In the course and conduct of its business, respondent Sears, in its capacity as a major tenant, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into Agreements with major tenants, shopping center joint venturers, and developers to maintain, control, fix and establish the range of prices, the range of fashions, the range of quality and the retail selling prices of goods and services offered for sale by tenants in shopping centers. Acting pursuant to these Agreements, shopping center joint venturers, developers or respondent includes certain price, fashion, or quality requirements in leases entered into with other tenants. Such Agreements have had, and continue to have, the tendency to restrain trade and commerce in shopping centers in that they eliminate, hinder, and discourage discount selling; fix, control, and maintain retail prices; and deny the public the benefit of price competition.

PAR. 9. In the course and conduct of its business, respondent Sears, in its capacity as a major tenant, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into Agreements with major tenants, shopping center joint venturers or developers, which Agreements enable respondent Sears to do the following or which themselves:

(a) limit the amount of floor space available to tenants or for specific use by various tenants;

(b) limit the types of products or services to be sold by tenants;

(c) control, restrict, or prohibit other tenants in the conduct of sales, use of advertising, or other methods of promotion;

(d) determine or approve the location of various tenants in shopping centers;

(e) require other tenants to continue operating their stores in shopping centers in a manner similar to that which the tenants operate at other locations so as to determine or control the price ranges, fashion or quality ranges, or particular brands or types of

goods and services which other tenants may sell in shopping centers; or

(f) determine or approve the minimum hours of operation of other tenants in shopping centers.

These Agreements are implemented by respondent through its subsidiary Homart or through shopping center joint venturers or developers.

PAR. 10. Such Agreements, as identified in Paragraph Nine, have had and continue to have the tendency to restrain trade and commerce in shopping centers in that they:

(a) limit the extent to which tenants can compete within shopping centers;

(b) limit a tenant's right to determine the types of products and services to be sold;

(c) eliminate, hinder, and discourage discount advertising, discount pricing, and discount selling;

(d) allow respondent to control the location of tenants in shopping centers so as to induce the public to shop in areas where respondent's stores are located;

(e) restrict other tenants to specified methods of operation so as to limit the price ranges, fashion or quality ranges, or brands of goods and services tenants may sell to the consuming public in shopping centers;

(f) deny other tenants the right to choose the minimum hours of business during which they may compete; and

(g) deny the public the benefit of price competition.

PAR. 11. In the course and conduct of its business, respondent Sears, in its capacity as a major tenant, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into Agreements with major tenants, shopping center joint venturers or developers to impose "radius restrictions" upon tenants in shopping centers in order to preclude them from placing other stores similar to their own within a specified distance from said shopping centers. Such Agreements are implemented by respondent through its subsidiary Homart or by shopping center joint venturers or developers. Such Agreements tend to restrain trade and commerce in that they limit the number and location of retail stores operated by tenants outside of the shopping center, thereby limiting competition and limiting the number and location of other retail stores that might otherwise be accessible to the public.

PAR. 12. In the course and conduct of its business, respondent Sears, in its capacity as a shopping center developer, is, and has been, engaged in unfair methods of competition in or affecting commerce,

in that it has entered into Agreements with major tenants and shopping center joint venturers to maintain, control, fix and establish the range of prices, the range of fashions, the range of quality and the retail selling prices of goods and services offered for sale by tenants in shopping centers. Acting pursuant to these Agreements, shopping center joint venturers or respondent, includes certain price, fashion or quality requirements in the leases entered into with tenants. Such Agreements have had, and continue to have, the tendency to restrain trade and commerce in shopping centers in that they eliminate, hinder, and discourage discount selling; fix, control, and maintain retail prices; and deny the public the benefit of price competition.

PAR. 13. In the course and conduct of its business, respondent Sears, in its capacity as a shopping center developer, is, and has been, engaged in unfair methods of competition in or affecting commerce, in that it has entered into and implemented Agreements which impose "radius restrictions" upon tenants in Homart shopping centers. Such Agreements tend to restrain trade and commerce in that they limit the number and location of retail stores operated by tenants outside of Homart shopping centers, thereby limiting competition among shopping centers, and limiting the number and location of other retail stores that might otherwise be accessible to the public.

PAR. 14. In the course and conduct of its business, respondent Sears, in its capacity as a shopping center developer, is, and has been, engaged in unfair methods of competition and unfair acts and practices in or affecting commerce by conditioning approval of certain tenants for entry into its shopping centers upon such tenants' agreement to occupy space in another Homart shopping center. That condition of approval for entry has had, and continues to have, the tendency to restrain trade and commerce among shopping centers. Included among the effects of such restraints are the following:

(a) denying tenants the freedom to occupy space in the shopping centers of their choice; and

(b) denying developers, competing with respondent, the freedom to negotiate with such tenants for the occupancy of space in the developers' shopping centers.

PAR. 15. The aforesaid acts, practices, and methods of competition of the respondent, as herein alleged, and the adverse competitive effects resulting therefrom, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted, and now constitute, unfair acts and practices and unfair methods of

competition 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 respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Washington, D.C. Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act, as amended; and

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

The Commission having thereafter considered the matter and having determined it had reason to believe that the respondent has 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 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Sears, Roebuck and Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at Sears Towers, Chicago, Illinois. 60684

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

ORDER

I

For the purpose of this order the following definitions shall apply:

(a) The term "respondent" refers to Sears, Roebuck and Co., its operating divisions, its subsidiaries including but not limited to

Homart Development Co., and their respective officers, agents, representatives, or employees.

(b) The term "shopping center" refers to a group of retail outlets in the United States of America planned, developed and managed as a unit and containing (1) a total floor area designed for retail occupancy of 200,000 square feet or more, of which at least 50,000 square feet are for occupancy by tenants other than respondent, (2) at least two tenants other than respondent, (3) at least one major tenant other than respondent, and (4) on-site parking.

(c) The term "tenant" refers to any retail occupant or potential occupant of floor area in a shopping center, whether as a lessee or owner of such space, but the term does not refer to an occupant of space within the store or other area occupied by respondent, which occupant operates as a department for respondent pursuant to a license from respondent.

(d) The term "major tenant" refers to a tenant providing primary drawing power in a shopping center. A tenant which occupies at least 50,000 square feet of floor area will be deemed to provide primary drawing power.

(e) The term "retailer" refers to a tenant which sells merchandise or services to the consuming public.

(f) The terms "range of prices," "range of fashions" and "range of quality" refer to such descriptive words as, but not limited to, "popular priced," "medium priced," and "high priced;" "low or popular fashion," "medium fashion," and "high fashion;" "low or popular quality," "medium quality" and "high quality," which identify a tenant as a member of a class of merchants which sell their merchandise within a generally identifiable range of prices.

(g) The term "radius restriction" refers to a limitation which precludes a tenant, directly or indirectly, from engaging in, owning, or operating any business within a specified radius or distance from a shopping center.

(h) The term "developer" means any business entity which plans, constructs, or operates a shopping center and negotiates and executes lease agreements with tenants.

(i) The term "shopping center joint venturer" or "joint venturer" means any shopping center developer who enters into an agreement with Sears, Roebuck and Co. through its subsidiary Homart Development Co. to develop, construct, or operate a shopping center.

(j) The term "Agreement" refers to any Operating Agreement, Reciprocal Easement Agreement (R.E.A.), lease, or other contract of any kind, oral or written, which sets forth a relationship between the parties relating to the occupancy of floor area in a shopping center.

II

A. *It is ordered,* That respondent Sears, Roebuck and Co., a corporation, its successors and assigns, and its officers, and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in its capacity as a tenant in a shopping center, cease and desist from making, carrying out or enforcing, directly or indirectly, an Agreement or provision of an Agreement, which:

1. prohibits the admission into a shopping center of any particular tenant or class of tenants, including, for purposes of illustration:

(a) other department stores,

(b) junior department stores,

(c) discount stores, or

(d) variety stores;

2. grants respondent the right to approve or disapprove the entry into a shopping center of any other tenant;

3. provides for the formulation or circulation of lists of approved tenants;

4. grants respondent the right to approve or disapprove the amount of floor space that any other tenant may occupy or use in a shopping center;

5. specifies that any tenant in a shopping center shall or shall not sell its merchandise or services at any particular price, or within any range of prices, or within any range of fashions, or within any range of quality, when such descriptions identify tenants as members of a class of merchants which sell their merchandise within a generally identifiable range of prices;

6. limits discount advertising, discount pricing, or discount selling;

7. grants respondent the right to approve or disapprove the amount of floor space that any other tenant may choose to allocate for specific use in a shopping center;

8. limits the types of merchandise or services which any named tenant other than respondent in a shopping center may offer for sale;

9. limits other tenants in a shopping center from conducting bona fide sales;

10. prescribes the minimum hours of business operation of other tenants in a shopping center;

11. grants respondent the right to approve or disapprove the location in a shopping center of any other tenant;

12. provides for radius restrictions upon any tenant in a shopping center; or

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13. authorizes a major tenant to limit the types of merchandise or services which respondent may offer for sale in a shopping center.

B. *It is further ordered,* That respondent, in its capacity as a tenant in a shopping center, shall not enter into or carry out any conspiracy, combination, or arrangement with any other tenant or developer to exclude any tenant from a shopping center or to achieve the results which respondent is prohibited from undertaking by Paragraph IIA of this order.

III

A. *It is further ordered,* That respondent, in its capacity as a shopping center developer, cease and desist from making, carrying out, or enforcing, directly or indirectly, an Agreement or provision of an Agreement, which:

1. specifies that any tenant in any shopping center shall or shall not sell merchandise or services at any price, or within any range of prices, or within any range of fashions, or within any range of quality, when such descriptions identify tenants as members of a class of merchants which sell their merchandise within a generally identifiable range of prices;

2. specifies that any tenant in any shopping center shall not be a discounter or sell merchandise or services at discount prices;

3. specifies that any tenant in any shopping center shall be subject to a radius restriction; or

4. specifically conditions the approval of tenant entry into one of its shopping centers upon the tenant's agreement to occupy space in another of its shopping centers.

B. *It is further ordered,* That respondent, in its capacity as a shopping center developer, cease and desist from entering into any Agreement or provision of an Agreement with any tenant that said tenant may:

1. specify or control or may require respondent to specify or control prices, price ranges, fashion ranges, quality ranges, which identify tenants as members of a class of merchants which sell their merchandise within a generally identifiable range of prices; or

2. control or may require respondent to control discounting by any other retailer; or

3. exclude any retailer from any of respondent's shopping centers by reason of such retailer's discount selling or discount advertising.

C. *It is further ordered,* That respondent cease and desist from using the same officers or other employees in respondent's separate capacities as a tenant in or as a developer of shopping centers.

D. *It is further ordered,* That this order shall not prohibit

respondent, in its capacity as a tenant in a shopping center, from including a provision in an Agreement which identifies in designated buildings respondent and those other major tenants which enter into such an Agreement.

E. *It is further ordered,* That this order shall not prohibit respondent, in its capacity as a tenant in a shopping center, from negotiating to include, including, carrying out or enforcing an Agreement or provision in any Agreement which:

1. requires that in regard to the selection of other tenants in the shopping center by the joint venturer or developer the following objective shall be considered --- maintaining a balanced and diversified grouping of financially sound retail stores, merchandise and services;

2. prohibits occupancy of space in a shopping center by clearly objectionable types of tenants, including, for purposes of illustration, establishments selling or exhibiting pornographic materials, massage parlors, and body and fender shops;

3. permits respondent to establish reasonable categories of retailers from which the developer or the landlord may select tenants to be located in the area immediately proximate to respondent's store; *provided,* that such categories shall not include specification of (a) price reasonably accessible to respondent's store determined by the application of such parking ratio to the number of square feet of floor area of respondent's store, (iii) the entrances and exits to and from respondent's store and any malls, and (iv) those parking area mall entrances and exits which substantially serve respondent's store; or

(d) shall be accomplished only after any and all covenants, obligations and standards (for example, construction, architecture, operation, maintenance, repair, alteration, restoration, parking ratio, and easements) of the shopping center, exclusive of the expansion area (i) shall be made applicable to the expansion area and (ii) shall be made prior in right to any and all mortgages, deeds of trust, liens, encumbrances, and restrictions applicable to the expansion area, and (iii) shall be made prior in right to any and all other covenants, obligations and standards applicable to the expansion area.

F. *It is further ordered,* That respondent, in its capacity as a shopping center developer, will within thirty (30) days after service of this order mail a copy of this order and a copy of Letter "A", attached hereto, by registered or certified mail, to all tenants in its Homart shopping centers.

G. *It is further ordered,* That respondent, in its capacity as a

shopping center developer, advise the Commission in writing within sixty (60) days after respondent has knowledge of any occasion that:

1. a tenant disapproves the admission into any of respondent's shopping centers of any other retailer;

2. a tenant refuses to approve the renewal of another retailer's lease in any of respondent's shopping centers;

3. a tenant approves the admission of another retailer into any of respondent's shopping centers subject to conditions imposed by the tenant relating to the pricing, price ranges, fashion ranges, quality ranges, (b) price lines, (c) trade names, (d) store names, (e) trademarks, brands or lines of merchandise of retailers, or (f) identity of particular retailers, including the listing of particular retailers as examples of a category; and *further, provided,* that such area shall not exceed 150 lineal feet on each level of the center;

4. requires that reasonable standards of appearance, signs, maintenance and housekeeping be maintained in a shopping center;

5. establishes a layout of a shopping center which layout may designate: (a) respondent's store and stores of other major tenants, (b) the location, size and height of all structures (including any structure that is to be occupied by only one tenant) but not the amount of floor area that any other tenant may occupy in the shopping center, (c) the use of all structures of a nonmerchandising nature, (d) the usage by square footage of leasable floor area in the shopping center (excluding floor area occupied by major tenants) of each type of merchandise or service to be handled or offered for sale, for which the developer will use his best efforts to obtain tenants, and (e) parking areas, roadways, utilities, entrances, exits, walkways, malls, landscaped areas and other common areas, and (f) expansion areas and may within such areas establish a layout incorporating items (a) through (e) of this subsection 5; or

6. requires that any expansion of the shopping center not provided for in the initial layout:

(a) shall not interfere with efficient automobile and pedestrian traffic flow into and out of the shopping center and between respondent's store and perimeter and access roads, parking areas, malls and other common areas of the shopping center;

(b) shall not interfere with the efficient operation of respondent's store, including its utilities or its visibility from within the shopping center or from public highways adjacent thereto;

(c) shall not result in a change of (i) the shopping center's parking ratio, (ii) the location of a number of parking spaces ranges, trade names, store names, trademarks, brands or lines of merchandise or the discounting practices or methods of such other retailer; or

4. a tenant enters into an Agreement or provision of an Agreement with respondent to become a tenant in any of respondent's shopping centers on condition that respondent refuse to renew the lease of another retailer.

IV

A. *It is further ordered,* That respondent shall within thirty (30) days after service of this order upon respondent distribute a copy of this order to each of its operating divisions.

B. *It is further ordered,* That respondent, in its capacity as a tenant, shall within thirty (30) days after service of this order upon respondent, distribute a copy thereof by registered or certified mail to each major tenant, shopping center joint venturer and developer in every shopping center in which respondent is a major tenant.

C. *It is further ordered,* That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent or in its subsidiary Homart 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 corporations which may affect compliance obligations arising out of the order.

D. *It is further ordered,* That respondent shall within sixty (60) days after service of this order upon respondent 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 Dole abstained, not having participated in the decision to provisionally accept this agreement. Commissioner Clanton dissented.

Dissenting Statement of Commissioner Clanton

I continue to adhere to my belief that the order, in its present form, should be rejected. Paragraph III E.5.(d) permits Sears to enter into agreements with shopping center developers that, *inter alia,* designate the layout of a shopping center, including "the usage by square footage of leasable floor area * * * of each type of merchandise or service to be handled or offered for sale for which the developer will use his best efforts to obtain tenants* * *." This exemption from the proscriptions of the order comes perilously close to conferring the kind of prior approval rights which the Commission struck down by its decision *In the Matter of Tysons Corner Regional Shopping Center, et al.,* 85 F.T.C. 970 (1975). While not authorizing the exclusion of identified prospective tenants, paragraph III E.5.(d) may achieve a

similar effect by enabling Sears to exercise veto power over various types of retail product lines and services (and thereby, perhaps, excluding certain classes of retailers) through the designation of allowable floor space.

As the Commission noted in *Tysons Corner:*

> It is almost self-evident, and the administrative law judge so found, that floor space is a crucial element in the ability of a store to compete (citation omitted). The inability to expand beyond a certain size can effectively preclude a retailer from offering a particular product line or services that would render it a more viable competitor for consumers' patronage. (Id. at 1013).

The interests of a tenant in the viability of a shopping center can be met, as the Commission pointed out in *Tysons Corner,* by spelling out in lease agreements "specific and legitimate considerations which a tenant may insist that developers consider in admitting new entrants, without creating the massive potential for price-fixing and anticompetitive exclusionary activity inherent in agreements conferring blanket approval rights* * *." Id. at 1012. (Footnote omitted). The Commission there distinguished between lease provisions giving a tenant broad rights of prior approval over other prospective entrants and those provisions setting forth well-defined entry criteria that are unlikely to constitute a cover for price-fixing and other price-controlling activities. In the latter situation, the burden would be on the tenant to demonstrate that the developer failed to give proper consideration to the relevant standards in the lease, a showing the Commission observed as "unlikely to be made or ever attempted if pricing policy is the main reason for the objection to the new competitor." Id. at 1018. By contrast, the *Sears* order permits major tenant participation in the design and layout of shopping centers in a way that renders effective enforcement of the order difficult if not impossible.

To the extent that appropriate consideration may be given to the economic viability of a proposed shopping center, the pending order contains several provisions outlining permissible lease arrangements similar to those incorporated in the *Tysons Corner* order; in fact, the order here would go further by permitting Sears to spell out in its lease agreement with a developer "reasonable categories of retailers" from which the developer would select tenants for location within the immediate proximity (150 feet) of Sears' store. (Paragraph III E.3.). To go beyond that, as provided in paragraph III E.5.(d), creates an unnecessary risk of anti-competitive exclusionary conduct.

For the above reasons, the order should not be approved.

IN THE MATTER OF

LAS ANIMAS RANCH, INC., ET AL.

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

Docket C-2877. Complaint, Apr. 22, 1977 — Decision, Apr. 22, 1977

Consent order requiring seven Colorado Springs, Colo., sellers of undeveloped land, among other things, to cease misrepresenting the risks involved in land purchase; the location and quality of the land offered for sale; the costs and availability of utilities; and the advisability of consulting with a professional real estate expert prior to purchase. Further, the order requires respondents to cease failing to furnish the information required by Regulation Z of the Truth in Lending Act; provide a cooling-off period; advise buyers of their rights to cancellation and refund; and to institute a surveillance program designed to ensure compliance with the terms of the order.

Appearances

For the Commission: *Gerald H. Jaggers.*

For the respondents: *Ron J. Robinson, Walton, Robinson & Shields,* Colorado Springs, Colorado.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Las Animas Ranch, Inc., Mount Blanca Estates, Inc., Mount Blanca Valley Ranches, Inc., Chubasco, Inc., Pine Cone Properties, Inc., corporations; O'Keefe-Baldwin & Associates, Ltd., Trinchera Creek Estates, Ltd., general partnerships; and Charles R. Baldwin, individually and as an officer, stockholder and managing partner of said corporations and partnerships; hereinafter sometimes referred to as respondents, have violated provisions of said Acts 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 in the enumerated paragraphs below.

Allegations in the enumerated paragraphs of respondents' present acts and practices include respondents' past acts and practices. Allegations in said paragraphs of respondents' representations or statements include such representations and statements in sales

contracts, advertising, promotional materials or sales communications made orally, visually or in writing, directly or by implication.

PARAGRAPH 1. Respondent Las Animas Ranch, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Mount Blanca Estates, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Mount Blanca Valley Ranches, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Chubasco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Pine Cone Properties, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent O'Keefe-Baldwin & Associates, Ltd. is a partnership existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Trinchera Creek Estates, Ltd. is a partnership existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondents Charles R. Baldwin and Danny W. O'Keefe are officers, managing partners, managers, or stockholders of the above corporations and partnerships. They formulate, direct and control the acts and practices of the corporate respondents and the partnership respondents. Their business address is 2860 South Circle Drive, Colorado Springs, Colo.

PAR. 2. Respondents are engaged in the business of acquiring undeveloped land and subdividing said land into lots; and advertising, offering for sale and selling said lots to the public.

PAR. 3. Respondents' volume of business is substantial and their acts and practices, as hereinafter set forth, are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of land.

PAR. 5. Among the subdivisions owned or formerly owned by respondents in which lots have been or are being offered for sale by respondents are the subdivisions known as Mount Blanca Estates, Mount Blanca Valley Ranches, Las Animas Ranch, Trinchera Creek Estates and Mountain View Ranches, all located in the State of Colorado. The acreage of each of these subdivisions is substantial. Respondents formerly acted as a sales agent for a Colorado subdivision known as San Luis Estates.

COUNT ONE

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One, Two, Three and Four hereof, are incorporated by reference in Count One as if fully set forth verbatim.

PAR. 6. In the conduct of their aforesaid business, respondents represent that the lots which respondents offer for sale are good investments and that there is little or no financial risk involved in the purchase of said lots.

PAR. 7. In truth and in fact, significant number of the aforesaid lots are not good investments involving little or no financial risk to purchasers from respondents. Therefore, the acts and practices described in Paragraph Six are unfair or deceptive.

PAR. 8. In the further conduct of their aforesaid business, respondents offer for sale and sell lots in their subdivisions without disclosing to prospective purchasers that the purchase of said lots is a risky investment in that, *inter alia,* the future value of said lots is uncertain and the purchaser will probably be unable to resell his or her lot at or above the purchase price. Therefore, respondents have failed to disclose material characteristics of their lots which would be likely to affect the consideration by purchasers of whether or not to purchase a lot from respondents. The failure to disclose such information is an unfair or deceptive act or practice.

PAR. 9. In the further conduct of their aforesaid business, respondents represent that the value of the undeveloped land and lots in their subdivisions is growing at a rate which corresponds to the growth rate of the value, at the undeveloped stage, of land and lots in more fully developed and populated areas.

PAR. 10. In truth and in fact, the growth rate of the value of the undeveloped land and lots in respondents' subdivisions does not

correspond to the growth rate of the value, at the undeveloped stage, of land and lots in more fully developed and populated areas referred to in Paragraph Nine. Therefore, the acts and practices described in Paragraph Nine are unfair or deceptive.

PAR. 11. In the further conduct of their aforesaid business, respondents represent that utilities, such as electricity and telephone, are presently available on the subdivisions, or that such utilities are located nearby, or that such utilities will be extended to prospective purchasers' lots at no additional cost to them, or that prospective purchasers will be able to obtain such utilities at a nominal cost.

PAR. 12. In truth and in fact, most of the lots sold by respondents are located a great distance from existing utility lines; no current plan exists to extend such lines to purchasers' lots; and, in addition to nominal hook-up or installation charges, purchasers must pay substantial expenses for utility line extension, plus sign longterm use contracts with local utility companies. Therefore, the acts and practices described in Paragraph Eleven are unfair or deceptive.

PAR. 13. In the further conduct of their aforesaid business, respondents represent that water may be obtained on each lot by drilling a well, or that the State of Colorado guarantees the availability of water or will automatically grant well drilling permits, or that drinkable water may be found at a shallow depth, 30 to 50 feet, and at nominal cost, and that water obtained may be used for any purpose.

PAR. 14. In truth and in fact, on most of the lots sold by respondents, sufficient drinkable water is either not available, or available only at excessive depths; the State of Colorado does not guarantee the availability of water, and on some lots, the State will not automatically issue well drilling permits; water permits are limited, in some areas, to domestic (in house) uses only; and drilling for water on many of respondents' lots involves substantial expense. Therefore, the acts and practices described in Paragraph Thirteen are unfair or deceptive.

PAR. 15. In the further conduct of their aforesaid business, respondents represent that the lots in respondents' subdivisions are useable as homesites.

PAR. 16. In truth and in fact, all or most of the aforesaid lots are not useable as homesites because of, *inter alia,* the lack or unreasonable cost of utilities, the difficulty in obtaining home construction financing, the remote location of the property and the poor quality of the land. Therefore, the acts and practices described in Paragraph Fifteen are unfair or deceptive.

PAR. 17. In the further conduct of their aforesaid business, respondents offer for sale and sell lots in their subdivisions without disclosing to prospective purchasers the total cost of all utilities, that one or more utility services may not be available and that home construction financing is difficult to obtain. Therefore, respondents have failed to disclose material characteristics of their lots which would be likely to affect the consideration by purchasers of whether or not to purchase a lot from respondents. The failure to disclose such information is an unfair or deceptive act or practice.

PAR. 18. In the further conduct of their aforesaid business, respondents represent that the land in their subdivisions will soon be unavailable and that prospective buyers must purchase lots immediately or risk being unable to do so.

PAR. 19. In truth and in fact, respondents' land is not selling at such a rate that prospective buyers cannot wait a substantial period of time and still be able to obtain land in the subdivision being offered. Therefore, the acts and practices described in Paragraph Eighteen are unfair or deceptive.

PAR. 20. In the further conduct of their aforesaid business, respondents represent that the money paid to respondents by purchasers is fully protected or "Guaranteed" by respondents' refund plan.

PAR. 21. In truth and in fact, the money paid to respondents by purchasers is not fully protected or "Guaranteed" by respondents' refund plan because of the conditions required of purchasers to get refunds including, but not limited to, the conditions that purchasers must bear the cost of traveling to the property and that purchasers must request a refund immediately upon completion of a required company guided tour when it may not be possible for purchasers to determine if the property is as represented at that time. Therefore, the acts and practices described in Paragraph Twenty are unfair or deceptive.

PAR. 22. In the further conduct of their aforesaid business, respondents represent that their subdivision land and the area in which said land is located is similar or comparable to urban, metropolitan and industrial areas as well as to mountain resort areas and recreation areas.

PAR. 23. In truth and in fact, respondents' land is not similar or comparable either to urban, metropolitan and industrial areas or to mountain resort areas or to recreation areas. Therefore, the acts and practices described in Paragraph Twenty-Two are unfair or deceptive.

PAR. 24. In the further conduct of their aforesaid business,

respondents represent that the subdivisions being sold are currently being developed or that many homes are now being built or will be built in the immediate future and that respondents or others are building or will build motels, resorts, ski areas and restaurants on or near the subdivisions.

PAR. 25. In truth and in fact, few permanent residences have been built on respondents' subdivisions and respondents have no plans to make additional improvements on their subdivisions. Therefore, the acts and practices described in Paragraph Twenty-Four are unfair or deceptive.

PAR. 26. In the further conduct of their aforesaid business, respondents represent that certain lots have been repossessed or forfeited, that the interest in such lots may be assumed by making certain back payments, and that purchasers are receiving credit for the equity or amount paid in by the previous purchaser of the lot.

PAR. 27. In truth and in fact, respondents offer no assumptions. The amounts identified by respondents as "assignment of equity" or "discount by credit" are, in fact, artificial or fictitious price reductions, and purchasers, in fact, pay the normal purchase price offered by respondents. Therefore, the acts and practices described in Paragraph Twenty-Six are unfair or deceptive.

PAR. 28. In the further conduct of their aforesaid business, respondents represent that no sales commission expense is involved in the purchase of respondents' lots and that, therefore, the purchase of respondents' lots is more economical when compared to other purchase or investment opportunities.

PAR. 29. In truth and in fact, respondents' salesmen do work on a commission basis. Therefore, the acts and practices described in Paragraph Twenty-Eight are unfair or deceptive.

PAR. 30. In the further conduct of their aforesaid business, respondents represent that lots in two subdivisions known as Las Animas Ranch may be used for any purpose desired by the purchasers thereof, including principal residence, mobile homes, resort developments or vacation homes.

PAR. 31. In truth and in fact, all or most of the lots in the Las Animas Ranch subdivisions are zoned "plains agriculture," requiring ownership of 320 acres before building of any sort is allowed. Therefore, the acts and practices described in Paragraph Thirty are unfair or deceptive.

PAR. 32. In the further conduct of their aforesaid business, respondents offer lots in their Las Animas Ranch subdivisions without disclosing to prospective purchasers that the lots being offered are zoned "plains agricultural," requiring ownership of 320

acres before building of any sort is allowed. Respondents, therefore, have failed to disclose material characteristics of their lots which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase a lot from respondents. The failure to disclose such information is a deceptive or unfair act or practice.

PAR. 33. In the further conduct of their aforesaid business, respondents use land sales contracts which contain declarations that the contract contains the entire agreement of the parties and that no representations were made to the lot purchaser to induce said purchaser to enter into the contract other than those representations expressed in the contract.

PAR. 34. Use by respondents of the contract declarations described in Paragraph Thirty-Three is an unfair or deceptive act or practice because respondents and their agents make representations which differ in material respects from, or which obscure, the rights and obligations of purchasers and respondents under said contracts.

PAR. 35. In the further conduct of their aforesaid business, respondents use land sales contracts which contain a provision that defaulting purchasers forfeit all payments previously made to respondents under the contract. When purchasers default and forfeit previously made payments, respondents retain and fail to offer refunds of those amounts of the purchasers' total payments which exceed respondents' reasonable damages caused by the defaults.

PAR. 36. Use by respondents of the contract provision described in Paragraph Thirty-Five and the retaining by respondents of purchasers' payments in excess of reasonable damages are unfair acts or practices.

PAR. 37. In the further conduct of their aforesaid business, respondents induce members of the public through the unfair and deceptive acts and practices, described in the enumerated paragraphs above, to pay to them, in advance of the passage of title, substantial sums of money toward the purchase of lots located within respondents' subdivisions. Said lots are of little or no use or value to purchasers as investments or as homesites. Respondents retain said sums of money.

PAR. 38. Respondents' retaining of the sums of money obtained through the acts and practices described in Paragraph Thirty-Seven is an unfair act or practice.

PAR. 39. The use by respondents of the aforementioned unfair or deceptive statements, representations, and practices has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements are true and to cause the purchase of substantial

numbers of respondents' lots because of said mistaken and erroneous belief.

PAR. 40. The aforementioned acts and practices, as herein alleged, are all to the prejudice and injury of the public and respondents' competitors and constitute unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT TWO

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count Two as if fully set forth verbatim.

PAR. 41. In the further conduct of their aforesaid business, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 42. Subsequent to July 1, 1969, respondents, in the conduct of their aforesaid business and in connection with credit sales as "credit sales" is defined in Section 226.2(n) of Regulation Z, have caused their customers to execute installment contracts, or contracts for deed. By and through the use of these contracts, respondents, in a number of instances:

1. Have failed to state the number, amount and the due dates or period of payments scheduled to repay the indebtedness, and the sum of such payments, using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

2. Have failed to use the terms "cash downpayment," "total downpayment" and "unpaid balance of cash price," and have failed to give the corresponding disclosures with those terms, as required by Sections 226.8(c)(1), 226.8(c)(2) and 226.8(c)(3) of Regulation Z.

3. Have failed to use the term "deferred payment price," and to give the corresponding disclosure with that term, as required by Section 226.8(c)(8)(ii) of Regulation Z.

4. Have failed to use the term "finance charge," and to give the corresponding disclosure with that term, as required by Section 226.8(c)(8)(i) of Regulation Z.

5. Have failed to disclose the identity of the creditor, as required by Section 226.8(a) of Regulation Z.

6. Have failed to make the disclosures in the manner required by Sections 226.8(a)(1) and 226.8(a)(2) of Regulation Z.

7. Have failed to accurately disclose the "annual percentage rate," to the nearest quarter of one per cent, as required by Sections 226.5(b) and 226.8(b)(2) of Regulation Z.

8. Have failed to disclose whether a rebate of the unearned finance charges upon prepayment in full is available, and, if available, the method of computation, as required by Section 226.8(b)(7) of Regulation Z.

9. Have failed to use the term "annual percentage rate," as required by Section 226.8(b)(2) of Regulation Z.

10. Have failed to use the term "amount financed," as required by Section 226.8(c)(7) of Regulation Z.

PAR. 43. Subsequent to July 1, 1969, respondents, in the conduct of their aforesaid business and in connection with credit sales, have caused to be published advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 44. Respondents, in certain of these advertisements state the amount of the downpayment or that no downpayment is required, the amount of an installment payment, or the period of repayment, or that there is no charge for credit, without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2):

(a) the cash price;

(b) the amount of the downpayment required or that no downpayment is required, as applicable;

(c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(d) the amount of the finance charge expressed as an annual percentage rate; and

(e) the deferred payment price.

PAR. 45. Respondents, in other advertisements state the rate of a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, and have not expressed said rate as an annual percentage rate, using the term "annual percentage rate," as "annual percentage rate" is defined in Section 226.2 of Regulation Z, in violation of Section 226.10(d)(1) of Regulation Z.

PAR. 46. By and through the use of a contract, respondents retain, create or acquire a security interest, as "security interest" is defined in Section 226.2(z) of Regulation Z, in real property which is expected or may be expected to be used as the principal residence of the

purchaser. Respondents' retention or acquisition of a security interest in said real property gives their customers, who are extended consumer credit, as "consumer credit" is defined in Section 226.2(k) of Regulation Z, the right to rescind the transaction until midnight of the third business day following the date of consummation of the transaction or the date of delivery of all the disclosures required by Regulation Z, whichever is later.

By and through the use of the aforementioned contract for deed, respondents in all instances since July 1, 1969:

1. Have failed to provide the "Notice of Opportunity to Rescind" to the customer on one side of a separate statement which identifies the transaction to which it relates, as required by Section 226.9(b) of Regulation Z.

2. Have failed to set out the "Effect of Rescission," Section 226.9(d) of Regulation Z in the manner and form required by Section 226.9(b) of Regulation Z.

PAR. 47. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act, and, pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

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 Denver Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Truth in Lending Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission for purposes of this proceeding 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 Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the

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

FINDINGS

1. Respondent Las Animas Ranch, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Mount Blanca Estates, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Mount Blanca Valley Ranches, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Chubasco, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Pine Cone Properties, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent O'Keefe-Baldwin & Associates, Ltd. is a partnership existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondent Trinchera Creek Estates, Ltd. is a partnership existing and doing business under and by virtue of the laws of the State of Colorado, with its office and principal place of business located at 2860 South Circle Drive, Colorado Springs, Colo.

Respondents Charles R. Baldwin and Danny W. O'Keefe are officers, managing partners, managers or stockholders of the above corporations and partnerships. They formulate, direct and control the policies, acts and practices of said corporations and partnerships, and their business address is also 2860 South Circle Drive, Colorado Springs, Colo.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

(Hereinafter, findings of present acts and practices include past acts and practices, and findings of representations include oral, written or visual communications, made directly or indirectly.)

3. Las Animas Ranch, Inc., subdivided approximately 15,000 acres of Colorado land and designated the subdivision as Las Animas Ranch.

4. Mount Blanca Valley Ranches, Inc., subdivided approximately 8,000 acres of Colorado land and designated the subdivision as Mount Blanca Valley Ranches.

5. Mount Blanca Estates, Inc., subdivided approximately 5,000 acres of Colorado land and designated the subdivision as Mount Blanca Estates.

6. Trinchera Creek Estates, Ltd., subdivided approximately 10,000 acres of Colorado land and designated the subdivision as Trinchera Creek Estates.

7. Chubasco, Inc., Pine Cone Properties, Inc., and O'Keefe-Baldwin & Associates, Ltd., acted as sales agents for the aforesaid subdivisions.

8. The aforesaid subdivisions were divided for the most part into five (5) acre lots, and lots in them were sold to members of the public located throughout the country.

9. Respondents represent that the lots which respondents offer for sale are good investments and that there is little or no financial risk involved in the purchase of said lots.

10. A significant number of the aforesaid lots are not good investments involving little or no financial risk to purchasers from respondents. Therefore, the acts and practices described in Finding 9 are unfair or deceptive.

11. Respondents offer for sale and sell lots in their subdivisions without disclosing to prospective purchasers that the purchase of said lots is a risky investment in that, *inter alia,* the future value of said lots is uncertain and the purchaser will probably be unable to resell his or her lot at or above the purchase price. Therefore, respondents have failed to disclose material characteristics of their lots which would be likely to affect the consideration by purchasers of whether or not to purchase a lot from respondents. The failure to disclose such information is an unfair or deceptive act or practice.

12. Respondents represent that the value of the undeveloped land and lots in their subdivisions is growing at a rate which corresponds to the growth rate of the value, at the undeveloped stage, of land and lots in more fully developed and populated areas.

13. The growth rate of the value of the undeveloped land and lots in respondents' subdivisions does not correspond to the growth rate of the value, at the undeveloped stage, of land and lots in more fully developed and populated areas referred to in Finding 12. Therefore, the acts and practices described in Finding 12 are unfair or deceptive.

14. Respondents represent that utilities, such as electricity and telephone, are presently available on the subdivisions, or that such utilities are located nearby, or that such utilities will be extended to prospective purchasers' lots at no additional cost to them, or that prospective purchasers will be able to obtain such utilities at a nominal cost.

15. Most of the lots sold by respondents are located a great distance from existing utility lines; no current plan exists to extend such lines to purchasers' lots; and, in addition to nominal hook-up or installation charges, purchasers must pay substantial expenses for utility line extension, plus sign long-term use contracts with local utility companies. Therefore, the acts and practices described in Finding 14. are unfair or deceptive.

16. Respondents represent that water may be obtained on each lot by drilling a well, or that the State of Colorado guarantees the availability of water or will automatically grant well drilling permits, or that drinkable water may be found at a shallow depth, 30 to 50 feet, and at nominal cost, and that water obtained may be used for any purpose.

17. On most of the lots sold by respondents, sufficient drinkable water is either not available, or available only at excessive depths; the State of Colorado does not guarantee the availability of water, and on some lots, the state will not automatically issue well drilling permits; water permits are limited, in some areas, to domestic (in house) uses only; and drilling for water on many of respondents' lots involves substantial expense. Therefore, the acts and practices described in Finding 16. are unfair or deceptive.

18. Respondents represent that the lots in respondents' subdivisions are useable as homesites.

19. All or most of the aforesaid lots are not useable as homesites because of, *inter alia,* the lack or unreasonable cost of utilities, the difficulty in obtaining home construction financing, the remote location of the property and the poor quality of the land. Therefore, the acts and practices described in Finding 18. are unfair or deceptive.

20. Respondents offer for sale and sell lots in their subdivisions without disclosing to prospective purchasers the total cost of all

utilities, that one or more utility services may not be available and that home construction financing is difficult to obtain. Therefore, respondents have failed to disclose material characteristics of their lots which would be likely to affect the consideration by purchasers of whether or not to purchase a lot from respondents. The failure to disclose such information is an unfair or deceptive act or practice.

21. Respondents represent that the land in their subdivisions will soon be unavailable and that prospective buyers must purchase lots immediately or risk being unable to do so.

22. Respondents' land is not selling at such a rate that prospective buyers cannot wait a substantial period of time and still be able to obtain land in the subdivision being offered. Therefore, the acts and practices described in Finding 21 are unfair or deceptive.

23. Respondents represent that the money paid to respondents by purchasers is fully protected or "Guaranteed" by respondents' refund plan.

24. The money paid to respondents by purchasers is not fully protected or "Guaranteed" by respondents' refund plan because of the conditions required of purchasers to get refunds including, but not limited to, the conditions that purchasers must bear the cost of traveling to the property and that purchasers must request a refund immediately upon completion of a required company guided tour when it may not be possible for purchasers to determine if the property is as represented at that time. Therefore, the acts and practices described in Finding 23 are unfair or deceptive.

25. Respondents represent that their subdivision land and the area in which said land is located is similar or comparable to urban, metropolitan and industrial areas as well as to mountain resort areas and recreation areas.

26. Respondents' land is not similar or comparable either to urban, metropolitan and industrial areas or to mountain resort areas or to recreation areas. Therefore, the acts and practices described in Finding 25 are unfair or deceptive.

27. Respondents represent that the subdivisions being sold are currently being developed or that many homes are now being built or will be built in the immediate future and that respondents or others are building or will build motels, resorts, ski areas and restaurants on or near the subdivisions.

28. Few permanent residences have been built on respondents' subdivisions and respondents have no plans to make additional improvements on their subdivisions. Therefore, the acts and practices described in Finding 27 are unfair or deceptive.

29. Respondents represent that certain lots have been repossessed

or forfeited, that the interest in such lots may be assumed by making certain back payments, and that purchasers are receiving credit for the equity or amount paid in by the previous purchaser of the lot.

30. Respondents offer no assumptions. The amounts identified by respondents as "assignment of equity" or "discount by credit" are, in fact, artificial or fictitious price reductions, and purchasers, in fact, pay the normal purchase price offered by respondents. Therefore, the acts and practices described in Finding 29 are unfair or deceptive.

31. Respondents represent that no sales commission expense is involved in the purchase of respondents' lots and that, therefore, the purchase of respondents' lots is more economical when compared to other purchase or investment opportunities.

32. Respondents' salesmen do work on a commission basis. Therefore, the acts and practices described in Finding 31 are unfair or deceptive.

33. Respondents represent that lots in two subdivisions known as Las Animas Ranch may be used for any purpose desired by the purchasers thereof, including principal residence, mobile homes, resort developments or vacation homes.

34. All or most of the lots in the Las Animas Ranch subdivisions are zoned "plains agriculture," requiring ownership of 320 acres before building of any sort is allowed. Therefore, the acts and practices described in Finding 33 are unfair or deceptive.

35. Respondents offer lots in their Las Animas Ranch subdivisions without disclosing to prospective purchasers that the lots being offered are zoned "plains agricultural," requiring ownership of 320 acres before building of any sort is allowed. Respondents, therefore, have failed to disclose material characteristics of their lots which, if known to certain consumers, would be likely to affect their consideration of whether or not to purchase a lot from respondents. The failure to disclose such information is a deceptive or unfair act or practice.

36. Respondents use land sales contracts which contain declarations that the contract contains the entire agreement of the parties and that no representations were made to the lot purchaser to induce said purchaser to enter into the contract other than those representations expressed in the contract.

37. Use by respondents of the contract declarations described in Finding 36 is an unfair or deceptive act or practice because respondents and their agents make representations which differ in material respects from, or which obscure, the rights and obligations of purchasers and respondents under said contracts.

38. Respondents use land sales contracts which contain a provision that defaulting purchasers forfeit all payments previously made

to respondents under the contract. When purchasers default and forfeit previously made payments, respondents retain and fail to offer refunds of those amounts of the purchasers' total payments which exceed respondents' reasonable damages caused by the defaults.

39. Use by respondents of the contract provision described in Finding 38 and the retaining by respondents of purchasers' payments in excess of reasonable damages are unfair acts or practices.

40. Respondents induce members of the public through the unfair and deceptive acts and practices, described in the enumerated findings above, to pay to them, in advance of the passage of title, substantial sums of money toward the purchase of lots located within respondents' subdivisions. Said lots are of little or no use or value to purchasers as investments or as homesites. Respondents retain said sums of money.

41. Respondents' retaining of the sums of money obtained through the acts and practices described in Finding 40 is an unfair act or practice.

42. The use by respondents of the aforementioned unfair or deceptive statements, representations, and practices has the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that such statements are true and to cause the purchase of substantial numbers of respondents' lots because of said mistaken and erroneous belief.

43. The aforementioned acts and practices, as herein alleged, are all to the prejudice and injury of the public and respondents' competitors and constitute unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

As used in this order, a requirement to cease and desist from representing or misrepresenting shall include representing or misrepresenting, directly or indirectly, and by any manner or means.

As used in this order, the term "subdivision" means:

> Land which has been or will be divided into 50 or more lots, whether contiguous or not, where said lots are bieng, have been, or will be offered for sale or lease as part of a common promotional plan.

I

It is ordered, That respondents Las Animas Ranch, Inc., Mount

Blanca Estates, Inc., Mount Blanca Valley Ranches, Inc., Chubasco, Inc., and Pine Cone Properties, Inc., corporations; O'Keefe-Baldwin & Associates, Ltd., and Trinchera Creek Estates, Ltd., general partnerships, their successors and assigns; and Charles R. Baldwin, individually and as an officer, managing partner and stockholder of said corporations and partnerships, and Danny W. O'Keefe, individually and as an officer, managing partner and stockholder of said corporations and partnerships, and respondents' officers, agents, representatives and employees, directly or through any corporation, partnership, subsidiary, division or other device, in connection with the advertising, offering for sale or sale of subdivisions, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Misrepresenting:

1. That real estate is a good or safe investment, or that the purchase of a lot in one of respondents' subdivisions is a good or safe investment.

2. That there is little or no financial risk involved in the purchase of respondents' lots.

3. That the resale of a lot purchased from respondents is not difficult.

4. That the value of, or demand for, any land, including lots being offered for sale or previously sold by respondents, has increased, or will or may increase, or that purchasers have made, or will or may in the future make, a profit by reason of having purchased respondents' land.

5. That the prices of respondents' lots periodically rise or that prices of said lots are increasing, have increased or will increase, without clearly and conspicuously disclosing at the same time, and by the same medium by which the price increases are communicated, that the price increases of respondents' lots do not in any way relate to the value of said lots.

6. That the purchase of a lot in one of respondents' subdivisions is a way to achieve financial security or prosperity, to deal with inflation or to become wealthy.

7. That the land in any of respondents' subdivisions will soon be unavailable or that prospective purchasers must purchase a lot in one of respondents' subdivisions immediately to ensure that such lot will be available.

8. That respondents' subdivision land and the area surrounding said land are comparable, similar or analogous either to urban, metropolitan and industrial areas or to mountain resort areas or to recreation areas.

9. That ski lifts, resorts, motels or other developments are planned on or near respondents' subdivisions, thereby increasing the value and desirability of the subdivisions.

10. That respondents will repurchase lots or resell lots for purchasers, unless such is a fact.

11. That lots being offered for sale have been repossessed, reduced in price, or may be purchased on an assumption basis, or that purchasers will be assigned or receive the benefit of a former purchaser's equity or payments.

12. That sales commissions are not paid to respondents' sales agents.

B. Including in any contract for the sale of respondents' land, or in any document shown or provided to purchasers or prospective purchasers of respondents' land:

1. Language to the effect that no express or implied representations have been made in connection with the sale or offering for sale of respondents' land, other than those set forth in the contract or document, or that any particular representation has not been made in such connection.

2. Language to the effect that upon a failure of the purchaser to pay any installment due under the contract or otherwise to perform any obligation under the contract, the seller shall be entitled to retain sums previously paid thereunder by the purchaser in excess of the seller's actual damages.

3. Any waiver, limitation or condition on the right of a purchaser to cancel a transaction or receive a refund under any provision of this order, except as such waiver, limitation or condition is expressly allowed by this order.

C. Misrepresenting the right of a purchaser under any provision of this order or any applicable statute or regulation to cancel a transaction or receive a refund.

D. Making any statement or representation, concerning the proximity of any city or place to a subdivision or a part thereof, without clearly disclosing in immediate conjunction therewith and with the same conspicuousness as such representation, the distance in road miles from the geographic center of the subdivision or part thereof to the other city or place referred to, including subtotals showing number of road miles paved and unpaved.

E. Misrepresenting the purpose or effect of any provision in the contract for sale, or other forms, completed at the time of sale or thereafter, whereby the purchasers are required to declare their intention as to establishing a permanent or principal place of residence on the land.

F. Misrepresenting the cost, availability or method of obtaining water, electric power, telephone or natural gas service, sewage treatment systems or any other type of improvement.

G. Misrepresenting, or failing to disclose, any type of zoning, covenant, easement, encumbrance, exception, reservation, restriction or condition or other matters of record which may significantly affect the use, enjoyment or value of lots sold by respondents.

H. Advertising for sale, offering for sale, contracting to sell or selling any interest in:

1. Subdivision lots represented in any manner as being useable now or in the future as a homesite, unless at the time of sale respondents include as a part of the sales contract a statement disclosing the then existing costs, availability, and feasibility of acquiring water, sewage disposal, electricity and telephone service for the lot being sold under such sales contract.

2. Any subdivision lots not covered in paragraph I.H.1. of this order unless;

a. There shall appear in the form and place described in paragraph II.C. of this order as an additional paragraph immediately following the first two paragraphs required by paragraph II.C., the following statement:

> THIS UNDEVELOPED LAND IS BEING SOLD "AS IS." ELECTRICITY, WATER, SEWER AND TELEPHONE SERVICE ARE NOT PLANNED FOR THIS SUBDIVISION AND MAY BE IMPOSSIBLE FOR YOU TO OBTAIN AT A REASONABLE COST. YOUR LOT WILL BE ACCESSIBLE, IF AT ALL, ONLY BY UNPAVED ROADS WHICH WILL NOT BE MAINTAINED BY US. THE USE OF SUCH ROADS MAY BE IMPOSSIBLE WITHOUT MAINTENANCE. AS A RESULT, YOUR LOT MAY HAVE NO USE AS A HOMESITE.

b. Each piece of advertising, sales or promotional material contains the following statement, in the same size type as that which is predominantly used in such material:

> LOTS IN THIS SUBDIVISION MAY NOT BE USEABLE AS HOMESITES

If respondents fail for any reason to make the disclosures required by the above paragraph (I.H.2.) of this order, they shall refund to each purchaser to whom the disclosures were not made all monies paid by such purchaser to respondents under the terms of the land sales contract when requested to do so by such purchaser.

II

It is further ordered, That respondents and respondents' officers, agents, representatives and employees, directly or through any

corporation, partnership, subsidiary, division or other device, in connection with the advertising, offering for sale or sale of subdivisions, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith:

A. Include clearly and conspicuously:

1. In all sales presentations, promotional materials and advertising, other than any TV or radio advertisements, in the same size type as that which is predominantly used in such material, the following statement:

> YOU SHOULD CONSIDER THE PURCHASE OF OUR LAND TO BE RISKY. THE FUTURE VALUE OF THIS LAND IS UNCERTAIN---DO NOT COUNT ON AN INCREASE IN ITS VALUE. IN THE PAST, IT HAS NOT ALWAYS BEEN POSSIBLE FOR PURCHASERS OF THIS LAND TO RESELL THE LAND AT A PROFIT.
>
> IT IS SUGGESTED THAT YOU DISCUSS ANY POSSIBLE PURCHASE WITH A LAWYER, REALTOR, OR OTHER QUALIFIED PROFESSIONAL.

2. In all TV and radio advertisements, the following statement:

> YOU SHOULD CONSIDER THE PURCHASE OF OUR LAND TO BE RISKY.

B. Set forth on the first page of any contract for the sale of land in 24-point boldface type, "CONTRACT FOR THE PURCHASE OF LAND," with no other writing except that required by paragraphs II.C. and I.H. of this order.

C. Print the following in 12-point boldface type as the only writing, in addition to that required by paragraphs II.B. and I.H. of this order, on the first page of all contracts for the sale of land:

> THIS IS A CONTRACT BY WHICH YOU AGREE TO PURCHASE LAND. THE FUTURE VALUE OF THIS LAND IS UNCERTAIN---DO NOT COUNT ON AN INCREASE IN ITS VALUE. YOU SHOULD NOT CONSIDER THIS PURCHASE AS A PROFITMAKING INVESTMENT. IN FACT, PURCHASERS MAY NOT BE ABLE TO RESELL THEIR LAND.
>
> IT IS SUGGESTED THAT YOU CONSIDER YOUR NEEDS CAREFULLY AND CONTACT A LAWYER, REALTOR OR OTHER QUALIFIED PROFESSIONAL ABOUT THIS PURCHASE.
>
> _____ _____
>
> Signature Date

No contract for the sale of respondents' land shall be valid unless this statement is signed and dated by the purchaser after he has had a reasonable amount of time to read the whole page.

D. Whenever respondents provide prospective purchasers with a

contract for the sale of land by any means other than by mailing said contract directly to such purchasers:

1. Furnish each purchaser, at the time the purchaser signs a contract for the sale of land, with two copies of a form, captioned in 12-point type "NOTICE OF RIGHT OF CANCELLATION," which shall contain in 10-point boldface type the following information and statements:

_____
Date of Transaction

_____
Contract Number

NOTICE OF CANCELLATION

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE SHOWN ON THE CONTRACT.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN TEN BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF THE CANCELLATION NOTICE.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO *(name of respondent)*, AT *(address of respondent's place of business)* NOT LATER THAN MIDNIGHT OF *(date)*.

I(WE) HEREBY CANCEL THIS TRANSACTION. (EACH PURCHASER MUST SIGN THIS NOTICE.)

_____ _____
(Date) (Signature of Purchaser)

2. Before furnishing copies of the above "Notice of Right of Cancellation" to the purchaser, complete both copies by entering the name of the respondent, the address of the respondent's place of business, the date of the transaction, the contract number and the date by which the purchaser may give notice of cancellation, but in no event may such date be earlier than the tenth business day following the date of the transaction.

3. Where a timely notice of cancellation is received and said notice is not properly signed, and respondents do not intend to honor the notice, immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of his error and stating clearly and conspicuously that a notice signed by the purchaser must be mailed by midnight of the seventh business

day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

4. Where the signature of prospective purchaser is solicited during the course of a sales presentation, inform each person orally, at the time he signs the contract, of his right to cancel as stated in paragraph II.D. of this order.

5. Include clearly and conspicuously in each contract for the sale of respondents' land the following statement in 12-point boldface type:

> PURCHASER HAS THE RIGHT TO CANCEL THE CONTRACT, WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE TENTH BUSINESS DAY AFTER THE DATE OF THIS CONTRACT. SEE THE ATTACHED "NOTICE OF RIGHT OF CANCELLATION" FOR AN EXPLANATION OF THIS RIGHT.

6. Within 10 business days after the receipt of a timely notice of cancellation signed by a purchaser, refund all payments made under the contract and cancel and return any negotiable instrument executed by the purchaser in connection with the contract.

E. Whenever respondents provide prospective purchasers with a contract for the sale of land by mailing said contract directly to such purchasers:

1. Include clearly and conspicuously in each contract for the sale of respondents' land the following statement in 12-boldface type:

> THIS OFFER OF LAND TO YOU WILL REMAIN OPEN FOR THIRTY CALENDAR DAYS FROM THE DATE OF YOUR RECEIPT OF THE CONTRACT, AND WE WILL ACCEPT ANY CONTRACT MAILED TO US WITHIN SAID THIRTY DAY PERIOD.

2. Honor any contract which is signed and mailed to respondents by purchaser within thirty calendar days from the date purchaser received it.

F. Furnish any report required by federal or state law to be furnished to a purchaser of respondents' land at or before the signing of a contract, and all materials required to be furnished by this order, with the first written materials or during the first contact which the prospective purchaser has with respondents or any of their agents or employees.

G. Inform all prospective purchasers that home financing may not be available, and that a bank located near the subdivision should be consulted prior to the purchase of land if the purchaser intends to build a house on that land.

H. Whenever respondents offer a refund contingent upon the purchaser taking a company-guided inspection tour or making a

registered inspection of the property in which the purchaser's lot is located:

1. Provide the purchaser three business days after taking said tour or making said inspection within which to request a refund.

2. Include in any contract, in immediate proximity to the provision setting forth the availability of a refund upon the completion of a company-guided inspection tour or registered inspection of the property, the following statements:

a. YOU, THE PURCHASER(S), HAVE THE RIGHT TO CANCEL THIS TRANSACTION IF YOU TAKE THE COMPANY-GUIDED TOUR OR MAKE A REGISTERED INSPECTION OF THE PROPERTY AND NOTIFY THE COMPANY PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF SUCH TOUR OR INSPECTION.

b. SELLER WILL *NOT* REIMBURSE THE PURCHASER(S) FOR ANY EXPENSES INCURRED BY THE PURCHASER(S) IN TRAVELLING TO THE PROPERTY IN ORDER TO TAKE THE TOUR OR INSPECTION.

3. Furnish each purchaser at the completion of the tour or inspection a completed form in duplicate, captioned "NOTICE OF CANCELLATION"which shall contain in at least 10-point boldface type the following statements:

NOTICE OF CANCELLATION

_____

Date of company-guided inspection tour or registered inspection of property

_____

Contract number

YOU MAY CANCEL YOUR CONTRACT WITHOUT ANY PENALTY OR OBLIGATION, AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE ABOVE DATE.

IF YOU CANCEL, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE.

TO CANCEL YOUR CONTRACT, MAIL OR DELIVER A SIGNED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO: *(name of respondent),* AT *(address of respondent's place of business)* NOT LATER THAN MIDNIGHT OF (date).

I (WE) HEREBY CANCEL THE CONTRACT. (EACH PURCHASER MUST SIGN THIS NOTICE.)

(Date)

_____

(Purchaser's signature)

4. Before furnishing the purchaser copies of the "Notice of Cancellation" set forth in paragraph II.H. of this order, complete both copies by entering the name of the respondent and the address of its place of business, the date of the company-guided inspection tour or the registered inspection of the property, and the date by which the purchaser may give notice of cancellation, but in no event shall that date be earlier than the third business day following the date of said tour or inspection.

5. Where a timely notice of cancellation is received purportedly in accordance with the requirements of this paragraph of this order, but where said notice is not properly signed, and respondents do not intend to honor the notice, immediately notify the purchaser by certified mail, return receipt requested, enclosing the notice, informing the purchaser of this error and stating clearly and conspicuously that a notice signed by the purchaser must be mailed by midnight of the seventh day following the purchaser's receipt of the mailing if the purchaser is to obtain a refund.

6. Orally inform the purchaser at the time the contract is signed and at the time the tour is taken or the inspection is registered of this cancellation right.

7. Provide an additional notice of cancellation as prescribed in subparagraph 3 above to purchasers not on a tour and purchasers who withdraw from tours, (1) who have completed their registration inspections, (2) who are invited to remain in the area and (3) who meet again with respondents or their agents. Said notice shall be provided to these purchasers on the day of the last such meeting. The notice shall be completed as required by subparagraph 4. above except the date by which the purchaser may give notice of cancellation shall not be earlier than the third business day following the date of the last such meeting.

For the purpose of determining the date after which the cancellation period shall begin to run, the termination date of the tour shall be controlling for all purchasers on a tour. The termination date of the tour for any purchaser who withdraws from a tour shall be the date he notifies respondents or their agents of his decision. For purchasers not on a tour, the date of the registered inspection shall be controlling.

III

It is further ordered, That in the event that any respondent transfers all or a substantial part of its subdivision land to any other person, partnership or corporation, or transfers all or part of its ownership interest in any or all of its wholly-owned subsidiaries, respondents shall require the transferee to file promptly with the Commission a written agreement to be bound by all the terms of this order including this one; *provided,* that, if respondents wish to present to the Commission any reasons why said order should not apply in its present form to said transferee, they shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said succession or transfer.

IV

It is further ordered, That respondents and respondents' officers, agents, representatives and employees, directly or through any corporation, partnership, subsidiary, division or other device, in connection with any extension (or arrangement for the extension) of consumer credit, or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "advertisement" and "consumer credit" are defined in Regulation Z (12 CFR 226) of the Truth in Lending Act (15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

A. Failing to:

1. State the number, amount and the due dates or period of payments scheduled to repay the indebtedness, and the sum of such payments, using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

2. Use the terms "cash downpayment," "total downpayment" and "unpaid balance of cash price," and to give the corresponding disclosures with those terms, as required by Section 226.8(c)(1), 226.8(c)(2) and 226.8(c)(3) of Regulation Z.

3. Use the term "deferred payment price," and to give the corresponding disclosure with that term, as required by Section 226.8(c)(8)(ii) of Regulation Z.

4. Use the term "finance charge," and to give the corresponding disclosure with that term, as required by Section 226.8(c)(8)(i) of Regulation Z.

5. Disclose the identity of the creditor as required by Section 226.8(a) of Regulation Z.

6. Make the disclosures in the manner required by Section 226.8(a)(1) or Section 226.8(a)(2) of Regulation Z.

7. Accurately disclose the "annual percentage rate," to the nearest quarter of one per cent, as required by Sections 226.5(b) and 226.8(b) (2) of Regulation Z.

8. Disclose whether a rebate of the unearned finance charges upon prepayment in full is available and, if available, the method of computation as required by Section 226.8(b)(7) of Regulation Z.

9. Use the term "annual percentage rate," as required by Section 226.8(b)(2) of Regulation Z.

10. Use the term "amount financed," as required by Section 226.8(c)(7) of Regulation Z.

11. In any transaction subject to Section 226.9 of Regulation Z, provide the customer with the notice of right to rescind, in the form and manner provided in that Section prior to consummation of the transaction.

B. Representing in any advertisement the amount of the downpayment or that no downpayment is required, the amount of an installment payment, or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

1. The cash price;

2. The amount of the downpayment required or that no downpayment is required, as applicable;

3. The number, amount and due dates or periods of payments scheduled to repay the indebtedness if the credit is extended;

4. The amount of the finance charge expressed as an annual percentage rate; and

5. The deferred payment price.

C. Stating in any advertisement the rate of a finance charge unless said rate is expressed as an annual percentage rate, using the term "annual percentage rate," as "finance charge" and "annual percentage rate" are defined in Section 226.2 and as required by Section 226.10(d)(1) of Regulation Z.

V

It is further ordered, That respondents deliver, by certified mail, a copy of this decision and order to each of their present or future salesmen and other employees, independent brokers and all others who sell or promote the sale of lots in respondents' subdivisions, and, as to each such person:

1. Provide them with a form, returnable to the respondents and to the Commission, clearly stating the intention to be bound by and to conform business practices to the requirements of this order.

2. Inform them that respondents:

a. Shall not use any person, or the services of any person, to sell or promote the sale of real estate unless such person agrees to and does file notice with the respondents and the Commission that it will be bound by the provisions contained in this order.

b. Are obligated by this order to discontinue dealing with those persons who continue on their own the unfair or deceptive acts or practices prohibited by this order or fail to adhere to the affirmative requirements of this order.

3. Institute a program of continuing surveillance adequate to reveal whether their business operations conform to the requirements of this order.

4. Discontinue dealing with, using or using the services of such persons who:

a. Do not file notice with the respondents and Commission of their intent to comply with, and be bound by, this order.

b. Are revealed by the aforesaid program of surveillance or by any other means to have continued on their own the unfair or deceptive acts or practices prohibited by this order; provided that, if remedial action is taken, evidence of such dismissal or termination shall not be admissible in any proceeding brought to recover penalties for alleged violation of any other paragraph of this order.

VI

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

233-738 O - 77 - 19

IN THE MATTER OF

NATIONAL ACCOUNT SYSTEMS, INC., ET AL.

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

Docket C-2884. Complaint, Apr. 22, 1977 --- Decision, Apr. 22, 1977

This consent order, among other things, requires a Chicago, Illinois, debt collection agency, and its subsidiaries, to cease using unfair and deceptive debt collection tactics; failing to disclose, in connection with the extension of consumer credit, such disclosures as are required by Federal Reserve Board regulations; and obtaining consumer credit information under false pretenses. Further, the order requires the return or destruction of unauthorized consumer credit information; the maintenance of certain prescribed records; and the establishment and maintenance of a surveillance program designed to insure the firm's employees comply with the provisions of the order.

Appearances

For the Commission: *Kenneth H. Donney.*

For the respondent: *Frank C. Christl, Gendel, Raskoff, Shapiro & Quittner,* Los Angeles, Calif.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that National Account Systems, Inc., a corporation, NAS Creditors Service, Inc., a corporation, National Accounts System of Milwaukee, Inc., a corporation, A. B. Hartman, Inc., a corporation, and Diners Club, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, 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:

DEFINITIONS

PARAGRAPH 1. For the purpose of this complaint the following definitions apply:

(a) "consumer reporting agency," "agency," and/or "agencies"--- any person, partnership, corporation or association, which for monetary fees, dues or on a cooperative nonprofit basis, regularly

engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

(b) "consumer report"---any written, oral or other communication of any information bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (1) credit or insurance to be used primarily for personal, family or household purposes, (2) employment purposes, or (3) other purposes authorized under Section 604 of the Fair Credit Reporting Act.

(c) "subscriber"---any person, partnership, corporation or association who receives a consumer report from a consumer reporting agency and who is authorized to receive such report by using a subscriber code issued by the agency.

(d) "subscriber code"---any code or codes issued to subscribers by a consumer reporting agency; such codes are used for identification purposes to obtain a consumer report and the use of such codes may result in the subscriber being billed by said agency.

(e) "debts" or "debt"---any financial obligation, alleged financial obligation, delinquent account or alleged delinquent account owed by or allegedly owed by a consumer to a creditor.

PAR. 2. Respondent National Account Systems, Inc. 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 located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of Diners Club, Inc.

Respondent NAS Creditors Service, Inc. 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 located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent National Accounts System of Milwaukee, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin, with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent A. B. Hartman, Inc. 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 located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent Diners Club., Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 10 Columbus Circle, New York, New York.

Respondent National Account Systems, Inc. owns fifty percent (50%) of the stock of Indianapolis Account Service, Inc., an Indiana corporation, and directs and controls the acts and practices of Indianapolis Account Service, Inc., whose corporate mailing address is 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois, but whose principal place of business is 1308 North Meridian St., Suite 103, Indianapolis, Indiana.

PAR. 3. Respondents are now, and for some time in the past have been engaged in, among other activities, the practice of collecting or attempting to collect a substantial number of debts.

PAR. 4. In the course and conduct of their business, as aforesaid, respondents solicit and receive accounts for collection from business and professional people (hereinafter sometimes referred to as "creditors") located in various States of the United States, which accounts the respondents seek thereafter to collect from debtors located in various States of the United States. In the further course and conduct of their business, respondents transmit collection messages from their places of business located in various States of the United States. The respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of their business, and at all times mentioned herein, respondents have been and are now, in competition in or affecting commerce with other persons, partnerships and corporations in the attempted collection and collection of consumer debts on behalf of creditors.

COUNT I

The following allegations are made in respect to National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., and A. B. Hartman, Inc.

Alleging violations of Section 5 of the Federal Trade Commission Act, as amended, the allegations of Paragraphs One, Two, Three, Four and Five are incorporated by reference as if fully set forth herein verbatim.

PAR. 6. In the ordinary course and conduct of their business, as aforesaid, respondents are now, and for some time in the past, have been, using the subscriber codes owned by subscribers, such subscribers being unrelated to respondents. Respondents engage in said activities by telephoning a consumer reporting agency, and falsely representing, directly or by implication, that respondents are the subscribers of the subscriber codes, or that respondents are authorized to use the subscriber codes. This is done by communicating to said agency a subscriber code that is owned by, and is for the sole use of, one of said subscribers. Thus, the reporting agency is deceived as to the identity of the telephone caller. Respondents use said codes to obtain consumer reports from said agency, the obtaining of which under such false pretenses is unauthorized. Further, respondents do not pay for the consumer reports, but rather the true subscriber is sometimes charged by said agency for such consumer reports. Moreover, respondents are not subscribers to any consumer reporting agency in their own right.

PAR. 7. By and through the use of the aforesaid acts and practices, respondents have obtained information on consumers from consumer reporting agencies under false pretenses. Said acts and practices constitute unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 8. In the ordinary course and conduct of their business, as aforesaid, and for the purpose of inducing collection of said debts, respondents or their agents and employees make several oral and written representations, directly and by implication to many debtors and others. Typical and illustrative of these representations and statements, but not inclusive thereof, are the following:

1. That if said debtors do not pay their debts the debtors will go to jail.
2. That legal documents are being served upon said debtors.
3. That respondents or their agents are "ministers" and/or "insurance agents," and/or attorneys.
4. That respondents will destroy or harm said debtors' credit standings.
5. That if said debtors do not pay immediately the debtors will be sued by respondents.
6. That respondents will "garnish" the debtors' wages.

PAR. 9. By and through the use of the aforesaid statements and representations, and others of similar import and meaning, but not expressly set out herein, and with the sole intent of collecting debts

owed by debtors, respondents and their agents and employees represent and have represented, directly or by implication that:

1. The debtors will go to jail if they do not pay off the debts immediately.

2. The debtors have in their possession legal documents served upon them by respondents and therefore are being sued by respondents.

3. The respondents or their agents are "ministers" of some church and/or insurance agents of some company and/or attorneys.

4. The respondents will harm or destroy the debtors' credit standings if the debtors do not pay by a certain date.

5. The respondents will sue the debtors if the debtors do not pay by a certain date.

6. The respondents will garnish the debtors' wages if said debtors do not pay by a certain date.

PAR. 10. In truth and in fact,

1. The debtors will not go to jail if they do not pay their debts.

2. The debtors have not been served with legal documents and have not been sued but rather have received letters written by respondents which are drafted in such a way so as to appear to be legal documents.

3. Respondents or their agents are not ministers nor insurance agents nor attorneys but rather pretend to be in order to mislead the debtors.

4. Respondents have not decided to destroy or harm credit standings, and often respondents never take such actions.

5. Respondents have not decided to sue the debtors, and often respondents never take such action.

6. Respondents have not decided to garnish the debtors' wages, and often respondents never take such action.

Therefore, the uses of said statements and representations are false and misleading and constitute unfair methods of competition and unfair and deceptive acts and practices.

PAR. 11. In the further course and conduct of their business, and for the purpose of inducing the consumers to pay the debts, respondents' employees use abusive and obscene language when contacting consumers. In addition, respondents telephone the consumers' employers and urge the employers to pressure the consumers to pay the debts. Such actions by respondents constitute oppressive debt collection practices and therefore are unfair methods of competition and unfair acts and practices.

PAR. 12. The aforesaid acts and practices of the respondents, as herein alleged, are unethical, oppressive, exploitative and cause

substantial injury to consumers, and 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 and deceptive acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

COUNT II

The following allegations are made in respect to National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., and A. B. Hartman, Inc.

Alleging violations of the Truth in Lending Act and of the Federal Trade Commission Act, as amended, the allegations of Paragraphs One, Two, and Three are incorporated by reference as if fully set forth herein verbatim:

PAR. 13. In the ordinary course and conduct of their business, as aforesaid, respondents regularly arrange for the extension of consumer credit or offer to extend or arrange for the extension of such credit, as "arrange for the extension of credit" and "consumer credit" are defined in Section 226.2 of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 14. Subsequent to July 1, 1969, in the further course and conduct of their business, as aforesaid, respondents have made and are making loans or have arranged for and are arranging for the making of loans which involve extensions of credit which are not credit sales. In these transactions respondents permit debtors or alleged debtors to repay their debts in more than four equal monthly installments for which respondents have been, and are charging many of their customers a finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z. Respondents do not provide these customers with consumer credit cost disclosures.

By and through the use of these methods, respondents:

1. Fail to disclose the finance charge expressed as an annual percentage rate, as "annual percentage rate" is defined in Section 226.2 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Fail to disclose the date on which the finance charge begins to accrue, as required by Section 226.8(b)(1) of Regulation Z.

3. Fail to disclose the number, amount, and due date or periods of payments scheduled to repay the indebtedness and the sum of such payments using the term "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

4. Fail to disclose the total amount of finance charges, with a description of each amount included, using the term "finance charge" as required by Section 226.8(d)(3) of Regulation Z.

5. Fail to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

6. Fail to disclose the annual percentage rate accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

7. Fail to make the disclosures required by Section 226.8 of Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

PAR. 15. By and through the acts and practices set forth above, respondents National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc. and A. B. Hartman, Inc., have failed and are now failing to comply with the requirements of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of the Act, and, pursuant to Section 108 thereof, respondents have violated 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 Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Truth in Lending 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 Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent National Account Systems, Inc. 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 located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of Diners Club, Inc.

Respondent NAS Creditors Service, Inc. 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 located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent National Accounts System of Milwaukee, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Wisconsin with its principal office and place of business located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent A. B. Hartman, Inc. 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 located at 53 West Jackson Boulevard, Suite 1250, Chicago, Illinois. It is a wholly-owned subsidiary of National Account Systems, Inc.

Respondent Diners Club, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 10 Columbus Circle, New York, New York. Diners Club, Inc. is joined as a respondent in that it is the sole owner of National Account Systems, Inc., and will be liable for civil penalty as provided in Paragraph 7 of the executed agreement in the event that any named respondent violates any of the provisions of Part IV of the order after it becomes final or in the event that National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., or A. B. Hartman, Inc., violate any of the other provisions of the order after it becomes final.

2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., and A. B. Hartman, Inc., for the purposes of Parts I, II, and III of this order are the only parties to whom reference is made when the term "respondents" is used.

I

It is ordered, That National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., and A. B. Hartman, Inc., their successors and assigns, their officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or branch, or other device in connection with the collection of or attempting to collect consumer debts, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

1. Obtaining information on consumers from a consumer reporting agency or any other source under false pretenses.

2. Failing to keep accurate records of the sources of all information obtained on all consumers.

3. Retaining on respondents' premises any books, pamphlets, or any other writings or materials containing subscriber codes or any information which would enable respondents to use subscriber codes unless respondents or their employees or agents are:

(a) Members of a consumer reporting agency; and

(b) Authorized to possess and use such codes; such authorization must expressly include collecting or attempting to collect debts for respondents and such authorization must be maintained in respondents' files.

Any such codes or information currently in respondents' possession or which subsequently come into respondents' possession and are not permitted as required in (a) and (b) must be destroyed or returned to the authorized user and a record kept of such action for three years, making such record available to the Federal Trade Commission for inspection and copying upon request.

4. Representing in any manner, directly or by implication, orally or in writing, that respondents have the authority or right to cause debtors to go to jail or to be defendants in criminal prosecutions for not

paying their debts; or misrepresenting in any manner respondents' authority to affect debtors' legal rights or liabilities.

5. Representing in any manner, directly or by implication, orally or in writing, that respondents are serving legal or judicial documents upon debtors unless such is the case; or misrepresenting in any manner the status, significance or official nature of any papers sent to debtors.

6. Representing in any manner, directly or by implication, orally or in writing, that respondents or their agents are something or someone other than a debt collection agency or debt collector; or misrepresenting in any manner the official, professional or vocational status of respondents or their agents, or misrepresenting, in any manner, the position or function of any of respondents' agents, employees, and representatives.

7. Representing in any manner, directly or by implication, orally or in writing, that respondents will destroy or attempt to harm debtors' credit standings, or that respondents possess the authority or intend to disclose information regarding debtors to a consumer reporting agency; or misrepresenting in any manner the effect of any action taken by respondents on a debtor's credit standing.

8. Representing in any manner, directly or by implication, orally or in writing, that legal action has been initiated or is being initiated unless respondents have in fact instituted the legal action represented; or misrepresenting in any manner that legal action will be initiated, including but not limited to, attachment or garnishment proceedings, unless respondents are able to establish that at the time the representation was made respondents intended in good faith to institute the legal action represented.

9. Representing in any manner, directly or by implication, orally or in writing, that judgment may be entered against a debtor without the debtor having notice of the legal action and an opportunity to appear and defend himself or herself in a court of law.

10. Informing a debtor of a creditor's post judgment rights without disclosing at the same time that no judgment may be entered against the debtor unless the debtor has first been given notice and an opportunity to appear and defend himself or herself in a court of law.

11. Representing in any manner, directly or by implication, orally or in writing, the post judgment rights of a creditor unless said rights are in fact as specifically represented in the jurisdiction in which collection is sought; or misrepresenting in any manner, directly or by implication, the post judgment rights of a creditor.

12. Using abusive or obscene language when talking with or writing to debtors.

13. Placing any telephone call to any debtor, or orally contacting debtors in any manner, between the hours, in the time zone of the debtor, of 9:00 p.m. and 7:00 a.m. on weekdays, including Saturdays, and between the hours of 9:00 p.m. and 12:00 noon on Sundays.

14. Initiating more than two (2) oral conversations with any debtor in any one week regarding the collection of the same debt.

It is further ordered, That respondents, their successors and assigns, with respect to oral or written communications to persons other than the alleged debtor, cease and desist from:

(a) Communicating or threatening to communicate, or implying the fact or existence of any debt to a debtor's employer prior to any judgment;

(b) Communicating with or threatening to communicate, or implying the fact or existence of any debt to any other third parties, including former employers of the debtor other than one who might be reasonably expected to be liable therefor except with the written permission of the debtor or except where legal documents are being served according to law;

(c) Reporting a debt or an alleged debt to a consumer reporting agency unless respondents also promptly report to said consumer reporting agency the subsequent payment of said debt or alleged debt, or the resolution of any dispute concerning said debt, or alleged debt.

It is further ordered, That said respondents shall maintain for a period of three (3) years with respect to each debtor, records which shall consist of copies of all collection letters, dunning notices, requests for information and similar correspondence delivered to such debtor or third parties, or any indication of what items or documents were sent; a record or tabulation of all telephone calls made to or about the debtor showing the identity of the caller, the date of the call, the telephone number called, the purpose and result of the call and any notes or reports made in connection therewith when obtained; and copies of all documents pertaining to collection efforts such as referrals to lawyers or other agencies and legal documents utilized in collection efforts, or any indication of what items were sent.

II

It is ordered, That National Account Systems, Inc., NAS Creditors Service, Inc., National Accounts System of Milwaukee, Inc., and A. B. Hartman, Inc., their successors and assigns, their officers, agents,

representatives and employees, directly or through any corporation, subsidiary, division or branch, or other device, in connection with any consumer credit transaction, including, but not limited to, transactions involving the deferment of the payment of debts and/or the refinancing of any existing extension of credit or the increasing of existing obligations, as these terms are defined in Regulation Z (12 CFR 226) of the Truth in Lending Act (15 U.S.C. 1601-65 (1970), *as amended,* 15 U.S.C. 1601-65(a), (Supp. IV, 1974), do forthwith cease and desist from:

1. Failing to disclose the finance charge, as "finance charge" is defined in Section 226.2 of Regulation Z, expressed and identified as an annual percentage rate, as "annual percentage rate" is defined in Section 226.2 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. Failing to disclose the date on which the finance charge begins to accrue, as required by Section 226.8(b)(1) of Regulation Z.

3. Failing to disclose the number, amount and due dates or periods of payments scheduled to repay the indebtedness and the sum of such payments using the term "total of payments" as is required by Section 226.8(b)(3) of Regulation Z.

4. Failing to disclose the total amount of finance charges, with a description of each amount included, using the term "finance charge," as required by Section 226.8(d)(3) of Regulation Z.

5. Failing to disclose the annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

6. Failing to disclose the annual percentage rate accurately to the nearest quarter of one percent, in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

7. Failing to make the disclosures required by Section 226.8 of Regulation Z clearly, conspicuously and in a meaningful sequence, as required by Section 226.6(a) of Regulation Z.

8. Failing in any consumer credit transaction to make all disclosures, required by Sections 226.6, 226.7, 226.8, and 226.9 of Regulation Z, and failing to make all disclosures, determined in accordance with Section 226.4 and Section 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, and 226.9 of Regulation Z.

III

It is further ordered, That:

(a) Respondents shall deliver a copy of this order to all present and future employees and their agents engaged in debt collection and to

any other person or entity connected with respondents to whom respondents presently refer or assign and to whom in the future respondents may refer or assign matters for debt collection;

(b) Respondents shall provide each of their employees with a form returnable to respondents clearly stating the employee's intention to conform his or her business practices to the requirements of this order; respondents shall require said persons to agree in writing on said form to conform his or her business practices to the requirements of this order and shall retain said statement during the period said person is so engaged, and for three (3) years thereafter, and make said statement available to representatives of the Federal Trade Commission for inspection and copying upon request;

(c) In the event such person will not agree to sign and file the form set forth in paragraph (b) above with respondents and conform to the provisions of this order, respondents shall not use or engage or continue the use or engagement of such person to collect debts or aid or assist respondents in the collection of debts;

(d) Respondents shall inform each person and entity described in paragraph (a) above that respondents shall not use or engage or shall terminate the use or engagement of any such person or entity unless such person or entity's business practices conform to the requirements of this order; and that respondents are obligated by this order to terminate the use or engagement of those persons or entities who engage on their own in the acts or practices prohibited by this order;

(e) Respondents shall institute a program of reasonable surveillance of their officers, employees and their agents engaged in debt collection, adequate to reveal whether the business practices of each said person conform to the requirements of this order;

(f) Upon receiving information from any source (including but not limited to respondents' program of surveillance, and representatives of the Federal Trade Commission) indicating reasonable proof of a violation of any provision of this order by any person or entity described in paragraph (a) above, respondents shall within 72 hours notify such person or entity by certified mail, return receipt requested, that such violation of this order has occurred ("Termination Notice"), and that respondents shall forthwith discontinue dealing with said person or entity. Immediately after such notification, respondents shall permanently discontinue dealing with said person or entity;

(g) Respondents shall retain evidence of compliance with this order and all Termination Notices and make such evidence available to representatives of the Federal Trade Commission for inspection and copying upon request;

(h) Respondents shall prepare and maintain a list of all employees containing the names of all such persons and their aliases, if any, and their last known addresses and telephone numbers for three (3) years following the date of their last employment with respondents; such list shall be made available to representatives of the Federal Trade Commission for inspection and copying upon request.

IV

It is further ordered, That respondents National Account Systems, Inc., a corporation, NAS Creditors Service, Inc., a corporation, National Accounts System of Milwaukee, Inc., a corporation, A. B. Hartman, Inc., a corporation, and Diners Club, Inc., a corporation, hereinafter referred to as respondents, shall not use independent agents or other entities knowingly for the purpose of circumventing any provision of this order.

It is further ordered, That respondents shall notify the Commission at least thirty (30) days prior to any proposed change in any of the corporate respondents 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 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.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with more restrictive agreements, orders or directives of any kind obtained by any other governmental agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by, the Federal Trade Commission.

IN THE MATTER OF

THE AMERICAN MEDICAL ASSOCIATION, ET AL.

Docket 9064. Interlocutory Order, Apr. 26, 1977

Denial of respondents' motions that Commission reconsider issuance of complaint and for oral argument.

ORDER DENYING MOTIONS TO RECONSIDER ISSUANCE OF COMPLAINT

The complaint in this matter alleges that respondents have entered into agreements that, *inter alia,* prevent their members (medical doctors) from soliciting business, by advertising, or otherwise from engaging in price competition. The complaint further asserts that respondents have caused the agreements to be published and circulated in the *Principles of Medical Ethics* and have enforced these alleged restrictions.

The administrative law judge has now certified respondents' motions that the Commission reconsider issuance of the complaint. Respondents assert that even before the filing of the complaint, the conduct challenged in this proceeding had been terminated. Respondents note, for example, that the Judicial Council of the American Medical Association has reviewed the Association's position regarding advertising and solicitation by physicians and issued a "Statement on Advertising and Solicitation" which permits the making of information about physicians available to the public. The Statement indicates that information may be provided "through the accepted local media of advertising or communication, which are open to all physicians on like conditions." The Statement proscribes "solicitation," defined as "the attempt to obtain patients by persuasion or influence, using statements or claims that (1) contain testimonials, (2) are intended or likely to create inflated or unjustified expectations of favorable results, (3) are self-laudatory and imply that the physician has skills superior to other physicians engaged in his field or specialty of practice, or (4) contain incorrect or incomplete facts, or representations or implications that are likely to cause the average person to misunderstand or be deceived."

Respondents also argue that in view of the pendency on the Supreme Court's docket of *Bates* v. *State Bar of Arizona,* Dkt. No. 76–316 (argued Jan. 18, 1977), a case raising the question of the legality of state restrictions on advertising by attorneys, the Commission should "reexamine whether this is the time to intervene in efforts of

physicians to regulate themselves in a manner consistent with the public interest."

It is well-established that the mere fact that allegedly offending practices have been discontinued does not provide, by itself, the requisite assurance that an order is unnecessary and not in the public interest. *See, e.g., Zale Corp.*, 78 F.T.C. 1195, 1240 (1971). Moreover, it is not clear, without a full record, that the allegedly illegal practices challenged in the complaint have been completely terminated, for instance, whether, assuming respondents now authorize physicians to advertise, the remaining restrictions on the methods by which physicians can solicit patients are unfair methods of competition.

The Commission also does not believe that it would be in the public interest to stay these proceedings pending a determination of the *Bates* litigation. Accordingly,

It is ordered, That the aforesaid motions be, and they hereby are, denied.[1]

[1] The Commission denies respondents' motions for oral argument. The Commission also rejects as untimely the "Supplementary Memorandum in Support of Motion of Respondent American Medical Association for Reconsideration of Issuance of the Complaint" as well as complaint counsel's response.

233-738 O - 77 - 20

IN THE MATTER OF

THE DINERS' CLUB, INC.

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

Docket C-2878. Complaint, Apr. 27, 1977 --- Decision, Apr. 27, 1977

Consent order requiring, among other things, a New York City credit card company to cease failing to furnish customers with periodic statements setting forth credit balances; failing to notify customers of their right to request and receive cash refunds of such credit balances; failing to provide prescribed disclosure statements with credit balance notifications; and failing to make proper refunds as detailed in the order.

Appearances

For the Commission: *Roger J. Fitzpatrick, Hong S. Dea, Howard Daniels* and *John F. Lefevre.*

For the respondent: *Stuart M. Rosen, Weil, Gotshal & Manges,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Diners' Club, Inc., a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Diners' Club, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 10 Columbus Circle, New York, New York.

PAR. 2. Respondent The Diners' Club, Inc. extends credit to consumers and others through the issuance of a credit card, hereinafter sometimes referred to as a Diners' Club card.

PAR. 3. Respondent The Diners' Club, Inc. maintains business offices located in several states. Respondent issues Diners' Club cards to persons throughout the United States and contracts with merchants to honor purchases made on Diners' Club cards in retail businesses throughout the United States. By these and other acts and practices, respondent maintains, and at all times mentioned herein has maintained, a substantial course of business in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its aforesaid business, respondent, pursuant to an agreement with its cardholders, issues Diners' Club cards, valid for a designated period of time, which enable the cardholders to charge purchases of merchandise or services from subscribing hotels, restaurants, gasoline stations, and other retail businesses. Respondent purchases from such businesses obligations incurred by cardholders when such businesses honor the Diners' Club card. In turn, the cardholders agree to repay respondent by making payments on their Diners' Club charge accounts.

PAR. 5. On occasion a Diners' Club cardholder's charge account balance reflects a credit on the cardholder's account which represents an amount of money owed to the cardholder by respondent, rather than an amount of money owed to respondent by the cardholder. This credit balance is the result of, among other things, overpayments by the customer or credits given for the purchase price of returned merchandise.

PAR. 6. Typical and illustrative of respondent's practices in handling the credit balances of its cardholders are the following:

Respondent provides a cardholder having a credit balance on his active Diners' Club account with periodic statements setting forth the amount of the credit balance. At no time does respondent refund cash representing an outstanding credit balance to a cardholder unless the cardholder specifically requests the refund of his credit balance.

Respondent cancels Diners' Club card accounts when, for among other reasons, it is requested to do so by the cardholders or when the cardholders fail to renew their accounts upon the expiration of their established terms. Upon the cancellation of his account, a cardholder is thereafter unauthorized to utilize his credit balance by making offsetting purchases. When cancelling an account which reflects a credit balance, respondent has not refunded cash representing the outstanding credit balance without the cardholder's specific request. Following six consecutive months during which there has been no change in the amount of the credit balance on a cancelled account, respondent has not refunded the credit balance from the cardholder's account.

Through such acts and practices, respondent in a substantial number of instances has retained in its possession substantial dollar amounts of credit balances belonging to its cardholders.

PAR. 7. By failing to refund to its cardholders without their request credit balances reflected on accounts on which no activity has taken place for a substantial period of time, and by cancelling Diners' Club accounts which reflect outstanding credit balances and failing to

refund without request credit balances from inactive cancelled accounts, respondent has caused a substantial number of its cardholders and former cardholders to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Six above were and are unfair.

PAR. 8. The acts and practices of respondent set forth in Paragraphs Six and Seven above were and are to the prejudice and injury of the public and constitute unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has 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, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Diners' Club, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 10 Columbus Circle, New York, New York.

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

It is ordered, That respondent The Diners' Club, Inc., a corporation, its successors and assigns and its representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on consumer credit accounts created incident to its business of issuing credit cards, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to mail or deliver to each of its cardholders having a credit balance created after the date of entry of this order a periodic statement setting forth such credit balance, no fewer than three times during the six-month period following the creation of the credit balance. *Provided, however,* that a periodic statement must be mailed or delivered as of the end of the first billing period during which the credit balance is created. *Provided further,* that no periodic statement need be sent once a credit balance is refunded or a fully offsetting purchase is made.

2. Failing to notify each cardholder having a credit balance created later than sixty (60) days from the date of entry of this order of his right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph One and accompanied by a return envelope. Such disclosure shall in all material respects be consistent with but need not be identical to the following:

"NO PAYMENT REQUIRED

The credit balance shown on the enclosed statement represents money we owe you. To obtain a refund, return the statement stub which contains your name and address, along with this notice, signed by you, in the enclosed envelope.

If you do not use your account or request a refund, a check will be mailed to you automatically within 7 months from the date this credit balance was created. But a credit balance of $1.00 or less will not be refunded unless specifically requested and after the 7 month period will not be credited against purchases.

To Diners Club

Please refund the credit balance shown on the enclosed statement.

(X) _____ Date _____"
Signature

Provided, however, that if respondent refunds without request credit balances of one dollar ($1.00) or less, the last sentence of such disclosure relating to such balances may be deleted.

If the disclosure furnished in compliance with this paragraph is not identical to the above-quoted statement, such disclosure shall provide all of the information contained in the above quotation, shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the periodic statement or entirely on one side of a separate page. In the event such disclosure is not on the face of the periodic statement, then the periodic statement shall state clearly and conspicuously on its face: "Credit Balance. Do not pay. For refund see [enclosed instructions"] or [reverse side"], *provided, however* that this notice may be abbreviated.

3. Writing off or deleting from a cardholder's account any credit balance of more than one dollar ($1.00) created after the date of entry of this order before respondent has made a cash refund or the cardholder has made a fully offsetting purchase, unless such credit balance is not in fact owed to the cardholder, or unless respondent has complied with the requirements of Paragraph B below.

4. Failing to refund to each cardholder having a credit balance of more than one dollar ($1.00) created after the date of entry of this order, the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive billing cycle during which a credit balance exists and the cardholder neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the cardholder.

A. *It is further ordered,* That with respect to each credit balance owed to a Diners' Club cardholder in the amount of more than one dollar ($1.00) which was created at any time within the three-year period prior to the date of entry of this order and which has not been refunded to the cardholder as of the date of entry of this order, respondent shall refund to each such cardholder the full amount of such credit balance, unless such credit balance is not owed to the cardholder, or the cardholder makes a fully offsetting purchase within the period for compliance herewith. Respondent shall effect complete compliance with the provisions of this paragraph no later than seven (7) months after the date of entry of this order, and the

report required by Paragraph G of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered,* That each refund shall be given to the cardholder either in person or by mailing a check payable to the order of the cardholder to the last known address shown in respondent's records for said cardholder. Each periodic statement sent pursuant to the terms of this order shall be mailed to the cardholder at the last known address shown in respondent's records. In the event that any such statement or check is returned to respondent with a notification to the effect that the cardholder to whom it was mailed is not located at the address to which it was sent, respondent shall remail the check or statement with an address correction request to the Post Office, unless respondent has already done so. If the check or statement which has been remailed is returned to respondent and reflects an amount larger than fifteen dollars ($15.00), respondent shall obtain from a credit bureau the most current address available for the cardholder in the credit bureau's files by means of an in-file report or other credit bureau report. If a new address is obtained, respondent shall remail the check or statement to the cardholder. If the cardholder is not located by the preceding method, respondent shall reinstate the full amount of the credit balance on the cardholder's account to be retained until such time as the term of the account expires so that offsetting purchases can be made, and upon such reinstatement, respondent shall be relieved of any further obligation to send any additional notices and/or any refund without request with respect to the credit balance in question. In the event said cardholder should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph C.

C. *It is further ordered,* That if a cardholder requests, in person or by mail, a refund of a credit balance in any amount at any time within six (6) years subsequent to the date on which the credit balance was created, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the cardholder with a written explanation, with supporting documentation, when available, of the reason(s) for refusing to refund the amount requested. Returning a periodic statement stub and signed credit balance notice to respondent shall constitute a request for refund of said credit balance.

D. *It is further ordered,* That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on an account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed

due to a cardholder's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be terminated and replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered,* That respondent shall maintain the following data: name and address of each Diners' Club cardholder who was sent a refund without request of a credit balance; the date the credit balance was created and the date it was refunded; and the amount of the credit balance. *Provided, however,* that respondent shall not be required to maintain such data for a period in excess of six years from the date such credit balance was refunded.

F. *It is further ordered,* That respondent shall, upon request, produce for the purpose of examination and copying by representatives of the Federal Trade Commission those records required to be retained by this order.

G. *It is further ordered,* That respondent shall, within ninety (90) days after the entry 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.

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

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