promulgated thereunder to describe such fur products or furs which are not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

FINAL ORDER

No appeal from the initial decision of the hearing examiner having been filed, and the Commission having determined that the case should not be placed on its own docket for review and that pursuant to Section 3.51 of the Commission's Rules of Practice (effective July 1, 1967), the initial decision should be adopted and issued as the decision of the Commission:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents, Market Fur Dressing Corp., a corporation, and Milton Mainwold, individually and as an officer of said corporation, shall, within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

THERMOCHEMICAL PRODUCTS, INC., ET AL.

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

Docket 8725. Complaint, Jan. 9, 1967—Decision July 25, 1969

Order requiring a New York City marketer of water repellent paints and coatings to cease misrepresenting that it is a division of Union Carbide Co. or any other large company, exaggerating the earnings of prospective franchised dealers, misrepresenting the quality of its paints, using a fictitious subsidiary to collect its accounts, failing to reveal that its purchase contracts may be negotiated to third parties, making false guarantees, and using other deceptive means to recruit salesmen and dealers to sell its products.

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 Ther-

mochemical Products, Inc., a corporation, and Jeannette Vine and Beatrice Freeman, also known as Beatrice Jacobs, individually and as officers of said corporation, and Charles A. Jacobs and David Jacobs, individually and as managers of said corporation, and Wolmart Discount Corporation, a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Thermochemical Products, 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 1860 Broadway, New York, New York.

Respondents Jeannette Vine and Beatrice Freeman, also known as Beatrice Jacobs, are officers of said corporate respondent and their address is the same as that of said corporate respondent Thermochemical Products, Inc.

Respondents Charles A. Jacobs and David Jacobs are managers of the said corporate respondent and their address is the same as that of the said corporate respondent Thermochemical Products, Inc.

Respondent Wolmart Discount Corporation 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 1841 Broadway, New York, New York. It is a wholly owned subsidiary of respondent Thermochemical Products, Inc.

Respondents Jeannette Vine and Beatrice Freeman, also known as Beatrice Jacobs, as officers, and Charles A. Jacobs and David Jacobs as managers, formulate, direct and control the acts and practices of the corporate respondent Thermochemical Products, Inc., including the acts and practices hereinafter set forth.

The aforementioned respondents cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale, sale and distribution of water repellent paints and coatings to dealers for resale to the public under the trade names, among others, of "Aqua-Chek," "Vivilume" and "Vin-L-Brush-On."

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said

products, when sold, to be shipped and transported from their place of business in the State of New York to purchasers thereof located in various other States of the United States and maintain, and at all times hereinafter mentioned have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent Wolmart Discount Corporation is now, and for some time past has been, engaged in the collection of past due or delinquent accounts and negotiable paper for the respondent Thermochemical Products, Inc., and others.

PAR. 5. In the course and conduct of its business, respondent Wolmart Discount Corporation is now, and for some time last past has been, receiving accounts and negotiable paper for collection from outside the State of New York. In addition thereto said respondent has sent and received, by means of the United States mail, letters, checks and documents to and from States other than the State of New York and maintains, and at all times herein mentioned has maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as that sold by respondents.

PAR. 7. In the course and conduct of their business, respondents have operated, and continue to operate, a sales plan by means of which they secure dealers for the sale and distribution of their products to the purchasing public. These dealers are solicited and secured by salesmen employed by said respondents, such salesmen having been selected and trained by said respondents for this purpose. The primary function of these salesmen is to establish said dealerships and to obtain orders for the products of said respondents by means of written contracts or so-called "special dealership agreements" with which are combined an initial order for one of said respondents' products. This special dealership agreement assigns to the said dealer a particular territory within which he may operate and sell said respondents' products. The dealer has the option of paying for the merchandise purchased within a specified time, usually 10 days, or of paying the amount in installments, usually by executing three trade acceptances which are immediately transferred to a finance or discount com-

pany. When, in the course of attempts to enforce payment of such trade acceptances, dealers protest that their contracts with respondents were obtained as a result of misrepresentation, the position is asserted in opposition to such protest that the finance company is a holder in due course and not subject to such defenses.

It is the said respondents' usual practice to follow up this transaction within a few weeks by having another salesman, called a "back man," visit the dealer and, using the same tactics as the first salesman, attempt to sell the dealer an order of a different one of respondents' products than that which was included in the first sale.

During the course of the sales presentations, as aforesaid, the said respondents' salesmen use physical demonstrations to portray the water repellent properties of the particular product being sold. The equipment for these demonstrations is supplied to the salesmen by the said respondents. When the product is delivered it is sometimes different from that used by the salesmen in the demonstrations and the dealer cannot perform the same demonstrations for his customers as did the salesman.

PAR. 8. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the sales of their products, respondents have made certain statements and representations to prospective dealers, by and through oral statements of their salesmen and representatives and by means of brochures and other written and printed material, directly or by implication.

Typical and illustrative, but not all inclusive, of said statements and representations, are the following:

1. That the respondent Thermochemical Products, Inc., is a subsidiary of, a division of or is affiliated with Union Carbide Company, General Electric Company or Aluminum Company of America.

2. That the products of the said corporate respondent are manufactured, or have been developed, by one of the aforesaid companies.

3. That products sold by the respondents are unconditionally guaranteed for five or ten years as the case may be.

4. That respondents' dealers will realize various profits up to $18,000 per year from the resale of respondents' products.

5. That the respondents' dealers may return to the respondents any merchandise that is not sold or that the respondents will transfer it to another dealer.

6. That respondents' products are waterproof.

7. That respondents' products are suitable for both inside and outside of a building.

8. That a survey has been made of the territory in which the prospective dealer is located, prior to the visit of the respondents' salesman to the dealer.

9. That one coat of any of respondents' products will be sufficient to cover the surface to be painted.

10. That respondents will assist the dealer in making sales by sending a representative to contact prospective customers of the dealer, by erecting billboards for display, by furnishing newspaper mats for the use of the dealer free of charge and by preparing suitable mailings on the dealer's letterhead which are to be sent to prospective customers of the dealer.

PAR. 9. In truth and in fact:

1. Respondent Thermochemical Products, Inc., is not a subsidiary of, a division of or is not affiliated with Union Carbide Company, General Electric Company, Aluminum Company of America or any other corporation.

2. The products of the corporate respondent Thermochemical Products, Inc., are neither manufactured nor developed by any one of said companies, although one of the ingredients in said products may have been manufactured by one or the other of said corporations and is placed in combination by the respondents with other ingredients not manufactured by such company.

3. The products sold by the respondents are only guaranteed in a limited way and not unconditionally.

4. Few, if any, dealers earn $18,000 per year from the resale of respondents' products or whatever lesser amount was represented to them at the time of the purchase and in many cases make no profit at all, but sustain a substantial loss.

5. Respondents seldom, if ever, permit the return of unsold merchandise or transfer such merchandise to other dealers.

6. Respondents' products are not waterproof but only water repellent.

7. Respondents' products are not suitable for use on the inside of a structure.

8. No survey has ever been made of the territory in which the prospective dealer is located for the purpose of ascertaining the potential sales within that territory.

9. One coat of any of respondents' products is not sufficient to cover the surface to be painted.

10. Respondents do not assist the dealer in making sales either by sending a representative to contact prospective customers of the dealers, by erecting billboards and other displays, by furnishing newspaper mats for the use of the dealer free of charge, or by preparing suitable mailings on the dealer's letterhead.

PAR. 10. When trade acceptances are taken in payment of merchandise purchased they are discounted with Ambassador Factors Corporation or some other discount company claiming to be holders in due course. After a default in the payment of such trade acceptances, the same are assigned to respondent Wolmart Discount Corporation which company brings suit in its name, alleging that it is an assignee of a holder in due course and therefore entitled to all the rights of a holder in due course.

PAR. 11. In truth and in fact, said Wolmart Discount Company is a wholly owned subsidiary of the respondents, so that the effect of such assignment is the same as if the paper had been assigned to the other corporate respondent, the original holder thereof.

PAR. 12. The fact of assignment to Wolmart Discount Corporation and the bringing of suit in its name as assignee has had, and now has, the tendency and capacity to mislead and deceive dealers against whom suit is brought into the erroneous and mistaken belief that the said representations and implications are true and to induce the said dealers to refrain from asserting defenses they may have against the respondents and to make payments which they might otherwise not have made.

PAR. 13. The use by the respondents of the aforesaid false, deceptive and misleading statements and representations with respect to their said products and the status of Wolmart Discount Corporation, has had, and now has, the capacity and tendency to mislead and deceive a substantial number of their said dealers as well as members of the purchasing public into the erroneous and mistaken belief that such statements and representations were, and are, true and to cause substantial numbers of said dealers, as well as members of the purchasing public, to purchase substantial quantities of the said respondents' products because of such erroneous and mistaken belief.

PAR. 14. The aforesaid acts and practices of respondents, as herein alleged, 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 commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Roy B. Pope and *Mr. Herbert S. Forsmith* for the Commission.

Mr. Miles Warner, of Philadelphia, Pa., for respondents.

INITIAL DECISION BY JOHN B. POINDEXTER, HEARING EXAMINER DECEMBER 11, 1968

The complaint, issued in this proceeding on January 9, 1967, charges Thermochemical Products, Inc., a corporation, Jeannette Vine, Beatrice Freeman, also known as Beatrice Jacobs, individually and as officers of said corporation, Charles A. Jacobs and David Jacobs, individually and as managers of said corporation, and Wolmart Discount Corporation, a corporation, hereinafter referred to as respondents, with using false, deceptive and misleading statements and misrepresentations to recruit dealers for respondents' paints and coatings, in violation of Section 5 of the Federal Trade Commission Act.

Through counsel, respondents answered the complaint and denied the substantial allegations. Hearings have been held in Los Angeles and San Francisco, California, Chicago, Illinois, Houston, Texas, Greensboro, North Carolina, and New York, New York, to receive testimony offered by complaint counsel. Defense hearings were delayed due to the illness of the individual respondent, Charles A. Jacobs. Defense hearings have now been completed and proposed findings of fact and conclusions of law have been filed by respective counsel. All proposed findings and conclusions not found or concluded herein are denied. Upon the basis of the entire record, the hearing examiner makes the following findings of fact and conclusions of law, and issues the following order:

FINDINGS OF FACT

1. The respondent, Thermochemical Products, Inc., is a corporation organized and doing business under the laws of the State of New York, with its office and principal place of business located at 1860 Broadway, New York, New York (Answer, Par. 1).

2. The individual respondent, Beatrice Freeman, is the wife of the individual respondent, David Jacobs (Tr. 1663–64), but does

business under her maiden name, Beatrice Freeman (CX 133A). The individual respondents, Jeannette Vine and Beatrice Freeman Jacobs, are the officers and directors of Thermochemical Products, Inc., Jeannette Vine being president and treasurer, and Beatrice Freeman Jacobs being Secretary thereof (Tr. 1663, 1669, 1670, 1674; CX 134A; Answer, Par. 1). Jeannette Vine and Beatrice Freeman Jacobs own all of the outstanding capital stock of the corporate respondent, Thermochemical Products, Inc. (Tr. 1664; CX 135 and 187).

3. The individual respondents, Charles A. Jacobs and David Jacobs, are agents of the individual respondents, Jeannette Vine and Beatrice Freeman Jacobs, appointed to operate Thermochemical Products, Inc. As such agents, Charles A. Jacobs and David Jacobs are managers of said corporate respondent. Their business addresses are the same as that of corporate respondent (CX 133A and B; Answer, Par. 1). As such managers, the said Charles A. Jacobs and David Jacobs control the acts and practices of Thermochemical Products, Inc., as agents for the individual respondents, Jeannette Vine and Beatrice Freeman Jacobs (CX 187; Tr. 1690–91, 2194).

4. The gross business of respondent Thermochemical Products, Inc., for the year ending October 31, 1967, amounted to approximately $2,000,000 (Tr. 1967).

5. The respondent, Wolmart Discount Corporation, is a corporation organized under the laws of the State of New York on December 17, 1964 (Glantz, Tr. 1932). No stock has been issued by Wolmart Discount Corporation, and no capital stock paid in. There are no directors, and the only officer is Bruce Mund, who is acting as secretary (Glantz, Tr. 1933; Mund, Tr. 1812). Wolmart Discount Corporation had no bank account until November 18, 1965 (Mund, Tr. 1874).

6. Thermochemical Products, Inc., along with the individual respondents named herein and above referred to, is now, and for some time last past has been, engaged in the offering for sale, sale, and distribution of paints and coatings to dealers for resale to the public under the trade names, among others, of "Aqua-Chek," "Permalume," "Vivilume," and "Vin-L-Brush-On" (Answer, Par. 2; CX 133A and 133B).

7. Prior to the formation of Thermochemical Products, Inc., the respondents, Charles A. Jacobs and David Jacobs, were engaged in the offering for sale, sale, and distribution of paints and coatings under the corporate names of Ohmlac Painting and Re-

fining Company, Inc., Sterling Materials Company, Inc., and Carbozite Coatings, Inc., and their sales methods were similar to those now used by Thermochemical Products, Inc. The Federal Trade Commission entered an order against the said Charles A. Jacobs and David Jacobs, and the three corporations named in the preceding sentence, directing the respondents to cease and desist from certain practices found therein to be deceptive (Docket No. 6426, 52 F.T.C. 909; Jacobs, Tr. 2229). A civil penalty proceeding was brought against said respondents in Docket No. 6426 for violation of the order entered therein, which resulted in a consent judgment for $28,000 against the said respondents (CX 129 and 130).

8. In the course and conduct of its business, Thermochemical Products, Inc., and the individual respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped and transported from their place of business in the State of New York, or from the place where such products are manufactured in the State of New Jersey, to purchasers thereof located in various other States of the United States, and maintain, and at all times herein mentioned have maintained, a substantial course of trade in said products in commerce (Answer, Par. 3).

9. In the conduct of its business, the corporate respondent, Thermochemical Products, Inc., has been in substantial competition, in commerce, with corporations, firms, and individuals in the sale of products of the same general kind and nature as that sold by respondents (Answer, Par. 6).

10. The charging allegations of the complaint allege, among other things, that:

In the course and conduct of the business of Thermochemical Products, Inc., the respondents have operated, and continue to operate, a sales plan by means of which they secure dealers for the sale and distribution of their products to the purchasing public. These dealers are solicited and secured by salesmen employed by respondents, such salesmen having been selected and trained by respondents for this purpose. The primary function of these salesmen is to establish said dealerships and obtain orders for the products of Thermochemical Products, Inc., by means of written contracts or so-called "Special Dealership Agreements" with which is combined an initial order for one of respondents' products. This Special Dealership Agreement purports to assign to the said dealer a particular territory within which the dealer may op-

erate and sell respondents' products. The dealer has the option of paying for the merchandise purchased within a specified time, usually ten days, or of paying the amount in installments, usually by executing three trade acceptances which are immediately transferred to a finance or discount company.

11. The complaint further alleges that it is the respondents' usual practice to follow up this original transaction within a few weeks by having another salesman, called a "back man," visit the dealer and, using the same or similar representations as the first salesman, attempt to sell the dealer an order for a product similar to that purchased by the dealer from the first salesman, but under a different trade name.

12. The complaint further alleges that, during the course of the sales presentations by respondents' salesmen, said salesmen use physical demonstrations to portray the water repellent properties of the particular product being sold. The equipment for these demonstrations is supplied to the salesmen by the respondents. When the product is delivered to, and received by, the dealer, it is generally different from that used by the salesmen in the demonstrations, and the dealer cannot perform the same demonstration with the product as did the salesmen.

13. The complaint further alleges that, in the course and conduct of their business, and for the purpose of inducing the sales of their products, respondents have made certain statements and representations to prospective dealers, by and through oral statements of their salesmen and representatives and by means of brochures and other written and printed material, directly or by implication; and that, typical and illustrative, but not all inclusive, of said statements and representations, are the following:

(a) That the respondent Thermochemical Products, Inc., is a subsidiary of, a division of or is affiliated with Union Carbide Company, General Electric Company or Aluminum Company of America; whereas, in truth and in fact, respondent Thermochemical Products, Inc., is not a subsidiary of, a division of or is not affiliated with Union Carbide Company, General Electric Company, Aluminum Company of America or any other corporation.

(b) That the products of the said corporate respondent are manufactured, or have been developed, by one of the aforesaid companies; whereas, in truth and in fact, the products of the corporate respondent Thermochemical Products, Inc., are neither manufactured nor developed by any one of said companies, although one of the ingredients in said products may have been

manufactured by one or the other of said corporations and is placed in combination by the respondents with other ingredients not manufactured by such company.

(c) That products sold by the respondents are unconditionally guaranteed for five or ten years as the case may be; whereas, in truth and in fact, the products sold by the respondents are only guaranteed in a limited way and not unconditionally.

(d) That respondents' dealers will realize various profits up to $18,000 per year from the resale of respondents' products; whereas, in truth and in fact, few, if any, dealers earn $18,000 per year from the resale of respondents' products or whatever lesser amount was represented to them at the time of the purchase and in many cases make no profit at all, but sustain a substantial loss.

(e) That the respondents' dealers may return to the respondents any merchandise that is not sold or that the respondents will transfer it to another dealer; whereas, in truth and in fact, respondents seldom, if ever, permit the return of unsold merchandise or transfer such merchandise to other dealers.

(f) That respondents' products are waterproof; whereas, in truth and in fact, respondents' products are not waterproof but only water repellent.

(g) That respondents' products are suitable for both inside and outside of a building; whereas, in truth and in fact, respondents' products are not suitable for use on the inside of a structure.

(h) That a survey has been made of the territory in which the prospective dealer is located, prior to the visit of the respondents' salesman to the dealer; whereas, in truth and in fact, no survey has ever been made of the territory in which the propsective dealer is located for the purpose of ascertaining the potential sales within that territory.

(i) That one coat of any of respondents' products will be sufficient to cover the surface to be painted; whereas, in truth and in fact, one coat of any of respondents' products is not sufficient to cover the surface to be painted.

(j) That respondents will assist the dealer in making sales by sending a representative to contact prospective customers of the dealer, by erecting billboards for display, by furnishing newspaper mats for the use of the dealer free of charge and by preparing suitable mailings on the dealer's letterhead which are to be

sent to prospective customers of the dealer; whereas, in truth and in fact, respondents do not assist the dealer in making sales either by sending a representative to contact prospective customers of the dealers, by erecting billboards and other displays, by furnishing newspaper mats for the use of the dealer free of charge, or by preparing suitable mailings on the dealer's letterhead.

14. The complaint further alleges that, when trade acceptances are taken in payment of merchandise purchased from respondents, the trade acceptances are discounted with Ambassador Factors Corporation or some other discount company which claims to be a holder in due course; and, when the discount company or factor attempts to enforce payment of such trade acceptances, and the dealer claims that the purchase of corporate respondent's product and the execution of the trade acceptances were obtained by misrepresentation, the finance company or factor asserts that it is a holder in due course and not subject to such a defense.

15. The complaint further alleges that, after a default in the payment of such trade acceptances, the same are assigned to the respondent, Wolmart Discount Corporation, which company brings suit in its name, alleging that it is an assignee of a holder in due course and therefore entitled to all the rights of a holder in due course; that, in truth and in fact, said Wolmart Discount Corporation is a wholly owned subsidiary of the respondents, so that the effect of such assignment is the same as if the paper had been assigned to the other corporate respondent, the original holder thereof; that the fact of assignment to Wolmart Discount Corporation and the bringing of suit in its name as assignee has had, and now has, the tendency and capacity to mislead and deceive dealers against whom suits are brought into the erroneous and mistaken belief that the said representations and implications are true and to induce the said dealers to refrain from asserting defenses which they may have against the respondents and to make payments which they might otherwise not have made.

16. The complaint further alleges that the use by the respondents of the aforesaid false, deceptive and misleading statements and representations with respect to their products and the status of Wolmart Discount Corporation has had, and now has, the capacity and tendency to mislead and deceive a substantial number of their said dealers, as well as members of the purchasing public, into the erroneous and mistaken belief that such statements and representations were true and to cause substantial numbers of said dealers and members of the purchasing public to purchase

substantial quantities of respondents' products because of such erroneous and mistaken belief; and that the aforesaid acts and practices of respondents were and are to the prejudice and injury of the public and of respondents' competitors and constitute 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.

17. To establish the allegations of the complaint, especially with respect to the allegedly false representations made by respondents' salesmen to prospective dealers for the resale of respondents' products, complaint counsel offered the testimony of approximately 40 persons engaged in various types of retail businesses, who had been personally solicitd by respondents' salesmen to purchase respondents' products and become local retail dealers therefor. It is the allegedly false, deceptive, and misleading statements and representations made by respondents' salesmen to these prospective dealers which constitute a substantial portion of the testimony offered by complaint counsel to establish the violations of Section 5 of the Federal Trade Commission Act alleged in the complaint. The evidence shows that respondents' salesmen called on and solicited prospective dealers among persons who operated retail businesses in various sections of the United States. At hearings held in California, 11 residents of that State testified concerning representations made to them by respondents' salesmen. In addition to the testimony of these 11 operators of businesses, two investigators from the District Attorney's office in Santa Clara County testified at the hearings held in San Francisco concerning representations made to them by salesmen for Thermochemical Products, Inc. (Howard B. Hamilton, Tr. 655–703; William D. Reed, Tr. 704–717). Ten witnesses testified at hearings held in Chicago, Ill., including three witnesses who resided in Ohio, two in Michigan, two in Indiana, one in Wisconsin, and two in Illinois. Eleven persons who resided in various sections of Texas testified at hearings held in Houston, Texas. Six persons who resided in North Carolina testified at hearings held in Greensboro, North Carolina. Two persons who resided in Pennsylvania and two from New York State testified at hearings held in New York, N.Y., concerning representations made to them by respondents' salesmen, along with other witnesses who testified on other phases of the case, including employees of respondents and the individual respondents. The testimony of each of these witnesses will not be discussed separately in this decision.

The discussion will be limited to a representative number who testified at hearings in various sections of the country, and whose testimony clearly shows a pattern of the types of representations made by respondents' salesmen to prospective dealers.

18. The first witness who testified was Mr. Paul Mauerhan, a master plumber, of Glendale, California. Mr. Mauerhan testified as follows: On April 24, 1967, pursuant to an appointment made by telephone, Mr. Mike Evans and an associate (whose name Mr. Mauerhan did not remember), representing the corporate respondent, Thermochemical Products, Inc., called at the office of Mr. Mauerhan's plumbing business, Mauerhan Plumbing, Inc., in Glendale, California, for the announced purpose of demonstrating Thermochemical's paint products and to set Mr. Mauerhan and his company up as a distributor of said products (Tr. 72, 74; CX 1 and 2). Mr. Evans proceeded to demonstrate one of Thermochemical's products, called "Aqua-Chek" (CX 1). Mr. Evans stated that the silicones contained in the paint were a product of General Electric Company (Tr. 86). Mr. Evans stated that the product was guaranteed for five years on outside use and for ten years when used inside. In Mr. Mauerhan's presence, Mr. Evans applied a clear liquid material to a brick, which caused the brick to appear to Mr. Mauerhan to be made waterproof. This clear liquid material was contained in a can bearing the name, Thermochemical, and which Mr. Evans had brought with him. Mr. Mauerhan asked Mr. Evans for a sample of the liquid material, but Mr. Evans stated that he was out of samples, as well as brochures. Mr. Evans then exhibited a piece of screen, and stated that he had put one coat of Aqua-Chek on the screen. The material on the screen had a high gloss, was very thick and flexible. Mr. Evans also produced a thin piece of metal on which the Aqua-Chek paint had been placed, and which, when twisted back and forth, the paint stayed on "beautifully," and which Mr. Evans stated was scratch-resistant. Mr. Mauerhan removed a key from his key chain and attempted to "scratch it, but it wouldn't scratch. It was a very tough—it was really an excellent material" (Tr. 75–76). Mr. Evans also produced an asphalt shingle which he stated was coated with this material and would stand up to 500 degrees in temperature. As a result of the demonstration, Mr. Mauerhan executed what is denominated as a "SPECIAL DEALERSHIP AGREEMENT," dated April 24, 1967 (CX 1), by which, among other things, Mauerhan Plumbing, Inc., purchased $982.80 worth of Aqua-Chek from corporate respondent, Thermochemical Prod-

ucts, Inc. In payment therefor, Mr. Mauerhan executed three trade acceptances due June 10, July 10, and August 10, 1967, respectively.

19. After receipt and delivery of the Aqua-Chek paint purchased from Thermochemical Products, Inc., and also sample cans of the product, Mr. Mauerhan decided to perform some tests of his own on the Aqua-Chek paint. He placed a coating of the colored Aqua-Chek on a piece of screen and found that it was entirely different from the product on the screen which Mr. Evans demonstrated to Mr. Mauerhan. The Aqua-Chek which Mr. Mauerhan applied on the screen was received in evidence as CX 3. Mr. Mauerhan further testified that he placed some of the Aqua-Chek on a piece of tile and it flaked off like chalk (CX 4). Mr. Mauerhan applied some of the Aqua-Chek to a piece of metal and it also flaked off like chalk (CX 6). Mr. Mauerhan testified that Mr. Evans told him that the Aqua-Chek paint would be ideal for "painting showers, waterproofing and painting and resurfacing showers" (Tr. 94). Mr. Mauerhan stated that the Aqua-Chek finish would not hold up for a period of five years and be water-resistant. Mr. Mauerhan described CX 5, which is a piece of plywood. Mr. Mauerhan testified that he applied two coats of Aqua-Chek to this piece of plywood as a test to verify whether or not it would be waterproof. After applying the first coat of Aqua-Chek, he waited twenty-four hours before applying the second coat. Mr. Mauerhan then "put it in water and it took on water like a piece of wood that was uncoated" (Tr. 96). Mr. Mauerhan testified that he applied two different colors of Aqua-Chek paint on the piece of galvanized metal (CX 6), in order to see how it would stay on a galvanized surface and how it would stand up to exterior use (Tr. 97–98). Mr. Mauerhan further testified that Mr. Evans stated that only one coat of Aqua-Chek would be required, and that there was no necessity for an undercoating or primer (Tr. 101). Mr. Mauerhan further stated that Mr. Evans promised, among other things, that, after the Aqua-Chek paint was delivered, Thermochemical Products, Inc., would send a person to assist in getting sales started, but that no one ever appeared. Contrary to the statement of Mr. Evans that only one coat of Aqua-Chek was necessary, the cans containing the Aqua-Chek paint, which were delivered to Mr. Mauerhan, had labels bearing directions which specified that an undercoat was required on some of the Aqua-Chek and some might require two coats of Aqua-Chek (Tr. 102).

20. On cross-examination, Mr. Mauerhan testified, among other things, that: After thirty years in the plumbing business, he knows "whether a material is going to stay on a shower for a reasonable amount of time or not" (Tr. 112). The scratch marks on CX 4 occurred after the paint had dried. Mr. Mauerhan was able to scratch it off with his fingernails. It was not necessary to use a key to scratch the paint, as was done in the case of the piece of metal produced by Mr. Evans (Tr. 112, 113). Unlike the Aqua-Chek which Mr. Mauerhan applied to the piece of galvanized metal (CX 6) and the wire screen (CX 3), the piece of metal which Mr. Evans demonstrated to Mr. Mauerhan contained a substance which clung to the metal. It was very elastic and would stretch with vigorous bending. Mr. Mauerhan testified that he "bent it politely," but that Mr. Evans bent it vigorously. "He had it in the screen and he [Mr. Evans] bent the screen vigorously" (Tr. 115).

21. As a result of the tests which Mr. Mauerhan made from the samples of Aqua-Chek, he refused to pay the trade acceptances, which had been assigned by Thermochemical Products, Inc., to Commercial Progress Corporation, a factoring concern. Mr. Mauerhan did not sell any of the Aqua-Chek paint, and it remained in his possession at the time of the hearing (Tr. 139).

22. Another witness, who testified at the hearing in Los Angeles, California, was Mr. Bryce Lee Long, a manufacturer of cement piers and screw jacks which are used to help support trailer or mobile homes. Mr. Long's plant is located in Orange, California. Mr. Long testified as follows: On February 1, 1967, pursuant to a telephone call made the previous day, a Mr. Winn called on Mr. Long to demonstrate "Permalume" paint. Mr. Winn stated that he was a representative of Thermochemical Products, Inc., and was interested in having Mr. Long become a dealer for its products (Tr. 322–25). Mr. Winn then proceeded to demonstrate the effectiveness of Permalume paint. Mr. Winn produced a sieve or screen which had been painted with Permalume, blew smoke through it, and then poured water on the screen and the screen retained the water. Mr. Winn also produced a spoon which had a split down the center. Mr. Winn then poured water into the spoon, and the spoon held the water (Tr. 326). Mr. Winn stated that he would sell Mr. Long the Permalume paint for $8 per gallon, which Mr. Long could resell at a price of $13 per gallon, and that Mr. Long could sell approximately 400 to 500 gallons per month. Mr. Winn stated that Permalume carried a regular guar-

antee for ten years, was very durable, and that one coat was sufficient to cover anything, metal, wood, cement, exterior and interior. Mr. Winn further stated that he would return in two weeks after delivery of the Permalume paint and render sales assistance to Mr. Long. However, he did not return (Tr. 327). As a result of Mr. Winn's demonstration, Mr. Long executed a Special Dealership Agreement, dated February 1, 1967 (CX 27), whereby, among other things, Mr. Long purchased $737.10 worth of Permalume paint from Thermochemical Products, Inc., and became a so-called dealer for its products.

23. About two weeks later, on or about February 14, 1967, but before delivery of the above order for Permalume paint from Thermochemical Products, Inc., a second representative of Thermochemical Products, Inc., called on Mr. Long for the purpose of selling him an order for one of Thermochemical's other products, Aqua-Chek paint. The name of this representative was Mr. Durbin. Mr. Long stated that Dr. Durbin told him that Aqua-Chek paint was completely waterproof for swimming pools; that for the colored Aqua-Chek, Thermochemical Products, Inc., would give a five-year guarantee, and for the clear Aqua-Chek, a ten-year guarantee; that one coat of Aqua-Chek was adequate for waterproofing any "cement, buildings, swimming pools, or whatever"; and that he (Mr. Long) could return any unsold portion of the Aqua-Chek to Thermochemical Products, Inc. As a result of this visit, Mr. Long signed an order for $501.00 worth of Aqua-Chek paint (CX 24), agreeing to send his check for $200.00 in a few days, and the balance payable in three trade acceptances (Tr. 329–332). Mr. Long further testified that: After receiving the shipment of Permalume paint, he made a long distance telephone call and wrote several letters to Thermochemical Products, Inc., requesting sales assistance as Mr. Winn had promised during his sales demonstration on February 1, 1967 (Tr. 333, 368). Finally, Mr. Long received a sales kit (CX 25) from Thermochemical Products, Inc., but the material contained in this sales kit was different and bore no resemblance to the materials used by Mr. Winn in his demonstration (Tr. 333–35). Mr. Long sold one gallon of the Permalume paint, but had to refund the purchase price to the purchaser (Tr. 371). Mr. Long employed a professional painter to assist him in making some practical tests of the Permalume paint which he had purchased from Thermochemical

Products, Inc. (Tr. 336–38). Mr. Long testified that he took a piece of plywood, cleaned and sanded it, and then applied one coat each of the nine colors of Permalume paint to the piece of plywood, approximately 30 inches long and 8 inches wide, marked and received in evidence as CX 27 (Tr. 339). Two coats of the rose-colored Permalume were applied to the plywood strip, CX 27 (Tr. 340–41). Mr. Long further testified that the colors of the Permalume paint shown on CX 27 are entirely different from the colors of the paint shown to Mr. Long by Mr. Winn during his demonstration (Tr. 341–342). After these tests, Mr. Long wrote a letter to Thermochemical Products, Inc., requesting that it send a representative to visit him as Mr. Winn had originally promised, and stating that, until this was done, Mr. Long would not make any further payment on the trade acceptances. Mr. Long further testified that one coat of the Permalume paint was not sufficient, would not cover, that it streaked, and that the colors were not the same as represented and demonstrated by Mr. Winn (Tr. 344). Mr. Long further stated that Thermochemical Products, Inc., did not ever send the demonstration kit promised by Mr. Winn, which included the strainer Mr. Winn had promised to waterproof and send to Mr. Long for use in demonstrations, together with the spoon and a kit to demonstrate how the Permalume paint was resistant to acid (Tr. 369).

24. A witness who testified in support of the complaint at a session of the hearings held in San Francisco, California, was Mrs. Jean Hixson who, with her husband, Karl Hixson, owns and operates Karl's Radiator Repair Shop in Mountain View, California (Tr. 403–404). Mrs. Hixson testified as follows: On March 20, 1967, a representative of respondent Thermochemical Products, Inc., a Mr. DeLucia, called at their radiator repair shop for the purpose of demonstrating and selling them an order for Aqua-Chek, one of corporate respondent's paint products. Mr. DeLucia stated that Aqua-Chek was a masonry paint that could be used inside and outside, on wood, cement floors, driveways, swimming pools, stucco, and brick (Tr. 405, 412). Mr. DeLucia had with him a satchel which contained, among other things, pieces of brick and cinderblock, aspirin tablets, ink, and a piece of aluminum which had been painted with different colors of paint (Tr. 405–406). Mr. DeLucia then made a demonstration by placing the piece of painted aluminum in muriatic acid to show that the acid would not affect the paint. Mr. DeLucia then produced a piece of cinderblock, half of it

painted with paint and half not, and he put some drops of ink on the one side which had been painted and the ink just beaded up. It didn't sink in at all. The other side, it sunk right into the brick (Tr. 406).

Mr. DeLucia next

put an aspirin in a cup of water that had been treated with this silicone, and it didn't dissolve, and an aspirin that hadn't been treated and which that dissolved (Tr. 406).

Mr. DeLucia also

put a tissuepaper over the piece of aluminum that was painted and put a cigarette on it and it didn't even burn the paper so—it was on top of the painted material.

* * * Then he put some powder * * * in a cup of water and stuck his finger down in it and it come down absolutely dry. And in the cup that didn't have it in and, of course, the finger was wet (Tr. 406).

Mr. DeLucia stated that the paint was guaranteed for ten years on the "inside and five on the outside" (Tr. 407). As a result of the demonstration, Mrs. Hixson purchased $982.80 worth of Aqua-Chek paint and executed a Special Dealership Agreement, dated March 20, 1967, a copy of which was received in evidence as CX 28. The $982.80 was to be paid in four monthly installments (Tr. 409; CX 28).

25. Mrs. Hixson testified that, after receiving shipment of the paint, she and her husband decided to paint their cement garage floor with the Aqua-Chek. She testified that they cleaned and scrubbed the floor with muriatic acid, a strong solution which they use in cleaning radiators (Tr. 407), and applied the clear Aqua-Chek to the cement garage floor. Mrs. Hixson was interested in preventing grease from sinking into the cement garage floor. After the clear Aqua-Chek had been applied to the floor and had dried, she and her husband poured some oil or grease on it "to see if it would wipe up, and it just smeared on there like there was nothing on the floor" (Tr. 412). After this, Mrs. Hixson, by letter and long distance telephone to Thermochemical Products, Inc., attempted to return the paint (Tr. 412; CX 29 and 30). Thermochemical Products, Inc., refused to accept return of the paint. Mrs. Hixson testified that she gave two quarts of the Aqua-Chek paint to a customer with which to paint some cement work around his place, and which he was to pay for later and probably purchase additional paint. The customer applied the Aqua-Chek paint, but it chipped and washed off and the customer refused to pay for it or to purchase any additional Aqua-Chek paint (Tr. 413–16). In spite of the representations of corporate

respondent's salesman, Mr. DeLucia, that the Aqua-Chek paint was appropriate to be used on cement floors and swimming pools, corporate respondent's letter to Karl's Radiator Repair Shop (CX 30) contradicts the representations of its salesman, Mr. DeLucia, and states, among other things, that Aqua-Chek is not suitable for use in swimming pools or on concrete floors.

26. Mr. C. L. Sweigart, operator of C. L. Sweigart Company, a machine shop, located in San Jose, California, was another witness who testified at the hearing in San Francisco, California. Mr. Sweigart testified as follows: In January 1967, he received a telephone call from a person who gave her name as Mrs. Johnson, who told Mr. Sweigart that she had a new product on the market, a clear plastic coating that would stick to glass, metal, wood, in fact, anything, without any necessary preparation beforehand; that it was rich in General Electric silicones; that Thermochemical Products, Inc., had the exclusive right in the United States to use such silicones in this product; and that Thermochemical Products, Inc., wanted to place this product in Mr. Sweigart's machine shop. Mrs. Johnson further told Mr. Sweigart that he would receive approximately $4,000 a year extra profit for his machine shop by selling Thermochemical's product. On the following day, January 21, 1976 (CX 31), Mr. Mike Evans, Regional Franchise Director for Thermochemical Products, Inc., called on Mr. Sweigart and demonstrated Thermochemical's product, Aqua-Chek (Tr. 456–59). Mr. Evans told Mr. Sweigart that Aqua-Chek was blisterproof, heat-resistant, and would waterproof just about anything; that it was superior to "Rustoleum" and to duPont's "Lucite." Mr. Evans demonstrated the use of Aqua-Chek by applying Aqua-Chek to one-half of a brick and pouring water over it. The part of the brick that had been treated with Aqua-Chek "shed" the water, made it "waterproof," and the part of the brick that had not been treated with Aqua-Chek absorbed the water (Tr. 460). Mr. Evans then placed some silicones in a glass of water and directed Mr. Sweigart to put his "finger in the water and see how the silicones made it waterproof." Mr. Evans had a piece of metal, supposedly treated with Aqua-Chek, which he bent and scratched to show "me how superior this Aqua-Chek was." Mr. Evans told Mr. Sweigart that Aqua-Chek was to be used anywhere "for waterproofing or color to make the appearance of any building more beautiful"; that it could be used inside and outside; and that no preparation was needed before application (Tr. 461). Mr. Evans also told Mr. Sweigart that one coat of Aqua-Chek

was usually sufficient (Tr. 462). As a result of the demonstration, Mr. Sweigart executed a Special Dealership Agreement (CX 32), in which he purchased $982.80 worth of Aqua-Chek paint, payable in the form of three trade acceptances which he executed for $327.60 each, payable 45, 75, and 105 days after date thereof.

27. On or about February 9, 1967, but before delivery to Mr. Sweigart of the $982.80 worth of Aqua-Chek paint which Mr. Sweigart purchased on January 21, 1967, another representative of Thermochemical Products, Inc., a Mr. Durbin, telephoned Mr. Sweigart and stated that he wished to visit him. Mr. Durbin visited Mr. Sweigart's machine shop and sought to interest Mr. Sweigart in purchasing another product of Thermochemical Products, Inc., called "Permalume." Mr. Durbin stated that Permalume was a superior automotive finish; that it was used on General Motors' Cadillacs; and that Ford also used it, and would probably use it entirely in their Lincoln line. Mr. Durbin stated that Permalume would "stay in 1165 degrees," and that the product was guaranteed for ten years due to the superior quality of the pigments, which were imported from Germany (Tr. 465). Mr. Durbin also told Mr. Sweigart that, if Mr. Sweigart became a dealer, Mr. Durbin would give Mr. Sweigart an exclusive franchise for Santa Clara County, and that Mr. Sweigart could expect about 1,000 gallons a month in sales. Mr. Sweigart signed a purchase order, dated February 9, 1967, for $962.20 worth of Permalume paint, for which he gave his check for $350 as a down-payment.

28. Mr. Sweigart further testified that: After receiving delivery of the Aqua-Chek paint, he attempted to make the tissuepaper test which had been demonstrated to him by Mr. Evans, but it "leaked right through there like a sieve" (Tr. 468). Mr. Sweigart also applied the Aqua-Chek paint to a piece of metal which he had first prepared by cleaning with a wire brush, emery cloth, and steel wool. Mr. Sweigart then applied one coat of Aqua-Chek to the piece of metal. After application, Mr. Sweigart was able to "peel it off" (Tr. 469).

29. Mr. Hugh W. Silsby, operator of the Silsby Implement Company, a seller of farm implements, of Mason, Michigan, was one of the witnesses who testified at a session of the hearings held in Chicago, Illinois. Mr. Silsby testified as follows: In January 1967, Mr. Silsby was called on the telephone by a person, ostensibly from New York, N.Y., who asked Mr. Silsby if he was interested in a business proposition on a new product (Tr.

781–82). Later, a man by the name of Mr. Andre, accompanied by another person, called on Mr. Silsby and stated that they were representatives of Thermochemical Products, Inc. Mr. Andre made a demonstration of one of Thermochemical's paint products, Aqua-Chek. Mr. Andre produced a spray can which he represented as containing a clear silicone paint, which he sprayed on Mr. Silsby's shoes, the threshold entrance to the store, a cement slab in front, a brick, and on a tile block on the adjoining building. After the paint had dried on each of these items, Mr. Andre then poured water over them and "the water beaded up and rolled off." Mr. Andre then produced a piece of flexible metal, which he stated had been coated with Aqua-Chek and on which he poured battery acid. Mr. Andre also poured the battery acid on the metal cover of a can, to which he then applied the heat from an acetylene torch. The heat from the torch did not mar the surface of the flexible piece of metal coated with Aqua-Chek; it boiled away the acid, but the Aqua-Chek coating remained on the flexible piece of metal. However, the heat from the torch boiled away the acid from the can cover, but discolored the surface of the can cover. Mr. Andre also produced two pieces of Kleenex. On one of the pieces, he sprayed the Aqua-Chek, and then allowed the Aqua-Chek to dry. He next poured water on each piece of Kleenex; the water did not pass through the piece of Kleenex which had been sprayed with the Aqua-Chek, but the water ran through the piece which had not been sprayed (Tr. 785–86). Mr. Andre represented to Mr. Silsby that Aqua-Chek was available in spray cans and would be helpful and useful in the home. For example, he stated that spraying Aqua-Chek on window drapery materials exposed to the sunlight would prevent their discoloration, and, when sprayed on furniture, would impregnate it against soiling. Mr. Andre also stated that Thermochemical Products, Inc., had a "practically unlimited warranty or guarantee"; that Aqua-Chek was a new product and could be applied on any material; and that one coat would be sufficient (Tr. 787–88). As a result of the demonstration and sales presentation by Mr. Andre, Mr. Silsby signed a Special Dealership Agreement, dated January 12, 1967, in which he agreed, among other things, to become a dealer for Aqua-Chek, and purchased $591.60 worth of Aqua-Chek, for which he gave his check for $147, with the balance payable in the form of three trade acceptances which he executed, due on or before 60, 90, and 120 days after date thereof (Tr. 795; CX 60). Mr. Andre stated that it would be possible for

Mr. Silsby to "increase our profit by four to five thousand dollars very easily" (Tr. 789).

30. After delivery of the Aqua-Chek, Mr. Silsby applied some of the clear Aqua-Chek from a can to his daughter's snow boots for the purpose of stopping the boots from leaking; however, the Aqua-Chek did not stop the boots from leaking. Later, another person, who stated that he was a representative of Thermochemical Products, Inc., called on Mr. Silsby. This person stated that he was not a salesman, but had been instructed to ascertain if Mr. Silsby wanted another Thermochemical product on a limited basis, because the production was not very great (Tr. 788). Mr. Silsby informed the representative of the failure of the Aqua-Chek to stop his daughter's snow boots from leaking, and the representative told Mr. Silsby that his daughter had worn the snow boots too soon after application of the Aqua-Chek, and that more than an overnight period was necessary for the Aqua-Chek to form crystals and dry (Tr. 789). The representative of Thermochemical Products, Inc., wrote up a tentative order for the new type of paint which they had discussed, but Mr. Silsby did not sign the order at that time. He intended to discuss it with his brother, a partner with him in the implement business, before signing the purchase order (Tr. 790). Following the instructions of the second Thermochemical representative, Mr. Silsby applied the clear Aqua-Chek to his daughter's snow boots on a Friday evening and his daughter did not wear the boots until the following Monday morning; however, the boots still leaked at that time (Tr. 789). Mr. Silsby telephoned the secretary of a trade association to which he belonged, Farm & Power Equipment Association, and inquired about Thermochemical Products, Inc. (Tr. 791). As a result of this inquiry, Mr. Silsby telephoned the office of Thermochemical Products, Inc., in New York City, and attempted to cancel the $591.60 order for Aqua-Chek paint. It was finally agreed that Mr. Silsby should pay $200, keep the paint, and corporate respondent returned the three trade acceptances which Mr. Silsby had executed. At the time of the hearing, Mr. Silsby had not sold any of the paint.

31. Another witness, who testified at the hearing in Chicago, Illinois, was Mr. Richard D. Small, operator of a service station in Michigan City, Michigan. Mr. Small testified as follows: In January 1967, a person called him on the telephone, telling Mr. Small that he was a representative of Thermochemical Products, Inc., in New York, N.Y.; that Thermochemical Products, Inc.,

had just discovered and was placing on the market a new protective coating, and inquired if Mr. Small was interested in seeing a demonstration of the product. Subsequently, a man appeared, stating that he was the representative of Thermochemical Products, Inc., and proceeded to demonstrate the use of his company's product, Aqua-Chek, with a clear color, from an aerosol spray can. The representative sprayed some of the contents from the can on a piece of wood, a piece of metal, and a paper napkin. He poured water on these articles that had been sprayed with the Aqua-Chek to show how the Aqua-Chek repelled water. The representative stated that the Aqua-Chek would last for ten years, and that one coat would be sufficient to cover (Tr. 881–884, 888). Mr. Small inquired from the representative if the Aqua-Chek came in different colors, and the representative went to his automobile and returned with a can of paint. With paint from this can, the representative painted a piece of wood which Mr. Small had in his service station. This paint was a rose color and looked very well (Tr. 885). As a result of this demonstration, Mr. Small executed a Special Dealership Agreement on the form produced by the representative, dated January 23, 1967 (CX 73). Mr. Small did not remember the name of the representative, but CX 73 bears the signature of M. Andre as the representative of Thermochemical Products, Inc. According to the terms of CX 73, Mr. Small purchased $819 worth of Aqua-Chek, and executed three trade acceptances for the balance due in payment therefor. After the Aqua-Chek was delivered, Mr. Small painted a wooden cabinet in his service station with some of the Aqua-Chek. On the following day, after the Aqua-Chek had completely dried, Mr. Small moistened a rag with water and rubbed it on the wooden cabinet which he had painted with the Aqua-Chek. The paint washed off (Tr. 887). Mr. Small then employed an attorney who arranged with the "company" to return the trade acceptances to him (Tr. 888).

32. Mr. T. E. Reese, a partner with Mr. Robert C. Maynard, in the operation of Metal Forms Company, a metal stampings business, of Grand Prairie, Texas, was one of the witnesses who testified at the hearing held in Houston, Texas. Mr. Reese testified as follows: In September 1965, he received a telephone call from a Mr. Wichita, who stated that he represented Thermochemical Products, Inc., and that Metal Forms Company was one of two companies that had been chosen from the Dallas area to be representatives of Thermochemical's product, Aqua-Chek. Subse-

quently, Mr. Wichita visited the place of business of Metal Forms Company in Grand Prairie, and made the representations complained about (Tr. 1243–45). Mr. Wichita stated that Thermochemical Products, Inc., was a part of the General Electric Company organization and used General Electric silicones in its paint products. These representations were the primary reasons Mr. Reese became interested in the Aqua-Chek paint. Mr. Wichita produced some brochures containing, among other things, a picture of an atomic submarine that had been painted with Aqua-Chek, and pictures of houses, with one-half of the house painted with Aqua-Chek and the other half unpainted, and portions of haydite brick construction painted with Aqua-Chek and portions not painted (Tr. 1249). Mr. Whichita described Aqua-Chek "as a water repellant paint-waterproof paint" (Tr. 1245); that Aqua-Chek could be used on metal surfaces for waterproofing, for painting on wooden surfaces, house eaves to waterproof them, to paint on concrete brick, haydite brick to waterproof, or to make it water-resistant, and for cellars (Tr. 1264). Mr. Wichita had with him a box or kit which contained bricks, a tea strainer, a bottle of Aqua-Chek, and bottles containing silicones and chemicals used in the Aqua-Chek paint to make it waterproof. Mr. Wichita then took two pieces of the firebrick, one of which he placed in water, and the brick absorbed the water. Mr. Wichita then painted the other brick with Aqua-Chek. After allowing the Aqua-Chek to dry for approximately three to five minutes, Mr. Wichita placed the brick in water, and "the brick would float, completely dry" (Tr. 1251). Mr. Wichita painted the brick in Mr. Reese's presence. Mr. Reese further testified that Mr. Wichita

> also showed me a tea strainer where you could paint this coating on the tea strainer then let it completely dry and it would hold water. He also showed me the paint on a Kleenex would make it water tight, where it would hold together, it would not leak out (Tr. 1251).

Mr. Wichita also "put some material on his finger and stuck it in a container, put it in a glass of water, when it came out it was dry" (Tr. 1252). Mr. Wichita told Mr. Reese that this material was a powdered silicone (Tr. 1252). As a result of the demonstration, Mr. Reese purchased $942.30 worth of Aqua-Chek paint, and executed a Special Dealership Agreement, dated September 9, 1965 (Tr. 1253; CX 102). Simultaneously, Mr. Reese executed three trade acceptances for a portion of the purchase price (Tr. 1255). Mr. Wichita further told Mr. Reese that, if he could not resell the Aqua-Chek paint, Mr. Reese could return it to Thermo-

chemical Products, Inc., and Thermochemical Products, Inc., could sell it to another company (Tr. 1258). Mr. Wichita further told Mr. Reese that, if his percentage return on sales was normal, Mr. Reese could expect "approximately fourteen hundred a month" in earnings (Tr. 1266–67). By the time the first and second trade acceptances, which Mr. Reese had executed, came due, the Aqua-Chek paint had not been received by Mr. Reese. Mr. Reese did not pay the first and second trade acceptances when they came due, but paid a portion and made an agreement for the remainder (Tr. 1267–68). When the Aqua-Chek paint finally arrived, Mr. Reese and his partner, Mr. Maynard, attempted to test it in the same type of demonstrations that Mr. Wichita had used, but Mr. Reese stated that their tests "were not effective, the material to us, apparently to us wasn't the same material" (Tr. 1262). Mr. Reese applied the Aqua-Chek paint to firebrick, letting it dry

> a couple of minutes, three minutes, and on up to thirty minutes in several sequences to see what would make it work, we even soaked it in the material, it still wouldn't work. * * * It still wasn't waterproof as it was demonstrated to us. We also tried the Kleenex and the tea strainer and where Aqua-Chek was used in Mr. Wichita's demonstrations (Tr. 1263).

The firebrick and the Kleenex absorbed water (Tr. 1263). Mr. Reese applied Aqua-Chek paint to a piece of screen and water would run through the screen. Mr. Reese also applied Aqua-Chek to aluminum, outside, in the weather, and the paint cracked. He also tried it on wooden surfaces, and they were not "waterproofed" (Tr. 1265). Eventually, Mr. Reese worked out an arrangement with Mr. Glantz, an attorney for the respondent, Wolmart Discount Corporation, whereby Mr. Reese paid a portion of the amount of the trade acceptances in full satisfaction of the total amount thereof (Tr. 1268–1270).

33. Mr. Ben R. Fleming, Jr., operator of the Fleming Floor Covering Company, Landis, North Carolina, testified at a session of the hearings held in Greensboro, North Carolina. Mr. Fleming testified as follows: During the month of October 1964, Mr. Fleming received a telephone call from Mr. Mike Hirsch, requesting an appointment for 9 o'clock on the following morning (Tr. 1381). Mr. Hirsch stated that he was a representative of Thermochemical Products, Inc., and wished to establish Mr. Fleming as a franchised dealer in the Landis territory for Aqua-Chek paint, one of Thermochemical's products. Mr. Hirsch appeared for his appointment at the specified time. Mr. Hirsch had in his possession a

half-pint can and a paint brush with which he painted a spot on one of Mr. Fleming's toolboxes, then poured water on it (Tr. 1382). Mr. Hirsch had a piece of aluminum, a piece of asphalt, and a piece of cement block, which he stated had previously been sprayed with Aqua-Chek, on which he poured water (Tr. 1383). Mr. Hirsch stated that Aqua-Chek could be used on any type of material, sheet rock, wood, metal, concrete blocks, cinder blocks, asphalt shingles, asbestos shingles, and brick (Tr. 1404). Mr. Hirsch further told Mr. Fleming that Thermochemical's advertising department would provide Mr. Fleming with an advertising sign which he could place in front of his place of business, provided Mr. Fleming paid the cost of installation. Mr. Fleming testified that he agreed to this (Tr. 1384). Mr. Fleming further testified that Mr. Hirsch promised that Mr. Fleming would receive a demonstration kit containing materials similar to those used by Mr. Hirsch in his Aqua-Chek demonstration, such as the piece of aluminum, asphalt, cement block, etc. (Tr. 1384). Mr. Hirsch stated that Mr. Fleming should be able to earn five or six thousand dollars extra in addition to his regular floor covering business, and that, if his relations with Thermochemical Products, Inc., were not satisfactory, Mr. Fleming could telephone Thermochemical Products, Inc., long distance, and Thermochemical Products, Inc., would pick up the Aqua-Chek paint. During Mr. Hirsch's visit, Mr. Fleming executed a Special Dealership Agreement, dated October 22, 1964, in which he purchased $488.10 worth of Aqua-Chek paint, payable in the form of three trade acceptances (Tr. 1388; CX 107). Mr. Hirsch stated that Aqua-Chek would cover from six to eight hundred feet per gallon, and that Mr. Fleming's order of Aqua-Chek would be delivered by Thermochemical's own truck at a cost of ten cents per gallon; however, Mr. Fleming's order of Aqua-Chek paint was delivered by a commercial motor freight line at a freight charge of thirty cents per gallon, which Mr. Fleming paid (Tr. 1389). Mr. Fleming sold some of the Aqua-Chek paint to his father-in-law, who lived in Kannapolis, North Carolina, and Mr. Fleming observed his father-in-law apply one coat of the Aqua-Chek paint on the rear of his house in Kannapolis, on a trial basis. Mr. Fleming testified that, after the Aqua-Chek was applied, it

> looked to me more like chalk than it did paint. Also in a short time, less than a year's time—I don't know just exactly how long—the paint started chalking off and scaling off, which Mr. Hirsch told me that it absolutely would not do (Tr. 1403).

Mr. Hirsch had stated that only one coat of Aqua-Chek was needed for any surface (Tr. 1402–1403). Upon Mr. Fleming's failure to pay the trade acceptances when they came due, Mr. Fleming was advised by attorneys for respondent, Wolmart Discount Corporation, that suit would be, and had been, instituted for collection of the amount due under the trade acceptances (CX 108, 109, and 110).

34. Mr. Earl B. Hockenberry, who, with a partner, Mr. Gerald Lewis, operates Lewis & Hockenberry, Inc., a sawmill and wood products company in Emporium, Pennsylvania, was one of the witnesses who testified at a session of the hearing held in New York, N.Y. Mr. Hockenberry testified as follows: In 1967, a man who gave his name as Mr. Brown, called at Mr. Hockenberry's office in Emporium, stated that he was a representative of Thermochemical Products, Inc., and inquired if Messrs. Hockenberry and Lewis were interested in becoming dealers for Thermochemical's products (Tr. 1554–56). Mr. Brown stated, among other things, that Messrs. Hockenberry and Lewis would become dealers for Thermochemical's products if they purchased Aqua-Chek paint (Tr. 1557). Mr. Brown described Aqua-Chek as being 100% waterproof, which could be painted on any surface, such as the inside of swimming pools, basements inside and out, sidewalks, and "any surface that you wanted waterproofed," and that one coat was sufficient (Tr. 1558). Mr. Brown told Messrs. Hockenberry and Lewis that, if they purchased the Aqua-Chek paint, they should not try to sell it, but that Thermochemical Products, Inc., would do the selling; that Thermochemical Products, Inc., knew more about selling than Messrs. Hockenberry and Lewis; and that Thermochemical Products, Inc., would furnish Messrs. Hockenberry and Lewis with brochures and advertising material for the Aqua-Chek paint which they could distribute to the public. Mr. Brown further stated that Thermochemical Products, Inc., had conducted a survey of the Emporium, Pennsylvania, area, and that Thermochemical Products, Inc., "could bring up the sales to make us an $8000 profit" (Tr. 1526). Messrs. Hockenberry and Lewis signed a Special Dealership Agreement, dated April 6, 1967, whereby they purchased $2,381.70 worth of Aqua-Chek paint, payable $594.44 down, and the balance in three trade acceptances, due May 15, June 15, and July 15, 1967, respectively (Tr. 1560; CX 121). Mr. Hockenberry further testified that the Aqua-Chek paint, which was actually delivered to him, did not correspond with the advertising literature which had been fur-

nished to him by Thermochemical Products, Inc., and, for this reason, he did not send out any letters or sales literature to the public (Tr. 1560–61). After receiving the Aqua-Chek paint, Mr. Hockenberry applied one coat to the wall in the basement of his home. One coat did not cover nor waterproof the wall; water still came through (Tr. 1565). Approximately sixty days following Mr. Brown's visit, a second Thermochemical salesman called on Messrs. Hockenberry and Lewis, and attempted to sell them another Thermochemical product, a vinyl and plastic paint. Mr. Hockenberry could not remember the name of the second salesman, but the second salesman promised Mr. Hockenberry that his earnings from sales of the vinyl and plastic paint would be from ten to eighteen thousand dollars per year (Tr. 1562). Mr. Hockenberry paid the sum of $2,381.70 for the Aqua-Chek paint, including the three trade acceptances (Tr. 1568, 1572).

35. From a preponderance of all the evidence, it is found that Thermochemical Products, Inc., salesmen represented to prospective dealers that Thermochemical Products, Inc., was a subsidiary or division of Union Carbide Company or General Electric Company (Mrs. Helen Lucas, Tr. 741–42, 763; Mohler, Tr. 822), whereas, Thermochemical Products, Inc., is not a subsidiary or division of Union Carbide Company, nor a part of the General Electric Company organization (Tr. 823).

36. It is further found that the allegations contained in subparagraph 2 of Paragraph Eight of the complaint (see subparagraph (b) of paragraph 13 hereof) to the effect that the products of Thermochemical Products, Inc., are manufactured or have been developed by Union Carbide Company, General Electric Company, or Aluminum Company of America have not been established by a preponderance of the evidence. A preponderance of the testimony from the dealer witnesses is to the effect that one of these companies developed the silicones or one or more of the ingredients contained in Thermochemical's products. The paint products which Thermochemical Products, Inc., sells are actually manufactured by the Pur-All Paint Company of Carlstadt, New Jersey (Tr. 2028).

37. It is further found that Thermochemical's salesmen have represented to prospective dealers that products sold by Thermochemical Products, Inc., are unconditionally guaranteed for five or ten years (Mauerhan, Tr. 75–76; Mrs. Hixson, Tr. 407; Sweigart, Tr. 465). As a matter of fact, Thermochemical's products are not unconditionally guaranteed. The guarantee is limited to

the extent that Thermochemical Products, Inc., will supply a sufficient amount of the product involved to repaint and cover the painted portion of the structure or other surface which leaks. The guarantee expressly provides that it is limited to the furnishing of the product, and does not cover the cost of labor to apply it (CX 58, CX 63; Krueger, Tr. 1609).

38. It is further found that salesmen for Thermochemical Products, Inc., have represented to prospective dealers that such dealers will realize various profits, ranging up to $18,000 per year, from the sale of Thermochemical's products (Long, Tr. 327; Mrs. Hixson, Tr. 407; Sweigart, Tr. 466; Silsby, Tr. 789; Reese, Tr. 1266–67; Fleming, Tr. 1386; Hockenberry, Tr. 1526); whereas, there was no testimony that any dealer made a profit from the handling of Thermochemical's products, much less make a profit of $18,000. The testimony from most of the dealers was that they sold very little, if any, of Thermochemical's paint. Mr. Long sold one gallon and had to refund the money (Tr. 336); Mrs. Hixson testified that one man picked up a sample and never came back (Tr. 411); Mr. Jiminez did not sell any of the paint (Tr. 525); Mr. Silsby did not sell any of the paint (Tr. 789); Mr. Sensmeier did not sell any of the paint (Tr. 980); Mr. Williams did not sell any of the paint (Tr. 1189); Mr. Boudreaux did not sell any of the paint (Tr. 1289); Mr. Gelston did not sell any of the paint (Tr. 1361); and Mr. Hockenberry did not sell any of the paint (Tr. 1560–61).

39. It is further found that salesmen for Thermochemical Products, Inc., have represented that prospective dealers may return to the seller, corporate respondent, any merchandise that is not sold by the prospective dealer, or that Thermochemical Products, Inc., will transfer the merchandise to another dealer (Mauerhan, Tr. 86–87; Damewood, Tr. 164; Long, Tr. 330; Reese, Tr. 1258; Fleming, Tr. 1386); whereas, Thermochemical Products, Inc., seldom, if ever, accepts the return of any unsold merchandise or effects the transfer of such merchandise to another dealer (Lucas, Tr. 746; Barosh, Tr. 1041; Ruzicka, Tr. 1107–1114; Boyd, Tr. 1334; Fleming, Tr. 1387; Dalton, Tr. 1496; Garrison, Tr. 1517).

40. It is further found that Thermochemical Products, Inc., through its salesmen, advertising, and promotional literature, has represented to prospective dealers that its products are waterproof (Mauerhan, Tr. 75, 146–48; Damewood, Tr. 160; O'Shea, Tr. 211; Long, Tr. 330; Sweigart, Tr. 460; Sensmeier, Tr. 967;

Reese, Tr. 1245; Hockenberry, Tr. 1558, 1578); whereas, Thermochemical's products are not waterproof (Mrs. Hixson, Tr. 411; Jiminez, Tr. 525; Sensmeier, Tr. 969–971, 987; Hockenberry, Tr. 1565). For example, the written guarantee issued by Thermochemical Products, Inc., for Aqua-Chek and Vivalume paints, CX 58 and 63, respectively, states:

> We Hereby Guarantee to the registered holder hereof, that should the application described on the reverse side leak where AQUA-CHEK [or VIVALUME, as the case may be] has been applied, we will replace free of charge the amount of AQUA-CHEK [VIVALUME] necessary to cover the leaking area * * *.

The representation that the surface to which the product is applied will not "leak" is a representation that water will not penetrate the surface to which the product is applied. This representation is false.

41. It is further found that salesmen for Thermochemical Products, Inc., have represented that Thermochemical's products are suitable for application on both the inside and outside of a building (Long, Tr. 327–330; Sweigart, Tr. 461; Ricci, Tr. 616; Mohler, Tr. 827; Bell, Tr. 905; Sensmeier, Tr. 972; Betts, Tr. 1065, 1069); whereas, Thermochemical's products are not suitable for use on the inside of a building (Velloney, Tr. 1019; Mauerhan, Tr. 75). The brochures contained in CX 58 specifically state that Aqua-Chek is suitable for use only on exterior surfaces. Mr. Chaleff, president of the company which manufactures the paint products which Thermochemical Products, Inc., sells and distributes, testified that Vivalume was suitable for use on exterior surfaces (Tr. 2034, 2036), and was to be used mainly for decorative purposes (Tr. 2035).

42. It is further found that salesmen for Thermochemical Products, Inc., have represented to prospective dealers that Thermochemical Products, Inc., has conducted a survey of the area in which the prospective dealer is located, prior to the time of the salesman's visit, for the purpose of ascertaining the prospective market for Thermochemical's products (O'Shea, Tr. 210; Boudreaux, Tr. 287; Boyd, Tr. 1317, 1353; Carter, Tr. 1472; Garrison, Tr. 1506; Hockenberry, Tr. 1562); whereas, no survey was ever made of the territory in which such prospective dealer was located for the purpose of ascertaining the prospective market for Thermochemical's products within that area (Sydney, Tr. 1787, 1793; Cohn, Tr. 1800).

43. It is further found that salesmen for Thermochemical

Products, Inc., have represented to prospective dealers that one coat of any of Thermochemical's products will be sufficient to cover the surface on which the product is applied (Mauerhan, Tr. 101, 144; Damewood, Tr. 164; O'Shea, Tr. 214; Long, Tr. 327; Sweigart, Tr. 462; Jiminez, Tr. 520; Silsby, Tr. 788; Mohler, Tr. 827; Fleming, Tr. 1389; Hockenberry, Tr. 1558); whereas, one coat of any of Thermochemical's products is not sufficient to cover the surface on which it is applied (Mauerhan, Tr. 144; Damewood, Tr. 166; Roberts, Tr. 260; Jiminez, Tr. 520; Rumer, Tr. 863; Rhode, Tr. 946–47; Velloney, Tr. 1012; Betts, Tr. 1074; Boudreaux, Tr. 1292–93; Boyd, Tr. 1324–25, 1329; Hockenberry, Tr. 1565; Krueger, Tr. 1614).

44. It is further found that Thermochemical Products, Inc., through its promotional literature, advertising, and oral statements by its salesmen, has represented that Thermochemical Products, Inc., would assist the prospective dealer in making sales by sending a representative to visit prospective customers of the prospective dealer, provide and furnish advertising displays and newspaper mats for the use of the dealer, at no cost to the dealer (Mauerhan, Tr. 102; Damewood, Tr. 165; O'Shea, Tr. 217; Keeling, Tr. 288, 292; Long, Tr. 327, 376; Sweigart, Tr. 742; Silsby, Tr. 788; Reese, Tr. 1271; Fleming, Tr. 1384; McCann, Tr. 1452; Carter, Tr. 1472; Best, Tr. 1545; Mohler, Tr. 825; Moore, Tr. 920; Williams, Tr. 1176; Williamson, Tr. 1185, 1194); whereas, Thermochemical Products, Inc., does not assist the dealer in making sales, either by sending a representative to visit prospective customers of the dealer, or by supplying advertising and newspaper mats for use by the dealer, at no cost to the dealer (Mauerhan, Tr. 102; Damewood, Tr. 173; Keeling, Tr. 292; Long, Tr. 327, 368, 376; Lucas, Tr. 742; Mohler, Tr. 825; Moore, Tr. 920; Rhode, Tr. 944; Sensmeier, Tr. 973; Velloney, Tr. 1011; Barosh, Tr. 1042; Betts, Tr. 1064; Ruzicka, Tr. 1117; Hatcher, Tr. 1139; Mrs. Hatcher, Tr. 1162; Williams, Tr. 1213; Boudreaux, Tr. 1294, 1299, 1301; Boyd, Tr. 1338; Fleming, Tr. 1385; Davis, Tr. 1441; Hockenberry, Tr. 1558).

45. It is further found that salesmen for Thermochemical Products, Inc., promised prospective dealers that Thermochemical Products, Inc., would furnish the dealer a sales kit containing materials and articles which were identical with those used by the salesman during his demonstration of Thermochemical's product; whereas, in many instances, no sales kit was delivered, and, if delivered, was less elaborate and did not contain any of the

items used by the salesman in his demonstration (Long, Tr. 334; Betts, Tr. 1062–63; Boudreaux, Tr. 1299–1300).

46. The use by Thermochemical Products, Inc., and the individual respondents herein of the aforesaid false, deceptive, and misleading statements and representations with respect to their said products has had, and now has, the capacity and tendency to mislead and deceive a substantial number of prospective dealers into the erroneous and mistaken belief that such statements and representations were, and are, true and to cause substantial numbers of said prospective dealers to purchase substantial quantities of said respondents' products because of such erroneous and mistaken belief.

47. It is further found that, when Thermochemical Products, Inc., receives trade acceptances for merchandise purchased by prospective dealers from Thermochemical's salesmen, Thermochemical Products, Inc., then sells and discounts said trade acceptances to various finance companies (Nadler, Tr. 1994). In the event the dealer refuses to pay the trade acceptance and default is made thereon, the finance company then assigns the trade acceptance to the corporate respondent, Wolmart Discount Corporation, for collection. Wolmart Discount Corporation then generally brings suit thereon, alleging in such suit, among other things, that said trade acceptances were executed by the dealer defendant named in the suit in payment for merchandise purchased from Thermochemical Products, Inc., and

> that thereafter, the said trade acceptances were duly endorsed by THERMOCHEMICAL PRODUCTS, INC. and so endorsed were, prior to maturity, duly negotiated and delivered for value, without notice of any defect or defense, to the plaintiff's [Wolmart Discount Corporation's] assignor, COMMERCIAL PROGRESS CORP-EQUITABLE DISCOUNT CORPORATION which thereupon became the owner and holder thereof, and who thereafter duly assigned said trade acceptances to the plaintiff herein (CX 52, 69, 88, and 118).

Wolmart Discount Corporation does not enter the picture unless and until default is made in the payment of a trade acceptance, at which time the trade acceptance is assigned to Wolmart Discount Corporation for collection and possible filing of suit (Tr. 1938).

48. Paragraph Twelve of the complaint herein alleges (see paragraph 15 hereof) that:

> The fact of assignment [of the trade acceptances] to Wolmart Discount Corporation and the bringing of suit in its [Wolmart's] name as assignee

has had, and now has, the tendency and capacity to mislead and deceive dealers against whom suit is brought into the erroneous and mistaken belief that the said representations and implications are true and to induce the said dealers to refrain from asserting defenses they may have against the respondents and to make payments which they might otherwise not have made.

Complaint counsel did not offer any evidence to show that any dealer against whom suit was brought, or his attorney, was misled and induced to refrain from asserting any defense which he may have had against any suit brought by Wolmart Discount Corporation for collection of any trade acceptance, or that any dealer made any payment which he might otherwise not have made, except for the statements made in any suit for collection of a trade acceptance.

49. Complaint counsel request that an order should be issued against Wolmart Discount Corporation for the reason, among others, that Wolmart Discount Corporation is owned and controlled by Thermochemical Products, Inc., and that Wolmart Discount Corporation brings suit in its own name against defaulting dealers and alleges in such suits that it is an assignee of a holder in due course. Because of such allegation, complaint counsel assert, the dealers and their attorneys believed there were no defenses open to them in suits for collection of trade acceptances. As above found, there is no evidence in the record to show that any statement by Wolmart Discount Corporation in any suit for collection of a trade acceptance misled or induced any dealer, much less his attorney, to refrain from asserting any defense to such suit or made any payment thereon which he might otherwise not have made, except for the allegations in such suit.

CONCLUSIONS

The aforesaid acts and practices of Thermochemical Products, Inc., and the individual respondents herein 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 commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act. This proceeding is in the interest of the public. Under the facts of record, no order should issue against Wolmart Discount Corporation.

ORDER

It is ordered, That the respondents Thermochemical Products, Inc., a corporation, and its officers, and respondents Jeannette Vine and Beatrice Freeman, also known as Beatrice Jacobs, individually and as officers of said corporation, and Charles A. Jacobs and David Jacobs, individually and as managers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of any water repellent paint or paint products or coatings or franchises in connection therewith, or any other articles of merchandise of franchises in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

A. Representing, directly or by implication, that:

1. Respondents are a subsidiary of, a division of or are affiliated with Union Carbide Company, General Electric Company or Aluminum Company of America or any other corporation entity; or misrepresenting, in any manner, respondents' trade or business connections or affiliations.

2. Respondents' products are guaranteed unless the nature, conditions and extent of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

3. Dealers will earn any stated gross or net amount; or representing, in any manner, the past earnings of dealers unless in fact the past earnings reported are those of a substantial number of dealers and accurately reflect the average earnings of those dealers under the circumstances similar to those of the dealer to whom the representation is made.

4. Respondents' dealers may return any unsold merchandise or that respondents will transfer unsold merchandise to other dealers.

5. Respondents' products are waterproof or will cause any surface to which they are applied to become waterproof; or misrepresenting in any manner, the performance characteristics of respondents' products.

6. Respondents' products are suitable for use on the

inside of a structure; or misrepresenting in any manner, the use characteristics of respondents' products.

7. A survey has been made of the territory in which a prospective dealer is located for the purpose of ascertaining the sales potential of the particular territory.

8. One or more coats or applications of respondents' products is sufficient to achieve or to produce a certain stated or implied result.

9. Respondents will send a representative to contact prospective customers of the dealer, or erect billboards and other displays, or furnish newspaper mats free of charge, or prepare suitable mailings on the dealer's letterhead; or misrepresenting, in any manner, the assistance which will be given the dealer in making sales of the particular product purchased.

B. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products and services and failing to secure from such salesmen or other persons a signed statement acknowledging receipt of said order.

It is further ordered, That the respondent Thermochemical Products, Inc., shall forthwith distribute a copy of this order to each of its operating divisions, if any.

It is further ordered, That the complaint herein against respondent Wolmart Discount Corporation be, and the same hereby is, dismissed.

OPINION OF THE COMMISSION

JULY 15, 1969

BY ELMAN, *Commissioner:*

I

The complaint in this proceeding, issued January 9, 1967, charged that respondents had violated Section 5 of the Federal Trade Commission Act by engaging in unfair methods of competition and in unfair and deceptive acts and practices in the offering for sale, sale and distribution of water repellent paints and coatings to dealers for resale to the public. Respondents filed answers denying the allegations and concurrently filed motions to dismiss the complaint.[1] These motions were denied by the hearing

[1] Wolmart Discount Corporation filed an answer and a motion to dismiss separate from those filed by the other respondents.

examiner on May 11, 1967. On August 18, 1967, respondent Wolmart filed an action in the United States District Court for the District of Columbia seeking to enjoin and ultimately to dismiss administrative proceedings against it as outside the jurisdiction and authority of the Federal Trade Commission.[2] On September 6, 1967, the district court dismissed this action on the grounds that Wolmart had failed to exhaust its administrative remedies.

After full evidentiary hearings,[3] the examiner issued an initial decision on December 11, 1968, in which he upheld the major charges of the complaint as they related to all respondents except Wolmart. As to Wolmart, the examiner dismissed the complaint. The case is before us on the cross-appeals of respondents and complaint counsel.

Respondents contend that insufficient evidence was produced to support the findings of the examiner, that the examiner's findings include matters not pleaded in the complaint as to which respondents were not given notice and the opportunity to defend, and that the examiner erred in crediting certain witnesses called by complaint counsel and in exclusing certain matter which respondents attempted to offer in evidence at the hearings. Complaint counsel contends that the examiner erred in dismissing the complaint as to Wolmart, and in dismissing one of the charges against the other respondents.

II

The facts are adequately set forth in the initial decision; the examiner's findings, to the extent they are not inconsistent with the findings made in this opinion, are hereby adopted as those of the Commission.

Thermochemical Products, Inc., is a corporation organized and doing business under the laws of the State of New York, with its

[2] It was alleged by Wolmart that the Commission was proceeding against it for practices not previously considered to be in violation of the Federal Trade Commission Act and further, that the proceeding constituted an unauthorized invasion of the "law merchant" by the Commission.

[3] Hearings were held in six cities, *viz.*: Los Angeles and San Francisco, California; Chicago, Illinois; Houston, Texas; Greensboro, North Carolina; and New York, New York. Section 3.41 (b) of the Commission's Rules of Practice provides that the examiner shall have authority to order hearings at more than one place only "in unusual and exceptional circumstances for good cause stated on the record." In *Universe Chemicals, Inc.*, Docket 8752, issued April 2, 1969, we held that unsubstantiated assertions by complaint counsel of hardship to witnesses and added expense to the government if hearings are held only in one place did not constitute a sufficient showing of "unusual and exceptional circumstances" within the meaning of Rule 3.41(b). No stronger showing of support for hearings in multiple locations was presented in this case. However, respondents made no issue of this at any stage in the proceedings. Respondents did request leave to file an interlocutory appeal from the examiner's order fixing hearing dates, but this request raised only the issue of the timing of the hearings, not their location.

office and principal place of business located at 1860 Broadway, New York, New York. Respondent Jeannette Vine is the president and treasurer of Thermochemical, and respondent Beatrice Freeman Jacobs is secretary of the company.[4] All of the outstanding capital stock of Thermochemical is owned by Jeannette Vine and Beatrice Jacobs, each having fifty percent of said stock.

Respondents Charles A. Jacobs and David Jacobs are agents of Jeannette Vine and Beatrice Freeman Jacobs, who, as agents, are managers of Thermochemical.[5] As managers, they control the acts and practices of Thermochemical.[6]

The gross business of Thermochemical for the fiscal year ending October 31, 1967, was approximately $2,000,000.

Respondent Wolmart Discount Corporation was issued a certificate of incorporation by the State of New York on December 17, 1964. No stock has been issued by Wolmart and no capital has been paid in. The company has no directors and its sole officer is one Bruce Mund, who acts as its secretary. Wolmart had no bank account until November 18, 1965. Wolmart's *raison d'etre* is to collect payment as the holder of defaulted trade acceptances originally given to Thermochemical in partial payment for merchandise sold by Thermochemical salesmen to "franchise dealers."

Respondents are engaged in the offering for sale, sale and distribution of paints and coatings to dealers for resale to the public

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[4] Beatrice Jacobs is the wife of respondent David Jacobs. She does business under her maiden name, Beatrice Freeman.

[5] This is not the first time that the individual respondents Charles Jacobs and David Jacobs have been involved in proceedings before this agency concerning alleged deceptive practices in the sale and distribution of paint and paint products. On March 6, 1956, a consent order was entered in *Sterling Materials Co., Inc.*, 52 F.T.C. 909, which ran aganist three associated New York paint firms and against, *inter alia*, Charles Jacobs, individually and as an officer of Ohmlac Paint and Refining Company, Inc., and David Jacobs, individually and as an officer of Sterling Materials Company, Inc., 1860 Broadway, New York, New York. David Jacobs was president and treasurer of Sterling Materials Company, and Charles Jacobs was president of Ohmlac Paint and Refining Company. The consent order prohibited misrepresentations as to exclusive sales territories and sales and promotional assistance granted by the companies to "franchise dealers," misrepresentations that the companies had been selling their paint products for 30 to 35 years, and misrepresentations that many well-known manufacturers, industrial firms, railroads, and agencies of the federal government used and approved said products. On February 6, 1962, a consent judgment was entered by the United States District Court for the Eastern District of New York for civil penalties aggregating $28,000 for violations of that order.

On February 24, 1962, a consent order was issued in *Ohmlac Paint and Refining Co., Inc.*, 60 F.T.C. 419, which ran against Charles Jacobs, individually and as an officer of Betty Jordan Paint Factories, Inc. (The complaint was dismissed as to Ohmlac.) The order prohibited misrepresentations as to the prices of paint and paint products. Ohmlac has since gone through bankruptcy and the other corporations against which these orders were issued are no longer in business.

[6] Counsel for respondents conceded, during the course of the hearings, that any order entered against Thermochemical Products, Inc., should also be entered against the four individual respondents named in the complaint. (Tr. 1690-91, 2194).

under the trade names, *inter alia*, "Aqua-Chek," "Vivilume," and "Vin-L-Brush-On." Respondents furnish to salesmen literature, samples, contracts, display materials, and trade acceptances. Armed with these materials, the salesmen then contact prospective dealers in various areas throughout the nation. The complaint alleges, and the examiner found, that, in the course of such contacts, many misrepresentations are made concerning the status of Thermochemical Products, Inc., the nature and quality of its products, and the terms under which the products are sold.

Specifically, the examiner found that respondents' salesmen have falsely represented to prospective dealers that Thermochemical Products, Inc., is a division or subsidiary of Union Carbide Company or General Electric Company, that the products sold by Thermochemical are unconditionally guaranteed for five or ten years, that dealers of Thermochemical Products will realize profits ranging up to $18,000 per year from the sale of such products, that Thermochemical normally will accept return of any merchandise unsold by its dealers and transfer such merchandise to other dealers, that Thermochemical's paints and coatings are waterproof, that the products are suitable for application on both the interior and exterior of buildings, that Thermochemical has conducted a survey of the area in which a prospective dealer is located to determine the prospective market for Thermochemical Products in that area, and that one coat of Thermochemical's products will be sufficient to cover the surface on which the product is applied. The examiner further found that Thermochemical, through its promotional literature and advertising, as well as by oral statements by its salesmen, has falsely represented that it will assist prospective dealers in selling the company's products by providing, without charge, advertising displays and newspaper mats for the use of the dealer. He also found that salesmen had falsely represented that Thermochemical would furnish to dealers sales kits which were identical to those used by salesmen in their demonstrations of Thermochemical products.

We have read the record and find that the evidence amply justifies the examiner's findings listed above. Complaint counsel called forty witnesses who had purchased respondents' products and had become "franchise dealers" thereof after having been solicited personally by respondents' salesmen. These witnesses, in most instances, were engaged in small businesses of a type not usually carrying paint or paint products for sale at retail to the

public.[7] In general, they testified that they agreed to become franchise dealers and purchased respondents' products after having witnessed demonstrations performed by respondents' sales representatives supposedly showing the water-proof character and other superior qualities of these products. The normal pattern was for a new dealer to execute a Special Dealership Agreement under which the dealer purchased an agreed amount of respondents' products in return for receiving a franchise to sell respondents' products in a specified territory. In most instances, the balance of the purchase over the downpayment was payable in the form of three trade acceptances executed by the new dealer at that time. When the dealer subsequently received his shipment of respondents' products, he found the products woefully lacking in the qualities demonstrated by respondents' salespeople, and, in most instances, the dealer found himself unable or unwilling to sell respondents' products to the public.[8] In the event that a dealer refused to pay the trade acceptances on the basis that his contract with respondent was obtained as a result of misrepresentation, Wolmart Discount Corporation, to which the trade acceptances are assigned in the event of default, asserts in opposition that it is the assignee of a holder in due course of these acceptances.

The testimony of Mrs. Jean Hixson (Tr. 403–54), who, with her husband, owns and operates a radiator repair shop in Mountain View, California, is typical of that given by the dealer-witnesses contrasting the representations of respondents' salesmen with the manner in which respondents' products actually performed.[9] Mrs. Hixson testified that a Mr. DeLucia, a sales representative of Thermochemical Products, called at her family's radiator repair shop for the purpose of demonstrating respondents' Aqua-Chek paint. Mr. DeLucia represented that Aqua-Chek was masonry paint suitable for inside and outside use, for use on wood, cement floors, driveways, swimming pools, stucco and brick. Mr. DeLucia presented a series of demonstrations to show

[7] For example, dealer-witness Mauerhan was a plumber (Tr. 72), dealer-witnesses Roberts and Boyd operated garages (Tr. 253, 1318), dealer-witness Keeling operated a wholesale nuts and bolts business (Tr. 285), dealer-witness Sweigart ran a machine shop (Tr. 455), dealer-witnesses Jiminez and Ricci were grocers (Tr. 508–09, 614), dealer-witness Rumer operated a saw-mill and pallet factory (Tr. 844), dealer-witness Small a service station (Tr. 882), and dealer-witness Sensmeier operated a feed and grain business (Tr. 963).

[8] *E.g.*, dealer-witnesses Long, Velloney, and Betts each sold one gallon (Tr. 366, 1005, 1061) and dealer-witnesses Hixson, Jiminez, Sensmeier, Williams, Boudreaux and Gelston sold none (Tr. 411, 526, 973–80, 1189, 1289, 1361).

[9] Pages 120–135 of the initial decision recount at length the testimony of nine dealer-witnesses concerning their experiences with respondents' salesmen and respondents' products.

the merits of Aqua-Chek. He placed a piece of aluminum, allegedly painted with Aqua-Chek, in muriatic acid to show that the acid did not affect the paint. He produced a piece of cinderblock half painted and a half unpainted, on which he placed drops of ink which sank into the unpainted portion of the brick but which just beaded and remained on the surface of the painted portion. He next put an aspirin supposedly treated with respondents' product in a cup of water and the aspirin did not dissolve. He also engaged in further demonstrations purportedly showing the water-proof and fire-resistant nature of Aqua-Chek paint. As a result of this, Mrs. Hixson purchased $982.80 of respondents' Aqua-Chek paint and executed a Special Dealership Agreement (CX 28), under which she became a franchised dealer of respondents' product.

After receiving shipment of the paint, Mrs. Hixson and her husband painted their cement garage floor with Aqua-Chek. Prior to painting, the couple cleaned and scrubbed the floor with muriatic acid, a strong solution used in cleaning radiators. They hoped the painting would prevent grease from sinking into the cement floor. After the Aqua-Chek had been applied and had dried, Mrs. Hixson and her husband poured some oil and grease on it "to see if it would wipe up, and it just smeared on like there was nothing on the floor." (Tr. 412). Thermochemical refused to accept return of the paint.

Respondents contend that the testimony of the dealer-witnesses was insufficient to justify the conclusion that misrepresentations of respondents' salesmen were anything more than isolated acts insufficient to justify an order. We find that, to the contrary, the evidence not only is sufficient to warrant issuance of an order, but demonstrates a clear pattern of misconduct by respondents' salesmen. We also find no merit in respondents' contention that the misrepresentations of their salesmen were unauthorized by respondents. Even if such assertions had been proven, it would not have excused the misrepresentations of respondents' salesmen, nor relieved respondents from their responsibility therefor. *Parke, Austin, & Lipscomb, Inc.* v. *Federal Trade Commission,* 142 F. 2d 437, 439–40 (2d Cir. 1944), *cert. denied,* 323 U.S. 753.

Respondents also object to certain specific provisions of the order as not being supported by the evidence. We find no merit in any of these objections, which we treat below.

Respondents contend that there is no basis for the examiner's finding that respondents' products "are not suitable for use on the inside of a building" because there was no testimony that respondents' products were less effective for one type of painting than another. However, the label on respondents' Aqua-Chek paint, which was not seen by dealers prior to purchase, states that the product is "for exterior surfaces" (see CX 58) and the president of Pur-All Paint Company, which manufacturers the products sold by respondents, testified that the product Vivilume was to be used only on exteriors and then primarily for decorative purposes (Tr. 2034–36). Nevertheless, respondents' salesmen represented these products to prospective dealers as suitable for both interior and exterior use.[10]

Respondents also contend that the representation that one coat of its products would cover satisfactorily was not false despite the testimony of the dealer-witnesses that they were unable to achieve satisfactory one-coat coverage with respondents' products.[11] Respondents assert that one-coat coverage will be sufficient if their products are "properly applied to surfaces of normal porosity." Testimony to that effect was given by employees of the company which manufactures respondents paints, who were called by respondents as expert witnesses. This testimony did not support the representations made by respondents' salesmen, who failed to indicate to prospective franchise dealers that any unusual care was required to obtain satisfactory one-coat coverage with respondents' products. Nor could any subsequent qualifications by respondents cure these initial misrepresentations. *Carter Products, Inc.* v. *Federal Trade Commission,* 186 F. 2d 821, 824 (7th Cir. 1951).

Respondents' position is not enhanced by the testimony of one of their expert witnesses concerning the physical exhibit prepared by him purporting to show that one coat of respondents' products, properly applied, would cover satisfactorily (RX 15). The witness recognized that, on that exhibit, a board painted in several colors, the portion painted in white is poorly covered. He testified that such unsatisfactory results were to be expected

[10] Sweigart, Tr. 461; Ricci, Tr. 616; Mohler, Tr. 827; Bell, Tr. 905; Sensmeier, Tr. 972; Betts, 1065, 1069; Hatcher, Tr. 1124; Boyd, Tr. 1320; Best, Tr. 1544; Cepar, Tr. 1590; Krueger, Tr. 1614–15.

[11] Damewood, Tr. 166; Roberts, Tr. 260 (3 coats unsatisfactory); Jiminez, Tr. 520; Rumer, Tr. 863 (application of two coats to an exterior surface was washed off by first subsequent rain; water soaked into coat applied to floor) Rhode, Tr. 945–47; Velloney, Tr. 1012; Betts, Tr. 1074 *et seq.*; Boudreaux, Tr. 1292–93; Boyd, Tr. 1324–26, 1329–30 (boat still leaked after application of four coats by witness); Hockenberry, Tr. 1565; Krueger, Tr. 1614.

when one used the white paint sold by respondents or any other white paint. (Tr. 2090–91) However, there is no evidence that such important qualifications as to the coverage of respondents' white paints were made by respondents at any time, nor have respondents asserted that such qualifications were made.

Respondents also object to the finding that respondents have represented Thermochemical to be a division or subsidiary of Union Carbide or General Electric. Respondents note that the examiner relied only on the testimony of two dealer-witnesses in reaching that finding, thus implying that this was the only testimony to that effect. In fact, at least eleven dealer-witnesses testified that it was represented to them that respondents had some affiliation or association with either or both of these large, well-known companies, or with the Aluminum Company of America.[12] Contrary to respondents' argument, such misrepresentations were not cured by respondents' practice of subsequently informing new franchise dealers, in telephone conversations recorded by respondents, that respondents' only connection with the General Electric Company or any other company was that General Electric had developed the silicones which are used in respondents' paint products. The law is violated if the first contact or interview is obtained by deception; respondents cannot escape responsibility for the initial misrepresentation by later qualification thereof. *Progress Tailoring Co.*, v. *Federal Trade Commission*, 153 F.2d 103 (7th Cir. 1946).[13] Indeed, the pains taken by respondents to place these subsequent statements to new dealers on record indicates respondents' awareness that earlier misrepresentations probably had been made by their salesmen.[14]

Respondents further contend that there was insufficient evidence to support the finding that it was falsely represented to franchise dealers that they were selected for interviews on the basis of territorial surveys, and the finding that respondents mis-

[12] Damewood, Tr. 161; Keeling, Tr. 287, 301; Sweigart; Tr. 457; Ricci, Tr. 642–44; Lucas, Tr. 741–42, 763; Mohler, Tr. 822; Rumer, Tr. 855–56; Sensmeier, Tr. 965; Williams, Tr. 1188; Reese, Tr. 1248–49, 1284; Boyd, Tr. 1320.

[13] The fact that some witnesses could not remember whether the exact word used by respondents' salesmen to describe the alleged relation of Thermochemical to larger companies was "subsidiary" or "division" does not support respondents' argument that the testimony of those witnesses was therefore "vague, careless and unobjective." It is not the exact words used, but the impression made by respondents' representation which is vital here. *Cf. Newton Tea & Spice Co.* v. *United States*, 288 Fed. 475, 479 (6th Cir. 1923).

[14] The employee of respondents who makes this statement in telephone communications with new dealers testified that the statement is made, in unvarying form, to each dealer whose purchase order is received in Thermochemical's office. (Tr. 2166, 2170–72).

represented the potential profits that franchise dealers could reap by selling respondents' products. As to the supposed surveys, respondents do not deny the testimony of dealer-witnesses that such representations were made by respondents' salesmen [15] and they do not contend that the alleged surveys were in fact made. Respondents simply assert that there is insufficient evidence to show that such surveys were not actually made. Respondents state that the examiner gave too much weight to the testimony of two long-time employees of Thermochemical that they had no knowledge of such surveys being made. However, we can find no compelling reason to interfere with the examiner's decision in this regard. Respondents also allege that they were denied the opportunity to prove that such surveys were made because the examiner did not allow proffered testimony by the president of Thermochemical to show that salesmen are trained and instructed to make surveys. Such evidence, however, would have been insufficient to absolve respondents from responsibility for misrepresentation by their salesmen as to surveys. *Federal Trade Commission* v. *Parke, Austin & Lipscomb,* 143 F. 2d 437, 439–40 (2d Cir. 1944), *cert. denied,* 323 U.S. 753. Respondents "are engaged in the business of selling, not conducting surveys and there is no evidence that they have ever conducted a legitimate survey in the past or intend to in the future." *Consumer Sales Corp.* v. *Federal Trade Commission,* 198 F. 2d 404, 408 (2d Cir. 1952), *cert. denied,* 344 U.S. 912 (1953).

As to the representation of potential profits, the record is replete with the testimony of dealer-witnesses that respondents' salesmen represented that substantial profits would be made by franchise dealers.[16] Respondents have not shown or offered to show any foundation which would support these representations, or made any showing of the profits actually made by any of respondents' dealers.[17]

[15] O'Shea, Tr. 210; Keeling, Tr. 287; Boyd, Tr. 1319, 1353; Carter, Tr. 1472; Garrison, Tr. 1506; Hockenberry, Tr. 1562. The representation that prospective dealers were selected on the basis of surveys showing them to be good outlets for the sale of respondents' products must also be considered in light of the fact that most of the prospects approached by respondents were not engaged in businesses which one would expect to be retailing paint. See note 7, *supra.*

[16] *E.g.,* Sweigart, Tr. 466 ($4,000 a year profit); Hamilton Tr. 667–68 ($6,000 a year profit); Silsby, Tr. 789 ($4,000 to $5,000 a year profit); Rumer, Tr. 845 ($10,000 a year profit); Sensmeier, Tr. 972 ($10,000 a year profit; Velloney, Tr. 1011 ($7,000 to $8,000 profit within 6 to 8 months); Barosh, Tr. 1037–38 ($5,000 to $7,000 profit a year); Hockenberry, Tr. 1562 ($8,000 to $18,000 net profit a year). Many of the dealer-witnesses, upon learning that respondents' paints would not perform as represented, found themselves unable or unwilling to sell any of the paint to the public. See note 8, *supra.*

[17] The only evidence proffered by respondents was testimony by respondent C. A. Jacobs as to: (a) what would be the profit margin of a dealer per gallon if he sold respondents' products

Respondents also complain that many of the findings of the examiner are based on the failure of respondents' paints to adhere properly, whereas the complaint did not specifically make reference to a failure of these products to adhere. However, the complaint clearly apprised respondents of the nature of the charges against them; and the examiner's findings concerning adherence are based on evidence presented throughout the record which was clearly relevant in substantiating the other allegations of the complaint. Under such circumstances, respondents cannot validly raise the questions of notice or variance. See *J. B. Williams Co., Inc.* v. *Federal Trade Commission,* 381 F. 2d 884, 888 (6th Cir. 1967); *Progress Tailoring Co.,* v. *Federal Trade Commission, supra,* 153 F. 2d at 106; *Armand Co., Inc.* v. *Federal Trade Commission,* 84 F. 2d 973, 974–75 (2d Cir. 1936), *cert. denied,* 299 U.S. 597.

Respondents allege that the examiner gave undue weight to the testimony of witnesses called by complaint counsel.[18] However, the credibility of witnesses is a matter primarily within the province of the examiner, who has heard the evidence, observed the witnesses, and lived with the case throughout the hearings. *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 496–97 (1951). We find nothing in this record which would constitute the clear error required to disturb the examiner's findings in this regard.

We have considered the other objections raised by respondents and find them to be without merit. Respondents' appeal is dismissed in all respects.

III

We turn now to the charges which were dismissed by the examiner. The complaint against respondent Wolmart was dismissed on the ground that complaint counsel failed to prove this charge by not producing any evidence showing that respondents' dealers or their attorneys were in fact deceived by the represen-

at the suggested retail price; and (b) whether a dealer who sells "good quality paint" could make money. Although such testimony, which was excluded by the examiner, would have been relevant to the issue of potential profits, respondents suffered no prejudice from the examiner's action. The proffered testimony dealt only with matters not in dispute and would not have been sufficient to rebut the evidence of complaint counsel. Respondents have not contended that there was any other evidence which would give credence to their representations concerning profits.

[18] Respondents contend that the testimony of some of the dealer-witnesses was impeached because it was brought out on cross-examination that these witnesses, prior to testifying, had seen a copy of the Commission's complaint but had not seen a copy of respondents' answer denying the violations charged in the complaint.

tation that Wolmart was the assignee of a holder in due course. In holding that such proof was required, the examiner clearly committed an error of law. A challenged practice must be judged in light of its capacity to deceive or its unfairness; it is not essential that actual injury be proved. *All-State Industries of North Carolina,* Docket 8738 (decided April 1, 1969), p. 9, n. 14 [75 F.T.S. 490].[19]

The only question of law presented as to Wolmart is whether the representations made by that company had the capacity to deceive. We believe that it is indisputable that they did. Moreover, a recounting of the manner in which Wolmart is connected with the other respondents clearly shows that Wolmart exists for the sole purpose of deceiving respondents' franchise dealers into believing that it is an innocent purchaser for value of the trade acceptances executed by Thermochemical's franchise dealers.

As earlier noted, when one agrees to become a franchise dealer for Thermochemical Products, he signs a contract designated a "Special Dealer Arrangement," which is, in effect, a purchase order. The new dealer has the option of paying for the merchandise within a specified period of time, or of paying for his purchase in installments. In most instances, installment payments are negotiated by having the dealer execute three trade acceptances. These acceptances are immediately discounted with a factoring company, with Thermochemical receiving 60 percent of the face value of the trade acceptances at the time of discount, and the remaining 40 percent being placed in a reserve account, which is retained by the factor. In the event of default on any of the trade acceptances, the amount that had been previously paid to Thermochemical is charged against the reserve account, although the paper itself is not re-endorsed or returned to Thermochemical, and the acceptances are assigned to Wolmart Discount Corporation for collection. Wolmart then brings suit in its own name against the debtor alleging that Wolmart is the assignee of a holder in due course. Wolmart never enters the picture unless default is made in the payment of a trade acceptance.

Wolmart, as a corporation, is simply a shell for the other respondents. The company has issued no stock, held no meetings, elected no directors, and apparently taken no corporate action beyond securing a certificate of incorporation. Wolmart's Secretary,

[19] See *Montgomery Ward & Co.,* v. *Federal Trade Commission,* 379 F. 2d 666, 670, 671 (7th Cir. 1967); *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission,* 143 F. 2d 676, 680 (2d Cir. 1944).

Bruce Mund, who is the only officer of the corporation, performed many services for Thermochemical and was frequently in Thermochemical's office, where an employee of Thermochemical was normally able to speak to Mr. Mund "over my shoulder." (Tr. 1791) The premises occupied by Wolmart were leased by Thermochemical, which also paid Wolmart's rent and telephone bills. (CX 139, 140, Tr. 1880–82.)[20]

Employees of Thermochemical were frequently paid by checks drawn on Wolmart.[21] In at least one instance where Wolmart had brought suit against a dealer who defaulted on payment of trade acceptances, the matter was settled after negotiations between employees of Thermochemical and an attorney for the dealer, resulting in dismissal of the suit and releases from Wolmart and Thermochemical being issued to the dealer. (Tr. 542–608; CXs 52–54.)

In sum, Wolmart must be held under our order because the company is simply a "legal fiction" whose sole purpose is "to forestall a claim made by a customer who had been a victim of the fraudulent sales plan, by pleading itself an innocent purchaser for value." *International Art Co.* v. *Federal Trade Commission,* 109 F. 2d 393, 396–97 (7th Cir. 1940), *cert. denied,* 310 U.S. 632.[22]

Respondents have argued that Wolmart should not be held because the assignee of a holder in due course is not himself a holder in due course when the assignment follows a default. The question before us, however, is not whether, under applicable State law, Wolmart is a holder in due course, but whether Wolmart's representation that it is an assignee of a holder in due course has the capacity to deceive Thermochemical's dealers into believing that Wolmart was an innocent purchaser for value of the trade acceptances. We answer that question in the affirmative.

The examiner also dismissed the charge that respondents falsely alleged that the products sold by Thermochemical are manufactured or were developed by Union Carbide, General Electric or Aluminum Company of America; he found that the "preponderance of the testimony from the dealer witnesses is to the effect that one of the companies developed the silicones of one or

[20] A former employee of Thermochemical, referred to the Wolmart office, in her testimony, as "the other office." (Tr. 1642)

[21] CXs 152–59, 181; Tr. 1547, 1739–52, 1771, 1841, 1969.

[22] The only companies other than Thermochemical for which Wolmart has collected are other corporations (now defunct) controlled by respondents Charles A. Jacobs and David Jacobs (Tr. 1899, 1935, 2230).

more of the ingredients contained in Thermochemical's products" (initial decision, p. 135;).[23] Although this finding may have been somewhat generous to respondents, we cannot say, on the basis of this record, that the examiner has misstated the preponderance of the evidence on this point. However, we disagree that such finding requires a dismissal of the charge. This charge must be considered in the context of the other misrepresentations made by respondents, especially the representation that Thermochemical is a division or subsidiary of the aforementioned companies or otherwise affiliated with them. In light of this, respondents should not be allowed any means which might be used to perpetuate misrepresentations of the kind made in the past. Few of the prospective franchise dealers approached by respondents' representatives are likely to draw any distinction between a paint containing silicones developed by General Electric and a paint developed by General Electric. There is ample precedent for the Commission to prohibit respondents from the future use of such representations, for it "is now settled that deception may be accomplished by innuendo rather than outright false statements." *Regina Corp.* v. *Federal Trade Commission,* 322 F. 2d 765, 768 (3d Cir. 1963).[24]

IV

In formulating our final order, we have modified the order entered by the examiner not only to render it fully consistent with our conclusions, but also, in light of the extent of respondents' present and past misrepresentations,[25] to frame it "broadly enough to prevent respondents from engaging in similarly illegal practices" in the future. See *Federal Trade Commission* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 395 (1965).

Respondents have, through the device of Wolmart and the use of the holder in due course doctrine, attempted to shield the misrepresentations made to franchise dealers. Although Wolmart

[23] Presumably, the examiner's reference to "one of the companies" meant General Electric, which respondents have asserted developed the silicones used in their paint products, an assertion which has not been challenged by complaint counsel; respondents have not contended that they are "connected" with General Electric in any other fashion, nor have they contended that they have any connection of any nature with Union Carbide or Aluminum Company of America. The paint products sold by Thermochemical are manufactured by the Pur-All Paint Company of Carlstad, New Jersey (Tr. 2028).

[24] "Words and sentences may be literally and technically true and yet be framed in such a setting as to mislead or deceive." *Bockenstette* v. *Federal Trade Commission,* 134 F. 2d 369, 371 (10th Cir. 1943). Respondents' representations must, like advertisements, be considered in their entirety and as they would be interpreted by those to whom they appeal. See *Ford Motor Co.* v. *Federal Trade Commission,* 120 F. 2d 175, 182 (6th Cir. 1941), *cert. denied,* 314 U.S. 688.

[25] See note 5, *supra.*

was not entitled to the rights of a holder in due course, our order would not be fully effectual if it allowed respondents to utilize the holder in due course doctrine in a different fashion to achieve the same end. Consequently, the prohibitions of our order are not limited to misrepresentations of the rights of Wolmart or any similar entity created by respondents as to negotiable paper held by that party; respondents are also required to make full disclosure on any negotiable instrument executed in connection with the sale of their products that the instrument may be assigned to a third party against which the debtor may not have the defenses available against the seller. Respondents will thereby be precluded not only from misrepresenting the rights of any subsequent possessor of negotiable paper, but also from evading the order by transferring or assigning negotiable instruments to others whose connection with respondents may be sufficiently unclear to accord them, under the applicable law, the rights of a holder in due course, unless prior notice of this possibility has been given to potential debtors.[26] Such a practice clearly would be "reasonably related" to the unfair trade practices in which respondents have engaged in the past and thus can properly be prohibited under our order. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419, 431 (1957); *Floersheim* v. *Federal Trade Commission*, 411 F. 2d 874, 878 (9th Cir. No. 22733, decided May 28, 1969); *Regina Corp.* v. *Federal Trade Commission, supra*, 322 F. 2d at 769–70.[27]

[26] Our order is also fashioned to take into account the law of any jurisdiction which may impose more stringent requirements than would our order upon transactions involving negotiable instruments executed in connection with the sale of respondents' merchandise. (At least two States have abolished the holder in due course doctrine insofar as holders of consumer paper are concerned (Mass. Gen Laws Ann. ch. 255, § 12c (1968); Vt. Stat. Ann. tit. 9, § 2455 (Supp. 1968)) and other States have restricted, in lesser fashion, the doctrine of negotiability as applied to consumer paper.) See generally Note, *A Case Study of the Impact of Consumer Legislation: The Elimination of Negotiability and the Cooling-Off Period*, 78 Yale L.J. 618, 632–37 (1969). Although these statutes apparently would not reach respondents' present practices, which normally do not involve sales at retail, we deem it appropriate to recognize the existence of such statutes in the order, since similar statutes may be interpreted as reaching transactions such as those involved here, and since there is always the possibility that respondents may change their methods of distribution and offer their products directly to the consuming public.

[27] The application of the prohibition in this case is no less appropriate than in a case involving ultimate consumers. The prospective dealers approached by respondents were small businessmen who presumed that they were dealing and would be dealing only with Thermochemical. These dealers may well have declined to execute the trade acceptances had they been given notice of the manner in which respondents handled these instruments. Under such circumstances, as we stated in *All-State Industries of North Carolina, Inc.*, Docket 8738, decided April 1, 1969, p. 15 [75 F.T.C. 493]:

In the words of the Supreme Court in another context, "It would seem a gross perversion of the normal meaning of the word, which is the first criterion of statutory construction, to hold that the method is not 'unfair' " *F.T.C.* v. *Keppel*, 291 U.S. 304, 313 (1934).

Our order, like that entered by the examiner, prohibits respondents from engaging in the illegal conduct of the past not only in connection with paint and paint products, but also in connection with the sale of any other merchandise or franchise in commerce. In light of the present and past conduct of respondents, any order less broad would not adequately serve the public interest.[28] The limitations which the order places on respondents' freedom of action are not undue; respondents "must remember that those caught violating the Act must expect some fencing in." [29]

FINAL ORDER

This matter has been submitted to the Commission on the cross-appeals of complaint counsel and respondents from the initial decision of the hearing examiner filed on December 11, 1968. The Commission has rendered its decision denying respondents' appeal and granting complaint counsel's, and adopting the findings of the hearing examiner to the extent they are consistent with the opinion accompanying this order. Other findings of fact and conclusions of law made by the Commission are contained in that opinion. For the reasons therein stated, the Commission has determined that the order entered by the hearing examiner should be modified and, as modified, adopted and issued by the Commission as its final order. Accordingly,

It is ordered, That the respondents Thermochemical Products, Inc., a corporation, and its officers, and respondents Jeannette Vine and Beatrice Freeman, also known as Beatrice Jacobs, individually and as officers of said corporation, and Charles A. Jacobs and David Jacobs, individually and as managers of said corporation, and Wolmart Discount Corporation, a corporation, and its officers, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of any paint or paint products or coatings or franchises in connection

[28] Should respondents at some future time embark upon a course of conduct so wholly different from their past and present modes of operation that the Commission's order may prove inappropriate or unduly burdensome, they may utilize the procedure provided by Section 3.72(b)(2) of the Commission's Rules for moving to reopen and modify the order in light of such changed conditions. See *Consumer Sales Corp.* v. *Federal Trade Commission,* 198 F. 2d 404, 408–409 (2d Cir. 1952), *cert. denied,* 344 U.S. 912 (1953); *P. Lorillard Co.* v. *Federal Trade Commission,* 186 F. 2d 52, 59 (4th Cir. 1950); *General Transmissions Corp. of Washington,* Docket 8713 (issued February 23, 1968), p. 11 [73 F.T.C. 427].

[29] *Federal Trade Commission* v. *National Lead Co.,* 352 U.S. 419, 431 (1957), citing *United States* v. *Crescent Amusement Co.,* 323 U.S. 173, 187 (1944).

therewith, or any other articles of merchandise or franchises, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

(a) Respondents are a subsidiary of, a division of, or are affiliated with Union Carbide Company, General Electric Company or Aluminum Company of America or any other corporate entity; or misrepresenting, in any manner, respondents' trade or business connections or affiliations;

(b) Any of respondents' products were manufactured or developed, in whole or in part, by any of the aforementioned companies or misrepresenting, in any manner, the company or organization which developed or manufactured, in whole or in part, any of the products manufactured or sold by the respondents.

2. Representing, directly or by implication, that respondents' products are guaranteed, unless the nature, conditions and extent of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed and further, unless all such guarantees are in fact fully honored and all the terms thereof fulfilled.

3. Representing, directly or by implication, that:

(a) Dealers selling respondents' products will earn any stated gross or net amount; or representing, in any manner, the past earnings of dealers, unless in fact the past earnings reported are those of a substantial number of dealers and accurately reflect the average earnings of these dealers under circumstances similar to those of the dealer to whom the representation is made;

(b) Respondents' dealers may return any unsold merchandise or that respondents will transfer unsold merchandise to other dealers;

(c) A survey has been made of the territory in which a prospective dealer is located for the purpose of ascertaining the sales potential of said territory;

(d) Respondents will send a representative to contact prospective customers of their dealers, or erect billboards and other displays, or furnish newspaper

mats free of charge, or prepare suitable mailings on the dealer's letterhead; or misrepresenting, in any manner, the assistance which will be given the dealer in making sales of the product purchased.

4. Representing, directly or by implication, that:

(a) Respondents' products are waterproof or will cause any surface to which they are applied to become waterproof or misrepresenting, in any manner, the characteristics and capabilities of respondents' products and the manner in which respondents' products will perform;

(b) Respondents' products are suitable for use on the interior of a structure; or misrepresenting, in any manner, the uses for which respondents' products are suitable;

(c) One or more coats or applications of respondents' products is sufficient to achieve or to produce any result other than that which normally is attained by such action.

5. Representing, directly or by implication, that:

(a) Any respondent is a holder in due course, or is entitled to the rights of a holder in due course, of any negotiable instrument executed in payment for a sale of respondents' products;

(b) Any person, firm, or corporation controlled by, or affiliated with, Thermochemical Products, Inc., or any other person, firm, or corporation controlled by, or affiliated with, the individual respondents, jointly or severally, is a holder in due course, or is entitled to the rights of a holder in due course, of negotiable paper executed in payment of products purchased from respondents.

6. Using the trade name Wolmart Discount Corporation, or any other name or names other than the names of payees or actual creditors, in seeking to collect any notes, trade acceptances or other instruments of indebtedness or other accounts receivable.

7. Failing to reveal, clearly and conspicuously, to the debtor, respondents' identity, when any other names are used by respondents or their agents in the sale of merchandise and collection of any notes, trade acceptances or other instruments of indebtedness or accounts receivable in connection therewith.

8. Participating in any plan or arrangement whereby others may falsely allege to be holders in due course, or entitled to the rights of a holder in due course, of negotiable instruments arising out of the sale of merchandise by respondents or services performed for respondents.

9. Failing to disclose orally prior to the time of sale, and in writing on any trade acceptance, promissory note or other instrument of indebtedness executed by a purchaser of respondents' products, and with such conspicuousness and clarity as is likely to be observed and read by such purchaser:

(a) The disclosures, if any, required by the federal law or by the law of the state in which the instrument is executed;

(b) Where negotiation of the instrument to a third party is prohibited or otherwise limited under the law of the state in which the instrument is executed, that the negotiation or assignment of the trade acceptance, promissory note or other instrument of indebtedness to a finance company or other third party will not cut off any rights or defenses that the purchaser may have under the contract;

(c) Where negotiation of the instrument to a third party is not prohibited by the law of the state in which the instrument is executed, that the trade acceptance, promissory note or other negotiable instrument may, at the option of the seller and without notice to the purchaser, be negotiated or assigned to a finance company or other third party;

(d) Where the law of the state in which the instrument is executed does not preserve as against any holder of the instrument all of the legal and equitable defences the purchaser may assert against the seller, that in the event the instrument is negotiated or assigned to a finance company or other third party, the purchaser may have to pay to such finance company or other third party the full amount due under his contract whether or not he has claims against the seller for defects in merchandise, nondelivery or the like.

It is further ordered, That the respondent corporations shall forthwith distribute a copy of this order to each of their operating divisions and to all present and future salesmen or other per-

sons engaged in the sale of respondents' products or services, and shall secure from each such salesman or other person a signed statement acknowledging receipt of said 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 of their compliance with this order.

IN THE MATTER OF

LIFE ELECTRONICS CORPORATION, INC., DOING BUSINESS AS LITE ELECTRONICS INC., ETC., ET AL.

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

Docket C-1566. Complaint, July 28, 1969—Decision, July 28, 1969 *

Consent order requiring a Washington, D.C., television repair shop to cease deceptively guaranteeing and misrepresenting the nature of its services, misrepresenting rebuilt parts as new, and making deceptive pricing and percentage savings claims.

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 Life Electronics Corporation, Inc., a corporation, trading and doing business as Lite Electronics, Inc., and Lite Radio & TV Repair, and Andrew C. Neidinger, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Life Electronics Corporation, Inc., is a corporation, trading and doing business as Lite Electronics, Inc., and Lite Radio & TV Repair, and is organized, existing and doing business under and by virtue of the laws of the District of Col-

* Modified by Commission's order of Sept. 1, 1970, by adding a new paragraph numbered 11 which forbids respondents from failing to maintain adequate records upon which its prices and savings to customers are based.

umbia, with its principal office and place of business located at 2012 14th Street, N.W., in Washington D.C.

Respondent Andrew C. Neidinger is an individual and an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and service of new, used and rebuilt televisions, radios, phonographs, and parts thereof to the public at retail.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, and appliances left in their care for repair, to be shipped from their place of business in the District of Columbia to purchasers of such merchandise and service located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise and service in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their merchandise and service, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in telephone directories, newspapers of general interstate circulation and radio broadcasts of which the following are typical and illustrative, but not all inclusive thereof:

TV SERVICE

[picture of television set]

GUARANTEED WORK
14 years serving Washington area—We repair all makes
U.S. & FOREIGN--1 YEAR GUARANTEE
$3.00 HOME CALLS
PICTURE TUBES
21"—15.95 23"—24.95 GUAR. 1 YR.
LITE TV 2012 14th St. N.W., to 9 p.m. HO 2-4410

17 Years Serving Washington Area—Quick Reasonable Service—Member T E S A—Most Sets Repaired in Home by Expert Technicians.

Save 40% On Over The Counter Sales Picture Tubes—Used TV.

TVs—Used $30 $40 $50 $60 Clearance Sale.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, the respondents have represented, and are now representing, directly or by implication that:

1. Merchandise sold by respondents or repair services performed by respondents are unconditionally guaranteed for a period of one year.

2. The $3 fee for service of television sets in the customer's home is the total charge that said customer will have to pay to receive home repair service.

3. Most consumers requesting service of television sets in their homes will be able to have such sets repaired in their homes without incurring the inconvenience and expense of removing the set to the repair shop for service.

4. The advertised picture tubes are new.

5. During the period of the advertised "Clearance Sale" or other words of similar import and meaning, the advertised price of the used television sets represents a reduction from the price at which respondents have made a bona fide offer to sell or have sold said sets on a regular basis for a reasonably substantial period of time in the recent, regular course of their business.

6. Purchasers of used televisions and picture tubes will realize a savings of 40% off the actual price that such merchandise was offered for sale or sold by respondents in good faith for a reasonably substantial period of time in the recent, regular course of their business.

PAR. 6. In truth and in fact:

1. Merchandise sold by respondents or repair services performed by respondents are not unconditionally guaranteed for a period of one year. Such guarantees as may be provided are subject to numerous conditions and limitations not disclosed in respondents' advertising. Furthermore, respondents have failed to disclose in their advertising the nature and extent of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder.

2. Respondents charge recipients of home service of television sets $12.50 for an estimate of repair costs. The advertised $3 fee arises only in an insignificant number of instances when the customer requests repair of the television set without first asking for an estimate of repair costs.

3. Most television sets repaired by respondents must be removed from customers' homes to receive the necessary service and in only isolated instances will customers obtain complete repair of their television sets in their homes.

4. The advertised picture tubes are not new, but are rebuilt or reconditioned picture tubes.

5. During the period of the advertised "Clearance Sale" or other words of similar import and meaning, the advertised price of any used television set did not represent a reduction from the price at which respondents have made a bona fide offer to sell or have sold said sets on a regular basis for a reasonably substantial period in the recent, regular course of their business.

6. Purchasers of used televisions and picture tubes will not realize a savings of the advertised percentage amount from the actual price at which such merchandise was offered or sold in good faith by respondents for a reasonably substantial period of time in the recent, regular course of their business.

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

PAR. 7. In the course and conduct of their business as aforesaid, respondents have engaged in and are now engaging in the following unfair and deceptive acts and practices:

1. Upon completion of repair service, respondents guarantee the workmanship performed and any parts replaced for a specified period of time. However, in a number of instances respondents have failed to honor, or have unduly and unreasonably delayed in honoring requests for further service as provided in said guarantee.

2. It is respondents' policy to inform customers who tender appliances for repair that said appliances will be repaired within a specified period of time. Respondents, however, in some instances have failed to complete the repairs within the stated period of time.

PAR. 8. 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 merchandise and service of the same general kind and nature as that sold by respondents.

PAR. 9. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices as had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' merchandise and service by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of respondents, as herein alleged, 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 commerce and unfair and deceptive acts and practices in 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 respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further

conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Life Electronics Corporation, Inc., is a corporation trading and doing business as Lite Electronics, Inc., and Lite Radio & TV Repair, and is organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its office and principal place of business located at 2012 14th Street, NW., Washington, D.C.

Respondent Andrew C. Neidinger is an officer of said corporation and his address is the same as that of said corporation.

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

It is ordered, That respondents Life Electronics Corporation, Inc., a corporation, trading and doing business as Lite Electronics, Inc., and Lite Radio & TV Repair, or under any other name, and its officers, and Andrew C. Neidinger, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, distribution and service of new, used and rebuilt televisions, radios, phonographs, and parts thereof or other articles or merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that respondents' merchandise or appliances repaired by respondents are guaranteed, unless the nature, conditions and extent of the guarantee, identity of the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed in immediate conjunction therewith, and unless all such guarantees are in fact honored and the terms thereof promptly fulfilled.

2. Representing, directly or by implication, the price of repair service of television sets or of other appliances, unless in conjunction with the advertised price for said service, respondents clearly and conspicuously disclose the nature and scope of the service rendered for the advertised price.

3. Representing, directly or by implication, that respondents can service and repair most television sets or other appliances in the customer's home; or otherwise misrepresenting the extent to which respondents can provide in-home repair service.

4. Representing, directly or by implication, that any rebuilt or reconditioned picture tube is new.

5. Failing to disclose in invoices, warranties and advertising of rebuilt or reconditioned picture tubes that such picture tubes are rebuilt or reconditioned and contain used parts.

6. Using words "Clearance Sale" or any other word or words of similar import and meaning unless the price of such merchandise being offered for sale constitutes a reduction, in an amount not so insignificant to be meaningless, from the actual bona fide price at which such merchandise has been offered or sold by respondents for a reasonably substantial period of time in the recent, regular course of their business and respondents' business records establish the price at which such merchandise has been offered or sold by respondents for a reasonably substantial period of time in the recent, regular course of their business.

7. Using the word "Save" or any other word or words of similar import and meaning in conjunction with a stated percentage amount of savings, unless the stated percentage amount of savings actually represents the difference between the offering price and the actual bona fide price at which such merchandise has been sold or offered for sale on a regular basis to the public by respondents for a reasonably substantial period of time in the recent, regular course of their business.

8. Falsely representing, in any manner, that savings are available to purchasers or prospective purchasers of respondents' merchandise or services; or misrepresenting in any manner the amount of savings available to purchasers or prospective purchasers of respondents' merchandise or services at retail.

9. Failing to provide repair service within the period of time respondents inform customers that said service will be completed, unless respondents obtain from such customers a signed statement permitting completion of the repair service

beyond the time period originally specified by respondents: *Provided however,* If customers do not agree to delay in completion of service, respondents will promptly return articles left for repair to customers without cost and in the same condition such articles were in when left for repair with respondents.

10. Failing to honor guarantees within thirty (30) days after respondents receive a request for service under said guarantees, unless respondents obtain a signed statement from customers permitting respondents to comply with the provisions of the guarantees beyond the aforesaid time period:

Provided however, If respondents do not obtain such agreements from customers, respondents will:

A. Refund all monies received in the purchase of items of merchandise under guarantees; or

B. Refund all monies received for repairs of appliances under guarantees; or

C. In instances when respondents have not received monies under the situations described in Subparagraphs A and B hereof, respondents will return all appliances received for repair under guarantees in the same condition the appliances were in when left for repair with respondents.

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

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

IN THE MATTER OF

CHEMETRON CORPORATION

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 7 OF THE CLAYTON ACT

Docket C-1567. Complaint, July 28, 1969—Decision, July 28, 1969

Consent order prohibiting a Chicago, Illinois, manufacturer of arc welding apparatus from acquiring any manufacturer or distributor of arc or gas

welding equipment for a period of 10 years without prior Commission approval.

COMPLAINT

The Federal Trade Commission having reason to believe that Chemetron Corporation has violated the provisions of Section 7 of the Clayton Act, as amended, (15 U.S.C. Section 18) by its acquisition of the Welding Products Division of Harnischfeger Corporation, and therefore pursuant to Section 11 of said Act, it issues this complaint, stating its charges in that respect as follows:

I. *Definitions*

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

(a) *Arc Welding Apparatus:* Arc Welding Machines Components, and Accessories, Except Electrodes, SIC product codes 36231 11–35; Arc Welding Electrodes, Metal, SIC product codes 36232 11–53. In addition, arc welding apparatus is to include the following accessories within SIC product code 36231 98: arc torches, automatic welding heads, semiautomatic welding guns and standard positioners.

II. *Chemetron Corporation*

2. Respondent, Chemetron Corporation, "Chemetron" is a corporation organized and existing under the laws of the State of Delaware, with its principal office and place of business located at 840 N. Michigan Avenue, Chicago, Illinois.

3. Chemetron ranks three hundred and sixteenth (316) among all industrial corporations in the United States (1967 figures) with total sales of $235 million in 1967. Chemetron's 1967 sales of arc welding apparatus were twenty-two million dollars ($22,000,000), accounting for 10% of total sales, ranking it fifth among all manufacturer-sellers of arc welding apparatus, with a market share of approximately 7%.

By 1967, Chemetron's net income was $16 million and its total assets were $209 million.

4. In 1968, Chemetron ranked as the fifth largest manufacturer-seller of arc welding apparatus with an approximate market share of 7%. Chemetron sold arc welding apparatus manufactured by its Alloy Rods Division and its All States Welding Al-

loys Co. (a subsidiary). Chemetron's proprietary interest in the Alloy Rods Division and All State Welding Alloys Co. is a result of two acquisitions consummated during the last seven years. Prior to these two acquisitions Chemetron did not manufacture arc welding apparatus.

5. Prior to the acquisition of the Welding Products Division of Harnischfeger, Chemetron purchased substantial quantities of arc welding apparatus from Harnischfeger and sold these products through Chemetron's extensive distribution system.

6. Chemetron's distribution system services its entire line of welding apparatus and welding related products (welding gases, gas welding apparatus). Chemetron has 400 distributors throughout the United States who sell and service its welding apparatus and related products.

7. Chemetron is amongst the nation's five hundred (500) largest industrial corporations, with assets in excess of two hundred million dollars ($200,000,000).

8. Prior to the acquisition, the Welding Products Division of Harnischfeger Corporation sold arc welding apparatus to other corporations, many of whom were potential or actual competitors of Chemetron in the distribution and sale of such products.

9. At all times relevant herein, Chemetron purchased, sold and shipped products in interstate commerce, and was engaged in "commerce" within the meaning of the Clayton Act.

III. *Welding Products Division of Harnischfeger Corporation*

10. Harnischfeger Corporation is a corporation organized and existing under the laws of the State of Wisconsin with its principal office and place of business at 4406 West National Avenue, Milwaukee, Wisconsin.

11. Prior to January 6, 1969, the Welding Products Division of Harnischfeger Corporation was engaged in the manufacture and sale of arc welding apparatus. Its manufacturing facilities were located at Monticello, Indiana; Leola, Pennsylvania; Charlottesville, Virginia; and Esconaba, Michigan. Sales of its products were made throughout the United States. In 1967, the Welding Products Division had sales of $25 million, with a net loss of $750,000.

12. At all times relevant herein, the Welding Products Division of Harnischfeger Corporation purchased, sold and shipped products in interstate commerce and was engaged in "commerce" within the meaning of the Clayton Act.

IV. *Trade and Commerce*

13. The welding apparatus industry accounted for total sales of $500 million in 1967. Welding apparatus consists of three major subdivisions: arc welding apparatus, gas welding apparatus and resistance welding apparatus. In 1958, industry sales of all welding apparatus were $290 million.

14. Sales of arc welding apparatus account for the largest single share of the total sales of welding apparatus in the United States. In 1967, sales of arc welding apparatus accounted for 70% of all sales of welding apparatus in the United States.

15. The market for arc welding apparatus is highly concentrated. In 1967, the top four firms engaged in the manufacture and sale of arc welding apparatus accounted for 70% of total sales in the market and the top eight firms 90% of the total sales in the market. Few firms have entered this industry in the past 10 years.

16. The manufacture and sale of arc welding apparatus constitutes a line of commerce, since the apparatus has peculiar characteristics and uses and is designed for specific functions that cannot be performed by other types of welding apparatus.

V. *Violation of the Clayton Act*

17. On January 6, 1969, Chemetron acquired the assets of the Welding Products Division of Harnischfeger Corporation in exchange for cash in excess of seven million dollars ($7,000,000) and seventy-five thousand (75,000) shares of convertible preferred shares of Chemetron, convertible into common shares not less than two years from date of issue.

VI. *Effects of the Acquisition*

18. The effect of the acquisition of the Welding Products Division of Harnischfeger Corporation, as described above, may be substantially to lessen competition or to tend to create a monopoly in the manufacture and distribution of arc welding apparatus throughout the United States or portions thereof in violation of Section 7 of the Clayton Act, as amended, in the following ways, amongst others:

(a) Substantial competition, both actual and potential, has been or may be eliminated between Chemetron and the Welding Products Division of Harnischfeger Corporation in the manufacture and distribution of arc welding apparatus.

(b) Substantial competition both actual and potential, has been eliminated between Chemetron and other actual or potential purchasers of arc welding apparatus from Harnischfeger's Welding Products Division.

(c) Harnischfeger's Welding Products Division has been eliminated as a competitor from the arc welding apparatus market.

(d) Concentration in the arc welding apparatus industry has been or may be substantially increased to the detriment of actual or potential competition.

(e) Other acquisitions in the arc welding apparatus industry may be encouraged or stimulated, thus multiplying the competitive impact of the acquisition challenged herein.

VII. *The Violation*

19. The acquisition by Chemetron of the Welding Products Division of Harnischfeger Corporation as herein-above alleged constitutes a violation of Section 7 of the Clayton 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 Bureau of Restraint of Trade proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of Section 7 of the Clayton 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 and 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 Section 7 of the Clayton Act, as amended, 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Chemetron Corporation 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 840 North Michigan Avenue, in the city of Chicago, State of Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent.

ORDER

I

It is ordered, That, for a period of ten (10) years from the date this Order becomes final, Chemetron Corporation (hereinafter referred to as "Chemetron") a corporation, through its officers, directors, agents, representatives and employees shall cease and desist from acquiring, without prior approval of the Federal Trade Commission, directly or indirectly, through subsidiaries or otherwise, the whole or part of the stock, share capital or assets of any concern, engaged in the business of manufacturing, distributing or selling in the United States arc and gas welding apparatus as herein defined. Arc or gas welding apparatus shall include all products enumerated by the 1967 Census of Manufacturers (Numerical List of Manufactured Products Bureau of the Census) within the following Standard Industrial Classification (SIC) Code Numbers: *Arc Welding Machines Components, and Accessories, Except Electrodes,* SIC product codes 36231 11–35; *Arc Welding Electrodes, Metal,* SIC product codes 36232 11–53; *Welding Apparatus, Except Electric,* SIC product code 35483 25 (Gas Welding Apparatus). In addition, arc welding apparatus is to include the following accessories within SIC product code 36231 98: arc torches, automatic welding heads, semiautomatic welding guns and standard positioners; and gas welding apparatus is to include such other nonelectric welding equipment as is within SIC product code 35483 29.

The prohibition of acquisitions contained in the above paragraph of this Order shall include but not be confined to the entering into of any arrangement between Chemetron and any concern

engaged in the manufacture, distribution or sale of arc or gas welding apparatus (see above paragraph) pursuant to which Chemetron acquires the market share, in whole or in part, of such concern in any of the above-mentioned product lines (a) through such concern discontinuing the manufacture, distribution or sale of arc or gas welding apparatus (see above) under its own trade name or labels and thereafter distributing such products under Chemetron's trade name or labels or (b) by reason of such concern discontinuing the manufacture, distribution or sale of such products and thereafter transferring to respondent customer lists or in any other way making available to Chemetron access to customers or customer accounts.

Nothing in this Section shall require prior approval of an acquisition of the stock or assets of a concern, corporate or noncorporate, when that concern is a distributor offering for sale arc welding apparatus and/or gas welding apparatus (as herein defined in the body of this order) purchased from Chemetron and (a) the acquired concern has gross annual sales of arc and/or gas welding apparatus not in excess of two hundred and fifty thousand dollars ($250,000): *Provided,* That the number of such acquisitions shall be limited to three (3) or (b) whose financial condition is such that it is unable to pay its current obligations when due, and for both (a) and (b) above, respondent shall divest its ownership interest in such distributor(s) within a period not in excess of three (3) years from the date(s) of such acquisition(s).

It is further ordered, That Chemetron Corporation shall notify the Commission at least 90 days prior to the consummation of any merger or acquisition wherein Chemetron acquires any part of the assets or stock or any other ownership of any enterprise engaged in the manufacture, distribution or sale of *Resistance Welding Apparatus* (*Resistance Welders, Components, Accessories and Electrodes,* SIC product codes 36233 13–81) and engaged in commerce in the United States.

It is further ordered, That Chemetron shall within sixty (60) days following the effective date of this order, and at such further times as the Commission may require, submit a verified report in writing to the Federal Trade Commission setting forth in detail the manner and form in which it intends to comply, is complying or has complied with this prohibition on acquisitions.

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

IN THE MATTER OF

HILCO HOMES CORPORATION

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

Docket C-1568. Complaint, July 28, 1969—Decision, July 28, 1969

Consent order requiring a Philadelphia, Pa., housing and building contractor to cease using bait tactics, false advertising, and deceptive pricing representations, and failing to disclose that settlement and other costs are to be borne by the purchaser of its houses.

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 Hilco Homes Corporation, 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 Hilco Homes Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business formerly located at 70th Street off Essington Avenue, in the city of Philadelphia, State of Pennsylvania, with present address 7320 Old York Road, Philadelphia, Pennsylvania.

PAR. 2. Respondent has engaged in the manufacturing, advertising, offering for sale, sale, distribution and construction of houses, garages, other structures, and other products to the public.

PAR. 3. In the course and conduct of its business, respondent caused its products, when sold, to be shipped from its place of business in the State of Pennsylvania to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of its aforesaid business, and for the purpose of inducing the purchase of its products, respond-

ent has made numerous statements and representations in newspaper and magazine advertisements, advertising circulars and other promotional material and in the oral representations made by its representatives, agents or employees with respect to the nature of its offer, the terms and conditions of sale, financing requirements, degree of completion, and other characteristics of its products.

Typical and illustrative of the statements and representations in said advertising and promotional material, but not all-inclusive thereof, are the following:

We'll custom-build your dream home
* * * and lend you the money to buy it!
100% completed
HILCO HOMES
start as low as
$69
per month on your lot
(25 year mortgage)

(Picture of Winston Model)

Ask us about the Hilco
"Pitch-in-Plan" that
lets you have a dream
home for as little as
$49 a month on your lot

NO DOWN PAYMENT * * * NO CLOSING OR SETTLEMENT COSTS
LONG-TERM PERMANENT FINANCING * * * if you own your own lot

PAR. 5. By and through the use of the aforesaid pictures, statements and representations, and others of similar import and meaning, but not specifically set out herein, and in the oral statements and representations of its representatives, agents or employees, respondent has represented, directly or by implication, that:

1. The offer set forth in said advertisement was a genuine and bona fide offer to sell houses of the kind therein illustrated and described at the price and on the terms and conditions therein stated.

2. A house of the kind illustrated and described was offered for sale at $69 per month under a 25-year mortgage.

3. A house of the kind illustrated and described was offered for sale at $49 per month on a "Pitch-in-Plan" basis.

4. A 100% complete, custom-built house of the kind illustrated and described was offered for sale for the monthly payments and

under the prices, terms and conditions stated; and that respondent's other houses were custom-built and 100% completed when purchased.

5. Respondent offered a house of the kind illustrated and described and respondent's other houses at the price and on the terms and conditions stated, to the owner of an unimproved lot or parcel of real estate upon which said house is to be built.

6. A house of the kind illustrated and described and respondent's other houses were sold and financed without the payment of closing or settlement cost.

7. A house of the kind illustrated and described and respondent's other houses were sold and financed without a downpayment or other initial payment of money.

PAR. 6. In truth and in fact:

1. The offer set forth above was not a genuine or bona fide offer to sell houses of the kind illustrated and described in the said advertisement and at the prices and on the terms and conditions stated. Said offer was made for the purpose of obtaining leads as to persons interested in the purchase of respondent's products. After obtaining such leads, respondent's dealers or representatives, called upon such prospective purchasers or negotiated with such purchasers in the offices or places of business of respondent, and dealers or representatives, and at such times and places made no effort to sell the houses at the prices and on the terms and conditions stated but induced such purchasers to purchase their houses at higher monthly payments and under terms and conditions different from the stated terms and conditions.

2. A house of the kind illustrated and described was not offered for sale for $69 per month under a 25-year mortgage. Respondent sold a different and less expensive house for the stated monthly amount and in few, if any, instances offered a mortgage for 25 years. Respondent failed to disclose and quote the terms involved in the purchase of the house illustrated and described.

3. A house of the kind illustrated and described was not offered for sale for $49 per month on a "Pitch-in-Plan" basis. Respondent offered to sell a different and less expensive house for said amount, and failed to disclose the terms involved in the purchase of the house illustrated on the said "Pitch-in-Plan" basis.

4. A 100% complete, custom-built house of the kind illustrated and described was not offered for sale at the prices, terms and conditions stated. The illustrated and described house could not

be purchased at the prices, terms and conditions stated and the house which could be purchased under the prices, terms and conditions stated was a prefabricated incomplete house and did not include all of the various items normally included in a completed home such as landscaping, driveways, walks, water, sanitation systems, and an oven in an otherwise equipped kitchen.

Generally, respondent's houses were not 100% complete when purchased but were incomplete houses which required additional items and fixtures at extra cost to the purchaser thereof which fact respondent failed to reveal.

5. Respondent did not offer a house of the kind illustrated and described or respondent's other houses at the prices and on the terms and conditions stated to owners of unimproved lots or parcels of real estate upon which the houses were to be constructed. Respondent required that said lot or real estate parcel be improved in certain respects and otherwise meet certain requirements imposed by the respondent before it could be used to meet respondent's requirements for purchasing and financing said houses.

6. A house of the kind illustrated and described or respondent's other houses were not sold and financed without the payment of settlement or closing costs. Respondent collected a substantial settlement or closing cost by inclusion thereof in the mortgage and/or purchase contract obligations, and failed to disclose the inclusion of such amount to the purchaser.

7. A house of the kind illustrated and described and respondent's other houses were not sold and financed without the requirement of a downpayment. In those transactions involving the purchase of respondent's houses through financing provided or arranged by respondent, the lending institution utilized by respondent obtained equitable title to the purchaser's lot or parcel of real estate together with the additions and improvements thereto by virtue of the execution of a mortgage thereon in favor of said lending institution by said purchaser, which title was in fact considered and accepted as said equity or security to constitute a downpayment on respondent's house, and a future initial payment in a substantial amount was required of a purchaser at the time of the execution of the purchase agreement.

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

PAR. 7. By and through the use of the aforesaid acts and practices, respondent placed in the hands of others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the acts and practices hereinabove alleged.

PAR. 8. In the conduct of its business, and at all times mentioned herein, respondent has been in substantial competition, in commerce, with corporations, firms and individuals in the sale of products of the same general kind and nature as those sold by the respondent.

PAR. 9. The use by respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing 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. 10. 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 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.

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 Deceptive Practices 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 thirty (30) days, now in further conformity with the procedure described in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Hilco Homes Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its principal place of business located at 7320 Old York Road, Philadelphia, Pennsylvania.

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 Hilco Homes Corporation, a corporation, and its officers, and respondent's agents, representatives, and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution or construction of houses, or other structures, or products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading or deceptive statements or representations are made in order to obtain leads or prospects for the sale of houses or other products.

2. Making representations purporting to offer houses or other products for sale when the purpose of the representation is not sell the offered house or other product but to obtain leads or prospects for the sale of other houses or other products.

3. Representing, directly or by implication, that any houses or other products are offered for sale when such offer is not a bona fide offer to sell such houses or other products.

4. Representing, directly or by implication, that houses or other products are offered for sale for certain prices or on

stated terms, conditions or financing arrangements unless fully applicable and available with respect thereto; or misrepresenting in any manner the prices, terms, conditions and financing arrangements for respondent's houses or other products.

5. Illustrating or describing a higher-priced home in conjunction with the price of a lower-priced home.

6. Failing to quote and to disclose in advertising and promotional material the price of an illustrated or described home with equal size and conspicuousness as the price quoted for any other home.

7. Representing, directly or by implication, that respondent's houses which are not 100% complete or custom-built are 100% complete or are custom-built.

8. Failing to disclose, clearly and conspicuously, in advertising and promotional material, that respondent's houses which are incomplete homes are incomplete homes.

9. Quoting prices, terms or conditions in advertising which does not include all of the features of the house or other products illustrated or described.

10. Representing, directly or by implication, that respondent's offers are made available to owners of lots or parcels of real estate without clearly and conspicuously revealing any requirements, conditions or limitations applicable to said property such as but not limited to value, location, size or improvements.

11. Representing, directly or by implication, that houses or other products may be purchased without downpayment, settlement or closing costs, or other initial payment.

12. Failing clearly and conspicuously to disclose and separately to designate both orally and in contracts of sale or contracts of purchase or papers which list the charges of respondent's products, the amounts of the downpayment, settlement charges, closing costs, or other initial payment.

13. Furnishing any advertising and promotional material, brochures, or mailings, suggested sales talks and presentations, contracts of sale or contracts of purchase, or any other means of similar import whereby the public may be misled or deceived as to any of the matters prohibited by this order.

14. Failing to deliver a copy of this order to cease and desist to all respondent's present and future salesmen or other persons engaged in the sale of respondent's products or services, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

15. Failing, after the acceptance by the Commission of respondent's initial report of compliance, to submit to the Commission on June 1st of each of the succeeding three years a report: (1) describing every complaint involving the acts and practices prohibited by this order received by respondent from or on behalf of their customers during the 12 months preceding the date of the report; (2) setting forth the facts uncovered by respondent in connection with the investigation made of each such complaint; and (3) stating the action taken by respondent with respect to each such complaint.

It is further ordered, 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

TECHNICAL EDUCATION CORPORATION, ET AL.

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

Docket C-1569. Complaint, July 29, 1969—Decision, July 29, 1969

Consent order requiring a St. Louis, Mo., data processing school to cease using deceptive offers of employment, misrepresenting that it is connected with International Business Machines Corporation, that it is State licensed, that its aptitude test is adequate to measure the student's ability, that the opportunity to enroll is limited, and failing to disclose all of the terms and conditions at the time of enrollment.

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 Automation Training, Inc., a recently merged corporation absorbed by

Technical Education Corporation, which surviving corporation and C.R. Johnson, individually and as an officer thereof, are hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Technical Education Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 5701 Waterman Boulevard, in the city of St. Louis, State of Missouri.

On February 1, 1969, Technical Education Corporation acquired all of the shares of Automation Training, Inc., issued and outstanding. On the same date, said corporations entered into a Joint Plan of Merger and Agreement of Merger, with Technical Education Corporation to be the surviving corporation. The certificate of merger was thereafter issued by the Secretary of State of Missouri on March 3, 1969. Technical Education Corporation has continued to advertise, offer for sale, sell and distribute courses of study and instruction represented to prepared students thereof for employment in the field of data processing, said courses being the same as or similar to those advertised, sold and distributed by Automation Training, Inc. Technical Education Corporation occupies the premises formerly occupied by Automation Training, Inc.

Respondent C.R. Johnson is an individual and officer of Technical Education Corporation and was an officer of Automation Training, Inc. He formulates, directs and controls the acts and practices of Technical Education Corporation and formulated, directed and controlled the acts and practices of Automation Training, Inc., including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent, Technical Education Corporation.

References hereinafter to the acts and practices of respondents shall be deemed to include the acts and practices of Automation Training, Inc., the merged corporation.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of courses of study and instruction represented to prepare students thereof for employment in the field of data processing. Said courses are pursued in part by correspondence through the

United States mails and in part by in–residence training at respondents' place of business in St. Louis, Missouri.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, the correspondence portion of their courses, when sold, to be shipped from their place of business in the State of Missouri to purchasers thereof located in various other States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said courses in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, as aforesaid, respondents have caused to be published in newspapers distributed through the United States mails and by other means to prospective purchasers in the States in which respondents do business, advertisements of which the following were typical and illustrative, but not all inclusive:

UNUSUAL OPPORTUNITY
MEN-WOMEN
TRAINEES URGENTLY NEEDED
IBM Machine Training
Persons selected can be trained
in a program which need not
interfere with present job. If
you qualify training can be financed. Write today, please
include home phone and age.
AUTOMATION TRAINING
Box—in care of this paper.

MEN-WOMEN
You Can
Qualify to
Push This
Button
IBM
Automation
TRAINEES
NEEDED!
For IBM Machine Operation
Computers
Programmers, etc.
Persons selected can be
trained in a program which
need not interfere with pre-
sent job. If you qualify
training can be financed.

Write today, please include
home phone and age.
For information Write
AUTOMATION TRAINING
Box — in care of this paper.

PAR. 5. By and through use of the statements and representations appearing in the advertisements set forth in Paragraph Four hereof and others similar thereto but not set forth therein, respondents have represented directly or by implication, that inquiries are solicited for the ultimate purpose of offering employment to qualified applicants who will be trained to operate various types of data processing equipment manufactured or distributed by the International Business Machines Corporation, or "IBM" as it is popularly known.

PAR. 6. In truth and in fact, inquiries are not solicited for the ultimate purpose of offering employment to qualified applicants, but are solicited for the sole purpose of obtaining leads to prospective purchasers of respondents' courses of instruction.

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

PAR. 7. In the course and conduct of their business, as aforesaid, respondents cause prospective purchasers of their courses to be visited by respondents' salesmen or representatives. In the course of their sales presentations to prospective purchasers, said salesmen or representatives have made many statements and representations, directly or by implication, concerning respondents, their school and their courses. Some of said representations have been made verbally by respondents' salesmen or representatives. Others have appeared in brochures and other printed material furnished by respondents to their salesmen or representatives and exhibited to prospective purchasers of respondents' courses. Respondents' salesmen or representatives have reiterated and reaffirmed the statements and representations appearing in the brochures and other printed material.

Among and typical, but not all inclusive of such statements and representations are the following:

1. Respondents or their school are sponsored by, approved by or affiliated with IBM.

2. Respondent Automation Training, Inc., has been licensed or registered, and thereby approved, in all States requiring licensing or registration and, therefore, has been found by all such states

to possess the resources necessary to provide training of the quality needed to attain the objectives claimed for its courses.

3. Persons who complete respondents' courses are guaranteed or assured of employment in the positions for which they have been trained.

4. A student who passed respondents' qualification test was thereby determined to possess the aptitude and ability to successfully complete respondents' course and attain the advertised objectives of the course.

PAR. 8. In truth and in fact:

1. Neither respondents nor their school are sponsored by, approved by or have any connection with IBM other than to provide training in the operation of data processing equipment manufactured or distributed by IBM.

2. Respondent Automation Training, Inc., was not licensed or registered in every state requiring licensure or registration at the time the representations were made.

Further, in many of the States wherein respondent Automation Training, Inc., or respondents' salesmen or representatives may be licensed or registered, the licensing or registration procedures do not include approval of a school or the quality of the training it offers. The granting of a license or registration in those states does not constitute a finding by the state authorities that respondents possess the resources necessary to provide training of the quality needed to attain the objectives claimed for their courses.

3. Persons who complete respondents' courses are not guaranteed or assured of employment in the positions for which they have been trained, or in any position.

4. The test used by respondents was inadequate to measure the aptitude or ability of a prospective student to successfully complete respondents' course and attain the advertised objectives of the course. A student who passed such test was not, therefore, determined to possess the aforesaid aptitude or ability.

Therefore, the statements and representations as set forth in Paragraph Seven hereof were false, misleading and deceptive.

PAR. 9. In the further course and conduct of their aforesaid business, respondents have engaged in the following unfair and deceptive acts and practices:

1. For the purpose of obtaining leads to prospective purchasers of their courses, respondents send or cause to be sent, to high

school seniors and recent high school graduates in the States of the United States wherein respondents do business, double post cards which bear an invitation to the recipient to return the reply portion of the card to respondents to receive a free booklet on "your future in IBM" which will be furnished "without cost or obligation." Said booklets are delivered to persons requesting them by respondents' sales representatives who, upon delivering the booklets, immediately undertake to enroll said persons in one or more of respondents' courses. No disclosure is made in advance of the sales representative's visit that he will call.

During the course of their sales presentation and for the purpose of inducing an immediate decision to enroll in respondents' home study courses, respondents' sales representatives have represented to prospective students and their parents that if the student is not enrolled during the sales representative's visit the opportunity to enroll will be lost. In truth and in fact, respondents have not refused to enroll students who may choose to enroll in respondents' home study courses subsequent to a visit by respondents' sales representatives.

By failing to clearly inform prospective students and their parents in advance thereof, that a sales representative will call upon them and by misleading prospective students and their parents into believing that the students must enroll in respondents' home study courses at the time of the sales representative's visit or lose the chance to enroll, respondents deprive, and have deprived, prospective students and their parents of the opportunity to properly evaluate respondents' home study courses and to make a fully informed determination of the advisability of enrolling in such courses.

2. Respondents' data processing school is accredited by the National Home Study Council and the National Association of Trade and Technical Schools, both of which require accredited schools to permit enrolled students to discontinue training at any time up to 180 days after the enrollment is accepted. The aforesaid policies provide that a student, upon giving such notice is as required, is entitled to discontinue training and receive a partial refund or adjustment in his obligation to the school. Respondents advise students of the existence of such policies only when a student insists upon discontinuing training despite repeated efforts by respondents to persuade and induce the student to continue his training and pay the tuition in full.

3. When students have agreed to pay their tuition in installments, respondents cause such accounts to be referred to a designated agency. The agency advises those students that it will handle the payments and that payments are to be made to the agency, not the school. Persons receiving notification of such referral are led to believe that their accounts have been assigned to a third party and are thereby induced to continue payments rather than to insist upon discontinuing their enrollments.

Therefore, the statements, representations and practices as set forth in (1), (2) and (3) preceding have been unfair, false, misleading and deceptive.

PAR. 10. 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 engaged in the sale of courses of study and instruction covering the same or similar subjects.

PAR. 11. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were true and into the purchase of substantial quantities of respondents' courses and into the payment therefor by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, have been all to the prejudice and injury of the public and of respondents' competitors and have constituted 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.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; 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 complaint to issue herein, 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 considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Technical Education Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 5701 Waterman Boulevard, in the city of St. Louis, State of Missouri.

Respondent C.R. Johnson is an officer of said corporation and his address is the same as that of said corporation.

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

It is ordered, That respondents Technical Education Corporation, a corporation, and its officers, and C.R. Johnson, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of courses of study and instruction in the field of data processing or any other subject in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

(1) Representing, directly or by implication, that employment is being offered when the real purpose of such offer is to obtain leads to prospective purchasers of respondents' course.

(2) Representing, directly or by implication, that respondents or their school are sponsored by, approved by or have any connection with the International Business Machines

Corporation (IBM) other than to provide training or instruction in the operation of equipment manufactured or distributed by IBM; or misrepresenting, in any manner, the status or affiliation of respondents, their school or their sales representatives.

(3) Representing, directly or by implication, that respondents' school is licensed or registered in any state unless it is so licensed or registered and unless in immediate connection with such representation respondents clearly and conspicuously disclose the meaning, if any, of such licensing or registration; or misrepresenting, in any manner, the import or effect of licensing, registration or any other action by a state or other jurisdiction.

(4) Representing, directly or by implication, that persons who complete respondents' courses are guaranteed or assured of employment in the positions for which they have been trained; or misrepresenting, in any manner, the ability, efforts or facilities of respondents or their placement service for assisting persons completing respondents' courses in obtaining employment.

(5) Representing, directly or by implication, that an aptitude or other test is adequate to measure the aptitude or ability of an enrollee to successfully complete respondents' course and attain the advertised objectives of the course unless such test is based upon established personnel testing practices in the data processing field; or misrepresenting, in any manner, the selectivity exercised by respondents in enrolling students in their courses or the qualifications which students must possess to be accepted for enrollment.

(6) Representing, directly or by implication, that a prospective student may enroll in respondents' home study courses only at the time of the visit by respondents' sales representative or that if the student is not enrolled at the time the opportunity to enroll will have been lost; or misrepresenting, in any manner, that the opportunity to enroll in respondents' courses is limited.

(7) Inviting or obtaining inquiries concerning respondents' courses from prospective students without clearly informing such persons reasonably in advance thereof that respondents' sales representatives will call upon them and seek to enroll them in one of respondents' courses.

(8) Failing to:

(a) Furnish to prospective students at time of enrollment a printed statement clearly and conspicuously disclosing (1) the exact terms and conditions under which a student may discontinue his or her enrollment prior to completion of the course in which enrolled and (2) such refund of money, if any, or other adjustment that respondents will make in the obligation of the student who requests withdrawl or discontinuance in accordance with respondents' terms and conditions therefor.

(b) Set forth the disclosures required by (a) preceding clearly and conspicuously in and as a part of the enrollment application or such documents as may be executed by prospective purchasers of respondents' courses.

(c) Require their sales representatives or other persons who visit prospective purchasers of respondents' courses and solicit their enrollments in respondents' courses to orally inform and advise prospective purchasers of the information required to be disclosed by (a) and (b) preceding.

(d) Clearly and conspicuously disclose to prospective purchasers of respondents' courses prior to enrollment that the collection of student accounts may be undertaken by a designated agency but that such action does not affect such rights to discontinuance or affirmative defenses as the student may have.

(9) Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' courses; and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

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

It is further ordered, That 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.

Complaint

IN THE MATTER OF

NEW HOME SEWING CENTER, ET AL.

Complaint

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

Docket 8769. Complaint, Nov. 14, 1968—Decision, Aug. 5, 1969

Order requiring an Allentown, Pennsylvania, retailer of sewing machines and other products to cease using bait advertising, false pricing and savings claims, fictitious contests and other deceptive practices in the sale of its merchandise.

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 New Home Sewing Center, a partnership, and Harry Epstein and Dennis W. Hart, individually and as copartners trading and doing business as New Home Sewing Center, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent New Home Sewing Center is a partnership comprised of the following named individuals who formulate, direct and control the acts and practices hereinafter set forth. The principal office and place of business of said partnership is located at 2117 North Belmont in the city of Allentown, State of Pennsylvania. Formerly, the principal office and place of business of said partnership were located at 400 South Market Street, in the city of Wilmington, State of Delaware.

Respondents Harry Epstein and Dennis W. Hart are individuals and copartners trading and doing business as the New Home Sewing Center with their principal office and place of business located at the above-stated address in Allentown, Pennsylvania. Formerly, their principal office and place of business were located at the above-stated address in Wilmington, Delaware.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of sewing machines and other products to the public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have

caused, their products, when sold, to be transported from their place of business in the State of Pennsylvania and from their former place of business in the State of Delaware, to purchasers thereof located in various States of the United States other than the state of origination, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products, the respondents have made and are now making, numerous statements and representations in advertisements inserted in newspapers with respect to the kind, quality, prices, terms and conditions of sale of their products.

Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

Repossessed Automatic
Singer Zig-Zag Sewing Machine
Cabinet model, 5 mo. old Sews on buttons, makes button holes & fancy stitches. No attachments needed.
UNPAID BALANCE $49.50
or take over low monthly payments of $5 mo.
Call Home Credit Dept. TR 6-9010

* * * * * * *

A CABINET MODEL 1966 SINGER

Zig-Zag. 3 positions. Fancy stitch, darns, makes button holes, monograms, appliques, sews on buttons, Slightly used, 5 year PART & SERVICE GUARANTEE. Now only $51.10 pay 8 dn., $5 month. HOME SEWING CREDIT DEPT., 656 2595.

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with oral statements and representations of their salesmen and representatives, the respondents have represented, and are now representing, directly or by implication:

1. Through the use of the phrases and words "Repossessed," "unpaid balance," "Balance," "take over low monthly payments" and other words and phrases of similar import, that sewing machines, partially paid for by a previous purchaser, have been repossessed and are being offered for sale for the unpaid balance of the purchase price.

2. That their principal business is that of lending money or providing credit to purchasers of merchandise, and buying, selling or otherwise dealing in commercial paper incident to the purchase of merchandise on credit.

3. That they are making a bona fide offer to sell repossessed sewing machines, as described in said advertisement, for reason of default in payment by the previous purchaser and on the terms and conditions stated.

PAR. 6. In truth and in fact:

1. Said products are not repossessed sewing machines being offered for the unpaid balance of the original purchase price.

2. Respondents' principal business is not that of lending money or providing credit to purchasers of merchandise or of buying, selling or otherwise dealing in commercial paper incident to the purchase of merchandise on credit. Respondents are engaged in the business of retailing sewing machines and other products to the public.

3. Respondents are not making bona fide offers to sell repossessed sewing machines on the terms and conditions stated; but said offers are made for the purpose of obtaining leads as to persons interested in the purchase of sewing machines. After obtaining leads through response to said advertisements, respondents or their salesmen call upon such persons but make no effort to sell said advertised sewing machines. Instead, they exhibit sewing machines which are in such poor condition as to be unusable or undesirable, and disparage the advertised product to discourage its purchase, and attempt, and frequently do, sell much higher priced sewing machines.

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

PAR. 7. In the course and conduct of their business and for the purpose of inducing the purchase of their products, the respondents hold an ostensible "drawing" in which persons are invited to register their names and addresses for the chance to win a free sewing machine and other prizes. Participants in said drawing then receive further promotional material by mail. Typical and illustrative, but not all inclusive of the statements and representations made in said registration blanks and followup material, are the following:

FREE FREE FREE

No.____

WIN A ZIG-ZAG SEWING MACHINE

Name _____

Address _____

City _____Phone _____

This stub entitles you to a chance to win a new Zig-Zag Sewing Machine. In addition to 1st prize, second prizes will be awarded.

☐ I own a machine at present. How old? _____

☐ I would like to have a new Zig Zag Sewing Machine.

If I were to buy a machine in the event I did not win, I would be available for a demonstration at this time: Day_____Time_____

NEW-HOME SEWING CENTER

CONGRATULATIONS:

Your name was selected in our SECOND AWARD GROUP in our DRAWING AT THE FAIR.

Enclosed is your $100.00 SECOND AWARD GROUP CERTIFICATE which may be applied toward the purchase of a NEW HOME sewing machine or our ELECTRO HYGIENE vacuum cleaner.

For example our brand new Automatic Zig Zag Sewing machine console that sells at	$165.95
LESS your award	100.00
IS YOURS FOR ONLY	65.95

PAR. 8. By and through the use of the aforementioned statements and representations, by oral statements of respondents or their salesmen, and by other written statements of similar import and meaning but not specifically set out herein, respondents represent and have represented, directly or by implication:

1. That they conduct bona fide drawings for prizes and that recipients of said certificates have won a valuable prize through their participation in said drawing entitling them to a discount or bonus in the amount stated on the certificate, as a reduction from the price at which such products are usually and customarily sold by respondents.

2. That the higher stated price is respondents' usual and customary retail price for the designated sewing machine and that purchasers are afforded savings of the amount of said award.

PAR. 9. In truth and in fact:

1. Respondents do not conduct bona fide drawings for prizes. Their purpose in having persons register for drawings is to obtain leads to prospective purchasers of their sewing machines and other products. Purchasers do not receive an award since the

amount of the award certificate is deducted, not from respondents' usual and customary price of the product, but from a fictitious higher price; therefore, the award is illusory.

2. The higher stated price is not the respondents' usual and customary price of the designated sewing machine but is fictitious so that purchasers are not afforded savings of the amount of the award.

Therefore, the statements and representations as set forth in Paragraphs Seven and Eight hereof were and are false, misleading and deceptive.

PAR. 10. 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 sewing machines and other products of the same general kind and nature as those sold by respondents.

PAR. 11. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, 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 commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Mr. William Somers, Washington, D.C., supporting the complaint.

Mr. Harry P. Creveling, Allentown, Pa., for respondent, Harry Epstein.

INITIAL DECISION BY LEON R. GROSS, HEARING EXAMINER
JUNE 17, 1969

PRELIMINARY STATEMENT

The complaint in this proceeding, which issued November 14, 1968, charges respondents with a violation of Section 5 of the

Federal Trade Commission Act [1] in the interstate sale of sewing machines. The complaint was duly served upon respondents, and respondent Dennis W. Hart did not file an answer to the complaint as required by the Rules of Practice for Adjudicative Proceedings of the Federal Trade Commission. Respondent Dennis W. Hart is, therefore, found to be in default of an answer.

Respondent Harry Epstein, by Harry P. Creveling, Esq., filed an answer to the complaint on February 6, 1969. The answer of February 6, 1969, put in issue certain allegations of the complaint. Pursuant to notice properly served, a prehearing conference was convened before the hearing examiner on March 3, 1969, in Washington, D.C. Complaint counsel appeared at said prehearing conference. No one representing either of the respondents appeared at said prehearing conference. On March 3, 1969, the hearing examiner entered an order setting a hearing in this matter for April 14, 1969, in Wilmington, Delaware. On March 21, 1969, notice of the hearing which had theretofore been set at Wilmington, Delaware, was issued to counsel supporting the complaint, to Harry P. Creveling as attorney for respondent Harry Epstein, and to Dennis W. Hart. Said notice was duly served.

On April 14 and 15, 1969, pursuant to the notices herein-above mentioned, hearings in this matter were held in Wilmington, Delaware. No one appeared at said hearings to represent respondent Harry Epstein. Dennis W. Hart, who was then in default of an answer, appeared as a witness at said hearings in response to a subpoena issued at the request of complaint counsel. On April 15, 1969, the testimony of witnesses was completed, but the record was kept open because during the hearing Harry P. Creveling, counsel for respondent Harry Epstein, had indicated to complaint counsel by long-distance telephone that Harry Epstein desired to withdraw the answer he had theretofore filed.

On May 9, 1969, Harry P. Creveling filed in this proceeding the following motion:

> Harry Epstein, one of the Respondents in the above entitled matter by his counsel, Harry P. Creveling, Esq., respectfully petitions the Commission to withdraw Answer filed and in compliance with Subpart B, Section 3.12(2) of Part 3-Rules of Practice for Adjudicative Proceedings of the Federal Trade Commission admits all of the material allegations of the Complaint to be

[1] "Sec 5(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful."

true and reserves the right to submit proposed findings and conclusions under Section 3.46 of said Rules and the right to appeal the initial decision to the Commission under Section 3.52 of said Rules.

On May 26, 1969, respondent Harry Epstein filed herein an admission answer pursuant to Section 3.12(b)(2) of the Commission's Rules, in words and figures as follows:

Respondent Harry Epstein, by Harry P. Creveling, his attorney, hereby withdraws his answer heretofore filed herein, and, pursuant to Section 3.12(b)(2) of the Commission's Rules of Practice for Adjudicative Proceedings, admits all of the material allegations in the complaint filed herein to be true. Respondent reserves the right to submit proposed findings and conclusions under Section 3.46 of the Commission's Rules, and the right to appeal the initial decision to the Commission under Section 3.52 of said Rules.

The withdrawal by respondent Harry Epstein of his prior answer and the filing of an admission answer has had the legal effect under Section 3.12(b)(2) of the Commission's Rules of Practice of constituting a waiver of hearings as to the facts alleged in the Complaint, and said admission answer together with the complaint provides the record basis upon which the hearing examiner is filing this initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding.

Although Harry Epstein, in his admission answer, reserved the right to submit proposed findings and conclusions under Section 3.46 of the Commission's Rules of Practice, respondent Harry Epstein did not file any such proposed findings and conclusions within the time set in the hearing examiner's order of May 28, 1969, to wit, not later than June 10, 1969.

For purposes of this initial decision the record consists of the complaint issued herein, the admission answer filed by Harry Epstein and the default of Dennis W. Hart. The hearing examiner is required to make his findings of fact and conclusions of law *in haec verba* the complaint. Now, therefore, the hearing examiner makes the following

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent New Home Sewing Center was a partnership comprised of the following named individuals who formulated, directed and controlled the acts and practices hereinafter set forth. The principal office and place of business of said partnership was located at 2117 North Belmont in the city of Allentown, State of Pennsylvania. Formerly, the principal office and place of business

of said partnership had been located at 400 South Market Street, in the city of Wilmington, State of Delaware.

2. Respondents Harry Epstein and Dennis W. Hart were individuals and copartners trading and doing business as the New Home Sewing Center with their principal office and place of business located at the above-stated address in Allentown, Pennsylvania. Formerly, their principal office and place of business had been located at the above-stated address in Wilmington, Delaware.

3. Respondents for some time last past had been engaged in the advertising, offering for sale, sale and distribution of sewing machines and other products to the public.

4. In the course and conduct of their business as aforesaid, respondents caused, and for some time last past had caused, their products, when sold, to be transported from their place of business in the State of Pennsylvania and from their former place of business in the State of Delaware, to purchasers thereof located in various States of the United States other than the State of origination, and maintained, and at all times mentioned herein had maintained, a substantial course of trade in said products in commerce as "commerce" is defined in the Federal Trade Commission Act.

5. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products, the respondents made numerous statements and representations in advertisements inserted in newspapers with respect to the kind, quality, prices, terms and conditions of sale of their products.

6. Typical and illustrative of said statements and representations, but not all inclusive thereof, are the following:

Repossessed Automatic
Singer Zig-Zag Sewing Machine

Cabinet model, 5 mo. old Sews on buttons, makes button holes & fancy stitches. No attachments needed.

UNPAID BALANCE $49.50

or take over low monthly payments of $5 mo.
Call Home Credit Dept. TR 6-9010

* * * * * * *

A CABINET MODEL 1966 SINGER

Zig-Zag. 3 positions. Fancy stitch, darns, makes button holes, monograms, appliques, sews on buttons, Slightly used, 5 year PART & SERVICE GUARANTEE. Now only $51.10 pay 8 dn., $5 month. HOME SEWING CREDIT DEPT., 656 2595.

7. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with oral statements and representations of their salesmen and representatives, the respondents had represented, directly or by implication:

(a) Through the use of the phrases and words "Repossessed," "unpaid balance," "Balance," "take over low monthly payments" and other words and phrases of similar import, that sewing machines, partially paid for by a previous purchaser, had been repossessed and were being offered for sale for the unpaid balance of the purchase price.

(b) That their principal business was that of lending money or providing credit to purchasers of merchandise, and buying, selling or otherwise dealing in commercial paper incident to the purchase of merchandise on credit.

(c) That they were making a bona fide offer to sell repossessed sewing machines, as described in said advertisement, for reason of default in payment by the previous purchaser and on the terms and conditions stated.

8. In truth and in fact:

(a) Said products were not repossessed sewing machines being offered for the unpaid balance of the original purchase price.

(b) Respondents' principal business was not that of lending money or providing credit to purchasers of merchandise or of buying, selling or otherwise dealing in commercial paper incident to the purchase of merchandise on credit. Respondents were engaged in the business of retailing sewing machines and other products to the public.

(c) Respondents were not making bona fide offers to sell repossessed sewing machines on the terms and conditions stated; but said offers were made for the purpose of obtaining leads as to persons interested in the purchase of sewing machines. After obtaining leads through response to said advertisements, respondents or their salesmen called upon such persons but made no effort to sell said advertised sewing machines. Instead, they exhibited sewing machines which were in such poor condition as to be unusable or undesirable, and disparaged the advertised product to discourage its purchase and attempted, and frequently did, sell much higher priced sewing machines.

9. Therefore the statements and representations as set forth in paragraphs 6 and 7 hereof were and are false, misleading and deceptive.

10. In the course and conduct of their business and for the purpose of inducing the purchase of their products, the respondents held an ostensible "drawing" in which persons were invited to register their names and addresses for the chance to win a free sewing machine and other prizes. Participants in said drawing then received further promotional material by mail. Typical and illustrative, but not all inclusive of the statements and representations made in said registration blanks and followup material, are the following:

FREE FREE FREE

No._____

WIN A ZIG-ZAG SEWING MACHINE

Name _____

Address _____

City _____Phone _____

This stub entitles you to a chance to win a new Zig-Zag Sewing Machine. In addition to 1st prize, second prizes will be awarded.

☐ I own a machine at present. How old? _____

☐ I would like to have a new Zig Zag Sewing Machine.

If I were to buy a machine in the event I did not win, I would be available for a demonstration at this time: Day _____Time _____

NEW-HOME SEWING CENTER

* * * * * * *

CONGRATULATIONS:

Your name was selected in our SECOND AWARD GROUP in our DRAWING AT THE FAIR.

Enclosed is your $100.00 SECOND AWARD GROUP CERTIFICATE which may be applied toward the purchase of a NEW HOME sewing machine or our ELECTRO HYGIENE vacuum cleaner.

For example our brand new Automatic Zig Zag Sewing machine console that sells at	$165.95
LESS your award	100.00
IS YOURS FOR ONLY	65.95

11. By and through the use of the aforementioned statements and representations, by oral statements of respondents or their salesmen, and by other written statements of similar import and meaning but not specifically set out herein, respondents had represented, directly or by implication:

(a) That they conducted bona fide drawings for prizes and that recipients of said certificates had won a valuable prize through their participation in said drawing entitling them to a discount or bonus in the amount stated on the certificate, as a re-

duction from the price at which such products were usually and customarily sold by respondents.

(b) That the higher stated price was respondents' usual and customary retail price for the designated sewing machine and that purchasers were afforded savings of the amount of said award.

12. In truth and in fact:

(a) Respondents did not conduct bona fide drawings for prizes. Their purpose in having persons register for drawings was to obtain leads to prospective purchasers of their sewing machines and other products. Purchasers did not receive an award since the amount of the award certificate was deducted, not from respondents' usual and customary price of the product, but from a fictitious higher price; therefore, the award was illusory.

(b) The higher stated price was not the respondents' usual and customary price of the designated sewing machine but was fictitious so that purchasers were not afforded savings of the amount of the award.

13. Therefore, the statements and representations as set forth in paragraphs 10 and 11 hereof were and are false, misleading and deceptive.

14. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents had been in substantial competition, in commerce, with corporations, firms and individuals in the sale of sewing machines and other products of the same general kind and nature as those sold by respondents.

15. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

16. The aforesaid acts and practices of respondents, as herein found, 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 commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Now, therefore,

ORDER

It is ordered, That respondents New Home Sewing Center, a partnership, and Harry Epstein and Dennis W. Hart, individually and as copartners trading and doing business as New Home Sewing Center or under any other name or names and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of sewing machines or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that sewing machines or other products have been repossessed or are being offered for sale for the unpaid balance of the original purchase price: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that said advertised products actually were repossessed and offered for sale and sold for the balance of the unpaid purchase price.

2. Representing, directly or by implication, that respondents are engaged in the business of lending money or providing credit to purchasers on merchandise or of buying, selling or otherwise dealing in commercial paper incident to the purchase of merchandise on credit; or misrepresenting, in any manner, the nature or status of respondents' business.

3. Representing, directly or by implication, that any products are offered for sale when such offer is not a bona fide offer to sell said products on the terms and conditions stated; or using any sales plan or procedure involving the use of false, deceptive or misleading statements to obtain leads or prospects for the sale of other merchandise.

4. Advertising or offering any product for sale, unless the product shown or demonstrated to the prospective purchaser does in all respects conform to the representations and description thereof as contained in the advertisement or offer.

5. Disparaging, in any manner, or discouraging the purchase of any products advertised or displayed to prospective purchasers.

6. Representing, directly or by implication, that names of winners are obtained through "drawings" or by chance when all the names selected are not chosen by lot; or misrepresent-

ing, in any manner, the method by which names of contest winners are selected.

7. Representing, directly of by implication that awards or prizes are of a certain value or worth when recipients thereof are not in fact benefited by or do not save the amount of the represented value of such prizes or awards.

8. Representing, directly or by implication, that any price for respondents' products is a special price or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products have been sold in substantial quantities by respondents in the recent, regular course of their business; or misrepresenting, in any manner, the prices at which such products have been sold or offered for sale by respondents or other sellers in respondents' trade area.

9. Representing, directly or by implication, that any savings, discount or allowance is given purchasers from respondents' selling price for specified merchandise unless said selling price is the amount at which such merchandise has been sold or offered for sale in good faith by respondents for a reasonably substantial period of time in the recent, regular course of their business.

10. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

FINAL ORDER

The Commission on July 17, 1969, having issued an order staying the effective date of the decision herein, and the Commission now having determined that the case should not be placed on its own docket for review:

It is ordered, That the initial decision of the hearing examiner, filed June 17, 1969, be, and it hereby is, adopted as the decision of the Commission. Accordingly,

It is ordered, That respondents New Home Sewing Center, a partnership, and Harry Epstein and Dennis W. Hart, individually and as copartners trading and doing business as New Home Sewing Center or under any other name or names and respondents' agents, representatives and employees, directly or through any

corporate or other device, in connection with the advertising, offering for sale, sale or distribution of sewing machines or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that sewing machines or other products have been repossessed or are being offered for sale for the unpaid balance of the original purchase price: *Provided, however*, That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that said advertised products actually were repossessed and offered for sale and sold for the balance of the unpaid purchase price.

2. Representing, directly or by implication, that respondents are engaged in the business of lending money or providing credit to purchasers of merchandise or of buying, selling or otherwise dealing in commercial paper incident to the purchase of merchandise on credit; or misrepresenting, in any manner, the nature or status of respondents' business.

3. Representing, directly or by implication, that any products are offered for sale when such offer is not a bona fide offer to sell said products on the terms and conditions stated; or using any sales plan or procedure involving the use of false, deceptive or misleading statements to obtain leads or prospects for the sale of other merchandise.

4. Advertising or offering any product for sale, unless the product shown or demonstrated to the prospective purchaser does in all respects conform to the representations and description thereof as contained in the advertisement or offer.

5. Disparaging, in any manner, or discouraging the purchase of any products advertised or displayed to prospective purchasers.

6. Representing, directly or by implication, that names of winners are obtained through "drawings" or by chance when all the names selected are not chosen by lot; or misrepresenting, in any manner, the method by which names of contest winners are selected.

7. Representing, directly or by implication, that awards or prizes are of a certain value or worth when recipients thereof are not in fact benefited by or do not save the amount of the represented value of such prizes or awards.

8. Representing, directly or by implication, that any price for respondents' products is a special price or reduced price,

unless such price constitutes a significant reduction from an established selling price at which such products have been sold in substantial quantities by respondents in the recent, regular course of their business; or misrepresenting, in any manner, the prices at which such products have been sold or offered for sale by respondents or other sellers in respondents' trade area.

9. Representing, directly or by implication, that any savings, discount or allowance is given purchasers from respondents' selling price for specified merchandise unless said selling price is the amount at which such merchandise has been sold or offered for sale in good faith by respondents for a reasonably substantial period of time in the recent, regular course of their business.

10. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

It is further ordered, That respondents New Home Sewing Center, a partnership, and Harry Epstein and Dennis W. Hart, 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 the order to cease and desist.

IN THE MATTER OF

CLAIROL INCORPORATED

MODIFIED ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SEC. 2(d) OF THE CLAYTON ACT

Docket 8647. Complaint, Sept. 15, 1964—Decision, Aug. 6, 1969

The Court of Appeals, Ninth Circuit, in an opinion dated April 2, 1969, 410 F.2d 647, modified the cease and desist order dated June 24, 1966, 69 F.T.C. 1009, which prohibited a manufacturer of beauty preparations from paying discriminatory promotional allowances; the Commission, in accordance with the court's opinion, modified the order by deleting the two subparagraphs pertaining to wholesalers, and adding to each of the two remaining provisions pertaining to retail stores and beauty salons a phrase to include retailer customers who do not purchase directly from respondent.

MODIFIED ORDER TO CEASE AND DESIST

Respondent having filed in the United States Court of Appeals for the Ninth Circuit a petition to review and set aside the order to cease and desist issued on June 24, 1966 [69 F.T.C. 1009]; and the court on April 27, 1969, having entered judgment modifying said order to cease and desist and affirming and enforcing said order as so modified; and the time allowed for filing a petition for certiorari having expired and no such petition having been filed:

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

It is ordered, That respondent, Clairol Incorporated, its officers, agents, representatives and employees, directly or indirectly, through any corporate or other device, in or in connection with the offering for sale, sale or distribution of its products, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith:

1. Cease and desist from paying or contracting to pay anything of value to or for the benefit of any retailer customer engaged in the resale of respondent's hair care products to home use consumers, as compensation or consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale or offering for sale of such products, unless such payment or consideration is available on proportionally equal terms to all other retailer customers of respondent, including retailer customers who do not purchase directly from respondent, who compete with the favored retailer customer in the distribution of such products to consumers for home use.

2. Cease and desist from paying or contracting to pay anything of value to or for the benefit of any customer engaged in rendering hair care services, in the course of which such customer uses respondent's hair care products, for advertising services furnished by or through such customer in the promotion of such products, unless such payment or consideration is available on proportionally equal terms to all other beauty salon customers of respondent, including beauty salon customers who do not purchase directly from respondent, who compete

with the favored beauty salon customer in the rendering of hair care services and the use of respondent's hair care products.

IN THE MATTER OF

HOUSEHOLD SEWING MACHINE CO., INC., ET AL.

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

Docket 8761. Complaint, Apr. 30, 1968—Decision, Aug. 6, 1969 *

Order requiring an Arlington, Va., marketer of sewing machines to cease using bait and switch tactics, misrepresenting the age, model or identity of any machine, making false savings claims, using deceptive names as means to collect bills, falsely guaranteeing any of its products, using prizes or awards deceptively, failing to disclose that its sales contracts may be sold to a finance company, and failing to notify signers of sales contracts and promissory notes that such instruments may be rescinded within 3 days.

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 Household Sewing Machine Co., Inc., a corporation, and William R. Clark, individually and as an officer of said corporation, and William R. Seeger, individually and as a former officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Household Sewing Machine Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business formerly located at 910 Ninth Street, N.W., Washington, D.C., and presently located at 2420 Wilson Boulevard, Arlington, Virginia.

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* Modified by Commission's order of Sept. 1, 1970, by adding paragraph 17 to Part I which forbids respondents from failing to maintain adequate records upon which its prices and savings to customers are based.

Respondent William R. Clark is an officer of the said corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

Respondent William R. Seeger formerly was an officer and was the manager of said corporate respondent. Along with respondent Clark, he formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address was the same as that of the corporate respondent, and currently is 910 Ninth Street, NW., Washington, D.C., where he sells sewing machines for another company.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, and distribution of sewing machines to the public.

PAR. 3. In the course and conduct of their business, respondents maintained their place of business wholly within the geographical confines of the District of Columbia and for some time last past caused their said products, when sold, to be shipped from their said place of business in the District of Columbia to purchasers thereof located within the District of Columbia and in various States of the United States, and respondents still maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made various statements and representations in classified advertisements in newspapers of general circulation and in direct mail literature, of which the following are typical and illustrative, but not all inclusive thereof:

SEW MACH.—Elna Supermatic, repo.
Bal. $74.10. $6 per mo.
Dealer. Call Credit Dept., EX 3-0540
aft. 6, CH 8-4484.

* * * * * * *

SEW MACH.—Singer port. '66 w/zig-zag attach., left in layaway. Bal. $22.50. free home demo. Dealer, EX 3-0540; aft. 6, 248-4484.

* * * * * * *

SEW MACH.—Singer 66. Zig-zag & button hole, left in layaway. Bal. $27.10. Dealer. Call for free home demo. EX 3-0540 aft. 6, 248-4484.

* * * * * * *

SEW MACH.—Singer port., w/zig-zag attach., left in layaway. Bal. $24.88. Call Household Credit Dept. 393-4693 aft. 6, 248-4484.

* * * * * * *

ALL MACHINES ARE GUARANTEED AND SERVICED BY YOUR LOCAL FACTORY AUTHORIZED DISTRIBUTOR: HOUSEHOLD SEWING MACHINE CO., INC.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning not specifically set out herein, separately and in connection with the oral statements and representations of their salesmen, respondents have represented, directly or by implication:

1. That respondents are making bona fide offers to sell the advertised sewing machines on the terms and conditions stated.

2. Through the use of the figures "'66" and words or statements of similar import, that the said sewing machines are models which have been manufactured in the year 1966.

3. Through the use of the words or abbreviations "left in layaway," "repo." and "Bal.," and words or statements of similar import, that sewing machines which were partially paid for by a previous purchaser are being offered for the unpaid balance of the purchase price, affording savings in the amount paid on the merchandise by the previous purchaser.

4. Through the use of the names "Credit Dept." and "Household Credit Dept.," that their principal business is that of lending money and settling and collecting accounts.

5. That said products are unconditionally guaranteed by respondents.

PAR. 6. In truth and in fact:

1. Respondents were not making bona fide offers to sell the advertised sewing machines on the terms and conditions stated. Said offers were made for the purpose of obtaining leads as to persons interested in the purchase of sewing machines. After obtaining such leads through response to said advertisements, respondents or their salesmen called upon such persons but made no effort to sell the advertised sewing machines. Instead, they exhibited what they represented to be the advertised sewing machines which, because of their poor appearance and condition, were usually rejected on sight by the prospective purchaser. Concurrently a higher priced machine of superior appearance and condition was presented, which by comparison disparaged and demeaned the advertised product. By these and other tactics purchase of the advertised machine was discouraged, and re-

spondents through their salesmen attempted to and frequently did sell the higher priced machine.

2. The said machines were not models manufactured in the year 1966. Some of them were manufactured more than twenty years ago.

3. Said sewing machines were not partially paid for by a previous purchaser, were not being offered for the unpaid balance of the purchase price, and the represented savings were not afforded to purchasers.

4. Respondents' principal business was not that of lending money or settling or collecting accounts.

5. Said products were not unconditionally guaranteed by respondents. Such guarantee as may have been provided was subject to numerous terms, conditions and limitations which were not disclosed in the advertisements.

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

PAR. 7. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents held ostensible "drawings" in which persons were invited to register their names and addresses for the chance to win a free sewing machine and other prizes. The participants in said "drawings" later received further promotional material by mail. Typical but not all inclusive of the statements and representations made in said promotional material are the following:

CONGRATULATIONS! YOUR NAME WAS SELECTED FROM THE TICKETS TAKEN AT THE RECENT SEWING MACHINE DRAWING TO RECEIVE ONE OF THE SECOND PRIZE AWARDS. YOU HAVE WON A $50.00 DISCOUNT CERTIFICATE.

THIS CERTIFICATE ENTITLES YOU TO A BRAND NEW 1966 NEW HOME SEWING MACHINE, MODEL #103. THIS MACHINE IS NATIONALLY ADVERTISED FOR $89.95, SO WITH YOUR CERTIFICATE ALL YOU PAY IS $39.95! THIS IS AN ADVERTISING PROMOTION. ALL WE ASK IS TELL YOUR FRIENDS ABOUT YOUR NEW HOME SEWING MACHINE.

PAR. 8. By and through the use of the statements and representations set out in Paragraph Seven, by oral statements of respondents or their salesmen, and by other written statements of similar import and meaning not specifically set out herein, respondents have represented, directly or by implication, that they conduct bona fide drawings and that recipients of said merchan-

dise certificates have won a valuable prize entitling them to a discount in the amount stated on the certificate, which constituted a reduction from the price at which such products were usually and customarily sold.

PAR. 9. In truth and in fact, respondents did not conduct bona fide drawings. Their purpose in having persons register for drawings was to obtain leads to prospective purchasers of sewing machines. The recipients of such certificates did not receive a valuable prize since the amount of the award certificate was deducted not from the usual and customary price of the product but from a higher price, and consequently the prize was illusory.

Therefore, the statements and representations as set forth in Paragraphs Seven and Eight hereof were and are false, misleading and deceptive.

PAR. 10. In the course and conduct of their business, respondents have failed to disclose certain material facts to purchasers, including, but not limited to the fact that, at respondents' option, conditional sale contracts, promissory notes, or other instruments of indebtedness executed by such purchasers in connection with their credit purchase agreements may be discounted, negotiated, or assigned to a finance company or other third party to whom the purchaser is thereafter indebted and against whom defenses may not be available.

Therefore, respondents' failure to disclose such material facts, both orally and in writing prior to the time of sale, was and is false, misleading and deceptive, and constituted and now constitutes an unfair or deceptive act or practice.

PAR. 11. In the conduct of their business, at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of sewing machines of the same general kind and nature as those sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, 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 commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. William E. Barr and *Mr. Dwight H. Oglesby* supporting the complaint.

Feldman, Cole and Walsh by *Mr. J. Robert Walsh* for Household Sewing Machine Co., Inc., and *Mr. William R. Clark* and *Mr. John W. Norwood* for Mr. William R. Seeger, Washington, D.C.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER DECEMBER 20, 1968

This proceeding was commenced by the issuance of a complaint on April 30, 1968, charging the corporate respondent and the two named individual respondents, individually and as officers of said corporation, with unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act by making false and misleading representations in the sale of sewing machines. In particular, it is alleged that respondents violated Section 5 by (1) deceptive advertising of their products; (2) misrepresenting the terms and conditions of their guarantee; (3) engaging in bait and switch practices; (4) conducting bogus drawings; (5) and through failing to disclose that conditional sale contracts might be negotiated to a finance company or other third party.

After being served with the said complaint, the corporate respondent and William R. Clark filed separate answers admitting a number of the specific allegations in the complaint, but denying generally any violation of law. Respondent Clark specifically denied that he "formulated, directed or controlled the acts and practices of the corporate respondent complained of in the complaint." Respondent William R. Seeger also filed an answer admitting all the material allegations of the complaint, but denying that he formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint.

A prehearing conference was held on July 9, 1968, at Washington, D.C., to discuss the date and place of the hearing, the exchange of lists of witnesses and documents, requests for admission and the simplification and clarification of the issues. Responses to requests for admissions of fact served upon the re-

spondents by counsel in support of the complaint served to substantially narrow the factual issues in this matter. These requests and the admissions thereto were received in evidence as probative of the factual allegations. The request for admissions of fact upon respondents Household Sewing Machine Co., Inc., and William R. Clark was received in evidence as CX 35 and their responses thereto were received in evidence as CX 36 and CX 37. The request for admissions of fact upon respondent William R. Seeger was received in evidence as CX 38 and his response thereto was received as CX 39.

Hearings were held at Washington, D.C., on September 10, 12, 16, 17, 18 and 24, 1968, at which complaint counsel adduced evidence in support of the complaint. Respondents elected not to put in any defense (Tr. 508). Proposed findings of fact, conclusions of law and briefs have been submitted by complaint counsel, the corporate respondent and William R. Clark. No submissions were received from William R. Seeger. All these proposals have been considered and those proposed findings not herein adopted, either in form or in substance, are rejected as not being supported by the record or as not being necessary; and the hearing examiner having considered the entire record, makes the following findings of fact, conclusions drawn therefrom, and order.

FINDINGS OF FACT

1. Respondent Household Sewing Machine Co., Inc., is a corporation organized, existing and doing business under and by virture of the laws of the District of Columbia, with its principal office and place of business formerly located at 910 9th Street, Northwest, Washington, D.C., and presently located at 2420 Wilson Boulevard, Arlington, Virginia (Ans. par. 1). The corporate respondent was organized by respondent William R. Clark on January 3, 1966, for the purpose of selling sewing machines at retail (Adm. 1, 2, 5, 28; CX 35 and CX 36; Tr. 15, 112, 122, 142, 177).

The capital of the corporation was provided by respondent William R. Clark (Tr. 112, 142, 177). The officers of the corporation at the time of its formation were William R. Clark, president and treasurer, William R. Seeger, vice president, Mary E. Clark, wife of William R. Clark, secretary (Adm. 8, 9, 10: CX 35 and CX 36). The corporation commenced business at a store located at 910 9th Street, Northwest, Washington, D.C. (Tr. 14, 113).

Prior to January 3, 1966, the predecessor corporation Household Sewing Machine Co., Inc., incorporated under the laws of the State of Delaware, was engaged in the sale of sewing machines to the public from the same store at 910 9th Street, Northwest, Washington, D.C. (Tr. 12, 140). This business, however, was dissolved prior to the incorporation of the corporate respondent in this matter. Upon dissolution of the predecessor company, the respondent corporation purchased its assets including the good will, furniture, fixtures and inventory, and assumed the corporate name (Tr. 122, 139). The employees, but not the principals of the predecessor Household Sewing Machine Co., Inc., joined the respondent corporation upon its incorporation (Tr. 140). Among those employees of the predecessor company who joined the respondent corporation, was individual respondent herein William R. Seeger, who had been the general manager of the predecessor company and who assumed the same position in the respondent corporation (Tr. 10, 12–14).

The business of the respondent corporation from the time of its incorporation to the present, has been the selling of new and used sewing machines to the public (Adm. 28, 31; CX 35, CX 36). In the year 1967, respondent corporation sold a total of 414 sewing machines of which 297 were new machines and 117 were used machines (Adm. 34; CX 35, CX 37). The respondent corporation sells sewing machines principally through salesmen who demonstrate the sewing machines in the homes of prospective customers (Adm. 29; CX 35, CX 36). These salesmen have sold sewing machines to residents of Virginia, Maryland and the District of Columbia (Adm. 30; CX 35, CX 36). Prospective customers are solicited by advertisements placed by the corporate respondent in the classified sections of the three metropolitan newspapers (Adm. 40–45; CX 35, CX 36). The names of the prospective customers responding to the classified advertisements are turned over to salesmen of the corporate respondent who contact the prospective customers in their homes (Tr. 49, 50, 187).

The corporate respondent maintained its principal place of business at 910 9th Street, Northwest, Washington, D.C., from January 3, 1966, to December 1, 1967, when it relocated at 2420 Wilson Boulevard, Arlington, Virginia (Tr. 143, 144).

2. The individual respondent William R. Seeger participated in the daily business of the respondent corporation from the time of its incorporation in January 1966 until March 1967 (Tr. 11).

During the period of January through October 1966 he acted as general manager of respondent corporation (Tr. 11). In November 1966, he was relieved of his position as general manager by the president of respondent corporation, William R. Clark (Tr. 18, 118). Thereafter until March 1967, respondent Seeger continued in the employment of Household as a salesman (Tr. 11). Respondent Seeger was also vice president of respondent corporation from the time of its incorporation until November 1966 at which time he relinquished that title (Tr. 18, 22). Seeger at no time owned any stock of the corporate respondent although it appears that he did have an option to purchase 24 percent of the corporation stock, which he also relinquished in November 1966 (Tr. 24, 25, 118). After leaving the respondent corporation Seeger joined United Appliances, a business also engaged in the sale of sewing machines to the public, where he is now employed as general manager (Tr. 9, 10). The principal place of business of United Appliances is the former place of business of the respondent corporation at 910 9th Street, Northwest, Washington, D.C. (Tr. 10).

3. From the time of Household's incorporation in January 1966 until the relocation of its store to 2420 Wilson Boulevard, Arlington, Virginia, on December 1, 1967, the individual respondent William R. Clark did not maintain an office at Household's place of business at 910 9th Street, Northwest, Washington, D.C. (Tr. 21). Clark maintained his office at 2420 Wilson Boulevard, Arlington, Virginia, where he operated a business titled WRC Enterprises (Tr. 145, 159). After December 1, 1967, both the respondent corporation and WRC Enterprises occupied the same premises (Tr. 144–145, 153). From January 1966 until December 1967, while Household's store was located in the District of Columbia, respondent Clark participated in the conduct of Household's business through frequent visits to the store, daily telephone contacts and other activities as will be hereinafter discussed (Tr. 46, 52).

William R. Clark has continued as president and treasurer of the corporate respondent and his wife, Mary E. Clark, has continued as secretary of the corporate respondent since its incorporation (Adm. 8, 9, 10; CX 35, CX 36). Mr. Clark and his wife have been the only corporate officers of Household since William R. Seeger relinquished his position as vice president in November 1966 (Tr. 115). Mr. Clark owned 76 percent of the stock of respondent corporation from the time of its incorporation until November 1966 and now holds 80 percent of its stock (Tr. 22, 24,

118). Although Mrs. Clark has been secretary of the corporate respondent since its inception (Adm. 10; CX 35, CX 36), she has held that position in name only and has never participated in the conduct of the corporation's business in any way (Tr. 170–179). Actually no individual other than respondent William R. Clark has ever acted in the capacity of a corporate officer (Tr. 17–19, 124, 126–128, 170–179).

4. Respondent William R. Clark, in addition to being the organizer, principal stockholder, and president and treasurer of the corporate respondent, as found above, also participated directly in its management and operation. From January 1966 through November 1966, Clark regularly visited the premises of Household's store at 910 9th Street, N.W. several times a week (Tr. 46). Clark maintained daily contact with the general manager of Household by telephone (Tr. 42, 52). During these regular visits to the 9th Street store of Household, Clark conferred with respondent Seeger, the general manager, on credit, sales, promotional and advertising policies (Adm. 22, 23, 26, 27; CX 35, 36; Tr. 36–38, 53). During these visits Clark inventoried Household's sewing machines (Tr. 47), examined and routed conditional sales contracts (Tr. 46), examined invoices and bills (Tr. 46, 47), cosigned payroll checks and checks for expenses (Adm. 24; CX 35, CX 36; Tr. 46, 137, 138), disseminated information and instructions to the general manager and salesmen (Tr. 46, 48), and discussed advertising (Tr. 46). In addition, Clark maintained extensive records in the nature of sales slips, ledger books and records of leads obtained from newspaper advertisements in order to keep abreast of the daily business of Household (Tr. 51).

During his daily telephone conversations with Seeger, Clark discussed sales and financing, but the emphasis was placed upon the daily advertising (Tr. 52). Clark read each advertisement placed by respondents when it appeared in the newspapers and contacted the general manager for reports as to the number of leads obtained through specific advertisements and how many of these leads had resulted in sales (Tr. 52). Clark and Seeger composed the text of the advertisements which respondents published and all advertisements had to be approved by Clark before their publication (Tr. 53). Clark also hired, fired and demoted employees and established their salaries and rates of commission (Tr. 22, 51, 136, 137, 185).

After the corporate reorganization of Household in January 1966, Clark arranged a change in finance companies so that the

same finance company which accepted conditional sales contracts executed by WRC Enterprises, thereafter handled conditional sales contracts for Household (Tr. 38, 39). Clark also originated the "Singer '66" advertisements, hereinafter discussed, over the objection of respondent Seeger (Tr. 36–38). Clark initiated, after his takeover of the company, the sales practice of providing a gift such as Regalware, stereo sets, or sterling silver in closing a sale. The Regalware used by Household was obtained from WRC Enterprises and transported to Household's store in Clark's car (Tr. 39–40). Clark likewise implemented other sales techniques and practices in the conduct of Household's business which were common to WRC Enterprises (Tr. 42–45).

Clark devoted equal attention to routine policies of the corporate respondent, such as terms and conditions of the guarantee and special promotions, such as drawings, hereinafter discussed. In this regard, Clark proposed to limit the duration of the guarantee and imposed a service charge as an additional consideration (Tr. 45). Clark approved the drawings conducted by Household and in fact he organized the drawing conducted at Rockville, Maryland. Clark together with Seeger prepared the purported gift certificates which were sent to the participants to these drawings (Tr. 75, 80, 81; CX 2).

Clark, who is 41 years of age (Tr. 164), has been engaged in the sale of products to the public since September 1964 when he organized WRC Enterprises as a sole proprietorship upon receiving a franchise to sell Kirby vacuum cleaners (Tr. 145, 163). The method of selling Kirby vacuum cleaners utilized by WRC Enterprises through home demonstrations is remarkably similar to that employed by Household in the sale of sewing machines. Conditional sales contracts are utilized, WRC salesmen are paid on a commission basis, promotional gifts are provided customers of WRC (Tr. 159–164), and presently both Household and WRC are located at the same address and the operations of the two companies to a large degree are commingled and conducted by the same personnel (Tr. 145, 152–158). On the basis of the foregoing evidence, it is concluded that respondent William R. Clark formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter discussed and that in order to be effective any order which will issue against the corporate respondent herein must also include the individual respondent William R. Clark.

5. As hereinabove found, respondent William R. Seeger was an

officer and manager of the corporate respondent along with respondent Clark. He participated in the formulation, direction and control of the acts and practices of the corporate respondent, including the acts and practices hereinafter discussed. Seeger admitted that he participated in the organization of Household and during 1966 participated in the formulation of sales, promotion, and publicity policies of Household. As general manager, Seeger conferred regularly with Clark concerning daily business practices, advertising, credit and promotional policies of Household (Adm. 4, 7, 8, 10–13; CX 38, CX 39). Seeger, in his position as manager, instructed salesmen on sales practices and in conjunction with respondent Clark determined the selling price of sewing machines, discounts that salesmen were to allow and the commissions that salesmen were to receive (Tr. 41, 42, 48, 87–89). Respondent Seeger was primarily responsible for all of the drawings conducted by the respondent corporation and together with Clark prepared the purported gift certificates (Tr. 78, 80, 81; CX 2). Finally, the record shows that Seeger has been continually engaged in the business of selling sewing machines to the public in the capacity of either a salesman or manager of a store from 1952 to date (Tr. 10–14). As previously indicated, he is presently the manager of United Appliances which is located at the former business address of Household and engaged in the sale of sewing machines (Tr. 9, 10). In these circumstances, it is concluded that any order which will issue must also include respondent Seeger.

6. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of sewing machines to the public (Respondent Household's Ans. par. 2; see also Findings Nos. 4 and 5, *supra;* Respondent Seeger's Ans. par. 2).

7. In the course and conduct of their business, respondents from January 3, 1966, to December 1, 1967, maintained their place of business wholly within the geographic confines of the District of Columbia and during that period caused their products, when sold, to be shipped from their place of business in the District of Columbia to purchasers thereof located within the District of Columbia and in various States of the United States, and respondents still maintain and at all times mentioned herein have maintained, a substantial course of trade in their products in commerce, as "commerce" is defined in the Federal Trade Com-

mission Act (Respondent Household's Ans. par. 3). Although the corporate respondent admitted the allegations of Paragraph Three of the complaint, it denied however that it maintained a "substantial course of trade in commerce." During 1966, the respondent corporation had gross sales of $50,000 to $64,000 (Tr. 26) and sold approximately 414 sewing machines (Adm. 34; CX 35, CX 37) to residents of Virginia, Maryland and the District of Columbia (Adm. 30; CX 35, CX 36). Gross sales in 1967 were approximately $60,000 (Tr. 166). It is concluded that the foregoing establishes that the respondents have maintained a substantial course of trade in commerce as "commerce" is defined in the Act. (*Surrey Sleep Products, Inc.*, Docket No. 8695, April 3, 1968 [73 F.T.C. 523], in which sales of $5,000 per year in interstate commerce were held sufficient.)

8. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made various statements and representations in classified advertisements in newspapers of general circulation, of which the following are typical and illustrative (Household's Ans. par. 4; see Admissions 66, 67, 68, 69; CX 35, CX 36):

SEW MACH.—Elna Supermatic, repo. Bal. $74.10. $6 per mo. Dealer. Call Credit Dept., EX 3-0540 aft. 6, CH 8-4484.

* * * * * * *

SEW MACH.—Singer port. '66 w/Zig-zag attach., left in layaway. Bal. $22.50. Free home demo. Dealer, EX 3-0540; aft. 6, 248-4484.

* * * * * * *

SEW MACH.—Singer 66. Zig-zag & button hole, left in layaway. Bal. $27.10. Dealer. Call for free home demo. EX 3-0540 aft. 6, 248-4484.

* * * * * * *

SEW MACH.—Singer port., w/zig-zag attach., left in layaway. Bal. $24.88. Call Household Credit Dept. 393-4693 aft. 6, 248-4484.

In addition to the advertisements set forth above, respondents have admitted placing the following advertisements, among others, in newspapers of general circulation during the first six months of 1966:

SEW. MACH.—Singer '66 walnut console w/zig-zag. Bal. $27. Free home demo. Dealer, EX 3-0540; aft. 6, 248-4484. (Admission 70, CX 35, CX 36.)

* * * * * * *

SEW. MACH.—Singer port. '66 w/zig-zag attach., left in layaway. Bal. $24.88. Free home demo. Dealer, EX 3-0540; aft. 6, 248-4484. (Admission 71, CX 35, CX 36.)

* * * * * * *

SEW. MACH.—Singer '66 wal cons w/zig-zag. Bal. $26. Free home demo. Dealer, EX 3-0540; aft. 6, 248-4484. (Admission 72, CX 35, CX 36.)

* * * * * * *

SEW. MACH.—Singer '66 wal cons w/ZZ; Bal. $27. Free home demo. Dealer, EX 3-0540; aft. 6, 248-4484. (Admission 73, CX 35, CX 36.)

* * * * * * *

SEW. MACH.—Singer port. '66 w/zig-zag attach., left in layaway, Bal. $22.50. Free home demo. Dealer, 393-0541; aft. 6, CH 8-4484. (Admission 74, CX 35, CX 36.)

* * * * * * *

SEW. MACH.—Singer '66 wal. cons. w/ZZ; bal. $26. Dealer. Free home demo. EX 3-0540; aft. 6, 248-4484. (Admission 75, CX 35, CX 36.)

* * * * * * *

SEW. MACH.—Singer port. '66 w/zigzag attach. left in layaway. Bal. $24.88. Dealer. Free home demo. 393-0541; aft. 6, CH 8-4484. (Admission 76, CX 35, CX 36.)

* * * * * * *

SEW. MACH.—Singer port. '66 w/zig-zag attach., left in, dealer, layaway. Bal. $22.50. Free home demo. EX 3-0540 aft. 6, 248-4484. (Admission 77, CX 35, CX 36.)

* * * * * * *

SEW. MACH.—'66 Singer zig-zag auto., bal. $51.10. Call Credit Dept., EX 3-0540 aft. 6, CH 8-4484. (Admission 78, CX 35, CX 36.)

* * * * * * *

SEW. MACH.—'66 Singer zig-zag auto., bal. $51.10. Call Credit Dept., Dealer, EX 3-0540; aft. 6, CH 8-4484. (Admission 79, CX 35, CX 36.)

* * * * * * *

SEW. MACH.—'66 Singer. Walnut console. Left in layaway. Bal. $38.10. Dealer Credit Dept. EX 3-0540; aft. 6, CH 8-4484. (Admission 80, CX 35, CX 36.)

* * * * * * *

SEW. MACH. SINGER—'66 zig-zag, left in layaway. Bal. $56.40. $7 per mo. Also 1966 cabinet model, left in layaway, Bal. $47.40. Call Credit Dept. Free home demo. 393-4693 or aft. 6, CH 8-4484. (Admission 81, CX 35, CX 36.)

* * * * * * *

SEW. MACH.—'66 zig-zag machine. Buttonhole and fancy stitch, no attachment needed. Bal. $62.95, $8 per mo. Call Credit Dept. 393-0540 aft. 6, 248-4484. (Admission 82, CX 35, CX 36.)

* * * * * * *

SEW. MACH.—Singer, '66 zig-zag, left in layaway. Bal. $54.10. $7 per mo. Call Credit Dept., 393-4693 or aft. 6, CH 8-4484. (Admission 83, CX 35, CX 36.)

9. By and through the use of the statements and representations as set forth in Finding No. 8, and others of similar import and meaning, separately and in connection with the oral statements and representations of their salesmen, respondents have represented, directly or by implication, that they are making bona fide offers to sell the advertised sewing machines on the terms and conditions stated (Household's Ans. par. 5, subparagraph 1, as charged by respondents' counsel at prehearing conference; record of prehearing conference, Tr. p. 14).

10. As previously found, respondents' principal method of doing business is through home demonstrations of sewing machines by salesmen from leads phoned into respondents' store in response to the aforesaid classified ads (Tr. 50, 51, 187, 188). Six consumer witnesses [1] were called, all of whose testimony followed a similar, if not almost identical, pattern. In short, these six witnesses testified that they each saw one of respondents' classified advertisement in a newspaper. However, only one of these witnesses, Rogene Jones, was able to identify the text of the specific ad to which she responded (Adm. 67; CX 35, CX 36; Tr. 409–410). The other five could only remember the price of the sewing machine in the ad or some other aspect of the ad such as, the name of the company. But none of these five could recall the entire ad or specifically identify the text of the ad from the exhibits in evidence. In the case of all six witnesses they called the telephone number listed in the ad and as a result thereof one of respondents' salesmen came to their home in a day or so and brought with him into the house the sewing machine which had been advertised. Upon the basis of this testimony, the hearing examiner finds a sufficient nexus between the advertisement set forth in Finding No. 8 above and the testimony of the six witnesses. Moreover, inasmuch as the text of their classified advertisements was stipulated, it was not incumbent upon complaint counsel to produce the physical newsprint version of the ads or to show actual injury. Capacity to deceive as well as potential injury to consumers or competitors is sufficient. *F.T.C.* v. *Raladam Co.*, 316 U.S. 149 (1942). The hearing examiner therefore finds respondents' objection to his refusal to strike the advertisements to be without merit.

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[1] Ella May Austin, Tr. 327–335; Leroy O. Hobson, Tr. 395–403; Rogene Jones, Tr. 405–414; Mrs. William J. Murchison, Tr. 444–451; Susie L. Stanfield, Tr. 453–459; Mrs. Helen Anger, Tr. 463–472.

Each of the witnesses testified that they were attracted by the low price of the machine set forth in the advertisement and did not expect, because of the low price, a new machine (Tr. 338). However, almost without exception each of the six witnesses testified that the advertised machine appeared to be 15 or 20 years old, but that the machine "was in about as good a condition as you would expect from a machine that age" (Tr. 399). Generally the machine was a black Singer model. Some witnesses testified that the "machine was clean but it was quite old and had a few marks and scratches on it." (Tr. 399.) Another witness stated that "it was pretty well beaten up." (Tr. 410.) Another witness testified that the machine looked all right but "didn't have a cover" and that she wasn't interested in a machine without a cover (Tr. 456–457). But in all cases it appears that the machines would perform the functions detailed in the advertisements.[2] In all but one case, the witnesses unequivocally and almost immediately upon viewing it rejected the advertised machine. The one witness, Mrs. William J. Murchison who was interested in the advertised machine, however, did not actually make a definite offer to purchase it. Mrs. Murchison testified:

> Well, after I saw it, I still was interested. I was gonna buy it, but he kept talking, and he said that he had something new model. I could get one of the new model ones.
>
> I told him I would not be able to; I was not working, and I would have to see what my husband would say about it. (Tr. 448.)

Although the salesman mentioned the fact that he had a new model machine, he did not bring it into the house that day and the witness did not actually see it. The visit that day terminated on this note, as testified to by Mrs. Murchison:

> Well, after he brought the old one; first, and he told me that he has some new model one, and how they could zig-zag and sew and all that, so he said that he would bring me one of those out.
>
> I told him not to bring them out, because I wasn't working; and I would have to talk to my husband before I would be interested in getting anything. (Tr. 449.)

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[2] Brockelbank, a former salesman of respondents, testified (Tr. 192):

> Q. When you showed the Singer 66 sewing machine to your leads what was their initial reaction to it generally speaking?
>
> A. Well, they wanted to see it sew, and this was done.
>
> Q. What did they think about it generally?
>
> A. The ones—some bought them. The ones that didn't buy them were actually looking for a newer machine.

It appears from her testimony that the salesman returned the next day with the new model machine and Mrs. Murchison purchased it at that time.

In the case of the other five witnesses, after they had unequivocally rejected the first machine, the salesman would then offer to show a new New Home machine to the customer and after they agreed, he would go to his car and bring the machine in (Tr. 330, 399, 410, 456–57, 466–67). These were new machines and the witnesses almost invariably purchased them and testified on cross-examination that they were satisfied with their purchases.

On the basis of this testimony, the hearing examiner finds that no witness made a clear-cut offer to buy the advertised used machine; that no salesman made any actual or implied disparaging remarks with regard to the old used machine; and that no salesman refused to sell any of the witnesses the used machines nor is there any indication that had there been such an offer it would have been refused. As a matter of fact, as hereinabove found, respondent corporation sold 117 used sewing machines in 1967 out of a total of 414 machines or roughly 30 percent of its sales were used machines.[3] The hearing examiner further finds that no new machine was demonstrated or brought into the customer's house until the witness had first expressed in clear and unambiguous terms that they did not want to purchase the advertised used machine.

It appears that respondents' salesmen received either no commission (Brockelbank, Tr. 193) or only 10 percent (Seeger, Tr. 60) on the sale of a used sewing machine, but received an average commission of 20 percent on the sale of a new New Home Sewing Machine (Tr. 59, 194). In the absence of some showing that respondents' salesmen refused to sell a used machine whenever possible or that the number of used machines sold was insubstantial, the fact that respondents' salesmen received a smaller commission on used machines is inconclusive. Likewise, the fact that respondents did not regularly advertise new New Home Sewing Machines (Adms. 57, 59, 61–65; CX 35, CX 36; Tr. 35), but did advertise used sewing machines on a daily basis (Tr. 33), is of little significance, in the absence of a similar showing of refusal to sell or that the number of used machines sold was insubstantial.

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[3] There is some testimony in the record that "most of the used sewing machines were sold in the stores rather than through home demonstrations," although no precise figures are given (Tr. 27).

In a recent opinion involving a comparable factual situation, Chairman Dixon speaking for the Commission stated:

It is the opinion of the Commission that respondent's practice closely resembles the classic "bait and switch" technique, [citations deleted] but that there are certain deficiencies in the evidence which prevent an affirmance of the examiner's finding of a violation. In past cases, we have always found that the advertisement in question did not present a bona fide offer of sale of the product therein described. The evidence in this case fails to establish that respondent was not making a genuine effort to sell the old Singer machines. To the contrary, the evidence is consistent with the theory that the respondent was making a bona fide offer to sell these machines and that only when it became apparent that no sale of one of them could be consummated was an attempt made to demonstrate other models. There was positive testimony that respondent was in the business of selling, *inter alia*, used Singer machines. There is nothing in the record to show that respondent did not sell these machines whenever possible or that the number sold was insubstantial. Further, the evidence is silent on the question of whether or not these old machines had, as represented in the advertisements, been repossessed. Since it affirmatively appears that these machines had been reconditioned and would perform the functions detailed in the classified advertisements, there has been no showing that the advertisements were not literally correct. Although the advertisements failed to disclose a fact which might be considered material—the age of the machines—this omission standing alone is not a sufficient predicate for a finding that the offer to sell the old machines was not genuine. Moreover, as respondent points out, its salesmen did not disparage or downgrade the old machines in an attempt to "switch" the customer's interest to other models and in fact did not even offer to demonstrate other machines until after the witnesses had voluntarily expressed their displeasure with the older machines." (*In the Matter of Clarence Soles, an individual, trading and doing business as Midwest Sewing Center*, Docket No. 8602, December 3, 1964, page 3 [66 F.T.C. 1234, 1249–1250]; *Cf. In the Matter of Leon A. Tashof, trading as New York Jewelry Company*, Docket No. 8714, Dec. 2, 1968, p. 12, footnote 2 [74 F.T.C. 1388, n. 12], citing the *Midwest* case as authority for "the Commission finding illegal bait and switch".)

Accordingly, the hearing examiner finds that the allegations of subparagraph 1 of Paragraph Five of the complaint alleging that respondents were not making a bona fide offer to sell the advertised sewing machines has not been sustained and must be dismissed.

11. We now turn to subparagraphs 2, 3 and 4 of Paragraph Five of the complaint alleging specific misrepresentations affirmatively made in respondents' advertisements set forth in Finding No. 8, above.

(a) Through the use of the figures "'66" and words and statements of similar import (Admissions 67, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83; CX 35, CX 36), it is found that respondents have represented that the advertised sewing machines are

models which were manufactured in the year 1966. Although it is clear that the hearing examiner and the Commission in their expertise are capable of examining a written advertisement and determining what a reader might understand from its terms (*Zenith Radio Corporation* v. *F.T.C.*, 143 F.2d 29, 31 (7 Cir. 1944)), testimony of Mrs. Rogene Jones, a consumer witness, amply demonstrates that the use of the term "Singer '66" conveys the impression that the respondents were advertising a 1966 model Singer sewing machine (Tr. 46). In truth and in fact some of the models advertised and designated as "Singer '66" were not manufactured in the year 1966 and the use of the figures " '66" had nothing to do with the year of manufacture, but said machines were actually manufactured 15 or 20 years ago (see testimony of consumer witnesses cited in footnote 1, page 221, *supra*; see also testimony of respondent Seeger, Tr. 37, 38, and Brockelbank, Tr. 190). As indicated above, respondent Seeger opposed respondent Clark's use of this type of misleading advertising and testified as follows (Tr. 37–38):

Q. Why were you against running this particular ad?
A. It was very misleading.
Q. In what way?
A. It gives the impression that the sewing machine was a 1966 model.
Q. Were these in fact 1966 models?
A. No.
Q. What models were they?
A. Model No. 66 Singers.
Q. When were they manufactured?
A. Anywhere from 10 to 40 years ago.

(b) Through the use of the words or abbreviations "Left in layaway" (Adms. 67, 68, 69, 71, 74, 76, 77, 80, 81, 83; CX 35, CX 36), "Repo." (Adm. 66; CX 35, CX 36), "Bal." (Adms. 66–83; CX 35, CX 36) and words or statements of similar import, it is found that respondents represented that the sewing machines so advertised were partially paid for by a previous purchaser and were being offered for the unpaid balance of the purchase price thereby affording savings in the amount paid on the merchandise by the previous purchaser. In truth and in fact the merchandise so advertised by respondents had not been "Left in layaway," "Repossessed" and were not being sold for the "unpaid balance" due thereon. The investigating attorney in this matter, William S. Sanger, Jr., was called and testified that in June 1966 he interviewed respondent William R. Seeger, who was manager of Household at that time, after failing to obtain an interview with

respondent Clark (Tr. 24, 230–231). Prior to that interview, Sanger prepared typewritten copies of respondents' classified advertisements placing each ad on a single sheet of paper together with the notation of the date the advertisement ran (Tr. 270–272). As he questioned Seeger with respect to each and every one of these advertisements, he made handwritten notes of Seeger's responses (Tr. 271, 308–310, 346). At the hearing, complaint counsel originally commenced to question Sanger concerning his investigation by handing him a copy of his "Summary of Report of Interview with Mr. Seeger," a rather lengthy document (Tr. 231). Objection by respondents' counsel was made to this procedure and upon inspection of the Report of Interview by the hearing examiner it was ascertained that the Report of Interview merely contained broad general summaries in Sanger's own words of his interview with no specifics concerning the individual ads. Actually, attachments to his Report identified as Sanger Exhibit 1, pp. 1 through 88, were the sheets containing the advertisements. However, these exhibits were not included with the Report when he took the witness stand. The hearing examiner sustained the objection, but ordered the attachments to the Report of Interview *i.e.*, Sanger Exhibit 1, pp. 1 through 88, to be produced for his inspection (Tr. 288–290).

While the hearing examiner was inspecting Sanger Exhibit 1, pp. 1 through 88, which were typed copies of Sanger's original notes, Sanger produced from his briefcase the original sheets upon which were his handwritten notes (Tr. 286–287). After examining the sheets with the handwritten notes, the hearing examiner permitted Sanger to refer to these documents in order to refresh his memory while testifying.[4] In addition, the hearing examiner briefly questioned Mr. Sanger to determine the procedure he followed in interviewing Mr. Seeger. Mr. Sanger testified that at the outset of the interview he asked Mr. Seeger to produce all books and records of respondent corporation pertaining to "layaways," "repossessions," and any material showing "balance due" on such merchandise (Tr. 349, 350). Sanger further testifed that he received and examined the active layaway file and what purported to be the inactive layaway file (Tr. 350). He also testified that respondents did not have a repossession file as such, and that the only way you could tell that a machine had been repossessed was if they had entered it on a sales slip. Furthermore,

[4] In the hearing examiner's judgment these notes were reliable and probative and since they were made contemporaneously with his interview were accurate.

it was Mr. Sanger's testimony that Seeger told him that respondents very rarely repossessed any machines (Tr. 351; see also testimony of Seeger, Tr. 55, 56). It therefore was developed by the hearing examiner that before Mr. Sanger commenced questioning Mr. Seeger with respect to the specific ads he had placed on the sheets he brought with him, all of respondents' "layaway" and "repossession" records, if any, were on the table in front of him and Mr. Seeger (Tr. 351), and as he questioned Mr. Seeger concerning a specific ad all of the records in existence were readily available on the table for Mr. Seeger's use (Tr. 352).[5] To summarize, Mr. Sanger testified as follows:

By Hearing Examiner Jackson:

Q. Well, you asked him if he had his records?
A. Right, he had his records.
Q. He said all his records were there?
A. That is correct, sir.
Q. So that if there was no record he couldn't point to a record. Then we must assume that he had no such record. Is that correct?
A. That is correct, sir (Tr. 350-354).

Upon further questioning by complaint counsel, Mr. Sanger testified that the advertisement set forth in Adm. 78; CX 35, CX 36, did not in fact have a balance due of $51.10 but had been received as a trade-in (Tr. 355). Similarly, Mr. Sanger was questioned concerning the terminology used in the other advertisements run by the respondents and after consulting his sheets of paper and handwritten notes made at the time of the interview, testified concerning the use of various terms such as "layaway," "balance due," etc., contained in these ads. It is clear from Mr. Sanger's testimony that in most instances Mr. Seeger could locate no records to support the terminology "left in layaway," "repossessed" or "balance due" set forth in the various advertisements run by respondents (Tr. 362–373; see also testimony of Mr. Seeger, Tr. 55–58 corroborating the foregoing). It must be inferred that the machines so described were not in truth and fact "left in layaway," "repossessed" or had a "balance due."

(c) Through the use of the terms "Credit Department," and "Household Credit Department" (Adms. 66, 69, 78, 79, 80, 81, 82, 83, 103; CX 35, CX 36), it is found that respondents represented

[5] The hearing examiner's findings are primarily based on the fact at the time of Sanger's interview, Mr. Seeger could produce no records in support of most of the specific ads in question. Since respondents chose to put in no defense, it must be assumed that no such records exist.

in their advertisements that they operated a credit department and they they were in the business of lending money and settling and collecting accounts. In truth and in fact respondents did not maintain a "Credit Department," and were not principally engaged in the lending of money and settling and collecting accounts. Seeger testified as follows:

Q. Did Household actually have a formal credit department?
A. No.
Q. Would you explain your answer, please?
A. Well, I worked out the applications for the finance company, called them in to the finance company, etc. I had to do with credit dealings in the store. We did not have a credit department as such (Tr. 56).

It is clear from the foregoing that through the use of the terms "Credit Department" and "Household Credit Department" in their classified advertisements in the context of their advertisements and in conjunction with the terms "left in layaway," "repossessed," and "balance due," respondents represented that the sewing machines advertised were being offered at a specially reduced price because of the circumstances described.

Accordingly, the hearing examiner finds that the statements and representations contained in Paragraph Five, suparagraphs 2, 3 and 4 of the complaint, were and are false, misleading and deceptive and should be prohibited.

12. In the course and conduct of their business and for the purpose of inducing the purchase of their products, respondents have made various statements and representations in direct mail literature, of which the following is typical and illustrative:

ALL MACHINES ARE GUARANTEED AND SERVICED BY YOUR LOCAL FACTORY AUTHORIZED DISTRIBUTOR: HOUSEHOLD SEWING MACHINE CO., INC. (Ans. par. 4; Adm. 97; CX 35, CX 36, CX 2).

The above-quoted statement is made in CX 2 which is an advertising promotional scheme designed to promote the sale of respondents' sewing machines and which were sent to participants in the drawings conducted by respondents, which will hereinafter be discussed, as second place gift certificates (Adms. 86, 95–96, 97; CX 35, CX 36).

The guarantee which respondents actually provided purchasers of their products is in evidence as CX 3A–B and is the usual manufacturer's guarantee, in this instance, New Home Sewing Machine Co., Los Angeles, California (CX 3A–B; Adms. 98–99;

CX 35, CX 36; Tr. 85, 419). Seeger testified that CX 3A–B accompanied the delivery of each new New Home sewing machine sold by the respondents (Tr. 85).[6] Mr. Seeger further testified with respect to CX 3A–B as follows:

By Hearing Examiner Jackson:

Q. This is the guarantee?
A. Right, yes.
Q. That goes with the machine?
A. Yes.
Q. There is no other guarantee?
A. No. (Tr. 85–86.)

Although New Home Sewing Machine carries the Good Housekeeping Seal of Approval as represented by respondents, the record contains no evidence of any guarantee by respondents. Under these circumstances respondents have falsely represented that they were the guarantor when in truth and in fact they were not. In addition, an examination of CX 3A–B reveals that it contains numerous conditions and limitations. Inasmuch as the manufacturer's guarantee provided by respondents was subject to numerous terms, conditions and limitations which were not disclosed in respondents' advertisements, respondents have misrepresented the nature and extent of the guarantee. It is found therefore that the failure of respondents in their advertisements to correctly disclose the identity of the guarantor and the conditions and limitations upon the guarantee, constitutes false, misleading and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act and must be prohibited.

13. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents held "drawings" in which persons were invited to register their names and addresses for the chance to win a free sewing machine and other prizes (Tr. 78). The participants in said "drawings" later received further promotional material by mail. Typical and illustrative of the statements and representations made in such promotional material are the following:

CONGRATULATIONS!
YOUR NAME WAS SELECTED FROM THE TICKETS TAKEN AT THE RECENT SEWING MACHINE DRAWING TO RECEIVE ONE OF THE SECOND PRIZE AWARDS. YOU HAVE WON A $50.00 DISCOUNT CERTIFICATE.

[6] See testimony of Ann D. Latimer, a consumer witness, to the same effect (Tr. 419–420).

THIS CERTIFICATE ENTITLES YOU TO A BRAND NEW 1966 NEW HOME SEWING MACHINE, MODEL # 103. THIS MACHINE IS NATIONALLY ADVERTISED FOR $89.95, SO WITH YOUR CERTIFICATE ALL YOU PAY IS $39.95! THIS IS AN ADVERTISING PROMOTION. ALL WE ASK IS TELL YOUR FRIENDS ABOUT YOUR NEW HOME SEWING MACHINE. (CX 2.)

By and through the use of the statements and representations quoted above and by oral statements of respondents of similar import and meaning, respondents have represented, directly or by implication, that they conduct bona fide drawings and that recipients of their merchandise certificates have won a valuable prize entitling them to a discount in the amount stated on the certificate, which constituted a reduction from the price at which such products were usually and customarily sold.

In truth and in fact, respondents did not conduct bona fide drawings. Their purpose in having persons register for drawings was to obtain leads to prospective purchasers of sewing machines. The recipients of such certificates did not receive a valuable prize since the amount of the award certificate was deducted not from the usual and customary price of the product, but from a higher fictitious price, and consequently the prize was illusory.

Respondent Seeger testified that the drawings were conducted by setting up a sewing machine and an entry box in a supermarket. One such drawing was set up at Earl's Supermarket (Adm. 86; CX 35, CX 36; Tr. 86–89), Frederick, Maryland, on or about June 11, 1966. Another such drawing was conducted at By-Pass Market, Warrenton, Virginia, in May 1966 (Adm. 94; CX 35, CX 36). Additional drawings were conducted in Rockville and Waldorf, Maryland, in 1966 (Tr. 75–79, 374, 375). Entry forms were dropped into the box and subsequently a drawing was held and the winner was awarded a sewing machine (Tr. 78). Generally, the manager of the supermarket drew the winning entry out of the box (Tr. 79). Seeger then testified that the second prize winners were selected by him and that "practically all of the entries were sent second prizes" which consisted of CX 2 (Tr. 79–81, 374–375).

Examination of the second prize gift certificate CX 2, the text of which is set forth above, reveals that the respondents represented that the New Home Model #103 was nationally advertised at a selling price of $89.95 (CX 2; Adm. 90; CX 35, CX 36). Respondents admit that to their knowledge Model #103 was not ad-

vertised at a price of $89.95 in any publication of interstate or national circulation other than publications prepared by the New Home Sewing Machine Company during 1966 (Adm. 91; CX 35, CX 36). Respondents also admit that they did not regularly sell the New Home Sewing Machine Model #103 for $89.95 during 1966 (Adm. 92; CX 35, CX 36). Moreover, the evidence establishes that respondents in the regular course of their business generally sold the New Home Model #103 Sewing Machine for $39.95 throughout 1966 to persons without gift certificates as well as to persons with gift certificates (see CXs 3, 6, 7, 8, 9, 11, 12, 13, 15, 16, 17, 18, 19, 20, 23, 24). Where the machine included a cabinet, respondents' usual and customary price was $69.50 (see CXs 4, 5).

From the foregoing it is clear that the drawings and gift certificates were no more than a device to obtain leads to prospective purchasers and the "gift certificate" afforded no saving. The hearing examiner finds the aforesaid practice to be false and deceptive and in violation of Section 5 of the Federal Trade Commission Act and must be prohibited.

14. Paragraph Ten of the complaint alleges that:

> In the course and conduct of their business respondents have failed to disclose certain material facts to purchasers, including, but not limited to the fact that at respondents' option, conditional sale contracts, promissory notes, or other instruments of indebtedness executed by such purchasers in connection with their credit purchase agreements may be discounted, negotiated, or assigned to a finance company or other third party to whom the purchaser is thereafter indebted and against whom defenses may not be available.

Conditional sales contracts or promissory notes executed between respondent Household Sewing Machine Co., Inc., and its customers were regularly negotiated or assigned to a third party during the period January 3, 1966, through April 30, 1968 (Adm. 102; CX 35, CX 36; Tr. 55). Employees of Household Sewing Machine Co., Inc., did not, as a matter of practice, orally advise customers prior to the execution of conditional sales contracts that such contracts might be negotiated or assigned to a finance company or other third party (Adm. 105; CX 35, CX 36) and that the purchaser would be indebted to a third party (Adm. 106; CX 35, CX 36).

Although respondents and their salesmen did not generally volunteer this information, they would disclose this infomation if

asked. Respondents' salesman Brockelbank testified as follows (Tr. 198):

Q. When you sold a sewing machine, did you volunteer to the purchasers of a sewing machine that they would be making their payments to a finance company or another third party? Did you volunteer this information to them?

A. Not all the time. If they asked I would tell them.

Respondent Seeger similarly testified as follows (Tr. 88–89):

Q. Did you while you were sales manager instruct the door-to-door salesmen with regard to disclosures to the customer executing conditional sales contracts that those contracts might be negotiated or assigned to a finance company or other third party?

A. If they were asked?

Q. Would you explain that, please?

A. If the customer asked if this contract was to be sold or financed by another company, then the salesmen were instructed to tell them yes, it would be.

The foregoing is corroborated by the testimony of Helen Celia Anger, a consumer witness, who testified as follows (Tr. 468):

Q. Now, at that time you filled in your contract and signed the contract, did the salesman tell you that you would be making your payments to a finance company?

A. I wasn't aware of this; I wasn't aware of this until later.

I thought I was going to make the payments to the Household Sewing Machine Company, but when he came and said that this is the way it was to be done, I accepted it.

Q. Now, when who came and said this?

A. When the salesman explained this to me.

Q. When did he explain it to you? Was this before or after you signed the contract that he explained it to you?

A. Repeat that again.

Q. Before or after? Did the salesman to the best of your recollection, did the salesman inform you prior to your signing the contract that you would be making the payments to a finance company? Did he to the best of your recollection, did he inform you of that fact prior to your signing the contract?

A. Yes, I believe so.

An examination of respondents' Conditional Sales Agreements (CXs 25, 26, 27, 28 and 29) reveal that on the second page thereof (CXs 25b, 26b, 27b, 28b, 29b) under the heading "CONDITIONS" appearing in large print at the top of the page, the first sentence reads as follows:

Purchaser agrees promptly and faithfully to pay to Seller or to Seller's successors or assigns, the full amount of the TIME BALANCE herein set forth in the installments as herein provided.

On the lower half of the page also appearing in large bold print is the following:

DEALER'S NON-RECOURSE ASSIGNMENT

together with a lengthy paragraph commencing with,

We hereby sell, assign, transfer, convey and set over to _____ the contract on the reverse hereof; etc.

Below that again in large bold print appears the following:

ASSIGNMENT WITH RECOURSE

together with a short paragraph commencing with,

For Value Received, the within Agreement, and all right and title of undersigned in the goods therein described, are hereby sold and assigned to the _____, etc.

Each of the respondents' customers signs an acknowledgment "that he received, at the time of execution of the above contract, an exact copy thereof, completely filled in." (CXs 25a, 26a, 27a, 28a, 29a).

Accordingly, the hearing examiner finds that all of respondents' customers receive adequate notice that the conditional sales contract may be negotiated or assigned to a finance company or other third party, that respondents' salesmen are instructed to explain this aspect of the conditional sales contract to customers if asked and in fact when so asked they do so explain these terms and conditions, and there is no evidence that oral representations to the contrary have ever been made by respondents or their salesmen.

The hearing examiner also finds, based upon the testimony of Mrs. Ella Austin (Tr. 333), and Mr. Leroy Hobson (Tr. 401–402), that generally consumers do not read thoroughly what they sign and as a result many persons are unaware of the assignment provisions contained in conditional sales contracts. However, unfortunate as this may be, in the absence of some affirmative misrepresentation, deliberate omission of a material fact, or failure to put the purchaser on notice through customary provisions contained in the contract, the hearing examiner is not prepared to rule that these respondents have a greater burden of explaining these provisions than is customary on any other contract or negotiable instrument. Moreover, in this record, there is no showing that respondents after assigning their contracts refuse to service or otherwise to satisfy a customer's complaint.

Complaint counsel in their proposals have cited nine prior decisions of the Commission as authority for their position. Of these

nine, seven were either orders obtained by default, stipulation or consent and one decision by a hearing examiner is on appeal. Only one case cited, *Lifetime, Inc.*, 59 F.T.C. 1231 (1961) was a contested matter decided by the Commission and that involved affirmative misrepresentations about financing including the signing of a hidden promissory note. That case is obviously distinguishable on the facts. Complaint counsel, however, have omitted any reference to *School Services, Inc., et al.*, Docket 8729, decided October 10, 1968 [74 F.T.C. 920, at 1016-17]), in which the Commission stated:

> We must presume that a prospective student is capable of reading this very short contract. It may well be that a prospective student does not grasp the full import of the provisions contained therein; based on this record, however, we are not prepared to rule that respondents have a greater burden of explaining these provisions than is customary. The significant contract provisions appear to be adequately disclosed and in the absence of oral representations to the contrary do not warrant further consideration. (Opinion, p. 26.)

In light of the foregoing, the hearing examiner finds that the allegations of Paragraph Ten of the complaint have not been sustained and must be dismissed.

15. In the conduct of their business, at all times mentioned herein, respondents have been, and now are, in substantial competiton, in commerce, with corporations, firms and individuals engaged in the sale of sewing machines of the same general kind and nature as those sold by respondents (Ans. par. 11; see also Finding 7, *supra*).

16. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' products by reason of said erroneous and mistaken belief.

CONCLUSIONS

1. The aforesaid acts and practices of respondents, as herein found, were and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce in violation of Section 5 of the Federal Trade Commission Act.

2. The Federal Trade Commission has jurisdiction of and over respondents and the subject matter of this proceeding.

3. The complaint herein states a cause of action and this proceeding is in the public interest.

Based upon his findings and conclusions, the hearing examiner deems the following order appropriate.

ORDER

It is ordered, That respondents Household Sewing Machine Co., Inc., a corporation, and its officers, and William R. Clark, individually and as an officer of said corporation, and William R. Seeger, individually and as a former officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of sewing machines, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any product has been manufactured or designed to be sold in any stated year, unless such product was in fact manufactured or designed to be sold in the year represented.

2. Misrepresenting in any manner the model year, the year of manufacture or design, or the age of any product.

3. Representing, directly or by implication, that any product was left in layaway, was repossessed, or that it is being offered for the balance of the purchase price which was unpaid by a previous purchaser, unless the specific product in each instance was left in layaway, was repossessed or is offered for the balance of the unpaid purchase price, as represented.

4. Misrepresenting in any manner the status, kind, quality or price of the products being offered.

5. Representing, directly or by implication, that purchasers save the paid-in amount on repossessed or unclaimed layaway products unless in each instance purchasers save the amount represented.

6. Misrepresenting in any manner the savings afforded to purchasers of respondents' products.

7. Using the names "Credit Dept." or "Household Credit Dept." or other names of similar import or meaning; or otherwise representing, directly or by implication, that respondents' principal business is that of lending money or settling or collecting accounts; or misrepresenting in any manner the nature or status of respondents' business.

8. Representing, directly or by implication, that products are guaranteed, unless the nature, conditions and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

9. Representing, directly or by implication, that names of winners are selected or obtained through "drawings" or by chance when all of the names selected are not chosen by lot; or misrepresenting in any manner the method by which names are selected in any drawing or contest.

10. Representing, directly or by implication, that certificates, awards or prizes are of a certain value or worth when recipients thereof are not in fact benefited by or do not save the amount of the represented value of such certificates, prizes or awards.

11. Representing, directly or by implication, that any savings, discount or allowance is given purchasers from respondents' selling price for specified products unless said selling price is the amount at which such product has been sold or offered for sale in good faith by respondents for a reasonably substantial period of time in the recent regular course of their business.

12. Using any advertising, sales plan or promotional scheme involving the use of false, misleading or deceptive statements or representations to obtain leads or prospects for the sale of any product.

13. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other perons engaged in the sale of respondents' products and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

OPINION OF THE COMMISSION

AUGUST 6, 1969

BY NICHOLSON, *Commissioner:*

I

The Commission issued its complaint in this proceeding on April 30, 1968, charging that respondents had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by engaging in unfair and deceptive practices and unfair methods of competition in the advertising and sale of sewing machines. Specifically, respondents were charged with—(1) using bait and switch tactics; (2) misrepresenting the year when their sewing machines were manufactured; (3) misrepresenting sewing machines as partially paid for by a previous purchaser and that the current purchase price was merely the unpaid balance; (4) misrepresenting their principal business as lending money or settling or collecting accounts; (5) misrepresenting the terms and conditions of a guarantee; (6) conducting a bogus drawing; and (7) failing to disclose to purchasers, prior to sale, that conditional sales contracts might be negotiated to a finance company or another third party.

Respondent William R. Seeger filed an answer admitting all the material allegations of the complaint but denying he formulated, directed, or controlled the acts and practices of the corporate respondent, including the acts and practices alleged in the complaint. Respondent William R. Clark and the corporate respondent, Household Sewing Machine Co., Inc., filed separate answers admitting certain specific allegations in the complaint but denying generally any violation of law.

Hearings were held on the complaint, respondents electing not to put in a defense. The hearing examiner issued his initial decision on December 20, 1968, upholding all charges of the complaint (including the responsibility of the individual respondents) except for the allegations relating to the use of bait and switch and failure to disclose that conditional sales contracts might be assigned by respondents.

Complaint counsel has appealed from the initial decision contending the examiner erred in his conclusion that the burden of proof had not been sustained on the two charges which were dismissed. Respondents concede these are the only issues presented for review. No appeal has been taken by respondents from any

portion of the findings of facts, conclusions, or order, and respondents urge the Commission to adopt the examiner's initial decision. To the extent that the examiner's findings are not inconsistent with the findings of this opinion, these findings are hereby adopted as those of the Commission.

II

There is no dispute on the facts. Respondent Household Sewing Machine Co., Inc. (hereinafter Household), is a corporation, organized and doing business under the laws of the District of Columbia with its principal place of business presently located at 2420 Wilson Boulevard, Arlington, Virginia.[1] Household is in the business of selling sewing machines to consumers in the metropolitan Washington, D.C., area through advertisements in the classified advertising section of Washington's three major newspapers.[2]

Respondents' basic advertising format is to represent that used sewing machines are available at a reduced price, and to couple this price reduction with representations that respondents' "Dealer Credit Department" has reclaimed partially paid for used machines which have been left in "lay away." [3] The reader of respondents' advertising is invited to call a telephone number for more information. The calls are taken in respondents' store and salesmen make an appointment to give these prospective customers a home demonstration.[4]

The machines, which had been represented in respondents' advertisements to be comparatively new and selling at a reduced price, were described by customers as "very old and rusty looking" [5] and "pretty well beaten up." [6] The examiner found that in almost all cases customers "unequivocally and almost immediately" rejected the advertised machines,[7] and respondents conceded that 80% of all "leads" did not buy the used machines.[8] These used machines, however, did serve one purpose: after rejecting the advertised machines the salesmen would announce that he just happened to have a new (and a much more expen-

[1] Until December 1, 1967, respondents' business was located at 910 9th Street, N.W., Washington, D.C. (Tr. 143, 144).

[2] Tr. 32, 52.

[3] Admissions 67 and 80; CX 35, CX 36.

[4] Demonstrations and sales were made in customers' homes located in Washington, D.C., Virginia and Maryland (Adm. 30; CX 35, CX 36).

[5] Tr. 329.

[6] Tr. 410. See also Tr. 327-340; 395-405; 444-452; 453-459; 463-472.

[7] Initial Decision, p. 223.

[8] Respondents Household and Clark's Proposed Findings of Facts Before the Examiner, Finding No. 4.

sive) machine in his car. When the new machine was shown the contrast between old and new was effective—almost invariably the new machine was sold.[9]

It was alleged in the complaint that respondents' advertisements for used machines are not bona fide offers but merely a "come-on" (or bait) to develop leads which are then "switched" during the home demonstration to expensive merchandise. The examiner dismissed this allegation and in concluding that the facts recited above do not constitute unlawful bait and switch tactics, he relied unduly upon some considerations and omitted others which are relevant. First, the examiner found (1) no clear-cut offer by any purchaser to buy a used machine; (2) no refusal by respondent to sell a used machine; and (3) no evidence that a clear-cut offer to buy would have been refused.[10] The examiner seemed to be saying that since no one "took" the "bait," no one was "switched."

To define bait and switch in terms of offers or refusals of offers misconceives the essential nature of the practice. Our decisions relating to bait and switch are grounded on a factual determination that the advertised product is not an offer which the seller seriously intends the buyer to accept, but a "come-on" which will lead to the sale of a higher priced product.[11] Whether the bait is actually taken or not is of no moment. On the contrary and as the record of this case plainly shows, the assumption of the bait and switch perpetrator is that the bait will probably *not* be "taken" (or at least not swallowed) but will serve as an opening gambit to get the salesman over the doorstep. Insofar as the examiner required proof of actual offers to buy the used machines, and subsequent refusals by respondents to sell, he erred—these factors are not material in establishing an illegal "bait and switch" scheme.

Next, the examiner attaches significance to the sale of some used machines by respondents. The Commission has long made it clear that actual sales of advertised merchandise do not preclude the existence of a bait and switch scheme.[12] Our decision in *Soles*,[13] which the examiner cites, did not turn merely upon sales of the advertised product. In *Soles* the Commission said that

[9] Initial Decision, p. 223. See also Tr. 410.

[10] Initial Decision, p. 223.

[11] *In the Matter of Leon A. Tashof t/a New York Jewelry Company*, F.T.C. Docket No. 8714 (December 14, 1968), 74 F.T.C. 1361; *In the Matter of All-State Industries of North Carolina, Inc.*, F.T.C. Docket No. 8738 (April 1, 1969), 75 F.T.C. 465.

[12] See *Guides Against Bait Advertising*, 2 CCH Trade Reg. Rep. ¶7893 (November 24, 1959). *In the Matter of Consumer Products of America, Inc.*, F.T.C. Docket No. 8679, 72 F.T.C. 533 (September 7, 1967), *aff'd*, 401 F. 2d 930 (3rd Cir. 1968).

[13] *In the Matter of Clarence Soles*, F.T.C. Docket No. 8602 (December 3, 1964), 66 F.T.C. 1234.

where there was positive evidence that respondent was actually in the business of selling used Singers, and the record did not show sufficient evidence that the advertised offer was insincere, we would not condemn the scheme as bait and switch. We are dealing here with entirely different facts.

The entire record here proves that respondents' method of operation consists of (1) representing used machines as fairly new models; (2) demonstrating used machines of ancient vintage; and (3) then switching consumers to brand new machines. Respondents Clark and Seeger conceded that respondents' principal business was selling new machines.[14] In any event, there is evidence that whatever sales there were of used machines, these were made in respondents' store, not in the home.[15] But our only concern here is with what happened *in the home* after respondents' salesmen developed a lead through the advertised used machines: *there* new machines were being sold.

The relative unimportance of the used machines to respondents' overall business is further proven by respondents' own sales figures. On sales of 297 new machines and 117 used machines (all used machines apparently sold in respondents' store) Household's gross sales were approximately $60,000.[16] The new machines sold for between $199 and $249 [17] while the used machines sold for less than $40.[18] Thus respondents' sales of the used machines accounted for approximately $4,680 or less than 8 percent of their total sales volume. Yet in order to obtain $4,680 worth of business respondents were willing to spend between $5,000 and $6,000 a year in advertising used machines.[19] Seldom, if ever, did they place an advertisement for the new machines which were the heart of their business.[20] It is clear to us that respondents' objective in placing these advertisements was not to sell used machines but to develop "leads" for new machines. Surely this is the most persuasive and the only economically rational justification for their behavior.[21]

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[14] Tr. 23, 142–143.

[15] Tr. 27. Total store sales accounted for a negligible portion of respondents' business. Tr. 27, 59, 143–144.

[16] Tr. 166.

[17] Tr. 72.

[18] Tr. 24, 73.

[19] Tr. 33.

[20] Tr. 35.

[21] See *Bond Sewing Stores*, 51 F.T.C. 470 (1954); *Household Sewing Machine Company* [not respondents herein], 52 F.T.C. 250 (1955).

The examiner also found that no salesman made "actual or implied disparaging remarks with regard to the old used machine." [22] The Commission, however, has held that oral disparagement of the product is not an essential element of bait and switch.[23] Because of the age and condition of the machines exhibited to prospective purchasers, no oral embellishments were necessary: the used machines gave a graphic and persuasive demonstration of their undesirability.

The examiner also erred in declining to give proper consideration to other evidence further substantiating the existence of a bait and switch scheme, especially the incentives respondents provided to encourage their salesmen to sell new machines. The salesmen received either no commission [24] or only 10 percent commission on the advertised used machine. Since the average sale price of the used machine was $40, a salesman who sold the advertised machine could look forward to no commission, or at most (and only on rare occasions) $4.[25] If he sold the unadvertised new machine (at a price between $199 to $249, he was paid a commission of 20 percent [26] or between $40 to $50 for each sale. On the basis of these incentives, there can be little doubt the salesmen were only interested in selling new machines once the leads were developed.[27]

Respondents' advertising, when read in its entirety, also reflects upon the sincerity of the used machine offer. We find the used machines being advertised with the aid of a classic collection of deceits. During 1966 respondents were advertising "66" Singers which were not made in 1966—they were Model 66 made 15 to 20 years earlier. And contrary to respondents' representations, the used machines had not been "repossessed"; they had not been "left in lay away"; they were not being sold for "unpaid balances" and respondents were not in the business of lending money and setting or collecting accounts.[28] Respondents have taken no appeal from the examiner's ruling on the illegality of any of these claims.

[22] Initial Decision, p. 223.

[23] See *Leon A. Tashof t/a New York Jewelry Company*, note 11 *supra*, slip opinion, p. 11, 74 F.T.C. 1388–89 Accord, *Household Sewing Machine Co.*, note 21 *supra; Consumer Products of America, Inc.*, note 12 *supra*.

[24] Tr. 186, 193.

[25] Tr. 59, 60. There was no commission on sales of used Singers, and almost all of respondents' ads were for the sale of used Singers.

[26] Tr. 59.

[27] The treatment of sales commissions by respondents is relevant in determining the sincerity of the used machine offer. *Consumers Products of America, Inc.*, note 12 *supra*.

[28] Initial Decision, pp. 224–231.

We said in *Soles* the truth of the advertised claim will beconsidered in determining whether a bona fide offer or a "come-on" was involved.[29] In *Soles* there was no proof of misrepresentation of age, or any other material fact. Here the misrepresentations are so extravagant that the entire ad can only be read as a ruse to attract the interest of customers who could be developed as profitable "leads" by respondents' salesmen. Indeed, it is likely that respondents anticipated that the difference between what was advertised and what was shown would result in immediate rejection (as in fact it was in all cases), thereby setting up the consumer for the execution of a switch.

In sum, the record clearly supports a finding that respondents have engaged in a bait and switch scheme.

III

We next consider the question of an appropriate order that will eliminate the use of highly deceptive advertising as "bait" to develop leads, and the subsequent switching of these "leads" to expensive items. In fashioning this order we are cognizant of the fact that moderate or low-income consumers may be especially susceptible to the blandishments of a deceptive come-on that misrepresents the age of used machines and emphasizes their low prices.[30] On the basis of these representations the salesman gains a foothold in the home where the demonstration of the advertised used machines almost immediately causes disappointment—a disappointment, however, which can be profitably exploited. For it has been our experience, based on the record herein and countless other proceedings in bait and switch cases[31] that once the consumer's appetite has been whetted, the display of a new machine has the psychological impact of breaking down resistance to careful deliberation, and a spur of the moment decision may be made to purchase a machine which the consumer may either not afford, or which may be bought cheaper if she shops around. Moreover, the consumer is likely to be taken in by respondents' particular varia-

[29] *Clarence Soles*, note 13 *supra*, slip opinion, pp. 3–4, 66 F.T.C. 1234, 1249–1251.

[30] Tr. 328–330, 397.

[31] See, *e.g.*, *Better Living, Inc.*, 54 F.T.C. 648 (1957) *aff'd per curiam*, 259 F. 2d 271 (3rd Cir. 1958); *Pati-Port, Inc.*, 60 F.T.C. 35 (1962), *aff'd*, 313 F. 2d 103 (4th Cir 1963); *Luxury Industries*, 59 F.T.C. 442 (1961); *Atlas Sewing Centers, Inc.*, 57 F.T.C. 974 (1960); *Clean-Rite Vacuum Stores, Inc.*, 51 F.T.C. 887 (1955); *Bond Sewing Stores*, 51 F.T.C. 470 (1954); *Lifetime, Inc.*, 59 F.T.C. 1231 (1961). The Supreme Court stated in *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 614 (1946), that "The Commission is entitled not only appraise the facts of the particular case and the dangers of the marketing methods employed * * * but to draw from its generalized experience."

tion of the bait and switch technique because they use demonstrations in the home where the non-commercial atmosphere may lower resistance to the sales pitch.

Having used an illegal bait and switch scheme, respondents should be effectively prevented by our order from engaging in misrepresentations for the purpose of making initial contact with a consumer, as well as deceptive manipulation of the consumer thereafter: both practices violate Section 5 of the Federal Trade Commission Act.[32]

An order limited merely to a prohibition against repetition of deceptive advertisements or a generalized ban against bait and switch tactics is not adequate protection for the consumer. What is required is an order that will dissipate the effects of deceptive invasions of the privacy of the home where high-pressure tactics may result in the ill-advised purchase of expensive merchandise which would not be bought upon careful reflection. The most effective protection is that which the consumer can provide for herself by taking a second look at the product to reconsider whether she can really afford it, or to discuss the purchase with her husband, all free from the influence of deceptive sales techniques.

Accordingly, the order will require respondents to allow a three-day period of grace during which all contracts negotiated in the consumer's home may be rescinded by the purchaser. This will serve as a cooling-off period during which any consumer, who may be subjected to the unfair pressures resulting from the deceptions we have discussed or similar deceits, may reevaluate

[32] The Commission's authority to prohibit misrepresentations that do not directly involve the inherent qualities of a product but rather concern ancillary factors, such as the products' origin, the identity of its manufacturer, or the circumstance of its sale is well established. *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212 (1933); *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67 (1934); *Kerran* v. *Federal Trade Commission*, 265 F. 2d 246 (10th Cir. 1959), *cert. denied*, 361 U.S. 818 (1959); *Mohawk Ref. Corp.* v. *Federal Trade Commission*, 263 F. 2d 818 (3rd Cir. 1959), *cert. denied*, 361 U.S. 814 (1959). Thus in addition to actions against bait advertising (note 31 *supra*), the Commission's rule against sales through deceptive "first contact" has been applied to a scheme to gain entrance to a home by purporting to conduct a survey (*Kalwajtys* v. *Federal Trade Commission*, 237 F. 2d 654 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957)) and to the use of deceptive mock-ups to break through viewer's skepticism about television advertising. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

The Commission has also forbidden the use of deceptive sales schemes involving purchases induced through consumer mistake about whether goods had been ordered (*Norman Co.*, 40 F.T.C. 296 (1945)), or consumer fear of a lawsuit (*Dorfman* v. *Federal Trade Commission*, 144 F. 2d 737 (8th Cir. 1944), or consumer vanity over being declared a contest "winner" (*Clark H. Geppert, et al.*, 57 F.T.C. 832 (1960); *Arthur Murray Inc.*, 57 F.T.C. 306 (1960)), or consumer "pride" over being one of a few "carefully selected" individuals to be contacted by respondent (*Federal Trade Commission* v. *Standard Educ. Soc'y*, 86 F. 2d 692 (2nd Cir. 1936), *modified*, 302 U.S. 112 (1937)).

and cancel her purchase. Our order will require the notice of the cooling-off period to be clearly printed in a conspicuous place on the contracts and will also require that respondents provide a separate, simple and clearly understandable cancellation form.[33] In the light of respondents' proclivity for the use of deception in both advertising and in the home, this is appropriate and necessary relief. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 173 (1944); *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

It should be added here that in ordering the cessation of these deceptive practices and in fashioning effective relief to prevent their resumption, we do not in any way condemn honest door-to-door selling. On the contrary, businesses relying on this method of sales will themselves be protected from unfair competition and will not be required by competitive pressure to resort to deceptive practices. See *Federal Trade Commission* v. *R. F. Keppel & Bro.*, 291 U.S. 304 (1934).

IV

We turn now to the allegations of the complaint respecting conditional sales contracts. Many of the sales described in Part II herein, were credit purchases. The complaint charges a violation of Section 5 of the Federal Trade Commission Act by reason of respondents' failure to disclose that instruments of indebtedness executed by consumers in connection with their credit purchase agreements may be transferred to third parties to whom respondents' customer would thereafter be indebted and against whom defenses on the contract may not be available. Complaint counsel appeal from the examiner's dismissal of this charge of the complaint.

The examiner found that the conditional sales contracts and promissory notes executed between Household and its customers were regularly negotiated or assigned to a third party. He found

[33] Several States have passed "Cooling-Off Laws" to provide a period during which the buyer can reconsider the purchase, *E.g.*, Ga. Code Ann. §96-906 (Supp. 1968); Ill. Ann. Stat. ch. 121 1/2 §262B (Smith-Hurd Supp. 1969); Mass. Ann. Laws ch. 255D, §14 (1968); Wash. Rev. Code Ann. §63.14.040(2)(e) (Supp. 1968). Sections 2.502–2.505 of the proposed Uniform Consumer Credit Code give the buyer a three-day period for rescinding a consumer credit purchase made in the home. A Federal "Door-to-Door Sales Act" (S. 1599 and H.R. 10904) had been introduced in the 90th Congress, 1st Session. The jurisdictions in which respondents currently do business have not yet enacted the same or similar "cooling-off" legislation. If they do, the relief required herein may create the impression among purchasers that their rights are in fact less well protected than they would be under state or federal "cooling-off" legislation. Therefore, the order will be drawn in anticipation of the possibility that the jurisdictions in which the respondents do business may adopt such legislation.

that Household's salesmen did not as a matter of practice undertake to inform customers of this circumstance—although the salesmen would disclose this information if asked for it.[34] The examiner further found that the contracts and notes contained the following sentence in large print at the top of the page:

> Purchaser agrees promptly and faithfully to pay to Seller or to Seller's successors or assignees, the full amount of the TIME BALANCE herein set forth in the installments as herein provided.

Also appearing on the page in large bold print were the words "DEALER'S NON-RECOURSE ASSIGNMENT," together with words reciting the transfer of the contract to a third party. Below those words appeared "ASSIGNMENT WITH RECOURSE" followed by more words describing the assignment.[35] These findings are supported by the record evidence.

The examiner concluded that these words constituted sufficient notice and that in the absence of affirmative misrepresentation, deliberate omission of a material fact, or failure to include customary notice, respondents had no greater burden of explanation than is customary in any other contract or negotiable instrument. We disagree.

Subsequent to the issuance of the initial decision on August 14, 1968, the Commission held in *All-State* that assignment of a purchaser's note to a holder in due course may materially alter the nature of the purchaser's rights and liabilities, and that where a seller customarily assigns instruments of indebtedness to third parties without disclosing to the purchaser that this may be done, the purchaser is deceived and such deception is prohibited by Section 5 of the Federal Trade Commission Act.[36]

As we said in *All-State,* when a seller knows, but the buyer does not know, that the debt contracted by the buyer will be assigned to a third party, the buyer may be entering into a transaction quite different from the one he believes he is entering. If the instrument of indebtedness if transferred to a holder in due course, the buyer may be indebted to the assignee notwithstanding any defense or claim the buyer may have against the seller on the original contract such as defective merchandise or failure of

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[34] Initial Decision, p. 231.

[35] *Id.* at 232–3.

[36] *In the Matter of All-State Industries of North Carolina, Inc.,* F.T.C. Docket No. 8738 (April 1, 1969), slip opinion, p. 10, 75 F.T.C. 465, at 490.

the seller to perform servicing functions as may be required in the contract.

That the *contractual* obligation of the seller to the buyer may not be relieved by the transfer of the instrument of indebtedness is of no consequence. Effective assertion of strictly contractual rights is severely curtailed by the financial condition and educational level of a substantial number of unsophisticated consumers who buy on such credit arrangements. Nor does it matter that purchasers may not have been injured by the seller's assignments. The practice must be judged by its capacity to deceive or its unfairness and not on the basis of demonstrated injury to purchasers.[37]

The buyer assumes, in the absence of adequate notice to the contrary, that if the product does not live up to its express or implied representations he will be able to obtain reasonable satisfaction by withholding payment for the product. The buyer not unreasonably regards his indebtedness as a form of leverage to insure that the seller will stand behind his product. This expectation is realistically an integral part of the consideration flowing to the buyer. The buyer must be made to understand—*before* the sale is consummated—that a demand for payment from a third party assignee may not be defeated even if the product turns out to be defective or worthless, even if the seller fails to perform contractual obligations—and even if the seller goes out of business.

The question of *sufficiency* of disclosure remains. The Commission held in *All-State* that the seller must make affirmative disclosure.[38] This means the purchaser must be made to understand how he is being affected. Indeed, the remedy in *All-State* requires that the disclosure be made with such conspicuousness *and clarity* as is likely to be observed and read by the purchaser.

We hold that the disclosure in the instant case does not meet the standard. It requires no elaborate analysis to demonstrate that the number of consumers buying sewing machines on credit who comprehend the implications of "Dealer's Non-Recourse Assignment" and "Assignment with Recourse," may be less than

[37] See *Montgomery Ward & Co.* v. *Federal Trade Commission*, 379 F. 2d 666 (7th Cir. 1967); *Charles of the Ritz Distributors Corp.* v. *Federal Trade Commission*, 143 F. 2d 676 (2d Cir. 1944); *All-State Industries of North Carolina, Inc.*, note 36 *supra*.

[38] *All-State Industries of North Carolina, Inc.*, note 36 *supra*, final order paragraph 13.

overwhelming.[39] Adequate disclosure means that the purchaser must be told in simple everyday language precisely how the assignment will affect him and our order will so require.[40]

As we said above, the need for disclosure is not conditioned upon a showing that the seller has in fact used the assignment as a device to avoid his contractual and warranty obligations to the buyer. It is enough that the assignment may confer upon the seller the ability to do this. There is no showing in this record—and it was not charged in this complaint—that respondents sought to avoid their obligations to buyers after assigning the contracts. A showing that a seller systematically uses assignments in such manner might well necessitate relief broader than that ordered here. A regular business practice of non-disclosure coupled with avoidance may very well require that the holder in due course himself be placed on notice that he is taking the instrument subject to all of the purchaser's original defenses and claims.

Since our order also provides for a three-day "cooling-off" period, part III, *supra,* respondents will be prohibited from transferring any instrument of indebtedness until two days after expiration of this three-day period. If respondents are allowed to negotiate the instrument of indebtedness during the consumer's cancellation period, the buyer's right to cancel may be of negligible value. A five-day restraint on negotiation of the instrument gives the respondents time to receive a notice of cancellation mailed within the three-day period. The order will so issue.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision. The Commission having determined that said appeal should be granted in full hereby adopts the findings of the

[39] *Black's Law Dictionary,* Fourth Edition, defines assignment as "A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein * * * . It includes transfer of all kinds of property * * * . But is ordinarily limited to transfers of choses in action and to rights in or connected with property, as distinguished from the particular item of property * * * . It is generally appropriate to the transfer of equitable interests." (Citations omitted.)

The phrase "Without Recourse" is defined as "* * * used in making a qualified indorsement of a negotiable instrument, signifies that the indorser means to save himself from liability to subsequent holders, and is a notification that, if payment is refused by the parties primarily liable, recourse cannot be had to him."

[40] As in the case of the "cooling-off" prohibition, note 33 *supra,* our order will be drawn in anticipation of legislative change. Two States, Vermont and Massachusetts, have already abolished the holder-in-due course doctrine for consumer paper. Mass. Gen. Laws ch. 255, §12c (1966 Supp.); Vt. Stat. Ann. Title 9, §2455 (1967 Supp.).

hearing examiner to the extent they are consistent with the opinion accompanying this order. Other findings of facts and conclusions of law made by the Commission are contained in that opinion. For the reasons contained in that opinion the order entered by the hearing examiner is modified and, as modified, adopted and issued by the Commission as its final order. Accordingly,

I

It is ordered, That respondents Household Sewing Machine Co., Inc., a corporation, and its officers, and William R. Clark, individually and as an officer of said corporation, and William R. Seeger, individually and as a former officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of sewing machines, or any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell said products or services.

2. Using any advertising, sales plan or promotional scheme involving the use of false, misleading or deceptive statements or representations to obtain leads or prospects for the sale of any product.

3. Making representations purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.

4. Disparaging, in any manner, or discouraging the purchase of any product advertised.

5. Representing, directly or by implication, that any product has been manufactured or designed to be sold in any stated year, unless such product was in fact manufactured or designed to be sold in the year represented.

6. Misrepresenting in any manner the model year, the year of manufacture or design, or the age of any product.

7. Representing, directly or by implication, that any product was left in lay away, was repossessed, or that it is being offered for the balance of the purchase price which was unpaid by a previous purchaser, unless the specific product in each instance was left in lay away, was repossessed or is of-

fered for the balance of the unpaid purchase price, as represented.

8. Misrepresenting in any manner the status, kind, quality or price of the product being offered.

9. Representing, directly or by implication, that purchasers save the paid-in amount on repossessed or unclaimed lay away products, unless in each instance purchasers save the amount represented.

10. Misrepresenting in any manner the savings afforded to purchasers of respondents' products.

11. Using the names "Credit Dept." or "Household Credit Dept.," or other names of similar import or meaning; or otherwise representing, directly or by implication, that respondents' principal business is that of lending money or settling or collecting accounts; or misrepresenting in any manner the nature or status of respondents' business.

12. Representing, directly or by implication, that products are guaranteed, unless the nature, conditions and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

13. Representing, directly or by implication, that names of winners are selected or obtained through "drawings" or by chance when all of the names selected are not chosen by lot; or misrepresenting in any manner the method by which names are selected in any drawing or contest.

14. Representing, directly or by implication, that certificates, awards or prizes are of a certain value or worth when recipients thereof are not in fact benefited by or do not save the amount of the represented value of such certificates, prizes or awards.

15. Representing, directly or by implication, that any savings, discount or allowance is given purchasers from respondents' selling price for specified products, unless said selling price is the amount at which such products has been sold or offered for sale in good faith by respondents for a reasonably substantial period of time in the recent regular course of their business.

16. Failing to disclose, orally prior to the time of sale and in writing on any trade acceptance, conditional sales con-

tract, promissory note, or other instrument of indebtedness executed by the purchaser, with such conspicuousness and clarity as is likely to be observed and read by such purchaser:

(a) The disclosures, if any, required by federal law or the law of the state in which the instrument is executed;

(b) Where negotiations of the instrument to any third party is prohibited or otherwise limited under the law of the state in which the instrument is executed, that the negotiation or assignment of the trade acceptance, conditional sales contract, promissory note or other instrument of indebtedness to a finance company or other third party will not rescind or diminish any rights or defenses the purchaser may have under the contract;

(c) Where negotiation of the instrument to a third party is not prohibited by the law of the state in which the instrument is executed, that the trade acceptance, conditional sales contract, promissory note or other instrument may, at the option of the seller and without notice to the purchaser, be negotiated or assigned to a finance company or other third party; and

(d) Where the law of the State in which the instrument is executed does not preserve as against any holder of the instrument all the legal and equitable defenses the purchaser may assert against the seller, that in the event the instrument is negotiated or assigned to a finance company or other third party, the purchaser may have to pay such finance company or other third party the full amount due under his contract whether or not he has claims against the seller's merchandise as defective; the seller refuses to service the merchandise; or the seller is no longer in business, or other like claims.

II

It is further ordered, That the respondents herein shall, in connection with the offering for sale, the sale, or distribution of sewing machines or any other products, when the offer for sale or

sale is made in the buyer's home, forthwith cease and desist from:

(1) Contracting for any sale whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after date of execution.

(2) Failing to disclose, orally prior to the time of sale and in writing on any trade acceptance, conditional sales contract, promissory note or other instrument executed by the buyer with such conspicuousness and clarity as likely to be observed and read by such buyer, that the buyer may rescind or cancel the sale by directing or mailing a notice of cancellation to respondents' address prior to midnight of the third day, excluding Sundays and legal holidays, after the date of the sale. Upon such cancellation the burden shall be on respondents to collect any goods left in buyer's home and to return any payments received from the buyer. Nothing contained in this right-to-cancel provision shall relieve buyers of the responsibility for taking reasonable care of the goods prior to cancellation and during a reasonable period following cancellation.

(3) Failing to provide a separate and clearly understandable form which the buyer may use as a notice of cancellation.

(4) Negotiating any trade acceptance, conditional sales contract, promissory note, or other instrument of indebtedness to a finance company or other third party prior to midnight of the fifth day, excluding Sundays and legal holidays, after the date of execution by the buyer.

(5) *Provided, however,* That nothing contained in part II of this order shall relieve respondents of any additional obligations respecting contracts made in the home required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent respondents can apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon proper showing, shall make such modifications as may be warranted in the premises.

III

It is further ordered, That the respondents herein shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and shall secure from each such salesman or other person a signed statement acknowledging receipt of said 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 of their compliance with this order.

IN THE MATTER OF

JAMES C. BRITT DOING BUSINESS AS UNITED REDEMPTION BUREAU, ETC.

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

Docket C-1570. Complaint, Aug. 6, 1969—Decision, Aug. 6, 1969

Consent order requiring an Auburn, Ky., marketer of a sales promotion plan for stainless steel tableware to cease misrepresenting himself as a corporation, using false pricing and savings claims, and placing in the hands of others promotional material through which they may mislead the public.

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 James C. Britt, an individual, doing business as United Redemption Bureau, United Redemption Center and National Promotion Bureau, 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 James C. Britt is an individual doing business as United Redemption Bureau, United Redemption Center and National Promotion Bureau, with his office and principal

place of business located at Russellville Road, in the city of Auburn, State of Kentucky.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the sale and distribution of a sales promotion plan to retail dealers which involves the use of certificates, cards or coupons redeemable in stainless steel tableware by said dealers and the respondent.

PAR. 3. In the course and conduct of his business as aforesaid, respondent now causes, and for some time last past has caused, his said products, when sold, to be shipped from his place of business in the State of Kentucky to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondent in the course and conduct of his business and in order to promote the sale of his said plan and the stainless steel tableware, has adopted a scheme or plan which provides that retail dealers may purchase from him certificates, cards or coupons which he agrees to accept, together with a stipulated sum in payment for stainless steel tableware. Respondent agrees to cause to be imprinted upon such certificate, cards or coupons the firm name of the retail dealers who purchase said certificates, cards or coupons and said retail dealers agree to furnish or give said certificates, cards or coupons to the retail dealers' customers as a premium for purchases of merchandise from said retail dealers. Respondent agrees to remit to said retail dealers a bonus or commission of 15 percent of the amounts received by him from the retail dealers' customers in payment for stainless steel tableware or to allow his customers to collect payment for the stainless steel tableware while retaining 15 percent as a bonus or commission. Respondent also agrees to give a matched set of 50 pieces of stainless steel tableware plus a chest to each retailer who purchases 20,000 certificates, cards or coupons.

PAR. 5. In the course and conduct of his aforesaid business, and for the purpose of inducing the purchase of and participation in his said plan, respondent, through his salesmen or representatives has represented, and now represents, directly or by implication, in his contracts and in oral solicitations to prospective purchasers, that:

a) United Redemption Bureau is a corporation;

b) Stainless steel tableware is available at a low price to respondent and his customers as a special advertising promotion by the tableware manufacturer before its introduction generally to the public;

c) Purchasers of respondent's said certificates, coupons or cards will receive free radio advertising;

d) The 50 piece set of "1881 Rogers Stainless Steel Tableware" with chest, given to the dealers, has a comparable value of $93.90 and that said individual items have comparable values of various stated amounts such as $1.29 for a teaspoon, $1.89 for a dinner fork and $3.79 for a dinner knife and so on and that said price amounts are not appreciably in excess of the highest price at which substantial sales of merchandise of like grade and quality have been made in the recent regular course of business in the trade area where such representations are made; and that purchasers who redeem said merchandise save an amount equal to the difference between said redemption price and the represented comparable value amounts.

PAR. 6. In truth and in fact:

a) United Redemption Bureau is not a corporation, but merely a trade style used by the respondent;

b) The stainless steel tableware is not made available at a low price to the respondent and his customers as a special advertising promotion by the tableware manufacturer before its introduction generally to the public. In fact, no promotion was ever conducted by the manufacturer in cooperation with the respondent.

c) Purchasers of respondent's said certificates, coupons or cards do not receive any free radio advertising.

d) The price amounts set forth in or referenced in Paragraph 5(d) hereof for said merchandise are appreciably in excess of the highest price at which substantial sales of merchandise of like grade and quality have been made in the recent regular course of business in the trade area where such representations were made; and purchasers do not save the difference between the redemption price and said represented comparable value amounts.

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

PAR. 7. In the course and conduct of his aforesaid business and at all times mentioned herein respondent has been, and now is, in substantial competition in commerce, with corporations, firms and

individuals in the sale and distribution of substantially similar promotion plans and merchandise.

PAR. 8. By and through the use of the aforesaid acts and practices respondent places in the hands of retailers, dealers, and others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to things hereinabove alleged.

PAR. 9. The use by respondent of the aforesaid false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead and deceive retailers, dealers and others into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of respondent's promotion plan and substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of the 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 in commerce and unfair methods of competition in 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 captain hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Deceptive Practices 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 respond-

ent 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 thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent James C. Britt is an individual doing business as United Redemption Bureau, United Redemption Center and National Promotion Bureau with his office and principal place of business at Russellville Road, Auburn, Kentucky.

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 James C. Britt, an individual, doing business as United Redemption Bureau, United Redemption Center or as National Promotion Bureau or under any other trade name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of a sales promotion plan or the cerificates, cards, coupons or tableware, for use in connection therewith, or any other products, plans or services in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing that any unincorporated business operation is a corporation; or misrepresenting, in any manner, the nature, size or extent of his business.

2. Representing, directly or by implication, that tableware or other products are available at a low price to respondent or to his customers as a special promotion by the manufacturer; or misrepresenting, in any manner, the identity of the promoter, the nature or extent of any promotion, sales plan or scheme.

3. Representing, directly or by implication, that purchasers or participants in any of respondent's sales promotions, plans or schemes will receive free radio advertising; or misrepresenting, in any manner, the nature or extent of advertising that will be afforded such purchasers as participants.

4. Using the words "Comparative Value," "Comparable Value" or any word or words of similar import or meaning to refer to any amount as the selling price of compared merchandise which is appreciably in excess of the highest price at which substantial sales of comparable merchandise of like grade and quality have been made in the recent regular course of business in the trade area where such representations are made; or otherwise misrepresenting the price at which merchandise of like grade and quality has been sold in the trade area where the representations are made.

5. Misrepresenting, in any manner, the savings or the amount of savings available to purchasers or prospective purchasers of respondent's merchandise.

6. Furnishing or otherwise placing in the hands of others the means or instrumentalities whereby they may mislead or deceive the public in the manner or as to the things hereinabove prohibited.

7. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondent's products or services, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

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

IN THE MATTER OF

NATIONAL INSTITUTE OF MEAT PACKING, INC., ET AL.

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

Docket C-1571. Complaint, Aug. 6, 1969—Decision, Aug. 6, 1969

Consent order requiring a Mundelein, Ill., correspondence school to cease using false advertising and other misrepresentations to sell its courses relating to the meat packing industry or any other subject.

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 Institute of Meat Packing, Inc., a corporation, and Philip J. Somerville, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. National Institute of Meat Packing, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 520 Seymour Road, in the city of Mundelein, State of Illinois.

Respondent Philip J. Somerville is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution to the public of a course of study and instruction offered to prepare students thereof for employment, in various positions, with meat packing companies, which said course is pursued by correspondence through the United States mail.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said course of study and instruction to be shipped from their place of business in the State of Illinois to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said course in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their said course of study and instruction, respondents have caused, and now cause, advertisements to be published in newspapers, followed by personal contact with persons responding to such advertising through their salesmen or representatives, who deliver a sales talk and undertake to consummate the sale of said course. Respondents, through the use of newspaper advertisements, a sales presentation furnished to their sales representatives and promo-

tional material have made, and are now making, statements and representations with respect to training for and employment by meat packers.

Typical and illustrative of the statements and representations contained in such contact advertising and other promotional material and instructions to salesmen, but not all inclusive thereof, are the following:

1. Newspaper advertisements:

MEN WANTED FROM
This Area To Train As
LIVESTOCK
BUYER

LEARN TO BUY HOGS, VEAL, LAMBS and CATTLE at Sale Barns, Farms, Terminal Yards and Buying Stations. We prefer to train men 18–50 with farm background. For local interview write age, phone and experience. Regional Manager for National Institute of Meat Packing, P.O. Box 57, Muskogee, Okla. 74401.

MEN WANTED
from this area to train for
LIVESTOCK BUYING

Must have farm or livestock background to train in complete know-how of all phases of buying and marketing, including Cattle Futures. Meat Packers are in need of trained men. Age 21 to 50. Give age and experience for local interview. Write: NATIONAL INSTITUTE OF MEAT PACKING P.O. Box 1726, Kansas City, Mo. 64141.

MEN WANTED FROM
This Area to Train As
LIVESTOCK BUYER

LEARN TO BUY CATTLE AND HOGS for Packers at Sale Barns and Farms. We prefer to train men 21-50 with farm or livestock experience. For local interview write age, phone and background to NATIONAL INSTITUTE OF MEAT PACKING, INC., 188 West Randolph St. Dept. H-25, Chicago, Ill. 60601.

2. Promotional material:

Interested individuals, meat packers and processors having questions or wishing information about our in-plant training program * * *.

3. Instructions to salesmen:

After introducing yourself, you can start things going by saying "I'm here because of the interest you expressed in the Institute and its training of men for the meat packing industry. The National Institute of Meat Packing has been in existence over ten years and has successfully trained scores of men for the livestock buying and meat packing industry. We are centrally located in Chicago, the meat packing and livestock buying center of the United States, and we seek qualified men to train for the industry."

You are not trying to "sell him a home study or trade school course." You are there to offer him a real OPPORTUNITY—*if he qualifies*—for extension training by the Institute.

PAR. 5. By and through the use of the above-quoted statements and representations and others of similar import and meaning but not expressly set out herein, the respondents have represented, and are now representing, directly or by implication, that:

1. Employment is being offered.

2. Respondents on behalf of meat packers will train persons for employment by meat packers and that employment in the meat packing industry is assured to persons completing their training course.

3. An in-plant training program is provided by respondents in meat packing plants.

PAR. 6. In truth and in fact:

1. Employment is not being offered but the purpose of the advertising is to obtain purchasers for respondents' course of study and instruction.

2. Respondents have not been requested by meat packers to train persons for employment by them nor is employment in the meat packing industry assured to persons completing respondents' training course.

3. Respondents do not provide an in-plant training program in meat packing plants. Their only training program consists of their correspondence course of study and instruction.

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

PAR. 7. Through the use of newspaper advertisements of the type referred to in Paragraph Four respondents conceal the nature of their organization and the purpose of the advertising.

The sole purpose of said advertising is to obtain by subterfuge the names of prospective purchasers of their course of study and instruction. This practice constitutes a scheme to mislead and conceal the purpose for which the information or communication is sought.

Therefore, the aforesaid statements and representations were, and are, unfair practices and are false, misleading and deceptive.

PAR. 8. Through the use of the name "National Institute of Meat Packing" respondents represent that their organization is

an institute, or a non-profit organization, which is affiliated with and represents meat packers.

In truth and in fact, respondents are not affiliated with nor do they represent meat packers. Neither do respondents, as implied by the use of the word "Institute" in their trade name, operate a resident institution with a staff of educators for the promotion of learning and research in the field of meat packing. Respondents' business is that of selling a correspondence course of study and instruction relating to the meat packing industry and the sole purpose of said business is financial gain for respondents.

Therefore, the use of the aforesaid trade name was, and is, an unfair practice and is false, misleading and deceptive.

PAR. 9. 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 courses of study and instruction of the same general kind and nature as that sold by respondents.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondents' aforesaid course of study and instruction by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of respondents, as herein alleged, 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 commerce and unfair and deceptive acts and practices in 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 respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; 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 complaint to issue herein, 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 considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent National Institute of Meat Packing, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 520 Seymour Road, in the city of Mundelein, State of Illinois.

Respondent Philip J. Somerville is an officer of said corporation and his address is the same as that of said corporation.

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

It is ordered, That respondents National Institute of Meat Packing, Inc., a corporation, and its officers, and Philip J. Somerville, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of a course of study and instruction relating to the meat packing industry or any other subject in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That employment is being offered when the purpose is to obtain purchasers for a course of study and instruction;

(b) That respondents on behalf of meat packers will train persons for employment by meat packers, or misrepresenting, in any manner, respondents' affiliation with or representation of meat packers or the meat packing industry or any other persons, corporations or industry;

(c) That a person completing respondents' training course, or course of study and instruction, is assured employment, or misrepresenting, in any manner, the availability of or the opportunity for employment by a person completing any training course, or course of study and instruction;

(d) The respondents provide an in-plant training program in meat packing plants, or misrepresenting, in any manner, the amount or kind of training furnished students enrolled in any course of study and instruction.

2. Using any advertising or other material to promote the sale of a course of study and instruction which does not clearly and conspicuously reveal that the purpose of such advertising or communication is to sell said course.

3. Using the word "Institute" or any abbreviation or simulation thereof, as part of respondents' trade name, unless there is a clear and conspicuous disclosure, in immediate conjunction therewith, that respondents' business is a private home study training organization; or misrepresenting, in any manner, the nature, character or affiliation of respondents' business.

4. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in selling respondents' courses of study and instruction, and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

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

It is further ordered, That 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.