

Complaint

91 F.T.C.

IN THE MATTER OF

PEPSICO, INC.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8856. Complaint, July 15, 1971 — Final Order, April 7, 1978.

This order, among other things, requires a Purchase, N.Y. soft drink manufacturer to cease imposing in any manner territorial limitations or class of customer restrictions on its licensed Pepsi-Cola or allied product bottlers, in connection with the sale or distribution of soft drink products sold in other than refillable containers. The firm is additionally required to provide protection for confidential commercial information submitted by its bottlers.

Appearances

For the Commission: *Raymond L. Hays, Martin A. Rosen, Michael Joel Bloom, Duncan J. Farmer and Jeffrey F. Shaw.*

For the respondent: *Milton Handler, Fred A. Freund, Elizabeth Head and Richard M. Steuer, Kaye, Scholer, Fierman, Hays & Handler, New York City. James G. Frangos for PepsiCo, Inc., Purchase, N.Y.*

For the intervenors: *Robert J. Sisk and James B. Kobak, Hughes, Hubbard & Reed, New York City.*

COMPLAINT

The Federal Trade Commission, having reason to believe that PepsiCo, Inc., hereby made and sometimes hereinafter referred to as respondent, or PepsiCo, has violated the provisions of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45), 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. For the purposes of this complaint, the following definitions shall apply:

(a) Bottler — any individual, partnership, corporation, association or other business or legal entity which purchases respondent's concentrate for use in the manufacture and sale, primarily at wholesale, of respondent's pre-mix or post-mix syrups or soft drink products, or who purchases respondent's pre-mix or post-mix syrups or soft drink products for resale, primarily at wholesale;

(b) Central warehousing — a method of distribution in which soft drink products are received at a storage facility and either resold or

(c) Concentrate – the basic soft drink ingredient sold to bottlers by respondent, which is combined with water and other ingredients for packaging in bottles or cans for sale and distribution as soft drink products, or is used to make post-mix and pre-mix syrups; [2]

(d) Consignment – a form of distribution in which the consignor retains title, dominion, bears all risks of loss and delivers his products to the consignee who is indistinguishable from a salesman or agent;

(e) Place of business – the location of any facilities available to a bottler without regard to customers or geographic area for production or service in the conduct of business operations, to include but not limited to business headquarters, branch sales offices, warehouses and garages, but specifically excluding the plant at which a bottler combines concentrate with water, and possibly other ingredients, for the packaging of soft drink products;

(f) Post-mix syrup – soft drink concentrate which is used in fountain dispensing or vending equipment and is usually sold by bottlers in steel tanks. A typical post-mix system draws one ounce of syrup from a five-gallon tank and mixes it at the point of sale with five ounces of carbonated water to produce 600 six-ounce finished soft drink servings per tank;

(g) Pre-mix syrup – although essentially the same syrup as post-mix, a pre-mix system differs from a post-mix system in that it draws from a five-gallon tank a serving of soft drink products containing both syrup and carbonated water to produce 100 six-ounce finished soft drink servings per tank; and

(h) Soft drink products – nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles and cans, or through pre-mix or post-mix systems or the like.

PAR. 2. Respondent is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its executive offices and principal place of business at Anderson Hill Road, Purchase, New York. Respondent had sales of \$848,265,196 and assets of \$471,915,996 in 1969. In 1968, PepsiCo made domestic sales to over 500 bottlers located in every State of the United States.

PAR. 3. Respondent is engaged principally in the manufacture and sale of concentrate which it sells to its over 500 bottlers who purchase the concentrate under a license to produce and sell soft drink products under respondent's trade names such as "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio." PepsiCo bottlers combine the concentrate with water and other ingredients and package the mixture in bottles and cans for resale as soft drink products to retailers. In addition to manufacturing and selling concentrate to its

bottlers, PepsiCo operates bottling plants in 25 areas of the United States and sells soft drink products to retailers. [3]

PAR. 4. Respondent is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) in that a continuous flow of interstate commerce in concentrate and soft drink products exists between its headquarters and production facilities and the numerous bottlers located throughout the United States which purchase their products.

PAR. 5. In the course and conduct of its business, respondent, except to the extent limited by the acts, practices and methods of competition hereinafter alleged, has been and is now in competition with other corporations, firms, partnerships and persons engaged in the manufacture, processing, distribution and sale of soft drink products in commerce.

PAR. 6. PepsiCo has hindered, frustrated, lessened and eliminated competition in the distribution and sale of pre-mix and post-mix syrups and soft drink products sold under its trade names by restricting its bottlers from selling outside of a designated geographical area. This restriction is set forth in the agreements between respondent and its bottlers. A typical agreement between respondent and its bottlers provides that the bottler is permitted "to bottle and distribute the carbonated beverage (herein called the 'Beverage'), sold under the trademarks Pepsi and Pepsi-Cola (herein collectively called the 'Beverage trademark'), in the following described territory (herein referred to as the 'Territory'), and nowhere else, bounded as follows:

PAR. 7. The aforesaid agreements used by respondent have had, and may continue to have, the following effects:

(a) Competition between and among respondent's bottlers in the distribution and sale of "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio" brands of soft drink products has been eliminated;

(b) Competition between and among PesiCo's bottling operations and its bottlers in the distribution and sale of PepsiCo soft drink products at the wholesale level has been eliminated;

(c) Innumerable retailers and other customers have been deprived of the right to purchase "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio" brands of soft drinks products from the bottler of their choice at a competitive price; and [4]

(d) Consumers of "Pepsi-Cola," "Diet Pepsi-Cola," "Mountain Dew," "Teem" and "Patio" brands of soft drink products have been deprived of the opportunity of obtaining such products in an unrestricted

PAR. 8. Respondent's contracts, agreements, acts, practices and methods of competition aforesaid have had, and may continue to have, the effect of lessening competition in the advertising, merchandising, distribution, offering for sale and sale of pre-mix and post-mix syrups and soft drink products; deprive, and may continue to deprive, the public of the benefits of competition in the purchase of soft drink products; and constitute unfair methods of competition and unfair acts or practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY JOSEPH P. DUFRESNE, ADMINISTRATIVE LAW
JUDGE

OCTOBER 3, 1975

PRELIMINARY STATEMENT

In a complaint dated July 15, 1971, the Commission charged PepsiCo, Inc. with violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45). The crux of the charges was that the territorial exclusivity provisions in trademark licensing contracts PepsiCo enters with its [2] bottlers impose an illegal restraint on competition. The provision limits the geographical territory in which a bottler may manufacture and sell Pepsi-Cola products.

It was alleged that the illegal effects of the provision were that competition had been eliminated:

- (a) between independent bottlers of PepsiCo products;
- (b) at the wholesale level between independent bottlers of PepsiCo products and PepsiCo's own bottlers;
- (c) in that retailers and other customers had been deprived of the right to purchase PepsiCo products from the bottler of their choice at a competitive price; and
- (d) in that consumers of PepsiCo products had been deprived of the opportunity of obtaining PepsiCo products in an unrestricted market and at competitive prices.

In its answer, PepsiCo admitted that it is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44) (Answer, pp. 4-5).

In summary, as affirmative defenses, PepsiCo stated that:

- (a) the bottling appointments are valid exclusive representation agreements creating lawful ancillary restraints which are essential, fair and reasonable and not in violation of Section 5 of the Federal Trade Commission Act (Answer, p. 6);

(b) the complaint was fatally defective because it did not join the bottlers as respondents (Answer, pp. 6-7);

(c) the complaint was barred by laches and the statute of limitation (Answer, p. 7); and

(d) the complaint failed to state a claim upon which relief could be granted (Answer, p. 7). [3]

Because of the time which has elapsed since the complaint issued, it is appropriate to set forth a listing of significant actions by both sides which took place after July 15, 1971. These were:

1. On July 30, 1971, a Motion for Consolidation of this case with Dkts. 8853-8859, which pertain to exclusive territory provisions in the bottler licensing contracts used for other national brands of soft drinks, was filed by complaint counsel. That motion was denied by the administrative law judge on September 28, 1971.

2. On October 12, 1971, a Motion to Dismiss the complaint for nonjoinder of indispensable parties was filed by PepsiCo. The administrative law judge denied the motion on January 20, 1972. The appeal to the Commission was denied on March 23, 1972 (80 F.T.C. 1023). The appeal from that decision to the United States District Court for the Southern District of New York was denied on June 8, 1972 (343 F. Supp. 396). PepsiCo's complaint to the court sought a preliminary injunction to bring a halt to the Commission's proceeding. The court granted the Commission's request that the complaint be dismissed. The Court of Appeals for the Second Circuit affirmed on November 20, 1972 (472 F.2d 179) and the Supreme Court denied certiorari on October 9, 1973 (414 U.S. 876).

3. On November 22, 1971, the petitions of Pepsi-Cola Bottler's Association and of several bottlers of Pepsi-Cola to intervene in the proceedings were granted. As a result, there were three (3) individual bottler intervenors ((1) Pepsi-Cola Albany Bottling Company Inc. (2) Pepsi-Cola Bottling Company of Central Virginia and (3) Pepsi-Cola Bottling Company of Tampa) plus the Association, of which five hundred twelve (512) of the five hundred thirteen (513) of the Pepsi-Cola bottlers are members, who had standing to participate in the proceedings.

4. On July 31, 1972, former complaint counsel filed a motion for partial summary decision. That motion was denied by the administrative law judge on May 3, 1973.

5. On November 28, 1973, counsel for PepsiCo filed a motion to notify or join bottlers and requested that it be certified to the Commission. The motion was certified to the Commission by the administrative law judge on April 1, 1974. The motion was denied by

6. On January 14, 1974, a motion to discontinue the proceedings and for certification of the motion to the Commission was filed by counsel for PepsiCo. The administrative law judge certified the motion to the Commission on April 1, 1974. The Commission denied the motion on May 14, 1974.

7. Various requests for orders to protect confidential information of PepsiCo and others who supplied such information, were filed and granted during 1974 and 1975.

8. On December 17, 1974, counsel for PepsiCo filed a motion for informative disclosure of complaint counsel's affirmative case. This motion was denied by the administrative law judge on January 22, 1975.

9. On May 19, 1975, a motion to establish matters not at issue was filed by counsel for PepsiCo. The motion was denied by the administrative law judge on May 30, 1975.

10. The litigative hearings began on August 4, 1975, but on August 5, 1975, after several stipulations had been agreed upon and made a part of the record, the parties requested time to negotiate a stipulation which would obviate the need for further evidentiary hearings. Such a stipulation was executed on August 6, 1975. The text follows:

STIPULATION

It is hereby stipulated and agreed by and among respondent, intervenors and complaint counsel in the Matter of PepsiCo, Inc. (Docket No. 8856), subject to the approval of the Administrative Law Judge and the Federal Trade Commission, as follows:

1. All signatories agreed that the purpose of this stipulation is to obviate the need for a separate and lengthy trial record on the merits in PepsiCo, Inc. (Docket No. 8856) because the completed trial record in a companion matter. The Coca-Cola Company, et al. (Docket No. 8855, hereinafter "Coca-Cola proceeding"), is deemed by all signatories as an appropriate basis for an adjudication on the merits in this proceeding. All signatories further agree that use of the trial record of the Coca-Cola proceeding, and [5] all agreements, admissions and waivers in paragraphs 1 through 9 of this Stipulation, shall be for the purpose of this proceeding only and shall have no effect in any other proceeding. As used in this Stipulation, "this proceeding" means Matter of PepsiCo, Inc. (Docket No. 8856) and all appeals, reviews and procedures, both before the Commission and in the federal judiciary system, with respect thereto.

2. Respondent and the intervenors admit all of the jurisdictional facts set forth in the complaint in this proceeding. In the signing of this Stipulation, respondent's answer and all pleadings inconsistent with this admission are deemed to be amended to conform to such admission for the purpose of this proceeding only.

3. Respondent and intervenors agree and admit that the Federal Trade Commission has jurisdiction of this proceeding (Docket No. 8856) and of the respondent and intervenors and that this proceeding is in the public interest.

4. All signatories waive all provisions of the Commission's Rules of Practice and the provisions of all federal statutes including, but not restricted to, the Federal Trade

Commission Act and the Administrative Procedure Act, which are inconsistent with the procedures established in this Stipulation.

5. All signatories agree that they will accept the following actions or determination by the Administrative Law Judge:

a. The Administrative Law Judge's findings of ultimate facts, conclusions of law and order issued in the Coca-Cola proceeding may be incorporated by reference and made a part of this proceeding by the Administrative Law Judge in whole or to the extent determined by him to be applicable to the [6] acts and practices charged in the Complaint in this proceeding.

b. The Administrative Law Judge may accord respondent's relevant agreements the same construction as accorded to those comparable agreements in the Coca-Cola proceeding.

c. The entire trial record in the Coca-Cola proceeding shall be incorporated by reference and made a part of this proceeding. The Administrative Law Judge may select or designate portions thereof which are or are not applicable in this proceeding as bearing upon the ultimate determination of the legality or illegality of respondent's agreements which he deems to be comparable to those in issue in the Coca-Cola proceeding, and the acts and practices pertinent thereto.

d. As so incorporated in full, and as may be thereafter selected or designated by the Administrative Law Judge, such trial record may have equal force, effect and validity as a full trial record in an adversary hearing before the Administrative Law Judge on the allegations of the Commission's complaint in this proceeding.

e. The ultimate acts, practices and failures to act, with the results and effects thereof, as found by the Administrative Law Judge in his findings and decision in the Coca-Cola proceeding to be the acts or omissions of respondents and intervenors therein may be deemed, in whole or in part, by the Administrative Law Judge to be the ultimate acts, practices and failures to act, with the results and effects thereof, of PepsiCo and intervenors in this proceeding. [7]

f. In issuing his findings of fact, conclusions of law and order in this proceeding, the Administrative Law Judge may make such technical evidentiary amendments and adaptations with respect to the trial record in this proceeding as may be necessary to effect the purposes of this Stipulation.

6. All signatories agree that:

a. If the Administrative Law Judge's findings and conclusions shall be adverse to respondent or intervenors in this proceeding, respondent and intervenors reserve the right to make application to be heard as to the matter of the relief or the form of an order. In the event such an application to be heard is made, any signatory shall have the right to oppose such application, both as to form and substance, and to further contest and challenge the procedures and merits of any proceedings which ensue as a result of the granting of any such application in whole or in part.

b. If the Administrative Law Judge dismisses the complaint in full in the Coca-Cola proceeding, then a like order, founded upon appropriate findings of fact and conclusions of law in this proceeding, shall be deemed by all signatories to be entered herein, subject to the full and complete rights of complaint counsel to appeal and seek review of such order entered in this proceeding.

7. The procedural rights of the signatories with respect to review or appeal to the Commission or any court from any decision, findings of fact, conclusions of law, order or other ruling, which may be entered in this proceeding [8] by the Administrative Law Judge, including the implementation of this Stipulation, shall not be impaired.

8. At the time when the Administrative Law Judge's decision on the merits in this proceeding comes before the Commission for review, or at such other time as the

sole discretion and without notice to the signatories, may reject this Stipulation and the procedures adopted thereunder. Any ordered remand to the Administrative Law Judge shall be without prejudice to the signatories.

9. In the event that the Commission elects to confirm this Stipulation and the procedures and action taken pursuant thereto, the procedural rights of respondent and intervenors with respect to review of, or appeal from, any decision or order which the Commission may issue shall not be impaired.

10. It is further stipulated and agreed by and between respondent and intervenors only, and not complaint counsel, that to the extent the restraint which is challenged in this proceeding is upheld, respondent will construe all its Exclusive Bottling Appointments as imposing upon all its bottler trademark licensees thereunder a vertical territorial limitation confining their sales thereunder within the respective territories defined therein and prohibiting direct or indirect sales by them outside such defined territories.

We are proceeding on the basis of the understandings recited in the stipulation because it is apparent that if witnesses had been called to testify at a litigative hearing of this matter, their testimony would have been substantially the same as that of the witnesses who testified in the Coca-Cola hearings. Bottlers of Coca-Cola, Pepsi-Cola, Dr Pepper and of other national brand soft drinks testified in the Coca-Cola [9] hearings and it is clear that the interests and experiences of these bottlers were sufficiently similar to warrant reliance on that testimony in deciding this matter.

11. On August 14, 1975, the testimony of Walter S. Mack, former president of the Pepsi-Cola Company, was taken before me in order to preserve it for possible introduction into the record of this matter in the event the litigative hearings are resumed. Thereafter, the parties agreed to the testimony being added to the limited record of the case.

The findings of fact following are based on a review of the allegations made in the complaint, respondent's answers and the four stipulations entered by counsel which are a part of the evidentiary record of this proceeding. The testimony of Victor A. Bonomo, the current president of PepsiCo, was not considered because he did not finish his direct testimony and was not cross-examined.

In accordance with the stipulation quoted above, certain portions of the initial decision of In the Matter of Coca-Cola Company (Dkt. 8855), a copy of which is appended hereto, have been incorporated in this decision and made applicable to PepsiCo. Reference should be made to that document for a complete understanding of the decision in this proceeding.

For the convenience of the Commission and other readers of this initial decision, the findings of fact include references to supporting evidentiary items in the PepsiCo (Dkt. 8856) and Coca-Cola (Dkt. 8855) records. Such references are intended to serve as guides to the testimony, evidence and exhibits supporting the findings of fact. They

do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used:

CX – Commission's Exhibit, followed by number of exhibit being referenced.

RX – Respondent's Exhibit, followed by number of exhibit being referenced.

Tr. – Transcript preceded by the name of the witness and followed by the page number. [10]

Mack Tr. – Transcript of the deposition of Walter S. Mack.

FINDINGS OF FACT

PepsiCo, Inc.

1. PepsiCo, Inc. is a corporation organized, existing and conducting its business under and pursuant to the laws of the State of Delaware. It maintains its executive offices and principal place of business at Anderson Hill Road, Purchase, New York. PepsiCo, Inc. had consolidated sales of \$848,265,196 and consolidated assets, including non-soft drink and foreign sales and assets, of \$471,915,966 in 1968. In 1968, PepsiCo, Inc. made domestic sales to approximately 500 bottlers in the United States. (Admitted in Answer; Stipulation No. 2, Tr. 285-86)

2. PepsiCo, Inc. is engaged, through its Pepsi-Cola Company division, in the manufacture and sale of concentrates and syrups which it sells to approximately 500 bottlers in the United States who purchase such concentrates or syrups under the terms of exclusive bottling appointment agreements licensing such bottlers to manufacture and sell soft drink products under PepsiCo, Inc.'s trademarks such as "Pepsi-Cola," "Pepsi," "Diet Pepsi-Cola," "Mountain Dew," "Teem," and "Patio." PepsiCo, Inc.'s licensed bottlers manufacture, can and/or bottle and package the soft drink products sold under PepsiCo's trademarks. In addition, subsidiaries of PepsiCo, Inc. operate approximately 20 bottling plants in various parts of the United States and sell the products of such plants. (Admitted in Answer; Stipulation No. 2, Tr. 286)

3. PepsiCo, Inc. has been and is now in competition with others engaged in the manufacture and sale of concentrates, syrups or soft drink products in commerce. (Admitted in Answer)

4. The Pepsi-Cola Company was a relatively late entrant into a soft drink market dominated by The Coca-Cola Company. (Mack. Tr. 82) In 1931, Pepsi-Cola was bankrupt and its assets had been sold by the trustee for \$10.500. At the end of 1933, Pepsi-Cola hit upon a successful

marketing strategy — sale of Pepsi in 12-ounce [11] bottles for the same 5¢ price charged for 6 1/2-ounce bottles of Coca-Cola and a vigorous drive to recruit independent franchisees. (Stipulation No. 3, Tr. 295)

5. In 1932 and 1933, Pepsi-Cola had been bottled for the Pepsi-Cola Company and was sold principally in the New York metropolitan area. Arrangements were made for bottling Pepsi-Cola in a few other cities in 1934. But by the end of 1934, it became apparent that Pepsi-Cola's new found success with its "twice as much for a nickel" strategy could become permanent only if it were possible to build a large nationwide sales volume quickly. Pepsi-Cola Company, with its limited resources and distribution facilities, could not itself capitalize on the impact of its 12-ounce drink. (Mack, Tr. 15) Franchising local independent businessmen to bottle Pepsi provided a solution to the problem. (Stipulation No. 3, Tr. 295-96)

6. By promising exclusive territorial rights, which granted to the licensee, among other rights, the exclusive right to manufacture, distribute and sell trademarked soft drink products in a defined geographical area, Pepsi-Cola representatives were able to persuade local bottlers across the country to become Pepsi-Cola franchisees. (Stipulation No. 3, Tr. 296; Mack, Tr. 13, 16)

7. The emergence of Pepsi as a nationally recognized cola drink depended on the network of independent bottler appointments issued in the mid-1930's. The franchise system was the cornerstone of Pepsi-Cola's steady campaign to become a viable, aggressive competitor to Coca-Cola. The effectiveness of this campaign was in turn dependent on the determination, business acumen and financial stability of Pepsi-Cola's franchisees. In order to induce individuals with the requisite financial and managerial resources to establish a local bottling plant, effectively exploit market potential and win consumer approval of its relatively unknown cola drink, the Pepsi-Cola Company had to demonstrate its commitment to the franchisee's success. (Stipulation No. 3, Tr. 297)

8. This it did by granting the bottlers the exclusive right to bottle and sell Pepsi in their designated franchise areas. Appointment as a Pepsi-Cola franchisee meant that the local bottler must make a substantial capital investment in plant, bottling machinery, bottles, cases, trucks, [12] equipment and supplies. He had to be willing to devote substantial personal and financial resources on behalf of a relatively unknown drink, the ultimate acceptance of which in the national market was far from certain, and to battle Coca-Cola which had been even further entrenched by the recent bankruptcy of the predecessor Pepsi-Cola Company. Without exclusive territorial fran-

chises Pepsi-Cola Company would have been unable to achieve the nationwide sales volume essential to enable it to compete successfully with Coca-Cola. (Stipulation No. 3, Tr. 297; Mack, Tr. 11-13, 16-16A, 29)

9. The domestic Pepsi-Cola bottling appointment agreements of PepsiCo, Inc. provide that the bottler is appointed as PepsiCo, Inc.'s "exclusive bottler, to bottle and distribute the carbonated beverage (herein called the 'Beverage'), sold under the trademarks Pepsi and Pepsi-Cola (herein collectively called the 'Beverage trademark'), in the following described territory (herein referred to as the 'Territory'), and nowhere else, bounded as follows: . . ." and refers to said agreement for the complete terms thereof. (Stipulation No. 2, Tr. 287)

10. As part of the effort to establish Pepsi as a nationally accepted cola drink, eight wholly-owned subsidiaries of Pepsi-Cola Company were formed during the period 1931-1937 for the purpose of operating Pepsi-Cola franchises in their states of incorporation. Some of these franchises were later granted to local businessmen, while franchises for the New York, Newark, Pittsburgh, Philadelphia, and Boston metropolitan areas were retained. They served to insure the presence of Pepsi-Cola in these important markets, to promote consumer acceptance in those markets, and contributed to the goal of making the product available everywhere. (Stipulation No. 3, Tr. 298)

11. Following World War II, the ratio of Pepsi sales to sales of Coca-Cola began an upward climb; and by the mid-1950's the latter's commanding lead in bottle sales of 5 to 1 over Pepsi in 1940 had been reduced to 2.5 to 1. By 1960, Pepsi had become a strong contender to Coca-Cola, having further reduced its lead in the total market to 2 to 1 and in food stores, where consumers can pick and choose freely between competing brands, Pepsi was outsold by Coca-Cola only 1.2 to 1. (Stipulation No. 3, Tr. 298-99) [13]

Interstate Commerce

12. PepsiCo, Inc. is engaged in "commerce" within the meaning of the Federal Trade Commission Act (15 U.S.C. 44). (Admitted in Answer; Stipulation No. 2, Tr. 286)

The Soft Drink Industry and the Exclusive Territorial Franchise System

13. In accordance with the stipulation of the parties (see pp. 4-8, *supra*), the following findings of fact from the initial decision of *In the Matter of The Coca-Cola Company* (Dkt. 8855) are deemed applicable to

herein: Nos. 27-55, 58-59, 63-70, 72-122, 124-127, 129-149, 151-195 (pp. 15-24, 25, 28-29, 29-50, 50-52, 53-60, 60-76). Where the words "Coca-Cola" (the company) and Coca-Cola (the drink) appear, they should be read, as appropriate, PepsiCo and Pepsi-Cola.

DISCUSSION AND CONCLUSIONS OF LAW

In accordance with the stipulation of the parties (see pp. 4-8, *supra*), the discussion of the applicable legal principles and the conclusions of law from the initial decision of *In the Matter of The Coca-Cola Company* (Dkt. 8855) are incorporated by reference herein.

ORDER

It is ordered, That the complaint in this matter be, and it hereby is, dismissed.

DISSENTING STATEMENT OF COMMISSIONER CLANTON

For the reasons expressed in my dissenting statement in the companion case involving the Coca-Cola Company, Dkt. 8855, I dissent from the Commission's decision with respect to PepsiCo, Inc.

OPINION

BY DOLE, *Commissioner*:

The complaint in this matter charges PepsiCo, Inc., with imposing territorial restrictions on the sale of Pepsi-Cola and allied products produced by independent bottlers, in violation of Section 5 of the Federal Trade Commission Act.

In 1968 PepsiCo had consolidated sales of \$848,265,196 and consolidated assets, including non-soft drink and foreign sales and assets, of \$471,915,966. Respondent's Pepsi-Cola Company division manufactures and sells soft drink concentrates and syrups to approximately 500 bottlers in the United States under the terms of exclusive bottling appointment agreements which authorize the bottlers to manufacture and sell soft drink products under PepsiCo trademarks, including "Pepsi-Cola," "Mountain Dew," "Teem," and "Patio." In addition to independent Pepsi-Cola and allied product bottlers, subsidiaries of PepsiCo operate approximately 20 bottling plants in various parts of the United States. (Admitted in Answer; Stipulation 2, Tr. 286).

I. STIPULATION OF FACTS

The trial of this case before the judge commenced shortly after the conclusion of the trial involving similar charges alleged in the

complaint against *The Coca-Cola Company, et al.*, Dkt. 8855. Following two [2] days of hearings, the parties and intervenors stipulated, *inter alia*, that:

... the completed trial record in a companion matter, *The Coca-Cola Co., et al.*, (Docket No. 8855, hereinafter "Coca-Cola proceeding"), is deemed by all signatories as an appropriate basis for an adjudication on the merits of this proceeding.

The stipulation further provides that, "The entire trial record in the Coca-Cola proceeding shall be incorporated by reference and made part of this proceeding." As so incorporated:

... such trial record may have equal force, effect and validity as a full trial record in an adversary hearing before the Administrative Law Judge on the allegation of the Commission's complaint in this proceeding. (Stipulation ¶5d).

Shortly after this stipulation was entered into the record, the testimony of Walter S. Mack, former President of PepsiCo, was taken before the judge in order to preserve it for possible introduction into the record in the event further litigation became necessary. Thereafter, the judge ordered that Mr. Mack's testimony be added to the record, along with certain exhibits which were offered and received with Mr. Mack's testimony. (Order Placing the Deposition of Walter S. Mack in the Record, entered September 4, 1975, Docket Binder 8856-1-3-2; Supplemental Order to Order of September 4, 1975, entered September 9, 1975). The judge further ordered, pursuant to the stipulation of the parties and intervenors, that the trial record in the Coca-Cola proceedings be incorporated into, and made a part of, the record of this proceeding. The case is now before us on appeal by complaint counsel from an initial decision of the judge dismissing the complaint. The oral arguments of counsel in this matter and in the matter of *The Coca-Cola Company, et al.*, Dkt. 8855, were received at a consolidated hearing on appeal.

The Commission, having reviewed the record in its entirety, has determined that the order entered by the judge dismissing the complaint be vacated. The Commission has further determined that certain findings and conclusions in the opinion of the Commission in the matter of *The Coca-Cola Company, et al.*, Dkt. 8855, as hereinafter noted, shall be adopted as the findings and conclusions [3] of the Commission in this case. In addition, the findings of fact as set forth in the judge's initial decision shall be adopted by the Commission to the extent that they are not inconsistent with the findings and conclusions

II. HISTORY OF PEPSICO AND THE RESTRAINT

The record shows that the Pepsi-Cola Company had a difficult period of entry into the soft drink market. In 1931 Pepsi-Cola was bankrupt; a trustee sold its assets for \$10,500. By 1934, however, the tide began to turn in its favor. It employed a new marketing strategy pursuant to which it sold Pepsi-Cola in 12-ounce bottles for the same price then being charged for 6 1/2-ounce bottles of Coca-Cola.

Prior to 1935, Pepsi-Cola was sold principally in the New York metropolitan area and a few other cities. Despite the success of its "twice as much for a nickel" strategy, respondent lacked the resources and distribution facilities to capitalize on the impact of its 12-ounce drink. (Mack, Tr. 15). Thus it initiated a drive to recruit independent entrepreneurs to bottle its product. (Stipulation No. 3, Tr. 295-96).

As an inducement to attract and encourage individual investors to establish local bottling plants, respondent granted them the exclusive right to bottle and sell "Pepsi" in designated geographic areas. Consequently, the bottling agreements provide that each bottler is appointed as PepsiCo's:

. . . exclusive bottler, to bottle and distribute the carbonated beverage (herein called the "Beverage"), sold under the trademarks Pepsi and Pepsi-Cola (herein collectively called the "Beverage trademark"), in the following described territory (herein referred to as the "Territory"), and nowhere else, bounded as follows: . . ." (Stipulation No. 2, Tr. 287; *See also* RX 99, incorporated exhibit from Dkt. 8855).

It is undisputed that a network of independent bottlers was an important part of respondent's plan 40 years ago to expand the sales of Pepsi-Cola in competition nationwide with the bottlers of Coca-Cola. (Stipulation No. 3; Tr. 297, Mack, Tr. 11-13, 16-16A, 29). In addition to the recruitment of independent bottlers, respondent established, [4] during the period of 1931-1937, eight wholly-owned bottling subsidiaries. While some of these franchises were later granted to local businessmen, respondent retained the franchises for the New York, Newark, Pittsburgh, Philadelphia, and Boston metropolitan areas. (Stipulation No. 3, Tr. 298).

Following World War II, the ratio of Pepsi sales to sales of Coca-Cola began an upward climb: in 1940 Coca-Cola's lead in bottle sales was 5 to 1 over Pepsi; by the mid-1950's the lead was 2.5 to 1; by 1960 it was 2 to 1. (Stipulation No. 3, Tr. 298-99). The record further shows that by 1971 Pepsi-Cola had overtaken Coca-Cola as the leading brand in numerous cities (RX 2Y-Z39 incorporated exhibits from Dkt. 8855) and in several regions of the country. (RX 2Y-Z39-40, incorporated exhibits from Dkt. 8855). Thus, while territorial restrictions may have assisted a faltering new entrant into the market four decades ago,

those same restrictions certainly cannot be justified as necessary on that basis today.

Respondent PepsiCo is a well-established, dominant soft drink syrup and concentrate producer; its bottlers are firmly entrenched in the fabric of the bottling industry; and PepsiCo brands are established, widely recognized soft drink beverages. Thus the evidence introduced into the record leads us to conclude that these brands could continue to be a viable interbrand competitive force in the market if the bottlers who now sell them are permitted to compete interbrand among themselves.

III. CONTINUING USE OF THE RESTRICTIONS

As we noted previously, the contract between PepsiCo and each of its bottlers provide, and bottlers understand their contracts to mean, that each bottler may sell Pepsi-Cola and allied products exclusively within the territory described in his license agreement and nowhere else.¹ (Mack, Tr. 16-A; *See also* incorporated testimony Dkt. 8855, Tr. 2859, 2861, 2918-20; 2958, 2993; 3108-09). It is arguable that the mere existence of such a provision in a contract between PepsiCo and Pepsi-Cola bottlers constitutes a threat to competition. Pepsi's syrups, concentrates and trademarks are vital to [5] the business of its bottlers, and there is always some danger that PepsiCo will seek to enforce the agreement or that the bottlers, as the record shows, will feel obliged to adhere to it.² Yet we need not rely solely upon the mere existence of these agreements; there is evidence in the record of PepsiCo's resolve to enforce compliance with the restriction.

According to respondent's former President, PepsiCo, "would protect their [the bottlers] franchise . . . and do everything we could to protect both the trademark and the name and their territory for them on an exclusive basis." (Mack, Tr. 17; *see also* Mack, Tr. 19, 38, 83, 91-94, 96).

Mr. Mack testified further:

Q. . . . were there sometimes complaints received by the Pepsi-Cola Company from bottlers that Pepsi-Cola product produced by another bottler was crossing into the complaining bottler's territory?

A. We had very little of that. The bottlers knew that the value of the Pepsi-Cola franchise was his exclusive in this area. And where those things happened inadvertently a letter or one bottler talking to another straightened it out. We had very little of that. The bottlers were a good group. They helped each other.

¹ Unlike The Coca-Cola Co., respondent PepsiCo also imposes territorial restrictions on the sale of its fountain syrup. (Mack, Tr. 34, 35, 87-89). Whether the restraint is also applicable to the sale and distribution of post-mix systems by Pepsi-Cola bottlers is unclear on this record. The order, however, will cover both post-mix syrup and pre-mix systems as a prophylactic measure. (*See* Opinion in Dkt. 8855 at 64.)

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Q. And they understood and knew the value of the exclusive franchise?

A. Right.

Q. And in those few instances you have described where a letter was written, that was a letter from the Pepsi-Cola Company to the offending bottler?

A. I don't remember ever having to write a letter. The field man usually would talk to him. And if there was an infraction, it was very easily straightened out. We had very little of that sort of trouble. [6]

Q. The field man would be a Pepsi-Cola employee who would talk to the offending bottler and it would be straightened out?

A. Yes. If there was any. We had no problems along that line. (Mack, Tr. 28-29).

The record also shows that respondent's concern for preserving the integrity of its territorial policy was a key consideration in its decision to abandon an innovative Pepsi-Cola canning experiment. The concern arose when a retailer was found transshipping the canned product from its central warehouse to its retail outlets located within the territories of various Pepsi-Cola bottlers.

Thus Mr. Mack testified:

Q. In the post-World War II period did you at some point enter into an experiment in the selling of Pepsi-Cola in cans?

A. Yes.

Q. Would you tell Judge Dufresne about that experiment?

A. It seems to me that we ought to test and find out how it fitted in the picture.

So I started an experiment with Pepsi-Cola in cans. It was difficult to get a can that had the lining . . . the ingredients didn't affect (and which did not) . . . affect the flavor by the lining, by the metal. And finally Continental Can worked out a can for me that had a crown top . . . And I started an experiment in three areas because I wanted to test the different consumers.

* * * * *

The parent company did the manufacturing. The parent company did the canning. And we shipped it to those three test areas.

Q. What were the results of the test?

A. Well, they were good and they were bad. The good part of it is that we found that the consumer was interested in it. The bad part of it was that it was an expensive operation. And that in some instances it couldn't be confined to the territory that the bottler was in. And we finally withdrew it and took [7] it off the market. We found it wouldn't go with the franchise system.

Q. Will you tell us specifically what the instances were in which you received reports of cans crossing franchise lines?

MR. FREUND: Objection. I don't know that he said he received reports.

JUDGE DUFRESNE: Before you ask that, what did you mean when you said you had problems confining the cans, Mr. Mack?

THE WITNESS: Well, I meant by that that in some instances due to the fact that they didn't have to go back to pick up the empties, they crossed territorial lines.

JUDGE DUFRESNE: You mean the licensee would sell canned product outside of the territory you had agreed upon he would serve, or what?

THE WITNESS: No I mean by that, specifically what happened particularly in the New Rochelle area was that the New Rochelle bottler sold to A&P.

JUDGE DUFRESNE: They might ship it outside?

THE WITNESS: That is right. They had a distribution system in which they went and distributed the way they do Campbells Soup or Heinz Beans or something to their chain stores. And their chain stores might get from a warehouse and be outside the franchise area and therefore cans in New Rochelle might get up into Stamford, Connecticut.

JUDGE DUFRESNE: This was an action by the reseller rather than the Pepsi-Cola?

THE WITNESS: Oh, yes. The bottler didn't do it. It was the reseller. The retailer did that.

JUDGE DUFRESNE: All right. [8]

By Mr. Sisk:

Q. Did the Pepsi-Cola Company receive complaints from the bottlers adjoining the New Rochelle franchise?

A. Yes, we got some complaints, and we withdrew the whole operation.

Q. That was the end of the canning operation as far as you were concerned?

A. Yes. (Mack, Tr. 24-28).

Pepsi-Cola is available today, of course, in both cans and bottles, but the extra-territorial sale or trans-shipment of it is still restricted. The bottlers testified that they do not engage in such sales or shipments, and if they did, it would constitute a breach of the territorial provisions of their bottling appointment agreements. (Testimony of Pepsi-Cola bottlers, Dkt. 8855, Tr. 2875-76, 2992-93, 3108-09).

Consequently, the evidence is uncontroverted that PepsiCo has imposed, by contract, and enforced, in practice, geographic exclusivity, using such methods as may have been necessary to preserve the territorial restrictions challenged in this proceeding. (Mack, Tr. 16, 16-A, 17, 28-29). The evidence further shows that it will, absent an order, continue to do so in the future. (Stipulation ¶10, Tr. 437-38).

IV. EFFECTS OF THE RESTRICTIONS

In accordance with the stipulation of the parties and intervenors, the following findings and conclusions set forth in the text of our opinion in the matter of *The Coca-Cola Company, et al.*, Dkt. 8855, are hereby adopted by the Commission and incorporated herein by reference: Section II through Section III, subsection B (Text at 6-19); Section III, subsection B2 through Section VI, subsection B4 (Text at 21-78); Section VI, subsection B5c and Conclusion (Text at 83-84). Our discussion of the anticompetitive effects of the territorial restriction imposed by The Coca-Cola Company, in the above noted portions of our opinion in Dkt. 8855, is equally applicable here. [9]

In addition, we note that, as a dual-distributing trademark licensor, PepsiCo, like The Coca-Cola Company, has access to competitively sensitive commercial information about each of its bottler's business

Therefore, we adopt and hereby incorporate by reference Section VI, subsections 5 and 5a of our Opinion in *The Coca-Cola* case, Dkt. 8855. (Text at 79-81). Section III of our order will provide ancillary safeguards which will prevent PepsiCo from exploiting such information to the detriment of the independent Pepsi-Cola or allied product bottlers.

Respondent and intervenors have reserved the right to be heard as to matters of relief or the form of an order, and they have been afforded the opportunity to be heard on these issues before the Commission. Neither has suggested, however, that relief entered here should be different from the relief in the *Coca-Cola* Case. No distinctions of any significance pertinent to the issues of relief, either with respect to the factual context in which the restraint is imposed by PepsiCo upon its bottlers or with respect to the potential impact lifting the restriction might have upon Pepsi-Cola bottlers, have been brought to our attention. The record supports uniform relief in these companion cases. Accordingly,

An appropriate order is attached.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of complaint counsel from the initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for reasons stated in the accompanying opinion, having granted the appeal:

It is ordered, That the entire record in the matter of *The Coca-Cola Company, et al.*, Dkt. 8855; be, and it hereby is, incorporated into, and made part of, the record in this proceeding.

It is further ordered, That the findings of fact set forth in the initial decision of the administrative law judge be, and they are, adopted by the Commission to the extent they are consistent with the findings of fact and conclusions of law contained in the accompanying opinion of the Commission in this matter.

It is further ordered, That the order dismissing the complaint entered by the administrative law judge be, and it hereby is, vacated.

Accordingly, the following cease and desist order is hereby entered:

[2]

ORDER

I

It is ordered, That the following definitions shall apply in this order:

A. Allied products – the soft drink products of PepsiCo, Inc., other

than "Pepsi-Cola" including "Teem," "Mountain Dew," and "Patio," among others;

B. Bottler – any individual, partnership, corporation, association, or other business or legal entity which purchases respondents' syrups or concentrates for use in the manufacture and sale, primarily at wholesale, of finished soft drink beverages;

C. Central warehousing – a method of distribution in which soft drink products are received at a storage facility and either resold or delivered to retail outlets or wholesalers;

D. Concentrate – the basic soft drink ingredients, either dry or liquid, to which sugar is added to prepare a syrup;

E. Confidential commercial information – facts, data, statistics, or other material which concern the business of licensed Pepsi-Cola or allied product bottlers including, but not limited to, trade secrets, customer lists, plant equipment or production capacities, or syrup and concentrate purchases obtained by or available to, respondent pursuant to, or as a result of, any agreement, understanding, or provision of a trademark license, and which could, if disclosed to a competitor, cause substantial harm to the competitive position of the bottler from whom the material was obtained;

F. Nonrefillable – a special container designed to be filled only once with finished Pepsi-Cola or allied soft drink beverages;

G. Post-mix syrup – a soft drink ingredient which is used in fountain-dispensing or vending equipment and which is usually sold by bottlers and other wholesalers in steel tanks. A typical post-mix system draws one ounce of syrup from a tank, usually having about a five-gallon capacity, and mixes it at the point of sale with five ounces of carbonated water to produce finished soft drink beverages; [3]

H. Pre-mix system – a system which draws from a tank, usually having about a five-gallon capacity, a finished serving of a soft drink product containing both syrup and carbonated water, "pre-mixed," to produce finished soft drink beverages;

I. Soft drink products – nonalcoholic beverages and colas, carbonated and uncarbonated, flavored and nonflavored, sold in bottles or cans, or through pre-mix or post-mix systems or the like;

J. Syrup – a mixture of ingredients in liquid form which, when mixed with carbonated water, becomes a finished soft drink product.

II

It is further ordered, That respondent PepsiCo, Inc., and the officers, agents, representatives, employees, successors, and assigns of respondent, directly or through any corporate or other device, in connection with the advertising, merchandising, offering, or sale of

distribution of soft drink products, including syrups and concentrates, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from directly or indirectly:

A. Attempting to enter into, entering into, continuing, maintaining, enforcing, or renewing any contract provision, combination, understanding, or agreement to limit, allocate, or restrict the territory in which, or the persons or class of persons to whom, licensed Pepsi-Cola or allied product bottlers may sell or distribute post-mix syrup or finished soft drink beverages packaged in pre-mix containers or in nonrefillable bottles or cans.

B. Imposing or attempting to impose any limitations or restrictions respecting the territories in which, or the persons or class of persons to whom, bottlers may sell or distribute post-mix syrup or finished soft drink beverages packaged in pre-mix containers or in nonrefillable bottles or cans. [4]

C. Refusing to sell, threatening to refuse to sell, or impairing sales to any bottlers, operating pursuant to a license consented to, granted by, approved by, or ratified by PepsiCo, Inc., for the duration of the license, anything used in the manufacture and sale of soft drink products, including, but not limited to, syrups and concentrates or the container in which they are sold, or otherwise in any way penalizing any such bottler because of the territory in which, or the persons or class of persons to whom, the bottler sells or distributes post-mix syrup or finished soft drink beverages packaged in pre-mix containers or nonrefillable bottles or cans.

D. Refusing to deliver all of a licensed Pepsi-Cola or allied product bottler's order for syrups, flavoring, or concentrates because the bottler has made, or intends to make, sales of post-mix syrup or soft drinks packaged in pre-mix containers or nonrefillable bottles or cans to customers outside of the territory granted to the bottler, or because the bottler has made, or intends to make, such sales to customers within the territory granted to the bottler, with knowledge that the customer has transshipped or will transship such soft drinks outside of the territory.

E. Impeding, hindering, or preventing, either directly or indirectly, the methods, including, but not limited to central warehousing, by which licensed bottlers may distribute Pepsi-Cola or allied products, *Provided, however*, that respondents may (1) establish quality standards, including standards for the rotation of Pepsi-Cola and allied product inventories in the central warehouse and at retail delivery locations, irrespective of whether the soft drinks are redelivered from a warehouse or delivered directly to the retail outlet by a bottler; (2)

require the bottlers to use a uniform container dating system so that bottlers and retailers will recognize the date without reference to a code; (3) require the bottlers to be responsible, directly or indirectly, for the maintenance of such standards of quality; and (4) require each bottler to place an identification mark of origin on each bottle, bottle cap, or can for the purpose of monitoring compliance with such quality control standards.

F. Enforcing or aiding in the enforcement of any contract provision, agreement, or understanding providing for entry into or examination of the plant and facilities of any independent bottler by another independent bottler. [5]

III

It is further ordered, That respondent shall provide for the protection of confidential commercial information acquired from bottler licensees of Pepsi-Cola or allied product brands as follows:

A. Access to or use of confidential commercial information obtained by respondent, its officers, employees, or agents concerning the production, packaging, distribution, promotion, or sale of Pepsi-Cola or allied product brands by any licensed bottler shall be restricted to those of respondent's officers, employees, or agents who are neither involved in nor responsible for the production, marketing, promotion, or sale of finished soft drink products by respondent's bottling or canning operations, divisions, subsidiaries, or affiliates.

B. Such officers, employees, or agents who receive, process, or evaluate package-approval requests; process or fill syrup or concentrate purchase orders; conduct on-site inspections of independent bottling plants and facilities; or receive or review confidential commercial information obtained from any independent Pepsi-Cola or allied product bottler in the course of carrying out the provisions of any soft drink trademark licensing agreement, shall refrain from making any such confidential information available to, or communicating or discussing any such information with, any person involved in or responsible for the production, marketing, promotion, or sale of finished soft drinks by respondent's bottling or canning operations, divisions, subsidiaries, or affiliates.

C. Such officers, employees, or agents who receive, process, or have access to confidential information concerning the business of individual independent Pepsi-Cola or allied product bottler licensees, shall refrain from suggesting, influencing, or making recommendations to any person concerning the production, distribution, marketing, promotion, or sale of finished soft drinks by respondent's bottling or canning operations, divisions, subsidiaries, or affiliates.

this provision shall not apply to respondent's officers, employees, or agents who receive, review, or evaluate data, information, or statistics only in aggregate form or quality control inspection reports which include such information as bacteriological tests, water analyses, water carbonation and syrup content tests, sanitation inspection checks, or bottle washing solution analyses, so long as such reports do not also contain information concerning the bottler's plant equipment, production capacity, or similar types of confidential commercial information.

[6]

D. Respondent shall provide each officer, employee, or agent who receives, reviews, or has access to confidential information as set forth in subparagraphs A. through C. above with a copy of this order and an explanation, in writing, of the restrictions this order imposes on access to and the use of such information.

E. Subparagraphs A. through C. above shall not apply (1) to data or information which is in the public domain or which has entered the public domain from a source other than respondent or its officers, employees, or agents; or (2) to transactions involving orders from licensed Pepsi-Cola or allied product bottlers for finished canned or bottled soft drink products prepared by respondent for a bottler pursuant to an agency canning or bottling agreement.

IV

It is further ordered, That within sixty (60) days from the date respondent receives service of this order, it shall service a copy of this order upon all bottlers of its soft drink products.

V

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

VI

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

It is further ordered, That respondent 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.

Chairman Pertschuk did not participate in the consideration of this matter. Commissioner Clanton dissents.

Interlocutory Order

IN THE MATTER OF

HOWARD ENTERPRISES, INC.

Docket 9096. Interlocutory Order, April 7, 1978

Order directing that oral argument not be set down without a further order of the Commission.

ORDER GRANTING MOTION TO OMIT ORAL ARGUMENT

On March 13, 1978, complaint counsel filed with the Secretary a motion dated March 8 to omit oral argument pursuant to Rule Section 3.52(f). The grounds urged for the motion were that the case presented essentially legal issues and that these were fully discussed in complaint counsel's brief. Counsel for the respondents, contacted telephonically by the Secretary, declined to oppose the motion.

That the issues presented by a case are legal rather than factual bears no necessary relationship to the value of oral argument, which serves as an opportunity to sharpen and define the opposing positions of the parties, and to probe the implications of their arguments, whatever the nature of the issues. However, we will defer provisionally to the evident judgment of both counsel that the issues here will be fully elaborated in the briefs. If the Commission should determine, once all the briefs are available, that oral argument would nonetheless be useful, it can so order at that time.

Accordingly, *it is ordered*, That no date for oral argument in this matter shall be set down without a further order of the Commission.

Interlocutory Order

91 F.T.C.

IN THE MATTER OF

KELLOGG COMPANY, ET AL.

Docket 8883. Interlocutory Order, April 19, 1978

Denial of Kellogg's applications (1) for review of ALJ's order denying motion to nullify subpoenas duces tecum for taking of depositions and production of documents, and (2) for stay of deposition program pending resolution of application for review.

ORDER DENYING APPLICATIONS OF KELLOGG COMPANY FOR
REVIEW AND FOR A STAY

On April 13, 1978, respondent Kellogg Company ("Kellogg"), filed with the Commission an Application for Review of Order Denying Its Motion to Nullify Subpoenas Duces Tecum for the Taking of Depositions and Production of Documents. With that Application, Kellogg also filed an Application for a Stay of the Commencement of Complaint Counsel's Deposition Program Pending Resolution of Kellogg Company's Application for Review. For the reasons briefly outlined below, the Commission denies both Applications.

Kellogg's Application for Review comes to the Commission without the certification of the Administrative Law Judge pursuant to Commission Rule 3.23(b). Under the Commission's Rules, that certification is essential for interlocutory review unless the matter is one which falls within the provisions of Rule 3.23(a). Kellogg cites to Reorganization Plan No. 4 of 1961, H. Doc. No. 159, 87th Cong., 1st Sess., as support for its appeal without certification. Even that Plan, however, provides that the Commission shall retain its discretionary right to review "within such time and in such manner as the Commission shall by rule prescribe . . ." In this instance, the Commission has explicitly provided for review under Rule 3.23(b) or after issuance of the Administrative Law Judge's initial decision.

The Commission's Rules are designed to provide for the orderly and efficient conduct of a hearing. That process would be seriously undercut if the Commission were to interject itself into every dispute between the parties and the law judge. Interlocutory review is the exception to the rule that the Administrative Law Judge is vested with broad discretionary powers to conduct the proceeding. Rule 3.42(c).¹ In fact, this is precisely the kind of matter which is peculiarly within the province of the Administrative Law Judge as the trier of fact. Accordingly,

¹ As we have noted on other occasions, *Kellogg Co., et al.*, 83 F.T.C. 1756 (1974); *Warner-Lambert Co.*, 83 F.T.C. 485

Interlocutory Order

It is ordered, That the Application of Kellogg Company for Review of Order Denying Its Motion to Nullify Subpoenas Duces Tecum for the Taking of Depositions and Production of Documents, and the Application of Kellogg Company for a Stay of the Commencement of Complaint Counsel's Deposition Program Pending Resolution of Kellogg Company's Application for Review be, and the same hereby is, denied.

Complaint

91 F.T.C.

IN THE MATTER OF

INSILCO CORPORATION, ET AL.

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

Docket C-2919. Complaint, April 19, 1978 — Decision, April 19, 1978

Consent order requiring a Meriden, Conn., distributor of pre-cut housing products and its subsidiary, among other things, to cease misrepresenting or failing to make relevant disclosures with regard to product assembly, delivery costs, legal building requirements, need for skilled building tradesmen, mortgage liens, and cancellation rights—in Spanish, if applicable. The order further requires the firm to acknowledge and resolve complaints in a prescribed manner. Additionally, the firm must cease failing to provide consumers, in connection with the extension of credit, such material disclosures as required by Federal Reserve Board regulations.

Appearances

For the Commission: *Blanche Stein, Richard A. Palewicz and Walter R. Baron.*

For the respondent: *William G. Dillon, Simpson, Thacher & Bartlett, New York, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Insilco Corporation, a corporation, and Miles Homes, Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the implementing regulation promulgated under the Truth in Lending Act, and it now 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. For purposes of this complaint, the following definitions shall apply:

a) The term "pre-cut housing" means homes sold to the general public by any of the Miles Homes Companies in the form of unassembled or partially assembled materials and components other than a package.

b) The term "package" means the materials and components for the

with pre-cut housing, or tile or paint which any of the Miles Home Companies offer to purchasers of pre-cut housing.

PAR. 2. Respondent Insilco Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 1000 Research Parkway, Meriden, Connecticut.

Respondent Insilco Corporation has numerous wholly-owned subsidiaries in various States of the United States which it collectively terms "Miles Homes Companies" and which includes, among others, Miles Homes, Inc.

Respondent Miles Homes, Inc. is a wholly-owned subsidiary of respondent Insilco Corporation, and is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 4500 Lyndale Ave., North, Minneapolis, Minnesota.

Respondent Insilco Corporation by reason of its ownership of Miles Homes, Inc. has the power to and does control the acts and practices of Miles Homes, Inc.

PAR. 3. Respondents are now and for some time in the past have been engaged in the advertising, offering for sale and sale of pre-cut housing and packages for such housing to the general public.

PAR. 4. In the course and conduct of its business, as aforesaid, and by virtue of the control it exercises over respondent Miles Homes, Inc. by formulating, establishing and monitoring the financial and sales policies and operations of this subsidiary; through its wholly-owned corporate subsidiaries engaged in the sale of pre-cut housing in various States of the United States; and, through its other wholly-owned corporate subsidiaries which are distribution centers for pre-cut housing sold by respondents, respondent Insilco Corporation now causes, and for some time last past has caused, pre-cut housing to be transported from the states in which such distribution centers are located directly to purchasers located in various other States of the United States.

In the course and conduct of its business, as aforesaid, respondent Miles Homes, Inc. now causes, and for some time last past has caused, business papers and advertisements to be transmitted through the United States mail from respondent's place of business in Minnesota to members of the public located in various other States of the United States, and certain other advertisements to be inserted in newspapers of interstate circulation.

Therefore, each of the respondents now maintain, and at all times mentioned herein has maintained, a substantial course of trade in or

Complaint

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

COUNT I

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

PAR. 5. In the course and conduct of their housing business, as aforesaid, and for the purpose of inducing the public to purchase respondents' products, respondents have made, or are now making, certain statements and representations in advertising brochures and in advertising inserted in newspapers of interstate circulation.

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

The only houses actually designed so they can be built by anyone who can drive a nail and follow simple instructions.

* * * * *

Build in spare hours without costly hired labor.

* * * * *

Your materials come pre-cut, ready to nail, with an excellent set of instructions designed for people with little or no previous building experience.

* * * * *

You can start the nailing and assembly within five minutes after you receive your home.

* * * * *

MILES PRECISION CUT HOMES

* * * * *

. . . a plan which combined financial assistance, all the materials, and easy to understand instructions. . . making it possible for any family to build their own home.

* * * * *

. . . We furnish precut building materials, step-by-step instructions, everything you need. . . inside and outside. Free delivery.

* * * * *

. . . You do not run out of material after you start building.

Our own fleet of trucks delivers your home in several loads, as you need it.

PAR. 6. By and through the use of the above-quoted statements and representations and others of similar import and meaning not expressly set out herein, respondents have represented, or are now representing, directly or by implication that:

1. Pre-cut housing sold by respondents is easy to assemble and can be completely constructed by anyone.

2. Anyone can assemble respondents' pre-cut housing without utilizing the services of skilled building tradesmen during the course of construction.

3. Pre-cut housing sold by respondents is delivered to purchasers with all parts pre-cut to exact size with such accuracy that a purchaser need only to nail the parts in place.

4. Instructions furnished to purchasers by respondents for the assembly of pre-cut housing are designed for the specific style house ordered by each purchaser.

5. Instructions furnished to purchasers by respondents for the assembly of pre-cut housing are so simple that they can be easily followed by anyone.

6. Deliveries of materials and components of pre-cut housing sold by respondents are timed to meet the individual construction schedule needs of each purchaser.

7. Purchasers of respondents' pre-cut housing will be furnished adequate supplies of building materials to assure that the purchaser will not run short of materials or components during the course of construction.

8. Purchasers of respondents' pre-cut housing are not required to pay delivery charges for any of the materials or components for such housing purchased from respondents.

PAR. 7. In truth and in fact:

1. Pre-cut housing sold by respondents is not easy to assemble and cannot be completely constructed by any ordinary purchaser. In many instances purchasers, including those who have previous building construction experience, must hire skilled tradesmen to lay the foundation for the house.

2. Anyone cannot assemble respondents' pre-cut housing without using the services of skilled building tradesmen during the course of construction. In many instances, purchasers find it necessary to hire a carpenter, electrician or plumber for the construction of the house.

3. Pre-cut housing sold by respondents is not delivered to purchasers with all parts pre-cut to exact size with such accuracy that the parts need only to be nailed in place. Door and window openings, stairways, interior partition plates, interior wall studs, and hip, valley

and jack rafters are not pre-cut and must be measured and cut by purchasers during the construction of such housing.

4. Instructions furnished to purchasers by respondents for the assembly of pre-cut housing are not designed for the specific style house ordered by each purchaser. The instructions furnished are general in nature, and all purchasers receive an identical set of instructions regardless of the style house ordered.

5. Instructions furnished to purchasers by respondents for the assembly of pre-cut housing are not so simple that they can be easily followed by anyone. In many instances, purchasers are unable to interpret the instructions without the assistance of a carpenter, and instructions are not set out in the sequence of construction practice normally followed in the industry.

6. Deliveries of materials and components of pre-cut housing sold by respondents are not timed to meet the individual construction schedule needs of each purchaser. In many instances, deliveries are late, are made ahead of schedule, or are made at respondents' own convenience without regard to the schedule of delivery dates requested by purchasers.

7. Purchasers of respondents' pre-cut housing are not always furnished adequate supplies of building materials or components to assure that the purchaser will not run short of such materials or components during the course of construction. In some instances, an inadequate supply of nails, plywood or insulation is furnished. Respondents frequently delay, neglect, refuse or ignore making replacements of materials or components that are delivered to purchasers in damaged condition or where the delivery of the materials or components are not in accord with the purchaser's orders.

8. Purchasers of respondents' pre-cut housing are required to pay delivery charges for some of the materials or components for such housing. Delivery charges are added to purchasers' accounts when materials or components are shipped by carriers other than respondents' own trucks.

Therefore, the statements and representations as set forth in Paragraph Six above were and are false, misleading and deceptive.

PAR. 8. In the further course and conduct of their business, as aforesaid, and for the purpose of inducing the public to purchase respondents' pre-cut housing, respondents have made, or are now making, statements and representations in advertising brochures and in advertising inserted in newspapers of interstate circulation concerning the financial arrangements for the purchase of such housing.

Typical and illustrative of such statements and representations, but

706

Complaint

You may build on your own lot. . .

* * * * *

Land need not be paid in full.

* * * * *

No Cash Needed. Monthly Payments: \$84, including custom kitchen cabinets, plumbing, heating, electrical, tile and paint. . .

* * * * *

MILES PRECISION-CUT HOMES are recommended by banks, lending institutions and mortgage companies throughout the United States.

By and through the use of such statements and representations, respondents have failed to disclose the following material facts which, if known to consumers would be likely to affect their decision to respond to said advertising or to enter into negotiations with respondents which results, in many instances, in the purchase of pre-cut housing offered for sale by respondents:

1. That, in addition to the requirement that purchasers enter into a written agreement for the purchase of pre-cut housing, purchasers are also required to give respondents a mortgage note and first mortgage lien on the land used as the building site.

2. That the plumbing, heating or electrical systems, tile and paint, and kitchen cabinets are optional items for which respondents make substantial additional charges.

3. That respondents add delivery charges for materials and components shipped by carriers other than respondents' own trucks, and that such delivery charges always will be made for any "packages" ordered.

4. That respondents do not arrange long-term financing for individual purchasers from institutions that customarily furnish mortgage loans.

5. That the monthly payments are essentially in payment of the interest on the mortgage note purchasers are required to give respondents and reflect little or no reduction in the principal amount of the amount financed.

Therefore, respondents' failure to disclose such material facts were and are unfair, false, misleading and deceptive acts and practices.

PAR. 9. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents have been and are now in substantial competition, in or affecting commerce, with corporations, firms and individuals in the sale of housing of the same general kind and nature as that sold by respondents.

PAR. 10. The use by respondents of the aforesaid unfair, 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 purchase of substantial numbers of respondents' pre-cut housing.

PAR. 11. The aforesaid acts and practices of the respondents as herein alleged were and are all to the prejudice and injury of the public and respondents' competitors and constituted and now constitute unfair methods of competition, in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

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

PAR. 12. In the ordinary course and conduct of their business as aforesaid, respondents regularly extend and for some time in the past have regularly extended, consumer credit, as "consumer credit" is defined in Section 226.2(p) of Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 13. Subsequent to July 1, 1969, respondents, in the ordinary course and conduct of their business, and in connection with their credit sales, as "credit sale" is defined in Section 226.2(t) of Regulation Z, have caused, and are now causing, customers to execute a document entitled "Agreement," a retail installment contract, for the purchase of pre-cut housing. Concurrently with the agreement, respondents have furnished such customers with a "Separate Disclosure Statement of Credit Sale," a "notice to customers required by federal law" and an "Effect of Rescission."

PAR. 14. Subsequent to the Agreement referred to in Paragraph Thirteen, respondents made additional sales of materials, components or packages for the pre-cut housing (hereinafter sometimes referred to as "Additional Sales"). Such "Additional Sales" were a "credit sale" as defined in Section 226.2(t) of Regulation Z. Respondents provided no consumer credit cost disclosures required by Regulation Z.

PAR. 15. By and through the use of the "Agreement" referred to in Paragraph Thirteen, respondents, in some instances, have consummated a rescindable consumer transaction. Respondents, in some instances,

It is understood that this is not an order but a binding contract. After the Buyers' 3 day right of rescission, provided by the Truth-in-Lending Law has expired, if the Buyers repudiate or countermand this contract prior to the delivery of any materials, Seller shall receive from Buyers reimbursement for all losses resulting from Buyers' breach, including the sum of \$375.00 as and for Seller's loss of profit.

By and through the use of this quoted language, respondents have:

(1) Represented, directly or by implication, that customers will or may be liable for damages, penalties or any other charges if they exercise the right to rescind provided by Section 226.9 of Regulation Z on additional credit sales made pursuant to the "Agreement," contrary to the provisions of Section 226.9(d) of Regulation Z.

(2) Supplied additional information, not required by Regulation Z, which is stated so as to mislead or confuse the customers concerning his right to rescind the credit transaction, in violation of Section 226.6(c) of Regulation Z.

PAR. 16. By and through the use of the "Agreement" referred to in Paragraph Thirteen a security interest, as "security interest" is defined in Section 226.2(gg) of Regulation Z, is or will be retained or acquired in real property which is or is expected to be used as the principal residence of the customer. Respondents have included the following language in the "Agreement":

SECTION D. It is agreed that the taking of a promissory note as evidence of Buyers' indebtedness to Seller shall not preclude Seller from filing a mechanic's lien in an amount specified herein for materials furnished and used in the improvement and alteration of Buyers' real estate and the Buyers consent and authorize the same.

However, in some cases, in the "Separate Disclosure Statement of Credit Sale" respondents have failed to properly identify the security interest as required by Section 226.8(b)(5) of Regulation Z.

PAR. 17. By and through the making of the "Additional Sale" referred to in Paragraph Fourteen respondents have made a "credit sale" as defined in Section 226.2(t) of Regulation Z. On these "Additional Sales," respondents have:

1. Failed in any consumer credit transaction to disclose the price at which respondent, in the regular course of business, offers to sell for cash the property or services which are the subject of the credit sale, and to describe that price as the "cash price," as required by Section 226.8(c)(1) of Regulation Z.

2. Failed to disclose the amount of any downpayment in money made in connection with any consumer credit transaction and to describe that amount as the "cash downpayment," as required by Section 226.8(c)(2) of Regulation Z.

3. Failed to disclose the "unpaid balance of cash price" to describe

the difference between the "cash price" and the "cash downpayment," as required by Section 226.8(c)(3) of Regulation Z.

4. Failed to disclose the "unpaid balance" to describe the sum of the "unpaid balance of cash price" and all other charges included in the amount financed but which are not part of the finance charge, as required by Section 226.8(c)(5) of Regulation Z.

5. Failed to disclose the amount of credit extended, and to describe that amount as the "amount financed," as required by Section 226.8(c)(7) of Regulation Z.

6. Failed to disclose the sum of all charges made to the customer which are required by Section 226.4 of Regulation Z to be included in the finance charge, and to describe that sum as the "finance charge," as required by Section 226.8(c)(8)(i) of Regulation Z.

7. Failed, in some instances, in consumer credit transactions to disclose accurately the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

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

9. Failed to disclose the number, amount, and due dates or period of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

10. Failed to disclose the sum of the payments scheduled to repay the indebtedness, and to describe the sum as the "total of payments" as required by Section 226.8(b)(3) of Regulation Z.

11. Failed to make all disclosures required by Section 226.8(a) of Regulation Z.

Therefore, respondents have failed to make the consumer credit cost disclosures required by Section 226.8 of Regulation Z before the transaction is consummated, as required by Section 226.8(a) of the Regulation.

PAR. 18. By and through the use of the "Additional Sales" referred to in Paragraph Fourteen, a security interest, as "security interest" is defined in Section 226.2(gg) of Regulation Z, other than a first lien or equivalent security interest, in some instances is or will be retained or acquired in real property which is used or expected to be used as the principal residence of the respondents' customers. Respondents' retention or acquisition of such security interest in said real property thereby entitles their credit customers to be given the right to rescind

the consummation of the transaction or the date of delivery of all the disclosures in the manner and form required by Regulation Z, whichever is later, as required by Section 226.9(a) of Regulation Z.

Having consummated a rescindable consumer credit transaction, respondents or their representatives have, in many instances, made deliveries of materials, components or packages.

By and through their actions as alleged above, respondents have:

(1) Failed to give notice, in some instances, to each customer of the right to rescind the credit transaction by furnishing the customer with two copies of the "Notice to customers required by Federal law," set forth in Section 226.9(b) of Regulation Z, as required by Section 226.9(b) of Regulation Z.

(2) Failed to delay the making of deliveries, in some instances, to the residence of the customer until after the rescission period has expired, as required by Section 226.9(c)(4) of Regulation Z.

(3) Failed to provide customers, in some instances, with two copies of the "effect of rescission," set forth in Section 226.9(d) of Regulation Z, in the manner and form prescribed by Section 226.9(b) of Regulation Z.

PAR. 19. Respondents have, in some instances, furnished a notice of Right of Rescission in accordance with Section 226.9 of Regulation Z. Such notice was not printed in capital and lower case letters of not less than twelve (12) point bold-faced type as required by Section 226.9(b) of Regulation Z.

PAR. 20. Subsequent to July 1, 1969, respondents, in the ordinary course of their business as aforesaid and in connection with credit sales, have caused, and are causing, to be published, advertisements, as "credit sale" and "advertisement" are defined in Section 226.2 of Regulation Z, which advertisements aid, promote or assist, directly or indirectly, the extension of other than open end credit.

PAR. 21. Respondents, in certain of the above-mentioned advertisements, have stated and are stating the amount of downpayment, the amount of an installment payment or the period of repayment without also stating, as required by Section 226.10(d)(2) of Regulation Z, all the following terms:

- (a) the cash price;
- (b) the amount of the downpayment required or that no downpayment is required, as applicable;
- (c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
- (d) the amount of the finance charge expressed as an annual percentage rate; and
- (e) the deferred payment price (if applicable).

PAR. 22. Pursuant to Section 103(s) of the Truth in Lending Act,

respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act, and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act and the Truth in Lending Act and the implementing regulation promulgated thereunder; 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 the 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 said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Insilco Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Connecticut, with its office and principal place of business located at 1000 Research Parkway, Meriden, Connecticut. It has numerous wholly-owned subsidiaries in various States of the United States which it collectively terms "Miles Homes Companies."

Respondent Miles Homes, Inc. is a wholly-owned subsidiary of respondent Insilco Corporation, and is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its office and principal place of business located at 4500 Lyndale Ave., North, Minneapolis, Minnesota.

2. The Federal Trade Commission has jurisdiction of the matter.

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

ORDER

I

DEFINITIONS

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

(a) The term "pre-cut housing" means homes sold to the general public by any of the Miles Homes Companies in the form of unassembled or partially assembled materials and components other than a package.

(b) The term "package" means the materials and components for the plumbing, electrical or heating systems, kitchen cabinets not included with pre-cut housing, or tile or paint which any of the Miles Homes companies offers to purchasers of pre-cut housing.

(c) The term "legal holiday" means any one of the following business holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans' Day, Thanksgiving Day, Christmas Day.

(d) The term "receipt" means three days following the date post-marked on written requests from purchasers provided that respondents are not precluded from establishing by other means the actual date of receipt of any written or oral request.

(e) The term "business days" means the days of the week that respondent Miles Homes, Inc. customarily conducts its business.

II

It is ordered, That respondents Insilco Corporation, a corporation, and Miles Homes, Inc., a corporation, and respondents' successors and assigns, and their officers, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, sale or delivery of pre-cut housing, packages, homes or housing, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, by any means that:

(a) The only skill required for the assembly of respondents' pre-cut housing or packages is the ability to drive a nail or use a hammer, or that respondents' pre-cut housing or packages can be assembled by everyone without any construction skills or experience.

(b) Pre-cut housing or packages sold by respondents can in all cases

be completely assembled without utilizing the services of a mason carpenter, plumber, electrician or any other skilled building tradesman or other person experienced in building construction.

(c) Instructions furnished to purchasers for the assembly of respondents' pre-cut housing or packages are simple and are easily followed in all cases without any assistance from persons experienced in the building construction trades.

(d) No additional charge is made to purchasers for packages or other optional materials or components.

(e) All deliveries of materials and components for pre-cut housing or packages purchased from respondents are made without charge to purchasers.

2. Using the term "precision-cut" or any other words or terms of similar import or meaning which represents, directly or by implication that materials or components for pre-cut housing or packages are delivered to purchasers accurately cut to size and fit when such materials or components require measuring and cutting after delivery to purchasers for assembly or installation in pre-cut housing purchased from respondents.

III

It is further ordered, That respondents, in connection with the advertising, offering for sale, sale or delivery of pre-cut housing packages, homes or housing, shall include in all catalogues furnished to prospective purchasers, and shall furnish to each purchaser prior to the time such purchaser enters into any initial binding agreement for the purchase of respondents' pre-cut housing, a written statement that will set forth the following disclosures in a clear and conspicuous manner:

1. That purchasers who do not possess building construction skills or experience may find it necessary to hire or to otherwise secure the assistance of persons experienced in the building construction trades, such as a mason to lay the foundation, a carpenter to measure and cut materials and components to size for the house plan, a plumber to assemble and install plumbing and heating systems, and an electrician to install the electrical system, and that in some localities certain of such work is required by law to be performed by licensed tradesmen;

2. That purchasers who do not possess building construction skills or experience may find it necessary to hire or to otherwise secure the assistance of persons experienced in building construction to explain or interpret the instructions furnished by respondents;

3. That the land upon which respondents' pre-cut housing is to be built will be subject to a mortgage lien as security for a note in an amount that will cover all payments made for the housing.

respondents may require that the purchaser furnish respondents with a copy of the deed showing ownership of such land;

4. That in those instances where the purchaser has not completed payment for the land upon which the pre-cut housing is to be built, respondents may require a copy of the contract evidencing sale of the land to the purchaser of such pre-cut housing and a permission-to-build agreement from the seller of the land;

5. That purchasers will be charged an additional amount for packages or other optional materials or components ordered when such are not included in the original purchase price;

6. That only specified deliveries will be made without charge to each purchaser and that other delivery charges which will vary depending on the number of orders a purchaser places, the quantity of materials purchased, the location of the shipper, and the method of shipment will be added to each purchaser's total indebtedness to respondents;

7. That respondents do not arrange long-term financing for individual purchasers from institutions that customarily furnish mortgage loans;

8. That the monthly payments made by purchasers to respondents will be, for the most part, in payment of the interest on the total amount financed with little, or no reduction in the total amount financed;

9. That materials or components delivered to purchasers should be inventoried and, in some cases must be sorted, after unloading;

10. That procedures, which respondents shall specifically identify and describe, have been established for the informal settlement of complaints and disputes concerning the shortage, omission or replacement of any material or component, and that purchasers will not be charged any fee by respondents for use of these procedures.

IV

It is further ordered, That respondents, in connection with the sale of pre-cut housing shall, at the time a purchaser enters into any initial contract or agreement for the purchase of such housing from respondents, inform each such purchaser orally of his right to cancel such contract or agreement and shall furnish to each such purchaser:

1. A fully completed copy of such purchase agreement or contract which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the

purchaser and in boldface type of a minimum size of ten points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY, EXCLUDING SUNDAYS AND LEGAL HOLIDAYS, AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

2. A completed form in duplicate, captioned "NOTICE OF CANCELLATION" attached to the purchase agreement or contract and easily detachable, and which shall contain in ten point boldface type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

(enter date of transaction)

(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO *(Name of Seller)*, AT *(Address of seller's place of business)* NOT LATER THAN MIDNIGHT OF *(Date)*.

I HEREBY CANCEL THIS TRANSACTION.

(Buyer's Signature)

3. The requirements set out in subparagraphs 1 and 2 above, do not apply in any case in which the purchaser is accorded the right of rescission by the provisions of the Consumer Credit Protection Act (15 U.S.C. 1635) or regulations issued pursuant thereto.

V

It is further ordered, That respondents, in connection with the sale or delivery of pre-cut housing, packages, homes or housing shall:

1. Upon the receipt of a purchaser's written request for delivery of materials or components, acknowledge each such request within ten (10) business days and notify the purchaser in writing within thirty (30) days of the receipt of such request of the date on which such delivery will be scheduled; *provided*, that if a purchaser has not furnished respondents with satisfactory documentary evidence that all conditions precedent to such purchaser's contractual right to the requested delivery have been fulfilled and that the construction of such purchaser's house has progressed to the point where delivery of the requested materials or components is appropriate, then respondents need not arrange for the requested delivery but must advise such purchasers, within thirty (30) days of the receipt of the request, of the reason or reasons why the request for delivery will not be honored;

2. Schedule the delivery date referred to in subparagraph 1 above for a date within ten (10) business days of the date requested by the purchaser; *provided*, that if the requested delivery date is less than thirty (30) days from the date of receipt by respondents of the request for delivery, then respondents shall schedule delivery for a reasonable time thereafter;

3. Notify each purchaser at the time the initial purchase contract is made where purchasers are directed to address inquiries or complaints concerning:

- (a) the purchaser's contractual agreement with respondents,
 - (b) the delivery of materials or components,
 - (c) shortages, omissions or replacement of materials or components,
- and
- (d) the construction, assembly and installation of pre-cut housing or packages.

4. Furnish to each purchaser a reasonable number of pre-addressed post cards for the purpose of submitting the inquiries or complaints referred to in subparagraph 3 above;

5. Acknowledge receipt of each written inquiry or complaint received from purchasers within ten (10) business days, and notify each

such purchaser in such acknowledgment of the approximate date on which response to the inquiry or complaint will be furnished; such response shall be in writing and no later than thirty (30) days from the date of the receipt of the inquiry or complaint;

6. Make a disposition relating to the purchaser's inquiry or complaint on or before the expiration of the thirty (30) day period referred to in subparagraph 5 above. Respondents' response to an inquiry or complaint relating to the shortage, omission or replacement of any material of component shall state:

(a) whether or not respondents will furnish such material or component,

(b) the date on which delivery of the requested material or component will be scheduled, which date shall not be unreasonably distant in the future, and

(c) the reason or reasons why respondents will not furnish the requested material or component, if such be the case.

Provided, that this subparagraph 6 shall not be construed to preclude respondents from furnishing any purchaser with a credit for the purchase price and delivery charges of any material or component or from taking other remedial action with respect to any material or component.

7. Designate a single focal point within the operations of Miles Homes Companies for the receipt of complaints which have not been resolved to the satisfaction of any purchaser under the procedures set out in subparagraphs 3, 4, 5 and 6 above, and notify each such purchaser at the time the response is made under subparagraph 6 above of the focal point and individual to whom such disputed complaints are to be directed;

8. Acknowledge, in writing, each complaint received pursuant to subparagraph 7 above within ten (10) business days of the date such complaint was received and within thirty (30) days of receipt of such complaint notify the purchaser in writing of the disposition made with respect to such dispute;

9. Establish a procedure whereby disputes with purchasers concerning the shortage, omission or replacement of any material or component which cannot be resolved on a mutually agreeable basis within forty (40) business days after the receipt of a complaint from a purchaser under the procedures described in subparagraphs 7 and 8 above, are promptly referred to and reviewed by an officer of Insilco Corporation. Such officer shall: be an officer who is not responsible for the day-to-day operation of Miles Homes, Inc. or for the day-to-day

tiously settle each dispute no later than thirty (30) business days from the date the dispute is received by the officer; and, notify the purchaser promptly, and in writing, of the disposition of the dispute;

10. Specifically perform without unreasonable delay and in good faith in each instance where a complaint or dispute is resolved in favor of a purchaser through the procedures in Part V of the order;

11. Use good faith efforts to meet each and every delivery date scheduled under Part V of the order, provided that in the event respondents are unable to make such deliveries as required due to intervening circumstances beyond their control such as labor strike, supplier failure to deliver, or unsuitable weather conditions, then respondents' obligation to deliver shall be suspended for the duration of such intervening circumstance and purchasers shall be notified in writing of the reason or reasons why delivery will be delayed.

Provided, however, in the event respondents adopt open-end credit plans under Section 226.7 of Regulation Z, respondents may petition the Commission to modify Part V of this order to make the time periods consistent with the time periods required under Sections 226.7 and 226.14 of Regulation Z (12 CFR 226).

VI

It is ordered, That respondents Insilco Corporation, a corporation, and Miles Homes, Inc., a corporation, and respondents' successors, assigns, officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with any extension of or arrangement for consumer credit, or any advertisement to aid, promote or assist, directly or indirectly any extension of or arrangement for consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR 226) of the Truth in Lending Act 15 U.S.C. 1601-65 (1970), *as amended*, 15 U.S.C. 1601-65(a) (Supp. IV) 1974, do forthwith cease and desist from:

1. Failing in any consumer credit transaction to disclose the price at which respondents, in the regular course of business, offer to sell for cash the property or services which are the subject of the credit sale, and to describe that price as the "cash price," as required by Section 226.8(c)(1) of Regulation Z.

2. Failing to disclose the amount of any downpayment in money made in connection with any consumer credit transaction and to describe that amount as the "cash downpayment," as required by Section 226.8(c)(2) of Regulation Z.

3. Failing to disclose the "unpaid balance of cash price" to describe

the difference between the "cash price" and the "cash downpayment," as required by Section 226.8(c)(3) of Regulation Z.

4. Failing to disclose the "unpaid balance" to describe the sum of the "unpaid balance of cash price" and all other charges included in the amount financed but which are not part of the finance charge, as required by Section 226.8(c)(5) of Regulation Z.

5. Failing to disclose the amount of credit extended, and to describe that amount as the "amount financed," as required by Section 226.8(c)(7) of Regulation Z.

6. Failing to disclose the sum of all charges made to the customer which are required by Section 226.4 of Regulation Z to be included in the finance charge, and to describe that sum as the "finance charge," as required by Section 226.8(c)(8)(i) of Regulation Z.

7. Failing to disclose accurately the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(ii) of Regulation Z.

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

9. Failing to disclose the number, amount, and due dates or period of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

10. Failing to disclose the sum of the payments scheduled to repay the indebtedness, and to describe the sum as the "total payments" as required by Section 226.8(b)(3) of Regulation Z.

11. Stating, utilizing, or placing any information or explanation not required or authorized by Regulation Z in a manner which might tend to mislead or confuse the customer or contradict, obscure, or detract attention from the information required by Regulation Z to be disclosed, as required by Section 226.6(c) of Regulation Z.

12. Failing to give notice to each customer of the right to rescind the credit transaction by furnishing the customer with two copies of the "Notice to customers required by Federal law," set forth in Section 226.9(b) of Regulation Z, as required by Section 226.9(b) of Regulation Z, and in the required type size set out in Section 226.9(b) of Regulation Z.

13. Failing to delay the making of deliveries to the residence of the customer until after the rescission period has expired, as required by Section 226.9(c)(4) of Regulation Z.

rescission," set forth in Section 226.9(d) of Regulation Z, in the manner and form prescribed by Section 226.9(b) of Regulation Z.

15. Failing to furnish customers with disclosures prescribed by Section 226.8 of Regulation Z at the time and in the manner and form required by that section.

16. Failing to furnish customers with a duplicate of the instrument or a statement by which the disclosures prescribed by Section 226.8 of Regulation Z are made, and on which the creditor is identified, as required by Section 226.8(a) of Regulation Z.

17. Failing to disclose a description or identification of the type of security interest held or to be retained or acquired by the creditor in connection with the extension of credit, as required by Section 226.8(b)(5) of Regulation Z.

18. Representing in any advertisement, directly or by implication, that no downpayment is required, the amount of the downpayment or the amount of any instalment payment, either in dollars or as a percentage, the dollar amount of any finance charge, the number of instalments or the period of repayment, or that there is no charge for credit, unless all of the following items are clearly and conspicuously stated, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) of Regulation Z:

- (a) the cash price;
- (b) the amount of the downpayment required or that no downpayment is required, as applicable;
- (c) the number, amount and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;
- (d) the amount of the finance charge expressed as an equal percentage rate; and
- (e) the deferred payment price if applicable.

Provided, that respondents may make disclosures for open-end credit under Section 226.7 of Regulation Z without regard to any provisions required under Section 226.8 above of Regulation Z.

19. Failing, in any consumer credit transaction or advertisement, to make all disclosures determined in accordance with Section 226.4 and Section 226.5 of Regulation Z at the time and in the manner, form, and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

VII

It is further ordered, That respondents in connection with the sale or delivery of pre-cut housing, packages, homes or housing shall:

1. Furnish each purchaser of respondents' pre-cut housing or

packages with an itemized statement of account at least once every six months which sets forth to such date all purchases, credits, payments credited to interest, payments credited to principal, and current balance owed to respondents.

2. Secure from each purchaser of respondents' pre-cut housing a written acknowledgment which shall state the following information:

(a) That the disclosures referred to in Part III of this order were received.

(b) The date on which the disclosures referred to in Part III of this order were received.

3. Notify each existing and future purchaser of respondents' obligations under Part V of this order.

VIII

It is further ordered, That respondents shall maintain and, upon reasonable notice, provide access to the Commission or its representatives for the purpose of inspection and copying, for a period of three years from the date each complaint is received:

1. All complaints made to respondents by purchasers concerning the shortage, omission, replacement or delivery of materials, components and packages.

2. All correspondence and documents regarding complaints, and disputes made by purchasers concerning the shortage, omission, replacement or delivery of materials, components and packages, including all records concerning the disposition of such complaints and disputes.

IX

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders, regulations, or building codes or directives of any kind issued or required by any governmental agency, or any other state or local laws, or act as a defense to actions instituted by municipal or state regulatory agencies, or be construed as a waiver of legal rights either party may have which vary from state to state.

X

It is further ordered, That respondents shall within thirty (30) days of the effective date of this order distribute a copy of the order to:

engaged in the advertising, offering for sale, sale or delivery of pre-cut housing, packages, homes or housing.

2. All personnel of the respondent corporations and of the operating divisions and subsidiaries of all of respondents' corporations who are engaged or who may hereafter become engaged in the consummation of any extension of consumer credit, and in the advertising, offering for sale, sale or delivery of respondents' pre-cut housing, packages, homes, or housing and that in connection with such distribution, respondents shall secure a signed statement from each person acknowledging receipt of a copy of this order.

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

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

Modifying Order

91 F.T.C.

IN THE MATTER OF

XEROX CORPORATION

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8909. Final Order, July 29, 1975 — Modifying Order, April 20, 1978*

This order modifies an order to cease and desist issued July 29, 1975, 40 FR 42203, 86 F.T.C. 364, by deleting the words "*in camera*" from Paragraph IV C.(9) thereof.

ORDER MODIFYING ORDER TO CEASE AND DESIST

On July 29, 1975, the Federal Trade Commission issued a consent order in the above-referenced matter. 86 F.T.C. 364 (1975).

Section 5(b) of the Federal Trade Commission Act provides that the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify or set aside, in whole or in part, any order issued by it, whenever in the opinion of the Commission conditions of fact or law have so changed as to require such action or if the public interest shall so require.

On January 19, 1978, the Commission issued its order to respondent to show cause why the Commission should not alter or modify the July 29, 1975 order so as to delete the words "*in camera*" from Paragraph IV C.(9) thereof.

On March 6, 1978, respondent filed an answer that did not oppose the proposed modification. Section 3.72(b)(3) of the Commission's Rules provides that if an order to show cause is not opposed the Commission may, in its discretion, decide the matter on the basis of that order and the answer thereto.

Accordingly, *it is ordered*, That the matter be reopened, and that Paragraph IV C.(9) of the order of July 29, 1975, be modified to read as follows:

If *Xerox* grants a license under *order patents* either pursuant to the terms of Paragraph II of this order or otherwise, the license agreement shall contain the irrevocable covenant of the licensee to license such of its *patents* as are licensed to *Xerox* on reasonable terms and conditions (including the license to itself of its licensees' *patents* or *improvement patents*) to any other person who is entitled to a license from *Xerox* pursuant to Paragraph II of this order, Provided That such license need not be effective prior to the effective date of the licensee's license to *Xerox*. Within 60 days following execution of a license agreement subject to this Paragraph IV C.(9) *Xerox* shall submit to

Complaint

IN THE MATTER OF

FIRESTONE PHOTOGRAPHS, INC., ET AL.

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

Docket C-2921. Complaint, April 20, 1978 — Decision, April 20, 1978

Consent order requiring a Columbus, Ohio, promoter and seller of photographic equipment and supply franchises, among other things, to cease misrepresenting its repurchase plan, potential profits, connection or affiliation with others, and the training and business assistance provided franchisees. The order further requires the firm to make full and timely disclosures and provide prescribed data regarding any cooling-off periods, cancellation and refund rights, and the financial history of both the corporation and previous franchisees. The firm is additionally required to maintain specific records and to institute a surveillance program designed to ensure compliance with the terms of the order.

Appearances

For the Commission: *Melvin H. Wolovits* and *Noble F. Jones*.

For the respondents: *Harris, Strip, Fargo, Schulman & Hoppers*, Columbus, Ohio.

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 Firestone Photographs, Inc., a corporation, Firestone Photo Co., a corporation, and Daniel Firestone, individually and as an officer of said corporations, hereinafter sometimes 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. For the purpose of this complaint and the Agreement Containing a Consent Order to Cease and Desist entered into by the Federal Trade Commission and respondents, the following definitions shall apply:

- (1) The term "franchise" shall mean any continuing commercial relationship created by written agreement or understanding where:
 - (a) A person offers, sells or distributes goods or commodities manufactured, processed or distributed by respondent; and
 - (b) Respondent directly or impliedly represents, either orally or in writing, that it will assist such person in such person's organization,

promotional activities, management, marketing plan, method of operation or other business activities.

(2) The term "franchisee" shall mean any person to whom a franchise is granted.

(3) The term "business day" means any day other than Saturday, Sunday, or the following national holidays: New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving, and Christmas.

(4) The terms "material," "material fact," and "material change" shall include any fact, circumstance, or set of conditions which would have a substantial likelihood of influencing a reasonable franchisee or a reasonable prospective franchisee in the making of a decision relating to respondents' franchise business or which would have any significant financial impact on a franchisee or a prospective franchisee.

(5) The term "bona fide wholesale price" refers to a price which constitutes a fair payment for goods purchased at the same level of distribution and no part of which constitutes payment for the right to enter into or continue in respondents' franchise business.

PAR. 2. Respondent, Firestone Photographs, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principle office and place of business located at 168 North Third St., Columbus, Ohio.

Respondent, Firestone Photo Co., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Ohio, with its principle office and place of business located at 168 North Third St., Columbus, Ohio.

Respondent, Daniel Firestone, is an individual and officer of respondent corporation. He formulates, directs and controls the acts and practices of said business entity, including the acts and practices hereinafter set forth. His address is 168 North Third St., Columbus, Ohio.

PAR. 3. Respondents are now, and for some time in the past have been engaged in the advertising, offering for sale, and sale of franchises which authorize franchisees to sell to members of the public items of merchandise, including but not limited to Kodak film and Firestone Photographs, Inc. prepaid film processing envelopes.

PAR. 4. In the course and conduct of their business, respondents for some time last past have caused, said products, when sold, to be shipped from their place of business in the State of Ohio to purchasers thereof located in various other states of the United States. In addition, in the course and conduct of their business, respondents have disseminated and caused to be disseminated in newspapers of interstate circulation, advertisements designed to be read by persons

residing outside the State of Ohio and intended to induce such persons to enter into contractual agreements with respondents to purchase franchises and products from respondents. Respondents also introduced into interstate circulation, through the instrumentality of the United States mails, promotional materials, circulars, business papers and other written instruments and communications with the result and effect that members of the public residing outside the State of Ohio, in various other States of the United States did, in fact, purchase respondents' franchises and products, thereby placing respondents' business in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act, as amended.

Respondents have maintained, and at all times mentioned herein maintained, a substantial course of trade in distributorships and products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. In the course and conduct of their business as above mentioned and for the purpose of inducing the purchase of their franchises and products, respondents Firestone Photographs, Inc., a corporation, Firestone Photo Co., a corporation, and Daniel Firestone, individually and as an officer of said corporations, engaged in a program of recruitment of franchisees for their franchise program. As part of this program respondents have made numerous statements and representations in promotional materials and in newspaper advertisements.

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

No selling or soliciting required

* * * * *

A 100% GUARANTEE FOR 12 MONTHS

* * * * *

QUALIFIED INDIVIDUAL MALE OR FEMALE

* * * * *

Very Conservative Profit Projections. . .

10 Locations . . . \$ 5,148 per year

50 Locations . . . \$25,740 per year

PAR. 6. By and through the use of the aforesaid statements and others of similar import not specifically set forth herein, respondents represent directly or by implication that:

(1) A person can expect to earn between \$5,148 and \$25,740 or more per year by devoting part time to his franchise.

(2) There is no selling or soliciting required of a franchisee.

(3) Respondents will repurchase and refund a franchisee's entire investment for any reason within a twelve (12) month period.

(4) Respondents are selective with regard to persons qualified to become franchisees.

PAR. 7. In truth and in fact:

(1) A person cannot expect to earn between \$5,148 and \$25,740 per year by devoting part time to his franchise. Such earnings claims are greatly in excess of the profit that will accrue in a great majority of cases, no matter how much time is devoted to the distributorship.

(2) Selling or soliciting is required of a franchisee if profitable locations are to be obtained.

(3) Respondents have in few cases, if ever, repurchased and refunded a franchisee's entire investment within a twelve (12) month period.

(4) In order to purchase a franchise from respondents, the only qualification existing is that the purchaser have sufficient funds for the franchise investment.

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

PAR. 8. In the further course and conduct of their business aforesaid and in furtherance of their purpose of inducing the purchase of their franchises, respondents direct various newspapers to print advertisements containing the corporate logo of Kodak Corporation. The use of this logo in newspaper advertising and on other printed matter disseminated by respondents represents, directly or by implication, that respondents are closely affiliated with the said corporation.

In fact, respondents are not closely affiliated, nor are they affiliated in any way with the said corporation. Rather, the relationship between respondents and the said corporation is basically that of supplier-purchaser.

Therefore, the acts and practices set forth above were and are, false, misleading and deceptive.

PAR. 9. In the further course and conduct of their business as aforesaid and for the purpose of inducing the purchase of their franchise and products, respondents, their agents, representatives or employees, or any of them, have made representations, either orally or in writing, that:

(1) A franchisee will earn between \$5,200 and \$52,000 or more per year.

(2) A distributor can recover his entire initial investment within a one year period.

(3) Respondents will obtain and set up profitable sales producing locations in high traffic business establishments and retail store outlets, such as supermarkets and drug stores.

(4) Respondents will obtain and set up permanent locations in business establishments and retail store outlets for franchisees.

(5) Business establishments and retail store outlets will be obtained and set up shortly after franchisees sign a contract or purchase agreement.

(6) Respondents will train and assist franchisees in obtaining and setting up new permanent business establishments and retail store outlets.

PAR. 10. In truth and in fact:

(1) Few, if any, of respondents' franchisees have earned \$5,200 per year or more.

(2) Few, if any, of respondents' franchisees have recovered, from the operation of the franchise, their entire initial investment within one year.

(3) The type of business locations and retail store outlets obtained and set up by respondents are not located in high traffic sales producing locations such as supermarkets and drug stores.

(4) Respondents do not obtain and set up permanent business locations and retail store outlets for franchisees. In fact, in a substantial number of instances, business locations and retail store outlets obtained and set up by respondents, terminate their relationship with the franchisee in sixty (60) days or less from the day they commence operating and through no fault of the franchisee.

(5) Business locations and retail store outlets are not obtained and set up shortly after franchisees sign their contracts. Often there are protracted delays caused by respondents.

(6) Respondents in few instances, if any, assist franchisees in obtaining and setting up additional permanent business locations.

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

PAR. 11. In the further course and conduct of its business, respondents and prospective franchisees enter into franchise contracts and purchase agreements. In a substantial number of these instances, the prospective franchisee is unemployed and without the assistance of counsel and enters said contracts in a state other than Ohio.

PAR. 12. Respondents, as a part of said franchise contract or purchase agreement, include the following "venue waiver" provision:

The parties further agree that this Agreement shall be deemed to have been executed in the State of Ohio and to submit any dispute or cause of action which may arise, solely to the Courts of the State of Ohio.

PAR. 13. The venue waiver provision is not a bargained-for part of the franchise contract or purchase agreement and is not generally understandable to persons without legal background or experience. By requiring franchisees to waive statutory venue provisions, respondents have deprived and is depriving them of rights otherwise available to them, under the laws of the state where in fact the franchise contract or purchase agreement was executed. Therefore, such use of the "venue waiver" provision is unfair.

PAR. 14. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has been, and now has the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and induce the purchase of respondents' franchises and products by reason of said erroneous and mistaken beliefs, and into the assumption of obligations and the payment of monies, as a result thereof, which they might otherwise not have incurred.

PAR. 15. 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 or affecting commerce, with corporations, firms and individuals engaged in the sale of franchises and products of the same general kind and nature as those sold by respondents.

PAR. 16. 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 and deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

The 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

for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Firestone Photographs, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 168 North Third St., Columbus, Ohio.

Respondent Firestone Photo Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Ohio, with its office and principal place of business located at 168 North Third St., Columbus, Ohio.

Respondent Daniel Firestone is an officer of said corporations. He formulates, directs, and controls the policies, acts, and practices of said corporations, and his address is the same as that of said corporations.

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

I

It is ordered, That respondent Firestone Photographs, Inc., a corporation, its successors and assigns, and its officers, agents, representatives, and employees, Firestone Photo Co., a corporation, and its successors and assigns, and its officers, agents, representatives, and employees, and Daniel Firestone, individually and as an officer of said corporations, directly or through any other corporation, subsidiary, division, or other device, in connection with the advertising, offering for sale, sale, contracting, or other promotion of any franchise, distributorship, dealership, license, goods, services, or commodities manufactured, processed or distributed in or affecting commerce, as

"commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Representing directly or by implication through the use of any means that:

(1) Selling or soliciting is not required to operate a franchise;

(2) Respondents have a connection or affiliation with any manufacturer of products or services available to franchisees, other than that of supplier-purchaser; or misrepresenting, in any manner, respondents' business connection, affiliation or association with other firms, organizations, groups, or individuals;

(3) Prospective franchisees will receive advice, assistance or training for organizing, maintaining or operating their franchise, or misrepresenting in any manner the quality, amount and nature of assistance to be provided by respondents, except as provided for in Paragraph II (9) of this order;

(4) Prospective franchisees will be provided, as a part of its franchise, specific types of business locations or retail store outlets, such as supermarkets or drug stores; or misrepresenting, in any manner, the desirability of any specific business location or retail store outlet to be provided, as stated hereinabove;

(5) Prospective franchisees must be qualified, possess certain skills or experiences in order to be selected or accepted as a franchisee.

B. Using in an advertisement any logo, trademark or seller's emblem of the Eastman Kodak Company or any other company or organization other than respondents; *provided*, that, if respondents use in an advertisement the trade name of any company other than its own, that trade name shall not appear in boldface type and in no greater than two (2) type point sizes smaller than respondents' name.

C. Providing respondents' franchisees with point of sale display racks which fail to disclose clearly and conspicuously respondents' name and its product or service being offered for sale.

D. From making, directly or by implication, orally or in writing, any representation with respect to a prospective franchisee's potential sales, income, gross or net profit, or with respect to a prospective franchisee's potential return of their purchase price within a stated period of time, except as provided for in Paragraph II (7) of this order.

E. Representing, directly or by implication, orally or in writing, any limitation with respect to the county or court in which a franchisee may institute a lawsuit against respondents. This provision shall not preempt any rule of law which limits choice of county or court.

F. Representing, directly or by implication, orally or in writing, that respondents will repurchase, guarantee or otherwise refund

amount of money paid to respondents in connection with the purchase of respondents' franchises, unless in immediate conjunction with the representation, and in each franchise contract or purchase agreement in no less than eight (8) point type size, all conditions and terms of the repurchase plan are clearly and conspicuously disclosed in simple and readily understood language. Such disclosure shall include the following information:

(1) Those products, services or franchise fees included in the repurchase plan, and all exceptions and exclusions of the repurchase plan;

(2) The step by step procedure which the franchisee must take in order to obtain performance under the repurchase plan, including the expenses he must incur; and

(3) The time or period of time in which respondents will perform any obligation under the repurchase plan.

G. Making any claim or representation, either orally or in writing, for which the respondents do not have in their possession valid substantiating data, which data shall be made available to prospective franchisees, and to the Commission or its staff upon five (5) days written notice.

II

It is further ordered, That each prospective purchaser of respondents' franchises receive, at least fifteen (15) business days prior to: (1) the execution of any contract, purchase agreement or other binding obligation in connection with the sale of respondents' franchise; or (2) the payment by or on behalf of the prospective purchaser of any consideration in connection with the sale or proposed sale of respondents' franchise, whichever occurs first:

A. The completed contract, purchase agreement, or other obligation proposed to be used;

B. A copy of the Federal Trade Commission's News Release issued by the Commission in conjunction with its provisional acceptance of this order; and

C. A single disclosure statement, which shall not contain any promotional claims or other information not required by this order. Provided this does not preclude respondents from giving explanatory information in separate literature so long as such explanatory information is not inconsistent with the disclosure statement required by this part.

The statement shall carry a distinctive and conspicuous cover sheet

with the following notice (and no other) imprinted thereon in boldface type of not less than 10 point size:

***INFORMATION FOR PROSPECTIVE DISTRIBUTORS REQUIRED BY
FEDERAL TRADE COMMISSION***

This package of information is provided for your own protection. It is in your best interest to study it carefully before making any commitment.

If you do sign a contract, you may cancel it, and obtain a full refund of any money paid, for any reason within ten (10) business days after signing. Details appear on the contract itself.

The information contained herein has not been reviewed or approved by the Federal Trade Commission. A false, inaccurate or incomplete statement may constitute a violation of Federal law and should be reported to the Federal Trade Commission in Washington, or the Federal Trade Commission's Regional Office nearest you. In addition, there may be laws concerning franchising within your state. It is recommended that you contact your state government for its requirements or regulations.

Such disclosure statement shall contain the following information as of the close of the respondents' last fiscal year. After the close of each fiscal year, respondents shall have a period not exceeding ninety (90) days to prepare a revised disclosure statement, and following such ninety (90) days may distribute only the revised prospectus and no other. Irrespective of the above, a revised prospectus must be prepared and distributed upon the occurrence of any material change in respondents or relating to the franchise business of respondents. As used in this order, the term "fiscal year" shall mean respondents' fiscal year:

(1) The official name(s) and address(es) of respondents and the name under which respondents are doing business.

(2) The business experience of respondents, including the length of time respondents have conducted a business of the type to be operated by the franchisee, or have granted franchises for such business, or have granted franchises, in other lines of business.

(3) Where such is the case, a statement that the respondents or any of its directors, stockholders owning more than ten percent of the stock, or chief executive officers:

(a) Has been held liable in a civil action, convicted of a felony, or pleaded nolo contendere to a felony charge in any case involving fraud, embezzlement, fraudulent conversion, or misappropriation of property during the previous seven (7) fiscal years; or

(b) Is subject to any currently effective court injunctive or restrictive order or ruling relating or affecting franchise activities of respondents as a result of action by any public agency or department;
or

(c) Has filed bankruptcy or been associated with management or any company that has been involved in bankruptcy or reorganization proceedings; or

(d) Is, or has been, a party to any cause of action brought by a franchisee against respondents.

Such statement shall set forth the identity and location of the court, date of conviction or judgment, any penalty imposed or damages assessed, and the date, nature and issuer of each such order or ruling.

(4) The financial history of the corporate respondents, including balance sheets and profit and loss statements for the most recent five-year period; and a statement of any material changes in the financial condition of the corporate respondent since the date of such financial statement.

(5) A statement of the total funds which must be paid to respondents in order to obtain or commence the franchise operation, and the total amount of said funds which is represented by, based upon a bona fide wholesale price, the following:

(a) Film;

(b) Prepaid film processing mailing envelopes;

(c) Other products individually identified.

(6) A statement disclosing with respect to respondents:

(a) The total number of franchises operating at the end of the preceding fiscal year;

(b) The names, addresses, and telephone numbers of the ten franchisees nearest the prospective franchisee's intended location;

(c) The number of franchises voluntarily terminated by franchisees during the preceding fiscal year; and

(d) The number of franchises repurchased or cancelled by respondent during the preceding fiscal year, including the average dollar amount repaid expressed as a percentage of the initial purchase price.

(7) If respondents choose to make a representation with respect to potential sales, income or gross or net profits such representation must be made only in the following manner:

(a) The number and percentage of franchisees which earned or made at least the same sales income or gross or net profits during a period of corresponding length in the immediate past as represented;

(b) The beginning and ending dates for the corresponding time period referred to in (a), above; and

(c) The following statement is clearly and conspicuously disclosed in immediate conjunction therewith, and in not less than ten (10) point boldface type:

THERE IS NO GUARANTEE THAT THESE [SALES] [INCOME] [AND/OR]

[PROFIT] PROJECTIONS WILL BE ACHIEVED BY YOU OR BY ANY SPECIFIC FRANCHISEE. THESE FIGURES ARE MERELY MANAGEMENT'S ESTIMATES OF THE [SALES] [INCOME] [PROFIT] THEY BELIEVE YOU MAY EXPECT FROM THE OPERATION OF THIS FRANCHISE BUSINESS. THERE IS THEREFORE AN ELEMENT OF RISK IN RELYING ON THESE ESTIMATES AS A BASIS FOR DETERMINING WHETHER YOUR DESIRE TO ENTER INTO A FRANCHISE RELATIONSHIP.

(8) All of the information, expressed in simple and readily understood language, as required by Paragraph I (F) of this order.

(9) If the respondents inform prospective franchisees that they intend to provide them with training or assistance, respondents disclose the specific details of such training or assistance to be provided.

(10) A verbatim copy of Paragraph IV (A) and (B) of this order.

(11) The name, address and telephone number of a person designated by respondents to whom franchise inquiries and complaints should be directed.

III

It is further ordered, That:

A. The following "NOTICE" be included immediately above and on the same page as the purchaser's signature line of any contract or agreement establishing or confirming a franchise and in boldface type no less than twelve (12) point type size:

"NOTICE"

(Non-Waiverable)

YOU MAY CANCEL THIS CONTRACT FOR ANY REASON WITHIN TEN (10) BUSINESS DAYS AFTER THE DAY YOU MAILED OR RETURNED THIS CONTRACT TO [COMPANY NAME], OR ITS OFFICER, AGENT, OR EMPLOYEE. If you choose to cancel, you will be entitled to receive a full refund within ten (10) business days after [Company Name] receives notice of your cancellation. In order to cancel this contract and receive a full refund, send a letter which states your name and address and the fact that you cancel the contract. Send this letter by *Certified Mail, Return Receipt Requested* to:

(Company Name)
(Street Name, Number)
(City, State, Zip Code)

B. Respondents shall not fail to cancel contracts and make refunds in accordance with the provisions contained in the "NOTICE" required by subparagraph (A) above.

IV

It is further ordered, That in all contracts, purchase agreements or any other binding obligation in connection with the sale or proposed sale of respondents' franchise, respondents shall clearly and conspicuously include therein the following provisions in at least eight (8) point type size and in the language specifically set forth as follows:

A. [Company Name] agrees to deliver or have delivered all merchandise, supplies and equipment; set up all business locations or retail store outlets; and take all other action as may be necessary to make your franchise fully operational within sixty (60) days from receipt of full payment, or cancel this contract and make refund of all money paid to [Company Name, officer, agent, or employee] within ten (10) business days thereafter.

B. If a business location or retail store outlet established by [Company Name] is terminated at the request of the owner, manager or operator of the said business location or retail store outlet within ninety (90) days from the date the business location or retail store outlet is fully operational and provided that purchaser has called at each said business location or retail store outlet for the purpose of taking inventory, replenishing the business location or retail store outlet with stock and making cash settlement at least once in each two week period since the business location or retail store outlet was fully operational, [Company Name] will, within five (5) business days from the day [Company Name] receives notice of said termination, notify the franchisee of its intention to:

(1) Provide, secure and set up a new business location or retail store outlet, by no later than twenty (20) business days after receiving the notice of termination; or

(2) Provide a refund, within twenty (20) business days from the day [Company Name] receives all of the photographic film and prepaid film processing envelopes remaining and unsold at the terminated business location or retail store outlet. The refund to be provided shall be computed as follows:

The Number of Business Locations or Retail Store <u>Outlets Terminated</u>	X	Total Price Paid to [Company Name] for the Franchise	= Refund
Total Number of Business Locations or Retail Store Outlets as Provided for in the Franchise Contract or Purchase Agreement			

C. Respondents shall not fail to cancel contracts, make refunds and provide new business locations or retail store outlets, in accordance with the provisions contained in subparagraph (A) and (B), above.

V

It is further ordered, That:

A. Respondents shall, within forty-five (45) days after the date this

order becomes final, notify in writing, all past and present franchisees that any provision of respondents' contract or agreement which a franchisee is a party to, and which expressly limits the county or court in which they may institute a lawsuit against respondents, will not be enforced by respondents or used by respondents in defense of any lawsuit brought against respondents: Such written notification shall be made by *certified mail, return receipt requested*, to the last known address of all past and present franchisees. The return receipt for each notification mailed shall be maintained in respondents' files for a period not less than two (2) years from the day this order becomes final and such files shall be made available for inspection by the Commission or its representatives upon five (5) days written notice; and

B. Respondents shall not represent directly or by implication to any franchisee, nor raise in any lawsuit filed by a franchisee, that respondents and the franchisee have by contract or agreement limited the county or court in which a franchisee may institute a lawsuit.

VI

It is further ordered, That respondents shall maintain files, for a period of two (2) years, containing all complaints from prospective franchisees, and respondents' franchisees', and respondents' response thereto, and that such files be made available to employees of the Federal Trade Commission for inspection and copying upon five (5) days written notice.

VII

It is further ordered, That respondents:

A. Deliver a copy of this order to each present and future employee, agent, solicitor, independent contractor, or other person engaged by respondents in the promotion or sale of franchises, or who participate in the establishment of business locations or retail store outlets on behalf of respondents.

B. Obtain from each person identified in Paragraph VII (A), above, as a condition of their position or job, a signed written statement which provides the following: Name, residence address and telephone number and (1) acknowledgement of receipt of a copy of this order; and (2) an agreement to conform his/her practices to the requirements of this order; respondents shall retain such statements for a period of three (3) years subsequent to the termination of their position or job and make each statement available to the Commission's staff for inspection and copying upon five (5) days written notice.

reveal whether each person described in subparagraph A of this paragraph is conforming to the requirements of this order.

D. Discontinue dealing with, or terminate the use or employment of, any person described in subparagraph (A), above, who refuses to sign a statement as described in subparagraph B of this paragraph, or who engages in any act or practice prohibited by this order.

VIII

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

IX

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, the respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising out of this order.

X

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.

XI

It is further ordered, That in the event the Federal Trade Commission promulgates a Trade Regulation Rule applicable to respondents' business, this order shall be deemed modified to the extent it contravenes said Rule.

XII

It is further ordered, That respondents shall afford representatives of the Federal Trade Commission, upon five (5) days written notice, access to their records, memoranda, and other documents relating to the provisions contained herein, as may be appropriate to enable the Commission to determine respondents' compliance with this Agreement Containing Consent Order to Cease and Desist.

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Complaint

IN THE MATTER OF

TOWNSMAN-CENCO INTERNATIONAL, LTD., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND WOOL PRODUCTS LABELING ACTS*Docket C-2920. Complaint, April 25, 1978 — Decision, April 25, 1978*

This consent order, among other things, requires a New York City importer, manufacturer and distributor of clothing products to cease misrepresenting or failing to properly identify the wool and fiber content of their products.

*Appearances*For the Commission: *Martin D. Gorman.*For the respondents: *Pro se.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Townsman-Cenco International, Ltd., and Newcastle Imports, Ltd., corporations, and Seymour Hertling and George Center, individually and as officers of said corporations, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Wool Products Labeling Act of 1939, and it now 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 Townsman-Cenco International, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 105 Fifth Ave., New York, New York.

Respondent Newcastle Imports, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 276 Park Ave. South, New York, New York.

Respondents Seymour Hertling and George Center are officers of Townsman-Cenco International, Ltd. and Newcastle Imports, Ltd. They formulate, direct, and control the policies, acts and practices of the corporate respondents including those hereinafter set forth. Their office and principal place of business is the same as that of respondent Townsman-Cenco International, Ltd.

PAR. 2. Respondent Townsman-Cenco International, Ltd., is engaged in the business of manufacturing and distributing various products including wool blend men's suits. Respondent Townsman-Cenco International, Ltd. is also a wholesale distributor of men's clothing imported by respondent Newcastle Imports, Ltd.

Respondent Newcastle Imports, Ltd. is engaged in the importation of various products including wool blend men's slacks, distributed by respondent Townsman-Cenco International, Ltd.

PAR. 3. Respondents, now and for some time last past, have manufactured for introduction into commerce, imported for introduction into commerce, introduced into commerce, transported, distributed, delivered for shipment, shipped, offered for sale, and sold in commerce, as "commerce" is defined in the Wool Products Labeling Act of 1939, wool products as "wool product" is defined therein.

PAR. 4. Certain of said wool products were misbranded by the respondents within the intent and meaning of Section 4(a)(1) of the Wool Products Labeling Act of 1939 and the rules and regulations promulgated thereunder, in that they were falsely and deceptively stamped, tagged, labeled, or otherwise identified with respect to the character and amount of the constituent fibers contained therein.

Among such misbranded wool products, but not limited thereto, were certain wool blend men's suits and wool blend men's slacks, stamped, tagged, labeled or otherwise identified by respondents as "45% wool, 55% polyester" and as "40% wool, 60% polyester" whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 5. Certain of said wool products were further misbranded by respondents in that they were not stamped, tagged, labeled, or otherwise identified as required under the provisions of Section 4(a)(2) of the Wool Products Labeling Act of 1939 and in the manner and form as prescribed by the rules and regulations promulgated under said Act.

Among such misbranded wool products, but not limited thereto, were wool products, namely wool blend men's suits and slacks, with labels on or affixed thereto, which failed to disclose the percentage of the total fiber weight of the said wool products, exclusive of ornamentation not exceeding 5 per centum of said total fiber weight, of (1) wool, (2) reprocessed wool, (3) reused wool, (4) each fiber other than wool, when said percentage by weight of such fiber was 5 per centum or more, and (5) the aggregate of all other fibers.

PAR. 6. The acts and practices of respondents as set forth in Paragraphs Four and Five were, and are, in violation of the Wool Products Labeling Act of 1939 and the rules and regulations

methods of competition and unfair and deceptive acts and practices, in or affecting commerce, under the Federal Trade Commission Act, as amended.

PAR. 7. Respondents are now and for some time past have been engaged in the importation, offering for sale, sale, and distribution of certain products, namely men's suits and slacks. In the course and conduct of their business as aforesaid, respondents now cause and for some time last past, have caused their said products, when sold, to be shipped from their places of business in the State of New York to purchasers 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 or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 8. Respondents in the course and conduct of their business have made statements on invoices to their customers misrepresenting the fiber content of certain of their products.

Among such misrepresentations, but not limited thereto, were statements setting forth the fiber content thereof as "55% polyester, 45% wool," "60% polyester, 40% wool" whereas, in truth and in fact, said products contained substantially different fibers and amounts of fibers than represented.

PAR. 9. The acts and practices set out in Paragraph Eight have the tendency and capacity to mislead and deceive the purchasers of said products as to the true content thereof.

PAR. 10. The aforesaid acts and practices of the respondents as herein alleged in Paragraph Eight were, and are, all to the prejudice and injury of the public, and constituted, and now constitute, unfair and deceptive acts or practices in or affecting commerce, within the intent and meaning of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, as amended, and the Wool Products Labeling Act of 1939; and,

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid

draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and,

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Townsman-Cenco International, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 105 Fifth Ave., New York, New York.

Respondent Newcastle Imports, Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 276 Park Ave. South, New York, New York.

Respondents Seymour Hertling and George Center are officers of said corporations. They formulate, direct and control the policies, acts and practices of said corporations, and their address is 105 Fifth Ave., New York, New York.

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 Townsman-Cenco International, Ltd., a corporation, Newcastle Imports, Ltd., a corporation, their successors and assigns, and their officers, and Seymour Hertling and George Center, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the introduction, or importing for introduction, into commerce, or the offering for sale, sale, transportation, distribution, delivery for shipment or shipment, in commerce, of wool products, as "commerce" and "wool product" are defined in the Wool Products Labeling Act of 1939, do forthwith cease and desist from misbranding such products

1. Falsely and deceptively stamping, tagging, labeling or otherwise identifying such products.

2. Failing to securely affix to or place on each such product a stamp, tag, label or other means of identification showing in a clear and conspicuous manner each element of information required to be disclosed by Section 4(a)(2) of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents Townsman-Cenco International, Ltd., a corporation, Newcastle Imports, Ltd., a corporation, their successors and assigns, and their officers, and Seymour Hertling and George Center, individually and as officers of said corporations, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the importing, advertising, offering for sale, sale or distribution of clothing in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from misrepresenting such products on invoices or shipping memoranda applicable thereto, or in any other manner.

It is further ordered, That respondents mail a copy of this order by registered mail to each of their customers that purchased the wool products described in this complaint.

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

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

It is further ordered, That each individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. In addition, for a period of ten years from the effective date of this order, each respondent shall promptly notify the Commission of each affiliation with a new business or employment. Each such notice shall include the respondent's new business address and a statement of the nature of the business or employment in which the respondent is newly engaged as well as a description of respondents' duties and responsibilities in connection with the business or employment. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order.

It is further ordered, That the respondents herein shall within sixty

(60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

Complaint

IN THE MATTER OF
JAY NORRIS CORP., ET AL.ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT

Docket 9054. Complaint, Sept. 3, 1975—Final Order, May 2, 1978

This order, among other things, requires a Freeport, L.I., N.Y. mail-order house to cease misrepresenting, in the advertising and sale of consumer products, that dissatisfied customers will receive prompt refunds; and that exchanges and refunds are expeditiously processed; that all parcels are insured against loss or damage; and that non-delivery is caused by the United States Postal Service. The order requires that purchases be shipped within time periods specified, and in the event of shipping delays, customers must be offered the option of consenting to the delays or cancelling their transactions. The firm is further obligated to honor such cancellations and to make proper refunds in a timely manner. The order further prohibits the company from making false or unsubstantiated claims regarding the characteristics, efficacy, performance, safety, and value of its consumer products. Additionally, the order requires the corporation and the Pan-Am Car Distributors Corp., both engaged in the advertising and sale of used motor vehicles, to cease misrepresenting that their vehicles have been inspected and repaired in preparation for delivery to purchasers; or that they are in a safe mechanical and operation condition and will render normal, adequate and satisfactory service.

Allegations of the complaint are dismissed as to Federated Nationwide Wholesalers Service, Garydean Corp., t/a Nationwide Wholesalers Service, and P-N Publishing Company, Inc.

Appearances

For the Commission: *Irving C. Koch and Sol Grand.*

For the respondent: *Robert Ullman, Bass, Ullman & Lustigman,*
New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Jay Norris Corp., Federated Nationwide Wholesalers Service, Garydean Corp., a corporation trading as Nationwide Wholesalers Service, P-N Publishing Company, Inc., a corporation, Pan-Am Car Distributors Corp., a corporation and Joel Jacobs, Mortimer Williams and Kenneth Mann, individually and as officers of said corporations, hereinafter referred to as the 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:

I. RESPONDENTS

PARAGRAPH 1. Respondents Jay Norris Corp., Federated Nationwide Wholesalers Service, Garydean Corp., trading as Nationwide Wholesalers Service, [2] P-N Publishing Company, Inc., and Pan-Am Car Distributors Corp. are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their principal offices and place of business located at 31 Hanse Ave., Freeport, Long Island, New York.

Individual respondents Joel Jacobs and Mortimer Williams are officers of said corporations. Kenneth Mann is an officer of Pan-Am Car Distributors Corp. They formulate, direct and control the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. Their business addresses are the same as that of the corporate respondents.

II. NATURE OF RESPONDENTS' BUSINESS

PAR. 2. Respondents are engaged in the advertising, offering for sale, sale and distribution of numerous articles of merchandise by mail order which they offer through newspaper, magazine, and catalog advertisements, including roach powder, TV antennas, socks, flashlights, flame guns, jewelry, books, girdles, watches, home furnishings, cheeses, ex-taxis sold as used cars and numerous other articles of merchandise.

PAR. 3. Respondents in the course and conduct of their business have been and are now engaged in the advertising, offering for sale, sale and distribution of merchandise which they ship or cause to be shipped when sold, from the State of New York to purchasers located in various other States of the United States or directly from manufacturers and distributors located in various other States to purchasers located throughout the nation, and have maintained a substantial course of trade in said merchandise in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents are now, and at all times mentioned herein have been, in substantial competition in commerce with other corporations, [3] firms and individuals engaged in the sale and distribution of products of the same general kind and nature as those

III. ACTS AND PRACTICES - REPRESENTATIONS

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made statements and representations in the advertising, offering for sale, sale and distribution of their products through flyers, catalogs, brochures and advertisements published in mail order catalogs and national newspapers and magazines.

PAR. 6. The statements and representations made as alleged in Paragraph Five hereof, include statements regarding respondent's guarantees, deliveries and refunds. Typical and illustrative, but not all inclusive, of statements and representations with respect to their guarantees, deliveries and refunds, are the following:

30-DAY MONEY-BACK GUARANTEE Mail No-Risk Coupon Now

ORDER BY MAIL WITH CONFIDENCE 30-DAY MONEY-BACK GUARANTEE

30-DAY MONEY-BACK GUARANTEE ON ALL PURCHASES

30-DAY MONEY-BACK GUARANTEE ON ALL PURCHASES CHRISTMAS DELIVERY GUARANTEED IF YOU ORDER NOW

BUY WITH CONFIDENCE! If not delighted, return your order within 30 days for refund of full purchase price

MONEY-BACK IF NOT DELIGHTED-SEND CHECK OR MONEY ORDER

ORDER NOW PROMPT DELIVERY GUARANTEED

"PERSONAL CHECKS" To insure immediate shipment of your order, please have your check certified. [4] Otherwise, allow about 2 weeks until your check clears your bank

Satisfaction guaranteed or money refunded

YOUR GUARANTEE OF SATISFACTION. . Everything you buy from JAY NORRIS CORP. is ALWAYS FIRST QUALITY. Any item not up to your expectations return in 30 days for full refund.

Unless item is marked express collect, use this easy chart to figure postage insurance, shipping and handling charges. It's only part of the delivery cost-we pay the rest.

-If Your Order Is- up to

\$15.00	add \$1.70
\$15.01 to \$20.00	add \$2.20
\$20.01 to \$30.00	add \$3.20
\$30.01 to \$40.00	add \$4.20
\$40.01 to \$50.00	add \$5.20
\$50.01 to \$60.00	add \$6.00
over \$60.00	add \$7.20

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DIRECT FACTORY SHIPMENT:

Some items in this catalog are shipped direct from the factory. Such shipments are sent to you Parcel Post, Express Collect or Freight Collect, depending on weights

REFUND: If for any reason, there is a refund due you after your order has been filled, we will send you such refund promptly.

SHIPPING INFORMATION:

Orders are usually filled within 24 hours of receipt (with the exception of factory shipments). . . Allow 1 to 3 weeks for factory shipments to reach you . . .

Dear Customer:

Because you did not receive your order, we must assume that it was lost in the mails. [5]

If you will be kind enough and return all these papers together with the original or photostatic copy of your check or money order, showing that it was cashed by us, a tracer will be placed and if necessary, a duplicate shipment will be made.

Please give us full details and information pertaining to the merchandise, such as size, color, price, style number, etc.

We regret any inconvenience we may have caused you. Thank you for your cooperation.

Very truly yours,
JAY NORRIS CORP.

PAR. 7. Through the use of the statements and representations alleged in Paragraph Six hereof, and others of similar import and meaning, respondents have represented, and are now representing, directly or by implication, that:

1. Merchandise paid for by a certified check is shipped to purchasers immediately.

2. Merchandise paid for by a non-certified check is shipped to purchasers about two weeks after said check has been approved for payment at the purchaser's bank.

3. The full purchase price of the product plus all additional charges paid by the purchaser in connection with said purchase are refunded by respondents if the purchaser is dissatisfied for any reason.

4. A sum of money in the form of cash, check, money order or other negotiable currency is refunded to purchasers if they are dissatisfied for any reason.

5. Pursuant to respondents' 30-day money back guarantee, purchasers will receive a full refund if the merchandise is returned to respondents within 30 days from the date of the purchaser's receipt of said merchandise. [6]

purchaser's order, is caused by the loss of the merchandise by the United States Postal Service.

7. Purchasers of respondents' products pay only part of the delivery cost and the respondents absorb the remaining portion of said cost.

8. Exchanges or refunds are expeditiously processed by respondents.

9. All parcels shipped to purchasers, except those items marked express collect, are insured against loss, damage or other casualty by respondents.

PAR. 8. In truth and in fact:

1. In numerous instances, merchandise paid for by a certified check is not shipped to purchasers immediately. Delays of as long as one month to one year have been encountered.

2. In numerous instances, merchandise paid for by a non-certified check is not shipped to purchasers about two weeks after said check has been approved for payment at the purchaser's bank. Delays of as long as one month to one year have been encountered.

3. The full purchase price of the product, plus all additional charges paid by the purchaser in connection with said purchase, are not refunded by respondents if the purchaser is dissatisfied. Postage, handling, shipping and insurance claims are deducted by respondents from the full purchase price.

4. A sum of money in the form of cash, check, money order or other negotiable currency is not refunded to purchasers if they are dissatisfied for any reason. Respondents [7] give purchasers a credit certificate which must be used to purchase merchandise from the respondents or be returned to the respondents in order to receive a cash refund.

5. Pursuant to respondents' 30-day money back guarantee purchasers do not receive a full refund if the merchandise is returned to respondents within 30 days from the date of the purchaser's receipt of said merchandise.

6. In numerous instances, the non-delivery of the purchaser's order is not caused by the loss of the merchandise by the United States Postal Service. Rather, respondents have failed to ship the ordered merchandise.

7. In numerous instances, the respondents do not absorb a portion of the delivery cost. Purchasers of respondents' merchandise pay the full cost of delivery.

8. In numerous instances, exchanges or refunds are not expeditiously processed by respondents. Delays of many months have been

encountered and only after purchasers write to the respondents and to governmental authorities are refunds received.

9. All parcels shipped to purchasers except those items marked express collect, are not insured against loss, damage or other casualty by respondents.

Therefore, the statements and representations, alleged in Paragraph Six hereof, were, and are, unfair or deceptive.

PAR. 9. The statements and representations made as alleged in Paragraph Five hereof include statements and representations regarding the performance, efficacy and other characteristics of respondents' products. Typical and illustrative, [8] but not all-inclusive, of the statements and representations with respect to product performance, efficacy and other characteristics are the following:

FLAME GUN

NEW JN INSTA-JET PROPANE FLAME GUN THE WORK-SAVER THE HEART-SAVER LIGHTWEIGHT, EASY-HANDLING FASTEST WAY WE KNOW TO CLEAR AWAY ICE AND SNOW! . . . Whips through even the heaviest drifts. Clears walks and driveways. Routs Clogged gutters of ice and old leaves.

Thaws frozen pipes Produces a clean hot flame for up to 14 hours on a single propane cylinder-easily obtainable at hardware, paint and department stores . . .

Just aim The Flame Gun and watch it dissolve the heaviest snow drifts, whip right through the thickest ice . . . in seconds!

SOCKS

YOU'LL NEVER NEED TO BUY ANOTHER PAIR OF SOCKS AGAIN FOR THE REST OF YOUR LIFE. (unless your laundry loses them) . . . IMMEDIATE DELIVERY GUARANTEED

. . . indestructible nylon socks . . .

. . . Guaranteed to wear forever in normal use - that "normal use" simply means don't burn holes in them deliberately, or try to cut them with scissors or razor . . .

These revolutionary 8-ply nylon socks are made of yarn so indestructible we unconditionally guarantee to give you FREE replacement pair for pair - for any you ever wear a hole in! 6 pair only \$7.98 12 pair for \$14.98 [9]

ROACH POWDER

Get rid of roaches ONCE AND FOR ALL! SURE-KILL WIPES OUT ROACH NESTS OR YOU PAY NOTHING. Roaches can't resist Sure-Kill. They devour its odorless

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starts, that wipes out every roach and every egg in the nest. Sure-Kill is safe to use, and never loses its killing power-even after years. A single can cleans out 6 to 8 rooms

GUARANTEED ROACH-FREE FOR 5 YEARS. Sure-Kill roach killer is guaranteed by the manufacturer to prevent reinfestation for up to 5 years when used as directed and left in place.

UNCONDITIONAL GUARANTEE Our roach killer is guaranteed by the manufacturer to prevent reinfestation when used as directed and left in place or your money back

. . . Completely safe to use, and never loses its killing power-even after years. . .

TV ANTENNA

ELECTRONIC MIRACLE TURNS YOUR HOUSE WIRING INTO JUMBO TV ANTENNA. . . ONLY \$1.99 - 2 for \$3.65 now you can bring in every channel in your area sharp and clear without installing an expensive outdoor antenna or using unsightly rabbit ears. This simple little invention does the trick. You attach it easily and quickly to your TV set, then plug it into wall outlet. . .makes your home wiring a huge antenna for super reception . . .

Every home a super receiver **ELECTRONIC MIRACLE [10] TURNS YOUR HOUSE WIRING INTO A JUMBO TV ANTENNA.** . . .

. . . Do you know that you have one of the greatest TV antennas ever constructed? It's better than any set of rabbit ears, more efficient than complicated external antennas. It's your house. Yes, the wiring in your home constitutes a great antenna that acts as a super receiver for TV, FM, all kinds of difficult reception. . . .

FLASHLIGHT

NEW! 5 - YEAR FLASHLIGHT USED ON THE APOLLO MISSIONS DEVELOPED FOR AMERICA'S ASTRONAUTS Totally new and revolutionary power cell (developed and used by the government in manned moon flights) keeps this flashlight shining bright for at least 5 years with 10 times the staying power of an ordinary flashlight. No external switch to corrode or break. (NASA wanted a fool-proof switch for their flashlight going to the moon). Now you can have it for your car or home - **YOUR COST \$7.99, 2 for \$14.99**

ABSOLUTE 5 - YEAR GUARANTEE Every command modual flashlight carries this absolute 5 - year guarantee. Carry your flashlight with you, keep it at home. It must work even if you haven't touched it for 5 years or your money back. So don't be another minute without the one safety element every car, every family needs.

CARS

BUY CHOICE . . . NOT CHANCE Buy direct and get the carefully maintained car of your choice below wholesale price. All cars are standard four door, six passenger sedans equipped with automatic transmissions, heater, defroster and feature durable vinyl interiors. They have been in regularly maintained fleet use and serviced far more frequently than the average car owner can afford to do. Each car has been thoroughly serviced by our mechanics [11] to put it in good operating condition and passes careful inspection before being released for delivery. These top-quality ex-taxis

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have been carefully selected for best value . . . We offer these fine cars at the prices shown (F.O.B., N.Y.) There are no hidden costs. . . .

IDEAL FOR PERSONAL USE OR TO RESELL AT A PROFIT!

1970 DODGE CORONET, AUTOMATIC TRANSMISSION \$999.

1969 FORD CUSTOM DODGE CORONET, AUTOMATIC TRANSMISSION \$799.

1969 CHEVROLET BISCAVNE, AUTOMATIC TRANSMISSION, \$899.

Only Pan Am gives you this 100% o.k. checkout certificate. Dependable Pan Am gives you a good car at a low price. Our highly trained mechanics double-check each car for all the terms below. When a car leaves our premises it is checked out as follows:

Brakes	Fan Belt	Starter
Plugs	Spare Tire	Water Pump
Points	Jack	Fuel Pump
Lights	Transmission	Block
Battery	Heater	Color
Generator	Defroster	

**MAIL THIS COUPON WITH YOUR DEPOSIT - ORDER AS MANY AS YOU WANT.
ALL CARS ARE SOLD ON AN AS IS FIRST ORDER FIRST SERVE BASIS.**

LINCOLN - KENNEDY PENNY

NOW AVAILABLE THE ONLY LINCOLN-KENNEDY PENNY EVER MINTED UNCIRCULATED COMMEMORATIVE LINCOLN HEAD PENNY WITH KENNEDY PROFILE Here's unusual news for collectors and anyone interested in unique commemorative issues. . . issues that may never be repeated again. A new uncirculated Lincoln Head penny is now available. This [12] unique coin shows the profile of President Kennedy stamped on the surface looking at President Lincoln. The relationship is uncanny. Never released for ordinary use, the coin is perfectly legal tender and is sanctioned by Section 332 of the U.S. Code. As a coin of both historical and numismatic significance it is certain to become a collector's item that will grow and grow in value. Because, however, this coin is not in circulation, you may obtain it only through an offering of this sort, and we urge you to order now, avoid disappointment. And if you order right away, you will also receive the Plaque of Coincidences showing the startling parallels in the career of these two tragic figures.

. . . . These and many more astonishing coincidences are yours in your Free Plaque of Coincidental Facts when you order The Lincoln-Kennedy Commemorative Penny.

PAR. 10. Through the use of the statements and representations alleged in Paragraph Nine hereof, and others of similar import and meaning, respondents have represented and are now representing, directly or by implication that:

FLAME GUN

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Complaint

the heaviest snow drifts and the thickest ice in seconds and is effective and efficient in clearing walks and driveways of ice and snow.

SOCKS

2. Respondents' nylon socks are indestructible.
3. Respondents' nylon socks last forever.

ROACH POWDER

4. Respondents' roach powder is safe to use.
5. Respondents' roach powder gets rid of roaches once and for all.
- [13] 6. Respondents' roach powder creates a deadly chain reaction which eliminates and kills roaches and eggs.
7. The manufacturer has unconditionally guaranteed that respondents' roach powder prevents reinfestation when used as directed and left in place or it will refund money.
8. Respondents' roach powder does not lose its capacity to kill under any conditions of use.

TV ANTENNA

9. Respondents' TV antenna will bring sharp and clear reception even in difficult areas.
10. The performance of respondents' TV antenna is superior to any rabbit ear antenna or outdoor antenna.
11. Respondents' TV antenna will turn all types of house wiring into a TV antenna.
12. Respondents' TV antenna is an electronic miracle.

FLASHLIGHT

13. Respondents' "FIVE YEAR FLASHLIGHT" carries an absolute 5-year guarantee.

CARS

14. Cars delivered to purchasers are in good mechanical and physical condition.
15. Cars delivered to purchasers are in safe operating condition.
16. Cars delivered to purchasers are finished and look as pictured and described in respondents' advertising materials. [14]
17. Cars are checked by expert mechanics and necessary repairs are made prior to release for delivery.

Complaint

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18. Cars delivered to purchasers are in sound condition and repair and render normal, adequate and satisfactory service.

19. Respondents' cars may be readily resold by the purchasers at a profit.

20. Cars are regularly ordered and received in advance of their being offered for sale and are held in stock until purchase orders are received.

21. Respondents' cars have undergone thorough and complete servicing and inspection before being released and approved for delivery.

22. Each price quoted for respondents' motor vehicles is the full price and there are no hidden costs.

23. Respondents bear the liability and responsibility of delivery of cars to purchasers at any destination in the United States where such purchasers may reside.

LINCOLN-KENNEDY PENNY

24. Respondents' Lincoln-Kennedy penny was minted by the United States Treasury Department.

25. Respondents' Lincoln-Kennedy penny is a coin of historical and numismatic significance which is certain to grow in value.

26. The issuance of respondents' Lincoln-Kennedy penny was sanctioned by Section 332, Title 18, U.S. Code.

27. A free plaque containing historical coincidences between the lives of President Lincoln and President Kennedy is provided to purchasers with each coin order. [15]

PAR. 11. In truth and in fact:

FLAME GUN

1. The "JN INSTA-JET PROPANE FLAME GUN" is not able to whip through the heaviest snow drifts and the thickest ice in seconds and is not effective and efficient in clearing walks and driveways of ice and snow.

SOCKS

2. Respondents' nylon socks are not indestructible.
3. Respondents' nylon socks do not last forever.

ROACH POWDER

4. Respondents' roach powder is not safe to use. Ingestion of the powder may cause sickness or death.

751

Complaint

and for all. The roach powder is a formulation of boric acid which works slowly. In many residential buildings cockroaches can reinfest before they are eliminated.

6. Respondents' roach powder does not create a deadly chain reaction which eliminates and kills roach and eggs. Each cockroach must contact the insecticide to be killed. Respondents' roach powder will not kill roach eggs.

7. The manufacturer has not unconditionally guaranteed that respondents' roach powder prevents reinfestation when used as directed and left in place or it will refund money.

8. Respondents' roach powder loses its capacity to kill under certain conditions of use. If wet, it cakes and does not adhere to the insects. If covered by grease or food deposits or non-insecticidal dusts, it becomes ineffective. [16]

TV ANTENNA

9. Respondents' TV antenna will not bring sharp and clear reception in difficult areas.

10. The performance of respondents' TV antenna is not superior to rabbit ear antennas or to outdoor antennas.

11. Respondents' TV antenna will not turn all types of house wiring into a TV antenna. If house wiring is encased in metal, it is shielded from the reception of any TV signals.

12. Respondents' TV antenna is not an electronic miracle.

FLASHLIGHT

13. Respondents' "FIVE YEAR FLASHLIGHT" does not carry an absolute 5-year guarantee. The flashlight is guaranteed by the manufacturer to store and remain usable for 5 years or to operate for a total of 10 hours, whichever ever comes first. The manufacturer further clearly states in its guarantee that the light will not stay "on" continuously for 5 years.

CARS

14. In a number of instances, cars delivered to purchasers are not in good mechanical and physical condition.

15. In a number of instances, cars delivered to purchasers are not in safe operating condition.

16. In a number of instances, cars delivered to purchasers are not finished and do not look as pictured and described in respondents' advertising materials. [17]

17. In a number of instances, cars are not checked by expert

mechanics and necessary repairs are not made prior to release for delivery.

18. Cars delivered to purchasers are not in sound condition and repair and do not render normal, adequate and satisfactory service.

19. Respondents' cars may not be readily resold by the purchasers at a profit.

20. In a number of instances, cars are not regularly ordered and received in advance of their being offered for sale and are not held in stock until purchase orders are received.

21. In a number of instances, respondents' cars have not undergone thorough and complete servicing and inspection before being released and approved for delivery.

22. In numerous instances, each price quoted for respondents' motor vehicles is not the full price and there are hidden costs. Purchasers are often required to expend large sums of money for the delivery of the cars or to enable cars to pass state motor vehicle registration safety or inspection requirements or to put cars into safe operating condition.

23. Respondents do not bear the liability or responsibility for delivery of cars to purchasers at any destination in the United States where such purchasers may reside.

LINCOLN-KENNEDY PENNY

24. Respondents' Lincoln-Kennedy penny was not minted by the United States Treasury Department. No branch of the United States Government had anything to do with the production of this coin. [18]

25. Respondents' Lincoln-Kennedy penny is not a coin of historical and numismatic significance which is certain to grow in value. It is a privately produced novelty item using an ordinary penny.

26. The issuance of respondents' Lincoln-Kennedy penny was not sanctioned by Section 332, Title 18, U.S. Code. Section 332 refers to the debasement of gold and silver coins by the physical removal or diminution of the gold or silver content.

27. A free plaque containing historical coincidences between the lives of President Lincoln and President Kennedy is not provided to purchasers with each coin order. The ordinary paper card upon which the Lincoln-Kennedy penny is pasted is neither "free" nor is it a "plaque." Said card was never offered for sale by respondents at a regular price but was always offered for sale in conjunction with the penny.

Therefore, the statements and representations as alleged in

IV. ACTS OR PRACTICES - FAILURE TO DISCLOSE MATERIAL FACTS

PAR. 12. In the further course and conduct of their business, as aforesaid, respondents have made statements and representations as aforesaid, without disclosing material facts. Such material facts include, but are not limited to, the following:

FLAME GUN

Initial purchase of respondents' flame gun does not include the propane cylinder mentioned in respondents' advertisements of its flame gun. The propane cylinder, which is an essential component of the flame gun, must be purchased at an additional cost. [19]

Respondents' flame gun is not assembled when delivered but rather must be assembled by purchasers after delivery.

ROACH POWDER

Respondents' roach powder is 50% boric acid and 50% inert ingredients.

Respondents' roach powder is hazardous. The product may be harmful to human beings and pets. Special precautions should be taken in the use of this product.

FLASHLIGHT

Respondents' flashlight has an on life of 10 to 20 hours.

Manufacturer's guarantee of respondents' flashlight is not absolute. The manufacturer guarantees that the light can be stored and remain usable for 5 years or operate for a total of ten hours, whichever comes first.

CARS

Respondents' cars are ex-New York City taxicabs.

Respondents' advertise that the cars are "FOB New York" and "As Is" without disclosing the import or meaning of those terms.

Respondents' cars are not inspected for compliance with any state motor vehicle inspection law.

Interiors of motor vehicles have not been cleaned or reconditioned by respondents prior to their being offered for sale.

Drivers hired to deliver cars to purchasers are independent contractors and are not respondents' agents, servants or employees.

The aforesaid material facts, if known to consumers would be likely to affect their consideration of whether or not to purchase

respondents' products. Therefore, the advertisements, acts or practices, which fail to disclose the aforesaid material facts are unfair or deceptive. [20]

V. OTHER ACTS AND PRACTICES

PAR. 13. In the further course and conduct of their business as aforesaid respondents have:

(a) Deposited purchasers' checks and money orders into their bank accounts within three days to one week from receipt of such checks and money orders and have failed to either ship the merchandise ordered or to refund money for one month to one year;

(b) Failed to answer letters of inquiry from consumers or have made inadequate responses which have thereby delayed or prevented purchasers, seeking deliveries of merchandise or refunds of their money, from obtaining same;

(c) Failed to provide a business telephone listing in the official telephone directory for its location or in any published telephone directory and have maintained an unlisted business telephone number;

(d) Placed the burden of record keeping upon the purchasers who, upon seeking a refund, exchange, or delivery of the advertised merchandise ordered and paid for by them, have been required by respondents to provide copies of their cancelled checks, original order blanks or various correspondence received from respondents, as well as the full details pertaining to the merchandise ordered such as the size, color, price, style number and the date the order was placed;

(e) Utilized numerous corporate and business names such as Jay Norris Corporation, P.N. Publishing Corporation, Norris Nutrition, Garydean Corp., Federated Nationwide Wholesalers Service, Federated Wholesalers Service, Nationwide Service, Cheese[21]lovers International, Pan American Car Distributors Corporation, Associated Auto Wholesalers Corporation, American Value Corporation, and various other corporate and business names, post office box numbers and addresses, in such manner as to create confusion in the minds of purchasers who are unable to relate all the names used to the Jay Norris Corporation or to its principal owners.

Such business practices by respondents constitute unfair or deceptive acts or practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 15. The use by respondents of the aforesaid unfair or

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 a substantial volume of respondents' products.

PAR. 16. The aforesaid acts and practices of respondents as herein alleged are all to the prejudice and injury of the public and of respondents' competitors, constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY MILES J. BROWN, ADMINISTRATIVE LAW
JUDGE

AUGUST 31, 1977

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this matter on September 3, 1975 (mailed October 3, 1975), charging respondents with unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45). [2]

In their answer, respondents denied that they had violated the Federal Trade Commission Act as alleged in the complaint. They asserted that the individual respondents acted only in their capacity as corporate officers. They further asserted that the respondent corporations, other than J. Norris Corp. ("Norris") and Pan-Am Car Distributors Corp. ("Pan-Am"), had nothing to do with the matters which were the subject of the complaint.

Thereafter, for approximately ten months, there was sporadic pretrial discovery occasioned by several long continuances prompted by the fact that the complaint counsel originally assigned to this matter was concurrently handling another adjudicative matter on which she was the only Federal Trade Commission counsel of record. On July 6, 1976, complaint counsel filed a list of witnesses containing 140 names. On August 2, 1976, complaint counsel filed her 219 page list of Commission exhibits identifying 4236 numbered documents (many multi-paged) and not cross-referenced to the allegations of the complaint. Whereupon respondents' counsel moved for an extension of time until December 30, 1976, in which to file their witness and document lists, on the grounds that the "overwhelming volume of complaint counsel's avalanche of documents (not to mention the list

of 140 witnesses) represents extraordinary cause for this request." (Motion for Rescheduling of Dates . . ., dated August 17, 1976.)

On September 9, 1976, the administrative law judge issued an order requiring complaint counsel to file amended lists of proposed exhibits and proposed witnesses and otherwise vacated all other pretrial requirements therefore imposed on counsel. Shortly thereafter, other complaint counsel were assigned to this matter. On November 30, 1976, substitute complaint counsel filed their amended and abbreviated lists.

Adjudicative hearings commenced on January 11, 1977. Complaint counsel concluded their case-in-chief on February 1, 1977, utilizing 14 trial days. Respondents' answering case commenced February 28, 1977. On March 2, 1977, after three days of hearings, respondents' counsel advised that respondent Joel Jacobs, the only remaining witness for respondents, was incapacitated and he requested a continuance of the hearings. After several hearing dates were postponed, due to the continuing incapacity of Mr. Jacobs, the parties, on April 21, 1977, filed a stipulation consenting to the written testimony of Joel Jacobs, including questions and answers on direct examination, as well as on cross-examination. On April 28, 1977, [3] the administrative law judge approved the stipulation and directed that Mr. Jacob's written testimony be incorporated into the record.

On May 23, 1977, the administrative law judge was notified that the exhibits, which had remained in the New York Regional Office since the last hearing date of March 2, 1977, pending further hearings for presentation of Mr. Jacob's testimony, had been delivered to the Secretary's office. On June 1, 1977, the administrative law judge issued his order making certain corrections to the record, closing the record for receipt of evidence, and establishing due dates for filing of proposed findings and reply briefs.¹

Any motions appearing on the record not heretofore or hereby specifically ruled upon either directly or by the necessary effect of the conclusions in this initial decision are hereby denied.

The proposed findings and conclusions submitted by counsel supporting the complaint ("CSCPF") and counsel for respondents ("Resp. PF") have been given careful consideration and to the extent not adopted by this decision, in the form proposed or in substance, are rejected as not supported by the evidence or as immaterial.

This case deals with certain matters relating to the business of selling, by mail-order, through advertisements disseminated by

¹ On August 16, 1977, the administrative law judge requested an extension of time until September 13, 1977, in

catalogs and newspapers or magazines. Certain challenged acts and practices relate to the handling of orders and shipments and, in addition, to respondents' handling of consumers' inquiries and complaints relative to non-delivery, money-back guarantees and refunds. Other matters relate to certain advertising representations concerning the efficacy, performance and characteristics of specific products and the truth or falsity of such representations. Allegations relating to the failure to disclose material facts were also included in the complaint.

Having reviewed the entire record in this proceeding, and having considered the demeanor of the witnesses² [4] together with the pleadings, the proposed findings, conclusions, and arguments submitted by counsel supporting the complaint and counsel for respondents, I make the following findings of fact based on the record considered as a whole:

FINDINGS AS TO THE FACTS

About the respondents.

1. Respondents Norris, Pan-Am, Federated Nationwide Wholesalers - Garydean Corp.³ ("Federated") and P-N Publishing Company, Inc. ("P-N") are all New York corporations with their principal offices located at 31 Hanse Ave., Freeport, Long Island, New York (Compl. Par. 1; Ans. Par. 1).

2. Respondents Joel Jacobs ("Jacobs") and Mortimer Williams ("Williams") are the sole shareholders, officers and directors of Norris, Federated and P-N (Compl. Par. 1; Ans. Par. 1; Jacobs Wr. D6A⁴). Jacobs is president of Norris (Jacobs 120). Williams is vice president and secretary-treasurer of Norris (Jacobs 122; Williams 162). Williams is president of P-N (Williams 162) and secretary-treasurer of Federated (Williams 162).

3. Respondents Jacobs, Williams and Kenneth Mann ("Mann") are the shareholders and officers and directors of Pan-Am (Compl. Par. 1; Ans. Par. 1). Williams is treasurer of Pan-Am (Williams 163). Mann is vice president of Pan-Am (Mann 213). In addition, Mann is Service Director of Future Motors, a new car franchise dealer in Long Island City, New York, selling Dodge taxicabs and other make Dodge vehicles (Mann 212).

² The content of Mr. Jacob's written testimony on behalf of respondents is not the subject of significant dispute. It should be noted that respondents' counsel deferred his cross-examination of Mr. Jacobs after his testimony on behalf of complaint counsel (160).

³ It is not clear whether "Garydean" is "Gary Dean" (See Jacobs Wr. D4A).

⁴ "Wr" refers to Jacobs' written testimony. "D6A" refers to his answer to question 6 on direct examination by respondents' counsel.

4. Norris is a "gift and novelty" mail-order company selling general merchandise to the consumer (CX 405-7, 409-10). It has been engaged in this business since 1953 (Jacobs 120-1).

5. Pan-Am was in the business of selling cars to consumers by mail (Jacobs 126). It became inactive in 1975 (Jacobs 128; Mann 213). [5]

6. Federated Wholesalers Service - Garydean trading as Nationwide Wholesalers Service was incorporated as one name (Jacobs 128). It was in the business of operating consumer buying clubs, *i.e.* finding persons who were interested in buying merchandise at lower prices, and introducing consumers to mail-order companies located throughout the country (Jacobs 129; see CX 741). Nationwide ceased to operate in 1973; Federated ceased to be active in 1974; and Garydean ceased to operate in 1972 (Jacobs 128-9; Wr. D4A). On several occasions respondents used the name "Nationwide" in "price testing" advertisements in connection with the Norris business (Wr. D12A; D31A; Williams 172).

7. P-N, inactive for the last ten years, was set up to publish a sales opportunity magazine. For a short time it also engaged in the mail-order sale of higher priced general merchandise (Jacobs 127; Wr. D16A). On several occasions respondents have used the name "P.N. Publications" in connection with advertising under their master contract with TV Guide Magazine (see Jacobs Wr. D21A; D24A; see Finding 38).

8. Respondents Jacobs and Williams formulate, direct and control the policies of the respondent corporations Norris, Federated and P-N (Compl. Par. 1; Ans. Par. 1).

9. Respondents Jacobs, Williams and Mann formulate, direct and control the policies of the respondent corporation Pan-Am (Compl. Par. 1; Ans. Par. 1).

10. Respondents Jacobs and Williams, along with others not respondents herein, also have business interests in other mail-order corporations not named as respondents in this proceeding, such as Cheeselovers International, Inc. (Jacobs Wr. D34-44A; see CX 2065) and Overseas Discount Shopping Services, Ltd. (Jacobs Wr. D51-53A).

About commerce and competition.

11. In the course and conduct of its business, Norris causes to be published and mails its catalog to prospective consumers located throughout the United States. In addition, it does substantial national advertising in such magazines as TV Guide and places advertisements in newspapers with interstate circulation.

Jacobs 123). Also, in the course and conduct of its business, Norris mails or otherwise causes the distribution of merchandise to purchasers located throughout the United States. [6]

12. In the course and conduct of its business, Pan-Am causes to be published in the Norris catalog advertisements for its cars. Also in the course and conduct of its business, Pan-Am delivers cars to purchasers thereof located outside the State of New York (see Finding 49).

13. Respondents Norris, Pan-Am and Jacobs, Williams and Mann are engaged "in commerce" as "commerce" is defined in the Federal Trade Commission Act, and business practices relating to the matters alleged in the complaint are "in commerce" and "affect commerce" within the meaning of such terms as set forth in the Federal Trade Commission Act.

14. Respondents Norris, Pan-Am and Jacobs, Williams and Mann are in substantial competition in commerce with others engaged in mail-order businesses distributing and selling various products in commerce (see Jacobs 124).

[NOTE: The term "respondents," as it may appear hereinafter in Findings Nos. 15-48, refers to the Jay Norris Corporation, Joel Jacobs and Mortimer Williams, only (see Discussion, p. 58).]

About guarantees, deliveries, and refunds —

Advertising

15. In the Norris catalogs (see CXs 405, 406, 407, 409, 410) certain statements are made concerning guarantees, deliveries and refunds. For example, the phrase "30 DAY MONEY-BACK GUARANTEE ON ALL PURCHASES" appears prominently on the front cover (CX 409). It is also stated: "Personal Checks: to insure immediate shipment of your order, please have your check certified. Otherwise allow about 2 weeks until your check clears the bank." (CX 409, order blank). On page 33 of CX 409 the following phrase appears: "30 day money back guarantee on all items in this catalog."

Other statements include:

Your guarantee of satisfaction . . . Everything you buy from Jay Norris Corp. is always first quality. Every item is exactly as described and illustrated. Any item not up to your expectations return in 30 days for full refund (CXs 57, 409). [7]

Unless item is marked express collect, use this easy chart to figure postage insurance, shipping and handling charges. It's only part of the delivery cost - we pay the rest.

If your order is up to:

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\$15.00	add \$1.70
\$15.01 to \$20.00	add \$2.20
\$20.01 to \$30.00	add \$3.20
\$30.01 to \$40.00	add \$4.20
\$40.01 to \$50.00	add \$5.20
\$50.01 to \$60.00	add \$6.00
over \$60.00	add \$7.20

(CX407, p. 52).

16. In the Norris newspaper and magazine advertisements similar statements are made concerning guarantees, deliveries and refunds.

Order now. Christmas Delivery Guaranteed. Mail no risk coupon now. . . . only \$9.99 plus \$1.00 each for shipping and handling, under your money back guarantee . . . 30-day money back guarantee (CX 2, Flame Gun, Parade Magazine, November 28, 1971). (See also CX 3261.)

30-day money-back guarantee! Mail no-risk coupon now! . . . only 7.99 plus \$1.00 each for shipping and handling, under your money-back guarantee . . . prompt delivery guaranteed (CX 4, Flame Gun, Parade Magazine, November 5, 1972.)

Mail no-risk coupon today for a lifetime supply of socks . . . immediate delivery guaranteed (CX 8, Parade Magazine, January 4, 1970.)

Buy with confidence - 30-day Money-Back Guarantee (CX 17, N.Y. Times, October 24, 1971). (See also CXs 20, 24, 25, 44, 67.)

Buy with confidence - Money-Back Guaranteed (CX 28 California Living Magazine, January 7, 1973.)

Use this Jumbo TV Antenna for 30 days at our risk if not completely satisfied return for prompt refund . . . only \$1.99 plus 60¢ shipping and handling under your money back guarantee (CX 886, 1-46 Jay Norris, 1975.)

[8] Order by mail with confidence - 30 day money back guarantee (CX 62, Parade Magazine, August 12, 1973 Lincoln-Kennedy Penny.)

Use these products 30 days at our risk. If not completely satisfied, return for refund. (CX 96A-D, Parade Magazine, February 9, 1975.)

90 Day Money Back Guarantee . . . you may return within 30 [90] days for prompt refund of purchase price (CX 117 A, H, Parade Magazine, March 14, 1976.)

Try this bait oil 30 days at our risk, if not completely satisfied, return for prompt refund (CX 886, New York City Metro T.V. Guide, February 15-21, 1975).

Representations

17. It is found that, through the printed statements contained in respondents' catalogs, newspaper and magazine advertisements, as well as various communications . . .

merchandise, respondents have, as alleged in the complaint, represented directly or indirectly, that:

- a. merchandise paid for by a certified check is shipped to purchasers immediately;
- b. merchandise paid for by a non-certified check is shipped to purchasers about two weeks after said check has been approved for payment at the purchaser's bank;
- c. the full purchase price of the product plus all additional charges paid by the purchaser in connection with said purchase are refunded by respondents if the purchaser is dissatisfied for any reason;
- d. a sum of money in the form of cash, check, money order or other negotiable currency is refunded to purchasers if they are dissatisfied for any reason; [9]
- e. pursuant to respondents' 30-day money back guarantee, purchasers will receive a full refund if the merchandise is returned to respondents within 30 days from the date of the purchaser's receipt of said merchandise;
- f. in a substantial number of cases, the non-delivery of the purchaser's order, is caused by the loss of the merchandise by the United States Postal Service;
- g. purchasers of respondents' products pay only part of the delivery cost and the respondents absorb the remaining portion of said cost;
- h. exchanges or refunds are expeditiously processed by respondents; and
- i. all parcels shipped to purchasers, except those items marked express collect, are insured against loss, damage or other casualty by respondents.

Consumer testimony

18. Complaint counsel presented consumer witnesses who testified about their prepaid mail-orders from respondent Norris and problems concerning delayed delivery or non-delivery of the merchandise ordered.

On January 8, 1973, Andrew Littlejohn ordered a flame gun from Norris by mail, paying for the merchandise by postal money order. A month later, having not received the ordered merchandise, Mr. Littlejohn wrote to Norris, but received no reply. Receiving no reply to subsequent letters, he contacted the Post Office Department and the Better Business Bureau. On May 3, 1973, he received the flame gun (337-339; see CX 3233).

Frank Trupia ordered a TV Antenna by mail from Norris on April

10, 1973 (332; CX 4251E). Not having received the merchandise by June 1, Mr. Trupia wrote to Norris. Receiving no response, Mr. Trupia, at the end of June, wrote to Norris again, threatening to take the matter to the Better Business Bureau. Norris responded to the second letter and in August Mr. Trupia received the ordered merchandise (332-334). [10]

In early 1973 Lester Colodny ordered a two drawer file from Norris, by mail (see CX 3091). After he wrote several letters, he received a form notice two months later and sometime after that received the merchandise (347-349).

Lois Johnson ordered a tool set from Norris by mail. She paid by certified check (3188). When she did not receive the merchandise after 4-6 weeks, she wrote to them. Norris sent her a post card response (CX 3190A, B dated August 27, 1975). When she still did not receive the merchandise she wrote again and received another post card response requesting information about the order (CX 3190C, D dated January 2, 1976). Miss Johnson did not answer the second card and never received the ordered merchandise (411-419).

Jeffrey Feldman ordered a socket wrench and tool set from Norris by mail on March 16, 1973 (CXs 3129AB, 3130). When he received his bank statement he noticed that his check had been cashed by Norris. Not having received the ordered merchandise, he wrote to Norris, but received no response. He wrote several more letters to Norris and received no reply. He then wrote to the Federal Trade Commission and, thereafter, received the ordered merchandise in the first week of June 1973 (424-429).

On March 24, 1974, Richard Waysse ordered a tube of glue from Norris by mail (CX 3320AB). On April 24, 1974, not having received the ordered merchandise, he wrote to Norris requesting the merchandise or a refund. He received a post card from Norris advising him to wait four weeks after the original order (CX 3321C). On May 24, 1974, Mr. Waysse requested Norris to send him a refund (CX 3323). He refused to accept the package from Norris when it was delivered in the latter part of June 1974 (435-439; see CX 3330). He subsequently received a refund on July 22, 1974 (CX 3334).

On November 5, 1973, Mr. White ordered a wrench and tool set from Norris by mail. After he inquired about delivery, Norris advised him that they were out of stock (453-456; see CXs 3358, 3359AB). He never received the merchandise (456, 459). [11]

On December 4, 1973, Mr. Henick ordered two sets of "Everything Organizers" from Norris by mail (483; CX 3173). He never received the merchandise although Norris was advised of the failure of

Clara Zappa ordered a "five-year" flashlight from Norris by mail in January 29, 1973, and when she did not receive the merchandise by May 1, 1973, she contacted the Better Business Bureau. She received the flashlight in May 1973 (529, 531-3; CX 3365, 3366).

Angela Martone ordered "Spanish Fly" fishing lure bait from American Value in February 1975, and after writing four letters to American Value⁵ requesting shipment or a refund, she contacted the Better Business Bureau and in September 1975 received the merchandise (543-47, 549; CX 3256AB).

Allen Carreau ordered a solar blanket in April 1973. Norris requested he remit an additional 50¢, which he did (CX 3074). He did not receive the merchandise until December 1973 or January 1974 after he had contacted Norris in June, and, receiving no reply, the Better Business Bureau in October (551-556; CX 3073).

Charles Silverman ordered a tool set from Norris by mail early in November 1973. In January 1974 he wrote to Norris twice advising that he had not received the merchandise, and receiving no response to either letter, contacted the Better Business Bureau on January 8, 1974. He then received a communication from Norris and received the merchandise in May 1974.

Leslie Gordon ordered a book from Norris by mail in February 1973 (CX 3168). When he did not receive the merchandise he wrote to Norris in March, but received no reply (570-1). After he wrote to the Attorney General of New York, he received a post card from Norris in April or May advising that they were going to ship the book, but he never received either the merchandise or a refund (572, 574).

In November 1971, responding to an advertisement that guaranteed delivery by Christmas, Frank Matullo ordered a [12] flame gun by mail from Norris (CX 3060B, 3261). When he did not receive it, he wrote to Norris, but received no response. After he complained to the Better Business Bureau in March 1972, he received a card from Norris, and a few weeks later received the flame gun (576-586).

On March 29, 1974, Catherine Cunningham ordered a socket wrench tool set from American Value by mail (CX 3095-6). In two weeks she received a card from Norris advising that there would be a delay in shipment. When six months passed and she still had not received the ordered merchandise, Mrs. Cunningham, in November, wrote to Norris, but received no response. Again in January she wrote to Norris but received no answer. After contacting the Better Business Bureau, she received a letter from Norris (CX 3098). She

⁵ For findings on "American Value," a trade name used by Norris when advertising in TV Guide, see Finding 37, *infra*.

supplied the information requested and in three or four weeks (in February or March of 1975) received the tool set (617-621).

Andrea Discepolo, in May of 1974, ordered a "moon mission" blanket from American Value by mail. Not receiving the ordered merchandise after ten months she wrote to American Value, but received no response. She wrote again a month later, but received no response. Four to six weeks after contacting the Better Business Bureau she received the product (629-637; CXs 3114, 3115).

In March 1973, Arthur Fink ordered some "miracle cement" from Norris, by mail. He wrote to Norris in May advising that he had not received the ordered merchandise, but received no response. He wrote again and received a letter from Norris asking for details about his order. Not receiving the merchandise by June, he wrote again requesting a refund. In July he contacted the New York Times, the newspaper in which the Norris advertisement appeared, and thereafter he received the merchandise (657-660).

At the end of January 1973, Henry Flury ordered two sets of tools from Norris by mail, responding to an advertisement in the New York Times (668). He received the merchandise in the beginning of April after he had cancelled his order and requested a refund (670).

On January 15, 1975, Jeffrey Simkowitz ordered "a couple of stainless steel [measuring] tapes" from Norris by mail (see CX 3305A). Three months later, not having received the ordered merchandise, he wrote to Norris. They responded by card telling him to wait four weeks from the time he sent in the order (CX 3305B). On May 30, 1975, [13] he contacted the Better Business Bureau and in June received a communication from Norris stating that if he wanted a refund he should send them the cancelled check but if he received the tapes in the meanwhile to disregard their letter. He received the tapes in the middle of June (677-683).

In 1975, John Clampet ordered an "Aztex Pendant" from American Value by mail (685-6; see CX 3080). When he did not receive the ordered merchandise and could not contact "American Consumer" by telephone, he contacted the Better Business Bureau. Thereafter Norris contacted him and advised that the product had been reshipped. Mr. Clampet never received it (688-689; CX 3084).

On April 24, 1974, John Amato ordered a pair of "Swedish scissors" from Norris by mail. After not receiving the ordered merchandise for three weeks, Mr. Amato wrote Norris and received a reply that there was a delay due to a strike. He sent two other letters and received other "excuses" (693-694, 697; CX 3041, 3042). In June, he finally received a pair of scissors (695).

Norris by mail (703; CX 3318). Not receiving the ordered merchandise in four or five weeks, Mr. Veale wrote to Norris, but received no reply. He again wrote to Norris two or three weeks later, but received no answer (705). He thereafter secured a refund after contacting the Consumer Affairs Office, State of New York (705-6; see CX 3319).

In February 1975, Gloria Gebel ordered a Monaco shaver from Norris, by mail (776-7). In March, having not received the razor-shaver, she tried to contact Norris by telephone and when that proved unsuccessful she complained to the Better Business Bureau (779). The merchandise was delivered at the end of March or early April (779).

On October 1, 1975, Peter Sanchez sent his check for \$21.49 to Norris, ordering a shaver-razor by mail (789-90; see CX 3288). When Mr. Sanchez had not received the ordered merchandise by October 30, 1975, he wrote to Norris on that date demanding a refund (791). He received the shaver two or three days later (792). [14]

On June 10, 1975, Bethuel Webster sent his check for \$14.99, and on June 24 a check for an additional 70¢, to Norris, ordering a pair of sunglasses by mail (CX 3337). On July 30, Mr. Webster wrote to Norris advising that he had not received the ordered merchandise (1192). On August 19, 1975, having not received a response to his July 30th letter, he sent to Norris a copy of that letter. Norris responded by post card, received by Mr. Webster August 20, advising that the sunglasses should be received shortly. Having not received the ordered merchandise by September 3, 1975, Mr. Webster requested a refund or the ordered product (CX 3342). On September 10, 1975, Norris requested verification of the purchase (CX 3339). Mr. Webster responded and received the merchandise about October 10, 1975.

In November 1974, Francisco DeLima ordered from Norris by mail a refrigerator defroster and some pairs of socks (1205). Having not received the ordered merchandise Mr. DeLima contacted the Consumer Affairs Office (New York City) in January 1975 and the Consumer Affairs Office (Nassau County) six months after placing his order. Norris then communicated with him asking whether to still ship the merchandise. He responded "no" and advised them that he wanted his money back.

19. Respondents also presented a number of consumer witnesses. They testified that in response to advertisements in newspapers, and in two instances, catalogs (see Nierenberg 1792; Trial 1794), they had ordered various items of merchandise by mail from Norris and had received the ordered merchandise anywhere from a week to four

weeks, but in most instances from 10 days to two weeks (Horn 1623-5: in 1974 or 1975, "wall plaque," "plastic container for milk carton," "artificial flowers;" Burns 1632-33: in 1974 or 1975, "graffiti remover," "rust buster;" Curley 1641-2: in 1975, "hose connection;" Nelson 1647-8: in 1976, "magic window cloth;" Calderaro 1649-50: in 1969, 1972 and 1973, "weather zone," "opera glasses," "clip-on glasses;" Dulsky 1658-9: in 1972, 1974 and 1976; "framed pictures," graffiti remover," "rust buster;" Ferrari 1668: in 1973, "heating pad;" Shands 1674-76: in 1973 or 1974, "book;" Vercy 1680-2: in 1974, "hose nozzle;" Brown 1685: in 1976, "graffiti remover;" Kefer 1785-87: from 1972 to 1976, "hose nozzle," "adhesive," "wall duster;" Nierenberg 1791-3; in 1974 or 1975, "happy home recipe;" Trial 1793-4: in 1974, "wall hanging;" Lengyel 1796-7: in 1975, "carving knives;" Lowery 1797-8: in 1974, "graffiti remover;" Edwardson 1813-4: in 1975, "Make-A-Log;" Sabatino 1814-5 in 1975, "sissors;" Dyer 1816-8: in 1974 and 1976, "vegetable slicer," "car brushes"). These consumer witnesses were [15] satisfied with the delivery of their orders. To the same effect see affidavits of 21 other consumer witnesses (RX 11-31).

Consumer Agency evidence

20. Several "Consumer Agency" witnesses testified as to the nature of complaints lodged against Norris. Mr. Vincent, account executive for TV Guide, testified that over the two-month period that TV Guide analyzed customer inquiries on Norris advertising, they received 50 complaints almost all (98%) of which related to "late delivery" (837).

Evelyn Vargas, an employee of Parade Publication, a Sunday supplement distributed in newspapers throughout the United States, testified that she handled letters of complaint received by Parade (905). Her tabulation of complaints relating to Norris, compiled at the request of the Federal Trade Commission, indicated that most of the complaints related to failure to deliver merchandise (CX 2484; see also CX 2485).

Ruth Ann Marsden, an investigator with the Nassau County Office of Consumer Affairs (927) testified she handled all Norris complaints and in 1975 wrote a report concerning such complaints (938-9; CX 2495). Many of those complaints related to nondelivery or late delivery and failure of Norris to respond to letters sent to them by customers inquiring about their orders (949, 966, 988; CX 2495 C-E).

Jean Bozek, an employee of the Long Island Better Business

testified that she tabulated complaints relating to Norris concerning nonreceipt of merchandise and nonreceipt of refunds (999, 1014).

About respondents' handling of mail orders

21. The day the mail is received it is opened. If the order is in response to a "space advertisement," that is an advertisement placed in a magazine or newspaper instead of the Norris catalog, it is sorted by department number. The orders are also separated according to products and are sent to "key punch" that same evening (Jacobs 135-6). On the second day the order is "key punched," *i.e.*, certain information is encoded onto a computer card (136). On the third day the order goes to the computer service, Harbor Computer Systems, located in Hicksville, New York. On the [16] third or fourth day the computer service returns a shipping label to Norris. Most orders on "space advertisements" are shipped on the fourth day (Williams 181). A computer memory record is kept of the customer's name, address and the product purchased (136).

In the case of catalog orders, only the customers' name and address, the date received and the amount of money remitted are put in the computer memory (182). Catalog orders, which are handled manually, are given to the personnel in the warehouse as soon as the order is opened and the information to be sent to the computer service has been recorded on the envelope (183).

A record is made in the "cash book" of all orders as to the date received and the amount of money sent in by the customer (184-186). Although separate records are kept in the cash book for "space" sales and "catalog" sales, all monies received are deposited to the same bank account (184).

Otherwise, Norris does not keep actual records of the customers' orders (186). In most instances (perhaps 80%) shipments to the customers are made through the United States Postal Service, the rest being shipped by United Parcel Service, when it is more economical to do so (Williams 185).

Respondents are self-insured; that is, instead of paying for public insurance on shipments, they make shipments at their own risk. Because they cannot trace shipments, they make all necessary replacements at their own expense and at no charge to the customer (Jacobs 146-7; Williams 200).

About respondents' handling of customer inquiries about nondelivery

22. Respondent Jacobs testified as follows regarding Norris'

response to customer inquiries relating to nondelivery of merchandise (140-1):

. . . The mail arrives. The girl opens it. She looks at it and she reads the customer's complaint. Assuming that there is a date on which the customer says she ordered, the girl checks the records and determines whether or not that order should have been shipped.

If sufficient time has elapsed for the . . . order to have been shipped, assuming that the customer hasn't complained too quickly before she would have had a chance to receive it, the girl will send a delay notice saying that if we received your order, it should have [17] arrived by the time you receive this notice or it will be arriving soon. Please allow another few days. If you still don't have it, let us know, so we can trace it.

Mr. Jacobs added that if respondents become aware of a delay in delivery of merchandise by a manufacturer to Norris, they "notify the customer that there is going to be a delay and tell her we expect to ship within a matter of time" (142).

In this respect, in the course and conduct of their business, respondents use form notices printed on post cards by which they make various responses to customers inquiries about delivery (see Williams 195, *et seq.*) One such card reads as follows (CX 4246; see also CXs 3305B, 3321C, 3338A-D):

Dear Customer:

Your order should have arrived by this time. However, actual delivery time varies tremendously and, unfortunately, is entirely out of our control once the shipment leaves our warehouse. It is possible that it is still enroute to you.

Please bear in mind that it often takes the best part of a week after mailing before an order reaches us. Then it takes a few days to process it. Since shipments are made via Parcel Post or where possible, United Parcel Service, delivery might take as long as another two weeks.

We suggest you allow a total of at least four weeks from the time you mail us your order until you receive it. By now, we feel confident your shipment is either in your hands, or will be within the next few days.

We are sorry for the inconvenience and appreciate your patience and understanding.

Sincerely,

/s/

Rhea Nichols
Customer Service

[18] Another form post card used by Norris in response to a complaint of nondelivery of merchandise reads as follows (CX 4245):

Dear Customer:

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the information we needed to check your order. Please supply us with the following information.

Date you mailed order _____
Merchandise ordered _____
Amount of your check _____
or money order _____

This matter will be given our immediate attention.

Thank you

/s/

Rita Andrews
Customer Relations

Another form post card used by Norris where shipment might have been delayed is CX 4243:

Re:

Dear Customer:

We are sorry there was a delay in shipping your order. It was caused by circumstances beyond our control. If you have not yet received the merchandise, please wait another week. If by that time you still have not gotten it, please indicate so below and return this card to us. We will then place a tracer with the Postal Authorities and a duplicate shipment will be made.
Thank you

/s/

Claris Walters
Customer Relations

[19] Another form post card used by Norris where nondelivery is involved is CX 4248:

This Card is Worth \$1.00 to you! See Below!

Dear Customer:

We are sorry that you did not receive the merchandise you ordered. It obviously was lost in transit.

We are sending a duplicate shipment at once. You should be receiving it within the next 2 or 3 weeks or sooner.

Thank you.

/s/

Evelyn Barnes
Customer Relations

P.S. If you return this card with your next order you may deduct \$1.00.

Nondelivery was sometimes due to the ordered item not being in

stock. An example of a post card used in such circumstances reads as follows (CX 3041a):

Dear Customer:

Thank you for your recent order.

Due to unusually heavy demand, the item you ordered is temporarily out of stock. More is expected soon. Just as soon as the new shipment arrives, your order will be rushed to you.

I'm sure that when it arrives, you'll be delighted with it and you will find it was well worth waiting for.

Thank you.

/s/

Rhea Nichols

Customer Service Dept.

[20] Another form post card used by Norris in 1973 reads as follows (CX 3092):

Dear Customer:

Thank you for your recent order.

Due to unusual circumstances beyond our control, there will be a short delay in shipping your recent order of our product. We appreciate your patronage and consider you a valued customer.

We will do everything possible to expedite your current order.

Please do not write. We will ship your order in two weeks or write to you again.

Respondents do not check the customers order against the information stored in the computer which they use. (see Williams 201).

About the number of customer complaints

23. Norris' annual volume of sales is approximately \$13,000,000 (Jacobs 123). This involves the processing of approximately 2,000,000 orders a year. In 1976, the number of complaints received from customers was about 2% of the total orders (Jacobs 148).

In 1975, the number of complaints was approximately 2-1/2% of a total of 2,000,000 orders and in 1974 the number of complaints was approximately 3% of a total of 1,500,000 orders (Jacobs 149). Generally, Norris does not retain copies of customers' letters of complaint (Williams 189).

Unfair and deceptive practices

24. During the period of time relevant to this matter, respondents on numerous occasions have deposited customers' checks or cashed money orders, and have not shipped the ordered merchandise

(Johnson 411, 418; Feldman 427; Waysse 437, 439, 442-3, 446; White 455-6; Henick 485-87, 491-2; Littlejohn 337-9; Colodny 349-50; Zappa 532; Martone 543, 545-6; Carreau 554-5; Silverman 566-7; Gordon 571; Matullo 577-9; Cunningham 620; Discepolo 633-5; Turk 658-60; Simkowitz 678-9, 682; Gebel 777-9; Sanchez 789-92; Clampet 687-9; Amato 693-5; Veale 704-5; Webster 1187, 1190-4, 1196; Delima 1205-6, 1211). [21] Respondents' representations that they ship merchandise "immediately" or in about "two weeks" are false and misleading. Moreover, receipt and retention of monies for merchandise not promptly shipped, is an unfair act or practice (see Feldman 427; Waysse 440; White 453; Henick 486; Littlejohn 338; Zappa 531; Martone 545; Silverman 567; Gordon 571; Matullo 577).

About refunds

Consumer testimony

25. Complaint counsel presented several witnesses who had requested refunds from Norris either because they were dissatisfied with the merchandise and had returned it or because they had not received the merchandise ordered.

Lester Colodny returned, by mail, the files he had ordered from Norris, requesting his money back (351; see CX 3091). Not hearing from Norris after writing "letter after letter" he wrote to the New York Times (CX 3090). Nine months after requesting the refund, Mr. Colodny received it (354). The amount of the refund was the amount he sent to Norris with his order (359).

Ralph Marino ordered and paid \$19.99 plus tax, sales tax, postage and handling for a shaver from Norris in June 1975 (362, 364). Being dissatisfied, he returned it by mail to Norris (366). He received a partial refund of \$19.99 in about four weeks (367, 385; CX 3249). Later he received an additional \$3.10, the amount of taxes and handling charges (390-2; CX 3248A).

In July 1974 Alfred Langella ordered from Norris, and paid \$7.21 for an orthopedic driver's seat for an automobile. Not being satisfied, he returned it promptly, requesting a refund (397-98). Failing to hear from Norris, he telephoned them (398-9). Getting no satisfaction from that contact, Mr. Langella contacted the Long Island Better Business Bureau, the New York Times and the Federal Trade Commission requesting help in securing his \$7.21 plus shipping charges for the return of the merchandise (399; see CX 3206). Thereafter, in late October, he received a refund from Norris in the amount of \$7.21 which was the amount that he had requested from Norris (401). [22]

When Jeffrey Feldman did not receive the tool set that he had ordered from Norris and paid \$14.98, he wrote to Norris in May requesting delivery or a refund. Not receiving any reply from Norris he contacted the Federal Trade Commission (428). In the first week of June he received the tool set (429). Being dissatisfied with the product, Mr. Jeffrey returned it to Norris, requesting a refund (433). He again wrote to Norris in July requesting his money back (430). He finally received the amount that he had sent to Norris at the end of July or early in August (430, 434).

Richard Waysse testified that he refused to accept packages from Norris after he had demanded a refund of \$2.57. Eventually, he received a refund after writing to many consumer agencies (444; see CX 3334).

John White testified that after he was notified by Norris that they did not have the tool set he had ordered in stock, he requested a refund. He never received either the merchandise or the refund (456, 458).

Bernard Henick testified that he requested a refund because the merchandise he ordered was never delivered to him, but he never received the refund (493).

Bruce Peters returned certain merchandise to Norris he had ordered in January 1974 (516; CX 3267). Not receiving the refund after three weeks, he wrote to several consumer agencies (518). In August 1976, at the suggestion of the attorney who was complaint counsel in this matter at that time, Mr. Peters wrote to respondent Joel Jacobs and promptly received a refund of the amount he had paid to Norris (\$23.58) (519).

Angela Martone testified that she wrote to Norris in March 1975 about nondelivery of merchandise and requested a refund if they did not have the merchandise. She received the merchandise in September 1975, after contacting the Better Business Bureau (545-46,549).

Arthur Fink testified that he received the ordered merchandise after he had requested that Norris make a refund (659-62). [23]

Henry Flury testified that he received the merchandise he ordered from Norris after he had requested a refund, having not received the merchandise within a reasonable time (669-70). He returned the merchandise to Norris and received a partial refund (\$25.00) after contacting the New York Times and the Better Business Bureau (670). Later he received the balance of the refund (\$5.98) (673).

Jeffrey Simkowitz testified that he received the merchandise ordered after he had requested a refund from Norris because of

John Amato testified that he returned certain merchandise to Norris for a refund of \$4.93 (693). About two months later Norris advised they would make a refund, and sent a money order for \$2.00 and stamps, which amounted to 13¢ less than the total amount he had paid to Norris (696).

William Veale testified that upon nondelivery of merchandise he secured a refund of \$12.00, \$2.00 less than the amount he paid Norris, after contacting the Consumer Affairs Office (705-6).

Gloria Gebel returned a shaver-razor to Norris at the end of March or early April. After contacting the Nassau Consumer Affairs Office towards the end of April, in about two weeks she received the refund (\$19.95) which was less than the amount she had paid Norris (\$22.89) (782). She did not pursue the matter further (784).

Peter Sanchez testified that he received the ordered merchandise from Norris after he had requested a refund because of nondelivery (791-2). Being dissatisfied with the product, he returned it in early November to Norris and demanded a refund (793-4). After complaining to the Postal Authorities he received a refund check dated November 24, 1975 (\$21.49) (795).

Francisco DeLima received a refund from Norris upon request after the merchandise he ordered was not delivered and after he had contacted the Nassau Consumer Affairs Office (1208).

John Dierenger returned a product to Norris with which he was dissatisfied and received what he considered to be a partial refund. After writing to the Better Business Bureau, Norris refunded the balance of 47¢ plus 1¢, in the form of postage stamps (1229), which represented the amount of postage he had paid to return the product to Norris (1233; see CX 3111). [24]

Richard Scully returned a damaged kite that he had ordered in April 1973 from Norris three or four days after receipt (506-7). He received a second kite in November after contacting the Better Business Bureau, Long Island (508; CXs 3299, 3300, 3301).

About respondents' handling of customers' requests for refunds

26. Respondent Jacobs testified that, generally, returns are opened within a matter of two or three days after the parcel arrives (at most seven days during "peak season"). The parcel is opened and duly recorded at which time the girl is actually writing the customer's refund check and an apology.

If a complaint comes in on a refund, the girl would write the customer and state that if Norris received the returned package the refund was made promptly and the customer should be receiving it soon (141-2; Wr. C2A).

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The form post card used for the purpose of responding to complaints on refunds is CX 4247:

Dear Customer:

We are most anxious to clear up the inquiry about the merchandise you returned to us. If we received it, a refund or exchange was made as you requested. If you did not receive a refund or exchange, we must assume that we never got your package. We suggest you contact the postal authorities and place a tracer on this shipment.

Thank you.

/s/

Re: Mrs. B. Marks

Jacobs testified that it is respondents' policy to refund the sales tax along with the price paid for the merchandise and any instance where this was not done might be attributed to human error (Wr. D1A, D2A). He further testified that stamps have been sent as a refund "on rare occasions when the amount being sent is under \$1." Credit certificates are issued only on catalog orders for multiple products when respondents are out of stock on a particular item. The customer is given the option of returning the certificate for cash or using it toward future purchases (Wr. C1A). [25]

Jacobs testified that Norris processed about 800 requests for refunds every week in 1976, and that before that, during the 1970s, the total may have been around 1000 requests for refunds per week (Wr. C3A).

Jacobs testified that respondents' policy is to handle these refund requests promptly, in a matter of days (Wr. C4A, C5A).

Respondents do not check the customers order with the information stored in the computer that they use (see Williams 202).

Unfair and deceptive practices

27. Respondents do not always refund the full purchase price of the product plus all additional charges paid by the purchaser in connection with said purchase (Marino 367, 385; Veale 705-6). In many instances respondents deduct the "handling and delivery" charge (Marino 377-8; Flury 670-5; Gebel 782-4; Veale 706; Dieringer 1229-30). Accordingly, respondents' representation that the full purchase price of the product plus all additional charges paid by the customer in connection with said purchase are refunded by respondents, if the purchaser is dissatisfied for any reason, is false and misleading.

28. Respondents do not always refund the sum of money in cash.

certificates or enclose stamps in connection with certain refunds (Amato 696-701; see Jacobs Wr. C1A; Resp. PF pp. 12-13). Accordingly, respondents' representation that they make refunds in cash or check or other negotiable currency is false and misleading.

29. Respondents do not always make a full refund, and sometimes have failed to make any refund, to purchasers who have returned the products within 30 days of their receipt thereof (Colodny 351-4; Marino 367, 385; Langella 397-401; Feldman 428-34; White 456-8; Henick 493; Peters 516-9; Sanchez 791-5). Accordingly, respondents' representation that they give a "30-day money back guarantee" is false and misleading. [26]

30. In several communications with customers respondents have requested that nondelivery of the customers' orders is due to the loss of the merchandise by the United States Postal Service (see CX 4248; Finding 22, *supra*). However, respondents, before making such a representation, do not ascertain whether such product has been shipped, but merely assume that it has (see Findings 21, 22, *supra*). In many instances the ordered merchandise has not been shipped. Accordingly, respondents' representation that nondelivery is due to the fault of the United States Postal Service is false and misleading.

31. There is no evidence of record to show what share of the cost of delivery is paid by respondents or their customers. Thus it cannot be determined whether respondents' representation that they absorb a portion of the delivery charges is true or false.

32. In some instances refunds are not expeditiously processed by respondents. Many purchasers have encountered long delays, sometimes constituting many months before receiving their refunds. Many purchasers' refunds have been secured only after they sought assistance from consumer protection agencies or local, state, and federal government agencies (Waysse 444; Peters 516-9; White 456, 458; Henick 492; Colodny 351, 354; Marino 377-8; Scully 507; Fink 659; Flury 669-70; Langella 398-400; Sanchez 791; Amato 696; Veale 706; DeLima 1207; Dieringer 1229).

33. Respondents are self-insured. Their representation that the purchasers merchandise will be shipped insured is false and misleading.

About respondents not answering customers' inquiries and complaints

34. Respondents, on numerous occasions, have failed to answer customers who have written to them complaining of nondelivery of merchandise ordered and paid for (Trupia 333; Littlejohn 337; Jeffrey 427-8; White 463; Henick 487, 492; Martone 545-6; Carreau

554; Silverman 566; Matullo 579; Discepolo 634; Clampet 687-8; Veale 705; DeLima 1206). In other instances respondents' replies have not responded to the customers' complaint, but have tended to delay and prevent customers from seeking delivery of merchandise or refund of money (Johnson 412-6; Waysse 437-43; White 455-6; Henick 487, 492; Colodny 351; Martone 545-6; Carreau 554; Silverman 566; Gordon 571-2; Matullo 579; Cunningham 620; Discepolo 634-6; Fink 659; Flury 671; Simkowitz 679, 683; Langella 398-9; Sanchez 795; Clampet 689; Amato 694; Veale 705; Webster 1193-5; DeLima 1206-7, 1211). [27]

About respondents not listing their telephone number

35. Respondents do not have the Norris telephone number listed in the Nassau County telephone directory, and many customers who have attempted to contact Norris by telephone have been unable to do so (Trupia 332; Feldman 427; White 456, 459; Scully 506; Peters 515, 525-6; Zappa 531; Carreau 559, 563; Silverman 568; Matullo 579; Discepolo 634; Clampet 687-8; Amato 695, 699; Gebel 778, 785; Sanchez 790; Dierenger 1228). Some customers were able to reach Norris by telephone (Langella 400; Henick 501; Gebel 782).

About respondents requiring customers to make proof of purchase

36. In certain instances, in response to complaints by purchasers about nondelivery of merchandise or failure of respondents to make refunds, respondents have required the purchaser to submit details concerning the transaction (see Williams 189). In cases of nondelivery, respondents request the cancelled checks, order blanks and a full description of the merchandise ordered (see CX 4245; Finding 22, *supra*). In cases involving demands for refunds, respondents require the purchaser to submit proof of purchase and proof of the return shipment to Norris, namely the insurance receipt (see Williams 201; see CX 4247).

About respondents' advertising in TV Guide

37. The J. Morton Williams Advertising, Inc., ("Morton") is the "in-house" advertising agency of Norris (Jacobs Wr. D22A). Its officers are Jacobs and Williams (Malfitano 234).

Before 1975, Norris advertised in TV Guide under the name "American Value." Actually Norris placed this advertising through "American Consumer," a competing mail-order business (Jacobs 124; Malfitano 243, 269; CXs 386, 389, 1808D), in order to take advantage

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part of its master advertising contract with TV Guide (Jacobs Wr. D13A, D14A).

In 1975, Norris entered into its own master contract with TV Guide. Morton placed not only Norris advertisements to be published in TV Guide, but also handled insertion orders for other sellers (Malfitano 238, 267). In this [28] respect, it notified TV Guide, as it was required to do, of the various names under which advertising would be placed under the contract (Jacobs 134, 138; Wr. D23A; Williams 167, 170; Malfitano 261). These names included Value House (CX 645, 646, 649); Fashion Scene (CX 667); Unique Ideas (CX 669); Deter Stop Smoking Plan (CX 694, 867); House of Values (CX 699, 868, 2754); and Fashion Scene & Value Corner (CX 706, 868). (See also Jacobs Wr. D24A, D25A). Morton bills these other advertisers (Malfitano 248). The merchandise ordered under these names by purchasers were shipped by the other sellers, not Norris, the address on the coupons not being that of Norris (Malfitano 247; see CXs 2783-90, 2792-3, 2795-2801, 2804-5). Norris never used these names in advertising its own products (Jacobs Wr. D26A, D27A).

On July 30, 1975, Roslyn Malfitano, an employee of Norris who described her duties as Advertising Director (233) wrote the following message to TV Guide from Morton (CX 866):

This is to advise you that the following companies all divisions of the Jay Norris Corp., are entitled to be covered under the Jay Norris Master contract:

P.N. PUBLISHING, J. MORTON WILLIAMS ADVERTISING INC., FEDERATED WHOLESALERS, VALUE HOUSE, UNIQUE IDEAS, AGGRESSI VESTOR, FASHION SCENE, CHEESELOVER'S INTERNATIONAL.

Subsequently, on February 17, 1976, she wrote the following message to TV Guide (CX 869):

Please be advised that Jay Norris Corp. has a major interest in the Adventurers & Radio Club.

Apparently Miss Malfitano's description of the relationship between Norris and the named organizations was to qualify them as advertisers, and was not intended to reflect a legal relationship (Malfitano 244, 263; Jacobs D28A, D29A, D32A).

About respondents' other advertising

38. Occasionally, Norris will advertise under another name. "Nationwide Wholesalers Service" was used to test a price (Williams 172). However, "P.N. Publication" was used in connection with another seller's advertising via the Norris-TV Guide contract (Jacobs Wr. D21A). [29]

J. Norris advertisements were run by out-of-state publishers, contracted by an agency to supply such advertising to publications of limited circulation. Sometimes, a local address would be used and the publisher or the agency would send the orders in bulk to Norris for filling (Jacobs 139). This did not constitute over 2% of Norris' business (Williams 176).

About Cheeselovers International

39. Cheeselovers International is a separate corporation. For a short time it had offices in the Norris Building, but has since "moved" to Westbury, Long Island, where it maintains a separate mailing address (Wr. D41A). During the time it was located in the Norris Building, Cheeselovers International had its own employees and paid all of its own bills (Wr. D42A, C14A, C15A, C16A; see CX 2065).

About respondents' mailing addresses

40. Respondents do not use post office box numbers; in fact now they have their own zip code, and the United States Postal Service provides a portable trailer substation for the handling of Norris mail (Williams 174-75).

Some of the mailing addresses used by Norris on the coupons which appeared in the various advertisements for Norris' products follow: American Value, Norris Bldg. 25 W. Merrick Rd., Freeport, N.Y. 11521 [February 1975] (CX 386); Jay Norris Corp., 31 Hanse Ave., Freeport, N.Y. 11520 [November 1971] (CX 2); [November 1972] (CX 4); [January 1970] (CX 8); Jay Norris Corp., 85 Henry St., Freeport, N.Y. [October 1971] (CX 17); Jay Norris Corp., 25 W. Merrick Rd., Freeport, N.Y. 11520 [1972] (CX 24); [1974] (CX 25); American Value, 25 W. Merrick Rd., Freeport, N.Y. 11520 [June 1973] (CX 26); Jay Norris Corp., 25 W. Merrick Rd., Freeport, N.Y. 11521 [1975] (CX 886).

In 1973, Norris' business mailing address was 31 Hanse Ave., Freeport, N.Y. 11520 (see CX 3301) and in 1976 it was 31 Hanse Ave., Freeport, N.Y. 11521 (see CX 3190C).

About respondents' various business styles

41. In the complaint it is alleged that respondents used numerous corporate names and various post office box numbers and addresses in such a manner as to create confusion in the minds of purchasers who are unable to relate all the names used to Norris or to its

The names listed in the complaint are Jay Norris Corporation, P.N. Publishing Corporation, Norris Nutrition, Garydean Corp., Federated Nationwide Wholesalers Service, Federated Wholesalers Service, Nationwide Service, Cheeselovers International, Pan American Car Distributors Corporation, Associated Auto Wholesalers Corporation.

This charge is not sustained by the record in this case. It does not appear that respondents tried any subterfuge in the use thereof. The only confusion of record arose from the use of "American Value" by Norris during the time when Norris was advertising under the American Consumer master contract with TV Guide. Several consumers testified that they did not know they were dealing with Norris (White 456-9; Martone 544; Cunningham 617, 622-5; Discepolo 629, 635, 639; Clampet 684-91). In my opinion this does not amount to an unfair or deceptive practice within the meaning of the Federal Trade Commission Act. Moreover, there is nothing unlawful about a company offering reduced advertising rates through its master contract. In any event, the complaint does not charge that respondents have hidden the identity of other sellers by use of respondents' various trade names.

About respondents' representations as to the performance, efficacy or characteristics of their products

42. In their catalogs and in their newspaper and magazine advertisements, respondents have made statements and representations about the performance, efficacy and other characteristics of respondents' products. Seven products were specifically named in the complaint and allegations relating to false and deceptive representations were set forth in said complaint. During the discovery phase of this matter, complaint counsel attempted to use pretrial procedures to look into the efficacy of additional products. Respondents' objection to expanding this case in this manner was sustained and the issues on product performance, efficacy and other characteristics were limited to the seven products and the matters raised in the complaint.

JN INSTA-JET PROPANE FLAME GUN

43. In advertising their flame gun, respondents make the following representations (see CX 4 [1972]; CX 2 [1971]).

Fastest Way We Know To Clear Away Ice and Snow THE WORK-SAVER, THE HEART SAVER Lightweight, Easy-Handling New JN INSTA-JET PROPANE FLAME GUN [31]

This new JN Insta-Jet Propane Flame Gun takes the work right out of dozens of clean-up chores. In winter, the adjustable instant-action flame clears away ice and snow faster than you'd believe possible. Whips through even the heaviest drifts. Clears walks and driveways . . .

Produces a clean, hot flame for up to 14 hours on a single propane cylinder — easily obtainable at hardware, paint and department stores. . . .

The advertisements include a picture of a woman using the flame gun to clear a front walk from what appears to be a significant snow accumulation (see CXs 2,4).

In the complaint, it is alleged that respondents have represented that "The 'J-N INSTA-JET PROPANE FLAME GUN' is able to whip through the heaviest snow drifts and the thickest ice in seconds and is effective and efficient in clearing walks and driveways of ice and snow."

It is found that respondents have, in fact, directly or indirectly, made the representation as alleged in the complaint.

John Lomash, Sales Manager for the Engineering Division of the United States Testing Company (not affiliated with the United States Government) testified that when he was a Project Engineer he performed certain tests on a flame gun supplied by Gem Products Corporation (1238-9). At the time the test results were disclosed to the Federal Trade Commission, the consent of General Fabricators, parent company of Gem Products Corporation, was sought (1240). General Fabricators supplied flame guns to Norris in 1971-1972 (Stip. 38).⁶

On the basis of the tests, Mr. Lomash was of the opinion that the flame gun was not very effective in the removal of ice. The test revealed that it took 6.5 minutes to melt 1/8 inch of ice 1 square foot at zero degrees Fahrenheit, and 11 minutes to melt a 1/4 inch thick patch of ice one [32] square foot at zero degrees Fahrenheit (1251). In addition, they tested the maximum duration of the flame and found it would burn continuously at minimum length for 32 1/2 hours (CX 2481A, B).

Andrew Littlejohn testified that the flame gun he purchased from Norris in early 1973 was not effective in removing snow about 18 inches deep. He used it for about 45 minutes and "finally I got a hole down there where I could put my arms in" (342, 344). "It is no good for burning snow" (344).

Elliot Burger testified that when he received the flame gun from Norris, he purchased a propane cylinder and he assembled it. He tried to melt ice for ten minutes without success (603-4). He testified

that the flame was not coming out of the end of the nozzle but out of the sides of the nozzle (614).

Frank Savoca purchased a flame gun from Norris in December 1971 (1492-3). He "received a long length of metal tubing, hollow tubing with a nozzle attachment at the bottom, with written instructions to obtain a propane tank at any hardware store" (1493). He further testified that the "ad gave the impression that the item was complete and ready for use" (*ibid.*).

He tried to melt off an "icy patch in front of the house" trying the gun on about "a square foot" patch for fifteen minutes. The result was "absolutely negative" (1494).

Respondents' representations as to the performance characteristics of their flame gun are total exaggerations. The flame gun will not "whip through even the heaviest drifts" of snow and is not "the fastest way . . . to clear away ice and snow." Moreover, it is not effective and efficient in "clearing walks and driveways of ice and snow." Respondents' representations are false and misleading.

The complaint further alleges that respondents have failed to disclose in their advertisements that the customer must purchase a propane gas cylinder and assemble the flame gun before it can be used. It is alleged that such facts are material to the consumers' choice of whether to purchase the product and that failure to disclose such facts constitutes a violation of the Federal Trade Commission Act. [33]

It is found that failure to reveal that the propane cylinder is not included, considered with the other representations in the advertisement (especially the picture of the person using a flame gun with a cylinder attached), is withholding a material fact.

The record is not clear whether the parts shipped do in fact come unassembled. Anyway, while it would be *nice* for everyone to know this fact, failure to disclose it is not, in the circumstances of the flame gun advertisement, a nondisclosure that would constitute an unfair or deceptive act or practice in violation of the Federal Trade Commission Act.

SURE-KILL ROACH POWDER

44. Respondents' advertisements on roach powder read, in pertinent part, (see CXs 17, 20, 23, 24, 25, 26; see also CX 117):

Get Rid Of Roaches ONCE AND FOR ALL SURE-KILL WIPES OUT
ROACH NESTS OR YOU PAY NOTHING

Roaches can't resist Sure-Kill. They devour its odorless white powder and crawl to their nests, where they die. Then, a deadly chain reaction starts, that wipes out every

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roach and every egg in the nest. Sure-Kill is safe to use, and never loses its killing power - even after years. A single can cleans out 6 to 8 rooms.

GUARANTEED ROACH-FREE FOR 5 YEARS Sure-Kill roach killer is guaranteed by the manufacturer to prevent reinfestation for up to 5 years when used as directed and left in place.

In the complaint it is alleged that through their advertisements on roach powder, respondents represent (Par. 10. (4-8)):

Respondents' roach powder is safe to use.

Respondents' roach powder gets rid of roaches once and for all.
[34]

Respondents' roach powder creates a deadly chain reaction which eliminates and kills roaches and eggs.

The manufacturer has unconditionally guaranteed that respondents' roach powder prevents reinfestation when used as directed and left in place or it will refund money.

Respondents' roach powder does not lose its capacity to kill under any conditions of use.

It is clear from merely reading the advertisements that respondents have made the representations alleged in the complaint.

Dr. Charles Mampe, Entomologist (relating to the "study of insects"), an employee of Western Industries, an "exterminating company," testified that he was employed for 10 years between 1964 and 1974 by the National Pest Control Association (1347-8).

He testified that boric acid is toxic to warm blooded animals, and used as a roach powder for the control of roaches in the home, it would represent a hazard (1351-2), if not used as directed (1390). He further testified that it was less effective than other products used, because it works much more slowly, approximately four days (1355, 1400). He added that he was not aware that any "chain reaction" occurs when boric acid is used as a roach control because the roach, to be killed, must contact and ingest the boric acid directly (1356). Although boric acid never loses its "killing power," for practical purposes, it loses its effectiveness if covered by dust or grease or becomes damp (1357). Boric acid will not be effective for five years under practical conditions (1359).

Dr. Mampe testified that, in his opinion, use of boric acid as a roach powder would not prevent "reinfestation," in the eyes of the homeowner (1365); that is because the presence of roaches moving

and that the same is true for all roach controls (1410). He added that he was not aware of any information "that indicates that boric acid will kill roach eggs or in any way affect the eggs" 1366, 1380-1).

Boric acid has been used as a roach control since 1900 and it is effective in killing roaches (1352, 1391). It is not repellant to roaches (1401). [35]

Thomas Williams, inventor and manufacturer of Sure-Kill Roach Killer, testified that his product has been sold to Norris (1412, 1419). He testified that although he gives a money-back guarantee that the product will get rid of roaches, he does not use the words "wipe out" or "forever riddance" because roaches move around (1416-17; see 1423). He added that generally the product is effective for approximately six months (1423). He also testified that the "chain reaction" does not always happen and it is not the primary way of killing roaches (1424). He did not think that one application would be effective for 5 years (1425).

Mr. Williams testified that Sure-Kill was 50% boric acid, 50% inert materials (1435), was a good product⁷ and that his money-back guarantee is unlimited as to time (1437). He also testified that, in his opinion, Sure-Kill was a safe product (1445).

Meyer Biddleman, President of Hye Test 303 Corporation, a manufacturer of chemical specialty products (1449), testified that his corporation compounds a roach powder for Valley Research Systems under the name High Action (1450). He drop-shipped this product directly to Norris between 1971 and 1975 (1450-1). This product is made of 50% boric acid and 50% inert ingredients (1451). He added that his customers like the product, "it does a terrific job" (1457, 1460). He guaranteed that the product would be effective and perhaps notified respondents that this guarantee was for a 5-year period (1463).

Edwin Meyer, President of Heddy Corporation, a manufacturer of chemical specialties, has sold a roach powder to Norris from 1973 (1475, 1479; see CX 2507). He never supplied Norris with any information about the efficacy of the product and has never discussed Norris' advertising with Norris (1484-5).

Emily Urf, the only consumer witness who testified about Norris' roach powder product, said that she ordered a can of that product in 1972, and that, after using it for [36] two months, she still had roaches (641-7, 654-5). She added that if she had known that the product was 50% boric acid and 50% inert ingredients she would not have bought it at the price she did pay (647-8, 653).

⁷ "It sure will kill the roaches if you put it in your home according to directions" (1441).

It is found that respondents' roach powder is relatively safe to use, if it is applied according to instructions (CX 2493C). The question is whether respondents' advertisements represent that the product is absolutely safe, *i.e.*, non-hazardous, and whether, as further alleged in the complaint, respondents' failure to disclose (1) that the product is hazardous, (2) that it may be harmful to human beings and pets, and (3) that special precautions should be taken in its use, constitutes misrepresentation in that such is a failure to disclose material facts to the potential consumer (see CX 4060, 4186).

In my opinion any overt representation that a potentially hazardous product is "safe" must be accompanied by a true statement as to the conditions under which it can be used "safely" (see CX 3020). Accordingly, respondents' unqualified representation that the product is "safe," is misleading, deceptive and unfair.

Respondents' roach powder is a formulation of boric acid which works slowly (CX 2493C). If used properly it will control and prevent reinfestation in treated areas. In many residential buildings cockroaches can move into the treated areas before those located there are completely eliminated. Accordingly, respondents' product may not get rid of roaches "once and for all," and respondents' unqualified representation that it does, is misleading and deceptive.

Respondents' roach powder will not kill roach eggs. Moreover, it does not create a deadly chain reaction which eliminates and kills roaches and eggs. Each cockroach must contact the boric acid to be killed. Accordingly, respondents' representations that the product creates a chain reaction and kills roach eggs are false and misleading.

Respondents' roach powder loses its capacity to kill roaches under certain conditions of use. If wet, it cakes and does not adhere to the roaches although upon drying it becomes an effective control once more (see CX 2493F). [37] If covered by grease or food deposits or dust, it becomes ineffective. Accordingly, respondents' representations that the roach powder does not lose its capacity to kill is false and misleading.

The record shows that the suppliers-manufacturers of the roach powder sold by Norris from 1970 to 1975 did unconditionally guarantee the product. There is no evidence that they did not honor this guarantee. The question is whether respondents' statement of the guarantee is, in effect, a representation that the product gets rid of roaches once and for all and does not lose its capacity to kill under any conditions. In my opinion, respondents' statement has the capacity to make such a false representation.

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ingredients (*i.e.*, 50% boric acid; 50% inert ingredients) is a failure to disclose a material fact. Boric acid is a well-known ingredient for roach killers. The consumer, who is ordering by mail, does not know what the ingredients are until receipt of the product. She is not in a position to make an informed judgment as to the nature of her purchase. Accordingly, facts as to the ingredients are material facts and failure to disclose them is failure to disclose material facts.

FOREVER SOCKS

45. Respondents' advertisements on socks read, in pertinent part, as follows (see CX 8, see CX 14):

YOU'LL NEVER NEED TO BUY ANOTHER PAIR OF SOCKS AGAIN - FOR THE REST OF YOUR LIFE! (unless your laundry loses them).

These revolutionary 8-ply socks are so indestructable . . . you can order Free replacements - pair for pair - for any you ever wear out . . . anytime!

. . . Guaranteed to wear forever, in normal use. That "normal use" simply means don't burn holes in them deliberately, or try to cut them with scissors or razor.

. . . "forever socks" . . .

. . . "lifetime supply of socks"

The complaint alleges that by the above statements in advertisements respondents represented that their "Nylon socks" are "indestructable" and they "last forever" (Par. 10 (2, 3)). [38]

It is clear from merely reading the advertisements that respondents did *not* make the representations alleged in the complaint. What is represented is that these socks are *practically* indestructible and, if they wear out, the customer may order a free replacement from Norris. Accordingly, the advertisements present a "forever" guarantee, not an indestructible sock.

Robert Sharp, President of Sox Unlimited, selling agents for various Southern mills, testified that his company has been one of the suppliers of "hosiery to Norris for approximately ten years, off and on" (1504, 1515). He considered that the product "for wearability was a high quality sock, it is a heavy nylon sock" (1508). Neither the Southern mills (manufacturers) nor Sox Unlimited, guarantees the product (1511).

Mr. Sharp was of the opinion that the socks would not wear forever, and did not think "anything" was indestructible. However, he added that "they are good socks and they will last an awful long time" (1515), unless they are worn by a person with an oversized foot (1517, 1519-20).

Salvatore Marsala, the only consumer witness to testify about respondents' socks, said that he was attracted by respondents' statement in advertising that "you'll never need to buy another pair of socks again." He ordered a dozen pair, wore one pair a short time (one hour (595) or twelve hours (599)), and it developed a hole in the toe (595). They were returned to Norris (595).

Mr. Marsala testified that he had a shoesize of thirteen. As explained by Mr. Sharp, a shoe size of thirteen was actually an oversized foot for a thirteen sock size (see Sharp 1516-7; 1521-2).

Certain indirect representations not challenged by the complaint are that the manufacturers unconditionally guarantee the socks (see CXs 8, 14). In truth and fact, the manufacturers do not guarantee the socks. In any event, this area is outside the scope of the complaint and, in my opinion, it would be unfair to amend the complaint at this time to encompass these representations. The administrative law judge sustained respondents' objection to any further testimony relating to Mr. Marsala's return of the socks and any subsequent replacement or refund, as not being relevant to the matters for which the witness had been noticed to testify (595-7). There is no evidence that respondents do not live up to their own guarantee on the socks. [39]

FIVE YEAR FLASHLIGHT

46. Respondents' advertising on the "Five Year Flashlight" in pertinent part reads (CXs 44, 46; see CX 45, 2132):

THE FIVE YEAR FLASHLIGHT

Guaranteed Storage Capacity for 5 years or Your Money Back. 10 Times the Staying Power of an Ordinary Flashlight

* * * * *

. . . The completely new, Command Module 5 Yr. Flashlight

* * * * *

From the company that made flashlights for every manned Moon mission . . . Command Module Lighting . . . the flashlight with proved storage capacity for its power cell for AT LEAST FIVE YEARS combined with 10 TIMES THE STAYING POWER of any ordinary flashlight. Yours in a handsome Command Module case with no external switch to corrode or break . . .

* * * * *

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your flashlight with you, keep it at home. It must work even if you haven't touched it for 5 years or your money back. So don't be another minute without the one safety element every car, every family needs.

It is alleged that through their advertising respondents represented that their "five year flashlight" carries an absolute 5-year guarantee (Par. 10 (13)). From a reading of the text of the advertisement, including the "guarantee" as described in the advertisement, it is clear that Norris did make the representation alleged in the complaint.

Chromalloy Electronics supplies the battery to Norris (RX 7, 8). Its guarantee to the consumer reads as follows (CX 2044B; Stip. 811-12):

Your 5 Year light is guaranteed against defects in materials and workmanship for a period of 30 days. [40]

If, during the 30 day period, your light fails to operate . . . return it to the dealer for an immediate exchange.

Your light is also guaranteed to remain usable for a period of five years providing it has not been used more than 10 hours. Specifically, the light is guaranteed to store and remain useable for 5 years or operate for a total of 10 hours, which ever comes first.

In the event that the light does not work and has been used for less than 10 hours and is less than 5 years old, return the light (prepaid) with proof of purchase and date of purchase to the address below for battery analysis and replacement.

Proof of date of purchase is considered to be the burden of the consumer and each proof must be supplied when applying for guarantee replacement.

Guarantee valid only during normal care and use at ambient temperatures. Abuse of the light or tampering with the case voids the guarantee.

The foregoing is in lieu of all other guarantees, expressed, implied or statutory and Chromalloy Electronics neither assumes or authorizes any person to assume for it any other obligation or liability in connection with the sale of this product.

Counsel also stipulated, and David Rush, President of ACR Electronics, Inc. (formerly Chromalloy) (811), agreed that if he testified he would state that "the average amount of time that the ordinary person would normally use or generally use a flashlight, any flashlight, would not generally exceed two hours per year" (Stip. 813).

In the instructions to the consumer, Chromalloy advises in pertinent part (CX 2044A):

This unique light was designed primarily for emergency use. It is the only light that can be left in your kitchen drawer or car glove compartment for a period of 5 years and still operate.

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Of course the light will not stay "on" continuously for 5 years but with normal emergency type use, it will retain its power for the full 5 year period. The total "on" time of 10 to 20 hours means a minimum of 4 half hour emergency uses each year for 5 years. [41]

Simply stated, the light will not self destruct like all other lights.

Clara Zappa, the only consumer witness who testified about the Norris flashlight stated that after three months, during which she checked to make sure it was in working order, "it was not a flashlight any longer . . . [i]t seemed to be dead" (533).

Norris' "Five Year Flashlight" is guaranteed by the manufacturer to store and remain usable for 5 years or to operate for a total of 10 hours, whichever comes first. The manufacturer further clearly states in its guarantee that the light will not stay "on" continuously for 5 years. Respondents' representation that the flashlight carried an absolute 5 year guarantee is false and misleading.

It is further alleged in the complaint that the facts that (1) the flashlight has an "on" life of 10 to 20 hours, and (2) the manufacturer guaranteed that the light can be stored and remain usable for 5 years or operate for a total of 10 hours, whichever comes first, are material facts and that respondents' failure to disclose those facts was a violation of the Federal Trade Commission Act (Par. 12).

Considering the content of respondents' advertisements, it is found that the facts alleged to be material are important to the consumers' decision as to whether to purchase the product, and that respondents' failure to disclose that information is unfair and has the tendency and capacity to mislead the purchasing public.

LINCOLN-KENNEDY PENNY

47. In their advertisements for the "Lincoln-Kennedy Penny" respondents state in pertinent part (CX 69, see CXs 62, 66, 275):

Now Available WORLD'S FIRST LINCOLN-KENNEDY PENNY -

UNCIRCULATED COMMEMORATIVE LINCOLN HEAD PENNY WITH KENNEDY PROFILE

* * * * *

Here's unusual news for collectors and anyone interested in unique commemorative issues . . . issues that may never be repeated again. A new, uncirculated Lincoln Head penny is now available. [42]

This unique coin shows the profile of President Kennedy stamped on the surface, looking at President Lincoln. The relationship is uncanny. Never released through ordinary channels, the coin is perfectly legal tender, acceptable under section 33[1],

might well become a sought-after collector's item that could grow and grow in value. Because, however, this coin is not in circulation, you may obtain it only through an offering of this sort, and we urge you to order now, avoid disappointment. And if you order right away, you will also receive The Plaque of Coincidences, showing the startling parallels in the careers of these two tragic figures . . .

FREE WITH EACH COIN ORDER HISTORICAL RESUME OF ASTONISHING
COINCIDENCES BETWEEN LINCOLN & KENNEDY

* * * * *

These and many more astonishing coincidences are yours in your Free Plaque of Coincidental Facts when you order the Lincoln Kennedy Commemorative Penny.

The complaint alleges that through such advertisements respondents represent that (Par. 10 (24, 25, 26, 27)):

1. Respondents' Lincoln-Kennedy penny was minted by the United States Treasury Department;
2. Respondents' Lincoln-Kennedy penny is a coin of historical and numismatic significance which is certain to grow in value;
3. The issuance of respondents' Lincoln-Kennedy penny was sanctioned by Section [331], Title 18 U.S. Code; and
4. A free plaque containing historical coincidences between the lives of President Lincoln and President Kennedy is provided to purchasers with each coin.

From a reading of the advertisement as a whole, and with special attention to the statements quoted above, it is clear that respondents made the representations as alleged in the complaint. [43]

Norman Stack, a rare coin dealer with 30-years experience, testified that a "Lincoln-Kennedy Penny does not exist as struck by the United States Government," and that its existence is not unusual news for collectors (1322). He was of the opinion that altering an already minted coin does not increase its numismatic value, which is determined because of a shortage of the coin, by attrition or by the quantity struck (1326, 1331, 1341-2, 1344). He added that the Lincoln-Kennedy Penny, because it was not struck by the United States Mint was of no historical significance, was not of numismatic significance, was not a "commemorative coin" and was never "minted" (1332).

Henry Weissblatt, former President of Federal Coin and Currency, a gold coin wholesaler, and a coin dealer on his own, testified that the so-called Lincoln-Kennedy penny shown to him was not "unique," was not minted by the United States, was not unusual news for collectors, was not of numismatic significance, and was not a commemorative coin (1468-9). He added that, in his opinion, the coin would not be of value to coin dealers (1470).

On August 1, 1973, the United States Postal Service, by its General Counsel, initiated a proceeding wherein it was charged that respondents, in advertising its "Lincoln-Kennedy Penny," had made false representations (CX 3029):

1. That the United States Treasury Department has minted a commemorative Lincoln Head penny with a Kennedy profile;
2. That the Lincoln-Kennedy penny, though legal tender, is uncirculated and never released for ordinary use;
3. That the issuance of the Lincoln-Kennedy penny is sanctioned by Section 331, Title 18, U.S. Code; and
4. That because said coin is of historical and numismatic significance, it is certain to become a collectors' item that will grow and grow in value. [44]

Chief Administrative Law Judge Duvall, in his initial decision filed October 19, 1973, found that respondents had made the representations alleged in the Postal Service complaint. He also found that representations 1, 3, and 4 were false, but found that the second representation, although technically false, was not "a material misrepresentation" (CX 3030).

The Postal Service, in its opinion filed February 27, 1974, sustained the administrative law judge's findings as to 1 and 4, and indicated that it believed determination as to the material nature of representation 3 was covered under its findings as to representation 1 (CX 3032). The Postal Service determined that respondent Norris was engaged in a scheme or device for obtaining money or property through the mail by means of materially false representations, and issued, on February 27, 1974, through its Judicial Officer, an order relating to the limited postal services thereafter available to Norris. Subsequently, the parties stipulated as to the handling of Norris' mail which was approved on March 12, 1974, by the Judicial Officer (CX 3034).

The particular representations challenged in the Federal Trade Commission proceeding appear to be similar to those considered by the Postal Service and those advertisements were disseminated before the issuance of the Postal Services' Order.⁸

It is clear that the Lincoln-Kennedy penny was not "minted" by the United States Government and that issuance of the Lincoln-Kennedy penny was not sanctioned by Section 331, Title 18, U.S. Code. Only the Lincoln penny, on which the Kennedy profile is superimposed, was minted and sanctioned, and respondents' representations are false and misleading.

⁸ Advertisements disseminated after the Postal Service order are CX 275 (February 9, 1974) and CX 405 (at

The Lincoln-Kennedy penny is of no historical and numismatic significance and there is no indication that it is certain to grow in value. Respondents' representations in this respect are false and misleading.

Finally, respondents offer of a FREE plaque (see CX 3027) is actually not an offer of a "free" item. The plaque is part of the [45] regular offer at the price of the coins and plaque, and accordingly the use of the word "Free" is unfair and deceptive.

TV ANTENNA

48. In advertisements for their "JUMBO TV ANTENNA," respondents make the following statements (CXs 28, 886 (p. 46)):

Every home a super receiver ELECTRONIC MIRACLE TURN YOUR
HOUSE WIRING INTO A JUMBO TV ANTENNA

Do you know that you have one of the greatest TV antennas ever constructed? It's better than any set of rabbit ears, more efficient than complicated external antennas. It's your house. Yes, the wiring in your home constitutes a giant antenna that acts as a super receiver for TV, FM, all kinds of difficult reception.

And the secret to using all this reception potential is an amazing little plug-in attachment that utilized the receptivity of your house wiring without using a single bit of electrical power. Yes, you simply attach the adapter easily & quickly to your set . . . plug it in to any wall outlet and immediately your entire electrical system is working for you. No ugly looking rabbit ears, no difficult, dangerous to maintain external antennas, and reception so sharp and clear it will amaze you even in the more difficult areas.

In the complaint it is alleged that through their advertisements respondents represented that (1) the TV antenna will bring sharp and clear reception even in difficult areas; (2) the performance of respondents' TV antenna is superior to any rabbit ear antenna or outdoor antenna; (3) respondents' TV antenna will turn all types of house wiring into a TV antenna; and (4) respondents' TV antenna is an electronic miracle (Par. 10 (9, 10, 11, 12)). [46]

From merely reading the advertisements, especially the portions quoted above, it is clear that respondents made the representations set forth in the complaint.

Frank Triolo, an electronics engineer employed by the United States Electronic Command in Fort Monmouth, New Jersey, testified that he conducted tests on the Norris TV antenna ("C-M Antenna") in December 1973, at the request of the Federal Trade Commission (272-3). From a comparison of the actual pictures received on television sets as well as an electronic measurement of the "received voltage" at the television sets, Mr. Triolo concluded that the Norris

antenna was "definitely inferior to all the other antennas that we used for comparison" (275; CX 2704).⁹

Mr. Triolo was of the opinion that the performance of respondents' TV antenna was not superior to any rabbit ear antenna or outdoor antenna and that it was not an electronic miracle (327-8). He testified further that house wiring can be turned into a TV antenna, although a poor one (328).

Frank Trupia testified that he purchased a TV antenna from Norris in 1973, and that the picture he received with that antenna was inferior to the picture received with the antenna he already had. He added that the television picture with the Norris antenna "was not even good" (332, 335).

Leonard Scrudato testified that he purchased a Norris antenna and "wired it up as I was instructed, and the performance was nonexistent" (469).

Respondents' presented an affidavit and it was stipulated that they had received a communication from a customer expressing satisfaction with the performance of Norris' TV antenna that they had purchased (RX 9AB; Stip. 1821-2).

It is found that respondents' TV antenna will not in all instances bring sharp and clear reception in difficult [47] areas and is not superior to rabbit ear antennas and outdoor antennas and respondents' representations in this respect are false and misleading. Respondents' antenna is not an "electronic miracle" and respondents' representation that it is, is false and misleading.

Respondents' representation that their TV antenna turns the house wiring into an antenna is true. There is nothing in the record to demonstrate under what conditions, if any, utilization of house wiring is ineffective and accordingly respondents' representation has not been shown to be false and untrue.

EX-TAXICABS

49. In their advertisements for cars, respondents¹⁰ made the following statements (see CXs 53, 58; see CX 50, 51, 56):

BUY CHOICE . . . NOT CHANCE

Buy direct and get the carefully maintained car of your choice below wholesale price

All cars are standard four door, six passenger sedans equipped with automatic

⁹ CX 2704, p. 4: "CONCLUSIONS": The C-M Antenna is definitely inferior to the conventional home and "rabbit-ears" antennas used in these tests. It does not serve as an effective TV antenna system in the suburban and fringe areas in which it was tested.

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transmissions, heater, defroster and feature durable vinyl interiors. They have been in regularly maintained fleet use and serviced far more frequently than the average car owner can afford to do. Each car has been thoroughly serviced by our mechanics to put it in good operating condition and passes careful inspection before being released for delivery. These top-quality ex-taxis have been carefully selected for best value

We offer these fine cars at the prices shown (F.O.B., N.Y.). There are no hidden costs! . . . (CX 58).

IDEAL FOR PERSONAL USE OR TO RESELL AT A PROFIT

ONLY PAN AM GIVES YOU THIS 100% O.K.

Dependable PAN AM gives you a good car at a low price. Our highly trained mechanics double-check each car for all the items below. When a car leaves our premises it is checked out as follows: [48]

Brakes	Fan Belt	Heater	Water Pump
Plugs	Spare Tire	Defroster	Fuel Pump
Points	Jack	Generator	Block
Lights	Transmission	Starter	Color
Battery			

MAIL THIS COUPON WITH YOUR DEPOSIT — ORDER AS MANY AS YOU WANT

ALL CARS ARE SOLD ON AN AS IS FIRST ORDER — FIRST SERVE BASIS

In the complaint it is alleged that through their advertisements, especially the statements quoted above, respondents have represented that (Par. 10 (14-23)):

1. cars delivered to purchasers are in good mechanical and physical condition;
2. cars delivered to purchasers are in safe operating condition;
3. cars delivered to purchasers are finished and look as pictured and described in respondents' advertising;
4. cars are checked by expert mechanics and necessary repairs are made prior to release for delivery;
5. cars delivered to purchasers are in sound condition and repair and render normal, adequate and satisfactory service;
6. respondents' cars may be readily resold by the purchasers at a profit;
7. cars are regularly ordered and received in advance of their being offered for sale and are held in stock until purchasers' orders are received;
8. respondents' cars have undergone thorough and complete servicing and inspection before being released and approved for delivery;

9. each price quoted for respondents' motor vehicles is the full price and there are no hidden costs; and

10. respondents bear the liability and responsibility of delivery of cars to purchasers at any destination in the United States where such purchasers may reside. [49]

From a reading of the advertisements in their entirety with special attention to the excerpts set forth above, it is found that respondents do make the representations alleged in the complaint.

Almost all, if not all, of the cars sold by mail-order by Pan-Am were supplied to it by Future Motors. These cars were trade-in taxis from some twenty taxi fleets located in the New York City area. Respondent Mann testified that between 1969 and 1974, Future Motors sold a total of approximately 700 to 800 ex-taxis to Pan-Am, (Mann 214).¹¹

After the cars were sold to Pan-Am, Future Motor's personnel serviced them. The service ordered by Pan-Am appeared on service order forms (see RX 32A-D). After such services were performed, the ex-taxis were painted, and "new" tires were installed by Future Motors. These services by Future Motors were performed either before or after the customer-purchaser was known to Pan-Am.

For consumers located in New York State, a State Inspection Certificate was required in order to secure State License application forms.

Ten consumers who had purchased cars from Pan-Am testified about their ordering and the delivery as well as their experience with their cars.

Patricia Berardi, a New York State resident, testified that in 1972 her husband purchased a 1970 Dodge Coronet for \$700, ordering by mail from Pan-Am (1131-4). They knew that it was an ex-taxi (1135, 1139). In describing the appearance of the car that she received, Mrs. Berardi said:

The car looked good. Mine happened to be a turquoise color, a nice color green.

The tires looked fine. The car was clean on the outside. It was very dirty in the inside . . . (1138).

She further testified that she had the car ten months. About three months after her car was delivered she had trouble with a loose bolt on the steering box. She returned to Future Motors (at College Point) about four months after she picked it up to have the steering box repaired and, although the [50] personnel there worked on the car,

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the problem was not solved. She had it repaired at a neighborhood station.

Six months later she experienced trouble starting the car, and a neighbor replaced a "solenoid switch" inside the starter (1141). She also installed a muffler (1141). Thereafter she experienced difficulty with the transmission, "it just wouldn't go into reverse." She gave "it to some friends of my husband for the parts."

Catherine Dyshuk, resident of Scranton, Pennsylvania, testified that in 1972 she and her husband, responding to an advertisement in the Norris catalog (1221), ordered a 1971 Dodge Coronet by mail from Pan-Am for \$999 (1214). Her husband, beginning in August, made three trips to New York to pick up the car. He was not successful. On December 17, 1972, the car was delivered to the Dyshuk home (1215). Mr. Dyshuk signed a receipt stating that it was received "in good condition" (1227).

Concerning the appearance of the car, she testified that the paint was already coming off. They did not know they were getting a taxi (1216), but thought they were getting a "fleet car" (1223). The next day they took it to a mechanic who showed them the bent frame of the car and some "dents in the side" (1217-8). She did not drive the car more than twice. Her husband drove the car to work for six months (1219). Then they sold it for \$100 (1220).

In early 1972, when Steven Fuchs was a resident of Demarest, New Jersey, he purchased a 1969 Dodge Coronet for \$599 from Pan-Am, responding to an advertisement in a Norris catalog (750-1, 755). From his interpretation of the advertisement he thought he would get a "reconditioned fleet car or taxi." "The advertisement portrayed a car which looked to be brand new, and I assumed the car would be reasonably well restored, and it said it did have new parts, and I remember it saying new tires, which is important, and a new paint job as another thing" (752).¹²

Mr. Fuchs picked up the car at College Point, after paying for it at the Norris office in Freeport (753).¹³ He test drove the car and told the personnel at College Point that the "brakes barely worked" (753). The car [51] was serviced and "the brakes were a little better but they weren't what I considered safe, but I took the car." (753). "[T]he paint job was totally inadequate." "I noticed that the headlights were not focused. One was facing up and one was facing down, it was loose. The emergency brake didn't work" . . . (753). He

¹² Mr. Fuchs understood the phrase "as is" to mean "the way you receive it" (759).

¹³ The invoice signed by Mr. Fuchs reads: "Above car approved and accepted. No warranty expressed or implied" (CX 42 32).

was of the opinion that the tires, which looked new, were "retreads" (769-70).

He kept the car for a couple of weeks and then returned it to Pan-Am and received his money back (755, 758).

John Kurimski, a resident of Stratford, Connecticut, purchased a Dodge car by mail-order in 1971 from Pan-Am for \$1000 (1173-4). About six months later the car was delivered to the Kurimski residence in Stratford (1178). He paid the driver \$50 (1178). He signed a statement that it was in "good condition" (1186).

Mr. Kurimski had the car for "approximately a year or so, but that thing just stayed in the driveway" (1183). "I don't think I had gone more than a hundred miles" (1183).

As to the kind of car he expected to receive, Mr. Kurimski testified as follows (1183):

Paint color you wanted, blue or red I think it was, something like that. It sounded good, that's why I got it, but I also expected to be able to make repairs on the car because when you get a used car, naturally there is always some work to be done. You don't get in a condition that good, but not to the extent that when I looked at this thing, what it was going to cost me. This was a piece of junk, period.

He further testified that although the paint job was pretty good, the interior was "a mess" (1178). "The engine was bad, all rusted out." He "tried to get the car going. It wouldn't go, kept stalling." He had it towed to a garage. They "found that the main bearings were gone." They got it going and then on the eight-mile trip home it stalled about ten times (1179).

He and a friend, who was a mechanic, replaced one bearing and found the frame broken and welded. "[T]he [52] weld job was terrible" (1180).¹⁴ In addition he replaced the points, plugs, condenser and timed it, replaced the front ball joints, muffler and carburetor (1182). The total cost of repairs was approximately \$300 to \$400 (1181).

Mrs. Truus M. Lamanna, a resident of East Norwich, New York, testified that in 1972 they purchased a 1970 four door [Dodge] Coronet from Pan-Am for \$700, responding to a catalog advertisement (1098-9; see RX 4). From the ad, they thought a 1970 car should be a pretty good car, being a fleet car which would be constantly serviced, it should be in good condition (1100).¹⁵

She paid for the car in Freeport and picked it up at College Point at Future [Motors]. She had to go to College Point twice because on

¹⁴ Mr. Kurimski is a welder (1181).

¹⁵ The Lamanna, Lo Motto and Berardi cars were bought as part of one transaction (see 1107). Down payment with the order was made on April 12, 1972, the balance paid July 13, 1972, and the cars were picked up on July 27.

the first visit the car "hadn't been inspected yet" (1102). "It had a new paint job, only the outside, because when you opened the trunk it was still all yellow, and the upholstery was taped up where the mechanism for the cab had been attached" (1102). "The inside was very dirty" (1102).

From the following day she had trouble starting the car, the "starter solenoid" being defective (1102). Within three months "the tires were completely shot, the front" (1104). "One day my whole front went, the whole "A" frame ["K"; see 1109-10] collapsed" (1104).

They had it towed back to College Point, and after two months she got her car back (1105). Six months after picking up the car the first time (late August) she gave the car to some kids "experimenting how to fix cars" (1105).

Upon receipt of the car she signed a statement: "Above car approved and accepted. No warranty express or implied. Any major thing go wrong, may be brought back, repaired at Pan-Am expense" (1111). [53]

Willie Lewis, a resident of Capitol Heights, Maryland, ordered two cars from Pan-Am by mail (1022). In March 1972, he ordered a Dodge Coronet for \$699, receiving delivery in June at College Point (1024; see CX 3211). In June he ordered a blue 1970 Dodge Coronet for his wife and picked it up in October (1037). He signed a statement: "Above car approved and accepted. No warranty express or implied" (1052).

In his view the advertisement (CX 55A) to which he responded represented that the cars were "inspected, they were in condition, . . . and guaranteed for thirty days . . . they were very reliable" (1023, 1047). He "expected to receive a car which had been used, but I expected to receive a car that would give me service, adequate service, for a certain length of time without any trouble." Although he knew they were "used" "fleet cars," he didn't see anything in the advertisements about ex-taxis (1044).

While he was driving the first car home, the "lights went out." In July he replaced the "disc brakes" (CX 3212) and later the power steering failed (1030-1). Pan-Am reimbursed him \$50 of the \$150 cost of repairing the power steering (1032).

In the spring of 1973, the motor blew up and he had that replaced for approximately \$300 (1033). He further testified that on the first day he noticed that the voltage regulator was defective (1034). Thereafter he carried a spare generator in his car (1035), and replaced the generator every six months (1035). In the latter part of 1973, he junked that car.

He had to replace the front end of the second car (CX 3218) and

sometime later "one night I was driving it home and, all of a sudden, whoof, the whole dashboard caught fire" (1039). He had other "troubles, minor, but I was able to repair them myself" (1043).

Frank LaManto, a resident of South Farmingdale, Long Island, New York, picked up a 1970 Dodge Coronet in late September 1972 (1118). It was "in a condition of a brand new painted car, a brand new-looking painted car from the outside." The interior "was a little disappointment, but it was still satisfactory" (1118-9). The car had an inspection sticker on it (1119). He signed an invoice dated August 1, 1972, which stated: "Above car approved and accepted. No warranty express or implied" (1129). [54]

He drove it home and noticed a problem with the transmission. The next day he returned it to College Point, where a used transmission from another cab was installed (1120). Approximately four months later the "engine seized" (1121).¹⁶ He replaced the motor four months later at a cost of approximately \$600 (1123). Three months later the car developed trouble in the drive train. They sold it for \$700 in July 1976 (1125). The car was driven 6000 miles during the seven months it was in running condition (1125).

Carol Orkin, a resident of North Babylon, New York, purchased a 1970 Ford for \$700, responding to an advertisement in the Norris Catalog (1059-61). She ordered it in July 1972 and picked it up in February 1973 (1063). From the advertisement "it was reasonable and it was a new car, comparatively. It was only two years old, and I thought it would be a good buy" (1061). "I knew I was buying a fleet car from the advertisement, but I assumed that since it was a fleet car it would be kept up properly . . ." (1062, see 1086).¹⁷ When Mr. and Mrs. Orkin picked up the car it had an inspection sticker on it (1065). On the way home they stopped at a gas station because there were "no brakes on the car." A "master cylinder" was put in the car by the station attendant (1066). She requested a refund on that bill from Norris, but never got a response from them (1072). They kept the car for about a year and finally "resold it to a junkyard for \$35.00" (1072).

Charles Weyland, a resident of Freeville, New York, purchased a 1972 used Dodge Coronet from Pan-Am for \$999 plus tax (1155-7). He picked up the car at College Point in March 1974. It had an inspection sticker on it (1157). To the best of his recollection he did not see "ex-taxis" in the advertisement (1166).

He drove the car from College Point to a nearby gasoline station to

¹⁶ "It's a condition that happens when the engine runs completely out of oil and there is nothing to indicate

get gasoline. The car failed to restart. The gas station secured the positive terminal of the battery (1158). Shortly after he continued his trip home, the brakes on the right front "seized" (1158). He returned to College Point, [55]

The service people at College Point replaced the battery and the front brakes and bearings, obtaining parts from other cabs, as well as a hanger on the exhaust pipe or muffler (1159).

On the way home the car overheated. The radiator had to be flushed out and the anti-freeze replaced (1160). Shortly thereafter they discovered a hole in the floor board (1160). He had further front brake trouble and had to have the "spider gears" replaced (1161). The paint started to peel in 1975 (1163). They gave it to a dealer to resell (1163).

George Roberts, a resident of Springfield Gardens, New York, ordered a car by mail from the Norris catalog for \$795 (713-4). He picked it up in May 1970 (715). He testified that if he had known it had been a "taxi," he would never have invested or decided to buy it (7160). The service people attached an inspection sticker to the car while Mr. Roberts was signing papers (717).

Upon driving it away, Mr. Roberts discovered that the brakes didn't work. He backed it to the College Point service area and they adjusted the brakes (718).

Two and a half months later he was stopped by a policeman for having an invalid inspection sticker on the car. Because it would require \$300 repairs to get a valid inspection sticker, Mr. Roberts sold the car to the mechanic at the inspection station for \$75 (721).

In a number of instances, cars delivered to purchasers are not in good mechanical condition and respondents' unqualified representation that they are, is false and misleading.

In a number of instances, cars delivered to purchasers are not in safe operating condition, and respondents' unqualified representation that they are, is false and misleading.

In a number of instances, it appears that the cars have not been serviced and necessary repairs had not been performed before release for delivery and respondents' unqualified representation that inspection, service, and repairs are performed in advance of delivery is false and misleading. [56]

In a number of instances, cars delivered to purchasers are not in sound condition and repair and have not rendered normal, adequate and satisfactory service. Respondents' representations as to the condition of the cars they sell is false and misleading.

In a number of instances respondents' cars have not undergone thorough and complete servicing and inspection before being

released for delivery and respondents' representation that such servicing and inspection is always performed is false and deceptive.

It appears that in many instances the cars ordered by customers by mail are not in stock, but are obtained as available to fill orders. Respondents' representation that they are offering for sale cars that are in stock is false and misleading.

It appears that all of respondents' cars are not in such condition that they may be sold at a profit by the purchaser. In many instances purchaser had to expend substantial sums of money in repair costs. Respondents' unqualified representation that such profit may be realized is false and misleading.

Respondents' cars are repainted on the exterior before they are delivered to purchasers. Generally, the appearance of the cars was as pictured in the catalog advertisements. However, the interiors are not refinished. There is no overt representation that they have been so serviced. Respondents' have not misrepresented the *appearance* of the cars which they sell.

Each price quoted for respondents' cars is the full purchase price except for the tax (for New York residents). The delivery charge for delivery to the purchasers' home is stated in the advertisements. Except for the necessary repairs that a customer might be required to make, there are no hidden costs. In my opinion, the "hidden costs" refer to the original price and not to subsequent repair costs, and respondents have not misrepresented the purchase price of their cars.

There is no evidence as to who bears the liability and responsibility of delivery and accordingly there is no proof that respondents' representations that they do, is actually false. [57]

It is further alleged in the complaint that respondents have failed to make known to the prospective purchaser certain material facts about their cars.

First, it is alleged that respondents do not disclose that the cars are "ex-New York City taxicabs." In their advertisements, respondents do state that their "fleet cars" are "ex-taxis." The additional disclosure that they are ex-New York City taxicabs is a material fact and failure to make this disclosure is unfair and has a tendency and capacity to mislead the prospective consumer.

Second, it is alleged that respondents advertise that their cars are sold "FOB New York" and "As is," without disclosing the meaning of those terms. There is no evidence that respondents have made any representation that their cars are sold on other terms. Absent some ambiguity, sellers are not required to define words that have well-

Third, the complaint alleges that respondents do not disclose that the cars are not inspected for compliance with any state motor vehicle inspection law. The record discloses that the cars sold to New York State residents have inspection stickers attached thereto. There is some ambiguity in the advertisements as to what "inspection" is represented as having been performed. It would appear that state law covers the inspection requirements and to require further disclosure in advertisements would create more confusion as to what is actually a fact.

Fourth, the complaint alleges that the interiors of respondents' cars have not been cleaned or reconditioned prior to being delivered to the purchaser. In fact, it appears that the interiors are not reconditioned. This is a material fact and failure to disclose it, especially in view of the other representations relating to the condition of the cars, is unfair and had a tendency and capacity to deceive.

Finally, the complaint alleges that respondents have failed to disclose that the drivers hired to deliver cars to purchasers are independent contractors and are not respondents' agents, servants or employees. The record does not demonstrate that failure to make this disclosure is important. There does not appear to be any serious ambiguity in the advertisement that would require this disclosure, and it is found that any such fact is not material to the purchasers' choice of whether to buy respondents' cars. [58]

DISCUSSION

About respondents' liability

The acts and practices challenged in this proceeding are primarily the acts and practices arising from the business operations of corporate respondent Norris. It is clear that respondents Jacobs and Williams are responsible for these acts and practices in their individual capacities, as well as corporate officials, for purposes of enforcement of Section 5 of the Federal Trade Commission Act. They control the policies of the corporation and direct its operations. See *Standard Educators, Inc. v. Federal Trade Commission*, 475 F.2d 401 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 828; *Guziak v. Federal Trade Commission*, 361 F.2d 700, 704 (8th Cir. 1966), *cert. denied*, 387 U.S. 1007 (1965).

None of these general practices are attributable to Pan-Am or Kenneth Mann. The only business that they are engaged in is the mail-order business of selling used cars. Of course, respondents Jacobs, Williams and Mann are responsible individually and as

corporate officers for the acts and practices of Pan-Am. *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112 (1937).

The other two corporate respondents had nothing to do with the challenged practices. Complaint counsel concede as much (CSC PF pp. 47-48). Without further discussion, the complaint will be dismissed as to the two corporate respondents Federated Nationwide Wholesalers Service, Garydean Corp., t/a Nationwide Wholesaler Service, and P-N Publishing Company, Inc.

The only remaining question as to respondents' responsibility for the challenged acts and practices is the relationship between Norris and Pan-Am. Although it was conceded that Norris was not in the business of selling cars (see tr. 66), the advertisements of Pan-Am appeared regularly in the Norris catalog and Pan-Am's business was conducted by Norris personnel at the Norris place of business (see Cxs 752-54, 756). In the circumstances, the practices of Pan-Am which arose out of advertisements in the Norris catalog (see CXs 57, 409, 410) are found also to be the responsibility of Norris, for purposes of enforcement of the Federal Trade Commission Act. See *Sunshine Art Studios, Inc. v. Federal Trade Commission*, 481 F.2d 1171 (1st Cir. 1973). [59]

About the Commission's jurisdiction

There is no dispute that the Federal Trade Commission has jurisdiction over the respondents Norris, Pan-Am, Jacobs, Williams and Mann. They are engaged in commerce within the meaning of the Federal Trade Commission Act, and the challenged acts and practices are in commerce and affect commerce within the meaning of that Act.

Meaning of the advertisements

With several exceptions, it has been found that the advertisements conveyed the meanings set forth in the complaint. This determination has been made from carefully considering the advertisements, including the format and the emphasis placed on certain words and phrases contained therein. It is well established that the meaning of an advertisement may be determined by an examination of the advertisement itself. *Carter Products, Inc. v. Federal Trade Commission*, 323 F.2d 523 (5th Cir. 1963); *J. B. Williams Co., Inc. v. Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967).

Such a determination may be made notwithstanding that the

ences may be made from statements actually made as well as from information not set forth therein, if the excluded facts are material, *i.e.*, facts considered to be material to the customers' choice whether to purchase the product advertised. *Chrysler Corp. v. Federal Trade Commission*, D.C. Cir. decided July 6, 1977 slip opinion at p. 12; *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

Respondents do not seriously contest the issues as to whether the challenged advertisements conveyed the alleged meanings. They do point out that with respect to the FLAME GUN advertisements the words "in seconds" do not appear therein, and argue that the alleged meaning which contains "in seconds" should not be interpolated from the advertisement (Resp. PF pp. 27-28). This advertisement uses such phrases as "fastest way we know" and "faster than you'd believe possible." Speed of performance is the theme. That is close enough.

About the performance characteristics of products

Respondents argue that complaint counsel have not proved that the performance characteristics of the products [60] are not as represented so as to render the challenged advertising false, deceptive or misleading in violation of the Federal Trade Commission Act.

With respect to the FLAME GUN, respondents argue that the test conducted by Mr. Lomash was limited to two one foot square sections of ice at zero degrees (0°) and that his test did not duplicate the environment or conditions which an ordinary consumer might encounter (Resp. PF pp. 30-32). In respondents' view the testimony of the three consumer witnesses should be disregarded because they were not competent to testify as to the technical or scientific validity of the claims made for the product and that they had no way of knowing whether the units they were using were not defective (Resp. PF pp. 28-29).

In my opinion the evidence of record is competent to support the finding that the FLAME GUN could not perform as represented in the advertisement. The burden shifted to respondents to come forth with some information in support of their claims. They did not do so.

The same situation exists with respect to the TV antenna. The test conducted by Mr. Tripolo at least demonstrated that the TV antenna did not produce the results as represented in respondents' unqualified advertisements. The fact that the TV antenna may have worked, as promised, in certain other areas of use, does not make the unqualified representation truthful as to all possible consumers.

As shown by the findings on the other products' performance characteristics, respondents' representations were to a great extent exaggerations or statements of true facts in a way that they had a tendency and capacity to mislead. In my opinion complaint counsel have sustained their burden of proof and without rebuttal evidence the record is sufficient to support these findings.

About general practices relating to the mail-order business

One of respondents' principal defenses to the allegations relating to nondelivery of merchandise and their failure to make prompt refunds centers around the relatively few complaints attributed to them compared to the great number of orders they process every year. Contending that the [61] complaints are inconsequential in terms of respondents' overall volume and operation of its business, respondents assert that the evidence offered herein by complaint counsel, involving a relatively minute percentage of the consumers which the company must deal with on a day-to-day basis, does not rebut the evidence of respondent Norris and its officers as to the policies, practices and procedures of the company to filling orders and making refunds promptly. Respondents concede that there are bound to be some mistakes which is part of the nature of the mail-order business (Resp. PF p. 21), but contend that Norris did not have such an unusual complaint record (Resp. PF p. 19) that would warrant a finding that they violated the provisions of the Federal Trade Commission Act.

In my opinion, it is respondents' regular business policies, practices and procedures that engender the basic "unfairness" in certain practices found in this matter. Respondents candidly admit that they cannot trace their shipments and accordingly cannot ascertain whether delivery of merchandise has been made. In response to complaints or inquiries about delivery they regularly make the assumption that the merchandise has been shipped and will be delivered soon. They do not check their records to see if shipment was actually made. They do not follow up to see if delivery was in fact subsequently accomplished. They assume that if nothing further is heard from the consumer, delivery was accomplished.

With respect to refunds, respondents take the position that if they received the returned merchandise, a refund was made, and conversely, if they did not send a refund, they did not receive the returned merchandise. They apparently make no automatic refunds on complaints that merchandise was not delivered, but eventually make a reshipment or refund after subsequent complaints are

The inherent unfairness in these procedures is that although the prospective customer is promised in respondents' advertisements that (1) they order at "no risk," (2) that delivery is "guaranteed" and (3) that the customer must be satisfied or his money will be refunded, respondents do not take the initiative in living up to these promises. If something goes amiss, the customer may be placed in a position where he must "hassle" respondents for the merchandise or the refund. In the circumstances, the incidents of complaints, [62] although perhaps relatively few in number as compared to the orders handled, cannot be termed "inconsequential." If any customer is placed in a position where he must "fight" for delivery or a refund, it is no excuse for respondents to say that the problems are part of the nature of the mail-order business. The answer is, and the Federal Trade Commission is mandated, to put a stop to the unfair practices.

Weight to be given testimony by consumer agency witnesses

Respondents contend that the testimony of the consumer agency witnesses must be afforded no weight and disregarded because it was founded on rank hearsay and cannot be relied upon as to the validity of the complaints reported (see Resp. PF p. 18). This testimony was not received for the truth of the complaints themselves, but for the fact that Norris' practices, the ones challenged in this proceeding, had often come to the attention of the consumer agencies. This merely tends to establish that the problem was more consequential than as established by the number of consumer witnesses who testified.

Except for the fact that the New York Attorney General's Office and the "Metropolitan Better Business Bureau" had forwarded consumer's letters of complaint to the Federal Trade Commission, no reliance was given to the testimony of Ms. Susan Metzger, Consumer Protection Specialist, Federal Trade Commission. The charts that she prepared were at the direction of complaint counsel for purposes of determining what possible allegations were to be included in a complaint, at that time still to be drafted. As demonstrated during cross-examination, it was difficult if not impossible for her to decipher the specifics of the consumer's complaint from the information on the charts. The degree of reliability of these exhibits was not such as to justify inclusion of them as evidence of record in this proceeding (see ALJ 1601-2).

About violations of the Federal Trade Commission Act

It is well settled that any advertising representation that has the

tendency and capacity to mislead or deceive a prospective purchaser is an unfair and deceptive act and practice which violates the Federal Trade Commission Act. *Chrysler Corp. v. Federal Trade Commission*, D.C. Cir. No. 76-1586, decided July 6, 1977 at slip op. 1; *Charles of the Ritz Dist. Corp. v. Federal Trade Commission*, 143 F.2d 676, 679-80 (2d Cir. 1944). [63]

It is also a violation of the Federal Trade Commission Act to fail to disclose facts relevant to the advertising representation that is known to the prospective purchaser, might affect his decision as to whether to purchase the advertised product. *Colgate-Palmolive Co. supra*.

The Federal Trade Commission may determine that certain practices are "unfair" when a seller does not live up to certain representations as to his performance in filling orders. See *Federal Trade Commission v. Sperry & Hutchinson* 405 U.S. 233 (1972). It is an unfair trade practice to retain moneys of consumers when performance on the transaction is not accomplished. *Windsor Distributing Co.*, 77 F.T.C. 204, *aff'd*, *Windsor Distributing Co. v. Federal Trade Commission*, 437 F.2d 443 (3d Cir. 1971).

In addition to the above type of "unfair" practices, complainant counsel contend that it is "unfair" for respondents not to maintain telephone listing in a local telephone directory. They argue that consumers should be able to reach respondents by telephone in order to make complaints as to delivery or refunds.

I am not aware of any prior case, adjudicative or non-adjudicative wherein respondent was held to have engaged in an unfair practice by *not* maintaining a public listing of its telephone or was ordered to maintain a public listing of its telephone number. Although it appears that the Commission's staff was concerned about this problem when it drafted the statement of basis and purpose of the Proposed Trade Regulation Rule on Mail Order Merchandising, the promulgated Rule does not contain any such requirement.

The Commission's promulgation of the Rule does not control this adjudicative proceeding, wherein determinations as to illegal conduct and appropriate remedies are made on the adjudicative record.

It certainly would be unfair for a seller to isolate himself from the consumer after the consumer has ordered and paid for a product and where the seller has guaranteed certain performance on the seller's part. But I do not think it is unfair merely to maintain an unlisted telephone, where other means of communication are available. Considering [64] the testimony of Mr. Fenvessey, as well as

orders and complaints, it would not appear very useful to *require* a general listing of their telephone number. The confusion and frustration that a great number of telephone inquiries would engender, if not processed properly, is not hard to imagine.

Coupled with the "telephone" issue, is the question of what type of response respondents should make to inquiries or complaints relating to delivery or refunds. In this respect, another question is what records respondents should maintain in order to upgrade their procedures for handling complaints and request for refunds. As pointed out above (see findings 22, 26; disc. p. 61), respondents, although they maintain computer information, do not use it to ascertain the status of the transaction that is subject to complaint or inquiry. The Trade Regulation Rule does require specific record keeping that would disclose such facts as well as respondents' actions on the complaints and inquiries. It may be that respondents, without much difficulty, could alter their computer capability to provide the information retrieval necessary for compliance with such requirements. There is no doubt that they must do something if they continue to make the representations that engendered the complaint in this matter.

Respondents contend that their practice of having customers document their purchase before respondents will process their claim for refund or reshipment is not unfair, in that most retail stores require presentation of the sales slips before making refunds on goods returned. But a retail store which provides a sales slip and a face-to-face confrontation between the customer and the seller, is in a different situation than a mail-order business that sells merchandise unseen, prepaid, by mail. As long as respondents represent that the customer will get a refund or that delivery is guaranteed, they cannot require the return of cancelled checks or other such proof of payment, as a condition for their acting on a complaint, unless they disclose to the customer in the original contact that such proof will be required before reshipment or refund is made.

Thus, failure to keep adequate records of mail orders is an unfair trade practice and a mail-order business can be required to maintain such records. In the circumstances of this case, failure to maintain a telephone listing is not by itself an unfair practice. [65]

The "telephone" issue has one more dimension. Once a customer does complain about nondelivery or failure of refund, it is an unfair practice not to provide them with a telephone number for future contacts. I think that at some posture of the transaction, respondents should disclose their telephone number. This is taken up in the remedy section which follows (see p. 73).

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Norris, Pan-Am, Jacobs, Williams and Mann.

2. This proceeding is in the public interest. The Commission determined upon the assumption of jurisdiction through the issuance of the complaint. *American Airlines, Inc. v. North American Airline Inc.*, 351 U.S. 79, 83 (1956). Nothing in the record or findings requires a different determination. See *Federal Trade Commission v. Klesne* 280 U.S. 19 (1929).

3. The individual respondents formulated, directed and controlled the acts and practices of the corporate respondents of which they were officers, including the acts and practices found herein.

4. Respondents Norris, Jacobs and Williams engaged in the following acts and practices as alleged in the complaint. They misrepresented that —

a. merchandise paid for by a certified check is always shipped to purchasers immediately;

b. merchandise paid for by a non-certified check is always shipped to purchasers about two weeks after said check has been approved for payment at the purchaser's bank;

c. the full purchase price of the product plus all additional charges paid by the purchaser in connection with said purchase are refunded by respondents if the purchaser is dissatisfied for any reason;

d. a sum of money in the form of cash, check, money order or other negotiable currency is always refunded to purchasers if they are dissatisfied for any reason; [66]

e. pursuant to respondents' 30-day money back guarantee purchasers will always receive a full refund if the merchandise is returned to respondents within 30 days from the date of the purchaser's receipt of said merchandise;

f. in a substantial number of cases, the non-delivery of the purchaser's order, is caused by the United States Postal Service;

g. exchanges or refunds are always expeditiously processed by respondents;

h. all parcels shipped to purchasers, except those items marketed express collect, are insured against loss, damage or other casualty by respondents.

In addition, these three respondents misrepresented that—

a. the "JN INSTA-JET PROPANE FLAME GUN" is able to whip through

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effective and efficient in clearing walks and driveways of ice and snow;

- b. respondents' roach powder is safe to use;
- c. respondents' roach powder gets rid of roaches once and for all;
- d. respondents' roach powder creates a deadly chain reaction which eliminates and kills roaches and eggs;
- e. the manufacturer has unconditionally guaranteed that respondents' roach powder prevents reinfestation when used as directed and left in place or it will refund money;
- f. respondents' roach powder does not lose its capacity to kill under any conditions of use;
- g. respondents' TV antenna will bring sharp and clear reception even in difficult areas;
- h. the performance of respondents' TV antenna is superior to any rabbit ear antenna or outdoor antenna; [67]
- i. respondents' TV antenna is an electronic miracle;
- j. respondents' "FIVE YEAR FLASHLIGHT" carries an absolute 5-year guarantee;
- k. respondents' Lincoln-Kennedy penny was minted by the United States Treasury Department;
- l. respondents' Lincoln-Kennedy penny is a coin of historical and numismatic significance which is certain to grow in value;
- m. the issuance of respondents' Lincoln-Kennedy penny was sanctioned by Section 331, Title 18, U.S. Code;
- n. a free plaque containing historical coincidence between the lives of President Lincoln and President Kennedy is provided to purchasers with each coin order.

In addition, these three respondents have failed to disclose the following material facts in their advertising that —

- a. initial purchase of respondents' flame gun does not include the propane cylinder mentioned in respondents' advertisements of its flame gun. The propane cylinder, which is an essential component of the flame gun, must be purchased at an additional cost;
- b. respondents' roach powder is 50% boric acid and 50% inert ingredients;
- c. respondents' roach powder is hazardous. The product may be harmful to human beings and pets. Special precautions should be taken in the use of this product;
- d. respondents' flashlight has an on life of 10 to 20 hours;
- e. the manufacturer's guarantee of respondents' flashlight is not absolute. The manufacturer guarantees that the light can be stored and remain usable for 5 years or operate for a total of ten hours whichever comes first. [68]

In addition, these three respondents engaged in the following acts and practices —

a. deposited purchasers' checks and money orders into their bank accounts within three days to one week from receipt of such checks and money orders and have failed to either ship the merchandise ordered or to refund money for one month to one year;

b. failed to answer letters of inquiry from consumers or have made inadequate responses which have thereby delayed or prevented purchasers, seeking deliveries of merchandise or refunds of their money, from obtaining same;

c. placing the burden of record keeping upon the purchasers who, upon seeking a refund, exchange, or delivery of the advertised merchandise ordered and paid for by them, have been required by respondents to provide copies of their cancelled checks, original order blanks or various correspondence received from respondents as well as the full details pertaining to the merchandise ordered such as the size, color, price, style number and the date the order was placed.

5. Respondents Norris, Jacobs, Williams, Pan-Am and Mann engaged in the following acts and practices as alleged in the complaint. They misrepresented that —

a. cars delivered to purchasers are in good mechanical and physical condition;

b. cars delivered to purchasers are in safe operating condition;

c. cars are checked by expert mechanics and necessary repairs are made prior to release for delivery;

d. cars delivered to purchasers are in sound condition and repair and render normal, adequate and satisfactory service; [69]

e. respondents' cars may be readily resold by the purchasers at a profit;

f. cars are regularly ordered and received in advance of their being offered for sale and are held in stock until purchaser orders are received;

g. respondents' cars have undergone thorough and complete servicing and inspection before being released and approved for delivery.

In addition, these five respondents have failed to disclose that —

a. respondents' cars are ex-New York City taxicabs;

b. interiors of motor vehicles have not been cleaned or reconditioned by respondents prior to their being offered for sale.

6. The aforesaid acts and practices of respondents have the tendency and capacity to mislead and deceive the public and

acts and practices in commerce or affecting commerce in violation of the Federal Trade Commission Act.

7. In all other respects the allegation of the complaint as to violation of the Federal Trade Commission Act have not been sustained by the evidence or as a matter of law.

REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to insure discontinuance of the unlawful practices found. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613 (1946); *Warner Lambert Co. v. Federal Trade Commission*, D.C. Cir. No. 76-1138 (decided August 2, 1977) (slip opinion at page 24); *Niresk Industries Inc. v. Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883. [70] The Commission is not limited to prohibiting the illegal practices in the exact form in which they were found to have been employed in the past and may close all roads to the prohibited goal. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419 (1957).

Counsel supporting the complaint have proposed an order to cease and desist that is somewhat narrower than the proposed order that accompanied the complaint (CSC PF pp. 81-96). Respondents in their proposed findings, although objecting to any order on the grounds of failure of proof, have specifically challenged certain features of the originally proposed order (Resp. PF pp. 101-117; see Resp. Ans. Par. 16, items a-r).

In the following discussion the new order proposed by complaint counsel will be used as a frame of reference. However, because many changes are required to conform the order to the findings in this decision as well as the requirements of law, the proposed order that follows is substantially different in format and content.

Pan-Am and Mann were not found to have been engaged in the general business practices attributable to Norris, Jacobs and Williams and which were found to be in violation of the Federal Trade Commission Act. Accordingly, the preamble to the principal portion of the order to cease and desist (Part I) relating to such practices will not include Pan-Am and Mann. On the other hand, those paragraphs of the order relating to practices in the sale of used cars by mail order (Part II) will run to Norris, Jacobs, Williams, Pan-

Am and Mann. All the above respondents will be subject to the general requirements of Part III of this order.

Respondent Mann contends that nothing in any order issue should relate to his business as an officer of Future Motors. It does not appear that Future Motors is engaged in a mail-order business. With the order limited to "mail-order sales" Mr. Mann's compliance should not involve him in his other capacity, unless Future Motors enters the mail-order business. Of course, Mr. Mann's future involvement in any mail-order business must be subject to the limited requirements of the order as it relates to him. [71]

Some of the prohibitions of complaint counsel's proposed order create absolute requirements on respondents irrespective of any representation they might make in their advertisements in the future. Such subjects as refunds and affirmative disclosures on respondents' flashlights and roach powder fall into this category. The requirements as to what makes up the refund total, *i.e.* everything tendered at the time of the order, is proper only where respondents make a general money back guarantee. If they state exactly what will be refunded, they should not be required to refund more. Requirements as to disclosure of the "on time" life of the flashlight should be required only if respondents represent in any way the life expectancy of a battery or power source. Requirements in advertising as to the hazards of roach powder should be required only if respondents represent in any way that the product is safe (Compare CXSC Proposed Order Pars. 1, 3, 11, 12, 13; I.D. Order Par. 1, 3, 12, 13, 15).

Respondents object to paragraphs 4, 5 and 6 of counsel's proposed order on the grounds that those paragraphs are almost exactly the requirements of the Commission's Trade Regulation Rule for Mail-Order Merchandising, and that they are already required to comply with those requirements. They contend that they should not be subjected also to possible enforcement sanctions of a cease and desist order.

The illegal practices in which respondents were found to have engaged support these order provisions. It is proper for the Commission to include them in an order. They are reasonably related to the practices and close all roads to the prohibited goal. In effect, using the exact language insures that, except for a different enforcement posture, all members of the industry are subject to the same requirements.

In my opinion the "reasonable basis" requirement of Par. 4

proper, and the requirement that respondent document this "reasonable basis" is not onerous.

Complaint counsel propose a paragraph that requires respondents to have a "reasonable basis" to support any advertising claim they may make for the safety, efficacy, performance, content or any characteristic of any product. Respondents claim that the Commission does not have the power to issue such a prohibition in that it would penalize them for statements which were in fact true, and that in any event such a requirement is so vague and burdensome that it cannot be justified in this case. [72]

There is no doubt that the Commission has the power to require an advertiser to have a reasonable basis at the time claims are made concerning the technical attributes of any product. See *Firestone Tire & Rubber Co. v. Federal Trade Commission*, 481 F.2d 246 (6th Cir. 1973); *Fedders Corp. v. Federal Trade Commission*, 529 F.2d 1398, 1400-1 (2d Cir. 1976). However, as a practical matter, those cases where the Commission has applied the so-called "reasonable basis" substantiation involved complicated scientific data. The proposed paragraph requires a mail-order business to have "competent scientific tests" or "competent objective material" as a reasonable basis for all advertising claims for *all products* that it offers for sale. While it is true that respondents were found to have made claims for some of their products which were found to be false and misleading, the "reasonable basis" requirement of the order is too broad. In my opinion that paragraph should be modified to limit "reasonable basis" documentation to possession of and reliance on "competent objective material". In other words, respondents must rely upon something objective before making any product claims. See *Fedders, supra*, 529 F.2d at 1403-4.

Complaint counsel also include a paragraph that would require respondents to disclose the actual shipper of the merchandise, when they are not the shipper. The record in this case does not establish that failure to make this disclosure is "unfair." Clearly the other paragraphs of the order should eliminate any problem purchasers might encounter where goods are not shipped by respondents. Respondents deal with customers, will be the subject of the customer's complaint, and will be responsible for delivery or refund. Paragraph 8 of the proposed order will be deleted.

Respondents point out that the Commission's challenge to their Lincoln-Kennedy penny advertising duplicates, in all major respects, the issues raised in the proceeding brought by the United States Postal Service against them before the issuance of the complaint in this matter. (Resp. PF at pp. 61-63; see Finding 47, *supra*). They

argue that the Commission's entry of an order to cease and desist as to their Lincoln-Kennedy penny advertisements is improper and unnecessary.

There is nothing improper in the Commission's proceeding under Section 5 of the Federal Trade Commission Act in areas already covered by Postal Service orders. There are many basic and material differences in the laws administered by the two public agencies. See *Reilly v. Pinkus*, 338 U.S. 269, 277 (1949); *Damar Products, Inc.*, 59 F.T.C. 1263 (1961), *aff'd*, *Damar Products, Inc. v. Federal Trade Commission*, 309 F.2d 323 (3d Cir. 1962). [73]

Respondents also argue that certain challenged practices should not be the subject of adjudication because they will be the only mail-order company subject to specific regulation. These areas, argue respondents, must be the subject of Rule Making Procedures (Resp. PF pp. 12, 82, 106-7, 115). The Commission is not estopped from proceeding by way of adjudication because a matter may also be the proper subject of Rule Making. Such a decision is for the Commission as a matter of policy. Insofar as respondents may be disadvantaged competitively from the strictures of an order to cease and desist, those caught violating the Federal Trade Commission Act must expect some fencing in. It should be pointed out, however, that the Commission, under the amendments contained in the Federal Trade Commission Improvement Act, may extend some proscriptions of the order issued against respondents to other mail-order businesses. See 15 U.S.C. 45(m)(1)(B).

In my opinion, complaint counsel's proposed order does not adequately cover the substantive unfair and deceptive advertising practices in which respondents were found to be engaged in connection with the offering for sale, sale and distribution of their FLAME GUN, LINCOLN-KENNEDY PENNY, TV ANTENNA, ROACH POWDER, and used automobiles. Paragraphs have been added which prohibit these specific practices.

Complaint counsel's proposed order does not prohibit misrepresentations that the consumer will receive something "free" in connection with the purchase of a product. A paragraph will be added covering this practice.

Respondents have been found to have misrepresented that they insure the shipments to customers. Complaint counsel recommend dropping the paragraph in the notice order (Par. 8) which relates to this practice. It will be retained in part.

The record-keeping requirements of the order are proper and the record in this case clearly demonstrates the need for such require-

As found above, respondents did not violate the Federal Trade Commission Act by using different corporate names, and in my opinion they are not required to "list" their telephone number in a local telephone directory. However in all correspondence relating to complaints they should disclose their telephone number, if, in fact, they do have a telephone. The order will be modified accordingly.

Finally, there is nothing improper or burdensome about the 30-day prior notice requirement as to any proposed change in the status of any respondent. [74]

ORDER

I

It is ordered, That Jay Norris Corp., a corporation, its successors and assigns, and Joel Jacobs and Mortimer Williams individually and as officers of said corporation, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, trade style, or other device, in connection with the advertising, offering for sale, sale and distribution of general mail-order merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to refund the amount required by paragraph 3, *infra*, in connection with the purchase of respondents' merchandise within the time specified in respondents' advertisements. If no time is specified, such refund must be made promptly.

2. Failing to disclose clearly and conspicuously in all advertisements or other promotional material, any charges to be paid by the purchaser for postage, insurance or for any other purpose in connection with the shipment or the return of merchandise. [75]

3. Failing to refund the full purchase price, of merchandise including postage, insurance, handling, shipping, or any other fee or charge paid by the purchaser any time refund is made to purchaser, unless respondents clearly state in their advertisement the exact nature of the refund including any items of the purchaser's expense that will not be refunded.

4. (A) Soliciting any order for the sale of merchandise to be ordered by the buyer through the mail unless, at the time of the solicitation, respondents have a reasonable basis to expect that they will be able to ship any ordered merchandise to the buyer: (1) within the time clearly and conspicuously stated in any such solicitation, or (2) if no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer; and

(B) Providing any buyer with any revised shipping date, as provided in paragraph 5 of this order unless, at the time any such revised shipping date is provided, respondents have a reasonable basis for making such representation regarding a definite revised shipping date; or [76]

(C) Informing any buyer that they are unable to make any representation regarding the length of any delay unless (1) respondents have a reasonable basis for so informing the buyer and (2) respondents inform the buyer of the reason or reasons for the delay.

A reasonable basis, for the purpose of this section, shall consist of records or other documentary proof establishing the use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time set forth in this order.

5. (A) Where respondents are unable to ship merchandise within the applicable time set forth in paragraph 4(A) above, failing to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel his order and receive a prompt refund. Said offer shall be made within a reasonable time after respondents first become aware of their inability to ship within the applicable time set forth in paragraph 4(A), but in no event later than said applicable time.

(1) Any offer to the buyer of such an option shall fully inform the buyer regarding his right to cancel the order and to obtain [77] a prompt refund and shall provide a definite revised shipping date, but where respondents lack a reasonable basis for providing a definite revised shipping date the notice shall inform the buyer that respondents are unable to make any representation regarding the length of the delay.

(2) Where respondents have provided a definite revised shipping date which is thirty (30) days or less later than the applicable time set forth in paragraph 4(A), the offer of said option shall expressly inform the buyer that, unless respondents receive, prior to shipment and prior to expiration of the definite revised shipping date, a response from the buyer rejecting the delay and cancelling the order, the buyer will be deemed to have consented to a delayed shipment on or before the definite revised shipping date.

(3) Where the respondents have provided a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph 4(A), or where the respondents are unable to provide [78] a definite revised shipping date and therefore inform the buyer that they are unable to make any representation regarding the length of the delay, the offer of said

ption shall also expressly inform the buyer that his order will automatically be deemed to have been cancelled unless (a) respondents have shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph 4(A) above, and have received no cancellation prior to such shipment, or (b) respondents have received from the buyer within thirty (30) days of said applicable time, a response specifically consenting to said shipping delay. Where the respondents inform the buyer that they are unable to make any representation regarding the length of the delay, the buyer shall be expressly informed that, should he consent to an indefinite delay, he will have a continuing right to cancel his order at any time after the applicable time set forth in paragraph 4(A) by so notifying respondents prior to actual shipment.

(4) Nothing in this paragraph shall prohibit respondents when they furnish a definite revised shipping date to paragraph 5(A)(1) above, [79] from requesting, simultaneously with or at any time subsequent to the offer of an option pursuant to paragraph 5(A), the buyer's express consent to a further unanticipated delay beyond the definite revised shipping date. *Provided, however,* that where respondents solicit consent to an unanticipated indefinite delay the solicitation shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the definite revised shipping date by so notifying respondents prior to actual shipment.

(B) Where respondents are unable to ship merchandise on or before the definite revised shipping date provided under paragraph 5(A)(1), and consented to by the buyer pursuant to paragraphs 5(A)(2) and 5(A)(3), failing to offer to the buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to a further delay or to cancel the order and to receive a prompt refund. Said offer shall be made within a reasonable time after respondents first become aware of their inability to ship before the said definite revised date, but in no event later than the expiration of the definite revised shipping date. *Provided, however,* [80] that where respondents previously have obtained the buyer's express consent to an unanticipated delay until a specific date beyond the definite shipping date, pursuant to paragraph 5(A)(4) or to a further delay until a specific date beyond the definite revised shipping date pursuant to paragraph 5(B), that date to which the buyer has expressly consented shall supersede the definite revised shipping date for purposes of paragraph 5(B).

(1) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where

respondents lack a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that respondents are unable to make any representation regarding the length of the further delay.

(2) The offer of a renewed option shall expressly inform the buyer that, unless respondents receive, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer [81] specifically consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if respondents are in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date. *Provided, however,* that when respondents offer the buyer the option to consent to an indefinite delay the offer shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the old definite revised shipping date or any date superseding the old definite revised shipping date.

(3) Paragraph 5(B) shall not apply to any situation where respondents, pursuant to the provisions of paragraph 5(A)(4), have previously obtained consent from the buyer to an indefinite extension beyond the first revised shipping date. [82]

(C) Whenever a buyer has the right to exercise any option under this order or to cancel an order by so notifying respondents prior to shipment, failing to furnish the buyer with adequate means, at respondents' expense, to exercise such option or to notify respondents regarding cancellation. For the purpose of this order "adequate means" requires respondents to:

(1) Provide any offer, notice or action required by this order in writing and by first class mail;

(2) Provide the buyer with the means in writing (by business reply mail or with postage prepaid by respondent) to exercise any option or to notify respondents regarding a decision to cancel.

Nothing in paragraph 5 of this order shall prevent respondents where they are unable to make shipment within the time set forth in paragraph 4(A) or within a delay period consented to by the buyer from deciding to consider the order cancelled and providing the buyer with notice of said decision within a reasonable time after they become aware of said inability to ship, together with a prompt refund. [83]

6. Failing to deem an order cancelled and to make a prompt refund to the buyer whenever:

from the buyer cancelling the order pursuant to any option, renewed option or continuing option under this order;

(B) Respondents have pursuant to paragraph 5(A)(3), provided the buyer with a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph 4 (A) or have notified the buyer that respondents are unable to make any representation regarding the length of the delay and respondents (1) have not shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph 4(A), and (2) have not received the buyer's express consent to said shipping delay within said thirty (30) days.

(C) Respondents are unable to ship within the applicable time set forth in paragraph 5(B) and have not received, within the said applicable time, the buyer's consent to any further delay;

(D) Respondents have notified the buyer of their inability to make shipment and have indicated their decision not to ship the merchandise; or [84]

(E) Respondents fail to offer the option prescribed in paragraph 5(A) and have not shipped the merchandise within the applicable time set forth in paragraph 4(A).

For purposes of this order:

(1) "Shipment" shall mean the act by which the merchandise is physically placed in the possession of the carrier.

(2) "Receipt of a properly completed order" shall mean the time at which respondents receive an order from the buyer containing all the information requested by respondents and accompanied, where required, by the proper amount of money in the form of cash, check or money order. *Provided, however,* that where respondents receive notice that the check or money order tendered by the buyer has been dishonored or that the buyer does not qualify for a credit sale, "receipt of a properly completed order" shall mean the time at which (a) respondents receive notice that a check or money order for the proper amount tendered by the buyer has been honored, (b) the buyer tenders cash in the proper amount or (c) the seller receives notice that the buyer qualifies for a credit sale.

(3) "Refund" shall mean:

(a) Where the buyer tendered full payment for the unshipped merchandise in the form of cash, check or money order, a return of *the full amount* tendered in the form of cash, check, or money order;

(b) Where there is a credit sale:

(i) and the seller is a creditor, a copy of a credit memorandum of the like or an account statement reflecting the removal or absence of

any remaining charge incurred as a result of the sale from the buyer's account;

(ii) and a third party is the creditor, a copy of an appropriate credit memorandum or the like to the third party creditor which will remove the charge from the buyer's account or a statement from the seller acknowledging the cancellation of the order and representing that he has not taken any action regarding the order which will result in a charge to the buyer's account with the third party;

(iii) and the buyer tendered partial payment for the unshipped merchandise in the form of cash, check or money order, a return [86] of the amount tendered in the form of cash, check or money order.

(4) "Prompt refund" shall mean:

(a) Where a refund is made pursuant to definition (3)(a) or (3)(b)(iii) a refund sent to the buyer by first class mail within seven (7) working days of the date on which the buyer's right to a refund vests under the provisions of this order.

(5) The "time of solicitation" of an order shall mean that time when respondents have:

(a) Mailed or otherwise disseminated solicitation to a prospective purchaser;

(b) Made arrangements for an advertisement containing the solicitation to appear in a newspaper, magazine or the like or on radio or television which cannot be changed or cancelled without incurring substantial expense, or

(c) Made arrangements for the printing of a catalog, brochure or the like which cannot be changed without incurring substantial expense, in which the solicitation in question forms an insubstantial part.

7. Representing the safety, efficacy, performance, content or any other characteristic of any product unless [87] such claims are fully and completely substantiated by a reasonable basis which shall consist of competent objective material and such substantiative material is available to the public.

8. Misrepresenting that the nondelivery of merchandise ordered and paid for by a customer is caused by loss of the merchandise by the United States Postal Service.

9. Misrepresenting, directly or indirectly, the time or manner in which respondents' flame gun, or any other product used for the removal of snow or ice, will perform in the removal of snow or ice.

10. Failing to disclose, clearly and conspicuously, in all advertisements or other promotional material that the purchase price of respondents' flame gun or any other product does not include all

component(s) which are not included in the purchase price, if such is the fact.

11. Misrepresenting, directly or indirectly, the time in which or the manner by which respondents' roach powder, or any other pesticide product, will kill or eliminate roaches.

12. Making any representation as to the safety of respondent's roach powder or any other pesticide [88] product without failing to disclose, clearly and conspicuously, in all advertisements or other promotional material for said products, the exact ingredients and percentage(s) of such ingredients contained therein.

13. Making any representation as to the safety of respondents' roach powder or other pesticide product without failing to clearly and conspicuously include the following statement in all advertisements and other promotional material for said products: "This product may be hazardous to your health and the environment. Read the label and use only as directed."

14. Misrepresenting, directly or indirectly, that respondents' TV antenna or any TV antenna will bring in sharp and clear reception and is superior to any other antenna.

15. Making any representation as to the life expectancy of flashlights or other similar battery operated product without failing to disclose, clearly and conspicuously in all advertisements and other promotional material for such products (a) the expected "on" life of the product; and (b) any limitations on the warranty of such product. [89]

16. Representing, directly or indirectly, that the Lincoln-Kennedy penny was minted by the United States Treasury Department.

17. Representing, directly or indirectly, that the Lincoln-Kennedy penny is a coin of historical and numismatic significance which is certain to grow in value.

18. Representing, directly or indirectly, in connection with the sale of any product that another product is given "free" or as a gift or without cost or charge in connection with:

a. any offer which runs for an indefinite term or continuously for a period in excess of one (1) year;

b. any offer not covered by (a) above, excluding introductory offers, unless as to such limited offer:

(1) a regular bona fide retail price is established for the product without the "free" product;

(2) a regular bona fide retail price is established for the "free" product, or in the absence of such price a determination is made of the cost to respondents of such other product; and [90]

c. the price of the product is reduced at least as much as the price or cost of the "free" product.

19. Failing to include the name "Jay Norris" or "Jay Norris Corporation" and an address and telephone number to which consumer complaints may be addressed in all correspondence relating to customer complaints.

20. Failing to maintain records of all orders, payments and shipments made by or received by respondents, including, but not limited to the following information:

- a. Name and address of the customer;
- b. Color, size, quantity, price, style number of merchandise ordered;
- c. Date of receipt of the order;
- d. The form of payment (check, cash, money order, credit sale);
- e. Date and method of shipment of merchandise, including whether or not the shipment was insured and the amount of insurance, if any;

f. Date and form of refund, if any, and reason for such refund.

21. Failing to maintain records of all consumer complaints for a period of three years after such complaint is received, including, but not limited [91] to the following information:

- a. Name and address of the consumer;
- b. Date of receipt of the complaint;
- c. Transaction about which complaint is received;
- d. Nature of the complaint;
- e. Date and disposition of the complaint.

II

It is further ordered, That Jay Norris Corp., and Pan-Am Car Distributors Corp., corporations, their successors and assigns, and Joel Jacobs, Mortimer Williams and Kenneth Mann, individually and as officers of said corporations, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, trade style, or other device, in connection with the advertising, offering for sale, sale and distribution of used automobiles by mail-order in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to disclose, clearly and conspicuously in all advertisements, correspondence, or other promotional material for automobiles that:

tioned by respondents prior to their being offered for sale, if such is the fact. [92]

(b) The used motor vehicles offered for sale by the respondents are ex-New York City taxicabs, if such is the fact.

2. Representing, directly or by implication, the ease or profit with which purchasers can resell respondents' automobiles.

3. Shipping, or causing to be shipped, any automobile which does not comply with all motor vehicle registration, safety and inspection standards of the state within which the automobile is being shipped or sold.

4. Misrepresenting the mechanical and physical condition of said automobiles;

5. Misrepresenting that said automobiles are in safe mechanical and operating condition;

6. Misrepresenting the extent to which said automobiles have been inspected and repaired in preparation for sale and delivery to customers; and

7. Misrepresenting that said automobiles are in sound condition and repair and will render normal, adequate and satisfactory service.

III

It is further ordered, That:

1. Respondents shall notify the Commission at least thirty (30) days prior to any proposed changes [93] in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other changes in the corporation which may affect compliance obligations arising out of the order.

2. The individual respondents named herein, shall promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

3. Respondents shall deliver a copy of this order to cease and desist to all personnel or agents of respondents responsible for the preparation, creation, production or publication of the advertising of all products covered by this order.

4. No provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying [94] with agreements, orders or directives of any

kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

IV

It is further ordered, That the allegations of the complaint are dismissed as to FEDERATED NATIONWIDE WHOLESALERS SERVICE, GARYDEAN CORP., t/a Nationwide Wholesalers Service, and P-N PUBLISHING COMPANY, INC.

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner*:

This proceeding challenges the lawfulness of a variety of claims made in connection with the advertising of mail [2] order products. Respondents, since 1953, have advertised and sold through the mails a wide range of generally low-cost consumer products.¹ [3]

The complaint alleges, and the administrative law judge ("ALJ") found, that respondents, among other things, failed to live up to advertised promises of immediate delivery and prompt refunds and misrepresented the performance or characteristics of six specific products. In their appeal from the ALJ's initial decision, respondents not only attack the factual and legal bases of the proposed findings but also vigorously challenge the breadth and stringency of the recommended order.² Our consideration of these issues follows:

¹ The respondents in this proceeding are Jay Norris, Inc.; Joel Jacobs and Mortimer Williams, who are the sole shareholders, officers and directors of Norris (ID 2); Pan Am, which was in the business of advertising and selling cars to consumers by mail (ID 5, 12); and Kenneth Mann, who together with Jacobs and Williams are the shareholders, officers and directors of Pan Am (ID 3). The ALJ dismissed the complaint as to Federated Nationwide Wholesalers Service, Garydean Corp., t/a Nationwide Wholesaler Service, and P-N Publishing Company, Inc. (ID p. 58). The term "respondents" hereinafter refers to the Jay Norris Corp., Joel Jacobs, and Mortimer Williams (and includes Pan Am and Kenneth Mann only as to ex-taxis). The following abbreviations are used in this opinion:

- ID — Initial Decision, Finding No.
- ID p. — Initial Decision, Page No.
- CX — Complaint Counsel Exhibit No.
- RX — Respondents' Exhibit No.
- Tr. — Transcript of Testimony, Page No.
- RAB — Respondents' Appeal Brief, Page No.
- CAB — Complaint Counsel's Answering Brief, Page No.
- RRB — Respondents' Reply Brief, Page No.
- CPF — Complaint Counsel's Proposed Finding, Page No.
- RPF — Respondents' Proposed Finding, Page No.
- TROA — Transcript of Oral Argument, Page No.

² Respondents do not appeal from the ALJ's finding that the individual respondents Jacobs and Williams are properly held responsible for wrongdoing by the corporate respondent Jay Norris. Similarly, complaint counsel have not contested any of the allegations dismissed by the ALJ.

I. *Immediate Delivery and Prompt Refund Claims*

The record quite clearly discloses that respondents made frequent statements in their catalogs and advertisements emphasizing the timeliness with which they effect delivery and issue refunds. These include representations such as "prompt delivery guaranteed," (CX 4) "immediate delivery guaranteed," (CX 8) or "to insure immediate delivery . . . please have check certified." (CX 409) For non-certified checks, respondents asked customers to "allow about 2 weeks until your check clears the bank." (*Id.*) Similar claims, of "prompt refund(s)" were made in connection with respondents' promises of money back guarantees for unsatisfied purchasers. (ID 17)

These and other representations were found to be deceptive by the law judge who noted, for example, that with respect to respondents' delivery claims they have "on numerous occasions deposited customers' checks or cashed money orders, and have not shipped the ordered merchandise for many months after receipt of the order and payment." (ID 24) The ALJ also found that many purchasers had encountered long delays in getting refunds and in some instances no refund was ever received. (ID 29, 32) [4]

Respondents do not deny making claims of "immediate delivery" or "prompt refunds," or even failing to fulfill such promises on occasion. Rather, they assert that the key issue is what consumers are reasonably entitled to expect in terms of the reliability of those promises. Every performance claim whether it be fuel economy in a car, durability in a toaster, or prompt service by a mail order company, expressly or impliedly represents how often that level of performance can be expected. Here, though their promises are unqualified, respondents nevertheless contend that the failure to make prompt deliveries and refunds 100 percent of the time does not necessarily compel the conclusion that their claims are false. Indeed, respondents argue that the magnitude of untimely deliveries and refunds—compared to their total sales—is relatively insignificant. To recharacterize this issue, when consumers read respondents' advertisements do they believe the statements implicitly represent, for example, that "all," "nearly all" or "most" purchasers would receive prompt delivery and refunds?

The record contains little direct evidence as to what degree of reliability the consuming public expected when it read these ads.³ It

³ In examining this issue, it is useful to note that a principal factor underlying promulgation of the Mail Order Merchandise TRR, 16 C.F.R. 435 (1975), was the frequent failure of mail order companies to deliver ordered goods within a reasonable time. As we noted there, the regulation of delivery procedures was called for in view of evidence "that substantial numbers of consumers are not getting mail order merchandise shipped within that time which consumers had been led to believe shipment would be made." 40 F. R. 51582, 51587 (1975). Much the same question is involved here.

is well established, however, that the Commission may determine the meaning of an ad without the aid of consumer testimony as to how the advertisement is perceived by the public. *E.g., Chrysler Corp. v. FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977). Nor can it be doubted "that where an advertisement conveys more than one meaning, one of which is false, the advertiser is liable for the misleading variation. . . ." *National Commission on Egg Nutrition*, 88 F.T.C. 89, 186 (1976), *enforced in part*, 570 F.2d 157 (7th Cir. 1977), *petition for cert. filed*, 46 USLW 3694 (April 28, 1978). [5]

After examining respondents' ads in their overall context, we believe the evidence is clear that they represented that timely deliveries and refunds would be effected virtually without exception. Common sense suggests that a person reading an ad promising "immediate delivery" would be entitled to rely upon that claim with a fairly high degree of confidence that it would be fulfilled. Respondents' ads go even further. For example, their claims guaranteeing prompt delivery (CX 2, 4, 8) indicate to consumers that respondents take extraordinary precautions to insure speedy deliveries.⁴ Similarly, respondents make unqualified claims of prompt refunds. (CX 386) Moreover, these refund claims are placed amidst claims of "your guarantee of satisfaction" (CX 57, 409), "no risk coupon" (CX 2, 4, 8) and "use . . . at our risk" (CX 96A-D, 886). Indeed, respondents' ads abound with claims that imply a purchaser cannot lose. We believe the rather unequivocal message conveyed by these ads is that respondents not only afforded their customers the opportunity to return any and all merchandise but also promised that such refunds would be made in a timely fashion in virtually every instance. Even if consumers might not expect absolute perfection, they could reasonably anticipate from reading respondents' ads that a far more reliable level of performance would be forthcoming than actually occurred. [6]

We find persuasive record support from which to conclude that respondents failed to make timely deliveries and refunds to numerous customers and that respondents' representations to the contrary were misleading and deceptive. The record is replete with

⁴ Respondents argue that guaranteed should not be interpreted to represent greater reliability. Indeed, in another context they argue that "a money back guarantee carries with it a representation that the product might not effectively treat all cases" (RAB n. 37). In the case of deliveries this contention is clearly without merit. When delivery is late, respondents do not offer pecuniary compensation. The consumer is afforded no additional recourse. Given this context, if "guaranteed" is to have any meaning at all, it is that respondents' claim of prompt delivery is extremely reliable. See F.T.C. Guide Against Deceptive Advertising of Guarantees, 16 C.F.R. 239.7; *All State Industries of North Carolina, Inc.*, 75 F.T.C. 465, 488-89 (1969), *aff'd*, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S.

testimony of consumers who experienced delivery or refund difficulties with respondents. (ID 18)⁵ Abundant evidence also exists that many customers took the time to write their complaints to respondents, government agencies, consumer protection groups and magazines (ID pp. 9-15, 21-24).⁶ These efforts are particularly noteworthy since most of the respondents' products are low price items for which many consumers are not likely to incur the trouble and expense of complaining. (CX 405-409) Thus, contrary to respondents' assertions, the testimony supplied by the 30 consumer witnesses, supplemented by the other evidence of consumer complaints, undoubtedly reflects the proverbial "tip of the iceberg."

Moreover, we agree with the ALJ that the procedures employed by respondents for recording, tracking, and responding to orders, complaints, and requests for refunds provide little solace to respondents in attempting to demonstrate the veracity of their claims. As the law judge observed: [7]

... Respondents candidly admit that they cannot trace their shipments and accordingly cannot ascertain whether delivery of merchandise has been made. In response to complaints or inquiries about delivery they regularly make the assumption that the merchandise has been shipped and will be delivered soon. They do not check their records to see if shipment was actually made. They do not follow up to see if delivery was in fact subsequently accomplished. They assume that if nothing further is heard from the consumer, delivery was accomplished.

With respect to refunds, respondents take the position that if they received the returned merchandise, a refund was made, and conversely, if they did not send a refund, they did not receive the returned merchandise. They apparently make no automatic refunds on complaints that merchandise was not delivered, but eventually make a reshipment or refund after subsequent complaints are received. (ID p. 61)

Notwithstanding these meager recordkeeping efforts and their demonstrated effect on delays in delivery and refunds, respondents contend that their performance relative to total sales is good.⁷ The basis of this claim is respondents' colorfully described but rather simplistic "bucket method" of measuring complaints. Mr. Jacobs described this method when he explained how respondents calculated the ratio of complaints to sales: [8]

A. I can tell you this. They [complaints] are going down percentage-wise because we measure by buckets. It's unusual. But our mail arrives and is kept in buckets. And we know that whereas years back we used to get "X" amount of buckets on a Monday and

⁵ Although respondents question the probity of some of this testimony (RAB at 16-17), our review of the record convinces us of its reliability. (See also CAB at 11-13)

⁶ As the ALJ correctly noted, this testimony by so-called "consumer experts" need not be discounted as being hearsay, since it was received not for the truth of the complaints, but rather to show that consumer dissatisfaction extended beyond the consumer witnesses who testified.

⁷ Similarly, respondents claim their performance compared with competing mail order companies is good (RAB at 20-22; RPF at 22-25). These comparisons to the performance of other mail order companies are largely irrelevant. The issue here is whether respondents' practices render their claims of prompt performance deceptive. Consequently, we are concerned with what consumers expect and whether respondents met those expectations.

"X" amount on any other given day, that with each succeeding year, the number of buckets coming in each year is less.

As far as the amount is concerned, percentage-wise again, I would estimate that it probably is running now about 2% . . . of orders received. . . (Tr. 147)

This measuring rod is far too susceptible to error for us to place much confidence in these figures.⁸ Clearly it does not indicate that respondents' failure to back up their claims was a rare occurrence. To the contrary, the evidence suggests that respondents had no basis for making the sweeping claims about delivery and refunds set forth in their advertisements.

Thus, in view of the record, respondents' representations of immediate delivery and prompt refunds were false and deceptive. [9]

II. *Miscellaneous Delivery and Refund Claims*

Respondents also made a variety of other delivery and refund claims in their advertising which the ALJ found to be deceptive. These ads represented that (1) the full purchase price, plus all additional charges, would be refunded to dissatisfied purchasers (ID 15, 16); (2) refunds would be made in negotiable currency (ID 15, 16); (3) nondelivery was frequently the fault in the Postal Service (ID 22); and (4) all shipments were insured against loss or damage (ID 15).⁹ We agree with the ALJ's determinations concerning each of the first three claims but disagree as to the fourth.

Respondents boldly make claims of "no risk" and "full refund" but candidly concede that they normally did not return the full amount tendered in payment by consumers (RAB at 52). Though some consumers may not have expected to be reimbursed for postage and handling charges (*Id.*), other consumers took a different view and demanded and received a refund for these additional charges (ID 27). In the face of express statements that purchasers incur "no risk," there is little doubt in our view that many, if not most, consumers would expect a full refund of the amount tendered. Similarly, in connection with the second claim, respondents also admit that for small amounts and under other circumstances they did not send the refund in a negotiable currency (ID 28). No such limitation can be read into respondents' advertising and in the absence of qualifying language we suspect that consumers would normally anticipate

⁸ Apart from this testimony, nowhere in the record do we find systematic evidence of respondents' overall delivery and refund performance. Absent these more revealing measures, we are not left impotent. Even rougher measures of consumer dissatisfaction when coupled with our previous experience with consumer complaints reveal the significant failings that plagued respondents' operations.

⁹ A separate allegation that respondents misrepresented the extent to which they would absorb part of the

payment of a promised refund to be in the form of cash or its equivalent. [10]

As for the third claim, respondents repeatedly represented that poor mail service was the cause of a delayed delivery or refund, rather than admitting that they were frequently to blame. (ID pp. 21, 22, 30) The prospect of losing customers to competitors is an important check on deceptive or just plain inefficient business practices. To avoid such competitive consequences, however, respondents attempt to mollify understandably upset customers by indiscriminately placing the blame on the U.S. Postal Service. Such efforts to hold onto consumers' business and induce repeat purchases are themselves deceptive.

Finally, we find respondents' claim that parcels shipped to purchasers are insured to be misleading. In reaching the same conclusion, the ALJ noted that:

Respondents are self-insured; that is, instead of paying for public insurance on shipments, they make shipments at their own risk. Because they can not trace shipments, they make all necessary replacements at their own expense and at no charge to the customer (Jacobs 146-147; Williams 200). (ID 21)

Undoubtedly, most consumers would probably assume that reference to insurance means third-party insurance, and accord greater significance to the protective value of such insurance than to self-insurance. Nevertheless, respondents' use of the term "insurance" appears only in that part of their catalogs which sets out the additional charges for such items as handling and shipment. *See e.g.*, CX 407 p. 52. While technically deceptive, this brief mention of insurance at a point where most consumers would have already decided whether to purchase merchandise is not likely to have more than a *de minimis* effect. Given this situation and the limited frequency with which the reference appeared after Jay Norris stopped carrying insurance for its shipments, we see no need for an order provision addressing this issue. In any event, it is quite apparent that consumer dissatisfaction with respondents' delivery and refund practices stems from reliance upon overblown claims of timely service and full refunds rather than unfulfilled promises about insurance. [11]

III. Performance Claims for Specific Products

Apart from their more general mail order claims, the ALJ further determined that respondents deceptively advertised six specific products: (1) a propane flame gun, (2) a roach insecticide, (3) a

flashlight, (4) a collector's coin, (5) a television antenna, and (6) extaxicabs.¹⁰

A. *J-N Insta-Jet Propane Flame Gun* The complaint alleged and the ALJ found that respondents represented that "THE J-N INSTA-JET PROPANE FLAME GUN" is able to whip through the heaviest snow drifts and the thickest ice in seconds and is effective and efficient in clearing walks and driveways of ice and snow."¹¹ (ID 43)

The record contains ample evidence of the flame gun's inefficacy in removing ice. A representative of a private testing firm, Mr. John Lomash, testified as to the length of time required for a propane flame gun to melt one square foot patch of ice at 0° fahrenheit. He found that the flame gun required 6.5 minutes to melt a patch 1/8 inch thick and 11 minutes to melt a patch 1/4 inch thick (ID 43; Tr. 1249-53). Mr. Lomash conceded that at warmer temperatures the ice would melt more quickly. (Tr. 1249-50) Respondents contend that because the record fails to reveal the typical conditions confronting an ordinary user, the test results do not prove that the flame gun is ineffective. Such an argument is misplaced, however, since respondents do not qualify their performance claims to limited temperature conditions. Indeed, respondents' broad representations suggest that the consumer will meet with success even in the worst weather: [12]

Fastest Way We Know To Clear Away Ice and Snow

. . . clears away ice and snow faster than you'd believe possible: Whips through even the heaviest drifts. Clears walks and driveways. . . (CX 2, 4)

It is not difficult to imagine that many of the consumers attracted to this alleged time-saving snow-removal product would hail from the northern reaches of the country where they would be all too likely to encounter Mr. Lomash's "test conditions" in real life.

Moreover, the experience of the three consumers who testified about the propane flame gun is equally persuasive evidence of the gun's inability to melt snow and ice quickly. (ID 43) Respondents challenge the credibility of this testimony because these consumers were unable to assure respondents' counsel that the flame guns they used were in operable condition. The record suggests, however, that the guns did produce flames (Tr. 342-343, 603, 1494) and were apparently being used for the first time (Tr. 342, 603-604, 1493-1494).

¹⁰ The ALJ dismissed another allegation that respondents misrepresented an allegedly long-wearing sock (ID 45).

¹¹ Respondents object to the reference to "in seconds" in the complaint. It seems this phrase was used only in connection with a kerosene flame gun. (ID 43) Nevertheless, we believe the ALJ correctly concluded that respondents' advertisements conveyed the impression that their product would rapidly remove snow and ice. For example, respondents claim that the flame gun will "whip through even the heaviest drifts" of snow and is "the

Further, we note that the assembly process involves only three parts (Tr. 603) and is relatively uncomplicated. (Tr. 613) More importantly, we reject respondents' supposed rule that would virtually eliminate the utility of consumer testimony except in the rare case where a consumer could assure with certainty that the product used was functioning properly. While the credibility of such testimony is always a relevant issue, there is nothing here to suggest that it should be discounted. Indeed, we find the similar experience of these three consumers strong evidence that respondents' performance claims greatly exaggerate the flame gun's ability to melt snow and ice quickly.¹² [13]

B. *Sure Kill Roach Powder* Respondents sell a product composed of equal parts boric acid and inert ingredients whose purpose is the elimination of the ubiquitous household pest — the cockroach. In their advertising respondents represented, *inter alia*, that their roach powder:

- . . . is safe to use;
- . . . gets rid of roaches once and for all;
- . . . creates a deadly chain reaction which eliminates roaches and eggs;
- . . . is guaranteed to prevent reinfestation for up to 5 years; and
- . . . does not lose its capacity to kill under any conditions of use. (ID 44)

In addition to finding that these claims were not supportable, the law judge also concluded that respondents failed to disclose a material fact by not specifying in their advertising the chemical ingredients of the insecticide. Respondents, not surprisingly, disagree with these findings.

(1) Safety. No one disputes that boric acid, a main component of respondents' roach powder, is toxic to warm blooded animals if taken internally (Tr. 1351-1352). At the same time, complaint counsel's primary witness, Dr. Charles Mampe, acknowledged "that respondents' roach powder is relatively safe to use if applied according to instructions" (CX 2493C). Because respondents' roach powder is one-half boric acid, however, it is virtually no less lethal than the less concentrated but more toxic chlorinated hydrocarbon insecticides (*compare* Tr. 1391; CX 2493C with CX 2493D). Indeed, roughly four tablespoons of this roach powder could kill a grown man (Tr. 1353; CX 2493D). Given such hazards, it is clearly deceptive to make an unqualified representation of safety for this product. Respondents cannot simply advertise as "safe" this noxious insecticide and hope mail order consumers will read the label and use the product as directed. [14]

(2) Efficacy. The record, particularly Dr. Mampe's testimony,

¹² We also leave intact the ALJ's ruling, which respondents do not challenge, requiring disclosure that the flame gun does not come equipped initially with a propane cylinder.

amply supports the ALJ's findings that respondents misrepresented that this roach powder will kill roach eggs (Tr. 1366, 1380-1381) and will create a deadly chain reaction (Tr. 1356, 1424).¹³ Respondents also claim their product will provide long-term, if not permanent, relief from cockroaches and will retain its effectiveness under varying conditions of use. While we are confident that few consumers would believe anything short of divine intervention could afford them eternal relief from this troublesome pest, respondents' ads are sufficiently specific (e.g., Sure-Kill "never loses its killing power—even after years.") to impart a degree of believability to these claims that consumers might reasonably rely upon. A review of the testimony, including that given by the inventor and manufacturer of this product, Mr. Williams, thoroughly demonstrates the falsity of such claims. (Tr. 1357-1359; 1423) [15]

(3) Advertising Disclosure of Ingredients. Noting that boric acid is a well-known roach killer, the ALJ concluded that respondents' advertising should disclose the fact that their roach powder is 50 percent boric acid. We are not convinced, however, that this disclosure is of material benefit to consumers. The proposed disclosure, for example, provides consumers no basis for determining the importance of the other ingredients in respondents' product. Indeed, there is some suggestion that these inert ingredients significantly improve the effectiveness of the powder by making it more attractive to roaches. (RAB at 37) Complaint counsel counter by contending that respondents could inform consumers that these inert ingredients are significant. (TROA at 41) This argument misses the mark. If respondents' product significantly surpasses boric acid at killing roaches, it may be of little consequence to consumers that the powder is half boric acid.

Even if this information might be helpful to some consumers, that is not sufficient to render its nondisclosure deceptive. To the extent consumers have been misled by respondents' advertising into believing that the roach powder has special properties or capabilities, it is due to the exaggerated claims made in those ads. Requiring prior substantiation for future claims should serve as an adequate

¹³ We are unimpressed with respondents' argument that a residue of the powder on roach eggs will kill the roaches when they hatch. (RAB at 36) The label directions instruct the consumer to place the powder in small trays (CX 3020, 4060) or to dust in cracks, crevices and building voids (CX 4186). The accumulation of powder on roach eggs could occur only if the dusting happened to reach eggs or if a contaminated roach returns to the nest and transfers sufficient quantities of the powder to eggs and other roaches to start a "chain reaction." Mr. Williams, inventor of this roach powder, testified that he has personally observed contaminated cockroaches return to the nest and transfer the insecticide to eggs and other roaches (Tr. 1424). He conceded, however, that the chain reaction does not always occur and is not the primary way of killing roaches (*Id.*). Moreover, Dr. Mampe seriously questioned whether the powder would be transferred to other roaches in sufficient amounts to kill them (Tr. 1393-

remedy to eliminate these misrepresentations. Without a stronger showing of materiality we see no justification for requiring disclosure of the ingredients in advertising. [16]

C. *Flashlight* In their advertising for this product, respondents refer to it as "The Five-Year Flashlight" and represent that it carries an "Absolute Five-Year Guarantee." (CX 46) In finding this advertising deceptive, the ALJ looked to the underlying manufacturer's guarantee which clearly states:

Your light is also guaranteed to remain usable for a period of five years providing it has not been used for more than 10 hours. (CX 2044B)¹⁴

Neither this limitation nor the fact that the flashlight has an "on-life" of 10-20 hours were disclosed in respondents' advertisements. By not doing so, the ALJ determined that respondents failed to disclose material facts necessary to prevent the ads from being misleading. (ID 46) Respondents, while not disputing the terms of the guarantee, argue that the ads must be read in their total context. When the ads are so viewed, they contend, it is clear that the five-year claim refers to the storage capacity of the flashlight, not its on-time life.

There is no doubt that the ads emphasize the unique capability of the flashlight to retain its power over long periods of time. Nevertheless, we decline to graft, by implication, a normal use (*i.e.*, 10 hours) limitation onto an absolute guarantee claim, particularly where, as here, the ads make no mention of any condition on actual use. Indeed, the ads stress the fact that the flashlight works "when you need it." Even if few consumers would believe the light could stay on continuously for five years—an assumption that stretches credulity—they might well conclude that it should work under abnormal as well as normal patterns of usage. Consequently, we concur with the ALJ that, absent disclosure of the "on-life" conditions, respondents' claims for their flashlight had the capacity to mislead purchasers. [17]

D. *Lincoln Penny* Respondents also sell a collector's Lincoln penny bearing the likeness of former President Kennedy. The ALJ found that respondents misrepresented that:

Their Lincoln-Kennedy penny was minted by the United States Treasury Department;

Their Lincoln-Kennedy penny is a coin of historical and numismatic significance which is certain to grow in value;

¹⁴ Based on evidence stipulated to at trial, normal usage of a flashlight is about two hours per year, or 10 hours over a five-year period. (ID 46)

The issuance of their Lincoln-Kennedy penny was sanctioned by Section [331], Title 18 U.S. Code; and

A free plaque containing historical coincidences between the lives of President Lincoln and President Kennedy is provided to purchasers with each coin. (ID 47)

On February 27, 1974, prior to issuance of the instant complaint, the United States Postal Service ruled that respondents had made misrepresentations similar to those set forth above in connection with the advertising of the Lincoln-Kennedy penny and issued an order limiting the postal services thereafter available to respondents. (ID 47)

Respondents have not sought to relitigate the substantive issues in this matter. Rather they urge on appeal that the allegations should be dismissed as not being in the public interest because the Postal Service decision adequately addresses the deception found in their advertising of the so-called "Lincoln-Kennedy" penny. Indeed, respondents argue that the challenged advertising was terminated even before the Postal Service issued its order. Abandonment of the practices, however, is no defense here. As complaint counsel point out, the present action involves claims made after as well as before issuance of the 1974 Postal Service order. (CAB at 35-36; CX 275, 405 at 11) A review of these later ads reveals that respondents have continued to misrepresent the source and value of the Lincoln-Kennedy penny. [18]

Furthermore, we reject respondents' contention that this case against the Lincoln-Kennedy penny lacks public interest. We note that the complaint issued in this case on September 3, 1975—well after the Postal Service issued its order against respondents. Recently, this Commission faced a similar contention that an already litigated case lacked public interest. See *Porter & Dietsch*, Dkt. 9047, slip op. at 32, 90 F.T.C. 770, (1977). There we noted that respondents' contention of a failure for want of public interest implicitly rests on "the wisdom of using limited public resources to correct particular law violations, a decision committed to the Commission's discretion." *Id.* Our response in that case applies with equal force here, "that bridge was crossed for the last time over two years ago when the Commission issued the complaint in this case." *Id.*

Finally, we concur with the ALJ's determination concerning respondents' offer of a "free" plaque (or resume) of historical coincidences.¹⁵ The evidence indicates that over a period of years the

¹⁵ There is no merit in respondents' contention that they lacked proper notice of this issue. Paragraphs 9-11 of the complaint clearly refer to the claims at stake here. There is also no foundation for respondents' assertion that

plaque and coins were never offered at a different price. (CX 62, 66, 69, 275)¹⁶ By advertising a "free" plaque, Jay Norris presumably hoped to convince consumers that the package deal was a bargain, [19] *i.e.*, that the penny was competitively priced and for a limited time the plaque would be tossed in for no additional charge. The deceptive potential of a "free" offer which is not *bona fide* is well established. See *FTC v. Mary Carter Paint Co.*, 382 U.S. 46 (1965); *Kalwajtys v. FTC*, 237 F.2d 654 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957). See also *F.T.C. Guide Concerning Use of Word "Free" and Similar Representations*, 16 C.F.R. 251 (1971). While the consumer injury here may not be great, we find the inclusion of such a representation in respondents' ads to be false and misleading, absent any evidence that the plaque was genuinely offered at no charge.

E. *Antenna* In connection with their advertisements for this product, respondents were found to have represented that: (1) the TV antenna will bring sharp and clear reception even in difficult areas; (2) the performance of the antenna is superior to any rabbit ear antenna or outdoor antenna; (3) the device will turn all types of house wiring into a TV antenna; and (4) their antenna is an electronic miracle (ID p. 45). Upon reviewing the evidence (CX 28, 886) we believe there can be little doubt that respondents' advertisements make these representations. For example, a typical ad (CX 886) includes the following assertions:

every home a super receiver,
 one of the greatest TV antennas ever constructed,
 a super receiver for black and white TV, FM, all kinds of difficult reception,
 electronic miracle,
 better than any set of rabbit ears, more efficient than complicated external antennas,
 reception so sharp and clear it will amaze you even in more difficult areas.

[20] Though they did not contest having made such claims, respondents contend that the evidence adduced is insufficient to establish the falsity of these representations. Respondents again question the probative value of the consumer testimony elicited here, observing that these consumers are neither television nor antenna experts and, therefore, might not know when a television or antenna

earlier Postal Service action. Neither the circumstances of this case nor the decision in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940), which respondents cite, provides any basis for such an argument.

¹⁶ Since the two items apparently were never sold separately, the only issue is whether they were ever sold at a higher, or regular price.

installation was defective (RAB at 39-40). Yet, the consumers expressing dissatisfaction with the Jumbo Antenna had working television sets which operated well before and after the use of respondents' product (Tr. 334-335, 469). While it is possible these consumers improperly installed the Jumbo Antenna, this possibility appears remote. (Tr. 468-469)¹⁷ In our view, this consumer testimony is persuasive evidence of the falsity of respondents' representations.¹⁸

Additionally, we find that witness Triolo's tests of respondents' product and other antennae provide convincing independent evidence that the expansive representations for the Jumbo TV Antenna are false. Mr. Triolo, who has thirty years' experience with technical antennae (Tr. 271), tested each of three types of antennae: an outdoor antenna, rabbit ears, and respondents' product (Tr. 273-274). At each of the two test sites, both the outdoor antenna and rabbit ears produced significantly better pictures than did the Jumbo TV Antenna (CX 2704). [21]

Respondents challenge Mr. Triolo's expertise, the reliability of his methods, and his impartiality. First, we find it irrelevant whether Mr. Triolo is a television expert. As we have already observed, even a layman can determine whether the TV picture is relatively the same before and after the installation of different antennae. Further, Mr. Triolo has the relevant expertise required in these tests: the ability to connect and disconnect the various antennae properly (Tr. 271).

Respondents also attempt at length to discredit Mr. Triolo's tests as unscientific or inconclusive for purposes of this proceeding. They fail. Respondents claim amazing performance even under the most difficult conditions; they also assert that their product is better than any set of rabbit ears and more efficient than complicated outdoor antennae. It is clear from an examination of the pictures taken in the course of the tests that respondents' product consistently produced substantially inferior television receptions compared to those produced by the other antennae. (CX 2704L-X) Respondents on the other hand have offered no substantial evidence to back up their claims.

Finally, respondents challenge Mr. Triolo's impartiality because he conducted the tests at the behest of Mrs. Mulhern, a Commission employee (Tr. 272-275). The record contains no evidence that would

¹⁷ One of the witnesses was an experienced electronics design engineer. (Tr. 468-469) Moreover, respondents tout the ease of installation in their ads, advising consumers that "no special tools or additional material [is] required" and "you simply attach the adapter easily and quickly to your set. . . ." (CX 886)

¹⁸ Respondents place considerable reliance on the testimony of Mrs. Theodora Pierce who expressed satisfaction with respondents' antenna (RX 9A, B). While such testimony tends to prove that respondents' product

suggest that Mr. Triolo was anything but objective (*Id.*). Certainly the mere fact that the Commission staff has contracted for a study does not undermine the study's conclusions. Although Mr. Triolo's tests were limited in nature,¹⁹ we believe they adequately demonstrate the falsity of respondents' broad claims.²⁰ [22]

F. *Ex-Taxis* For approximately five years from 1969 to 1974, respondent Pan Am engaged in the rather creative venture of selling through the mails used New York City taxicabs. Some 700-800 cars were sold during this period. As the ALJ found, respondent's advertising contained a host of misrepresentations concerning the mechanical and physical condition of these cars as well as their availability. In addition, the ALJ determined that the failure to disclose where the taxis came from and that the interiors of the cars were not reconditioned had the tendency and capacity to deceive prospective customers.²¹ Respondents take issue only with the findings of non-disclosure.²²

Undoubtedly, anyone who has had the scintillating experience of riding in a New York City taxicab — and presumably many who haven't but who have heard the tales related by others — will realize that these cars frequently do not receive the most delicate treatment. Nevertheless, we are reluctant to single New York out for special mention as the locale where these taxis saw service. While the trials and tribulations may be greater there, we suspect that conditions are not so different elsewhere that mere disclosure of the fact that the cars being offered for sale were once driven as taxis should suffice to alert would-be purchasers to the risks involved. Since respondent's ads disclosed that the used cars were ex-taxis, we decline to go further. [23]

Nor are we persuaded that this record adequately demonstrates the need for disclosing whether the car interiors have been cleaned or reconditioned. The ALJ did not find that respondent misrepresented the interior condition of the cars (ID pp. 56-57); neither do we. Although a mail order purchaser might reasonably expect that the

¹⁹ Respondents also object to a number of other methodological factors (RAB at 42-43), but we believe they do not undercut the essential validity of the results.

²⁰ Respondents also urge that their use of the phrase "Electronic Miracle" is mere puffery. Although not insensitive to respondents' concern that the term "miracle" is commonly used in situations short of changing water into wine, we must conclude that the use of "electronic miracle" in the context of respondents' grossly exaggerated claims would lead consumers to give some added credence to the overall suggestion that this device is superior to other types of antennae.

²¹ Finding insufficient record support, the ALJ dismissed allegations concerning claims relating to the appearance and price of the cars and the responsibility for effecting delivery. (ID p. 56) Similarly, the law judge dismissed allegations that respondents failed to disclose the meaning of "FOB" and "as is," whether the cars complied with any state motor vehicle inspection law, and whether the drivers hired to deliver cars to purchasers were independent contractors (ID p. 57).

²² Respondents' other objection concerns paragraph I 3, which would require their automobiles to meet the various state inspection requirements and is considered in the discussion on relief.

car interiors were in presentable shape, it is also likely that most consumers would expect a used car, particularly a used taxi, to show signs of wear. Beyond that, the record is inadequate to establish that the interiors were generally in such poor condition that disclosure of that fact in respondent's advertising should be required.²³

Moreover, aside from proscribing future misrepresentations, neither the notice order nor the order proposed by the law judge would require respondents to disclose the mechanical condition of their cars. The record reveals, however, that this attribute of the cars caused consumers the most trouble. We are reluctant to require the more intrusive remedy of affirmatively disclosing the condition of the car interior where the evidence of materiality is much less compelling. However, should respondents be induced to get into the used car business again, we believe the order provisions appropriately fence-in respondents with respect to misleading claims concerning a car's physical condition (both exterior and interior) as well as its mechanical condition. [24]

IV. *Unfair Business Practices*

The complaint alleged several additional unfair practices, including retention by respondents of monies for merchandise not shipped promptly, maintaining an unlisted telephone number and requiring proof of purchase and/or proof of return shipment in cases of nondelivery and demands for refunds.²⁴

There is no dispute with the ALJ's determination that respondents committed an unfair practice in retaining customer payments while not fulfilling their end of the bargain by making prompt deliveries and refunds as promised. It is no less unfair for a firm to keep the benefits of unlawful acts than it is to have engaged in those acts in the first place. See *Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1157, 1184-85 (1975); *Universal Credit Acceptance Corp.*, 82 F.T.C. 570, 647-54 (1973), *rev'd in part sub nom. Heater v. FTC* (refund provisions set aside), 503 F.2d 321 (9th Cir. 1974); *cf. Windsor Distributing Co.*, 77 F.T.C. 204, 222-23 (1969), *aff'd*, 437 F.2d 443 (3d Cir. 1971).

As for the unlisted telephone, the ALJ found that it was not unfair for respondents to close off this form of communication since other means were available. (ID p. 63) But once a customer complains about nondelivery or a failure to refund, the ALJ held it to be an

²³ What consumer testimony the record contains on this point sheds little light as to what consumers expected. One consumer, although disappointed, found the interior satisfactory (Tr. 1118-1119). Two others objected to the interior being dirty (Tr. 1102, 1138), but it is not clear whether this dirt would be easily removed. And another consumer objected to the fact that the dash was taped where the taxi equipment had been removed (Tr. 1178).

unfair practice for respondents not to provide the customer with a telephone number for future contacts. (ID p. 65)

We sympathize with the plight of consumers who have been frustrated in their attempts to obtain satisfaction from respondents. Similar problems were extensively documented during the Commission's consideration of the mail order rule. (See 40 F.R. 51582-86 (1975)) Nevertheless, we agree with the ALJ that many of the same difficulties encountered by purchasers in communicating with respondents by writing are likely to crop up in telephone contacts. (See ID p. 64) By correcting the central problem surrounding respondents' operations, namely their failure to perform as promised, many of the difficulties involved in [25] resolving complaints can be cleared up. That is the objective of our order as well as the mail order TRR (which also contains no telephone disclosure requirement). Moreover, for many customers of Jay Norris, telephone access would be of little value since the low price of many of the items purchased would not justify the cost of a long-distance call to the company's New York offices.

Thus, we concur in the law judge's refusal to require respondents to list their telephone number. For similar reasons, we decline to follow the ALJ's ruling concerning respondents' failure to disclose their phone number when responding to complaints.

The ALJ further concluded that in certain cases respondents unfairly required customers to submit proof of purchase before complaints were acted upon. This allegedly was necessitated by respondents' failure to keep better records. (ID p. 64) In reaching this decision the law judge rejected respondents' attempt to analogize their practice to the requirements customarily imposed by retail stores. He noted that

a retail store which provides a sales slip and a face to face confrontation between the customer and the seller . . . is in a different situation than a mail-order business that sells merchandise unseen, prepaid, by mail. As long as respondents represent that the customer will get a refund or that delivery is guaranteed, they cannot require proof of payment, as a condition for their acting on a complaint, unless they disclose to the customer in the original contact that such proof will be required before reshipment or refund is made. (*Id.*)

However, the ALJ's finding of unfairness appears to be based on respondents' recordkeeping deficiencies, rather than the fact that they demanded proof of payment before making a refund or reshipment.

We agree with the law judge that customers ordering by mail should be able to expect that their orders could be satisfactorily processed by respondents in the ordinary course of business without

the need for further documentation. But the record here clearly does not support the charge that respondents systematically demanded proof of purchase before granting a refund or reshipping the ordered merchandise. To [26] be sure, respondents at one time used a form letter in responding to complaints which requested further information, such as the date of original order, the product ordered and the amount of the check. (CX 4245) Mr. Williams, vice-president and treasurer of Jay Norris, testified, however, that this form was employed only in those instances in which the customer didn't provide sufficient information for respondents to "check it back." (Tr. 196) Moreover, at some indeterminate time in the past respondents even stopped requesting this kind of information and simply shipped the customer duplicate merchandise where sufficient time had elapsed for delivery. (Tr. 196; CX 4248)

In view of this evidence we cannot sustain the law judge's finding that respondents' practices were unfair. Nor do we retain the recordkeeping provisions in paragraph 20 of the ALJ's order designed to remedy these alleged practices. To the extent better records are required, we believe the provisions of the mail order rule (which we incorporate in this order), together with the requirement for retention of complaint correspondence, satisfactorily address the shortcomings in respondents' recordkeeping procedures.

V. Relief

The order proposed by the ALJ differs in a number of respects from the original notice order. As discussed more fully below, we adopt with revisions the basic approach reflected in the law judge's recommended order.

A. *Delivery and Refund Practices* Both the notice order and the ALJ's proposed order rely primarily on provisions drawn from the Mail Order Merchandise TRR to remedy the violations uncovered in connection with respondents' delivery and refund practices.²⁵ Though the findings made in a specific case may justify harsher or milder remedies than those applied industrywide, we are persuaded that the law judge properly incorporated large portions of the mail order rule in his order. That is because many of the [27] problems encountered by consumers in this case are similar to those which led to issuance of the Rule and because we are challenging largely pre-TRR practices. Thus, in the absence of any particularly unique

²⁵ The corresponding provisions in the order we issue are Paragraphs 3-5 of Part I, Paragraph 1, as modified.

conditions in this proceeding, we are reluctant to stray from the guidance provided by the Rule.

Indeed, in view of this situation, we believe it is appropriate to reinstate in our order the rebuttable presumptions contained in the TRR but deleted from paragraphs 4(c) and 5(c) of the order recommended by the ALJ. Under the Rule mail order sellers without documentary proof are presumed to lack a reasonable basis for their delivery claims. (16 C.F.R. 435.1(a)(4)) Similarly, sellers are presumed to have failed to provide buyers with an adequate opportunity to exercise their rights in the event of a delayed delivery by not providing written notification or the means to reply in writing. (*Id.* 435.1(b)(3)) However, the Commission permitted mail order firms to overcome these presumptions by demonstrating that equally effective means were used to meet the TRR's objectives.²⁶

We see no compelling basis to depart from that scheme here. To be sure, respondents' meager recordkeeping contributed to our finding that they failed to live up to the performance claims in their advertising. Respondents clearly will have to limit their claims to the performance they can deliver. Moreover, it appears obvious that they will have to improve their procedures in order to conform with the requirements of this order and the Rule. For example, respondents will have to show that ordered merchandise is shipped routinely within the time promised (or if no time is specified within 30 days) and that procedures are in place which assure that purchasers are properly notified of shipping delays. Respondents' present inability to ascertain [28] when, or whether, shipment has been made following receipt of an order cannot continue.²⁷ Nevertheless, we are not disposed to foreclose alternative means of compliance so long as they satisfy the standards of conduct set forth in the order. In short, we believe reliance on the mail order rule as a basis for this part of the order provides a fair and effective means for dealing with the practices found unlawful in this proceeding.²⁸

B. *Substantiation Requirements* Respondents challenge virtually every provision in the ALJ's proposed order, but nowhere is their opposition more vehement than that directed against order paragraph I 7 which prohibits them from:

²⁶ As the Commission recognized in that proceeding, care must be taken not to unduly restrict the ability of companies attempting to deliver goods to consumers in the most cost-effective manner. [See, e.g., 40 F.R. at 51588 (potential cost of recordkeeping), *Id.* at 51589 (flexible requirements on seller depending on number of delays), *Id.* at 51590 (30-day grace period to obtain buyer's consent).] We appreciate the fact that some improvements in the reliability of performance may exact too high a cost in reduced efficiency and higher prices.

²⁷ The only records kept were the (1) customers' names and addresses, (2) the date the order was received, (3) the amount of money remitted, and (4) for noncatalog orders, the product purchased. (ID 21) No records are kept showing shipment dates for specific orders.

²⁸ Another advantage of incorporating the mail order rule provisions in this order is that the explanations and interpretations associated with the Rule will facilitate compliance with the order.

Representing the safety, efficacy, performance, content, or any other characteristic of any product unless such claims are fully and completely substantiated by a reasonable basis which shall consist of competent objective material and substantive material is available to the public. (ID pp. 86-87)

Respondents contend that paragraph I 7 infringes on their First Amendment rights, exceeds the Commission's statutory authority, and fails for lack of public interest. We consider each of these contentions in turn. [29]

It is beyond dispute that commercial speech is protected by the First Amendment. See *Bates v. Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); and *Bigelow v. Virginia*, 421 U.S. 809 (1975). It is equally clear, however, that commercial speech does not enjoy the same unfettered protection as political speech. In particular, deceptive or misleading commercial speech is properly subject to government regulation. For example, as the Court observed in *Virginia Pharmacy*,

much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We see no obstacle to a State's dealing effectively with this problem. (*Id.* at 773; see also, *Bates*, 433 U.S. at 383-84)

More recently, in *Ohralick v. Ohio State Bar Association*, the Supreme Court explained why commercial speech is differentiable from other protected speech:

To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression. [46 USLW 4511, 4513-14 (1978)]

Respondents contend, though, that this order prohibits them from making representations for which they have no reasonable basis but which are nonetheless true. (RAB at 4-10) Complaint counsel counter by arguing that the order constitutes a reasonable deterrent to future deceptive advertising by proven violators of the FTC Act. (CAB at 7) [30]

In the first place, there is nothing novel about the substantiation

able basis for their claims have been included in numerous Commission orders.²⁹

Moreover, while we are sensitive to Constitutional implications in fashioning a proper remedy for deceptive advertising, where the Commission merely orders violators to reasonably substantiate their performance claims, as it does here, such a requirement furthers rather than impairs First Amendment objectives. As the Seventh Circuit explained in *National Commission on Egg Nutrition, et al.*, 570 F.2d 157, 162 (7th Cir. 1977), *petition for cert. filed*, 46 USLW 3694 (April 28, 1978), the First Amendment interest in commercial speech also embraces the interests of the prospective audience — consumers. The consumers' interest in product information “is served by *insuring* that the information is not false or deceptive, and in fact, coincides with the public interest served by the regulation.” (*ID.*) (emphasis added) The Supreme Court has also recognized the importance in insuring that commercial speech flows cleanly, commenting in *Bates* that

the public and private benefits from commercial speech drive from confidence in its accuracy and reliability. Thus the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. (433 U.S. at 383-84)

Of course, concern for accuracy in commercial speech is not a new one for this Commission. In *Porter & Dietsch*, we recently considered how our statutory obligations to prohibit deceptive commercial speech mesh with the objectives of the First Amendment: [31]

Deceptive commercial speech does not aid consumers in making their purchasing decisions and may cause economic injury to those consumers who purchase the advertised product because of the deception. It also reduces the effectiveness of all advertising by casting doubt on its reliability. Therefore, although sensitive to the public interest in the free flow of commercial speech, we serve the same public goals when we meet our statutory obligations by prohibiting deceptive advertising. (Slip op. at 5)

Similarly, in *Egg Nutrition*, we stated:

Neither the objectives of the First Amendment, nor of the FTC Act are well-served, however, by commercial speech which is deceptive *** As Justice Stewart noted in concurring with the majority in *Virginia Pharmacy Board*, “**** the elimination of false and deceptive claims serves to *promote* the one facet of commercial price and product advertising that warrants First Amendment protection — its contribution to

²⁹ See e.g., *Porter & Dietsch*, slip op. at order paragraphs I. A and I. B. [90 F.T.C. 770]; *Fedders Corp.*, 85 F.T.C. 38, 69 (1975), *aff'd*, 529 F.2d 1398 (2d Cir. 1976), *cert. denied*, 429 U.S. 818 (1976); *National Dynamics Corp.*, 82 F.T.C. 488, 569 (1973), remanded for other reasons, 492 F.2d 1333 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 475 (1972), 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973).

the flow of accurate and reliable information relevant to public and private decisionmaking." [425 U.S. at 781] (88 F.T.C. at 196) (emphasis added)

Respondents' argument appears to stem from the fear that the cost of acquiring a reasonable basis which they feel confident meets the order's requirements will chill their dissemination of truthful advertising claims. Yet, as the previously cited decisions emphasize, more reliable information enhances the flow of truthful advertising and furthers First Amendment interests. Since advertisers are in a far better position than consumers to verify the accuracy of their claims, it is only reasonable that they bear the burden of such verification.

Moreover, as the Commission has held on prior occasions, representations of objective product characteristics made without substantiation are, *for that reason*, deceptive, *National Dynamics Corp., et al.*, 82 F.T.C. 488, 559-60 (1973); *aff'd*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974). Accordingly, when it forbids unsubstantiated performance claims by way of fencing in, the Commission is doing no more than proscribing a class of *deceptive* claims—indisputably permissible action under the First Amendment, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n. 24 (1976). [32]

In *Egg Nutrition*, the Commission observed that

Many consumers are likely to assume that when a product claim is advanced which is in theory subject to objective verification, the party making it possesses a reasonable basis for so doing, and that the assertion does not constitute mere surmise or wishful thinking on the advertiser's part. As a result, the rendition of a claim based upon inadequate or nonexistent substantiation violates Section 5 for failure to state a highly material fact, whose omission is deceptive. (88 F.T.C. at 191)

Although the complaint did not include such a charge, as respondents point out (RRB at 4), requiring them to have substantiation for their claims is clearly an appropriate remedial device for preventing recurrences of deceptive advertising.³⁰ [33]

As the Supreme Court has pointed out, the hardness and objectivity of commercial speech make the prospects of its being

³⁰ We also note that it appears the Commission would be fully justified under the circumstances of this case in imposing upon respondents a broad requirement that they not *misrepresent* the safety or performance of any of the products they sell. For example, the Commission has entered, and courts have sustained, orders forbidding broad categories of misrepresentations with respect to the sale of "all products," see *American Aluminum Corporation, et al.*, 84 F.T.C. 21 (1974), *aff'd*, 522 F.2d 1278 (5th Cir. 1975); *All State Industries of North Carolina, Inc.*, 75 F.T.C. 465, 495 (1969), *aff'd*, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970); *Mutual Construction Co., Inc., et al.*, 87 F.T.C. 621 (1976). We choose here not to enter an order prohibiting misrepresentations of various facets of all respondents' products; respondents will not be held to account for the absolute truth of their claims. Thus we impose a lesser remedy by requiring that respondents not make a safety or performance claim for any product without a reasonable basis. Rather respondents must simply substantiate these claims, and this will absolve them

chilled by proper regulation unlikely. *Bates*, 433 U.S. at 383-84; *Virginia Pharmacy*, 425 U.S. n. 24 at 771-72⁷ These attributes led the court in *Virginia Pharmacy* to indicate that earlier cases approving the reasonableness of regulatory prior restraints on commercial speech have continuing validity. *E.g.*, *Donaldson v. Read Magazine*, 333 U.S. 178, 189-191 (1948); *FTC v. Standard Education Society*, 302 U.S. 112 (1937); *E. F. Drew & Co. v. FTC*, 235 F.2d 735, 739-740 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957).³¹ And elsewhere the Supreme Court has noted as well established the Commission's power to restrain misleading statements in labels and advertisements. *See Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 69 n. 31 (1976).³² *See also Ohralick*, 46 USLW at 4513-14.

Undoubtedly, many advertisers, irrespective of a substantiation requirement, would take steps to document their claims as a matter of good business practice or possibly out of fear of a subsequent false advertising challenge. To that extent, truthful advertising will not be chilled. Though substantiation increases the risk that some truthful, as well as false, claims may be challenged, it is a small price to pay to insure greater confidence in all [34] advertising. Whatever incremental reduction in advertising, attributable to a substantiation order, beyond that which would result if advertisers only disseminated nondeceptive claims "may well be necessary if the interest of consumers in truthful information is to be served at all." *Warner Lambert v. FTC*, *supp. op.* 1977-2 Trade Cases p. 61,646 at 72,653 (September 14, 1977), *cert. denied*, 46 USLW 3613 (April 4, 1978). *See also National Society of Professional Engineers v. U.S.*, 98 S. Ct. 1355, 1365-68 (1978).

Respondents also advance several additional arguments to the effect that paragraph I 7 of the ALJ's order exceeds the scope of the Commission's authority: (1) the coverage of all products and any advertisement is too broad, (2) the standard of "full," "complete" and "competent" substantiation is too vague, and (3) the requirement of making substantiative material generally available to the public is unwarranted.

Regarding the "all products - any advertisement coverage," respondents stress that the proposed order is overly broad and

³¹ *Virginia Pharmacy* and *Bates* also leave intact other Commission cases holding that the government can restrict commercial speech to prevent deception to consumers, citing *Tashof v. FTC*, 437 F.2d 707 (D.C. Cir. 1970); *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270 (3rd Cir. 1962); *American Medicinal Prods. Inc. v. FTC*, 136 F.2d 426 (9th Cir. 1943). In *Tashof*, the court upheld a Commission order prohibiting a retailer from advertising discount prices without first conducting a "statistically significant survey" of competing stores to establish the accuracy of its claims. Even though the court conceded that advertised prices might otherwise be truthful, it found the requirement of a prior survey to be a reasonable deterrent to future violations. (347 F.2d at 715)

³² The Court relied on *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946); *FTC v. National Commission on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975); *E. F. Drew & Co. v. FTC*, 235 F.2d 735, 740 (2d Cir. 1956).

unduly burdensome. Respondents, however, have previously been subjected to orders of the Commission, the U.S. Postal Service and the New York State Attorney General for claims for three different products.³³ Moreover, in this case we have found that respondents misrepresented the performance of six products of widely varying cost and use. [35] The Commission has authority to fashion broad relief where necessary to deal effectively with wrongdoers. See *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 468 (1972), 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973) and cases cited therein.³⁴ The Commission's order must, of course, be tailored in some measure to the violations found. But where, as here, the violations involve a wide variety of products and a wide variety of deceptive claims an effective order must necessarily be very broad. That is particularly true in light of the history of prior proceedings undertaken to prevent deceptive claims by respondents. Precisely because they sell so many products, with no one category being substantially more important than any other, it seems likely that an order which did not apply to all products would do very little to protect the public. Rather than eliminating future deception, it would merely shift its locus to a different part of respondents' catalog.³⁵

Although the order is broad, we note that respondents' troubles stemmed in large measure from making unqualified claims which, at least in the case of the flashlight and roach powder, overstated the manufacturers' claims for the products. By exercising a little more care in preparing their ads, respondents' compliance burdens under this order will be greatly reduced. Moreover, we have modified the substantiation provision in Part I of our order to limit its coverage to safety and performance claims, thereby [36] deleting reference to content or other product characteristics.³⁶ This change appropriately narrows the scope of the provision to those kinds of deceptive claims

³³ The order issued by the Commission in this matter will be the third imposed by the Commission upon these respondents within the past 15 years. The first order, a consent settlement, forbade various misrepresentations concerning the nutritional characteristics of vitamins and vitamin-mineral preparations, *Jay Norris Company Trading as Norris Nutritions, et al.*, 68 F.T.C. 702 (1965). The second order was entered after litigation and involved misrepresentations by respondents regarding their trade status and deceptive pricing, *Federated Nationwide Wholesalers, et al. v. Federal Trade Commission*, 398 F.2d 253 (2d Cir. 1968). See also U.S. Postal Service proceeding as referred to in ID 47; and Assurance of Discontinuance Pursuant to Executive Law Section 63, Subdivision 15, Attorney General of the State of New York Bureau of Consumer Frauds and Protection, dated June 30, 1976.

³⁴ See also *FTC v. Colgate Palmolive Co.*, 380 U.S. 374, 392 (1965); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 613 (1946); *Warner Lambert Co. v. FTC*, 562 F.2d 749, 762 (7th Cir. 1977), *cert. denied*, 46 USLW 3613 (April 4, 1978); *Niresk Industries, Inc. v. FTC*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883, cases which limit the Commission's discretion only by requiring that the remedy be reasonably related to the unlawful practice.

³⁵ No logical sub-grouping of respondents' products is suggested as a basis for limiting product coverage and there appears to be none. Respondents' products generally, like the ones involved in this case, vary tremendously in price and use. In any event, this record demonstrates that respondents' penchant for misrepresentation of performance is not confined to any one product.

which predominate in this case. Additionally, we have clarified the order to provide that substantiation must be available in written form. For example, that does not preclude respondents from relying, where appropriate, upon the technical advice of qualified persons for substantiation of product claims. It only means that such advice must be reduced to writing.

A separate substantiation provision has been inserted in Part II of the order to avoid any suggestion that the reference to "any product" in paragraph 6 of Part I does not include products covered by Part II. Part II coverage also has been expanded to include all used motor vehicles, rather than just automobiles. Given the variety and seriousness of the misrepresentations which occurred in connection with respondents' sale of used cars, it seems appropriate to fence in respondents as to future mail order sales of other types of vehicles, such as trucks, motorcycles, campers and the like.

Respondents further contend that the broad standards provided by the words "full," "complete" and "competent" are unduly vague and illegal as a matter of law. We note that similar language has been used in other substantiation orders. See n. 29, *supra*. These cases provide ample guidance to respondents in construing these terms, and more generally, the concept of reasonable basis. Moreover, we believe that the general meaning of these terms is readily understood.

Respondents next question the legal basis for requiring substantiation to be generally available to the public. We do not reach this question because we find there has been no showing that this is necessary to cure the violations found to exist. In this context it is sufficient that consumers are in a position to rely on the advertising claims without the trouble and expense of investigating the substantiation for themselves. See *Porter & Dietsch*, slip op. at 38. [37]

Finally, relying on *NLRB v. Wyman Gordon Co.*, 394 U.S. 759 (1969), respondents contend that prior substantiation requirements should be addressed in a rule forum. We recently rejected "this variation on the old theme of selective enforcement." *Porter & Dietsch*, slip op. at 32. We reject it again. We do not believe the public good would be well served if the Commission, in dealing with proven violators of Section 5, refrained from meeting out in administrative proceedings remedies appropriate to the violations found. Moreover, under 15 U.S.C. 45(m), the Commission is free to hold other concerns to the same standards we are imposing on these respondents, when the order we will enter becomes final.

Thus, having rejected respondents' challenges to the propriety of

requiring them to substantiate their claims, the final order will include such a provision.

C. *Other Provisions* After excising those order provisions for which corresponding violations were not found,³⁷ we adopt with some revisions the ALJ's order as it applies to the specific misrepresentations involving the six products.

In addition, we delete paragraph I 3 of the law judge's order which would prohibit respondents from shipping to any state any car which fails to meet the motor vehicle registration, safety and inspection standards of that state. The ALJ retained this provision in the order without explanation after dismissing the complaint charge that respondents failed to disclose a material fact by not revealing whether their cars were inspected for compliance with state law. [38] (ID p. 57) The record sheds little light on respondents' obligations under state inspection laws, the extent of their compliance with such laws, or whether state law is adequate to deal with the kind of distribution scheme engaged in by respondents. Thus, absent deception, we find little basis for imposing this requirement.³⁸

We also believe paragraph I 13 of the proposed order is somewhat overbroad. Our determination that respondents deceptively advertised their roach powder as safe is based on the failure to qualify such claims by noting that the product could be used safely only in accordance with the instructions on the label. A more appropriate disclosure requirement is to require respondents to condition any claim of safety in ads for pesticides by including the following language: "To Use This Product Safely, You Must Follow The Instructions On The Label."

Lastly, we agree that the ALJ properly included Jay Norris, Jacobs, and Williams within the scope of Part II of the order.³⁹ The law judge's discussion of this issue is persuasive (ID p. 58). Jacobs and Williams were stockholders and corporate officers of Pan Am (*Id.*; Tr. 163). Though these individual respondents may not have taken an active role in the day to day business of Pan Am (Tr. 155, 167), they clearly were aware of its operations (Tr. 159, 167). See *Standard Educators, Inc. v. FTC*, 475 F.2d 401 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 828 (1973). Furthermore, Pan Am's business was

³⁷ Those provisions dropped include (1) disclosure of the roach powder ingredients, (2) disclosure of the interior condition of respondents' used cars, and (3) disclosure that the taxis were from New York.

³⁸ Respondents' ads do assert that "[e]ach car has been thoroughly serviced by our mechanics to put it in good operating condition and passes careful inspection before being released for delivery." See, e.g., CX 51A. Although, as the ALJ noted (ID p. 57), it is not entirely clear what this "inspection" refers to, we are reluctant to construe it as meaning that respondents' cars conform to the inspection requirements of all 51 jurisdictions. Nor does the complaint allege such a claim. (*Cf.* complaint para. 9(21))

³⁹ With respect to Part II of the ALJ's order, respondents contend and the complaint counsel agree that the first word of paragraph 2 should be "misrepresenting" rather than "representing" (RAB at 50; CAB at 39). We have retained this provision in the final order as so modified.

conducted by Norris personnel at the Norris place of business (*Id.*; CX 752-754, 756). [39]

For reasons already articulated, the final order will not include provisions requiring respondents to disclose the Norris telephone number in response to complaints and imposing on them specific recordkeeping responsibilities. (See paragraphs I 19 and I 20 of the ALJ's order) We have kept in the final order, however, the provision obligating respondents to maintain records of consumer complaints, including the disposition of such complaints, for three years. This information is necessary to assist the Commission in ascertaining compliance with the order. To the same end, we have also inserted a requirement similar to that contained in other orders that respondents submit a detailed compliance report within 60 days and annually thereafter for five years.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondents from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the initial decision with certain modifications: [2]

It is ordered, That the initial decision of the administrative law judge, pages 1-73, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent modified or otherwise indicated in the accompanying Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

ORDER

I

It is ordered, That Jay Norris Corp., a corporation, its successors and assigns, and Joel Jacobs and Mortimer Williams individually and as officers of said corporation, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, trade style, or other device, in connection with the advertising, offering for sale, sale and distribution of general mail-order merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to refund the amount required by Paragraph 2, in connection with the return of merchandise purchased from respondents, within the time specified in respondents' advertisements. If no time is specified, such refund must be made within the time specified in Paragraph 5(E)(4) of this Part. [3]

2. Failing to refund the full purchase price of merchandise including postage, insurance, handling, shipping, or any other fee or charge paid by the purchaser any time a refund is made to such purchaser, unless respondents clearly state in their advertisement the exact nature of the refund including any items of the purchaser's expense that will not be refunded.

3. (A) Soliciting any order for the sale of merchandise to be ordered by the buyer through the mails unless, at the time of the solicitation, respondents have a reasonable basis to expect that they will be able to ship any ordered merchandise to the buyer: (1) within the time clearly and conspicuously stated in any such solicitation, or (2) if no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer; and

(B) Providing any buyer with any revised shipping date, as provided in Paragraph 4 of this Part unless, at the time any such revised shipping date is provided, respondents have a reasonable basis for making such representation regarding a definite revised shipping date; or

(C) Informing any buyer that they are unable to make any representation regarding the length of any delay unless (1) respondents have a reasonable basis for so informing the buyer and (2) respondents inform the buyer of the reason or reasons for the delay.

For purposes of this order, the failure of respondents to have records or other documentary proof establishing their use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time set forth in this order will create a rebuttable presumption that the respondents lacked a reasonable basis for any expectation of shipment within said applicable time. [4]

4. (A) Where respondents are unable to ship merchandise within the applicable time set forth in Paragraph 3(A) above, failing to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel his order and receive a prompt refund. Said offer shall be made within a reasonable time after respondents first become aware of their inability to ship within the applicable time set forth in Paragraph 3(A), but in no event later than said applicable time.

buyer regarding his right to cancel the order and to obtain a prompt refund and shall provide a definite revised shipping date, but where respondents lack a reasonable basis for providing a definite revised shipping date the notice shall inform the buyer that respondents are unable to make any representation regarding the length of the delay.

(2) Where respondents have provided a definite revised shipping date which is thirty (30) days or less later than the applicable time set forth in Paragraph 3(A), the offer of said option shall expressly inform the buyer that, unless respondents receive, prior to shipment and prior to expiration of the definite revised shipping date, a response from the buyer rejecting the delay and cancelling the order, the buyer will be deemed to have consented to a delayed shipment on or before the definite revised shipping date.

(3) Where the respondents have provided a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in Paragraph 3(A), or where the respondents are unable to provide a definite revised shipping date and therefore inform the buyer that they are unable to make any representation regarding the length of the [5] delay, the offer of said option shall also expressly inform the buyer that his order will automatically be deemed to have been cancelled unless (a) respondents have shipped the merchandise within thirty (30) days of the applicable time set forth in Paragraph 3(A) above, and have received no cancellation prior to such shipment, or (b) respondents have received from the buyer within thirty (30) days of said applicable time, a response specifically consenting to said shipping delay. Where the respondents inform the buyer that they are unable to make any representation regarding the length of the delay, the buyer shall be expressly informed that, should he consent to an indefinite delay, he will have a continuing right to cancel his order at any time after the applicable time set forth in Paragraph 3(A) by so notifying respondents prior to actual shipment.

(4) Nothing in this paragraph shall prohibit respondents when they furnish a definite revised shipping date to Paragraph 4(A)(1) above, from requesting, simultaneously with or at any time subsequent to the offer of an option pursuant to Paragraph 4(A), the buyer's express consent to a further unanticipated delay beyond the definite revised shipping date. *Provided, however,* that where respondents solicit consent to an unanticipated indefinite delay the solicitation shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the definite revised shipping date by so notifying respondents prior to actual shipment.

(B) Where respondents are unable to ship merchandise on or before the definite revised shipping date provided under Paragraph 4(A)(1), and consented to by the buyer pursuant to Paragraphs 4(A)(2) and 4(A)(3), failing to offer to the buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to a further [6] delay or to cancel the order and to receive a prompt refund. Said offer shall be made within a reasonable time after respondents first become aware of their inability to ship before the said definite revised date, but in no event later than the expiration of the definite revised shipping date. *Provided, however,* that where respondents previously have obtained the buyer's express consent to an unanticipated delay until a specific 4(A)(4) definite shipping date, pursuant to Paragraph 4 (A) (4) or to a further delay until a specific date beyond the definite revised shipping date pursuant to Paragraph 4(B), that date to which the buyer has expressly consented shall supersede the definite revised shipping date for purposes of Paragraph 4(B).

(1) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where respondents lack a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that respondents are unable to make any representation regarding the length of the further delay.

(2) The offer of a renewed option shall expressly inform the buyer that, unless respondents receive, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer specifically consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if respondents are in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date. *Provided, however,* that where respondents offer the buyer the option to consent to an indefinite delay the offer shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the old definite revised shipping date or any date superseding the old definite revised shipping date.

[7]

(3) Paragraph 4(B) shall not apply to any situation where respondents, pursuant to the provisions of Paragraph 4(A)(4), have previously obtained consent from the buyer to an indefinite extension beyond the first revised shipping date.

this order or to cancel an order by so notifying respondents prior to shipment, failing to furnish the buyer with adequate means, at respondents' expense, to exercise such option or to notify respondents regarding cancellation. For the purposes of this order, the failure of respondents:

(1) To provide any offer, notice or action required by this order in writing and by first class mail will create a rebuttable presumption that the respondents failed to offer a clear and conspicuous offer, notice or option;

(2) To provide the buyer with the means in writing (by business reply mail or with postage prepaid by respondents) to exercise any option or to notify respondents regarding a decision to cancel, will create a rebuttable presumption that the respondents did not provide the buyer with adequate means pursuant to this Paragraph 4(C).

Nothing in Paragraph 4 of this Part shall prevent respondents where they are unable to make shipment within the time set forth in Paragraph 3(A) or within a delay period consented to by the buyer, from deciding to consider the order cancelled and providing the buyer with notice of said decision within a reasonable time after they become aware of said inability to ship, together with a prompt refund.

5. Failing to deem an order cancelled and to make a prompt refund to the buyer whenever:

(A) Respondents receive, prior to the time of shipment, notification from the buyer cancelling the order pursuant to any option, renewed option or continuing option under this order; [8]

(B) Respondents have pursuant to Paragraph 4(A)(3), provided the buyer with a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in Paragraph 3(A) or have notified the buyer that respondents are unable to make any representation regarding the length of the delay and respondents (1) have not shipped the merchandise within thirty (30) days of the applicable time set forth in Paragraph 3(A), and (2) have not received the buyer's express consent to said shipping delay within said thirty (30) days;

(C) Respondents are unable to ship within the applicable time set forth in Paragraph 4(B) and have not received, within the said applicable time, the buyer's consent to any further delay;

(D) Respondents have notified the buyer of their inability to make shipment and have indicated their decision not to ship the merchandise; or

(E) Respondents fail to offer the option prescribed in Paragraph

4(A) and have not shipped the merchandise within the applicable time set forth in Paragraph 3(A).

For purposes of this Part:

(1) "Shipment" shall mean the act by which the merchandise is physically placed in the possession of the carrier.

(2) "Receipt of a properly completed order" shall mean the time at which respondents receive an order from the buyer containing all the information requested by respondents and accompanied, where required, by the proper amount of money in the form of cash, check or money order. *Provided, however,* that where respondents receive notice that the check or money order tendered by the buyer has been dishonored or that the buyer does not qualify for a credit sale, "receipt of a properly completed order" shall mean the time at which (a) respondents receive notice that a check or money order for the proper amount tendered by the buyer has been honored, (b) the buyer tenders cash in the proper amount or (c) the seller receives notice that the buyer qualifies for a credit sale. [9]

(3) "Refund" shall mean:

(a) Where the buyer tendered full payment for the unshipped merchandise in the form of cash, check or money order, a return of the full amount tendered in the form of cash, check, or money order;

(b) Where there is a credit sale:

(i) and the seller is a creditor, a copy of a credit memorandum or the like or an account statement reflecting the removal or absence of any remaining charge incurred as a result of the sale from the buyer's account;

(ii) and a third party is the creditor, a copy of an appropriate credit memorandum or the like to the third party creditor which will remove the charge from the buyer's account or a statement from the seller acknowledging the cancellation of the order and representing that he has not taken any action regarding the order which will result in a charge to the buyer's account with the third party;

(iii) and the buyer tendered partial payment for the unshipped merchandise in the form of cash, check or money order, a return of the amount tendered in the form of cash, check or money order.

(4) "Prompt refund" shall mean:

(a) Where a refund is made pursuant to definition (3)(a) or (3)(b)(iii) a refund sent to the buyer by first class mail within seven (7) working days of the date on which the buyer's right to a refund vests under the provisions of this order.

(5) The "time of solicitation" of an order shall mean that time

(a) Mailed or otherwise disseminated solicitation to a prospective purchaser; [10]

(b) Made arrangements for an advertisement containing the solicitation to appear in a newspaper, magazine or the like or on radio or television which cannot be changed or cancelled without incurring substantial expense; or

(c) Made arrangements for the printing of a catalog, brochure or the like which cannot be changed without incurring substantial expense, in which the solicitation in question forms an insubstantial part.

6. Representing the safety or performance of any product unless such claims are fully and completely substantiated by a reasonable basis which shall consist of competent and objective material available in written form.

7. Misrepresenting that the nondelivery of merchandise ordered and paid for by a customer is caused by loss of the merchandise by the United States Postal Service.

8. Misrepresenting, directly or indirectly, the time or manner in which respondents' flame gun, or any other product used for the removal of snow or ice, will perform in the removal of snow or ice.

9. Misrepresenting, directly or indirectly, the time in which or the manner by which respondents' roach powder, or any other pesticide product, will kill or eliminate roaches.

10. Making any representation as to the safety of respondents' roach powder or other pesticide product without failing to clearly and conspicuously include the following statement in all advertisements and other promotional material for said products: "To use this product safely, you must follow the instructions on the label."

11. Misrepresenting, directly or indirectly, that respondents' TV antenna or any TV antennna will bring in sharp and clear reception and is superior to any other antenna. [11]

12. Making any representation as to the life expectancy of flashlights or other battery operated product without failing to disclose, clearly and conspicuously in all advertisements and other promotional material for such products (a) the expected "on" life of the product; and (b) any limitations on the warranty of such product.

13. Representing, directly or indirectly, that the Lincoln-Kennedy penny was minted by the United States Treasury Department.

14. Representing, directly or indirectly, that the Lincoln-Kennedy penny is a coin of historical and numismatic significance which is likely to increase in value.

15. Representing, directly or indirectly, in connection with the

sale of any product that another product is given "free" or as a gift without cost or charge in connection with:

a. any offer which runs for an indefinite term or continuously for a period in excess of one (1) year; or

b. any offer not covered by (a) above, excluding introductory offers, unless as to such limited offer:

(1) a regular bona fide retail price is established for the product without the "free" product;

(2) a regular bona fide retail price is established for the "free" product, or in the absence of such price a determination is made of the cost to respondents of such other product; and

(3) the price of the product is reduced at least as much as the price or cost of the "free" product. [12]

II

It is further ordered, That Jay Norris Corp., and Pan-Am Car Distributors Corp., corporations, their successors and assigns, and Joel Jacobs, Mortimer Williams and Kenneth Mann, individually and as officers of said corporations, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, trade style, or other device, in connection with the advertising, offering for sale, sale and distribution of used motor vehicles by mail-order in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting, directly or by implication, the ease or profit with which purchasers can resell respondents' motor vehicles;

2. Misrepresenting the mechanical and physical condition of said motor vehicles;

3. Misrepresenting that said motor vehicles are in safe mechanical and operating condition;

4. Misrepresenting the extent to which said motor vehicles have been inspected and repaired in preparation for sale and delivery to customers;

5. Misrepresenting that said motor vehicles are in sound condition and repair and will render normal, adequate and satisfactory service; and

6. Representing the safety or performance of said motor vehicles unless such claims are fully and completely substantiated by a reasonable basis which shall consist of competent and objective material available in written form.

III

It is further ordered, That:

1. Respondents shall maintain records of all consumer complaints for a period of three years after such complaint is received, including, but not limited to the following information: [13]

- a. Name and address of the consumer;
- b. Date of receipt of the complaint;
- c. Transaction about which complaint is received;
- d. Nature of the complaint; and
- e. Date and disposition of the complaint.

2. Respondents shall notify the Commission at least thirty (30) days prior to any proposed changes in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other changes in the corporation which may affect compliance obligations arising out of the order.

3. The individual respondents named herein, shall promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

4. Respondents shall deliver a copy of this order to cease and desist to all personnel or agents of respondents responsible for the preparation, creation, production or publication of the advertising of all products covered by this order.

5. No provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission. [14]

6. Respondents herein shall, within sixty (60) days after service of this order, and annually for five (5) years thereafter, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order. The expiration of the obligation to file such reports shall not affect any other obligation arising under this order.

Final Order

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IV

It is further ordered, That the allegations of the complaint are dismissed as to FEDERATED NATIONWIDE WHOLESALERS SERVICE, GARYDEAN CORP., t/a Nationwide Wholesalers Service, and P-N PUBLISHING COMPANY, INC.