It is ordered, That the aforesaid motion be, and it hereby is, denied with respect to both requests.

IN THE MATTER OF

G C SERVICES CORPORATION, ET AL.

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

Docket C-2511. Complaint, Apr. 16, 1974—Decision, Apr. 16, 1974

Consent order requiring a Houston, Tex., collection agency, among other things to cease using printed material which cause harassment, fear or undue embarrassment to alleged debtors receiving them or which simulates legal process; misrepresenting that past due accounts have been referred to an attorney for collection or legal action has been or is about to be instituted; or threatening to contact a debtor's employer or to institute legal processes.

Appearances

For the Commission: *Joseph Hickman.*
For the respondents: *John C. Bagalay,* Houston, Tex.

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 G C Services Corporation, formerly doing business as Gulf Coast Collection Agency, a corporation, and Jerold B. Katz, William A. Inglehart and Martin M. Katz, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent G C Services Corporation formerly doing business as Gulf Coast Collection Agency is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Texas with its principal office and place of business located at 3333 Fannin Street, in the city of Houston, State of Texas.

Respondents Jerold B. Katz, William A. Inglehart and Martin M. Katz are individuals and are officers of the corporate respondent. They formulate, direct, and control the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past, have been engaged in the business of collection of delinquent accounts for business

organizations throughout the United States. Respondents' collection procedures include sending through the United States mail various collection forms, letters and other printed materials to alleged debtors, from respondents' place of business in Tex. and branches in Calif., Fla., Ga., Ill., Mo., N. Y. and Ohio to various other States in the United States and receiving through the United States mail forms, letters, checks, payment and other printed materials from alleged debtors located in these states and other states other than the aforesaid states. Respondents maintain, and at all times hereinafter mentioned have maintained, a substantial course of trade in their said collection business in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. Respondents' forms, letters and other printed materials, as hereinbefore described, are designed and intended to be, and are, used by respondents for the purpose of obtaining information concerning alleged debtors of customers of respondents and in the collection of delinquent accounts which are to be paid directly to respondents for benefit of customer.

PAR. 4. In the course and conduct of their business respondents have caused and cause to be sent through the mail from their place of business located in the State of Texas and various other States of the United States letters, forms and other printed materials for the purposes set forth in Paragraph Three. Typical, but not all inclusive of such letters, forms and other printed materials are the following:

Does your child know that the books from Doubleday Book Club are not paid for? Is it fair for your child to be embarrassed at school when you are legally responsible for the bill?

$9.20 is a small amount. Pay it now to avoid further contact.

It will be humiliating for your child when our collector calls. You owe the $9.20 to Doubleday Book Club. Your child does not.

* * * * * * *

Why are you forcing us to have our collector in San Jose, California contact you at your home or place of employment?

He will spend whatever time and expense is necessary to liquidate this debt. We mean business.

It's up to you. * * * We must have $7.58. Your deadline is October 22, 1970.

* * * * * * *

"You" ordered the merchandise from 69 Grolier Annual, Lawrence Bauer.
"You" ran up the bill, Lawrence Bauer.
"You" owe the money, Lawrence Bauer.
"You" are going to pay this bill, Lawrence Bauer.
"You" are going to send us full payment today.
"We" are going to see that you do

* * * * * * *

Where is the money Pete Rodriquez? We want the $5.66 now! No more chances Pete Rodriquez, this is it. Your time is up. Either you pay now or our collector will get every last cent.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import but not specifically set forth herein, the respondents thereby make implied threats that respondents will embarrass and harass alleged debtor so as to force him to pay bills sent to him.

PAR. 6. Such forms, letters and other printed materials are placed in the mail at fifteen day intervals. Respondents usually continued to mail such forms, letters and other printed materials at such intervals, regardless of notification by alleged debtor that the account is disputed or not owed.

PAR. 7. The use of the forms, letters and other printed materials described in Paragraphs Four and Five mailed at periodic intervals as described in Paragraph Six which causes embarrassment and harassment of alleged debtors is contrary to the established public policies of the United States and is an unfair practice.

PAR. 8. The use by respondents, as hereinabove set forth in Paragraph Four of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the public and to the erroneous and mistaken belief that said statements and representations were and are true and to induce payment by respondents for benefit of respondent's customers, whether the amounts claimed by respondents are in fact due and owed.

PAR. 9. In the course and conduct of their business, respondents cause, and have caused, to be sent from their various places of business throughout the United States letters, forms, and other printed materials to alleged debtors whose accounts have become delinquent. Said letters, forms and other printed materials contain many statements or representations as to actions that have been taken or will be taken to effect the collection of such delinquent accounts. Typical, but not all inclusive of such statements, are the following:

We are forwarding the file of T L Posten to our lawful agent in Monterey Pk, California. We will instruct that firm to enforce the purchase agreement as follows:

Plaintiff	:	Grolier Enterprise
Defendant	:	T L Posten
Jurisdiction	:	Monterey Pk, California
For	:	$11.99

Our date of action is Sept 08 1970. The $11.99 in our office before this date is the only way for dismissal.

* * * * * * *

We are transferring the above claim from delinquent accounts to our legal file.

Enclosed you will find the necessary papers and information to sue the above named debtor, as he has not paid his legal obligation nor has he been willing to work out a reasonable schedule of payments.

Service of Citation may be served at place of employment or residence. Upon obtaining a judgement, please file for a Writ of Execution.

We request you hold the enclosed papers for five (5) days, in order to give debtor an opportunity to make payment to this office.

* * * * * * *

When your account was turned over to us for collection, we were requested to take all necessary legal action for the immediate collection of this past due debt that you owe our client.

Due to your claim of hardship, we made special arrangements with you to give you ample time to pay this account on an installment basis.

Now that you have breached your agreement we must protect the interest of our client and refer this account to an Attorney with instructions to proceed as follows:

A. Service of Citation at your home or place of employment.

B. The taking of depositions and written interrogatories.

C. Summons to appear in Court with your Attorney.

D. Default judgments, garnishments, foreclosures and attachments.

The choice is yours. * * *

Either we receive payment from you within the next five days as agreed or we will proceed as outlined above.

* * * * * * *

We are forwarding the file of Marian Diorio to our collection agent for Lansdowne, Pennsylvania. We will instruct that firm to enforce the purchase agreement as follows:

Creditor	:	RCA Record Club
Debtor	:	Marian Diorio
Location	:	Lansdowne, Pennsylvania
For	:	$2.89

Our date of action is December 05, 1970. The $2.89 in our office before this date is the only way to prevent this encounter.

* * * * * * *

We will not hesitate to employ every available lawful means which we have at our disposal until we collect all money owed our client. The only way for you to settle this matter without legal involvement and further notice is for you to pay what you owe without further delay.

By means of the foregoing statements or representations repondents represent, directly or by implication, that if delinquent accounts are not settled to respondents' satisfaction they will be collected by legal action.

In truth and in fact legal action with respect to the alleged delinquent accounts has not been, nor in many cases is it about to be initiated. Therefore, the aforesaid statements and representations were and are false, misleading and deceptive.

PAR. 10. Respondents, directly and through their representatives request and for some time last past have requested alleged debtors to

give to respondents a series of postdated checks which, when obtained are from time to time presented to the alleged debtors' banks for payment.

By and through the use of these postdated checks respondents have the means of threatening alleged debtors with criminal prosecution for violation of the laws of various states, relating to the issuance of worthless checks, in case sufficient funds are not on deposit in alleged debtors bank accounts.

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

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34 (b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent, G C Services Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Texas, with its principal office and place of business located at 3333 Fannin Street, Houston, Tex.

Respondents, Jerold B. Katz, William A. Inglehart, and Martin M. Katz, are officers of said corporation. They formulate, direct and control the policies, acts, and practices of said corporation and their address is the same as that of said corporation.

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

ORDER

It is further ordered, That respondents G C Services Corporation, formerly doing business as Gulf Coast Collection Agency Company, a corporation, its successors and assigns, and its officers and Jerold B. Katz, William A. Inglehart, and Martin M. Katz, individually and as officers of said corporation and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the collection of accounts in commerce, as "commerce" is defined by the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using any forms, letters, or other printed materials which cause, or which respondents should know are likely to cause, harassment, fear, or undue embarrassment to alleged debtors who receive them.

2. Representing orally or in writing, or placing in the hands of others the means and instrumentalities by and through which they may represent, directly or by implication that:

(a) Past due accounts that are being or have been referred for collection to an attorney when these accounts are not being nor have they been so referred;

(b) Legal action with respect to an allegedly delinquent account has been or is about to be or may be initiated unless the respondents are able to establish that at the time the representation was made (1) legal action has been initiated or was about to be initiated, and (2) the true nature of the legal action was clearly and completely disclosed.

3. Using forms or any other items of printed or written matter which simulates legal process.

4. Representing orally or in writing that alleged debtor's employer has been notified or may be notified that any or all of the following actions have been or will be taken when no such action or actions have been or will be taken:

(a) Suit institued against the alleged debtor to collect the alleged sum due;

(b) The alleged debtor's wages attached;

(c) The alleged debtor's wages garnished.

5. Using any means or devices for the collection of delinquent accounts from alleged debtors in circumstances where it has been brought to respondents' attention:

(a) That said debt has been paid;

(b) That said debt is being billed to an improper person;

(c) That alleged debtor is not liable to respondents' client for the reason that the client has not provided any articles, devices, services or other items of value to the alleged debtor;

(d) That materials ordered have been returned;

(e) That materials received were unordered merchandise, and debtor is under no obligation to pay for such merchandise, or

(f) That there would be a defense in an action brought on the disputed debt;

until such time as respondents can furnish to alleged debtor an affirmative written reply from their clients that said debt is, in fact, a just one.

6. Receiving from alleged debtors post-dated checks, which will not be deposited immediately or which will be held by respondents or their representatives for more than fifteen business days after date of receipt.

It is further ordered, That respondents maintain and make available records relative to complaints received by respondents involving the acts and practices prohibited by this order and which describe steps taken by respondents to investigate and dispose of said complaints. Said records shall be maintained for a period of six (6) months from the date such complaint is received, for inspection and copying by the Federal Trade Commission.

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

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

It is further ordered, That the individual respondents named herein 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.

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

IN THE MATTER OF

TALENT, INC., TRADING AS TALENT, INC., ETC., ET AL.

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

Docket C-2512. Complaint, Apr. 19, 1974—Decision, Apr. 19, 1974

Consent order requiring a North Quincy, Mass. soliciter of contracts and fees from songwriters and seller/distributor of records and lead sheets, among other things to cease misrepresenting the products or services offered; misrepresenting the size of its staff; misrepresenting the prices of its services and failing to inform customers of the terms and conditions of its services.

Appearances

For the Commission: *David I. Keniry.*
For the respondents: *Pro se.*

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 Talent, Inc., a corporation, trading and doing business as Jerry Dee, Grand Recording Company, Cathedral Recording Company, Chapel Recording Company, Country and Western Recording Company, Music Hall Recording Company and Melody Lan, and Theodore Rosen, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Talent, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its principal office and place of business located at 91 Newbury Avenue, North Quincy, Mass. Repondent Talent, Inc. is also trading and doing business as Jerry Dee, Grand Recording Company, Cathedral Recording Company, Chapel Recording Company, Country and Western Recording Company, Music Hall Recording Company and Melody Lane.

Respondent Theodore Rosen is an officer of the corporate respondent and, as such, he formulates, directs, and controls the acts and practices of the corporate respondent and the aforesaid affiliated businesses, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the solicitation of contracts and fees from songwriters and prospective songwriters for the recording of songs, and in the sale and distribution of records and lead sheets containing the songs of writers contracting with them. Said solicitations are made through advertisements placed in magazines, and through form letters and other written solicitations circulated to songwriters and prospective songwriters located in the various States of the United States and in the District of Columbia.

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

PAR. 4. In the course and conduct of their aforesaid businesses, and for the purpose of soliciting contracts for the recording of songs of songwriters and prospective songwriters, and for the purpose of inducing the purchase of records, lead sheets, and related products and services offered by respondents pursuant to said contracts, and for the purpose of receiving monetary fees from songwriters in connection with said contractual arrangements, respondents have made, and are now making, statements and representations by repeated advertisements inserted in numerous magazines of interstate circulation, and by manifold statements and representations, explicit and implicit, contained in contracts, form letters and other written instruments of a solicitous nature, to songwriters and prospective songwriters with respect to respondents' business status, products and services, and the benefit to be derived by said songwriters and prospective songwriters utilization of such products and services.

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

SONGS—POEMS WANTED FOR PUBLISHING AND RECORDING CONSIDERATION.

Accepted songs will be published and recorded at our expense—for information write to Talent, 17 Longwood Rd., Quincy, MA 02169.

SONGWRITERS! POETS!

Spiritual and religious poems and songs wanted for recording by the Chapel Symphony Orchestra and Choir. We pay all recording costs.

Information: Write Dept. Chapel Recording Co., P.O. Box 162, Wollaston, MA 02170.

* * * * * * *

Talent will pay all costs in the producing and in the recording of the above song.

That there will be no charge made to the author for the producing and the recording of the above song.

* * * * * * *

A publishing contract will be issued by Talent prior to the release of the above song by a major record company.

* * * * * * *

I would be glad to record your song if a more suitable and commercial melody could be set to your lyric.

It takes a great deal of time and effort to produce a recording of this nature, and unless the music is commercial, it will all be in vain.

The fabulous demonstration recording that you will receive of your completed song will be as beautiful and commercial as our talents will allow.

* * * * * * *

In view of the greatness of sound and quality of your recording, I certainly hope and feel that many of the songs that I will record will be accepted and released by record companies, as others have in the past. In order that I may retain the publishing royalties on your song, a publishing contract will, therefore, be issued by an ASCAP or BMI publisher on all songs accepted for release by a major record company.

* * * * * * *

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

1. Songs and poems submitted to respondents for recording and publishing consideration will be subjected to a good faith evaluation in order to determine the likelihood of these songs or poems achieving commercial success.

2. Songs and poems failing to meet the qualitative criteria employed by respondents in analyzing and determining the likelihood of these songs achieving commercial success will not be accepted by respondents for publishing and recording.

3. All costs and expenses involved in the production and recording of accepted songs will be borne by respondents and that there is no charge to the author for the production and recording of his song.

4. Respondents' primary interest in contracting with songwriters for

the production and recording of their songs is in attaining the commercial success of these recordings.

5. By and through the use of the words, "A publishing contract will be issued by Talent prior to the release of the above song by a major record company," and other words of similar import and meaning not set out specifically herein, that there is a reasonable expectation that songs produced and recorded by respondents may be released by a major record company or achieve commercial success, and that in the normal course of their business respondents negotiate, enter into, or otherwise issue publishing contracts to songwriters.

6. By and through the use of the words, "In order that I may retain the publishing royalties on your song, a publishing contract will, therefore, be issued * * * " and through the use of the words, "all royalties that the above song may earn from the sales of records, sheet music, motion pictures, etc. are to be divided as follows: 90% to the above author and 10% to Talent," and other words of similar import and meaning not set out specifically herein, that there is a reasonable expectation that songs produced and recorded by respondents may earn royalties from the sales of records, sheet music, and motion pictures, and that the retention, by respondent, of a percentage of the royalties realized from the sales of records, sheet music, and motion picture rights is the means whereby respondents recoup the financial investment involved in their producing and recording songs at no cost or expense to the songwriter.

PAR. 6. In truth and in fact:

1. Songs and poems submitted to respondents for recording and publishing consideration are not subjected to a good faith, qualitative evaluation in order to determine the likelihood of these songs or poems achieving commercial acceptance or success. Respondents do not maintain or employ a selective review process based upon qualitative considerations. To the contrary, substantially all songs and poems submitted by songwriters and prospective songwriters are accepted for recording without any evaluation or assessment regarding the likelihood of commercial acceptance or success.

2. Respondents do not reject or refuse to accept songs and poems submitted by songwriters and prospective songwriters for publishing and recording as a result of a deliberative determination that these songs and poems may fail to achieve commercial acceptance or success. To the contrary, the minimal number of songs and poems rejected by respondents each year are rejected due to a determination by respondents that the lyrics are coarse or offensive or because the song or poem is illegible.

3. All costs and expenses involved in producing and recording accepted songs are not borne by respondents, nor are songs produced and

recorded at no charge to their authors. To the contrary, all costs and expenses incurred by respondents in the producing and recording of accepted songs are included, along with a profit, in a musical setting fee or a fee for studio use, which all songwriters are required to pay as a condition precedent to the recording of their song by respondents.

4. Respondents' primary interest in contracting with songwriters for the producing and recording of their songs is not directed toward attaining the commercial acceptance or success of these recordings. To the contrary, respondents' primary interest in contracting with songwriters is to obtain payment under these contracts and to establish a relationship with these songwriters which is conducive to further overtures by which respondents induce the purchase of additional recordings and services for the alleged purpose of achieving the commercial acceptance and success of these recordings.

5. There is no basis in fact which would reasonably support the expectation that songs produced and recorded by respondents may be released by a major record company or achieve commercial success, nor do respondents, in the normal course of business, negotiate, enter into, or otherwise, issue publishing contracts to songwriters. To the contrary, songs produced and recorded by respondent have failed to be released by major record companies or to achieve commercial success. Further, any publishing contracts issued by respondents have been, and are, insubstantial in number, not pursuant to release of a recording by a major recording company, but utilized primarily to induce the purchase of additional recordings and services from respondents.

6. There is no basis in fact which would reasonably support the expectation that songs produced and recorded by respondents may earn royalties from the sale of records, sheet music, and motion picture rights, or that any or all of the costs and expenses incurred by respondents in the producing and recording of songs will be recouped by respondents as a percentage of the royalties earned by the sale of records, sheet music, and motion picture rights. To the contrary, respondents have failed to produce or record, for any customer, any songs which have earned royalties from the sale of records, sheet music, or motion picture rights. Accordingly, respondents do not rely upon the receipt or collection of royalties earned from the sale of records, sheet music, or motion picture rights for the recoupment of the costs and expenses incurred by them in producing and recording songs. All costs and expenses incurred by respondents in producing and recording accepted songs are included, along with a profit, in a musical setting fee or a fee for studio use, which all songwriters are required to pay as a condition precedent to the recording of their song by respondents.

Therefore, the statements and representations as set forth in Para-

graphs Four and Five, hereof, were and are false, misleading and deceptive.

PAR. 7. In addition to those statements and representations set forth in Paragraphs Four and Five, hereof, and in furtherance of a sales program for inducing the purchase of their products and services, respondents have made, and are now making, further statements and representations to songwriters and prospective songwriters with respect to respondents' business status, procedures, products and services, and the benefit to be derived by said songwriters and prospective songwriters' utilization of such products and services.

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

Our company has made provisions with professional writers who * * * have agreed with Grand Record Company to write a limited amount of melodies each month at a cost of only $47.50 for each musical setting.

* * * * * * *

TALENT will furnish copyright advisory services including all necessary papers to register song (as author's sole property) in U.S. Copyright Office in Washington, D.C.

In view of the very commercial aspects of your song, and considering the fact that many people will be hearing your recording, we feel that a copyright certainly should be secured in your name in order to protect your rights and ownership to your song.

* * * * * * *

SONGS AND POEMS NEEDED IMMEDIATELY.

We are interested in ballads, spirituals, Country and Western, and all types of songs and poems that have the possibility of becoming hits.

* * * * * * *

A great deal of time, money and effort is involved in the producing of your recording. The average cost of a 32-piece, fully orchestrated recording would cost over $1500.

We have indicated to you in our correspondence, that the cost of reproducing the recording of your song would normally cost from $600 to $900.

* * * * * * *

Because our writers are collaborating with the musicians and the choir, as well as the featured vocalist, the result is a much more magnificent recording that could not possibly be done by anyone not working in such close harmony with everyone concerned.

Our selected writers will be working in close contact with the vocalist, and the background orchestra, and the vocal group.

* * * * * * *

Hoping to hear from you soon,
I remain,

Yours truly,

Don Richards
Artist and Repitoire (sic)
Department

* * * * * * *

PAR. 8. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the statements and representations set forth in Paragraphs Four and Five, above, respondents have represented, and are now representing, directly or by implication, that:

1. Respondents have entered into agreements, or otherwise made arrangements with independent professional songwriters for the creation of musical settings for the represented fees and that the sole cost to respondents' customers for obtaining the services of these independent professional songwriters is the payment of the represented fees.

2. Respondents maintain a copyright advisory service which renders and performs valuable and knowledgeable copyright advisory services for the purpose of assisting songwriters to secure copyrights for their songs because the imminent commercial success and impending exposure of their songs to a large segment of the public necessitates the immediate acquisition of copyright protection.

3. Completed songs, that is, lyrics and music, submitted by songwriters will be accorded a good faith evaluation by respondents as to the songs' acceptability for purposes of recording and publishing.

4. The normal, regular or average cost of producing a recording, similar to those recordings produced by respondents, varies from six hundred dollars to fifteen hundred dollars, and that individuals contracting with respondents for the production of recordings will realize a substantial monetary savings by retaining respondents to produce and record their songs.

5. Professional songwriters are utilized by respondents to write the music which accompanies the lyrics submitted by customer-songwriters, and that the aforesaid professional songwriters, as part of the preparation and writing of this music, frequently establish a personal, working relationship with, or otherwise confer and consult with, the vocalist, vocal group, and background orchestra participating in the producing and recording of customer-songwriters' songs.

6. Respondents maintain an "Artist and Repitoire (sic) Department" as a distinct, separate and functional entity within their organizational

framework and that this department is staffed by personnel who render specialized services or advice to songwriters.

PAR. 9. In truth and in fact:

1. Respondents have not entered into agreements or otherwise made arrangements with independent professional songwriters for the creation of musical settings at the represented fees. To the contrary, the independent professional songwriters utilized by respondents are compensated on an hourly basis for the creation of musical settings and the represented fees are established by respondents and include therein, production and recording costs, and a margin of profit for respondents.

2. Respondents do not maintain a copyright advisory service for the purpose of assisting songwriters secure copyrights because the immediate acquisition of copyright protection for customers' songs is necessitated by the likelihood that these songs will achieve commercial success or be exposed to a large segment of the public. To the contrary, respondents urge virtually all songwriters to secure copyright protection, irrespective of the commercial merit of the songwriters' completed recordings. Respondents' purpose in urging that songwriters secure copyrights for their songs is to enable respondents to obtain an additional fee for the preparation of a lead sheet which must accompany all songs submitted to the United States Copyright Office.

3. Completed songs, that is, lyrics and music, submitted by songwriters are not accorded a good faith evaluation by respondents with respect to the songs' acceptability for purposes of recording and publishing. To the contrary, all songwriters submitting completed songs to respondents with but few insubstantial exceptions, are informed by means of a series of form letters that respondents have determined that the lyrics thereof, but not the music, are acceptable for recording and that respondents, for a fee, will provide for the creation of an acceptable musical setting. Respondents' solicitation of songs is not directed towards the acquisition of songs for recording and publishing consideration but, rather, towards obtaining fees from songwriters.

4. The normal, regular, or average cost of producing a recording, similar to those recordings produced by respondents, does not vary from six hundred dollars to fifteen hundred dollars, and individuals contracting with respondents for the production of recordings do not realize a substantial monetary savings by retaining respondents to produce and record their songs. To the contrary, respondents aforesaid pricing representations contemplate a live, fully orchestrated recording session, whereas respondents utilize taped, pre-recorded orchestrations which, in most instances, have been purchased by respondents for substantially less than six hundred dollars.

5. In most instances, professional songwriters are not utilized by

respondents to write the music which accompanies the lyrics submitted by customer–songwriters, and the aforesaid professional songwriters, as part of the preparation and writing of this music, do not frequently establish a personal working relationship with, or otherwise confer and consult with, the vocalist, vocal group, and background orchestra participating in the producing and recording of the customer–songwriters' songs. To the contrary, in most instances, lyrics submitted by customer–songwriters are sung by a vocalist who "creates" the songs' melodies or music extemporaneously during a recording session without benefit of written music. As a result of this informal, *ad hoc* recording procedure, the professional songwriters utilized by respondents do not maintain a close working relationship with vocalists pursuant to the preparation and writing of music for songs submitted by respondents' songwriter–customers. Further, the aforesaid vocal group and background orchestra utilized by respondents are pre–recorded vocal choruses and pre–recorded background orchestrations, which are selected from respondents' tape library, thereby precluding any personal contact between or among respondents' professional songwriters and members of the background orchestra or vocal groups.

6. Respondents do not maintain an "Artist and Repitoire (sic) Department" as a distinct, separate and functional entity within their organizational framework which renders specialized services or advice. To the contrary, "Don Richards" is a pseudonym for the individual respondent, Theodore Rosen, whose business activities are not confined or limited to any specific department of, or service offered by, respondents.

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

PAR. 10. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their products and services, respondents have engaged in the following additional unfair, false, deceptive and misleading acts and practices:

1. Respondents have inserted or caused to be inserted, in numerous magazines of interstate circulation, certain advertisements over the trade names of Talent, Inc., Grand Recording Company, Cathedral Recording Company, Chapel Recording Company and Country and Western Recording Company and, in a substantial number of instances, have inserted, or caused to be inserted, in a single edition of the aforesaid magazines, advertisements appearing over the trade name of two or more of the aforesaid recording companies. Through the use of such advertisements respondents have, and are, representing that the businesses conducted under the aforesaid trade names were, and are,

separate and distinct competing recording businesses and have unfairly and deceptively concealed the fact that all of the aforesaid recording companies are owned, controlled and managed by respondents. In such manner and by said means respondents induce the submission of songs and poems from songwriters and prospective songwriters who are thus misled into the mistaken and erroneous belief that they are dealing with companies and individuals other than respondents and who, if the true identity of the company soliciting their songs and lyrics were known to them, would not submit their songs and poems because many of said songwriters and prospective songwriters have been previously deceived and misled by respondents acting under the pretense and in the name of one or several of the aforesaid recording companies.

2. In a substantial number of instances, through the use of the false, deceptive and misleading statements, representations and practices set forth in Paragraphs Four through Nine, above, separately, and in connection with others of similar import and meaning but not expressly set out herein, respondents have been able to induce a substantial number of songwriters to purchase additional products and services such as commercially pressed records, hand prepared lead sheets, listings of record publishers, recording artists, record companies, and radio stations, song portfolios and record disbursement services, all of which products and services are offered by respondents for the alleged purpose of precipitating the commercial acceptance and success of customers' songs and the financial enhancement which accompanies such commercial acceptance and success.

The literature employed by respondents in the offering and sale of the aforesaid additional products and services, directly, by implication, and by a failure to disclose material facts, leads respondents' customers to the erroneous and mistaken belief that their songs have been selected by respondents for further promotional efforts because the songs possess distinctive quality, individual merit, and commercial promise, and that the promotional products and services offered by respondents considerably enhance the likelihood that customers' songs will achieve commercial acceptance and success.

3. Respondents' initial offers to produce and record songs for customers are replete with the statements and representations set forth in Paragraphs Four through nine concerning the commercial nature of respondents' endeavors. In making such offers, respondents have failed to disclose that the recordings produced by them are hand-cut, demonstration records, and inferior in quality and fidelity to commercially pressed records, and unsuitable for use in commercial promotional efforts.

The aforesaid failure of the respondents to disclose said material facts

to customers and prospective customers has the tendency and capacity to lead and induce a substantial number of such persons into the understanding and belief that the aforesaid recording companies are separate, distinct and independent businesses; that the represented promotional products and services will cause, substantially contribute to, or materially affect the commercial success of customers' recordings; and that the recordings produced by respondents are of a quality suitable for use in commercial promotion.

Therefore, respondents' failure to disclose such material facts was, and is, unfair, false, misleading and deceptive.

PAR. 11. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of records, lead sheets, and related products and services of the same general kind and nature as those sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of respondents' products and services by reason of said erroneous and mistaken belief.

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

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint,

and waivers and other provisions as required by the Commission's rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) 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(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Talent, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts, with its office and principal place of business located at 91 Newbury Avenue, North Quincy, Mass.

Respondent Theodore Rosen is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Talent, Inc., a corporation, trading and doing business in its own name and as Jerry Dee, Grand Recording Company, Cathedral Recording Company, Chapel Recording Company, Country and Western Recording Company, Music Hall Recording Company and Melody Lane, and Theodore Rosen, individually and as an officer of said corporation, and respondents' agents, representatives, and employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of records, lead sheets and related products or services, or any other products or services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, orally or in writing that:

(a) Songs, poems or lyrics submitted to respondents are assessed or evaluated in order to determine the likelihood of their achieving commercial acceptance or success.

(b) Songs, poems or lyrics failing to meet qualitative stan-

dards established by respondents will not be accepted for recording.

(c) There is no charge to customers for the production or recording of their songs; or misrepresenting in any manner that products or services are provided at either no cost or a reduced cost.

(d) Respondents' primary interest in contracting or dealing with songwriters is in assisting them to achieve commercial success or acceptance for their songs or recordings.

(e) Songwriters whose songs are accepted for recording by respondents may reasonably expect that their songs will ultimately be released by a record company; or that respondents frequently, or in the normal course of business, issue publishing contracts.

(f) Songwriters whose songs are accepted for recording by respondents may reasonably expect that their songs will earn royalties from the sales of records, sheet music, or radio, television or motion picture rights.

(g) The sole charge to customers for the services of professional songwriters employed by respondents is respondents' cost for obtaining the services of these professional songwriters; or that respondents provide customers with any products or services at respondents' cost for such products or services.

(h) It is necessary or desirable that customers secure copyright protection because of their songs' distinctive merit, commercial character, or the likelihood that their songs will gain wide public attention or acceptance; or that respondents maintain a copyright advisory service for the purpose of assisting songwriters secure copyrights on songs that are of commercial quality.

(i) Songs are or may be accepted for recording.

(j) Any price for respondents' products and services is a special price or substantially less than prices charged by other companies or individuals for similar products or services.

(k) Respondents employ or utilize songwriters to write music for customers' lyrics prior to the recording of these customers' songs; or that songwriters employed or utilized by respondents work closely with, or confer and consult with, respondents' vocalists, vocal groups or background orchestra.

(l) Respondents maintain separate and functional departments within their organizational framework; or misrepresenting, through the use of pseudonyms, or by any other means, the number of personnel employed by respondents.

2. Representing, directly or by implication, in their advertising or in any other manner, that any recording company or business owned, operated, or controlled by them or either of them is otherwise owned, operated, or controlled; or that one of two or more such recording companies or businesses owned, operated, or controlled by either or both of them is separate, distinct, or competitive with the others similarly owned.

3. Inducing the purchase of any products or services by representing, directly or by implication, that the purchase of these products or services will cause, substantially contribute to, or materially affect either the commercial success or acceptance of a song or recording, or the customer's financial enhancement.

4. Failing to inform each customer or prospective customer, in clear and conspicuous language, prior to the execution of a recording contract, that the recording provided by respondents is hand cut, a demonstration record, and unsuitable for use in commercial promotion.

5. Failing to inform each customer or prospective customer, in clear and conspicuous language, prior to the execution of a recording contract, that the background orchestrations and vocal choruses provided by respondents are pre-recorded; and that respondents' use of these pre-recorded background orchestrations and vocal choruses is not exclusive to, or limited to, his song or recording.

6. Selling, or offering for sale, commercially pressed recordings, without disclosing in clear and conspicuous language, contemporaneous with the sale or offering for sale, that many radio stations, as a matter of policy, refuse to play demonstration records.

7. Making any agreement, arrangement, provision or representation concerning the disposition of royalties a song may earn without affirmatively disclosing that respondents have never produced or recorded a song for a customer which has earned any royalties.

It is further ordered, That respondents shall forthwith deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale or sale of respondents' products or services or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging the receipt of the order from each such person.

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

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

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

IN THE MATTER OF

AUSLANDER DECORATOR FURNITURE, INC., TRADING AS A.D.F., ETC., ET AL.

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

Docket 8911. Complaint, Jan. 30, 1973–Order & Opinion, Apr. 23, 1974

Order requiring a Hanover, Md., seller and distributor of furniture and related products, among other things to cease failing to deliver ordered merchandise; delivering damaged or defective merchandise; failing to repair or replace damaged goods as advertised; misrepresenting the availability of merchandise in stock; misrepresenting prices as being "sale" prices unless such prices are reduced significantly to afford a meaningful savings over the regular selling prices; and failing to maintain records to substantiate savings claims. Further, respondents are required to refund all monies paid by customers if respondents fail to deliver merchandise within five (5) business days from an agreed-upon date of delivery.

Appearances

For the Commission: *James D. Tangires, Michael Mpras* and *Alan Cohen.*

For the respondents: *John S. Yodice* and *Edwin W. Holden, III.* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Auslander Decorator Furniture, Inc., a corporation, doing business as A.D.F. and A.D.F. Warehouse, and Maxwell Auslander, Sandra Tye, and Linda Decker,

individually, and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Auslander Decorator Furniture, Inc., doing business as A.D.F. and A.D.F. Warehouse, is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 7451 Race Road, Hanover, Md. Its warehouse, shipping and storage facilities are located at 701 Edgewood Street, N.E., and Fourth and Channing Streets, N.E., Wash., D.C., and 7451 Race Road, Hanover, Md. It operates furniture outlets in the States of Maryland and Virginia and in the District of Columbia.

Respondents, Maxwell Auslander, Sandra Tye and Linda Decker are individuals and are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth, and their address is that of said corporation.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of furniture and related products to the public at retail.

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

PAR. 4. In the course and conduct of their aforesaid business and for the purpose of inducing the sale of their merchandise, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by materials disseminated through the mails, and on tags or labels and in signs posted in respondents' stores. Typical and illustrative of the foregoing, but not all-inclusive thereof, are the following:

FREE DELIVERY
LAY-A-WAY * * * 8 MONTHS FREE STORAGE
ADF WAREHOUSE SALE PRICE!!
SAVINGS!!! AT ALL 7 ADF OUTLETS
ADF WAREHOUSE SALE

ADF WAREHOUSE CLEARANCE SALE
BUY NOW AND SAVE

In addition to the aforesaid statements and representations, the respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the terms and conditions under which merchandise will be sold and delivered and services provided by respondents.

PAR. 5. By and through the use of the above-quoted statements and representations in Paragraph Four, and others of similar import and meaning not expressly set out herein, including the aforesaid oral statements and representations made by respondents and their sales representatives, respondents have represented, and are now representing, directly and by implication, that:

1. Respondents will deliver their furniture to customers on or near the dates they have promised those customers for delivery.

2. Respondents maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised delivery dates.

3. Respondents' customers may purchase furniture on the layaway plan, and, while the payments are being made, the furniture will be stored in their warehouse, ready for delivery upon completion of all payments.

4. Respondents are offering furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

PAR. 6. In truth and in fact:

1. Respondents, in many instances do not deliver their furniture to customers on or near the dates they have promised those customers for delivery.

2. Respondents, in many instances, do not maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised delivery dates.

3. Furniture purchased by respondents' customers on the layaway plan is not, in many instances, stored in the warehouse ready for immediate delivery upon completion of all payments, but is sold to other customers, necessitating reordering of the merchandise when the layaway payments are completed, with resultant delays in delivery.

4. Respondents, in many instances, do not offer furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

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

PAR. 7. In the course and conduct of their aforesaid business and for the purpose of inducing the sale of their furniture, respondents have maintained, and are now maintaining, in their salesrooms, floor models and displays of furniture being offered for sale, on the bases of which their customers select and order the furniture they purchase from the respondents. In this connection, respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the quality and durability of the furniture being offered for sale, the terms and conditions under which merchandise will be sold and delivered, and the services that will be provided by the respondents. Moreover, subsequent to making sales and deliveries, respondents and their employees have made, and are now making, numerous oral statements, representations and promises to their customers regarding the time and the manner in which respondents will perform various adjustments, replacements and/or repairs.

PAR. 8. By and through the use of floor models and furniture displays discussed in Paragraph Seven, together with the aforesaid oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, and are now representing, directly or by implication, that:

1. Furniture which is delivered to respondents' customers will be identical to that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays.

2. Furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, will be replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees.

3. Furniture which is delivered to respondents' customers will be free from damages and/or defects.

4. Furniture which is delivered to purchasers with damages and/or defects, will be repaired or replaced within a reasonable time.

5. Furniture which is delivered to purchasers with damages and/or defects, will be repaired or replaced to the satisfaction of the purchasers.

6. Furniture which is delivered to purchasers with damages and/or defects, will be repaired or replaced in accordance with promises made to the purchasers by respondents' employees.

PAR. 9. In truth and in fact:

1. Furniture is delivered to customers which, in many instances, is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays.

2. Furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, in many instances, is not replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees.

3. Furniture delivered to purchasers, in many instances, is damaged and/or defective.

4. Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced within a reasonable time.

5. Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced to the satisfaction of the purchasers.

6. Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced in accordance with promises made to the purchasers by respondents' employees.

Therefore, the statements, representations, acts and practices set out in Paragraphs Seven and Eight were, and are, false, misleading and deceptive.

PAR. 10. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by the respondents.

PAR. 11. The respondents' use of the aforesaid false, misleading and deceptive statements, representations, acts and practices, have had, and now have, 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 complete, and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 12. The acts and practices of the respondents as set forth above were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

FEBRUARY 15, 1974

PRELIMINARY STATEMENT

Respondents Auslander Decorator Furniture, Inc., a corporation, doing business as A.D.F. and A.D.F. Warehouse, and Maxwell Auslander, Sandra Tye and Linda Decker, individually, and as officers of said corporation, are charged with violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). The complaint, issued by the Commission on Jan. 30, 1973, alleges that respondents, through advertisements placed in newspapers of interstate circulation, through brochures disseminated through the mails, by the use of tags or labels and in signs posted in respondents' retail stores, and by oral representations by respondents and their sales representatives, have represented directly and by implication that:

(1) respondents will deliver furniture to customers on or near the dates they have promised those customers for delivery;

(2) respondents maintain in their warehouse adequate stock to insure that furniture ordered by customers will be available for delivery on the promised delivery dates;

(3) respondents' customers may purchase furniture on the layaway plan, and, while the payments are being made, the furniture will be stored in their warehouse, ready for delivery upon completion of all payments; and

(4) respondents are offering furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

In truth and in fact, the complaint alleges,

(1) respondents, in many instances, do not deliver furniture to customers on or near the dates promised customers for delivery;

(2) respondents, in many instances, do not maintain in their warehouse adequate stock to insure that furniture ordered by customers will be available for delivery on the promised delivery dates;

(3) furniture purchased by respondents' customers on the layaway plan is not, in many instances, stored in the warehouse ready for immediate delivery upon completion of all payments, resulting in delays in delivery; and

(4) respondents, in many instances, do not offer furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

The complaint further alleges that by and through the use of floor models and furniture displays, together with oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, directly or by implication, that:

(1) furniture which is delivered to respondents' customers will be identical to that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays;

(2) furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays will be replaced within a reasonable time, to the satisfaction of the customers, in accordance with promises made to the customers by respondents;

(3) furniture which is delivered to respondents' customers will be free from damages and/or defects; and

(4) furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced within a reasonable time to the satisfaction of the purchasers and in accordance with promises made to the purchasers by respondents.

In truth and in fact, the complaint alleges,

(1) furniture is delivered to customers which, in many instances, is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays;

(2) furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, in many instances, is not replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents;

(3) furniture delivered to purchasers, in many instances, is damaged and/or defective, is not repaired or replaced within a reasonable time, is not repaired or replaced to the satisfaction of the purchasers, and is not repaired or replaced in accordance with promises made to the purchasers by respondents.

Therefore, the statements, representations, acts and practices of respondents, as set out hereinbefore, were, and are, false, misleading and deceptive.

Respondents filed an answer to the complaint on Mar. 12, 1973 which consisted of a general denial of all the complaint allegations of unlawful conduct. Thereafter complaint counsel moved to strike respondents' answer on the grounds that it did not conform to the requirements of the Commission's Rules of Practice. Respondents at the same time requested additional time in which to file an amended answer since re-

spondents' attorneys had only recently been retained and needed additional time in which to fully prepare an answer.

Pursuant to permission granted by the undersigned, respondents filed an amended answer on Apr. 6, 1973. The amended answer was in greater detail than the original answer, and respondents generally denied substantially all the allegations of unlawful conduct set forth in the complaint.

Prior to the filing of the aforesaid amended answer, a prehearing conference was held on Apr. 3, 1973. Thereafter, on Apr. 30, 1973 and May 14, 1973, prehearing conferences were held. At the prehearing conference on Apr. 30, 1973, respondents amended their answer in part (P. Tr. 48). On June 11, 1973, respondents filed a motion for permission to further amend their answer, together with a Second Amended Answer. By order filed June 21, 1973, respondents' motion to further amend their answer was granted.

By the Second Amended Answer, respondents Auslander Decorator Furniture, Inc. and Maxwell Auslander admitted the allegations contained in the complaint. Individual respondents Sandra Tye and Linda Decker admitted the allegations of the complaint, except that these respondents denied that (1) they have participated as individuals in any of the acts or practices alleged in the complaint, and (2) denied that they formulate, direct and control the acts and practices of the corporate respondent, Auslander Decorator Furniture, Inc., including the acts and practices set forth in the complaint. All respondents reserved the right to submit proposed findings and conclusions under Section 3.46 of the Rules of Practice, the right to appeal the initial decision herein to the Commission under Section 3.52 of the Rules of Practice, and the right to judicially appeal from any adverse Commission decision.

On June 20, 1973, the undersigned issued an order limiting the factual issues to be tried in this proceeding in view of respondents' admission answer. The factual issues remaining to be tried were set forth as follows:

(1) Do individual respondents Sandra Tye and Linda Decker formulate, direct and control the acts and practices of the corporate respondent Auslander Decorator Furniture, Inc., and

(2) Have individual respondents Sandra Tye and Linda Decker participated in the acts and practices alleged in the complaint?

By letter dated Aug. 1, 1973, the undersigned was advised by John S. Yodice, counsel for respondents, that he was withdrawing his representation of individual respondents Sandra Tye and Linda Decker, but would remain as counsel for the corporate respondent and individual respondent Maxwell Auslander. Thereafter, by telephone, the undersigned was advised by individual respondents Sandra Tye and Linda

Decker that Mr. Yodice was withdrawing as their counsel as they were financially unable to retain counsel to represent them in their individual capacities. Individual respondents Sandra Tye and Linda Decker requested that the undersigned provide them with counsel to represent them in the trial of this matter, because of their financial inability to retain counsel.

On Aug. 15, 1973, the undersigned issued an order requiring individual respondents Sandra Tye and Linda Decker to support their request for assignment of counsel by filing a statement of financial status and other supporting documentation. Individual respondents Sandra Tye and Linda Decker, by telephone, later withdrew their request for assignment of counsel and stated their intention of appearing in person at the trial and representing themselves (see Decker, Tr. 333; Tye, Tr. 365).

Hearings were held on Sept. 10-11, 1973, at which time evidence was received relating to the two issues remaining to be litigated, *i.e.*, the responsibility of Sandra Tye and Linda Decker for the acts and practices of corporate respondent Auslander Decorator Furniture, Inc. and their personal participation in the acts and practices admitted to be unlawful. Complaint counsel called as witnesses the three corporate officials named in the complaint, Maxwell Auslander, Sandra Tye and Linda Decker. Over one hundred (100) exhibits were offered by complaint counsel and received into evidence. Individual respondents Sandra Tye and Linda Decker offered no evidence in defense. Complaint counsel and counsel for corporate respondent Auslander Decorator Furniture, Inc. and individual respondent Maxwell Auslander have submitted proposed findings, conclusions and supporting memoranda. Individual respondents Sandra Tye and Linda Decker have not submitted any memoranda, although they were offered the opportunity to do so if they desired (Tr. 367). On Nov. 28, 1973, the Commission extended the time for filing this initial decision to and including Feb. 18, 1974.

This proceeding is before the undersigned upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by complaint counsel and by counsel for the corporate respondent and individual respondent Maxwell Auslander. These submissions by the parties 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 record or as immaterial. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and upon a consideration of the demeanor of the witnesses who gave testimony in this proceeding.

For the convenience of the Commission and the parties, the findings of fact include references to the principal supporting evidentiary items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the recommended findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are made in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CX—Commission's Exhibits
CPF—Proposed Findings, Conclusions of Law, And Order of Counsel Supporting the Complaint
RPF—Proposed Findings, Conclusions, And Order of Respondents Auslander Decorator Furniture, Inc. and Maxwell Auslander
CRB—Brief In Reply To Proposed Findings, Conclusions, And Order of Respondents Auslander Decorator Furniture, Inc. and Maxwell Auslander filed by Counsel Supporting the Complaint
The transcript of the testimony is referred to with the abbreviation "Tr.," and the page number or numbers upon which the testimony appears and the last name of the witness whose testimony is being cited. "P. Tr." refers to the transcript of the prehearing conferences.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings, conclusions and briefs submitted by the parties, as well as replies, the administrative law judge makes the following:

FINDINGS OF FACT

1. Respondent Auslander Decorator Furniture, Inc. (hereinafter referred to as "ADF"), doing business as A.D.F. and A.D.F. Warehouse, is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 7451 Race Road, Hanover, Md. Its warehouse, shipping and storage facility is located at said principal place of business. Prior to September 1972, ADF had warehouse, shipping and storage facilities located at 701 Edgewood Street, N.E., Wash., D.C., and Fourth and Channing Street, N.E., Wash., D.C. Respondent ADF, doing business as A.D.F. and A.D.F. Warehouse, operates furniture outlets in the States of Maryland and Virginia and in the District of Columbia (Admitted Second Amended Answer; P. Tr. 91–92).

2. Respondent Maxwell Auslander is an individual and is president of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and prac-

tices set forth in the complaint issued herein. His address is the same as that of the corporate respondent (Admitted Second Amended Answer; P. Tr. 60).

3. Respondent Sandra Tye is an individual and is a vice president of corporate respondent ADF (Admitted Second Amended Answer; Tye, P. Tr. 88–89; Tye, Tr. 334; Auslander, Tr. 123–124). Her address is the same as that of the corporate respondent (Admitted Second Amended Answer).

4. Respondent Linda Decker is an individual and was, from Nov. 1971 until May 31, 1973, a vice president of corporate respondent ADF (Admitted Second Amended Answer; Decker, P. Tr. 94; Decker, Tr. 240; Auslander, Tr. 124). Her present home address is 1418 Kensington Place, Crofton, Maryland (Decker, P. Tr. 94; Decker, Tr. 639). Respondent Linda Decker is no longer employed by corporate respondent ADF (Decker, Tr. 239–241).

5. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of furniture and related products to the public at retail (Admitted Second Amended Answer).

6. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the District of Columbia to purchasers thereof located in various States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act (15 U.S.C. 41–58) (Admitted Second Amended Answer).

7. In the course and conduct of their business as set forth in the complaint and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by the respondents (Admitted Second Amended Answer).

8. In the course and conduct of their business as set forth in the complaint and for the purpose of inducing the sale of their merchandise, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by materials disseminated through the mails, and on tags or labels and in signs posted in respondents' stores.

Typical and illustrative of the foregoing, but not all-inclusive thereof, are the following:

FREE DELIVERY
LAYAWAY * * * 8 MONTHS FREE STORAGE
ADF WAREHOUSE SALE PRICE!!
SAVINGS!!! AT ALL 7 ADF OUTLETS
ADF WAREHOUSE SALE
ADF WAREHOUSE CLEARANCE SALE
BUY NOW AND SAVE

In addition to the aforesaid statements and representations, the respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the terms and conditions under which merchandise will be sold and delivered and services provided by respondents (Admitted Second Amended Answer).

9. By and through the use of the above-quoted statements and representations, as set out in Finding 8 hereinabove, and others of similar import and meaning not expressly set out, including the aforesaid oral statements and representations made by respondents and their sales representatives, respondents have represented, and are now representing, directly and by implication, that:

(1) Respondents will deliver their furniture to customers on or near the dates they have promised those customers for delivery.

(2) Respondents maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised dates.

(3) Respondents' customers may purchase furniture on the layaway plan, and, while the payments are being made, the furniture will be stored in their warehouse, ready for delivery upon completion of all payments.

(4) Respondents are offering furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business (Admitted Second Amended Answer).

10. In truth and in fact:

(1) Respondents, in many instances, do not deliver their furniture to customers on or near the dates they have promised those customers for delivery.

(2) Respondents, in many instances, do not maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised delivery date.

(3) Furniture purchased by respondents' customers on the layaway plan is not, in many instances, stored in the warehouse ready for immediate delivery upon completion of all payments, but is sold to other customers, necessitating reordering of the merchandise when the layaway payments are completed, with resultant delays in delivery.

(4) Respondents, in many instances, do not offer furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

Therefore, the statements and representations, as set forth in Findings 8 and 9 hereinabove, were, and are, false, misleading and deceptive (Admitted Second Amended Answer).

11. In the course and conduct of their business as set forth in the complaint and for the purpose of inducing the sale of their furniture, respondents have maintained, and are now maintaining, in their salesrooms, floor models and displays of furniture being offered for sale, on the bases of which their customers select and order the furniture they purchase from the respondents. In this connection, respondents and their sales respresentatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the quality and durability of the furniture being offered for sale, the terms and conditions under which merchandise will be sold and delivered, and the services that will be provided by the respondents. Moreover, subsequent to making sales and deliveries, respondents and their employees have made, and are now making, numerous oral statements, representations and promises to their customers regarding the time and the manner in which respondents will perform various adjustments, replacements and/or repairs (Admitted Second Amended Answer).

12. By and through the use of the floor models and furniture displays discussed in Finding 11 hereinabove, together with the aforesaid oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, and are now representing, directly or by implication, that:

(1) Furniture which is delivered to respondents' customers will be identical to that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays.

(2) Furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, will be replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees.

(3) Furniture which is delivered to respondents' customers will be free from damages and/or defects.

(4) Furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced within a reasonable time.

(5) Furniture which is delivered to purchasers with damages and/or

defects will be repaired or replaced to the satisfaction of the purchasers.

(6) Furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced in accordance with promises made to the purchasers by respondents' employees (Admitted Second Amended Answer).

13. In truth and in fact:

(1) Furniture is delivered to customers which, in many instances, is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays.

(2) Furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, in many instances, is not replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees.

(3) Furniture delivered to purchasers, in many instances, is damaged and/or defective.

(4) Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced within a reasonable time.

(5) Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced to the satisfaction of the purchasers.

(6) Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced in accordance with promises made to the purchasers by respondents' employees (Admitted Second Amended Answer).

Therefore, the acts, practices, statements and representations, as set forth in Findings 11 and 12 hereinabove, were, and are, false, misleading and deceptive (Admitted Second Amended Answer).

Individual Respondent Linda Decker

14. Individual respondent Linda Decker began her employment with ADF as a sales person in ADF's College Park, Md., store in Jan. 1970 and continued as a sales person until Oct. 1970 (Auslander, Tr. 140; Decker, Tr. 243). In Oct. 1970, she became manager of ADF's Lexington Park, Md., store (Auslander, Tr. 141; Decker, Tr. 243). She returned to the main office in College Park when Mr. Auslander suffered his heart attack in Oct. of 1971 (Auslander, Tr. 133, 141; Decker, Tr. 245). She served as a vice president of ADF from November 11, 1971 until May 31, 1973 (Decker, Tr. 240; Auslander, Tr. 124), and also served as vice president of ADF of Lexington Park, Inc. from June, 1970 until May 31, 1973 (Decker, Tr. 240). The latter corporation was

formed to obtain a mortgage loan from a bank (Auslander, Tr. 125). Mrs. Decker left ADF on May 31, 1973 and is now self-employed as Decker and Associates, selling an advertising specialty item (Decker, Tr. 239–242). During her employment with ADF, Mrs. Decker was a salaried employee; she did not receive a commission or percentage of profits, and she did not own any stock in ADF (Decker, Tr. 250, 327–328, 333).

15. As manager of the Lexington Park retail store, Mrs. Decker had authority to hire store personnel (Decker, Tr. 250). She also arranged her own delivery schedules, which was a unique situation among the ADF stores (Auslander, Tr. 148). She trained her employees (Auslander, Tr. 147), and arranged for newspaper and radio advertisements in the Lexington Park area newspapers and radio stations (Auslander, Tr. 167, 168; Decker, Tr. 243, 244). Mrs. Decker also sold on the floor (Decker, Tr. 244), and was responsible for the innovation of having her, as store manager, deal directly with the customers:

> Q. Now, when you became store manager of the Lexington Park store, you also were performing some innovations for that particular store that was not being carried out by other retail stores; is that correct?
>
> A. So far as handling the customer directly, I knew that there had been problems as far as getting through to the warehouse to set up delivery at this end, and I asked him to agree to let me handle all of my customers myself, and particularly because they would be calling long distance. I thought that it would be better to be done on a local basis.
>
> I am from that area, and could not see having any problems to call long distance; I prefer that myself. So it became kind of a self-contained, you know, everything had to go back to Washington, but I literally did it (Decker, Tr. 244).

16. During her employment with ADF from January, 1970 through May 31, 1973, Mrs. Decker performed various duties other than those already mentioned. She had authority to sign checks, but never did so (Decker, Tr. 250). She had authority to hire and fire store personnel as a store manager [all store managers had this authority] (Decker, Tr. 250, 251). She shopped competition (Decker, Tr. 275); she visited ADF stores and reported back to Mr. Auslander (Decker, Tr. 285); she handled details concerning the construction of new stores and the warehouse (Decker, Tr. 321). Mrs. Decker talked with the manufacturers' representatives and followed purchase orders to determine why there were shipping delays (Auslander, Tr. 159). Later, as assistant to Mr. Auslander, she fired certain personnel, including a store manager, and she was requested to fire the ADF advertising agency. These latter acts had the specific approval of Mr. Auslander (Decker, Tr. 252, 254, 284).

17. After firing the ADF advertising agency, Mrs. Decker prepared the advertising copy and placed the advertisements with the newspapers. This work was all approved by Mr. Auslander (Decker, Tr. 253–

259). She identified herself as the ADF advertising manager on occasions (Decker, Tr. 266). She used the pseudonym of Decker Advertising; the idea was to form an "in-house advertising agency" (Decker, Tr. 255) in order to get an agency rebate, which was turned over to ADF (Decker, Tr. 267–268).

18. On Oct. 25, 1971, Mr. Auslander suffered a severe heart attack and was hospitalized for one month (Auslander, Tr. 129, 131; Decker, Tr. 245). Within 24 hours, Mrs. Decker moved to the main ADF office at College Park (Decker, Tr. 245). With the assistance of individual respondent Sandra Tye, Mrs. Decker began "picking up pieces" and made a sincere effort to continue the day-to-day operations of ADF and "to bring everything under control" (Decker, Tr. 247). Mr. Auslander, after being hospitalized for one month, thereafter worked a light schedule for several weeks (Auslander, Tr. 131–132). Mrs. Decker and Mrs. Tye carried on the business operations. Mr. Auslander testified:

Q. So Linda Decker and Sandy Tye sort of held the pieces together until you came back, is that correct?

A. As best as they could, yes.

Q. Did they do a good job?

A. I think they did a great job compared to with suddenly a whole new situation was thrust upon them and consequently, I think under the circumstances, they performed, I think, most admirably (Auslander, Tr. 133).

19. At the time of Mr. Auslander's heart attack, the opening of a Rockville, Md., store was pending. Mrs. Decker, with permission from Mrs. Auslander and with the assistance of Mrs. Tye, went ahead with plans for the Rockville store opening:

So, the first couple of days we brought the managers together to discuss how we were going to do this, and worked on the Rockville grand opening, and everyone volunteered to work.

We kept the store open to Midnight for the grand opening, and so forth, and the whole idea was to keep the morale up and let the world think we knew what we were doing, whether we did or not (Decker, Tr. 247).

* * * * * * *

You kind of had to pretend it was all going well (Decker, Tr. 331).

20. In June of 1972, Mrs. Decker was given the responsibility for handling consumer complaints for ADF (Auslander, Tr. 141–142; Decker, Tr. 296–298). Pursuant to Mr. Auslander's instructions, Mrs. Decker contacted the various consumer protection groups, including the Federal Trade Commission, and informed them that all consumer complaints were to be directed to her attention (Decker, Tr. 298–299). She testified that she usually took these complaints to Mr. Auslander for instructions, although there were instances where she did not discuss

the complaints with him prior to disposition (Decker, Tr. 299). Mrs. Decker also testified that she did not always show Mr. Auslander the letters which she sent out in response to consumer complaints (Decker, Tr. 300).

21. In May of 1971, ADF was notified of a pending investigation by the Federal Trade Commission (Auslander, Tr. 149). Mr. Auslander testified that he had Mrs. Decker talk with Mr. Klasic, the FTC attorney, in the Lexington Park store because:

A. At that time, we had the Edgewood Street warehouse, * * * and the Edgewood Street warehouse was just an absolute disaster. You had a bunch of people in a tiny little room; it was not conducive in any way for any kind of conversation or for any kind of fact finding.

So consequently, this was probably the only area, that it was a reasonably new building, it had a couple of private offices and, of course, she was there and she was a little more knowledgeable than some of the other people in the other stores were so consequently, we chose that area right down there.

Q. Why didn't you talk to the FTC Attorney, you are President of the Company; she is not even an Officer?

A. Okay, good point. But again, she was a little more familiar, again, with dealing with the customers thing. Also in that area, she would have more knowledge as to what would be handled, delivered, what would be selling and so forth, whereas I kind of would not know (Auslander, Tr. 150).

Mrs. Decker stated that she spoke with the FTC attorney because of the Lexington Park location, since Mr. Auslander was busy with other things, and:

* * * I had more time to do this sort of thing from a cost standpoint. It was less costly to have me doing this rather than to pay an attorney. In addition I knew where the information was (Decker, Tr. 269).

Part of Mrs. Decker's interview with Mr. Klasic concerned the sales tag used by ADF at that time (CX 4), and Mrs. Decker relayed to Mr. Auslander Mr. Klasic's concern about its terminology, including the word "Sale," used on the sales tag (Decker, Tr. 272). Mrs. Decker testified about CX 5, the sales tag which replaced CX 4:

Q. And you helped in creating this particular sales tag.

A. I relayed the information to Mac, the final sale [sic] on everything.

Q. But didn't you have some input as to what should be said on the tag in view of your conversations with Mr. Classic [sic].

A. Yes (Decker, Tr. 272).

22. The record supports a conclusion that Mrs. Decker participated in the challenged acts and practices of corporate respondent ADF. There is substantial evidence that Mrs. Decker participated in ADF's advertising, both while store manager at the Lexington Park store (Decker, Tr. 243) and while serving as an assistant to Mr. Auslander (Decker, Tr.

255–266). She testified that she was aware that the advertised prices of most merchandise appearing in ADF advertisements were generally the usual selling price, and not reduced (Decker, Tr. 277). She testified that merchandise purchased on layaway would be set aside only if a substantial deposit were paid (Decker, Tr. 290–291). She also testified that she knew that there was a dollar limitation on ADF's advertised "Free Delivery" policy (Decker, Tr. 294). Mrs. Decker participated in the formulation of the sales tags and invoices (CX 5, 8), which misrepresented "Free Delivery," "Sale," and "Layaway" (Decker, Tr. 282).

23. Mrs. Decker's participation in the admitted unlawful acts and practices of the corporate respondent ADF was, however, that of an employee, and not as an officer of the corporation responsible for corporate policy. Mr. Auslander testified quite emphatically that "* * * the decisions or basic policy was absolutely originating with me, either right or wrong" (Auslander, Tr. 145–146). Mrs. Decker was not even aware of the fact that she was an officer of corporate respondent ADF until the FTC investigation was well under way (Decker, Tr. 240–241, 327).

Mr. Auslander testified that the Rockville store opening was preplanned (Auslander, Tr. 134), that he chose the items of furniture for the advertisements, established the advertised prices, and was the final authority on advertising (Auslander, Tr. 143, 153, 169). He testified that he established the guidelines for handling customer complaints, he saw many of the complaint letters before they were sent out, and that he actually dictated or wrote other responses to complaints (Auslander, Tr. 144, 189, 203, 217, 222, 227; CX 55). Mr. Auslander determined the selling prices of all merchandise (Auslander, Tr. 167, 171), and he revised the ADF sales invoices and sales tags (Auslander, Tr. 182–185, 195).

Mrs. Decker testified that the advertisements she placed while manager of the Lexington Park store were items "Max would give me" (Decker, Tr. 243). She received permission from Elaine (Mrs. Auslander) to proceed with the Rockville store opening after Mr. Auslander had his heart attack (Decker, Tr. 247). The advertisements for the Rockville store opening were taken from previous advertisements "which is the way I have seen Max do it almost two years" (Decker, Tr. 248). After she took over the advertising duties, she made up the advertisements, "cutting and pasting them together bit by bit" for Mr. Auslander's approval (Decker, Tr. 255–256). She made suggestions for the advertisements, which suggestions were sometimes accepted, sometimes not (Decker, Tr. 257–258). Her participation in the advertising program under the pseudonym "Decker Advertising" was for the purpose of getting a rebate for ADF (Decker, Tr. 267–268). While Mrs. Decker admitted she had some "input" on the revised sales tag, Mr.

Auslander had the final say on everything (Decker, Tr. 272). In handling customer complaints, she became a detective and talked to everyone involved with the customer and ultimately took it to Mr. Auslander for final resolution (Decker, Tr. 299).

24. In sum, Mrs. Decker was an employee of corporate respondent ADF, certainly a very loyal and hardworking employee, whose duties after Mr. Auslander's heart attack were those of "a general assistant" to Mr. Auslander (Auslander, Tr. 159). Carrying on the business while Mr. Auslander was disabled was basically a singular occurrence under special circumstances.

25. Neither the duties of Mrs. Decker as a general assistant to Mr. Auslander, nor the conduct of the business while Mr. Auslander was disabled, is sufficient to attribute to Mrs. Decker the responsibility for formulation, direction or control of the acts and practices of corporate respondent ADF.

As Mrs. Decker stated it, there are two big issues concerning her individual responsibility—advertising and taking over operation of the business while Mr. Auslander was incapacitated. As regards these issues, she testified:

> * * * Under the advertising aspect of it I certainly have no training per se in advertising. I copied 100 percent what I had seen two advertising agencies do, and the only reason I did it was to save the company money. So the mistakes that were made there were made strictly because I was copying somebody else's work. That is all I had to go by.
>
> Regarding my taking-over situation when he was in the hospital I—to say the very least, I am very fond of the man. * * * The whole idea was to keep morale up, and keep sales up, and get rid of many problems before he comes back. * * * I wanted as much as possible for him to think everything was under control. * * * I feel I am being persecuted by the Federal Government because of what was really a humanitarian act. That is what it amounts to (Tr. 329–330).

Individual Respondent Sandra Tye

26. Individual respondent Sandra Tye has been employed by ADF for over nine (9) years (Tye, Tr. 363). She has been vice president of ADF at least since 1970 (Auslander, Tr. 123, 124; Tye, Tr. 334). For the last four years Mrs. Tye has been in charge of ADF's warehouse operation (Tye, Tr. 89, 334). Her duties consist of receiving all the merchandise which comes from the factories, and shipping all merchandise out to customers (Tye, Tr. 89, 338). Mrs. Tye also has worked part-time as a sales person for ADF in addition to her warehouse duties (Tye, Tr. 344). She has, on occasion, trained other ADF employees in sales work (Tye, Tr. 363–364). She has authority to sign payroll checks and to sign checks for freight bills (Tye, Tr. 356–357).

Mrs. Tye is a salaried employee of ADF; she does not participate in any profit sharing arrangement or receive a commission (Tye, Tr. 353, 364), and she does not own any stock in ADF (Tye, Tr. 335).

27. At one time ADF operated three warehouses, located at 701 Edgewood Street, N.E., Wash., D.C., Fourth and Channing Street, N.E., Wash., D.C., and 7451 Race Road, Hanover, Md. The Channing Street warehouse was used as a storage area (Tye, P. Tr. 91–92; Tye, Tr. 336). In 1972, the Race Road warehouse was completed and opened, enabling ADF to close the other two warehouses (Tye, Tr. 337).

28. Mrs. Tye handled some consumer complaints coming into the warehouse (Tye, Tr. 340–341, 349, 352). These complaints were handled without reference to Mr. Auslander (Tye, Tr. 341).

29. At the time of Mr. Auslander's heart attack, Mrs. Tye "only did what I have been doing before and anything that the two of us [Mrs. Decker and Mrs. Tye] would try to work out but we didn't do anything differently that was not being—hadn't been done. We tried to piece up things" (Tye, Tr. 354–355). Mrs. Tye worked with Mrs. Decker, mostly by telephone, during Mr. Auslander's absence, since Mrs. Tye had a full schedule operating the warehouses (Tye, Tr. 354, 355; Decker, Tr. 246). Payments due to furniture manufacturers were held until Mr. Auslander returned to work—"the factories were quite understanding" (Tye, Tr. 356).

30. Mrs. Tye was well-acquainted with the problems of late delivery of merchandise, the failure to lay away merchandise for customers, the delivery of damaged merchandise, and the failure to deliver merchandise identical to the items ordered by a customer (Tye, Tr. 338–339, 343, 347, 348, 350–351, 357–361). As the person in charge of the warehouse, she personally participated in these admittedly unlawful acts and practices of corporate respondent ADF.

31. Testimony by Mrs. Tye indicates that the delivery problems alleged in the complaint—the delayed deliveries, the failure to lay away customers' orders, the delivery of damaged merchandise, and the failure to deliver merchandise identical to that ordered by a customer were due to inadequate warehouse space and incompetent warehouse personnel (Tye, Tr. 341–343, 348, 357; Auslander, Tr. 150, 192–193). Theft was also a serious problem at the warehouse (Tye, Tr. 348). Mr. Auslander was aware of the warehouse conditions, the lack of space and the problems with theft. The Race Road warehouse was constructed to alleviate these problems (Tye, Tr. 342, 357–358; Auslander, Tr. 192).

32. Mr. Auslander testified that he made all policy in the warehouse (Auslander, Tr. 129), and that he set up the inventory and storage controls in the warehouse (Auslander, Tr. 192). Further, he established the guidelines for handling customer complaints (see Finding 23). Mr. Auslander testified that "basic policy was absolutely originating with me" (Auslander, Tr. 145–146). Since Mr. Auslander was responsible for basic policy, and since he was well aware of the warehouse problems

faced by Mrs. Tye, it is concluded that it was his responsibility that the acts and practices of ADF, admitted to be unlawful, occurred.

33. Mrs. Tye was basically an employee of ADF, a hard working employee (Tye, Tr. 342–344). She was not responsible for the formulation, direction or control of the acts and practices of ADF. The fact that she was a corporate vice president is of little significance, as she did not do anything differently than before she was made a corporate official—"it didn't mean anything" (Tye, Tr. 356, 364).

34. Prior to issuance of the complaint herein, respondents signed a consent agreement, not a part of the adjudicative record, wherein individual respondents Linda Decker and Sandra Tye agreed to individual responsibility for the acts and practices of ADF (Decker, Tr. 325). Complaint counsel questioned both Mrs. Decker and Mrs. Tye about their reasons for signing such an agreement and later denying individual responsibility for the complaint allegations.

Mrs. Decker testified:

Q. Why were you two still left in? Who insisted on it?
A. It is hard to explain.
Q. Was it a situation sign or you don't work for ADF anymore?
A. No. I am sure it would not be true. It became a loyalty issue without saying anything.
Q. Loyalty issue?
A. You are either with the company or not.
Q. Sink or swim.
A. I might add that at that point I found it inconceivable that it could go through.
* * * (Tr. 326–327).

Mrs. Ty testified:

Q. You signed a Consent Agreement, did you not?
A. Yes, I did.
Q. Would you explain how that came about?
A. Yes. Mr Auslander had been meeting with the attorneys and one of the attorneys brought the agreement to me to sign and I signed it. I would in no way upset Mr. Auslander. He is a very ill man and I owe a great deal to him.
Q. You signed the agreement without knowing anything about it?
A. That is correct.
Q. Because Mr. Auslander wanted to have it signed?
A. That is correct (Tr 362).

Mr. Auslander testified that is was his own "stupidity" which permitted Mrs. Decker and Mrs. Tye to sign the consent agreement which was very injurious to them (Tr. 151–152). He testified:

Q. To your knowledge, nobody ever brought to the attention of the Commission that these two women were not, in fact, responsible for the acts and practices complained about in the complaint?
A. I know, really it is strictly my fault and my stupidity or negligence.

Q. These two women executed an agreement, were they consulted about that, as to what they were signing?

A. At the time, I was so disturbed about this thing, I think that both of them in their aim to possibly pacify me and because of my condition, whatever, I think they probably would have gone along with most anything.

Q. A great sense of loyalty?

A. Yes, even though—exactly even though something was very injurious to themselves (Tr. 151–152).

The events surrounding the execution of the consent agreement shed illumination over the other issues raised by the complaint. The participation of individual respondents Linda Decker and Sandra Tye in the admittedly unlawful acts set forth in the complaint occurred out of employee loyalty, not corporate responsibility.

CONCLUSIONS

Corporate respondent Auslander Decorator Furniture, Inc. and individual respondent Maxwell Auslander have, by their Second Amended Answer, admitted all the material allegations of the complaint. This Second Amended Answer was filed with the Commission on June 11, 1973 and accepted for filing in the record herein by order of the undersigned dated June 20, 1973.

Under Section 3.12(b)(2) of the Commission's Rules of Practice, it is provided that the complaint and the admitting answer will provide a record basis on which the administrative law judge shall file an initial decision, including an appropriate order. Accordingly, the undersigned has, in this case, ruled that the complaint allegations and said respondents' Second Amended Answer shall constitute the record basis for this decision regarding said respondents (Order Denying Complaint Counsel's Motion To Reconsider Order Limiting Proof Complaint Counsel May Offer To Corroborate Admitted Complaint Allegations, dated July 13, 1973; Tr. 115). The findings of fact relating to these two respondents are based entirely on their admission answer. Therefore, the only issues remaining as to these respondents are the scope of the remedy and whether the remedy should be made applicable to Maxwell Auslander in his individual capacity.

Individual Respondent Maxwell Auslander

Respondent Maxwell Auslander, by virtue of the Second Amended Answer filed herein on June 11, 1973, has admitted that he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in the complaint. This answer includes the admission that the acts and practices enumerated in Paragraphs Four, Five, Seven and Eight of the complaint are false, misleading and deceptive, and that respondents' use of the aforesaid false,

misleading and deceptive statements, representations, acts and practices have had, and now have, 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 complete, and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief. Thus, respondent Maxwell Auslander has admitted that he is personally responsible for the unlawful acts and practices of the corporate respondent.

Respondents ADF and Maxwell Auslander argue that individuals have only been included in orders when it appeared that such course was necessary to prevent evasion of the order, referring to the Supreme Court's decision in *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112 (1937) (RPF, p. 17). The record in this case, according to respondents, is devoid of any evidence that respondent Maxwell Auslander must necessarily be individually joined in the order because a possibility of evasion exists.

It is admitted that Maxwell Auslander formulates, directs and controls the acts and practices of corporate respondent ADF, including the acts and practices admitted to be deceptive and therefore unlawful. Thus, individual respondent Maxwell Auslander's dominion and control over corporate respondent ADF is without dispute.

Because of these undisputed facts, it is believed necessary to subject Maxwell Auslander personally to the order. It is not necessary to demonstrate an intent to evade the order, or even a probability of evasion of the order, to hold an individual respondent personally liable. As the Commission stated in *Coran Bros. Corp., et al.*, Docket No. 8697, 72 F.T.C. 1, 25 (July 11, 1967):

> The public interest requires that the Commission take such precautionary measure as may be necessary to close off any wide "loophole" through which the effectiveness of its orders may be circumvented. Such a "loophole" is obvious in a case such as this, where the owning and controlling party of an organization may, if he later desires, defeat the purposes of the Commission's action by simply surrendering his corporate charter and forming a new corporation, or continuing the business under a partnership agreement or as an individual proprietorship with complete disregard for the Commission's action against the predecessor organization.

The undersigned is entirely in accord with the above reasoning. Although the record as to Maxwell Auslander does not show his extent of ownership, it does demonstrate his complete dominion over the acts and practices of the corporate respondent. The record does establish that individual respondents Linda Decker and Sandra Tye do not own any stock in ADF. The record further establishes that Maxwell Auslander appoints officers of ADF (Linda Decker was made a vice president)

without even informing the individual of this fact. Further, numerous corporate devices are utilized in the operations of ADF, *i.e.*, ADF Lexington Park and ADF Manassas, Va. (Tye, Tr. 335; Auslander, Tr. 125; Decker, Tr. 240). Further, in 1964 the Commission issued a cease and desist order against Maxwell Auslander individually and ADF Warehouse, Inc., apparently a different corporate device than the present corporate respondent *(ADF Warehouse, Inc., et al.*, Docket No. 8645, 66 F.T.C. 1267).

By simply surrendering the present corporate charter, and utilizing other existing corporations, any Commission order issued solely against corporate respondent ADF could be evaded. As a simple precautionary measure, such an obvious "loophole" should be closed. It is well settled that the choice of the remedial order is committed to the discretion of the Commission. *Federal Trade Commission* v. *Mandel Bros.*, 359 U.S. 385, 392–93 (1959); *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1960); *L. G. Balfour Co.* v. *Federal Trade Commission*, 442 F.2d 1 (7th Cir. 1971). Moreover, " * * * once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States* v. *E. I. du Pont de Nemours & Co., et al.*, 366 U.S. 316, 334 (1961).

Thus, it seems most appropriate here to include individual respondent Maxwell Auslander within the scope of the remedy. As the Fourth Circuit stated in *Pati-Port, Inc., et al.* v. *Federal Trade Commission*, 313 F.2d 103, 105 (1963):

> To the foregoing we might add the comment that it would seem in cases of this sort to be a futile gesture to issue an order directed to the lifeless entity of a corporation while exempting from its operation the living individuals who were responsible for the illegal practices.

Individual Respondents Linda Decker and Sandra Tye

Individual respondents Linda Decker and Sandra Tye, in their Second Amended Answer, admitted the allegations of the complaint, except that said respondents deny that:

> (1) they participate or have participated as individuals in any of the acts or practices alleged in the complaint, and
>
> (2) they formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint.

It is concluded that individual respondents Linda Decker and Sandra Tye did not formulate, direct or control the acts and practices of ADF. The record clearly establishes that "the decisions or basic policy was absolutely originating with" Maxwell Auslander, the president of ADF (Auslander, Tr. 145–146). Linda Decker and Sandra Tye were essen-

tially employees of ADF, who worked under Mr. Auslander's direction and supervision. They owned no stock in the corporation and received only a salary, with no commission or percentage of profits. The fact that each was a vice president of the corporation is not sufficient to import control over the corporate activities. Linda Decker did not even know when she was made an officer of ADF. She testified:

> * * * I was told after it had been done. I am sure he thought he was being complimentary, and I would enjoy it, although I had said previously that I did not want to (Tr. 241).

Sandra Tye testified as to her designation as vice president of ADF:

> At that time I thought it was a title because we had so many offices and I didn't do anything differently than I had done before (Tr. 356).

Complaint counsel rely upon several previous decisions as a precedent for including Sandra Tye and Linda Decker individually in a cease and desist order (CPF, pp. 13–17). It is unquestioned that an individual may be personally subjected to a Commission order where the circumstances so warrant. The decisions referenced by complaint counsel all have the element of control or responsibility for the corporate acts. In *Standard Distributors, Inc., et al.* v. *Federal Trade Commission*, 211 F.2d 7, 15 (2d Cir. 1954), the very language quoted by complaint counsel states that an order may include those officers "in top control of the activities" of the corporation. In *Cotherman, et al.* v. *Federal Trade Commission*, 417 F.2d 587 (5th Cir. 1969), a corporate vice president, who was second in command of the corporation and who actively participated in the unlawful practices, was held individually liable. He was also a stockholder and had had previous experience in the industry before joining respondent. *In the Matter of Allenton Mills, Inc., et al.*, 60 F.T.C. 1630, 1641 (1962), the Commission found that the operations of the respondents were conducted strictly as a family arrangement, and that the corporate identities were a fiction. Ownership, direction and control were found to exist with the individual respondents, although each individual looked for guidance to one respondent, Max Furman. In *Surf Sales Company, et al.* v. *Federal Trade Commission*, 259 F.2d 744 (7th Cir. 1958), the manager of the corporation was named individually in the order, but here again the Court concluded that the individual "had and did exercise authority, responsiblity and direction of the affairs" of the corporation (*Id.* at 747).

Consequently, since the record is devoid of evidence of actual control or responsiblity by Sandra Tye and Linda Decker over the affairs of ADF, and since their participation in the unlawful acts and practices of ADF was that of employees working under the direction and supervision of Maxwell Auslander, it is concluded that any remedy entered

herein should bind these two respondents only in their corporate capacity, and not as individuals.

The Remedy

Complaint counsel have proposed an order in strict accordance with the order served with the complaint. Complaint counsel argue that the proposed order is well within the periphery of the Federal Trade Commission's authority to issue remedial orders, and has, at the very least, a reasonable relation to the unfair and deceptive acts and practices admitted by respondents' Second Amended Answer.

Respondents have admitted that, in many instances, they (1) do not deliver merchandise to customers on or near the delivery dates promised, (2) do not maintain in their warehouse adequate stock to insure delivery on the promised delivery dates, and (3) do not store layaway items, necessitating reordering of the merchandise with resultant delays in delivery.

Respondents have admitted that, in many instances, they (1) deliver merchandise to customers which is different from that which the customers have selected, and do not replace such merchandise within a reasonable time and in accordance with promises and representations made to respondents' customers, and (2) deliver damaged or defective merchandise, and do not repair or replace such merchandise within a reasonable time, to the satisfaction of the customers, nor in accordance with promises and representations made to respondents' customers.

The order proposed by complaint counsel redresses these unfair and deceptive acts and practices by requiring respondents to inform all customers, orally and in writing on the contracts, of their right to cancel the contracts with a refund within ten (10) days from the date of delivery of defective or damaged merchandise, or merchandise not identical to that ordered, and requiring a refund of all monies to customers who request contract cancellation. The proposed order provides that respondents may, with the written consent of such aggrieved customers, repair or replace such damaged or defective merchandise. These provisions exempt the delivery of merchandise sold "as is" if such sales are so designated on the sales contracts, and the sale of damaged or defective merchandise is to customers who have knowledge of the damage or defect and have given written consent to purchasing same. The proposed order also requires respondents to maintain adequate records for two years in order to enable the Commission to verify compliance with these provisions of the proposed order.

Respondents have admitted that, in many instances, they have falsely and deceptively represented that merchandise being offered for sale constituted a reduction from the actual bona fide price at which such

merchandise was sold or offered for sale by respondents to the public on a regular basis for a reasonably substantial period of time in the recent, regular course of their business. The proposed order prohibits misrepresentations of this type, and provides for the retention of adequate records for a period of two years in order to enable the Commission to verify compliance with this provision.

The proposed order further requires that respondents (1) prominently post the cease and desist order in their salesrooms with notice that customers may receive a copy thereof, (2) deliver a copy of the order to their operating divisions and employees, and (3) notify the Commission of a change in the individual respondent's employment and the nature of his new employment, and any change in the corporate respondent which may affect compliance obligations with the order.

Respondents ADF and Maxwell Auslander object to the proposed order on the grounds that certain provisons go beyond the scope of what the Commission may lawfully require, that certain provisions go beyond what is reasonably necessary to correct admittedly unlawful acts and practices of respondents, and that certain provisions are unsupported by the record (RPF, pp. 11–13). Respondents argue that certain provisions of the order will drastically affect respondents in the lawful conduct of their business; and that, taken as a whole, they are so unreasonable in relation to the record as to be penalizing rather than remedial. Respondents therefore urge that these provisions be stricken from any order issued herein (RPF, p. 41).

Respondents particularly object to the order provision requiring respondents to post in a prominent place a copy of the order and provide any customer or prospective customer with a copy thereof upon demand, as being punitive in nature, and subjecting respondents to humiliation and embarrassment (RPF, pp. 14, 33). Respondents also argue that the admitted unfair, misleading and deceptive acts and practices relate to representations, statements and promises made orally and in various advertisements, posters and signs. There is nothing in the record to indicate that respondents' written invoices or sales contracts are in any way unfair, misleading or deceptive. By requiring respondents to cease and desist from making any such unfair or deceptive representations, the evils found to have existed will be effectively eliminated. To go beyond this and to require respondents to alter the terms and conditions in their sales contracts violates the Supreme Court's test announced in *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608 (1946), which requires that the remedy must relate to the violation found. Respondents argue that these provisions bestow specific rights upon respondents' customers and saddle respondents with obligations which respondents' competitors are left free to contest.

Respondents also argue that the Commission seeks to confine the use of the words "sale," or "buy now and save," or any other word or words of similar import or meaning, to situations where the price of such merchandise being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business. This restriction is too narrow in view of the Commission's own guidelines and its interpretation of their meaning.

The undersigned has carefully reviewed the provisions of the proposed order served with the complaint and recommended by complaint counsel. Certain changes have been made by the undersigned in this proposed order. The provisions of the order entered herein do have a reasonable relation to the practices found to be unlawful, and are, in fact, necessary to bring an end to and prevent recurrence of such unlawful practices. *Jacob Siegel Co.* v. *Federal Trade Commission, supra.*

Commission orders requiring alteration of contracts and providing for similar types of refunds have been upheld by the courts. The Fifth Circuit Court of Appeals has upheld a Commission order requiring respondents to (1) incorporate on their contracts a seven-day cooling off period and (2) limit the amount of their contracts to $1500. *Arthur Murray Studio of Washington, Inc., et al.* v. *Federal Trade Commission,* 458 F.2d 622 (5th Cir. 1972). The Third Circuit Court of Appeals has upheld Commission authority to order respondents, *inter alia,* to refund all monies to customers who have requested contract cancellation in writing within three days from the execution thereof, or those customers who indicate that they are not satisfied with respondents' products. *Windsor Distributing Company* v. *Federal Trade Commission,* 437 F.2d 443 (3rd Cir. 1971). Thus, it is clear that the Commission has the power, in its discretion, to direct whatever relief is reasonably necessary, including the alteration of contracts and prohibition of lawful practices, to prevent not only the unlawful practices found to exist but a recurrence of such unlawful practices. *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 (1958).

The relation between the violation (nondelivery of merchandise or delivery of damaged or defective merchandise and the unlawful retention of customers' monies) and the remedy (establishing dates certain for delivery of merchandise and refunding monies unless respondents deliver on dates promised, repair or replace said merchandise promptly and satisfactorily) is direct, specific, and necessary, and is framed to bring the illegal conduct to an end. By placing these customer rights on

order forms, sales contracts and invoices, the customer will be certain to have in writing the understanding between the parties, and compliance with the order will be assured and monitored by customers. By placing such notices in writing, customers will actually be informed in writing of their rights under the order. The posting of the order will thus be unnecessary to protect customers' rights under the order entered herein.

Complaint counsel have only proposed a one-year posting requirement, and it is difficult to see what such a one-year requirement will accomplish over the long haul. If the posting requirement is necessary for one year, which complaint counsel have not demonstrated, it should be necessary indefinitely. Since the order has been somewhat restructured by the undersigned to require more customer information on documents connected with the sales transactions, the posting provision has been eliminated.

The undersigned has also revised the proposed order to require delivery within five (5) business days of the agreed upon delivery date. Complaint counsel's proposal extended respondents no leeway whatsoever on delivery dates, while respondents proposed an order requiring delivery "on or near the agreed delivery dates" (RPF, p. 6). The undersigned is of the belief that a specific time frame must be included in the order and that respondents must be given some latitude on delivery for such unforeseen occurrences as weather, equipment failure, work stoppages, or where help unexpectedly fails to report for work. Since severe penalties may attach for each order violation, some leeway is appropriate.

The order provision dealing with use of the words "sale" or "buy now and save" is designed to correct the violation of law which has been admitted. Respondents' unlawful advertising claims represent "savings" claims, not comparative claims. The order, as drafted, does not prohibit comparative advertising, if respondents choose to do such advertising in the future, and if respondents otherwise comply with the Commission's Trade Practice Rules for the Household Furniture Industry (CRB, pp. 12–15).

The remaining provisions of the order entered herein relate to record keeping requirments and reporting requirements. Such provisions have been utilized in numerous Commission orders in the past and are deemed necessary herein to enable the Commission to monitor compliance with the order as entered.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the respondents and this proceeding is in the public interest.

2. Respondent Auslander Decorator Furniture, Inc., doing business as A.D.F. and A.D.F. Warehouse, is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 7451 Race Road, Hanover, Md.

3. Respondent Maxwell Auslander is an individual and is president of corporate respondent Auslander Decorator Furniture, Inc. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint issued herein. His address is the same as that of the corporate respondent.

4. Respondent Sandra Tye is an individual and is a vice president of corporate respondent Auslander Decorator Furniture, Inc. Her address is the same as that of the corporate respondent.

5. Respondent Linda Decker is an individual and was, from Nov. 1971 until May 31, 1973, a vice president of corporate respondent Auslander Decorator Furniture, Inc. Her present home address is 1418 Kensington Place, Crofton, Md. Respondent Linda Decker is no longer employed by the corporate respondent.

6. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of furniture and related products to the public at retail.

7. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the District of Columbia to purchasers thereof located in various States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act (15 U.S.C. 41–58).

8. In the course and conduct of their business as set forth in the complaint and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by the respondents.

9. In the course and conduct of their business as set forth in the complaint and for the purpose of inducing the sale of their merchandise, respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by materials disseminated through the mails, and on tags or labels and in signs posted in respondents' stores. In addition to the aforesaid statements and representations, respondents

and their sales representatives have made, and are now making, numerous oral statements to customers and prospective customers regarding the terms and conditions under which merchandise will be sold and delivered and services provided by respondents. By and through the use of these statements and representations, respondents have represented, and are now representing, directly and by implication, that: (1) respondents will deliver their furniture to customers on or near the dates they have promised those customers for delivery; (2) respondents maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised dates; (3) respondents' customers may purchase furniture on the layaway plan, and, while the payments are being made, the furniture will be stored in their warehouse, ready for delivery upon completion of all payments; and (4) respondents are offering furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

In truth and in fact: (1) respondents, in many instances, do not deliver their furniture to customers on or near the dates they have promised those customers for delivery; (2) respondents, in many instances, do not maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised delivery date; (3) furniture purchased by respondents' customers on the layaway plan is not, in many instances, stored in the warehouse ready for immediate delivery upon completion of all payments, but is sold to other customers, necessitating reordering of the merchandise when the layaway payments are completed, with resultant delays in delivery; and (4) respondents, in many instances, do not offer furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

The aforesaid statements and representations are false, misleading and deceptive.

10. In the course and conduct of their business as set forth in the complaint and for the purpose of inducing the sale of their merchandise, respondents have maintained, and are now maintaining, in their salesrooms, floor models and displays of furniture being offered for sale, on the bases of which their customers select and order the furniture they purchase from respondents. In this connection, respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the quality and durability of the furniture being offered for sale, the terms and conditions under which merchandise will

be sold and delivered, and the services that will be provided by respondents. Moreover, subsequent to making sales and deliveries, respondents and their employees have made, and are now making, numerous oral statements, representations and promises to their customers regarding the time and the manner in which respondents will perform various adjustments, replacements and/or repairs.

By and through the use of floor models and furniture displays, together with the aforesaid oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, and are now representing, directly or by implication, that: (1) furniture which is delivered to respondents' customers will be identical to that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays; (2) furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays will be replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees; (3) furniture which is delivered to respondents' customers will be free from damages and/or defects; (4) furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced within a reasonable time; (5) furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced to the satisfaction of the purchasers; and (6) furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced in accordance with promises made to the purchasers by respondents' employees.

In truth and in fact: (1) furniture is delivered to customers which, in many instances, is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays; (2) furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, in many instances, is not replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees; (3) furniture delivered to purchasers, in many instances, is damaged and/or defective; (4) furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced within a reasonable time; (5) furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced to the satisfaction of the purchasers; and (6) furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced

in accordance with promises made to the purchasers by respondents' employees.

The aforesaid acts, practices, statements and representations are false, misleading and deceptive.

11. Respondents' use of the aforesaid false, misleading and deceptive statements, representations, acts and practices have had, and now have, 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 complete, and into the purchase of substantial quantities of respondents' merchandise by reason of such erroneous and mistaken belief.

12. The aforesaid acts and practices of respondents, as herein concluded, were, and are, all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair or deceptive acts and practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

ORDER

It is ordered, That respondents Auslander Decorator Furniture, Inc., a corporation, its successors and assigns, and its officers, and Maxwell Auslander, individually and as an officer of Auslander Decorator Furniture, Inc., and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, sale and distribution of furniture and other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

(1) Failing to state, in writing, on the face of all order forms and sales contracts executed by customers, and on all invoices covering the sale of merchandise to customers, in conspicuous language likely to be read and understood by the customer, the dates for delivery of such merchandise agreed to by respondents and their customers at the time of the execution of the order or contract or the date of sale, and that respondents will refund all monies paid by such customers in the event such delivery is not made within five (5) business days of the agreed delivery dates, unless such customers agree in writing to extensions of the delivery dates.

(2) Failing to deliver merchandise to customers within five (5) business days of the agreed delivery dates, or failing to refund immediately all monies paid by such customers in the event such

delivery dates are not met by respondents, unless the customers agree, in writing, to extensions of the delivery dates.

(3) Misrepresenting orally or in writing, directly or by implication, the availability of merchandise in stock for delivery by specific dates.

(4) Selling merchandise to customers on the layaway plan, unless such merchandise is physically set aside, in storage, for delivery to such customers upon the completion of the layaway payments, in accordance with the provisions of Subparagraphs (1) and (2) hereinabove.

(5) For a period of two (2) years from the effective date of this order, failing to maintain and produce for inspection and copying by the Federal Trade Commission upon ten (10) days' notice, adequate records (a) which disclose the history of all orders, sales and deliveries; and (b) from which it can be determined whether or not merchandise was available in stock for delivery as of specific dates.

II

(1) Using the words "sale," "sale price," "warehouse sale," "clearance sale," "savings," or "buy now and save," or any other word or words of similar import or meaning, unless the price of such merchandise being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual *bona fide* price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business.

(2) For a period of two (2) years from the effective date of this order, failing to maintain and produce for inspection and copying by the Federal Trade Commission upon ten (10) days' notice, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations of the type described in Subparagraph (1) hereinabove are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

III

It is further ordered, That respondents shall:

(1) Inform, orally, all customers at the time of sale and provide in writing on the face of all order forms and sales contracts executed by customers, and on all invoices covering the sale of merchandise to customers, in conspicuous language likely to be read and under-

stood by the customer, that the customer may cancel the contract with a refund of all monies theretofore paid to respondents by notification to respondents in writing within five (5) days from the date of actual delivery of the merchandise, where the merchandise delivered to a customer is defective or damaged, or is not identical to the merchandise ordered by the customer; *Provided, however,* That the provisions of this subparagraph shall not apply to merchandise sold "as is," such sales to be so designated specifically on the order forms, sales contracts and invoices utilized in connection with such sales transactions, nor to sales of merchandise to customers who have knowledge of damage to, or defects in, the particular merchandise and have given written consent to purchasing same in its stated condition.

(2) Refund immediately all monies to customers who have requested contract cancellation in accordance with the provisions of Paragraph III(1) above; *Provided, however,* That, in lieu of making such a refund, respondents may, with the written consent of, and with no additional cost to, the customer, replace or repair defective or damaged merchandise, such replacement or repair to be fully, satisfactorily, and promptly performed. In such a case, the customer who consents to accept replacement or repair in lieu of a refund, may cancel the contract with a refund of all monies by notification to respondents in writing within five (5) days from the date of actual delivery of any replacement or repaired merchandise that is itself defective or damaged.

(3) For a period of two (2) years from the effective date of this order, maintain and produce for inspection and copying by the Federal Trade Commission upon ten (10) days' notice, adequate records to disclose the facts pertaining to the receipt, handling and disposition of each and every communication from a customer, oral or written, requesting contract cancellation, refund, replacement or repair.

IV

(1) *It is further ordered,* That respondents deliver a copy of this order to all present and future employees or other persons engaged in the preparation and placing of respondents' advertisements, and the offering for sale, or sale, of respondents' products, and secure from each such employee or other person a signed statement acknowledging receipt of said order.

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

(3) *It is further ordered,* That the individual respondent Maxwell

Auslander promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include said respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

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

(5) *It is further ordered,* That respondents shall, within sixty (60) days from the effective date of this order, notify the Commission in writing of the manner and form in which each has complied with this order.

(6) *It is further ordered,* That the complaint be, and it hereby is, dismissed as to respondents Sandra Tye and Linda Decker as individuals.

ORDER AND OPINION DENYING MOTION FOR EXTENSION OF TIME FOR FILING OF NOTICE OF INTENTION TO APPEAL AND FOR FILING APPEAL BRIEF AND FINAL ORDER AND DECISION OF THE COMMISSION

This matter is before the Commission on the motion for extension of time for filing of notice of intention to appeal and for filing appeal brief of respondents Auslander Decorator Furniture, Inc. and Maxwell Auslander. Also before the Commission are complaint counsel's opposition to motion for extension of time for filing of notice of intention to appeal and for filing appeal brief, and respondents' answer to opposition of motion for extension of time.

Section 3.52(b), Subpart F, Part 3 of the Commission's Rules of Practice states that a party's right to appeal an initial decision is conditioned upon his filing of a notice of intention to appeal within 10 days after he is served with said initial decision. Movants have failed to do so, conceding that they were served on March 11, 1974, and did not even attempt to appeal or file any notice of such intention until at least April 2, 1974. Notwithstanding this provision of the rules, respondents seek waiver by the Commission of the ten-day requirement.

Section 4.3(b), Part 4, of the Commission's Rules of Practice allows an extension of time limits provided for by the rules "for good cause

shown." The only showing of cause made by movants is that respondent Maxwell Auslander was busy serving as warehouse manager as well as chief executive officer of respondent Auslander Decorator Furniture, Inc., during the ten-day period provided by Rule Sec. 3.52(b). Respondents do not dispute the fact that counsel was served with the initial decision. The Commission is of the opinion that the filing of a notice of intention to appeal is not so burdensome that movants could not have filed one. The facts presented by respondents in extenuation are not persuasive. Under these circumstances, we do not believe that the failure to so file is excused by good cause. Accordingly,

It is ordered, That respondents' motion for extension of time for filing of notice of intention to appeal and for filing of appeal brief be, and it hereby is, denied.

It is further ordered, That the initial decision and order of the administrative law judge be, and hereby are, adopted as the decision and final order of the Commission.

IN THE MATTER OF

FOOD FAIR STORES, INC., ET AL.

Docket 8935. Interlocutory Order, Apr. 23, 1974

Order denying respondents' motion for reconsideration of Commission's Mar. 19, 1974 denial of their application for review of administrative law judge's order denying their motion to quash or limit certain subpoenas *duces tecum*.

Appearances

For the Commission: *Lewis F. Parker and Robert Fleishman.*

For the respondents: *Shipley, Akerman, Stein & Kaps,* Wash., D.C. and *Stein & Rosen,* New York City.

ORDER DENYING MOTION FOR RECONSIDERATION

By order of Feb. 20, 1974, the administrative law judge in the above-captioned matter granted respondents leave to file an application for review of his order denying their motion to quash or limit certain subpoenas *duces tecum*. The order limited such review to the question of whether the subpoenas contravened the Commission's policy against "comprehensive postcomplaint investigations." By order issued Mar. 19, 1974, the Commission denied respondents' application for review on the ground that the internal policy guide against comprehensive post-complaint investigations is not a basis for quashing a subpoena *duces tecum*.

Respondents now move that the Commission reconsider this decision in order to resolve the alleged "state of confusion" which exists in the

law as to "what postcomplaint information complaint counsel are entitled to receive from respondents." If this motion is granted, respondents request that the Commission grant them permission to file briefs within five days after receipt of the Commission's order granting rehearing and that the Commission grant oral argument in the matter. Complaint counsel oppose this motion.

Despite repeated efforts by the Commission to clarify the meaning of its ruling in *All-State Industries of North Carolina, Inc.*, 72 F.T.C. 1020 (1967), the Commission has seen a proliferation of requests from both complaint counsel and respondents seeking guidance on the scope of discovery in the postcomplaint phase of litigation. Respondents Food Fair and Amterre's motion for reconsideration is founded entirely on an alleged lack of clarity in the Commission position on this subject.

In *All-State*, an administrative law judge issued an order granting complaint counsel access to respondent's files under Section 3.32 of the Rules of Practice and Procedure.[1] The respondent moved to quash the order, which motion was denied by the administrative law judge. In an interlocutory appeal to the Commission, respondent renewed its motion to quash, alleging as one of the grounds, that the order was "overly broad, basically investigative in nature and outside the scope of the Commission's intended discovery processes." 72 F.T.C. 1021.

In granting the motion to quash, the Commission drew a distinction between precomplaint investigations and postcomplaint discovery. The investigative phase of Commission inquiry was viewed as analogous to the role of a Grand Jury, "which does not depend on a case or controversy for power to get evidence, but can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 636 (1950). Such precomplaint investigative inquiries will be upheld as within the limits of fundamental fairness comporting with due process "if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant." 338 U.S. at 641.

The postcomplaint discovery phase was viewed differently. In an adjudicative proceeding, expeditious and fair hearings require that each side be fully apprised of the contentions and evidence of the other. Towards this end, both sides will be allowed discovery on each other as to matters placed in controversy by the Commission's complaint and the respondent's answer. Therefore, in any postcomplaint discovery, it is incumbent upon the moving party: 1) to justify the reasonableness of the scope of the discovery, 2) to demonstrate the relevance of the material

[1] This rule has since been rescinded by the Commission.

sought, and 3) to show that the inquiry is within the bounds of proper discovery.[2] The Commission viewed the order in *All-State* as an overly-broad investigative-type inquiry, inappropriate for the discovery phase. Complaint counsel had given neither the judge nor the Commission any justification for the broad language spelled out in the order,[3] nor had they satisfactorily explained that the material sought could not have been obtained by a more narrowly drawn order or by a less burdensome means.

Less than a year after *All-State*, the Commission was again confronted with a similar factual situation in *Lehigh Portland Cement Company*, 74 F.T.C. 1589 (1968). There complaint counsel sought specific evidentiary market data concerning five acquisitions. In overruling respondent's motion to quash in that matter, the administrative law judge carefully scrutinized complaint counsel's subpoena and found the scope of the inquiry reasonable, the material sought relevant to the issues in the case, and the subpoena within the bounds of proper discovery. Respondent appealed to the Commission, citing *All-State* as a severe limitation on the scope of postcomplaint discovery. In overruling respondent's motion, the Commission concluded that its policy, articulated in *All-State*, "of requiring complaint counsel to have evidence sufficient to support a *prima facie* case before issuance of the complaint, is merely an internal 'housekeeping' matter. It is not a matter of concern to a respondent or the hearing examiner in dealing with a request for discovery after complaint." 74 F.T.C. at 1590–91.

Contemporaneous with *Lehigh*, the Commission felt compelled to issue a "Supplemental Clarifying Opinion of the Commission" in regard to the original *All-State* opinion. 74 F.T.C. 1591 (1968). In this latter opinion, the Commission made the point that nothing in the first *All-State* opinion was meant to allow a respondent to "put into litigation the adequacy of the precomplaint investigation conducted by the Commission or its staff." 74 F.T.C. at 1592. To the extent that the first *All-State* opinion spoke of precomplaint internal guidelines for investigations, it did not thereby confer upon respondents a legal right to question the standards by which the Commission seeks to guide its staff. Were it otherwise, both the Commission and the reviewing courts "would be confronted by the well-nigh impossible task of determining * * * whether the precomplaint investigation was proper or sufficient. The proceeding would become converted into a trial of the scope and adequacy of the precomplaint investigation. To introduce such collateral matters into the hearing would invite inexcusable delay." 74 F.T.C. at 1592.

[2] That is, that the things sought are properly subject to discovery, and not privileged, statutorily exempt etc. See also Section 3.34 of the Rules of Practice and Procedure.

[3] Among other things, complaint counsel sought to inspect and copy "Records or files containing all correspondence relating to purchases, sales and advertising for the period January 1, 1965 to date." 72 F.T.C. at 1024–25.

The Commission further observed that its rules, like those of the Federal Rules of Civil Procedure, are designed to facilitate discovery "in the light of the issues raised by the complaint." Therefore, "A *discovery request* made by compalint counsel is not open to objection on the ground that the materials sought should have been in hand at the time of the issuance of the complaint." 74 F.T.C. at 1592 (emphasis added). The Commission drew no distinction between subpoenas and pretrial orders in making this declaration.

On July 27, 1973, the Commission issued an "Order Quashing Investigational Subpoena," in *Exxon Corporation, et al.*, Docket 8934 [83 F.T.C. 233]. There, respondents had moved to quash an investigational subpoena based on, among other grounds, the contention that *All-State* forbade investigational-type inquiry once adjudication had begun. While granting the motion to quash on other grounds,[4] the Commission observed that "the *All-State* opinion is not a basis for quashing a subpoena." Whatever had been said in that opinion about the staff's gathering of evidence prior to issuance of the Commission complaint was "an internal administrative guideline between the Commission and its staff" and could not be used "in opposition to a subpoena which otherwise meets the requirements set forth in the Commission's Rules of Practice." *Exxon*, at 2 [83 F.T.C. 234]

Finally, on Mar. 19, 1974, in an "Order Denying Application for Review" in the instant proceeding, *Food Fair Stores, Inc., et al.*, Docket 8935 [p. 1401, herein], the Commission declined to review the administrative law judge's decision to overrule respondents' alleged *All-State* restriction against "comprehensive postcomplaint investigation."

In the "Order Denying Review," the Commission once again attempted to lay to rest the controversy surrounding interpretation of *All-State*. *All-State* was never intended to "add to the requirements of subpoenas under Part III of the Rules." *Food Fair*, at [p. 1402, herein]. On the contrary, *All-State* spelled out internal guidelines for the conduct of precomplaint investigations and postcomplaint discovery.

Respondents seek reconsideration of this ruling. Although we have addressed this matter before, the Commission will endeavor to restate herein its position with regard to the matter of precomplaint investigations vis-a-vis postcomplaint discovery:

Commission investigations may be undertaken over a very wide scope, circumscribed only by the statutory limits on Commission authority and a reasonable relation between the material sought and the practices being investigated. At the conclusion of such an investigation

[4] On the grounds that the subpoena was issued under Part II of the rules, while the litigation had meanwhile passed from the Part II investigative phase to the Part III adjudicative phase.

the Commission will determine whether there is "reason to believe": 1) a violation of law has occurred, and 2) prosecution of the alleged violation would be to the interest of the public. 15 U.S.C. § 45(b). These are the *sole statutory* requirements for issuance of a Commission complaint. Other standards, determining the manner in which an investigation might be evaluated, are in the nature of internal guidelines between the Commission and the staff. The Commission alone, pursuant to statute, takes responsibility for the issuance of its complaints and the reasonable basis therefore.

Once a complaint is issued, and the discovery period commences, it is expected that requests for pretrial orders and subpoenas will define the reasonableness of the scope of the inquiry and set out the relevance of the material sought to the issues raised in the pleadings. Further, the things sought by means of discovery must be within the bounds of proper discovery. In making these determinations the administrative law judge has wide discretion.[5]

It shall not be a grounds to challenge complaint counsel's discovery to argue that the precomplaint investigation was the proper time to obtain the information sought, if such information is relevant to the issues raised in the pleadings. This is the holding of *All-State*, and reflects the position of the Commission. To the extent that *All-State* is in seeming conflict with the above, it is held confined to its own facts and not further controlling.[6]

We feel this interpretation of *All-State* has also been taken by the federal courts, in an appeal arising from the *Lehigh* case, *infra*. In *F.T.C.* v. *Browning*, 435 F.2d 96 (1970), the United States Circuit Court of Appeals for the District of Columbia denied that a challenge to postcomplaint discovery could be predicated on the alleged inadequacies of precomplaint investigation. The adequacy of a discovery request is determined by whether the request is reasonable in scope, the material relevant to the issues of the case, and the things sought within the proper bounds of discovery. The court upheld the issuance of the discovery subpoena in question.

In the instant proceeding, respondent attempts to obtain reconsideration of a denial for review of a Motion to Quash overruled by the

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[5] "The Commission recognizes that in the abstract, the meaning of 'discovery' is necessarily vague." *All-State Industries of North Carolina, Inc.*, 72 F.T.C. 1024 (1967). We believe it is initially within the administrative law judge's realm of expertise to make the necessary determinations of what is, or is not, proper discovery. His determinations will not be overturned absent a showing of a clear abuse of his discretion. *Warner-Lambert Co.*, Docket No. 8891 (Interlocutory Order, Sept. 18, 1973) [83 F.T.C. 485]; *Lehigh Portland Cement Company*, 74 F.T.C. 1589, 1590 (1968).

[6] Nor is *Curtiss-Wright Corporation*, 72 F.T.C. 1027 (1967) good authority for a contrary proposition. There the Commission remanded a subpoena issued under Section 3.34 of the rules in order to seek assurance that the administrative law judge had considered the requirements of 3.34 in light of the newly issued *All-State* ruling. Despite the dictum in that opinion, we are persuaded that the subsequent history of that case demonstrates that the *sole relevant* inquiry in authorizing discovery subpoenas lies within the language of 3.34. See 73 F.T.C. 1235 (1968).

administrative law judge. The judge had held that the Commission's policy against comprehensive postcomplaint investigations was not contravened by a discovery subpoena which specifically indicated the material to be produced and stated the relevancy of that material to the litigation, as well as the reasonableness of the scope of the subpoena. We declined review of this ruling on Mar. 19, 1974.[7] Respondent has raised no new issues in its motion for reconsideration, and merely refers to an alleged "state of confusion" in the law regarding the permissible scope of complaint counsel's discovery.

We note this recurrent theme in filings before the Commission despite our repeated efforts to guide counsel away from challenges to discovery procedures predicated on the alleged inadequacies of precomplaint investigation. While in the case now before us, we have no reason to suspect the misuse of the appeal process to delay adjudication, we are hopeful that henceforth counsel will think again before recourse to the *All-State* tactic. Accordingly,

It is ordered, That respondents' motion for reconsideration, including their request for briefing and oral argument, be, and it hereby is, denied with prejudice.

IN THE MATTER OF

EDU-CARDS CORPORATION

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

Docket 8924. Complaint, Apr. 13, 1973—Decision, Apr. 24, 1974

Consent order requiring a Commack, N.Y., manufacturer of toy, gift and hobby products, among other things to cease packaging its products in oversized containers creating appearance or impression that contents contained therein are of a greater size or quantity than is the fact.

Appearances

For the Commission: *Herbert S. Forsmith.*

For the respondent: *Bruce Aldecker, of Shea, Gould, Climenko & Kramer,* New York, N.Y.

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

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[7] The administrative law judge is responsible for the conduct of adjudicative proceedings, and his rulings on procedural matters are subject to interlocutory review only in accordance with the requirements of Section 3.23 of the Commission's Rules of Practice and Procedure.

Commission, having reason to believe that Edu-Cards Corporation, a corporation, hereinafter referred to as respondent, has violated the provisons of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Edu-Cards Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 60 Austin Boulevard, Commack, N.Y.

PAR. 2. Respondent now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of toy, gift and hobby products to jobbers and retailers for resale to the public.

PAR. 3. In the course and conduct of its business, respondent now causes, and for some time last past has caused, said products, when sold, to be shipped from its place of business in the State of New York to purchasers thereof located in various other States of the United States, and maintains, and at all times mentioned herein has maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Among the products which are offered for sale and sold by the respondent are a number of toy, gift and hobby products. Through the use of certain methods of packaging, respondent has represented, and has placed in the hands of others the means and instrumentalities through which they might represent, directly or indirectly, that certain of the above products, as depicted or otherwise described on the exteriors of packages, corresponded, in their lengths and widths, or their lengths, widths and thicknesses, with the boxes in which they were contained, and that others of such products were offered in quantities reasonably related to the size of the containers in which they were presented for sale.

PAR. 5. In truth and in fact, such products often have not corresponded with their container or package dimensions and are often not offered in quantities reasonably related to the size of the containers or packages in which they are presented for sale. Purchasers of such a product are thereby given the mistaken impression that they are receiving a larger product or a product of greater volume than is actually the fact.

Therefore, the methods of packaging referred to in Paragraph Four hereof were and are unfair and false, misleading and deceptive.

PAR. 6. In the conduct of its business, at all times mentioned herein, respondent has been in substantial competition, in commerce, with

corporations, firms and individuals in the sale of products of the same general kind and nature as the products sold by the respondent.

PAR. 7. The use by respondent of the aforesaid unfair, false, misleading and deceptive methods of packaging has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that the quantum or amount of the product being sold was and is greater than the true such quantum or amount, and into the purchase of substantial quantities of respondent's product by reason of said erroneous and mistaken belief.

PAR. 8. The aforesaid acts and practices of the respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint on Apr. 13, 1973, charging the respondent named in the caption hereof with violation of the Federal Trade Commission Act, and the respondent having been served with a copy of that complaint, together with a proposed form of order; and

The Commission having duly determined upon motion submitted by the respondent that, in the circumstances presented, the public interest would be served by a withdrawal of the matter from adjudication for the purpose of negotiating a settlement by the entry of a consent order; and

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

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having been placed on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Edu-Cards Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its offices and principal place of business located at 60 Austin Boulevard, Commack, N.Y.

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

ORDER

It is ordered, That respondent Edu-Cards Corporation, a corporation, and its officers, agents, representatives, employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of toy, gift and hobby merchandise and any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Packaging said products in oversized boxes or other containers so as to create the appearance or impression that the width or thickness or other dimensions or quantity of products contained in a box or container is appreciably greater than is the fact; but nothing in this order shall be construed as forbidding respondent to use oversized containers if respondent justifies the use of such containers as necessary for the efficient packaging of the products contained therein and establishes that respondent has made all reasonable efforts to prevent any misleading appearance or impression from being created by such containers;

2. Providing wholesalers, retailers or other distributors of said products with any means or instrumentality with which to deceive the purchasing public in the manner described in Paragraph (1) above.

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

It is further ordered, That the respondent distribute a copy of this order to all divisions and subsidiaries of said corporation and all firms and individuals involved in the formulation or implementation of respondent's business policies, and all firms and individuals engaged in the advertising, marketing, or sale of respondent's products.

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

IN THE MATTER OF

HAMMERMILL PAPER COMPANY

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

Docket C–2513. Complaint, Apr. 24, 1974—Decision, Apr. 24, 1974

Consent order requiring an Erie, Pa., manufacturer and seller of printing and fine paper products, among other things to cease maintaining or enforcing contracts which limit dealer's or distributor's freedom to carry, list or sell competing products; discourage selling at other than suggested prices; and limit the resale of respondent's products to firms of their choice.

Appearances

For the Commission: *Ronald J. Dolan.*

For the respondent: *Bergson, Borkland, Margolis & Adler*, Wash., D.C.

COMPLAINT

The Federal Trade Commission, having reason to believe that Hammermill Paper Company, a corporation subject to the jurisdiction of the Commission, 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 and states its charges as follows:

PARAGRAPH 1. Respondent, Hammermill Paper Company, is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, with its principal office in Erie, Pa.

PAR. 2. Respondent has been and is now, a manufacturer and nationwide seller of printing and fine paper and other paper products. For purpose of this complaint, the term "printing and fine paper" includes coated and uncoated book papers, coated and uncoated printing papers, offset papers, text and cover papers, sulphite bond papers, rag or cotton content papers, mimeograph and duplicator papers, onionskin, ledger paper and bristols.

PAR. 3. In 1970, respondent had net sales in excess of $352 million and total assets of approximately $353.8 million.

PAR. 4. Respondent sells more than seventy (70) percent of its products to wholesale distributors who resell these products to printers and other users of such products.

PAR. 5. At all times relevant herein, respondent has sold its products to wholesale distributors located throughout the United States and,

therefore, respondent is and has been engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Since Feb. 23, 1967, respondent has published and distributed to its wholesale distributors a document entitled "Hammermill Sales Policies" which imposes upon such distributors the following terms and conditions, among others:

1. Hammermill Paper Company confines the sale of its standard lines exclusively to Hammermill agents; and does not choose nor maintain as such Agents who carry, list or sell any watermarked line at or below the price of Hammermill Bond, except such lines as may be established and owned by Hammermill Paper Company.

2. All suggested resale schedules are to be considered as exact and not minimum.

3. No Hammermill Agent is permitted to sell Hammermill Advertised Lines for stock purposes to a merchant who is not a Hammermill Agent * * *

PAR. 7. Each of the terms and conditions described above may tend to limit the freedom of respondent's wholesale distributors to carry, list or sell competing products; to prohibit wholesale distributors of respondent's products from selling respondent's products at prices other than those suggested by respondent; and to limit the freedom of such distributors to resell respondent's products to persons, firms and users of their own choice. Such acts and practices therefore constitute unfair methods of competition and unfair acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint

in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Hammermill Paper Company is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place of business located at 1540 East Lake Road, Erie, Pa.

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

ORDER

It is ordered, That respondent Hammermill Paper Company, and its officers, agents, representatives, employees, successors and assigns, directly or through any corporate or other device, in or in connection with the merchandising, offering for sale and sale or distribution of paper and paper products in commerce, as "commerce" is defined in the Federal Trade Commission Act, shall cease and desist from:

1. Putting into effect, maintaining or enforcing any merchandising or distribution plan or policy under which contracts, agreements or understandings are entered into with dealers or distributors of its products which have the purpose or effect of

(a) Limiting, allocating or restricting the persons or classes of persons to whom any dealer or distributor may resell his products;

(b) Fixing, establishing or maintaining or attempting to fix, establish and maintain the prices at which such products may be sold by dealers or distributors;

(c) Terminating or threatening to terminate any person as a dealer or distributor of the Hammermill line of printing and fine papers because such dealer or distributor carries, lists or sells a product which competes with any of respondent's products at or below the price of respondent's competing product.

2. Entering into, continuing or enforcing, or attempting to enforce, any contract, agreement or understanding with any dealer in or distributor of its products for the purpose or with the effect of establishing or maintaining any merchandising or distribution plan or policy prohibited by paragraph 1 of this order.

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

It is further ordered, That respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of

subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

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

IN THE MATTER OF

HOLIDAY MAGIC, INC., ET AL.

Docket 8834. Interlocutory Order, Apr. 29, 1974

Order granting 30-day extension within which to submit additional information and views, with answer by complaint counsel due 15 days following respondents' submission.

Appearances

For the Commission: *Joseph S. Brownman* and *Stuart D. Cameron.*

For the respondents: *Stein, Mitchell & Mezines,* Wash., D.C.

ORDER GRANTING EXTENSION OF TIME IN WHICH TO SUBMIT ADDITIONAL INFORMATION AND VIEWS

Respondents have petitioned the Commission, by motion dated Apr. 24, 1974, for a thirty-day extension of time in which to submit additional information and views pertaining to the relationship of certain orders of the United States District Court for the Northern District of California to the disposition of this matter.

In view of the complexity of this matter, the desirability that it be thoroughly evaluated by counsel, and inasmuch as the requested extension is not likely to delay final disposition of this case, the requested extension of time will be granted. The Commission specifically invites counsel for respondents, in the course of his submission, to assume *arguendo* that the findings of violations of law recommended by the administrative law judge are affirmed, and suggest in that regard specific alternative order provisions in those instances in which it is felt that order provisions recommended by the administrative law judge go beyond what is necessary to eliminate the violations of law found by the administrative law judge, and would serve to impede the future operation of corporate respondent in a lawful fashion.

The answer of complaint counsel to respondents' submission shall continue to be due fifteen days following filing of the submission. Therefore,

It is ordered, That respondents be, and they hereby are, granted an extension of thirty days within which to submit additional information

and views pursuant to Section 3.54(c) of the Commission's Rules of Procedures, such views to be submitted no later than May 24, 1974.

IN THE MATTER OF

EXXON CORPORATION, ET AL.

Docket 8934. Interlocutory Order, April 29, 1974

Order denying respondent's motion for relief from Commission's decision to release to certain parties, under the Freedom of Information Act, copies of transcript of prehearing conference held on Dec. 18, 1973.

Appearances

For the Commission: *Robert Liedquist.*

For the respondent: *William Simon,* Wash., D.C. and *John Chiles,* Houston, Tex.

ORDER DENYING RELIEF FROM COMMISSION DECISION

Respondent Exxon Corporation moved on Apr. 24, 1974, for appropriate relief from the Commission's decision to release to certain parties, under the Freedom of Information Act, copies of the transcript of the prehearing conference held in this matter on Dec. 18, 1973. The administrative law judge certified this motion to the Commission in accordance with Section 3.22(a) of the Commission's Rules of Practice by order of Apr. 25, 1974.

Respondent argues that the Commission's decision to release the transcript was in violation of its own Rules of Practice, particularly Section 3.21(c), which states in pertinent part that prehearing conferences "shall not be public unless all parties agree." Respondents had duly objected to the making of these prehearing conferences public at the time and the administrative law judge subsequently denied complaint counsel's motion to make them public over respondents' objections. Requests were later made to the Commission itself for disclosure of the transcript under the Freedom of Information Act, 5 U.S.C. Section 552, however, and the Commission determined, Commissioner Thompson dissenting, that it was required by that statute to grant those requests. The Commission rule cited by respondent, Section 3.21(c), does not foreclose our granting a valid request for prehearing transcripts under the Freedom of Information Act. We note that if Section 3.21(c) were inconsistent with the Freedom of Information Act, it would have to give way to that Act.

Respondent further requests that it be allowed to examine this tran-

script and indicate those portions that contain confidential business information. It has had that transcript for nearly four months, however, and was notified of the Commission's decision to release it under the Freedom of Information Act some two weeks ago. Respondent having failed to designate in its instant motion any such protected information in this transcript, the Commission sees no purpose in granting additional time for a further examination of that material. Accordingly,

It is ordered, That respondent Exxon's motion be, and it hereby is, denied.

Commissioner Thompson dissenting.

IN THE MATTER OF

GEORGE MANOS & WILIBEL KOWALKER, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATIONS OF THE FEDERAL TRADE COMMISSION AND FUR PRODUCTS LABELING ACTS

Docket C-2514. Complaint, May 2, 1974—Decision, May 2, 1974

Consent order requiring a St. Petersburg, Fla., wholesaler of fur products, among other things to cease misbranding and falsely invoicing its fur products; and misrepresenting that it has foreign branches and a continuing guaranty on file with the Federal Trade Commission.

Appearances

For the Commission: *Joel S. Thwaites.*

For the respondents: *Yeakle & Riden,* St. Petersburg, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that George Manos & Wilibel Kowalker, Inc., a corporation, and George Manos, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the rules and regulations promulgated under the Fur Products Labeling Act, and it now appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent George Manos & Wilibel Kowalker, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its principal office and place of business at 411 19th Street, South, St. Petersburg, Fla.

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

Respondents are engaged in the business of purchasing fur products and wholesaling such throughout the southeastern region of the United States to retailers for direct sales to purchaser consumers.

COUNT I

Alleging violation of the Fur Products Labeling Act and the implementing rules and regulations promulgated thereunder, and the Federal Trade Commission Act, the allegations of Paragraph One hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the manufacture for introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have manufactured for sale, sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act.

PAR. 3. Certain of said fur products were misbranded in that they were falsely and deceptively labeled to show that fur contained therein was natural, when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artifically colored, in violation of Section 4(1) of the Fur Products Labeling Act.

PAR. 4. Certain of said fur products were misbranded in that they were not labeled as required under the provisions of Section 4(2) of the Fur Products Labeling Act and in the manner and form prescribed by the rules and regulations promulgated thereunder.

Among such misbranded fur products, but not limited thereto, were fur products with labels which failed to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 5. Certain of said fur products were falsely and deceptively invoiced by the respondents in that they were not invoiced as required by Section 5(b)(1) of the Fur Products Labeling Act and the rules and regulations promulgated under such Act.

Among such falsely and deceptively invoiced fur products, but not limited thereto, were fur products covered by invoices which failed to disclose that the fur contained in the fur products was bleached, dyed, or otherwise artificially colored, when such was the fact.

PAR. 6. Certain of said fur products were falsely and deceptively invoiced in that certain of said fur products were invoiced to imply that the fur contained therein was natural when in fact such fur was pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, in violation of Section 5(b)(2) of the Fur Products Labeling Act.

PAR. 7. Respondents, in violation of Rule 49 of the rules and regulations promulgated under the Fur Products Labeling Act, falsely invoiced misbranded fur products by stating that such products were not misbranded under the provisions of the Fur Products Labeling Act and rules and regulations thereunder.

PAR. 8. Certain of said fur products were falsely and deceptively invoiced in violation of the Fur Products Labeling Act in that they were not invoiced in accordance with the rules and regulations promulgated thereunder in the following respect:

The term "natural" was not used on invoices to describe fur products which were not pointed, bleached, dyed, tip-dyed, or otherwise artificially colored in violation of Rule 19(g) of said rules and regulations.

PAR. 9. Respondents, in violation of Rules 35(a) and 49, in substituting fur products labels under the provisions of Section 3(e) of said Act, did not disclose on the substitute labels all the information required under the Act and rules and regulations in the same form and manner as required in respect to the original label.

Among such substitute fur products labels affixed by respondents, but not limited thereto, were those which identified the fur in the fur product as being "Natural," whereas, in truth and in fact, such fur in the fur product had been dyed, tip-dyed or otherwise artificially colored.

PAR. 10. The aforesaid acts and practices of respondents as herein alleged, are in violation of the Fur Products Labeling Act and the rules and regulations promulgated thereunder and constituted and now constitute unfair methods of competition and unfair and deceptive acts and practices in commerce under the Federal Trade Commission Act.

COUNT II

Alleging violations of Section 5 of the Federal Trade Commission Act, the allegations of Paragraph One, hereof, are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 11. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said products to be shipped among themselves between the States of Florida and New York and have maintained, and now maintain offices in the States of Florida and New York, and have sent and received and now send and receive, statements, bills, negotiable instruments and other commercial papers among themselves in these offices, and main-

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

PAR. 12. Respondents falsely and deceptively implied on invoices that they maintain branch offices or other facilities in Paris, France, whereas, in truth and in fact, respondents do not maintain such facilities.

PAR. 13. Respondents falsely and deceptively represented on invoices that they had on file with the Federal Trade Commission a continuing guaranty under the Flammable Fabrics Act, as amended, when, in truth and in fact, respondents had not filed such a continuing guaranty.

PAR. 14. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals, engaged in the business of purchasing and selling fur products of the same general kind and nature as that purchased and sold by the respondents.

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

PAR. 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 and practices and unfair methods of competition, in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta 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 Fur Products Labeling Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the

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

The Commission having thereafter considered the matter and having determined that it has 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 thirty (30) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent George Manos & Wilibel Kowalker, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida with its offices and principal place of business located at 411 19th Street, South, St. Petersburg, Fla.

Respondent George Manos is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation.

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

ORDER

COUNT I

It is ordered, That respondents George Manos & Wilibel Kowalker, Inc., a corporation, its successors and assigns, and its officers, and George Manos, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction into commerce, or the sale, advertising or offering for sale in commerce, or the transportation or distribution in commerce, of any fur product; or in connection with the sale, advertising, offering for sale, transportation or distribution of any fur product which is made in whole or in part of fur which has been shipped and received in commerce, as the terms "commerce," "fur" and "fur product" are defined in the Fur Products Labeling Act, do forthwith cease and desist from:

A. Misbranding fur products by:

1. Representing directly or by implication on a label that the fur contained in such fur product is natural when such fur is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

2. Failing to a affix a label to such fur product showing in words and in figures plainly legible all of the information required to be disclosed by each of the subsections of Section 4(2) of the Fur Products Labeling Act.

3. When substituting fur products labels under the provisions of Section 3(e) of the Fur Products Labeling Act, failing to disclose on the substitute labels all of the information required under the Act and rules and regulations in the same form and manner as required in respect to the original label.

B. Falsely or deceptively invoicing fur products by:

1. Failing to furnish an invoice, as the term "invoice" is defined in the Fur Products Labeling Act, showing in words and figures plainly legible all the information required to be disclosed by each of the subsections of Section 5(b)(1) of the Fur Products Labeling Act.

2. Representing, directly or by implication, on an invoice that the fur contained in such fur product is natural when such is pointed, bleached, dyed, tip-dyed, or otherwise artificially colored.

3. Failing to disclose the term "natural" on invoices to describe fur products which contain fur which has not been pointed, bleached, dyed, tip-dyed, or otherwise artificially colored, as required by Rule 19(g) of said rules and regulations.

4. Stating that misbranded fur products are not misbranded under the provisions of the Fur Products Labeling Act and the rules and regulations thereunder.

COUNT II

It is further ordered, That George Manos & Wilibel Kowalker, Inc., a corporation, its successors and assigns, and its officers, and George Manos, individually and as an officer of said corporation, and respondents' representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, or distribution of fur products in commerce as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Falsely and deceptively representing, directly or by implication, on fur products sales invoices or other instrumentalities, that said respondents maintain branch offices or other facilities in Paris,

France, or in any other geographical area.

2. Falsely representing in writing that respondents have a continuing guaranty on file with the Federal Trade Commission, under the provisions of the Flammable Fabrics Act, as amended.

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

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

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

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

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

IN THE MATTER OF

TYSONS (TYSONS) CORNER REGIONAL SHOPPING CENTER, ET AL.

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

*Docket 8886. Complaint, May 8, 1972**—Decisions, May 3, 1974

Consent order requiring a Tysons Corner, Va., developer of a northern Va. regional shopping center, among other things to cease entering into or enforcing agreements which limit the merchandise, services, or price ranges of prospective tenants or

*For case as to City Stores Company, see 85 F.T.C. .....

tenants; control or allow other tenants to control the advertising of other tenants; or involves any connection with price fixing.

Consent orders requiring two major tenants of Tysons Corner Regional Shopping Center, one headquartered in St. Louis, Mo., and the other in Washington, D.C., among other things to cease entering into or enforcing leases which exclude competitors, fix retail prices, eliminate discount selling and otherwise restrain trade.

Appearances

For the Commission: *Barbara B. Wiggs, Anthony L. Joseph, David I. Wilson* and *Sandra K. Casber.*

For the respondents: *H. Max Ammerman,* Washington, D.C. for Tysons Corner Regional Shopping Center. *Surrey, Karasik and Morse,* Washington, D.C. for Woodward and Lothrop, Inc. *George W. Wise,* of *Hogan & Hartson,* Washington, D.C. for The May Department Stores Company.

COMPLAINT

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

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

a) The term "regional shopping center" means a planned development of retail outlets serving the general public in an approximately defined trading area and containing one or more major tenants.

b) The term "major tenant" means a department store providing primary drawing power for a regional shopping center.

c) The term "satellite tenant" means any commercial occupant of a shopping center not a major tenant.

d) The term "trading area" means the geographical bounds within which tenants of a regional shopping center derive the predominance of their customers.

e) The term "corporate respondent" means each of the corporations named herein and their respective officers, agents, representatives, employees, successors or assigns.

PAR. 2. Respondent, Tysons Corner Regional Shopping Center, [hereinafter referred to as Tysons Corner] is a partnership composed of Theordore N. Lerner, H. Max Ammerman and the Gudelsky Company,

with its principal office and place of business in Tysons Corner, Va. The business of the partnership includes the development and operation of a regional shopping center located at Tysons Corner, Va.

Tysons Corner is one of the nation's largest regional shopping centers with over 100 retail stores and 1.2 million square feet of floor space. It has three major tenants occupying approximately 450,000 square feet of its gross floor space. The stores which comprise Tysons Corner carry a wide variety of major brand items, and sold to consumers millions of dollars worth of wearing apparel and accessories, household linens and dry goods, home furnishings, housewares, appliances and other merchandise in 1969.

Tysons Corner is located in a triangular area bound by three major highways in Fairfax County, Va. It serves and dominates a retail trading area with one of greater metropolitan Washington, D.C.'s highest population and income growth rates. Tysons Corner is located approximately 9 miles northwest of downtown Washington, D.C. and approximately 4 miles from its nearest competition, the Seven Corners Shopping Center. Prior to the development of Tysons Corner, the only shopping facilities available to residents in the Tysons Corner trading area were community shopping centers and neighborhood stores.

PAR. 3. Respondent City Stores Company* [hereinafter referred to as City Stores] is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal office and place of business located at 500 Fifth Avenue, New York, N.Y. Respondent operates and controls its subsidiaries from its principal office and place of business.

City Stores and its subsidiaries are engaged in the operation of chain retail stores, including department stores. In 1969, City Stores was one of the nation's largest department store concerns, with sales in excess of $380 million operating leading department stores in nine metropolitan areas.

In the Washington, D.C. metropolitan area, City Stores owns, operates, directs and controls the Lansburgh's department store chain, a subsidiary with its principal office and place of business at 420 Seventh Street, N.W., Washington, D.C.

Lansburgh's is one of the leading department store operations in the Washington area. It has four stores with an approximate total of 600,000 square feet of floor space. A warehouse for the Lansburgh's stores is maintained at 10 T Street, S.W., Washington, D.C. In fiscal 1969, Lansburgh's estimated sales were $32 million. In recent years Lansburgh's has entered both the Langley Park and Tysons Corner

*For case as to City Stores Company, see 85 F.T.C. ____.

regional shopping centers. Lansburgh's occupies approximately 138,000 square feet of floor space in Tysons Corner as a major tenant.

PAR. 4. Respondent The May Department Stores Company [hereinafter referred to as May Company] is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business at Sixth & Olive Streets, St. Louis, Mo. May Company is engaged in the operation of department stores.

In 1969, May Company was approximately ninth in sales volume among the nation's department store operators, with fiscal 1969 sales in excess of $1.13 billion. May Company operates over 86 department stores in many parts of the country. In the Washington, D.C. metropolitan area, May Company operates Hecht Company, [hereinafter referred to as Hecht's], a wholly-owned subsidiary incorporated under the laws of the State of Maryland, with its principal office and place of business at "F" and Seventh Street, N.W., Washington, D.C. Hecht's is a leading operator of department stores in the Washington, D.C. metropolitan area.

The Hecht Company operates nine department stores in the Washington, D.C. metropolitan area and has over 1.52 million square feet of floor space. Hecht's operates one or more warehouses for the nine stores in the Washington, D.C. metropolitan area, one of which is located at 1173 E. University Boulevard, Langley Park, Md. In fiscal 1969 Hecht's estimated sales were $80.6 million.

In recent years, Hecht's has entered several regional shopping centers in the Washington, D.C. area. Hecht's presently operates department stores in the following regional shopping centers: Prince Georges Plaza, Landmark, Marlow Heights, Montgomery Mall, Tysons Corner and Parkington. Hecht's occupies approximately 150,000 square feet of floor space in Tysons Corner as a major tenant.

PAR. 5. Respondent, Woodward and Lothrop, Inc. [hereinafter referred to as Woodward] is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business at "F" and Tenth Streets, N.W., Washington, D.C.

Woodward operates one of the largest department store chains in the Washington, D.C. area, with twelve department stores and over 1.39 million square feet of floor space. Woodward also owns and operates three warehouses in the Washington area, one of which is in Virginia. In 1969, Woodward's sales exceeded $126 million dollars.

In recent years, Woodward has entered the following regional shopping centers: Landmark, Seven Corners, Iverson Mall, Prince George Plaza, Wheaton Plaza and Tysons Corner. Woodward occupies approx-

imately 150,000 square feet of floor space in Tysons Corner as a major tenant.

PAR. 6. In the course and conduct of their businesses at Tysons Corner, Woodward, Hecht's and Lansburgh's are extensively engaged in the shipment, purchase for resale and sale of goods across state lines. Such goods have been and are advertised and offered for sale by respondents in newspapers circulated among and between the several states and the District of Columbia. Moreover, respondents have caused and are now causing a continuous flow of customer services and customers across the District of Columbia, Maryland and Virginia lines. There is now and has been since the opening of Tysons Corner a constant and substantial flow of said goods and services "in commerce" as that term is defined in the Federal Trade Commission Act.

In the course and conduct of its business, Tysons Corner extensively uses the United States mail in the development and operation of the shopping center. Tysons Corner has disseminated, and caused the dissemination, of certain advertisements and promotional materials concerning the shopping center, by various news media in commerce, as "commerce" is defined in the Federal Trade Commission Act, for the purpose of soliciting prospective tenants located in and among the various states including the District of Columbia. Tysons Corner has been, and is now engaged in interstate lease negotiations and transactions with its tenants and prospective tenants. There is a continuous flow of customers across state lines to transact business at Tysons Corner. The continued viability of Tysons Corner depends upon interstate commerce.

PAR. 7. The movement of population, and particularly the higher income segment of the population, from the central city to the suburbs has precipitated the growth of shopping centers in suburban areas. In 1960, there were approximately 4,500 shopping centers in the United States; their number now exceeds 13,100 and is projected to reach 21,000 by 1980. In 1970, retail sales in shopping centers amounted to $118 billion and accounted for approximately 33.2 percent of all United States retail sales. Retail sales in shopping centers is projected to reach approximately $200 billion by 1980.

Regional shopping centers are the most economically significant type of shopping center. They are displacing and replacing the central downtown business district in the retail distribution of goods and services. They reproduce to a substantial extent the retail facilities once available only in downtown business districts and are particularly favored by consumers. Department store operators including the corporate respondents herein, have recognized the potential business opportunities presented by the expanding suburban markets and have, in

recent years, concentrated their efforts in such suburban markets and on establishing themselves in regional shopping centers.

PAR. 8. Except to the extent that competition has been hindered, frustrated and eliminated as set forth in this complaint, corporate respondents, in the course and conduct of their businesses of leasing or otherwise obtaining locations for their department stores and of offering for sale and selling household goods, home furnishings, apparels and services, have been and are in substantial competition with each other and with other corporations, individuals and partnerships in the retail sale of the same or comparable brands of merchandise carried and sold by respondents.

PAR. 9. In 1964–65, Tysons Corner entered into negotiations with May Company and Woodward looking toward the execution of leases by May Company and Woodward covering the leasing of floor space to each of them for the establishment of department stores in Tysons Corner. During the course of such negotiations, May Company and Woodward jointly and severally induced Tysons Corner to agree with them to the inclusion of certain provisions in their respective leases. Such lease provisions, more fully described hereinafter, authorized May Company and Woodward severally to control and determine, without limitation, the admission to Tysons Corner of those seeking to occupy space therein and to impose and control conditions affecting tenants in Tysons Corner.

On December 6, 1965, May Company executed in California its lease with Tysons Corner containing the aforesaid provisions. Shortly thereafter, on December 21, 1965, Woodward executed a lease identical in all respects material to this complaint, in the District of Columbia with Tysons Corner.

On June 13, 1967, City Stores, with the knowledge, consent and agreement of May Company and Woodward, executed a lease identical in all respects material to this complaint in the State of Maryland with Tysons Corner.

COUNT I

PAR. 10. In the course and conduct of their businesses, respondents are and have been engaged in unfair methods of competition in commerce, in that they have caused the inclusion or enforcement of lease provisions which suppress, restrict, hinder, lessen, prevent and foreclose competition in the resale and distribution at retail of goods and services in the Tysons Corner trading area.

The leases and lease provisions referred to in Paragraph 9 above, which said respondents have entered into, enforced, and maintained, confer on the corporate respondents the following rights, powers and privileges:

a) The right, individually, to disapprove other tenant leases;

b) The right, individually, to limit the floor space available to other tenants;

c) The power, individually, to require other tenants to join an approved "merchant association;" and

d) The power, individually, to exercise continuing control over the conduct of other business operations.

PAR. 11. The aforesaid lease provisions, and the rights, powers and privileges conferred thereby on the corporate respondents as major tenants of Tysons Corner have had and continue to have the tendency to restrain trade and commerce in the retail trading area served by Tysons Corner. Included among such restraints are the following

a) Fixing, controlling and maintaining retail prices;

b) Allowing the corporate respondents to choose their competitors and to exclude actual and potential competitors;

c) Eliminating discount advertising and discount selling;

d) Denying the public the benefit of price competition;

e) Boycotting potential tenant entrants to the shopping center;

f) Restricting, hindering and coercing the developer in his choice of potential tenants in shopping centers.

PAR. 12. The negotiations, agreements, understandings, leases and lease provisions referred to above constitute an agreement, combination and conspiracy among respondents in restraint of trade and an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT II

The allegations of Paragraphs 1 through 9 are incorporated by reference in Count II as if fully set forth therein.

PAR. 13. In the course and conduct of their individual businesses, the individual corporate respondents named in this complaint have and are engaged in unfair methods of competition in that each has caused the inclusion or enforcement of lease provisions which suppress, restrict, hinder, lessen, prevent and foreclose competition in the resale and distribution at retail of goods and services in the Tysons Corner trading area.

The leases and lease provisions referred to in Paragraph 9 confer on the individual corporate respondents the following rights, powers and privileges which said individual respondents have entered into, enforced, and maintained:

a) The right, individually, to disapprove other tenant leases;

b) The right, individually, to limit the floor space available to other tenants;

c) The power, individually, to require other tenants to join an approved, "merchant association;" and

d) The power, individually, to exercise continuing control over the conduct of other business operations.

PAR. 14. The aforesaid lease provisions, and the rights, powers and privileges conferred thereby on the corporate respondents as major tenants of Tysons Corner have had and continue to have the tendency to restrain trade and commerce in the retail trading area served by Tysons Corner. Included among such restraints are the following:

a) Fixing, controlling and maintaining retail prices;

b) Allowing the corporate respondents to choose their competitors and to exclude actual and potential competitors;

c) Eliminating discount advertising and discount selling;

d) Denying the public the benefit of price competition;

e) Boycotting potential tenant entrants to the shopping center;

f) Restricting, hindering and coercing the choice of the developer in his choice of potential tenants in shopping centers.

PAR. 15. The inclusion and enforcement of the lease provisions referred to above, by each respondent, individually, constitutes a restraint of trade and an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

COUNT III

The allegations of Paragraphs 1 through 9 are incorporated by reference in Count III as if fully set forth therein.

PAR. 16. In the course and conduct of its business, respondent Tysons Corner is and has engaged in unfair methods of competition in that it has unfairly and unlawfully inserted restrictive provisions in satellite tenant leases which tend to maintain, control, fix and establish the retail selling price of goods and services in the Tysons Corner trading area.

Said acts, practices, and methods of competition, and the adverse competitive effects resulting therefrom constitute an unfair method of competition in commerce within the intent and meaning of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

AS TO TYSONS CORNER REGIONAL SHOPPING CENTER

The Federal Trade Commission having issued a complaint which charges respondent Tysons Corner Regional Shopping Center, a partnership, with violating the Federal Trade Commission Act; and

The respondent and H. Max Ammerman and Theodore N. Lerner,

and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent and H. Max Ammerman and Theodore N. Lerner of all the jurisdictional facts set forth in the aforesaid complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission 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 accepted the executed consent agreement and placed such agreement on the public record for a period of thirty (30) 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(b) of its Rules, the Commission hereby makes the following jurisdictional findings and enters the following order:

1. Respondent Tysons Corner Regional Shopping Center is a partnership composed of Theodore N. Lerner, Annette M. Lerner, H. Max Ammerman, Josephine F. Ammerman, and the Gudelsky Company, with its principal place of business in Wheaton, Md. The business of the partnership includes the development and operation of a regional shopping center located at Tysons Corner, Va.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent and H. Max Ammerman and Theodore N. Lerner, and the proceeding is in the public interest.

ORDER

I.

For purposes of this order the following definitions shall apply:

A. The term "respondents" refers to Tysons Corner Regional Shopping Center, a partnership, and its partners, officers, agents, representatives, employees, successors, and assigns, in their capacities as such, and H. Max Ammerman and Theodore N. Lerner individually to the extent hereinafter specified. The term "respondents" refers to any or all of the respondents.

B. The term "shopping center" refers to a planned development of retail outlets, managed as a unit in relation to a trade area which the development is intended to serve, and providing on-site parking in some definite relationship to the types and sizes of stores in the development.

C. The term "tenant" refers to any occupant or potential occupant of retail space in any of respondents' shopping centers, whether as a lessee or owner of such space.

D. The term "retailer" refers to a tenant which sells merchandise or services to the public.

E. The terms "range of prices" and "price range" refer to such descriptive words as "popular priced," "medium priced," "high priced," "merchandise ranging in price from $90 to $190," and "the sale of merchandise at prices less than $15."

F. The term "price line" refers to descriptive words identifying a particular retailer as an example of a category of merchants selling merchandise within a generally identifiable range of prices.

II.

Shopping centers with respect to which each respondent is bound by this order shall be, in addition to Tysons Corner Regional Shopping Center, any shopping center constructed after the issuance of this order in which such respondent actively participates in leasing, negotiating leases, or enforcing leases, or in establishing leasing policies or leasing practices of such shopping center, including any standard form of leasing contract and substantial modifications thereto.

III.

A. *It is ordered,* That respondents cease and desist from making, carrying out, or enforcing, directly or indirectly, an agreement or provision of an agreement which:

1. specifies that any retailer in any of respondents' shopping centers shall or shall not sell merchandise or services at any particular price or within any range of prices;

2. specifies that any retailer in any of respondents' shopping centers shall or shall not sell designated price lines of merchandise;

3. specifies that any retailer in any of respondents' shopping centers shall not be a discounter or sell merchandise or services at discount prices;

4. specifies the content of or prohibits any type of advertising by a retailer, other than advertising within any of respondents' shopping centers, except that respondents may require a tenant to include the name, insignia, or other identifying mark of any of respondents' shopping centers in advertising pertaining to the tenant's store in any of respondents' shopping centers; or

5. prohibits price advertising within any of respondents' shopping centers or controls advertising within any of respondents' shopping centers in such a way as to make it difficult for consumers to discern advertised prices from the common area of such shopping centers, *Provided,* That, in all other respects, respondents may

make, carry out, and enforce reasonable standards for advertising within any of respondents' shopping centers.

B. *It is further ordered,* That respondent Tysons Corner Regional Shopping Center will within thirty (30) days after service of this order mail a copy of Letter "A," attached hereto, to all tenants of Tysons Corner Regional Shopping Center whose leases make reference in the use clauses to the price or quality of the merchandise or services to be sold.

C. *It is further ordered,* That respondents cease and desist from entering into any agreement with any tenant that said tenant may:

1. specify or control or may require any of respondents to specify or control prices, price ranges, or price lines of merchandise or services sold by any other retailer;

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

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

D. *It is further ordered,* That respondents advise the Commission in writing within sixty (60) days of any occasion that:

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

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

3. a tenant approves the admission of another retailer into any of respondents' shopping centers subject to conditions imposed by the tenant relating to the pricing, price ranges, price lines, trade names, store names, trademarks, brands or lines of merchandise, or the discounting practices or methods of such other retailer; or

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

IV.

It is further ordered, That respondents shall:

A. within thirty (30) days after service of this order upon respondents, notify each tenant with which any of them have a lease of this order by providing each such tenant with a copy thereof by registered or certified mail;

B. within sixty (60) days after service of this order upon respondents, file with the Commission a report showing the manner

and form in which they have complied and are complying with each and every specific provision of this order; and

C. notify the Commission at least thirty (30) days prior to any change in the form of business organization of Tysons Corner Regional Shopping Center, such as dissolution, incorporation, assignment, or sale, or any other change in the partnership which may affect compliance obligations arising out of this order.

LETTER "A"

[On Official Tysons Corner Regional Shopping Center Stationery]

Gentlemen:

Tysons Corner Regional Shopping Center has consented to the issuance by the Federal Trade Commission of an Order which, among other things, prohibits Tysons Corner from specifying that its tenants shall or shall not sell merchandise or services at any particular price or within any range of prices, and that its tenants shall or shall not sell designated price lines of merchandise. A copy of the Order is enclosed.

Your lease describes the merchandise or services you are to sell in terms such as "popular priced," "medium priced," "high priced," "medium to better quality," or the like. Please be advised that such language is intended only as a description of the general quality of the merchandise or services you sell. It is not intended and will not be enforced to affect the retail selling price of your merchandise or services. Pursuant to the terms of the Order you are free to set the prices for your merchandise and services and are not required to adhere to any particular price, range of prices, or price lines expressed or implied in your lease or in any other agreement with the shopping center.

This letter shall not operate as a waiver of any rights which Tysons Corner may now have to require you, except as your lease otherwise provides, to sell merchandise or services at a general quality level or levels.

Sincerely,

Theodore N. Lerner,
Partner,
Tysons Corner Regional Shopping Center

COMBINED ORDER AS TO THE MAY DEPARTMENT STORES COMPANY AND WOODWARD AND LOTHROP, INC.

I

For purposes of these orders, the following definitions shall apply:

A. The term "respondent" refers to the May Department Stores Company and Woodward and Lothrop, Incorporated, their operating divisions, their subsidiaries, and their respective officers, agents, representatives, employees, successors or assignees.

B. The term "shopping center" refers to a group of retail outlets in the United States of America, planned, developed and managed as a unit and containing (1) a total floor area designed for retail occupancy of 200,000 square feet or more, of which at least 50,000 square feet is for occupancy by tenants other than respondent, (2)

at least two tenants other than respondent, (3) at least one major tenant, and (4) on-site parking.

C. The term "tenant" refers to any occupant or potential occupant of retail space in a shopping center which occupancy is for the sale of merchandise or services to the public, whether said occupant leases or owns said space, but the term does not refer to an occupant of space within the store occupied by respondent, which occupant operates a department for respondent pursuant to a license from respondent.

D. The term "major tenant" refers to a tenant providing primary drawing power in a shopping center. A tenant which occupies at least 500,000 square feet of floor area will be deemed to provide primary drawing power.

II

A. *It is ordered,* That respondents, in their capacity as tenants in a shopping center, cease and desist from making, carrying out or enforcing, directly or indirectly, an agreement or provision of any agreement, whether applicable to the shopping center or to any expansion thereof, which:

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

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

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

   (a) other department stores,

   (b) junior department stores,

   (c) discount stores, or

   (d) catalogue stores;

4. limits the types or brands of merchandise or services which any other tenant in a shopping center may offer for sale;

5. specifies that any other tenant in a shopping center shall or shall not sell its merchandise or services at any particular price or within any range of prices;

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

7. specifies or prohibits any type of advertising by other tenants, other than advertising within a shopping center; or

8. prohibits price advertising within a shopping center by other tenants or controls advertising within a center by other tenants in such a way as to make it difficult for customers to discern adver-

tised prices from the common area of such shopping center.

B. *It is further ordered,* That respondents, in their capacity as tenants in a shopping center, shall not enter into or carry out any conspiracy, combination or arrangement with any other tenant to exclude any tenant from a shopping center or to achieve the other results which respondents are prohibited by Paragraph II A of this order from undertaking by themselves.

III

A. *It is further ordered,* That this order shall not prohibit respondents from including a provision in a reciprocal easement agreement or lease with respect to a shopping center, which provision identifies in designated buildings respondents and those other major tenants which contemporaneously enter into such reciprocal easement agreement or lease with respect to such shopping center.

B. *It is further ordered,* That this order shall not prohibit respondents from negotiating to include, including, carrying out or enforcing an agreement or provision in any agreement which:

1. requires that in respect of the selection of other tenants in the shopping center by the developer the following objective shall be considered—maintaining a balanced and diversified grouping of retail stores, merchandise and services;

2. prohibits occupancy of space in a shopping center by clearly objectionable types of tenants, including, for purposes of illustration, shops selling pornographic materials;

3. prohibits occupancy of space in a shopping center immediately proximate to respondents by types of tenants that create undue noise, litter or odor, including, for purposes of illustration, carry-out food shops;

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

5. establishes a layout of a shopping center which layout may (a) designate respondents' store, (b) set forth the location, size and height of all buildings, but not the amount of floor space that any other tenant may occupy in the shopping center, and (c) locate parking areas, roadways, utilities, entrances, exits, walkways, malls, landscaped areas and other common areas.

IV

It is further ordered, That respondents shall:

A. within thirty (30) days after service of this order upon re-

spondents, distribute a copy of this order to each of their operating divisions;

B. within thirty (30) days after service of this order upon respondents, notify each developer of shopping centers in which respondents are tenants, of this order by providing each such developer with a copy thereof by registered certified mail;

C. within sixty (60) days after service of this order upon respondents, file with the Commission a report showing the manner and form in which they have complied and are complying with each and every specific provision of this order; and

D. notify the Commission at least thirty (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 these orders.

IN THE MATTER OF

PEPSICO, INC.

Docket 8856. Interlocutory Order, May 8, 1974

Order denying respondent's motion that Commission serve formal notice of existence and nature of these proceedings on each of its 513 bottlers, or that it join said bottlers as indispensable parties.

Appearances

For the Commission: *Thomas R. Hefty, William D. Henderson* and *Raymond L. Hays.*

For the respondent: *Kaye, Scholer, Fierman, Hays & Handler,* New York, N.Y.

ORDER DENYING MOTION TO NOTIFY OR JOIN

In this action, charging respondent with maintaining a territorial allocation system among its bottlers in the market for soft drinks sold under its trade name, respondent moves that the Commission serve formal notice of the existence and nature of these proceedings on each of its 513 bottlers; or, in the alternative, that it join said bottlers as indispensable parties. Complaint counsel oppose both requests, and intervenors argue that the first request is pointless while taking no position as to the second. The administrative law judge, pursuant to Section 3.22(c) of the Commission's Rules of Practice, certified this motion to the Commission by order of April 1, 1974, with the recommendation that it be denied.

This is one of several Commission actions charging certain soft drink manufacturers with similar violations of Section 5 of the Federal Trade Commission Act. From the beginning, respondents in these actions have argued that their bottlers are indispensable parties, because the relief sought could alter the bottlers' rights under contracts with respondents. A motion by respondent Pepsico, setting forth this precise ground for dismissal, was denied by the Commission which, in the same order, denied similar motions in other proceedings* involving the same legal controversy. *Crush International Limited,* 80 F.T.C. 1023 (1972). The United States District Court for the Southern District of New York dismissed Pepsico's suit for an injunction against these proceedings and the Court of Appeals affirmed this dismissal. *Pepsico, Inc.* v. *F.T.C.*, 472 F.2d 179 (2d Cir. 1972), *cert. denied,* 42 U.S.L.W. 3199 (U.S. Oct. 9, 1973).

Respondent concedes that its bottlers are aware of these proceedings but argues that notification would further explain their right to intervene and would remove even the scintilla of doubt that its bottlers understand the nature of these proceedings. Such notice could easily be provided by Pepsico itself. In view of the notoriety this matter has received, however, and the intervention by a trade association to which 512 of respondents 513 bottlers belong, it is difficult to understand what the proposed notice could accomplish.

Respondent further argues that a staff proposal that relief in this matter include a Metro Area Bottler Handicap has created strong difference of interest among the bottlers depending upon their size and location, thus making it even more vital that each and every bottler be given the fullest opportunity to intervene including complete and formal notice. The need to consider this argument, however, is obviated by complaint counsel's abandonment of that proposed remedy.

That abandonment also obviates the need to further consider the Handicap proposal in connection with respondent's argument for reconsideration on joinder. Respondent presents no other grounds sufficient to warrant reconsideration. Accordingly,

It is ordered, That the aforesaid request for notification of respondent's bottlers be, and it hereby is, denied;

It is further ordered, That the aforesaid request for joinder of said bottlers be, and it hereby is, denied.

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*The others include: Crush International Ltd., Docket 8853; Dr. Pepper Co., Docket 8854; The Coca-Cola Co., Docket 8855; The Seven-Up Co., Docket 8857; National Industries, Inc., Docket 8859.