IV

It is further ordered, That respondent shall:

* A. within thirty (30) days after this order becomes final, distribute a copy of this order to each of its operating divisions;

* B. within thirty (30) days after this order becomes final, notify each developer of shopping centers, in which respondent is a tenant, of this order by providing each such developer with a copy thereof by registered certified mail;

* C. within sixty (60) days after this order becomes final, file with the Commission a report showing the manner and form in which it has complied and is 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 respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

IN THE MATTER OF

HORIZON CORPORATION

Docket 9017. Order, June 10, 1975

General counsel ordered to take action to notify the Arizona District Court in accordance with Commission's determination contained in its order.

Appearances

For the Commission: *Eugene Kaplan, Alan N. Schlaifer* and *Morgan D. Hodgson.*

For the respondent: *Basil Mezines, Stein, Mitchell & Mezines*, Wash., D.C. and *Samuel Pruitt, Jr.* and *J. Michael Brennan, Gibson, Dunn & Crutcher*, Los Angeles, Calif.

ORDER DIRECTING GENERAL COUNSEL TO TAKE APPROPRIATE ACTION IN JUDICIAL PROCEEDING

By motion filed May 12, 1975, complaint counsel requested that the General Counsel of the Commission be directed to appear as *amicus*

* Commission order of July 29, 1975, corrected the statement of compliance deadlines in the final order by substituting the words "this Order becomes final," for the words "service of this Order upon respondents" in each of subparagraphs IV A., B., and C.

curiae in *O'Neil* v. *Horizon Corp.*, Docket No. 10427, an action now pending in the Arizona District Court in which, they contend, a proposed settlement may have some effect on the above-captioned matter. Respondent does not object to such an appearance by a representative of the Commission, but argues that it would violate the Administrative Procedure Act, 5 U.S.C. § 554(d), for the General Counsel, as the Commission's chief legal adviser, to perform the investigative and prosecutorial duties necessary to make the appearance. Pursuant to Section 3.22 of the Commission's Rules of Practice, the law judge certified this motion to the Commission.

The Commission has determined to grant the motion to the extent of notifying the court of 1) the pending Commission action against Horizon; 2) the authority of the Commission to seek consumer redress in court and the possibility that such authority might be exercised if a final cease and desist order were entered against Horizon; and 3) the effect of the proposed settlement in the *O'Neil* case on any future Commission consumer redress action. The Commission finds no impropriety in the General Counsel representing the Commission in this matter, since he will not be prosecuting the Commission's complaint within the meaning of 5 U.S.C. § 554(d) but will simply be informing the court of matters relevant to the court's consideration of the potential settlement in the *O'Neil* case.

It is ordered, That the General Counsel take action to notify the court in the *O'Neil* case in accordance with the above.

IN THE MATTER OF

CENTRAL CARPET CORPORATION, INC., ET AL.

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

Docket 8980. Complaint, July 8, 1974–Decision, June 12, 1975

Consent order requiring a Bradbury Heights, Md., seller, distributor and installer of carpeting and floor coverings, among other things to cease using bait and switch tactics and other deceptive selling practices.

Appearances

For the Commission: *Everette E. Thomas, Richard F. Kelly, M. McGill, Alice Kelleher, Alan L. Cohen.*

For the respondents: *Jeremiah D. Griesemer*, 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 Central Carpet Corporation, Inc., a corporation, and James A. Taylor, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PAR. 1. Respondent Central Carpet Corporation, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland with its principal office and place of business located at 4407 Southern Ave., Bradbury Heights, Md.

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

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

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business located in the State of Maryland, to purchasers thereof located in various other States in 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 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 purchase of their carpeting and floor coverings, the respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations to prospective purchasers with respect to their products and services.

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

$109
3 Rooms
NYLON PILE CARPET
Quality Wall to Wall

up to 270 sq. ft.

* * * * * * *

Free
38 Piece
Ovenware Set
When you purchase 3 rooms
of our Deluxe 501 Nylon Carpet
Call Now

* * * * * * *

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 forth herein, separately and in connection with the oral statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing, directly or by implication, that:

1. Respondents are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements.

2. Purchasers of the said Dupont 501 Carpet receive a "free" 38-piece ovenware set.

PAR. 6. In truth and in fact:

1. Respondents' offers are not bona fide offers to sell carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of carpeting. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents' salesmen, who make no effort to sell to the prospective customer the advertised carpeting. Instead, they exhibit what they represent to be the advertised carpeting which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced carpeting or floor coverings of superior quality and texture are thereupon exhibited, which by comparison disparages and demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents' salesmen attempt to sell and frequently do sell the higher priced carpeting.

2. Purchasers of respondents' Dupont 501 Carpet do not receive a free 38-piece ovenware set. To the contrary, the cost of the "free" gift is added to and regularly included in the selling price of the merchandise sold to the customer.

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 further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Six, above, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

Therefore, the acts and practices as set forth in Paragraph Seven hereof were and are unfair and false, misleading and deceptive acts and practices.

PAR. 8. In the further course and conduct of their aforesaid business, and in connection with the representations set forth in Paragraph Four above, respondents offer carpet with padding and installation included at a price based upon specified areas of coverage. In making such offer, respondents have failed to disclose the material fact that the prices stated for such specified areas of coverage are not applied at the same rate for additional quantities of carpet needed, but are priced substantially higher.

The aforesaid failure of the respondents to disclose said material facts to purchasers has the tendency and capacity to lead and induce a substantial number of such persons into the understanding and belief that the prices charged for quantities of carpet needed in excess of the specified areas of coverage will not be substantially higher than the rate indicated by the initial offer.

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

PAR. 9. In the further course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents use the term "up to 270 sq. ft." to indicate the quantity of carpeting available at the advertised price.

PAR. 10. The unit of measurement usually and customarily employed in the retail advertising of carpet is square yards. Consumers are accustomed to comparing the price of carpet in terms of price per square yard, therefore, respondents' use of the square foot unit of measurement confuses consumers who compare respondents' prices with competitors' prices advertised on a square yard basis.

Furthermore, respondents' use of square foot measurements exag-

gerates the size or quantity of carpeting being offered, and, therefore, has the capacity and tendency to mislead consumers into the mistaken belief they are being offered a greater quantity of carpet than is the fact.

Therefore, the acts and practices as set forth in Paragraph Nine hereof were and are unfair, false, misleading and deceptive.

PAR. 11. In the further 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 rugs, carpeting and floor coverings 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 aforesiad, 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 substantial quantities 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.

INITIAL DECISION BY ALVIN L. BERMAN, ADMINISTRATIVE LAW JUDGE

APRIL 17, 1975

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this proceeding on July 8, 1974, charging respondents Central Carpet Corporation, Inc., a corporation, and James A. Taylor, individually and as an officer of said corporation, with having engaged in unfair and deceptive acts and practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

More specifically, respondents were charged with (1) having engaged in bait and switch tactics in the advertising and sale of carpeting, (2) falsely representing that customers would receive a "free" gift, (3) utilizing the aforesaid acts and practices to be able to induce a customer

into signing a contract upon initial contact without giving him sufficient time to carefully consider the purchase and the consequences thereof, (4) failing to disclose the fact that advertised prices for stated areas of coverage are not applied to additional quantities required, but that the rates for such additional quantities are substantially higher and (5) offering carpeting for sale in terms of a price for a number of square feet, *e.g.*, "up to 270 sq. ft.," and so (a) confusing customers who attempt to compare respondents' prices with those of competitors who advertise on a square yard basis (the usual and customary unit of measurement employed in retail advertising of carpets) and (b) exaggerating the size or quantity of carpeting offered.

Respondents, who at the time were being represented *pro se* by James A. Taylor, were granted an extension of time for filing an answer to the complaint. Respondents filed their answer on Sept. 26, 1974, admitting the complaint in part but denying the allegations of violation.

After, on two separate occasions, allowing respondents additional time to respond to complaint counsel's request for admissions, hearings were scheduled to commence on Jan. 6, 1975. While respondents were in default in responding to the request for admissions, upon an appearance of counsel for respondents on Dec. 23, 1974, and upon motion of that counsel, a tardy response to the request for admissions was allowed to be filed and hearings were scheduled to commence on Jan. 20, 1975. Hearings were held on Jan. 20, 1975 through Jan. 23, 1975, at the conclusion of which the record was closed. Proposed findings were filed by the parties on Feb. 24, 1975, and respondents filed a reply on Mar. 12, 1975.

This initial decision is based on the record as a whole and upon a consideration of the demeanor of the witnesses who gave testimony in this proceeding. References to particular parts of the record are frequently cited as examples only. Proposed findings of fact and conclusions of law submitted by the parties have been given careful consideration and to the extent not included herein in the language proposed or in substance are rejected as not supported by the record or as immaterial or irrelevant.[1]

[1] References to the record are set forth in parentheses, and certain abbreviations, set forth below, are used:
Ans. - Respondents' answer to the complaint.
RPF - Proposed findings of fact submitted by respondents, followed by the page being referenced.
RRB - Reply brief submitted by respondents, followed by page being referenced.
CX - Commission's exhibit, followed by number of exhibit being referenced.
RX - Respondents' exhibit, followed by number of exhibit being referenced.
RRA - Respondents' reply to request for admissions, followed by number of the reply being referenced.
Tr. - Official transcript of the formal hearings, followed by the page number being referenced and preceded by the name of the witness whose testimony is being referenced.

FINDINGS OF FACT

1. Respondent Central Carpet Corporation, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal place of business and office located at 4407 Southern Avenue, Bradbury Heights, Md. (RRA 1-6; Ans.; Taylor, Tr. 7).

2. Respondent James A. Taylor is an individual and an officer of the corporate respondent Central Carpet Corporation, Inc. His business address is the same as that of the corporate respondent. Mr. Taylor is the president and sole shareholder of Central Carpet Corporation, Inc. He formulates, directs and controls the acts and practices of the corporate respondent and has at all times done so. He formulated, directed and controlled the acts and practices of Central Carpet Company, the predecessor to the corporate respondent. Central Carpet Company started doing busines on Jan. 5, 1973. The business was taken over by Central Carpet Corporation, Inc. when it was incorporated on May 1, 1973. Mr. Taylor was the only salesman employed by Central Carpet Company. He was the only salesman for Central Carpet Corporation, Inc., until Oct. 5, 1973 (RRA 10, 11, 13; Taylor Tr. 54, 58, 59, 306).

3. Respondents are now and for some time last past have been engaged in the advertising, offering for sale, sale and distribution and installation of carpeting and floor coverings to the public. Their gross sales for 1973 were close to $200,000. At all relevant times mentioned herein, respondents have maintained a substantial course of trade in merchandise in commerce as "commerce" is defined in the Federal Trade Commission Act, in that they now sell and ship, and for some time last past have sold and shipped, carpet from their place of business located in the State of Maryland to purchasers located in Maryland, Virginia and the District of Columbia. Respondents, moreover, are engaged in commerce by virtue of their extensive advertising in Washington area newspapers which circulate in interstate commerce (RRA 12, 45-74; Ans.; Taylor, Tr. 8, 57-59, 82, 83).

4. Respondents at all relevant times mentioned herein have been, and now are, in substantial competition in commerce with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and services of the same general kind and nature as those sold by respondents (Ans.; Taylor, Tr. 13).

5. Respondents advertised heavily in Washington area newspapers for the purpose of obtaining leads for, and inducing the purchase of, their carpeting and floor covering during the period from Jan. 7, 1973 to Oct. 6, 1974. At present, they advertise weekly in the TV Guide Section

of the Washington Star-News (Taylor, Tr. 83, 311; RRA 26). The record contains 13 Cental Carpet advertisements placed in the Washington Star-News by, or at the direction of, the respondents between Jan. 7, 1973 and Oct. 6, 1974, which are representative of all advertising placed by respondents during the relevant time period for the purpose of inducing the purchase of their carpeting and floor covering (CX 251-263; RRA 45-70).

6. CX 251, the earliest of respondents' advertisements in the record, appeared in the Washington Star and Daily News on Jan. 10, 1973. Identical advertisements appeared in that newspaper on Jan. 7, 14 and 21, 1973 (RRA 45, 46). It reads as follows:

3 ROOMS	Quality Wall to Wall NYLON PILE CARPET	FREE SHOP-AT-HOME DECORATOR SERVICE
	Up to 270 Sq. Ft. PRICE INCLUDES SEPERATE (sic) CUSHION-EZE PADDING AND INSTALLATION!	$109 Call Anytime 'till 11 PM For Free Home Demonstration

7. CX 252 featured the same representations as CX 251 with the addition of an offer of a "Free 38 Piece Ovenware Set" with the purchase of 3 rooms of Delux 501 Nylon Carpet. The availability of other carpets was also noted. This advertisement appeared in the Washington Sunday Star and Daily News TV Magazine on Mar. 4, 1973. Identical advertisements appeared on Jan. 28, 1973, Feb. 4, 11, 18 and 25, 1973, Mar. 11, 18 and 25, 1973 and Apr. 1 and 18, 1973 (RRA 47, 48). It reads as follows:

FREE Shop-At-Home decorator service

3 ROOMS NYLON PILE CARPET QUALITY WALL TO WALL UP TO 270 Sq. Ft.	$109	Easy Terms to fit your budget
CALL ME NOW ASK ABOUT THESE OTHER BEAUTIFUL CARPETS Shag DuPont 501 Indoor-Outdoor Runners Mill Ends, Etc. ALL SIZES AND COLORS	PRICE INCLUDES SEPARATE CUSHION-EZE PADDING and installation	FREE 38 PIECE OVENWARE SET When you purchase 3 Rooms of Our Deluxe 501 Nylon Carpet. Call Now Custom Tackless Installation

8. CX 253 contained representations identical to those of CX 252. It appeared in the Washington Sunday Star and Daily News TV Magazine on Apr. 15, 1973. Identical advertisements appeared on Apr. 22 and 29, 1973, and May 6 and 13, 1973 (RRA 49, 50).

9. Respondents' advertisements appearing on May 20, 1973, and thereafter changed the offer of "3 Rooms" to "Any 3 Areas" or "Up to 3 Areas" of Nylon Pile Carpet (CX 245-63; RRA 51-69), and added a parenthetical "(30 Sq. Yds.)" after the offer of "270 Sq. Ft.". The "free gift" was changed to that of one room carpeted free - any size up to 12 x 10 with the purchase of 3 rooms of Deluxe 501 Nylon Carpet in CX 258 and 259; and again changed to an offer of "free" draperies for one window, with the purchase of three rooms of Deluxe 501 carpeting in CX 260 and 261. After Feb. 3, 1974, respondents' advertisements contained no representations as to any "free" gift (RRA 58-65). Of respondents' advertisements appearing after Aug. 19, 1973, several gave the price charged for additional yardage over the advertised 270 square feet (CX 257, 258, 260-62; RRA 56-59, 62-67).

10. Throughout respondents' advertising, though changed as set forth above, certain themes remain constant. The most arresting feature in each of the advertisements is the highlighted price of $109, focusing the consumer's attention on the dominant representation that "3 rooms" or "areas" of "quality" nylon pile carpeting are being offered for $109 (Findings 6-9, *supra*). The words, "up to 270 sq. ft.," read in the context of the entire advertisements, do not detract from or limit the dominant representation that 3 rooms of quality nylon pile carpet may be had for $109. Indeed, those words could reasonably lead the consumer to believe that 270 square feet is the amount that would adequately cover the average three rooms, thus making it logical for

the advertiser to advertise in terms of "rooms." Visual inspection of respondents' advertisements in the record by the undersigned as well as consumer testimony compel the conclusion that "3 rooms" of "quality" nylon pile carpet for $109 was in each instance respondents' dominant offer. The testimony of consumer witness John Smith, on cross-examination by respondents' counsel, is instructive on this point:

Q. Do you recall seeing in the advertisement in the TV Guide a statement that you should call Central about their other carpets, shags, DuPont 501, indoor-outdoor, runners et cetera?

A. No sir, I don't remember seeing that. If it was there I overlooked it because this type carpeting was run on a special price that I was interested in and I focused all my attention on that (Tr. 254).

(And see Mylechraine, Tr. 183-84; Kirtley, Tr. 213-14; Felder, Tr. 240-41; Lewis, Tr. 256).

11. By and through the use of the above-described type of advertisements (Findings 6-10, *supra*), respondents have represented and are now representing that they were and are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in their advertisements, and that the carpeting was suitable for the uses for which advertised (Ans., Taylor, Tr. 9).

12. In truth and in fact, respondents' advertisements did not constitute bona fide offers to sell the advertised carpeting on the terms and conditions stated in the advertisements, and the carpeting was not suitable for the uses for which advertised. To the contrary, the advertisements were used primarily for the purpose of obtaining leads to persons interested in purchasing carpeting in order to sell such persons more expensive carpeting (Findings 13-17, *infra*).

13. Consumers who responded to respondents' advertisements were called upon in their homes by respondent James Taylor or another salesman of respondent Central Carpet Corporation. The salesman would exhibit what was represented as the advertised carpet[2] (CX 249, RX 2, 3 or 4). Far from being "quality" carpet, the advertised carpet was of such poor appearance and condition that it was virtually self-disparaging and was frequenty rejected on sight by the prospective customer. Respondent Taylor himself admitted that the carpeting (CX 249) was "at the low end of the spectrum of carpet offered by respondents or anyone" (RPF, p. 3); that while "the looks of the carpet [RX 2 and 3] is extremely better* * *, [t]he wear is not that much better" and that RX 4 is "possibly better" (Tr. 322-23). Albert Wahnon, editor of Floor Covering Weekly, the leading trade publication in the

[2] CX 249 is the carpeting sold as the "advertised" carpeting from Jan. 5, 1973 through approximately June 1974 (Taylor, Tr. 322-26; RRA 15). CX 250 is the accompanying "cushion-eze" padding. Respondents substituted RX 2, 3 or 4 for CX 249, selling them as the "ad carpet," beginning in mid-1974, sometimes selling them concurrently (Taylor, Tr. 313-26.)

floor covering industry and one which regularly reviews advertisements in that industry, qualified as an expert witness in carpeting and carpet advertising (Wahnon, Tr. 409-15; RPF, p. 2). He too was of the opinion that the carpet (CX 249) was at the low end of the spectrum; that "it could not withstand too great wear * * * you could not walk over it too many times with shoes." (Wahnon, Tr. 428). The reaction of the consumer witnesses who testified in this proceeding, upon being shown the advertised carpeting, supports respondent Taylor's and Mr. Wahnon's assessment of the carpeting. Witness Mary Young's testimony was typical:

Q. What did the carpeting sample look like?

A. It was just cheesy, real thin, and looked like it had been washed, and everything.[3] (Young, Tr. 172)

(And see Mylechraine, Tr. 185; Beck, Tr. 202-03; Kirtley, Tr. 215-16; Hughes, Tr. 225; Felder, Tr. 242; Smith, Tr. 205; Lewis, Tr. 299).

14. Not only was the appearance of the advertised carpeting shoddy and patently unsuitable, but in some instances, Central Carpet salesmen openly disparaged the advertised carpeting and drew unfavorable comparisons with the higher priced lines. For example, witness Mylechraine testified as follows:

Q. Did Mr. Taylor make any remarks to you about the [advertised] carpet?

A. He said it was, more or less, for people that were going to be moving and that they would just leave it behind. (Tr. 185)

Mrs. Eleanor Lewis testified similarly:

Q. What happened when the salesman came into your home?

A. Well, he had a sample of the carpet and he showed me what was on the ad. He told me by having children it was no good, it wouldn't last.

Q. What did that advertised sample look like?

A. A piece of cheesecloth.

Q. Then what happened after the salesman said this to you about that sample?

A. He showed me better, he told me that was a better carpet, that it would last. (Tr. 258)

Respondents' own witness, Mary E. Lewis, testified to respondent James Taylor's comments on the advertised carpet as follows:

Q. What did he say about the carpet he was advertising?

A. He said the carpet he was advertising was you know, he showed me the threads and everything in it, and he said it would not hold up too long. (Tr. 302)

(And see Hughes, Tr. 226; Smith, Tr. 251). Respondent Taylor himself testified that he always told and tells his customers that the advertised

[3] This is similar to the reaction of the undersigned to his examination of CX 249.

carpeting will last only one to three years, while the higher priced DuPont 501 will last 20 to 30 years (Taylor, Tr. 151-52). All carpets other than the advertised $109 grade are represented as being longer lasting. The time period represented has varied from five years to the 20 to 30 years for the DuPont 501 quality (Taylor, Tr. 151-52; Mylechraine, Tr. 185-86; Hughes, Tr. 226; Eleanor Lewis, Tr. 258; Epps, Tr. 389).

Still another drawback to, or limitation of suitability of, the advertised carpet was the fact that it was available only in from two to four colors, whereas each of the other carpets displayed by respondents came in six or seven colors (Taylor, Tr. 88; Hughes, Tr. 225; Smith, Tr. 250).[4] As respondent Taylor explained, when he goes into a house he takes and displays seven different carpets, including the advertised $109 carpet. While he shows the $109 carpet first, he tries to ascertain what color the prospective customer is interested in (Taylor, Tr. 347).

15. Upon rejecting the advertised carpeting, customers are shown better quality carpeting by their Central Carpet salesmen which, by comparison, further serves to disparage the advertised carpeting. (See, *e.g.*, Young, Tr. 172; Mylechraine, Tr. 185-86; Beck, Tr. 203; Kirtley, Tr. 216; Hughes, Tr. 226; Smith, Tr. 251).

16. Under these circumstances and by these tactics, respondents are able to push their higher priced lines of carpeting to the virtual exclusion of the low-priced advertised carpet. Respondents made very few sales of the advertised carpeting at the price and on the terms set forth in the advertisements. There are in the record copies of customer contracts and charge tickets which reflect all sales of carpeting by respondents, except those made by James A. Taylor while working for other firms, namely Sir Carpet and Maryland Carpet Company, between Jan. 7, 1973 and Oct. 5, 1973 (CX 110-24; CX 126-29, 131-248; RRA 40). SALES OF THE ADVERTISED carpet (CX 249) can be identified on contracts and charge tickets as "nylon pile" or "nylon cut pile" (RRA 18; Taylor, Tr. 67). An examination of the exhibits reveals that only two contracts (CX 110 and 233) out of a total of 137 sales for this period were for the sale of the advertised carpet. Of these sales, only one (CX 110) was at the sale price of $109, and that was to cover a "living area" only; the other (CX 233) was for the substantially higher cash price of $381 for living room, dining room and hall. Therefore, less than one percent of Central Carpet's sales, for the only period for

[4] Customer Hughes, for example, was shown two colors of the advertised carpet (Hughes, Tr. 225). Customer Smith was shown three (Smith, Tr. 250).

which complete records are in evidence, was for the sale of the advertised carpet at or less than the advertised price.[5]

Over 98 percent of the total sales were for more than $109.[6] Approximately 100 sales, or more than 73 percent of the total sales in evidence, were for more than $400, excluding tax and finance charges. Approximately 54, or nearly 40 percent, were for over $500. Nearly 22 percent were at prices greater than $600. Five percent of total sales in the record were for prices greater than $800, exclusive of tax and finance charges, and three customers made purchases of over $1000.

17. The representations set forth in Findings 10 and 11, *supra*, were false, misleading and deceptive and had the tendency and capacity to deceive members of the purchasing public.

18. Respondents' advertisements, as set forth in Findings 7-9, *supra*, have represented further that purchasers of the DuPont 501 carpet receive a "free" 38-piece ovenware set or other "free" gift.

19. In truth and in fact, purchasers of respondents' DuPont 501 carpet did not receive a "free" 38-piece ovenware set. Respondents have no regularly established selling price for their carpet on which a "free" offer could be based (Taylor, Tr. 61-62). Moreover, the cost of the ovenware set was regularly included by respondents in the selling price of the carpet sold to such customers. Respondents state that they carried the cost of each ovenware set in their advertising budget from March through September 1973 (RPF, p. 4). It is irrelevant where they "carried" this cost. Respondent James Taylor himself testified that he included the cost of this "free" gift in calculating the price of his carpeting (Taylor, Tr. 61) (And see RRA 43). Moreover, he admitted that at times he has reduced the price of a customer's purchase on condition that the customer forego the "free" gift (Tr. 103-05, 133; CX 121, 156, 158, 179; RPF, p. 4).

20. Since purchasers of respondents' DuPont 501 did not in fact receive a "free" gift of ovenware with their purchase of carpeting, respondents' representation as set forth in Finding 18 is unfair, misleading and deceptive, and has the tendency and capacity to deceive members of the purchasing public.

21. During the period between Jan. 7, 1973 and May 13, 1973, respondents advertised carpeting in terms of square feet only (CX 251, 252, 253; Findings 6-8, *supra*), using the phrase "up to 270 sq. ft.". After that date, they added a parenthetical "(30 sq. yds.)" to the "270 sq. ft." Respondent Taylor admitted that this change was made in response to

[5] The situation may realistically be viewed as no "advertised" sales having been made. The one sale of the advertised quality of carpet at $109 was to cover one room The newspaper offer represented that three rooms or areas would be covered for $109 (Finding 10, *supra*).

[6] There were two sales of pieces of carpeting-other than the advertised carpeting-at less than $109.

"F.T.C. displeasure" (RPF, p. 2); that he was "nudged a little" by the Federal Trade Commission (Taylor, Tr. 137).

22. Mr. Albert Wahnon, the expert in the field of retail carpet advertising (Finding 13, *supra*), testified that the customary and, in fact, standard unit of measurement employed by carpet retailers in their advertisements is the square yard (Wahnon, Tr. 424-25). Respondents themselves admitted that, except for certain carpet dealers who advertise quantities of carpet in terms of a number of rooms for a stated price, the unit of measurement usually and customarily employed in the retail advertising of carpet is the square yard (RRA 39).

23. Since the unit of measurement customarily employed in the retail advertising of carpet is the square yard, consumers are accustomed to comparing prices of carpeting in terms of price per square yard. Respondents' use of "square feet" alone in their advertisements inhibited an accurate comparison, tended to exaggerate the amount of carpet being offered, both absolutely and in comparison to competitors who advertised in terms of square yards, and thus had the tendency and capacity to mislead and deceive consumers into believing they would get more carpeting for their money than was the fact. This tendency was bolstered by other representations in the advertisements that the offered carpeting would be sufficient for "three rooms" or "3 areas" wall to wall. Moreover, testimony in the record indicates that consumers were in fact deceived into thinking that the offered amount of 270 square feet would cover the areas they desired to carpet, when in fact those areas were much larger (Mylechraine, Tr. 188; Kirtley, Tr. 214; Hughes, Tr. 224-25; Felder, Tr. 243).

24. Between Jan. 7, 1973 and Aug. 19, 1973, respondents offered their featured advertised carpeting in terms of a set quantity-270 square feet or 30 square yards-for $109. This is an effective rate of approximately $3.63 per square yard (Findings 6-9, *supra*). In making such offers, respondents failed to reveal the material fact that, for additional quantities of the carpeting over and above the stated amount customers would be charged, variously $5.99 or $7.00 per square yard (RRA 21; Taylor, Tr. 92-93). Beginning with September 23, 1973, several of respondents' advertisements supplied the information that quantities of the advertised carpeting over and above 270 square feet would cost the purchaser $5.99 per square yard (CX 257, 258, 260-63; finding 9, *supra*). Respondents admitted that this change in their advertisements was made as a result of "F.T.C. displeasure", that they were "nudged by the Federal Trade Commission" into making the change (RPF 2; Taylor, Tr. 335).

25. Respondents' failure to disclose the aforementioned material fact had the tendency and capacity to deceive consumers into believing that prices charged for quantities of carpeting in excess of the featured area would be at a rate identical to, or at least not substantially higher than, that indicated for the specified area.

26. Through the use of the unfair, false, misleading and deceptive statements, misrepresentations and practices found above, respondents and their salesmen have been able to induce customers into signing contracts upon initial contact, without giving them time to consider carefully the purchase and the consequences thereof. Ninety-nine percent of respondents' sales leads are from newspaper advertisements featuring the $109 carpet (Taylor, Tr. 311). The consumer witnesses who testified in this proceeding were almost uniformily attracted to respondents' offer of carpeting for $109; yet they and practically all of respondents' customers signed contracts on the initial contact for more expensive carpeting in amounts costing substantially more than the featured $109 (Findings 10, 16, *supra*). Respondent Taylor testified that "99.44 percent" of his sales were consummated on the initial visit to the customer's home (Tr. 153).

DISCUSSION

Individual Liability of James A. Taylor

Respondents make no argument against holding James A. Taylor liable in his individual capacity for the acts and practices that may be found unfair and deceptive. It is settled that to prevent erosion of its orders, the Federal Trade Commission has the authority to name individually, officers, directors and the stockholders of corporations when they have participated in or controlled the challenged acts or practices. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112 (1937); *Rayex Corporation* v. *Federal Trade Commission*, 317, F.2d 290 (2d Cir. 1963); *Standard Distributors* v. *Federal Trade Commission*, 211 F.2d 7 (2d Cir. 1954). As the individual solely responsible for every facet of Central Carpet Corporation, Inc.'s operations, James A. Taylor is unquestionably liable for the acts and practices found herein.

The Unfair and Deceptive Acts and Practices

"Bait and Switch"

Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of a bait advertisement is to obtain leads as to persons interested in buying

merchandise of the type so advertised. *Guides Against Bait Advertising*, 16 C.F.R. §238.0 (1957). Bait advertising and the practice of bait and switch whereby the customer responding to the "bait" is "switched" to a higher priced item have been repeatedly condemned by the Commission and the courts. *Tashof* v. *Federal Trade Commission*, 437 F.2d 707(D.C. Cir. 1970); *Consumers Products of America, Inc.* v. *Federal Trade Commission*, 400 F.2d 930 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1088; *Guides Against Bait Advertising*,16 C.F.R. §238.1-.4 (1975). Factors evincing bait advertising and a bait and switch scheme include, among others, the use of an offer using statements or illustrations that create a false impression of the grade, quality or usability of the offered product such that on disclosure of the true facts, the purchaser might be switched to another product; and the discouragement of the purchase of the advertised article by refusing to show it, disparaging the product by acts or words, or showing of a product which is defective, unusable or impractical for the purpose represented or implied in the advertisement. *Guides*, *supra*, §238.2(a), 238.3(a), (b), (e).

In light of the above, it is clear that respondents' advertising and selling practices constitute a bait and switch scheme. The "bait" here, which successfully caught the attention of consumers, is low quality, inferior and very unattractive carpeting, limited as to colors in which available, advertised and offered as "quality" "wall to wall" carpeting in amounts sufficient to cover three rooms or three areas at a very low price. In no way could this be considered a bona fide offer. The terms of the offer could not in fact be filled, because the product referred to was in fact *not* "quality"-with all that the word implies in terms of durability and attractiveness, *nor* was it suitable for wall to wall installation, *nor* would the amount offered usually cover three rooms or three "areas." The offer was patently a means of obtaining leads to persons who wanted carpeting. Exhibition of the advertised carpet was generally sufficient in itself to switch the prospective customer to higher priced carpeting-it was a self-disparaging product. The record here is devoid of some of the more outrageous examples present in other cases of salesmen's efforts to disparage their product and discourage its purchase, although even here, respondents' salesmen did point out all the shortcomings of their featured carpet.

As discussed above, the poor appearance of the carpet, together with the few colors in which it was available, made it unnecessary for the salesman to do more than merely exhibit the carpet to disparage it. At any rate, it is not essential to show evidence of actual disparagement of the advertised product to find "bait and switch." It may be inferred that customers were "switched" from the advertised product by

evidence of bait advertising, present here, and minimal sales of the advertised product. *Tashof* v. *Federal Trade Commission*, *supra*, at 709-10; see also, *National Lead Co.* v. *Federal Trade Commission*, 227 F.2d 825, 832 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957). Only one sale of the advertised carpeting at the advertised price is in the record-representing less than 1 percent of respondents' total carpet sales in evidence (Finding 16, *supra*). This is certainly "minimal" sales.[7] The great number of sales of higher priced carpeting shows the success of the "switch."

Respondents argue that they never refused to show or demonstrate the advertised carpet and that they were always willing to sell it (RPF 3). The undisputed fact remains that the appearance of the advertised carpet alone could and did "switch" customers to higher priced carpeting. Respondents argue further that their salesmen were merely telling the truth in pointing out the advertised carpet's shortcomings (RPF 3; RRB 3). Clearly, however, the law is violated if the first contact with a customer is secured by deception, as here in the form of respondents' advertisements. *Guides*, *supra*, §238.2(b). An integral part of respondents' business operation, therefore, consisted of "baiting" the consumers with misleading advertisements of inexpensive carpeting, and subsequently "switching" them to higher priced carpeting through demonstrating and comparing the inferior carpeting with better quality goods. Respondents' purpose was accomplished, though it was unnecessary for them to resort to some of the egregious tactics employed in other "bait and switch" schemes.

Use of the Word "Free"

To represent that merchandise or services are offered "free" in connection with the sale of other merchandise or services, there must have been an established regular price on which to base the "free" offer. *Federal Trade Commission* v. *Mary Carter Paint Co.*, 382 U.S. 46 (1965). it is plainly deceptive to represent as was done by these respondents that an ovenware set is "free" if its cost, unknown to the purchaser, is included in the price of the advertised carpeting. *Sunshine Art Studios, Inc.* v. *Federal Trade Commission*, 481 F.2d 1171 (1st Cir. 1973); *Mary Carter Paint Co.*, *supra; Guide Concerning Use of the Word "Free" and Similar Representations*, 16 C.F.R. 251 (1975).

Use of "Square Feet" and Undisclosed Rates

[7] The fact that for the only period for which there is documentary evidence, advertised carpet sales represented less than 1 percent of all sales tends, at best, to cast doubt on the accuracy of respondent Taylor's recollection that for all of 1973 and 1974 sales of the advertised carpet amounted to 7 percent of all carpet sold by respondents. Moreover, sales of the advertised merchandise does not preclude existence of a "bait and switch" scheme. It has been determined that, on occasions, this is a mere incidental by-product of the fundamental plan and is intended to provide an aura of legitimacy to the overall operation. *Guides To Bait Advertising*, *supra*.

In consideration of the fact that the unit of measurement customarily employed in advertising carpeting is by the square yard, the advertising of carpeting in terms of square feet, without disclosing the equivalent in square yards, is unfair and deceptive because (1) it inhibits an accurate comparison of respondents' prices with those of competitors, and (2) because it tends to exaggerate the amount of carpet being offered.

Further, it is an unfair trade practice to fail to reveal any relevant and material facts concerning representations in an advertisement where such information might be important to the prospective customer in making his decision as to whether to purchase the product advertised. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Spiegel, Inc.* v. *Federal Trade Commission*,495 F.2d 59 (7th Cir. 1974). Therefore, respondents' practices of advertising carpeting in terms of square feet only and of failing to disclose the higher rates charged for quantities of carpeting beyond the advertised amounts are unfair and have the tendency and capacity to deceive the public. It is of no matter that customers were informed of the true facts concerning respondents' offers before they made their purchases. The harm was done on initial contact in that these practices tended to enhance the "bait" quality of respondents' advertisements. *Exposition Press, Inc.* v. *Federal Trade Commission*,295 F.2d 869, 873 (2d Cir. 1961), *cert. denied*, 370 U.S. 917(1962); *Carter Products, Inc.* v. *Federal Trade Commission*,186 F.2d 821, 824 (7th Cir. 1951).

Respondents argue that there was no evidence presented that persons responding to advertisements of respondents were misled by the failure to specify the cost of additional yardage and that no evidence was presented that such persons were misled by the use of square feet into thinking that they were being offered a greater quantity of carpeting than was the fact (RPF 5, 7). To the contrary, the record does establish that customers received the impression that greater amounts of carpet were being offered than was the fact (Finding 23, *supra*). In any event, evidence of actual deception of the public is not necessary to a finding of violation, a tendency and capacity to deceive being sufficient. *Feil* v. *Federal Trade Commission*, 285 F.2d 879 (9th Cir. 1960); *Montgomery Ward* [*Co.* v. *Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967). The Federal Trade Commission Act was not intended to protect only the sophisticated, but the unthinking and credulous who do not stop to analyze but are governed by general impressions. *Giant Food, Inc.* v. *Federal Trade Commission*, 332, F.2d 977 (D.C. Cir. 1963); *Helbros Watch Company, Inc.* v. *Federal Trade Commission*, 310 F.2d 868 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963). Therefore, in the context of all representa-

tions made, upon his own examination of the advertisements as well as the other pertinent portions of the record, the undersigned concludes that the use of square feet and the failure to disclose higher rates on quantities above the advertised amounts have the tendency and capacity to deceive the consumer. *J.B. Williams Co.*v. *Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967).

Cooling Off Period

In view of the facts that (1) respondents are able to secure entry into potential customers' homes by virtue of advertisements that stress the availability and suitability of inexpensive carpeting, (2) the actual sales made are almost invariably of a much higher priced carpet and for a substantially greater expenditure than that indicated in the advertisements and (3) these sales are practically always made upon the initial visit of the salesman, it is clear that respondents' customers require the protection of a "cooling off" period of the type enunciated in the Commission's Trade Regulation Rule, *Cooling Off Period For Door-To-Door Sales*, 16 C.F.R. Section 429 (1975).[8] Such protection will be afforded by the order.

The Remedy

The Commission is vested with broad discretion in determining the type of order necessary to ensure the discontinuance of the unlawful practices found. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965). The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608,613 (1946); *Federal Trade Commisson* v. *Ruberoid Co.*, 343 U.S. 470 (1952). It is also settled that the Commission, as part of its remedial powers, has the authority to require respondents to take affirmative action, or make affirmative statements in advertising. *Federal Trade Commission* v. *Colgate-Palmolive*, *supra; American Cyanamid Co.* v. *Federal Trade Commission*,401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

The order is reasonably related to the unlawful practices found and has been devised to bring about cessation of such practices. In addition to proscribing the unlawful acts and practices found and variations of those practices, the order is also directed at certain aspects of the unlawful practices which played an integral part in their execution. For

[8] It is of no moment that the record does not contain actual evidence of instances of hard pressure tactics. The very fact that individuals who invite respondents into their homes to display an advertised inexpensive carpeting are somehow prevailed upon, on the very first calls, to contract for much more expensive carpeting demonstrates that respondents' customers require a "cooling off" period to reconsider what they have obligated themselves to do.

example, numbered paragraphs 14, 15 and 16 of the order are directed at specific aspects of the bait and switch that helped make the practice work. The inclusion in the advertisements of references to carpeting for "3 rooms" or "3 areas" or "up to 3 areas", regardless of how qualified, tends to infer that three rooms or areas will be carpeted. As an integral part of the bait, such advertising should be proscribed unless the rooms or areas referred to will be fully covered at the price advertised. Similarly, featuring carpeting which, for all practical purposes has limited suitability or availability because of a limited number of colors or short life expectancy under normal or not unusual conditions of use has also been an integral part of the bait. Such advertising should be proscribed unless the limitations are disclosed.

Respondents argue that since they have discontinued any offer of a "free gift" and have added the square yard measurement to their advertisements, an order addressed to those matters is no longer necessary (RPF, p. 8). It is settled that discontinuance or abandonment of a practice does not prevent the issuance of a cease and desist order directed to such practice. *Giant Food, Inc.*, 61 F.T.C. 326 (1962). This principle is particularly applicable to situations where the discontinuance was not entirely voluntary but occurred only after the Commission had begun an investigation into such practices, where respondent continues in the same line of business and where there is no guarantee that the practices may not be resumed. *Coro, Inc.*, 63 F.T.C. 1164, 1201 (1963), *modified and aff'd., Coro, Inc.* v. *Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). Respondents discontinued their "free gift" offer, and added "square yards" to their advertisements long after the first investigational hearing of March 20, 1973. Respondent Taylor himself admitted that he made the changes of adding "square yards" and disclosing the cost of carpeting over the specific advertised quantity only as a result of being "nudged" by the Commission (Findings 21, 24, *supra*). It should be noted that Mr. Taylor is still engaged in the same retail carpet business and there is no reason to believe he will not continue in that business. Under such circumstances, an order directed to the aforementioned practices is most appropriate and necessary. Without an order, the public has no definite assurance that the unlawful practices will not be resumed in the future.

In the "Notice Order" attached to the complaint, and in their proposed order, complaint counsel have included a provision requiring respondents to disclose clearly and conspicuously, by means of a black-bordered notice in all their advertisements, the fact that the Commission has found that they "engage in bait and switch advertising."

Despite the wide leeway granted the Commission in framing orders, the undersigned will not adopt such a proposal in this case. In four recent cases, *Wilbanks Carpet Specialists*, Docket No. 8933 (Sept. 24, 1974 [84 F.T.C. 510]); *Tri-State Carpets, Inc.*, Docket No. 8945 (Oct. 15, 1974 [84 F.T.C. 1078]); *Theodore Stephen Co., Inc.*, Docket 8944 (Jan. 28, 1975 [85 F.T.C. 152]); and *Sir Carpet, Inc.*, Docket 8981 (Feb. 6, 1975 [85 F.T.C. 190]), the Commission has struck similar warning provisions from orders issued in the initial decisions. The Commission held that the records in those cases presented insufficient evidence that a consumer warning was a necessary or appropriate means for the termination of the acts or practices complained of or for the prevention of their recurrence. The record in the instant matter presents no stronger evidence in this regard and complaint counsel's request is rejected.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has had, and now has, jurisdiction over respondents, and the methods of competition and acts and practices charged in the complaint and found herein took place in commerce as "commerce" is defined in the Federal Trade Commission Act.

2. Respondents have engaged in false, misleading and deceptive advertising, and used unfair methods of competition and unfair and deceptive acts and practices in the offering for sale, sale and distribution of carpeting and floor coverings.

3. The aforesaid methods of competition and acts and practices of respondents were and are 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.

ORDER

It is ordered, That respondents Central Carpet Corporation, Inc., a corporation, its successors and assigns, and its officers, and James A. Taylor, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, distribution, and installation of carpeting and floor coverings, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

2. Making representations, directly or indirectly, orally or in writing, purporting to offer merchandise or services for sale when the purpose of the representation is not to sell the offered merchandise or services but to obtain leads or prospects for the sale of other merchandise or services at higher prices.

3. Disparaging in any manner, or discouraging the purchase of any merchandise or services which are advertised or offered for sale.

4. Representing, directly or indirectly, orally or in writing, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Failing to maintain and produce for inspection and copying for a period of three (3) years following the date of publication of any advertisement, adequate records to document for the entire period during which each advertisement was run and for a period of six (6) weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price; and

c. a computation of the net profit from the sales of each advertised product or service at the advertised price.

6. Representing, directing or indirectly, orally or in writing, that any price amount is respondents' regular price for any article of merchandise or service unless said amount is the price at which such merchandise or service has been sold or offered for sale by respondents for a reasonably substantial period of time in the recent, regular course of their business and not for the purpose of establishing fictitious higher prices upon which a deceptive comparison or a "free" or similar offer might be based.

7. Representing, directly or indirectly, orally or in writing, that any merchandise or service is furnished "free" or at no cost to the purchaser of advertised merchandise or services, when, in fact, the cost of such merchandise or service is regularly included in the selling price of the advertised merchandise or service.

8. Representing, directly or indirectly, orally or in writing, that a "free" offer is being made in connection with the introduction of new merchandise or services offered for sale at a specified price unless the respondents expect, in good faith, to discontinue the offer after a

limited time and commence selling such merchandise or service, separately, at the same price at which it was sold with a "free" offer.

9. Representing, directly or indirectly, orally or in writing, that merchandise or service is being offered "free" with the sale of merchandise or service which is usually sold at a price arrived at through bargaining, rather than at a regular price, or where there may be a regular price, but where other material factors such as quantity, quality, or size are arrived at through bargaining.

10. Representing, directly or indirectly, orally or in writing, that a "free" offer is available in a trade area for more than six (6) months in any twelve (12) month period. At least thirty (30) days shall elapse before another such "free" offer is made in the same trade area. No more than three such "free" offers shall be made in the same area in any twelve (12) month period. In such period, respondents' sales in that area of the product or service in the amount, size or quality promoted with the "free" offer shall not exceed 50 percent of the total volume of sales of the product or service, in the same amount, size or quality, in the area.

11. Representing, directly or indirectly, orally or in writing, that a product or service is being offered as a "gift," "without charge," "bonus," or by other words or terms which tend to convey the impression to the consuming public that the article of merchandise or service is free, when the use of the terms "free" in relation thereto is prohibited by the provisions of this order.

12. Advertising the price of carpet, either separately or with padding and installation included, for specified areas of coverage without disclosing in immediate conjunction and with equal prominence the square yard price for additional quantities of such carpet with padding and installation needed.

13. Advertising any carpeting or floor covering using square feet as the unit of measurement, unless square yards is also employed as the unit of measurement in immediate conjunction therewith and with equal prominence or using any term or terms which tends to exaggerate the size of quantity of carpeting or floor covering being offered at the advertised price.

14. Advertising the price of carpet, either separately or with padding and installation included, in terms of an area or areas unless the area or areas will be fully covered at the price advertised.

15. Featuring in an advertisement any carpet for use in wall to wall installation which carpet is not suitable for use in heavy traffic, in a household having children or over a particular number of individuals or which may not reasonably be expected to last at least five (5) years, without conspicuously disclosing any of such limitations.

16. Featuring in an advertisement any carpet which is available in five or less colors without conspicuously disclosing the colors in which the carpet is available.

17. Contracting for any sale whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

18. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used in bold face type of a minimum size of 10 points, a statement in substantially the following form:

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

19. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION", which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

[*enter date of transaction*]

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE. IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED. IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK. IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY

FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT. TO CANCEL THIS TRANSACTION MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [*Name of Seller*], AT [*address of seller's place of business*], NOT LATER THAN MIDNIGHT (*date*).

I HEREBY CANCEL THIS TRANSACTION.

_____

(Date)

_____

(Buyer's signature)

20. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

21. Including in any sales contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

22. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

23. Misrepresenting, directly or indirectly, orally or in writing, the buyer's right to cancel.

24. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

25. Negotiating, transferring, selling, or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

26. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to reposses or to abandon any shipped or delivered goods.

Provided, however, That nothing contained in this order shall relieve respondents of any additional obligations respecting contracts required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent, respondents can apply to the

Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon showing, shall make such modifications as may be warranted in the premises.

It is further ordered, That respondents shall maintain for at least a one (1) year period, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor coverings and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by respondents to obtain leads for the sale of carpeting or floor coverings and other merchandise, with a copy of this order.

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, sale of any product, consummation of any extension of consumer credit 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 the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

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 this order.

It is further ordered, That the respondent James A. Taylor promptly notify the Commission of the discontinuance of his present business or employment and of his affiliations 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.

FINAL ORDER

The administrative law judge filed his initial decision in this matter on Apr. 17, 1975, finding respondents to have engaged in the acts and practices as alleged in the complaint and entering a cease and desist order against respondents. A copy of the initial decision and order was

served on the respondents on May 9, 1975. No appeal was taken from the initial decision.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision should become effective as provided in Section 3.51(a) of the Commission's Rules of Practice,

It is ordered, That the initial decision and order contained therein shall become effective on the date of issuance of this order.

It is further ordered, That respondents shall, within sixty (60) days after service of this order upon them, file with the Commission a report in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

IN THE MATTER OF

C. D. PAIGE COMPANY, INC., ET AL.

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

Docket C-2672. Complaint, June 12, 1975-Decision June 12, 1975

Consent order requiring an East Providence, R.I., seller of insurance at retail, among other things to cease violating the Truth in Lending Act by failing to disclose to consumers, in connection with the extension of consumer credit, such information as required by Regulation Z of the said Act.

Appearances

For the Commission: *Raymond J. McNulty.*

For the respondents: *Richard T. Linn, Gunning, LaFazia, Gnys & Selya, Inc.*, Providence, R.I.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that C. D. Paige Company, Inc., a corporation, trading and doing business as Premium Budget Plan, and Kenneth E. Norris, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the implementing regulation, 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 C. D. Paige Company, Inc., trading and doing business as Premium Budget Plan, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its principal office and place of business located at 680 Warren Ave., East Providence, R. I.

Respondent Kenneth E. Norris is an officer of the corporate respondent. He formulates, directs and controls the policies, acts and practices of the corporation, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are and have been, engaged in the offering for sale and sale of insurance to the public at retail.

PAR. 3. In the ordinary course and conduct of their business as aforesaid, respondents offer to extend consumer credit and extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing Regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, respondents in the ordinary course of business as aforesaid, and in connection with their financing of insurance premiums which are credit sales as "credit sale" is defined in Regulation Z, have caused, and are causing, their customers to enter into contracts for the purchase of insurance, by executing a binding combination promissory note and disclosure statement, hereafter referred to as the "statement." Respondents provide these customers with no consumer credit cost disclosures other than on the statement.

By and through the use of the statement, respondents:

1. Failed in some instances to identify the amount or method of computing the amount of any default, delinquency, or similar charge payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

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

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

4. Failed in some instances to disclose the method of computing any

589-799 O - 76 - 67

unearned portion of the finance charge in the event of prepayment of the obligation as required by Section 226.8(b)(7) of Regulation Z.

5. Provide additional information which misleads or confuses the customer or obscures or detracts attention from the information required to be disclosed by Regulation Z, in violation of 226.6(c) of Regulation Z.

6. Failed to preserve evidence of compliance with Regulation Z for a period of not less than two years after the date each disclosure is required to be made as required by Section 226.6(i) of Regulation Z.

PAR. 5. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Boston 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 implementing regulation promulgated thereunder and 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 Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 (b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent C. D. Paige Company, Inc., trading and doing

business as Premium Budget Plan, is a corporation organized, existing and doing business under and by virtue of the laws of the State of Rhode Island and Providence Plantations, with its office and principal place of business located at 680 Warren Ave., East Providence, R. I.

Respondent Kenneth E. Norris is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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 C. D. Paige Company, Inc., a corporation, trading and doing business as Premium Budget Plan or under any other name or names, its successors and assigns, and its officers, and Kenneth E. Norris, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit or advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. § 1601, *et seq.*) do forthwith cease and desist from:

1. Failing to identify the amount or method of computing the amount, of any default, delinquency, or similar charge payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

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

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

4. Failing to identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligations as required by Section 226.8 (b)(7) of Regulation Z.

5. Stating, utilizing or placing any additional information in conjunction with the disclosures required to be made by Regulation Z, which information misleads, confuses, contradicts, obscures or detracts

attention from disclosure of information required to be disclosed by Regulation Z, in violation of Section 226.6(c) of Regulation Z.

6. Failing in any consumer credit transaction to preserve evidence of compliance for a period of not less that two years as required by Section 226.6(i) of Regulation Z.

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 consummation of any extension of consumer credit, 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 notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent, such as dissolution, assignment, or sale, resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That 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

NATIONAL DYNAMICS CORPORATION, ET AL.

OPINION AND MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8803. Decision, Feb. 16, 1973 Modified Order June 17, 1975*

Order further modifying order issued Mar. 4, 1975, 40 F.R. 19459, (p. 390 herein), against a New York City seller of battery additive, VX-6, and other products, by eliminating certain "loopholes" in the earlier order, while setting forth in some detail and with greater clarity a wide variety of options available to

* See 82 F.T.C. 488.

respondents for making truthful claims concerning the earnings of their distributors.

Appearances

For the Commission: *Jeffrey Tureck* and *Michael C. McCarey.*
For the respondents: *Solomon H. Friend*, N.Y., N.Y.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

Complaint counsel have filed a "Petition for Reconsideration" of the Commission's order in this matter issued on Mar. 4, 1975. Respondents have replied in opposition. In order to obtain more time within which to consider the petition for reconsideration, the Commission, by order dated May 27, 1975, stayed the effective date of its Mar. 4 order, and thereby, the time within which respondents might appeal it. The order of Mar. 4 modified an earlier cease and desist order of the Commission, pursuant to remand from the United States Court of Appeals for the Second Circuit, which had instructed that the original order be changed.

Having reviewed the arguments made by complaint counsel in their petition for reconsideration, and respondents' arguments in opposition, and after conducting our own review of the order previously entered, we have determined that it must be modified in order to accomplish the purposes intended by the Commission when it issued its opinion and order of Mar. 4. The order as revised is designed to eliminate certain "loopholes" in the earlier order to which complaint counsel have properly objected, while setting forth in some detail and with greater clarity a wide variety of options available to respondents for making truthful claims concerning the earnings of their distributors, consistent with the mandate of the Court of Appeals.

The Commission's original order in this matter, of which the Court of Appeals disapproved, limited respondents essentially to representations of average earnings. The Court of Appeals remanded with the instructions that respondents should not be limited to average earnings. The Court suggested that the Commission consider permitting ranges of earnings to be represented, and implied, by its reference to an earlier assurance of voluntary compliance, that truthful testimonials should also be allowed, though cautioning that respondents must not be allowed to make deceptive use of the unusual earnings of a few.

In fashioning our modified order, we have proceeded on the theory that respondents should be allowed to make a wide variety of simple, truthful, nondeceptive statements concerning the earnings of their distributors. At the same time, they must be prevented from bandying

about high earnings achieved by a minority of purchasers with no indication of the unrepresentativeness of such earnings. If respondents lack evidence that the high reported earnings of a few distributors are in fact representative of the earnings of large numbers of other distributors, then it is clearly deceptive for them to portray the minority results reported to them without a clear indication of their unrepresentativeness. The appended order embodies a general prohibition on representations of past earnings, followed by a detailed enumeration of various broad sorts of earnings claims, in addition to average earnings claims which respondents may make:

(1) *Average or median earnings.* The order makes clear that any true statement of average or median earnings achieved by distributors during any particular stated past time period is permissible. For example;

1. Last year our distributors earned an average of $_____.
2. In 1971 our distributors earned an average of $_____.
3. For all of 1973 our distributors earned an average of $_____ per month.
4. In May, 1973, our distributors earned an average of $_____.

The requirement that respondents provide some indication of the time period upon which a statement of earnings is based is implicit in the requirement that they not misrepresent past earnings, a prohibition sanctioned by the Court of Appeals. Failure to disclose that represented achievements are in fact several years old is clearly misleading, since the assumption of readers is likely to be that they are based on recent information.

(2) *Statement of non-average, non-median earnings achieved by a substantial number of purchasers.* Respondents may wish to advertise that some number of their purchasers have earned some stated figure or more when the stated figure exceeds the average. The order would permit all representations of this sort, provided that a substantial number of purchasers have in fact earned the stated figure or more, and provided that a clear and conspicuous disclosure is made of the percentage of the total number of distributors constituted by those who, according to respondents' representations, have achieved or exceeded the stated amount. The percentage disclosure is necessary in order to avoid the misleading implications of statements such as "Hundreds of our distributors have earned $_____ or more" when the hundreds constitute only a tiny fraction of all purchasers. Examples of the numerous earnings claims permitted by this section would be the following:

1. Last year at least 585 of our distributors (_____% of all our distributors) earned $_____ or more.
2. In 1972, _____% of our distributors earned $_____ or more.
3. In all of 1973, hundreds of our distributors (_____% of all distributors) earned an average of $_____% or more per month.

4. In May, 1973, at least 600 of our distributors (_____% of the total) earned $_____ or more.

(3) *Statements of earnings ranges.* As complaint counsel have pointed out in their petition for reconsideration, statements of ranges may be deceptive if the earnings ranges are too large. A consumer presented with a statement that thousands of distributors have earned from "$_____ to $_____" is likely to assume that the average lies somewhere near the middle of the range, and that substantial numbers of people have achieved results in the top of the range. As complaint counsel point out in their petition for reconsideration, stipulated records in this case show for a particular year that over 99 percent of respondents' distributors earned under $10,000, while a few earned in excess of $25,000. Common sense, moreover, would suggest that in most business opportunity situations one would find a few exceptional individuals performing well above average, rather than an even distribution of earnings results from bottom to top. Thus, the use of an unduly large range which encompasses the exceptional earnings of a few will result in deception, with the extent of deception increasing as the range does.

Complaint counsel's solution to this problem is to require that respondents state figures for each quartile of any earnings range they choose to employ. This solution, however, would not be fair in instances where respondents properly employed narrow ranges in an effort to present an accurate portrayal of their purchasers' earnings, nor would it entirely suffice in instances where respondents chose ranges so large that even quartiles thereof might be unduly broad. We think it is clear that in suggesting that the Commission fashion its order to permit the use of earnings ranges, the Court of Appeals anticipated that respondents would make use of reasonably descriptive ranges. In dealing with this problem in the past the Commission has at times adopted the approach of mandating particular ranges within which disclosures must be made.[1] In an effort to allow respondents maximum flexibility consistent with the nondeceptive use of earnings ranges, we believe the most appropriate solution in this case is to set an outer limit on the size of permissible ranges.

The order as revised will limit the size of permissible ranges to $4,000 for representations of yearly earnings and proportional amounts for other time periods. Stipulated evidence in this case, indicated that for a recent year over 99 percent of respondents' distributors earned $10,000 or less. Thus, if respondents wish to use earnings ranges to give consumers an accurate picture of the earnings achieved by their distributors, it appears they will be able to cover the earnings of over

[1] See *Universal Credit Acceptance Corp., et al.*, 82 F.T.C. 570, 670 (1973), reversed as to another issue, sub nom *Heater* v. *Federal Trade Commission*, 503 F.2d 321 (9th Cir. 1974).

99 percent of their distributors by use of at most three ranges. Even allowing for some measure of inflation and improvement in the performance of respondents' distributors, it would appear that at most four or five $4,000 ranges will, for the foreseeable future, be adequate to permit a description of the earnings of all but a tiny, unrepresentative handful of purchasers.[2] Larger ranges, in light of these considerations, could too easily be used to deceive. In the event that circumstances should change in the future and respondents can demonstrate that the order as drafted would prevent them from describing the earnings of the vast majority of their distributors by means of a small number of ranges, they may petition the Commission to modify its order.

In addition, the order as revised requires that in stating any range, respondents must indicate the percentage of their distributors who have achieved results within the range. As noted with respect to statements of non-average earnings above, this requirement is necessary to avoid the misleading implications of such statements as "Hundreds of our distributors have earned from $____ to $____" when in fact the hundreds may constitute only a small fraction of the total. In the event, however, that respondents choose to employ ranges beginning with $0 and proceeding continuously upward, they need only indicate the number *or* percentage of distributors within each range. Under such circumstances a consumer can readily determine the significance of large absolute numbers in the higher ranges.

As in the case of other provisions, the one respecting earnings ranges requires that they must apply to "any stated period of time." Once again, this phrase is intended to require that respondents indicate the year in which stated results were compiled, as well as whether the results are yearly results, monthly averages, the results of one month only, or whatever. We think this is clearly implied in any requirement that respondents not misrepresent earnings. Pursuant to subsection (3) of the order, following are examples of the many sorts of representations which respondents would be able to make:

1. In 1973, (*number*) of our distributors (_____%) of all our distributors) earned from $6-10,000.

2. In April, 1972, _____% of our distributors earned from $350-700.

3. In the first 9 months of 1973, (*number*) of our distributors (_____% of the total) earned from $400-750 each month.

4. In 1972, our distributors achieved the following earnings:

$0-4,000	(number or percentage)
$4-8,000	"
$8-12,000	"

[2] Respondents can, of course, encompass the earnings of all those at the top with a representation in the form "$_____or more," permitted by the order, or by use of testimonials, *infra*.

$12,000 and up

(4) *Earnings testimonials.* Complaint counsel are correct, we believe, in pointing out that even though a consumer may be apprised that an earnings testimonial represents a "better than average" result, the consumer is still likely to assume that testimonial results represent an achievement that is within the realm of reasonable possibility for herself or himself. Thus, if a truthful testimonial represents a performance that has been achieved by only one or a handful of purchasers out of thousands, it is likely to convey a misleading impression even in the presence of a disclosure that it is a "better than average" result. For this reason, we believe it necessary to alter the treatment given to this problem in our order of March 4. One possible solution would be simply to prohibit the use of testimonials which describe a performance which has not been matched or exceeded by a representative fraction of respondents' purchasers. An alternative would be to require a disclosure which adequately apprises the consumer of the full extent of the disparity between the testimonial performance and the performance of others. Under the circumstances of this case we believe an appropriate resolution is to permit all truthful testimonials, provided the following disclosures are made:

1. A statement of the average amount of time per day, week or month spent by the purchaser to achieve the stated performance;

2. The year or years during which, and the geographical area in which the results were achieved;

3. If the results achieved by the purchaser have been accomplished or exceeded by fewer than 10 percent of its distributors, either of the following disclosures, in conspicuous boldface type:

(a) a statement of the average or median achieved by all distributors; or

(b) the following statement in boldface type: IMPORTANT NOTICE: THE RESULTS DESCRIBED ABOVE ARE SUBSTANTIALLY IN EXCESS OF THE AVERAGE RESULTS ACHIEVED BY ALL OUR DISTRIBUTORS. OUR RECORDS SHOW THAT ONLY ____ % OF OUR DISTRIBUTORS HAVE EQUALLED OR EXCEEDED THE PERFORMANCE DESCRIBED ABOVE DURING THE INDICATED TIME PERIOD.

4. If respondents have records to indicate that the results achieved by a purchaser have been matched or exceeded by more than 10 percent of its distributors, either of the following disclosures:

(a) a statement of the average or median achieved by all distributors; or

(b) a statement of the percentage of respondents' distributors who

have equalled or exceeded the performance indicated during the indicated time period.

If the results achieved by the purchaser are in fact those of only an unrepresentative fraction (we have chosen 10 percent for the sake of clarity and precision) of total purchasers, then we believe it is imperative that consumers be placed on notice in the strongest terms of the unrepresentativeness of the stated performance. A disclosure of average earnings should be sufficient to notify viewers of the full extent of the disparity. If respondents do not wish to compile average figures, then they must make a disclosure which warns in the strongest possible terms of the unrepresentativeness of the purchaser. The alternative disclosure provided would not require any additional recordkeeping on respondents' part, since it requires only a disclosure of the fraction of purchasers who, according to whatever records respondents have chosen to keep, have equalled or exceeded testimonial performance.

On the other hand, if, in fact, the testimonial performance has been equalled or exceeded by a significant fraction of all purchasers then a simple indication that it exceeds the average should be sufficient to convey an accurate impression. This can be accomplished by an actual statement of the average, or a statement of the actual fraction of purchasers who, to respondents' knowledge, have equalled or exceeded the represented performance. Examples of the numerous simple, concise, nondeceptive testimonials which would be permitted by this order are as follows:

1. In 1973, Mary Roe earned $\$$_____ selling VX-6 battery additive in the New York Metropolitan area, spending an average of _____ hours per week on the job. The average earnings for all our purchasers during the same period were $\$$_____.

2. In 1972, John Doe earned $\$$_____ selling VX-6 battery additive in the Philadelphia Metropolitan area, spending an average of _____ hours per week on the job. 15% of all our distributors did as well as or better than John that year.

Paragraph 2 of the order has been modified to require maintenance of substantiation for claims made pursuant to paragraph 1. We have not republished paragraphs 3 through 6 of the original order because those paragraphs have previously become final.

As modified, we believe the order entered herein will permit respondents to make a virtually limitless variety of simple, truthful, nondeceptive statements concerning the earnings of their distributors, while at the same time preventing them from passing off the earnings of unrepresentative samples with no disclosure of their unrepresentativeness. If respondents have evidence that impressive fractions of their distributors have earned goodly sums of money, they should be pleased to disclose the facts. On the other hand, if they lack evidence that more than a small fraction of distributors have earned given

amounts, it would be a disservice to consumers to permit the representation of such amounts in advertisements without information to place them in perspective. While absolute clarity and precision in an area of such complexity as that of earnings claims is certainly impossible, we believe the approach adopted herein is in accord with the mandate of the Court of Appeals on remand and sufficient to eliminate the shortcomings of the Commission's order of Mar. 4, 1975.

Because the Commission has modified its earlier order, respondents will, by law, have the full statutory time period within which to appeal the new order. Their request for a 30-day period within which to appeal following our disposition of the motion to reconsider is, therefore, moot.

Order Granting in Part Petition for Reconsideration and Modifying Order to Cease and Desist

Complaint counsel have filed a "Petition for Reconsideration" of the Commission's order in this matter issued on Mar. 4, 1975. Respondents have replied in opposition. The Commission has determined upon review of the matter that paragraphs 1 and 2 of its order of Mar. 4, 1975, must be modified, for reasons indicated in the accompanying opinion. Therefore,

It is ordered, That respondents National Dynamics Corporation, a corporation, and its officers, and Elliott Meyer, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale, or distribution of the battery additive VX-6, or of any other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1.(a) Representing, directly or by implication, that persons purchasing respondents' products can or will derive any stated amount of sales, profits, or earnings therefrom;

(b) Misrepresenting in any manner the past, present, or future sales, profits or earnings from the resale of respondents' products, or representing, directly or by implication, the past or present sales, profits or earnings of purchasers of respondents' products except that any or all of the following representations shall not be prohibited:

(1) A true statement of the average or median sales, profits, or earnings actually achieved by all purchasers of respondents' products during any stated time period.

(2) A true statement of any particular amount of sales, profits, or earnings actually achieved or exceeded by a substantial number of purchasers of respondents' products during any stated time period, provided that it is accompanied by a clear and conspicuous disclosure (if

printed, in typesize at least equal to that of the statement of sales, profits, or earnings) of the percentage of the total number of purchasers who have achieved such results.

(3) An accurate representation of any range or ranges of sales, profits, or earnings actually achieved by purchasers of respondents' products for any stated period of time. Ranges describing yearly results shall not exceed $4,000 (*e.g.*, $0-4,000; $2,000-6,000; $4,000-8,000). Ranges describing monthly results shall not exceed $350(*e.g.*, $0-350; $350-700) and ranges describing results for any other time period shall not exceed an amount constituting the same percentage of $4,000 as the time period constitutes of one year. A representation of any range or ranges of sales, profits, or earnings achieved by purchasers of respondents' products must include a clear and conspicuous statement (if printed, in typesize at least equal to that of the statement of the range) of the percentage which purchasers achieving results within the range constitute of the entire number of respondents' purchasers; *Provided, however*, That if the ranges employed begin with $0 and proceed continuously upward, a statement of the number of purchasers within each range may be included in lieu of the percentage.

(4) Truthful testimonials regarding the sales, profits, or earnings achieved by a purchaser of respondents' products, provided that any such testimonial includes or is accompanied by the following clear and conspicuous disclosures (if printed, in boldface type at least equal in size to that of any sales, profits, or earnings figure stated in the testimonial):

(i) An accurate statement of the average amount of time per day, week, or month required by the purchaser to achieve the stated results;

(ii) An accurate statement of the year or years during which, and the georgraphical area(s) in which, the stated results were achieved;

(iii) If the results achieved by the purchaser providing the testimonial have not been achieved by at least 10 percent of all purchasers of respondents' products during the time period covered by the testimonial, a statement of the average or median sales (or profits or earnings, whichever is included in the testimonial) of all purchasers of respondents' products during the time period covered by the testimonial, or the following statement: IMPORTANT NOTICE: THE RESULTS DESCRIBED ABOVE ARE SUBSTANTIALLY IN EXCESS OF THE AVERAGE RESULTS ACHIEVED BY ALL OUR DISTRIBUTORS. OUR RECORDS SHOW THAT ONLY ____ % OF OUR DISTRIBUTORS HAVE EQUALLED OR EXCEEDED THE PERFORMANCE DESCRIBED ABOVE DURING THE INDICATED TIME PERIOD; and

(iv) If the results achieved by the purchaser providing the

testimonial have been achieved by 10 percent or more of all purchasers of respondents' products during the time period covered by the testimonial, but are in excess of the average or median results achieved by all purchasers, a statement of the percentage of all respondents' distributors who, according to respondents' records, have achieved equal or better results during the same time period, or a statement of the average or median results achieved by all purchasers of respondents' products during the same time period.

2. Failing to maintain records which substantiate that any representation made regarding past or present sales, profits, or earnings are accurate. Such records shall be sufficient to substantiate the accuracy of any representations made regarding amounts earned or sold, the number or percentage of purchasers achieving such results, the time period during which such results are achieved, and the amount of time per day, week, or month required to achieve such results.

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

It is further ordered, That 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

CORNING GLASS WORKS

AMENDED ORDER TO CEASE AND DESIST IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 8874. Complaint, Jan. 13, 1972–Amended Decision, June 17, 1975*

Amended final order to cease and desist prohibiting a Corning, N.Y. manufacturer, advertiser, seller and distributor of Pyrex, Corning Ware, and Corelle Livingware brands of glass household products for food preparation, serving, and storage, among other things, from entering into, maintaining or enforcing resale price agreements; and refusing to deal with customers or potential

* Complaint reported in 82 F.T.C. 1675.

customers unless they agree to maintain the fair trade price of the commodities to be resold.

Appearances

For the Commission: *Ronald A. Bloch* and *Steven B. Gold.*

For the respondent: *Shearman [Sterling,* New York, N.Y. and *William C. Ughetta,* Corning Glass Works, Corning, N.Y.

ORDER REOPENING PROCEEDINGS, VACATING ORDER, AND ISSUING AMENDED FINAL ORDER TO CEASE AND DESIST

On Apr. 30, 1975, the Commission's order in this matter became final.[1] On that same day, respondent filed a Petition to Reopen the Proceedings to Vacate the Final Order Entered Herein and to Substitute an Amended Final Order and a Motion for Suspension of Compliance with Final Order Pending Disposition of Petition to Vacate Same. Complaint Counsel on behalf of the Bureau of Competition filed their answer to both the Petition and the Motion on May 1, 1975. The Motion to Suspend Compliance was granted in part on May 8, 1975. On May 19, 1975, the parties filed a stipulation as to a modification in respondent's proposed Amended Final Order.

Treating the petition to reopen as a petition to reopen and modify under Rule Section 3.72(b)(2), we find that it should be granted as modified by the stipulation of May 19, 1975.

Under Section 3.72(b), a reopening of a final order is authorized if changed conditions of fact so require. Here, respondent has alleged, and complaint counsel agree, that it has wholly abandoned its fair trade program which was the subject of this matter. We are persuaded that this changed condition of fact and the public interest require a modification of the order entered herein. Accordingly;

It is ordered, That the proceedings in the above-captioned matter be, and they hereby are, reopened.

It is further ordered, That the Commission's order in said matter, issued June 5, 1973, be, and it hereby is, vacated and the following Amended Final Order is hereby entered:

AMENDED FINAL ORDER

I

It is ordered, That respondent, Corning Glass Works, a corporation, directly or indirectly, through its officers, agents, representatives,

[1] The Commission order of June 5, 1973 (82 F.T.C. 1675) was appealed by Corning to the United States Court of Appeals for the Seventh Circuit. The Commission's decision and Order was *affirmed* by that Court, 509 F.2d 293 (Jan. 29, 1975). Under 15 U.S.C. Sec. 45(g)(2), the order thus became final on Apr. 30, 1975.

employees, subsidiaries, successors, licensees, or assigns, or through any reseller or any other corporate or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of Pyrex, Corning Ware, and Corelle brand commodities, or of any other commodity which bears, or the label or container of which bears, any other trademark, brand, or name owned by respondent, with respect to which commodity respondent may in the future establish any fair trade program, shall not:

1. Enter into, maintain or enforce any understanding, contract, or agreement with any reseller located within, or applicable to resales occurring within, any state which at the time is, or thereafter becomes a free trade State;[2]

(a) which contains any provision which establishes, is intended to establish, or may be construed by the reseller to establish, any stipulated or minimum price at which resales shall be made; or which contains any circumstance or condition under which any such provision shall become applicable to any resale; or

(b) which contains any provision which restricts, is intended to restrict, or may be construed by the reseller to restrict, the reseller's right to deal with any customer, whether for subsequent resale or otherwise, in any State; or which otherwise imposes, is intended to impose, or may be construed by the reseller to impose, any qualification, precondition, or other limitation on said right; or which contains any circumstance or condition under which any such provision shall become applicable to any resale.

2. Enter into, maintain, or enforce any understanding, contract or agreement, with any reseller located within any State which at the time is, or thereafter becomes a free trade State, which requires, is intended to require, or may be construed by the reseller to require, as a precondition to any resale or as a qualification or other limitation on the right to resell, that said reseller;

(a) obtain from any customer or potential customer in any State any understanding, contract, or agreement by which said customer or potential customer agrees with respondent to maintain the fair trade price of the commodity to be resold; or

(b) refuse to deal with any customer or potential customer in any State unless such customer or potential customer has agreed to maintain the fair trade price of the commodity to be resold.

3. (a) Circulate to any free trade State reseller any list ("blacklist") of retailers who have advertised, offered for sale, or sold any of

[2] The definitions of terms contained in Part I.A of the Commission's June 5, 1973 opinion in this matter shall apply to this Amended Final Order.

respondent's fair traded commodities at less than the fair trade prices established therefor, or who have not signed a fair trade contract, or whose retailer contracts have been terminated; or in any other manner communicate the names of such retailers to any free trade State resellers; or (b) take any other action which is intended to, or which may in fact, prevent or have a tendency to prevent any retailer from obtaining any such commodity: *Provided, however*, That nothing in (b) of this subparagraph 3 shall apply to any action taken by virtue of the breach of a signed contract, lawfully obtained and entered into pursuant to a fair trade law which is valid as of the time of both the breach and the action taken; or to any action taken to enforce any right against a nonsigner created by a fair trade law or provision thereof which is enforceable as of the time of the action taken.

4. Impose, by refusing to deal, termination, or any other unilateral action, or by contract, combination or conspiracy, any limitation, qualification, or precondition not expressly permitted by Sections 5(a)(2) and 5(a)(3) of the Federal Trade Commission Act, on any reseller's right or ability to purchase or sell any fair traded commodity;

(a) where the purpose or effect thereof is, or is likely to be, adherence to resale prices or any course of conduct established, required, or suggested by respondent, by any reseller whose resale prices or conduct are not, or cannot be, lawfully controlled by respondent; or

(b) where the purpose or effect thereof is, or is likely to be, the unavailability, through normal channels of distribution, of respondent's commodities to, or any discrimination with respect thereto against, any such reseller due to his failure or unwillingness to adhere to said resale prices or course of conduct.

II

It is further ordered, That respondent, directly or indirectly, through its officers, agents, representatives, employees, subsidiaries, successors, licensees, or assigns, or through any reseller or any other corporate or other device, in connection with the manufacture, advertising, offering for sale, sale, or distribution, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, of any commodity, shall forthwith cease and desist from entering into, maintaining, or enforcing any contract, combination or conspiracy which imposes any limitation, qualification, or precondition not expressly permitted by applicable State law and granted immunity by Section 5(a)(2) of the Federal Trade Commission Act, on any reseller;

1. Where the purpose or effect thereof is or is likely to be, adherence to resale prices or any course of conduct established,

required, or suggested by respondent, by any reseller whose resale prices or conduct are not, or cannot be lawfully controlled by respondent; or

2. Where the purpose or effect thereof is, or is likely to be, the unavailability through normal channels of distribution of respondent's commodities to, or any discrimination with respect thereto against, any such reseller due to his failure or unwillingness to adhere to said resale prices or course of conduct.

III

It is further ordered, That beginning ninety (90) days following the date upon which this order becomes final and continuing for a period of ten (10) years thereafter in connection with the advertising, offering for sale, sale or distribution of any nonfair traded glass and glass ceramic product for food preparation, serving and storage under the names Pyrex and Corning Ware and tableware under the name Corelle, respondent shall not suggest any resale prices either in advertising or in any material provided, published, or paid for in whole or in part by respondent, including but not limited to pricelists, advertising and promotional material, boxes and containers furnished for the transport or display of such commodities and tags, labels and other devices affixed to such commodities, unless such advertising and material include the clear and conspicuous statement "Manufacturer's Suggested Price," or a statement substantially equivalent thereto; *Provided, however*, That nothing in this Paragraph III shall prevent respondent from furnishing or causing to be furnished to resellers of such products any advertising or promotional materials containing respondent's suggested prices without such statement when alternative materials without prices for use by such resellers to advertise or promote prices of their own choosing are simultaneously furnished; and *Provided, further*, That respondent shall not initiate, conduct, sponsor, participate in, or contribute anything of value to, any cooperative advertising or other program of sales promotion or assistance wherein participation therein or the benefits thereof to any reseller are in any way conditioned upon the reseller's advertising, offering for sale or selling at no less than any price(s) suggested by respondent for such products.

IV

It is further ordered, That respondent shall:

1. Within sixty (60) days from the date upon which this order becomes final, mail, deliver or cause to be delivered and request signed receipts for, copies of this order to the following resellers of glass and

589-799 O - 76 - 68

glass ceramic products for food preparation, serving and storage under the names Pyrex and Corning Ware and tableware under the name Corelle:

(a) every reseller who was either under fair trade contract on Mar. 1, 1971 or who was placed under such contract thereafter;

(b) every reseller whose fair trade contract has been terminated by respondent since Jan. 1, 1966;

(c) every reseller whose name has appeared on any blacklist since Jan. 1, 1966; and

(d) every other current reseller of such products.

2. Within sixty (60) days from the date upon which this order becomes final, and on the six (6) month and twelve (12) month anniversary date of this order, mail, deliver or cause to be delivered, and request signed receipts for notices in forms submitted to and approved by the Commission prior to mailing or delivery, which clearly inform all resellers specified in subparagraphs 1(a), (b), (c) and (d) of this Paragraph IV:

(a) that respondent has ceased to fair trade its commodities;

(b) that all provisions of their contracts (should the same otherwise be in effect) relating to fair trade are cancelled and that said resellers are under no legal duty to reenter into any fair trade agreements;

(c) that such fair trade provisions will no longer be enforced;

(d) that said resellers may and are encouraged to sell respondent's goods to any customer at such prices as may be individually determined by each such reseller;

(e) that said resellers may and are encouraged to sell respondent's goods to any customer, whether for subsequent resale or otherwise, without restriction or precondition, and irrespective of whether the customer is located within, or may resell the goods within, any fair trade State;

(f) that no resellers in any State are required to refuse to deal with any other reseller due to the other reseller's failure or unwillingness to sign any contract requiring the maintenance of resale prices;

(g) that any reseller in any State who places an order for respondent's goods with any reseller which is not filled due to its having advertised, offered for sale, or sold such goods at less than respondent's suggested resale price or any former stipulated or minimum price, should immediately notify respondent in writing of the name and address of the reseller so refusing to deal;

(h) that the exercise by said resellers of any of their rights previously subject to the fair trade provisions of respondent's fair trade contracts shall in no way prejudice said resellers' ability to obtain or to continue to obtain respondent's merchandise;

(i) that any reseller who believes that respondent is violating any provision of this order, either directly or indirectly (through its wholesalers or otherwise) should set forth the facts and circumstances believed relevant and submit them to: Assistant Director, Division of Compliance, Bureau of Competition, Federal Trade Commission, Washington, D.C. 20580

The first notice required to be mailed or delivered to retailers by this subparagraph 2 shall be accompanied by a list of the names and addresses (arranged by State) of all wholesalers of respondent's goods. Said list shall contain a clear and conspicuous statement that all wholesalers listed therein are free to sell at prices of their own choosing to any retailer in any State without qualification, limitation or precondition.

3. Within sixty (60) days from the date upon which this order becomes final, mail or deliver, and obtain a signed receipt for, a written offer of reinstatement to:

(a) any free trade State wholesaler who was terminated by respondent since Jan. 1, 1966 for failure to comply with the refusal-to-deal provision of his wholesaler contract, and

(b) any free trade State wholesaler who was terminated by respondent since Jan. 1, 1966 for failure to comply with the resale price maintenance provision of his wholesaler contract;

and reinstate forthwith, any such wholesalers who within thirty (30) days thereafter request reinstatement. Said offer of reinstatement shall be accompanied by a copy of this order and the notice required by subparagraph 2 of this Paragraph IV.

4. Immediately upon receipt, take such action as is necessary to ensure correction of all complaints received pursuant to any provision of this Paragraph IV, and retain such complaints and records of all corrective action taken thereon for a period of five years from the date on which each complaint is received. Reports of said complaints and of corrective action shall be included in reports to the Commission required by Paragraph VI 1. of this order.

V

It is further ordered, That respondent shall:

1. Fully acquaint all appropriate present and future personnel with the provisions and requirements of this order.

2. For a period of five (5) years from the date of this order, mail or deliver and obtain a signed receipt for, a copy of this order to all new resellers to whom respondent directly sells glass and glass ceramic products for food preparation, serving, and storage under the names Pyrex and Corning Ware and tableware under the name Corelle.

3. Make any fair trade provisions of contracts entered into by it in the future conform with the requirements and intent of this order and submit any such contracts to the Commission for approval prior to their use.

VI

It is further ordered, That respondent shall:

1. Within sixty (60) days from the date on which this order becomes final, and annually each year for a period of five (5) years thereafter, submit to the Commission a written report setting forth in full detail the manner in which respondent is complying with each requirement of this order, accompanied by such documents, forms, contracts, receipts, or other material as is necessary to constitute proof that respondent is in full and faithful compliance herewith.

2. Notify the Commission in writing at least ninety (90) days prior to the reinstitution by respondent of any future fair trade program and neither execute nor obtain the execution of any new fair trade contract which has not been submitted to and approved by the Commission prior to its use.

3. Notify the Commission in writing at least thirty (30) days prior to any proposed change in the corporation such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of this order.

4. Retain all receipts required to be obtained by this order for a period of five (5) years from the date of each said receipt.

Commissioner Thompson not participating.

IN THE MATTER OF

MARK ENTERPRISES, INC., ET AL.

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

Docket 8984. Complaint, July 29, 1974–Decision, June 17, 1975

Consent order requiring a Kansas City, Mo., seller and installer of residential, above-the-ground swimming pools and other home improvement products, among other things to cease using bait and switch tactics and other deceptive selling practices.

Appearances

For the Commission: *F. Kelly Smith, Jr.*

For the respondents: *William B. Miller*, Kansas City, Mo., and *Peabody, Revlin, Lambert & Dennison*, 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 Mark Enterprises, Inc., a corporation, also doing business as Marc Enterprises, Inc., and Paul K. Cassidy, individually and as an officer of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Mark Enterprises, Inc., also doing business as Marc Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 3025 Main in the city of Kansas City, State of Mo.

Respondent Paul K. Cassidy is an individual and officer of said corporate respondent. He formulates, directs and controls 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 advertising, offering for sale, sale and distribution to the public of products including, but not limited to, residential above ground swimming pools, and in the installation thereof.

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

PAR. 4. In the course and conduct of their business and for the purpose of inducing the purchase and installation of their residential above ground swimming pools, respondents and their salesmen or representatives have made, and are now making, numerous statements and representations in advertising and promotional material and

through oral statements and representations with respect to the nature and limitations of their offers, their prices and their purchasers' savings.

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

MARC SAYS:
BRING THE COUNTRY
CLUB HOME
Big Pool — Big Savings!
SUN., MON., TUES.
ONLY
OFFER LIMITED
CALL NOW

* * * * * * *

NOW ONLY,
$649
Installed

* * * * * * *

SAVE an
extra $50
Now!

* * * * * * *

"THE RIVERIA" (sic)
31 feet x 16 feet Outside
Dimensions
15 feet x 24 feet Swim Area
4 feet Deep

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

1. The offers set out in their advertisements are bona fide offers to sell swimming pools and their installations of the kind therein described at the prices and on the terms stated.

2. Their offer of a 31' x 16' outside dimension swimming pool for $649 is for a limited period of only three days.

3. Their swimming pools and installations are being offered for sale at special or reduced prices, and savings are thereby afforded to their purchasers because of reductions from respondents' regular selling price.

4. Installation of their swimming pools is complete for the advertised price and no other installation work needs to be done.

5. After the installation of their product is complete, the homes of their purchasers will be used for demonstration and advertising purposes by respondents and, as a result of allowing their homes to be used as models, purchasers will be granted reduced prices or will receive allowances or discounts.

PAR. 6. In truth and in fact:

1. The offers set out in respondents' advertisements are not bona fide offers to sell swimming pools and their installations of the kind therein described at the prices or on the terms and conditions stated but are made for purpose of obtaining leads to persons interested in the purchase thereof. After obtaining such leads, respondents' salesmen or representatives call upon such persons and disparage respondents' advertised swimming pools and their installations and otherwise discourage the purchase thereof and attempt to sell and frequently do sell different and more expensive swimming pools and installations.

2. Respondents' advertised offer of a 31' x 16' outside dimension swimming pool for $649 is not made for a limited period of time. Said product is regularly advertised for the represented price or at another so called reduced price over a period of time greater than the represented limitations.

3. Respondents' swimming pools and installations are not being offered for sale at special or reduced prices, and savings are not thereby afforded to their purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices for particular advertised swimming pools, but the prices at which said swimming pools are offered for sale vary from purchaser to purchaser and from month to month.

4. Installation of respondents' swimming pools is not complete for the advertised price. In fact, purchasers are often required to provide some steps in the installation process themselves.

5. After installation of respondents' swimming pools is completed, the homes of respondents' purchasers will not, in most instances, be used for demonstration or advertising purposes by respondents and as a result of allowing, or agreeing to allow their homes to be used as models, purchasers are not granted reduced prices, nor do they receive allowances or discounts of any type.

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 at all times mentioned herein, respondents have been, and now are, in

substantial competition, in commerce, with corporations, firms and individuals in the sale of residential above ground swimming pools of the same general kind and nature as those sold by respondents.

PAR. 8. The use of the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' swimming pools and installations by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having issued its complaint against the respondents named in the caption hereof, and the respondents having been served with notice of the Commission's complaint charging them with violation of Section 5 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 decided to withdraw the matter from adjudication, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mark Enterprises, Inc., also doing business as Marc Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with

its office and principal place of business located at 3025 Main, City of Kansas City, State of Missouri.

Respondent Paul K. Cassidy is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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 Mark Enterprises, Inc., a corporation, also doing business as Marc Enterprises, Inc., or under any other name, its successors and assigns, and Paul K. Cassidy, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale, distribution or installation of residential above-ground swimming pools, or any other home improvement products and services at retail in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

2. Making representations purporting to offer home improvement products, installations or services at retail when the purpose of such representations are not to sell the offered products, installations or services but to obtain leads or prospects for the sale of other such products, installations or services at higher prices.

3. Discouraging the purchase of any swimming pool or other home improvement product, installation or service at retail by failing to deliver as contractually obligated or disparaging any product, installation or service which is advertised or offered for sale by respondents.

4. Representing, directly or by implication, that any home improvement product, installation or service at retail is offered for sale by respondents when such offer is not a bona fide offer to sell such product, installation or service.

5. Representing, directly or by implication, that any of respondents' offers to sell home improvement products, installations or services at retail are limited as to time or restricted or limited in any other manner, unless such represented limitations or restrictions are actually in force and in good faith adhered to.

6. Representing, directly or by implication, that any price for respondents' home improvement products, installations or services at retail is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products, installations or services have been sold in substantial quantities by respondents in the recent regular course of their business; or misrepresenting in any manner their prices or the savings available to their purchasers.

7. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement of swimming pools or other home improvement products was run and for a period of six weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price;

c. the wholesale cost to the respondents of each advertised product or service; and

d. the retail price charged each customer of respondents for the advertised product or service.

8. Using the word "Sale," or any other word or words of similar import or meaning not set forth specifically herein unless the price of said merchandise being offered for sale constitutes a significant reduction 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.

9. (a) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise at retail, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price, unless such merchandise has been sold or offered for sale in good faith at the former price by respondents for a reasonably substantial period of time in the recent, regular course of their business.

(b) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise at retail, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise at the compared price or some higher price.

(c) Representing, orally or in writing, directly or by implication, that

by purchasing any of said merchandise at retail, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price, and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in their trade area which establishes the validity of said compared price, and it is clearly and conspicuously disclosed that the comparison is with merchandise of like grade and quality.

10. Representing, directly or by implication, that installation of respondents' swimming pools or other home improvement products is included in an advertised or represented price, unless such represented price does actually include such installation.

11. Misrepresenting, orally or in writing, directly or by implication, the efficiency, durability, quality or limitations of said products, services and installations.

12. Representing, directly or by implication, that the home of any of respondents' purchasers or prospective purchasers will be used for any type of advertising or demonstration purpose or as a model home or that as a result of such use, respondents' purchasers or prospective purchasers will be granted reduced prices or will receive discounts or allowances of any type; unless in every instance, the parties to whom such representations are made are offered merchandise or services at a price:

(a) that is significantly less than the price at which identical merchandise or services are offered to those to whom such representations have not been made; and

(b) which constitutes a significant reduction from the price established by sales of a reasonably substantial number of identical items of merchandise or services by the respondents in their recent, regular course of business.

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, installations or services at retail or in any aspect of preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging the receipt of said 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

SANFORD INDUSTRIES, INC., ET AL.

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

Docket 8997. Complaint, Oct. 29, 1974-Decision, June 17, 1975

Consent order requiring a Pompano Beach, Fla., manufacturer and distributor of truss fabricating equipment, connecting plates and the design and sale of engineering services connected therewith, among other things to cease entering into or enforcing agreements which obligate purchasers of equipment to obtain materials and services from sources designated by respondents; offering discounts, rebates, etc. based on amount of purchases from designated sources; and requiring purchasers of equipment to purchase from respondent or its designated sources.

Appearances

For the Commission: *Duncan J. Farmer.*

For the respondents: *Lee, Toomey & Kent*, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, as amended (15 U.S.C. § 41, *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sanford Industries, Inc., a corporation, and A. Carol Sanford, an individual, respondents herein, have violated and are now violating the provisions of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. § 45), and Section 3 of the Clayton Act (15

U.S.C. § 14), 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 the following:

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

A. The term "Sanford" refers to Sanford Industries, Inc., a corporation, and its subsidiaries, affiliates, successors, assigns, officers, agents, representatives and employees, and the term "Mr. Sanford" refers to A. Carol Sanford, an individual.

B. The term "truss fabricating equipment" refers to all machinery and equipment sold, leased, or licensed by Sanford to be used in the assembly, production and construction of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

C. The term "truss connecting plates" refers to all metal plates bearing any number of nails or other sharp devices used to permanently connect the joints of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

D. The term "engineering services" refers to design specification services provided by Sanford in connection with the assembly, production and construction of wood roof trusses, and the selection and designation of truss connecting plates deemed necessary for the proper support of said trusses.

PAR. 2. Respondent Sanford is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal place of business located at 951 Southwest 12th Ave., P. O. Box 1177, Pompano Beach, Fla.

PAR. 3. Respondent Mr. Sanford is an individual and the principal officer of Sanford. He formulates, directs and controls the acts and practices of Sanford, including the acts and practices hereinafter set forth. His business address is the same as that of Sanford.

PAR. 4. Respondent Sanford is now, and for some time last past has been engaged in the manufacture and distribution (by sale, lease and/or license) of truss fabricating equipment; the manufacture and sale of truss connecting plates; and the design and sale of engineering services in connection therewith.

PAR. 5. In the course and conduct of its business, respondent Sanford, under the control and direction of respondent Mr. Sanford, now causes, and has caused in the past, its products and services, when sold, leased, and/or licensed, to be shipped from its place of business in the State of Florida to purchasers, lessees and/or licensees thereof in other states, and maintains, and at all times mentioned herein has maintained, a

substantial course of trade in said products and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Except to the extent that actual and potential competition has been lessened, restricted and restrained by reason of the practices hereinafter alleged, respondent Sanford has been and is now engaged in competition with firms, partnerships, and corporations engaged in the manufacture and distribution of truss fabricating equipment, the manufacture and sale of truss connecting plates, and the design and sale of engineering services.

PAR. 7. In the course and conduct of its business as described above, respondent Sanford, under the control and direction of respondent Mr. Sanford, has offered, entered into and enforced agreements with purchasers, lessees and/or licensees of its truss fabricating equipment which require such purchasers, lessees and/or licensees, as a condition to the purchase, lease or license of truss fabricating equipment from Sanford, to purchase truss connecting plates and/or engineering services from said respondent.

PAR. 8. In the course and conduct of its business as described above, respondent Sanford, under the control and direction of the respondent Mr. Sanford, has offered, entered into and enforced agreements with users of its engineering services which require them, as a condition to the furnishing of engineering services by Sanford, to purchase truss connecting plates from said respondent.

PAR. 9. The effect of the aforesaid agreements has been or may be to substantially lessen competition in the manufacture and sale of truss connecting plates and the design and sale of engineering services.

PAR. 10. The acts, practices and methods of competition alleged herein constitute tying agreements or practices by respondents in violation of Section 3 of the Clayton Act and/or Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereto with violation of Section 5 of the Federal Trade Commission Act and Section 3 of the Clayton Act, and the respondents having been served with a copy of that complaint, together with a proposed form of order; and

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

has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter withdrawn this matter from adjudication in accordance with Section 2.34(d) of its rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Sanford Industries, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal place of business located at 951 Southwest 12th Ave., P.O. Box 1177, Pompano Beach, Fla.

2. Respondent Mr. Sanford is an individual and the principal officer of Sanford. He formulates, directs and controls the acts and practices of Sanford. His business address is the same as that of Sanford.

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

ORDER

I.

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

A. The term "respondents" refers to Sanford Industries, Inc., a corporation, and its subsidiaries, affiliates, successors, assigns, officers, agents, representatives and employees; and to A. Carol Sanford, an individual.

B. The term "truss fabricating equipment" refers to all machinery and equipment sold, leased, or licensed by respondents to be used in the assembly, production and construction of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

C. The term "truss connecting plates" refers to all metal plates bearing any number of nails or other sharp devices used to permanently connect the joints of wood roof trusses used in the construction of residences, multiple dwellings, commercial or industrial buildings and farm structures.

D. The term "engineering services" refers to design specification services provided by respondents in connection with the assembly, production and construction of wood roof trusses, and the selection and

designation of truss connecting plates deemed necessary for the proper support of said trusses.

II

It is ordered, That respondents, directly or indirectly through any corporate or other device, in connection with the sale, lease or license of truss fabricating equipment, truss connecting plates and/or engineering services in the United States shall, within thirty (30) days after entry of this order, cease and desist from:

1. Offering, entering into or enforcing any agreement or provision of any agreement, express or implied, which in any way requires or obligates any purchaser, lessee or licensee of respondents' truss fabricating equipment, as a condition to the execution or continuation of a purchase, lease or license agreement with respect to such equipment, to purchase or agree to purchase all or any part of such purchaser's, lessee's or licensee's requirements of truss connecting plates and/or engineering services from respondents or from any source designated by respondents.

2. Offering, allowing or granting a price discount, rental or royalty reduction, rebate, or other valuable consideration on or with respect to the sale, lease or license of respondents' truss fabricating equipment which is in any way based upon purchases of truss connecting plates and/or engineering services from respondents or from any source designated by respondents.

3. Requiring any of its purchasers, lessees or licensees of truss fabricating equipment to purchase truss connecting plates and any other products from respondents or from any source designated by respondents.

III

It is further ordered, That respondent, Sanford Industries, Inc., shall:

1. Within thirty (30) days after entry of this order, mail a letter on its stationery, signed by the officers of the respondent and enclosing a copy of this order, to all of its purchasers, lessees, and/or licensees of truss fabricating equipment who have purchased truss connecting plates from it during the twenty-four (24) months preceding entry of this order which informs each such purchaser, lessee or licensee of the prohibitive terms of this order.

2. Notify, during the five (5) year period after entry of this order, each new prospective purchaser, lessee or licensee of its truss fabricating equipment (excluding replacement parts) of the prohibitive

terms of this order on its first written proposal to each such new prospective purchaser, lessee or licensee.

3. Within ten (10) days after entry of this order, provide a copy of this order to each of its salesmen, sales agents and sales representatives.

4. Within thirty (30) days after entry of this order, and continuing thereafter, make available its manuals concerning its standard wood roof truss designs, including updated standard wood roof truss designs, to any truss fabricator desiring such manuals; nothing contained in this order shall prohibit respondent from charging a reasonable fee for such manuals.

5. Within sixty (60) days after entry of this order, file with the Commission a report in writing setting forth in detail the manner and form in which it has complied with this order.

6. Notify the Commission at least thirty (30) days prior to any proposed corporate change 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.

IN THE MATTER OF

JOSEPH RICHARD HORVATH T/A SEW RITE

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

Docket 8999. Complaint, Dec. 4, 1974-Decision, June 17, 1975

Consent order requiring a Springfield, Va., seller and distributor of new and used sewing machines and related products, among other things to cease using bait and switch tactics and other deceptive pricing practices.

Appearances

For the Commission: *Richard G. Day*, and *Richard F. Kelly*.
For the respondent: *Henry Counts, Jr.*, Alexandria, Va.

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 Joseph Richard Horvath, an individual, trading and doing business as Sew Rite, hereinafter sometimes referred to as respondent, has violated the

589-799 O - 76 - 69

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 Joseph Richard Horvath is an individual trading and doing business as Sew Rite with his office and principal place of business located at 8002-C Haute Court, Springfield, Va. He formulates, directs and controls the acts and practices of said business, including the acts and practices hereinafter set forth.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribtuion of new and used sewing machines and related products to the general public.

PAR. 3. In the course and conduct of his business as aforesaid, respondent has caused, and now causes, advertisements for said sewing machines to appear in newspapers of interstate circulation, which advertisements are designed and intended to induce persons to purchase said sewing machines.

In the course and conduct of his business as aforesaid, respondent, from his place of business in the Commonwealth of Virginia, makes contracts for the sale of sewing machines with persons in the State of Maryland and in the District of Columbia.

In the course and conduct of his business as aforesaid, respondent, through his agents and representatives, transports his merchandise from his place of business in the Commonwealth of Virginia to the homes of purchasers located in the State of Maryland and in the District of Columbia.

Accordingly, respondent has maintained, and now maintains, a substantial course and conduct of business in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his aforesaid business, and in furtherance of a sales program for inducing the purchase of sewing machines, respondent has made, and is now making, numerous statements and representations in advertisements inserted in newspapers of interstate circulation and in other promotional material and by oral statements and representations of his salespersons with respect to his products and services.

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

Zig-Zag Sewing Machine Brand New 1973. Must be disposed of. Orig. price $189. Thursday only $48.88.

Grand Opening Sale! Suggested Retail Price $189.95 Sale Price $58.88

3-Day Sale at Close Out Prices Plus these Items Free! Comparative Retail Values $498. However Our Price Only $279.

Warehouse Sale at Liquidation Prices! Plus these 10 Items FREE! Comparative Retail Values $498. However Our Price Without Trade In Is Only $289.

'73 SINGER ZIG ZAGS Like new. 5-yr. parts & labor guaranteed. No obligation. Free home demonstration. $38.88. Call Credit Manager, 9-9

PAR. 5. By and through the use of the above quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with oral statements and representations by respondent's salespersons to prospective purchasers of respondent's products, respondent has represented, and is now representing, directly or by implication, that:

1. The zigzag sewing machines offered for $48.88 had been sold, or openly and actively offered for sale, at a price of $189 by the respondent for a reasonably substantial period of time in the recent, regular course of his business.

2. Respondent's sewing machines are being offered for sale at a price reduced from respondent's regular selling price, thereby affording savings to purchasers.

3. The advertised prices are available for only a limited period of time.

4. A bona fide offer is being made to sell the advertised Singer sewing machine at the price and on the terms and conditions stated in the advertisements.

5. Respondent's sewing machines are available at reduced prices because they have been repossessed by respondent or have been forfeited by a layaway purchaser.

6. Purchasers of the advertised Singer sewing machine receive a written guarantee from the Singer Company.

7. The sewing machine offered with "free" merchandise is being offered at its regular price, or less, and the "free" merchandise is not regularly included with the machine at the regular price.

PAR. 6. In truth and in fact:

1. The zigzag sewing machine offered by the respondent for $48.88 had not been sold, or openly and actively offered for sale, at a price of $189 by the respondent for a reasonably substantial period of time in the recent, regular course of his business.

2. Respondent's sewing machines are not being offered for sale at special or reduced prices and savings are not thereby afforded respondent's customers because of a reduction from respondent's regular selling prices. In fact, respondent does not have regular selling prices. The prices at which respondent's sewing machines are sold vary from customer-to-customer depending upon the resistance of the prospective purchaser.

3. Advertised prices are not available for only a limited period of time.

4. A bona fide offer is not being made to sell the advertised Singer sewing machine at the price and on the terms and conditions stated; but said offer is made for the purpose of obtaining leads as to persons interested in purchasing a sewing machine. After obtaining leads through responses to said advertisements, respondent or his salespersons call upon such persons but make no effort to sell the advertised sewing machines. Instead, they exhibit sewing machines which are in such poor condition as to be unusable or undesirable and disparage the advertised product to discourage its purchase and attempt to sell, and frequently do sell, other sewing machines at a much higher price.

5. Respondent's sewing machines are not offered to purchasers at a reduction from respondent's regular selling price as a result of having been repossessed or forfeited by a layaway purchaser. In fact, respondent's sewing machines have no regular selling price. Prices are generally arrived at through negotiation between the buyer and seller.

6. Purchasers of the advertised Singer sewing machines do not receive a written guarantee from the Singer Company.

7. The merchandise offered "free" with the purchase of the sewing machine offered for $279, or $289, is regularly included in the purchase of the machine at that price. When the machine is sold without the ten "free" items it is sold at a price considerably less than $279, or $289.

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

PAR. 7. In the further course and conduct of his aforesaid business and in furtherance of a sales program for inducing the purchase of his sewing machines, respondent has engaged in the following additional unfair and deceptive act and practice.

Through the use of false, misleading and deceptive statements and representations as set forth in Paragraphs Four through Six hereof, respondent and his salespersons have induced members of the general public to purchase respondent's sewing machines at a cost of up to several hundred dollars each without allowing such persons adequate time to consider the offer and reflect upon the merits of the offer and the effect of the expense upon their financial situation.

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

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

public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 10. The aforesaid acts and practices of 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 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 HARRY R. HINKES, ADMINISTRATIVE LAW JUDGE

MARCH 31, 1975

PRELIMINARY STATEMENT

Pursuant to a complaint issued by the Commission on Dec. 4, 1974, respondent Joseph Richard Horvath, doing business as Sew Rite, was charged with 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.

Said complaint was served on respondent's attorney of record on Jan. 31, 1975, but no answer or other response has been received although an answer was required within 30 days of service.

Section 3.12(c) of the Commission's Rules of Practice provides as follows:

> Failure of the respondent to file an Answer within the time provided shall be deemed to constitute a waiver of his right to appear and contest the allegations of the complaint and to authorize the Administrative Law Judge, without further Notice to the respondents, to find the facts to be as alleged in the Complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

Pursuant to said rule, complaint counsel on Mar. 7, 1975, moved that respondent be held in default for failure to file an answer. Although this motion was served on Mar. 12, 1975, no response to said motion has been made by respondent. Accordingly, complaint counsel's motion is granted and the following findings, conclusions and order are made.

FINDINGS OF FACT

PARAGRAPH 1. Respondent Joseph Richard Horvath is an individual trading and doing business as Sew Rite with his office and principal place of business located at 8002-C Haute Court, Springfield, Va. He formulates, directs and controls the acts and practices of said business, including the acts and practices hereinafter set forth.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of new and used sewing machines and related products to the general public.

PAR. 3. In the course and conduct of his business as aforesaid, respondent has caused, and now causes, advertisements for said sewing machines to appear in newspapers of interstate circulation, which advertisements are designed and intended to induce persons to purchase said sewing machines.

In the course and conduct of his business as aforesaid, respondent, from his place of business in the Commonwealth of Virginia, makes contracts for the sale of sewing machines with persons in the State of Maryland and in the District of Columbia.

In the course and conduct of his business as aforesaid, respondent, through his agents and representatives, transports his merchandise from his place of business in the Commonwealth of Virginia to the homes of purchasers located in the State of Maryland and in the District of Columbia.

Accordingly, respondent has maintained, and now maintains, a substantial course and conduct of business in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of his aforesaid business, and in the furtherance of a sales program for inducing the purchase of sewing machines, respondent has made, and is now making, numerous statements and representations in advertisements inserted in newspapers of interstate circulation and in other promotional material and by oral statements and representations of his salespersons with respect to his products and services.

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

Zig-Zag Sewing Machine Brand New 1973. Must be disposed of. Orig. price $189. Thursday only $48.88.

Grand Opening Sale! Suggested Retail Price $189.95 Sale Price $58.88

3-Day Sale at Close Out Prices Plus these Items Free! Comparative Retail Values $498. However Our Price Only $279.

Warehouse Sale at Liquidation Prices! Plus these 10 Items FREE! Comparative Retail Values $498. However Our Price Without Trade In Is Only $289.

'73 SINGER ZIG ZAGS Like new. 5-yr. parts & labor guaranteed. No obligation. Free home demonstration. $38. Call Credit Manager, 9-9.

PAR. 5. By and through the use of the above quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with oral statements and representations by respondent's salespersons to prospective purchasers of respondent's products, respondent has represented, and is now representing, directly or by implication, that:

1. The zigzag sewing machines offered for $48.88 had been sold, or openly and actively offered for sale, at a price of $189 by the respondent for a reasonably substantial period of time in the recent, regular course of his business.

2. Respondent's sewing machines are being offered for sale at a price reduced from respondent's regular selling price, thereby affording savings to purchasers.

3. The advertised prices are available for only a limited period of time.

4. A bona fide offer is being made to sell the advertised Singer sewing machine at the price and on the terms and conditions stated in the advertisements.

5. Respondent's sewing machines are available at reduced prices because they have been repossessed by respondent or have been forfeited by a layaway purchaser.

6. Purchasers of the advertised Singer sewing machine receive a written guarantee from the Singer Company.

7. The sewing machine offered with "free" merchandise is being offered at its regular price, or less, and the "free" merchandise is not regularly included with the machine at the regular price.

PAR. 6. In truth and in fact:

1. The zigzag sewing machine offered by the respondent for $48.88 had not been sold, or openly and actively offered for sale, at a price of $189 by the respondent for a reasonably substantial period of time in the recent, regular course of his business.

2. Respondent's sewing machines are not being offered for sale at special or reduced prices and savings are not thereby afforded respondent's customers because of a reduction from respondent's regular selling prices. In fact, respondent does not have regular selling prices. The prices at which respondent's sewing machines are sold vary from customer-to-customer depending upon the resistance of the prospective purchaser.

3. Advertised prices are not available for only a limited period of time.

4. A bona fide offer is not being made to sell the advertised Singer sewing machine at the price and on the terms and conditions stated; but said offer is made for the purpose of obtaining leads as to persons interested in purchasing a sewing machine. After obtaining leads through responses to said advertisements, respondent or his salespersons call upon such persons but make no effort to sell the advertised sewing machines. Instead, they exhibit sewing machines which are in such poor condition as to be unusable or undesirable and disparage the

advertised product to discourage its purchase and attempt to sell, and frequently do sell, other sewing machines at a much higher price.

5. Respondent's sewing machines are not offered to purchasers at a reduction from respondent's regular selling price as a result of having been repossessed or forfeited by a layaway purchaser. In fact, respondent's sewing machines have no regular selling price. Prices are generally arrived at through negotiation between the buyer and seller.

6. Purchasers of the advertised Singer sewing machines do not receive a written guarantee from the Singer Company.

7. The merchandise offered "free" with the purchase of the sewing machine offered for $279, or $289, is regularly included in the purchase of the machine at that price. When the machine is sold without the ten "free" items it is sold at a price considerably less than $279, or $289.

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

PAR. 7. In the further course and conduct of his aforesaid business and in furtherance of a sales program for inducing the purchase of his sewing machines, respondent has engaged in the following additional unfair and deceptive act and practice.

Through the use of false, misleading and deceptive statements and representations as set forth in Paragraphs Four through Six hereof, respondent and his salespersons have induced members of the general public to purchase respondent's sewing machines at a cost of up to several hundred dollars each without allowing such persons adequate time to consider the offer and reflect upon the merits of the offer and the effect of the expense upon their financial situation.

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

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

PAR. 10. The aforesaid acts and practices of 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 in commerce and unfair and deceptive acts and

practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

ORDER

It is ordered, That respondent Joseph Richard Horvath, an individual, trading and doing business as Sew Rite or under any other name or names, and respondent's 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 sewing machines, or any other product or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist from:

1. Using the words "orig. price," or any other word or words of similar import or meaning but not specifically set forth herein, to refer to any price at which respondent has offered any product or service to the public, if such price is in excess of the price at which such product or service has been sold, or offered for sale in good faith, to the public, by the respondent, for a reasonably substantial period of time in the recent, regular course of his business and unless respondent's business records establish that said price is the price at which such product or service has been sold, or offered for sale in good faith, to the public, by the respondent, for a reasonably substantial period of time in the recent, regular course of his business.

2. Using the word "Sale," or any other word or words of similar import or meaning but not specifically set forth herein, to refer to any offering of a product or service for sale unless the price for such product or service being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the price at which such product or service has been sold, or offered for sale in good faith, to the public, by the respondent, for a reasonably substantial period of time in the recent, regular course of his business.

3. (a) Representing, in any manner, that by purchasing any product or service, customers are afforded savings amounting to the difference between respondent's stated price and respondent's former price, unless such product or service has been sold, or offered for sale in good faith, to the public, by the respondent, at the former price for a reasonably substantial period of time in the recent, regular course of his business.

(b) Representing, in any manner, that by purchasing any product or service, customers are afforded savings amounting to the difference between respondent's stated price and a compared price for said product or service in respondent's trade area, unless a substantial number of the principal retail outlets in respondent's trade area

regularly sell said product or service at the compared price, or a higher price.

(c) Representing, in any manner, that by purchasing any product or service, customers are afforded savings amounting to the difference between respondent's stated price and a compared value price for comparable products or services, unless substantial sales of products of like grade and quality or similar services are being made in respondent's trade area at the compared price, or a higher price, and unless respondent has in good faith conducted a market survey, or obtained a similar representative sample of prices, in his trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with a product of like grade and quality or with a similar service.

4. Misrepresenting, in any manner, the savings afforded to purchasers of respondent's products or services or the prices charged for the same products or services or for products or services of like grade quality by any seller.

5. Making any representation, orally or in writing, directly or by implication, concerning any reduction in price for any of respondent's products or services, or concerning any possible saving available to purchasers of respondent's products or services, including, but not limited to, the use of the words "Sale," "Special," "Regularly," "Originally," "Value," "Save" or any other word or words of similar import and meaning but not specifically set forth herein, without clearly and conspicuously disclosing in close proximity to such representation:

(a) the make and model name or number of the product being offered;

(b) the cash price at which such product or service is being offered;

(c) the cash price at which such product or service has been sold, or offered for sale in good faith, to the public, by the respondent, for a reasonably substantial period of time in the recent, regular course of his business, when the comparison is being made with respondent's former price. When such price representation is in writing, the above disclosure shall be made in bold face type of a minimum size of 8 points.

6. Representing, orally or in writing, directly or by implication, that any offer to sell a product or service is limited or restricted as to time or is limited or restricted in any manner, unless the represented limitation or restriction is imposed and adhered to in good faith by the respondent.

7. Representing, orally or in writing, directly or by implication, that any product or service is offered for sale when such is not a bona fide offer to sell said product or service.

8. Advertising, or offering for sale, any product or service for the purpose of obtaining leads to potential purchasers of different products or services, unless the advertised, or offered, product or service is capable of adequately performing its intended function and respondent maintains an adequate and readily available stock of said product and is willing and able to perform said service.

9. Disparaging in any manner, or refusing to sell, any advertised product or service.

10. The use of any policy, sales plan or method of compensation for salespersons which has the effect, in any manner, of discouraging salespersons from selling, or has the effect of penalizing salespersons for selling, advertised products or services.

11. Using any advertisement, sales plan or procedure which involves the use of any false, misleading or deceptive statement, representation or illustration designed to obtain leads to potential purchasers of respondent's products or services.

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

13. Misrepresenting, in any manner, the status, kind, quality or price of any product or service being offered.

14. Representing, orally or in writing, directly or by implication, that respondent's products or services are guaranteed unless the nature, extent and duration of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and unless respondent promptly and fully performs all of his obligations directly or impliedly represented, under the terms of each such guarantee.

15. Representing, orally or in writing, directly or by implication, that any price is respondent's regular price for any product or service, unless such price is the price at which such product or service has been sold, or offered for sale in good faith, to the public, by the respondent, for a reasonably substantial period of time in the recent, regular course of his business, and not for the purpose of establishing fictitious higher prices upon which a deceptive comparison or a "free" or similar offer might be based.

16. Representing, orally or in writing, directly or by implication, that a purchaser of respondent's products or services will receive any "free" merchandise, service, gift, prize or award, unless all conditions, obligations, or other prerequisites to the receipt and retention of such

are clearly and conspicuously disclosed at the outset in close conjunction with the word "free" wherever it first appears in each advertisement or offer.

17. Representing, orally or in writing, directly or by implication, that any product or service is furnished "free" or at no cost to the purchaser of an advertised product or service when, in fact, the cost of such product or service is regularly included in the selling price of the advertised product or service.

18. Representing, orally or in writing, directly or by implication, that a "free" offer is being made in connection with the introduction of a new product or service offered for sale at a specified price unless the respondent expects, in good faith, to discontinue the offer after a limited time and commence selling such product or service separately at the same price at which it was sold with a "free" offer.

19. Representing, orally or in writing, directly or by implication, that a product or service is being offered "free" with the sale of a product or service which is usually sold at a price arrived at through bargaining, rather than at a regular price, or where there may be a regular price but where other material factors such as quantity, quality, or size are arrived at through bargaining.

20. Representing, orally or in writing, directly or by implication, that a "free" offer is available in a trade area for more than six (6) months in any twelve (12) month period. At least thirty (30) days shall elapse before another such "free" offer is made in the same trade area. No more than three (3) such "free" offers shall be made in the same trade area in any twelve (12) month period. In such period, respondent's sales of the product or service in the amount, size or quality promoted with the "free" offer in any trade area shall not exceed 50 percent of his total volume of sales of the product or service in the same amount, size or quality in that trade area.

21. Representing, orally or in writing, directly or by implication, that a product or service is being offered as a "gift," as a "bonus" or "without charge," or by other words or terms which tend to convey the impression to the consuming public that the product or service is free, when the use of the term "free" in relation thereto is prohibited by the provisions of this order.

22. (a) Contracting for any sale, whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise, which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after the date of execution.

(b) Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services, a fully completed copy of the sales contract, or a fully completed receipt in the

event of a cash sale, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller and which includes, in immediate proximity to the space reserved in the contract for the signature of the buyer, or on the front page of the receipt if a contract is not used, and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

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

(c) Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and shall be easily detachable therefrom, and which shall contain in 10 point bold face type the following information and statements in the same language, *e.g.*, Spanish, as that used in the sales contract:

NOTICE OF CANCELLATION

(enter date of transaction)

(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE. IF YOU CANCEL, AND PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED. IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK. IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT. TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO (*name of seller*) AT (*address of seller's place of business*) NOT LATER THAN MIDNIGHT OF (*date*) I HEREBY CANCEL THIS TRANSACTION.

_____

(Date)

_____

(Buyer's signature)

(d) Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

(e) Including in any sales contract or receipt any confession of judgment or any waiver of the rights to which the buyer is entitled under this provision including, specifically, his right to cancel the sale in accordance with this provision.

(f) Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

(g) Misrepresenting, in any manner, the buyer's right to cancel.

(h) Failing, or refusing, to honor any valid notice of cancellation by a buyer and failing, within ten (10) business days after the receipt of such notice, to: (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

(i) Negotiating, transferring, selling, or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

(j) Failing, within ten (10) business days of receipt of the buyer's notice of cancellation, to notify the buyer whether the seller intends to repossess or to abandon any shipped or delivered goods.

Provided, however, That nothing contained in this provision shall relieve respondent of any additional obligation respecting contracts required by federal law or the law of the State in which the contract is made. When such obligations are inconsistent with this provision respondent may apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon showing, shall make such modifications as may be warranted in the premises.

It is further ordered, That respondent shall forthwith cease and desist from:

(a) Failing to retain, for a period of not less than two (2) years from the date of their last use, a copy of each advertisement and item of promotional material, including, but not limited to, each newspaper advertisement, radio or television script, direct mail advertisement and product brochure, used for the purpose of obtaining leads to pros-

pective purchasers of respondent's products and services or in promoting the sale of respondent's products and services.

(b) Failing to retain, for a period of not less than two (2) years following each price reduction or savings claim, including, but not limited to, each claim of the types described in Paragraphs 1 through 8 of this order, adequate records to substantiate each such claim.

(c) Failing to produce, for the purpose of examination and copying by representatives of the Federal Trade Commission, those records required to be retained by this order.

It is further ordered, That respondent shall forthwith deliver a copy of this order to cease and desist, and a copy of the Commission's news release setting forth the terms of the order, to each advertising agency and advertising medium, such as newspaper publishing company, radio station or television station, presently utilized in the course of his business, and that respondent shall immediately upon opening an account deliver a copy of this order and such news release to any such agency or medium with which he subsequently opens an account.

It is further ordered, That respondent shall forthwith deliver a copy of this order to cease and desist to each of his agents, representatives and employees engaged in the offering for sale or sale of respondent's products or services, in the consummation of any extension of consumer credit or in any aspect of the creation, preparation or placing of respondent's advertisements and that respondent shall deliver a copy of this order to each such person whom he subsequently employs, immediately upon employing such person, and that respondent shall secure from each such person a signed statement acknowledging receipt of a copy of this order.

It is further ordered, That respondent shall 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 new business address and a statement as to the nature of the new business or employment in which he is engaged as well as a description of his new duties and responsibilities.

FINAL ORDER

The administrative law judge filed his initial decision in this matter on Mar. 31, 1975, finding respondent to have engaged in the acts and practices as alleged in the complaint and entering a cease and desist order against respondent. A copy of the initial decision and order was served on respondent on May 7, 1975. No appeal was taken from the initial decision.

The Commission having now determined that the matter should not be placed on its own docket for review, and that the initial decision

should become effective as provided in Section 3.51(a) of the Commission's Rules of Practice,

It is ordered, That the initial decision and order contained therein shall become effective on the date of issuance of this order.

It is further ordered, That respondent shall, within sixty (60) days after service of this order upon him, file with the Commission a report in writing, signed by such respondent, setting forth in detail the manner and form of his compliance with the order to cease and desist.

IN THE MATTER OF

ASSOCIATED DRY GOODS CORPORATION, ET AL.

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

Docket C-2674. Complaint, June 18, 1975-Decision, June 18, 1975

Consent order requiring a New York City parent and its department store operation, Lord & Taylor, among other things to provide charge customers having credit balances with periodic statements setting forth credit balances, no less than three times in a six-month period following creation of the balance; to notify charge account customers with credit balances of their right to a cash refund of the balance; to stop deleting credit balances of $1.00 or more from a customer's account before making a cash refund or an offsetting purchase has been made; to automatically refund amounts of unclaimed credit balances after a period of account inactivity; and to refund all unclaimed credit balances more than $1.00 created since June 30, 1972.

Appearances

For the Commission: *Alan D. Reffkin*, *Justin Dingfelder*, and *Howard F. Daniel.*

For the respondents: *M. Wade Kimsey*, *Gould & Wilkie*, 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 Commission, having reason to believe that Associated Dry Goods Corporation, a corporation, and its division Lord & Taylor, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Associated Dry Goods Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia with its principal office and place of business located at 417 Fifth Ave., New York, N.Y. Respondent Associated Dry Goods Corporation formulates, controls and directs the policies, acts and practices, including those hereinafter set forth, of its division, Lord & Taylor.

Respondent Lord & Taylor is a division of Associated Dry Goods Corporation. Its principal office and place of business is located at 424 Fifth Ave., New York, N.Y.

PAR. 2. Respondent Associated Dry Goods Corporation, through its operating division Lord & Taylor operates and controls a number of retail specialty clothing stores in nine States and the District of Columbia.

PAR. 3. Respondents sell and distribute merchandise in commerce by operating and controlling retail specialty clothing stores in a number of States and by causing merchandise to be shipped from their warehouses and from the places of business of their various suppliers to their warehouses and retail specialty clothing stores for distribution to and purchase by the general public located in States other than those from which such shipments originate. By these and other acts and practices, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in merchandise and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of their aforesaid business, respondents permit customers of Lord & Taylor, who qualify for credit to charge purchases in accordance with the terms of charge account agreements executed between said customers and respondents. On occasion a customer's charge account balance represents an amount of money owed to the customer by respondents, rather than an amount of money owed to respondents by the customer. This credit balance is the result of, among other things, overpayments by the customer or credits for returned merchandise.

PAR. 5. Respondents customarily provide each customer having a charge account credit balance a monthly statement setting forth the amount of the credit balance, at the end of the billing cycle during which the credit balance is created and at the end of each subsequent billing cycle during which the credit balance has not been cleared from the customer's account and a transaction on the customer's account occurs. No such statements are furnished for any billing cycle during which the customer transacts no business on his account.

If a customer with a credit balance on his charge account does not

589-799 O - 76 - 70

specifically request that respondents pay him the amount of his credit balance but purchases merchandise or services on his charge account, respondents for a limited time apply the amount of the credit balance to reduce or eliminate the customer's obligation created by the purchase of merchandise or services.

If the customer does not request a refund in cash of the amount of the credit balance or make a purchase within a period of time allowed by respondents for activity to occur on the customer's account, respondents, through bookkeeping entries, clear the amount of the credit balance from the customer's charge account. No cash payment to the customer is made at the time of the clearing of his credit balance from his charge account. Subsequent periodic statements are not mailed until a later purchase is made. The outstanding credit balance that was previously reflected on a periodic billing statement is not applied to any purchase occurring after the credit balance has been cleared from the customer's account.

At no time is the customer informed of his right to receive a cash refund nor do respondents voluntarily refund cash representing outstanding credit balances without a specific customer request. Respondents have through such acts and practices eliminated substantial dollar amounts of credit balances as aforesaid from customer accounts in a substantial number of instances.

PAR. 6. By failing to notify customers with charge account credit balances that they have the right to request and receive cash payment of the amounts of their credit balances; by failing to furnish customers, at the end of each and every billing cycle during which credit balances remain outstanding, monthly statements reflecting the amount of their credit balances; by deleting outstanding credit balances from accounts without refunding such amounts and by providing billing statements for subsequent purchases which do not reflect such outstanding credit balances, respondents have caused a substantial number of their customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondents set forth in Paragraphs Five and Six above were and are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition 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, and 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 sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedures 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, Associated Dry Goods Corporation, is a corporation organized, existing and doing business under and by virtue of the laws of Commonwealth of Virginia, with its offices and principal place of business located at 417 Fifth Ave., New York, N.Y.

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 respondent, Associated Dry Goods Corporation, a corporation, and its division Lord & Taylor (hereinafter collectively referred to as respondent), their successors and assigns and their representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer open end credit accounts or other retail consumer charge accounts (including but not necessarily limited to thirty (30) day charge accounts) created incident to the business of selling consumer merchandise and services at retail, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to provide each charge account customer having a credit balance created after the date of entry of this order with a periodic

statement setting forth such credit balance, no fewer than three times during the six month period following creation of the credit balance.

2. Failing to notify each charge account customer having a credit balance created after the date of entry of this order of the right to request and receive a cash refund in the amount of such credit balance. Such notice shall accompany, or be made on, the periodic statement required by Paragraph One hereof and shall contain a clear and conspicuous disclosure of the following facts, to the extent applicable: the amount of the credit balance (unless shown on the accompanying periodic statement); the credit balance represents money owed to the customer; the customer's right to make purchases against such balance or to obtain a cash refund of such balance by presenting such periodic statement at respondent's store or by returning the statement to respondent in an envelope which respondent shall enclose with the statement for that purpose; a check will be mailed automatically after six months if no charge is made against the credit or a refund is not requested. In addition to the above requirements each periodic statement required by Paragraph One shall state clearly and conspicuously: "a credit balance of one dollar ($1.00) or less will not be refunded unless specifically requested, and it will not be credited against future purchases after this period." Such statement need not be made in the event that is the store's policy to refund without request all amounts of less than one dollar.

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

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

A. *It is further ordered*, That with respect to each credit balance owed a customer in the amount of more than one dollar ($1.00) which was created at any time since June 30, 1972, and which has not been refunded to the customer as of the date of entry of this order, respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for

compliance herewith; *Provided, however,* That nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s) in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s), or an accompanying notice attached to the certificate, shall clearly and conspicuously disclose that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent shall comply with the provisions of this paragraph no later than three (3) months after the date of entry of this order, and the report required by Paragraph F of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered,* That each refund shall be given to the customer either in person or by mailing a check (or a credit certificate(s) in the case of credit balances existing prior to the date of entry of this order) payable to the order of the customer at the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address shown in respondent's records. In the event that any such statement or check (or credit certificate(s) is returned to respondent with a notification to the effect that the addressee is not located at the address to which it was sent, respondent shall remail the check or statement (or credit certificate(s)). If a check or statement (or credit certificate(s)) which has been mailed is returned to respondent, the full amount of the credit balance shall be reinstated on the customer's account to be retained for one year from the date on which the remailed check or statement (or credit certificate(s)) was returned so that offsetting purchases can be made. Thereafter respondent shall be relieved of any further obligation to send any additional notice and/or any refund with respect to the credit balance in question; *Provided, however,* That in the event said customer should subsequently request a refund of any such credit balance owed the customer, respondent shall promptly make such refund.

C. *It is further ordered,* That if a customer requests, in person or by mail, a refund of a credit balance in any amount which had been reflected at any time on such customer's account, respondent shall, within thirty (30) days of receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with a written explanation, with supporting documentation when available, of the reason(s) for refusing to refund the amount requested.

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

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

E. *It is further ordered*, That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balance on accounts administered by third parties.

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

G. *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.

IN THE MATTER OF

GIMBEL BROTHERS, INC., ET AL.

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

Docket C-2675. Complaint, June 18, 1975-Decision, June 18, 1975

Consent order requiring a New York City parent and its department store operation, Gimbels New York, among other things to provide charge customers having credit balances with periodic statements setting forth credit balances, no less than three times in a six-month period following creation of the balance; to notify charge account customers with credit balances of their right to a cash refund of the balance; to stop deleting credit balances of $1.00 or more from a customer's account before making a cash refund or an offsetting purchase has been made; to automatically refund amounts of unclaimed credit balances after a period of account inactivity; and to refund all unclaimed credit balances more than $1.00 created since June 30, 1972.

Appearances

For the Commission: *Alan D. Reffkin*, *Justin Dingfelder*, and *Howard F. Daniel.*

For the respondents: *Eugene H. Gordon*, 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 Commission, having reason to believe that Gimbel Brothers, Inc., a corporation, and its divisions, Gimbels New York, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Gimbel Brothers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 1275 Broadway, New York, N.Y. Respondent Gimbel Brothers, Inc. has the legal authority to formulate, control and direct the policies, acts and practices, including those hereinafter set forth, of its division Gimbels New York.

Respondent Gimbels New York is a division of Gimbel Brothers, Inc. Its principal office and place of business is located at 1275 Broadway, New York, N.Y.

PAR. 2. Respondent Gimbel Brothers, Inc., through operating divisions and a wholly-owned subsidiary, operates and controls a number of retail department and apparel stores in 14 states.

Respondent Gimbels New York operates approximately 11 department stores in three States.

PAR. 3. Respondents sell and distribute merchandise in commerce by operating and controlling retail department stores in a number of States and by causing merchandise to be shipped from their warehouses and from the places of business of their various suppliers to their warehouses and retail department stores for distribution to and purchase by the general public located in states other than those from which such shipments originate. By these and other acts and practices, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in merchandise and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of their aforesaid business, respondents permit customers of Gimbels New York who qualify for credit to charge purchases in accordance with the terms of charge account agreements executed between said customers and respondents. On occasion a customer's charge account balance represents an amount of money owed to the customer by respondents, rather than an amount of money owed to respondents by the customer. This

credit balance is the result of, among other things, overpayments by the customer or credits for returned merchandise.

5. Respondents customarily provide each customer having a charge account credit balance a monthly statement setting forth the amount of the credit balance, at the end of the billing cycle during which the credit balance is created and at the end of each subsequent billing cycle during which the credit balance has not been cleared from the customer's account and a transaction on the customer's account occurs. No such statement is provided for any billing cycle during which a customer does not transact any business on his charge account.

If a customer with a credit balance on his charge account does not specifically request that respondents pay him the amount of his credit balance but purchases merchandise or services on his charge account, respondents for a limited time apply the amount of the credit balance to reduce or eliminate the customer's obligation created by the purchase of merchandise or services.

If the customer does not request a refund in cash of the amount of the credit balance or make a purchase within a period of time allowed by respondents for activity to occur on the customer's account, respondents, through bookkeeping entries, clear the amount of the credit balance from the customer's charge account. No cash payment to the customer is made at the time of the clearing of his credit balance from his charge account. Subsequent periodic statements are not mailed until a later purchase is made. The outstanding credit balance that was previously reflected on a periodic billing statement is not applied to any purchase occurring after the credit balance has been cleared from the customer's account.

At no time is the customer informed of his right to receive a cash refund nor do respondents voluntarily refund cash representing outstanding credit balances without a specific customer request. Respondents have through such acts and practices eliminated substantial dollar amounts of credit balances as aforesaid from customer accounts in a substantial number of instances.

PAR. 6. By failing to notify customers with charge account credit balances that they have the right to request and receive cash payment of the amounts of their credit balances; by failing to furnish customers, at the end of each and every billing cycle during which credit balances remain outstanding, monthly statements reflecting the amount of their credit balances; by deleting outstanding credit balances from accounts without refunding such amounts and by providing billing statements for subsequent purchases which do not reflect such outstanding credit balances, respondents have caused a substantial number of their customers to be deprived of substantial sums of money rightfully

theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondents set forth in Paragraphs Five and Six above were and are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition 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, and 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 sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedures 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 Gimbel Brothers, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal place of business located at 1275 Broadway, New York, N.Y.

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 respondent Gimbel Brothers, Inc., a corporation,

and its division, Gimbels New York (hereinafter collectively referred to as respondent), their successors and assigns and their representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer open end credit accounts or other retail consumer charge accounts (including, but not necessarily limited to thirty (30) day charge accounts) created incident to the business of selling consumer merchandise and services at retail, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to provide each charge account customer having a credit balance created after the date of entry of this order with a periodic statement setting forth such credit balance no fewer than three times during the six month period following the creation of the credit balance.

2. Failing to notify each charge account customer having a credit balance created after the date of entry of this order of the customer's right to request and receive a cash refund in the amount of such credit balance. Such notice shall be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement; shall be accompanied by a return envelope, and shall be consistent with but need not be identical to the following:

NO PAYMENT REQUIRED

The Credit Balance shown on [this] [the enclosed] statement represents money we owe you. You may obtain a refund by presenting your statement at our store or by returning it in the enclosed envelope.

If you do not charge against this credit or request a refund, a check will be mailed to you automatically after six months, except a credit balance of one dollar or less will not be refunded unless specifically requested, and it will not be credited against future purchases after this period.

Such disclosure need not be made by respondent in the event that it is respondent's policy to refund automatically and without request all credit balances regardless of amount. In such case a disclosure consistent with but not necessarily identical to the following must be made:

Contact any store for refund or you may purchase against the balance. If you do neither, refund will be made after 6 months.

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

4. Failing to refund to each charge account customer with a credit

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

A. *It is further ordered*, That with respect to each credit balance owed to a customer in the amount of more than one dollar ($1.00) which was created at any time since June 30, 1972, and which has not been refunded to the customer as of the date of entry of the order, respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for compliance herewith; *Provided, however*, That nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s) in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s), or an accompanying notice attached to the certificate, shall clearly and conspicuously disclose that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent shall comply with the provisions of this paragraph no later than three (3) months after the date of entry of this order, and the report required by Paragraph F of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered*, That each refund shall be given to the customer either in person or by mailing a check (or a credit certificate(s) in the case of credit balances existing prior to the date of entry of this order) payable to the order of the customer to the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer to the last known address shown in respondent's records for such customer. In the event that any such statement, check or credit certificate(s) is mailed without an address correction request to the Post Office and is subsequently returned to respondent with a notification to the effect that the customer to whom it was mailed is not located at the address to which it was sent, respondent shall remail the check, credit certificate(s) or statement with an address correction request to the Post Office. If any such check, credit certificate(s) or statement which has been mailed with an address correction request to the Post Office is returned to respondent and represents an amount of twenty-five dollars ($25.00) or more, respondent shall employ one of the following procedures to locate the

customer: contacting a credit bureau; employing an independent contractor engaged in the business of skip-locating; contacting the customer's last known employer as shown in respondent's records; or reinstating the full amount of the credit balance on the customer's account and retaining it in such account for one year from the date on which the remailed check, certificate(s) or statement is returned so that offsetting purchases can be made. If any such check, credit certificate(s) or statement which has been mailed with an address correction request to the Post Office is returned to respondent and represents an amount of less than twenty-five dollars ($25.00), respondent shall not be required to take any of the additional actions set forth in the preceding sentence. Thereafter, respondent shall be relieved of any further obligation to send any additional notice and/or any refund with respect to the credit balance in question; *Provided, however*, That in the event said customer should subsequently request a refund of any such credit balance owed the customer, respondent shall treat such request in the manner provided in Paragraph C.

C. *It is further ordered*, That if a customer requests, in person or by mail, a refund of a credit balance in any amount which had been reflected at any time on such customer's account, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with a written explanation, with supporting documentation, when available, of the reason(s) for refusing to refund the amount requested.

D. *It is further ordered*, That a credit balance shall be deemed to be created, if it still exists, at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a customer's activity on the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered*, That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by parties other than respondent or to transactions arising out of installment sales contracts.

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

G. *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.

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

IN THE MATTER OF

McCRORY CORPORATION, ET AL.

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

Docket C-2676. Complaint, June 18, 1975-Decision, June 18, 1975

Consent order requiring a New York City parent and its department store operation, Lerner Stores Corporation, among other things to provide charge customers having credit balances with periodic statements setting forth credit balances, no less than three times in a six-month period following creation of the balance; to notify charge account customers with credit balances of their right to a cash refund of the balance; to stop deleting credit balances of $1.00 or more from a customer's account before making a cash refund or an offsetting purchase has been made; to automatically refund amounts of unclaimed credit balances after a period of account inactivity; and to refund all unclaimed credit balances more than $1.00 created since June 30, 1972.

Appearances

For the Commission: *Alan D. Reffkin*, *Justin Dingfelder*, and *Howard F. Daniel.*

For the respondents: *Max Wild*, *Rubin, Wachtel, Baum & Levin*, 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 Commission, having reason to believe that McCrory Corporation, a corporation, and its wholly-owned subsidiary, Lerner Stores Corporation, a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent McCrory Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware. Its principal office and place of business is located at 360 Park Ave., New York, N.Y. Respondent McCrory Corporation has the power to elect the Board of Directors of Lerner Stores Corporation.

Respondent Lerner Stores Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland. Its principal office and place of business is located at 460 W. 33rd St., New York, N.Y.

PAR. 2. Respondent Lerner Stores Corporation operates and controls a number of retail clothing stores in 39 States, Puerto Rico and the Virgin Islands.

PAR. 3. Respondents sell and distribute merchandise in commerce by operating and controlling retail clothing stores in a number of States and by causing merchandise to be shipped from their warehouses and from the places of business of their various suppliers to their warehouses and retail clothing stores for distribution to and purchase by the general public located in States other than those from which such shipments originate. By these and other acts and practices, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in merchandise and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of their aforesaid business, respondents permit customers of Lerner Stores Corporation who qualify for credit to charge purchases in accordance with the terms of charge account agreements executed between said customers and respondents. On occasion a customer's charge account balance represents an amount of money owed to the customer by respondents, rather than an amount of money owed to respondents by the customer. This credit balance is the result of, among other things, overpayments by the customer or credits for returned merchandise.

PAR. 5. Respondent Lerner Stores Corporation customarily provides each customer having a charge account credit balance a monthly statement setting forth the amount of the credit balance, at the end of the billing cycle during which the credit balance is created and at the end of each subsequent billing cycle during which the credit balance has not been cleared from the customer's account and a transaction on the customer's account occurs. Respondent Lerner Stores Corporation furnishes a charge account customer with one additional monthly statement setting forth his credit balance at the end of the first billing

cycle during which the customer transacts no business on his charge account after creation of his credit balance.

If a customer with a credit balance on his charge account does not specifically request that respondent Lerner Stores Corporation pay him the amount of his credit balance but purchases merchandise or services on his charge account, before respondent Lerner Stores Corporation refunds the amount of his credit balance, the amount of the credit balance is applied to reduce or eliminate the customer's obligation created by the purchase of merchandise or services.

For a substantial period of time, if the customer did not request a refund in cash of the amount of the credit balance or make a purchase within a period of time allowed by Lerner Stores Corporation for activity to occur on the customer's account, Lerner Stores Corporation, through bookkeeping entries, cleared the amount of the credit balance from the customer's charge account. No cash payment to the customer was made at the time of the clearing of his credit balance from his charge account. Subsequent periodic statements were not mailed until a later purchase was made. The outstanding credit balance that was previously reflected on a periodic billing statement was not applied to any purchase occurring after the credit balance had been cleared from the customer's account.

At no time was the customer informed of his right to receive a cash refund nor did Lerner Stores Corporation voluntarily refund cash representing outstanding credit balances without a specific customer request. Respondent Lerner Stores Corporation, through such acts and practices eliminated substantial dollar amounts of credit balances as aforesaid from customer accounts in a substantial number of instances.

PAR. 6. By failing to notify customers with charge account credit balances that they had the right to request and receive cash payment of the amounts of their credit balances; by failing to furnish customers, at the end of each and every billing cycle during which credit balances remained outstanding, monthly statements reflecting the amount of their credit balances; by deleting outstanding credit balances from accounts without refunding such amounts and by providing billing statements for subsequent purchases which did not reflect such outstanding credit balances, Lerner Stores Corporation caused a substantial number of their customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of Lerner Stores Corporation set forth in Paragraphs Five and Six above were to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods

of competition 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, and 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 sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedures 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 McCrory Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its principal place of business located at 360 South Park Ave., New York, N.Y.

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 respondent McCrory Corporation, a corporation, and its wholly-owned subsidiary, Lerner Stores Corporation, a corporation, (hereinafter collectively referred to as respondent), their successors and assigns and their representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail

consumer open end credit accounts or other retail consumer charge accounts (including, but not necessarily limited to thirty (30) day charge accounts) created incident to the business of selling consumer merchandise and services at retail in the United States or any of its territories or possessions, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to provide each charge account customer having a credit balance created after the date of entry of this order with a periodic statement setting forth such credit balance, no fewer than three times during the six month period following the creation of the credit balance.

2. Failing to notify each charge account customer having a credit balance created after the date of entry of this order of the right to request and receive a refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement to be accompanied by a return envelope; such disclosure shall be consistent with, but need not be the same as, the following:

The Credit Balance shown on [this] [the enclosed] statement represents money we owe you. Therefore:

NO PAYMENT IS REQUIRED

You may apply this balance to future purchases, or you may obtain a refund by mail by presenting your statement at our store or by returning [the top half of] your statement in the enclosed envelope.

If you do not charge against this credit or request a refund, a check will be mailed to you automatically after six months, except a credit balance of one dollar ($1.00) or less will not be refunded unless specifically requested, and it will not be credited against future purchases after this period.

Such disclosures need not be made by any store in the event it is that store's policy to refund automatically and without request all credit balances regardless of amount. In such cases the following disclosures must be made:

For refund contact [our] [any] store or we will send check in 6 [or smaller number] months.

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

4. Failing to refund to each charge account customer with a credit balance of more than one dollar ($1.00) created after the date of entry of this order the full amount of said credit balance no later than thirty-

589-799 O - 76 - 71

one (31) days from the end of the sixth consecutive billing cycle during which the credit balance exists and the customer neither transacts any business on his account nor requests a refund, unless such credit balance is not in fact owed to the customer.

A. *It is further ordered,* That with respect to each credit balance owed a customer in the amount of more than one dollar ($1.00) which was created at any time since June 30, 1972, and which has not been refunded to the customer as of the date of entry of the order respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for compliance herewith; *Provided, however,* That nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s) in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s), or an accompanying notice attached to the certificate, shall clearly and conspicuously disclose that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent shall comply with the provisions of this paragraph no later than three (3) months after the date of entry of this order, and the report required by Paragraph F of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered,* That each refund shall be given to the customer by mailing a check (or a credit certificate(s) in the case of credit balances existing prior to the date of entry of this order) payable to the order of the customer at the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address in respondent's records. In the event that any such statement or check (or credit certificate) is returned to respondent with a notification to the effect that the addressee is not located at the address to which it was sent, respondent shall make one remailing of the check (or credit certificate) or statement with an address correction request to the Post Office. If the check (or certificate) or statement which has been remailed is returned to respondent and represents an amount of twenty-five dollars ($25.00) or more, the respondent shall employ one of the following procedures: contacting a credit bureau; employment of an independent contractor engaged in the business of skip-locating; contacting the customer's last known employer as shown in respondent's records; or reinstating the full amount of the credit balance on the customer's account to be retained for one year from the date on which the remailed check or statement was returned so that

offsetting purchases can be made. If a remailed check (or credit certificate) or statement reflecting a credit balance of less than twenty-five dollars ($25.00) is returned, respondent shall not be required to take any of the additional actions set forth in the preceding sentence. Thereafter respondent shall be relieved of any further obligation to send any additional notice and/or any refund with respect to the credit balance in question; *Provided, however*, That in the event said customer should subsequently request a refund of any such credit balance owed the customer, respondent shall promptly make such refund.

C. *It is further ordered*, That if a customer requests, in person or by mail, a refund of a credit balance in any amount which had been reflected at any time on such customer's account, respondent shall, within thirty (30) days of receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with a written explanation, with supporting documentation when available, of the reason(s) for refusing to refund the amount requested.

D. *It is further ordered*, That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered*, That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by parties other than respondent or to transactions arising out of layaway plans or installment sales contracts.

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

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

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

IN THE MATTER OF

CARTER HAWLEY HALE STORES, INC., ET AL.

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

Docket C-2677. Complaint June 18, 1975- Decision June 18, 1975

Consent order requiring a Los Angeles, Calif., parent and five of its department store operations located in California, Texas and New York, among other things to provide charge customers having credit balances with periodic statements setting forth credit balances, no less than three times in a six-month period following creation of the balance; to notify charge account customers with credit balances of their right to a cash refund of the balance; to stop deleting credit balances of $1.00 or more from a customer's account before making a cash refund or an offsetting purchase has been made; to automatically refund amounts of unclaimed credit balances after a period of account inactivity; and to refund all unclaimed credit balances more than $1.00 created since June 30, 1972.

Appearances

For the Commission: *Alan D. Reffkin, Justin Dingfelder*, and *Howard F. Daniels.*

For the respondents: *Bingham B. Leverich, Covington & Burling*, 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 Carter Hawley Hale Stores, Inc., formerly Broadway-Hale Stores, Inc., a corporation, its divisions, Broadway Department Stores, Emporium Capwell, Weinstock's, Neiman-Marcus, and its wholly-owned subsidiary, Bergdorf Goodman Inc., a corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Carter Hawley Hale Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 600 S. Spring St., Los Angeles, Calif. Respondent Carter Hawley Hale Stores, Inc. has the legal authority to formulate, control and direct the policies, acts and practices, including those hereinafter set forth, of its divisions, Broadway Department Stores,

Emporium Capwell, Weinstock's and Neiman-Marcus, and has the power to elect the board of directors of its wholly-owned subsidiary Bergdorf Goodman Inc.

Respondent Broadway Department Stores is a division of Carter Hawley Hale Stores, Inc. Its principal office and place of business is located at 3880 N. Mission Rd., Los Angeles, Calif.

Respondent Emporium Capwell is a division of Carter Hawley Hale Stores, Inc. Its principal office and place of business is located at 835 Market St., San Francisco, Calif.

Respondent Weinstock's is a division of Carter Hawley Hale Stores, Inc. Its principal office and place of business is located at K St. at Twelfth, Sacramento, Calif.

Respondent Neiman-Marcus is a division of Carter Hawley Hale Stores, Inc. Its principal office and place of business is located at Main and Ervay St., Dallas, Tex.

Respondent Bergdorf Goodman Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 754 Fifth Ave., New York, N.Y.

PAR. 2. Respondent Carter Hawley Hale Stores, Inc., through operating divisions, operates and controls a number of retail department stores in California, Arizona, Nevada, and Utah. These department stores are operated under the trade names the Broadway, the Emporium Capwell's, and Weinstock's. Respondent Carter Hawley Hale Stores, Inc., also operates and controls retail specialty stores through its division Neiman-Marcus and its wholly-owned subsidiary Bergdorf Goodman Inc.

Respondent Bergdorf Goodman Inc. operates a retail specialty store in New York.

PAR. 3. Respondents sell and distribute merchandise in commerce by operating and controlling retail department and specialty stores in a number of States and by causing merchandise to be shipped from their warehouses and from the places of business of their various suppliers to their warehouses and retail department and specialty stores for distribution to and purchase by the general public located in States other than those from which such shipments originate. By these and other acts and practices, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in merchandise and services in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of their aforesaid business, respondents permit customers who qualify for credit to charge purchases in accordance with the terms of charge account

agreements executed between said customers and respondents. On occasion a customer's charge account balance represents an amount of money owed to the customer by a respondent, rather than an amount of money owed to a respondent by the customer. This credit balance is the result of, among other things, overpayments by the customer or credits for returned merchandise.

PAR. 5. Respondents customarily provide each customer having a charge account credit balance a monthly statement setting forth the amount of the credit balance, at the end of the billing cycle during which the credit balance is created and at the end of each subsequent billing cycle during which the credit balance has not been cleared from the customer's account and a transaction on the customer's account occurs. Of all respondents, only Emporium Capwell and Neiman-Marcus furnish charge account customers with additional monthly statements setting forth their credit balances, at the end of a number of billing cycles during which the customers transact no business on their charge accounts. A customer of Emporium Capwell is furnished such a monthly statement at the end of each of five consecutive billing cycles following the billing cycle of the customer's last transaction. A customer of Neiman-Marcus is furnished such a monthly statement at the end of each of eleven consecutive billing cycles following the billing cycle of the customer's last transaction.

If a customer with a credit balance on his charge account does not specifically request that the respondent concerned pay him the amount of his credit balance but purchases merchandise or services on his charge account, the respondent for a limited time applies the amount of the credit balance to reduce or eliminate the customer's obligation created by the purchase of merchandise or service.

If the customer does not request a refund in cash of the amount of the credit balance or make a purchase within a period of time allowed by respondents for activity to occur on the customer's account, the respondents, with the exception of the Broadway Department Stores Division, through bookkeeping entries, clear the amount of the credit balance from the customer's charge account. The Broadway Department Stores Division engaged in this practice through 1971. No cash payment to the customer is made at the time of the clearing of his credit balance from his charge account. Subsequent periodic statements are not mailed until a later purchase is made. The outstanding credit balance that was previously reflected on a periodic billing statement is not applied to any purchase occurring after the credit balance has been cleared from the customer's account.

At no time is the customer informed of his right to receive a cash refund nor do respondents voluntarily refund cash representing

outstanding credit balances without a specific customer request. Respondents have through such acts and practices eliminated substantial dollar amounts of credit balances as aforesaid from customer accounts in a substantial number of instances.

PAR. 6. By failing to notify customers with charge account credit balances that they have the right to request and receive cash payment of the amounts of their credit balances; by failing to furnish customers, at the end of each and every billing cycle during which credit balances remain outstanding, monthly statements reflecting the amount of their credit balances; by deleting outstanding credit balances from accounts without refunding such amounts and by providing billing statements for subsequent purchases which do not reflect such outstanding credit balances, respondents have caused a substantial number of their customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondents set forth in Paragraphs Five and Six above were and are to the prejudice and injury of the public and constitute unfair acts and practices and unfair methods of competition 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, and 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 sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedures 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 Carter Hawley Hale Stores, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 600 S. Spring St., Los Angeles, Calif.

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 respondent Carter Hawley Hale Stores, Incorporated, its divisions Broadway Department Stores, Emporium Capwell, Weinstock's and Neiman-Marcus, and its wholly-owned subsidiary Bergdorf Goodman Inc., a corporation (hereinafter collectively referred to as respondent), their successors and assigns and their representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer open end credit accounts or other retail consumer charge accounts (including, but not necessarily limited to thirty (30) day charge accounts) created incident to the business of selling consumer merchandise and services at retail, in the United States or any of its territories, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to provide each charge account customer having a credit balance created after the date of entry of this order with a periodic statement setting forth such credit balance, no fewer than three times during the six month period following the creation of the credit balance.

2. Failing to notify each charge account customer having a credit balance created after the date of entry of this order of the right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement and accompanied by a self-addressed return envelope. Such disclosure may be in the following terms: "We owe you . Your balance will be refunded on request. After 6 months it will be refunded automatically, except if $1.00 or less, it will not be applied to purchases or refunded unless requested." If such form of disclosure is not used, respondent shall make a disclosure which shall be consistent with but need not be the same as the following:

NO PAYMENT REQUIRED

The Credit Balance shown on [this] [the enclosed] statement represents money we owe you. You may obtain a refund by mail by presenting your statement at our store or by returning the top half of your statement in the enclosed envelope. If you do not charge against this credit or request a refund, a check will be mailed to you automatically after six months, except a credit balance of one dollar ($1.00) or less will not be refunded unless specifically requested, and it will not be credited against future purchases after this period.

Such disclosure need not be made by any store in the event it is that store's policy to refund automatically and without request all credit balances regardless of amount. In such case the following disclosure or a disclosure which provides at least the following information must be made in a clear and conspicuous manner:

For refund send back top half of statement or we will send check in 6 months.

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

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

A. *It is further ordered*, That with respect to each credit balance owed a customer in the amount of more than one dollar ($1.00) which was created at any time since June 30, 1972, and which has not been refunded to the customer as of the date of entry of the order respondent shall refund to each such customer the full amount of such credit balance, unless such credit balance is not owed to the customer, or the customer makes a fully offsetting purchase within the period for compliance herewith; *Provided, however*, That nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s) in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s), or an accompanying notice attached to the certificate, shall clearly and conspicuously disclose that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent

shall comply with the provisions of this paragraph no later than three (3) months after the date of entry of this order, and the report required by Paragraph F of this order shall address itself specifically to the steps taken to comply with this paragraph.

B. *It is further ordered*, That each refund shall be given to the customer either in person or by mailing a check (or a credit certificate(s) in the case of credit balances existing prior to the date of entry of this order) payable to the order of the customer at the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address shown in respondent's records. In the event that any such statement or check (or credit certificate) is returned to respondent with a notification to the effect that the addressee is not located at the address to which it was sent, respondent then shall make one remailing of the check (or credit certificate) or statement with an address correction request. If a remailed check (or credit certificate) or statement reflecting a credit balance in excess of twenty-five dollars ($25.00) is returned, respondent shall reinstate the full amount of the credit balance on the customer's account to be retained for one year from the date on which the remailed check (or credit certificate) or statement was returned, so that offsetting purchases can be made; *Provided, however*, That in lieu of the preceding, respondent may seek to obtain a current mailing address by either contacting a local credit bureau or employing an independent contractor regularly engaged in the business of skip-locating. If a remailed check (or credit certificate) or statement reflecting a credit balance of twenty-five (25) dollars or less is returned, respondent shall not be required to take any of the additional actions set forth in the preceding sentence. Thereafter, respondent shall be relieved of any further obligation to send any additional statement and/or any refund with respect to the credit balance in question; *Provided, however*, That in the event said customer should subsequently request a refund of any such credit balance owed the customer, respondent shall make such refund or provide a written explanation pursuant to the terms of Paragraph C.

C. *It is further ordered*, That if a customer requests, in person or by mail, a refund of a credit balance in any amount which has been reflected at any time on such customer's account, respondents shall, within thirty (30) days of receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with a written explanation, with supporting documentation when available, of the reason(s) for refusing to refund the amount requested.

D. *It is further ordered*, That a credit balance shall be deemed to be

created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such change shall automatically be replaced by its obligations under this order with respect to the new credit balance created by said change.

E. *It is further ordered*, That notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by third parties.

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

G. *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.

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

IN THE MATTER OF

ASH GROVE CEMENT CO.*

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND SEC. 7 OF THE CLAYTON ACT

Docket 8785. Complaint, July 8, 1969–Decision, June 24, 1975

Order requiring a Kansas City, Mo., manufacturer and seller of lime and portland cement, among other things, to divest itself of two producers of ready mixed concrete in the Kansas City marketing area, and for a ten-year period, not to acquire, without prior Commission approval, ready mixed concrete companies whose purchases of portland cement exceed designated amounts. The Commission also decided that a third acquisition of a quarrying business was not anticompetitive.

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* For appearances, see p. 969, herein.