necessary to discuss in detail a major part of all the evidence indicative of Holiday Magic's complete *modus operandi* with extensive precise quotation of the corporate respondents' publications including manuals and directives as well as other media.

The issues involving an evaluation of whether or not the entire plan *per se* violates public policy as related to fair trade practice under Section 5 of the Federal Trade Commission Act and whether or not the plan is conducive to and in fact involves Robinson-Patman violations under Section 2(a) of the Clayton Act, also requires extensive recitation of the evidentiary facts and discussion in order to avoid inept consideration. In the foregoing connection to assure credibility and accuracy of the findings, documentary excerpts have been quoted rather extensively to avoid any possible out of context misinterpretation of the findings themselves. To have otherwise abbreviated summarily would have only enhanced unwarranted and time consuming interpretive argument hereafter over what the relevant and material evidence accurately is in resolving the enumberable issues. Therefore careful and exhaustive consideration of every facet of the evidentiary findings, conclusions and order has been given to the thorough and able although unabbreviated proposals and argument of complaint counsel and respondent counsel. The excellent charts prepared by complaint counsel's staff reflecting profit margins, sales summaries as well as areas of competition, also vividly substantiate the findings and conclusions justifying the entry of the order hereinafter set forth.

ORDER

I.

It is ordered, That respondent Holiday Magic, Inc., a corporation, its officers, agents, representatives, employees, successors and assigns, and respondent William Penn Patrick, individually and as chairman of the board of directors of Holiday Magic, Inc., respondent Fred Pape, individually, and respondent Janet Gillespie, individually, their agents, representatives and employees, directly or indirectly, or through any corporate or other device, in connection with the offering for sale, sale, or distribution of goods or commodities in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Act, shall forthwith cease and desist from:

1. Entering into, maintaining, promoting, or enforcing any contract, agreement, understanding, marketing system, or course of conduct with any dealer or distributor of such goods or commodities to do or perform or attempt to do or perform any of the following acts, practices, or things:

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(a) Fix, establish, or maintain the prices, discounts, rebates, overrides, commissions, fees, or other terms or conditions of sale relating to pricing upon which goods or commodities may be resold.

(b) Require, coerce or suggest that any person enter into a contract, agreement, understanding, marketing system, or course of conduct which fixes, establishes, or maintains the prices, discounts, rebates, overrides, commissions, fees, or other terms or conditions of sale relating to pricing upon which goods or commodities may be resold.

(c) Requiring or coercing any person to refrain from selling his merchandise in any quantity to or through any specified person, class of persons, business, class of business or retail outlet of his choosing.

(d) Require, coerce or suggest that any person enter into a contract, agreement, understanding, marketing system, or course of conduct or requiring, inducing, coercing or entering into any agreement with any distributor to refrain from selling any merchandise in any quantity to or through any specified person, class of persons, business, class of business, or retail outlet of his choosing.

(e) Require, coerce or suggest that any person enter into a contract, agreement, understanding, marketing system, or course of conduct requiring, inducing, or coercing any distributor to refrain from selling any merchandise in any geographic area; *Provided, however*, That nothing contained herein shall prevent respondent corporation, acting alone and not in conjunction with other distributors, from assigning routes to individual distributors as areas of primary responsibility.

(f) Require, coerce or suggest that any person enter into a contract, agreement, understanding, marketing system, or course of conduct which discriminates, directly or indirectly, in the net price of any merchandise of like grade and quality by selling to any purchaser at net prices higher than the net prices charged to any other purchaser who in fact competes in the resale or distribution of such merchandise with the purchaser paying the higher price.

(g) Require, coerce or suggest that any person enter into a contract, agreement, understanding, marketing system, or course of conduct which prevents the distributor from selling his merchandise to another under terms and conditions which they may mutually agree to.

(h) Require, coerce or suggest that any person enter into a contract, agreement, understanding, marketing system, or course of conduct which prevents the distributor from entering into business or financial arrangements with persons of their own choosing, and under terms and conditions mutually acceptable to the distributors and said third persons.

3. Discriminating, directly or indirectly, in the net price of any merchandise of like grade and quality by selling to any purchaser at net prices less favorable than the net prices upon which such products are sold to any other purchaser who competes in the resale of any such products with the purchaser who is afforded less favorable terms and conditions of sale or with a customer of the purchaser afforded the less favorable terms and conditions of sale.

4. Discriminating, directly or indirectly, in the terms or conditions of sale of any merchandise of like grade and quality by selling to any purchaser upon terms or conditions of sale less favorable than the terms or conditions of sale upon which such products are sold to any other purchaser who competes in the resale of any such products with the purchaser who is afforded less favorable terms and conditions of sale or with a customer of the purchaser afforded the less favorable terms and conditions of sale.

5. Classifying distributors who are in competition or potential competition with one another into different categories, where such categorization is based upon the amount of inventory initially purchased, the amount of inventory purchased during any specified period of time, or any monies invested.

6. Preventing distributors from operating their business in any lawful manner they choose to, including but not limited to:

(a) individual owning or having a financial interest in more than one distributorship;

(b) an individual incorporating his distributorship or taking on additional partners without the necessity of each individual separately purchasing additional inventories or qualifying as a separate distributor;

(c) a distributorship selling the business to another individual or potential distributor;

(d) distributors entering into consignment arrangements;

(e) requiring departing partners of a partnership-distributorship to requalify in any manner to continue to do business with respondents.

7. Adopting, encouraging, participating in, coercing or otherwise promoting any plan or common course of conduct whereby distributors in competition with one another allocate or are allocated sales territories.

8. Engaging, either as part of any contract, agreements, understandings, or courses of conduct with any distributor or dealer of any goods or commodities, or individually and unilaterally, in the practice of:

(a) Publishing or distributing, directly or indirectly, any resale price, product price list, order form, report form, or promotional material which employs resale prices for goods or commodities for a period of three (3) years. Thereafter, no such list or material shall be employed without stating clearly and visibly in conjunction therewith the following statement:

The prices quoted herein are suggested prices only. Distributors are free to determine for themselves their own resale prices.

(b) Publishing or distributing, directly or indirectly, any discount, rebate, commission, override, or other bonus to be paid by one distributor or class of distributors to any other distributors or class of distributors, suggested or otherwise.

(c) Entering into, maintaining, enforcing, or threatening to enforce any contracts, agreements, rights, or privileges pursuant to or claimed by virtue of the Miller-Tydings Act, as amended, the McGuire Act, or any other similar legislation, for a period of three (3) years from the effective date of this order.

9. Paying or granting anything of value to any dealer, distributor, or participant in respondents' merchandising program, directly or indirectly, except for services actually rendered to respondents in connection with the sale or purchase of goods, wares, or merchandise; *Provided*, That the solicitation, sponsorship, training or upgrading of other participants shall not fall within the meaning of services rendered in connection with the sale or purchase of goods, wares, or merchandise described herein.

10. Requiring any distributor or dealer or other participant in any merchandising programs to obtain the prior approval of respondents for any product advertising promotion, or proposed product advertising or promotion, unless the selling prices and selling outlets are required to be deleted from same prior to submission.

II.

It is further ordered, That the aforesaid respondents and their officers, agents, representatives, employees, successors and assigns, in

connection with the advertising, offering for sale or sale of products, franchisees or distributorships, or with the seeking to induce or inducing the participation of persons, firms or corporations therefor, in connection with any marketing program or any other kind of merchandising, marketing or sales promotion program, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist, directly or indirectly, from:

1. Operating or participating in the operation or suggested operation of any program or plan wherein participants may join in a process of geometrical expansion of other participants at the same functional or horizontal levels or other "endless chain" scheme.

2. Operating or participating in the operation or suggested operation of any program or plan wherein participants engage in a program or plan involving referral selling.

3. Operating or participating in the operation or suggested operation of any program or plan wherein the financial gains to the participants are or may be dependent in any manner and to any degree upon the recruitment of other participants.

4. Offering to pay or paying, or authorizing, suggesting or requiring the payment of any commissions, fees, release fee, bonus, override, commission, cross-commission, discount, rebate, dividend or other consideration or thing of value to any participant in respondents' marketing program or other kind of merchandising, marketing or sales promotion program, for the solicitation, recruitment, referral, upgrading or training of other participants or potential participants therein.

5. Operating or participating in the operation or suggested operation of any program or plan which is in the nature of a lottery, gift enterprise or gaming device.

6. Requiring, suggesting, using or participating in any multilevel marketing program or pyramid marketing program or any other kind of merchandising, marketing or sales promotion program, directly, or indirectly:

(a) Wherein any compensation, profits or other thing of value inuring to participants therein are or may be dependent, in whole or in part, upon the element of chance dominating over the skill and judgment of the participants.

(b) Wherein no amount of judgment or skill exercised by the participant has any appreciable effect upon any or all compensation, profits or other things of value which the participant may receive or be entitled to receive.

(c) Wherein the participant is without that degree of control over the operation of such plan as to enable him to substan-

tially affect the amount of any or all compensation, profits or other things of value which the participant may receive or be entitled to receive.

(d) Wherein a participant pays a valuable consideration for the chance or right to receive compensation for introducing or recruiting one or more additional persons into participation or for the chance to receive compensation when a person introduced by the participant introduces a new participant.

(e) Whereby a participant gives or agrees to give a valuable consideration for the chance to receive something of value for inducing one or more additional persons to give a valuable consideration in order to participate in the plan or operation, or for the chance to receive something of value when a person induced by the participant induces a new participant to give such valuable consideration including such plans known as chain referrals, pyramid sales, or multi-level sales distributorships.

7. Requiring or suggesting that prospective participants or participants in any merchandise, marketing or sales promotion programs purchase product or pay any other consideration, either to respondents or to any other person, other than payment for the actual cost of reasonably necessary sales materials, as determined by the purchaser, in order to participate in any manner therein.

III.

It is further ordered, That the aforesaid respondents and their officers, agents, representatives, employees, successors and assigns, in connection with the advertising, offering for sale or sale of products, franchisees or distributorships, or with the seeking to induce or inducing the participation of persons, firms or corporations therefor, in connection with any marketing program or any other kind of merchandising, marketing or sales promotion program, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist, directly or indirectly, from:

1. Representing, directly or by implication, or by use of hypothetical examples that participants in any marketing program, or any other kind of merchandising, marketing or sales promotion program, will earn or receive, or have the potential or reasonable expectancy of earning or receiving, any stated or gross or net amount, or representing in any manner the past earnings of participants, unless in fact the earnings represented are those of a substantial number of participants in the community or geographic area in which such representations are made, accurately reflect the

average earnings of all active and inactive participants under circumstances similar to those of the participant or prospective participant to whom the representation is made, and actually resulted from predominant elements of skill and judgment rather than chance.

2. Representing, directly or by implication, or by use of hypothetical examples, that a gross income is a net income, salary, earning or profit figure.

3. Misrepresenting the facility of recruiting or retaining participants in any merchandising, marketing or sales promotion programs, as distributors or sales personnel.

4. Representing, directly or by implication, that any participant in any merchandising, marketing or sales promotion programs can attain financial success.

5. Misrepresenting the supply or availability of potential participants or customers in any merchandising, marketing or sales promotion programs in any given community or geographical area.

6. Failing to clearly disclose to each prospective participant in any merchandising, marketing or sales promotion programs, the total number of participants at the various levels or positions, whether active or not, in the county, state, and geographical market area in which prospective participants reside.

7. Representing that persons can expect to remain active in business for any length of time; or representing, in any manner, the longevity or tenure of past or existing persons unless in fact the periods of time represented are those for which the average and mean number of all persons who pursued their business operation at all.

8. Selling, or offering distributorship, in any manner, without disclosing clearly and conspicuously in writing at or before the time of the first oral sales presentation, or in the event no oral sales presentation is made, at least seven (7) days prior to the execution of a franchise application, agreement or contract:

(i) the median and mean gross earnings of all active and inactive franchisees or distributors in any program by all persons in the most recent calendar year preceding the year in which such sale or offer is made;

(ii) the total number active and inactive franchisees or distributorships nationwide;

(iii) the total number of active and inactive franchisees or distributors recruited in the state and county in which the prospect resides, since the company has been in existence;

(iv) the total number of franchisees or distributors in sub-

paragraph (ii) above who had profits during the most recent calendar year in the following dollar amounts:

a. $1,000 or less
b. over $1,000 but not over $5,000
c. over $5,000 but not over $10,000
d. over $10,000 but not over $20,000
e. over $20,000

(v) the turnover rate of sales personnel of products or of the personnel of franchisees or distributors of respondents' products.

(vi) the average dollar volume of monthly sales generated by sales personnel of products or the sales personnel of franchisees or distributors of respondents' products.

(vii) the nature and total amount of the expenses which a distributor, businessman or franchisee can reasonably anticipate in his business activities.

(viii) the names and current address of each of the distributors or franchisees recruited in the county in the most recent calendar year preceding the year in which such sale or offer is made;

(ix) a financial statement reflecting respondents' assets and liabilities (stating separately fixed assets and liquid assets) for the most recent calendar year;

Provided, however, That in the event respondents operated or used any corporate or trade name for a period of less than five years, the disclosures called for in this paragraph shall reflect the operations of the last preceding business entity used by respondents to sell and administer distributorships, or franchises.

9. Misrepresenting the reasonably necessary and anticipated costs of doing business to prospective distributors, dealers, sales personnel or franchisees.

10. Misrepresenting that once a man understands the business, he will not or cannot fail.

11. Misrepresenting that any business operation, merchandising or sales promotion plan can be the key to a person's financial future and security, or the answer to a person's financial dreams.

12. That a business operation, merchandising or sales promotion plan is a once in a lifetime opportunity.

13. Misrepresenting the amount or degree of the consuming public's acceptance of any products or representing that the public receives any products with great enthusiasm or that repeat busi-

ness is high without making available at the same time market studies which in fact substantiate the representations.

14. Misrepresenting that it is not difficult to obtain a lifelong income in connection with any merchandising, marketing or sales promotion programs.

15. Misrepresenting that any merchandising, marketing or sales promotion program are sound, profitable and distinquished.

16. Representing that a person who knows respondents' merchandising, marketing or sales promotion programs cannot fail.

17. Representing that persons who fail in respondents' merchandising, marketing or sales promotion programs are either lazy, stupid or greedy.

18. Misrepresenting the relationship between profits and income at one functional level of business to any other functional level of that or any other business.

19. Misrepresenting that the wholesale sales actually reflect retail sales or consumer demand for products.

20. Using or encouraging the use of advertisements which offer or suggest employment when the purpose of such advertisement is to obtain non-employee participants in any merchandising, marketing or sales promotion program; or misrepresenting, in any manner, the kind of character of the position or job opportunity offered to prospective applicants.

21. Representing, directly or by implication, that it is not difficult for participants to recruit or retain persons who will invest or participate in any marketing program or any other kind of merchandising marketing or sales promotion program, either as distributors, franchisees, wholesalers or sales personnel, or that there is a very large number of prospective distributors or sales persons from which to choose.

22. Representing, directly or by implication, that products will be or are advertised either locally or nationally, or in the geographic area in which such representations are made, without clearly revealing the manner, mode, extent and amount of the advertising.

23. Selling, or offering franchises of distributorships, in any manner, without furnishing to each prospective purchaser at least seven (7) days reasonably prior to the execution of a franchise application or agreement, a copy of the Federal Trade Commission Consumer Bulletin No. 4, "ADVICE FOR PERSONS WHO ARE CONSIDERING AN INVESTMENT IN A FRANCHISE BUSINESS."

24. Representing that respondents have applications pending for a particular area; or that any person must act immediately to be considered for a franchise or distributorship, or that he must act immediately to take advantage of a special deal, sale or event or misrepresenting, in any manner, the nature and extent of interest of others in any particular franchise or distributorship.

25. Representing that persons risk losing little or nothing in investing in a franchise or distributorship.

26. Misrepresenting that franchises or distributorships increase in value over the years.

27. Using any payment check or other materials which purport to represent the satisfaction or success of franchises or distributorships.

28. Misrepresenting the earnings potential of franchises or distributors, prospective franchisees or prospective distributors.

IV.

It is further ordered, That respondents, their successors and assigns, incident to selling their franchises or distributorships:

1. Inform orally all persons to whom solicitations are made and provide in writing in all applications and contracts in at least ten-point bold type that the application or contract may be cancelled for any reason by notification to respondents in writing within seven (7) days from the date of execution.

2. Refund immediately all monies to all persons who have requested cancellation of the application or contract within seven (7) days from the execution thereof.

V.

It is further ordered, That corporate respondent and William Penn Patrick, their successors and assigns:

1. Within thirty (30) days from the effective date of this order, compile a list which shall name each distributor from whom monies were obtained directly or indirectly, or in trust, during the period from and including Oct. 1, 1964, to the effective date of this order, state the last known address of each such distributor and specify all fees and payments for products paid by each such distributor to Holiday Magic, Inc. or to William Penn Patrick, or to their successors and assigns, directly or indirectly, or to or through any parent or subsidiary corporation, in connection with any activities engaged in which violate the Commission's order in the instant matter.

VI.

It is further ordered, That corporate respondent and William Penn Patrick, their successors and assigns, within thirty (30) days after this order becomes final, shall make an offer to any participant of a refund of all sums of money to which the participant is entitled under this order, and within sixty (60) days after the aforesaid respondents, their successors and assigns, receive notification of the acceptance of such offer of refund from such participant shall pay all sums of money to which the participant is entitled under this order.

1. For the purposes of this order, the term "participant" shall mean any person who invested money to participate, in any manner, in marketing programs of respondents, their successors and assigns.

2. For the purposes of this order, the term "refund" means all sums of money paid by a participant to respondents, or their successors and assigns, directly to or through a trust, parent or subsidiary corporation, less:

(a) any amount of money paid by respondents or their successors and assigns to participants, including any refund either made voluntarily or pursuant to court order, and

(b) the price paid for any products purchased by participant that participant does not return (a participant requesting refund pursuant to this order who has product either credited to him in an account, or in his actual possession, shall be entitled to refund for such products on the basis of the price paid by participant for the products; *Provided, however*, That any of said products in participant's actual possession for which he requests refund under this order must be delivered to one of the warehouses of respondents or their successors and assigns before refund is payable to participant), plus

(c) interest at the rate of 6 percent per annum on the amount to be refunded to participant from the date participant entered into respondents' program to the date notification of the right to refund is received by participant.

3. For the purposes of this order, the term "offer" means a notification by certified mail, return receipt requested, to each participant with the following information and none other:

(a) On the front of the envelope, together with the name and address of the participant and the name and address of the sender, the following legend in 16-point, bold-face type: "IMPORTANT: REFUND NOTICE".

(b) On the letter, in 12-point, bold-face type, the following language:

IMPORTANT NOTICE

By order of the Federal Trade Commission, all persons who invested money to participate, in any manner, in [name of company] are hereby offered a refund of all sums of money so paid, less (1) any amount of money paid by [name of company] to you, including any refund either made voluntarily or pursuant to court order, and (2) the price paid for any products purchased by you that you do not return to [name of company] (a participant requesting refund pursuant to this order who has [name of company] product either credited to him in an account, or in his actual possession, shall be entitled to refund for such products on the basis of the price paid by participant for the products; provided, however, that any of said products in participant's actual possession for which he requests refund under this order must be delivered to one of [name of company] warehouses before refund is payable to participant), plus interest at the rate of 6 percent per annum on the amount to be refunded to you, from the date you entered into [name of company] program to the date this notification of the right to refund is received by you.

If you accept this offer, then (1) send a letter to [name and address of company] within 60 days of receipt of this notification stating the amount and basis of your claim and (2) send any product in your possession to a [name of company] warehouse or, (3) in the event product is credited in an account with [name of company], a statement that upon receiving a refund, you relinquish any rights to such account.

Within 60 days after the receipt of the said information, you will receive all sums of money to which you are entitled under the formula set forth above.

Provided, however,

(c) If respondents or their successors and assigns claim they do not have adequate funds to comply with this order provision, they may within sixty (60) days of the effective date of this order petition the Commission to reopen the proceedings to consider the claim. The petition shall set forth the list of distributors or franchisees to whom refunds are due under this order and the sum of money each such distributor or franchisee is to receive in accordance with this order, a notarized statement of all assets and liabilities together with the assets and liabilities of all corporations in which the individual is an officer or stockholder.

Upon receipt of this petition and any response thereto which complaint counsel wishes to make, the Commission will assign an administrative law judge for the purpose of making findings and recommendations with respect to the claim. The administrative law judge shall furnish petitioner with the Commission's Statement of Financial Status (F.T.C. Operating Manual, Chapter 6, Illustration 20, Paragraph 6.19), shall require its prompt execution and may conduct such interrogations of the petitioner or require the production of such documents as he

deems necessary in order to make findings and recommendations as to any modification of this order which may be warranted on the issues raised by petitioner's claim. The findings and recommendations will be reported to the Commission for a final determination.

(d) If any dispute arises as to the compliance with the refund provision of this order which cannot be satisfactorily resolved by the parties, notice shall be given to respondents or to their successors and assigns of the extent to which they are regarded not to be in compliance and the facts respecting such alleged noncompliance. Within thirty (30) days after the receipt of such notice of noncompliance, they may petition the Commission for a hearing on such noncompliance or for a modification of the order provision giving rise to the disputed compliance or for such other relief as he believes is warranted and the Commission may set the matter down for hearing before itself or before an administrative law judge or shall either grant or deny such petition by order formally entered in the same manner and form as if it were an original order of this Commission.

VII.

It is further ordered, That respondents and their successors and assigns shall maintain adequate recores, to be furnished upon request by the Federal Trade Commission, which disclose the manner and dates members and franchisees or distributorships entitled to refunds under this order have received refunds or the reasons such members or franchisees have not received refunds.

VIII.

It is further ordered, That the respondents and their successors and assigns shall forthwith deliver a copy of this order to cease and desist to all past, present and future salesmen and franchisees, distributors or other persons engaged in the sale of franchises, distributorships, products, or services, and secure from each such salesman, franchisee or person a signed statement acknowledging receipt of said order.

IX.

It is further ordered, That respondent corporation and its successors and assigns shall forthwith distribute a copy of this order to each of its operating divisions and respondent William Penn Patrick furnish a copy of this order to each corporation or business entity in which he has any interest directly or indirectly.

X.

It is further ordered, That the respondents and their successors and assigns notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of 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.

XI.

It is further ordered, That each of the respondents herein and their successors and assigns 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 all of the provisions of this order. The report which corporate respondent, William Penn Patrick and their successors and assigns shall file within sixty (60) days after service upon them of this order shall include the lists they are to compile in accordance with subsection (a) of the provision of this order requiring them to refund certain monies.

Thereafter, within two hundred ten (210) days after service upon them of this order, they shall again file with the Commission a second report in writing, setting forth in detail the manner and form in which they have complied with this refund order.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner:*

The complaint in this matter was issued on Jan. 18, 1971, charging respondents with numerous violations of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) and Section 2(a) of the Clayton Act (15 U.S.C. §13(a)).

Among the unfair and deceptive acts and practices alleged were (1) operation of a multi-level open-ended (pyramid) type distributional scheme which had the capacity to deceive and was also in the nature of a lottery; (2) making of various specific misrepresentations to participants in the program, including use of misleading "want ads" purporting to offer employment, misrepresentation of the ease with which participants could recruit other participants, misrepresentation of the extent to which respondents' products would be advertised by the parent organization, and misrepresentation of profit expectations.

Among the unfair methods of competition charged were (1) price fixing; (2) division of territories; (3) imposition of assorted restrictions on resale rights of distributors; and (4) price discrimination.

After protracted hearings, the administrative law judge rendered a lengthy initial decision on May 31, 1973, finding respondents in violation on all counts of the complaint. The administrative law judge recommended a detailed cease and desist order, including provisions requiring restitution on the part of the corporate respondent and individual respondent Patrick.

On June 9, 1973, respondent Patrick perished in the crash of his private airplane.

Surviving respondents have appealed from a large portion of the initial decision.

On appeal, respondents challenge in general the validity of the initial decision, arguing that the administrative law judge borrowed heavily and verbatim from findings proposed by complaint counsel. In raising this point, respondents mistake the significance of the *Coors* and *Grand Caillou* cases which they cite in attacking the judge's findings.[1] These cases do not hold that it is impermissible *per se* for the administrative law judge to use findings proposed by either side, or that it is necessarily inconsistent with the required exercise of independent judgment and evaluation of the record for the judge to do so. To the contrary, while in both *Coors* and *Grand Caillou* the judge did adopt most of the proposals of one side, the other side on appeal subsequently pointed out the precise respects in which the initial decision was therefore incorrect, or in which it overlooked evidence germane to the charges in the complaint, and the Commission's own review of the record bore out those specific attacks on the initial decision.

With the exception of those findings of fact pertaining to the Clayton Act charge, respondents' brief is noticeably lacking in specific examples of findings of fact in the initial decision which are alleged to be incorrect, and similarly lacking in specific examples of excluded evidence which might compel legal conclusions contrary to those reached by Judge Buttle. Under such circumstances, we cannot take seriously an attack on the initial decision to the extent it is based on the barebones contention that the findings of one side are adopted verbatim. Moreover, our own review indicates that, while occasionally repetitive, and by no means a paragon of succinctness, the law judge's findings of fact are supported by the record, and, with the exceptions noted, *inter alia*, we adopt them as our own, and have relied upon them in our disposition of the appeal. We have taken greater issue with parts of the law judge's legal analysis, as have respondents, though again we have concluded it is correct with

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[1] *In the Matter of Adolph Coors Company*, Docket No. 8845 (July 24, 1973) [83 F.T.C. 32], slip op. p. 4; *aff'd* No. 73-1567 (10th Cir. 1974); *In the Matter of Grand Caillou*, 65 F.T.C. 799, 806-07, 814-15 (1964).

respect to most counts of the complaint. Finally, we have made substantial revisions in the order proposed by the administrative law judge, for reasons noted in the text.

I. BACKGROUND—THE HOLIDAY MAGIC MARKETING SYSTEM

Holiday Magic, Inc., was founded in 1964 by William Penn Patrick. Individual respondent Fred Pape was president of Holiday Magic and the company's first Master Distributor, and respondent Janet Gillespie was vice-president, a member of the board of directors, and the first Organizer Distributor.

Holiday Magic, through its multi-level marketing program, purports to enlist the services of men and women throughout the country to sell its products (primarily cosmetics, and some toiletries and home care products) at wholesale and retail. In order to enter the program, participants must purchase inventories of varying sizes, and having entered they may earn money by reselling the product they have purchased, and by recruiting others to participate in the program, as set forth below.

An individual may enter the marketing program at one of three levels,[2] Holiday Girl, Organizer, and Master Distributor, and persons at each of these levels may attain the fourth and "highest" level of General Distributor. Entry at each of the three levels requires a different monetary investment. Purchase requirements have varied with time, but the figures cited in the initial decision are $11.99 for Holiday Girls,[3] $130.41 for Organizers,[4] and $2,500 to $4,500 for Masters. (I.D. 80) The Master's investment pays for an inventory of cosmetics and sales aids. Individuals may also work up to the Master level by achieving the requisite volume of retail sales, either by themselves or through the efforts of themselves and others recruited by them. Entry into General status requires payment of a "release fee," described at greater length hereinafter, which has ranged in amount from $2,500 to $4,500, payable by certified check to Holiday Magic. (I.D. 84)

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[2] The system described herein in the present tense is generally that which existed at times prior to the complaint in this matter, except where indicated. Certain of the excesses of the program have been moderated in the face of challenge by various government agencies and private litigants.

[3] This amount would purchase a "mini-kit." An alternative would be purchase of $39 of product and sales aids (I.D. 60)

The following abbreviations will be used throughout:
I.D. - Initial Decision (Finding No.)
I.D. p. - Initial Decision (Page No.)
CX - Complaint Counsel's Exhibit (No.)
RX - Respondents' Exhibit (No.)
Tr. - Transcript (Page No.)
RB - Respondents' Appeal Brief to the Commission (Page No.)
CB - Complaint Counsel's Answer Brief on Appeal to the Commission (Page No.)

[4] This amount was later raised to $299, for which the Organizer received a "one-pack" of all Holiday Magic products, a mini-kit, a ten cassette library of recorded inspirational messages, a year's subscription to "Perception" Magazine, and a two-day course in selling. (I.D. 70)

Profits are earned in the marketing system by (1) retailing, (2) wholesaling, or (3) recruiting others into the system. Persons at all four levels may sell at retail. Masters and Generals buy directly from Holiday Magic at 55 percent and 65 percent off list price respectively. Organizers and Holiday Girls buy from their sponsors at discounts ranging from 30 percent to 55 percent depending on monthly sales volume. Those at all levels but Holiday Girl may also wholesale. (I.D. 328, 62-64, 70-73, 81, 83, 86)

Profits from recruiting others are earned in a variety of ways which are detailed in the initial decision (I.D. 118-142, 104-107), and the various Holiday Magic Manuals (*e.g.*, CX 76-115). Complaint counsel in their reply brief identify the two most important recruiting possibilities as the "Organizer to Master" level and the "Master to General" level (CB 5) and for convenience we shall adopt this terminology.

In the "Organizer to Master" level, Organizers, Masters, or Generals may sponsor other Organizers and Masters, with the right to recruit passed on *ad infinitum*.

Promotional material prepared by Holiday Magic states or implies that Organizers will each, on the average, recruit five other Organizers each month, for at least three months. (I.D. 74; CX 79Z31) It is thus represented as possible for Masters and Generals to recoup their large investments merely by recruiting other Masters (or Organizers who become Masters). For each Master (or Organizer who becomes a Master), the recruiting General receives 10 percent of the retail list price value of the Master's inventory purchase (which ranged from $5,000 to $7,000). A Master who recruits another Master (or Organizer who becomes a Master) receives 2 percent of the Master's inventory purchase.[5]

It is at the so-called "Master to General" level that the greatest abuse appears to have occurred. A General obtains his position by paying the release fee and recruiting a "Replacement Master." Respondents have pretended from time to time that certain qualifications beyond the tender of a certified check and a replacement Master were required for elevation to General, but the evidence shows otherwise. (I.D. 85) While an individual could not enter the program directly as a General, one could become a General almost immediately after entering as a Master. [I.D. 85(b)] Once a General, an individual could make large sums of money merely by recruiting other Generals. The "release fee" of each new General recruited would be paid to the recruiting General. Two release fees would normally be sufficient to compensate the recruiting

[5] Any Organizer who achieved the volume of recruitment represented by Holiday Magic promotional materials would automatically become a work-in Master by virtue of the inventory purchases of his recruits.

General for his or her own investment (the release fee plus the initial inventory purchase required to become a Master). Thereafter, every release fee of $2,500 to $4,500 obtained by the General would be pure profit. Moreover, each time a General persuaded a Master to ascend, the Master would be required to replace himself or herself with a "Replacement Master," whose own ascension would mean another release fee for the General (and, of course, another sale of $2,500 in inventory by Holiday Magic to the new replacement Master).[6]

The release fee described earlier is rationalized by the company as a "contract settlement fee," an amount paid to the General for the loss of income which would otherwise be made from the 10 percent override on sales of the Master who has left, and the Master's organization. There is little evidence in the record to suggest that this release fee bore any reasonable relationship to the real loss which any General collecting it would suffer. Rather, the major inducement for many individuals to become Generals was clearly the prospect of recruiting other Generals and receiving the release or contract settlement fee from them, rather than the opportunity to earn equivalent amounts by building a sales organization which would generate the requisite retail volume.

None of these various overrides, it would appear, constituted compensation for continuous wholesaling services being performed by those to whom they were paid. (I.D. 125, 136-37, 142)

II. MISREPRESENTATIONS (COUNTS I AND III)

The Holiday Magic marketing plan was presented to individuals in a variety of ways, of which chief was the "Opportunity Meeting." There, representatives of the company, in some cases its employees and in others various distributors acting pursuant to instructions contained in company manuals, described Holiday Magic and the marketing plan to potential distributors. (I.D. 287-317) The administrative law judge found, and respondents do not contest, that in the course of advertising the Holiday Magic program to potential distributors, numerous misrepresentations were made, and high pressure sales tactics employed, as described in great detail over more than 60 pages of the initial decision. (I.D. 392-432, 483; pp. 164-216, 278-291 [pp. 875-906, 949-955 herein])

Among the specific deceptions alleged in the complaint and found by the administrative law judge were:

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[6] In addition to the above, a complex system of reimbursement exists to provide Generals with overrides or rebates on inventory purchases made by those whom the General has recruited, recruits of recruits, and so forth. As noted, General Distributors receive a monthly payment equal to 10 percent of the retail list price value of products purchased by Master Distributors whom they had recruited or who were assigned to them, or who had been recruited by Organizers or Holiday Girls to whom they sold. When a General's Master becomes a General, the first General no longer receives the 10 percent override on the ex-Master's purchases, but does continue to receive a 1 percent override on all purchases made by the new General and the new General's recruits.

(1) False representations of the earnings potential of distributors, and of the ease with which retail selling distributors could be recruited; (I.D. 392-423)

(2) False representations concerning the ease with which one could succeed in Holiday Magic, including representations that through the application of hard work and diligence anyone could succeed in the program; (I.D. 392-423)

(3) False representations of the amount, degree, and type of advertising which Holiday Magic engaged in for the purpose of creating retail demand for its product; (I.D. 424-427)

(4) Misleading use of "employment offered" advertisements for the purpose of attracting distributors with the promise that a job, with guaranteed income, was being offered. (I.D. 428-432)

Of greatest importance were the numerous misrepresentations of earnings potential and ease of sales and recruitment for participants in the program. Some of these took the form of misleading illustrations of the manner in which an individual, as a result of recruiting others, could build a large sales organization, with substantial wholesale and retail volume producing hefty profits. Similarly misleading were various representations concerning the ease with which those who had paid several thousands of dollars to become "Generals" could recoup their investments by recruiting other Generals.

Some of the misrepresentations emanated directly from the corporate respondent and its officers, in the form of manuals, films, directives, and the like. Other misrepresentations were the creation of distributors of the company who added their own deceptive gloss to the marketing plan in order to garner more recruits. The administrative law judge found that, in various instances, Holiday Magic became aware of the misrepresentations being made by its representatives but did not repudiate them, and refused to refund money paid to Holiday Magic by those induced to become distributors by these misrepresentations. (I.D. 411-419, pp. 336-340 [pp. 898-902 herein])

Holiday Magic furnished its representatives with detailed instructions for the operation of opportunity meetings, covering specific promotional representations to be made, decor and format, and even particular "closing techniques" designed to hasten that magic moment when a prospect signed an application and parted with a certified check. One highly recommended technique was the "Impending Event;"

* * * This is a Power-House method of enrolling your prospect through presenting him a situation which he can take advantage of only today and which will not be available tomorrow. (I.D. 318)

Holiday Magic assisted by creating numerous "Impending Events,"

repeatedly announcing increases in the cost of General Distributorships to take effect imminently, but then withholding the increase when the threatened time came. The same imminent increase could then be threatened again, to create the requisite sense of urgency on the part of a new batch of prospects. (I.D. 320)

Among closing techniques recommended, as described by the administrative law judge (I.D. 325; CX 1842Z20-29) were:

(j) *Final Objection Enrollment*—Make guest explain his objection until he feels "stupid".

(l) *Ben Franklin Balance Sheet Enrollment*—Used for indecisive prospects. Put down reasons pro and con for joining. Help prospect with pro reasons. Subconscious mind won't be able to switch to the con so fast.

(s) *Name Enrollment*—Ask prospect to write down names of five people who would like to make an extra $25,000 a year. Then explain how much money these five people will make for your prospect if he sponsors them into the business. But in order to sponsor you have to enroll. If he doesn't enroll, threaten him that you will sponsor the people. The moment you enroll one of his contacts you will have leverage to enroll him again.

(u) *Cash Money Enrollment*—Used when you have a prospect who is a non-believer. Pull roll of $100 bills out of your pocket and say "Now, I am not trying to impress you with the money I'm making, but would earning this kind of money each week interest you? Wonderful."

When all that remained was for the prospect to sign, Holiday representatives were well prepared with "Pen Handling Techniques" recommended by the company:

(1) Pen Circling—Always circle pen into your prospect's hand beneath his eye level (between the first finger and thumb).

(2) Pen Snapping—Make a mark on the application where you want him to write, then snap the pen down upon the top (indicating you want him to use it). "Please put you name and mailing address right here."

(3) Pen Reaching—When you have a wide distance to cover in placing your pen in prospect's hand. Place pen in prospect's hand while keeping your eyes at his level.

(4) Pen Dropping—Should only be used after several unsuccessful attempts have been made to place your pen in you prospect's hand. You must become extremely nervous and accidentally on purpose drop your pen, saying "Whoops." When prospect picks up pen, don't thank him, but tell him to put his name on the application.

(5) Pen Tapping—Is used to bring about fast signature. "Let's go."

(6) Pen Borrowing—Used when prospect has his own pen close at hand. Borrow his pen to make a mark on application, then give it back to prospect, telling him to finish filling out application.

(7) Pen Priming Techniques—Used to get prospect to start writing after pen successfully placed in his hand.

(i) Quick Prime—Pick up second pen and quickly point to place you want him to sign—"Just like a small bird sitting on your prospect's shoulder and softly whispering into his ear 'You forgot to sign your name.'"

(ii) Hot and Cold Switch—Put pen that has started writing into prospect's hand. Clear the negative deception from his conscious mind first. (I.D. 325)

As a result of the representations and misrepresentations made by

Holiday Magic and its agents, thousands of individuals were induced to invest millions of dollars in inventories of cosmetics and release fees to become Holiday Magic distributors. These investments in more than a few instances turned out to be worthless or of little value. Holiday Magic's great concern for moving non-returnable product into the hands of its distributors often proved in marked contrast to its rather more casual attitude toward movement of product from the hands of its distributors into the homes of consumers. The administrative law judge found that Holiday Magic does not know and keeps no records of the retail sales of its products at the consumer level (I.D. 482); that it claims not to know what the turnover ratio is of its Holiday Girls (I.D. 469), although assumptions about the retail sales of Holiday Girls figured prominently in the Opportunity Meetings (I.D. 392, 394, 396, 398), and that it does not know the effect of the retail advertising it does. (I.D. 477) While some attention was certainly paid by the organization to the retail sales of its products, it is clear from the record that the major emphasis in promoting the program, and the major attraction for many participants, was the prospect of the profits to be made through recruitment of others. (I.D. 327-352)

Having acknowledged responsibility for the orgy of deception described by the administrative law judge, respondents do not object to entry of order provisions specifically prohibiting those misrepresentations challenged in Count III of the complaint (with a few exceptions noted hereinafter). Respondents do, however, balk at the administrative law judge's finding pursuant to Count I of the complaint, that the Holiday Magic marketing plan is, by its very nature, deceptive, and they object to order language recommended by the administrative law judge which would prohibit use of any sort of open-ended, pyramidal form of distribution in the future. We believe, nonetheless, that such a prohibition is warranted by the evidence introduced in support of both Counts I and III.

Count I of the complaint alleged in part that:

> * * * respondents' multilevel merchandising program is operated in such a manner that the realization of financial gains is often predicated upon the exploitation of others who have been induced to participate therein, and who have virtually no chance of receiving the kind of return on their investment implicit in said merchandising program. Therefore, the use by respondents of the above-described multilevel merchandising program in connection with the sale of their merchandise * * * was false, misleading and deceptive, and was and is an unfair act and practice. * * *

In essence, the Holiday Magic marketing plan is little more than an elaborate, modern-day version of the chain letter, with the capacity to part a slightly more sophisticated, and more ambitious victim from his or her money. The plan holds out the promise of profit for all based upon

recruitment of other distributors, at both horizontal and vertical levels, with the passing on of such right to recruit to those recruits, as an inducement for them to join, and so on *ad infinitum.*

That such a plan must lend itself to massive deception is amply demonstrated by the initial decision and the record in this case. Holiday Magic encouraged its distributors to illustrate the operation of the marketing system by means of diagrams which portrayed an individual entering the program and recruiting five distributors, who in turn each recruited five others, who in turn each recruited five more. While Holiday Magic argues that its promotional materials did not extend these calculations beyond three months, the marketing plan did, of course, allow and encourage distributors to promise those whom they recruited that those recruits could generate the same chain of sub-distributors; hence in the hypothetical illustration those who were induced into the program at any given period of time would presumably have been so induced by the promise that they could generate their own chain, as illustrated, for at least three months, and so on without end.[6a] Clearly such a system must fall of its own weight, and well before every citizen of the United States is recruited to work for the company.

The mere, unqualified, holding out of an open-ended, pyramidal distributional system allowing for uninterrupted recruitment as a reasonable business opportunity for all inevitably creates the *potential* for massive deception, and the fact that this potential was realized on an enormous scale in this case only underlines the patent illegality of the scheme. Implicit in the holding-out of the system as a reasonable business opportunity is the promise that the party to whom the system is represented can earn profits in it by means of recruiting others. This representation may be true with respect to those to whom the representation is intitially made; those at the beginning of the chain or the top of the pyramid. But, since a fundamental aspect of the system is that those at the beginning will be able to succeed by promising others the same ostensibly lucrative right to recruit, and so on, it is a virtual certainty that at some point the representation that profits are to be earned will be made to individuals to whom it will still appear plausible but for whom it is blatantly untrue, by virtue of the fact that the universe of potential recruits has been effectively exhausted. The party who utters the words which deceive and injure may well not be the perpetrator of the scheme, just as the originator of a chain letter may never correspond with those who become its eventual victims. But the deception and unfairness are not, thereby, any less the responsibility of the one who

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[6a] The same chain mechanism was implicit in the representation made to every would-be General that he or she could recoup the release fee by recruiting another General, and offering that General the same inducement for signing up.

initiates the process. [See *Ger-Ro-Mar, Inc., et al.*, Docket No. 8872, Slip Op. pp. 8-12 (July 23, 1974) [84 F.T.C. 95]; Cf. *Twentieth Century Company* v. *Quilling*, 139 Wisc. 318, 110 N.W. 173, 176 (1906)]

In this case, as illustrated by the initial decision, there is striking evidence that saturation of the market for distributors actually occurred, *i.e.*, that recruitment in certain areas was carried to such extremes that the mere offering of a Holiday Magic distributorship as a reasonable business opportunity amounted to the grossest deception. (I.D. 372-380) In these instances, quite apart from any specific misrepresentations that may have been made, the simple solicitation of money from individuals, with the implicit understanding that money could be made in return by means of recruiting (or, indeed, by one's own retail sales), was patently false and misleading.

But even if such saturation were not painstakingly shown to have occurred, the overwhelming potential for fraud and oppression would have remained, and the system as a whole would still require proscription. Counsel for respondents quarrel with the administrative law judge's purported holding that the Holiday Magic marketing plan is "inherently" deceptive, without regard to specific misrepresentations made by its exponents. Put somewhat differently, we believe the holding is essentially correct. A plan which holds out the opportunity of making money, by means of recruiting others, with that right to recruit being passed on as an inducement for those others to join, and being passable by them *ad infinitum*, contains an intolerable potential to deceive, quite apart from whatever particular representations may be made in promoting the plan. A plan involving such unlimited recruitment which extracts a valuable consideration from individuals in return for the opportunity to participate in it, threatens severe injury since at some point the likelihood must arise that participants will be unable to recoup their investment of money and time in the manner held out as reasonable. The Holiday Magic marketing plan meets these criteria entirely. To say that it is "inherently" deceptive is to say no more than that it contains this intolerable potential to deceive, and on those grounds as well the plan requires condemnation. [See *Ger-Ro-Mar, Inc., supra*, pp. 8-12, I.D., pp. 292-310 [pp. 956-967 herein]; *Goodman* v. *Federal Trade Commission*, 244 F. 2d 584, 604 (9th Cir. 1957); *FTC* v. *Algoma Lumber Company*, 291 U.S. 67, 81 (1934); *Vacu-Matic Carburetor Company* v. *FTC*, 157 F. 2d 711 (7th Cir. 1946), *cert. denied*, 331 U.S. 806 (1947)] Indeed, a tragic aspect of this case is that the challenged marketing plan was not obliterated in its infancy, before the seed of deception ripened into the poisonous fruit of fraud and oppression. The Commission will consider carefully in the future whether marketing

plans of the sort involved here are a suitable target for its newly-gained authority to obtain injunctive relief.

Aside from the actual and potential deceptiveness of the marketing plan (Count I of the complaint), its proscription is also warranted by virtue of the multitude of particular misrepresentations which were found to permeate it (Count III). We do not believe that an order which merely forbade respondents to make specific misrepresentations would succeed in eliminating such misrepresentations, at least on the part of those independent distributors in whose hands respondents were allowed to continue placing the instrumentality of deception--the Holiday Magic Marketing Plan.

One of the saddest aspects of this case is the picture it presents of "consumers" being schooled in fraud, and in some cases learning their lessons all too well. Some of the worst deceptions on the record were perpetrated by Holiday Magic's so-called "independent" distributors, albeit with the aid and ultimately profitable and knowing acquiescence of respondents. The Holiday Magic marketing plan lends itself to exaggeration and misrepresentation of the sort which occurred, particularly on the part of those who, having made a large investment, feel the urgent need to get it back. Holiday Magic encouraged such deception on the part of its distributor-representatives, both directly and through its emphasis on the use of emotionally exploitive selling techniques. Such deception is its responsibility, and an order designed to serve the public interest must be designed both to eliminate misrepresentations on the part of named respondents, and those made by respondents' distributors with respondents' aid. We doubt at this late date that such a result can be achieved by a mere prohibition in terms of specific misrepresentations. Only a future prohibition on use of the marketing plan which nourishes such deception will ensure the elimination of Section 5 violations. For this reason, additionally, we must enter order provisions forbidding Holiday Magic to utilize a marketing system which partakes of the pernicious elements of the plan in effect at the time of this case.[7]

III. ORDER PROVISIONS (COUNTS I AND III)

The Commission has given careful attention to the question of appropriate relief in this matter, and has obtained the views of both sides via supplemental submissions filed subsequent to oral argument. Counsel for Holiday Magic notes that by virtue of the company's settlement of

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[7] For reasons noted in detail in our decision in *Ger-Ro-Mar, Inc., et al., supra* (pp. 17-21) [pp. 153-155, herein], we believe that an adequate evaluation of the lottery charge (Count II) is not possible on the record before us, and we shall, therefore, vacate those portions of the initial decision and proposed order dealing therewith. It does not appear in any event that the provisions of the law judge's proposed order pertaining to lotteries are in fact needed to prevent recurrence of the wrongdoing here.

litigation brought by the Securities and Exchange Commission and various private litigants [Civil Action No. 73 1095 (DCNDCA, Apr. 1, 1974)] the company has agreed to modify its mode of operation in certain respects, and counsel moves that further hearings be held before an administrative law judge to determine what additional order provisions should be imposed by the Commission, and to avoid inconsistencies in the orders of the Commissions and the District Court.

We do not believe that further hearings are necessary as part of this already much-delayed adjudication, and the motion therefor will be denied. The order to which corporate respondent has agreed enjoins it from various violations of laws other than the Federal Trade Commission Act. The company had further agreed to devote a portion of any future earnings to the payment of restitution to distributors. A Special Counsel has been appointed to oversee corporate operations.

While we are not qualified to evaluate the adequacy of the consent order in redressing alleged violations of the laws pursuant to which the SEC and various litigants brought suit, it is clear to us that the consent order is in no way adequate to remedy and ensure the non-recurrence of violations of Section 5 of the Federal Trade Commission Act found in the record, nor, of course, was it intended to be. In particular, we note that while the consent order contains certain broad prohibitions on the use of fraud and the use of Master and General distributorships, these prohibitions may be avoided by respondents if the products of the company are "rendered in substantial degree to consumers" (Pars. I, II). There is still room for a great deal of fraud and injury to distributors in a program in which product is rendered in substantial degree to consumers, fraud and injury of the sort respondents have shown themselves past masters in administering. By selling inventory to distributors only on consignment, or by offering to buy it back (perhaps at reduced price), a company can guarantee that its product is rendered in substantial degree to consumers (to the extent it is rendered at all). This situation, however, is hardly inconsistent with the use of pervasive deception to induce distributors to pay franchise fees, training and instruction fees, sample kit fees, or to make other investments all of which may turn out to be worthless. To remedy violations of Section 5, therefore, an order must prohibit deceptive practices whether or not the company renders such product as it does produce in substantial degree to consumers.

We do not believe that any inconsistencies should result from the orders of the Commission and the District Court. Certainly we do not believe that the intention of the SEC in bringing suit under its Act, and entering into a settlement of it, or the intention of the District Court in approving the settlement, was to permit Holiday Magic to insulate itself from the effects of an order fully warranted on the basis of lengthy

administrative proceedings demonstrating numerous violations of the Federal Trade Commission Act (and, in one small respect, the Clayton Act). The order that we shall enter is intended to ensure that violations of the statutes we are required to enforce will not recur in the same or related form. To the extent that the order prohibits conduct that is not prohibited by the order of the District Court, it may require modifications of the corporation's latest marketing plan. We believe that the District Court contemplated such a result when it modified its own order on June 7, 1974.[8]

We agree with respondents that it is highly desirable that Holiday Magic continue as a viable business entity, offering individuals throughout the country a legitimate business opportunity selling cosmetics to consumers, and devoting a portion of any profits realized therefrom to repayment of victims of past illegalities, as contemplated by the order of the District Court. At the same time, it would be folly for us to ignore the record of this case and enter an order which would permit respondents to engage in future deceptions so that they might thereby be better able to repay victims of past ones.

Respondents do not object to the majority of the administrative law judge's proposed order provisions prohibiting specific misrepresentations (Part III of proposed and final orders). With the exception of rewording for the sake of greater clarity and precision, we have generally retained those portions of the administrative law judge's proposed order.

Respondents do object to Paragraphs 6, 8 and 23 of Part III of the proposed order. Paragraphs 6 and 8 require disclosure of certain information to prospective participants in any marketing program operated by respondents prior to entry. Respondents argue that, since they have modified their program so that an initial investment of only $25 in sales materials is required for participation, there is little need for the

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[8] "Stipulation and Order Modifying Consent Judgment with Corporate Defendants"

The amended order of the Court enjoins respondents to: * * * conduct their operations in conformity with the marketing plan most recently submitted to the Commission [SEC] and currently in effect, except to the extent that it may be hereafter determined that such marketing plan may conflict with antitrust laws and/or other laws administered by the Federal Trade Commission, in which event the corporate defendants, with the approval of Special Counsel, will make whatever modifications are necessary in order to comply with said laws.

We do not believe that the Court intended by this provision to require that the Federal Trade Commission hold new *adjudicative* hearings to adjudge the legality of the new marketing plan, just as it has previously held hearings stretching over 15 months and 10,708 pages of transcript to evaluate the legality of the past marketing plan. We believe that the intention of the amended paragraph was to require that Holiday Magic conform its operations to the order of the F.T.C. based on the fully litigated record, and designed to prevent future violations of law. The determination to which the District Court's order refers may be made by counsel for Holiday Magic and the Special Counsel, in consultation with the compliance staff of the Commission. If problems arise with respect to the meaning of our order that cannot be resolved with compliance staff, the Commission will, as always, be prepared to render advice. These observations refer as well to the order provisions pertaining to restraints of trade, discussed in subsequent sections of this opinion.

disclosures required by Paragraphs 6 and 8, and the cost and difficulty of furnishing them would be excessive.

We agree with respondents that provision of aggregated operating results for numerous small distributors might constitute an onerous burden which we shall not impose. Strict adherence by respondents to those portions of the order forbidding misrepresentation of earnings potential should be sufficient to remedy the abuses in this regard.[9]

We have difficulty, however, accepting respondents' arguments with respect to those portions of the order requiring disclosure of the number of competing distributors in a given market area. This is information which respondents should have in their possession. The record in this case reveals that respondents encouraged the recruitment of thousands of distributors into their program without regard for whether or not the market for their products would sustain those recruits. When an individual pays a valuable consideration to participate in a marketing program, his or her assumption is that there is a reasonable possibility of earning back the investment by selling the product. It is of crucial importance to the individual to know that scores of others in the same marketing area may be attempting to earn back investments by selling the very same brand product, and at the heart of the fraud in this case was Holiday Magic's failure to disclose that fact.

We agree that by reducing the amount of money which is extracted from a participant to enter the program the injury which may be done is thereby also diminished.[10] But the potential for some injury remains, and we are loath to abandon a disclosure requirement so germane to the decision to become a distributor, so long as respondents require any investment whatsoever on the part of their distributors in order to participate in their program. As modified, our order will require respondents to disclose the number of other participants in a given market area, prior to the time an individual is required to pay any consideration to respondents in order to enter their program, including payment for sales aids. Respondents may avoid the bite of this paragraph by furnishing sales aids to their distributors on a consignment or delayed payment basis, so that an individual may determine for himself or herself the

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[9] We have added a record-keeping provision [Par. III(1)] requiring that respondents maintain substantiating material for any earnings claims they may choose to make. This housekeeping provision is necessary in order for the Commission to enforce effectively prohibitions on earnings misrepresentations. If respondents cannot obtain and maintain substantiating material for earnings claims, as they seem to suggest in objecting to the ALJ's disclosure requirements, they should not make representations which suggest to prospective distributors that they do know how much participants in their program are earning.

[10] Par. II(7) of the ALJ's order, to which respondents have not objected, and which we shall incorporate in our order [Par.II(3)] forbids respondents to require any participant to purchase product or pay other consideration (except for purchase of reasonably necessary sales aids) to participate in the marketing program. This will limit though not eliminate the financial risk to participants.

extent of the intrabrand competition before being obliged to make any monetary investment.

Respondents object to Section III(23) of the administrative law judge's order, and Section VIII of the order. The former would require delivery to all prospective participants of the Commission's Consumer Bulletin No. 4, "Advice for Persons Who Are Considering an Investment in a Franchise Business," and the latter would require delivery of a copy of the order in this matter to prospective distributors. Respondents argue that the cost of such requirements is unwarranted in view of the substantially reduced nature of their business.

There is no question that the Commission may properly require delivery of a copy of its order to distributors of a franchisor found to be in violation of Section 5. Delivery of the order places the distributor on notice of past violations and future prohibitions, and assists in enforcement of the order by alerting potential victims of conduct which would violate it. While the rationale for delivery of the order is abundantly applicable to the case before us, we also recognize the unusual length of the order in this matter, and the cost its distribution to thousands of distributors might entail. We believe it is most important that participants be furnished with the provisions of Section III of the administrative law judge's order forbidding specific misrepresentations. Other provisions of the order are likely to be less readily comprehensible to the full range of participants, and compliance therewith is more readily determinable by review of the company's printed materials. We have modified our order accordingly to require provision to distributors only of Section III of the order.

Also, we do not believe that furnishing Consumer Bulletin No. 4 to prospective participants in the program should prove unduly burdensome to respondents, particularly in view of the large number of publications they have been able to distribute to participants in the past. The purpose of this short consumer bulletin is to alert individuals to the questions they should ask in order to evaluate, and before investing in, a business opportunity. The need for such vigilance on the part of participants in respondents' program is abundantly clear from the record and will help to ensure that past deceptions are not repeated.

With respect to Section II of the administrative law judge's order, we have omitted some of the more nebulous prohibitions, and those pertaining solely to the vacated lottery count, but retained, we believe, the essence of his proposed relief. Paragraph II(1) prohibits respondents from operating a marketing program in which an individual pays a valuable consideration in return for the right to earn compensation for the mere act of recruiting other participants, irrespective of such recruits' sales to consumers. This paragraph is designed to ensure that any

compensation received by a participant for recruiting activities will be based strictly on product sales of recruits, and not on the inventory purchases (or other payments) of recruits. Without such an absolute prohibition, individuals may be induced to purchase inventory from, or pay other consideration to, respondents on the understanding that they may recoup their investment (at least in part) by inducing others to purchase inventory and pay a consideration, and by offering them the prospect of making back their investment in the same way. This is a chain letter scheme, pure and simple. We must unequivocally reject respondents' contention that they be allowed to pay some "nominal" sum to distributors for the mere act of recruiting other distributors, whether such distributors sell at retail or not. The amounts taken from individual Holiday Magic victims ran into the thousands of dollars, but they might as easily and no less unfairly have been in the hundreds. "Buy a sales kit, sell cosmetics, and earn the right to $25 for each person you induce to buy the sales kit and enter our program." This is an illegal chain letter scheme just as much as "Buy $5000 worth of cosmetics, sell cosmetics, and earn the right to $500 for each person you induce to do the same thing." At some point many people will be unable to recoup their investment from referral fees, and to induce them to make such investment with the promise that they can so recoup it is fraud—whether or not such product as is involved in the program happens to be rendered in substantial degree to consumers. Paragraph II(1) will *not* prohibit payment of compensation to distributors for recruiting other distributors based on actually consummated sales of such recruits to consumers. We recognize that some incentive is necessary in a direct selling system in which a company lacks resources to *hire* distributional personnel, to induce distributors to recruit other distributors. Overrides based on actually consummated retail sales of recruits appear to us to be the least potentially pernicious of such incentives, and not subject to the same abuse in which respondents engaged with respect to flat payments or overrides related to inventory purchases. The order would not forbid such payments to compensate distributors for recruiting efforts, but such an incentive structure should help impress upon all participants that their concern must be with retailing or building a retail organization, and not merely with recruiting.

Order Paragraph II(2) is addressed to the related problem of unlimited recruitment. Even if so-called "headhunting" is eliminated by Paragraph 1, and participant profits from recruiting in the system are related solely to the retail sales of successive generations of recruits, the possibility of deception remains, because an individual may be induced to participate in the program on the mistaken premise that he or she can delegate the retailing function to later generations of re-

cruits, who in turn may enlist for similar mistaken reasons. The misrepresentations made by respondents concerned both the possibility of huge profits based on inventory purchases and payment of release fees by recruits, *and* the possibility of such profits based on retail sales of successive generations of recruits. Our order will allow respondents to establish a participant-recruited three-tiered system of distribution, provided that those at the lowest level may not perform recruiting functions for a period of at least one year following their entry into any merchandising program. This should permit respondents reasonable flexibility in building a distribution network, while helping guarantee that the plan must be presented to potential participants in a way which makes clear that their profits will depend directly on their own efforts in retailing to consumers or in directly building a retail organization. We recognize that upgrading of participants at the lowest level of a *legitimate* business organization is an important feature; for that reason the third level of recruits is allowed to engage in recruiting functions after one year. At the same time, it is crucial to create a pronounced interruption in any chain of recruitment, even one limited by Paragraph II(1), to avoid the inherently deceptive lure of the pyramid mechanism as exploited by respondents.

Paragraph II(3) is adapted from Paragraph II(7) proposed by the administrative law judge. It prohibits respondents from suggesting or requiring that an individual make any inventory purchase as a condition of participating in any marketing program. We believe this provision is fully warranted in light of the gross abuses of inventory purchases wrought by respondents. There is no evidence in the record to suggest that respondents cannot operate a legitimate direct selling business without requiring inventory purchases on the part of participants.

Restitution

The administrative law judge concluded that restitution is necessary to remedy the continuing violation of Section V resulting from retention by the corporate respondent and respondent Patrick of monies unlawfully obtained from participants in the Holiday Magic program. The administrative law judge found that by virtue of respondents' massive misrepresentations and inventory loading schemes, the large inventories of cosmetics purchased by participants "in many situations are largely worthless to persons who are unable to sell the same at wholesale or at retail." (I.D. pp. 371-72 [pp. 1011-1012 herein])

The order proposed by the judge provides in essence that restitution shall be made based upon the amount of money paid by distributors to respondents, less any monies returned to distributors by respondents,

and less the cost to distributors of inventory which distributors do not tender back to respondents.

In view of respondent Patrick's post-initial decision demise, complaint counsel moved to substitute his executor, Sam Olivo, as party respondent in this matter for the purpose of effecting such restitutionary relief as might be appropriate. Olivo opposed this motion. By order of Aug. 29, 1974 [p. 347 herein], the Commission granted the motion to substitute the executor, and granted him 30 days within which to file an appeal brief from the initial decision. The executor has filed no appeal brief, however the arguments raised in opposition to restitution by corporate respondent Holiday Magic apply generally to the executor as well and will be considered with respect to both parties. Holiday Magic challenges the Commission's authority to order restitution generally, and in this particular case, and the propriety of ordering restitution in view of the previously-noted settlements between respondents and the SEC and class action litigants in California.

We have discussed at length in other recent opinions our general authority to order restitution of unlawfully obtained and retained monies and will not repeat those arguments here. See *Curtis Publishing Co.*, 78 F.T.C. 1472 (1971); *Universal Credit Acceptance Corporation*, 82 F.T.C. 570 (1973). Respondents' challenge to the Commission's authority to order restitution is thus rejected. [11]

Holiday Magic further alleges that it was not adequately apprised that the Commission would consider restitution in this case, and that certain comments of the administrative law judge led respondents to think that restitution would not be considered. (Tr. 69-70.) These contentions are similarly rejected. Complaint counsel stated their intention to seek restitution on the first day of trial (Tr. 68-70), at least 15 months before closing of the record. Respondents were left with adequate time in which to prepare to cross-examine and call witnesses with relation to the matter of restitution.

At the start of the trial, the administrative law judge stated as follows:

> I will be guided by the complaint insofar as the order is concerned * * * my ruling will be they [complaint counsel] are not going to get any relief that they haven't asked for, that cannot be supported by the complaint. (Tr. 69-70.)

These comments expressed nothing more than an intention to limit any eventual order to the scope of the complaint. The complaint set

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[11] The Commission is fully aware of the decision by the Ninth Circuit Court of Appeals declaring that it may not order restitution of retained monies obtained as a result of violations of the F.T.C. Act occurring prior to the entry of a cease-and-desist order. (*Heater* v. *Federal Trade Commission*, No. 73-1750 [503 F.2d 321], Sept. 11, 1974.) With all due respect for the court, the Commission believes that the court's decision in this matter is incorrect, and the Commission will seek to obtain review of this decision by the Supreme Court.

forth clearly the basis for a restitutionary order, alleging that as a result of various unlawful practices individuals were induced to make investments on which they subsequently received little or no return. Respondents' counsel had full opportunity to argue the relevant issues at trial and on appeal, and indeed was not so misled by the administrative law judge's remarks that he did not seek to justify the presentation of a mammoth defense record on grounds of its relevance to restitution. (Tr. 7570.) We do not believe that respondents were deprived of due process by post-notice order introduction of restitution, nor have they indicated with particularity any respect in which they were injured by non-inclusion of restitution in the notice order.

With regard to the propriety of restitution in this particular case, we believe it is clear beyond peradventure. Illegality permeated every facet of the promotion of the Holiday Magic marketing program. All agree that respondent Patrick was its architect and prime mover. Tens of thousands of individuals invested tens of millions of dollars in huge inventories of cosmetics and release fees, often as the result of misconceptions fostered by respondents, and often with the end result of financial disaster. There is every indication in the record that respondent Patrick regarded institution of the Commission's suit not as a sign to go slow, but as a spur to intensify the heist.[12] Retention of deceptively and illegally obtained property is as much a violation of Section 5 as continuation of the deception. Our duty is to enjoin both.

The administrative law judge's proposed formula for measuring the amount of unlawfully obtained funds appears reasonable, though exactitude is obviously impossible under the circumstances. Unlike common law restitution, restitution under Section 5 is designed to remedy the continued violation of the statute resulting from retention of unlawfully obtained funds. To some extent, therefore, respondents are let off the hook by the requirement that refunds on inventory purchases be made only to the extent that inventory is returned, because in certain instances distributors may have destroyed or given away such inventory,

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[12] Witness Ben Gay, a past president of Holiday Magic testifying as to the reaction of William Penn Patrick to the F.T.C. investigation, in Dec. 1969 or Jan. 1970, spoke as follows:

The subject of compromise had come up and that was the theme of his talk. He stood up. He was sitting at the end of the board table. He began shouting and screaming and pounding on the table saying that the next person who so much as uttered the word "compromise" would be fired and that there would be no compromise with the Federal Trade Commission or any other regulatory agency * * *.

Mr. Patrick and myself were sitting in my office. I was sitting in my office after everyone else had left and when the door shut I looked at him and said, "compromise," because he had just said the first person who uttered the word would be fired. Then he laughed and he said, "What do you mean?" and I said, "The changes that were suggested are reasonable and valid and they don't make any difference to our business anyway. If the Federal Trade Commission would be happy with them, I say let them have them." I said, "I am trying to build a company that will be here 20 years from now," and he said, "Let's get something straight. I can steal more money in the next two years than you can make building an organization. It is going to take the Federal Trade Commission at least two years to get us and we are going to proceed on that line," and he left my office. [Tr. 9841-44; witness adhered to these words on cross-examination, Tr. 10073.]

and even in instances in which inventory has been sold, this would not alter the fact that respondents had made their sale as a result of deception. A countervailing consideration is that, despite the pervasive, all-encompassing nature of deception in the Holiday Magic scheme, some inventory sales to distributors may have been consummated without deception, even though distributors still retain such inventory. On the whole, we believe the administrative law judge's formula is a reasonable and equitable one for measuring the amount of funds obtained unlawfully by respondents, and we shall not disturb it.

Holiday Magic argues that no order is required, because by virtue of a settlement reached with the Securities and Exchange Commission and certain class action litigants, respondent Holiday Magic has agreed to devote a large part of current assets and a portion of future earnings towards repaying monies taken from General and Master distributors. Our concern under Section 5 is to ensure that monies unlawfully obtained and retained are disgorged. With respect to the corporate respondent, the settlement, if executed, appears likely to achieve the result. While Holiday Magic will retain certain assets fraudulently procured, these will be used to continue its operations, some profits from which will be returned to distributors. Under these circumstances, it appears that the settlement does contemplate effective disgorgement by the corporate respondent of all unlawfully retained monies.

At the same time, the violations of Section 5 have been massive, and in view of the record herein and the length of these proceedings, we are reluctant to omit entirely any provision for restitution, thereby necessitating reopening of the proceedings in the event a material modification or violation of the California settlement should occur. For this reason, we shall enter an order of restitution against the corporate respondent, but stay its effective date so that it will not (ever) become operative unless a violation of the California settlement pertaining to restitution should occur. In that event, the order permits the corporation to request proceedings to consider the practicability of further restitution, but the question of its legal justification will not be subject to retrial.

The situation is somewhat different with respect to the assets unlawfully retained by decedent Patrick. The record before us indicates that tens of thousands of individuals became Masters or Generals in Holiday Magic, each investing sums of $2000 to $9000 or more. Not all this money was retained by Holiday Magic (some release fees went back to recruiting Generals, for instance) and some of the inventory purchased by defrauded individuals has undoubtedly been resold (and so would not come within the scope of our restitution order). Nonetheless, it would appear that the amount of money illegally obtained by Holiday Magic

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and deceased respondent Patrick amounts to scores of millions of dollars.

The papers now before us indicate only that, after liquidation of certain assets, a sum somewhat in excess of $2 million will be available for the class victims. Since this amount is far less than the amounts unlawfully obtained by respondents, since the assets of the *corporation* appear to be effectively depleted by the settlement, and since decedent Patrick exercised substantial control over the corporation and was in a position to withdraw substantial amounts of money from it, it seems to us that the Patrick estate may well be retaining substantial sums of illegally obtained funds, unless such funds have been spent.[13]

If it is an unfair practice for an individual to retain monies obtained as a result of fraud and overreaching, it would seem no less unfair for the estate of that individual to retain such monies and dispose of them in accord with the wishes of the defrauder. It is clear to us that Section 5 does not permit an individual or a corporation to become rich and powerful by use of monies secured as a result of flagrantly illegal behavior. This case may present the question of whether the law allows an individual to pass on to his heirs a massive financial legacy crafted from the callous deception of his fellow citizens. We think Section 5 clearly does not, and we think it our clear duty to inquire further to determine whether or not that is what is transpiring here. We shall thus order that restitution be made by substituted respondent Olivo to the extent he administers funds obtained from Holiday Magic, which are not already subject to restitution. The order provides that at such time as it becomes effective, the individual respondent, as to whom its effect would not be stayed, may petition the Commission to hold supplemental hearings in the event he cannot make the restitution required. It may be that the estate is not in possession or entitled to possession of funds obtained as a result of illegality, in which case respondent Olivo will be effectively in compliance and may so demonstrate. We would be remiss in our duty, however, were we not to provide for the possibility that the situation is otherwise.

IV. RESTRAINT OF TRADE COUNTS

A. Price-Fixing

Holiday Magic rule 3, contained in company manuals and incorporated

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[13] Complaint counsel state that the Patrick Trust, which has settled, was the recipient of substantial transfers from respondent Patrick subsequent to institution of the Commission's suit. It is obviously for the California probate court to determine whether or not these funds were transferred to the trust to avoid a judgment against the individual. If so, they may properly belong to the estate. Our concern is with the estate and not with funds lawfully donated to the Trust, for a purpose other than evading a Commission order.

by reference into the contract signed by the company's distributors, provided that:

> Distributor agrees to purchase merchandise only from the company or his Sponsor in accordance with the Holiday Magic marketing plan and to sell merchandise only at those prices established by the company. (I.D. 179)

An agreement to fix prices, whether horizontal or vertical, is illegal *per se*, *United States* v. *Socony-Vacuum Oil Co*, 310 U.S. 150, 228 (1940); *Dr. Miles Medical Co.* v. *John D. Parke & Sons Co.*, 220 U.S. 373, 408 (1911); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 152-53 (1968). The distributor's contracts incorporating the above-quoted language were clearly agreements to fix prices, and hence illegal. Even assuming, as respondents argue (contrary to the findings of the administrative law judge) that the above provision was not enforced, its inclusion in the distributor's contract would still constitute a violation of the law, for it is the agreement to fix prices that is illegal, regardless of whether it comes to fruition or not. See *United States* v. *Socony-Vacuum Oil Co.*, *supra*, p. 275 n. 59. The danger of illegal price-fixing agreements in an organization like Holiday Magic is particularly great, because it is likely that many distributors signing the contract will lack the legal expertise or recourse to legal counsel necessary to inform them that their agreement is unenforceable in court. Whether or not the company takes steps to enforce the price-fixing contract, there is always a danger that the other party to it will feel obliged to adhere. Moreover, as noted, there is evidence in the record to indicate that at various times and places efforts were made to enforce the resale price maintenance provisions of the Holiday Magic contract. (I.D. 184, 186)

Sometime in the fall of 1967, the above-cited rule appeared with the added phrase "in accordance with Fair Trade Statutes in those states having Fair Trade Laws." (I.D. 179) Respondents argue that by addition of this phrase they effectively abandoned their earlier policy of illegal price-fixing, limiting retail price maintenance to so-called "fair-trade" states.[14] The administrative law judge concluded otherwise, citing certain other language in the Holiday Magic manuals (I.D. 179), continued reference by the company to resale prices without indication they were suggestions only (I.D. 180-83), and occasional efforts to enforce adher-

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[14] There is some question as to whether the change in the manual regarding retail price maintenance was initiated before or after the company had knowledge of the Commission's investigation. The administrative law judge found that the company had knowledge of the investigation no later than July 1967 (I.D. 1), and that the change in the manual regarding retail price maintenance was published in Oct. 1967. (I.D. 179) However, respondents contended in their proposed findings before the administrative law judge that the change was authorized and steps taken to effectuate it prior to the company's having knowledge of the investigation (Respondents' Proposed Findings 152-54). Whether or not initiation of the alleged discontinuance occurred before, or as a result of, the Commission's investigation is not material in view of other factors recited in the text of the initial decision.

ence to stated prices (I.D. 186). It is clear from the initial decision that prior to the fall of 1967, respondents did enter into illegal agreements to fix prices, and they did not entirely discontinue such price-fixing by virtue of the change in their manual as of October. Moreover, even were the above-mentioned change to be construed as discontinuance, we find no basis in the record of this case for concluding that respondent corporation may be relied upon to abstain permanently from the discontinued activities except under compulsion of law. Our duty is thus to enter an order prohibiting any recurrence of price-fixing found to have existed in the past. [See *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F.2d 523, 531 (5th Cir. 1963); *Guziak* v. *Federal Trade Commission*, 361 F.2d 700, 704 n. 6 (8th Cir. 1966).]

With respect to price-fixing at the wholesale level, it appears that this practice has continued unabated to the present time. If a company chooses, as did Holiday Magic, to pass title to its distributors and receive payment from them without regard to their ability to resell, it has no right whatsoever to establish the price terms under which those distributors may resell the product they have purchased.[15]

For these various reasons, an order prohibiting resale price-fixing will be entered. We shall, however, modify the order of the administrative law judge in certain respects. As urged both by respondents and complaint counsel, we shall alter the order to take account of Fair Trade laws. In addition, our order will not require the company to desist from the use of all suggested price lists for a period of three years, as recommended by the administrative law judge.

Under normal circumstances, of course, the use of suggested resale prices is not illegal, and, indeed, where the distributors to whom the suggestion is made are, as here, generally in need of business guidance, provision of information as to what price might constitute a competitive resale price may serve a useful and pro-competitive function, provided it is very clear that the suggested price is merely that.

Those cases in which a temporary prohibition on use of resale price lists has been imposed have generally involved distributors who were also full-time business people, and not likely to be in need of pricing

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[15] Corporate recognition of the illegality of fixing resale prices to distributors, combined with corporate desire to continue fixing such prices results in such schizophrenic corporate prose as the following, taken from a post-complaint company manual introduced by respondents:

"That same day, Joe [a master] *must pay* Mary [an up-and-coming holiday girl] a bonus amounting to a *suggested* 25 percent on all the products she purchased directly from him that month. ($3500 times 25 percent equals $875.) This means that Mary *really only had to invest* $1,049.65 in product to become a Master now that she has a 55 percent discount." (RX 132-D, Par. 3, emphasis added)

The company president contended on cross-examination that under the rule as he construed it, Joe would not have had to pay Mary the suggested 25 percent. (Tr. 9609) We doubt if that was clear to Mary—or Joe under the plan, even as amended after the complaint in this matter.

information.[16] There were also involved long-standing coercive relationships between supplier and distributor, such that simply prohibiting the overt coercion, while permitting uninterrupted use of the price lists which had been at the heart of such coercion, was deemed unlikely to eliminate the impetus to fix prices. In this case, the constant turnover in distributors militates against the sort of relationship found in *Coors* or *Lenox*, *supra*. Moreover, while not effectively abandoned, it is clear that respondents' price-fixing activities have moderated in some respects since the early stages of the Commission's investigation. For all the above reasons, we believe that the corporate respondent should be allowed to continue use of "suggested retail prices." Our order provides, however, that such suggested prices must be clearly denominated as "suggested" in states in which the suggestions may not legally be enforced. This proviso should satisfy the legitimate business needs of Holiday Magic to inform its distributors of suggested resale prices and permit them to advertise suggested retail prices like other cosmetics salespersons, while making clear to those distributors that they remain free to charge the prices they choose.

B. Marketing Restrictions

Count V of the complaint charged that various restrictions imposed upon Holiday Magic participants via the distributor's contract were unfair methods of competition in violation of Section 5. Respondents do not generally contest that the challenged restrictive agreements were in fact entered into, but they dispute the administrative law judge's conclusions of illegality and recommendation that appropriate order provisions issue.

1. Wholesale Sale Restrictions

Respondents required that Masters, Generals, and Organizers sell at wholesale only to the Organizers and Holiday Girls they sponsored, and that Holiday Girls and Organizers purchase only from their sponsoring distributors. Distributors were prohibited from buying back merchandise already sold to other distributors. (I.D. 187, 189, 191, 192)

The administrative law judge concluded that the above restrictions were anticompetitive and unreasonable because their only "Purposes" were to (1) generate further master inventory purchases from Holiday Magic, Inc., without regard to the needs of the distributor, and (2) maintain the pricing, override and pyramid structure of the marketing

[16] See for example *In the Matter of Lenox, Inc.*, Docket No. 8718 (1968)[73 F.T.C. 578], *aff'd* 417 F.2d 126 (2d Cir. 1969); *In the Matter of Adolph Coors Company*, Docket No. 8845 (1973) [83 F.T.C. 32], *aff'd* No. 73-11567 (10th Cir. 1974).

plan. (I.D. p. 344, [p. 991 herein]) Respondents argue summarily that the restrictions were necessary to facilitate the entry of Holiday Magic into an oligopolistic market and that in any event these restrictions were not enforced. (RB 101-02)

We do not find these contentions convincing. The restrictions described above are in essence customer restrictions, limitations of the right of one who has purchased goods outright to resell those goods to customers of the owner's choosing. The Supreme Court has declared customer restrictions to be illegal *per se*, *United States* v. *Arnold, Schwinn & Company*, 388 U.S. 365, 382 (1967). There is some suggestion in the *Schwinn* opinion that exceptions to this rule might be recognized in the case of failing firms or small and aspiring entrants, whose use of such restrictions would be evaluated on a "rule of reason basis." While not deciding whether Holiday Magic would fall within this possible narrow exception to the *Schwinn* rule, the administrative law judge did determine that the challenged customer restrictions were not reasonable and on balance served anticompetitive ends. We find no reason to upset this conclusion. The record in this case indicates that individuals acquired large inventories of Holiday Magic cosmetics which they were in some cases subsequently unable to resell. Prohibitions on the right of such individuals to resell acquired merchandise to particular distributors (or, conversely, limitations on the right of particular distributors to purchase inventory) could only serve to increase inventory purchases from Holiday Magic itself, without at the same time necessarily increasing the flow of product to the ultimate consumer. It is possible, of course, that from the standpoint of the potential distributor, a guarantee that his or her recruits would be bound to purchase from the distributor might serve to operate as a needed incentive for undertaking the risk of becoming a Holiday Magic distributor. (Tr. 9314) At the same time, however, the restrictions could only serve to increase the risk of loss if it turned out that the distributor could not liquidate inventory via his or her own efforts or those of recruits, since the likeliest resale outlets for the remaining inventory would be foreclosed.

In addition, these restrictions would clearly have the possible effect of supporting the company's illegal policy of wholesale and retail price maintenance. See *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 724 (1944). On the whole, we believe that the administrative law judge's evaluation of the "purpose, nature, and probable effect" of these restrictions was accurate and we find no reason to disturb his conclusion that they were anticompetitive.

Respondents' alternative argument that the restrictions were not enforced (RB 102) is not well taken, For one thing, there is evidence that

these contract provisions were enforced [CX 686B; I.D. 191(c)].[17] The point was often made by Holiday Magic officials that adherence to the marketing plan was critical, and violators would be terminated. As in the case of price-fixing, the existence of an illegal agreement itself creates the danger that parties unaware of its illegality will feel constrained to adhere.

2. Retail Outlet Restrictions

Respondents, at least until 1970, entered into agreements with their distributors prohibiting them from reselling to a wide variety of commercial retail outlets, including drug stores, grocery stores, variety stores, and chain stores. Evidence that these agreements were enforced was adduced at trial. (I.D. 194) In 1970, well after institution of the Commission's investigation, this policy was changed to the extent that the formerly "unauthorized" outlets became merely "non-recommended" outlets. (RB 103; RX 133-D) Also prohibited under the marketing plan were sales of products on consignment (I.D. 202), a practice which would be necessary in some cases in order to supply retail outlets.

Respondents contend that these restrictions were intended for protection of the Holiday Magic trademark, which might suffer if Holiday cosmetics were displayed alongside the products of better-established competitors (a fate which might, of course, befall them in the boutiques, wig shops, beauty schools, barber shops, and health food stores which were "authorized outlets"). The administrative law judge found this justification unconvincing, whatever its legal relevance, and concluded that this customer restriction, like others, was designed to prevent price-cutting on Holiday Magic products. (I.D. pp. 342, 344 [pp. 989, 991]) There can be no doubt that prohibition of resale to the kinds of retail outlets noted above does serve to limit the likelihood that price-cutting on the retail level will occur by eliminating the most likely price-cutters from access to the product.

It is not illegal for Holiday Magic merely to "recommend that its products be withheld from certain classes of stores, but it is unlawful for it to enter into agreements with its distributors which prohibit resale to certain classes of customers. Even assuming, *arguendo*, as did the administrative law judge, that a justification for these restrictions initially should be considered in view of Holiday's fledgling status at the time they were instituted (though not, of course, by the time they were nominally eliminated) we still do not find the justification presented adequate to excuse the likely anticompetitive potential of the practice.

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[17] It is also curious to note that in defending against allegations of illegal price discrimination respondents argue that these customer restrictions were enforced. (RB 39)

We find that the retail outlet restrictions of Holiday Magic are unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, and an order provision prohibiting their recurrence is required.

3. Advertising Restrictions

The administrative law judge found that Holiday Magic had entered into agreements with its distributors providing that prior company approval must be obtained for advertising or promotion of Holiday Magic products. (I.D. 195) The law judge concluded that the prescreening of advertising was a:

> device which enables Holiday Magic, Inc., to control and supervise by prior restraint the price fixing and retail outlet restriction requirements of Holiday Magic, Inc. * * * (I.D. 196)

There is no doubt that prescreening of all product advertising may be a powerful means of coercing adherence to unlawful price-fixing and customer agreements. The distributor who wants to cut prices will likely want to advertise that fact, and it is not hard to surmise the chilling effect created by the necessity to clear such advertisements in advance with the company which disapproves of such price-cutting. In the circumstances of this case we agree with the administrative law judge that unqualified prescreening of advertising material is a violation of Section 5.

Holiday Magic argues that it is obliged to review the advertising of its distributors by virtue of various orders of the Food and Drug Administration and the Attorney General of the State of California. (RB 103-04) The order proposed by the administrative law judge speaks fully to this objection by forbidding only the prescreening of advertising from which price terms and the names of retail outlets have not been deleted. Under the proposed order, which we shall adopt as our final order, Holiday Magic may in the future concern itself fully with those aspects of distributor advertising which are its legitimate business, and with which other agencies have required it to be concerned—*i.e.*, claims about the product itself, and claims about the marketing system which have been the subject of so much abuse. Deletion from prescreened advertising of price terms and retail outlet identifications will ensure that the company does not exercise control over matters which the law requires be left to the ultimate control of its independent distributors.

4. "Private Arrangements"

Certain other restrictions on distributors, deemed "private arrangements" by the administrative law judge, were challenged by the com-

plaint. These related to the fact that a "Distributor" (Master or General) under the Holiday Magic system might be not only one individual person, but a husband and wife, a partnership, a corporation, or some other business entity. Among challenged contractual restrictions, whose existence was not contested, were:

(1) Upon the dissolution of a distributor partnership, the departing partner is required to revert back to his or her original sponsor (*i.e.*, he or she may not remain in the role of Master or General occupied by the partnership). (I.D. 197)

(2) In the event a General Distributorship dissolves, the principal or partner who is departing, if desirous of staying in the organization, must requalify as a new Master Distributor under the original sponsor, create a replacement Master, and pay a $2500 release fee to qualify as a General again. (I.D. 198)

The administrative law judge found these restrictions to be unreasonable restraints of trade, in violation of Section 5. This portion of the administrative law judge's opinion is not, however, adequately supported by record evidence or legal precedent, nor, after our own review of counsel's arguments and the sparse record on this point, can we find these restrictions to be in violation of Section 5. The record evidence concerning the meaning and operation of these restrictions is not overwhelmingly clear. Apparently the thrust of the restrictions is that once an individual leaves a distributorship, the individual may not continue to purchase from Holiday Magic on the same terms as did the distributorship, but must revert to purchasing from the original sponsor, and requalify if so desired as Master or General in order to purchase on the terms granted a Master or General.

These restrictions are not, in the same sense as those discussed previously, limitations on the right of alienation by the distributor of goods already owned.[18] It is not challenged that Holiday Magic may establish certain conditions under which it will accord an individual the rights of a distributor. It chose to require a certain initial inventory purchase for the buy-in Master, whether the Master was an individual or a group. Imposition of the subject restrictions on departing partners amounts to no more than insistence on the same qualifying conditions for all distributorships, whether the distributor be a *de novo* entrant or a prior partner. While this restriction was obviously designed to encourage large inventory purchases and no doubt might have such an effect, the same can be said of the very requirement that one purchase $5000 of merchandise in retail value to become a Master instead of any lesser

[18] It is not clear from the record whether the restriction was intended to limit the ability of a departed partner to sell off accumulated inventory acquired as a result of a partnership dissolution.

amount. Assuming that Holiday Magic had the right to impose such a requirement on an individual entering initially,[19] we do not see why it did not have a right to impose the same requirement on one who might initially have qualified for the Master's discount by virtue of making only half the required investment (by entering with a partner), so long as these rules were clearly spelled out and no deception was involved. Certainly these restrictions are not *per se* illegal, and it is not apparent to us from the sparse record that they operated, or were likely to operate, to achieve an impermissible anticompetitive end.

Other restrictions on private arrangements of distributors were that

(3) An individual could not be part of more than one distributorship;

(4) Distributors could not enter into agreements with other distributors to make a division of profits, assets, or new recruits in violation of the marketing plan; and

(5) Addition of new partners to an existing distributorship, or sale of the distributorship must meet the same requirements as a new Master or General (whichever the distributorship was).

Here, again, the record is insufficient to permit an evaluation of the competitive effects of these restrictions, and we shall, therefore, dismiss the complaint with respect to them.[20]

C. Exclusive Territories

The administrative law judge found that respondents had conspired to allocate territories among their Holiday Girls. (I.D. 385-91) The record shows that various Holiday Magic manuals advised and instructed so-called "Distributor's Council" organizations of Holiday Magic distributors to assign routes to Holiday Girls. (I.D. 385-388) While it appears that in many areas routes were not assigned, evidence exists to show that they were assigned in areas of Florida at the instigation of Holiday Magic, via its "suggestions" in the manuals and at the express recommendation of respondent Pape, corporate president. (I.D. 386)

There is some question initially as to whether or not the territories imposed by respondents were exclusive, or more akin to the "areas of primary responsibility" permitted by the order of the administrative law judge. While the Holiday Magic manuals speak of allocations in order to insure market coverage, at least one case in which respondents

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[18] It is not clear from the record whether the restriction was intended to limit the ability of a departed partner to sell off accumulated inventory acquired as a result of a partnership dissolution.

[20] With more evidence regarding the effects of these restrictions, our conclusion might be different as to certain of them. Given the enormous proportions of the record, complaint counsel are hardly to be faulted for giving least attention to these most peripheral elements of the case. We do not believe, moreover, that at this point a remand for further evidence would serve any useful purpose.

conspired to allocate routes arose where the market had become saturated, and the purpose of imposing territories was to avoid competition between Holiday Girls and their distributors. (I.D. 386) This consideration is dispositive of the issue of exclusivity. Clearly the conspirators did not contemplate, in trying to undo the effects of market saturation, that distributors given scarce territories would be able to go outside them, since the entire point was to allocate scarce territory, not stretch limited resources over large areas. (See also I.D. 391, CX 76D.)

We believe that a determination of the legality of these exclusive territories is governed by our decision in *Adolph Coors, supra* (slip op. pp. 14-30). Here, as in *Coors*, imposition of exclusive territories was accompanied by price fixing, and that combination renders the use of exclusive territories illegal *per se*.

Respondents argue that the only instances in which allocation of territories was actually proven to have occurred were in Florida, a state which sanctions resale price fixing contracts under certain conditions. We do not believe that this situation constitutes an exception to the rule in *Coors*, nor have respondents shown any reason why it should. Fair trade laws are in essence a compromise of the public interest in competition, and the exemption from the antitrust laws they confer must be construed narrowly, *United States* v. *McKesson & Robbins*, 351 U.S. 305, 316 (1956).

The order of the administrative law judge on this point is entirely proper, forbidding the imposition of exclusive territories, but expressly permitting the assignment of areas of primary responsibility to Holiday Girls, which will enable the company to insure coverage of a particular market area.

D. Price Discrimination

The administrative law judge concluded that respondents had engaged in price discrimination violative of Section 2(a) of the Clayton Act (15 U.S.C. 13) in two major respects:

(1) *Wholesale*—General Distributors, the favored customers, received goods at 35 percent of list price, while the disfavored Master Distributors received them at 45 percent of list (and disfavored Organizers at somewhat more). All sold at wholesale.

(2) *Retail*—The disfavored customers, Holiday Girls and Organizers, purchased product at 70 percent of list price (or less, depending on volume) which they sold at retail, as did the favored General and Master Distributors who bought at 35 percent and 45 percent of list, as noted above. (Masters were also disfavored at retail with respect to Generals.) (I.D., pp. 345-363 [pp. 991-1006 herein])

The only issue with respect to both facets of the challenged discriminations is whether or not their effect, in statutory terms, "may be substantially to lessen competition."

Complaint counsel did not demonstrate any actual injury to competition from the discriminations, but both sides recognize that such a demonstration is not necessary for a violation to be made out. All that need by shown is that the challenged discimination may have the prescribed anticompetitive effect, see *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 46 (1947); *Corn Products Refining Co.* v. *FTC*, 324 U.S. 726, 738 (1945), and this showing may rest on inferences drawn from the state of competition and the nature of the discimination.

With respect to the discriminations at the wholesale level, respondents attempt to nip the inferential process in the bud by arguing that Masters and Generals did not actually compete at wholesale because of company-imposed customer restrictions which required that a Holiday Girl (or other retail outlets buying at a similar discount) continue to purchase from her or his recruiter. (RB 39) This argument is wholly unpersuasive. Even assuming the complete effectiveness of this customer restriction, it would not have eliminated vital competition between Masters and Generals for new accounts, *i.e.*, individual Holiday Girls, boutiques, beauty parlors, and the like, selling at retail. Such competition assumed a particularly important role in the Holiday Magic scheme in view of the demonstrably large turnover of Holiday Girls, necessitating continuous recruitment on the part of any Master or General who desired to make a living by wholesaling to retailers. (I.D. 65-66) The fact that Masters or Generals did not compete for sales to already-recruited girls and retail outlets simply does not have any bearing on the existence of substantial competition to sign up new girls and outlets. The evidence clearly shows that Masters and Generals operated in the same limited geographic areas in seeking to enlist Holiday Girls and retail outlets to the cause. (I.D. 442-445; 447) There were no divisions of territories or populations between Masters or Generals seeking individuals and businesses to sell at retail. They were free to, and did, advertise to and solicit within the same population group in any geographic area. No more than this need be shown to demonstrate that favored and disfavored customers were in competition. Hand-to-hand combat on the doorsteps of prospective Holiday Girls is not a necessary element of proof. (But see I.D., pp. 289-290 [pp. 954-955 herein])

It is clear, moreover, that the substantiality of the price discrimination (the favored customer bought at 22.2 percent less than the disfavored customer), and other findings of the administrative law judge

compel a finding of substantial potential prejudice to competition. Such a margin obviously leaves great leeway for the favored customer to offer a discount from the suggested resale price when it is not enforced, or to subsidize various services which would assist the favored customer in competing for accounts. (Cf. I.D. 452) The record contains many instances of wholesale distributors operating at low or nonexistent profit margins (I.D. 453), and in such circumstances product price advantages are obviously crucial. The evidence compels us to conclude, therefore, that the discrimination in favor of General Distributors at wholesale runs afoul of Section 2(a).[21]

With respect to discriminations at the retail level, we do not find the evidence of violation to be as convincing. Once again, we are not impressed by respondents' argument that customer restrictions prevented favored and disfavored customers from competing for *repeat* sales to Holiday customers, because this does not account for competition for initial purchasers. Nevertheless, respondents' assertions regarding the relative insignificance of competition between favored and disfavored customers ring somewhat truer in the context of Holiday Magic retail sales than they do at the wholesale level. Of the purchases made by favored Generals, cited by the administrative law judge, only a relatively small portion appear to have been devoted to retail sales, and in some cases so-called favored retailing generals do not appear to have engaged in more than sporadic retail sales to friends and relatives. Certainly the fact that products were retailed door-to-door does not in itself necessitate evidence of competitive "encounters" to sustain the complaint, as respondents suggest. The situation of casual salespeople endeavoring to dispose of product by going door-to-door and in a pinch prevailing on sympathetic relatives is, however, somewhat different from that in which the same volume of goods is offered to all comers by competing retailers at stationary outlets accessible to the public at large. On the record before us we are unable to find a degree of retail competition between favored and disfavored customers sufficient to warrant an inference that the challenged discriminations may have had the statutorily proscribed effect. See *Universal-Rundle Corporation* v. *Federal Trade Commission*, 382 F.2d 285, 287 (7th Cir. 1967).

The proposed order language of the administrative law judge will be

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[21] Respondents argue that even assuming competition between Generals and Masters, a General could not be considered to be favored until such time as he or she had recouped the release fee. We doubt the validity of the release fee argument, since the General received in return for the release fee an additional valuable consideration denied the Master—the right to recruit other Generals. Thus, at best, only a fraction of the release fee can be considered as mitigating or redressing the discrimination. The General who recruited one other would more than erase any disadvantage.

retained insofar as it relates to the illegal discrimination at the wholesale level.

V. INDIVIDUAL RESPONDENTS

Respondents object to application of any order to individuals Pape and Gillespie. They argue that deceased respondent Patrick was the creator and guiding light of Holiday Magic, and that to select two of his employees for imposition of liability is unwarranted.

With respect to respondent Pape, the record clearly compels a finding of individual liability. The record relates that Pape "took the reins" and "raised Holiday Magic to even greater heights" while his patron Patrick ran for the California gubernatorial nomination. (CX 1840L; I.D. 30) Later Pape became president and as chief executive officer he was responsible for directing the day-to-day activities of the corporation. While Pape may not have originated various of the plans and policies attacked in the complaint, he played an instrumental role in directing their execution, with full knowledge of what they were. This is emphatically not a case in which the *subordinates* of a corporate president perform illegal acts without his knowledge. Holiday Magic was a small organization and direction of all facets of business operation came directly from the top, from William Penn Patrick and respondent Pape. That Mr. Pape left Holiday Magic in 1968 is wholly immaterial to his liability. Some of the worst practices evidenced in the record occurred while Mr. Pape directed the operations of corporate respondent. In order to prevent recurrence of illegal practices, it is necessary that any order run against those shown to have engaged in or directed such practices. We conclude that the administrative law judge properly applied his order to respondent Pape. (I.D. 27-32; *Federal Trade Commission* v. *Standard Education Society, et al.*, 302 U.S. 112, 119-120 (1937); *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F.2d 313, 324-325 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966)

Respondent Gillespie was the first Holiday Magic Organizer, and later served as administrative vice president, and a member of the Board of Directors. Gillespie's own testimony reflects considerable familiarity with the day-to-day operations and policies of Holiday Magic, which is understandable inasmuch as she was responsible at various times for directing headquarters' operations and wrote revised editions of various Holiday Magic distributor's manuals. The testimony of witness Gay indicated that Gillespie, together with Pape, directed the activities of Holiday Magic during Patrick's absence. (Tr. 9926-32) Though not president, it is clear that Gillespie was centrally involved in directing the operations of Holiday Magic, and at a time when respon-

dent Patrick had withdrawn to the political arena. Once again, hers is not a case in which a respondent is charged with actions of subordinates for which the respondent is nominally responsible, but of which the respondent is unaware. Gillespie, with full knowledge of the operations of the company, played a key role in directing them. To eliminate practices found, an order must name those found to have engaged in or knowingly directed the practices, particularly, as here, where the wrongdoing was so pervasive, and is readily subject to transfer to a different business operation. For these reasons, we believe that respondent Gillespie was properly included. While it may be that the complaint did not exhaust the universe of individuals who should be held accountable for the wrongdoing which occurred, the naming, in addition to founding father and guiding light Patrick, of the two individuals who shared primary responsibility for directing the company in the patriarch's absence, was in no sense arbitrary.

VI. MISCELLANEOUS OBJECTIONS

Respondents have raised other miscellaneous objections which are without merit.

A. Alleged Prejudgment

Respondents claim that the Commission has prejudged certain issues in their case, because shortly after these proceedings began the Commission initiated a Trade Regulation Rule Proceeding in which it indicated its belief that certain practices in the area of franchising might constitute violations of Section 5. Respondents allege that the practices covered by the proposed rule are so similar to theirs that the Commission's consideration of the rule amounts to a consideration of the illegality of their own practices, a consideration in which respondents (like all others), have been denied leave to cross-examine witnesses, and in which *ex parte* communications have been made by the staff to the Commission.

As we have noted before,

> Prejudgment occurs when there is evidence that a decision maker in an adjudicatory proceeding has irrevocably closed his mind *on the specific facts of a case yet to be heard by him.* [Emphasis added. *Hearst Publishing Co.*, Docket No. 8832, Interlocutory Opinion; 79 F.T.C. 1007, 1011 (1971)]

There is no suggestion here that the Commission or the administrative law judge has prejudged in any respect whether or not respondents engaged in the acts and practices challenged in the complaint. The determination of the facts in this case has been entirely on the voluminous record compiled in accord with standard adjudicatory procedures.

Respondents appear to argue that prejudgment still exists because, by instituting the rulemaking proceedings, the Commission had made a determination that certain actions of respondents, allegedly subject to coverage by the rule, were violations of Section 5. Initially, it should be noted that the rule in question has not been finally promulgated, and, in promulgating a rule for public comment, the Commission expresses no more than a determination that it has reason to believe that the practices subject to the rule are violative of the laws it administers. Thus, even if respondents' acts and practices are in some respects subject to the rule, the Commission has as yet made no determination in the rulemaking proceeding as to their legality. Assuming, however, that the Commission were to make such a determination in the rulemaking proceeding, it is not clear in what respect respondents would have been injured, since rulemaking is a proper function of the Commission, and, if undertaken according to appropriate rulemaking procedures, parties engaging in covered activities are subject to the rules made, even though the rulemaking process does not confer all the rights of an adjudication. *Federal Trade Commission* v. *National Petroleum Refiners Association*, 482 F.2d 672 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974) Of course, any party cited for violating a rule is entitled to an adjudication to determine whether or not it has engaged in the acts and practices which the rule condemns.

More to the point, perhaps, respondents' arguments amount to the contention that the Commission must enter every judicial proceeding with a totally open mind concerning the *legal principles* applicable to the conduct challenged in the particular adjudication. This is folly. The Commission's statutory mandate requires that it be constantly considering, in both adjudicative and non-adjudicative contexts, the applicability of statutes it is charged to administer to a variety of acts and practices. No citizen or corporation accused of violating the law has the right, under the Constitution or any law, to a judge with an open (or empty) mind *as to what the meaning of the law* is under which the citizen or corporation is to be tried.[22] Virtually all the cases cited by respondents in support of their position deal with prejudgment of *facts*. (RB 145-157) Respondents conclude by citing the APA which grants a party adjudicatory rights to obtain a "full and true disclosure of *the facts*." [5 U.S.C. §556(d)(1967)] There has been no prejudgment in this case whatsoever with respect to the factual issues of whether or not respondents have

[22] Respondents, while objecting to the findings on deception, might as easily argue that they were prejudged on the issue of price-fixing, since the Commission freely acknowledges that it had concluded long before reviewing the record in this case and in proceedings to which respondents were not privy, that entry into agreements to fix prices is illegal. Respondents seem to be objecting to the principle of *stare decisis* and the objection cannot be well taken.

engaged in challenged acts and practices. Moreover, the Commission has considered carefully the arguments of respondents on all legal issues. Whether or not the Commission has considered these same or related legal issues in other proceedings, in which respondents had no right to cross-examine or even participate at all, is, however, totally immaterial to whether respondents have been accorded a fair hearing.

B. Denial of Right to Amend Answer

Petitioners also object to the decision because the administrative law judge denied them leave to amend their answer to the complaint to include the meritless defense which we have just considered. If the judge erred in this regard his error was harmless, since the Commission has now fully considered respondents' argument on the issue of prejudgment as it relates to the Trade Regulation Rule Proceedings. Respondents apparently still object, on the grounds that if the administrative law judge had permitted them to amend their answer they could then have undertaken discovery of Commission files to determine the extent of what they mistakenly view as illegal Commission prejudgment of the issues. The administrative law judge correctly perceived that repsondents' argument on prejudgment raised no issues that would warrant further fact-finding. There is simply no hint here of prejudgment or *ex parte* communications concerning the facts of this case, and hence no grounds for discovery. In denying respondents' motion to amend their answer, the administrative law judge in effect dealt as fully with the prejudgment defense as if he had allowed an amendment of the answer but then denied motions for discovery on the gounds the answer raised no basis for them. Whether the administrative law judge should technically have allowed an amendment of the answer is unnecessary to decide. Respondents' legal argument has been fully considered here. It is misconceived and raises no issues that could possibly warrant additional fact-finding below.

C. Interference of SEC

Respondents allege a denial of the right to present witnesses in their defense because an SEC process server caught one defense witness in the hearing room after her testimony (and after departure of the ALJ) and served her with a subpoena in that agency's investigation of respondents. Thereafter, contend respondents, only a few of the 84 witnesses they had planned to call in the New York area were willing to appear for fear of similar treatment.

While the incident is regrettable, it did not deprive respondents of the right to present their defense. Both complaint counsel and the adminis-

trative law judge deplored the occurrence, and assurances were given by an SEC official that the agency would neither subpoena nor contact witnesses during the pendency of the F.T.C.'s New York proceedings. (Tr. 7447-49) Respondents thereafter had the opportunity to subpoena any witnesses who might still have been apprehensive about testifying. They did subpoena some, but six refused to testify on Fifth Amendment grounds, arguably still for fear of the SEC. When respondents made no proffer of proof, the administrative law judge ruled that, in the absence of a proffer, the testimony of non-appearing and appearing non-testifying witnesses would be held cumulative. Respondents then filed a limited proffer of proof, though not covering the witnesses who had taken the Fifth Amendment. No indication is given in their brief by respondents of how the proffered evidence might undermine the conclusions of the administrative law judge, and that being so we cannot accept the argument that respondents were in any way prejudiced by the SEC's intervention.

D. Rulings on Respondents' Witnesses

Respondents argue that they were also denied an opportunity to present their defense because of rulings by the administrative law judge to the effect that testimony of witnesses respondents sought to produce would be cumulative, and because of various comments made by the administrative law judge regarding the approach he would take in evaluating the testimony of those distributors who did appear.

It had not occurred to us, upon first glance at a record comprising over 10,000 pages of testimony, and 17 binders of physical exhibits, compiled in hearings spanning more than a year, to commend the presiding official for his expedition. Respondents' arguments (and our review of the record) convince us, however, that such commendation is warranted. A balance must be struck in all adjudications between the respondents' right to defend and the public's right to have violations of law adjudicated and halted in a reasonable amount of time. The administrative law judge struck this balance more than equitably with respect to respondents, who have given no concrete indication of how any limitations on witnesses would have altered the findings [Cf. *Basic Books, Inc.* v. *Federal Trade Commission*, 276 F.2d 718, 720-21 (7th Cir. 1960)] and who might even still be calling witnesses at hearings throughout the land had their original grandiose plan of defense (see Tr. 6786) not yielded to a more realistic notion of what justice and the public interest require. Enough is enough.

An appropriate order is appended.

FINAL ORDER*

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

It is ordered, That the following Findings of Fact and Conclusions of Law of the administrative law judge (as hereinafter modified by the appended listing of "Errata") are adopted as Findings of Fact and Conclusions of Law of the Commission: Pp. 1-6 [pp. 763-766 herein]; Findings 1-483; pp. 292-311 (through 1st paragraph) [pp. 956-967 herein]; pp. 326 (penultimate paragraph)-342 [pp. 978-989 herein]; Paragraphs D(1)-(2) and E(6) on pp. 343-344 [pp. 989-991 herein]; pp. 345-361 [pp. 991-1005 herein]; pp. 364-367 (through 3rd paragraph) [pp. 1006-1008 herein]; p. 368 (last 6 paragraphs, except for second sentence of penultimate paragraph and substituting "higher" for "lower" in last paragraph) [pp. 1009 herein]; p. 369 (except for 2nd paragraph) [pp. 1010 herein]; page 370 (except for 3rd and 4th full paragraphs) [pp. 1010-1011 herein]; pp. 371-376 [pp. 1012-1015 herein].

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order be, and it hereby is, entered:

ORDER

I.

It is ordered, That respondent Holiday Magic, Inc., a corporation, its officers, agents, representatives, employees, successors and assigns, respondent Fred Pape, individually, and respondent Janet Gillespie, individually, their agents, representatives and employees, directly or indirectly through any corporate or other device, in connection with the offering for sale, sale, or distribution of goods or commodities in commerce, as "commerce" is defined in the Federal Trade Commission Act and in the Clayton Act, shall forthwith cease and desist from:

1. Entering into, maintaining, promoting, or enforcing any contract, agreement, understanding, marketing system, or course of conduct with any dealer or distributor of such goods or commodities to do or perform or attempt to do or perform any of the following acts, practices, or things:

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*Paragraph V reported as modified by Commission order issued Jan. 21, 1975, 85 F.T.C. 89.

(a) Fix, establish, or maintain the prices, discounts, rebates, overrides, commissions, fees, or other terms or conditions of sale relating to pricing upon which goods or commodities may be resold; *Provided*, That in those states having Fair Trade laws products may be marketed pursuant to the provisions of such laws.

(b) Require or coerce any person to enter into a contract, agreement, understanding, marketing system, or course of conduct which fixes, establishes, or maintains the prices, discounts, rebates, overrides, commissions, fees, or other terms or conditions of sale relating to pricing upon which goods or commodities may be resold; *Provided*, That in those states having Fair Trade laws products may be marketed pursuant to the provisions of such laws.

(c) Require or coerce any person to refrain from selling his or her merchandise in any quantity to or through any specified person, class of persons, business, class of business, or retail outlet of his or her choosing.

(d) Require or coerce any person to enter into a contract, agreement, understanding, marketing system, or course of conduct or require, induce, coerce, or enter into any agreement with any distributor to refrain from selling any merchandise in any quantity to or through any specified person, class of persons, business, class of business, or retail outlet of his or her choosing.

(e) Require or coerce any person to enter into a contract, agreement, understanding, marketing system, or course of conduct requiring, inducing, or coercing any distributor to refrain from selling any merchandise in any geographic area; *Provided, however*, That nothing contained herein shall prevent respondents from assigning routes to individual distributors as areas of primary responsibility.

(f) Require or coerce any person to enter into a contract, agreement, understanding, marketing system, or course of conduct which discriminates, directly or indirectly, in the net price of any merchandise of like grade and quality by selling to any purchaser at net prices higher than the net prices charged to any other purchaser who in fact competes in the resale or distribution of such merchandise with the purchaser paying the higher price.

2. Discriminating, directly or indirectly, in the net price, or terms or conditions of sale of any merchandise of like grade and quality by

selling to any purchaser at net prices, or upon terms or conditions of sale less favorable than net prices or terms or conditions of sale upon which such products are sold to any other purchaser to the extent such other purchaser competes in the resale of any such products with the purchaser who is afforded less favorable net price or terms or conditions of sale, or with a customer of the purchaser afforded the less favorable net price or terms or conditions of sale.

3. Preventing distributors from entering into consignment agreements or selling their business to another individual.

4. Engaging, either as part of any contract, agreement, understanding, or course of conduct with any distributor or dealer of any goods or commodities, or individually and unilaterally in the practice of:

(a) Publishing or distributing, directly or indirectly, any resale price, product price list, order form, report form, or promotional material which employs resale prices for goods or commodities without stating clearly and visibly in conjunction therewith the following statement:

The prices quoted herein are suggested prices only. Distributors are free to determine for themselves their own resale prices.

(b) Publishing or distributing, directly or indirectly, any schedule of discounts, rebates, commissions, overrides or other bonuses to be paid by one distributor or class of distributors to any other distributors or class of distributors, without stating clearly and visibly in conjunction therewith the following:

The discounts [rebates, commissions, etc.] quoted herein are suggested only. Distributors are free to determine for themselves any amounts to be paid.

Provided, That in those states having Fair Trade laws products may be marketed pursuant to the provisions of such laws.

5. Requiring any distributor or dealer or other participant in any merchandising program to obtain the prior approval of respondents for any product advertising or promotion, or proposed product advertising or promotion, unless any selling prices and names of any selling outlets are required to be deleted from such proposed advertising or promotion prior to submission for prior approval.

II.

It is further ordered, That the aforesaid respondents and their officers, agents, representatives, employees, successors and assigns, in

connection with the advertising, offering for sale or sale of products, franchises or distributorships, or in connection with the seeking to induce or inducing the participation of persons, firms, or corporations therefor, in connection with any marketing program or any other kind of merchandising, marketing or sales promotion program, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist, directly or indirectly, from:

1. Offering, operating, or participating in, any marketing or sales plan or program wherein a participant gives or agrees to give a valuable consideration in return for (1) the opportunity to receive compensation in return for inducing other persons to become participants in the plan or program, or for (2) the opportunity to receive something of value when a person induced by the participant induces a new participant to give such valuable consideration; *Provided*, That the term "compensation" as used in this paragraph only does not mean any payment based on actually consummated sales of goods or services to persons who are not participants in the plan or program and who do not purchase such goods or services in order to participate in the plan or program.

2. Offering, operating, or participating in, directly or indirectly, any marketing or sales plan or program wherein the financial gains to participants are represented to be based in any manner or to any degree upon their recruiting of other participants who obtain the right under the plan or program to recruit yet other participants whose function in the program includes during their first year of participating the recruitment of participants.

3. Requiring or suggesting that prospective participants or participants in any merchandising, marketing or sales promotion program purchase product or pay any other consideration, either to respondents or to any other person in order to participate in said program, other than payment for the actual cost of reasonably necessary sales materials, as determined by the purchaser, in order to participate in any manner therein.

III.

It is further ordered, That the aforesaid respondents (Holiday Magic, Inc., Fred Pape, and Janet Gillespie) and their officers, agents, representatives, employees, successors and assigns, in connection with the advertising, offering for sale or sale of products, franchises, or distributorships, or in connection with the seeking to induce or inducing the participation of persons, firms or corporations in any marketing program or other kind of merchandising, marketing or sales promotion

program, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist, directly or indirectly, from:

1. Representing, directly or by implication, or by use of hypothetical examples that participants in any marketing program, or any other kind of merchandising, marketing or sales promotion program, will earn or receive, or have the potential or reasonable expectancy of earning or receiving, any stated or gross or net amount, or representing in any manner the past earnings of participants, unless in fact the earnings represented are those of a substantial number of participants in the community or geographic area in which such representations are made, and the representation clearly indicates the amount of time required by said past participants to achieve the earnings represented, and failing to maintain adequate records which disclose the facts upon which any claims of the type discussed in this paragraph of the order [III(1)] are based; and from which the validity of any claim of the type in this subparagraph of the order can be determined.

2. Representing, directly or by implication, or by use of hypothetical examples, that a gross income figure is a net income, salary, earnings, or profit figure.

3. Misrepresenting the ease of recruiting or retaining participants in any merchandising, marketing or sales promotion programs, as distributors or sales personnel.

4. Representing, directly or by implication, that any participant in any merchandising, marketing or sales promotion program can attain financial success.

5. Misrepresenting the supply or availability of potential participants or customers in any merchandising, marketing or sales promotion program in any given community or geographical area.

6. Requiring that an individual pay a valuable consideration of any kind in return for the right to participate in any marketing or sales program without first disclosing to such prospective participant in writing the number of other participants already active in the market area in which such prospect plans to operate.

7. Misrepresenting that participants can expect to remain active in business for any length of time, or misrepresenting in any manner the longevity or tenure of past or current participants, as, for example, by using a hypothetical illustration of how a marketing program operates, which implies that participants remain active for a given period, when in fact such period is more than the average length of time for which such participants do remain active.

8. Misrepresenting the reasonably necessary and anticipated costs of doing business for prospective distributors, dealers, sales personnel or franchisees.

9. Representing that once a man or woman understands any business, or marketing plan or program, he or she will not or cannot or should not fail to achieve success in it.

10. Misrepresenting that any business operation, merchandising or sales promotion plan can be the key to a person's financial future and security, or the answer to a person's financial dreams.

11. Representing that a business operation, merchandising or sales promotion plan is a once-in-a-lifetime opportunity.

12. Misrepresenting the amount or degree of the consuming public's acceptance of any products or representing that the public receives any products with great enthusiasm or that repeat business is high without making available at the same time market studies which in fact substantiate the representations.

13. Representing that it is not difficult to obtain a life-long income in connection with any merchandising, marketing or sales promotion program.

14. Misrepresenting that any merchandising, marketing or sales promotion program is sound, profitable, or distinguished.

15. Representing that persons who fail in any merchandising, marketing or sales promotion program are lazy, stupid or greedy, or any combination thereof.

16. Misrepresenting the relationship between profits and income at one functional level of a business to those at any other functional level of that or any other business.

17. Misrepresenting that wholesale sales actually reflect retail sales or consumer demand for products.

18. Using or encouraging the use of advertisements which offer or suggest employment when the purpose of such advertisement is to obtain non-employee participants in any merchandising, marketing or sales promotion program; or misrepresenting, in any manner, the kind or character of any position or job opportunity offered to prospective participants.

19. Representing, directly or by implication, that it is not difficult for participants to recruit or retain persons who will invest or participate in any marketing program or any other kind of merchandising, marketing or sales promotion program, either as distributors, franchisees, wholesalers or sales personnel, or that there

is a very large number of prospective distributors or sales persons from whom to choose.

20. Representing, directly or by implication, that products will be or are advertised either locally or nationally, or in the geographic area in which such representations are made, without clearly and truthfully representing the manner, mode, extent and amount of the advertising.

21. Selling, or offering franchises or distributorships, to obtain which a participant is required to make monetary investment without furnishing to such participant at least seven (7) days prior to the time at which such investment must be made, a copy of the Federal Trade Commission Consumer Bulletin No. 4, "ADVICE FOR PERSONS WHO ARE CONSIDERING AN INVESTMENT IN A FRANCHISE BUSINESS."

22. Misrepresenting that respondents have applications pending for distributorships in a particular area; or that any person must act immediately to be considered for a franchise or distributorship, or that any person must act immediately to take advantage of a special deal, sale or event, or misrepresenting in any manner the nature and extent of interest of others in any particular franchise or distributorship.

23. Misrepresenting that persons risk losing little or nothing by investing in a franchise or distributorship.

24. Misrepresenting that franchises or distributorships increase in value over the years.

25. Using any payment check which purports to portray the satisfaction or success of franchisees or distributors, or any other document which misrepresents the satisfaction or success of franchisees or distributors.

26. Misrepresenting the earnings potential of franchises or distributorships, prospective franchisees or prospective distributors.

IV.

It is further ordered, That the aforesaid respondents, their successors and assigns, incident to selling any franchise or distributorship shall:

1. Inform orally all persons to whom solicitations are made, and provide in writing in all applications and contracts, in at least ten-point gold* type, that the application or contract may be cancelled

*By order of the Commission dated Nov. 19, 1974, the word "gold" was changed to "bold."

for any reason by notification to respondents in writing within at least seven (7) days from the date of execution.

2. Refund immediately all monies paid pursuant to any contract or application by all persons who request cancellation of the application or contract within at least seven (7) days from the execution thereof.

V.

It is further ordered, That corporate respondent and respondent Sam Olivo, as executor for William Penn Patrick, their successors and assigns, within thirty (30) days after this order becomes final, shall make an offer to any participant of a refund of all sums of money to which the participant is entitled under this order, and within sixty (60) days after the aforesaid respondents, their successors and assigns, receive notification of the acceptance of such offer of refund from such participant, shall pay all sums of money to which the participant is entitled under this order.

1. For the purposes of this order, the term "participant" shall mean any person who invested money to participate, in any manner, in marketing programs of respondents, their successors and assigns.

2. For the purposes of this order, the term "refund" means all sums of money paid by a participant to respondents or their successors and assigns, directly to or through a trust, parent or subsidiary corporation:

(a) less any amount of money paid by respondents or their successors or assigns to participants, including any refund either made voluntarily or pursuant to court order, and

(b) less the price paid for any products purchased by participant that participant does not return, and

(c) plus interest at the rate of 6 percent per annum on the amount to be refunded to participant from the date participant entered into respondents' program to the date notification of the right to refund is received by participant.

3. For the purposes of this order, the term "offer" means a notification by certified mail, return receipt requested, to each participant with the following information and none other:

(a) On the front of the envelope, together with the name and address of the participant and the name and address of the sender, the following legend in 16-point, bold-face type: "IMPORTANT: REFUND NOTICE."

(b) On the letter, in 12-point, bold-face type, the following language:

IMPORTANT NOTICE

By order of the Federal Trade Commission, all persons who invested money to participate, in any manner, in [name of company] are hereby offered a refund of all sums of money so paid, less (1) any amount of money paid by [company or individual] to you, including any refund either made voluntarily or pursuant to court order, and (2) the price paid for any products purchased by you that you do not return to [company or individual], plus interest at the rate of 6 percent per annum on the amount to be refunded to you, from the date you entered into [name of company]'s program to the date this notification of the right to refund is received by you. A participant requesting refund pursuant to this order who has [name of company] product either credited to him in an account, or in his actual possession, shall be entitled to refund for such products on the basis of the price paid by participant for the products; *Provided, however*, that any of said products in participant's possession for which participant requests refund under this order must be delivered to one of [company's or individual's] warehouses before refund is payable.

If you accept this offer, then (1) send a letter to [name and address of company or individual] within 60 days of receipt of this notification stating the amount and basis of your claim, and (2) send any product in your possession to a [name of company or individual] warehouse, or (3) in the event product is credited in an account with [name of company], a statement that upon receiving a refund you relinquish any rights to such account.

Within 60 days after the receipt of the said information, you will receive all sums of money to which you are entitled under the formula set forth above.

Provided, however,

(c) A participant requesting refund pursuant to this order who has product either credited in an account or in his or her actual possession, shall be entitled to refund for such products on the basis of the price paid by participant for the product; *Provided,* That any of said products in participant's possession for which participant requests refund under this order must be delivered to one of the company's or individual's warehouses before payment is made, if the company or individual so elects.

(d) The obligations of this section (V) of the order shall be stayed indefinitely with respect to corporate respondent for so long as it remains in compliance with the order entered *In the Matter of Securities and Exchange Commission* v. *Holiday Magic, Inc., et al.,* Civil Action No. C 73 1095 LHB (N.D. Cal. Apr. 1, 1974) insofar as that order requires the payment by corporate respondent of monies to its Master and General Distributors.

(e) If respondents or their successors and assigns claim they do not have adequate funds to comply with this order provision, each may within sixty (60) days of the effective date as to him or it of the refund obligations of this order petition the Commission to reopen the proceedings to consider the claim.

The petition shall set forth the list of distributors or franchisees to whom refunds are due under this order and the sum of money each such distributor or franchisee is to receive in accordance with this order, plus a notarized statement of all assets and liabilities.

Upon receipt of this petition, and any response thereto which complaint counsel shall make, the Commission will assign an administrative law judge for the purpose of making findings and recommendations with respect to the claim. The administrative law judge shall furnish petitioner with the Commission's Statement of Financial Status, shall require its prompt execution, and may conduct such interrogations of the petitioner or require the production of such documents as he deems necessary in order to make findings and recommendations as to any modification of this order which may be warranted on the issues raised by petitioner's claim. The findings and recommendations will be reported to the Commission for a final determination.

(f) If any dispute arises as to compliance with the refund provisions of this order which cannot be satisfactorily resolved by the parties, notice shall be given to respondents or to their successors and assigns of the extent to which they are regarded not to be in compliance and the facts respecting such alleged noncompliance. Within thirty (30) days after the receipt of such notice of noncompliance, they may petition the Commission for a hearing on such noncompliance, or for a modification of the order provision giving rise to the compliance dispute or for such other relief as is believed warranted, and the Commission may set the matter down for hearing before itself or before an administrative law judge, or shall either grant or deny such petition by order formally entered in the same manner and form as if it were an original order of this Commission.

VI.

It is further ordered, That respondents Holiday Magic, Fred Pape, and Janet Gillespie, their successors and assigns shall forthwith deliver a copy of Section III of this order to cease and desist to all present and future salespeople, franchisees, distributors or other persons engaged in the sale of franchises, distributorships, products, or services on behalf of respondents, and secure from each such person a signed statement acknowledging receipt of said Section III of this order.

VII.

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

VIII.

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

IX.

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

X.

It is further ordered, That each of the respondents herein and their successors and assigns shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the provisions of this order. Thereafter, within two hundred and ten (210) days after service upon them of this order, corporate respondent, and respondent Sam Olivo as executor for William Penn Patrick, shall file with the Commission a second report, in writing, setting forth in detail the manner and form in which they have complied with Section V of the order.

Commissioner Nye not participating.

ERRATA

(The initial decision is adopted by the Commission subject to the exclusions noted in the order, and subject to the following changes. Lines are numbered by including chapter headings, captions and all other lines of print in the count.)

1. Finding 86, line 3, substitute "65%" for "54%"
2. Finding 115, line 3, substitute "continues" for "contines"

3. Finding 131, delete subparagraph "a"

4. Finding 132, subparagraph "a," substitute "Finding 130" for "XIII 3"

5. Finding 133, subparagraph "a," substitute "Finding 130" for "XIII 3"

6. Finding 140, substitute "Finding 131" for "XIII 4"

7. Finding 141, lines 2 and 3, substitute "who obtain a 10% override on their sales" for "over whom a 10% override is obtained"; substitute "Findings 132, 133" for "XIII 5, 6"

8. Finding 159, subparagraph "a," substitute "Findings 152-158" for "XVII-174"

9. Finding 175, p. 64, line 9 [p. 810, line 12 herein], substitute "$200" for "$300"

10. Finding 186, p. 71, lines 13 and 38, substitute "lose" for "lost"

11. Finding 187, line 9, substitute "marketing" for "merketing"

12. Finding 196, delete "See Part XVII 6"

13. Finding 198, line 5, substitute "is" for "in"

14. Finding 287, line 8; Finding 288, line 6, substitute "Enrollments" for "Enrollements"

15. Finding 333, p. 128, line 17 [p. 851, line 20 herein], substitute "$39,600" for "$39,009"

16. Finding 360, line 23, substitute "Pangerl" for "Pangrel"

17. Finding 369, subparagraph "c," substitute "Finding 320" for "Part XXXII 4"

18. Finding 381, line 12, substitute "Marget" for "Margert"

19. Finding 381, p. 159, line 22 [p. 871, line 44 herein], delete second "to"

20. Finding 382, line 9, substitute "procedures" for "producers"

21. Finding 387, p. 164, line 7 [p. 874, line 30 herein], insert "in" before "approximately"

22. Finding 393, p. 170, line 14 [p. 878, line 16 herein], substitute "undivided" for "individed"

23. Finding 393, p. 170, line 40 [p. 878, line 30 herein], substitute "their" for "thier"

24. Finding 402, line 14, substitute "accomplish" for "accompolish"

25. Finding 403, p. 202, line 36 [p. 896, line 37 herein], substitute "indication" for "inclination"

26. Finding 418, line 15, substitute "insistence" for "insistance"

27. Finding 421, line 11, substitute "dollar" for "dollars"

28. Finding 433, p. 219, line 26; p. 220, line 11 [p. 907, line 19; line 35 herein], substitute "echelons" for "eschelons"

29. Finding 441, p. 224, line 4 [p. 910, line 34 herein], substitute "principle" for "principal"

30. Finding 453, p. 260 [p. 932 herein], substitute "variance" for "varience"

31. Finding 483, p. 288, line 26 [p. 954, line 22 herein], substitute "thought" for "though"

32. P. 293, line 11 [p. 957, line 3 herein], substitute "was" for "were"

33. P. 296, line 6 [p. 959, line 13 herein], substitute "rounds" for "rouds"

34. P. 299, line 27 [p. 961, line 16 herein], delete "in"

35. P. 301, line 11 [p. 962, line 11 herein], substitute "Blachly" for "Blachy"

36. P. 304, line 25 [p. 964, line 4 herein], substitute "attendant" for "attenant"

37. P. 306, line 14 [p. 965, line 6 herein], substitute "proposes" for "proposeds"

38. P. 306, line 33 [p. 965, line 18 herein], substitute "members" for "embers"

39. P. 308, line 21 [p. 966, line 16 herein], substitute "Promotes" for "Promoter"

40. P. 309, line 30 [p. 966, line 44 herein], substitute "inseverable" for "inservable"

41. P. 330, line 32 [p. 981, line 20 herein], delete comma

42. P. 330, line 34 [p. 981, line 21 herein], delete "that"

43. P. 335, line 18 [p. 984, line 12 herein], substitute "Carburetor" for "Carburator"

44. P. 336, line 4 [p. 984, line 36 herein], substitute "caused" for "causing"

45. P. 336, line 30 [p. 985, line 18 herein], substitute "role" for "roll"

46. P. 337, line 8 [p. 985, line 39 herein], delete "where"

47. P. 337, lines 19-20 [p. 986, line 7 herein], substitute "Commission's finding" for "Commission found"

48. P. 337, line 34 [p. 986, line 19 herein], add apostrophe after "petitioners"

49. P. 338, line 39 [p. 987, line 15 herein], delete "of"

50. P. 341, line 19 [p. 989, line 19 herein], substitute "Lenox" for "Lennox"

51. P. 343, line 14 [p. 990, line 24 herein], add "be allowed" at end of line

52. P. 351, lines 18-19 [p. 996, line 29 herein], substitute "competed for" for "completed with in"

53. P. 353, line 32 [p. 998, line 23 herein], substitute "is this" for "as this is"

54. P. 364, line 6 [p. 1006, line 27 herein], substitute "and" for "as"

55. P. 364, line 13 [p. 1006, line 34 herein], delete "d" from "entered"

56. P. 365, line 10 [p. 1007, line 20 herein], substitute "or" for first "of"

57. P. 370, line 12 [p. 1011, line 2 herein], insert "from" between "that" and "the"

58. P. 375, line 22 [p. 1014, line 23 herein], delete first "s" from "ssuccessors"

IN THE MATTER OF

TRI-STATE CARPETS, INC., ET AL.

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

Docket 8945. Complaint, Dec. 7, 1973—Decision, Oct. 15, 1974

Order requiring a College Park, Md., carpeting retailer, among other things to cease using bait and switch tactics and deceptive sales plans; disparaging merchandise; misrepresenting terms and conditions, guarantees, and limited or special offers; and in connection with the extension of consumer credit, to cease violating the Truth in Lending Act by failing to make such disclosures as required by Regulation Z of the said Act.

Appearances

For the Commission: *Everette E. Thomas, Richard F. Kelly & Michael E. K. Mpras.*

For the respondents: *Ronald S. Goldberg,* Silver Spring, Md.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Tri-State Carpets, Inc., a corporation, and Michael J. Lightman and William R. Lightman, individually and as officers of said corporation, and Matthew Mintz, individually and as manager of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts,

and the implementing regulation promulgated under the Truth in Lending 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 Tri-State Carpets, 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 at 10011 Rhode Island Avenue, College Park, Md.

Respondents Michael J. Lightman and William R. Lightman are individuals and officers of the corporate respondent. Respondent Matthew Mintz is an individual and sales manager of the corporate respondent. Together they formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent.

All of the aforementioned respondents cooperated and acted together in the carrying out of the acts and practices hereinafter set forth.

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.

COUNT I

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

PAR. 3. In the course of conduct of their business as aforesaid, respondents have caused, and now cause, the dissemination of certain advertisements concerning the aforesaid carpeting and floor coverings, by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including television broadcasts transmitted by television stations located in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of respondents' said merchandise.

In the further 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 the Commonwealth of Virginia and the District of Columbia. Thus respondents 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.

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PAR. 4. In the course and conduct of their business, as aforesaid, 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 in advertisements by means of television broadcasts transmitted by television stations located in the District of Columbia, having sufficient power to carry such broadcasts across state lines and by means of oral and written statements and representations of their salesman 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:

Imagine three full rooms of this beautiful nylon pile carpeting — up to three hundred square feet—for only $129—and that *does* include the padding and 48 hour installation!

* * * * * * *

To prove that *no*body can beat our prices, call in the next five minutes and we'll knock off *another* 10 per cent, bringing your cost down to $116.

* * * * * * *

When you purchase our Dupont 501 nylon carpeting you'll get this deluxe Hoover vacuum cleaner with all attachments for cleaning the *deepest* shag.

* * * * * * *

Free Vacuum Cleaner

* * * * * * *

Special Price - No Gifts

* * * * * * *

10 Year Guarantee

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 the oral and written 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. By and through the use of the words "and that *does* include the padding and 48 hour installation" and other words of similar import and meaning, not set out specifically herein, that all of the carpeting mentioned in such advertisements is installed with separate padding included at the advertised price.

3. Purchasers of 501 Nylon carpeting, and certain other styles of carpet, receive a free vacuum cleaner.

4. Certain of respondents' products are unconditionally guaranteed for various periods of time, such as ten (10) years.

PAR. 6. In truth and in fact:

1. Respondents' offers are not bona fide offers to sell said 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 or their salesmen, who make little or 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, through their salesmen, attempt to sell the higher priced carpeting.

2. A substantial portion of the carpeting advertised by the respondents is not installed with separate padding which is included in the advertised price. To the contrary, a substantial portion of the advertised carpeting has rubberized backing which is bonded to the carpeting.

3. Purchasers of the said 501 Nylon carpeting, and certain other styles of carpet, do not receive a free vacuum cleaner. 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.

4. Respondents' carpeting and floor coverings are not unconditionally guaranteed. To the contrary, such guarantees as are available are subject to numerous substantial conditions and limitations.

PAR. 7. By and through the use of respondents' television advertisements containing the aforesaid statements and representations, and others of similar import and meaning but not expressly set forth herein, respondents offer three rooms of nylon pile carpeting (up to 270 sq. ft.) for $129. An additional 10 percent reduction in price is offered to purchasers of such carpeting who telephone respondents within five minutes after the commercial is aired. As a further inducement, respondents' advertisements offer a "free" vacuum cleaner to purchasers of certain nylon pile carpeting. By the audio and visual manner in which the "free" gift is presented in immediate conjunction with the offer of the featured low price carpeting, respondents have represented, and are now representing, directly or by implication, that purchasers of the low price carpeting are entitled to the "free" gift.

PAR. 8. In truth and in fact, the offer of the "free" gift does not apply to the purchase of the low price carpeting. To the contrary, the "free" gift applies only to the purchase of a much higher price carpeting to which the television advertisement makes only an inconspicuous and misleading reference.

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

PAR. 9. In the 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 carpeting is square yards. Consumers are accustomed to comparing the price of carpeting 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 exaggerates 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 carpeting 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 business, and in furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents and their salesmen or representatives 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.

PAR. 12. 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. 13. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and service of the same general kind and nature as those sold by respondents.

PAR. 14. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 15. 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.

COUNT II

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

PAR. 16. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 17. Respondents, in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in

Regulation Z, have caused, and are causing, customers to execute binding retail installment contracts, hereinafter referred to as the "contract."

PAR. 18. By and through the use of the contract respondents, in a number of instances:

1. Sold credit life insurance to be written in connection with its credit sales without obtaining a specific dated and separately signed affirmative written indication of the customer's desire for such insurance. Failing to provide for authorization pursuant to Section 226.4(a)(5) of Regulation Z, respondent was required to include the cost of such insurance in the amount of the finance charge, and by failing to do so, respondent failed to disclose accurately the "amount financed" and the "finance charge" as required by Sections 226.8(c)(7) and 226.8(c)(8)(i) respectively, of Regulation Z, and thereby also failed to state the "annual percentage rate" accurately, as required by Section 226.7(b)(6) of Regulation Z.

2. Failed to disclose the annual percentage rate accurately to the nearest quarter of one percent computed in accordance with Section 226.5(b)(1) of Regulation Z, as required by Section 226.8(b) (2), by reason of either understating the "annual percentage rate" by amounts ranging from .5 percent to .8 percent or by leaving the space provided therefor blank.

3. Failed to disclose due dates scheduled for the repayment of the customer's indebtedness as required by Section 226.8(b)(3) of Regulation Z by leaving the space provided therefor blank.

4. Failed to use the term "amount financed" to describe the amount of credit of which the customer has the actual use, as required by Section 226.8(c)(7) of Regulation Z.

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

6. Failed 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.

PAR. 19. 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.

INITIAL DECISION BY DANIEL H. HANSCOM, ADMINISTRATIVE LAW JUDGE

JULY 8, 1974

PRELIMINARY STATEMENT

By its complaint issued Dec. 7, 1973, the Federal Trade Commission charged respondents under Count I with unfair and deceptive acts and practices in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings in violation of Section 5 of the Federal Trade Commission Act. Under Count II the complaint charged respondents with violations of the Truth in Lending Act through practices utilized to aid and promote credit sales.

Count I of the complaint alleged in substance that respondents' television advertising, which offered "three full rooms" of "beautiful nylon pile carpeting" up to "three hundred square feet" "for only $129," and offered a 10 percent reduction if viewers telephoned respondents within 5 minutes after the commercial was aired, was not a *bona fide* offer to sell but was merely a device to obtain leads to persons interested in the purchase of carpeting who were then called on in their homes and subjected to "bait and switch" sales tactics. Count I of the complaint further alleged:

That the statement in respondents' advertising "and that does include the padding and 48 hour installation" meant that the advertised carpeting was installed with separate padding at the advertised price, whereas in truth and fact the advertised carpeting did not have separate padding but came with rubber backing attached to the carpet.
That the "free" vacuum offered with the purchase of duPont 501 Nylon carpeting was not a free "gift" but in reality was added to the selling price of that carpet.
That the "free" vacuum offered with the purchase of duPont 501 Nylon carpeting was made in the audio and visual portion of respondents' commercial in "immediate conjunction with the offer of the featured low price carpeting" so as to represent in a false, misleading and deceptive manner that purchasers of the "three full rooms" of nylon pile carpeting "for only $129" would get a free vacuum cleaner.
That respondents' advertising represented that the carpet offered was unconditionally guaranteed whereas in truth and fact respondents' guarantees were subject to numerous and substantial conditions and limitations.

The complaint further alleged that the unit of measurement customarily employed in the retail advertising of carpeting was square yards; that consumers were accustomed to comparing the price of carpeting in terms of square yards; and that respondents' use of the square foot unit of measurement was confusing, and led consumers to compare respondents' prices by the square *foot* with competitors' prices by the square *yard.* According to the complaint, this advertising stratagem exaggerated the size or quantity of carpeting offered by respondents, and had

the tendency and capacity to mislead members of the public into the mistaken belief that they were being offered a greater quantity of carpet than was the fact.

Respondents were also charged with failing to disclose in their television advertising, and through salesmen and representatives calling on the public, that the prices charged for carpet over and above the advertised area of coverage were substantially higher than for the area advertised. In other words, according to the complaint, persons responding to the advertising, and thereafter in communication with respondents' salesmen and representatives, were not advised that if they needed more carpeting than the "three hundred square feet" advertised, the additional carpet was priced at a substantially higher rate than the advertised price.

Under Count II respondents were charged with violation of the Truth in Lending Act and its implementing regulation by:

Selling credit life insurance without obtaining a specific dated and separately signed affirmative written indication of the customer's desire for such insurance, and failing to include the cost thereof in the finance charge, and in this manner failing to disclose accurately the "amount financed" and the "finance charge."

Failing to disclose the annual percentage rate accurately by understating that amount or by leaving the space provided therefor blank.

Failing to disclose due dates scheduled for the repayment of the customer's indebtedness by leaving the space provided therefor blank.

Failing to use the term "amount financed" to describe the amount of credit of which the customer had the actual use.

Failing to use the term "total of payments" to describe the sum of payments scheduled to repay the indebtedness.

Failing to disclose the sum of the cash price, all charges included in the amount financed but not part thereof, and the finance charge, and to describe that sum as the "deferred payment price."

Answer

Respondents Tri-State Carpets, Inc., Michael J. Lightman, and William R. Lightman answered denying all material allegations of the complaint and demanding "strict proof" thereof. The answer further alleged that individual respondent William R. Lightman, although serving as an officer of respondent corporation, was "never active in the business," and never played "any role in the promotion, advertising, or resale of carpets, or other floor coverings" by respondent corporation. William R. Lightman denied that he was "given any responsible work" which called for "decision making on any responsible level" in the management of Tri-State.

Individual respondent Matthew Mintz, although served with the complaint, failed to file an answer, did not attend any of the hearings

although he had notice of them, and was ruled in default by the undersigned.

By order of May 2, 1974, the Commission authorized the filing of an initial decision with respect to Matthew Mintz at the same time as the initial decision was filed with respect to the other respondents.

Proceedings

A prehearing conference was held on Feb. 14, 1974, and hearings on the merits were commenced on Apr. 2, 1974. The were concluded on Apr. 5, 1974. Complaint counsel subpoenaed individual respondents Michael J. Lightman and William R. Lightman, the director of the Washington area Better Business Bureau, an expert in the marketing of carpet, the proprietor of respondents' advertising agency, a former salesman of respondents and a substantial number of members of the public who had answered respondents' advertising. A large number of documents were also offered and received in evidence. Respondents offered certain documentary material during the case in chief, but, when the time came to present the case in defense, counsel for respondents stated that the defense would "submit on the record" (Tr. 417). Although given an opportunity to submit proposed findings and a memorandum in support, and provided an extension of time until June 5, 1974, to reply to complaint counsel's proposed findings and supporting authority, nothing was filed by respondents or their counsel by that date.

Basis of Decision

This initial decision is based on the record as a whole and on the observation by the undersigned of the witnesses and their demeanor. Proposed findings of fact and conclusions of law submitted and not included herein in substance, or in the language proposed, are rejected as erroneous or not in accord with the evidence, or immaterial or irrelevant. The following findings of fact and conclusions of law are made:

FINDINGS OF FACT

Respondents and Their Business

1. Respondent Tri-State Carpets, Inc. (Tri-State) is a corporation which was organized and did business under the laws of the State of Maryland. Tri-State is a "close" corporation and an affiliate of Classic Carpet Center, Inc. (Classic Carpet) which did business as "Carpeteria" (Tr. 7, 51). Both Tri-State and Classic Carpet were "family" firms (Tr. 82, 98), being owned and operated by the Lightmans, William R. Lightman, his wife, and son, Michael J. Lightman. All of the stock of both corporations was held by one or another of the foregoing family mem-

bers, who also served as officers of both firms. Although Tri-State is now "inoperative" it has not been dissolved (Tr. 7).[1] Individual respondents Michael J. Lightman, William R. Lightman and Matthew Mintz formulated, directed, and controlled the acts and practices of corporate respondent Tri-State.

2. Both Tri-State and its affiliate Classic Carpet were engaged in the retail sale of "wall-to-wall" carpet for home installation. The Tri-State method of operation was to obtain names of persons interested in such carpet by television advertising. Thereafter salesmen of Tri-State would call upon such prospective customers in their homes and attempt to sell them carpet.

3. Classic Carpet Center, Inc. ("Carpeteria"), was operated primarily by William R. Lightman and had been in business for several years before Tri-State was formed. Tri-State was started as an off-shoot so as to engage in the retail carpet business under another name "to make more money" (Tr. 15). As respondent Michael J. Lightman put it, "if you change your name, you can sometimes capitalize because of—people dissatisfied with the previous company may buy from a new company" (Tr. 15).

4. Tri-State's office was in the family's Classic Carpet Center, Inc. warehouse in Fairfax, Va. and its retail outlet was located in College Park, Md. (Tr. 80). Classic Carpet Center, Inc. ("Carpeteria") and Tri-State were both operated out of the same office, William R. Lightman and Michael J. Lightman having adjoining desks (Tr. 111). Inasmuch as the business operations of Classic Carpet and Tri-State were conducted from the same office, customer folders were differentiated by different colors, one being used for Classic Carpet's customers and a different color for Tri-State's customers. The contents of the folders, however, were "made up identical" (Tr. 86).

5. Michael J. Lightman was president of Tri-State and his father was secretary-treasurer (Tr. 83-88). William R. Lightman oversaw the "expedition of all sold merchandise" for Tri-State, and arranged "for the purchase of all products for resale" by Tri-State (Tr. 75). He also acted as a trouble shooter handling "backlashes" from Tri-State customers who were dissatisfied or had problems (Tr. 84-85). Contrary to the answer, as secretary-treasurer William R. Lightman was a decision-maker for Tri-State, as the following demonstrates (Tr. 83-84).

Q. So you did carry out these responsibilities as Secretary-Treasurer?
A. Yes. Let's put it this way—the buck stops here because there has to be a boss over

[1] Michael J. Lightman and William R. Lightman, at the time they testified herein, had become affiliated with TransAmericard, a firm understood to be engaged in the discounting of notes and instruments obtained by companies dealing with consumers (Tr. 3, 82, 103-104).

someone * * * if anything went array [sic], the carpet wasn't there, people weren't there, whatever backlash, I would get into it * * *

And further (Tr. 87-88):

Q. It was your decision whether the customer would get carpet installed, and this is a customer of Tri-State Carpets?
A. Yes, sir.

In essence, as already indicated, the operation of Tri-State and Classic Carpet constituted a family business (Tr. 98):

Q. During this period of time you were Secretary-Treasurer with Tri-State, you also held an office in Classic Carpets?

* * * * * * *

A. * * * I was Vice-President. * * * It is all in the family. * * *
Q. You viewed Classic Carpets as a family corporation?
A. Yes.
Q. Did you view Tri-State as a family corporation?
A. Yes.

6. Respondent Matthew Mintz managed the retail outlet of Tri-State located in College Park, Md. (Tr. 15-16, 79-81), having been recruited at the time Tri-State was formed by the Lightmans (Tr. 17). Mr. Mintz had previously been a carpet salesman. After being hired by Tri-State, he and Michael J. Lightman supervised the selling operations and salesmen of Tri-State (Tr. 32-33). Shortly before Tri-State ceased business operations (apparently because of the Commission's investigation) respondent Matthew Mintz briefly functioned as president of Tri-State (Tr. 12).

7. Classic Carpet supplied the carpet sold by Tri-State (Tr. 83) and handled all installations in customers' homes of all carpeting sold by Tri-State. Such installations were accomplished through subcontractors (Tr. 31). All labor and materials used by Tri-State were supplied by Classic Carpet, the cost thereof being billed as a bookkeeping matter to Tri-State (Tr. 31).

8. The sales volume of Tri-State at all times mentioned herein has been substantial, amounting to between $12,000 and $18,000 per week which is between $624,000 and $936,000 annually (Tr. 43). At all relevant times mentioned herein respondents have been engaged in "commerce" as commerce is defined in the Federal Trade Commission Act. Respondents have sold and shipped carpet to customers residing in Maryland, Virginia and the District of Columbia (CX 17-173).

Bait and Switch

9. Respondents advertised heavily over television stations located in the metropolitan Washington, D.C., area. A local advertising agency

known as Weitzman & Associates was utilized (Tr. 17, CX 5). The principal television station employed was WDCA-TV, Channel 20, although Mr. Michael J. Lightman testified that "at one time or another, we used all of the television stations that were presently in the Washington metropolitan area" (Tr. 44).

10. The contracts between Weitzman & Associates and Milton Grant, WDCA-TV's vice-president and general manager, were for relatively large sums of money. For example, advertising during the period May 13, 1972 and Sept. 1, 1972 was at the rate of $2,025 per week for a total of $32,400 for the period (CX 7).

11. The advertisements of respondents consisted principally of "spot" commercials costing $40 each over WDCA-TV (CX 6(a)).They were broadcast with considerable frequency, twenty of them being aired for example in the two day period of Apr. 8 and 9, 1972 (CX 6(a)). Exposure of the public to the commercials in the Washington metropolitan area including suburban Virginia and Maryland, as well as the District of Columbia, was substantial.

12. The nature of the commercials of respondents was typical "hard sell" and their full flavor can only be appreciated from a viewing of the tape of the commercial which is in the record (CX 208). The commercial featured an announcer or salesman standing beside a rack or "waterfall" of carpet samples centered in a showroom with rolls of carpet against the walls. The entire setting resembled the "wall-to-wall"carpet and rug showroom of a department store or substantial retail outlet. The rack of carpet beside which the salesman stood consisted of what appeared on the television commercial to be high quality, if not luxurious, sections or samples of various types of carpet commonly used in the home for "wall-to-wall" installation, shags, tip shears, plush piles, and so forth. During the commercial the announcer or salesman repeatedly put his hand on the top of the rack of samples indicating that the "three full rooms" of carpet being offered "for only $129" was contained in the carpet displayed in the rack, or was equal to it in quality and appearance. Although the audio portion of the commercial does not reveal the full impact of the representations and messages conveyed to the public, it is reproduced herein and reads as follows (CX 191, 205):

Can you believe three rooms of carpeting for $129? *Yes*, if its *Tri-State*, because we and our affiliates have installed over 5 million square feet of brand name carpeting and it's because of *volume* that we can give you quality shags, tip shears and plush pile carpeting at discount prices. Imagine three full rooms of this beautiful nylon pile carpeting—up to three hundred square feet—for only $129—and that *does* include the padding and 48 hour installation! When you purchase our Dupont 501 nylon carpeting, you'll get this deluxe Hoover vacuum cleaner with *all* attachments for cleaning the deepest shag. To prove that *nobody* can beat our prices, call in the next five minutes and we'll knock off *another* 10 percent, bringing your cost down to $116. Three rooms, up to 300 square feet, convenient

shop-at-home service, all for $116. So call 345-4500 right now. Convenient budget terms available, so call 345-4500 *now*. [Emphasis in original]

13. Respondents also used testimonials from alleged satisfied customers of Tri-State. The audio portion of one of these is the following (CX 180):

Hi, I'm sitting here today with 2 of Tri-State Carpet Co.'s many satisfied customers.

Mrs. Berard, what do you think of Tri-State Carpet?

"The price on TV was so low we could hardly believe it—but our carpeting is beautiful and we're more than satisfied."

Well, thank you.

Mrs. Pierce, what do you think of Tri-State? "They're great people to deal with. It was a pleasure to be able to shop in our own home and the budget terms they had made buying it so easy."

Thank you.

You too can have 3 full rooms of this beautiful nylon pile carpeting—installed with padding—up to 300 square feet, for only $129. Who else could bring you such volume savings! And as a special bonus, if you call within 5 minutes you'll get another 10% discount—bringing the price down to an incredible $116 for 3 rooms of this beautiful carpeting. Or if you prefer to purchase our Dupont 501 nylon pile carpeting, you also get this deluxe Hoover vacuum with *all* the attachments! So call 345-4500 right now! That's 345-4500 right now!

14. Neither Mrs. Berard nor Mrs. Pierce, however, had purchased the low priced carpet advertised in the foregoing commercial, although respondents' commercial conveyed the impression that they had purchased such carpet—"you too can have 3 full rooms of this beautiful nylon pile carpeting * * *" Both had purchased entirely different and much higher priced carpet paying $212.16 and $900 for such carpet respectively (Tr. 215, 221).

15. A sample of the carpet taken by Tri-State's salesmen to the homes of members of the public responding to the foregoing television commercials, and shown to them as the carpet advertised, is in the record (CX 213). It bears no resemblance whatever to the attractive carpet pictured and suggested in respondents' television commercials (CX 208). On the contrary, it is cheap and flimsy carpet of poor appearance and transparently low quality which none of the witnesses who testified in this proceeding desired to have installed in their homes or apartments. The pile was skimpy and attached to a thin layer of rubber backing which served as "padding." The mere exhibition of CX 208 to a prospective customer who answered respondents' television advertisements hoping to obtain "three full rooms" of carpeting like that shown by the commercials over WDCA-TV "for only $129" was likely to be sufficient to dissuade such customer from any further interest in it.

16. Complaint counsel subpoenaed thirteen (13) members of the public who had responded to the Tri-State's commercials and had tele-

phoned the number advertised. Without exception, these witnesses appeared to be responsible and sincere persons, who were motivated to answer the commercials by the attractive carpet shown and seemingly being offered by respondents, and the low prices featured.

17. Although the experience of those who answered the commercials varied, in general events took the following pattern: the person would telephone the number advertised in the commercial and would give his or her name and address. In due time one of respondents' salesmen would visit the customer. The customer would ask about the "three full rooms" of carpet advertised "for only $129." At this point, display of the flimsy, low quality sample (CX 213) would usually be enough to discourage the prospective customer from any further interest in it. If not, overt or subtle disparagement was resorted to by respondents' salesmen. Sometimes salesmen would avoid even showing CX 213, telling the customer that their homes were too nice for the advertised carpet, or that they would not be interested in the advertised carpet. Regardless of the manner in which it was done, respondents' salesmen "switched" the householder's interest to higher priced carpet, and often succeeded in selling such higher priced carpet to those who had responded to the television commercials seeking "three full rooms" of carpeting "for only $129." Many such persons, instead of obtaining carpet for $129, obligated themselves to the extent of hundreds of dollars for much higher priced carpet.

18. The specific experiences of a number of witnesses who answered respondents' commercials are summarized in the following paragraphs:

Witness saw respondents' advertisement on WDCA-TV, Channel 20, in Apr. 1972 featuring 300 square feet of carpet for $129. Witness thought the price featured very attractive and felt that 300 square feet would cover the areas he wished to cover. Witness made an appointment immediately to have a salesman come to his home. After the salesman arrived and laid out samples, witness and wife asked to see the advertised carpet. They didn't like it at all. It was "very cheap construction" and the "quality was terrible." Respondents' salesman agreed that the advertised carpeting was inferior, and that it wouldn't last in witness' home. Witness and his wife ultimately bought much higher priced carpet, spending far more than they had intended. They purchased the higher priced carpet after the salesman stressed its virtues and told them that they had to decide right away or they wouldn't get the free vacuum cleaner. Although they were told the carpet carried a guarantee, no terms or conditions thereof were specified or discussed. The contract was financed (Tr. 264-278, CX 214).

Witness saw respondents' advertisement on WDCA-TV, Channel 20, in Oct. or Nov. 1972. Witness stated that the commercial offered 300

square feet which would cover 3 rooms for approximately (as witness remembered) $120 or $115. Witness was attracted by the advertisement because she "thought it was a lot of carpet" and also got the impression that she would receive a free vacuum cleaner if she bought the carpet. Witness telephoned the number given, made an appointment and one of respondents' salesmen came to her home. He first showed her more expensive carpet than that advertised saying that the advertised carpet would not fit her home. After witness asked, she was shown the advertised carpet. Witness thought it "wasn't worth it," that it looked "like the type you would buy at the 5 & 10," and that it didn't look like the carpet she had seen on television. The salesman told her that the advertised carpet "wouldn't last" and that if she wanted it she would have to wait since they did not have it in stock. Witness ultimately bought the best carpet respondents sold for $1600 financing the transaction (Tr. 285-291).

Witness saw respondents' advertisement on WDCA-TV, Channel 20, in Mar. or Apr. of 1972 featuring 3 rooms up to 300 square feet of carpeting for $129 or $116, plus (witness thought) a free vacuum cleaner. Witness made an appointment and one of respondents' salesmen came to his home. Witness inquired about the advertised carpet and the salesman said he didn't think witness would want the advertised carpet, that witness had a much nicer home than the advertised carpet would be useful for. Salesman suggested that he might have some carpet at a good price which was left over from an "Embassy job" they had just done. He then quoted witness a price far more than witness could "even think about" at that time. Ultimately, however, salesman sold witness the better carpet, but for a smaller area than witness had originally intended to cover. The price was $965 including financing. Witness and his wife then reconsidered, and told the salesman they couldn't afford the purchase. The salesman told them that if they would forego the vacuum cleaner he could get them 10 percent off. They agreed and the salesman wrote the contract for such lower price. They were told there was a guarantee, but the salesman discussed it only "vaguely." "10 yr. guarantee" was put on the contract (Tr. 291-300, CX 62(f)).

Witness saw respondents' advertisement on WDCA-TV, Channel 20, in Apr. 1972. Witness recalled that the advertisement featured 3 rooms of carpet for approximately $115. Witness telephoned for an appointment and one of respondents' salesmen called at her home. He first started showing the duPont 501, but witness asked to see the advertised carpeting. The salesman said that it wasn't really very good. Upon looking at a sample of the advertised carpet, it did not appeal to the witness at all. Witness found it "flimsy," "thin" and "didn't look like it was worth $119." Ultimately witness purchased duPont 501 for approxi-

mately $600. Witness was told that the contract could be financed if she put $29 down. The salesman told her there was a ten year guarantee on the carpet, and that the guarantee was in the contract. No guarantee was in the contract, however. Witness was later told that the guarantee was on the back of the carpet. When witness inquired about the "free" vacuum cleaner the salesman said she would have to call the company. She did so and was told that she would not receive a vacuum cleaner because she had been given a reduced price. After two months of calling regarding the guarantee without satisfaction, witness contacted the Federal Trade Commission. Witness received a written guarantee after contacting the Commission (Tr. 300-309, CX 24(a)).

Witness saw respondents' advertisement on WTTG, Channel 5, in Apr. 1972. In his recollection the advertisement offered 3 rooms of carpeting for approximately $116 including installation and padding. A vacuum cleaner was to "go along with" the carpeting. Witness was attracted by the commercial because he had planned to carpet 3 rooms and "figured what they said, 3 rooms, would cover what I had planned to cover." He called for an appointment and one of respondents' salesmen came to his house. The salesman showed him the advertised carpeting. Witness immediately said that it wouldn't do for what he wanted it for, and that it didn't look to him like what he had seen advertised. Witness "wouldn't have bought it at any price." The salesman then showed him other samples. Witness finally bought carpet for one bedroom for $312. He was told that the free vacuum cleaner came only with the "advertised" carpet (Tr. 312-321).

Witness saw respondents' advertisement on WTTG, Channel, 5, in 1972, featuring 3 rooms of carpeting for $116 including installation and padding. Witness received the impression that a customer would receive a free vacuum cleaner with the carpeting. Witness was attracted by the fact that she "could get the carpet I wanted for what I needed, for such a low rate." She thought the carpet advertised would cover the area she had in mind. She called for an appointment and two of respondents' salesmen came to her home. The salesmen first showed her carpet different from that advertised. She asked to see the advertised carpet, and the salesmen told her she would not be interested in this type for her home. Witness' husband mentioned that the advertised carpet "didn't look like anything, nor did it look like anything that was on T.V." After seeing other samples witness was attracted to duPont 501, and the salesmen stressed its quality. She purchased the 501 for $500, financing through *Household Finance*. Witness had been told she would receive a guarantee. The salesmen wrote on the contract that she would receive a written guarantee, but she did not. Witness inquired about the

vacuum cleaner. The salesmen told her that that would require an extra charge. She contacted the manager, and finally received the vacuum cleaner after the carpet had been installed (Tr. 322-339, CX 215).

Witness saw respondents' advertisement on WTTG, Channel 5. The advertisement featured 300 square feet or 3 rooms of carpeting for $129, with a 10 percent reduction from that price if a customer were to call within 5 minutes. The witness was "mostly induced by the price and it seemed like a good bargain" to call the company. He thought he could carpet the 3 areas he had in mind with the amount advertised. One of respondents' salesmen came to the witness' home. Witness asked to see the advertised carpeting. He decided against it immediately, thinking it "looked like maybe a good quality bath towel." Witness looked at more expensive carpet and was quoted a price of $500. He thought that price too high and requested either a reduction or a vacuum cleaner. The salesman said he would give witness a vacuum cleaner. The salesman said a written 15-year guarantee would be mailed to the witness, and wrote on the contract of sale to that effect. However, the customer never received a guarantee (Tr. 341-349, CX 216-218).

Witness saw respondents' advertisement on WDCA-TV, Channel 20 in the summer of 1972, offering 300 square feet or 3 rooms of carpeting for around $129, with (witness thought) a free vacuum cleaner to come with the carpeting. The witness thought the offer was for 3 rooms of duPont 501 carpeting. According to witness' recollection, there was to be a further 10 percent reduction if a customer would telephone within 10 minutes [sic]. The witness did so. One of respondents' salesmen came to her house, measured the area the witness had in mind, and told her the advertised carpet would not cover it. Witness inspected the advertised carpet, and found it "very cheap, low-quality carpeting." It did not look to her like the carpeting advertised on television. The television carpeting looked like the better grade carpeting the salesman showed her. Witness looked at other samples and ultimately signed a contract for duPont 501. No guarantee was mentioned. The next day, witness changed her mind and tried to cancel the contract. After telephoning respondents' office several times she was eventually told by the "manager" that she could not cancel. Witness insisted on cancellation and Tri—State sued. Although apparently the suit was dismissed, witness' credit rating was hurt because of the transaction (Tr. 350-358).

Witness saw respondents' advertisement on WDCA-TV, Channel 20, offering 3 rooms of carpeting for $116, including padding and installation and (witness believed) a free vacuum cleaner. Witness telephoned the company and one of respondents' salesmen came to his home.

Witness asked to see the advertised carpeting and was disappointed; he thought the carpet shown on television was better and did not think the carpet he was shown was the same as the carpet advertised. The salesman told him he could pick out a better carpet. Witness ultimately bought carpet for $850 (Tr. 358-364, CX 219).

Witness saw respondents' advertisement on WDCA-TV, Channel 20, in Apr. of 1972. It featured 3 rooms of carpeting for $129, with a reduction if one were to call immediately. When respondents' salesman first arrived at witness' apartment, he showed her the duPont 501. When witness asked about the advertised carpet, the salesman told her it wasn't very good quality, was not for her type of person, that it had no padding, and anyway would cost her more than the advertised price because the areas she wanted covered were too large. When witness saw the advertised carpet she thought it looked "cheap," "real thin," and did not look like what was advertised on television. She did not want it even at the low advertised price. She ultimately decided on duPont 501 carpeting, for which she signed a contract for $826. The salesman told her the carpet was guaranteed for 10 years. He also told her, in response to her question, that she could cancel the contract if her roommate did not agree on the transaction. Her roommate did not agree and witness tried vainly by telephone and letter to cancel the contract within the 3 days she had been told she could cancel. She was told the carpet had been cut for her apartment, and was told she would be taken to court. She then agreed to go through with the deal (Tr. 365-373).

Witness saw respondents' advertisement on WDCA-TV, Channel 20. It featured 3 rooms of carpeting for $119 or $129, and in witness' recollection represented that, if one called within five minutes, one would receive a discount and a free vacuum cleaner. The witness described the salesman as a "con man." When the witness asked to see the advertised carpet, "he showed me a piece of carpet I don't believe anybody would want." It did not appear to him to be the carpet he had seen advertised on television. The salesman said it was not worth putting down. Witness ultimately bought other carpet from Tri-State for one room for $170. He was told he had a 10-or 15-year "wear and tear" guarantee, but he never received it. He was also told that a vacuum cleaner would be sent to him, but he never received one (Tr. 375-380).

Witness saw respondents' advertisement on WDCA-TV, Channel 20. The advertisement featured 3 rooms (witness thought) of duPont 501 carpet for $129. The price would be reduced to $116 for a customer calling immediately. The witness thought the advertised carpet would cover the 3 small rooms she planned to carpet, and was attracted by the low price and the additional offer, in her understanding, of a free

vacuum cleaner. She called for an appointment. One of respondents' salesmen then called at her home. When he showed her the advertised carpet she noted that it was different from what she had seen advertised. The salesman stated "I did not think you would want this," and told her the advertised carpet would not cover her 3 rooms. Witness finally chose duPont 501 carpeting for $707 and signed a contract. The salesman told her that there was a guarantee on the carpet, but witness does not remember his telling her any of its terms and conditions (Tr. 380-285).

Witness saw respondents' advertisement on WDCA-TV, Channel 20, in Sept. of 1972. In witness' recollection, the advertisement featured 3 rooms of duPont nylon carpeting at a low price plus a free vacuum cleaner. She made an appointment and one of respondents' salesmen called at her home. Witness was shown the advertised carpeting and did not like it at all. She described it as "not good carpeting at all * * * very fuzzy, very skimpy." The salesman then said he had other samples. The witness picked one she liked and was quoted a price of $9 per square yard. She thought this price was too high. Discussion brought the price down to $8.50 per square yard. A contract was written up and witness made a $100 cash deposit which the salesman told her was necessary. The salesman told her there was a 10-year guarantee on the carpet, and the witness made him write that on the contract. The witness believed the salesman said that the written contract would come in the mail, but she never received one. The salesman never explained the terms and conditions of the guarantee. The witness had forgotten to ask the salesman about the vacuum cleaner which she had supposed was free. She called respondents' company and was told that the vacuum cleaner came only with the "advertised" carpeting. The carpet was not delivered on the day promised. When it was delivered, customer found it was not the same quality carpeting as that she had picked, and she refused delivery. Respondents refused to return her deposit (Tr. 411-416).

19. As one of respondents' salesmen succinctly testified, the cheap and flimsy sample of carpet shown to prospects as the advertised carpet helped sell carpet because (Tr. 238-39):

> It is a piece of carpet to come off of to a better piece of carpet.

In selling respondents' carpet some salesmen used an alias (Tr. 247).

20. Respondents' television commercials were false, misleading and deceptive in that they conveyed to the viewing public the impression that "three full rooms" up to "three hundred square feet" of attractive "beautiful nylon pile," high quality carpet consisting of "quality shags, tip shears and plush piles" were being offered "for only $129" whereas the carpet exhibited to persons responding to respondents' commercials

was not like that shown on television, but was cheap, flimsy and of poor quality and appearance.

21. Respondents' television commercials were false, misleading and deceptive in that they held out to the public the offer of attractive quality carpet at bargain prices not in truth available.

22. Respondents' advertising was false, misleading and deceptive in that it was not a *bona fide* offer to sell carpet at the price and on the terms and conditions stated, but was utilized for the purpose of luring members of the public into making appointments with respondents' salesmen, so that such members of the public could be sold other carpeting than that advertised, at prices higher than those advertised. Between Apr. 7, 1972 and May 23, 1972, over 96 percent of respondents' customer contracts represented sales of higher priced carpeting than that advertised (CX 17-173).

23. Respondents' advertising and selling practices constituted an unfair and deceptive scheme by which members of the public, on being visited in their homes by respondents' salesmen, were shown a sample of carpeting which was cheap, flimsy and unattractive in appearance, were told that such sample was the advertised carpet, although it bore little or no resemblance to that shown over television by respondents, such carpet was openly or subtly disparaged and, when prospective customers indicated disinterest in the exhibited carpet, attempts were made to sell them carpet much higher in price.

Separate Padding

24. As quoted earlier herein respondents' television advertising stated:

> Imagine three full rooms of this beautiful nylon pile carpeting—up to three hundred square feet—for only $129—*and that does include the padding* and 48 hour installation! (CX 10, 191, 208; emphasis added).
>
> You too can have 3 full rooms of this beautiful nylon pile carpeting—*installed with padding*—up to 300 square feet, for only $129 (CX 180; emphasis added).

By and through the use of these statements, respondents represented that the carpeting advertised would be installed with separate padding included at the advertised price.

25. In truth and in fact, the advertised carpeting did not come with separate padding but was manufactured with a thin foam rubber backing which was bonded to the fabric (CX 213, M. Lightman, Tr. 54; Dunlap, Tr. 368). Respondents' advertisements therefore were false, misleading and deceptive in this respect.

"Free" Vacuum Cleaner

26. Through the advertisements set out in Findings 12 and 13, and through oral and written statements of respondents' salesmen to customers and prospective customers, respondents represented that purchasers of "DuPont 501 nylon carpeting" would receive a "free" vacuum cleaner. Respondents' commercial, which was broadcast repeatedly over television, stated (CX 10, 180, 191, 208):

When you purchase our DuPont 501 nylon carpeting, you'll get this deluxe Hoover vacuum cleaner with *all* attachments for cleaning the deepest shag.
Or if you prefer to purchase our DuPont 501 nylon pile carpeting, you also get this deluxe Hoover vacuum with *all* the attachments!

27. By the audio and visual manner in which the "free" vacuum cleaner was presented by respondents' commercials in immediate conjunction with the offer of the featured low priced carpeting, respondents also represented that purchasers of the low priced carpeting were likewise entitled to the "free" vacuum cleaner (see tape, CX 208). The commercial features a salesman with "rapid-fire" delivery. The reference to the "free" vacuum cleaner and to "DuPont 501" as a specific type of carpeting is preceded and followed by references to the advertised low priced $129 carpet. There is no break in the delivery of the advertisement between the discussion of the $129 carpet, the mention of DuPont 501, the offer of a vacuum cleaner, and the offer of a 10 percent discount on the $129 carpet. The salesman states, "Imagine three full rooms of this beautiful nylon pile carpeting * * * for only $129 * * * ," and goes on immediately to tell the public that "when" you purchase our "DuPont 501 nylon carpeting," you'll get this "deluxe Hoover vacuum cleaner" (CX 208, 10). The impression conveyed is that the reference to "DuPont 501 nylon carpeting" refers back to the $129 carpet. There is no question whatever that viewers of the television broadcast would derive this impression concluding that all carpet references were to the same product, that DuPont 501 was the low priced featured carpet, and that the vacuum cleaner was included with it. The undersigned has viewed the tape of the commercial (CX 208) and finds that the commercial conveys the net impression that a free vacuum cleaner is offered with the purchase of the $129 carpet. This finding is verified by the statements of consumer witnesses in this proceeding. Eleven out of thirteen of these members of the public were clearly under the impression that the free vacuum cleaner came with the advertised low price carpet. The following are examples:

At the time, they stated, in the commercial, if you called within 10 or 15 minutes to call for an appointment, they would offer a vacuum cleaner free as a bonus gift, if you would call within a certain period of time, so we tried to call * * * [Tr. 258-259].

* * * * * * *

The vacuum, I was under the impression, came with the purchase of carpet and at the same time they were talking about the advertised carpet and the vacuum, so the two sort of went together [Tr. 324].

* * * * * * *

Q. Will you describe it [the commercial].

A. Advertised three rooms of carpeting for a very low price, around $129 I think, and a free vacuum cleaner with the carpeting [Tr. 351].

* * * * * * *

* * * I can describe what I seen. This fellow came out and said—he had his hand pointing to a carpet—"Three rooms of carpeting for 119" or "129"—now I can't get that right. If I call within the next five minutes I would get a vacuum cleaner free. So I called * * * [Tr. 376].

* * * * * * *

Well, by the way they explained it, I thought the carpet I was looking at was 501, all of this seemed like a lot for $116. This is the thing that made me call; the amount of the money and the vacuum cleaner being thrown in along with it [Tr. 384].

* * * * * * *

They were advertising carpet for three rooms for about $160.00 [sic]. I think it was 100 percent DuPont nylon, and they also said if you purchased carpeting, you were entitled to a Hoover Vacuum Cleaner (Tr. 412).

28. A free vacuum cleaner was not given with the purchase of the $129 carpeting. The president of the company, Michael J. Lightman, admitted this as follows (Tr. 66):

Persons that purchased the carpet advertised for $116 or $129, respectfully [sic], did not receive a vacuum cleaner.

Virtually no one was ever sold respondents' low priced carpeting advertised "for only $129" in any event (CX 17-173; see Finding 22, *supra*). Not all purchasers, even of the duPont 501 carpeting, however, received a "free" vacuum cleaner. Some purchasers of duPont 501 were told that the vacuum cleaner was included only with the low priced carpeting (Tr. 305, 319-320, 414). Those who did receive a Hoover vacuum cleaner, moreover, did not in fact receive it "free." In truth, no "free" vacuum cleaner or "free gift" of any kind was included in the purchase of *any* of respondents' carpeting, notwithstanding the representations in respondents' advertising. Although a customer who obtained a vacuum cleaner from respondents may have thought that he or she was receiving the vacuum "free," under the "par" system[1] used by respondents such

[1] Under the "par" system, for each type of carpet sold by Tri-State salesmen there was set a minimum sale price per square foot, the "par," which a salesman would have to reach before he could obtain his minimum percentage rate of commission. The commission rate would increase on sales above the "par" price. When a vacuum cleaner was to be included with the carpet, the total cost of the vacuum cleaner would be divided by the number of square feet sold in that particular job, and the "par" or minimum price per square foot would be increased by that proportional amount of the vacuum cleaner's cost. Therefore, respondents' salesmen to draw their commissions would increase the price of the carpet accordingly, charging a higher price than they would have, had the vacuum cleaner not been included (Tr. 60-64).

vacuum cleaner was included by respondents' salesmen in the price the customer paid for the duPont 501 carpet. There was not, of course, even a pretense on the part of respondents or their salesmen (aside from the deception in their commercials) that a vacuum cleaner or "gift" of any kind came with the carpeting advertised "for only $129" (Lightman, Tr. 34, 63-64, 67-68; Robinson, Tr. 252).

29. Respondents' advertising was false, misleading and deceptive in that it had the tendency and capacity to mislead, and misled, members of the purchasing public into believing that they would receive a "free" vacuum cleaner or "free" gift with the purchase of respondents' carpeting when such was not the case.

Guarantees

30. Respondents, through oral and written representations of their salesmen to customers and prospective customers, represented that their carpet was unconditionally guaranteed. Consumer witnesses in this proceeding testified to the fact that respondents' salesmen represented that the carpeting was guaranteed, without informing the prospective customer of conditions or limitations:

A. He [the salesman] mentioned the fact that there was a 15 year guarantee on the carpeting and made a strong point stressing the wearability of it as far as the traffic I would have *and it would not snag* and things of this nature—that it would be very durable carpeting for our particular needs.

Q. Did he tell you the terms and conditions of the guarantee?

A. Not in any detail no [Tr. 264-265; emphasis added].

* * * * * * *

Q. Were you given a guarantee on the carpeting that you did buy from Tri-State?

A. Yes. On my contract it is a 10 year guarantee.

Q. Were the terms and conditions of that guarantee explained to you by the salesman?

A. Vaguely. I would say he made some discussion about it but I couldn't quote anything that he said related to that guarantee * * * I didn't find anything in the contract other than 10 year guarantee. The conditions, it didn't specify [Tr. 298-299].

* * * * * * *

Q. Did they [the salesmen] make any comments with respect to the other samples of carpeting?

A. He told me the one I was buying was DuPont 501, and he did stress the fact we did not have a basement and our living room and dining room area required a lot of wear, that I would get a ten year wear warranty, guarantee from DuPont [Tr. 327-328].

* * * * * * *

Q. Was the carpeting that you were buying, guranteed?

A. Yes, we asked the salesman was it guaranteed, and he said, yes. * * *

Q. Did he write anything on the contract about the guarantee?

A. No, we asked him about the guarantee and he said it was in the contract. * * * But after reading the contract, I didn't see any guarantee [Tr. 304].

* * * * * * *

Q. Was there any discussion between you and the salesman as to the guarantee on the carpet you were purchasing?

A. Yes, he said there was a 15-year guarantee and it would be mailed to me. * * * *

Q. Did Mr. Miller [the salesman] explain the terms and conditions of the guarantee?

A. He mentioned if ever I moved, the carpet would be moved and installed at the new address [Tr. 345].

* * * * * * *

Q. Did the salesman say anything about a guarantee?

A. Yes, * * * on the one I got, the duPont 501, it was going to be ten years for a guarantee, and he said if the carpet I decided to get, if I ever moved or anything like that, they would come in and take it up and, if I was still in the area, *they would reinstall it for free* [Tr. 369; emphasis added].

* * * * * * *

* * * We have a large family, ten children, and a lot of feet running around, so I wanted something pretty strong and tough. I made him write that down in the contract that it would last ten years.

Q. Did he explain terms and conditions of the guarantee?

A. No (Tr. 413-414).

By stating simply that their products were "guaranteed," without disclosing any conditions or limitations, respondents through their salesmen were representing that the merchandise was guaranteed without condition or limitation. See *Montgomery Ward & Co., Inc.*, 70 F.T.C 52 (1966), *aff'd* 379 F.2d 666 (7th Cir. 1967).

31. Such representations were false and misleading in that none of respondents' carpeting was unconditionally guaranteed for any period of time. On the contrary, such guarantees were subject to a number of conditions and limitations not disclosed in respondents' guarantee representations (see CX 11). For example, the guarantee did not cover carpeting on stairways or other non-flat surfaces. Also, Tri-State could at its election repair or replace carpet found by Tri-State to be worn out, and in such case a purchaser only received credit prorated on the price originally paid. Further, the guarantee did not apply to damage due to snagged pile of carpet or pile crushing. The guarantee, moreover, did not apply when carpet was not laid over carpet padding. (As found above, Tri-State carpeting did not come with separate padding.) The warranty subject to the foregoing conditions and limitations, furthermore, excluded "all implied warranties."

32. As testified to by the president of Tri-State and one of Tri-State's salesmen, it was the practice not to disclose any conditions and limitations on their guarantees, unless the customer pressed the salesman for a written copy (Lightman, Tr. 74; Robertson, Tr. 245-246).

Use of "Square Feet" in Advertisements as a Means of Deception

33. In the advertising of their products, respondents used the term "up to three hundred square feet" to indicate the quantity of carpet available at the advertised price (CX 10, 180, 191, 208). Square yards were not disclosed.

34. Over the years the retail carpet industry has sold "wall-to-wall" carpet by the square yard, and members of the purchasing public have become accustomed to evaluate prices and areas of coverage in terms of square yards. An expert in the field of retail carpet advertising, the editor of one of the industry's leading trade publications, *Floor Covering Weekly*, testified that the standard unit of measurement used in the retail carpet industry to advertise quantities of carpet has been, and is, the square yard (Tr. 121). As he stated (Tr. 128):

> If you were to go into the carpet business tomorrow, you would buy carpet and sell it by the square yard. I say that without reservation. Everyone, every honest man in this country would do that * * *. That is the way it is.

In his expert opinion, in view of the industry's historic practice of offering carpet by the square yard, and the consuming public's familiarity with that unit of measurement in the sale of "wall-to-wall" carpet, use of "square feet" in lieu of square yards had the tendency to deceive. He testified (Tr. 122):

> * * * The only reason you could use square footage would be to deceive. If you had no other motive, I imagine you would sell carpet like every other legitimate retailer, by the square yard * * *. If you advertise it by the square foot—unless somebody could show me a good plausible economic reason for doing that, and honest one, of course, I see no purpose except to deceive somebody. Square foot must be divided by nine to get the square yard. The average person does not attempt to do that * * *.

He further stated that to give both the square footage and the square yardage would be "incredibly honest" (Tr. 128).

35. Respondents' use of square feet as the only unit of measurement in their advertisements had the tendency and capacity to mislead consumers into the mistaken belief that they were being offered a greater quantity of carpeting than was the fact. This is supported by statements of consumer witnesses in this proceeding who, on viewing the advertisements, were almost invariably under the impression that they would receive a "lot of carpet" that would certainly cover three rooms:

> At the time of the advertisement, they said 300 square feet, 3 rooms of carpeting—I assumed, at that time, that that would be enough to probably cover what we were figuring on covering, but, now, as I look back on it, I realize that 300 square feet is not the same as what he came up with, as 70 square yards, when he measured my apartment. At the time, I didn't see the difference * * * [Tr. 271].

* * * * * * *

Q. Did you think that the 3 rooms you saw advertised would cover these areas?
A. Yes, I did * * * When they said 300 and some carpet, I thought it was a lot of carpet, you know [Tr. 287].

* * * * * * *

* * * I figured what they said, 3 rooms, would cover what I had planned to cover [Tr. 313].

* * * * * * *

I am in a town-house. * * * But from the way he was saying it on television, I assumed this would cover three bedrooms. (Tr. 382).

See also Tr. 276, 325, 343.

Failure to Disclose Higher Rates for Greater Carpet Quantities than Advertised

36. In their advertising, respondents offered carpet with padding and installation included at a price based upon specified areas of coverage, *i.e.*, "three full rooms," "up to 300 square feet" for $129 (CX 10, 180, 191, 208).

37. In making this offer, respondents failed to disclose that the prices stated for the specified areas of coverage were not applied at the same rate for any additional quantities of carpet needed, but such was priced substantially higher. For example, whereas the "beautiful nylon pile" carpet priced at 300 square feet for $129 cost the customer $3.87 per square yard for the first 300 square feet, or about $3.50 per square yard if the price were $116; for anything exceeding 300 square feet, respondents charged the customer a minimum of $7.02 per square yard, an almost 90 percent increase in cost per square yard (M. Lightman, Tr. 52-53; CX 190 "Par Sheet").

38. That members of the public would have to pay almost 90 percent more per square yard for carpet needed in excess of the 300 square feet (33 1/3 square yards) advertised is a fact highly material to the decision of members of the public to answer respondents' commercials. Had respondents disclosed the foregoing facts in their advertisements, members of the public who telephoned respondents in answer to the advertisements might not have done so. Anyone viewing respondents' commercials would reasonably conclude that additional carpet in excess of the 300 square feet offered for $129, or for $116 if a call were placed within 5 minutes, could be purchased at an equivalent low rate. There was no reason to believe otherwise, and the failure of respondents to disclose the contrary was materially deceptive and misleading.

Pressuring Customers to Sign Contracts in Haste

39. Through the use of the false, misleading and deceptive statements, representations and practices, respondents and their representa-

tives induced customers to sign contracts upon initial contact without giving them time to consider carefully the purchase and the consequences thereof. All but one of the consumer witnesses who testified in these proceedings signed a contract on the initial visit of respondents' salesman. The high pressure techniques employed by respondents' salesmen are illustrated by the following testimony (Tr. 262):

We asked him [the salesman] if there was a possibility of us talking it over and checking some more prices before we made up our minds whether to buy or not buy the carpet. At that time he said, well, I have to know today. This struck me funny. I said, what is the reason you have to know today? He said * * * if you tell me yes or no today, then I can give you this vacuum cleaner. If you don't give me the order today, then I can't guarantee the vacuum cleaner will be thrown in on the deal.

Furthermore, customers who, after signing a contract, reconsidered and decided to cancel their order within three days were subject to frustration and further pressure by respondents as illustrated by the following testimony (Tr. 356-357):

* * * The very next day I called and wanted to cancel; I talked to this girl * * * and she said we could cancel it. And I asked her her name and she wouldn't give me her name, said I did not need it, and she hung up on me.

* * * * * * *

I called back and asked to speak to the manager. * * * They said it would be Mr. Schwartz, he was in the warehouse and can't talk to me right now.

Q. Were you successful in canceling your order?

A. No, they took me to court because I canceled my order. We did not put any money down. Mr. Schwartz called and said the credit went through and they would go ahead and lay the carpeting * * * Mr. Schwartz said we couldn't cancel the order * * * Then two months later we get a summons in the mail because they were suing us * * *

We went to court * * * and they just let us go; * * * but our credit is ruined now.

Another consumer testified to a similar experience (Tr. 370-371):

I have a room-mate—I said if she decided not to go through with the deal, could I get the contract canceled? He [the salesman] said I could, just call him.

My room-mate was on leave. When she came back * * * she did not want it.

So I wrote the letter that night because he said you have three days to cancel it. Then I called the next morning and asked to speak to Mr. Floyd. He was not in. I kept calling, he was never there.

The next day I went out there * * * I talked to some other man * * * He went on to tell me how good the carpet was and they could make other financial arrangements if she did not want to buy the carpet.

* * * I did not want the carpet * * * He still wouldn't let me out of the deal. We went through a little argument. * * *

He said he would call the next day and said he had found another way to finance it and they would take me to court if I did not go through with the deal. I decided to go through with it. * * *

He said they couldn't let me out of the deal because the carpet had been cut for my apartment. * * * They did not deliver the carpeting for about two weeks.

Such testimony, in conjuction with proof that contracts were typically signed on the initial contact with respondents' salesmen, that customers uniformly purchased far more expensive carpet and spent far more money than they had originally intended, and that inducements were offered to make them purchase, reinforces the testimony quoted earlier that high-pressure tactics were used to cause prospects to sign contracts in haste.

Truth in Lending

40. The record of this proceeding establishes that respondents in the offering for sale and sale of carpeting and floor coverings regularly arranged for "consumer credit" as 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 (M. Lightman, Tr. 48-49; W. Lightman, Tr. 103-105; CX-189(a), 189(b), 189(c); see also Commission Exhibits cited in Findings 42 and 43 below).

41. In the ordinary course of business and in connection with their credit sales, as "credit sale" is defined in Regulation Z, respondents have caused customers to execute binding retail installment contracts (see Commission Exhibits cited in Findings 42 and 43 below).

42. In the drawing up of the aforesaid contracts, respondents have failed to obtain, as required by Section 226.4(a)(5) of Regulation Z, a specific dated and separately signed affirmative written indication of the customer's desire for credit life insurance to be written in connection with its credit sales. Failing to provide for authorization pursuant to Section 226.4(a)(5) of Regulation Z, respondents were required to include the cost of such insurance in the amount of the finance charge, and by failing to do so, respondents failed to disclose accurately the "amount financed" and the "finance charge" as required by Sections 226.8(c)(7) and 226.8(c)(8)(i), respectively, of Regulation Z, and thereby also failed to state the "annual percentage rate" accurately, as required by Section 226.7(b)(6) of Regulation Z (CX 28(d), 25(c), CX 20(f), 36(f), 70(c), 137(f), 117(e), 215).

43. In the drawing up of the aforesaid contracts respondents have failed, as required by the foregoing Act and regulation (1) to disclose the annual percentage rate accurately in accordance with Section 226.5(b)(1) of Regulation Z, as required by Section 226.8(b)(2), by reason of either understating the "annual percentage rate" by amounts from 5 percent and more or by leaving the space provided therefor blank (CX 20(c), 32(j), 43(d), 53(c), 54(d), 62(i), 68(c), 69(c), 69(g), 90(d), 91(e), 92(d), 95(h), 117(e), 126(e), 127(c), 128(d), 142(e), 147(f), 515(c), 153(e), 168(d), 214, 215; (2) to disclose the due date(s) scheduled for the repayment of the customer's indebtedness as required by Section 226.8(b)(3) of Regulation Z, by leaving the space provided therefore blank (CX 23(d), 24(e),

26(c), 27(e), 28(d), 29(h), 30(d), 40(c), 43(d), 47(f), 53(g), 54(d), 55(g), 60(c), 62(i), 68(c), 69(c), 74(d), 75(f), 76(e), 78(d), 95(h), 97(f), 109(h), 117(e), 123(c), 125(f), 126(e), 129(e), 130(d), 139(e), 147(f), 150(d), 153(e), 215, 217; (3) to use the term "amount financed" to describe the amount of credit of which the customer has the actual use, as required by Section 226.8(c)(7) of Regulation Z (CX 32(e), 32(f), 53(c), 69(g), 69(h), 113(d), 127(c); (4) to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z (CX 32(e), 32(f), 53(c), 69(g), 69(h), 113(d), 127(c); (5) 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 (CX 20(f), 43(d), 68(c), 69(c), 84(c), 95(h), 117(e), 137(f), 145(f), 147(f), 168(d), 171(e), 215.

44. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid fairlures 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.

CONCLUSIONS

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

2. Respondents, as demonstrated in the findings of fact set out earlier, engaged in false, misleading and deceptive advertising, and utilized unfair and deceptive acts and practices in the offering for sale, sale and distribution of carpeting and floor coverings.

3. Such false, misleading and deceptive advertising, and such unfair and deceptive acts and practices, had the tendency and capacity to mislead, and in fact misled, members of the purchasing public into the purchase of substantial quantities of respondents' carpeting and floor coverings, and were to the prejudice and injury of the public and of respondents' competitors, and constituted violations of Section 5 of the Federal Trade Commission Act.

4. In the course and conduct of their business, respondents have failed to comply with Regulation Z duly promulgated by the Board of Governors of the Federal Reserve System and, pursuant to Section 103(q) of the Truth in Lending Act, such failure constitutes a violation of the Federal Trade Commission Act.

DISCUSSION

The Individual Respondent

It is argued that the order, if any is to be issued in this case, should not be applicable to respondent William R. Lightman, individually. The contention made is that William R. Lightman, though a corporate officer, was "never active in the business," never played "any role in the promotion, advertising, or resale of carpets or other floor covering," had "no responsibility for the promotion or sale of carpets," and did not engage in "decision making on any reasponsible level" in the management of Tri-State Carpets, Inc.

These contentions are unsubstantiated on the record as a whole and are rejected. William R. Lightman was intimately involved in the activities of Tri-State Carpets, Inc. Indeed, Tri-State itself was essentially an expansion of Classic Carpet Center, Inc., which William R. Lightman founded and had operated for the previous five years. Both were "family" corporations, owned and operated by the Lightman family. William R. Lightman was an officer of both firms. In fact, Classic Carpet Center, Inc., and Tri-State were family businesses to such an extent that William R. Lightman was even confused as to his technical position with each, as follows (Tr. 98):

> I believe I was Secretary-Treasurer there. No, I was Vice-President. I got confused with Tri-State. I thought it was mentioned I was Vice-President, but as I say, it is immaterial. It is all in the family.

After Tri-State was established as an expansion of Classic Carpet Center, Inc., "to make more money" as Michael Lightman put it (Tr. 15), William Lightman served at various times as vice-president or secretary-treasurer of Tri-State, Inc. He oversaw the expedition of all merchandise sold for Tri-State, and arranged for the purchase of all products for resale. He was a general "trouble shooter", handling all customer "backlash" problems, *i.e.*, customer complaints that arose from Tri-State's operation. In these areas his was the final decision; as he put it, the "buck stops here" (Tr. 75, 83-84, 90). It was he who initiated a meeting with salesmen to settle the question of how and when the "free" vacuum cleaners were to be distributed by Tri-State (Tr. 93-95). Similarly, he made decisions as to whether a customer would receive a guarantee on his purchase of carpet from Tri-State (Tr. 92). More generally, he personally handled serious problems involving Tri-State as they arose. For example, when a problem arose involving the finance company, TransAmericard (Tr. 104), with whom Tri-State dealt, William

R. Lightman took over, and was successful in recovering funds allegedly owed Tri-State (Tr. 103-105). Further, although William R. Lightman claimed that he had nothing to do with advertising it was Michael Lightman's recollection that William R. Lightman was present at the initial meeting with Tri-State's advertising agency, when the Tri-State commercials were "brain stormed" (Tr. 24, 110). On that occasion, William R. Lightman participated in the discussion and evaluation of the commercials (Tr. 24-25). The two Lightmans shared the very same office in the Classic Carpet Center, Inc., warehouse; in fact, they had adjoining desks. Significantly, it was William R. Lightman who took over full management of Tri-State in Michael Lightman's absence (Tr. 76-77).

From these facts, it is clear that William R. Lightman exercised substantial responsibility and control over Tri-State, was properly named as an individual respondent in the complaint, and must be bound personally and individually by the terms of the order issued herein. Furthermore, apart from his control over Tri-State's operations, William R. Lightman as proprietor of Classic Carpet Center, Inc., was essential to and supported the Tri-State operation. William R. Lightman, using Classic Carpet Center, Inc., was not only supplier of carpet (Tr. 83), but handled all installation of carpet sold by Tri-State (Tr. 31). Installation orders for Tri-State customers were written on Classic Carpet Center, Inc., *i.e.*, "Carpeteria," forms (Tr. 86). The very advertising of Tri-State leaned to a degree on Classic Carpet Center, Inc., in that it referred to Tri-State and its *affiliates* as having "installed over 5,000,000 square feet of brand name carpeting" (CX 208, Tr. 50).

For any order in this case to be effective, it must be applied to William R. Lightman individually, and the undersigned has so found. Were it not, its purpose could be easily frustrated. William R. Lightman not only founded the business of which Tri-State was an offshoot but, indeed, founded Tri-State, as stated. He has been long involved in retail carpet operations. Without an order binding him, there would be nothing to prevent him from carrying on the same type of business as Tri-State under a new name, or through a newly formed or already established corporation, and continuing the false, misleading, deceptive and unfair acts and practices proven in the record and prohibited herein. As the Commission stated in *Coran Bros. Corp.*, 72 F.T.C. 1, 25 (1967):

> The public interest requires that the Commission take such precautionary measures as may be necessary to close off any wide "loophole" through which the effectiveness of its orders may be circumvented.

In *Coran* the Commission found that the individual respondent could have formed a new corporation and continued the business with "com-

plete disregard for the Commission's action against the predecessor organization." 72 F.T.C. at 25. Considerations of public interest require similar precautionary measures in this case to ensure that its order will have its full intended effect. The authority of the Commission to name officers, directors and sole stockholders of corporate respondents to prevent evasion of its orders has long been established. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112 (1937); *Rayex Corporation* v. *Federal Trade Commission*, 317 F.2d 290 (2nd Cir. 1963); *Standard Distributors* v. *Federal Trade Commission*, 211 F.2d 7 (2nd Cir. 1954).

Deceptive and Unfair Acts and Practices

"Bait and switch" sales tactics have long been held to violate Section 5 of the Federal Trade Commission Act. Advertising a "phony" bargain in order to obtain contact with a prospective customer for the purpose of selling another product at a much higher price is an ancient practice, but one of continuing effectiveness. It is oppressive and exploitive of the public, is deceptive and unfair, and has been repeatedly condemned. *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 (1969); *Guides Against Bait Advertising*, 16 C.F.R. §238 (1974).The "gimmick" utilized by respondents in this case consisted of cheap and flimsy carpet, far different in appearance from that shown over television, which was shown to prospects whose names had been obtained by respondents' commercials. Exhibition of this carpet was typically sufficient to switch prospects to higher priced carpet. Actual verbal disparagement of the advertised carpet is not essential to a finding of bait and switch sales tactics, *Tashof* v. *Federal Trade Commission*, *supra*, and was not often necessary, although were required that tactic was resorted to by respondents, as described.

With respect to the "free" vacuum cleaner, it is plainly deceptive to represent that something is "free," if the cost of the "free" item, unknown to the purchaser, is added to what would otherwise have been the price of the merchandise advertised. *Sunshine Art Studios, Inc.*, v. *Federal Trade Commission*, 481 F.2d 1171 (1st Cir. 1973); *Federal Trade Commission* v. *Mary Carter Paint Co.*, 382 U.S. 46 (1965); see also *Guide Concerning the Use of the Word "Free" and Similar Representations*, 16 C.F.R. 251 (1974). Moreover, there was not even a pretense of giving a "free" vacuum cleaner to the few who did purchase the advertised carpet for $129 or $116, although respondents' commercials

led viewers to believe that a "free" vacuum cleaner would be provided with such purchase.

Respondents and their salesmen consistently represented that their carpet was "guaranteed" without advising customers of applicable limitations or conditions. Representation that a product is guaranteed without saying more constitutes a representation that it is unconditionally guaranteed. *Montgomery Ward & Company, Inc.*, 70 F.T.C. 52 (1966), *aff'd.*, 379 F.2d 666 (7th Cir. 1967). It is an unfair practice to offer an unconditional guarantee when in reality there are undisclosed conditions in the terms of the actual guarantee. *Benrus Watch Co.*, v. *Federal Trade Commission*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Parker Pen Co.*, v. *Federal Trade Commission*, 159 F.2d 509 (7th Cir. 1946).

Expert testimony introduced by complaint counsel established that the retail carpet industry has over the years consistently sold carpet exclusively by the square yard. Under circumstances where members of the public have long been accustomed to an industry practice which advertises carpet in commercials by the "square yard," use of the "square foot" measure, without also stating the square yards offered, tends to create the impression that a larger quantity of carpet is being offered at the price quoted than is the case. Under such circumstances use of square feet to denote the quantity of carpet offered, without stating square yards, has the tendency and capacity to mislead and deceive, and is an unfair trade practice. Actual deception of the public is not necessary for a violation, a tendency and capacity to deceive being sufficient. *Feil* v. *Federal Trade Commission*, 285 F.2d 879 (9th Cir. 1960). The Federal Trade Commission Act was not intended to protect "sophisticates," *Giant Food Inc.* v. *Federal Trade Commission*, 322 F.2d 977 (D.C. Cir. 1963), but the unthinking and credulous who do not stop to analyze but are governed by general impressions. *Helbros Watch Company, Inc.* v. *Federal Trade Commission*, 310 F.2d 868 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963).

Where the price for additional carpeting beyond the quantity advertised is substantially higher per square yard than the advertised carpet, such increased price is a fact material to the advertised offer. It is therefore unfair and deceptive not to disclose such fact in the advertisements. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

It is, furthermore, an unfair trade practice to manipulate a prospective customer by high pressure tactics. *Household Sewing Machine Co., Inc.*, 76 F.T.C. 207, 242-243 (1969); see also Trade Regulation Rule, *Cooling—Off Period for Door-to-Door Sales*, 16 C.F.R. 429 (1974). And,

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it is obviously deceptive and misleading to advertise carpet in such a manner as to convey the impression that "separate padding" is included (CX 10, 180, 191, 208) when the "padding" consists of thin rubber backing affixed to the rear side of the carpet.

The Remedy

In the "Notice Order" attached to the complaint, and in the order issued herein, there is included a provision requiring respondents to disclose clearly and conspicuously, by means of a blackbordered notice in all their advertisements, the fact that they have been found to "engage in bait and switch advertising." This provision is necessary to end with certainty the deceptive and oppressive practices disclosed by this record, and to prevent their resumption at some other time, either in the sale of carpet or floor coverings or of some other product or service. Respondents' violation of Section 5 of the Act was flagrant. The use of bait and switch was an integral part of their misleading and unfair selling operation, which was harsh, deliberate and sophisticated. Thirteen consumer witnesses testified that they were uniformly "taken in" by respondents' deceptive advertising and selling techniques. Clearly there were hundreds more who were similarly bilked by respondents' methods, but who did not appear in this proceeding.

The consumer warning provision therefore is not punitive. Rather, it is designed to prevent the recurrence of the unfair practices that respondents utilized. It is no longer open to question that the Commission, as part of its remedial powers, has the authority to require respondents to take affirmative action. *American Cyanamid* v. *Federal Trade Commission*, 401 F.2d 574 (1968), *cert. denied*, 394 U.S. 920 (1969). An order requiring disclosures and disclaimers that detracted greatly from the "image" of the advertiser was recently upheld in *La Salle Extension University*, 78 F.T.C. 1272 (1971), *aff'd.* No. 71-1648, 7th Cir., Oct. 23, 1973 (unreported). The only qualification on the Commission's broad discretion in framing an order is that the remedy be reasonably related to the unlawful practices found. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470 (1952). In the opinion of the undersigned, the provision in question clearly meets this qualification. By its very nature the practice of bait and switch can be done so skillfully that few customers, especially the unsophisticated and trusting, realize at the time what is happening to them. The proposed warning is the only effective means of alerting members of the public that such unfair practices may be perpetrated on them in their own homes. Such a warning arms prospective customers in advance. Aware of such prac-

tices, the member of the public will be in position to recognize bait and switch tactics if utilized an to end the sales presentation. Additionally, the provision serves as an incentive to respondents as well as to their salesmen to abide by the terms of the order. It is true that the requirement for inclusion of this warning provision may detract somewhat from the effectiveness of respondents' advertising. However, even if that is the necessary result of the order, such detriment to the respondents must be balanced against the benefit to the public in being protected by such a warning. In the opinion of the undersigned, the public interest in being protected from the deceptive and oppressive sales tactics of respondents clearly outweighs any hardship to respondents, if such there is. The Commission has rejected the argument that an otherwise necessary and proper order cannot issue because its effect would be to hinder respondent in the conduct of its business. *S. Dean Slough* v. *F.T.C.* 396 F.2d 870, 872, *cert. denied,* 393 U.S. 980 (1968).

As a consequence of the foregoing, and of the findings of fact set out earlier herein, the following order is entered:

ORDER

I

It is ordered, That respondents Tri-State Carpets, Inc., a corporation, its successors and assigns, and its officers, and Michael J. Lightman and William R. Lightman, individually and as officers of said corporation, and Matthew Mintz, individually and as a manager of said corporation, and their agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, or as an official or employee of any firm or corporation, in connection with the advertising, offering for sale, sale or distribution of carpeting and floor coverings, or of any other product, merchandise or service of whatever nature or description, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, and do forthwith cease and desist from contributing to, or aiding or abetting in any manner whatever, any firm or corporation in:

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 of other product, merchandise or service.

2. Making representations, directly or by implication, orally or in writing, purporting to offer any product, merchandise or service for sale when the purpose of the representation is not to sell the offered product, merchandise or service but to obtain leads or

prospects for the sale of another product, or merchandise or service, at higher prices.

3. Disparaging in any manner, or discouraging the purchase of any product, merchandise or service which is advertised or offered for sale.

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

5. Failing to maintain and produce for inspection and copying, on demand by the Federal Trade Commission or its representatives, adequate records which reveal for every advertisement published in print or broadcast media, for three years from the date of its publication:

a. the volume of sales made of the advertised product, merchandise or service at the advertised price; and

b. the net profit from the sale of each advertised product, merchandise or service at the advertised price.

6. Representing, directly or by implication, orally or in writing, that a stated price for carpeting or floor coverings includes the cost of separate padding and the installation of such padding, unless in every instance where it is so represented the stated price for floor coverings does, in fact, include the cost of such separate padding and installation.

7. Misrepresenting in any manner, the prices, terms or conditions under which separate padding and installation is provided in connection with the sale of carpet and floor coverings.

8. Representing, directly or by implication, orally or in writing, that the purchaser of any advertised product, merchandise or service will receive a "free" vacuum cleaner or any other "free" merchandise, gift, service, prize or award unless all conditions, obligations, or other prerequisites to the receipt and retention of such merchandise, service, gift, prize or award are clearly and conspicuously disclosed at the outset in close conjunction with the word "free" wherever it first appears in any advertisement or offer.

9. Representing, directly or by implication, orally or in writing, that any merchandise or service is furnished "free" or at no cost to the purchaser of any advertised product, merchandise or service, when, in fact, the cost of such merchandise or service is added to what would otherwise have been the selling price of the advertised product, merchandise or service.

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

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

12. Representing, directly or by implication, 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. *Note:* After one "free" offer is made, 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, sales of respondents, or any of them, 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.

13. Representing, directly or by implication, orally or in writing, that any product, merchandise or service is being given "free" in connection with the purchase of any other product, merchandise or service, unless the stated price of the product, merchandise or service required to be purchased in order to obtain said "free" product, merchandise or service is the same or less than the regular price at which the same product, merchandise or service required to be purchased has been sold separately, for a substantial period of time in the recent and regular course of business of respondents, or any of them, in the geographic market or trade area in which the "free" offer is made.

14. Representing, directly or by implication, 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 merchan-

dise or service is free, when the use of the term "free" in relation thereto is prohibited by the provisions of this order.

15. Representing, orally or in writing, directly or by implication, that any product or service is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed, and unless there is delivered to each purchaser, prior to the signing of the sale contract, a written guarantee clearly setting forth all of the terms, conditions and limitations of the guarantee fully equal to the representations, orally or in writing, directly or by implication, made to each such purchaser, and unless all obligations and requirements under the terms of each such guarantee are promptly and fully performed.

16. Advertising any carpeting or floor covering using any unit of measurement not usually and customarily employed in the retail advertising of such products unless the unit of measurement usually and customerily employed in the retail advertising of such products is also given.

17. Advertising any carpeting or floor covering using any unit of measurement which tends to mislead or deceive by exaggerating the size or quantity of carpeting or floor covering offered at the advertised price.

18. 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.

19. 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 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, 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 FORM FOR AN EXPLANATION OF THIS RIGHT.

20. 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 easily detachable, and which shall contain in ten point bold face type the following information and statements in the same language as that used in the contract:

NOTICE OF CANCELLATION

[enter date of transaction]
(Date)

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

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

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

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO TO 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)

21. 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.

22. 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.

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

24. Misrepresenting, directly or by implication, orally or in writing, the buyer's right to cancel.

25. 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.

26. 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.

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

28. 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.

Provided, however, That nothing contained in this order shall relieve respondents, or any of them, 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, or any of them, 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, will make such modifications as may be warranted in the premises.

II

It is further ordered, That respondent Tri-State Carpets, Inc., a corporation, its successors and assigns, and its officers, and Michael J. Lightman and William R. Lightman, individually and as officers of said corporation, and Matthew Mintz, individually and as manager of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, or as an official or employee of any firm or corporation, 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 C.F.R. 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from, and do forthwith cease and desist from contributing to, or aiding or abetting in any manner whatever, any firm or corporation in:

1. Failing, in any credit transaction, to include and to itemize the amount of premiums for credit life and disability insurance as part of the finance charge, unless the amount of such premiums is excluded from the finance charge because of appropriate exercise of the option available pursuant to Section 226.4(a) (5) of Regulation Z.

2. Failing to disclose accurately the "amount financed," and the "finance charge," as required by Sections 226.8(c)(7), and 226.8(c)(8)(i), respectively, of Regulation Z.

3. Failing to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, computed in accordance with the provisions of Section 226.5(b)(1) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

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

5. Failing to use the term "amount financed" to describe the amount of credit extended as required by Section 226.8(c)(7) of Regulation Z.

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

7. 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.

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

It is further ordered, That each of respondents forthwith cease and desist from disseminating, or causing or contributing to the dissemination, or aiding or abetting the dissemination of, any advertisement or solicitation for any product, merchandise or service, by means of newspapers or other printed media, or by television or radio, or by letter or communication, or by any other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, unless such respondent clearly and conspicuously discloses in each advertisement or solicitation the following notice set off from the text of the advertisement or solicitation by a black border:

The Federal Trade Commission has found that we engage in bait and switch advertising; that is, the salesman or representative makes it difficult for you to buy the advertised product, merchandise or service and he attempts to switch you to a higher priced item or service.

One year from the date this order becomes final or at any time thereafter, unless at the time this order becomes final respondents, or any of them, have ceased engaging in the offering for sale, sale or distribution of carpeting or floor coverings, or of any other product, merchandise or service, in which circumstance one year from the date such respondent or respondents, again engage[s], directly or indirectly, in such business, such respondent or respondents, upon showing that the practices prohibited by this order have been discontinued and that the notice provision is no longer necessary to prevent the continuance of such practices, may petition the Commission to waive compliance with this order provision.

It is further ordered, That each of respondents shall maintain for a period of one (1) year following the date this order becomes final, unless at the time this order becomes final such respondent has ceased engaging in the offering for sale, sale or distribution of carpeting or floor coverings, or of any other product, merchandise or service, in which circumstance one year from the date such respondent again engages, directly or indirectly, in such business, copies of all newspaper, radio and television advertisements and solicitations, direct mail and in-store advertisements and solicitations, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or of any other product, merchandise or service, or utilized in the advertising, promotion or sale of carpeting or floor coverings, or of any other product, merchandise or service.

It is further ordered, That each of respondents shall provide, for a period of one (1) year from the date this order becomes final, unless at the time this order becomes final such respondent has ceased engaging in the offering for sale, sale or distribution of carpeting or floor coverings, of any other product, merchandise or service, in which circumstance for a period of one (1) year from the date such respondent again engages, directly or indirectly in such business, each advertising agency utilized by such respondent and each newspaper publishing company, television or radio station, or other advertising medium, which is utilized by such respondent to obtain leads for the sale of carpeting or floor coverings and of any other product, merchandise or service, with a copy of the Commission's news release setting forth the terms of this order.

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 respondents shall forthwith distribute a copy of this order to each of their operating divisions.

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

It is further ordered, That each individual respondent named herein shall promptly notify the Commission of his present business or employment, of the discontinuance of such business or employment, and of his affiliation with any new business or employment. Such notice shall include each individual 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 each of 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.

FINAL ORDER

This matter has come before the Commission on its own motion, for consideration of the question whether the consumer warning provision ordered by the administrative law judge should be adopted as part of

the Commission's cease and desist order. The Commission has determined that this matter is indistinguishable from the matter of *Wilbanks Carpet Specialists, Inc., et al.*, Docket 8933, inasmuch as the record presents insufficient evidence that a consumer warning is a necessary or appropriate means for the termination of the acts or practices complained of or for the prevention of their recurrence. Having declined to order a consumer warning in the *Wilbanks* matter, the Commission has concluded that the same disposition is warranted herein.

Accordingly, the initial decision issured by the judge should be modified in accordance with the foregoing views of the Commission, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision issued by the administrative law judge be modified by striking therefrom the following:

> Those portions of the conclusions of law which concern "consumer warning" relief (at pp. 45-47 [pp. 1112-1113 herein], *sub nom.* "*THE REMEDY*"); and the second "FURTHER ORDERED" paragraph of the order to cease and desist issued by the judge (at p. 57) [p. 1120 herein].

As so modified, the initial decision is hereby adopted.

IN THE MATTER OF

LAWRY'S FOODS, INC.

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

Docket C-2575. Complaint, Oct. 16, 1974—Decision, Oct. 16, 1974

Consent order requiring a Los Angeles, Calif., manufacturer and distributor of salad dressings, seasonings, and other food products, among other things to cease discriminating in paying promotional allowances among competing distributors of its products.

Appearances

For the Commission: *Paul R. Roark.*

For the respondent: *Thomas J. McDermott, Jr., Kadison, Peaelzer, Woodward & Quinn*, Los Angeles, Calif.

COMPLAINT

The Federal Trade Commission, having reason to believe that the party named in the caption hereof, and hereinafter more fully described, has violated and is now violating the provisions of Section 2(d) of the