in individual cases. As the Commission pointed out in *Permanente Cement Co.*, 65 F.T.C. 410, 494 (1964):

> In the interim between the institution of a Trade Regulation Rule proceeding and the actual promulgation of any Trade Regulation Rules, the Commission, if it is to enforce the statutes within its jurisdiction, may be obliged to rely on the case-by-case adjudicative method. Commencement of a rule-making proceeding is not tantamount to declaring a moratorium on all enforcement activities with respect to transactions consummated before the effective date of the rules.

The deceptive practices found to exist in the instant case clearly call for the imposition of a three-day cooling-off period, and we believe the proposed rule-making in this area in no way impairs the Commission's authority to order such a remedy to assure the cessation of these practices.

IN THE MATTER OF

THE CREDIT BUREAU, INC. OF WASHINGTON, D.C., ET AL.

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

Docket C-2113. Complaint, Dec. 7, 1971—Decision, Dec. 7, 1971

Consent order requiring a credit reporting service of Washington, D.C., which includes the operation of a new resident information-reporting service under the franchised name of Welcome Newcomer, to cease securing personal and financial information from new area residents through subterfuge and selling it without their knowledge.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that The Credit Bureau, Inc. of Washington, D.C., a corporation, and Edward F. Garretson, individually, and as manager of The Credit Bureau, Inc. of Washington, D.C., hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent The Credit Bureau, Inc. of Washington, D.C. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal

office located at 1600 Peachtree Street, Northwest, Atlanta, Georgia, and its principal place of business located at 222 Sixth Street, N.W., Washington, D.C.

On or about October 28, 1970, said respondent, The Credit Bureau, Inc. of Washington, D.C., acquired The Credit Bureau, Inc., which was a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 222 Sixth Street, N.W., Washington, D.C., and controlled and dominated its acts and practices until it was dissolved on or about November 18, 1970. The business operations of The Credit Bureau, Inc. were thereafter continued at 222 Sixth Street, N.W., Washington, D.C., by The Credit Bureau, Inc. of Washington, D.C.

Respondent Edward F. Garretson is an individual and was an officer of The Credit Bureau, Inc., and is manager of its corporate successor, repondent The Credit Bureau, Inc. of Washington, D.C. The said individual respondent formulated, directed and controlled the acts and practices of The Credit Bureau, Inc., including the acts and practices hereinafter set forth. He now is primarily responsible for formulating, directing and controlling the acts and practices of the corporate respondent, including those hereinafter set forth.

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, among other things, engaged in the business operation of a credit reporting service, which business operation includes the gathering, dissemination and sale of personal and financial information from residents newly located in the Washington, D.C. metropolitan area. In the course and conduct of their business aforesaid, respondents use the trade name Welcome Newcomer. Individuals designated by respondents as Welcome Newcomer Hostesses make visits to new residents to the area, purportedly to dispense free gifts, familiarize them with area businesses, and make application for charge accounts with firms which do business in the community.

PAR. 3. In the course and conduct of their business, as aforesaid, respondents now cause, and for some time last past have caused, materials relating to newcomers to be delivered to newcomers who are located in Washington, D.C. and in various States of the United States, and information received from said newcomers to be transmitted from their place of business in Washington, D.C. to persons and businesses located in various other States of the United States and Washington, D.C.

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

PAR. 4. In the course and conduct of their business, as aforesaid, and for the purpose of inducing newcomers to supply personal and financial information, respondents employ and engage persons (called hostesses) who call on the newcomers in their homes, and through their hostesses respondents have made, and are now making, to newcomers various statements and representations, directly or by implication, of which the following are typical and illustrative, but not all inclusive thereof:

1. The personal data obtained by the hostess will be used only as proof that the hostess has called upon the newcomer or to make application for charge accounts with firms which do business in the community.

2. The information will be available only to a limited number of persons.

PAR. 5. In truth and in fact:

1. The personal data obtained by the hostess is used for purposes in addition to proof that the hostess has called upon the newcomer or to make application for charge accounts with firms which do business in the community, which purpose is not disclosed to the newcomer.

2. The information is not available only to a limited number of persons, but is generally available to an unlimited number of persons. The information is relayed by the hostesses to respondents, who place the information in their files for use in making credit reports throughout the United States. Furthermore, the personal information is compiled on lists which are available to anyone desiring to purchase this information, which fact is not disclosed to the newcomer.

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

PAR. 6. Furthermore, it was and is an unfair practice and a false, misleading and deceptive act and practice for respondents to induce persons new to the Washington, D.C. metropolitan area to provide them with personal and financial information which would not have been otherwise revealed by such persons had they been informed of the purpose for which the information was being sought. Respondents' subterfuge and failure to disclose the actual purpose for obtaining such information and failure to adequately disclose that the trade name Welcome Newcomer identifies a credit bureau or a service or activity of a credit bureau, constitute a scheme to obtain personal and financial information through deception and misrepresentation.

Therefore, the respondents' methods, as set forth herein, of obtaining personal and financial information were and are unfair acts and practices and were and are false, misleading and deceptive.

PAR. 7. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals gathering personal information of the same general kind and nature as that obtained and used by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices and the failure to disclose the true nature, purpose and use of the information obtained through said visits, has had, and now has, the capacity and tendency to mislead members of the public into the erroneous and mistaken belief that said statements and representations were and are true, and in making contributions of personal and financial information to the respondents by reason of said erroneous and mistaken belief.

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

DECISION AND ORDER

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

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

The Commission, having considered the agreement and having accepted same, and the Agreement Containing Consent Order having thereupon been placed upon public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in

Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent The Credit Bureau, Inc. of Washington, D.C. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Georgia, with its principal office located at 1600 Peachtree Street, Northwest, Atlanta, Georgia, and its principal place of business located at 222 Sixth Street, N.W., Washington, D.C.

Respondent Edward F. Garretson is an individual and manager of the said corporate respondent, The Credit Bureau, Inc. of Washington, D.C. His address is 222 Sixth Street, N.W., Washington, D.C.

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

ORDER

It is ordered, That respondents The Credit Bureau, Inc. of Washington, D.C., a corporation, and its officers, and Edward F. Garretson, individually, and as manager of The Credit Bureau, Inc. of Washington, D.C., and each of said respondents trading as Welcome Newcomer or under any other trade name or names, and respondents' agents, employees and representatives, directly or through any corporate, subsidiary, division or other device, in connection with the solicitation, compilation, use, sale or distribution of personal, financial or other information or debt collections or other service in "commerce" as defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that the personal and financial information obtained by the hostess making the visit for Welcome Newcomer will be used only as proof that the hostess has called upon the newcomer or to make application for charge accounts with firms which do business in the community; or misrepresenting, in any manner, the purposes for obtaining any information from whatever source, or how or the manner in which the information is to be used or revealed to third parties.

2. Obtaining personal and financial information without clearly and conspicuously disclosing at the outset, in each introduction or presentation by hostesses or other representatives of respondents to newcomers that such information, in addition to being submitted in connection with any credit applications signed by the newcomer, will be available to specifically identified organizations

which subscribe to the Welcome Newcomer service and may solicit the newcomer's patronage.

3. Disclosing any personal or financial information furnished by a newcomer for any purposes other than those described in Paragraph 2 without clearly and conspicuously disclosing to the newcomer, prior to obtaining such information, the exact information which will be used, the particular use which will be made of such information, and the parties or entities to whom the information will be made available.

4. Using the trade name "Welcome Newcomer" or any other trade name of substantially similar import or meaning, either orally or in writing, in connection with the collection of personal or financial information for credit rating, debt collection or other purposes without clearly and conspicuously revealing in immediate connection therewith that the name identifies a credit bureau or a service or activity of a credit bureau.

It is further ordered, That respondents shall deliver a copy of this order to cease and desist to all present and future hostesses or other representatives engaged in securing personal and financial information from newcomers, and shall obtain a signed statement acknowledging receipt of said order from each said agent, representative or person receiving a copy of said 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 change in the corporation which may affect compliance obligations arising out of this order.

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

IN THE MATTER OF

SHELTON HEALTH SPA, INC., ET AL.

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

Docket C-2114. Complaint Dec. 7, 1971—Decision, Dec. 7, 1971

Consent order requiring two health clubs of Forest Hills, N.Y., and New York City, to cease violating the Truth in Lending Act by failing, in consumer

credit transactions and advertisements to use the terms "cash price," "unpaid balance of cash price," "amount financed," "finance charge," "total of payments," "deferred payment price," and "annual percentage rate" as required by Regulation Z of the Act.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Shelton Health Spa, Inc., and Shelton Health Club for Women, Inc., corporations and Howard Joseph, individually and as an officer of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts and regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Shelton Health Spa, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 111–20 Queens Boulevard, Forest Hills, New York.

Respondent Shelton Health Club for Women, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 525 Lexington Avenue, New York, New York.

Respondent Howard Joseph, president, is an officer of the corporate respondents. He formulates, directs and controls the consumer credit policies, acts and practices of the corporations, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondents.

PAR. 2. Respondents are now, and for sometime last past have been engaged in the advertising, offering for sale and sale of health club memberships of various types; the financing of the purchase of club memberships by the general public; the collection of members' club dues; and the general management and supervision of said health clubs located in Manhattan and Queens, New York which offer health club memberships to and accept said memberships from residents of the State of New York and other States of the United States.

PAR. 3. In the ordinary course 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. 4. Subsequent to July 1, 1969, in the ordinary course of their business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, respondents have caused and are causing their customers to enter into contracts for the sale of respondents' services in the form of health club memberships. On these contracts, hereinafter referred to as "the contract," respondents provide certain consumer credit cost information. Respondents do not provide these customers with any other consumer credit cost disclosures.

PAR. 5. By and through the use of the contract, set forth in Paragraph Four, respondents have:

1. Failed to obtain new contract forms or to alter their existing stock of contract forms prior to, during, and subsequent to the period beginning July 1, 1969 and ending December 31, 1969, as required by Section 226.6(k) of Regulation Z.

2. Failed to use the term "cash price" to describe the price which the respondents offer, in the ordinary course of business, to sell for cash the health club memberships which are the subject of the consumer credit transactions, as required by Section 226.8(c)(1) of Regulation Z.

3. Failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the cash downpayment, as required by Section 226.8(c)(3) of Regulation Z.

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

5. Failed to use the term "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.

6. 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.

7. Failed to use the term "deferred payment price" to describe the sum of the cash price, all other charges which were included in the amount financed but which were not part of the finance charge, and the finance charge, as required by Section 226.8(c)(8)(ii) of Regulation Z.

8. Failed to express the finance charge as an annual percentage rate, using the term "annual percentage rate" as required by Section 226.8(b)(2) of Regulation Z.

9. Failed to disclose and identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation and failed to provide a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be

credited to the obligation or refunded to the customer, as required by Section 226.8(b)(7) of Regulation Z.

PAR. 6. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Shelton Health Spa, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 111-20 Queens Boulevard, Forest Hills, New York.

Respondent Shelton Health Club for Women, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at 525 Lexington Avenue, New York, New York.

Respondent Howard Joseph, president, is an officer of said corporations. He formulates, directs and controls the consumer credit policies,

acts and practices of said corporations and his address is the same as that of said corporations.

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

ORDER

It is ordered, That respondents Shelton Health Spa, Inc., and Shelton Health Club for Women, Inc., and Howard Joseph, individually and as an officer of said corporations, and respondents' agents, representatives, and employees, directly or through any corporate or other device, in connection with any extension of consumer credit, as "consumer credit" is defined in Regulation Z (12 CFR § 226) of the Truth in Lending Act (Public Law 90–321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Failing to use the term "cash price" to describe the price at which respondents offer, in the regular course of business, to sell for cash the health club memberships which are the subject of the credit sale, as required by Section 226.8(c) (1) of Regulation Z.

2. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the cash downpayment, as required by Section 226.8(c) (3) of Regulation Z.

3. 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.

4. Failing to use the term "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c) (8) (i) of Regulation Z.

5. 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(6) (3) of Regulation Z.

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

7. Failing to express the finance charge as an annual percentage rate, using the term "annual percentage rate" as required by Section 226.8(b) (2) of Regulation Z.

8. Failing to identify the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation and failing to provide a statement of the amount or method of computation of any charge that may be deducted from the amount of any rebate of such unearned finance charge that will be credited to the

customer, as required by Section 226.8(b)(7) of Regulation Z.

9. Failing, in any consumer credit transaction or advertisement, to make all disclosures in the manner, form, and amount required by Sections 226.6, 226.7, 226.8, 226.9, and 226.10 of Regulation Z.

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

It is further ordered, That respondents notify the Commission at least thirty (30) days prior to any proposed change in corporate respondent's business organization such as dissolution; assignment or sale resulting in the emergence of a successor business, corporate or otherwise; the creation of subsidiaries; any change of business name or trade style; or any other change which may affect compliance obligations arising out of the order.

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

IN THE MATTER OF

THREE "B" MOTORS, INC., ET AL.

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

Docket C-2115. Complaint, Dec. 7, 1971—Decision, Dec. 7, 1971

Consent order requiring two used car dealers of Miami, Fla., to cease violating the Truth in Lending Act by failing, in consumer credit transactions, to make all disclosures in the manner, form, and amount required by Regulation Z of the Act.

COMPLAINT

Pursuant to the provisions of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Three "B" Motors, Inc., a corporation, and Joseph C. Barger, individ-

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

PARAGRAPH 1. Respondent Three "B" Motors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at 501 N.W. 36th Street, Miami, Florida.

Respondent Joseph C. Barger is manager of the corporate respondent. He formulates, directs and controls the policy, acts and practices of the corporation, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

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

PAR. 3. 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. 4. Subsequent to July 1, 1969, respondents, in the ordinary course of business as aforesaid, and in connection with consumer credit sales, as "consumer credit" and "credit sale" are defined in Regulation Z, have caused and are causing customers to execute a binding Used Car Order Contract, hereinafter referred to as the "Order Contract."

Respondents have caused and are causing customers to also sign a Florida Conditional Sales Contract, hereinafter referred to as the "Sales Contract." Respondents do not provide these customers with any other consumer credit cost disclosures.

By and through the use of the Order Contract and the Sales Contract, respondents:

1. Fail to use the term "cash price" to describe the price at which respondents offer, in the regular course of business, to sell the vehicle for cash, as required by Section 226.8(c)(1) of Regulation Z.

2. Fail to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

3. Fail to use the term "trade-in" to describe the downpayment in property made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

4. Fail to use the term "total downpayment" to describe the sum of

the cash downpayment and the trade-in, as required by Section 226.8 (c)(2) of Regulation Z.

5. Fail to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

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

7. Fail to use the term "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.

8. Fail 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.

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

10. Fail to disclose the number of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

11. Fail to use the term "total of payments" to describe the dollar amount of the sum of payments scheduled to repay the indebtedness as required by Section 226.8(b)(3) of Regulation Z.

12. Retain a security interest in property in connection with the credit sale and fail to describe the type of security interest as required by Section 226.8(b)(5) of Regulation Z.

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

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

DECISION AND ORDER

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

tion of the Truth in Lending Act and the implementing regulation promulgated thereunder, and the Federal Trade Commission Act; and

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

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

1. Respondent Three "B" Motors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at 501 N.W. 36th Street, Miami, Florida.

Respondent Joseph C. Barger is an individual and manager of Three "B" Motors, Inc. He directs, formulates and controls the acts and practices of the respondent corporation including the acts and practices under investigation.

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

ORDER

It is ordered, That respondents Three "B" Motors, Inc., a corporation, and its officers, and Joseph C. Barger, individually and as manager of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with any extension of consumer credit or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR § 226) of the Truth in Lending Act (Public Law 90–321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. Failing to use the term "cash price" to describe the price at which respondents, in the regular course of business offer to sell for cash the property or service which is the subject of the credit sale, as required by Section 226.8(c)(1) of Regulation Z.

2. Failing to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

3. Failing to use the term "trade-in" to describe the downpayment in property made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

4. Failing to use the term "total downpayment" to describe the sum of the cash downpayment and the trade-in, as required by Section 226.8(c)(2) of Regulation Z.

5. Failing to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment, as required by Section 226.8(c)(3) of Regulation Z.

6. 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.

7. Failing to use the term "finance charge" to describe the sum of all charges required by Section 226.4 of Regulation Z to be included therein, as required by Section 226.8(c)(8)(i) of Regulation Z.

8. 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.

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

10. Failing to disclose the number of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

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

12. Failing to describe the type of security interest, as required by Section 226.8(b)(5) of Regulation Z.

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

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

It is further ordered, That respondents deliver a copy of this order to cease and desist to each operating division and to all present and future personnel of respondents engaged in the consummation of any extension of consumer credit and that respondents secure a signed statement acknowledging receipt of said order from each such person.

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

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

IN THE MATTER OF

ABE KAIRY TRADING AS KAIRY'S

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

Docket C-2116. Complaint, Dec. 7, 1971—Decision, Dec. 7, 1971

Consent order requiring a Miami Beach, Fla., seller of novelty items and wearing apparel, including ladies' scarves, to cease marketing dangerously flammable products in violation of the Flammable Fabrics Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Abe Kairy, an individual trading as Kairy's hereinafter referred to as respondent has violated the provisions of said Acts and the rules and regulations promulgated under the Flammable Fabrics Act, as amended, 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 Abe Kairy is an individual trading as Kairy's. He is engaged in the sale of novelty and souvenir items and wearing apparel, including but not limited to ladies' scarves. The business address of respondent is 1144 Marseille Drive, Miami Beach, Florida.

PAR. 2. Respondent is now and for some time last past has been engaged in the sale and offering for sale, in commerce, and has introduced, delivered for introduction, transported and caused to be transported in commerce, and has sold or delivered after sale or shipment in commerce, products, as the terms "commerce" and "product" are defined in the Flammable Fabrics Act, as amended, which fail to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the Flammmable Fabrics Act, as amended.

Among such products mentioned hereinabove were ladies' scarves.

PAR. 3. The aforesaid acts and practices of respondent were and are in violation of the Flammable Fabrics Act, as amended, and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

The Commission having thereafter considered the matter and hav-

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

1. Respondent Abe Kairy is an individual trading as Kairy's with his office and principal place of business located at 1144 Marseille Drive, Miami Beach, Florida.

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

ORDER

It is ordered, That respondent Abe Kairy, individually and trading as Kairy's, or under any other name or names, and respondent's representatives, agents and employees, directly or through any corporate or other device, do forthwith cease and desist from selling or offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, any product, fabric, or related material; or selling or offering for sale, any product made of fabric or related material which has been shipped or received in commerce, as "commerce," "product," "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which product, fabric, or related material fails to conform to an applicable standard or regulation issued, amended or continued in effect, under the provisions of the aforesaid Act.

It is further ordered, That respondent herein notify all of his customers who have purchased or to whom have been delivered the products which gave rise to the complaint, of the flammable nature of said products, and effect the recall of said products from such customers.

It is further ordered, That respondent herein either process the products which gave rise to the complaint so as to bring them into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products.

It is further ordered, That respondent herein shall, within ten (10) days after service upon him of this order, file with the Commission a special report in writing setting forth the respondent's intentions as

to compliance with this order. This special report shall also advise the Commission fully and specifically concerning (1) the identity of the product which gave rise to the complaint, (2) the number of said products in inventory, (3) any action taken and any further actions proposed to be taken to notify customers of the flammability of said products and effect the recall of said products from customers, and of the results thereof, (4) any disposition of said products since March 11, 1971, and (5) any action taken or proposed to be taken to bring said products into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products and the results of such action. Such report shall further inform the Commission as to whether or not respondent has in inventory any product, fabric, or related material having a plain surface and made of paper, silk, rayon and acetate, nylon and acetate, rayon, cotton or any other material or combinations thereof in a weight of two ounces or less per square yard, or any product, fabric, or related material having a raised fiber surface. Respondent shall submit samples of not less than one square yard in size of any such product, fabric, or related material with this report.

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

IN THE MATTER OF

IRVIN HOWARD LASWELL DOING BUSINESS AS HOUSECRAFT OF EVANSVILLE

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

Docket C-2117. Complaint, Dec. 16, 1971—Decision, Dec. 16, 1971

Consent order requiring a home improvement firm of Evansville, Ind., to cease using false pricing, savings, and "free" claims and other misrepresentations in promoting the sale of its products and installations, and to cease transferring its credit customers' contracts of indebtedness to third parties, unless all rights of its customers are preserved.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal

Trade Commission, having reason to believe that Irvin Howard Laswell, an individual trading and doing business as Housecraft of Evansville, a sole proprietorship, hereinafter referred to as respondent, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Irvin Howard Laswell is an individual trading and doing business as Housecraft of Evansville with its principal office and place of business located at 2311 East Division Street, Evansville, Indiana.

PAR. 2. Respondent is now, and for some time last past has been, engaged in the advertising, offering for sale, sale and distribution of residential steel siding, storm windows, storm doors and various other home improvement products to the public and in the installation thereof.

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

PAR. 4. In the course and conduct of his business and for the purpose of inducing the purchase of his home improvement products and installations, respondent has made numerous statements and representations, through oral statements made to prospective purchasers by his salesmen or representatives, in newspaper advertisements, and in direct mail advertising, circulars and other promotional material, respecting the nature of his offer and his business, price, guarantee, and the quality of his product.

Typical and illustrative of respondent's oral statements and published advertising representations, but not all inclusive thereof, are the following:

25% Fuel Saving. We insure your installation. You save 25% in fuel costs or get the difference in cash

USS—United States Steel

MAIL THIS FREE GIFT COUPON TODAY

Offer Not Good After Three Days. If this coupon is returned within three days, you will receive this beautiful dinnerware absolutely free!

Your home will be used as a Model Home Demonstrator.

This siding is unconditionally guaranteed.

This siding is guaranteed against everything for the lifetime of the house.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning not specifically set out herein, and through oral statements made by his salesmen and representatives, respondent has represented, directly or by implication, that:

1. Customers would have reduced fuel costs of twenty-five percent after having respondent's siding installed on their homes.

2. Respondent's siding was manufactured by the United States Steel Company.

3. All persons who mailed the free gift coupon to respondent would receive a gift without charge.

4. Homes of prospective purchasers have been specially selected as model homes for the installation of respondent's siding; after installation such homes would be used for demonstration and advertising purposes by respondent; and, as a result of allowing their homes to be used as models, purchasers would be granted reduced prices or would receive allowances, discounts or commissions.

5. Respondent's siding materials and installations are unconditionally guaranteed in every respect without condition or limitation.

PAR. 6. In truth and in fact:

1. Customers do not have their fuel costs reduced twenty-five percent after having respondent's siding installed on their homes.

2. Respondent's siding is not manufactured by the United States Steel Company.

3. All persons who mailed the free gift coupon to respondent did not receive a gift.

4. Homes of prospective purchasers are not specially selected as model homes for installations of respondent's siding; after installations, such homes are not used for demonstration and advertising purposes by respondent; and purchasers, as a result of allowing their homes to be used as models, are not granted reduced prices, nor did they receive allowances, discounts or commissions.

5. Respondent's siding materials and installations are not unconditionally guaranteed in every respect without condition or limitation. Such guarantee as may be provided is subject to numerous terms, con-

ditions and limitations, and fails to set forth the nature and extent of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder. Furthermore, in a substantial number of cases, respondent or his salesmen fail to furnish any written guarantee to the customer.

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

PAR. 7. In the further course and conduct of his business, and in furtherance of a sales program for inducing the purchase of his residential siding materials and installations, respondent and his salesmen or representatives have engaged in the following additional unfair and false, misleading and deceptive acts and practices:

In a substantial number of instances and in the usual course of his business, respondent sells and transfers his customers' obligations, procured by the aforesaid unfair, false, misleading and deceptive means, to various financial institutions. In any subsequent legal action to collect on such obligations, these financial institutions or other third parties, as a general rule, have available and can interpose various defenses which may cut off certain valid claims customers may have against respondent for his failure to perform or for certain other unfair, false, misleading or deceptive acts and practices.

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

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

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

PAR. 10. The aforesaid acts and practices of respondent as herein alleged were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Decision and Order

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

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

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

1. Respondent Irvin Howard Laswell is an individual trading and doing business as Housecraft of Evansville with its office and principal place of business located at 2311 East Division Street, Evansville, Indiana.

Respondent Irvin Howard Laswell, formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of the sole proprietorship.

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

ORDER

It is ordered, That respondent Irvin Howard Laswell, an individual trading and doing business as Housecraft of Evansville or under any other name or names, and respondent's agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sales, distribution and installation of residential siding or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

2. Representing, directly or by implication, that purchasers of respondent's residential siding materials will realize a substantial savings on their heating bills; or representing, in any manner, the amount of savings afforded to respondent's customers on their heating bills.

3. Representing, directly or by implication, that respondent's siding materials are manufactured by United States Steel Corporation; or misrepresenting, in any manner, the origin of manufacturer or respondent's products.

4. Representing, directly or by implication, that persons will receive a gift of a specified article of merchandise, or anything of value; or misrepresenting, in any manner, that free gifts will be given to persons who return "free gift" coupons to respondent.

5. Representing, directly or by implication, that the home or any of respondent's customers or prospective customers has been selected to be used or will be used as a model home, or otherwise, for advertising or sales purposes.

6. Representing, directly or by implication, that any allowance, discount or commission is granted by respondent to purchasers in return for permitting the premises on which respondent's products are installed to be used for model home or demonstration purposes.

7. Representing, directly or by implication, that any of respondent's products and installations are 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 in immediate conjunction therewith; or making any direct or implied representation that any of respondent's products or installations are guaranteed unless in each instance a written guarantee is given to the purchaser containing provisions fully equivalent to those contained in such representations and unless respondent promptly fulfills all of his obligations under the represented terms of such guarantee.

8. Assigning, selling or otherwise transferring respondent's notes, contracts or other documents evidencing a purchaser's indebtedness, unless any rights or defenses which the purchaser has and may assert against respondent are preserved and may be asserted against any assignee or subsequent holder of such note, contract or other such documents evidencing the indebtedness.

9. Failing to include the following statement clearly and conspicuously on the face of any note, contract or other instrument of indebtedness executed by or on behalf of respondent's customers:

NOTICE

Any holder takes this instrument subject to the terms and conditions of the contract which gave rise to the debt evidenced hereby, any contractual provision or other agreement to the contrary notwithstanding.

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

IN THE MATTER OF

GUS KROESEN, INC., ET AL.

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

Docket C-2118. Complaint, Dec. 16, 1971—Decision, Dec. 16, 1971

Consent order requiring a California based jewelry wholesaler and its affiliated firms to cease using deceptive advertising to induce the sale of their jewelry; and to cease violating the Truth in Lending Act by failing, in consumer credit transactions and advertisements, to make all disclosures in the manner, form, and amount required by Regulation Z of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Gus Kroesen, Inc., a corporation; National Diamond Sales, Inc., a corporation; Gus Kroesen Naval Tailor, Inc., a corporation; G. Kroesen Jewelers of Augusta, Inc., a corporation; and Joseph B. Kroesen and Edward G. Koch, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Acts, and of the 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. Respondents Gus Kroesen, Inc., National Diamond

Sales, Inc., Gus Kroesen Naval Tailor, Inc., and G. Kroesen Jewelers of Augusta, Inc., are corporations organized, existing, and doing business under and by virtue of the laws of the State of California.

Respondents Gus Kroesen, Inc., National Diamond Sales, Inc., and Gus Kroesen Naval Tailor, Inc., have their principal offices and places of business located at 401–15th Street, Oakland, California. Respondent G. Kroesen Jewelers of Augusta, Inc., has its principal office and place of business located at 613 Broad Street, Augusta, Georgia. Respondent Joseph B. Kroesen owns, directly or indirectly, majority ownership in each of the corporate respondents.

Respondent National Diamond Sales, Inc., is trading and doing business as National Diamond Sales and Jewelry Sales Company. Respondent Gus Kroesen Naval Tailor, Inc., is trading and doing business as Gus Kroesen Navy Tailor and Military Diamond Sales. Respondent G. Kroesen Jewelers of Augusta, Inc., is trading and doing business as Gus Kroesen Jewelers and G. Kroesen Jewelers Inc.

Respondent Joseph B. Kroesen is an individual and is vice president of respondent Gus Kroesen, Inc. He is also president of respondents National Diamond Sales, Inc., and Gus Kroesen Naval Tailor, Inc. He formulates, directs, and controls the policy, acts, and practices of the corporate respondents, including the acts and practices hereinafter set forth. His business address is 401–15th Street, in the city of Oakland, State of California.

Respondent Edward G. Koch is an individual and is president of respondent Gus Kroesen, Inc. He is also president of G. Kroesen Jewelers of Augusta, Inc. He also participates in formulating, directing, and controlling the policy, acts, and practices of the corporate respondents, including the acts and practices hereinafter set forth. His business address is 401–15th Street, in the city of Oakland, State of California.

PAR. 2. Respondent Gus Kroesen, Inc., is engaged in the nationwide distribution of jewelry and watches through the other above named corporate respondents, which are engaged in the offering for sale, sale and distribution of jewelry and watches to the public through catalog, magazine, and comic book advertising and through retail stores located in the States of Georgia, Illinois, Mississippi, and Missouri. Revenues from said sales are remitted by the above-named corporate respondents, so engaged, to respondent Gus Kroesen, Inc. which dominates, controls, furnishes the means, instrumentalities, services and facilities for, and condones, approves and accepts the pecuniary and other benefits flowing from the acts, practices, and policies of said corporate respondents hereinafter set forth.

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 and conduct of their business, respondents Gus Kroesen, Inc., National Diamond Sales, Inc., Gus Kroesen Naval Tailor, Inc., Joseph B. Kroesen, and Edward G. Koch now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of California to purchasers thereof located in various other States of the United States and have transmitted and received and caused to be transmitted and received in the course of selling, delivering, and collecting payment for said products among and between the several States of the United States, payment books, checks, letters, payment schedules, and various other kinds of commercial paper and documents; and in addition, respondents advertise in magazines and comic books of general circulation which are distributed across state lines and by mailing catalogs across state lines to prospective customers. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have represented and now represent, in catalog, comic book, and magazine advertising, that:

1. Certain rings contain stones that are "blue star sapphire" or "birthstone."

2. Certain rings contain stones that are "genuine Linde blue star sapphire" or "genuine black star," thereby implying that Linde rings are genuine star sapphires.

3. Certain rings are "10 K solid gold."

4. Cultured pearls are "genuine cultured pearls," thereby implying that cultured pearls are genuine pearls.

5. Certain watches are "waterproof."

PAR. 5. In truth and in fact:

1. None of respondents' rings contain blue star sapphires or birthstones.

2. Linde blue and black star sapphires are not genuine star sapphires.

3. Certain of respondents' rings which are represented as "10 K solid gold" are not composed throughout of gold alloy but contain a concealed hollow center.

4. None of respondents' cultured pearls are genuine pearls.

5. None of respondents' watches are waterproof.

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

PAR. 6. In the further course and conduct of their business, and for the purpose of inducing the purchase of their products, proposed respondents have represented that certain of their watches have a "gold filled case" without designating the karat fineness of the plating. The practice of using the term "gold filled" in describing watch cases without disclosing the karat fineness of the gold alloy plating of such cases in immediate conjunction therewith, is deceptive and confusing to the consuming public.

PAR. 7. In the further course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have:

1. Stated in their advertising that their diamond rings have a "Lifetime Trade-in Guarantee" and are sold with a Guarantee Bond but fail to reveal the limitations and conditions of the guarantee including a disclosure of the manner in which the guarantor will perform.

2. Featured in their advertising depictions of rings, diamonds, and other stones in greater than actual size without a clear and conspicuous disclosure of the fact that the depictions are enlargements.

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

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

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

PAR. 10. The aforesaid acts and practices of respondents as herein alleged were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violations 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. 11. In the ordinary course and conduct of their business, as aforesaid, respondents Gus Kroesen, Inc., National Diamond Sales, Inc., Gus Kroesen Naval Tailor, Inc., G. Kroesen Jewelers of Augusta, Inc., Joseph B. Kroesen, and Edward G. Koch regularly extend, and for some time in the past have regularly extended, 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. 12. Subsequent to July 1, 1969, respondents Gus Kroesen, Inc., National Diamond Sales, Inc., Gus Kroesen Naval Tailor, Inc., Joseph B. Kroesen, and Edward G. Koch, in the ordinary course and conduct of their business and in connection with credit sales as "credit sales" is defined in Regulation Z, have caused and induced and are causing and inducing, their customers to execute order blanks contained in catalogs, magazines, and comic books in response to which the respondents send the customers by mail a payment schedule on which the respondents provide certain consumer credit cost information. Respondents do not provide these customers with any other consumer credit cost disclosures.

By and through the use of the payment schedule respondents:

1. Fail to furnish the customer with a duplicate of a statement on which the creditor is identified and which identifies the transaction as required by Section 226.8(a)(2) of Regulation Z.

2. Fail to use the term "cash price" to describe the price at which respondents offer, in the regular course of business, to sell for cash the property or services which are the subject of the credit sale as required by Section 226.8(c)(1) of Regulation Z.

3. Fail to use the term "trade-in" to describe the downpayment in property made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

4. Fail to use the term "unpaid balance of cash price" to describe the difference between the cash price and the "trade-in" as required by Section 226.8(c)(3) of Regulation Z.

5. Fail 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. Fail to disclose the sum of the payments scheduled to repay the

indebtedness, and to describe that sum as the "total of payments," as required by Section 226.8(b)(3) of Regulation Z.

7. Fail to disclose the sum of the cash price and all charges which are included in the amount financed but which are not part of a 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. Fail to disclose the number of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

PAR. 13. In the ordinary course of their business as aforesaid, respondents cause to be published advertisements of their goods and services, as "advertisement" is defined in Regulation Z. These advertisements aid, promote, or assist directly or indirectly extensions of consumer credit in connection with the sale of these goods and services. By and through the use of the advertisements, respondents:

State that no downpayment is required, the amount of installment payments, and that there is no charge for credit without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

(a) The cash price;

(b) The amount of the downpayment required or that no downpayment is required, as applicable;

(c) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(d) The deferred payment price.

PAR. 14. Subsequent to July 1, 1969, respondents Gus Kroesen, Inc., National Diamond Sales, Inc., Gus Kroesen Naval Tailor, Inc., G. Kroesen Jewelers of Augusta, Inc., Joseph B. Kroesen, and Edward G. Koch, in the ordinary course and conduct of their business and in connection with credit sales as "credit sales" is defined in Regulation Z, have caused and induced and are causing and inducing their retail store customers to execute retail installment contracts, hereinafter referred to as "the contract."

By and through use of the contract, respondents:

1. Fail to use the term "cash price" to describe the price at which respondents offer, in the regular course of business, to sell for cash the property or services which are the subject of the credit sale, as required by Section 226.8(c)(1) of Regulation Z.

2. Fail to use the term "cash downpayment" to describe the downpayment in money made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

3. Fail to use the term "trade-in" to describe the downpayment in

property made in connection with the credit sale as required by Section 226.8(c)(2) of Regulation Z.

4. Fail to disclose the sum of the "cash downpayment" and the "trade-in," and to describe that sum as the "total downpayment," as required by Section 226.8(c)(2) of Regulation Z.

5. Fail to use the term "unpaid balance of cash price" to describe the difference between the cash price and the total downpayment as required by Section 226.8(c)(3) of Regulation Z.

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

7. Fail to disclose the "finance charge," using that term, in credit transactions where finance charges are imposed as required by Sections 226.4, 226.6(a), and 226.8(c)(8)(i) of Regulation Z.

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

9. Fail 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.

10. Fail to disclose the "annual percentage rate," using that term, in credit transactions where finance charges are imposed as required by Sections 226.5, 226.6(a), and 226.8(b)(2) of Regulation Z.

11. Fail to disclose the number of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

PAR. 15. 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 thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

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

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement

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

The Commission having considered the agreement and having accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, and having duly considered the comments filed thereunder pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order.

1. Respondents Gus Kroesen, Inc., National Diamond Sales, Inc., and Gus Kroesen Naval Tailor, Inc., are corporations organized, existing, and doing business under and by virtue of the laws of the State of California, with their offices and principal places of business located at 401–15th Street, in the city of Oakland, State of California.

Respondent G. Kroesen Jewelers of Augusta, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 613 Broad Street, in the city of Augusta, State of Georgia.

Respondent Joseph B. Kroesen is vice president of Gus Kroesen, Inc., and president of National Diamond Sales, Inc., and Gus Kroesen Naval Tailor, Inc. Respondent Edward G. Koch is president of Gus Kroesen, Inc., and G. Kroesen Jewelers of Augusta, Inc. They formulate, direct and control the policies, acts and practices of said corporations and their address is 401–15th Street, in the city of Oakland, State of California.

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

ORDER

I

It is ordered, That respondents Gus Kroesen, Inc., a corporation, and its officers; National Diamond Sales, Inc., a corporation, and its officers; Gus Kroesen Naval Tailor, Inc., a corporation, and its officers; and Joseph B. Kroesen and Edward G. Koch, individually and as officers of any of said corporations, and respondents' representatives, agents, and employees, directly or through any corporate or other

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

1. Representing, directly or by implication, in describing jewelry containing synthetic imitation, or simulated stones that the said jewelry contains stones that are "blue star sapphire," "birthstone," or any other precious or semiprecious stone, unless such descriptive wording is immediately preceded with equal conspicuity, by the word "synthetic," or by the word "imitation," or "simulated," whichever is applicable or by some other word or phrase of like meaning, so as clearly to disclose the nature of such product and the fact that it is not a natural stone.

2. Using the words "real," "genuine," "natural," or similar terms as descriptive of such stones as the Linde blue and black star sapphires or other stones which are manufactured or produced synthetically or artificially.

3. Using the word "solid," whether in connection with karat fineness or otherwise, to describe jewelry or any part thereof which contains a concealed hollow center or interior, and from failing to clearly disclose the fact that such jewelry contains a hollow center or interior.

4. Using the words "real," "genuine," "natural," or similar terms as descriptive of cultured pearls or any other article or articles which are artificially cultured or cultivated.

5. Representing that their watches are "waterproof."

6. Using the term "gold filled" in describing watchcases unless the term "gold filled" or an abbreviation thereof is immediately preceded by a correct designation of the karat fineness of the gold alloy of which the plating is composed.

7. Representing, directly or by implication, that any of respondents' products are 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 in immediate conjunction therewith; or making any direct or implied representation that any of respondents' products are guaranteed unless in each instance a written guarantee is given to the purchaser containing provisions fully equivalent to those contained in such representations and unless respondent promptly fulfills all of his obligations under the represented terms of such guarantee.

8. Representing, directly or by implication, through the use of

any picture, illustration or other depiction that rings, diamonds, or other stones are greater than actual size unless the said picture, illustration, or depiction is accompanied by a clear and conspicuous disclosure of the fact that the picture, illustration, or depiction is an enlargement.

II

It is further ordered, That respondents Gus Kroesen, Inc., a corporation, and its officers; National Diamond Sales, Inc., a corporation, and its officers; Gus Kroesen Naval Tailor, Inc., a corporation, and its officers; G. Kroesen Jewelers of Augusta, Inc., a corporation, and its officers; and Joseph B. Kroesen and Edward G. Koch, individually and as officers of any of said corporations, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with any extension of consumer credit, or any advertisement to aid, promote, or assist, directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement," are defined in Regulation Z (12 CFR § 226) of the Truth in Lending Act (Public Law 90–321, 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from:

1. In connection with the disclosure statements made in conjunction with mail order sales as required by Section 226.8(a)(b)(c) of Regulation Z,

(a) Failing to furnish the customer with a duplicate of a statement on which the creditor is identified and which identifies the transaction as required by Section 226.8(a)(2) of Regulation Z.

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

(c) Failing to disclose the amount of any downpayment in property and to describe that amount as the "trade-in," as required by Section 226.8(c)(2) of Regulation Z.

(d) Failing to disclose the difference between the "cash price" and the "trade-in," and to describe that difference as the "unpaid balance of cash price," as required by Section 226.8(c)(3) of Regulation Z.

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

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

(g) Failing to disclose the sum of the cash price and all charges which are included in the amount financed but which are not part of a 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.

(h) Failing to disclose the number of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

2. Stating, in any advertisement, that no downpayment is required, the amount of installment payments, or that there is no charge for credit, without also stating all of the following items, in terminology prescribed under Section 226.8 of Regulation Z, as required by Section 226.10(d)(2) thereof:

(a) The cash price;

(b) The amount of the downpayment required or that no downpayment is required, as applicable;

(c) The number, amount, and due dates or period of payments scheduled to repay the indebtedness if the credit is extended;

(d) The deferred payment price.

3. In connection with the disclosure statements made in conjunction with retail store sales as required by Section 226.8(b)(c) of Regulation Z.

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

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

(c) Failing to disclose the amount of any downpayment in property and to describe that amount as the "trade-in," as required by Section 226.8(c)(2) of Regulation Z.

(d) Failing to disclose the sum of the "cash downpayment" and the "trade-in" and to describe that sum as the "total downpayment," as required by Section 226.8(c)(2) of Regulation Z.

(e) Failing to disclose the difference between the "cash price" and the "total downpayment," and to describe that difference as the "unpaid balance of cash price," as required by Section 226.8(c)(3) of Regulation Z.

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

(g) Failing to disclose the "finance charge," using that term, in credit transactions where finance charges are imposed as required by Sections 226.4, 226.6(a), and 226.8(c)(8)(i) of Regulation Z.

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

(i) 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.

(j) Failing to disclose the "annual percentage rate," using that term, in credit transactions where finance charges are imposed as required by Sections 226.5, 226.6(a), and 226.8(b)(2) of Regulation Z.

(k) Failing to disclose the number of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

4. 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 in the manner, form and amount required by Sections 226.6, 226.8, 226.9 and 226.10 of Regulation Z.

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

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

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

IN THE MATTER OF

FILM CORPORATION OF AMERICA, ET AL.

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

Docket C-2119. Complaint, Dec. 17, 1971—Decision, Dec. 17, 1971

Consent order requiring a Pennsylvania mail order photofinishing firm to cease distributing "free" color film, coupled with a photofinishing offer, to the public through misrepresentations.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Film Corporation of America, and Ames Advertising Agency, Inc., corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Film Corporation of America is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its executive offices located at The Benjamin Fox Pavilion, Foxcroft Square, in Jenkintown, Commonwealth of Pennsylvania. Respondent corporation also maintains processing and warehouse facilities in the city of Philadelphia, said addresses being S.W. Corner 20th and Allegheny Avenue, 4901 Stenton Avenue, and the Philadelphia Industrial Park. Film Corporation of America has used and continues to use the following trade names: National Brand Film, Famous Brand Film, Famous Brand, Famous-Brand 36 Pictures Photo Labs, Triple-Print Processing Laboratories, Famous Brand Triple-Print Laboratories, Photomation Film Labs, and Triple-Print Laboratories.

Ames Advertising Agency, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its principal office and place of business

located at The Benjamin Fox Pavilion, Foxcroft Square, in Jenkintown, Commonwealth of Pennsylvania. Ames Advertising Agency, Inc., is a wholly-owned subsidiary of Film Corporation of America.

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

PAR. 2. Respondent Film Corporation of America is now, and for some time last past has been, engaged in the advertising, offering for sale, sale, distribution and mail order photofinishing, *i.e.*, the developing, printing and processing of color negatives and black and white photographic film sold for amateur use. Respondent's film, which is predominantly of foreign manufacture, is now, and for some time last past has been, advertised, offered for sale, sold and distributed under the trade name "Famous Brand."

Respondent Ames Advertising Agency, Inc., is now, and for some time last past has been, an advertising agency of Film Corporation of America, and now prepares, designs and places, and for some time last past has prepared, designed and placed, respondent Film Corporation of America's newspaper and magazine advertisements and related direct mail promotional literature and mailers, including but not limited to the advertising referred to herein, to promote the sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of color film and the solicitation of mail order photofinishing business.

PAR. 3. In the course and conduct of its business as aforesaid, respondent Film Corporation of America now causes, and for some time last past has caused, its color negative photographic film, coupled with a film processing offer, when distributed, to be mailed from its place of business in the Commonwealth of Pennsylvania to prospective purchasers located in the various States of the United States and in the District of Columbia, and maintains and at all times mentioned herein has maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business and for the purpose of distributing a cartridge or roll of film and inducing the mail order finishing of aforesaid photographic film, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers and magazines disseminated through the mails and by other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, coupon solicitation requests for film attached to general merchandise, direct mail and in-store solicitation of literature and promotional material.

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

Absolutely FREE sample roll of color film—Nothing To Buy No Obligation.

A Startling Introductory Offer.

Now You Can Deal Direct With America's Largest, Independent Processing Company Employing Over 1000 Technicians.

For Fast 24–48 Hour Service Mail To P.O. Box Nearest Your Home.

GUARANTEE If you are not 100% satisfied with your finished pictures your money will be promptly refunded.

Famous Brand Film.

CAUTION—This Film Can Only Be Processed On Our Special Equipment For Special Film & Process Combination.

Exclusive Triple Print Process

Be a hero * * * Introduce them to exclusive Triple-Print! It's a tremendous new patented Color Film and Processing breakthrough.

Kodak Equipment Used Exclusively.

12 Portrait Size Photos Bonus 1.

Bonus 2—Free 24 Extra Prints—24 additional wallet size prints * * * at no extra cost to you (2 duplicates of each printable negative on a 12 exposure roll).

New Roll of Color Film—Bonus 3—No Charge.

Never Buy Film Again!

27 Locations from Coast-to-Coast.

Remember! We Refund You To The Penny For All Unprintable Negatives Or If You Send Us Too Much Money.

No Middle Man Mark-up and our exclusive Triple Print Process gives you $7.53 in FREE bonus extras everytime we develop your film.

Famous Brand.

Mail this valuable coupon to get FREE Color film for your Kodak or other camera.

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

1. There are no gimmicks involved, no strings are attached, and no obligations of any kind are incurred as a result of consumer participation in the FREE color film offer.

2. The FREE sample roll of color film is an introductory offer.

3. Respondent Film Corporation of America is America's largest independent film processing company, employing over 1,000 "technicians."

4. Mail order customers receive fast 24–48 hour service on all of their film processing.

5. Respondent Film Corporation of America guarantees that mail order customers who are not 100 percent satisfied with the finished pictures will have their money promptly refunded.

6. The FREE sample roll of film and processing combination is special and a result of a tremendous new patented color film and processing breakthrough, and that this film can only be processed on respondent Film Corporation of America's special equipment for exclusive triple-print process.

7. Kodak equipment is used exclusively in respondent Film Corporation of America's film processing operation.

8. Mail order customers receive as a bonus 12 portrait size photos and 24 additional wallet size prints * * * at no extra cost.

9. Mail order customers receive as a bonus a new roll of color film; and will never have to buy film again.

10. Respondent Film Corporation of America has 27 film processing locations from coast-to-coast.

11. The respondent, Film Corporation of America, refunds in cash for all unprintable negatives or if the consumer sends too much money.

12. The triple-print process gives the mail order customer $7.53 in FREE bonus extras every time respondent Film Corporation of America develops the customer's film.

13. The recipient of respondent Film Corporation of America's FREE color film will receive either a nationally well-known brand of color film or color film manufactured by a company which is well known to the American public. The use of the term "Kodak" and the color composition used in respondents' advertising and packaging (Kodak yellow and black), further tends to infer that popular American-made color film is being offered.

PAR. 6. In truth and in fact:

1. There are gimmicks involved, strings attached and participating consumers incur a definite obligation if the film is to be used. Until recently, recipients of the Famous Brand foreign film had no option except to return the exposed color film to respondent Film Corporation of America for processing. Although some major photofinishers are now undertaking the processing of Famous Brand foreign film, a substantial number of photofinishers located throughout the United States continue to refuse to process Famous Brand foreign film due to the technical problems involved in processing foreign film. Respondents failed to disclose these facts in connection with their offer.

2. The offer of a FREE sample roll of color film is not introductory. Respondent Film Corporation of America has, for a reasonably substantial period of time, in the regular course of its business made such offers on a continuing basis.

3. Respondent Film Corporation of America is not America's largest independent film processing company, nor does it employ 1,000 "technicians."

4. Mail order customers do not receive fast 24–48 hour service on all of their film processing. Depending upon the customer's location, the total time involved in returning finished prints usually runs from three to six days following receipt by respondent Film Corporation of America.

5. Mail order customers who are not completely satisfied with respondent Film Corporation of America's service will not have their money promptly refunded unless and until the customer returns the pictures, new roll of film, credit coupons, and specifically requests a cash refund. Guarantee refunds are usually given in credits rather than cash. These conditions are not revealed in the guarantee statement.

6. The FREE color film is not special, nor a tremendous new patented color film breakthrough. The film can be developed and printed on regular photofinishing equipment; the patented process involved herein has nothing to do with the development of the film but pertains to the manner in which the negative is printed to produce the triple print. The triple print is not exclusive; other photofinishers now offer triple print processing.

7. Kodak equipment is not used exclusively in respondent Film Corporation of America's film finishing operations.

8. Mail order customers do not receive as a bonus 12 portrait size photos and 24 additional wallet size prints * * * at no extra cost. The 12 prints are 4″ x 4″ and are not portrait size prints; the additional 24 prints are 2″ x 2″ and are not wallet size prints. The three prints involved herein are made simultaneously and the triple print processing fee charged by respondent Film Corporation of America covers the cost for said operation.

9. Mail order customers do not receive as a bonus a new roll of color film; the processing fee charges include the cost of the replacement roll of film.

10. Respondent Film Corporation of America does not have 27 film processing locations from coast-to-coast. The mailing material used by the respondent contains a list of post office boxes maintained by the respondent in 27 cities throughout the country. Consumers are directed to mail the exposed film to the post office box nearest their homes. The contents of each post office box are collected daily by an independent agent and sent by air freight to the company's central processing facility in Philadelphia.

11. The respondent Film Corporation of America does not make refunds in cash for all unprintable negatives, or if the consumer sends too much money; the respondent issues credit coupons to customers for pictures which cannot be printed, etc. The coupon entitles the customer to credit in a like amount against any future processing order

received within one year. The nature of the credit coupon and the time limit within which the customer may exercise his right of refund is not adequately disclosed on the return mailer or promotional literature.

12. The triple-print process does not give the mail order customer $7.53 in FREE bonus extras every time respondent Film Corporation of America develops the customer's film. Under its triple-print process the respondent delivers to each customer who returns a roll of film for processing, one print and two duplicate prints of each picture finished by it. The three prints are made simultaneously. The processor's price for the triple-print is respondent's established, regular price for processing the 4″ x 4″ enlargements, and the additional 2″ x 2″ duplicate prints.

13. The Famous Brand FREE color film offered is not a nationally well-known brand of color film or color film manufactured by a famous and well known domestic company. The Famous Brand FREE color film, in most instances, is foreign film (Gevacolor [Belgium] and Ilford [British]) made by either Agfa-Gavaert, Inc., Brussels, Belgium or Ilford, Inc., a subsidiary of Ilford, Limited, Essex, England; both of these films are not famous or well-known brands in the United States.

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

PAR. 7. In the conduct of their aforesaid business and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals engaged in the advertising, offering for sale, the sale and finishing of merchandise of the same general kind and nature as that advertised, offered, sold and finished by the respondents.

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

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

Decision and Order

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

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

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

1. Respondent Film Corporation of America is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its executive office located at The Benjamin Fox Pavilion, Foxcroft Square, Jenkintown, Commonwealth of Pennsylvania. Respondent corporation also maintains processing and warehouse facilities in the city of Philadelphia, said addresses being S.W. Corner 20th and Allegheny Avenue, 4901 Stenton Avenue, and the Philadelphia Industrial Park. Film Corporation of America has used and continues to use the following trade names: National Brand Film, Famous Brand Film, Famous Brand, Famous-Brand 36 Pictures Photo Labs, Triple-Print Processing Laboratories, Famous Brand Triple-Print Laboratories, Photomation Film Labs, and Triple-Print Laboratories.

Respondent Ames Advertising Agency, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Pennsylvania, with its office and principal place

of business located at The Benjamin Fox Pavilion, Foxcroft Square, Jenkintown, Commonwealth of Pennsylvania. Ames Advertising Agency, Inc., is a wholly-owned subsidiary of Film Corporation of America.

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

ORDER

It is ordered, That the respondents Film Corporation of America and Ames Advertising Agency, Inc., corporations, and respondents' officers, agents, representatives and employees, directly or through any corporate, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of color film, photofinishing, or any other product or service in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to clearly, affirmatively and expressly disclose, at the outset of the FREE film offer in each instance in which such an offer is made, in any advertisement or in any other form of communication, that forthcoming is an offer to sell photofinishing services and that the FREE color film may be processed by major quality photofinishers.

2. Representing, directly or by implication, that any offer is an introductory offer when such offer is made by respondents on a continuing basis in the regular course of business; or misrepresenting, in any manner, the nature or terms of any introductory offer by respondents.

3. Representing, directly or by implication, that respondent Film Corporation of America is America's largest independent film processing company or employs 1,000 technicians; or misrepresenting, in any manner, the number, skill and technical expertness of respondent Film Corporation of America's employees and the size, nature and extent of its film processing facilities.

4. Representing, directly or by implication, that any merchandise and/or service is guaranteed, (a) unless the terms, conditions and extent to which such guarantee applies and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed, and (b) unless respondent Film Corporation of America, within a reasonable time, not to exceed ten (10) working days from receipt of the request, performs each obligation directly or indirectly represented with said guarantee; misrepresenting, in any manner, the terms, conditions and extent of any guarantee.

5. Representing, directly or by implication, that:

(a) The FREE sample roll of color film can only be processed and/or developed on respondent Film Corporation of America's special equipment; or misrepresenting, in any manner, the processing required or available for respondent Film Corporation of America's film;

(b) Kodak equipment is used exclusively in respondent Film Corporation of America's film processing operations; or misrepresenting, in any manner, the type of equipment used in respondent Film Corporation of America's film processing operations;

(c) Respondent Film Corporation of America's mail order customers receive fast 24–48 hour service on all of their film processing; or misrepresenting, in any manner, the time required to process film processing orders;

(d) Respondent Film Corporation of America has 27 film processing locations from coast-to-coast; or misrepresenting, in any manner, the number of its office or processing locations;

(e) The triple-print process is exclusive and the sample roll of color film and processing combination is special and the result of a tremendous new patented color film and processing breakthrough; or misrepresenting, in any manner, the exclusivity, essential characteristics, constitution or the newness of Film Corporation of America's film and film processing services; and

(f) The 4″ x 4″ photos are "portrait size" and that 2″ x 2″ prints are "wallet size;" or misrepresenting, in any manner, the size of finished photos.

6. Representing, directly or by implication, that any article of merchandise or service is being given free or without charge or cost or as a gift, in connection with the purchase of other merchandise or service, unless the stated price of the merchandise and service required to be purchased in order to obtain said article or service is the same or less than the customary and usual price at which such merchandise or service has been sold separately for a substantial period of time in the recent and regular course of respondent Film Corporation of America's business.

7. Representing, directly or by implication, that exact cash refunds will be made for all unprintable negatives or if the consumer sends too much money, unless respondent Film Corporation of America automatically does refund in cash for all unprintable negatives and overpayments.

8. Representing, directly or by implication, that refunds are

made, cash or credit, without clearly and conspicuously disclosing all of the terms and conditions of said refunds.

9. Using the trade names Famous Brand, Famous Brand Film, and other similar names, in any advertisement, package, or in any other form of communication unless, in each instance in which such representation is made, there is clear and conspicuous disclosure that said color film is foreign film when such is the fact; or misrepresenting, in any manner, the origin of manufacture of the film sold or distributed by respondent Film Corporation of America.

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

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

It is further ordered, That respondents notify the Commission at least 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 corporations which may affect compliance obligations arising out of the order.

It is further ordered, That respondents maintain for at least a two (2) year period, copies of all advertisements, direct mail and in-store solicitation literature, coupon solicitation requests, and any other such promotional material made for purposes of distributing film and/or inducing the mail order finishing of amateur photographic film.

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

IN THE MATTER OF

LONGINES-WITTNAUER, INC., ET AL.

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

Docket C-2120. Complaint, Dec. 21, 1971—Decision, Dec. 21, 1971

Consent order requiring a corporation and its subsidiary of New York, N.Y., to cease using promotional games unless all prizes are awarded as repre-

sented and disclose the odds of winning and other material information, and to cease using false claims in connection with such promotions.

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Longines-Wittnauer, Inc., a corporation, and Credit Services, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

Paragraph 1. Respondent Longines-Wittnauer, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 580 Fifth Avenue, in the city of New York, State of New York.

Respondent Credit Services, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 1 West 47th Street, in the city of New York, State of New York.

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

Par. 2. Respondent Longines-Wittnauer, Inc., is now and for some time past has been engaged, among other things, in the advertising, offering for sale, sale and distribution of watches and other products at wholesale through dealers for resale to the purchasing public and of phonograph records and other products at retail to the general public. The said corporate respondent operates through various wholly-owned corporate subsidiaries including respondent Credit Services, Inc.

Respondent Credit Services, Inc., is a wholly-owned and controlled subsidiary of respondent Longines-Wittnauer, Inc., and is now and for some time past has been engaged in the advertising, offering for sale, distribution and retail sale of phonograph records and other products to the general public.

Respondents Longines-Wittnauer, Inc., and Credit Services, Inc., have sold and distributed phonograph records and other products through an organizational division generally but not always designated as "The Longines Symphonette Society." Such a designation appears on respondents' advertising, sales promotional materials, business stationery, and other printed matter used in connection with this organizational division.

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

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of the products of respondents, Longines-Wittnauer, Inc., and Credit Services, Inc., respondents have engaged in the solicitation of prospective customers through the United States mails. These solicitations, which utilized promotional materials concerning respondents' products, were mailed to millions of prospective customers through the country and were placed in magazines having nationwide circulation. Many of the said solicitations utilized a promotional device commonly known as a "sweepstakes." These "sweepstakes" which respondents have employed since at least 1962 were conducted in a similar manner.

Millions of copies of promotional materials were printed and distributed in envelopes. Each envelope contained a certificate on which a number was printed. Before distribution to the public, some of the numbers were designated as winning numbers and others were designated as losing numbers. Recipients were directed to return the certificate, usually to "The Longines Symphonette Society" where it would be checked against a list of winning numbers. If the number on the certificate returned to "The Longines Symphonette Society" matched a number contained on its list of winning numbers, the recipient was entitled to a specified prize. If a recipient of a certificate which contained a winning number failed to return the certificate, the prize to which he would have been entitled if he had done so was not awarded.

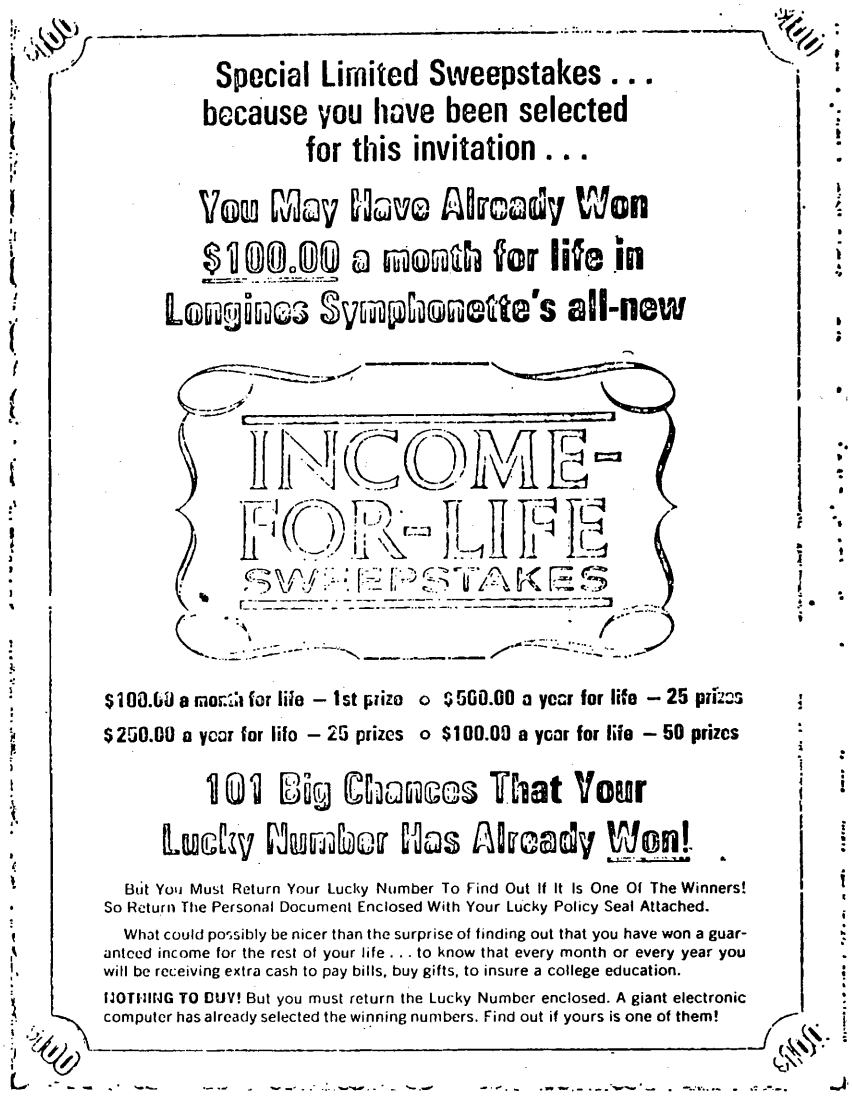
Such "sweepstakes" were conducted by the respondents on numerous occasions between 1962 and the present time, including but not limited to the following:

(a) 1969–70 Income for Life Sweepstakes.
(b) 1969–70 Around the World Sweepstakes.
(c) 1969–70 Lucky Cash Sweepstakes.
(d) 1969–70 Personal Lucky Number Sweepstakes.
(e) 1969–70 Give-A-Way Sweepstakes.

PAR. 5. In the course and conduct of their business, the respondents engaged in the above-described "sweepstakes" and other promotions for the purpose of inducing the purchase of their products; and respondents have made and are now making in their advertising and

promotional material statements and representations concerning their products and "sweepstakes."

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



How Sweepstakes works . . . The Longines Symphonette has reserved the described gifts for holders of lucky numbers, selected by electronic computers under the direction of the D. L. Blair Corporation. Each Lucky Number entry submitted by an adult 21 years or older will be checked against the official list of winning numbers. Employees of The Longines Symphonette and its media and suppliers shall not be eligible. Your entry must list the official lucky number and must be received by March 31, 1970. This sweepstakes is subject to all Federal, State and Local regulations. Prize winners will be notified by mail. Unless you return your Lucky Number, you will be giving up your chance to win a valuable FREE prize. Winning Lucky Numbers must be returned before prizes can be awarded.

1 SF 116

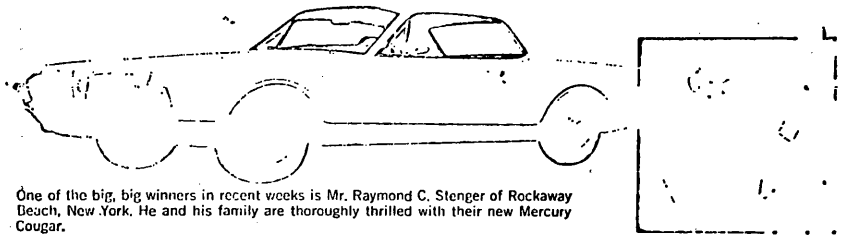
From Vermont to the Virgin Islands...from the Carolinas to California...

WINNERS, WINNERS EVERYWHERE!

Put yourself in the winners' circle... a chance to win in a Longines Symphonette Sweepstakes is yours for the asking...and it's always FREE...

HERE ARE SOME RECENT WINNERS!

GOLDEN MERCURY COUGAR WINNER



One of the big, big winners in recent weeks is Mr. Raymond C. Stenger of Rockaway Beach, New York. He and his family are thoroughly thrilled with their new Mercury Cougar.

...AND MORE BIG WINNERS!

Mrs. H. G. Philp
Southampton, New York

Mrs. M. L. Stone
Houston, Texas

Mr. C. D.Brazel
Enderlin, North Dakota

$1,000.00 WINNER

M. W., Seattle, Washington

$500.00 WINNERS

L. D., Charlestown, South Carolina
J. O., Willows, California
E. R., Guaymo, Puerto Rico
T. W., Richmond, Virginia
A. C., Sacramento, California
A. G., Brewster, New York
V. K., Christiansted, Virgin Islands
C. R., Roanoke, Virginia
H. S., Gadsden, Alabama
C. F., Grand Ledge, Mississippi
K. N., Martinez, California
A. D., Norfolk, Virginia
A. S., Gloucester, Massachusetts

$100.00 WINNERS

J. B., Atlanta, Georgia
M. B., Kinsman, Illinois
F. D., El Paso, Texas
A. E., Sellersville, Pennsylvania
F. G., Burnt Hills, New York
V. H., Burbunet, Texas
H. O., Paden City, West Virginia
R. S., Long Beach, California
G. T., Muscle Shoals, Alabama
J. V., Rio Piedrea, Puerto Rico
M. B., New York, New York
F. M., Augusta, Georgia
F. H., Havana, Illinois
D. H., Memphis, Tennessee
B. M., Moscow, Idaho
G. S., Boulder, Colorado
B. H., Miami, Florida
E. Y., Kent, Washington
E. F., Milford, Connecticut
T. R., Norwood, Massachusetts
R. W., Whittier, California
E. W., Buffalo, New York

YOU COULD BE NEXT

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

(a) One prize of $100 a month for life, 25 prizes of $500 a year for

life, 25 prizes of $250 a year for life, and 50 prizes of $100 a year for life were to be awarded in the 1969–70 Income for Life Sweepstakes.

(b) One world trip for 2 plus $2,500 cash, or $7,500 cash, 1 Chevrolet Camaro, and 100 TV's were to be awarded in the 1969–70 Around the World Sweepstakes.

(c) 100 prizes of $1,000, 200 prizes of $500 and 500 prizes of $100 were to be awarded in the 1969–70 Lucky Cash Sweepstakes.

(d) One Chevrolet Camaro and 200 AM/FM Clock radios with lamps were to be awarded in the 1969–70 Personal Lucky Number Sweepstakes.

(e) One Chevrolet Camaro, 1 prize of $500 cash, and 200 AM/FM radios were to be awarded in the 1969–70 Give-A-Way Sweepstakes.

(f) Individuals who submitted cards or certificates bearing winning numbers in accordance with the rules has only to mail the certificates to "The Longines Symphonette Society" in order to claim and obtain a prize.

(g) Individuals who participated in respondents' "sweepstakes" had a reasonable opportunity to win the represented prizes.

(h) All of the represented prizes in respondents' "sweepstakes" had been purchased before or during the time the "sweepstakes" were in progress for individuals who held winning cards or certificates.

(i) Cards, certificates, or similar printed material received by individuals contain " 'lucky' numbers" and as such are winning certificates which will entitle the recipient to a prize.

(j) Individuals who receive respondents' promotional materials have been "selected," "chosen," or are "one of the few people * * * to be invited" to participate in the respondents' "sweepstakes;" and that such selection is restricted to a significantly limited number of individuals.

(k) Simulated checks, "money" and other negotiable instruments received by individuals from the respondents are valuable and can be cashed, redeemed, or exchanged for United States currency.

(l) All individuals who participate in respondents' "sweepstakes" will receive a prize having some retail value.

(m) Individuals who agree to order respondents' products have "won" a free record album.

PAR. 7. In truth and in fact:

(a) One prize of $100 a month for life, 25 prizes of $500 a year for life, 25 prizes of $250 a year for life, and 50 prizes of $100 a year for life were not awarded to individuals who participated in the "sweepstakes." No prize of $100 a month for life, approximately 1 prize of $500 a year for life, no prize of $250 a year for life, and approximately 7 prizes of $100 a year for life were in fact awarded.

(b) One world trip for 2 plus $2,500 cash, or $7,500 cash, 1 Chevrolet Camaro, and 100 TV's were not awarded to individuals who participated in the "sweepstakes." No world trip for 2 plus $2,500 cash or $7,500 cash, no Chevrolet Camaro, and approximately 10 TV's were in fact awarded.

(c) 100 prizes of $1000, 200 prizes of $500 and 500 prizes of $100 were not awarded to individuals who participated in the "sweepstakes." Approximately 13 prizes of $1000, 20 prizes of $500, and 41 prizes of $100 were in fact awarded.

(d) One Chevrolet Camaro and 200 AM/FM Clock radios with lamps were not awarded to individuals who participated in the "sweepstakes." No Chevrolet Camaro and approximately 7 AM/FM Clock radios with lamps were in fact awarded.

(e) One Chevrolet Camaro, 1 prize of $500 cash, and 200 AM/FM radios were not awarded to individuals who participated in the "sweepstakes." No Chevrolet Camaro, no prize of $500 cash, and approximately 25 AM/FM radios were in fact awarded.

(f) Individuals who submitted certificates bearing winning numbers in accordance with the rules were asked to or had to do more than mail the ticket to "The Longines Symphonette Society" in order to claim and obtain a prize. Such individuals were asked to or had to comply with previously undisclosed terms and conditions.

(g) Individuals who participated in respondents' "sweepstakes" were not afforded a reasonable opportunity to win the represented prizes. For example, in the 1969–70 Income for Life Sweepstakes referred to in Paragraphs 6(a) and 7(a) hereof, only one ticket carried a winning number for a first prize of $100 a month for life. Respondents distributed approximately 25 million tickets to the public. As a result, participants in this "sweepstakes" had one chance in approximately 25 million to win a first prize.

Additionally, the length of time in which these "sweepstakes" promotions were held open to further entries is not disclosed in the promotional materials sent out by respondents. Respondents' "sweepstakes" were often conducted over a period of one year or more, thereby contributing to the lessening of a reasonable opportunity to win the represented prizes.

(h) Most of the enumerated prizes were not purchased by the respondents either before or during the time its "sweepstakes" were in progress. Most of the prizes were purchased only after the termination of the "sweepstakes."

(i) Most of the certificates designated as "'lucky' number tickets" are not winning certificates and do not entitle the recipient to a prize.

(j) Individuals who receive respondents' promotional materials have not been "selected," "chosen" nor are "one of the few people . . . to be invited" to participate in the respondents' "sweepstakes" and such selection is not restricted to a significantly limited number of individuals. Respondents distribute such advertising and promotional material to millions of individuals whose names and addresses have been obtained from a list of purchasers of its products and from purchased mailing lists.

(k) Simulated checks, "money" and other negotiable instruments, received by individuals from the respondents, are not valuable and cannot be cashed, redeemed, or exchanged by recipients for United States currency.

(l) All individuals who participate in respondents' "sweepstakes" do not receive a gift having some retail value. Such individuals often receive a "Spend-Life-Cash" gift certificate which requires a purchase of respondents' products and has no retail value.

(m) Individuals who agree to order respondents' products do not "win" a free record album, but receive it as part of the consideration passing between purchaser and seller.

PAR. 8. In connection with the promotion of their products, respondents provide the same form for the use of individuals who wish to purchase the advertised products and enter their "sweepstakes" as for persons who wish merely to enter the "sweeptakes;" instructions in this regard on the form are unclear and confusing, and cause the inadvertent purchase of the advertised products by persons who intended only to enter respondents' "sweepstakes."

PAR. 9. In the course and conduct of their businesses and at all times mentioned herein, respondents have been in substantial competition in commerce with corporations, firms and individuals in the sale of phonograph records and other products.

PAR. 10. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and has induced many members of the public to participate in respondents' "sweepstakes" and into the purchase of substantial quantities of respondents' phonograph records and other products by reason of said erroneous and mistaken belief.

PAR. 11. The aforesaid acts and practices of the respondents as herein alleged were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute,

unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Decision and Order

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

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

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, and having duly considered the comment filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission thereby issues its complaint, makes the following jurisdictional findings, and enters the following order.

1. Respondent Longines-Wittnauer, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 580 Fifth Avenue, in the city of New York, State of New York.

Respondent Credit Services, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at One West 47th Street, in the city of New York, State of New York.

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

ORDER

I

It is ordered, That Longines-Wittnauer, Inc., and Credit Services, Inc., corporations, and their officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the preparation, advertising, sale, distribution or use of any "sweepstakes," contest, game, or similar promotional devices, any of which involve chance in commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

A. (1) Failing to disclose clearly and conspicuously to participants and prospective participants the exact number of prizes which will be awarded, the exact nature of the prizes, the approximate retail value of each, and the odds of winning each such prize: *Provided, however*, That in those promotional devices in which the odds cannot be determined with reasonable accuracy, respondents shall clearly and conspicuously disclose the approximate number of individuals to whom the promotional device is being disseminated.

(2) Failing to award and distribute all prizes of the value and type represented.

(3) Representing directly or by implication to participants and prospective participants that:

(a) An entry offered to any individual or group of prospective participants represents a better opportunity to win or receive a prize than that offered to other prospective participants;

(b) The number of participants has been significantly limited or that the opportunity to participate in respondents' promotional devices and to purchase their products is not available to other members of the public, unless the basis for such representation is clearly and conspicuously disclosed.

(4) Using the word "lucky" in any manner that represents, or representing in any other manner directly or by implication, to participants and prospective participants that any number, ticket, coupon, symbol, or other entry confers or will confer an advantage upon the recipient or is more likely to win a prize than are others, or has some value that other entries do not have.

(5) Failing to disclose clearly and conspicuously to participants and prospective participants those terms and conditions

with which persons who hold winning tickets will be asked to or must comply in order to obtain a prize.

(6) Representing directly or by implication to participants and prospective participants that prizes have been purchased, unless such prizes have, in fact, been purchased at the time the representation is made, or that prizes will be purchased by a future date, unless such prizes will, in fact, be purchased by that date.

(7) Failing to disclose to participants and prospective participants in clear and conspicuous instructions the way in which persons may enter respondents' promotional devices without making or committing themselves to a purchase, or incurring any other obligation, or performing an inspection of any product, or agreeing to any other act or condition.

(8) Failing to furnish upon request to any individual a complete list of the names and states of residence of winners of major prizes, identifying the prize won by each.

(9) Failing to maintain adequate records:

(a) Which disclose the facts upon which any of the representations of the type described in Paragraphs 1–7 of this order are based, and

(b) From which the validity of the representations of the type described in Paragraphs 1–7 of this order can be determined.

(10) Failing to furnish upon the request of the Federal Trade Commission:

(a) A complete list of the names and addresses of the winners of each category or denomination of prizes which does not exceed 1,000 in number, and an exact description of the prize, including its approximate retail value;

(b) A list of the winning numbers or symbols, if utilized, for each prize;

(c) The total number of coupons or other entries distributed;

(d) The total number of individuals known or reasonably estimated to have participated in the promotion;

(e) The total number of prizes in each category or denomination which were made available; and

(f) The total number of prizes in each category or denomination which were awarded.

B. Engaging in the preparation, promotion, sale, distribution, or use of any "sweepstakes," contest, game, or similar promotional devices, any of which involve chance in commerce, as

"commerce" is defined in the Federal Trade Commission Act, unless the following are disclosed clearly and conspicuously to participants and prospective participants:

(1) The total number of prizes to be awarded;

(2) The exact nature of the prizes, their approximate retail value and the number of each;

(3) All of the terms, conditions and obligations with which individuals will be asked to or have to comply with in order to obtain a prize;

(4) The odds of winning each prize; *Provided however*, That in those promotional devices in which the odds cannot be determined with reasonable accuracy, respondents shall clearly and conspicuously disclose the approximate number of individuals to whom the promotional device is being disseminated;

(5) The geographic area or states in which any such device is used; and

(6) The date the device is initiated and the date the device is to end.

II

It is ordered, That Longines-Wittnauer, Inc., Credit Services, Inc., and their officers, agents, representatives, and employees, directly or through any corporate or other device in connection with the advertising, offering for sale, sale or distribution to consumers of phonograph records or other products in commerce, as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

(1) Failing to disclose clearly and conspicuously the exact nature and approximate retail value of any gift or other item furnished without charge, or at nominal charge, or at a cost substantially below its retail value to any purchaser or prospective purchaser of respondents' products, or to any participant or prospective participant in their promotional devices.

(2) Representing directly or by implication to prospective purchasers or participants that:

(a) Any individual or group of prospective purchasers or participants has a better opportunity to receive any gift or other item furnished without charge or at a cost substantially below its retail value than that afforded other prospective purchasers or participants to whom the offer has been made;

(b) The number of individuals to whom such offer has been made has been significantly limited or that the oppor-

tunity to purchase respondents' products is not available to other members of the public, unless the basis for such representation is clearly and conspicuously disclosed.

(3) Using or distributing items that simulate currency, checks, other negotiable instruments, or any other item of value.

(4) Using the word "win," "prize," or other similar term denoting chance or skill, unless the selection of individuals receiving a record album or any other item is based on some element of chance or skill.

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

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

It is further ordered, That this order shall become effective upon final acceptance by the Commission, or on September 30, 1971, whichever shall occur later.

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

In the Matter of

ROBERTSON PHOTO-MECHANIX, INC.

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

Docket C-2121. Complaint, Dec. 27, 1971—Decision, Dec. 27, 1971

Consent order requiring a manufacturer of photomechanical equipment including large specialized cameras, of Des Plaines, Ill., to cease discriminating in paying promotional allowances among competing sellers and distributors of its equipment in violation of Section 2(d) of the Clayton Act.

Complaint

The Federal Trade Commission, having reason to believe that respondent, Robertson Photo-Mechanix, Inc., has violated and is now violating the provisions of subsection (d) of Section 2 of the Clayton

Act, as amended (U.S.C. Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Robertson Photo-Mechanix, Inc. (hereinafter referred to as Robertson), is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 250 Wille Road, Des Plaines, Illinois.

PAR. 2. Respondent has been and is now engaged in the manufacture, sale and distribution of photomechanical equipment, including large specialized cameras which are sold for use by photographers, printers, engravers, lithographers and various other specialized and industrial users.

Respondent Robertson is one of a number of competing manufacturers in the photomechanical equipment field and had approximately $3.8 million in sales in the fiscal year ending July 31, 1969.

PAR. 3. In the course and conduct of its business; respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act, as amended, in that respondent sells and causes its products to be transported from its principal place of business in the State of Illinois to customers located in various other States of the United States and in the District of Columbia. There has been at all times mentioned herein a continuous course of trade, in commerce, in said products between said respondent and its customers.

PAR. 4. In the course and conduct of its business in commerce, respondent sells its products of like grade and quality to purchasers who are in substantial competition with each other in the resale and distribution of respondent's like products.

PAR. 5. In the course and conduct of its business in commerce respondent has paid or contracted for the payment of something of value to or for the benefit of some of its dealers as compensation or in consideration for services or facilities furnished by or through such dealers in connection with their offering for sale or sale of products sold to them by respondent, and such payments were not made available on proportionately equal terms to all other dealers competing in the sale and distribution of respondent's products.

For example, during the period from June 14, 1968, through June 16, 1970, respondent maintained a promotional program, designated Robertson Distributor Display Program, pursuant to which it offered to all of its dealers an additional discount of five (5) percent from the cost of any of a selection of its cameras purchased for display and thereafter displayed by the dealer for a period of not less than ninety (90) days.

While some of respondent's dealers were able to, and did, avail themselves of the discount offer, the Robertson Distributor Display Program was not suitable and usable under reasonable terms by all competing dealers. A substantial number of dealers, competing with the favored dealers in the resale of respondent's photomechanical equipment, lacked an adequate display area to demonstrate the subject cameras, which are substantial in size. Moreover, due to the considerable cost of the subject cameras, a substantial number of dealers could not afford to carry them in inventory, as yet unsold, even if they had adequate space to display them. Such dealers customarily purchase such cameras from respondent only upon receipt of orders for specific equipment placed by their customers.

In view of the above circumstances, a substantial number of competing dealers were functionally eliminated from participation in the Robertson Distributor Display Program, as fashioned and administered by respondent.

PAR. 6. The acts and practices of respondent as alleged herein are in violation of subsection (d) of Section 2 of the Clayton Act, as amended by the Robinson-Patman Act (U.S.C. Title 15, Section 13).

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Bureau of Competition proposed to present to the Commission for its consideration and which if issued by the Commission, would charge respondent with violation of subsection (d) of Section 2 of the Clayton Act, as amended; and

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

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

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

1. Respondent Robertson Photo-Mechanix, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 250 Wille Road, Des Plaines, Illinois.

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

ORDER

It is ordered, That respondent Robertson Photo-Mechanix, Inc., a corporation, and its officers, agents, representatives, employees, successors and assigns, directly or through any corporate or other device, in or in connection with the offering for sale, sale or distribution of photomechanical equipment, in commerce, as "commerce" is defined in the Clayton Act, as amended, do forthwith cease and desist from:

Paying, or contracting for the payment of anything of value to or for the benefit of any customers of the respondent as compensation for or in consideration of the displaying or demonstrating of respondent's products in connection with the processing, handling, sale or offering for sale of products manufactured and sold by respondent unless such payment or consideration is made available on proportionately equal terms to all other customers who compete with such favored customer in the sale and distribution of respondent's products.

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

It is further ordered, That during the period from the date of entry of this order to the expiration of 10 years from such date respondent notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the order.

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

IN THE MATTER OF

SANDERS AIRLINE TRAINING SCHOOL, ET AL.

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

Docket C-2122. Complaint, Dec. 28, 1971—Decision, Dec. 28, 1971

Consent order requiring a correspondence school, selling a home study course in airline personnel training, located in Newark, N.J., to cease violating provisions of the Truth in Lending Act by failing, in consumer credit transactions and advertisements, to make all disclosures in the manner, form and amount required by Regulation Z of the Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sanders Airline Training School, a corporation, and Louis Rudnick, Ben Simon and Stanley Young, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and implementing regulation, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sanders Airline Training School is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey, with its principal office and place of business located at 786 Broad Street, Newark, New Jersey.

Respondents Louis Rudnick, Ben Simon and Stanley Young are officers of the corporate respondent. They formulate, direct and control the policy, acts and practices of the corporation, including the acts and practices hereinafter set forth. Their addresses are the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale to the public of a home study course of instruction in Airline Personnel Training.

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

regularly extended, consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 4. Subsequent to July 1, 1969, in the ordinary course of their business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in Regulation Z, respondents have caused and are causing their customers to enter into contracts for the sale of respondents' goods and services. On these contracts, hereinafter referred to as "the contract," respondents provide certain consumer credit cost information. Respondents do not provide these customers with any other consumer credit cost disclosures. Respondents regularly extend consumer credit payable in more than four (4) installments, without finance charge as "finance charge" is defined in Regulation Z.

PAR. 5. By and through the use of the contract set forth in Paragraph Four respondents have:

1. Failed to use the term "cash price" to describe the price at which respondents offer, in the regular course of business, to sell for cash the services which are the subject of the credit sale, as required by Section 226.8(c)(1) of Regulation Z.

2. Failed to disclose the cash downpayment and failed to use the term "cash downpayment" to describe the downpayment made in connection with the credit sale, as required by Section 226.8(c)(2) of Regulation Z.

3. Failed to disclose the unpaid balance of cash price and failed to use the term "unpaid balance of cash price" to describe the difference between the cash price and the cash downpayment as required by Section 226.8(c)(3) of Regulation Z.

4. Failed to disclose the amount of the unpaid balance, the amount financed and the deferred payment price and failed to describe these amounts as "unpaid balance," "amount financed" and "deferred payment price" as required by Section 226.8(c)(5), (7) and (8)(ii). Because there is no finance charge and no other charges, these amounts are all the same.

5. Failed to disclose the number, amount, and due dates or periods of payments scheduled to repay the indebtedness and the sum of such payments using the term "total of payments" as required by Section 226.8(b)(3) of Regulation Z.

6. Disclosed the condition under which the contract could be can-

celled, modified or adjusted and the method of computing the charges payable in the event of cancellation, modification or adjustment but failed to make the disclosure with other required disclosures on the same side of the page of the instrument evidencing the obligation, above or adjacent to the place for the customer's signature as required by Section 226.8(a)(1) of Regulation Z.

PAR. 6. 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 thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Bureau of Consumer Protection proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondents with violation of the Federal Trade Commission Act, the Truth in Lending Act, and the implementing regulation promulgated thereunder; and:

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

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

1. Respondent Sanders Airline Training School is a corporation organized, existing and doing business under and by virtue of the

laws of the State of New Jersey, with its office and principal place of business located at 786 Broad Street, Newark, New Jersey.

Respondents Louis Rudnick, Ben Simon, and Stanley Young are officers of said corporation; they formulate, direct and control the policies, acts and practices of said corporation and their addresses are the same as that of said corporation.

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

ORDER

It is ordered, That respondents Sanders Airline Training School, a corporation, and its officers, and Louis Rudnick, Ben Simon, and Stanley Young, individually and as officers of said corporation, and respondents' agents, representatives, employees, successors and assigns, directly or through any corporate or other device, in connection with any extension of consumer credit, as "consumer credit" is defined in Regulation Z (12 CFR § 226) of the Truth in Lending Act (Public Law 90–321 15 U.S.C. 1601 *et seq.*), do forthwith cease and desist from failing in any consumer credit transactions or advertisement, to make all disclosures, determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

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

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

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

470–883—73——63

IN THE MATTER OF

SOL L. SILVERSTEIN & CO., INC., ET AL.

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

Docket C-2096. Complaint, Nov. 15, 1971—Decision, Nov. 15, 1971

Consent order requiring an importer of Los Angeles, Calif., to cease marketing dangerously flammable products in violation of the Flammable Fabrics Act.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Flammable Fabrics Act, as amended, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Sol L. Silverstein & Co., Inc., a corporation, and Sol L. Silverstein and Robert Silverstein, individually and as officers of said corporation, hereinafter referred to as respondents have violated the provisions of said Acts and the rules and regulations promulgated under the Flammable Fabrics Act, as amended, 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 Sol L. Silverstein & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 849 South Broadway, Los Angeles, California.

Respondents Sol L. Silverstein and Robert Silverstein are officers of said corporation. They formulate, direct and control the policies, acts and practices of said corporation and their address is the same as that of the said corporation.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the importation and distribution of ladies' and misses' wearing apparel, including, but not limited to, ladies' scarves.

PAR. 3. Respondents are now and for some time last past have been engaged in the sale and offering for sale, in commerce, and have introduced, delivered for introduction, transported and caused to be transported in commerce, and have sold or delivered after sale or shipment in commerce, products, as the terms "commerce," and "product" are defined in the Flammable Fabrics Act, as amended, which products fail to conform to an applicable standard or regulation continued in effect, issued or amended under the provisions of the Flammable Fabrics Act, as amended.

Among such products mentioned hereinabove were ladies' and misses' scarves.

PAR. 4. The aforesaid acts and practices of respondents were and are in violation of the Flammable Fabrics Act, as amended, and the rules and regulations promulgated thereunder, and as such constituted and now constitute unfair methods of competition and unfair and deceptive acts and practices in commerce, within the intent and meaning of the Federal Trade Commission Act.

DECISION AND ORDER

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

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

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

1. Respondent Sol L. Silverstein & Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its principal place of business located at 849 South Broadway, Los Angeles, California.

Respondents Sol L. Silverstein and Robert Silverstein are officers of said corporation. They formulate, direct and control the policies,

acts and practices of said corporation and their address is the same as that of the said corporation.

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

ORDER

It is ordered, That respondents Sol L. Silverstein & Co., Inc., a corporation, and its officers, and Sol L. Silverstein and Robert Silverstein, individually and as officers of said corporation, and the respondents' agents, representatives and employees, directly or through any corporate or other device, do forthwith cease and desist from selling, offering for sale, in commerce, or importing into the United States, or introducing, delivering for introduction, transporting, or causing to be transported in commerce, or selling or delivering after sale or shipment in commerce, any product, fabric or related material; or selling or offering for sale, any product made of fabric or related material which has been shipped or received in commerce as "commerce," "product," "fabric" and "related material" are defined in the Flammable Fabrics Act, as amended, which product, fabric, or related material fails to conform to an applicable standard or regulation issued, amended or continued in effect, under the provisions of the aforesaid Act.

It is further ordered, That respondents notify all of their customers who have purchased or to whom have been delivered the products which gave rise to the complaint, of the flammable nature of said products, and effect the recall of said products from such customers.

It is further ordered, That the respondents herein shall either process the products which gave rise to the complaint so as to bring them into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products.

It is further ordered, That the respondents herein shall, within ten (10) days after service upon them of this order, file with the Commission a special report in writing setting forth the respondents' intentions as to compliance with this order. This special report shall also advise the Commission fully and specifically concerning (1) the identity of the products which gave rise to the complaint, (2) the number of said products in inventory, (3) any action taken and any further actions proposed to be taken to notify customers of the flammability of said products and effect the recall of said products from customers, and of the results thereof, (4) any disposition of said products since August 21, 1970, and (5) any action taken or proposed

to be taken to bring said products into conformance with the applicable standard of flammability under the Flammable Fabrics Act, as amended, or destroy said products, and the results of such action. Such report shall further inform the Commission as to whether or not respondents have in inventory any product, fabric, or related material having a plain surface and made of paper, silk, rayon and acetate, nylon and acetate, rayon, cotton or any other material or combinations thereof in a weight of two ounces or less per square yard, or any product, fabric, or related material having a raised fiber surface. Respondents shall submit samples of not less than one square yard in size of any such product, fabric, or related material with this report.

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

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

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

INTERLOCUTORY, VACATING, AND MISCELLANEOUS ORDERS

ALTERMAN FOODS, INC.

Docket 8844. Order, Aug. 11, 1971

Order denying respondent's request to be heard on exceptions to hearing examiner's order denying respondent's motion for a more definite statement.

ORDER DENYING RESPONDENT'S REQUEST TO BE HEARD ON EXCEPTIONS

Respondent, on July 20, 1971, filed a document which it entitled as follows: "Exceptions To Ruling Of Hearing Examiner Edward Creel Denying Respondent's Motion For A More Definite Statement Or, In The Alternative, To Dismiss The Complaint." [1] Complaint counsel, on July 28, 1971, filed an answer in opposition to respondent's exceptions.

Respondent's document, while termed "exceptions," in fact urges the Commission to reconsider the hearing examiner's order and to grant the relief requested. Thus, it seems to be more in the nature of an appeal. The Commission's rules do not permit the filing of an interlocutory appeal from such ruling as this unless permission is first obtained from the Commission, and permission will not be granted except upon a showing that the ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before the conclusion of the hearing is essential to serve the interests of justice (Section 3.23(a)). Respondent has not complied with this requirement of the Commission's rules and so it is not properly before the Commission in making its request.

Nevertheless, some general observations would seem to be in order. The examiner held, in effect, that the complaint is sufficient for the purpose of filing an answer. The Commission ordinarily will not disturb such a ruling and we see no reason to do so in this instance. Moreover, if it is discovery which respondent seeks, its rights are fully protected because the hearing examiner has scheduled a pre-

[1] It should be noted that the Commission's Rules of Practice do not require formal exception to an adverse ruling (Section 3.43(f)).

hearing conference for August 19, 1971, at which time or soon thereafter complaint counsel is to disclose his expected evidence. We conclude that respondent has not been prejudiced by the action taken herein. Accordingly,

It is ordered, That respondent's request to be heard on exceptions from the hearing examiner's order filed July 9, 1971 be, and it hereby is, denied.

MISSOURI PORTLAND CEMENT COMPANY

Docket 8783. Order, Aug. 23, 1971

Order denying various appeals by respondent and third parties from hearing examiner's rulings granting in part and denying in part motions of third parties to quash, limit or accord confidential treatment as to certain specifications in subpoenas *duces tecum*, and returning case to him for clarification of his ruling on specification 6.

Order Denying Interlocutory Appeals and Returning Matter to the Examiner for Clarification of Rulings Regarding Quashing of September 6

This matter having come before the Commission upon respondent's appeals, filed June 14, 1971, and July 6, 1971, from the hearing examiner's orders, filed June 7, 1971, and June 24, 1971, in which the examiner granted in part and denied in part the motions of third parties to quash, limit or accord confidential treatment as to certain specifications in subpoenas *duces tecum* issued at the instance of respondent; and upon answers in opposition filed by third parties on June 17, 1971, June 21, 1971, July 12, 1971, and July 16, 1971, and by complaint counsel on June 21, 1971, and July 13, 1971; and upon replies to certain of these answers filed by respondent on June 28, 1971; and upon the appeal of Ash Grove Cement Company and Fordyce Concrete, Inc., filed July 6, 1971, from the hearing examiner's order, filed June 24, 1971; and upon answer in opposition filed by complaint counsel on July 13, 1971; and

It appearing to the Commission that in all respects other than as to specification 6 in the said subpoenas *duces tecum* issued to certain cement manufacturers, no showing has been made as required by Rule 3.35(b) of the Commission's Rules of Practice to justify the above appeals; and

It further appearing to the Commission that the hearing examiner's orders quashing the said specification 6 do not sufficiently articulate his

bases or reasons for such action, including whether he considered the requested data relevant for purposes of discovery; and

The Commission therefore having determined that the matter should be returned to the hearing examiner for clarification of his rulings as to the said specification 6 so as to afford the Commission a more informed basis for determination of respondent's appeals on this question, that respondent's appeals should be denied in all other respects, and that the appeal of Ash Grove Cement Company and Fordyce Concrete, Inc., should also be denied:

It is ordered, That respondent's appeals from the hearing examiner's orders filed June 7, 1971, and June 24, 1971, be, and they hereby are, denied insofar as they pertain to rulings of the examiner other than as to the said specification 6.

It is further ordered, That the appeal of Ash Grove Cement Company and Fordyce Concrete, Inc., from the hearing examiner's order filed June 24, 1971, be, and it hereby is, denied.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for clarification of his rulings as to the said specification 6.

Without the concurrence of Commissioner MacIntyre.

THE PAPERCRAFT CORPORATION

Docket 8779. Order, Sept. 9, 1971

Order denying respondent's petition for reopening and for a stay of the effective date of the final order; granting respondent's petition for leave to file a further statement; modifying Paragraph IX of the final order of June 30, 1971 (78 F.T.C. 1352); and otherwise denying respondent's petition for reconsideration.

Order of the Commission Ruling on Respondent's Petitions for Reconsideration, Reopening, Stay of Final Order, and Petition for Leave

Respondent Papercraft Corporation having filed on August 12, 1971, a Petition for Reconsideration of Paragraph IX of the Commission's final order of June 30, 1971, or for reopening under Sections 3.55, 3.71, and 3.72 of the Commission's rules, and for a stay of the effective date of that final order under Section 3.55; and counsel supporting the complaint having filed its opposition thereto on August 20, 1971; and respondent Papercraft Corporation having filed on September 2, 1971, a Petition for Leave to file a further pleading

in this proceeding; and counsel supporting the complaint having filed its opposition thereto on September 8, 1971; and

The Commission having determined that respondent's Petition for Leave should be granted and having considered the contents of said further pleading; and

The Commission having determined that respondent's Petition for Reconsideration is addressed solely to a question that was presented in complaint counsel's Proposed Findings of Fact of May 12, 1970 (pp. 60 and 69), and ruled upon by the hearing examiner in his initial decision of July 27, 1970, is not "confined to new questions raised by the decision or final order of the Commission" in its decision or order of June 30, 1971 [78 F.T.C. 1352, 1427], as required by Section 3.55 of the Commission's rules and therefore should be denied; and

The Commission having determined that respondent's Petition for Reopening and for a stay of the effective date of the final order should be denied; and

The Commission having determined that Paragraph IX of its order of June 30, 1971, should be revised to make clear that it applies to direct customer accounts of CPS Industries, Inc., and should be modified to apply only to customers sold by CPS during a two (2) year period preceding the acquisition of December 27, 1967, and until divestiture hereunder;

Now therefore, it is ordered, That Papercraft's Petition for Leave to file a further statement be, and it hereby is, granted;

It is further ordered, That Paragraph IX of the Commission's final order of June 30, 1971, be, and it hereby is, modified to read as follows:

> *It is further ordered*, That for a period of three (3) years from the date of divestiture the Papercraft Corporation is prohibited from selling any decorative giftwrap products to any direct customer account of CPS Industries, Inc., which at any time during the two (2) years preceding December 27, 1967, and until divestiture is effected hereunder, has been sold any decorative giftwrap products by CPS Industries, Inc., unless such customer account was sold such decorative giftwrap products by the Papercraft Corporation prior to December 27, 1967.

It is further ordered, That respondent's Petition for Reconsideration be, and it hereby is, otherwise denied; and

It is further ordered, That respondent's Petition for Reopening and for Stay of the effective date of the Commission's final order of June 30, 1971, be, and they hereby are, denied.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order and Opinion, Sept. 23, 1971

Order denying the request of two of the respondents for an interlocutory appeal from hearing examiner's order denying their motion for an order dismissing Paragraph Seven of the complaint.

Opinion and Order Denying Request for Leave To File an Interlocutory Appeal

Respondents, the Hearst Corporation and Periodical Publishers' Service Bureau, Inc., have requested leave to file an interlocutory appeal from the hearing examiner's August 10, 1971 order denying their motion for an order dismissing Paragraph Seven of the complaint.

On April 8, 1971, respondent International Magazine Service of the Mid-Atlantic, Inc. (IMS), filed with the examiner a motion to dismiss Paragraphs 4, 5, 6, and 7 of the complaint on the ground that the "matters covered therein are also the subject of an active, pending proceeding looking to the adoption of a trade regulation rule" concerning a cooling-off period in door-to-door sales, notice of which was published September 30, 1970 (35 Fed. Reg. 15164). The examiner certified this motion to the Commission pursuant to Section 2.33 of our Procedures and Rules of Practice. In the alternative, IMS moved that the adjudicative proceeding be stayed as a matter of administrative discretion pending disposition of the rulemaking proceeding.

We denied this motion to dismiss or stay by order issued May 26, 1971, pointing out *inter alia* that there was no overlap between Paragraphs 4, 5, and 6 of the instant complaint and the pending trade regulation rule. As to Paragraph 7, we noted that complaint counsel had made it quite clear during pretrial proceedings that this paragraph did not charge that gaining access to a potential customer's residence without prior invitation was itself an unlawful practice (Commission Opinion, May 26, 1971, Note p. 3 [78 F.T.C. 1588, 1590]). We also noted that the question of whether it is *per se* an unfair practice to fail to provide a right of cancellation in door-to-door sales is a major issue in the trade regulation rule proceeding and, therefore, to the extent this issue might be encompassed within the allegations of Paragraph 7, this issue was withdrawn from the complaint and Paragraph 7 modified *pro tanto*.

Respondents Hearst and Periodical have now also filed a motion seeking a dismissal of Paragraph 7 of the complaint. The hearing examiner denied this motion and respondents have requested leave to file an interlocutory appeal.

We believe that the examiner correctly denied this motion of respondents.

Respondents contend that the Commission, by its May 26 order modifying *pro tanto* Paragraph 7 of the complaint, withdrew from this adjudicative proceeding "all issues pertaining to the 72-hour cancellation right." We find no basis for respondents' contention. It is obvious that our May 26 order did not delete the entire paragraph but merely made clear that Paragraph 7 does not charge that failure to provide a cancellation right constitutes a *per se* violation of Section 5. It is also quite clear that the deceptive acts and practices which Paragraph 7 alleges respondents engaged in are not limited to this single issue of non-cancellable door-to-door sales transactions.

Respondents further contend that if the Commission does not dismiss Paragraph 7, they will be denied due process of law because the 72-hour cancellation right contained therein is the subject of trade regulation proceedings. A similar contention was considered and rejected by the Commission in its denial of IMS's April motion to dismiss, and respondents in the instant motion have presented no new contentions which would cause us to depart from our prior holding.

Accordingly, we find no basis for granting respondents' request for an interlocutory appeal from the examiner's denial of the instant motion and their request is, therefore, denied.

Chairman Kirkpatrick not participating.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order and Opinion, Oct. 29, 1971

Order denying the appeal of two respondents from hearing examiner's order denying their motion to dismiss the complaint.

Opinion of the Commission

By Jones, *Commissioner*:

I

Respondents filed a motion with the hearing examiner seeking a dismissal of this complaint. The hearing examiner denied the motion and we granted respondents' request for an interlocutory appeal.

The grounds urged by respondents in support of their motion are essentially two: (1) that the Commission in issuing its complaint violated its own Procedures and Rules of Practice and (2) that counsel supporting the complaint will be relying on illegally obtained evidence

in the proof of the instant adjudicative proceeding and hence will be violating respondents' Fourth Amendment rights. (RB, pp. 3, 5–6).[1]

The basis for both of these contentions by respondents rests on the circumstances surrounding the Commission's issuance of Advisory Opinion No. 128 [71 F.T.C. 1735; 16 C.F.R. § 15.128].[2] This Advisory Opinion was issued on May 22, 1967, at the request of these respondents and other members of the magazine subscription sales industry. It advised that the Commission found no illegality under the antitrust laws of the industry's proposed self-regulatory program designed to eliminate abuses in the sales practices of this industry.

Respondents argue that this opinion: (1) approved practices alleged as illegal in the instant complaint served on respondents on January 21, 1971; (2) committed the Commission not to institute adjudicative proceedings against these respondents while the advisory opinion was in effect; and (3) bound the Commission not to use any information received during the course of investigations in connection with the advisory opinion in any subsequent adjudicative proceedings brought against them. We will deal with these various contentions in the course of our consideration of respondents' two principal grounds for its appeal.

RESPONDENTS' CONTENTIONS THAT ISSUANCE OF THE COMPLAINT VIOLATES COMMISSION PROCEDURES AND RULES OF PRACTICE

Respondents contend that the Commission's issuance of this complaint violated its own Section 1.3(b) of the Commission's Procedures and Rules of Practice and that, therefore, it must be dismissed in its entirety.

Section 1.3(b) of the Commission's Procedures and Rules of Practice provides that following issuance of an Advisory Opinion the Commission will not:

> * * * proceed against the requesting party with respect to any action taken in good faith reliance upon the Commission's advice under this section, where all relevant facts were fully, completely, and accurately presented to the Commission and where such action was promptly discontinued upon notificaton of rescission or revocation of the Commission's approval.

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[1] RB refers to respondents' Interlocutory Appeal From Order Denying Motion to Dismiss Complaint (hereinafter cited as RB).

[2] The Advisory Opinion was conveyed to respondents' counsel in a letter from the Secretary of the Commission. Under then existing rules, the text of this letter was held confidential. A "digest" or paraphrase of the substance of the opinion was issued in a press release May 23, 1967. Respondents have placed the text of the letter on the record as Respondents' Exhibit 3 to the Deposition of Sidney Harris, submitted for consideration with this appeal (hereinafter cited as Harris Deposition). Accordingly, all references to and quotations from this opinion will be to the original text of the letter and not to the digest.

Respondents argue that all of the sales practices challenged in the instant complaint were either approved or permitted by the Commission's Advisory Opinion or were prohibited by their own industry self-regulatory Code which was approved by the Advisory Opinion. They argue further that in issuing its Advisory Opinion, the Commission expressly committed itself not to sue the respondents or other industry members subject to the Code for any of the practices which they claim were prohibited or permitted while the Code was in effect, and that, therefore, all of their activities were undertaken in reliance on this commitment and could not be challenged, until the Advisory Opinion was rescinded.

The answer to all of respondents' assertions, understandings and beliefs concerning the Advisory Opinion must be found squarely within the four corners of the industry request for a Commission Advisory Opinion and the text of the Commission's response. It is necessary, therefore, to examine this opinion in order to deal fully with respondents' contentions.

The Commission's opinion and the industry's original request show clearly that the magazine subscription sales industry came to the Commission for the express purpose of receiving an *antitrust* clearance for a self-regulatory program which the industry desired to institute in order to clean up its own sales practices in the solicitation and sale of magazine subscriptions.[3]

The Commission's Advisory Opinion stated unequivocally that with the modifications contained therein, the Commission believed the antitrust obstacles to the Code could be overcome and the Code approved so as to enable the industry to carry out its self-regulatory program. The Commission's opinion makes clear its almost total preoccupation with the antitrust problems which were raised by the industry's proposals to levy sanctions against Code violators.[4] Thus the Commission's Advisory Opinion pointed out:

> The Commission has given this matter very careful consideration in view of the magnitude of the problems which confront the industry and the obvious sincerity of the [PDS Agency] Committee in attempting to devise ways to cope with those

[3] The industry's preoccupation with the antitrust implications of its self-regulatory program is borne out by the fact that originally it had gone to the Antitrust Division of the Department of Justice for a railroad release and had been referred by the division to the Federal Trade Commission. (See, letter, Zimmerman to Kintner, August 24, 1966, Ex. 7, Harris Deposition).

[4] Indeed it was this precise issue of private police power which gave rise to Commissioner Elman's dissent. However, there is no doubt that even Commissioner Elman had no concept that in approving the self-regulatory program, the Commission was abdicating its own law enforcement responsibilities to the industry. See, for example, Chairman Weinberger's opening statement at the Commission's 1970 hearing concerning the operations of the PDS Code and Commissioner Elman's interchange with industry counsel on this precise point. See note 7 *infra* for citations.

problems. Even taking all these factors into consideration, however, the Commission is unable to give its approval to those sections of the Code which apply to the salesmen as those sections are now written. While the Code now provides that the action to be taken with respect to the salesmen found to be in violation would be on the basis of a recommendation by the Administrator rather than by agreement among the signatory agencies, the Commission believes the probable result of that recomemendation would be to substantially interfere with those individuals' right of employment and their right to have their fate decided by their individual employers uninfluenced by virtually mandatory recommendations from the Administrator. However, the Commission does not believe that this would call for outright rejection of the Code, since it *is believed the Code can be amended so as to achieve the legitimate objectives of the Committee without running afoul of the antitrust laws.*

* * * * * * *

The Commission is further of the opinion, now that greater participation of the independent agencies has been insured, *that it is possible to apply the Code as now written to the publishers and agencies in such a manner as not to do violence to the antitrust laws,* particularly if the element of coercion can be truly eliminated insofar as the independent agencies are concerned when they are arriving at their decision as to whether to join or whether to remain under the Code after having joined. It should be made clear, however, that this conclusion is a tentative one since there is little recorded experience upon which to predicate such a judgment. Therefore, this opinion is based on the understanding that there will be no coercion of any agency to subscribe to the plan, no coercion of any agency to remain in it after it has subscribed and no retaliation of any kind against any agency which does not choose to join or which subsequently elects to leave after having joined. (Emphasis added)

Indeed the Commission was so concerned with the antitrust implications of the industry's assertion of sanction power over its members that it was reluctant to make its approval unconditional. Therefore, it advised the industry that its approval was limited to a trial period of three years and that during this period the industry was to provide it with detailed reports on the operations of the Code so that the Commission could observe for itself the way in which the Code enforcement provisions were actually implemented.

There is not the slightest indication either in the opinion or in the record before us on this motion that the Commission in approving the organization and enforcement machinery of the Code from an antitrust viewpoint also granted clearance for any proposed types of selling practices or in any way surrendered any right or power to proceed against unfair or deceptive acts and practices engaged in by members of this industry. The industry's request clearly shows that no immunity from prosecution for selling practices was sought. Although the Commission's opinion noted that the proposed Code contained substantive provisions setting out the practices prohibited by the Code, the Commission observed that in its view these provisions merely at-

tempted to restate the substantive law respecting practices in the selling of magazine subscriptions and as such it had no objection to them.[5] This clearly affords no basis for the contention that the Commission thereby "approved" any or all selling practices not specifically prohibited by the Code.[6]

Nor is there anything in the Commission opinion or the papers before us which indicates an intention on the part of the Commission to delegate exclusive policing authority to the industry. Not only did the Commission not surrender any such rights, it could not have done so legally. The Commission has no power to delegate even temporarily to private parties its statutory duties to enforce the law. It did not do so in this case.

Respondents suggest in their papers that their alleged understanding of the immunity purportedly granted to them by the Advisory Opinion was supported by statements made by members of the Commission and by its staff. We have no indication of what these statements might be, but in any event respondents' assertions on this point are legally and factually irrelevant.[7] The Commission is a collegial

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[5] The sentences containing this observation in the Advisory Opinion read as follows:

It is noted that the Code incorporates a number of provisions which attempt to restate the substantive law applicable to this method of field selling of magazine subscriptions. The Commission herewith advises you that it sees no objection to these provisions as presently worded.

[6] Respondents argue that Paragraphs 4(a), 5(a), 6(a), 6(e) and 7 of the complaint challenge practices which were permitted under the Code and that the Commission therefore approved of those practices. Aside from the fact that the Commission did not "approve" any selling practices, we have examined the Code and fail to find any indication that such practices are permitted. Indeed, the Code appears to prohibit the practices alleged in Paragraphs 4(a), 5(a), and 6(a). Paragraph 7 of the complaint has been modified subsequent to the issuance of the complaint so that it no longer asserts that failure to provide a 72-hour cooling-off period constitutes a *per se* violation of Section 5. See Commission Opinion, May 26, 1971.

[7] Commissioner Elman in his dissent [71 F.T.C. 1738] from the Commission's decision to issue the Advisory Opinion deplored the fact that the Commission's Opinion permitted the industry to exercise what he termed the regulatory powers of government. But nothing in his statement can possibly be interpreted or implied to be a representation that in his view the Commission's opinion was allowing the industry to exercise any powers to the exclusion of the Commission's right and duty to do so. Again, there is simply nothing in this statement which could form any reasonable basis for respondents' present claims in this regard. See also Commissioner Elman's interchange with counsel for the industry during the public hearing on the operations of the PDS Code. *Infra* note 7.

The only other "statement" contained in respondents' appeal papers by a Commissioner or Commission staff members is an oblique reference in a letter by respondents' counsel to the Special PDS Agency Committee which requested the Advisory Opinion about a meeting he had had with then Commission Chairman Dixon in which counsel reported that Chairman Dixon intimated that complaints would issue against industry leaders unless the code "developed" into operation. (Letter, Kintner to Campbell, February 21, 1967, Ex. 13, Harris Deposition.) Whatever encouragement the Chairman reportedly gave to the industry to go forward with their own efforts to clean up abuses in their industry can hardly be translated by hindsight into a commitment or understanding given to respondents that approval of their self-regulatory program constituted a formal Commission commitment not to proceed adjudicatively against industry members prior to revocation or expiration of the Advisory Opinion.

body and can act officially only in its collegial form. No individual expressions on the part of Commissioners or staff can change one iota of the Commission's official actions as they are reflected by its response to this industry's request for an advisory opinion.[8]

It would be anomalous for a Commission, empowered and directed by Congress to initiate enforcement actions against unfair and deceptive acts and practices, to be stopped from such actions by the private expressions of staff members or even of individual Commissioners. This is not the law. Courts will not apply the principles of estoppel against government actions taken to protect the public interest. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947); *Utah Power and Light Co.* v. *United States*, 243 U.S. 389, 408–409 (1917); *Nichols and Co.* v. *Secretary of Agriculture*, 131 F. 2d 651, 658–659 (1st Cir. 1942); *SEC* v. *Torr*, 22 F. Supp. 602, 611–612 (S.D. N.Y. 1938); *L. B. Samford, Inc.* v. *United States*, 410 F. 2d 782, 788 (Ct. Cl. 1969); *Bornstein* v. *United States*, 345 F. 2d 558, 562 (Ct. Cl. 1965).

Our examination of the record presented on this motion has failed to indicate any factual or legal basis for respondents' contentions. Quite apart from the legality of any such grant of power as is claimed by respondents, if any such sweeping commitment to confer on an industry blanket immunity from prosecution was to have been granted, it would surely have been stated quite expressly and not be embodied in a respondents' "understanding" of what on its face was a very carefully worded advisory opinion discussing in painstaking detail the Commission's reactions to the industry proposal. It is inconceivable that if the Commission was in fact granting the industry the type of power which these respondents now claim that not a single word about it was included in the Commission's lengthy dis-

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[8] While we do not believe that statements made outside the text of the advisory opinion can in any way change the plain meaning of the opinion itself, it is of some relevance to respondents' assertions about statements of individual Commissioners, to note the statement of Chairman Weinberger made on behalf of the full Commission in the course of his opening statement in the public hearing which the Commission held at the request of these respondents and other industry members to consider the operations of the PDS Code.

[I]t is the Commission's view that industry efforts to[wards] self-regulation should in no way affect or limit the Commission's responsibility under Section V of the Federal Trade Commission Act to eliminate any deceptive or unfair practices that may exist in the industry, nor is it the purpose of this hearing to hear arguments on how the Commission can or should act to exercise its responsibility to protect the public interests. (Special Public Hearing in the Activities of Door-To-Door Magazine Subscription Sales Industry, March 10, 1971, p. 3.)

During the hearings, Commissioner Elman asked counsel for the industry association whether the PDS Code "repealed" any aspect of the Federal Trade Commission Act. (Id., p. 51.) Counsel for the association, who initiated the request for Advisory Opinion No. 128, responded in the negative. He characterized the relationship between the Commission and the industry as "a joint cooperative effort." (Id., p. 52.)

cussion of the legality of the industry proposal. We, therefore, conclude that respondents have failed to sustain their argument that the Commission's Advisory Opinion expressly or implicitly contained a commitment that industry members would be immune from prosecution under Section 5 of the Federal Trade Commission Act while the Advisory Opinion was in effect.[9]

RESPONDENTS' CONTENTION THAT THEIR FOURTH AMENDMENT RIGHTS HAVE BEEN VIOLATED

Respondents' second argument in support of their motion to dismiss the instant complaint is also without factual or legal support. It, too, rests essentially on respondents' basic contentions with respect to the meaning of Advisory Opinion No. 128 and the commitments which they argue were given in connection with it.

Respondents state that part of the information complaint counsel will rely on to prove the allegations of the instant complaint was in fact provided voluntarily by respondents in response to Commission investigations of the administration of the PDS Code. Respondents contend that these documents were furnished to the Commission only pursuant to their agreement to do so under Advisory Opinion No. 128 and assert that they would not have cooperated in these investigations and would not have submitted this information had they been aware that the information would be used against them in an adjudicative proceeding. (RB, p. 6; respondents' Motion for Order Dismissing Complaint, p. 22) (hereinafter cited as RM). From this they argue that the use of any documents obtained by the Commission in connection with the PDS Code "constitutes the practical equivalent of using information obtained through a warrantless search and thereby a violation of the Fourth Amendment." (RB, p. 6)

Counsel supporting the complaint counter this argument with the statement that "any information developed [in support of the instant complaint] was still in response to a normal letter of access that precedes any investigation." (counsel supporting the complaint's Answer To Respondents' Interlocutory Appeal From Order Denying

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[9] In view of our conclusion of this point, it is unnecessary for us to deal with the question of the date when the advisory opinion expired or with the argument of complaint counsel, accepted by the examiner, that whatever respondents' understanding as to commitments which might or might not have been given, the complaint filed against these respondents was served after the expiration of the advisory opinion by its own terms and hence respondents' argument must fall on this ground alone. We have no quarrel with the examiner's conclusion on this point but we have elected to treat the more fundamental issue raised by respondents because of its significance both to this part of respondents' motion to dismiss as well as to the second part of its motion to which we now turn.

Motion To Dismiss Complaint, p. 7, Ex. C) Respondents reply to this argument by pointing to proposed exhibits submitted by counsel supporting the complaint which bear stamps and signatures indicating that they were received by the Commission from an officer of one of the respondents several months prior to the date of the initial letter of access. (respondents' Reply To Answer to Request For Permission To File An Interlocutory Appeal From Order Denying Motion To Dismiss Complaint, pp. 2–5, Ex. C)[10]

The hearing examiner found "no indication" in the record before him that an illegal search had taken place. He noted that the Advisory Opinion notified the industry that it would be subject to careful Commission scrutiny. He noted that the Commission had not relinquished any of its powers to investigate the practices of the PDS Industry stating: "The Commission had the right and authority under the Advisory Opinion and the mandate of the Congress under the Federal Trade Commission Act to investigate these [PDS] complaints. The Commission so informed the respondents." (Hearing Examiner's Order Denying Motion to Dismiss Complaint, p. 6) We agree with the examiner's conclusion.

Respondents do not deny that under Advisory Opinion No. 128 they were required and agreed to provide the Commission with documentation as to the administration of their self-regulatory code.[11] Essentially respondents are arguing first that the Commission misled them into agreeing to provide this documentation concerning the administration of their self-regulatory code and second, that they were also misled into believing that the documentation which they supplied would not be used in any adjudicative proceeding.

Respondents acknowledge that the Commission investigators stated to them that they were requesting access to respondents' files in connection with investigations of the PDS Code. (respondents' Reply to Complaint Counsel's "Answer to Respondents' Motion for Order Dis-

[10] Respondents also argued before the hearing examiner that the Commission could not use information obtained in connection with the PDS Code to lead to evidence to be used in adjudicative proceedings, citing the so-called "fruit of the poison tree" doctrine, *Wong Sun* v. *United States*, 371 U.S. 471 (1963), *Nardone* v. *United States*, 308 U.S. 338 (1939).

[11] The Advisory Opinion made the following provision with respect to the furnishing of information to the Commission:

[T]he Administrator or the Committee must submit reports to the Commission of each complaint which was received, considered or investigated and of each action taken by the Administrator. Further, the opinion is being rendered with instructions to the staff of the Commission to initiate periodic inquiries after the plan has been put into effect to determine and report to the Commission as to how it is actually working.

After this opinion was issued, the PDS Code Administrator made periodic submissions of documents to the Commission. The Commission staff initiated several investigations of PDS Code signatories and received from them various documents pertinent to their business operations.

missing Complaint, p. 3, Ex. A; respondents' Reply To Answer To Request For Permission To File An Interlocutory Appeal From Order Denying Motion To Dismiss Complaint, pp. 3–5, and Ex. A and B attached thereto). No misrepresentation, therefore, was made by these investigators as to the information they were seeking or the purpose of their requests. Since, as noted above, we have concluded that the Commission made no commitment to refrain from prosecuting industry members cooperating in the PDS self-regulatory program, we do not find that respondents were misled into agreeing to provide the Commission with documentation concerning the implementation of this program. Therefore, we do not find any wrongful or improper action on the part of the Commission in seeking respondents' disclosure of documents to the Commission.

We find equally unpersuasive the second prong of respondents' search and seizure argument that the Commission in some way committed itself not to use the documents received in the course of its monitoring of the PDS self-regulatory Code in any adjudicative proceeding.

Respondents were on notice of the fact that documents and information obtained by the Commission under any of its powers could be used against them in any adjudicative proceedings. Section 3.43(c) of our Procedures and Rules of Practice states:

> Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by Counsel representing the Commission in any such proceedings.

Thus respondents were fully aware at all times that materials secured in investigations of the PDS Code could be used in adjudicative proceedings. If they had desired or received some contrary commitment with respect to these so-called PDS generated documents, it is quite evident that such a commitment would have had to be express and explicit. No such commitment is pointed to by respondents.

Respondents repeatedly assert that they have cooperated with Commission investigations of the PDS Code. They also assert, in an apparent effort to bolster their argument that the Commission misrepresented the use to which information obtained from them might be put, that members of the Commission staff commended them for their performance under the PDS Code.[12] We have no reason to question

[12] The Affidavit of John F. DeGroot, Ex. A to respondents' Reply to Complaint Counsel's "Answer to Respondents' Motion for Order Dismissing Complaint" discusses several occasions on which Commission staff members expressed commendatory opinions of respondents' operations. See, pp. 2–3 DeGroot Aff't. See also Harris Deposition, p. 59.

any of these assertions. But we do not believe they are relevant to the issues. Individual expressions by staff are in no way binding on the Commission. More important, they are hardly an equivalent to a waiver of the Commission's rules which govern the use to which documents furnished the Commission can be put. Finally, we cannot find in these statements any representation by our staff that the documents which were being sought would not be used in adjudicative proceedings.

Respondents, therefore, have not made out even a colorable claim that their Fourth Amendment rights will in any way be infringed by the Commission in the course of the instant adjudicative proceeding through use by counsel supporting the complaint of documents secured in the course of investigations of the PDS Code or submitted to the Commission by respondents in connection with the operations of that Code.

For the reasons stated above we deny the respondents' appeal from the hearing examiner's denial of their motion to dismiss the complaint.

Chairman Kirkpatrick did not participate in this matter, and Commissioner MacIntyre did not concur.

ORDER DENYING INTERLOCUTORY APPEAL FROM DENIAL OF MOTION TO DISMISS COMPLAINT

Respondents the Hearst Corporation and Periodical Publishers' Service Bureau, Inc., having filed an interlocutory appeal from the hearing examiner's June 8, 1971 Order Denying Motion to Dismiss Complaint; and

The Commission having considered said appeal and the answer of counsel supporting the complaint thereto and having determined, in accordance with the views expressed in the accompanying opinion that respondents' appeal should be denied;

It is ordered, That respondents' appeal from the hearing examiner's June 8, 1971 order denying their motion to dismiss the complaint in this matter be, and the same hereby is, denied.

Chairman Kirkpatrick not participating, and Commissioner MacIntyre not concurring.

EATON YALE & TOWNE, INC.

Docket 8826. Order and Opinion, Nov. 11, 1971

Order denying third party appeal from the hearing examiner's protective order, and denying request of respondent for permission to appeal said protective order.

ORDER AND OPINION DENYING THIRD PARTY APPEAL AND DENYING REQUEST OF RESPONDENT FOR PERMISSION TO APPEAL

This matter is before the Commission upon the filing August 5, 1971, of an appeal brief by a third party to this proceeding, General Motors Corporation (General Motors) entitled "General Motors' Appeal From Hearing Examiner's Order Directing Use and Disclosure of 6(b) Survey Data Without Application of Mississippi River Fuel Treatment" which appeal brief has reference to a protective order filed by the examiner July 27, 1971, complaint counsel's answer and respondent's answer thereto, both filed August 13, 1971; and upon respondent's request filed August 6, 1971, for permission to file interlocutory appeal from the hearing examiner's protective order filed July 27, 1971, and complaint counsel's answer thereto filed August 11, 1971.[1]

I

General Motors has filed an appeal objecting to the hearing examiner's protective order filed July 27, 1971, contending (1) that its responses to a Section 6(b) survey, a survey assertedly made for investigatory purposes, cannot later be used in specific litigation, and (2) that if the material in such responses is so used it should be accorded the so-called "Mississippi River" treatment. General Motors claims a right to appeal pursuant to Section 3.35(b) of the Commission's Rules of Practice, but complaint counsel has questioned whether it has standing to appeal under this section of the Commission's rules. Section 3.35 (b) concerns generally appeals from rulings on applications for compulsory process. The issue here does not concern such as application but, rather, the use in adjudication of material in the Commission's files obtained in a special report filed with the Commission in connection with a survey under Section 6(b) of the Federal Trade Commission Act.[2]

Notwithstanding the lack of a specific provision for appeal, particular circumstances in this case have convinced us that we should here consider General Motors' objections. The record is not wholly clear on the details, but it seems that complaint counsel, on or about April 9, 1971, advised General Motors, as well as thirty-three or so other reporting companies involved in the 1968 6(b) survey, that they pro-

[1] The Commission, on August 12, 1971, issued an order staying the protective order of the hearing examiner filed July 27, 1971, until "further order of the Commission."

[2] The Commission, on May 14, 1968, issued a resolution entitled: "Resolution Directing An Investigation Into the Acts and Practices of Companies Manufacturing Automotive Parts, Accessories and Equipment." Under this resolution orders requiring the filing of special reports were mailed to a number of manufacturers, including General Motors. General Motors furnished certain data to the Commission in response to this demand.

posed to use in this adjudication certain information furnished to the Commission in that survey. The notices apparently were sent out at the behest of respondent's counsel (Tr. 69), who sought access to the data for the purpose of preparing respondent's defense.

The notice letter which complaint counsel sent to General Motors is quoted verbatim in the record (Tr. 71–73). Therein it is noted that the hearing examiner indicated he would issue a protective order restricting access to the data in question to respondent's legal counsel, consulting economist and company officials as necessary in the preparation of its defense. Complaint counsel further states in the letter, among other things, that if General Motors would prefer a different kind of order than the one proposed by the hearing examiner or if it desires other limits on disclosure, it should "file an appropriate motion under Commission Rule 3.45 and appear before Judge Buttle at the prehearing conference scheduled for April 30."

Subsequently, General Motors made an appearance, through its attorneys, at the pretrial conference held April 30, 1971. At that time General Motors was given the opportunity to present its position. General Motors on May 17, 1971, additionally filed a memorandum of its opposition to the use of the 6(b) data. It argued substantially the same points it makes in its appeal brief now before the Commission.

The hearing examiner ultimately resolved the question by issuing, on July 27, 1971, a protective order governing the use of the 6(b) survey data here in controversy, including that which has been supplied by General Motors.[3] This order provides that complaint counsel make a certain limited disclosure of the 6(b) material, specifying that it shall be released only to "independent counsel (excluding house counsel) and/or independent economist of respondent, who shall protect and maintain the confidentiality of such information and shall not reveal the contents thereof to anyone other than members of independent counsel's law firm or attorneys actively employed in this litigation * * *." A further feature of the order among others is a provision that if any of the information is offered in evidence it shall be accepted subject to an appropriate *in camera* order.

It is from this protective order that General Motors has filed an appeal. As stated, we believe the circumstances justify its consideration by the Commission.

[3] Previously the examiner, on June 29, 1971, certified to the Commission a question on whether or not the so-called "Mississippi River" confidentiality treatment should be used. The Commission by order issued July 13, 1971, remanded the matter back to the examiner holding that the question should be at least initially answered by the examiner. Thereafter, the examiner issued his protective order which in effect denied General Motors' request that the material not be used in the adjudication and its alternative request that, if used, the "Mississippi River" treatment be applied.

Here, to a large extent, if not entirely, the questions raised concern the protection, if any, to be given to data claimed to be confidential or trade secrets. This is an area in which the hearing examiner has a broad discretion, and his determinations will not be ordinarily disturbed except on the basis of a showing of abuse. No such showing has been made here. Accordingly the appeal is denied for that reason, although there are some aspects of the matter we believe merit some further discussion which follows.

THE USE OF SECTION 6(B) DATA IN AN ADJUDICATIVE PROCEEDING

General Motors argues that responses to a Section 6(b) survey, assertedly made for investigatory purposes, cannot be used in specific litigation. It has referred to a number of cases for this proposition, but none are in point. These cases raise a different issue on the use by respondents of the authority under 6(b) or 6(b) reports in a Commission proceeding.[4] Contrary to General Motors' assertion of a limitation, the Federal Trade Commission Act, in Section 6(f), quite clearly authorizes the Commission in its discretion to make public data received in a 6(b) response except trade secrets and names of customers. The pertinent part of this Act authorizes the Commission to "make public from time to time such portions of the information obtained by it hereunder, except trade secrets and names of customers, as it shall deem expedient in the public interest * * * ."

In *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), the U.S. Supreme Court, while not dealing with the use of Section 6(b) data in a complaint matter, nevertheless held that the Commission's powers under Section 6(b) could be broadly used in connection with all its functions. Therein the Court stated in part:

> While we find a great deal which would warrant our concluding that § 6 was framed with pre-existing antitrust laws in mind, and in the expectation that the information procured would be chiefly useful in reports to the President, the Congress, or the Attorney General, we find nothing that would deny its use for any purpose within the duties of the Commission, including a § 5 proceeding. A construction of such an Act that would allow information to be obtained for only a part of the Commission's functions and would require the Commission to pursue the rest of its duties as if the information did not exist would be unusual, to say the least * * * . (*Id.* at 649.)

We believe it is clear, therefore, under the Act and the Supreme Court's interpretation thereof, that the Commission may, with certain limitations, use Section 6(b) data in adjudicative matters.

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[4] The cases relied upon by General Motors are *Papercraft Corporation* v. *F.T.C.*, 307 F. Supp. 1401 (W.D.Pa. 1970); *Union Bag-Camp Paper Corporation* v. *F.T.C.*, 233 F. Supp. 660 (S.D. N.Y. 1964); and *Texas Industries, Inc.*, Docket 8656, 67 F.T.C. Reports 1378 (1965).

Section 6(f) excepts trade secrets and names of customers. Although General Motors in its brief refers to its data as being "highly confidential in nature and represents trade secrets," it has made no showing that such would necessarily fall within the category of a "trade secret." In any event, even if trade secrets are to some extent involved, the protective order issued by the hearing examiner is adequate, we believe, to protect General Motors against prohibited disclosures. The examiner's protective order assures that there would be no making "public" of any trade secret data. The information would be used only in the guarded confines of this litigation with protection against any other release or disclosure.

Finally, Commission Rule 3.43(c) provides for the disclosure during adjudication of materials obtained by the Commission "under any of its powers." [5] Complaint counsel was authorized to make use of the data here in issue, and, in light of this rule, it is not material as General Motors asserts, that the resolution and the report forms were silent on such possibility.

REQUEST FOR "MISSISSIPPI RIVER" TREATMENT

General Motors' second point is that if the survey data is used it should be accorded so-called "Mississippi River" treatment. The type of confidentiality treatment here sought is that which the Commission applied in the matter of *Mississippi River Fuel Corporation*, Docket No. 8657 (Order issued June 8, 1966 [69 F.T.C. 1186]). Therein the Commission directed that material submitted in response to subpoenas "should be submitted to a reputable and disinterested accounting firm, to be selected by the hearing examiner in consultation with the parties, which shall compile and present the material to respondent's counsel in such manner that no individual company's confidential arrangements or data will be revealed." This is known as the "Mississippi River" treatment. Contrary to General Motors' apparent position, the court, in *Federal Trade Commission* v. *Crowther*, 430 F. 2d 510 (D.C. Cir. 1970), did not lay down a rule requiring application of the "Mississippi River" formula generally. In that case the court had before it a subpoena issued by the hearing examiner in *Lehigh Portland Cement Co.*, Docket No. 8680, which called for data identical to the type involved in the earlier *Mississippi River* case, yet the Commis-

[5] Section 3.43(c) reads as follows:

"(c) *Information obtained in investigations.*—Any documents, papers, books, physical exhibits, or other materials or information obtained by the Commission under any of its powers may be disclosed by counsel representing the Commission when necessary in connection with adjudicative proceedings and may be offered in evidence by counsel representing the Commission in any such proceedings."

sion had not required application of the "Mississippi River" treatment. All the court held was that the Commission, having devised the "Mississippi River" formula "in a set of circumstances closely comparable to the one at hand," should not have abandoned the formula without sufficiently identifying and articulating its reasons for doing so.

It is apparent, however, that the data for which "Mississippi River" protection is sought in this case do not have the degree of parallelism with that involved in the *Mississippi River* case so as to bring the examiner's ruling within the holding in *Crowther*. Nor are there any other grounds shown which would prompt us to overrule the hearing examiner's exercise of discretion in refusing to order that procedure in this case. While we do not believe it necessary to expressly distinguish this case from *Mississippi River*, there are obvious differences. The information involved in *Mississippi River* was sought by the respondent in that case for the purpose of showing the extent to which "vertical integration" in a particular market had been avowedly accomplished through financial and other arrangements other than outright ownership of stock or assets. Data on such arrangements between certain ready-mix concrete companies and cement suppliers was sought primarily to obtain only a total industry picture without identifying details. For this and other reasons it was deemed appropriate to allow the data submitted in response to the subpoenas to be compiled by an independent accountant—essentially a ministerial act—so that no individual company's confidential arrangements would be revealed.

In the instant case, however, complaint counsel proposes to use sales figures in the Section 6(b) survey to show market shares and sales volume of individual companies. They assert that it will not be sufficient for their purposes to rely only on total industry figures and relative rankings within the industry. Both complaint counsel and respondent argue that unless individual company sales data are available, an inaccurate picture of the market structure could result in several possible ways. Usually, of course, sales volume and market shares of companies doing business in a market constitute very important evidence in Section 7 cases. "Mississippi River" type treatment for sales data coming from the same Section 6(b) survey has been held to be inappropriate in other Section 7 cases. See *Maremont*, Docket No. 8763 (Order of April 2, 1969), and *Avnet*, Docket No. 8775 (Order of June 16, 1971) (3 CCH Trade Reg. Rep. ¶ 19,282).

A further factor distinguishing this case from *Mississippi River* is that respondent here is represented by independent counsel. As we

pointed out in *Lehigh Portland Cement Company*, Docket No. 8680 (Opinion of July 31, 1970 [77 F.T.C. 1638]), in the *Mississippi River* case, respondent's counsel were employees of respondent ("house counsel") and the examiner's protective order in that case would have permitted disclosure to other employees of respondent to the extent necessary to prepare for the case-in-defense. Hence, disclosure to respondent's counsel and other employees of respondent would probably have meant disclosure to respondent's management. In the present case the information is to be made available only to respondent's independent counsel and/or an independent economist. Considering the nature of the data involved and the relevance it appears to have to the allegations of the complaint, we think this is a strong protective order.

In the circumstances, we do not believe it has been shown that the hearing examiner abused his discretion in entering the protective order here in issue, and so we deny General Motors' appeal, as heretofore indicated.

II

The other issue before the Commission is respondent's request for permission to file an interlocutory appeal from the hearing examiner's July 27, 1971, protective order in this matter. Respondent objects to only one feature of such protective order and that is the part which prohibits disclosure "(b) with regard to sales to original equipment manufacturers, either as a category or as individually * * * ." Respondent alleges that the complaint includes the original equipment market and that complaint counsel have stated they intend to offer original equipment sales data into evidence. Thus, respondent claims, the ruling will deprive it of the opportunity to review such data and would prejudice it in the preparation of its defense.

Complaint counsel, in their response, acknowledge that the Section 6(b) data relative to certain original equipment manufactured products has been in the custody of complaint counsel, was utilized in the preparation of the complaint and will be proffered in evidence. Accordingly, they state they do not oppose respondent's request to file the interlocutory appeal.

It appears to the Commission, from the facts available, that the disputed original equipment manufacturers' data possibly should also be disclosed subject to the provisions of the protective order. The examiner may have inadvertently excluded this information. In the circumstances, to avoid undue delay, we are going to deny the request to appeal but remand the matter to the examiner for his reconsideration in the light of the representations made, and the position taken, by com-

plaint counsel as to such original equipment manufacturers' data. Accordingly,

It is ordered, That the appeal of General Motors Corporation from the hearing examiner's protective order of July 27, 1971, be, and it hereby is, denied.

It is further ordered, That respondent's request for permission to file interlocutory appeal be, and it hereby is, denied.

It is further ordered, That the Commission's order issued August 12, 1971, staying order of the hearing examiner be, and it hereby is, vacated.

It is further ordered, That this matter be, and it hereby is, remanded to the hearing examiner for his reconsideration in the light of complaint counsel's representations and for his further action on Paragraph 1(b) of the protective order as he deems appropriate in the circumstances.

Chairman Kirkpatrick not participating.

UNITED BRANDS COMPANY

Docket 8835. Order and Opinion, Nov. 18, 1971

Order denying respondent's motion to postpone hearings and dismiss the complaint; case returned to hearing examiner.

Order and Opinion of the Commission Denying Respondent's Motion to Postpone Hearings and Dismiss Complaint

This matter is before the Commission upon the hearing examiner's order filed October 13, 1971, certifying to the Commission respondent's motion to postpone the hearings and to later dismiss the complaint, alleging that a proposal to regulate the marketing of lettuce made by the U.S. Department of Agriculture moots the charges in the complaint. The hearing examiner held that the relief sought in the motion presents a question addressed to the administrative discretion of the Commission and that under the Commission's rules and pertinent decisions certification is the proper procedure. He accordingly certified the motion but without recommendation.[1]

We agree that the motion here was properly certified and we will proceed to consider the merits of respondent's request. See *First Buck-*

[1] The papers before the Commission on the question, other than the certification, include the following: Respondent's motion to postpone hearings and to dismiss the complaint, filed September 28, 1971; complaint counsel's answer in opposition thereto, filed October 8, 1971; respondent's reply memorandum in support of its motion, filed October 20, 1971; and, finally, complaint counsel's comments on the reply memorandum, filed October 22, 1971.

ingham Community, Inc., Docket 8750, Order Vacating Initial Decision and Dismissing Complaint, May 20, 1968 [73 F.T.C. 938].

Respondent asserts that the hearings should be postponed and the complaint ultimately dismissed on the ground mainly that the substantive issues relating to alleged anticompetitive effects are made moot by a proposed marketing order, covering lettuce, of the Department of Agriculture; secondarily, it contends that a continuation of the proceeding pending a decision by the Department of Agriculture would be contrary to asserted policy of the Commission not to proceed where the subject matter is, by specific legislation, the direct responsibility of another federal agency.

On the first point, the marketing order relied upon has not yet been put into effect, and it may never become effective.[2] Even if adopted, it may possibly remain in effect only for a short time. Thus there is no certainty here that the market will be changed or that it will be changed on a permanent basis, as respondent seems to imply.

In addition, respondent has not otherwise supported its contentions. There have been no sufficient facts presented on which to base a valid conclusion. It would be highly premature to conclude that none of the alleged anticompetitive effects can be shown as a result of the proposed marketing order. The facts on this will be developed during the course of the hearings.

Finally, there has been no showing that the existence of the marketing order would dispense with the need for enforcement of laws involved in the complaint if violations are proved, and we therefore reject the contention that there is a conflict of some kind between agencies here in administering their respective statutes.

We conclude that the motion of respondent should be denied. Accordingly,

It is ordered, That respondent's motion to postpone hearings and subsequently to dismiss the complaint be, and it hereby is, denied.

It is further ordered, That this matter be, and it hereby is, returned to the hearing examiner for further proceedings pursuant to the Commission's Rules of Practice.

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[2] The referendum on the proposal apparently is scheduled for some time in November or December 1971.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order and Opinion, Dec. 6, 1971

Order and opinion denying interlocutory appeal by two of the respondents from examiner's order granting motion to quash subpoena of newspaper reporter's records.

Opinion of The Commission

By Jones, *Commissioner:*

This matter is before the Commission on the interlocutory appeal of respondents, Hearst Corporation and Periodical Publishers' Service Bureau, Inc., from the hearing examiner's order of September 22, 1971, granting a motion to quash a subpoena *duces tecum* to Arthur E. Rowse, a syndicated columnist specializing in articles of interest to consumers. Respondents are appealing this ruling on the ground that it involves substantial rights and will materially affect the final decision in this case. Since matters of discovery and claims of First Amendment violations are involved, we have concluded that a decision now on the merits of the appeal will substantially further the expeditious handling of this proceeding.[1]

The subpoena which is the subject of this appeal was requested by respondents on July 13, 1971, and seeks production by Mr. Rowse of all of the documents upon which he based a newspaper article written by him about Congressman Fred B. Rooney's efforts to eliminate abuses in the magazine sales industry.[2] In addition, respondents' subpoena also asked for the production of all documents communicated between Mr. Rooney or his staff and the Federal Trade Commission, all documents dealing in any way with the efforts of Mr. Rooney or his staff to cause any government agency to take action against respondents and all documents reflecting positions by Mr. Rooney or his staff in regard to the Paid During Service (PDS) Code, a self-regulatory industry program to eliminate selling abuses in the magazine subscription industry.

Respondents contend that this material may be relevant to three of their defenses to the pending Commission complaint against them

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[1] Section 3.35(b) of the Commission's Rules of Practice provides that appeals to the Commission from rulings on motions to limit or quash process will be entertained by the Commission on a showing that:

[T]he ruling complained of involves substantial rights and will materially affect the final decision, and that a determination of its correctness before conclusion of the hearing is essential to serve the interests of justice.

[2] The article entitled, "New Magazine Guidelines Set," appeared in the Washington Star on July 11, 1971.

charging them with violation of Section 5 of the Federal Trade Commission Act. These defenses briefly are that the Commission's Advisory Opinion No. 128 [71 F.T.C. 1735; 16 C.F.R. § 15.128] approving the legality of the industry's self-regulatory PDS Code barred the Commission from bringing the instant complaint while the Advisory Opinion was still in effect. This defense is the subject of a separate motion to dismiss the complaint brought by respondents which has recently been ruled on by the Commission adversely to respondents.[3]

Respondents contend that the Rowse material may also be relevant to their other two defenses that the Commission has prejudged this matter and hence has deprived them of an opportunity to obtain a fair and impartial adjudication of the matters alleged in the complaint and that improper *ex parte* communications have been made to the Commission.

Mr. Rowse moved to quash the Commission subpoena issued by the examiner on respondents' request, claiming *inter alia* that the subpoena was defectively overbroad and in effect a "fishing expedition" and that the First Amendment provides him with a journalistic privilege to refuse to disclose information obtained as a result of his efforts as a reporter.

The hearing examiner granted Mr. Rowse's motion to quash the subpoena on the basis of his finding that the deposition of Mr. Rowse was not "essential" for discovery purposes and that even if Mr. Rowse's article was accurate in stating that Congressman Rooney "spurred" the Commission into action, this in itself would not "constitute a defense" to the complaint in this proceeding, since such action on the part of the Congressman would not be improper.

Respondents' appeal seeks a reversal of the examiner's ruling and contends that the examiner erred in applying the wrong test in ruling on the motion to quash and in failing to deal with the First Amendment arguments urged by both parties.

Respondent's Contention that the Examiner Adopted an Erroneous Rule of Law

The essential issue raised by this portion of respondents' appeal is whether the documents and information sought by respondents

[3] Order Denying Interlocutory Appeal from Denial of Motion to Dismiss Complaint, FTC Docket No. 8832 (October 29, 1971) [p. 989 herein].

under this subpoena are relevant to the proceedings and should be ordered to be produced.[4]

In dealing with this issue, it is essential that we consider respondents' documentary requests in the subpoena in the light of each of the defenses which they assert form the basis for their need—and indeed right—to the requested material.

1. *Respondents' Advisory Opinion Defense*

Respondents' principal ground in arguing their need for the material sought under the subpoena rests on that portion of their defense directed to their claim that the Commission's Advisory Opinion relating to the legality of their self-regulatory PDS Code barred the Commission from bringing the instant complaint without first rescinding the Advisory Opinion.[5]

On its face, we can find no relevance of any of the material sought under the subpoena to the issues raised by respondents under this defense as to whether the Commission intended, led respondents to believe, or, in fact, committed itself not to issue any complaint against respondents or the industry in general while the advisory opinion

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[4] The Commission's rule which governs the rights of parties to use subpoenas *duces tecum* is Section 3.34(b)(2) which provides:

Subpoenas duces tecum may be used by any party for purposes of discovery or for obtaining documents, papers, books or other physical exhibits for use in evidence, or for both purposes. When used for discovery purposes, a subpoena may require a person to produce and permit the inspection and copying of nonprivileged documents, papers, books, or other physical exhibits which *constitute or contain* evidence relevant to the subject matter involved and which are in the possession, custody, or control of such person (emphasis added).

Respondents argue that these words have been interpreted both by the Commission and by the courts in decisions dealing with analogous discovery rules of the Federal Rules of Civil Procedure, as embodying production of materials which may "lead" to evidence rather than simply to materials which may "constitute or contain" evidence. We do not believe these distinctions, if they exist, are significant for the purpose of determining this particular motion. Our consideration of the arguments of counsel, therefore, will be based squarely on the issue of relevancy as it may be interpreted in the broadest possible sense without determining whether the Commission's rule represents, in fact, a somewhat narrower view of relevancy than that embraced in Rules 26(b) and 34 of the Federal Rules of Civil Procedure.

[5] Thus respondents' brief states that their need for thorough discovery "is supported by far more than bare charges of prejudgment or mere suspicion of the propriety of the Commission activities." (Res. App. Br. at 17.) The "far more" is stated to consist of their four contentions with respect to the Commission's Advisory Opinion which formed the basis for their motion to dismiss the complaint. The facts are enumerated by respondents to consist of the following:

"1. The Commission is presently attacking practices which it approved in Advisory Opinion No. 128.

2. No notice to respondents of rescission of Advisory Opinion No. 128 has ever been given.

3. Hearst and Periodical have been given no opportunity to effect voluntary compliance in conjunction with the rescission of Advisory Opinion No. 128.

4. The press reports that Congressman Fred B. Rooney has brought pressure to bear upon the Commission during the three-year period which the Commission had approved for the operation of the PDS Code." (Res. App. Br. at 17.)

was still in effect. Nor can we find anything in the documentary request of the subpoena bearing on the question of whether the Commission, through the issuance of this advisory opinion, did or did not approve any of the industry's sales practices challenged in the complaint. Nothing in respondents' brief helps us in this respect.

Respondents argue that the article by Mr. Rowse asserts that Congressman Rooney and his staff "spurred" government agencies to take action against them.[6] We do not see the relevance of this assertion to respondents' arguments that the Commission's Advisory Opinion barred it from bringing the instant complaint against respondents or approved any of the practices challenged by the complaint. Clearly the validity of respondents' claims in this respect must stand or fall on whatever is ultimately decided about the intent and effect of the Commission's Advisory Opinion.[7] However, it is our view that the validity of respondents' contentions on this issue are neither supported nor detracted from by injecting into that issue the claimed actions of some third party *vis-a-vis* the Commission—whether he be a Congressman, a newspaper reporter or another member of the public.

Respondents argue that whether Congressman Rooney "required" the Commission to bring this complaint, and if so, how and through what types of communications is somehow relevant to this issue. We disagree that discovery into these facts is relevant to respondents' defense concerning the Advisory Opinion. If the Commission was barred or had barred itself, as respondents assert, from bringing the instant complaint against respondents, the reasons why the Commission chose to bring the complaint are surely wholly irrelevant to that issue.

We cannot see, therefore, just how the subpoena request directed to Mr. Rowse bears in any respect on this precise issue. We conclude, that on the record before us the subpoena did not search for any information which was either essential or even remotely relevant to this part of their defense.

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[6] The reference in the Rowse article bearing on the activities of Congressman Rooney and the Federal Trade Commission's actions relating to the magazine subscription industry appeared in the following two paragraphs:

To him [Congressman Rooney] belongs much of the credit for successful government actions earlier this year resulting in elimination of numerous questionable practices by some of the largest firms selling long term subscriptions via monthly payments, a system known as PDS for "Paid During Service."

His lonely crusade eventually spurred the Federal Trade Commission and the Post Office Department into action against deceptive sales tactics in the industry. His persistent efforts also persuaded several companies to discontinue PDS business entirely.

[7] The Commission in its recent opinion [989 herein] denying respondents' motion to dismiss, which was based squarely on their contentions reflected in this defense, held that the Advisory Opinion was designed to exempt the magazine sales industry from prosecution by the Commission for antitrust violations and has no bearing on allegations of sales deceptions which are at issue in the instant proceedings. *See* note 3, *supra*.

2. *Respondents' "Prejudgment" Defense*

The second ground urged by respondents in support of their need for the requested information is their contention that these documents will in some way relate to their affirmative defense that the Commission has prejudged the case.

In addition to asserting that there has been "clear prejudgment" by the Commission, respondents include within this defense contentions that the Commission has been subject to undue political pressure and that public comment on the case has created an atmosphere of adverse and unfair publicity which make it impossible for them to have a fair and impartial trial.[8] We will consider each of these allegations in relation to respondents' subpoena of Mr. Rowse's files.

With regard to the assertion of "clear prejudgment," we fail to see how the documents sought by respondents' subpoena bear in any way on this defense.

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. *FTC* v. *Cement Institute*, 333 U.S. 683, 701 (1948). It has not been found to occur in the absence of some type of statement or expression of opinion by the decision maker as to an ultimate controverted issue in the pending case. *Safeway Stores, Inc.*, v. *FTC*, 366 F. 2d 795, 802 (9th Cir. 1966), *cert. denied*, 386 U.S. 932 (1967). The test is whether a Commissioner or hearing examiner has "taken a position apparently inconsistent with an ability to judge the facts fairly. * * *" *Texaco, Inc.* v. *FTC*, 336 F. 2d 754, 764 (D.C. Cir. 1964). In short, evidence of prejudgment must rest on positions or statements made by a decision maker himself which indicate that he has in some measure decided the merits of a pending case in advance of hearing the matter.

We find nothing in the actions attributed to Congressman Rooney by Mr. Rowse's article which suggests that prejudgment as defined by the above cited case law has occurred in the instant proceeding.

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[8] Respondents phrase their argument in their brief in the following words:

That respondent is unable to obtain a fair and impartial adjudication of the matters alleged in the complaint because of a clear prejudgment by the Federal Trade Commission; that said prejudgment is a direct result of adverse and inaccurate newspaper and other publicity alleging directly and by implications that "all" members of the PDS industry have engaged in unlawful acts; similar adverse and inaccurate allegations in reports, speeches, press releases and other communications by legislators and other governmental personnel; and other unfair and inaccurate ex parte communications; that respondent has had and will have no opportunity to rebut such unfair communications and that said unfair communications and the Federal Trade Commission's resulting prejudgment violate the Commission's Rules of Practice, and the Administrative Procedure Act, and deny respondent the Due Process of Law guaranteed by the Fifth Amendment of the Federal Constitution. [Periodical's Ans., 9–10.]

The article indicates that the Commission took "action" against the magazine sales industry. This, in fact, was the case. The Commission filed complaints against several members of the industry, alleging that they had engaged in acts and practices which violated Section 5 of the Federal Trade Commission Act. The filing of a complaint by the Commission, however, has nowhere been held or even argued as providing any basis for a charge of prejudgment by the Commission. *See FTC* v. *Cinderella Career and Finishing Schools, Inc.*, 404 F. 2d 1308 (D.C. Cir. 1968).[9] The cases make it quite clear that allegations of prejudgment must rest upon statements by the Commission or by Commissioners or other decision makers and not upon the mere filing of a complaint.

Respondents in the instant case have pointed to no such statements for their assertion that prejudgment has taken place, nor have they even indicated whether the prejudgment exists in the minds of a single Commissioner or in the Commission as a whole or whether it exists rather in the mind of the hearing examiner. Certainly Mr. Rowse's article gives no indication that there has been any prejudgment on the part of the decision makers in this proceeding.

Accordingly, we cannot find any relevance which the background materials for Mr. Rowse's article might have to respondents' prejudgment defense, insofar as it relates to this type of asserted prejudgment of the issues in the instant complaint.

Respondents, however, do not confine their "prejudgment" defense to a claim that the Commission has taken a position indicating prejudgment of the instant case. They also seem to assert that prejudgment can also be shown through evidence of undue political pressure. Such pressure they maintain has occurred here. In this connection, respondents filed a supplemental appeal brief urging that a speech by Mr. Rooney before the Women's National Democratic Club on October 7, 1971, provides additional justification for their discovery application. In this speech Congressman Rooney stated that his "investigation of magazine subscription sales practices [has] to date produced Federal Trade Commission charges of deception and misrepresentation against 18 corporations. * * *" [Res. Supp. App. Br. at 2.]

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[9] In *Cinderella*, the court pointed out:

Congress has, as a general practice, vested administrative agencies with both the specific power to act in an accusatory capacity through the initiation of an action designed to enforce compliance with or prevent further violations of a statutory provision and with the responsibility of ultimately determining the merits of charges so presented. * * * "It is well settled that a combination of investigative and judicial functions within an agency does not violate due process." 404 F. 2d 1308, 1315 (footnotes omitted).

Respondents argue that:

> Under such circumstances, there can be little doubt that the Commission was and continues to be influenced by the positions taken by Congressman Rooney. *A fortiori*, these respondents cannot be given a fair hearing: regardless of the scrupulousness of any individual Commissioner. * * * No Commissioner could ignore the purport of Congressman Rooney's October 7th speech any more than a Commissioner could have ignored the purport of Senator Kefauver's public remarks in connection with the *Pillsbury* case. [Res. Supp. App. Br. at 3.]

Thus, respondents contend that they have been precluded from the possibility of a fair hearing of their case, such as occurred in *Pillsbury Co.* v. *FTC*, 354 F. 2d 952 (5th Cir. 1966). A review of the law and facts in that case is, therefore, warranted.

The decision in *Pillsbury* was not based on a finding of prejudgment, but rather on a finding that powerful Congressional influence had sacrificed the appearance of impartiality in an adjudicatory proceeding before the Commission. The court found that two of the four Commissioners who participated in the final decision of the case had been substantially exposed to interference in their role as Commissioners during the course of extensive congressional hearings. The facts of the case revealed that the Commission had handed down an opinion on an interlocutory appeal reversing the hearing examiner's ruling to dismiss the complaint. Following that interlocutory opinion, but while the case was still pending, the Commission was called to testify at hearings before the antitrust subcommittees of the Judiciary Committees in the Senate and House of Representatives. During the hearings the Chairman of the Commission was asked to explain the reasons and rationale for the opinion in the interlocutory appeal. A "barrage" of questions directly relating to the Commission's views about the issue involved in the appeal were put to the Chairman, and a number of committee members challenged the correctness of the Commission's ruling. 354 F. 2d at 955–6. As a result of such questioning, the Commission Chairman disqualified himself from the case with the following statement which he read into the record at the House subcommittee hearing:

> [B]ecause of some of the penetrating questions [during the Senate hearings] I felt compelled to withdraw from the case because I did not think I could be judicial any more when I had been such an advocate of its views in answering questions. 354 F. 2d at 963.

The respondents in *Pillsbury* moved to dismiss the complaint on the ground that the Commission had become disqualified to hear the case since none of the Commissioners could have remained free to consider the issues on their merits after this display of Senate belief as to the

error of the Commission's interlocutory decision. *Pillsbury Mills, Inc.*, 57 F.T.C. 1274, 1376 (1960). On appeal the court found that the Congressional influence was improper and sacrificed the appearance of impartiality when a congressional investigation such as occurred in that case focused "directly and substantially upon the mental decisional processes of a Commissioner in a case which [was] pending before it. * * *" 354 F.2d at 964. The gravaman of the court's conclusion is reflected in this excerpt from its opinion in which it concluded:

> To subject an administrator to a searching examination as to how and why he reached his decision in a case still pending before him, and to criticize him for reaching the "wrong" decision, as the Senate subcommittee did in this case, sacrifices the appearance of impartiality * * *. *Id.*[10]

Thus, the improper influence which the court found in *Pillsbury* involved the substantial probing of the minds of the decision makers on a single and crucial issue in a pending case. It also involved the clearly and publicly enunciated view of a Senator as to what he viewed as the proper decision to be reached.

In the instant case, respondents provide no grounds for their assertions that improper political interference has occurred here as occurred in *Pillsbury*. Certainly nothing in Mr. Rowse's article indicates that Congressman Rooney has in any way been probing the minds of Commissioners or the hearing examiner on any issue involved in this complaint.

All that is attributed to Mr. Rooney either by Mr. Rowse's article or by Mr. Rooney himself in his own speech is that he spurred the Commission to take action against the magazine subscription industry. Nothing in these papers implies that even Mr. Rooney himself has reached any conclusions on the merits of the Commission's complaint, let alone that Mr. Rooney has pressured the Commission to reach a particular conclusion. Nor is there anything in respondents' documentation which raises the slightest implication of improper influence on the judicial functioning of the Commission within the meaning of *Pillsbury*.[11]

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[10] In so concluding, the court referred to Senator Kefauver's statement during the hearing that he was "shocked and surprised" with the interpretation which had been given to the statute at issue in *Pillsbury*. 354 F.2d at 964 n. 5.

[11] Respondents also rely upon *D.C. Federation of Civic Associations* v. *Volpe*, No. 24, 838 (D.C. Cir. October 12, 1971) to support their contentions of improper congressional pressure. That case held that a non-judicial or quasi-judicial decision by the Secretary of Transportation to approve plans for the construction of a bridge would be invalid if based in whole or in part on the pressures emanating from a Congressman who had stated publicly that he would do everything in his power to withhold appropriations from an area-wide rapid transport system until the bridge project was approved (slip op. at 25–27). We believe the decision in that case adds little to our consideration of the instant appeal since we are here concerned with a quasi-judicial proceeding unlike the case cited, and since again we find nothing in Mr. Rowse's article which touches this point.

Respondents' argument, however, seems to extend even beyond their allegations of improper influence by Mr. Rooney and suggests that as a result of his concerns, there has been created a public atmosphere against the activities of respondents which are the subject of this complaint as to render a fair adjudication of these issues impossible. Respondents rely for this aspect of their argument on various newspaper reports of the case and of Mr. Rooney's concerns. Clearly the mere fact of public discussion of matters which ultimately may find themselves to be the subject of FTC actions, whether by Congressmen or members of the public could hardly be grounds for quashing the FTC action. Indeed some of the press articles cited by respondents in this connection are simply newspaper accounts of their instant subpoena request directed to Mr. Rowse.

Respondents' argument is akin to claims asserted by defendants in criminal proceedings that they cannot get a fair trial before a jury in matters which have received substantial publicity. An administrative proceeding could hardly be likened to a jury trial. Moreover, the article by Mr. Rowse and the other articles generated by respondents' subpoena request hardly constitute the type of inflammatory publicity which could possibly give rise to an issue of fair trial even if this were a criminal proceeding, which it quite obviously is not.

We cannot see, therefore, that this argument adds any greater relevance of the Rowse documents to the issues in this case. In short, insofar as the Rowse article, and the documents, if any, on which it is based are concerned, we find nothing in these papers to warrant our granting the requested subpoena with all of the attendant First Amendment issues which this subpoena raises.

Respondents imply, however, that there may have been covert political pressure on the Commission from Congressman Rooney about which Mr. Rowse knows or has evidence in his possession. On the basis of Mr. Rowse's article, however, we find not even the slightest implication that he has such evidence. Moreover, respondents have directed a subpoena *duces tecum* to the Secretary of the Commission to search for these precise documents. The Commission placed this motion on its docket for consideration and simultaneously with this opinion is issuing its opinion on this matter. Under its decision, the Commission has determined to treat respondents' motion as a request for documents under the Freedom of Information Act, and pursuant to this opinion will search its files and produce all documents to which respondents are entitled under the Information Act which reflect communications dated between January 15, 1971 and the present time between the Commission and its staff and Congressman Rooney and his staff re-

lating to the PDS magazine subscription industry, Hearst and Periodical. In light of this decision, we find no need for respondents to seek these documents from Mr. Rowse. Whatever influence Congressman Rooney has had on the Commission during the pendency of this proceeding can be gleaned by respondents from the documents in the Commission's files and need not be obtained from Mr. Rowse.

As for Mr. Rooney's public statements reflecting his opinions or activities in this area, there is likewise no need for respondents to obtain those statements from Mr. Rowse. Respondents cannot expect Mr. Rowse to do their research for them. *Keogh v. Pearson*, 35 F.R.D. 20, 23 (D.D.C. 1964). These materials are in the public domain and readily available to respondents without the need for compulsory process.

3. *Respondents' Defense of Ex Parte Communications*

Respondents' final argument in support of their need for these documents from Mr. Rowse's file is that they are relevant to respondents' third defense that the Commission has engaged in improper *ex parte* communications. While respondents do not specify any time period when the alleged *ex parte* communications were supposed to have taken place, it is quite clear that the only improper communications by third parties with the Commission members or the hearing examiner which could possibly be relevant would have to be communications occurring after the final complaint was issued, in this case after Januray 15, 1971. *See* Section 4.7 of the Commission's Rules of Practice.

Mr. Rowse's article, on which respondents' motion is grounded, stated only that communications from Congressman Rooney to the Commission had occurred regarding the magazine sales industry. This statement by itself can hardly constitute a basis for the sweeping dragnet of the documentary search which respondents are asking for in this subpoena designed to search out improper *ex parte* communications.

Clearly an *ex parte* communication does not embrace statements appearing in the press which are read by the public. They involve private communications involving some aspect of the issues of a pending case which are communicated to the Commission which are not made available to both parties. It is obvious, therefore, that any publicly made observations by third parties about matters in issue in an FTC proceeding hardly constitute *ex parte* communications to the Commission. To so regard them would indeed put the Commission's right to discharge its decision-making obligations in a proceeding completely at the mercy of members of the public, any one of whom is entitled

to comment publicly on any matter pending before the Commission.

Moreover, respondents' subpoena does not even appear to search for *ex parte* communications. It does not specify communications directed to the Commission or to individual Commissioners or the hearing examiner after the complaint was issued in the instant case, clearly the only *ex parte* communications relevant to this proceeding. No such time limitation is contained in the subpoena. Thus, this asserted basis for the requested materials must fall as do the other grounds advanced by respondents.

Not only do we find the materials requested irrelevant to the defenses of respondents to which they purport to relate, but we are also of the view that the subpoena suffers from a fatal defect in that it is so broad in its scope as to require us so to strike it down on that additional ground.

For example, the first category of requested documents includes *all* materials upon which Mr. Rowse based his article, "New Magazine Guidelines Set." Yet the article contained matters not at all relevant to this proceeding, such as an explanation of the PDS Code, references to communications by Congressman Rooney to members of the industry and descriptions of actions by industry members. That portion of the article which respondents emphasize in support of their request for relevant document or materials which contain or constitute evidence are two short excerpts from that article referring to a Congressman's "lonely crusade" which "eventually spurred the Federal Trade Commission and the Post Office Department into action against deceptive sales tactics in the industry." As we have shown above, these two statements appear to have no relevance to any of the asserted defenses of respondents. Clearly, the entire article as a whole has even less connection with the issues in this case. Discovery of all documents upon which the article was based, therefore, appears to be largely a dragnet operation by respondents in the hope of finding something useful.

The second category of specific requested documents in the subpoena covers *all* documents communicated between Congressman Rooney and his staff and the Commission and its staff. It thus includes all correspondence whether or not related to the PDS industry or respondents and without any limitation as to a relevant time period. Again, this request is fatally defective in its far-ranging scope.

In the third category of documents, respondents seek documents reflecting communications from Mr. Rooney to "any government

agency" causing it to take action against respondents. Since we are concerned in this proceeding only with actions by the Federal Trade Commission, respondents' request includes materials which would appear to have no bearing whatsoever on this case. Finally, respondents seek *all* documents pertaining in any way to positions taken by Congressman Rooney and his staff in regard to the PDS selling code. Again, this request is overbroad since positions taken by Congressman Rooney are not in themselves pertinent to the Commission's actions in this case or to respondents' asserted defenses. Thus, we conclude that respondents' subpoena on its face is defective. Each of the four categories of requested documents ranges far beyond information which is relevant to this proceeding. Moreover, it is impossible to relate the requested documents to the specific defenses of respondents for which the information is claimed to be relevant.

Respondents nevertheless argue that the Commission's decision in *Koppers Co., Inc.* FTC Docket No. 8755 (July 2, 1968 [74 F.T.C. 1579]) laid down the rule that respondents are entitled to an opportunity prior to trial to obtain information for purposes of discovery and that under the decision of that case, they have made a sufficient showing that their requested subpoena could produce documents which might, in turn, lead to evidence relevant to their case. Certainly, our *Koppers* decision cannot be interpreted as respondents seek to do here as having created an open door to the production of any and all materials which respondents simply assert will lead to certain evidence. Subpoenas are not issued on bare suspicions. *Coro, Inc.* v. *FTC*, 338 F.2d 149, 153 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965). Nor was *Koppers* designed to lay down a new standard of discovery not contained in the Commission's rules which would eliminate any need whatsoever for a respondent seeking discovery to make some showing as to the relationship between the materials sought and the issues in the case.

In the instant case, we find that respondents have failed to make this showing of relevancy. Certainly the materials being sought under the subpoena have no bearing on the issue raised by respondents as to whether the Commission's Advisory Opinion precluded the Commission from proceeding against respondents by formal complaint. Equally clearly they appear to have no bearing on whether the Commission as a whole or individual Commissioners have prejudged some or all of the issues in this case. Finally, they can have only the most tenuous connection with the issues of whether improper *ex parte*

communications were made to the Commission as to this issue. The obvious source of relevant material on this issue is the Commission files themselves. As noted earlier, the Commission has today acted on repondents' motion to the Commission for production of all materials to which they are entitled under the Freedom of Information Act which might bear on this defense. The disposition of this matter, therefore, may well satisfy respondents' alleged need for obtaining documents from Mr. Rowse.

THE FIRST AMENDMENT ISSUES

One final point must be mentioned here. Respondents urge that the examiner erred because he refused to consider the First Amendment arguments presented by the parties. We disagree.

It is a recognized and salient principle of law that if nonconstitutional grounds may be dispositive of a matter, it is preferable to explore these grounds first before reaching the constitutional issues raised by the parties. *Communist Party of the United States* v. *Subversive Activities Control Board*, 351 U.S. 115, 122 (1956).

Our analysis of the subpoena leads us to the conclusion that it is irrelevant to the issues to which it purports to relate, that it is too indefinite and ambiguous as to the information sought to be produced, and that it is unduly and unreasonably broad in scope.[12] Much of the documentary material purportedly sought by the subpoena relates to communications by and between third parties. Indeed the bulk of the material sought would not seem to relate to communications to or from Mr. Rowse. Furthermore, it is obvious that there is nothing in the papers before us on this motion which demonstrates that the subpoena against Mr. Rowse searches for materials "which constitute or contain evidence relevant to the subject matter involved." Commission's Rules of Practice, Section 3.34(b)(2). It is possible that upon a review of

[12] Respondents argue that the Commission rules do not limit a respondent's discovery to materials which would in themselves constitute a valid defense. This is not the issue. But the implication of respondents' contention is that they are entitled to any discovery on their mere assertion that it might tend to lead to relevant evidence. This too begs the issue. There are limits to discovery through subpoenas *duces tecum* and the limits can be broadly stated to rest on the relevancy of the material sought to the issues in the case. As expressed in the Commission's Rules, Section 3.34(b)(2), the test is stated to be whether the materials sought are likely to "constitute or contain" relevant evidence.

It is obvious that respondents cannot just ignore the fact that discovery must have some relationship to issues in the case. They must make some showing that information being sought bears some relevance to the issues beyond their mere assertion that such is the case. Respondents nowhere make this showing under whatever interpretation is given to the Commission's rule under which their subpoena is sought.

the Commission's opinion concerning respondents' motion to dismiss the complaint issued October 29, 1971, and upon an examination of the materials produced pursuant to our decision today on their motion for production of Commission files, respondents' need for all or some part of the materials sought by the instant subpoena is already mooted.

Accordingly, we are sustaining the hearing examiner's decision to quash the subpoena for the reasons stated in this opinion. We agree with the examiner that the mere fact that Mr. Rowse wrote an article about the efforts of Congressman Rooney to spur government action against magazine sales subscription industry practices is not a sufficient basis for granting the subpoena.

Accordingly, we approve the hearing examiner's ruling that the subpoena to Mr. Rowse be quashed.

Chairman Kirkpatrick did not participate in this matter.

ORDER DENYING INTERLOCUTORY APPEAL FROM EXAMINER'S ORDER GRANTING MOTION TO QUASH SUBPOENA

Respondents the Hearst Corporation and Periodical Publishers' Service Bureau, Inc., having filed an interlocutory appeal from the hearing examiner's September 23, 1971 Order Granting Motion to Quash Subpoena to Arthur E. Rowse; and

The Commission having considered said appeal and the answer of Mr. Rowse in opposition thereto, and having determined, in accordance with the views expressed in the accompanying opinion that respondents' appeal should be denied;

It is ordered, That respondents' appeal from the hearing examiner's September 23, 1971 order granting the motion to quash the subpoena to Mr. Rowse be, and it hereby is, denied.

Chairman Kirkpatrick not participating.

THE HEARST CORPORATION, ET AL.

Docket 8832. Order and Opinion, Dec. 6, 1971

Order and opinion vacating subpoena *duces tecum* and remanding case to hearing examiner for reconsideration.

ORDER VACATING SUBPOENA DUCES TECUM AND REMANDING TO HEARING EXAMINER FOR RECONSIDERATION

This matter is before the Commission on its own motion. Respondents the Hearst Corporation (Hearst) and Periodical Publishers' Serv-