FEDERAL TRADE COMMISSION DECISIONS

Findings, Opinions and Orders

IN THE MATTER OF

OLIN SKI COMPANY, INC., ET AL.

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

Docket C-2895. Complaint, July 19, 1977 — Decision, July 19, 1977

This consent order, among other things, requires a Middletown, Conn. manufacturer and distributor of ski boots and other ski industry items to cease establishing, maintaining, and enforcing price maintenance agreements; requiring such agreements as a precondition to dealing; soliciting reports of recalcitrant distributors and terminating those dealerships; using serial numbers as a means of tracing products sold to unauthorized outlets; and failing to honor warranties for products sold by such establishments. Further, the order requires the respondents to maintain prescribed files for a five-year period; and prohibits them from disseminating, for two years, all materials suggesting resale prices.

Appearances

For the Commission: *David W. Dinardi.*

For the respondents: *Allen F. Maulsby, Cravath, Swain & Moore,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Olin Ski Company, Inc., a corporation, hereinafter sometimes referred to as respondent, has violated and is now violating the provisions of Section 5 of the Federal Trade Commission Act (38 Stat. 719, as amended; 15 U.S.C. 45), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Olin Ski Company, Inc., hereinafter referred to as respondent, 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 at 475 Smith St., Middletown, Connecticut.

PAR. 2. Respondent has been and is now engaged in the manufacture, sale or distribution of skis, ski boots or other ski industry items, hereinafter referred to as said products. Said products are subse-

quently distributed and sold throughout the United States for resale to the general public through authorized dealers who have signed with respondent an Authorized Dealership Agreement (hereinafter authorized dealers).

PAR. 3. In the course and conduct of its business as aforesaid, respondent has been engaged and is now engaged in commerce or its acts and practices affect commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, in that respondent has sold and caused and now causes said products to be shipped from the state in which they are manufactured or warehoused to other States of the United States for resale and distribution through authorized dealers to the general public.

PAR. 4. Except to the extent that competition has been hampered, hindered, lessened or restrained as set forth in this complaint, respondent has been and is now in competition with other persons, firms and corporations engaged in the manufacture, sale and distribution of said products in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 5. Respondent, in combination, agreement, or understanding with certain of its authorized dealers, has for the last several years been engaged in a course of action to fix, establish and maintain certain resale or retail prices at which said products are resold to the general public. In furtherance of said course of action, respondent has for the past several years engaged in the following acts or practices, among others:

(a) Regularly furnishing its authorized dealers with price lists and necessary supplements thereto containing certain resale or retail prices;

(b) Establishing agreements, understandings, or arrangements with its authorized dealers, one or more of whom are located in states which did not have fair trade laws, as a condition precedent to the granting of a dealership, that such authorized dealers would maintain certain resale or retail prices for said products or such dealership would be terminated; and that respondent would not honor a guaranty on said products sold by other than an authorized dealer of respondent;

(c) Requiring its authorized dealers to execute an Authorized Dealership Agreement under the terms of which such authorized dealers agree, among other things; That said products shipped to them by respondent will be sold at the retail level; and To resell to respondent any unsold stock of said products in the event that business relations between respondent and its authorized dealers are terminated;

(d) Affixing serial numbers on all skis shipped by respondent to its authorized dealers for the purpose of tracing sales of such skis by authorized dealers to unauthorized retail outlets;

(e) Soliciting and obtaining from its authorized dealers, cooperation and assistance in identifying and reporting any authorized dealer who advertises, or offers to sell, or sells said products at prices lower than certain resale or retail prices;

(f) Contacting those authorized dealers who fail to adhere to and maintain certain retail or resale prices for said products and securing, or attempting to secure, assurances from such authorized dealers that they will adhere to and observe respondent's resale or retail prices;

(g) In certain instances threatening to terminate and terminating authorized dealers who fail or refuse to observe, maintain or advertise respondent's resale or retail prices for said products.

PAR. 6. By means of such acts and practices, including but not limited to the foregoing, respondent, in combination, agreement, or understanding with certain of its authorized dealers, has established, maintained and pursued a course of action to fix and maintain certain resale or retail prices at which said products will be resold.

PAR. 7. The aforementioned acts and practices of respondent have been and are now having the effect of hampering and restraining competition in the resale and distribution of said products, and constitute unfair methods of competition in commerce, all in derogation of the public interest and 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 respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Boston Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, which order incorporates an agreement of Olin Corporation, 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 having determined that it had reason to believe that the respondent has violated the said Act, and that complaint should issue stating its charges in that respect, having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Olin Ski Company, 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 at 475 Smith St., Middletown, Connecticut.

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

I. *It is ordered,* That respondent Olin Ski Company, Inc., a corporation, or any of its subsidiaries, divisions, successors and assigns, and its officers, and respondent's agents, representatives and employees, individually or in concert, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, manufacture, distribution, offering for sale or sale of skis, ski boots or other ski industry items (hereinafter referred to in this order as "said products") in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, as amended, do forthwith cease and desist from:

A. Establishing, maintaining or enforcing with any authorized dealer any contract, agreement, understanding or arrangement fixing, establishing, maintaining, controlling or enforcing, directly or indirectly, the price at which any of said products is advertised, sold or offered for sale at retail.

B. Requiring any authorized dealer or prospective dealer to enter into an oral or written agreement or understanding that such authorized dealer or prospective dealer will maintain any resale or retail price for any of said products as a condition of buying any of said products.

C. Prior to selling to a prospective dealer, requiring a promise or assurance, whether by understanding, agreement, or otherwise, that

such dealer will adhere to and observe any resale or retail price for any of said products.

D. Requiring from any authorized dealer a promise or assurance to adhere to any resale or retail price for any of said products as a condition precedent to any future sales to said authorized dealer.

E. Requesting or requiring, either directly or indirectly, any authorized dealer or prospective dealer to report any authorized dealer who does not adhere to any resale or retail price for any of said products.

F. Terminating or threatening, either directly or indirectly, to terminate any authorized dealer for the reason that such dealer had been reported as not adhering to or observing any resale or retail price for any of said products.

G. Terminating or threatening, either directly or indirectly, to terminate any authorized dealer because of any resale or retail price observed, maintained, or advertised by the authorized dealer for any of said products.

H. For two (2) years from the date on which this order becomes final, publishing or circulating any suggested resale or retail price for any of said products by price list, discount schedule, invoicing procedure, pre-pricing of commodities or their containers, or by any other such means, to any reseller or authorized dealer.

I. After the expiration of the time period stipulated in provision H above, publishing, disseminating or circulating to any reseller or authorized dealer any price list, price book, price tag, advertising or promotional material, or other document indicating any resale or retail price of said products unless each reference to such price is accompanied by a clear and conspicuous disclosure that the price is suggested or approximate.

J. Refusing to honor a guaranty on any of said products for the reason that said product was not sold by an authorized dealer of respondent.

K. Requiring or inducing by threats of termination any authorized dealer or prospective dealer to refrain, or to agree to refrain from reselling any of said products to any independent dealer or distributor.

L. Using serial numbers, registration numbers or other similar identifying marks on said products as a means of tracing sales of said products to particular authorized dealers where the purpose of such tracing is to terminate or threaten to terminate authorized dealers of respondent selling said products to unauthorized dealers.

M. Requiring any authorized dealer to resell to respondent any unsold stock of said products in the event that business relations

between respondent and the authorized dealer are terminated; *provided, however,* that respondent shall not be prohibited from repurchasing such unsold stock with the consent of an authorized dealer, or where respondent has a "security interest" in said products, or where the authorized dealer is unable to meet its financial obligations to respondent.

II. *It is further ordered,* That respondent shall, within fifty-nine (59) days after service upon it of this order, mail to all current authorized dealers of said products, on official stationery of respondent, together with a copy of this order, a copy of the letter signed by the President of respondent, attached hereto as Exhibit A, and furnish the Commission proof of the mailing thereof.

III. *It is further ordered,* That respondent, during the five (5) year period of time following the date of service of this order, shall furnish to all future authorized dealers of said products at the time said dealers are opened as accounts a copy of this order, together with a copy of the letter attached hereto as Exhibit A.

IV. *It is further ordered,* That respondent shall forthwith distribute a copy of this order to each of its operating divisions and subsidiaries now engaged in the manufacture, sale and distribution of said products and to all of its officers and directors now engaged in the manufacture, sale and distribution of said products.

V. *It is further ordered,* That respondent shall, within thirty (30) days from the date of service of this order, mail or deliver, and obtain a signed receipt therefor, a copy of this order to all of its sales personnel and sales representatives then engaged in the distribution, offering for sale or sale of said products.

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

VII. *It is further ordered,* That respondent, for a period of five (5) years from the date of service of this order, maintain files of all records referring or relating to respondent's termination of any authorized dealer, which files shall contain a record of any written communication to each such dealer explaining such termination, and which files will be available for Commission inspection on reasonable notice; and, annually, for a period of five (5) years from the date of service, submit a report to the Commission listing the names and addresses of all authorized dealers whom respondent has terminated

during the preceding year, a description of the reason for the termination and the date of the termination.

VIII. *It is further ordered,* That the agreement of Olin Corporation, the parent corporation of the respondent, which agreement is in the form of an affidavit of the President of Olin Corporation, attached hereto as Exhibit B, be incorporated herewith into this order.

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

EXHIBIT A

(Letterhead of Olin Ski Company, Inc.)

(date)

Dear Authorized Olin Ski Dealer:

We have agreed with the Federal Trade Commission to inform you that the Federal Trade Commission has entered into a consent order with the Olin Ski Company, Inc.

Our agreement to the issuance of a consent order was for settlement purposes only and does not constitute an admission that the law has been violated by us in connection with the marketing of skis, ski boots and other ski industry items.

Subject to the provisions of the enclosed consent order:

(1) You are free to set your own retail or resale prices for our products;

(2) We will not solicit, invite or encourage you or any other person to report that any authorized dealer is not following any retail or resale price for any of our products, and, further, we will not act on any such reports sent to us; and

(3) We will not require any authorized dealer to refrain from advertising our products at any price or from selling or offering our products at any price to any person.

As a result of the consent order, you are free to determine independently your own pricing policy with respect to the advertising, offering for sale and sale of our products without interference by us and without jeopardy from such determination to your status as an authorized dealer.

Very truly yours,

President

EXHIBIT B

UNITED STATES OF AMERICA BEFORE FEDERAL TRADE COMMISSION

In the Matter of

OLIN SKI COMPANY, INC., File No. 731 0049

a corporation AFFIDAVIT OF JOHN M. HENSKE

STATE OF CONNECTICUT, SS.:

COUNTY OF FAIRFIELD,

JOHN M. HENSKE, being duly sworn, deposes and says:

1. I am the President and a Director of Olin Corporation (Olin), whose wholly-owned subsidiary, Olin Ski Company, Inc., (Olin Ski), is the respondent herein.

2. Olin Ski will today execute with counsel for the Federal Trade Commission an Agreement Containing Consent Order to Cease and Desist pertaining to future marketing practices in the manufacture, sale or distribution of skis, ski boots or other ski industry items.

3. Olin will undertake to have Olin Ski fulfill all its obligations under the aforementioned agreement.

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

5. In the event that Olin Ski is sold, assigned or otherwise disposed of by Olin to any other person, firm, partnership or corporation, Olin will insert in the agreement of purchase a provision specifying that the purchaser or assignee is a successor to or assignee of the obligations of Olin under the order.

6. In the event that Olin dissolves Olin Ski and/or Olin Ski discontinues the manufacture, sale or distribution of skis, ski boots or other ski industry items, and if Olin at any time in the future manufactures, sells or distributes skis, ski boots or other ski industry items, Olin will become a successor to or assignee of the obligations of Olin Ski under the order.

/s/JOHN M. HENSKE

Sworn to before me this
19th day of April 1976.
/s/Pauline E. Altieri
Notary Public
My Commission Expires April 1, 1981

IN THE MATTER OF

CBS INC.

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

Docket C-2896. Complaint, July 21, 1977 — Decision, July 21, 1977

This consent order requires a New York publishing firm to cease mailing and billing for unauthorized magazines; sending collection letters to receivers of unordered magazines; misrepresenting the effects of nonpayment on credit ratings in such letters; and transferring unpaid accounts to recipients of unsolicited magazines to debt collection or consumer reporting agencies. Further, the order requires respondent to make proper restitution to individuals who paid for unordered magazines; and to send correction letters to consumers whose credit standings may have been adversely affected by respondent's actions. Additionally, respondent is required to maintain prescribed records; and to institute an adequate program of continued surveillance to ensure conformance with the terms of the order.

Appearances

For the Commission: *Paul P. Eyre* and *John M. Mendenhall.*

For the respondent: *Edward Kelman* and *Jerry Ebenstein,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that CBS Inc., a corporation, hereinafter sometimes 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 CBS 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 51 West 52nd St., New York, New York. Respondent conducts its publishing of magazines through its CBS Consumer Publishing Division of the CBS Publishing Group, located at 600 Third Ave., New York, New York.

PAR. 2. Respondent, through its CBS Consumer Publishing Division, is now, and has been, engaged in the business of publishing, distributing, offering for sale, and selling various types of magazines.

PAR. 3. In the course and conduct of its magazine business, through

its CBS Consumer Publishing Division, respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended.

PAR. 4. In late 1974 and early 1975, respondent, in the course and conduct of its magazine business through the CBS Consumer Publishing Division, in connection with the publishing, distributing, offering for sale, or selling of *Field & Stream* magazine:

(a) Ran a sweepstakes promotion in conjunction with a subscription campaign for *Field & Stream* magazine. In order to enter the sweepstakes, consumers were requested to sign an entry card and check a box to indicate whether the consumer wanted only to enter the sweepstakes or to also subscribe to *Field & Stream.* A number of people returning the card did not check either box. Respondent, through the CBS Consumer Publishing Division, sent copies of *Field & Stream* magazine to consumers who did not check either box, as well as those who checked the subscription box.

(b) Has mailed, or caused to be mailed, to persons who received such magazines without having checked either box, a bill for such magazines.

(c) Has mailed, or caused to be mailed, persistent demands for payment to persons who received such magazines without having checked either box.

Pursuant to the Postal Reorganization Act, Section 2, 39 U.S.C. 3009 (1970), the aforesaid acts and practices of respondent's CBS Consumer Publishing Division constituted a violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 5. In the course and conduct of its business, and in connection with the publishing, distributing, offering for sale, or selling of *Field & Stream* magazine, respondent, through its CBS Consumer Publishing Division, transferred, or caused to be transferred, the purportedly due or delinquent accounts of those consumers who received copies of *Field & Stream* magazine and who did not indicate on the sweepstakes entry card whether they desired the magazine subscription to a debt collection agency or consumer reporting agency, for the purpose of collecting the subscription price for such magazines or for the purpose of including information in the consumer files of said agencies.

The aforesaid acts and practices constituted a violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 6. Respondent, through its CBS Consumer Publishing Division, has used the acts and practices set forth in Paragraphs Four and Five, to induce persons who received copies of *Field & Stream*

magazine without having checked either box to pay the subscription price for such magazine. Respondent's CBS Consumer Publishing Division has received the said sums from some of such persons, and has failed to offer refunds, or refund such sums to said persons.

The use by respondent, through its CBS Consumer Publishing Division, of the aforesaid acts and practices constituted, and respondent's continued retention of said sums of money as aforesaid constitutes, a violation of Section 5 of the Federal Trade Commission Act, as amended.

PAR. 7. Respondent, in the course and conduct of its business, through its CBS Consumer Publishing Division, for the purpose of inducing consumers to pay due or delinquent accounts, has transmitted, or has caused to be transmitted, to consumers, form letters demanding payment, representing that:

(a) If the consumer does not respond to a collection letter within a specified period of time, such consumer's account will be transferred to a consumer credit reporting agency for immediate inclusion in a national bad debt file;

(b) A consumer's account has been transferred to a credit collection manager of respondent's credit collection department.

PAR. 8. In truth and in fact:

(a) The failure of a consumer to respond to a collection letter within a specified period of time did not automatically result in the transferral of such consumer's account to a consumer credit reporting agency for immediate inclusion in a national bad debt file;

(b) The consumer's account was not transferred to a credit collection manager of respondent's collection department.

Therefore, the representations set forth in Paragraph Seven hereof were false, and had the tendency and capacity to mislead members of the public, and to induce the payment of delinquent accounts.

PAR. 9. In the course and conduct of its magazine business through its CBS Consumer Publishing Division, and at all times mentioned herein, respondent has been, and is now, in substantial competition in or affecting commerce with corporations, firms, and individuals engaged in the similar business of publishing, distributing, offering for sale, and selling magazines.

PAR. 10. The aforesaid acts and practices of respondent, through its CBS Consumer Publishing Division, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, and constituted unfair methods of competition and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act, as amended.

DECISION AND ORDER

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

1. Respondent CBS 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 51 West 52nd St., in the City of New York, State of New York, and one of its components is the CBS Publishing Group.

CBS Consumer Publishing Division, a division of the CBS Publishing Group, with its principal office and place of business located at 600 Third Ave., New York, New York, is engaged in the manufacture, distribution, and sale of consumer publications, including magazines.

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

I

It is ordered, That respondent CBS Inc., a corporation, its succes-

sors and assigns, and respondent's agents, representatives, and employees, directly or through the CBS Consumer Publishing Division, or any other corporation, subsidiary, division, or other device in connection with the advertising, publishing, distributing, offering for sale, or selling of magazines in commerce or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do continue to, and forthwith, cease and desist from:

A. Mailing, or causing to be mailed, magazines without the prior expressed request or consent of the recipient.

B. Mailing, or causing to be mailed, a bill to recipients of magazines mailed without the recipient's prior expressed request or consent.

C. Mailing, or causing to be mailed, collection letters to recipients of magazines mailed without the recipient's prior expressed request or consent.

D. Transferring, or causing to be transferred, the alleged delinquent accounts of recipients of magazines mailed without the recipient's prior expressed request or consent, to a debt collection or consumer reporting agency.

Provided, that respondent may act in accordance with the exceptions extended by the Postal Reorganization Act, Section 2, 39 U.S.C. 3009 (1970), as amended or modified.

II

It is further ordered, That respondent CBS Inc., a corporation, its successors and assigns, and respondent's agents, representatives, and employees, directly or through the CBS Consumer Publishing Division, or any other corporation, subsidiary, division, or other device in connection with the collection of consumer debts in commerce or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, do continue to, and forthwith, cease and desist from:

A. Using any forms, letters, or materials which represent directly or indirectly, by any means, that where payment due from a consumer in purported receipt of magazines is not received, the information of said delinquency is referred to a debt collection or consumer reporting agency, unless such agency is notified as represented.

B. Misrepresenting, by any means, the manner, extent, and consequences of the referral of debt delinquency information, compiled as a result of the purported receipt of magazines, to debt collection or consumer reporting departments or agencies.

C. Misrepresenting, by any means, that failure to pay the alleged

debt or delinquency, as a result of the purported receipt of magazines, will result in the consumer's credit rating being adversely affected.

D. Misrepresenting, in any manner, the names, roles, functions, relationship to respondent, or titles of individuals who are engaged in the collection of money purportedly due and payable as a result of the purported receipt of magazines, or who transfer information regarding particular consumers to debt collection or consumer reporting departments or agencies as a result of money purportedly due and payable as a result of the purported receipt of magazines.

III

It is further ordered, That:

A. Respondent deliver a copy of this order to each of its present and future operating groups, magazine publishers, and employees directly responsible for magazine circulation marketing activities, and to each of its present and future independent contractors engaged in magazine subscription fulfillment activities or magazine subscription advertising activities.

B. Respondent, through its CBS Consumer Publishing Division, institute a program of continuing surveillance adequate to reveal whether the business practices of individuals or entities described in Section III, paragraph A, conform to the requirements of this order.

C. Respondent, through its CBS Consumer Publishing Division, maintain files containing all inquiries or complaints from any source relating to acts or practices prohibited by this order, for a period of two years after their receipt, and that such files be made available for inspection and copying by the Federal Trade Commission or its staff upon request.

IV

It is further ordered, That:

A. Respondent CBS Inc., through its CBS Consumer Publishing Division, shall offer a choice, at the option of the consumer, of full restitution ($2.98) or a free one (1) year subscription to *Field & Stream* magazine to any consumer who paid in full for an unordered subscription to *Field & Stream* magazine in connection with the *Field & Stream* Sweepstakes/Subscription promotion conducted in late 1974 and early 1975, after the receipt by such consumer of the letter signed by Ken Edwards or Vince Dema, which letter stated in part:

> Dear Friend,
>
> When you sent us your FIELD & STREAM subscription order I accepted it in good faith, and billed you as you requested.

> Since that time I've sent you three action-packed issues of FIELD & STREAM, but have not received your payment. You are long overdue. . . .

This offer of full restitution or a free one (1) year subscription shall be made in the following manner:

(1) Within thirty (30) days after the date this order becomes final, respondent, through its CBS Consumer Publishing Division, shall identify all consumers described in Section IV, paragraph A.

(2) Within sixty (60) days after the date this order becomes final, respondent, through its CBS Consumer Publishing Division, shall notify in writing by first-class, post-paid mail, all consumers identified in Section IV, paragraph A(1), at their last known addresses, of their right to restitution in the language, manner, and form shown in Appendix A.

(3) The letter set forth in Appendix A shall request a response to respondent's offer by a certain date. Such date shall be at least one hundred twenty (120) days after the date this order becomes final. Any response to such offer postmarked after such date shall be null and void.

(4) Within one hundred fifty (150) days after the date this order becomes final, respondent, through its CBS Consumer Publishing Division, will, in accordance with consumers' replies to Appendix A, either refund, by first-class, post-paid mail, all monies paid by consumers identified in Section IV, paragraph A(1), or initiate, in accordance with the terms of said letter, a free one (1) year subscription to *Field & Stream* magazine on behalf of said consumer.

(5) Within two hundred ten (210) days after the date this order becomes final, respondent, through its CBS Consumer Publishing Division, will provide to the Commission the following information:

(a) A list of the consumers identified pursuant to Section IV, paragraph A(1), of this agreement.

(b) A list of the consumers to whom letters were sent pursuant to Section IV, paragraph A(2), and which were returned by the United States Postal Service to respondent's CBS Consumer Publishing Division, having been undelivered to consumers.

(c) A list of the consumers who do not return Appendix A or otherwise respond to Appendix A within the time period allowed for such response.

(d) A list of the consumers who elect to receive full two dollars and ninety-eight cents ($2.98) restitution under the terms of the offer extended by Appendix A.

(e) A list of the consumers who elect to receive a free one (1) year subscription to *Field & Stream* magazine under the terms of the offer extended by Appendix A.

B. Respondent, through its CBS Consumer Publishing Division, shall retain in its files for a period of three (3) years after the date that this order becomes final:

(1) All letters and their respective envelopes sent pursuant to Section IV, paragraph A(2), which are returned to respondent's CBS Consumer Publishing Division by the United States Postal Service as undeliverable.

(2) All letters (including those specified by Appendix A) sent to respondent's CBS Consumer Publishing Division by consumers in response to the offer extended by respondent's CBS Consumer Publishing Division pursuant to Section IV, paragraph A.

V

It is further ordered, That, within thirty (30) days after the date this order becomes final, respondent, through its CBS Consumer Publishing Division, shall notify in writing, by first-class mail, in the language, manner, and form shown in Appendix B, those consumers whose names were forwarded by it in respect of *Field & Stream* magazine to Credit Index, a division of Hooper-Holmes.

VI

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

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

APPENDIX A

DATE

Name, Address, City, State, ZIP Code.

Re: 1975 World of Leisure Sweepstakes– Field & Stream Magazine.

Dear _____:

Last year, we entered a subscription in your name to *Field & Stream* magazine. If you are dissatisfied with the entry of this subscription and your payment therefor, we would like to make you the following offer:

A cash refund of $2.98 paid; or

A free one-year subscription to *Field & Stream* magazine (newsstand value of $12.00) to begin at once or added at the end of your current subscription.

Please indicate, by checking one box only, which of the above alternatives you desire.

In order to take advantage of this offer, this letter must be postmarked by (*date*). We have enclosed a business reply envelope for your convenience.

Looking forward to hearing from you.

Very truly yours,

CBS Consumer Publishing.

By: _____

APPENDIX B

DATE

Name, Address, City, State, ZIP Code.

Re: 1975 World of Leisure Sweepstakes- Field & Stream Magazine.

Dear _____:

Due to a confusion with respect to an incompletely filled-out sweepstakes entry form/subscription order form, and the resultant billing to you with respect to copies of *Field & Stream* magazine, we referred your name to a direct-mail bad pay file with a consumer credit reporting agency.

Please be advised that we have caused your name to be removed from said file permanently.

By law (Fair Credit Reporting Act), all debt collection agencies or consumer credit reporting agencies must delete information with regard to this misunderstanding upon presentation of this letter.

Please excuse this misunderstanding, and accept our apology.

Very truly yours,

CBS CONSUMER PUBLISHING.

By: _____

IN THE MATTER OF

CENTRAL CALIFORNIA LETTUCE PRODUCERS COOPERATIVE, ET AL.

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

Docket 8970. Complaint, June 10, 1974 — Final Order, July 25, 1977

This order dismisses a complaint issued against a Salinas, Calif. nonprofit cooperative and 22 of its members for alleged price-fixing practices in the lettuce market, violative of antitrust law. The Commission ruled that the price-fixing practices were exempt from the antitrust laws, under the Capper-Volstead Act, which permits producers of agricultural products to "act together in association . . . in collectively . . . marketing" their products.

Appearances

For the Commission: *Carl J. Batter, Jr.* and *David B. Loken.*

For the respondents: *Philip C. Olsson* and *James F. Rill, Collier, Shannon, Rill & Edwards,* Washington, D.C., *Andrew Church, Abramson, Church & Stave,* Salinas, California and *Max Thelen Jr., Thelen, Marrin, Johnson & Bridges,* San Francisco, California.

COMPLAINT

[2] Pursuant to the provisions of the Federal Trade Commission Act (Title 15, U.S.C. 41, *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to belive that the parties listed in the caption hereof, and more particularly described and referred to hereinafter, have violated the provisions of Section 5 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 Central California Lettuce Producers Cooperative (hereafter "Central") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Central maintains its home office and principal place of business at 512 Pajaro St., Salinas, California. [3]

PAR. 2. Respondent Admiral Packing Co. (hereafter "Admiral") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Admiral maintains its home office and principal place of business at 495 Brunken Ave., P.O. Box 1089, Salinas, California.

PAR. 3. Albert C. Hansen is an individual doing business as Hansen

Farms (hereafter "Hansen"). Hansen maintains its home office and principal place of business at 1941 Alisal Rd., P.O. Box 269, Salinas, California.

PAR. 4. Respondent California Coastal Farms, Inc. (hereafter "Coastal") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Coastal maintains its home office and principal place of business at 1140 Abbott St., P.O. Box 811, Salinas, California.

PAR. 5. Respondent Carl Joseph Maggio Inc. (hereafter "Maggio") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Maggio maintains its home office and principal place of business at South 1st St. & Lonoak Rd., P.O. Box 536, King City, California.

PAR. 6. Respondent D'Arrigo Bros. Co. of California (hereafter "D'Arrigo") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. D'Arrigo maintains its home office and principal place of business at 706 West Market St., P.O. Box 850, Salinas, California.

PAR. 7. Respondent Eckel Produce Co. (hereafter "Eckel") is a partnership organized, existing and doing business under and by virtue of the laws of the State of California. Eckel maintains its home office and principal place of business at 740 Airport Blvd., P.O. Box 1027, Salinas, California.

PAR. 8. Respondent Green Valley Produce Co-Op (hereafter "Green Valley") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Green Valley maintains its home office and principal place of business at 1148 Abbott St., P.O. Box 2123, Salinas, California. [4]

PAR. 9. Respondent Growers Exchange, Inc. (hereafter "Growers") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Growers maintains its home office and principal place of business at 740 Airport Blvd., P.O. Box 479, Salinas, California.

PAR. 10. Respondent Harden Farms of California (hereafter "Harden") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Harden maintains its home office and principal place of business at 1102 Growers St., P.O. Box 779, Salinas, California.

PAR. 11. Respondent J. R. Norton Co. (hereafter "Norton") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Norton maintains its home office and principal place of business at Front & Gabilan Sts., P.O. Box 5375, Salinas, California.

PAR. 12. Respondent Jack T. Baillie Co., Inc. (hereafter "Baillie") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Baillie maintains its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 268, Salinas, California.

PAR. 13. Respondent Let-Us-Pak is a partnership organized, existing and doing business under and by virtue of the laws of the State of California. Let-Us-Pak maintains its home office and principal place of business at 740 Airport Blvd., P.O. Box 225, Salinas, California.

PAR. 14. Respondent Merit Packing Co. (hereafter "Merit") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Merit maintains its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 1649, Salinas, California.

PAR. 15. Respondent Merrill Farms (hereafter "Merrill") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Merrill maintains its home office and principal place of business at 1067 Merrill St., P.O. Box 659, Salinas, California. [5]

PAR. 16. Respondent Pacific Lettuce (hereafter "Pacific") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Pacific maintains its home office and principal place of business at Rianda & Prader Sts., P.O. Box 534, Salinas, California.

PAR. 17. Respondent R. T. Englund (hereafter "Englund") is a partnership organized, existing and doing business under and by virtue of the laws of the State of California. Englund maintains its home office and principal place of business at 271 Rianda St., P. O. Box 517, Salinas, California.

PAR. 18. Respondent Royal Packing Co. (hereafter "Royal") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Arizona. Royal maintains an office and place of business at 91 Spicer St., P.O. Box 5337, Salinas, California.

PAR. 19. Respondent Salinas Lettuce Farmers Cooperative (hereafter "Salinas Lettuce") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Salinas Lettuce maintains its home office and principal place of business at 624 South Sanborn Rd., P.O. Box 594, Salinas, California.

PAR. 20. Respondent Salinas Marketing Cooperative (hereafter "Salinas Marketing") is a corporation organized, existing and doing

business under and by virtue of the laws of the State of California. Salinas Marketing maintains its home office and principal place of business at 1222 Merrill St., P.O. Box 357, Salinas, California.

PAR. 21. Respondent The Garin Co. (hereafter "Garin") is a corporation organized, existing and doing business under and by virtue of the laws of the State of California. Garin maintains its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 1731, Salinas, California.

PAR. 22. Respondent United Brands Company (hereafter "United Brands") is a corporation organized, existing and doing business under and by virtue of the [6] laws of the State of New Jersey. United Brands maintains its home office and principal place of business at 245 Park Ave., New York, N.Y. United markets fresh produce, including lettuce, through a wholly-owned subsidiary, Inter Harvest, Inc. whose home office and principal place of business is located at 122 East Alisal St., P.O. Box 2115, Salinas, California.

PAR. 23. Respondent West Coast Farms (hereafter "West Coast") is a partnership organized, existing and doing business under and by virtue of the laws of the State of California. West Coast maintains its home office and principal place of business at 470 West Beach St., P.O. Box 809, Watsonville, California.

PAR. 24. Respondents Admiral, Hansen, California, Maggio, D'Arrigo, Eckel, Green Valley, Growers, Harden, Norton, Baillie, Let-Us-Pak, Merit, Merrill Pacific, Englund, Royal, Salinas Lettuce, Salinas Marketing, Garin, United Brands and West Coast (sometimes referred to as "respondent marketers") market fresh produce, including lettuce, primarily from the growing areas of California and Arizona. The total sales of lettuce by respondent marketers in the Salinas, California area in 1973 was substantial, approximately 20,000,000 cartons. Each respondent marketer is a member of respondent Central.

PAR. 25. In the course and conduct of respondent marketers' business of offering for sale, selling, shipping or causing the shipping of fresh produce, including lettuce, from the State of California to persons, corporations or partnerships located in states other than the State of California, and/or in the maintenance by some respondent marketers of selling offices in both California and Arizona, respondent marketers have been and are now engaged in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 26. Respondent Central is engaged in commerce as "commerce" is defined in the Federal Trade Commission Act by virtue of its functions as the vehicle by which its members fix, control,

establish or maintain the price or price ranges of lettuce which is shipped by respondent's members in interstate commerce.

PAR. 27. Except to the extent that competition has been hampered and restrained by reason of the practices hereinafter described, respondent marketers have been in substantial competition with each other and other marketers of fresh produce, including lettuce. [7]

PAR. 28. Since approximately May of 1972, when respondent Central was incorporated, Central and respondent marketers have engaged in a plan, policy, or course of action, the purpose of which is to fix, control, establish or maintain the prices, or price ranges, or price floors, or price ceilings, at which each respondent marketer offers to sell or sells lettuce.

PAR. 29. In furtherance of the plan, policy, or course of action referred to above, Central and respondent marketers have engaged, among others, in one or more of the following acts or practices, each of which constitutes, in itself, an illegal act or practice:

(a) On or about May, 1973, each respondent marketer agreed in writing to sell lettuce to all customers only at prices within the limits of the ceiling prices and floor prices established on a weekly or daily basis by Central.

(b) Representatives of respondent marketers have met, under the auspices of respondent Central, and have discussed or agreed upon prices, or price ranges, or floor or ceiling prices at which each respondent marketer would sell lettuce to their customers.

(c) Respondent marketers have offered to sell or have sold lettuce to their customers at the prices, or price ranges, or floor or ceiling prices discussed or agreed upon at meetings held under the auspices of respondent Central.

PAR. 30. The above acts and practices have or may have the capacity to unduly hinder, suppress, lessen and eliminate competition between respondent marketers and between respondent marketers and other marketers of lettuce and deprives or may deprive the consuming public of prices determined by free and open competition in the sale of lettuce or other fresh produce and thus constitute unfair methods of competition in commerce and unfair acts and practices in commerce, within the intent and meaning of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY MORTON NEEDELMAN, ADMINISTRATIVE LAW JUDGE

MARCH 13, 1975

[3] 1

STATEMENT OF THE CASE

The Federal Trade Commission issued a complaint on June 10, 1974, charging respondent Central California Lettuce Producers Cooperative (hereinafter "Central"), and its 22 members with a violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by reason of illegal price-fixing in the sale of lettuce.

Prior to filing an answer, respondents moved to dismiss the complaint on the grounds, first, that Central comes within the antitrust exemption for agricultural cooperatives contained in Section 6 of the Clayton Act, and the Capper-Volstead Act of 1922; and second, that since Central is an exempt cooperative only the Secretary of Agriculture has authority to review its pricing practices. On September 4, 1974, I ruled that the Secretary of Agriculture does not have exclusive jurisdiction and the Federal Trade Commission may properly assert its own jurisdiction to determine all the issues in this case including the very issue of the existence of an antitrust exemption.[1] I said at the time that the exemption issue is so closely intertwined with the merits of the case that a motion to dismiss could not [4] be granted, but I indicated the respondents would be given ample opportunity to present evidence as well as legal argument to show why they are entitled to a Capper-Volstead exemption. Subsequently, I ruled that respondents' motion to dismiss on the grounds of lack of jurisdiction may not be certified to the Commission and respondents were ordered to file an answer.[2]

Respondents' answer dated September 20, 1974, admitted, with certain minor exceptions, the allegations respecting the identity of each of the respondents. The answer also admitted that each of the individual respondents is engaged in commerce as "commerce" is

[1] See, Order Denying Motion to Dismiss and Request for Oral Argument and Setting Date for Filing of Answer (September 4, 1974). Addressing the argument that the Secretary of Agriculture has exclusive or primary jurisdiction over the exemption question, I said that this view has been "unequivocally rejected" by the Supreme Court after "full consideration" was given to the legislative history. *Maryland and Virginia Milk Producers Assn., Inc.* v. *United States*, 362 U.S. 458, at 462-463 (1960); *United States* v. *Borden Co.*, 308 U.S. 188 (1939). In addition, I noted that the plain language of the statute, as well as the legislative history and the decided cases compel the conclusion that the Capper-Volstead Act grants no more than auxiliary power to the Secretary in certain special circumstances, and even if the Secretary should exercise that power, the Commission need not stay its hand. *Washington Crab Assn., et al.*, 66 F.T.C. 45 (1964).

[2] See, Order Denying Respondents' Request for Certification to the Commission pursuant to Section 3.23(b) and Granting Further Time to Answer (September 16, 1974).

defined in the Federal Trade Commission Act by reason of the fact that they all sell lettuce across state lines. All other material allegations of the complaint were denied and respondents again asserted the affirmative defense that the Commission lacked jurisdiction because of the exempt status of Central and its members.[3]

With the joinder of issue, a prehearing conference was held on October 15, 1974. After listening to the arguments of both parties, it appeared to the Administrative Law Judge that the facts of the case could be stipulated and on the basis of that stipulation a decision could be rendered on both the applicability of the Capper-Volstead exemption and whether a substantive antitrust violation had occurred.

[5] The parties agreed to follow this suggested course and on December 11, 1974, a stipulation, with exhibits attached, was filed. Thereafter, on January 20, 1975, motions and briefs and accompanying affidavits in support of summary decision were submitted by both parties; replies were filed on February 21, 1975, and oral argument on the cross-motions was heard on February 27, 1975.

Based on the factual stipulation and exhibits as well as the briefs filed in support of the cross-motions for summary decision, I make the following findings of fact, and conclude that complaint counsel's motion for summary decision should be granted.

II

FINDINGS OF FACT

Central and Its Members

1. This case involves the formation and subsequent pricing activity of Central California Lettuce Producers Cooperative (hereinafter "Central"), an association of 22 lettuce producers located in the Salinas-Watsonville-King City area of California and who, together, account for a significant share of the total production in the United States of this important fresh food. (Finding 37)

2. Central was incorporated on June 8, 1972, as a nonprofit cooperative association without capital stock under the provisions of Chapter 1, Division 20, of the Agricultural Code of California, West's Ann. Agric. Code, §§ 54001, *et seq.* (Stip. ¶¶ 2, 6; Ex. B-1)

3. Central began functioning in May 1973, when it signed an

[3] Another affirmative defense relating to alleged denial of an opportunity to present and discuss offers of settlement as provided by Sections 2.31 and 2.34 of the Commission's Rules and 5 U.S.C. 554 has not been adequately briefed to the Administrative Law Judge to the point where an initial decision can be rendered on this issue. Moreover, the Commission's policy relating to administration of Part 2 of its Rules is not a matter properly before an Administrative Law Judge.

identical "Cooperative Marketing Agreement" (hereinafter "CMA") with each of the following 22 individual respondents named in the complaint: Admiral Packing Company; Albert C. Hansen d/b/a Hansen Farms; California Coastal Farms, Inc.; Carl Joseph Maggio, Inc.; D'Arrigo Bros. Co. of California; Eckel Produce Co.; Green Valley Produce Co-Op; Growers Exchange, Inc.; Harden Farms of California; J. R. Norton Co.; Jack T. Baillie Co., Inc.; Let-Us-Pak; Merit Packing Co.; Merrill Farms; Pacific Lettuce; R. T. Englund Co.; Royal Packing Co.; [6] Salinas Lettuce Farmers Cooperative; Salinas Marketing Cooperative; The Garin Co.; Inter Harvest, Inc., a

subsidiary of United Brands Co.; and West Coast Farms. (Stip. ¶ 1)[4] [9]

The Production and Marketing of Lettuce[5]

4. The practices of Central and its members, which are the subject of this proceeding, take place in a lettuce industry consisting of growers, grower-shippers, and shippers, as well as brokers and buyers

[4] In the joint answer filed by the 22-member respondents, each admits the complaint allegations respecting corporate identity. Minor errors in the complaint with respect to respondents J. R. Norton Co. and Inter Harvest, Inc. were corrected by stipulation (see, Order Incorporating Stipulation Into Record, March 3, 1975). The corporate identities of the 22 members of Central are as follows:

Respondent Admiral Packing Co. is a California corporation with its home office and principal place of business at 495 Brunken Ave., P.O. Box 1089, Salinas, California.

Albert C. Hansen is an individual doing business as Hansen Farms with its home office and principal place of business at 1941 Alisal Rd., P.O. Box 269, Salinas, California.

Respondent California Coastal Farms, Inc. is a California corporation with its home office and principal place of business at 1140 Abbott St., P.O. Box 811, Salinas, California.

Respondent Carl Joseph Maggio, Inc. is a California corporation with its home office and principal place of business at South 1st St. & Lonoak Rd., P.O. Box 536, King City, California.

Respondent D'Arrigo Bros. Co. of California is a California corporation with its home office and principal place of business at 706 West Market St., P.O. Box 850, Salinas, California.

Respondent Eckel Produce Co. is a California partnership with its home office and principal place of business at 740 Airport Blvd., P.O. Box 1027, Salinas, California.

Respondent Green Valley Produce Co-Op is a California corporation with its home office and principal place of business at 1148 Abbott St., P.O. Box 2123, Salinas, California.

Respondent Growers Exchange, Inc. is a California corporation with its home office and principal place of business at 740 Airport Blvd., P.O. Box 479, Salinas, California.

Respondent Harden Farms of California is a California corporation with its home office and principal place of business at 1102 Growers St, P.O. Box 779, Salinas, California.

Respondent J. R. Norton Co. is an Arizona corporation with its home office and principal place of business at Front & Gabilan Sts., P.O. Box 5375, Salinas, California.

Respondent Jack T. Baillie Co., Inc. is a California corporation with its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 268, Salinas, California.

Respondent Let-Us-Pak is a California partnership with its home office and principal place of business at 740 Airport Blvd., P.O. Box 225, Salinas, California.

Respondent Merit Packing Co. is a California corporation with its home office and principal place of business at 634 South Sanborn Rd., P.O. Box 1649, Salinas, California.

Respondent Merrill Farms is a California corporation with its home office and principal place of business at 1067 Merrill St., P.O. Box 659, Salinas, California.

Respondent Pacific Lettuce is a California corporation with its home office and principal place of business at Rianda & Prader Sts., P.O. Box 534, Salinas, California.

Respondent R. T. Englund is a California partnership with its home office and principal place of business at 271 Rianda St., P.O. Box 517, Salinas, California.

Respondent Royal Packing Co. is an Arizona corporation. Royal maintains an office and place of business at 91 Spicer St., P.O. Box 2337, Salinas, California.

Respondent Salinas Lettuce Farmers Cooperative is a California corporation with its home office and principal place of business at 624 South Sanborn Rd., P.O. Box 594, Salinas, California.

Respondent Salinas Marketing Cooperative is a California corporation with its home office and principal place of business at 1222 Merrill St., P.O. Box 357, Salinas, California.

Respondent The Garin Co. is a California corporation with its home office and principal place of business at 634 South Sanborn, P.O. Box 1731, Salinas, California.

Respondent United Brands Company is a New Jersey corporation with its home office and principal place of business at Prudential Center, Boston, Mass. United Brands markets fresh produce, including lettuce, through a wholly-owned subsidiary, Inter Harvest, Inc., whose home office and principal place of business is located at 122 East Alisal St., P.O. Box 2115, Salinas, California.

Respondent West Coast Farms is a California partnership with its home office and principal place of business at 470 West Beach St., P.O. Box 809, Watsonville, California.

[5] The stipulated facts relating to the lettuce industry are derived from some of the findings on the subject in the Initial Decision in F.T.C. Dkt. No. 8835, *United Brands Company* (Slip Opinion dated March 19, 1973 [83 F.T.C. 1614]).

located at various shipping points. The shipping points change during the year. Starting with spring shipments in May and until October, the Salinas-Watsonville-King City area (Monterey and Santa Cruz Counties, California) furnishes the major share of lettuce. In November, most lettuce comes from Arizona. And from December through March, the major source, again, is California (the Imperial Valley, and, especially in March, the Blythe District of the Imperial Valley). During April, as in November, the largest share comes from Arizona. In addition to these major shipping points, smaller amounts of lettuce come from other areas from time to time. (Stip. ¶ 25(a))

5. Lettuce is a perishable food which means that once it ripens, it must be harvested within three or four days. (Stip. ¶ 25(a))

6. Harvesting decisions are made on a day-to-day basis and depend on such factors as volume shipped and the prices received on the preceding day, information as to the "unloads" and prices in major terminal markets, local weather conditions, weather conditions in terminal markets, and the condition of the crop. (Stip. ¶ 25(a))

7. After the harvesting decision is made, lettuce is cut, packed, and inspected in the field. Lettuce is normally packed 24 heads to a cardboard carton and then trucked to a vacuum cooler, where the temperature is lowered to about 34 degrees. From the vacuum cooler, the cartons are shipped by rail or truck to destinations throughout the United States. Again, because it is a perishable product, it must be shipped on the same day it is cut or, at the latest, the next day. (Stip. ¶ 25(a))

[10] 8. Buyers and buyer representatives may inspect the lettuce at the vacuum cooling plant or in the field. Inspection normally takes place before a final purchase is made. Buyers compare quality as between different grower-shippers or between the lettuce produced in different fields but handled by the same shipper or grower-shipper. Quality is an important factor in pricing and accounts in significant measure for the range of lettuce prices at each shipping point. (Stip. ¶ 25(a))

9. Most lettuce is shipped "naked" in the carton; that is, the heads are not individually wrapped. The clear plastic film in which lettuce is sometimes displayed in retail stores is ordinarily added by the store after the lettuce head is cut and trimmed of any discoloration that may have taken place in transit. While lettuce, both wrapped and unwrapped, is not advertised to consumers on a brand basis, individual label names are used by growers and certain labels have achieved some measure of trade recognition for quality. (Stip. ¶ 25(a); Affidavit of John Derdivanis, January 15, 1975, attached to Respon-

dents' Memorandum in Support of Motion For Summary Decision, January 20, 1975.)

10. Growers, grower-shippers, and shippers keep abreast of the market by contacts with one another and through the services offered by the Federal-State Market News Service. By personal contact, and by telephone, and by following the publications of the Federal-State Market News Service, both sellers and buyers have available the latest information relating to the price and the volume of lettuce being sold. This includes information on "unloads" and prices in terminal markets, on weather conditions in these markets, as well as in other producing areas; the shipping volume and price for the preceding day; and also the current day's volume and pricing. Market News reporters seek and disseminate information on both the selling and buying side of the market. This is done through contacts with shippers and with purchasers. This information is verified and published the following day. (Stip. ¶ 25(a))

[11] 11. As indicated in Finding 6, lettuce is sold on a day-to-day basis. Negotiations over any particular sale begin in the morning and terminate in the afternoon after each party has had the opportunity of informing himself fully on the day's market, both through the Market News Service and by contact with the trade. The buyers are represented by brokers or by their own representatives. (Stip. ¶ 25(a))

12. Most lettuce is sold f.o.b. at the shipping point. However, some lettuce is sold on a consignment basis. This usually represents an established relationship between a particular terminal market wholesaler and grower-shipper with a consequent sharing of the profits or losses involved in resale at the terminal market. (Stip. ¶ 25(a))

13. At times, consignments are made on a distress basis — that is, cars that could not be sold at the shipping point are consigned to a wholesaler or another representative who will undertake to sell the contents at the terminal market for the best price he can get. In other words, the car has a "home," where a designated representative will undertake to sell it. (Stip. ¶ 25(a))

14. In the absence of either a shipping point sale or a consignment, a grower-shipper may "roll" the car and endeavor to sell it while it is en route toward Eastern markets. Otherwise, he may "no-bill" the car — that is, provide no bill of lading for that day but hold the car over for another day for possible sale or consignment at that time. (Stip. ¶ 25(a))

15. To the extent that there exists any substantial volume of no-bills, rollers, and distress consignments, this tends to depress the market since such cars are surplus at the going prices. (Stip. ¶ 25(a))

16. The lettuce industry often will be faced with average annual prices over a two or three-year period which do not cover total costs of production and harvesting. For this reason, well-established grower-shippers and shippers plan their schedules and evaluate financial performance over relatively long periods of operations [12] of up to four to five years, with the expectancy that losses in one year will be offset by gains in others. As would be expected, successful shippers and grower-shippers require sufficient cash reserves to carry them through possible years of low return. (Stip. ¶ 25(a))

17. Traditionally, the industry has been characterized by considerable price uncertainty. Because of the perishable character of lettuce and the huge volumes that must be moved to market in a brief period of time, supplies are highly variable, not only from area to area and from season to season, but also from year to year. Both the vagaries of weather and the uncoordinated production of many growers may result in sudden shortages or unanticipated surpluses. (Stip. ¶ 25(c))

18. Lettuce is subject to an inelastic demand curve. This means that a small change in quantity will generate an opposite but relatively larger change in the prevailing market price. If shipments are reduced by a given percentage, there is an opposite and more than proportional increase in price resulting in greater total grower-shipper returns. On the other hand, if shipments are increased by given percentage, there is an opposite and more than proportional decrease in price, with a resultant decrease in total revenue for the industry. (Stip. ¶ 25(c))

19. With the industry subject to so many variables on both the supply side and the demand side, prices tend to fluctuate widely and wildly. Prices may drop or rise by as much as 300 percent in a week — from $5.50 to $1.50, or the converse. (Stip. ¶ 25(d))

The Activities of Central

20. Against this background of perishability of product, price uncertainties, demand inelasticities, as well as a history of distress selling, Central was created. Its purpose, as indicated in the preface to the CMA which was signed with the 22 members (Finding 3), is as follows:

> [13] WHEREAS, it is the objective of the Cooperative [*i.e.*, Central] to improve conditions in the produce industry for the mutual benefit of its members as producers by promoting, fostering, and encouraging the intelligent and orderly marketing of agricultural products through cooperation; eliminating speculation and waste; making the distribution of agricultural products between producers and consumers as direct as can be efficiently done; stabilizing the marketing of

agricultural products; encouraging efficiency and economy in marketing; preventing the demoralizing of markets resulting from dumping and predatory practices; mitigating the recognized evils of a marketing system under which prices are set for the entire industry by the weakest producer; and fostering the ability of the members of the Cooperative to obtain prices for their products, in competitive markets, which are fair prices but not prices inflated beyond the reasonable value of such products by reason of artificially created scarcity of such products or other predatory trade practices which would injure the public interest; and

WHEREAS, the objective can be achieved only if supported by mutual cooperative effort of all the members on a relatively permanent basis, and this agreement is one of a series of contracts with the members evidencing such cooperative effort. (Stip. ¶ 1; Ex. A, p. 1)

21. The CMA in effect between Central and each of its members during the 1973 and 1974 Salinas-Watsonville-King City lettuce season had a three-year term, but the producers' obligations thereunder are limited to the actual Salinas-Watsonville-King City season. Moreover, the CMA may be terminated by a member upon 31 days notice. (Stip. ¶ 1; Ex. A, pp. 1,7)

22. While each of the 22 members of Central is a producer of lettuce, Central, itself, does not grow or harvest or ship lettuce in its own name. Central does not negotiate directly with buyers of lettuce, and does not enter into direct agreements with buyers for the sale [14] or shipment of specific lots of lettuce. Central does not employ any sales personnel in its own name and has no receipts from sales of lettuce. (Stip. ¶¶ 9, 19, 22)

23. Central's income comes from membership fees and assessments. Each member pays a membership fee in the same amount as every other member. Assessments were paid during the 1973 season at the rate of $500 per member and during the 1974 season at the rate of $0.002 per carton shipped. Central has never made any distribution of its income to its members. (Stip. ¶ 20)

24. Each individual member of Central or his individual agent, arranges or negotiates with buyers for the sale of lettuce produced by or for him during the Salinas-Watsonville-King City season. Members compete with each other for the same customers. Payment for such lettuce is billed and collected by the individual member or its individual agent for its own account. At all times the individual members deal with lettuce buyers under their individual trade names. The member's affiliation with Central is disclosed by imprinting the organization's name or logo on shipping boxes. (Stip. ¶¶ 22, 24)

25. Paragraph 2 of the CMA imposes the following obligations on each member (*i.e.*, "Producer"):

A. *Cooperative Marketing.* Producer agrees to handle and market

all lettuce grown or harvested by or for Producer during the term of this agreement, whether on land owned by or rented to Producer or otherwise, only through the Cooperative [*i.e.*, Central] and under its auspices and pursuant to the terms and conditions of this agreement.

B. *Crop Reports.* Producer agrees to report to the Cooperative and keep the Cooperative advised at all times of the actual and expected status of all crops of lettuce under Producer's control. Such reports shall include, but not be limited to, the number of acres and types of lettuce planted, date of planting, expected yields of each lot, and expected dates of harvest, relating to the harvesting, packing, shipping, and/or marketing of such lettuce. Reports of planting shall be rendered [15] within one month after planting has been completed in each lot. Reports of expected yields and harvest dates shall be rendered weekly, or at such other intervals as the Cooperative may establish, with each report to contain a breakdown to daily estimates.

C. *Cooperative Schedules.* Producer agrees to abide by the harvesting, processing, packing and shipping schedules, and other requirements established by the Cooperative. Volume controls may not be imposed by the Cooperative unless approved by a unanimous vote of all those members in attendance at a meeting called to consider such controls after giving actual notice of the time, place and purpose of such meeting to all members, either in person, by phone, or by delivery of written notice, at least 24 hours in advance of such meeting.

D. *Inspection.* Producer agrees to permit official representatives of the Cooperative to enter Producer's fields, sheds and other facilities to inspect the condition, quality and quantity of growing and harvested crops.

E. *Brokerage.* Producer agrees to make no discounts or concessions in lieu of brokerage. Any brokerage paid shall be shown on the invoices to all parties.

F. *Prices.* Producer agrees to sell lettuce to all customers only at prices within the limits of the ceiling prices and floor prices established on a weekly or daily basis by the Cooperative.

G. *Shipping Terms.* Producer agrees to sell lettuce to all customers on only the terms authorized by the Cooperative, and those terms shall be F.O.B., F.O.B.A., F.O.B.A.F. No Recourse, Joint Account, Guarantee Consignment, and Open Consignment, except for Government buying, which shall be D.S.A., if required. Producer agrees to make no sales on terms better than "Good Delivery Standards as set forth for produce under P.A.C.A. Rules & Regulations, under a 'No grade' contract."

H. *No Market Protection.* Producer agrees to eliminate market protection at the time of transaction.

I. *No Unsold Rollers.* Producer agrees not to roll any lettuce unless and until it has been sold or consigned.

[16] J. *Canadian Sales.* Producer agrees that on all sales to Canada, the costs of inspection and inspection services wires are to be paid by the receiver or buyer.

K. *Delinquent Accounts Report.* Producer agrees to submit to the Cooperative on Monday of each week during the season a list of all accounts over 30 days old from date of shipment, listing customers, amounts in arrears, and age of accounts.

L. *Chronic Complainers Report.* Producer agrees to submit to the Cooperative on Monday of each week the names of receivers and buyers who have become habitual and chronic complainers about grade, quality and/or condition of produce received by them from Producer.

M. *Accounts and Records.* Producer agrees to make available to the Cooperative for inspection and copying all sales confirmation documents for each and every sale of lettuce made by Producer during the term of this contract, whether or not such sale has been in compliance with the schedules and requirements established as provided herein. Producer agrees that all books of accounts and records relating to the sale of crops during the term of this contract shall be open to inspection by Cooperative at reasonable times during business hours and for a period not exceeding three years following any transaction. Producer shall not be obligated by this contract to keep or retain any of his records more than three years following the consummation of any given transaction during the term of this contract. (Stip. ¶ 1, Ex. A, pp. 1-3)

26. The obligations of Central are set forth in paragraph 3 of the CMA. One such obligation is to set up a committee or committees, and through such committee or committees to "establish for its membership . . . such schedules and requirements for harvesting, processing, packing, shipping, grading, quality control, marketing and pricing of lettuce as shall be considered necessary by the Cooperative [Central] to achieve the objectives set forth in the preamble to this Cooperative Marketing Contract." (Stip. ¶ 1; Ex. A, pp. 3-4)

[17] 27. In addition, the CMA provides that a committee of committees is to meet weekly or more often if necessary. Decisions are to be by majority vote, Central is to provide proper notice of meetings, and give equitable treatment to all members (Stip. ¶ 1; Ex. A, pp. 3, *et seq.*), and

acquire, exchange, interpret, and disseminate past, present and prospective crop, market, statistical, economic and similar information to and for the benefit of its membership, including Producer hereunder. Such information shall include information relating to complaints, rejections, sales and purchasing practices and credit of brokers, commission merchants, receivers and purchasers. (Stip. ¶ 1; Ex. A, p. 3 (CMA Para. 3(E)))

28. Pursuant to by-laws adopted subsequent to the formation of the cooperative, each member of Central had a seat on the Board of Directors and a seat on the Executive Committee of Central. During 1973 and 1974, each respondent member had a seat on the Board of Directors and a seat on the Executive Committee of Central. (Stip. ¶ 8; see, Tr. 17-19 (Feb. 27, 1975))

29. Central's Executive Committee meets weekly or more often and reviews the various factors affecting the overall supply and demand for lettuce and determines a ceiling price, a floor price, or both, for future sales of lettuce by its members. (Stip. ¶ 6)

30. The organization and activity of Central is further described in a series of "messages" which Central caused to be published in *The Packer,* a trade publication which is the national newspaper of the fresh fruit and vegetable industry. (Stip. ¶ 12)

31. The "message" of June 16, 1973, described how the members of the Executive Committee meet at least once a week, how each member provides information on his acreage, plantings, expected yields, and estimated shipments for the following week. The Committee takes into account estimated shipments of nonmembers, and from other shipping points, as well as marketplace conditions. Then, the Committee fixes a ceiling or floor, or both on the price of lettuce. Thus, according to the June 16, 1973 "message" —

[18] Accurate information is the key ingredient in any successful marketing program. The marketing agreement signed by the 22 lettuce producing members of the Central California Lettuce Producers Cooperative recognizes its importance.

At least once each week, the Co-op members gather as a committee of the whole to present current crop reports. Each member reports the actual and expected status of all lettuce crops under his control for the coming period, usually one week.

These reports include the number of acres and type of lettuce planted, date of planting, expected yields of each lot and expected dates of harvest. It is interesting that for the week June 4-8 the production estimated by the members a week ahead of harvest was for 1.326 carlot equivalents. The actual total packed was 1.352 carlot equivalents. We think this is very accurate forecasting in a crop prone to such sizeable fluctuations due to weather.

The committee of the whole also takes into consideration what amounts of lettuce can be expected from producing areas other than the Salinas-Watsonville-King City district, the amounts expected from S-W-K.C., shippers not participat-

ing in the Co-op and conditions in the marketplace that will have a bearing on demand.

Working with accurate production information provides the basis for an open debate by Co-op members. With 22 separate members and 22 separate points of view, debate is assured. Every member can and does express his view en route to a consensus opinion.

With the production information firmly in hand, members then seek to arrive at an equitable range of prices that will result in an orderly flow of lettuce to market during the coming week.

[19] Section F of the marketing agreement states the "producer agrees to sell lettuce to all customers only at prices established on a weekly or daily basis by the cooperative."

To date, the Co-op has suggested only ceiling prices above which sales by members were prohibited. Tight supplies to date have made suggested price floors unnecessary.

The agreement also provides for inspection of members' fields should it be necessary to insure the accuracy of a members' crop estimate.

By arriving at a price range on a factual basis, the Co-op makes it possible for its members' customers to enjoy a new confidence in the supply and price quotations. It also insures our members a fair return within the dictates of supply and demand. It is, we submit, orderly marketing in action. (Stip. ¶ 12; Ex. C, p. 2)

32. The June 23 "message" dealt with "Good Delivery Standards, Shipping Terms Defined." Paragraph 2 of the CMA was quoted in full, and the message interpreted it as follows:

Not authorized and therefore forbidden are delivered sales, price arrival, and F.O.B. Inspection and Acceptance on Arrival. Specifically forbidden under Section I of the agreement are unsold rollers.

Those practices not authorized in the agreement are forbidden on the grounds that lettuce sales on those terms are not conducive to orderly marketing. (Stip. ¶ 12; Ex. C, p. 3)

33. The "message" in the August 18 *Packer* was entitled, "1973 a Year of Steep Union Wage Increases in Salinas." It dealt in particular with the week of August 6:

[20] The Central California Lettuce Producers Co-op has experienced a good deal of success in promoting orderly marketing during the 1973 season at price levels fair to both shippers and receivers in view of lighter than normal supplies. Yet it was not entirely the Co-op's activity that was responsible for lettuce pricing the week of August 6 — a week that may be looked back upon as the time that $1.25 lettuce became obsolete.

Getting back into action after a 19-day strike by Teamster Union Local 890, a huge glut of supplies developed the week of August 6 as growers and shippers tried to salvage fields past the peak of maturity in addition to lettuce scheduled for that date. The remarkable factor was that prices did not generally go below the $1.75 mark — $.50 higher than the normal rock-bottom distress price.

* * * * * * *

With the heavy cost increases of labor, packaging supplies, and other inputs in

1973, it seems likely that $1.75 may be the lowest price at which growers will harvest and pack in time of burdensome supply. (Stip. ¶ 12; Ex. C, p. 10)

34. In addition to the "messages" the day-to-day operations of the cooperative are further reflected in the minutes of the weekly, or more frequent meetings, at which members of the Executive Committee of Central discuss prices and sometimes other terms and conditions of sale. These "minutes" are usually the handwritten notes kept by the chairman. (Stip. ¶ 13)

35. The "minutes" which are in the record show that during 1973 the Executive Committee took the following actions to establish ceiling prices: [21]

May 9, 1973	$6.00 ceiling	in effect May 9-12
May 11, 1973	$6.00 ceiling	in effect until May 18
May 25, 1973	$7.00 ceiling	in effect May 28-June 1
May 30, 1973	$7.00 ceiling	in effect through June 6
August 3, 1973	$5.00 ceiling	in effect until August 8
August 29, 1973	$2.75 ceiling	in effect until September 1
August 31, 1973	$3.00 ceiling	in effect until September 5
September 5, 1973	$3.00 ceiling	in effect September 6-12
September 12, 1973	$3.00 ceiling	in effect September 13-19

(Stip. ¶13; Ex. D, pp.3, 6, 8, 10, 24, 30, 31, 32, 35)

36. The "minutes" of the Executive Committee meetings for 1973 reflect only one decision to establish a price range. At the meeting of August 6, 1973, the Executive Committee voted to establish a maximum price of $2.50 and a minimum price of $1.75 to remain in effect until August 10. (Stip. ¶ 13; Ex. D, p. 25)

37. During 1973, the 22 members of Central shipped over 20 million cartons or over 60 percent of the lettuce originating from the Salinas-Watsonville-King City shipping point. During calendar year 1973, approximately 77,678,000 cartons of lettuce were shipped from all California areas during all seasons and total U.S. shipments covering all U.S. areas and seasons were approximately 110,622,000 cartons. (Stip. ¶ 23)

38. The lettuce produced by the 22 members of Central is shipped

in interstate commerce generally, on a day-to-day basis, from approximately mid-April to mid-October (the Salinas-Watsonville-King City season). (Stip. ¶ 10)

39. All 22 respondent members of Central sold lettuce pursuant to the policies of Central as set forth in Sections 2E to 2J of the CMA and as further implemented by votes of the Executive Committee. (See, Finding 25; Stip. ¶ 18; Ex. A, pp. 2-3) [22]

III

DISCUSSION

This case has been submitted on cross-motions for summary decision under Section 3.24 of the Commission's Rules. All of the major facts have been stipulated, and complaint counsel do not contest certain additional facts as stated in two supporting affidavits filed by respondents. Since there is no dispute as to any material question of fact, I have decided, as a matter of law, that summary decision sustaining the complaint is justified.[6]

The case involves the scope of the so-called agricultural cooperative exemption as it applies to the 22 lettuce growers who, during 1973 and 1974, made up the Central California Lettuce Producers Cooperative (Central).

The exemption derives, initially, from Section 6 of the Clayton Act, which states that nothing in the antitrust laws shall "forbid the existence and operation of * * * agricultural or horticultural organizations, instituted for * * * mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof." Section 6 of the Clayton Act further provides that neither such organizations nor their members "shall be held or construed to be illegal combinations or conspiracies in restraint of trade under the antitrust laws."[7] By its terms, the Section 6 exemption applies only to cooperatives "not having capital stock"; this limitation, however, was removed by enactment of the Capper-Volstead Act of 1922.[8]

[23] Section 1 of Capper-Volstead allows agricultural producers to "act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market,

[6] The Supreme Court has said that antitrust cases usually are not susceptible to disposition by summary judgment under Rule 56 of the Federal Rules of Civil Procedure, *Poller* v. *Columbia Broadcasting System Inc.*, 368 U.S. 464 (1962); there is no reason, however, for denying summary decision in an antitrust case where the main facts have been stipulated, and particularly, where the controlling issue is one of jurisdiction. See, Gellhorn and Robinson, *Summary Judgment In Administrative Adjudication*, 84 Harv. L. Rev. 612, 626-628 (1971).

[7] 38 Stat. 731 (1914), 15 U.S.C. 17.

[8] 42 Stat. 388 (1922), 7 U.S.C. 291-292.

handling, and marketing" their products. Section 1 also provides that "Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes . . . ." Section 2 of the Act authorizes the Secretary of Agriculture to issue cease and desist orders if he finds that a cooperative monopolizes or restrains trade "to such an extent that the price of any agricultural product is unduly enhanced by reason thereof."

Central is not a stock corporation,[9] and respondents claim the agricultural exemptions under both the Clayton Act and the Capper-Volstead Act.[10] While the right of farmers to organize into cooperatives derives from both Acts, it has been held that Capper-Volstead clarifies the exemption,[11] and a specific practice must be sanctioned by Capper-Volstead since the "full effect" of the Clayton Act is to allow the creation of an agricultural cooperative without triggering the antitrust laws by reason of the mere existence of the cooperative.[12] [24] Therefore, in resolving the ultimate issue in this case — whether Central was legally engaged in "collectively marketing" as that term is used in Capper-Volstead or engaged in illegal price-fixing — I assume that the latter is not a "legitimate object" of Clayton 6, while the former is. In short, the Clayton Act adds no additional substantive breath to the claimed exemption, and respondents' cause must rise or fall with the Capper-Volstead Act.

In this case the Capper-Volstead exemption is claimed by 22 lettuce growers in the Salinas-Watsonville-King City area who created Central because they were concerned about certain industry conditions and competitive practices which tended to depress prices.[13] Dealing with a highly perishable commodity which had to be harvested within three or four days after it ripens, and is usually sold on the same day as it is harvested, lettuce was being marketed by some growers at distress prices while other growers were consigning lettuce to Eastern markets in the form of so-called "unsold rollers."[14] The existence of such surplus lettuce had the effect of bringing prices down to the point that the industry as a whole operated at a loss for periods of two years or more.[15] The stipulation describes the background of Central as follows:

> To the extent that there exists any substantial volume of no-bills, rollers, and

[9] Finding 2.

[10] As well as the Cooperative Marketing Act of 1926, see Footnote 24, *infra*.

[11] *Case-Swayne Co., Inc.* v. *Sunkist Growers, Inc.*, 389 U.S. 384 (1967). See also, *Sunkist* v. *Winckler & Smith Co.*, 370 U.S. 19 at 28 (1962) ("The Capper-Volstead Act set out this immunity [*i.e.*, Clayton 6] in greater specificity").

[12] *Maryland and Virginia Milk Producers Assn.* v. *United States*, 362 U.S. 458, 465-466 (1960).

[13] Findings 4 to 20.

[14] Findings 5, 6, 7, 11, 13, 14, 15, 20.

[15] Findings 15, 16.

distress consignments, this tends to depress the market since such consignments are surplus at the going prices.[16]

* * * * * * *

Traditionally, the industry has been characterized by considerable price uncertainty. Because of the perishable character of lettuce and the huge volumes that must be moved to market in a brief period of time. Supplies are highly variable, not only from area to area and from season to season, but also from year to year. Both the [25] vagaries of weather and the uncoordinated production of many growers may result in sudden shortages or unanticipated surpluses.[17]

* * * * * * *

With the industry subject to so many variables on both the supply side and the demand side, prices tend to fluctuate widely and wildly. Prices may drop or rise by as much as 300% in a weekly time — from $5.50 to $1.50 or the converse.[18]

The stipulation also shows that some producers, by reason of long-range corporate planning, were able to overcome the financial strain of short-term price uncertainty but others, apparently, were not.[19] And obviously, *all* would have preferred not to have to confront competitive conditions which tend to depress prices. Taking what Central actually did (eliminate "rollers," and set a range of prices or a ceiling price)[20] and in the light of the background described above, a fair conclusion from the stipulation is that Central was put together mainly to stop distress selling, to get higher prices, and thereby to improve profits; its members assuming that regulation of pricing and elimination of price cutting in order to accomplish these ends was permissible conduct under the limited antitrust exemption recognized by the Capper-Volstead Act. Unquestionably, if there is no exemption in this case, the members and Central are guilty of illegal price-fixing under *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150 (1940).

To qualify for the exemption, an agricultural cooperative must meet the following structural requirements: (1) It must be an association of agricultural producers — *i.e.,* actual farmers, not middlemen; (2) It must operate on a nonprofit basis; (3) It must [26] operate for the mutual benefit of its members; (4) It must not deal in a greater dollar volume of nonmembers' products than the value of products handled by it for members; (5) It must conduct its business either on a one member, one vote basis, or not pay dividends on capital in excess of 8 percent per year.

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[16] Finding 15.
[17] Finding 17.
[18] Finding 19.
[19] Finding 16.
[20] Findings 25, 29, 31, 32, 33, 35, 36, 39.

Complaint counsel do not challenge the organizational basis of Central, and I conclude that Central did, indeed, meet all structural requirements.[21] But consideration of the Capper-Volstead Act exemption only begins with these conditions. Before the exemption can be claimed, it must be shown that the cooperative was engaged in "*collectively* processing, preparing for market, handling and *marketing* in interstate and foreign commerce, such products of persons so engaged [*i.e.*, the products of the farmer members]."

Respondents contend that given the fact that Central was properly organized, they come within the Capper-Volstead exemption because the weekly meeting for the purpose of setting a ceiling price or a range of prices or to eliminate "distress" practices is a proper collective marketing function of a legitimately structured Capper-Volstead cooperative. Complaint counsel, on the other hand, say that there is no exemption because Central does not engage in any legitimate form of collective marketing and, therefore, the meetings constituted illegal price fixing.

The meaning of the term "collectively marketing" is the key issue here because clearly Central does not perform any of the *other* legitimate functions of a Capper-Volstead cooperative; that is, it does no collective "processing," "preparing for market," or "handling." By this I mean, that Central does not negotiate with buyers of lettuce nor does it enter into agreements with buyers of lettuce for the sale or shipment of produce.[22] Central does not employ any sales personnel in its own name nor does it have receipts from the sale of lettuce. Central does not grow, harvest, or ship lettuce in its own name.[23] [27] All that Central does, that is of any significance to this case, is to serve as a meeting ground for the lettuce producers to come together and agree on pricing policy.[24] After these price discussions, and on the basis of the pricing policies established at the meetings, each individual member of Central negotiates with buyers for the sale of the lettuce produced by it.[25] Payment for the lettuce is billed and collected by the individual member for its own account.[26] Given these facts, as I indicated above, the area of dispute in this case is whether

[21] See also, Findings 22, 27.

[22] Finding 22.

[23] Finding 22.

[24] Central carries out some informational and educational functions, but these are clearly secondary to its main pricing function. Moreover, the stipulation shows that even prior to the formation of Central there was no shortage of accurate information available on all aspects of lettuce growing and marketing (Finding 10). I am willing to assume, however, that whatever Central did in a purely educational or informational vein was sanctioned by the Cooperative Marketing Act of 1926, 44 Stat. 803, 7 U.S.C. 455, *et seq.*, which provides that agricultural producers and their associations may acquire and exchange "past, present and prospective crop, market, statistical, economic, and other similar information" directly or through an agent. By its terms, an act which allows the exchange of information so that farmers can compete more effectively, does not sanction a price-fixing agreement.

[25] Finding 24.

[26] Finding 24.

Central engages in the *kind* of activity which comes within the meaning of the Capper-Volstead term "collectively marketing."

[28] The meaning of "collectively marketing" in an agricultural cooperative context was recently treated at length in *Treasure Valley Potato Bargaining Association* v. *Ore-Ida Foods, Inc.,* 497 F.2d 203 (9th Cir. 1974), *rev. denied* by Supreme Court, 43 Law Week 3274 (reported, 11-12-74). There the argument was made that "bargaining associations" had no antitrust exemption because they did not sell the potatoes grown by the members and, therefore, they did not "collectively market." The Court of Appeals rejected this argument and upheld the exemption claim on the grounds that the cooperatives were indeed "marketing." The Circuit Court said:

> The two associations were in fact "bargaining" associations. They were named "Malheur Potato *Bargaining* Association" and "Treasure Valley Potato *Bargaining* Association." (Emphasis added.) Their principal function was to bargain collectively for their respective members as to prices, terms and conditions of preseason potato contracts. They "coordinated their bargaining efforts" and tacitly attempted to secure similar contracts from both associations so that their members would be treated similarly regardless of the defendant-processor to whom they sold their potatoes.
>
> True, the associations did not collectively *process, prepare for market, handle* or actually sell potatoes. But Section 1 of the Capper-Volstead Act further authorizes "Persons engaged in the production of agricultural products as farmers . . . [to] act together in associations . . . in collectively . . . *marketing* in interstate and foreign commerce, such products of persons so engaged . . . and have marketing agencies in common; . . . ."
>
> The activities of the two associations came within the word *marketing.* Each association acted and bargained for its members in negotiating contracts for the sale of potatoes by its members. [29] It was such bargaining activity, and particularly the practice of one association following the lead of the other, and attempting to secure for its members the same price obtained by the other association in its first contract with Ore-Ida and Simplot, that was the basis for defendants' (cross-appellants') contention of antitrust violations.
>
> We think the term *marketing* is far broader than the word *sell.* A common definition of "marketing" is this: "The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including *among others* buying, selling, storing, transporting, standardizing, financing, risk bearing, and *supplying market information.*" *Webster's New Collegiate Dictionary,* 1953 Edition. [Emphasis added.] The associations here were engaged in bargaining for the sales to be made by their individual members. This necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes. The associations were thus clearly performing "marketing" functions within the plain meaning of the term. We see no reason to give that word a special meaning within the context of the Capper-Volstead Act.[27]

[27] 497 F.2d 203, at 215 (all emphasis supplied by Court). There is a separate question in *Treasure Valley* of the legality of an inter-cooperative agreement (*i.e., between* Malheur and Treasure). The court disposed of that issue by saying that since Capper-Volstead allows *associations* to have common marketing agencies, it follows that *without*

(Continued)

[30] *Treasure Valley* held that a bargaining cooperative need not sell the produce of its members, but there was no issue there whether a *mere* agreement about prices without *any* other cooperative activity (*i.e.,* not even collective "bargaining") vis-a-vis the "outside world" is "collectively marketing" within the statutory meaning. Consequently, I believe that *Treasure Valley* left open the question of whether there is a real distinction between (a) the cooperative that bargains with buyers for a price for its members (undoubtedly on the basis of discussions amongst the members about a desirable selling price) and (b) a cooperative which serves as a forum for the members to agree on prices and then lets its members do the actual selling, as in the instant case.

In dealing with the problem of whether the policy behind the exemption logically compels a distinction between these two ways of doing business, I start with the proposition that Capper-Volstead, like any other limited antitrust exemption, is to be construed in the light of the national economic policy as reflected in the antitrust laws. With respect to this policy, the Supreme Court has said:

> [The antitrust laws were] designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. . . . [They] rest on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.[28]

When it is said, therefore, that exemptions like Capper-Volstead are to be *narrowly* read, this means that every effort must be made to harmonize the exemption with the basic national economic policy of encouraging "interaction of competitive forces." Precedent indicates that this standard is to be met by not going beyond what is reasonably [31] necessary to serve whatever *other* Congressionally-mandated policies are inherent in the exemption itself, while at the same time preserving to the fullest extent possible the basic policy of competition.[29]

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such a separate agency, the associations may act together under the principle that if the act of the agent is lawful, the same act performed by the principal is also lawful. *Id.* at 214. The court, however, did not say that either the existence or nonexistence of a common marketing agency *between* cooperatives has any bearing on the legality of the activity of the *individual* cooperatives. On *that* issue, the court went into a long discussion of what is "collectively marketing" by a single cooperative. In this case, contrary to respondent's argument, there is no issue of a common marketing agency as between cooperatives. The main issue here is analagous to the second part of *Treasure Valley* — *i.e.,* does Central, as an individual cooperative, engage in the kind of activity which is exempt by Capper-Volstead?

[28] *Northern Pacific Railway Co., et al.* v. *United States,* 356 U.S. 1, at 4 (1958).

[29] "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both if possible. . . . The intention of the legislature to repeal 'must be clear and manifest' . . . There must be a positive repugnance between the provisions of the new law, and those of the old; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy." *United States* v. *Borden Co.,* 308 U.S. 188, at 198-199 (1939). See, also, *Federal Maritime Commission* v. *Seatrain Lines, Inc.,*

(Continued)

In this instance, the exemption, reflects a Congressionally-mandated policy of permitting relief of a certain kind to farmers who face the disadvantages (and, presumably, the low prices) which result from being small, disorganized, scattered, subject to the vagaries of the weather, and in many other respects, largely the victims of contingencies beyond their control.[30] Relief, insofar as Capper-Volstead is concerned,[31] was to be granted in the form of allowing a pooling of resources into a single democratically-functioning "corporate" entity which was to meet in [32] open market and bargain with large buyers.[32] Viewed in the light of our basic economic policy, the purpose of Capper-Volstead, then, was to allow the creation of an organizational unit which could *compete* effectively in the market and have its prices determined by equality, or near equality, of strength rather than by the autocratic power of oligopsonists. As Congressman Volstead said,

> The farmers are not asking a chance to oppress the public, but insist that they should be given a fair opportunity to meet business conditions as they exist — a condition that is very unfair under the present law. Whenever a farmer seeks to sell his products he meets in the market place the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself with his neighbors for the purpose of *collectively negotiating* for a fair price, he is threatened with prosecution [*i.e.*, under the Sherman Act].[33]

[33] Against this legislative background, the Ninth Circuit could conclude in *Treasure Valley* that formation of a cooperative bargaining unit was at least not inconsistent with the notion of allowing farmers to join together and form a single bargaining unit as a way of overcoming the imbalance in bargaining power which was said to exist between small, family farmers and corporate middlemen. Here, however, there is no joining together of farmers in any sense contemplated by the act or even within the broad definition of "marketing" advanced by *Treasure Valley*. Instead, a group of

411 U.S. 726 (1973); *Otter Tail Power Co.* v. *United States*, 410 U.S. 366, at 372-74 (1973); *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963); *Silver* v. *NYSE*, 373 U.S. 341 (1963); *United States* v. *McKesson & Robbins*, 351 U.S. 305 (1956).

[30] *Tigner* v. *Texas*, 310 U.S. 141 (1940).

[31] It must be stressed that we are not dealing here with the *total* agricultural policy of the United States. Capper-Volstead is but a segment of that policy relating to collective marketing as one remedy to some of the farmers' problems. 61 Cong. Rec. 1042 (1921) (remarks of Cong. Sumners). Other facets of that policy — "parity" prices, restrictions on production, marketing agreements, and "soil banks" — indicate no dearth of tools when Congress desires to raise or stabilize prices in ways other than by allowing farmers to negotiate as a group.

[32] See, H.R. Report No. 24, 67th Congress, 1st Session (1921); 61 Cong. Rec. 1033 (1921) (remarks of Cong. Volstead); 62 Cong. Rec. 2057 (1922) (remarks of Senator Volstead); Hearings on S. 4344 Before a Subcommittee on the Senate Committee on the Judiciary, 66th Cong., 2nd Sess., at 49 (1920) (remarks of Senator Brandegee).

In the legislative debates there are also references to the prospect of eliminating unnecessary middlemen entirely, by encouraging farmers, through their collective marketing efforts, to sell directly to consumers, 62 Cong. Rec. 2255 (1922) (remarks of Senator Norris).

[33] H.R. Report No. 24, 67th Congress, 1st Session (1921), at p. 2. [Emphasis added.]

growers simply put into effect a plan to manipulate the market price and then go their separate ways.

The fact that they do go their separate ways (after first agreeing on price) contradicts the basic assumption of the exemption — namely, that farmers are to be allowed to band together to redress a presumed imbalance in bargaining strength. Nowhere in the legislative history of the Act is there a suggestion that farmers are to be given an exemption to resort to their own devices and to make whatever agreements or arrangements they may wish to inflict on a substantial part of commerce.[34] Such an interpretation of the exemption would not only bring it into direct conflict with our basic economic policy, but it would be contrary to the legislative goal of allowing farmers to unite into single bargaining units for the purpose of *counteracting* price-fixing by handlers and middlemen. To this effect, in *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-Operative Marketing Association,* 276 U.S. 71 (1928), the Supreme Court quoted with approval the opinion of the Kentucky Supreme Court upholding the Bingham Act [Kentucky Co-operative Incorporating Statute]:

> We take judicial knowledge of the history of the country and of current events and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others *who fixed the price of the selling producer and the final consumer through combinations and other arrangements,* [34] *whether valid or invalid,* and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handlers between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is also a well known fact that without the agricultural producer society could not exist and the oppression brought about in the manner indicated was driving him from his farm thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power.[35]

Legislatures, in short, knew too well the evils which had resulted from fixing the price of farm produce by powerful middlemen, and it is untenable that they would entrust to *either* party to the transaction — a cooperative of selling producers or a combine of buyers — power to fix market prices to the possible detriment of the consuming public. Indeed, both the limited state and Federal exemptions to the antitrust laws which were given to farmers were based on the assumption that combinations of farmers would *not* subject the general public to monopolistic or restrictive practices. In *Tigner* v. *Texas,* the Supreme Court said:

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[34] See, Findings 37, 38.

[35] 276 U.S. 71, at 93. [Emphasis added.]

> Farmers were widely scattered and inured to habits of individualism, their economic fate was in large measure dependent upon contigencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen.[36]

[35] Not only were the cooperatives not considered a "threat" to the community, they were looked on, as I indicated above, as a way of *promoting* competition. The House Report by Congressman Volstead on the exemption legislation declares:

> it is not sought to place these associations above the law [Sherman Act] but to grant them the same immunity from prosecution that corporations now enjoy [*i.e.*, in terms of allowing the existence of corporate organizations] so that they may be able to do business successfully *in competition* with them.[37]

Manifestly, there was no purpose in Capper-Volstead to make the national economic policy as reflected in the antitrust laws inapplicable to the farm industry; the purpose was to assure fair and vigorous competition where formerly one side — the buyers — were able to dictate terms. Consistent with the objective of fair competition and the limited means chosen to accomplish that objective — *i.e.*, allowing farmers an exemption to organize and then to sell or bargain as one unit — the courts have uniformly said that *certain* cooperative activity does not conform with this legislative plan however organizationally "pure" the cooperative may be, and no matter how directly the questioned activity relates to the ultimate price to be realized by the farmers. Thus, in *United States* v. *Borden,* the Supreme Court held that the Pure Milk Association, a milk producers cooperative, had engaged in a criminal violation of Section 1 of the Sherman Act when it conspired with milk distributors to fix and maintain uniform and noncompetitive milk prices in the Chicago area. While affirming the right of agricultural producers "to unite in preparing for market and marketing their products," the Supreme Court said that the Capper-Volstead Act does not "authorize any

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[36] 310 U.S. 141 at 145 (1940). In the Congressional debates on Capper-Volstead, the threat of a farm monopoly was rejected ("In the case of the farmer it is impossible for him through these farm organizations and under this bill to create a trust or monopoly such as is contemplated by antitrust laws" 61 Cong. Rec. 1044 (1921) (remarks of Cong. Hersey)). See also, 62 Cong. Rec. 2053 (1922) (remarks of Senator Kellogg) and 62 Cong. Rec. 2059 (1922), where Senator Capper said, ". . . a farmer's monopoly is impossible. If the cooperative marketing association makes its price too high, the result is inevitable self-destruction by overproduction in the following years."

[37] H.R. Report No. 24, 67th Cong., 1st Session (1921), at p. 3. [Emphasis added.] There is other internal evidence in the Act that Congress did not intend to give farmers the power to fix market prices ". . . in restricting membership to producers. Congress also intended to limit in a rough way the amount of market power which could be controlled by such organizations." *Case-Swayne Co.* v. *Sunkist Growers, Inc.*, 389 U.S. 384 at 398-399 (opinion of Mr. Justice Harlan, concurring and dissenting).

combination or conspiracy with other persons in restraint of trade that these producers may see fit to devise."[38] It is particularly significant [36] that in *Borden,* the Court said that it was unable to accept the view of the district court which had held that the Act "legalizes price-fixing for those within its purview."[39] The Supreme Court stated:

> . . . *the conspiracy charged is not that of merely forming a collective association of producers to market their products* but a conspiracy, or conspiracies, with major distributors and their allied groups, with labor officials, municipal officials, and others in order to maintain artificial and non-competitive prices to be paid to all producers for all fluid milk produced in Illinois and neighboring States and marketed in the Chicago area, and thus in effect, as the indictment is construed by the court below "to compel independent distributors to exact a like price from their customers" and also to control "the supply of fluid milk permitted to be brought to Chicago." . . . Such a combined attempt of all the defendants, producers, distributors and their allies, to control the market finds no justification in § 1 of the Capper-Volstead Act.[40]

While it is true that *Borden* involved a conspiracy with "others," the rationale of the opinion should apply to any attempt by a cooperative to do more (at least with respect to price) than organize and function as a single bargaining unit. In *Maryland and Virginia Milk Producers Assn.,* the Supreme Court, relying on *Borden,* held that even where a cooperative of dairy farmers acts *by itself* it may be found to be in violation of Section 2 of the Sherman Act where it attempts to manipulate the market by such tactics as interfering with truck shipments [37] of nonmembers, and boycotting a dairy's farm supply store in order to compel it to buy from the cooperative.[41]

Addressing the question of the exemption granted by Section 6 of the Clayton Act, the Supreme Court held in *Maryland and Virginia Milk Producers Assn.:*

> Thus the full effect of § 6 is that a group of farmers acting together as a single entity in an association cannot be restrained "from lawfully carrying out the legitimate objectives thereof" but the section cannot support the contention that it gives such an entity full freedom to engage in predatory trade practices at will.[42]

Turning, next, to the scope of Capper-Volstead, the Supreme Court said that the Act was intended to allow individual farmers acting

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[38] *United States* v. *Borden Co.,* 308 U.S. 188, at 204 (1939).

[39] *Id.* at 205.

[40] *Id.* at 205 [emphasis added].

[41] *Maryland and Virginia Milk Producers Assn.* v. *United States,* 362 U.S. 458 (1960). In addition, on the basis of *Maryland and Virginia Milk Producers Assn.*, resale price maintenance or vertical price-fixing is clearly forbidden to cooperatives. *Bergjans Farm Dairy Co.* v. *Sanitary Milk Producers,* 241 F.Supp. 476 (E.D.Mo. 1965), *aff'd,* 368 F.2d 679.

[42] *Id.* at 465-466.

through cooperatives the same competitive advantages as other forms of corporations, but "the Act did not leave the cooperatives free to engage in practices against other persons in order to monopolize trade or restrain and suppress competition with the cooperative."

By the same token, where there is no more than an agreement by farmers to fix the market price, I believe this is, in the words of *Maryland and Virginia Milk Assn.*, an attempt to "restrain and suppress competition." It is not "collectively marketing" as that term is used in Capper-Volstead, because the term cannot be read to exceed the legislative purpose — to allow farmers to join together and bargain as one. There was no legislative purpose to sanction a market-rigging private price arrangement of the kind involved in this case.

[38] Apparently this case presents a new question on which no Federal court has had an opportunity to rule one way or the other — that is, whether internal price-fixing by farmers in the absence of any other collective marketing activities is exempt under Capper-Volstead. As far as I know, there is only one Federal case which has plainly held that the Clayton Act and the Capper-Volstead Act exempt a naked price-fixing agreement as between otherwise legitimately functioning cooperatives. This was *United States* v. *Maryland Cooperative Milk Producers, Inc.*, 145 F.Supp. 151 (D.C.D.C. 1956), a conspiracy involving two cooperatives who were fixing prices to the Army at Fort Meade.[43] Because the Government lost *Maryland Cooperative,* it could not appeal, but it is hardly reliable authority considering the fact that the district court which decided the case was the *same* court which rendered the lower court opinion in *United States* v. *Maryland and Virginia Milk Producers Ass'n,* 167 F.Supp. 45 (D.C.D.C. 1958). In both Maryland milk cases, the lower court opinions are based on the view that cooperatives were totally immune from the Sherman Act in the absence of any conspiracy with other persons. The second Maryland milk case, however, *was* appealable, and this theory of total immunity was totally rejected in *Maryland and Virginia Milk Producers Assn.* v. *United States,* 362 U.S. 458 (1960). Moreover, in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.,* 370 U.S. 19 (1962), where the Supreme Court was presented with the opportunity to apply the total immunity concept to an inter-cooperative agreement, it did not cite the reasoning of *Maryland Cooperative* and said, instead, that

[43] While *Maryland Cooperative* contains expansive language about the immunity for price-fixing by cooperatives, the case is not squarely in point since the district court relied, at least in part, on the language in Section 1 of Capper-Volstead relating to common marketing agencies as *between* cooperatives. 145 F.Supp. 151 at 154-55. See, also, Footnote 27, *supra.*

because all the cooperatives involved were part of Sunkist, their existence as separate corporations had no economic significance.

[39] In reaching the conclusion that I have — to sustain complaint counsel's Motion for Summary Decision — I necessarily conclude that it is irrelevant that the lettuce growers usually agree on a ceiling price only (although at least once they set a floor, too) and that in evidentiary hearings it might develop that there may have been some instances where some growers sold below the "lid" (*i.e.*, ceiling price), and that the lid, itself may on occasion be less than "going" market price.[44] Since the 22 lettuce growers do not have an exemption, they come within *Trenton Potteries:*

> The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed.[45]

There are several additional points which must be considered. First, the argument has been made that where a group of farmers operating under the cover of the cooperative exemption fixes market prices, the sole remedy contemplated by Congress is for the Secretary of Agriculture to convene a proceeding under Section 2 of the Capper-Volstead Act and determine whether the market price has been "unduly enhanced."[46] The Supreme Court, however, has plainly held in *Borden* that the powers given the Secretary of Agriculture are merely "auxiliary" and that the "procedure for which § 2 [of Capper-Volstead] provides is not to be deemed to be designed to take the place of or to postpone or prevent, prosecution under § 1 of the Sherman Act for the purpose of punishing such conspiracies."[47] Since Section 5 of the Federal Trade Commission Act minimally registers all Sherman Act violations, *FTC* v. *Cement Institute,* 333 U.S. 683 (1948), the Commission, like [40] the Justice Department, is not precluded from challenging an illegal price-fixing conspiracy which could lead to unduly enhanced prices.

Second, respondents argue that the Commission's own interpretation of another exemption — the Webb-Pomerene Act, 40 Stat. 517 (1918), 15 U.S.C. 62 — allows exporters to agree on a price and then sell individually. Such an interpretation, of course, would be perfectly consistent with the Congressional purpose of Webb-Pomerene of depriving foreign buyers of the benefits of competition among

[44] Supplemental Affidavit of Henry Franta in Support of Respondents' Motion for Summary Decision (January 27, 1975) and Proposed Finding 34 of Respondents' Proposed Findings of Fact and Conclusions of Law (February 21, 1975).

[45] *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, at 397 (1927).

[46] The Secretary of Agriculture has never issued an order under Section 2 of Capper-Volstead.

[47] 308 U.S. 188, at 205-206 (1939).

American firms, without in any significant way depriving American consumers of the advantages of competition. *United States* v. *Concentrated Phosphate Export Assn., Inc., et al.,* 393 U.S. 199 (1968). There is nothing in Capper-Volstead which suggests that Congress intended that farmers be allowed the same rights as exporters or that domestic consumers of farm produce were to be treated under the same competitive standards as the foreign businessmen.

Finally, while I am convinced that a price-fixing agreement standing alone is not condoned by the strict interpretation of Capper-Volstead which I have followed,[48] the dilemma posed by this case, is that the legal alternative to illegal price-fixing may create still additional problems for consumers. By the terms of the "Notice Order" filed with this complaint, respondents are not precluded from forming a cooperative which either acquires and bargains to sell the entire production of its members, or merely bargains for the members in the open market on the basis of prices agreed to by the members.[49] [41] Should the lettuce growers decide to form such a cooperative, the assumption of the Act is that with the imbalance in the bargaining strength of sellers and buyers having been redressed, the ultimate price will be determined on the basis of ordinary give-and-take of the market. The legislative judgment behind that assumption may have been proven faulty with the passage of time and the emergence of selling cooperatives which may have significant market power.[50] What is especially troublesome to me is that the market price which may be commanded by a cooperative which bargains on the basis of one man control over 60 percent of production may be more inflexible than the price fixed internally on 60 percent of production with the understanding that each member of the conspiracy will sell on its own. A firm hold by one bargaining agent on 60 percent of production may be infinitely more difficult to break than a conspiracy of 22 independent sellers who eventually can be expected to "cheat" or "shade" on the price-fixed terms.

Notwithstanding the *possibility* that an even more restrictive cooperative may be formed by the lettuce producers, I believe an order disbanding Central as it is presently constituted — *i.e.,* as a mere forum for price-fixing — is appropriate. There is some evidence

[48] See text at Footnotes 28-29, *supra.* See also, *Case-Swayne Co.* v. *Sunkist Growers,* 389 U.S. 384, at 393 (1967) ("We deal here with 'special exceptions to a general legislative plan' . . . (§ 6 of the Clayton Act), and therefore we are not justified in expanding the Act's coverage . . . .").

[49] Such an agreement among the members setting the cooperative's own selling or bargaining price is clearly not illegal price-fixing. *Maryland and Virginia Milk Producers Assn.* v. *United States,* 362 U.S. 458, 468; *Treasure Valley Bargaining Assn.* v. *Ore-Ida,* 497 F.2d 203 (9th Cir. 1974).

[50] See Testimony of Thomas E. Kauper, *Hearings Before The Subcommittee On Monopolies and Commercial Law Of The House Comm. On The Judiciary,* 93rd Cong., 1st Sess., ser. 15, at 4 (1973). Mr. Kauper's views were sharply challenged by the National Counsel of Farmer Cooperatives. *Id.* at 576.

that its members neither wanted, needed, nor will they claim the advantages of selling or bargaining as one — the *only* advantage allowed under the exemption. The stipulated facts are (1) that there are established relationships between certain growers and certain wholesalers, and (2) that through the use of individual labels some growers have been able to establish some measure of trade recognition for quality.[51] The producers of these [42] more highly regarded labels, particularly those with established relationships, may see very little advantage in being lumped together with their less efficient neighbors. In other words, it may turn out that *all* that the lettuce producers *ever* wanted from their neighbors was an agreement to eliminate some distressful pricing practices, and that, in fact, some, if not all of the growers, *prefer* to confront the market alone. As I indicated above, where the method of operation demonstrates no need (or, for that matter, desire) to bargain collectively, there is no exemption. From the stipulated facts, one cannot tell how important these non-price factors are, and what alternative course the members may pursue if they are not allowed to get together solely to fix prices. In any event, the antitrust laws do not permit a price-fixing conspiracy to remain in effect because of the mere possibility that the price-fixers may attempt to exploit whatever legal loopholes now exist in an antitrust exemption.

The long-range solution, of course, is that the consuming public should not have to face the Hobson's choice between a group of farmers who fix prices illegally and a cooperative which legally sets its own price and then may "fix" it on the basis of significant market power.

In sum, perhaps Congress should be told that the major assumptions underlying the exemption, itself, are now open to serious question because (1) the exemption is being claimed by giant agribusinesses, like United Brands in this case, which have resources that are far different from those of the small family farmers who were Congress' concern in 1922;[52] and (2) that despite [43] the regulatory safety-valve contemplated by Section 2 of the Act, the exemption may fall into the hands of cooperatives who may have

[51] Finding 9.

[52] While the legislative history shows that the purpose of the Capper-Volstead Act was to redress the imbalance which existed between the relatively powerless individuals who toil the land and large marketing corporations, nevertheless, the Supreme Court has not denied the exemption when some of the producers were corporate farmers. In *Case-Swayne Co.* v. *Sunkist Growers*, 389 U.S. 384 (1967), the Supreme Court notes, without additional comment, the presence of "corporate growers" and it addresses itself, instead, to the antitrust consequences of membership in the association of nongrower packing houses. *Id.* at 387.

Apparently no decided case has directly dealt with the issue of whether giant corporate agribusinesses, like United Brands, are even eligible for an exemption which assumes a lack of bargaining strength due to size. In any event, I do not presume to perform the legislative function of reading a "dollar" or "size" limit into a statute where none exists, and the size of some of the members of Central has not been a consideration in this decision.

enough market power to set prices in much the same anticompetitive ways as combines of middlemen.

IV

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction in this matter because (a) the action is in the public interest; (b) respondents are engaged in commerce, as "commerce" is defined in the Federal Trade Commission Act,[53] and (c) respondents have no exemption from Section 5 of the Federal Trade Commission Act.

2. The antitrust exemption for agricultural producers conferred by Section 6 of the Clayton Act and the Capper-Volstead Act is a limited exemption, providing only that agricultural producers may organize together in associations to collectively process, prepare for market, handle and market their agricultural products.

3. A cooperative association which does not have any contacts with the outside commercial world, and which, specifically, does not grow, harvest, ship, sell, bargain or compete for the sale of any agricultural products and merely serves as a forum for a price-fixing agreement does not engage in collective processing, preparing for market, handling and marketing as those terms are used in the Capper-Volstead Act.

[44] 4. Central California Lettuce Producers Cooperative (Central) does not engage in the collective processing, preparing for market, handling and marketing of the agricultural products of its members and it is not permitted by virtue of Section 6 of the Clayton Act and the Capper-Volstead Act to serve as a forum in which its individual members agree to fix the prices at which the individual members will sell their lettuce.

5. The individually named respondents and Central conspired together to fix the prices at which each respondent member of Central would sell lettuce at the Salinas-Watsonville-King City shipping point, and each respondent member of Central, during the period of the complaint, did sell lettuce at prices agreed upon under the auspices of Central, which activities constitute a violation of Section 5 of the Federal Trade Commission Act.

Accordingly, complaint counsel's motion for summary decision is granted, and the following order will be issued:

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[53] Central is engaged in commerce by reason of the fact that it is used by interstate sellers as an instrumentality of fixing interstate prices. See, *FTC* v. *Cement Institute*, 333 U.S. 683 (1948).

ORDER

It is ordered, That respondent Central California Lettuce Producers Cooperative and the respondent marketers,[54] individually and collectively:

[45] 1. Cease and desist from entering into any agreement, understanding or course of dealing between any respondent marketer and any other marketers of fresh produce, including other respondent marketers, as to factors which may affect the prices, the price ranges, price ceilings, or price floors at which any respondent marketer and any other marketers of fresh produce, including other respondent marketers, individually sell or offer to sell their fresh produce.

2. Cease and desist from the adherence, in any manner, by any respondent marketer to any agreement, understanding or course of dealing as to factors which may affect the prices, the price ranges, the price ceilings, or price floors at which any respondent marketer and any other marketers of fresh produce, including other respondent marketers, individually sell or offer to sell their fresh produce.

It is further ordered, That respondent Central California Lettuce Producers Cooperative be dissolved, and that respondent marketers cease and desist from the formation of any association, or the joining of any association, among whose purposes or activities are the discussion of or agreement on factors which may affect the prices, price ranges, price ceilings, or price floors [46] at which members of such association individually sell their fresh produce.

It is further ordered, That respondent marketers deliver a copy of this Order to all present and future personnel of said respondent engaged in the offering for sale, or sale of fresh produce.

It is further ordered, That respondent marketers notify the Commission at least thirty (30) days prior to any proposed change in said 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 said respondents 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 in which they have complied with this order.

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[54] Admiral Packing Company; Albert C. Hansen d/b/a Hansen Farms; California Coastal Farms, Inc.; Carl Joseph Maggio, Inc.; D'Arrigo Bros. Co. of California; Eckel Produce Co.; Green Valley Produce Co-op; Growers Exchange, Inc.; Harden Farms of California; J. R. Norton Co.; Jack T. Baillie Co., Inc.; Let-Us-Pak; Merit Packing Co.; Merrill Farms; Pacific Lettuce; R. T. Englund Co.; Royal Packing Co.; Salinas Lettuce Farmers Cooperative; Salinas Marketing Cooperative; The Garin Co.; United Brands Company; and West Coast Farms.

OPINION OF THE COMMISSION

BY COLLIER, *Commissioner:*

[2] The complaint in this matter was issued on June 10, 1974, charging Central California Lettuce Producers Cooperative, a corporation ("Central"), and 22 of Central's members, with violating Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) by illegally agreeing among themselves on the prices at which Central's members would sell the lettuce they produce.

[3] On the basis of a stipulated factual record, Administrative Law Judge ("ALJ") Morton Needelman entered an initial decision on March 13, 1975, sustaining the allegations of the complaint and recommending the issuance of an order to cease and desist. The respondents appealed to the Commission. Argument on the appeal was heard on October 1, 1975; the Commission ordered reargument, which was heard on June 30, 1976.

The facts are undisputed. Central was incorporated on June 8, 1972, as a nonprofit cooperative association without capital stock under California law (I.D. 2),[1] and began operating in May of the following year after signing an identical "Cooperative Marketing Agreement" ("CMA") with each of the 22 other respondents (I.D. 3). During 1973, Central's members shipped over 20 million cartons of lettuce out of a total of approximately 77,678,000 cartons shipped from all California areas, and approximately 110,622,000 from all areas in the United States (I.D. 37).

Central neither grows, harvests nor ships lettuce in its own name. Central does not negotiate directly with lettuce buyers and does not enter directly into sales agreements with buyers. It has no sales personnel in its own name, and no receipts from lettuce sales (I.D. 22). Rather, each member enters into separate arrangements with buyers for the sale of his own lettuce. Members sell under their own trade names (although they stamp Central's name on their cartons as well). Since lettuce produced in different fields by different growers at different times commands different prices (I.D. 8) the members compete among themselves for the same customers, and each member bills and collects its own accounts (I.D. 24).

"All that Central does, that is of any significance to this case," the ALJ concluded, "is to serve as a meeting ground for the lettuce producers to come together and agree on pricing policy." (I.D. p. 27). Under the terms of the CMA, Central's members bind themselves to sell all their lettuce through the cooperative, and only at prices

[1] The following abbreviations are used in this opinion: I.D.—Initial Decision, Finding No. I.D. p.—Initial Decision, Page No. Stip.—Stipulation.

within the limits of ceiling and floor prices set by the cooperative [4] (I.D. 25).[2] During the 1973 season, Central's Executive Committee (on which each respondent member had a seat) met several times and agreed on ceiling prices for the members' lettuce, although there was only one occasion on which a floor price was set (I.D. 28, 35, 36).

It is clear that the activities of Central and its members violate Section 1 of the Sherman Act (15 U.S.C. 1), and thus Section 5 of the F.T.C. Act, unless the respondents' conduct falls within some exemption to the antitrust laws.[3] The respondents claim three separate sources of exemption: Section 6 of the Clayton Act (15 U.S.C. 17), Section 1 of the Capper-Volstead Act (7 U.S.C. 291), and Section 5 of the Cooperative Marketing Act of 1926 (7 U.S.C. 455). Complaint counsel contest Central's eligibility for any of these exemptions. They contend that no ostensible cooperative whose predominant (if not sole) function is to fix the prices at which its individual members sell their products can take advantage of the cooperative exemptions conferred by Congress, however those exemptions are construed.

I. JURISDICTION

Section 2 of the Capper-Volstead Act (7 U.S.C. 292) provides, in pertinent part:

> [5] That if the Secretary of Agriculture shall have reason to believe that any such association monopolizes or restrains trade in interstate or foreign commerce to such an extent that the price of any agricultural product is unduly enhanced by reason thereof, he shall serve upon such association a complaint stating his charge in that respect, to which complaint shall be attached, or contained therein, a notice of hearing, specifying a day and place not less than thirty days after the service thereof, requiring the association to show cause why an order should not be made directing it to cease and desist from monopolization or restraint of trade. . . .

The respondents argue that Section 2 specifies the exclusive remedy against the antitrust transgressions of cooperatives meeting the criteria of Section 1 of Capper-Volstead. The Supreme Court has squarely rejected this position on two occasions and the Commission has rejected it on a third. *United States* v. *Borden Co.*, 308 U.S. 188,

[2] The CMA also bound Central's members to other obligations, including certain uniform terms and conditions of sale, the rendering of crop reports, and steps to reduce the amount of surplus lettuce on the market ("unsold rollers") (I.D. 25). Central performs certain other educational and informational functions.

[3] Since complaint counsel not surprisingly relied on well-settled principles of per se illegality, the stipulated record contains no indication of the effects of the respondents' conduct on quantities or prices of lettuce. For example, there is no indication whether any of respondents' lettuce is withheld entirely from the market as a result of establishing prices that are too high to clear the market. Nor is it clear whether stabilization of lettuce prices after the formation of Central was attributable to its activities or whether, if so, it was the result either of Central's pricing policies or Central's efforts to furnish timely information on market conditions to growers (see I.D. 6, 10, 17, 19, 20, 25 B, 33). As explained below, note 20, different questions might be presented if respondents' pricing practices had the effect of imposing production or quality restrictions on lettuce.

205-06 (1939); *Maryland and Virginia Milk Producers Association, Inc.* v. *U.S.*, 362 U.S. 458, 562-63 (1960); *Washington Crab Association*, 66 F.T.C. 45, 122 (1964).[4]

The respondents attempt to distinguish these cases from their own because Central and its members are charged neither with combining with outsiders nor with predatory practices. We find no support for such a distinction in the reasoning of these authorities, and the respondents fail to offer any reasons of their own for so narrowly confining the clear holdings.

II. CAPPER-VOLSTEAD EXEMPTION

The central question is whether the respondents' conduct is covered by Section 1 of the Capper-Volstead Act which reads, in relevant part, as follows:

> That persons engaged in the production of agricultural products as farmer, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, [6] such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: . . .[5]

Complaint counsel make two arguments why respondent cannot claim the exemption. First, they argue that a qualifying cooperative must engage in all of these enumerated functions. Concededly, Central does not collectively process, prepare for market, or handle the products of its members. This argument, however, fails to find support in the plain language of the statute. Section 1 of the Capper-Volstead Act enumerates those activities in which a qualifying association "may" engage. It does not, by its terms, constitute a checklist of functions that must be performed. No cases are cited in [7] support of complaint counsel's reading of the statute and, as noted below, Congress has manifested no intent to mandate any particular

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[4] *Marketing Assistance Plan, Inc.* v. *Associated Milk Producers, Inc.*, 338 F. Supp. 1019, 1024 (S.D. Tex. 1972).

[5] The rest of Section 1 reads:

Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,

Second. That the association does not pay dividends on stock or membership capital in excess of 8 percentum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members.

Complaint counsel do not contest Central's compliance with these structural requirements.

degree of vertical integration as a precondition to Capper-Volstead immunity.

Complaint counsel's second argument, accepted by the Administrative Law Judge, is that respondent is not engaged in "collectively. . .marketing" within the meaning of the statute. This issue is at the core of the case and warrants more extended treatment.

Legislative History

Because the words of the statute are undefined, a review of its legislative history is in order.

The 1922 Capper-Volstead Act was enacted in response to Congressional concern that Section 6 of the Clayton Act[6] put undue organizational limitations on the cooperative exemption by denying it to associations either organized for profit or having capital stock. There was also concern that Section 6 failed adequately to protect even those cooperatives which could qualify because the exemption was not clearly stated. Indictments of cooperatives and their members by allegedly overzealous prosecutors were cited in hearings and debate.[7] Although many of Capper-Volstead's proponents maintained that Section 6 fully shielded the cooperative activities of farmers, they argued that the threat of even unjustified prosecutions deterred cooperative development. Senator Norris said in dabate: "They say, 'We will be threatened, and because we have not got it explicitly in black and [8] white the farmers are afraid. The people in the business circulate propaganda and write letters, and so forth, and the farmers are afraid to come in.' So that as a matter of fact as to the great bulk of the producers I am of the opinion that it is more a matter of psychology than anything else. I do not believe they violate the law now when they organize."[8]

In the course of considering the perceived shortcomings of existing law, however, considerable discussion took place on the theory of cooperative organization and how it was expected to improve the lot of the farmer. Two themes predominated. The first was a theory of countervailing power: that farmers should be able to unite to bargain

[6] That the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. (15 U.S.C. 17).

[7] 61 Cong. Rec. 1037 (1921) (remarks of Rep. Volstead); 62 Cong. Rec. 2259 (1922) (remarks of Sen. Norris); *Association of Producers of Agricultural Products: Hearing on S. 4344 Before Subcomm. of Senate Judiciary Comm.*, 66th Cong., 2d Sess. 27-28 (1920) (statement of Charles A. Lyman).

[8] 62 Cong. Rec. 2165 (1922).

effectively with middlemen. The confederation of producers was expected to enable farmers to gain higher prices.[9] The second theme was the expectation that farmers would use cooperative associations as a vehicle for vertical integration, not only to confront the middleman but to supplant him and deal more directly with consumers. The integrated cooperative was expected to achieve economies by performing processing and distribution functions, and to divide up the savings realized through higher returns to farmers and lower retail prices for consumers.[10]

Both themes appear in the House Reports on Capper-Volstead. Rep. Volstead advised the full House:

> Whenever a farmer seeks to sell his products he meets in the marketplace the representatives of vast aggregations of organized capital that largely determine the price of his products. Personally he has very little if anything to say about the price. If he seeks to associate himself [9] with his neighbors for the purpose of collectively negotiating for a fair price, he is threatened with prosecution. Many of the corporations with which he is compelled to deal are each composed of from thirty to forty thousand members. These members collectively do business as one person. The officers of the corporation act as agents of these members. This bill, if it becomes a law, will allow farmers to form like associations, the officers of which will act as agents for their members.
>
> * * * * * * *
>
> While this bill confers on farmers certain privileges, it can not properly be said to be class legislation. Business corporation have under existing law all the powers and privileges sought to be conferred on farm organizations by this bill. Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to ordinary business corporations so farmers can take advantage of it.[11]

While speaking the language of effective bargaining, however, the report used an illustration of vertical integration: the inability of small, farmer-owned grain elevators to join together and accumulate enough capacity to deal directly with millers. The report also said:

> (European farmers' associations) have tended to prevent much of the gambling in foodstuffs and to eliminate many of the useless middlemen that stand between the producers, the retailers, and the consumers.[12]

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[9] 59 Cong. Rec. 8022 (1920) (remarks of Rep. Sumners of Tex.) ("There must be given to agriculture some compensatory advantage to offset the present economic advantage which industry holds by reason of the fact that it can write into the selling price which it fixes all cost of production plus a profit."); 61 Cong. Rec. 1038 (1921) (remarks of Rep. Reavis); 62 Cong. Rec. 2223 (1922) (remarks of Sen. Lenroot); 59 Cong. Rec. 7856 (1920) (remarks of Rep. Evans of Nebr.).

[10] 62 Cong. Rec. 2059-60 (1922) (remarks of Sen. Capper); 62 Cong. Rec. 2257 (1922) (remarks of Sen. Norris); 59 Cong. Rec. 7852 (1920) (remarks of Rep. Morgan); 59 Cong. Rec. 8022 (1920) (remarks of Rep. Swope).

[11] H.R. Rep. No. 24, 67th Cong., 1st Sess. 2 (1921).

[12] *Id.* at 3.

Although Congress seems to have expected cooperatives to assume middlemen's functions,[13] it is not at all clear that Congress intended to deny the benefits of Capper-Volstead [10] to any cooperative that did not step into the shoes of the middleman. The vertically integrated cooperative may have been a contemplated form of organization, but, in light of the additional intention to enhance farmers' bargaining effectiveness, it does not follow that it was intended to be exclusive.

Nor does the legislative history demonstrate specific consideration of the meaning of the statutory phrase, "collectively processing, preparing for market, handling, and marketing," let alone "collectively marketing" in isolation. Both complaint counsel and counsel for respondents concede that there is no direct evidence in the legislative history of what precisely Congress meant by the word "marketing".

The legislative history is equally inconclusive on Congress' intent with respect to agreements among members of a cooperative over prices. The debates contain several approving references to the ability of the cooperative members to "fix prices," a power sometimes compared with corporate behavior.[14] It is not clear, however, that Congress intended to require farmers to combine as tightly as they would were they to incorporate. Production, for example, remained under individual control,[15] and a mainspring of the legislation was, in fact, the assumed impossibility of farmer incorporation.[16]

In summary, although price-setting was clearly a contemplated activity, the legislative history does not address the question whether or what kind of additional activity is required to qualify for the exemption. [11]

Judicial Interpretation

As framed by complaint counsel, the issue in this case is one of first impression, with the exception of a recent factually identical private action brought against Central itself. *Northern California Supermarkets Inc.* v. *Central California Lettuce Producers Cooperative,* 413

[13] It is clear, of course, that the permissible goal of vertical integration does not immunize agreements with other or predatory conduct to achieve this goal. *Maryland and Virginia Milk Producers Association, Inc.* v. *U.S.; United States* v. *Borden Co.; Washington Crab Association; supra; Case-Swayne Co. Inc.* v. *Sunkist Growers, Inc.,* 389 U.S. 384 (1967).

[14] 62 Cong. Rec. 2223 (1922) (remarks of Sen. Lenroot); 59 Cong. Rec. 8025 (1920) (remarks of Rep. Hersman).

[15] 62 Cong. Rec. 2058 (1922) (remarks of Sen. Capper) ("Because of this peculiar characteristic of agriculture, the growers have never been able to adopt a corporate form of organization; they have, therefore, gradually fitted into the cooperative form of organization *which maintains the individuality of production* but enables them to unite for marketing purposes." (emphasis added). *But see* 62 Cong. Rec. 2225 (1922) (remarks of Sen. Lenroot) ("If the farmers of the United States could, through cooperation, have some control and agreement as to production and as to prices. . . ."). See note 20 below.

[16] H.R. Rep. No. 24, 67th Cong., 1st Sess. 2-3 (1921).

F. Supp. 984 (N.D. Cal. 1976), *appeal docketed,* No. 76-1456 (9th Cir., March 8, 1976). While it has been held that the members and officers of a single lawfully constituted agricultural cooperative cannot, for that reason alone, violate Sections 1 and 2 of the Sherman Act by conspiring with each other,[17] the question raised by complaint counsel goes back a step: is a cooperative on Central's model lawfully constituted in the first place?

The Ninth Circuit considered a closely related issue in *Treasure Valley Potato Bargaining Ass'n.* v. *Ore-Ida Foods Inc.,* 497 F.2d 203 (9th Cir.), *cert. denied,* 419 U.S. 999 (1974). In that case cooperative activities consisted of bargaining with processors for preseason contracts under which cooperative members would sell their potatoes. The court rejected an antitrust attack on this conduct, stating:

> We think the term *marketing* is far broader than the word *sell.* A common definition of "marketing" is this: "The aggregate of functions involved in transferring title and in moving goods from producer to consumer, including *among others* buying, selling, storing, transporting, standardizing, financing, risk bearing, and *supplying market information.*" Webster's New Collegiate Dictionary, 1953 Edition. (Emphasis added). The associations here were engaged in bargaining for the sales to be made by their individual members. This necessarily requires supplying market information and performing other acts that are part of the aggregate of functions involved in the transferring of title to the potatoes. The associations were thus clearly performing "marketing" functions within the plain meaning of the term. We see no reason to give that word a special meaning within the context of the Capper-Volstead Act. 497 F.2d at 215 (emphasis in original).

[12] Neither complaint counsel nor the ALJ discovered the answer in *Treasure Valley,* because that case involved bargaining for preseason contracts with buyers on behalf of cooperative members, while the respondent members here merely agree under the aegis of Central on the prices which they will seek individually. The district judge in *Northern California Supermarkets* dismissed this argument as "a distinction without a difference," 413 F. Supp. at 992. He found Central's activities within the term "marketing" as construed in *Treasure Valley* and concluded:

> Moreover, I am of the opinion that even if Central engaged in no other collective marketing activities, mere price-fixing is clearly within the ambit of the statutory protection. It would be ironic and anomalous to expose producers, who meet in a cooperative to set prices, to antitrust liability, knowing full well that if the same producers engage in even more anticompetitive practices, such as

[17] *April* v. *National Cranberry Ass'n.,* 168 F. Supp. 919, 920 (D. Mass. 1958); *Shoenberg Farms, Inc.* v. *Denver Milk Producers, Inc.,* 231 F. Supp. 266 (D. Col. 1964). At the same time, it is equally well-established that a cooperative is not thereby immune from charges of monopolization. See *Muirbrook Farms, Inc.* v. *Western General Dairies,* C 75-177 (D. Utah March 17, 1977) (Order on Summary Judgment Motion); and cases cited in note 13, *supra.*

collective marketing or bargaining, they would clearly be entitled to an exemption.

It is true that the sponsors of Capper-Volstead were laboring under the assumption that the cooperative or association would be the collective marketing agent for the farmers in most circumstances. However, there is nothing in the legislative history that suggests a Congressional intention to *force* farmers into a corporate form or that collective marketing with the cooperative as the exclusive agent was considered the *only* form under which farmers' groups could organize. *Id.* (emphasis in original) (footnote omitted).

Whatever "marketing" activity excludes, it would surely seem to include establishing an asking price as an essential element of negotiations looking toward a sale.

Complaint counsel take issue with this reasoning, pointing to the Supreme Court's characterization of the exemption in *Maryland and Virginia Milk Producers Ass'n.* v. *U.S., supra:*

[13] We believe that it is reasonably clear that from the very language of the Capper-Volstead Act, as it was in §6 of the Clayton Act, that the general philosophy of both was simply that individual farmers should be given, through agricultural cooperatives acting as, entities, the same unified competitive advantage—and responsibility—available to businessmen acting through corporations as entities. As the House Report on the Capper-Volstead Act said:

> Instead of granting a class privilege, it aims to equalize existing privileges by changing the law applicable to the ordinary business corporations so that the farmers can take advantage of it.

This indicates a purpose to make it possible for farmer-producers to organize together, set association policy, fix prices at which their cooperative will sell their produce, and otherwise carry on like a business corporation without thereby violating the antitrust laws. 362 U.S. at 466 (footnote omitted).

Although the intracooperative activity of the defendant in *Maryland and Virginia* was not at issue, but rather its acquisition of one competitor and its preying upon others, complaint counsel find in the phrases, "agricultural cooperatives acting as entities," and, "fix prices at which their cooperative will sell their products," a minimum standard for cooperative status that Central cannot meet. Unfortunately, the word "entity" does not provide a standard any more precise or discriminating than "collective marketing." To say that a cooperative has to do business as a single business entity in its own right does not reveal how many activities the cooperative must perform to qualify.

To conclude that a cooperative may lawfully function as a corporate entity does not compel or even support the additional conclusion that it must perform an undefined list of corporate functions. Neither the Court's opinion nor the legislative history on

which it is grounded provides a basis for using the otherwise helpful corporate analogy in this fashion. The Commission's opinion in *Washington Crab Association, supra,* concedes the right of a fisherman's cooperative to sell at a single, agreed-upon price. Quoting the same passage from *Maryland and Virginia* upon which complaint counsel rely, the Commission said: [14] "The single corporation can, of course, 'fix' the prices of its various 'divisions,' with no duty to require them to compete with each other. Similarly, these 140 crab fishermen can create a single marketing agent—Washington Crab Association—to 'fix' a single price to be charged by all of its fishermen members, thus eliminating by agreement all competition between them."[18] The Commission continued: "The ends—the 'legitimate objectives' of such cooperative association and its members—are the collective catching, processing, and marketing of its members' product. . . . Price-fixing is an approved objective, but it cannot be pursued by techniques that go beyond those provided by the statute."[19] In short, the Commission placed intra-cooperative price-fixing on a par with collective catching, processing, and marketing as an acceptable objective of a fishermen's cooperative. We cannot find in *Washington Crab* a limitation of the exemption to cooperatives that engage in "collective catching, processing, and marketing of (their) members' product," especially since the phrase merely describes how that particular respondent did business.

In short, like the legislative history, the principal cases relied on by complaint counsel readily accept intra-cooperative pricing agreements as a necessary incident of collective marketing. They do not establish a threshhold for the cooperative's level of additional activity below which this conduct becomes illegitimate.

Complaint counsel's argument is not strengthened by the anomaly it introduces: as the ALJ clearly perceived (I.D. pp. 40-43), reorganizing the cooperative to assign it more functions is likely to lead to a more rigid form of collusion than the existing arrangement. The question, of course, is what Congress intended; we are not permitted the luxury of equating a nonexempt Tweedledum with an exempt Tweedledee. Nevertheless, complaint counsel have not advanced a convincing explanation why the distinction they urge will promote either agricultural policy or antitrust policy. The ALJ speculated that the cooperative might splinter if it were required to perform additional, unspecified functions which he assumed would mean the end of some members' valuable brand identification. But the

[18] *Washington Crab Association,* 66 F.T.C. 45, 106 (1964).

[19] *Id.* The Commission reviewed those nonexempt techniques, which included combination with nonproducers, monopolization, coercion, and other predatory practices.

stipulated record does not [15] tell us whether lettuce can be marketed efficiently without individual labels (I.D. 9), or even whether a bargaining cooperative under these circumstances would necessarily abandon individual labels. In any case, it is hard to see why entitlement to Capper-Volstead treatment should depend on whether the product is highly perishable and differentiated and thus most suitable for sale in the field (like lettuce), or only moderately perishable and relatively fungible and thus suitable for single preseason sales transactions (like potatoes).

In this regard, it is instructive to compare the Supreme Court's treatment of the Capper-Volstead exemption in *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.,* 370 U.S. 19 (1962) with *Case-Swayne Co., Inc.* v. *Sunkist Growers, Inc.,* 389 U.S. 384 (1967). In *Winckler & Smith,* the trial court had given a jury instruction that would have permitted a conspiracy to be found among three cooperatives even though the same group of 12,000 producers owned all three. Noting that the producers could have united in a single cooperative without fear of illegal combination or conspiracy, the Court said: "(W)e feel that the 12,000 growers here involved are in practical effect and in the contemplation of the statutes one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities. To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers who have banded together for processing and marketing purposes within the purview of the Clayton and Capper-Volstead Acts." 370 U.S. at 29. In *Case-Swayne,* however, the Court found Sunkist's activities nonexempt on a different ground: the cooperative had included nonproducing processors, a class of persons clearly not entitled to Capper-Volstead.

The pair of Sunkist cases demonstrate that the explicit requirements of Capper-Volstead are to be applied strictly. No vague policy friendly toward agricultural cooperation is to be permitted to expand the scope of the exemption beyond what the statute and its legislative history warrant, and restrictions on membership, structure and activity should be rigorously observed. At the same time, we are unwilling to read into Capper-Volstead, as the lower courts did in *Winckler & Smith,* formalistic internal limitations on otherwise conforming cooperatives. The Supreme Court there refused to find a forfeiture of the exemption and to order the cooperatives to reshuffle their affiars, a step with no apparent practical effect. We are equally reluctant to do so here. [16] While the absence of practical effect would not justify the inclusion of ineligible parties, as in *Case-Swayne*

or the pursuit of prohibited objectives, it is hard to see why a single group of eligible producers should be prevented from pursuing an authorized object because of failure to observe a moot formality.

Conclusion

Congress clearly intended that cooperatives provide farmer-members with a restricted license to unify and balance their combined strength and information against the corporations with which they deal. By the same token, it may well be that Congress intended cooperatives to have few if any advantages over an ordinary corporation in their dealings with outsiders. But the weakness in complaint counsel's position is the assumption that the corporate analogy provides an internal standard for cooperatives as well as an external one.[20] As previously noted, Congress regarded farmer incorporation as impossible even if it were desirable, and [17] intended to permit farmers the competitive advantages of incorporation without compelling them to adopt a corporate form. One of those advantages appears to have been the ability to exchange information about and agree on the prices it would seek from purchasers. We can find no indication that Congress intended that advantage to be available only to cooperatives who adopt, as complaint counsel argue, "a corporation-like instrument with which to deal with other corporations," or, as the ALJ found, "a pooling of resources into a single democratically functioning 'corporate' entity which was to meet in open market and bargain with large buyers." (I.D. pp. 31-32) These standards are nowhere to be found in or fairly inferred from the statute, the legislative history or the decided cases. Indeed, in the absence of more precise guidelines not supported by the record in this

[20] Congress' attitude toward production controls provides an additional indication that it did not regard the corporation as the model around which the Capper-Volstead exemption would be built. Beyond doubt, a single corporation can restrict its output, if it chooses, without incurring antitrust liability. Nevertheless, there are strong indications that Congress did not intend to allow farmers to use cooperatives as a vehicle by which they could effectively agree to limit production. Sen. Capper said in debate:

> But a farmers' monopoly is impossible. If the cooperative marketing association makes its price too high, the result is inevitable self-destruction by overproduction in the following years. No other industry except agriculture has this automatic safeguard. With corporation activities the group producers, such as the United States Steel Corporation, can reduce the quantity of steel rails it will produce at any given time or completely close down its mills and reduce the supply. 62 Cong. Rec. 2059 (1922).

See also fn. 15, *supra; Authorizing Association of Producers of Agricultural Products: Hearings on H.R. 2373 Before Subcomm. of Senate Judiciary Comm.*, 67th Cong., 1st Sess. 201-202 (1921) (statement of Sec. of Agr. Henry C. Wallace). Congress has reinforced the interpretation that production controls were not authorized by adding to the Capper-Volstead Act a comprehensive statutory scheme for controlling supply in the form of the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. 601 *et seq.* A different issue would be presented if it were alleged and proven that a cooperative had sought to limit production even among its own members, thus shutting off the safety valve against private abuse that ameliorates the adverse consumer impact of the Capper-Volstead exemption and circumventing the important procedural safeguards of the AMAA. Although Central's bylaws prohibited the regulation of plantings or production (Stip. Exhibit B-2, Section 5.14), its cooperative marketing agreement permitted "volume controls" under certain circumstances (Stip. Exhibit A, Par. 2(C)). The issue of cooperative production control was not litigated here.

case, a cooperative would be hard-pressed to know just what degree of corporate integration would be required to qualify under Capper-Volstead were we to adopt complaint counsel's theory.

If, as in *Treasure Valley,* it is sufficient merely for the cooperative to unite producers in "collectively negotiating" over price, legal consequences should not attach if the cooperative presents the results of its decisions through each member rather than through a single agent representing each member. It would seem to make little sense, for example, to require that the employees of the growers become employees of Central only to thereafter go about their business of [18] negotiating the sale on different terms of individual members' crops in their fields or cooling plants (I.D. 8). As the Supreme Court said, in a different context, the Capper-Volstead Act does not lend itself "to such an incongruous immunity-distinction . . . as that urged here."[21]

In view of our conclusion with respect to the application of the Capper-Volstead Act to the facts of this case, we see no need to consider whether Sec. 6 of the Clayton Act or the Cooperative Marketing Act of 1926 provide independent authorization for the respondents' activity. The respondents' motions to dismiss dated Oct. 1, 1975, and June 10, 1976 are denied as moot.

An appropriate order will be entered vacating the order issued by the Administrative Law Judge and dismissing the complaint.

[2] Final Order

This matter having been heard by the Commission upon the appeal of respondent from the administrative law judge's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having concluded that the administrative law judge's initial decision should be set aside and that the complaint should be dismissed:

[3] It is ordered, That the administrative law judge's initial decision be, and it hereby is, set aside.

It is further ordered, That the complaint be, and it hereby is, dismissed.

Chairman Pertschuk was recorded as not participating.

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[21] *Maryland and Virginia Milk Producers Ass'n., Inc.* v. *U.S.,* 362 U.S. 458, 464 (1960).

IN THE MATTER OF

NEW RAPIDS CARPET CENTER, INC., ET AL.

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

Docket 9052. Complaint, Aug. 26, 1975 — Order, July 26, 1977

This order, among other things, requires Lee Kantor, a/k/a Lee Woods, a Bronx, N.Y. retailer of carpets, furniture and major appliances, to cease using bait and switch tactics, and other unfair or deceptive techniques in the advertising and sale of its products; to cease failing to make relevant disclosures in contracts regarding quantity/unit cost data; and customers' right to cancellation and refund. Additionally, the firm must advise delinquent customers of impending collection suits and bring such suits only in the county where the customer resides or signed the contract. The order also requires the firm to provide consumers, in connection with the extension of credit, such material and disclosures as are required by Federal Reserve System regulations.

Appearances

For the Commission: *Irving C. Koch* and *Diana Kirigin,* Consumer Protection Specialist, assisting.

For the respondents: *Sol S. Perlow,* New York City.

COMPLAINT

[1] Pursuant to the provisions of the Federal Trade Commission Act and of the Truth in Lending Act and the regulations promulgated thereunder, and by virtue of the authority vested in it by said Acts and regulation, the Federal Trade Commission having reason to believe that New Rapids Carpet Center, Inc., Charge Account Factors, Inc. and Charge Account Credit Corp., corporations, and Lee Kantor, a/k/a Lee Woods (hereinafter sometimes referred to as Lee Kantor), individually and as General Manager of New Rapids Carpet Center, Inc., as an officer [2] of Charge Account Factors, Inc. and Charge Account Credit Corp., and as an individual doing business as New Rapids Furniture Warehouses, Inc. [formerly a New York corporation dissolved by proclamation of the Secretary of State on December 15, 1970], hereinafter referred to as respondents, have violated the provisions of said Acts 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 New Rapids Carpet Center, Inc. and Charge Account Factors, Inc. are corporations organized, existing and doing business under and by virtue of the laws of the State of

New York; respondent Charge Account Credit Corp. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New Jersey; and respondent Lee Kantor is an individual doing business as New Rapids Furniture Warehouses, Inc. [formerly a New York corporation dissolved by proclamation of the Secretary of State on December 15, 1970] and is also General Manager of respondent New Rapids Carpet Center, Inc. and an officer of respondents Charge Account Factors, Inc. and Charge Account Credit Corp.

The corporate and individual respondents named in Paragraph One maintain their principal place of business and offices at 4195 Third Ave., Bronx, New York. In addition, respondent Charge Account Factors, Inc. maintains a mail address at 1746 Andrews Ave., c/o Abe Kantor, Bronx, New York, and respondent Charge Account Credit Corp. maintains a mail address at 330 Windsor Road, Englewood, New Jersey.

PAR. 2. Respondent Lee Kantor is General Manager of respondent New Rapids Carpet Center, Inc., an officer of respondents Charge Account Factors, Inc. and Charge Account Credit Corp. and does business as New Rapids Furniture Warehouses, Inc. and during the time of its corporate existence was general manager [3] of New Rapids Furniture Warehouses, Inc. He formulates, directs and controls the policies of the corporate respondents named in Paragraphs One and Two, including the acts and practices hereinafter set forth.

PAR. 3. The corporate and individual respondents named in Paragraphs One and Two do not operate as separate independent corporate or individual business entities, but are components of one business entity which respondent Lee Kantor dominates and controls. He shifts and assigns the personnel of each corporate and individual respondent to function and perform duties for the other corporate and individual respondents so that as a consequence a nexus of such degree exists between and among each of the corporate and individual respondents that they have lost their individual identities. Thus, the acts and practices of each of the corporate and individual respondents named in Paragraphs One and Two may be deemed the acts and practices of all of the other corporate and individual respondents named in said Paragraphs One and Two.

PAR. 4. Respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc., are now, and have been for some time last past, engaged in business as a retailer of carpets, and respondent Lee Kantor, both individually and doing business as New Rapids Furniture Warehous-

es, Inc., is now, and has been for some time last past, engaged in business as a retailer of furniture, major appliances and carpets, all of the said respondents offering for sale and selling their respective products to the consuming public on a cash or credit basis. Respondents sell and ship their products from New York State to purchasers located in other States of the United States. 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. [4]

In the course and conduct of their business in connection with sales made on credit, respondents New Rapids Carpet Center, Inc. and Lee Kantor assign or transfer their installment sales contract paper, which each of said respondents secure from purchasers of their respective products, to their two affiliated companies, respondents Charge Account Credit Corp. and Charge Account Factors, Inc., for collection purposes only.

In furtherance of their collection objectives, respondents Charge Account Credit Corp. and Charge Account Factors, Inc. currently and for some time last past have issued coupon payment books to the aforesaid purchasers, many of whom are residents of the State of New Jersey, have used the facilities of the United States mail to solicit and obtain payments from said purchasers, and have used the facilities of the courts of the State of New York to sue residents of the State of New Jersey. In connection with the foregoing activities, respondents Charge Account Credit Corp. and Charge Account Factors, Inc. maintain and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

As an integrated operation, all of said respondents referred to in this Paragraph Four, in the course and conduct of their aforesaid business, and at all times mentioned herein, have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the offering for sale, and sale, of furniture, major appliances and carpets and other products of the same general kind and nature as that sold by said respondents and in the collection of monies allegedly due in connection therewith.

PAR. 5. Respondent New Rapids Carpet Center, Inc. for a period of time last past entered [5] into and maintained a limited business relationship with another firm with which it otherwise had no legal or official corporate connection, and which firm is unnamed as a corporate respondent or party herein, and hereinafter will be referred to as "The Advertiser" for the purpose of identity. The Advertiser was, during the period of time in question, similarly

engaged in business as a retailer of carpets and floor coverings which it offered for sale and sold to the consuming public.

In the course and conduct of its business The Advertiser caused the dissemination of certain advertisements for carpeting, including but not limited to, advertisements on radio and television broadcasts transmitted by radio and television stations having sufficient power to carry such broadcasts across state lines, for the purpose of inducing, and which were likely to induce, directly or indirectly, the purchase of its merchandise.

In addition, The Advertiser, directly or indirectly, assigned, transferred or sold to respondent New Rapids Carpet Center, Inc. the names and addresses of residents of the State of New Jersey who responded in the State of New Jersey to the advertisements disseminated as aforesaid by The Advertiser.

COUNT I

Alleging violations of Section 5 of the Federal Trade Commission Act by respondents New Rapids Carpet Center, Inc., and Lee Kantor individually and as General Manager of New Rapids Carpet Center, Inc., the allegations of Paragraphs One, Two, Three, Four and Five hereof are incorporated by reference in Count I, as if fully set forth verbatim.

PAR. 6. In the course and conduct of its aforesaid business, and for the purpose of inducing the purchase of its products, The Advertiser made certain representations in its aforesaid radio and television advertisements to purchasers and [6] potential purchasers residing in the States of New York and New Jersey with respect to the identity of the vendor and the nature and terms and conditions of its offers.

PAR. 7. Typical but not all inclusive of the statements appearing in the television commercials disseminated as aforesaid are the following:

SLIDE I	NEED LUXURY CARPETING? NOW [THE ADVERTISER] IS RUNNING, THEIR GREATEST CARPET SPECIAL EVER. . .
SLIDE II	[THE ADVERTISER] DESIGNS CUTS CARPET PRICES. . .NOW! GET ENOUGH BROADLOOM TO CARPET ANY AREA OF YOUR HOME OR APARTMENT, UP TO 150 SQUARE FEET, CUT, MEASURED,

AND READY FOR INSTALLATION FOR ONLY $77 _____

SLIDE III — GET A REAL CARPET BUY. . .GET 100% DUPONT CONTINUOUS FILAMENT NYLON PILE BROADLOOM, FOR ONLY $77 _____

SLIDE IV — ENOUGH BROADLOOM TO CARPET A LIVINGROOM, OR BEDROOM, OR DINING AREA, DURING THIS SPECIAL OFFER, FOR ONLY $77 ONLY $77 CALL NOW _____

SLIDE V — CALL NOW. . .GET INCLUDED WITH YOUR ORDER, AN UPRIGHT LEWYT VACUUM CLEANER, OR A 9X12 RUG . . . CALL NOW MURRAYHILL [X XXXX]

SLIDE VI — FOR FREE INFORMATION, IN NEW YORK, L.IL. WEST CHESTER CALL MURRAYHILL [X XXXX] MU[X XXXX] THATS MURRAYHILL [X XXXX] IN N.J. CALL ESSEX [X XXXX] _____THATS ESSEX [X XXXX] OUT OF TOWN, PLEASE CALL COLLECT. . .

[7] PAR. 8. By and through the use of the aforesaid advertisements and others of similar import and meaning not specifically set out herein, The Advertiser represented, directly or by implication that:

The offers set forth in said advertisements were bona fide offers by The Advertiser to sell to residents of the State of New Jersey the advertised carpeting on the terms and conditions set forth in the advertisement, to wit:

1. The carpet would be "continuous filament nylon pile broadloom."

2. Before installation, the floor area would be accurately measured and the carpeting would be properly cut to fit the area to be covered.

3. The carpeting was being offered by The Advertiser at a "special" or sale price.

4. By placing an order for carpeting with The Advertiser the purchaser would receive from said firm a *free gift* of either a vacuum cleaner or a 9 x 12 rug.

PAR. 9. In truth and in fact:

The offer set forth in the aforesaid advertising, and in similar advertising, was not a bona fide offer by The Advertiser to sell to residents of the State of New Jersey the advertised carpeting on the terms and conditions set forth in the advertisement. [8]

To the contrary, The Advertiser never intended to sell the advertised carpeting under any terms or conditions to residents of the State of New Jersey.

PAR. 10. In the course and conduct of its business as aforesaid, The Advertiser transferred the names and addresses of New Jersey residents who responded to the aforesaid advertisements to respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as general manager of New Rapids Carpet Center, Inc. who then sent salesmen to the homes of said New Jersey residents for the purpose of selling carpeting.

PAR. 11. In the course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting, respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc., through their salesmen and representatives, have engaged in the following unfair, false, misleading and deceptive acts and practices:

1. In a substantial number of cases the salesmen did not accurately measure the area to be covered and the carpeting was not cut to fit the area measured.

2. In a substantial number of cases the respondents did not supply "continuous filament nylon pile broadloom" but pieced the broadloom to simulate "continuous filament nylon pile broadloom" with the result that there was excessive seaming. [9]

3. The carpeting was not sold at a "special" or sales price but at the usual and customary retail price for respondents' merchandise.

4. In a substantial number of cases persons who purchased carpeting from the respondents did not receive a gift and some were told the gift was not available to purchasers of more expensive carpeting.

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

PAR. 12. In the course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting, respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc., through their salesmen and representatives, have

engaged in the following unfair, false, misleading and deceptive acts and practices:

1. Prospective purchasers who questioned respondents' salesmen were told they worked for New Rapids Carpet Center, Inc. *and* The Advertiser.

2. In a substantial number of cases the salesmen had no samples of the advertised carpet and told the prospect it was unavailable or out of stock, or disparaged the advertised carpet and used the opportunity to sell carpeting at a higher price, and prospects who insisted on purchasing the lower-priced carpet as advertised were permitted by the salesmen to sign the contract at the lower price, as advertised, but carpeting was never delivered as per the agreed contract.

Therefore, the statements, representations and practices as set forth above were, and are, false, misleading and deceptive. [10]

PAR. 13. The promotional activities of The Advertiser as described in Paragraphs Six, Seven, Eight, Nine, Ten and Twelve above and the resulting leads sold, transferred and assigned to New Rapids Carpet Center, Inc. were exploited by respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. by their misleading the purchasing public as to the identity of the vendor, the nature of the offer and all the terms and conditions of the offer.

PAR. 14. The use by respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. of the aforesaid false, misleading and deceptive statements, representations and practices has had 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 products of the aforesaid respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. by reason of said erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondents as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging further violation of Section 5 of the Federal Trade Commission Act by respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids

Carpet Center, Inc. and as an individual doing business as New Rapids Furniture Warehouses, Inc., the allegations of Paragraphs One, Two and Four are incorporated by reference in Count II as if fully set forth verbatim. [11]

PAR. 16. In the further course and conduct of their business, and in furtherance of their purpose of inducing the purchase of carpeting by the general public, respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. and as an individual doing business as New Rapids Furniture Warehouses, Inc. and their representatives, directly or indirectly, have engaged in the following additional acts and practices:

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

2. At the time of the sale of carpeting, respondents' salesmen write across the face of the sales contract, "Eight (or Ten or Twelve) year wear guarantee." By the use of such representations, respondents and their representatives have implied that the carpeting is guaranteed to wear for eight (or ten or twelve) years without adequately disclosing: (1) the nature and extent of the guarantee; (2) the conditions and limitations on the guarantee and (3) the manner in which the guarantor will perform. In a substantial number of instances, the respondents have not performed under the implied terms and conditions of the guarantee.

3. In a substantial number of instances, the respondents have substituted or have attempted to substitute carpeting which was used or soiled or of a different quality and color from that ordered by the purchaser and such purchaser was informed that he must accept the substituted item. [12]

4. In the circumstances set forth in subparagraph 3 above, where the purchaser refused delivery, respondents have instituted lawsuits to effect payment.

5. When writing up sales contracts, respondents' salesmen did not state the yardage nor the price per yard but merely stated carpeting and the total cost. Thus, customers were unable to check the amount of carpeting actually used against the amount for which they were charged and were deprived of the opportunity to compare unit costs with those charged by respondents' competitors.

Therefore, respondents' statements, representations, acts and practices as set forth in Paragraph Sixteen herein were, and are, unfair, false, misleading and deceptive acts and practices.

PAR. 17. By and through the use of the aforesaid acts and practices, respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. and as an individual doing business as New Rapids Furniture Warehouses, Inc. have misled and deceived the purchasing public in the manner and as to the matters herein alleged.

PAR. 18. 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 III

Alleging further violations of Section 5 of the Federal Trade Commission Act by respondents New Rapids Carpet Center, Inc., Charge Account Factors, Inc., and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc., and as an officer of Charge Account Factors, Inc., and Charge Account Credit Corp. and as an individual doing business as New Rapids Furniture Warehouses, Inc., the [13] allegations of Paragraphs One, Two and Four are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 19. In the further course and conduct of their business, respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. permitted and are permitting customers to purchase carpeting on a deferred payment plan. Respondent New Rapids Carpet Center, Inc. assigns retail installment contracts executed by purchasers of carpeting to respondent Charge Account Factors, Inc. Charge Account Factors, Inc. transferred the retail installment contracts signed by customers who did not receive the carpeting to New Rapids Furniture Warehouses, Inc. during the time of its corporate existence, and after its dissolution to Lee Kantor doing business as New Rapids Furniture Warehouses, Inc.

In the further course and conduct of his business, respondent Lee Kantor doing business as New Rapids Furniture Warehouses, Inc. permitted and is permitting customers to purchase carpeting and furniture on a deferred payment plan. Respondent at times assigns

retail installment contracts executed by purchasers of carpeting and furniture to respondent Charge Account Credit Corp.

In furtherance of their purpose to collect allegedly delinquent debts and to induce payment by allegedly delinquent debtors, respondents and their agents have engaged in the following additional unfair acts and practices:

1. Respondents New Rapids Carpet Center, Inc., Charge Account Factors, Inc., Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc. and as an individual doing business as New Rapids Furniture Warehouses, Inc. have instituted suits in the Civil Court of the City of New York against allegedly delinquent New Jersey residents, and thus have utilized a forum for lawsuit which has made it inconvenient and expensive for the New Jersey residents to appear and defend. In most such lawsuits default judgments have been entered against the New Jersey residents. [14]

2. Respondents New Rapids Carpet Center, Inc., Charge Account Factors, Inc., Charge Account Credit Crop., and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc., and as an officer of Charge Account Factors, Inc. and Charge Account Credit Corp. and as an individual doing business as New Rapids Furniture Warehouses, Inc., have failed to serve allegedly delinquent debtors with notice of suit. In a substantial number of cases, respondents utilized a process server who was also an employee of respondents and who failed to serve process on persons sued as required by law and thereafter filed with the court false affidavits of service.

3. The respondents named in subparagraph 2 above, entered default judgments against debtors who had no knowledge of suits against them and in a substantial number of cases, failed to inform judgment debtors who remitted payment after the entry of the default judgment that judgments have been entered against them.

4. The respondents named in subparagraph 2 above, failed to credit against the default judgments payments made subsequent to the entry of such default judgments.

5. The respondents named in subparagraph 2 above, sued for amounts in excess of the amounts actually due.

6. In some instances, said respondents sued for the total amount of the contract despite failure to deliver the merchandise ordered.

7. In some instances, said respondents secured income executions on the basis of default judgments against debtors who had not been served with process and thereby obtained payment of alleged debts, thus depriving such debtors of the opportunity to defend themselves in court.

8. Respondents in a substantial number of instances have failed to file satisfactions or partial satisfactions of judgments when judgments have been paid in full or partially satisfied. [15]

The use by respondents of the aforesaid practices has had the tendency and capacity to mislead and deceive many persons into thinking that valid judgments have been obtained against them and that binding obligations to pay have been received as a result thereof and to pay substantial sums on alleged debts or obligations which they might otherwise not have paid, or has tended to deny debtors a reasonable opportunity to appear, answer and defend lawsuits instituted against them. Therefore, the practices set forth in Paragraph Nineteen were and are unfair, false, misleading and deceptive acts and practices.

PAR. 20. 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 contstiuted, and now constitute unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT IV

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder, and of the Federal Trade Commission Act, on the part of respondents, New Rapids Carpet Center, Inc., Lee Kantor, individually and as general manager of New Rapids Carpet Center, Inc. and as an individual doing business as New Rapids Furniture Warehouses, Inc., the allegations of Paragraphs One, Two and Four are incorporated by reference in Count IV as if fully set forth verbatim.

PAR. 21. Respondents, in the ordinary course and conduct of their business, as aforesaid, and in connection with the extension of consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, have caused and are causing their customers to enter into contracts for the sale of respondents' goods. On their contract, hereinafter referred to as "the contract," respondents provide certain consumer credit cost information. Respondents do not provide their customers with any other consumer credit cost disclosures.

By and through the use of the contract, respondents:

[16] 1. Failed to disclose, before the transaction was consummated as required by Section 226.8(a) of Regulation Z, the following:

(a) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

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

(c) The amount of the finance charge, as required by Section 226.8(c)(8) of Regulation Z.

(d) The annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z. Where the annual percentage rate was disclosed, it was not stated within the nearest one quarter of one percent as required by Section 226.5(b)(1).

2. Failed 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.

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

4. Failed to make the required disclosures clearly, conspicuously and in meaningful sequence, as required by Section 226.6(c) of Regulation Z.

PAR. 22. 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 the Truth in Lending Act and pursuant to Section 108 thereof, respondents thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY PAUL R. TEETOR, ADMINISTRATIVE LAW JUDGE

JANUARY 19, 1977

[2] SUMMARY OF THE COMPLAINT

On August 26, 1975 this Commission issued its complaint and notice of proposed order against Lee Kantor, a/k/a Lee Woods (hereafter "Kantor"), a small Bronx retailer of carpets, furniture and major appliances, d/b/a New Rapids Furniture Warehouse, Inc., and certain corporate entities associated with his business. The complaint contained three counts charging violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 5, and one count charging violations of the Truth in Lending Act, Pub. Law 90–321 (1968).

Count I, while never using the phrase "bait and switch," charges an unusual kind of "bait and switch" operation. During an unstated

period (which the evidence showed to be about 1969–71) respondent Kantor purchased sales "leads"[1] elicited by another carpet seller's advertising commercial on a New York City TV/radio station. Because the other firm was located on Long Island, it could not economically make use of the New Jersey "leads" which the commercial generated. Hence the arrangement to sell these leads to respondents. (Paragraphs 5–10) The complaint further charges that respondents' salesmen, after confusing their identity, proceeded to disparage the TV offer and work the customers up to the purchase of much more costly alternative carpeting. (Paragraph 12)

There are also charges that the salesmen involved used other unfair tactics such as (1) failure to supply "continuous filament nylon pile broadloom"; (2) failure to measure carpeting accurately and cut properly; (3) wrongly calling the sale price a "special" and dishonestly promising a "free gift" with every sale. (Paragraphs 8, 11) The first two of these lesser charges were, however, abandoned by complaint counsel in their Trial Brief (at p. 8).

Count II deals with more miscellaneous sales practices alleged to characterize respondents' marketing of carpeting, apparently with particular reference to the New Jersey sales leads described in Count I. These include (1) high-pressure selling, (2) deceptively vague guarantees, (3 & 4) unsatisfactory substitutions for unsatisfactory carpeting and (5) use of contracts which omit to state the quantity purchased or the unit cost. (Paragraphs 16–18)

[3] *Count III* charges respondents with regular abuse of legal process to collect debts arising out of installment credit sales contracts (which were assigned by the carpeting businesses to their financing affiliates). This count is concerned primarily with respondents' default judgments against delinquent customer-debtors allegedly obtained by (1) bringing collection suits against New Jersey residents in an inconvenient form, the Civil Court of the City of New York (Paragraph 19–1) and by deliberately failing to serve notice of such suits on the customer debtors (*i.e.*, so-called "sewer service"). (Paragraph 19–2) A number of lesser abuses of legal process are also alleged.[2]

Count IV charges violations of the Truth in Lending Act by respondents by virtue of failure to disclose before consumation of the transaction, a number of things which by Regulation Z of the Federal Reserve Board must be disclosed before consumation. (Paragraph 21–

[1] Respondent Kantor during the hearing defined "lead" as a prospect". . .somebody who is interested in buying the product which you are selling (Kantor 221–222).

[2] *E.g.*, overclaiming; suing without delivering the goods; garnishing wages with knowledge that judgments had been obtained improperly; failure to credit post-judgment payments; and failure to file satisfactions when paid. (Paragraph 19, sub-paragraphs 3–8)

1) It charges also failure to use the term "unpaid balance of cash price" and to disclose the sum of certain other costs which should be described as the "deferred payment price". (Paragraph 21–3)

The complaint further appended a detailed proposed order against all respondents which the Commission thought likely to be issued if all charges were proven but it reserved the right to make changes needed to protect the public in light of all the facts developed during the adjudicative proceedings here.

History of the Case

Following issuance of the complaint and proposed order, on October 1, 1975, all respondents appeared by attorney Sol S. Perlow, Esquire of the New York bar and were granted an extension of time to answer the complaint until November 5, 1975. On October 30, 1975, respondents filed their joint Answer, denying most allegations, putting complaint counsel to their proof as to others and admitting only a handful of charges.

[4] On November 10, 1975, a prehearing conference was held in Washington and on November 11, 1975, a prehearing order issued, reporting on said conference[3] and laying down a pre-trial preparation schedule to culminate in evidentiary hearings beginning March 8, 1976. On November 25, 1975, complaint counsel filed an informal request for certain discovery which elicited nothing from respondents. On December 16, 1975, complaint counsel also filed 26 Requests For Admissions, none of which evoked any response within the ten days provided by Rule Section 3.31.

Failing to obtain anything of significance by voluntary discovery, on December 17, 1975, complaint counsel sought and on December 24, 1975, the Administrative Law Judge issued a subpoena duces tecum to respondent Kantor, returnable in New York City on January 22, 1976. Further, on notice from complaint counsel that the voluntary discovery originally expected from respondent had not been received, the Administrative Law Judge on December 24, 1975 suspended indefinitely the requirement of Prehearing Order No. 1 that the Commission's case be turned over to respondents by December 29, 1975 (exhibits) and January 7, 1976 (testimonial summaries).

At a prehearing conference held in New York City on January 22, 1976 to receive respondents' return in response to the subpoena duces tecum issued December 24, 1976, respondent Kantor testified that he was producing nothing because some responsive material had been

[3] Among other matters, the Court was advised that settlement negotiations had broken down largely because of failure to agree on the applicability of an order to respondent Lee Kantor individually. Whether or not to subject him to such individual liability has remained the practical issue throughout the history of this matter.

lost in recent break-ins at his store and as for other responsive materials he had not realized until the previous day that production for this subpoena would be required. Following examination as to what documents were or were not still available, Kantor was directed by the Administrative Law Judge to purge his default by producing all responsive documents not waived by complaint counsel at an adjourned prehearing conference to be held at the same place on February 19, 1976.

[5] At the same time, the Administrative Law Judge gave respondents a second chance to answer complaint counsel's Requests For Admissions by responding within 10 days, *i.e.,* by February 2, 1976. No such response was made, however, and on February 12, 1976, complaint counsel moved for summary decision under Rule Section 3.24 on the ground that respondents had failed to answer complaint counsel's Requests For Admissions by February 2, 1976 and by this second default had made the requested admissions, (which parallelled the complaint's allegations) automatically operative and a summary decision appropriate. At the adjourned prehearing conference held in New York City on February 19, 1976, the Administrative Law Judge again offered respondents a *locus penitentiae,* giving them a third chance to respond to the Requests For Admissions if they would actually file good faith answers within a few days. A sworn response by respondent Kantor, dated March 4, 1976, denying most requests and pleading ignorance as to others but admitting eight facts, was, in fact filed and over complaint counsel's strenuous objections (filed March 15, 1976) the Administrative Law Judge in an "Omnibus Order and Trial Setting" dated March 25, 1976, concluded that complaint counsel's examples of "bad faith" in respondents' answers did not quite prove "bad faith." He accordingly allowed the late filing of respondents' answers to complaint counsel's Requests For Admissions and simultaneously denied complaint counsel's motion for summary decision.

Meanwhile, at the adjourned prehearing conference in New York City on February 19, 1976 to receive the return on the subpoena duces tecum to respondent Kantor which had not been forthcoming on January 22, 1976, the effort was again in vain. Again, Kantor appeared without a single business record. Under examination he now supplemented his earlier explanation in terms of break-ins and fires (Kantor 54, 61, 99) with a speculation that other corporate books and records may have been lost somewhere between trips to the New York City Consumer Fraud Bureau and a prior lawyer (one Harris), who died suddenly of kidney trouble without ever returning Kantor his books (Kantor 100, 107, 108). More recent corporate records

"weren't stolen but, frankly, I don't even know where they are. They're all dispersed." (Kantor 101) All records of earlier lawsuits involved here were said to have been left with Kantor's attorney and Kantor did not get them to bring to the hearing because he allegedly did not know they were wanted (Kantor 137). [6] He had tried to locate his "deferred cash" contracts, he said but explained that this effort failed because "when we get into that other room (where they were kept) it's so cold that you can't do anything" (Kantor 136). When questioned as to how long this had been true, he estimated several months (which would extend the cold weather back to summertime). The most recent records had not been written up yet. (Kantor 101) So there was nothing to return. Interestingly, Kantor never invoked here, the explanation given the New York City Department of Consumer Affairs in 1972 was that he could produce none of his records because his file clerk was constantly misfiling them (CX 3 z45).

The Administrative Law Judge noted in his "Omnibus Order and Trial Setting" of March 25, 1976 that Kantor's demeanor reinforced the inference of incredibility to be drawn from what he was saying in attempted explanation of his failure to produce a single business record. The Court concluded that a case had been made for application of sanctions under Rule Section 3.38 and proceeded to order that all documents called for but not produced would be deemed "adverse" to respondents' defense and that secondary evidence might be introduced at trial if necessary to make up for the loss of this primary evidence, in situations where such would be reasonable. The policy laid down was stated thus:

> We do not intend to see this case tried primarily on secondary evidence. However, we shall not hesitate to apply either sanction (presumptions of adverseness and secondary evidence) on motion of complaint counsel whenever it seems fair and necessary to fill particular voids in their case, reasonably related to respondent's failure to produce his business records on subpoena.

On April 8, 1976, in anticipation of trial, complaint counsel requested that respondents admit the genuineness and authenticity of a number of proposed exhibits, copies of which had earlier been served on respondents. No response being forthcoming within 10 days, on motion of complaint counsel under Rule Section 3.31 the Administrative Law Judge on April 28, 1976 declared that said proposed exhibits would be deemed authentic copies of documents correctly described in complaint counsel's request of April 8, 1976.

[7] At a prehearing conference held in New York City on February 19, 1976, complaint counsel was given three weeks to turn over his prospective evidence to respondents, they were given one week

thereafter to request any discovery desired. (Tr. 160) However, no request for discovery was ever made by any respondent.

An "Omnibus Order" dated March 25, 1976, set the case down for trial in New York City on April 26, 1976. In view, however, of the serious illness of respondents' counsel during April, on April 14, 1976, the trial date was put over to May 3, 1976. A trial brief for the assistance of the Administrative Law Judge was filed by complaint counsel voluntarily on April 30, 1976, but none was filed on behalf of respondents.

The hearing of evidence in this matter began in New York City on May 3, 1976 and continued daily through May 10, 1976, on all workdays except May 5, 1976. Because the aid of the U.S. District Court for the Southern District of New York was required to compel the appearance of one of complaint counsel's witnesses (Marvin Fisher), the hearings were adjourned on May 10, 1976, and resumed for a single day on July 27, 1976 to take said Fisher's testimony, after which the hearing was adjourned *sine die* but the record was not closed, pending a ruling by the Administrative Law Judge on the admissibility of a large number of affidavits offered by complaint counsel to fill out voids in his case for, which respondents' refusal to turn over any records was said to be responsible, wholly or in part.

The witnesses who testified at the evidentiary hearings were all called by complaint counsel (including respondent Kantor, who was called as an adverse witness). Their names, addresses, businesses, the dates of their testimony and page references thereto are as follows:

	Name & Address	*Business*	*Date of Testimony*	*Transcript References*
1.	Lee Kantor[4] a/k/a Lee Woods 4195 Third Avenue Bronx, New York	Retailer	5/3/76 5/4/76	205-246 249-279
[8] 2.	Frank DiDonato	Business Reporter for Dunn & Bradstreet	5/4/76	283-336
3.	Edith M. Novack	Asst. Counsel N.Y. State Banking Dept.	5/4/76	336-368

[4] Respondent Kantor also testified extensively during pre-hearing proceedings on January 22, 1976 (pp. 59-108) and February 19, 1976 (pp. 121-145).

	4. Leonard S. Cammalleri	Business Reporter for Dunn & Bradstreet	5/6/76	389-410
	5. Moira P. McDermott	Retired Attorney FTC	5/6/76	410-480
	6. Abraham A. Karlin	Consumer Specialist FTC	5/6/76 5/7/76	481-505 589-617 628-707
	7. Joan Francis Cipriani 263 Manning Ave. North Plainfield, New Jersey	Housewife	5/6/76	505-528
	8. Nadean Porter 184 Weequahic Ave. Newark, New Jersey	Not Stated	5/6/76	532-554
	9. Mildred Mary Crete 437 Carroll Street Orange, New Jersey	Not Stated	5/6/76	555-568
	10. Roberta Beard 784 South 15th Street Newark, New Jersey	Not Stated	5/6/76	569-588
	11. Jacqueline Burke 635 Castle Hill Avenue Bronx, New York	Not Stated	5/7/76	709-726
	12. Edwin Burks	Former FTC Investigator	5/7/76	728-772
[9]	13. William Tomaro 430 62nd Street West New York,	Retired Construction Worker	5/10/76	776-809

New Jersey

14. Aaron Weiss	Attorney Civil Court of City of N.Y.	5/10/76	810-846
15. Marvin Fisher 1381 Jonathan Lane Wantaugh, N.Y.	Salesman, formerly partner in Ideal Design, Inc.	7/27/76	881-909

Although afforded the usual opportunity to call any witnesses and offer any exhibits desired, respondents announced that they would offer neither witnesses nor exhibits in their own defense (Tr. 873).

On August 16, 1976, complaint counsel filed a lengthy brief in favor of his pending offer of certain hearsay evidence (a ruling on the admissibility of which had been deferred at the hearing).[5] Respondents elected to rely on their oral argument and filed no brief (Tr. 909). By order dated October 12, 1976, the Administrative Law Judge, although doubting that he would ordinarily receive the hearsay evidence so offered, nevertheless held that in the circumstances of this case, where complaint counsel had plainly been precluded from finding updating consumer witnesses by respondents' contumacious refusal to turn over any business records on discovery, it was necessary to admit such hearsay testimony to adequately compensate for loss of such discovery opportunity.

On the same date (October 12, 1976), record corrections having meanwhile been accepted, the record in this matter was closed and the parties were given 40 days to file proposed findings of fact and conclusions of law. At respondents' request this deadline was extended on November 22, 1976 to November 29, 1976, and thereafter to December 1, 1976. On November 22, 1976, complaint counsel filed cited proposals for findings of fact and conclusions of law on all aspects of the case. On December 9, 1976, respondent filed a handful of proposed findings and conclusions, without transcript references, consisting [10] solely of conclusionary assertions that respondent Kantor was not individually involved in any offenses and should not be included individually in any cease and desist order.

[5] In one case (CX 93a-z59) the evidence was actually excluded at the hearing and the request was therefore to reverse the exclusion.

FINDINGS OF FACT

Respondent Lee Kantor, d/b/a New Rapids Furniture Warehouses, Inc.

1. Respondent Lee Kantor, sometimes also known as Lee Woods, runs a retail establishment selling carpeting, furniture and appliances at 4195 Third Ave., Bronx, New York, doing business under the name "New Rapids Furniture Warehouses, Inc." (Kantor, 206, 207)

2. Until 1970 this business was carried on by a New York corporation of the same name (New Rapids Furniture Warehouses, Inc.) chartered on June 11, 1962, but on December 15, 1970, said corporation was dissolved by proclamation of the Secretary of State of New York. (CX lg, Kantor 182) Since then the same business has been carried on by Kantor at the same location under the same name (Kantor, 142, 206, 206A). Kantor's testimony during discovery proceedings here (on January 22, 1976 and again on February 19, 1976) that he was even then unaware that this corporation has been dissolved and believed it was "still a going corporation" until he found out about it from complaint counsel, is not credited (Kantor 63, 142).

3. Kantor's wife owned 100 percent of the stock of New Rapids Furniture Warehouses, Inc. and was entitled to all its "earnings." (Kantor 215, 216, CX 3j)

4. Regardless of who had the beneficial ownership of the business known as New Rapids Furniture Warehouses, Inc., it appears that respondent Kantor's wife took no active part in the operation of the business (Kantor 216); that he had the responsibility for its day-to-day operations (Kantor 218) and that he has always been responsible for its policies (Kantor 72). Respondents do not deny that Kantor has formulated, directed and controlled the policies of New Rapids Furniture Warehouses, Inc., including the acts and practices set forth in this complaint. (Respondents' Answer, Paragraph 1) In particular, he has made the arrangements for the company's advertising, because he was the only one who could do it. (Kantor, 221)

Respondent New Rapids Carpet Center, Inc.

5. Respondent New Rapids Carpet Center, Inc., a New York corporation operating out of the same premises as New Rapids Furniture Warehouses, Inc. (Kantor 73), was chartered on April 16, 1969. (CX 1h, Kantor, 182–183) [11] One Stanley Katzman, an employee of Kantor's in the New Rapids Furniture Warehouses, Inc. business, persuaded Kantor to put the furniture warehouse in the

carpet business sometime in the mid-1960's and New Rapids Carpet Center, Inc. was organized tow or three years later to handle the growing carpet business (Kantor 68, 69, 70). At a discovery hearing on January 22, 1976, Kantor was not sure if the corporation had ever been dissolved but testified that "we haven't been using it as a corporation for at least three or four years" (Kantor 62, 63). It was, in fact, dissolved by proclamation of the Secretary of State of New York on December 15, 1973. (CX 1h, Kantor 182-183)

6. As in the case of the furniture warehouse business, the carpet center, according to Kantor, was owned 100 percent by his wife, who was entitled to all its "earnings" (Kantor 215, 216, CX 3j).

7. Respondent Kantor's wife, however, took no active part in the operation of the business (Kantor 216). He, as "General Manager" of New Rapids Carpet Center (CX 106b) was responsible for New Rapids Carpet Center Inc.'s day-to-day operations (Kantor 218) and had "more or less full control of the thing" (Kantor 219). In any event, respondents do not deny that Kantor formulated, directed and controlled the policies of New Rapids Carpet Center, Inc., including the acts and practices challenged in this complaint. (Answer, Paragraph 1)

Respondent Charge Account Factors, Inc.

8. Respondent Charge Account Factors, Inc. was chartered as a New York corporation on October 21, 1955 (CX 1f). In its early years, when respondent Kantor's father Abraham was active to some extent in the business and the office was at 29th St. and Broadway in New York City, this corporation bought installment paper from various dealers (Kantor 235, 236). By about 1968 or 1969, however, the father was no longer active, the office downtown was closed[6] and Charge Account Factors, Inc., having ceased to buy paper from other dealers, was taking only the paper from "the carpet sales" (Kantor 236). [12] Kantor recalled at a discovery hearing in early 1976 that no taxes to New York State had been paid for three or four years (Kantor 63). Official records disclose that Charge Account Factors, Inc. was dissolved by proclamation of the Secretary of State of New York on December 15, 1972 (CX 1f).

9. At the hearing here Kantor testified that he and his father, Abraham Kantor, each had had a one-third interest in the "earnings" of Charge Account Factors, Inc., and a third "partner" one Morris Wishnetsky, had had the final third (Kantor 215, 216, 234, 235). However, he omitted to explain, as shown in the transcript of his 1972

[6] Kantor testified under oath in 1972 that the address of Charge Account Factors, Inc. was by then in his father's home at 1746 Andrews Ave. in the Bronx. (CX 3g)

testimony before the Consumer Affairs Department of the City of New York, that he and his father had bought the third partner out "many years ago" (CX 3i), so that long before 1972 he and his father were the sole owners of Charge Account Factors, Inc. (CX 3j).

10. Respondent Kantor was the Secretary of the Corporation and "the active individual" therein. (Kantor 72) His father, who had never been very active in the business, was entirely inactive from about 1968 or 1969 (Kantor 236) and Kantor was "the only active person at that time" (Kantor 236). Again, as with the furniture warehouse and carpet center, respondent Kantor was responsible for the day-to-day operations (Kantor 218). Nor do respondents deny that Kanter formulated, directed and controlled the policies of Charge Account Factors, Inc., including the acts and practices challenged by this complaint. (Answer, Paragraph 1)

Respondent Charge Account Credit Corp.

11. Charge Account Credit Corp., a New Jersey corporation was chartered on November 7, 1956 (CX 1d). Like its New York chartered counterpart, Charge Account Factors, Inc., Charge Account Credit Corp.'s business was buying installment paper from various dealers (Kantor 235) but in this case it was to buy Jersey paper (Kantor 71). Its official New Jersey office was 2377 5th St., Coytesville, New Jersey (CX 1d) but its main office was always in New York City. In the early years, while respondent Kantor's father was to some extent active in the business, said office was at 29th St. & Broadway (Kantor 235, 236) but about 1968 or 1969, when respondent Kantor's father became completely inactive in the business, the office was moved to [13] respondent Kantor's own home (Kantor 236).[7] The charter of Charge Account Credit Corp. was voided for non-payment of New Jersey State taxes by proclamation on April 12, 1973 (CX 1d). Thereafter respondent Kantor, using the name Lee Woods and with his wife as a partner, registered the trade name Charge Account Credit Company with the State of New Jersey, ostensibly to liquidate the paper involved but he was still doing business under this name in New Jersey three years later at the time of the hearing (Kantor 63, 64).

12. Respondent Kantor testified at this hearing that, as in the case of Charge Account Factors, Inc., he had had only a one-third interest in the "earnings" of Charge Account Credit Corp., his father, Abraham Kantor, and another "partner," one Morris Wishnetsky, each also having one-third interest (Kantor 72, 215, 216, 234, 235). However, he omitted to explain, as shown in the transcript of his 1972

[7] Kantor testified under oath in 1972 that the office of Charge Account Credit Corp. had "for many, many years" been in his own home at 330 Windsor Road, Englewood, New Jersey.

testimony before the Consumer Affairs Department of the City of New York, that he and his father had bought out the third partner "many years ago" (CS 3i), so that long before 1972 he and his father were the sole owners of Charge Account Credit Corp. (CX 3j).

13. Respondent Kantor was the Secretary of the corporation and "the active individual" therein (Kantor 72). After his father's complete retirement from the business about 1968 or 1969, it appears that respondent Kantor was not only responsible for day-to-day operations (Kantor 218) but was "the only active person at that time (Kantor 236) and was responsible for the organization's policy (Kantor 72). Respondents do not deny that Kantor formulated, directed and controlled the policies of Charge Account Credit Corporation, including the acts and practices challenged by this complaint (Answer, Paragraph 1).

The Integrated Family Enterprise

14. The several corporations described in Findings 1 thru 3 have all come and gone but the integrated family enterprise for the sale and financing of household furnishings of which each was for a while a part remains constant under the direction and control of Lee Kantor, a/k/a Lee Woods.

[14] 15. The two corporations selling carpeting and furniture, New Rapids Furniture Warehouses, Inc. and New Rapids Carpet Center, Inc., were wholly owned by respondent Kantor and his wife (Kantor 215, 216) and his was the direction and control of each (Answer, Paragraph 1). The two corporations financing such sales (Charge Account Factors, Inc. and Charge Account Credit Corporation) were wholly owned by respondent Kantor and his father (CX 3i–j) and his was the direction and control of these parts, too, of the integrated enterprise (Answer, Paragraph 1). The corporations come and go but the underlying reality, respondent Kantor's family enterprise, endures.

16. Despite respondent Kantor's, occasional protestations on the stand that various parts of his enterprise were "separate and independent," it appears that he himself ordinarily views the carpeting, furniture, and related financing activities as a single enterprise. When estimating total dollar sales of his business in the late 1960's at about $200,000 a year,[8] he testified that "of our installment sales it (carpeting) involved 70% of the business" (Kantor

[8] Respondent Kantor claims that the gross sales of the business have fallen off badly in recent years. At an early prehearing conference (January 22, 1976), his attorney, Mr. Perlow stated:

"He's got a business that – I don't think they gross – what is your gross all together? Mr. Kantor: I couldn't tell you offhand – but it's not a hell of a lot. Mr. Perlow: Any approximation? Mr. Kantor: About $40,000 or $50,000" (Kantor 57).

215). Another time he referred to "the carpet department" of the business (Kantor 81). Of similar import was his statement that by 1968 Charge Account Factors, Inc. was taking only the installment paper from "the carpet sales" (Kantor 236).

17. Particularly significant here was Kantor's testimony while explaining his negotiation of the purchase of carpet sales "leads" in New Jersey (see Finding below) that "they (the leads) were sent to New Rapids Carpet Center — or New Rapids Furniture. . . . I don't recall, actually. It was either one or the other" (Kantor 81–82). Shortly thereafter, explaining to which company such leads would have been sent, he testified: [15]

> I really don't recall. I don't know if he (the seller) was aware of the fact that there was another corporation called New Rapids Carpet Center or not. This was a later day organization. This wasn't organized the same time as New Rapids Furniture was. He was aware of New Rapids Furniture and it would seem to me he would think of (in?) those terms (Kantor 82–83).

To the question "So he would send in these leads to New Rapids Furniture, as well as New Rapids Carpet?" Kantor answered, "Yes" (Kantor 83).

Ideal Designs, Inc.

18. Ideal Designs, Inc. (hereafter "Ideal") was a corporate retailer of carpeting for about a decade (from 1965 to 1975, when it went into bankruptcy) in Floral Park and later in Franklin Square in Nassau County on Long Island (Fisher 881–2). It was wholly owned by three "partners": Harvey Brodsky, Jules Engelson, and Marvin Fisher (Fisher 895, 897). The last testified here at the instance of complaint counsel only under compulsion of an order from the District Court for the Southern District of New York (Fisher 880, *et seq.*, 895, 897).

19. During the period of its existence Ideal had an arrangement with an advertising agency called Herb Brauner Associates (hereafter "Brauner") whereby Brauner would run TV commercials worked up by Ideal and Brauner (Fisher 887, 899) on TV and radio time bought by Brauner from New York City broadcasting stations for the use of such clients as aluminum siding marketers and swimming pool contractors as well as Ideal Designs (Fisher 897). Ideal paid nothing for this broadcast time, which was purchased by Brauner, but Ideal did pay Brauner for the customer "leads" which the commercial evoked, on a "per lead" basis (Fisher 897–898).

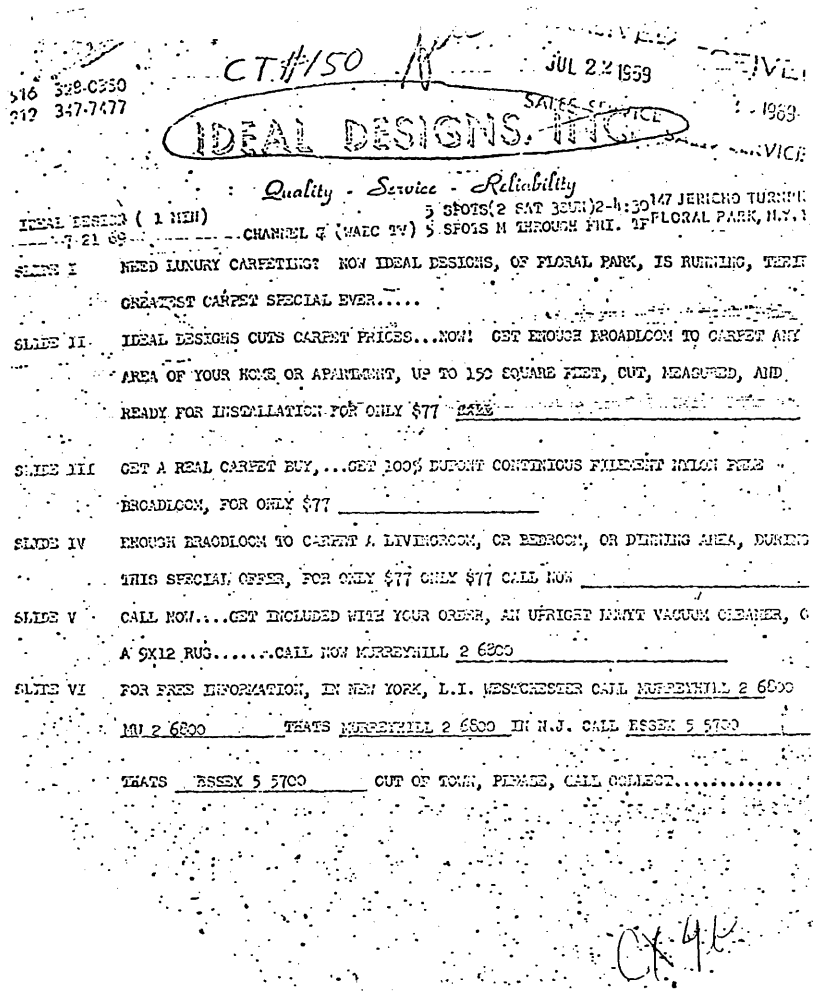
20. The format and content of Ideal's commercial, which had been worked up by Ideal & Brauner together (Fisher 899), did not vary significantly throughout the life of the arrangement, except as to

details like the precise amount of the price (*e.g.*, $77 vs. $69) or the exact amount of square footage (Fisher 883). [16]

> Q. Did you run this identical ad from the first time that you advertised?
> A. No (but) (t)hey were all very similar. In other words, there were slight variations. Sometimes we advertised instead of $77 it would have been $69. Or we changed the square footage. But basically it was the same ad. And we gave the same gifts away.
> Q. And can you tell us once again what was the period covered by these ads?
> A. The ad ran the full time we were in business, the full ten years. (Fisher 883)

This remained as true after as before the Jersey leads were sold by Brauner to Kantor (Fisher 896).

21. Complaint counsel's Exhibit CX 9b, a copy of which follows, is a fair example of the text of the Ideal commercial as it was broadcast, both before and after Kantor began buying the Jersey leads (Fisher 896): [17]



516 328-0330
212 347-7477

CT #150 JUL 22 1969

IDEAL DESIGNS, INC.

Quality - Service - Reliability

IDEAL DESIGNS (1 MIN) 5 SPOTS(2 SAT 3PM)2-4:30 147 JERICHO TURNPIKE
7-21 69 CHANNEL 4 (WNEW TV) 5 SPOTS M THROUGH FRI. 1F FLORAL PARK, N.Y.

SLIDE I NEED LUXURY CARPETING? NOW IDEAL DESIGNS, OF FLORAL PARK, IS RUNNING, THEIR GREATEST CARPET SPECIAL EVER.....

SLIDE II IDEAL DESIGNS CUTS CARPET PRICES...NOW! GET ENOUGH BROADLOOM TO CARPET ANY AREA OF YOUR HOME OR APARTMENT, UP TO 150 SQUARE FEET, CUT, MEASURED, AND READY FOR INSTALLATION FOR ONLY $77 SALE

SLIDE III GET A REAL CARPET BUY,...GET 100% DUPONT CONTINUOUS FILAMENT NYLON FREE BROADLOOM, FOR ONLY $77

SLIDE IV ENOUGH BROADLOOM TO CARPET A LIVINGROOM, OR BEDROOM, OR DINING AREA, DURING THIS SPECIAL OFFER, FOR ONLY $77 ONLY $77 CALL NOW

SLIDE V CALL NOW....GET INCLUDED WITH YOUR ORDER, AN UPRIGHT LIGHT VACUUM CLEANER, A 9X12 RUG.....CALL NOW KERRYHILL 2 6800

SLIDE VI FOR FREE INFORMATION, IN NEW YORK, L.I. WESTCHESTER CALL KERRYHILL 2 6800 MU 2 6800 THATS KERRYHILL 2 6800 IN N.J. CALL ESSEX 5 5700

THATS ESSEX 5 5700 OUT OF TOWN, PLEASE, CALL COLLECT.....

CT 4

[18] 22. The Ideal commercial, as will be noted from CX 9b, included telephone numbers for viewers to call if they wanted to take advantage of the offer being made on the commercial. Broadcasts of this commercial reached such potential buyers not only in New York City but in its environs to the east (Nassau and Suffolk Counties, on Long Island), to the north (Westchester County and Connecticut), and to the west (New Jersey) (Fisher 882, CX 3z13). However, from Ideal's viewpoint, its Long Island location was too far from New Jersey to service the leads that were phoned in from that state and so after a while it ceased to respond to the Jersey leads (Fisher 884).

23. About 1968 Brauner told Ideal he would have to raise the price per lead from $15 to $18 unless he (Brauner) were permitted to sell the Jersey leads to a reliable company "that would handle it for (Ideal)" (Fisher 885, 898-9). When the Ideal people said they didn't care what Brauner did with the Jersey leads (Fisher 899) Brauner proceeded to make a separate arrangement of his own with respondent Kantor, whose advertising over WMCA Brauner had been handling (Kantor 221).

24. Kantor had begun to feel that the cost of advertising exceeded the profit in the carpet business and Brauner suggested buying "leads" so that New Rapids would know what its promotional cost was (Kantor 221). Kantor agreed verbally to purchase the Jersey leads on the same (per lead) basis as Ideal was purchasing leads elsewhere in the area (Fisher 882, 887, Kantor 222, CX 3z14). The date that this arrangement was entered into is not clear on the record. While it may have started as early as late 1968 (Fisher 885), or as late as early 1970 (CX 106b) it probably started in 1969 (CX 3z14) and lasted something over a year (Kantor 84; CX 3z13) until early 1971 (CX 106a; CX 3z14).

Respondents' Knowledge of the Ideal Design Commercial

25. During the hearing of this matter, respondent Kantor made various inconsistent statements about his knowledge as to where Brauner was getting the leads that New Rapids was buying. Kantor at one point testified that Brauner made "no specific mention of the fact that they (the leads coming thru Brauner's answering service) were Ideal Design's leads" (Kantor 224). Shortly thereafter, however, Kantor conceded that when Brauner asked if Kantor would be interested in buying leads "he (Brauner) told us that he had leads from Ideal Design. . .and later we found out that they came from other sources" (Kantor 225). We adopt as most likely Kantor's [19] subsequent testimony that Brauner told him Ideal was the advertiser and the leads being purchased were names of people who had

answered Ideal TV ads. Because of Kantor's dominant position in New Rapids Carpet Center, Inc. and the other corporate respondents, his knowledge was also theirs.

26. The record evidence of respondents' knowledge concerning the content of the Ideal ad which was generating the leads being purchased is also somewhat confused. In a 1971 affidavit on this subject, Kantor said that Ideal had:

> apparently received these names as a result of certain television advertising which offered 150 feet of continuous filament nylon carpeting for $77.00. Said price did not include delivery, padding and installation charges. (CX 106b)

Comparison with the ad itself (CX 9b) reveals this to be inaccurate in that a gift was mentioned but the price and square footage were correctly stated. Again, whatever knowledge Kantor had was also that of New Rapids Carpet Center, Inc., and the other corporate respondents, which he dominated.

27. Kantor's testimony in the hearing here was that "at the beginning" he was not aware of the representations made in the Ideal ads (Kantor 83). According to him, he never listened to TV or radio, never heard the advertisement as it appeared there and never saw any written copy (Kantor 86, 225A). At some point, Kantor testified, he had asked Brauner "what is the ad?" and Brauner allegedly said:

> The ad reads - 150 square feet of carpeting for $89.95 and - this was supposed to be uninstalled - just 150 square feet of carpeting - and for installation, you charge them the prevailing installation price. (Kantor 86)

Kantor added that "this is about what I was told about it - and this is what I knew about it" (Kantor 86).

28. It will be noted that in addition to the deviation from the terms of the advertisement (*i.e.*, no gift) to which Kantor testified in 1971, his 1976 testimony in [20] this case fixed the advertised price at $89.95 instead of $77.00. If the price originally quoted by New Rapids' salesmen to New Jersey leads was, as Kantor says, $89 for 150 square feet (Kantor 256), it is fairly inferable that Kantor's alleged unawareness of the terms quoted in the Ideal commercial could not have extended much, if any, beyond "the beginning" of the arrangement.

29. Even the $89 price, not being in accordance with the Ideal commercial, according to Kantor, elicited protests from New Jersey leads, who had heard the price was $79 ($77?). As a result New Rapids' price was reduced to $79 ($77?) he testified (Kantor 238, 256, 257; see also 232, which may refer to this episode).

30. It was allegedly two or three months after Kantor started answering the Jersey leads before he found out from customers

complaining to his salesmen Kantor says, that the Ideal commercial contained an offer of a free gift (CX 3z18). He was "dumbfounded" when demands for such gifts were made and promptly called Brauner, who confirmed that that was what the ad said but explained that the offer was "innocuous" (CX 3z18) because it applied only if the viewer bought precisely what was offered on the commercial (*i.e.*, the $79 or $89 package) and Ideal could supply Kantor with one or two of the advertised vacuum cleaners in case he ever needed them (Kantor 238, 239, 240).

31. However, Kantor could never get any vacuum cleaners or even the name of Ideal's source of supply (Kantor, CX 217). Accordingly, he adopted a suggestion by his salesmen that New Rapids substitute a different gift, to wit, a free reinstallation of the carpet purchased, in case the customer were to move to a new home within the next year (Kantor 238, 240). With this explanation, Kantor asserted, it could fairly be said that there was no situation where New Rapids did not supply a promised gift (Kantor 238).

32. The foregoing findings make it clear that respondent Kantor and through him the corporate respondents he dominated were substantially aware of the basic terms (price and square footage) of the Ideal TV commercial almost from "the beginning" of the arrangement and at least after the first two or three months of an arrangement that lasted over a year, were similarly aware of the same commercial's promise of a free gift. [21] Accordingly, it is found that respondents were aware of the key terms of the commercial during most of the time they were responding to the New Jersey leads which said commercial evoked.

Alleged Buyer Confusion of New Rapids and Ideal

33. Upon receipt of each name from Brauner respondent Kantor would arrange for one of his two New Jersey commission salesmen to communicate with the prospective customer and seek an order for carpeting (CX 106c & d). Sometimes, however, Kantor would call such leads preliminarily himself (Kantor 252).

34. When Kantor made such preliminary calls, he testified, he not only avoided mention of any connection with Ideal Design or even that Ideal was the source of the lead but "in every case" affirmatively told the lead that "we are not the people that advertised" (Kantor 253, 254). The claim of affirmative disclosure that "we are not the people that advertised" is somewhat at variance with testimony which Kantor gave the City of New York Department of Consumer Affairs in 1972:

Ms. Sullivan: Did you say that you were not from Ideal Designs?
Mr. Kantor: Well, we said, "we understand that you're interested in carpeting," that's the way we started. (CX 3z15, CX 3z16, referred to at Kantor 253)

In light of this inconsistency, we do not credit Kantor's assertion that he made an affirmative disclosure to New Jersey leads that his company was not the same one that advertised. It is further found that failure to mention Ideal by name when saying "we understand that you're interested in carpeting" may have left the customer, initially, at least, believing he was dealing with an Ideal representative.

35. Despite this potential for some confusion inherent in respondent Kantor's failure adequately to disassociate New Rapids from Ideal in his approach to the New Jersey leads, the consumer testimony here revealed relatively little such confusion. Only two witnesses out of many witnesses and affiants testified that a New Rapids salesman said he worked for both New Rapids and Ideal (Crute 556, 557; Beard 571). Our attention has been drawn to no evidence that any other lead thought [22] New Rapids was Ideal or somehow represented Ideal.[9] Accordingly, the two cases cited are found insufficient to support the complaint's allegation in Paragraph 12–1 that it was a "practice" of respondents' salesmen to tell questioning purchasers that they worked for both New Rapids and Ideal.

Bait and Switch Tactics

36. The price advertised in the Ideal Design TV commercial for 150 square feet of continuous filament nylon carpeting,[10] whether $77 or even $89, represented a "substantial" reduction from the price regularly charged by New Rapids Carpet Center, Inc.[11] (Kantor 260). The addition of the advertised gift (either an upright vacuum cleaner or a 9' x 12' rug) would have made such an offer cost more than the company's profit on the sale (Kantor 240). Kantor conceded in a 1972 hearing before the New York City Department of Consumer Affairs that he was not, in fact, "in a position" to offer the free gift that Ideal was advertising (CX 3z17).

37. The evidence of consumer witnesses and affiants leaves little question but that the real purpose of respondents in purchasing

[9] In two cases a lead mistakenly thought New Rapids had also been the advertiser (Cipriani 508; Tomaro 709).

[10] The commercial's reference to continuous filament "pile" carpeting is a mistake of some sort. As explained by respondent Kantor at the hearing, pile (sheared filament) cannot be continuous filament; the terms are mutually inconsistent (Kantor 261).

[11] This uncontested evidence that the TV ads' "special" price was substantially below New Rapids' regular price for similar carpeting, while tending to support a bait and switch charge, at the same time disposes of the allegation of Paragraph 11–3 of the complaint that this carpeting was actually sold at the "usual and customary" retail price for respondents' merchandise. It clearly was not and such is our finding.

Brauner's New Jersey leads was not to sell the advertised goods at the advertised price. The real purpose, it is found, was to use the low, low price and gift offer in Ideal's TV commercial merely to get a foot in the door and then, by disparagement and invidious comparison, to switch the New Jersey leads over to a much more expensive substitute.

[23] 38. A pattern of disparaging New Rapids' "special" offer and persuading the Jersey leads to switch to a much more expensive substitute is documented in this record by a substantial amount of evidence. Four witnesses told their stories at some length and 21 affiants corroborate the picture which emerged from the witnesses' testimony.

39. Witness Cipriani was led to buy $400 worth of substitute carpeting by the New Rapids salesman's disparagement of his own $77 "special":

> When he (the New Rapids salesman) got to my house he told me it was ridiculous to think that they would carpet three of those size rooms under that price, because they were too big. (Also?) the carpeting that was. . .advertised was of a lower grade and I would probably want something a little heavier for the traffic and everthing. So naturally I chose a better grade carpeting. (Cipriani 511, 520)

40. Witness Crute was led to buy $500 worth of substitute carpeting by the New Rapids salesman's disparagement of his own $77 "special":

> A man came to my house, a representative, with the carpeting for $77. The carpeting that he showed me for $77 was really - and also the salesman downgraded the carpeting himself.
>
> * * * * * * *
>
> He was telling me it was no good, you know. This wasn't worth putting in (down?) and he had some better carpeting he could show me which was a little bit more money and which he did. . . (Crute 556)

41. Witness Beard's purchase of over $580 worth of substitute carpeting was effected by similar disparagement of the salesman's own "special":

> Well, he came and he showed the carpet that he had. The carpets that he had that he showed me for $77, you know, weren't nice. He admitted himself that they weren't fit.
>
> * * * * * * *
>
> [24] He said that they weren't - you know - they just weren't fit either for $77 to put down in your home.
>
> * * * * * * *

> So, in turn, of course, he had - you know - other carpets, so naturally I looked at the better carpet. So I also did buy the better carpet. (Beard 572)

42. Witness Tomaro was similarly led to buy $148 worth of substitute carpeting by a salesman's disparagement of his own $77 "special":

> (T)he carpet was guaranteed longer and it was a better make than - because he told me the one that's advertised in television he can only guarantee it for one year.
>
> * * * * * * *
>
> He volunteered it (this information).
>
> * * * * * * *
>
> The only thing that made me change my mind was that I wasn't going to get a carpet for $77 and next year I have to turn around and put another carpet there for $77 and keep on going one year after another.
>
> * * * * * * *
>
> If they only guarantee it for one year, I figured it's less. (Tomaro 803, 804)

43. Many affiants confirm that the bait and switch tactics described by the above four witnesses were not isolated or untypical acts and, at the same time, illustrate the variety of ways employed by New Rapids' salesmen to achieve the desired result. Sometimes the affiant simply states that the salesman "downgraded" or "degraded" the $77 carpeting special: Scavone, CX 30a & b (up to $350); Ransom, 29a (up to $650); Smith, CX 32a (up to $350) and Mordicai, CX 23a (up to $175). Sometimes it appears that the salesman attached specifically the $77 carpet's quality: Ronan, CX 84 (up to $150); Manning, CX 22a (up to $200); Hughes, CX 36a (up to $506); or durability: Champion, CX 16 (up to $495); Doloszycki, CX 11 (up to $138); or called it "cheap" or "for cheap people": Enna, CX 17(up to $173); Schuman, CX 31a (up [25] to $354). Sometimes the salesman carried unattractive samples of the special: Nelson, CX 38a & b (up to $600) or samples of the substitute carpet only: Nann, 39a (up to $559). Sometimes the $77 special was simply said not to be available: Myers, CX 24a (up to $495); Hill, CX 35a (up to between $270 and $370); Baskerville, CX 33a (up to $551); Smith, 41a (up to $723). One salesman pointedly ignored the special: Flor, CX 19a (up to $373). One "advised against" buying the special, apparently successfully: Ferrara, CX 18a (up to $600). In only one case reviewed did the salesman meet such determination to buy the $77 special that the lead could not be talked out of it. New Rapids solved this novel problem by never

making delivery of the order. O'Grady, CX 25a & b (purchased for $92, including incidental charges).

44. No significant infirmities in any of this evidence is apparent and no rebuttal evidence was tendered. Accordingly, it is found that New Rapids Carpet Center, Inc.'s salesmen made no use of the Ideal Design leads except to get their feet in potential customers' doors, after which they promptly disparaged the $77 offer and commonly succeeded, instead, in selling such customers substitute carpeting at prices many times higher than the Ideal TV commercial had advertised. It must be inferred from the extent of the practice that this was all done pursuant to a plan by respondent Kantor and the respondent corporations dominated by him to use the Brauner leads for just such bait and switch purpose rather than to obtain customers by actually selling carpeting at the bargain price advertised by Ideal.

Free Gift

45. The Ideal TV commercial included a promise of a free gift – either a stand-up vacuum cleaner or a 9' x 12' rug – to anyone taking advantage of the advertisement's principal offer: 150 sq. ft. of continuous filament nylon carpeting for $77 (CX 9b). The cost of a vacuum cleaner, however, was enough to make the offer unprofitable for respondents if they should attempt to carry out these terms literally (Kantor 240).

46. To minimize this expense Kantor was advised by Brauner to take the tack that no-one was entitled to a gift unless he bought the $77 "special" on the advertised terms (CX 3z18). Since most buyers were talked out of the "special" by New Rapids' salesmen, the burden of giving away rugs or vacuum cleaners (or a free re-installation, which Kantor says he added in place of [26] a vacuum cleaner, 238, 240) should not have been burdensome. However, while New Rapids never openly repudiated the general promise of a gift, it made successful use of many expendients to avoid giving such gifts away, as the record here reveals.

47. Witness Crute understood from the Ideal TV commercial that there would be a gift if she ordered three rooms of carpeting (as she did) but she didn't think to mention this at the time and the salesman never mentioned it either. She never received one and didn't know why. (Crute 558).

48. Witness Beard was told by her New Rapids salesman that if she bought the better carpet he was offering she would receive a gift. She bought the carpet and asked for the gift but she never received anything and didn't know why. (Beard 572).

49. Witness Tomaro testified that the TV ad offered a free gift of a

vacuum cleaner or a 9' x 12' rug (Tomaro 779) and the salesman who responded to his phone call promised the vacuum cleaner, but Tomaro never received it (Tomaro 778). Four or five months later, when he complained about this to New Rapids' lawyer, the latter said "I'll look into it" but that was the last Tomaro ever heard from the lawyer or the company or anybody on that subject (Tomaro 782, 783).

50. That Kantor's various ways of avoiding the gift promised on Ideal's TV ad were not limited to a few such instances is confirmed by a number of affidavits in evidence here:

Doloszycki, CX 11a&b	(TV promise of gift disparaged by salesman who promised "better deal" with other carpeting)
Champion, CX 16b	(salesman promised free carpet sweeper; never delivered despite many protests)
Ferrara, CX 11b	(salesman disparaged vacuum cleaner so elected to take 9' x 12' rug; promise always confirmed but never honored)
[27] Manning, CX 22b	(salesman promised either vacuum cleaner or 9' x 12' rug but neither ever received)
Scavone, CX 30a&b	(per TV ad, bought carpeting and selected vacuum cleaner as free gift but never received gift, despite repeated company assurances it would be forthcoming)
Baskerville, CX 33a&b	(per TV ad, when carpeting purchased asked for free vacuum cleaner, which salesman promised; never received despite subsequent promise by company it would be shipped)
Hill, CX 35a&b	(at time of carpet purchase salesman confirmed TV promise of free vacuum cleaner with carpet; never delivered)

Rentas, CX 40a	(TV offered free vacuum cleaner or 9' x 12' rug with carpet purchase; salesman disparaged rug and promised vacuum cleaner with carpet; never delivered despite repeated promises by company)

51. No significant infirmities in this evidence are apparent and no rebuttal evidence was ever tendered. From the substantial number of omissions by respondents to deliver the free gifts offered on the Ideal TV commercial, even though this expectation was commonly confirmed by respondents' own salesmen and even though an obligation to deliver in such cases was never denied by the respondents, it is found that such omissions were a regular practice of the business.

COUNT II

Miscellaneous Incidental Marketing Practices

52. Count II of the complaint supplemented the main charges of Count I (bait & switch, free gift) with additional allegations of miscellaneous other marketing practices by respondents which apparently came to the Commissions's attention as an incident to the main investigation. Apart from two unfair practices apparent on the face of New Rapids Carpet Center's executed contracts, the charges recited in Count II seem to have been tacitly abandoned and/or inadequately briefed.

[28] 53. Par. 16-1 charges the use of high pressure selling tactics. Complaint counsel's pretrial brief (at page 9) anticipated producing consumer witnesses and affiants "who tried to cancel within a day or a few days after execution of the contract but without success" and were thereafter sued for payment. If such evidence was produced the Administrative Law Judge has no memory of it and complaint counsel's proposed finding (#22) makes no reference to such evidence, relying rather on a "contention" of complaint counsel that respondents' customers "might well have cancelled within a reasonable time afterward had they been given adequate opportunity to consider . . ." Accordingly, the request for a specific finding of high pressure selling is declined, although without prejudice to entry of a cooling-off order insofar as the facts found here are sufficient in themselves to justify such an order.

54. Paragraph 16-2 charges that it has been the practice of respondents' salesmen to write on the face of carpeting purchase contracts a purported "guarantee" (*e.g.* "8 year wear guarantee" or

"10 year wear guarantee" or "12 year wear guarantee") so vague as to be deceptive. That this was, in fact, a usual practice was well established by certain witnesses (Porter 538, Beard 573–575) and confirmed by a large number of executed contracts in evidence. (See the CX 55 series of contracts, particularly b, c, h, k, m, n, r, s, t, u, v, w, x, y, z, z1–15 and z17–19.)

55. It is further found that such a guarantee (*e.g.* "8 year wear guarantee") fails to disclose adequately (1) the nature and extent of the guarantee, (2) the conditions and limitations on the guarantee, and (3) the manner in which the guarantor will perform and is therefore unfair.

56. However, the further allegation of Paragraph 16–2 of the complaint that in a substantial number of instances the respondents have not performed under the implied terms and conditions of the guarantee is a complex question not well adapted to resolution in the present litigation and, perhaps for that reason, apparently abandoned by complaint counsel. In any event the non-performance charged is not found to be a fact.

[29] 57. Paragraph 16–3 of the complaint charges that in a substantial number of instances respondents have forced substitution or have tried to force substitution of carpeting which was used or soiled or varied in quality or color from that ordered and Paragraph 16–4 goes on to charge wrongful institution of lawsuits to effect payment in such cases. So far as we can tell from complaint counsel's proposed findings of fact these charges have completely abandoned. In any event we are pointed to no evidence supporting such charges and, accordingly, they are not found to be a fact.

58. Paragraph 16–5 of the complaint charges that, when writing up carpeting sales contracts, respondents salesmen have stated neither the yardage nor the price per yard but have merely referred to carpeting and total cost, thus depriving customers of opportunity to check the amount of carpeting or to compare unit costs with those charged by respondents' competitors.

59. It appears that one of the New Rapids Carpet Center purchase form contracts in evidence here (CX 55a thru CX 55z19) did not even contemplate statement of the amount of carpeting purchased. The other form contracts in evidence here (CX 55z20 thru CX 55z34) contain a blank space to enter "quantity" but the executed forms show no example of such entry.

60. None of these contracts, of either kind (CX 55a thru CX 55z34) reveals either an entry or a place to enter the unit (per yard) price of the carpeting purchased. It is found that the combination of these

omissions made in practically impossible for the buyer to make more than a very rough price comparison with competitive carpeting.

COUNT III

Inconvenient Venue

61. Many New Jersey purchasers of carpeting from respondent Kantor and/or his sales corporations (including many of the customers attracted by the Ideal TV commercial), have been sued for the alleged purchase price or deficiencies in payment or on other grounds by such corporation or an affiliated finance company to [30] whom the related installment purchase contract has been transferred. Such suits have frequently been brought in New York City's Civil Court, even though the sale out of which such alleged causes of action arose was made in New Jersey to a New Jersey citizen who could not, merely by virtue of such purchase, be deemed to do business in New York under New York's so-called "long arm" statute. It may fairly be inferred that the purpose of invoking such improper venue has been to facilitate obtaining default judgments and thus avoid a fair adjudication of the facts. The evidence in support of this complex finding is summarized in TABLE I, whose underlying supports are as follows.

62. A survey of suits which were brought by respondents here against New Jersey residents in the Civil Court of the City of New York during the period from 1/1/69 to 6/21/71 was made by a law clerk, one Laidman for the Newark Essex Law Reform Project. His statistical affidavits (CX 6a-k and CX 7a-j) summarizing his findings, which are of a purely routine, clerical nature, are specifically found to constitute reliable hearsay evidence of judicial records, individual copies of which would unquestionably constitute admissible evidence in any court.

63. Laidman's survey reveals a total of 175 such suits. That a large number of the New Jersey residents named as defendants in such suits were customers of respondents who had bought carpeting in New Jersey and had nothing to do with New York is established by reference to the live testimony of five such defendants, supplemented by the affidavits of 30 more such defendants.

64. That a common result (and thus, inferably, a purpose) of respondents' suits against New Jersey residents in New York has been to obtain default judgments is shown by the high proportion of such suits which resulted in a default.

65. The evidence supporting both these findings may be summarized as follows:

[31] TABLE I

N.J. Resident	Laidman Reference	Transcript or Affidavit Reference	Sale Made in N.J. Reference	Purchase Cost	Ad damnum or default judgment	N.J. residents denial of service of process (reference)	Suit filed (S) Default Judgment (D) in N.Y.
Witnesses							
Cipriani	CX 6h	505–528	514	$400.00	$261.20	514	(S)
Beard (Gilbert)	CX 6h	569–588	576	$580.00	$90.98	587	(S)
Porter	CX 7f	532–554	541	$653.00	$952.20	541	(D)
Tomaro	CX 7f	776–809	781	$148.00	$143.85	786	(D)
Crute	CX 7i	555–568	558	$500.00	$695.61	559	(D)
Affiants							
Doloszycki	CX 7g	CX 11	11c	$138.02	$164.47	11c	(D)
Casler (Caster)	CX 7e	CX 15	15c	$300.00	$252.17	15c	(D)
Champion	CX 7h	CX 16	16a,c	$495.43	$647.58	16d	(D)
Enna (Emma)	CX 7e	CX 17	17a,c	$173.04	$277.79	17c	(D)
Flor	CX 6g	CX 19	19c	$372.86	$329.97	19b	(S)
O'Grady	CX 6e	CX 25	25b	$92.00	$138.35	25b	(S)
Parker	CX 7e	CX 26	26b	$182.46	$208.67	26b	(D)
Pickett	CX 7f	CX 27	27a,b	$811.64	$1199.60	27c	(D)
Schuman	CX 6e	CX 31	31a,c	$354.00	$354.00	Summons rec'd (31b)	(S)
Gass	CX 7c	CX 34	34a,b	$700.00	$1126.18	34b	(D)
Hill	CX 6e	CX 35	35a	$270–$370	$290.05	Summons rec'd (35c)	(D)

[31] TABLE I — Continued

N.J. Resident	Laidman Reference	Transcript or Affidavit Reference	Sale Made in N.J. Reference	Purchase Cost	Ad damnum or default judgment	N.J. residents denial of service of process (reference)	Suit filed (S) Default Judgment (D) in N.Y.
Affiants — Continued							
Hughes	CX 6g	CX 36	36a,b	$506.76	$582.00	36f	(S)
Lewis	CX 6g	CX 37	37a,c	$400–$500	$303.37	37c	(S)
Melson	CX 6f	CX 38	38b,d	$600.00	$317.88	38e	(S)
Nann	CX 6f	CX 39	39b,c	$558.60	$664.40	39c,d	(S)
Rentas	CX 7g	CX 40	40b	$599.46	$1068.18	40c	(D)
Sutton	CX 7d	CX 42	42b,c	$450.00	$751.12	42c,d	(D)
Moultrie	CX 7f	CX 52	52a,c	$700.00	$1253.10	Summons rec'd	(D)
[32] Addison	CX 7d	CX 14	14a	not given	$642.80	14b	(D)
Ferrara	CX 6i	CX 18	18a	$600.00	$1387.07	18c	(S)
Hamilton	CX 6e	CX 20	20a	$400.00	$457.80	Summons rec'd (20b)	(S)
King	CX 7h	CX 21	21a	$634.00	$965.18	21c	(D)
Manning	CX 7c	CX 22	22a	$200.00	$102.14	22c	(D)
Mordecai	CX 7f	CX 23	23a	$175.00	$151.82	Summons rec'd (23b)	(D)
Myers	CX 6e	CX 24	24a	$495.60	$495.60	24c	(S)
Ransome	CX 7d	CX 29	29b	$650.00	$808.68	Summons rec'd	(D)
Scavone	CX 7d	CX 30	30b	$350.00	$482.60	30c,d	(D)
Smith	CX 7d	CX 32	32a	$350.00	$485.93	32b	(D)
Baskerville	CX 7h	CX 33	33a	$551.00	$850.21	33c	(D)
Smith	CX 6e	CX 41	41a	$723.45	$723.45	41b	(S)

[33] 66. The foregoing finding that in 175 cases respondents sued New Jersey residents on New Jersey contracts in the City Court of New York City is corroborated by a determination of Hon. Edward Thompson, Administrative Justice of that Court on May 24, 1973, that 181 such actions (brought by respondents against New Jersey residents) must be set aside and dismissed and all judgments entered therein must be vacated (CX 95a-f) because of improper venue and resultant denial of due process of law developed before Justice Thompson during a hearing on January 16, 1973, (CX 93a-z59), (See particularly Justice Thompson's final finding at CX 93z55 and CX 93z56:

> I am convinced beyond a shadow of a doubt that each and every one of those judgments and/or summonses . . . should, in the interest of justice be vacated or dismissed. . . . Due process has not even been waved before the eyes or the ears of the average witnesses who have testified. . .)

"Sewer Service"[12]

67. The data appearing in the last two columns of the table incorporated in Finding #65 which is entitled "TABLE I" reveals that in most of respondents' "long arm" suits against New Jersey customers in the Civil Court of the City of New York (whether or not such suit had yet eventuated in a default judgment) the consumer-defendants denied that they had ever been served with process or had otherwise learned (except from FTC or other investigators) that they had been sued in New York or that a default judgment had been taken against them there.

[34] 68. The evidence of "sewer service" and default judgments turned up by the Laidman study related only to New Jersey residents sued in New York. However, other evidence confirms that arranging for "sewer service," thereby obtaining default judgments against customers has been a common practice of respondents in their suits generally, not merely those against New Jersey residents.

69. One Novack, an attorney employed by the New York Regional Consumer Protection Council, headed a survey of actions brought by respondents against New York City residents between (January) 1969 and (May) 1972 (CX 56a). Her statistical findings, embodied in worksheets (CX 57) and summarized in a statistical affidavit (CX 56) reveal that respondents took about 22 default judgments against New Yorkers during that period.

[12] "Sewer service," as used in the complaint here was defined by complaint counsel:
"It's a common word used around this area for a process server who has ostensibly made personal service upon a defendent in accordance with the law when in fact he never made such personal service. The term "sewer service" means that the summons is actually put into the sewer rather than served in accordance with the law" (Koch 199).

70. Although the court records in almost all of these cases show a proper return of service of summons and complaint (CX 56b thru CX z9), that there must have been some deficiency in the notice given defendants in such actions seems almost certain in light of the large number of defaults found. Using the Novack summary of default judgments (above), Commission investigators set out to determine how many, if any, of the judgment debtors were really served with process, as shown on the records of the Civil Court of the City of New York.

71. Affidavits obtained from 13 such judgment debtors, establish (1) that the alleged debt in each case arose out of a purchase of carpeting or furniture from respondents and (2) that the judgment debtor in each case denied that any process had ever been served on him. Table II summarizes these findings:

[34a] TABLE II

Name of New York Resident	NOVACK Reference	Judgement Debtor's Affidavit	Debt related to carpet or furniture purchase	Service of process denied by debtor
1. Kellam	57z56	CX 77	77a	77d
2. Michael	57z78	CX 79	79a	79b
3. Neuer	57z85	CX 80	80a	80d
4. Pena	57z91	CX 81	81a	81b
5. Prieto	57z94	CX 82	82a	82b
6. Robinson	57z101	CX 83	83b	83c
7. Ronan	57z108	CX 84	84b	84d
8. Alexander	57d	CX 86	86a	86b, c
9. Coleman	57z28	CX 88	88a	88c
10. Douglas/Person	57z19	CX 89	89a	89c
11. Elsey	57z21	CX 90	90a	90b
12. Gaines	57z31	CX 91	91a	91c
13. Jones	57z52	CX 92	92a	92c

[35] 72. Complaint counsel also urge us to make use of affidavits by Commission investigators showing that in an additional 18 cases such investigators were unable to locate New York judgment debtors identified by the Novack study and that from what the investigator learned at the recited place of service it would have been impossible for the debtor to have resided there because the building had previously been torn down or the debtor had never been heard of in such building or had moved before the date of service or for other similar reasons. (CX 58 thru CX 74)

73. We decline to attach any weight to such evidence because it

plainly involves multiple hearsay from unknown sources whose reliability cannot be weighed properly. It is found, however, from the affidavits of the purchaser-defendants themselves (which we deem sufficiently reliable for this purpose) that in many of respondents' collection suits against New Yorkers in the Civil Court of the City of New York the service of process shown on the records of that court was falsely returned and we further find that such false return by the process server in most cases was entered by respondent Kantor or his employees, who served much of respondents' process. (Kantor 267–270)

COUNT IV

Truth in Lending

74. Respondents regularly arrange for the extension of consumer credit, as the phrases "consumer credit" and "arrange for the extension of consumer credit" are defined in the Federal Reserve Board's Regulation Z, the implementing regulation of the Truth in Lending Act. (Cipriani, 521; Porter, 537) In connection with their credit sales, as "credit sales" is defined in Regulation Z, respondents have required their customers to enter into contracts for the sale of respondents' goods. (Crute, 557; CX 10d; Beard (Gilbert) 573; CX 47c)

75. Sixty-one contracts entered into by respondent New Rapids Carpet Center, Inc., and its consumer-contractors, (who are identified in the contracts) are found on one or the other of two pre-printed contract forms. (CX 55a thru CX 55z34) Such cost and financing information as was offered the consumer appears on these contracts.

[36] 76. One of these two pre-printed contract forms (see contracts numbered CX 55a thru 55z19) used both before and after July 1, 1969 (the effective date of the Truth in Lending Act) fails to disclose the following:

(1) The amount of the finance charge, as required by Section 226.8(c)(8) of Regulation Z.

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

(3) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments, as required by Section 226.8(b)(4) of Regulation Z.

4. Identification of the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, as required by Section 226.8(b)(7) of Regulation Z.

77. The same pre-printed contract form (CX 55a thru CX 55z19) uses the terms "contract," "deposit," and "net," instead of "cash

price," "cash downpayment," and "unpaid balance of cash price" respectively, when describing the difference between the cash price and the total downpayment, as required by Section 226.8(c)(1), (2), and (3) of Regulation Z.

78. The same pre-printed contract form (CX 55a thru CX 55z19) did not have a space provided for the "deferred payment price" (which is defined as the sum of the cash price, the finance charge, and all charges which are included in the amount financed but which are not part of the finance charge), as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

79. The same contract form (CX 55a thru CX 55z19) contains no blank spaces for required disclosures, including the finance charge, the annual percentage rate of interest, the amount or method of computing late charges, [37] or the penalty for prepayment. Nor was such information hand written by the salesmen on any of the 44 such contracts in evidence here. The financial information which was provided to respondents' customers was written in a small box approximately two inches square, at the bottom of the front page of this contract. Even if fully completed by the salesman, such box of information could not have provided financial disclosure which was clear, conspicious, or in a meaningful sequence, as required by Section 226.6 of Regulation Z.

80. At various times after July 1, 1969, the effective date of the Truth in Lending Act, respondents used another type of pre-printed contract form (see CX 55z20 thru CX 55z34) which, when completed properly, as appears generally to have been the case, contained the information and terminology necessary for compliance with Regulation Z. However, in a number of instances after July 1, 1969, as listed below, respondents continued to use the older contract forms for contracts providing for more than four installment payments (the regulatory minimum until 10/28/75) and did not alter them to make the required disclosures.

Consumer	*Contract*	*Contract Date*
Anthony	CX 55a	1/13/70
Clifton	CX 55f	2/28/70
Davis	CX 55i	10/11/70
McFaddon	CX 55y	3/30/70
Mari	CX 55z	9/11/70
Rouse	CX 55z10	3/20/70
Taylor	CX 55z16	11/22/70

Interstate Commerce

81. Respondents in their joint Answer do not deny any of the allegations of Paragraph 4 of the complaint concerning interstate commerce. Accordingly it is found, as alleged in the first section of Paragraph 4 of this complaint, that:

> Respondents New Rapids Carpet Center, Inc. and Lee Kantor, individually and as General Manager of New Rapids Carpet Center, Inc., are now, and have been for some time last past, engaged in business as a retailer of [38] carpets, and respondent Lee Kantor, both individually and doing business as New Rapids Furniture Warehouses, Inc.,[13] is now, and has been for some time last past, engaged in business as a retailer of furniture, major appliances and carpets, all of the said respondents offering for sale and selling their respective products to the consuming public on a cash or credit basis. Respondents sell and ship their products from New York State to purchasers located in other States of the United States. 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.

82. It is further found, as alleged in the second section of Paragraph 4 of the complaint that:

> In the course and conduct of their business in connection with sales made on credit, respondents New Rapids Carpet Center, Inc. and Lee Kantor assign or transfer their installment sales contract paper, which each of said respondents secure from purchasers of their respective products, to their two affiliated companies, respondents Charge Account Credit Corp. and Charge Account Factors, Inc., for collection purposes only.

[39] 83. It is further found, as alleged in the third section of Paragraph 4 of the complaint that:

> In furtherance of their collection objectives, respondents Charge Account Credit Corp. and Charge Account Factors, Inc. currently and for some time last past have issued coupon payment books to the aforesaid purchasers, many of whom are residents of the State of New Jersey, have used the facilities of the United States mail to solicit and obtain payments from said purchasers, and have used the facilities of the courts of the State of New York to sue residents of the State of New Jersey. In connection with the foregoing activities, respondents Charge Account Credit Corp. and Charge Account Factors, Inc. maintain and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

84. It is further found, as alleged in the fourth section of Paragraph 4 of the complaint that:

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[13] In their answer to Paragraphs 1 and 2 of the complaint, respondents formally denied that respondent Kantor has been doing business individually as New Rapids Furniture Warehouses, Inc. since that corporation was dissolved. (For legal theory, see TR 142.) However, we do not understand this to constitute a denial that the business carried on by Kantor, whether under his own name or the corporate typle, is and has not been engaged in interstate commerce.

As an integrated operation, all of said respondents referred to in this Paragraph Four, in the course and conduct of their aforesaid business, and at all times mentioned herein, have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the offering for sale, and sale, of furniture, major appliances and carpets and other products of the same general kind and nature as that sold by said respondents and in the collection of monies allegedly due in connection therewith.

85. The parties' agreement on the correctness of these jurisdictional facts is corroborated by the evidence of record here. The charges of Counts I & II (bait and switch, free gift and miscellaneous marketing tactics) concern selling leads called from New Jersey in response to television advertising broadcast from New York to New Jersey and the ensuing acts and practices of a New York retailer in the course of soliciting sales, [40] entering into purchase contracts and delivering carpeting in New Jersey. Count III concerns the impropriety of out-of-state venue in litigation growing out of such interstate sales and financing contracts incidental thereto. [Count IV, concerning truth in lending, requires no showing of engagement in interstate commerce.]

Conclusions of Law

1. The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over all respondents.

Comment: Jurisdiction over the subject matter here is found in Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. 45(a) and, with respect to Count IV, under Section 108 of the Truth in Lending Act, 15 U.S.C. 1607. All respondents appeared generally by attorney.

2. The acts and practices charged in the complaint and proved here took place in commerce, within the meaning of the Federal Trade Commission Act, except that no finding concerning engagement in commerce is made as to acts and practices charged under Count IV.

Comment: Engagement in interstate commerce within the meaning of the Federal Trade Commission Act, 15 U.S.C. 44, was not denied by respondents in their joint Answer to the complaint and was confirmed by evidence summarized in Findings #81–85. The Truth in Lending Act authorizes this Commission to seek cease and desist orders against violators of the Act without reference to engagement in or effect on interstate commerce. 15 U.S.C. 1607(c).

3. Respondent Lee Kantor, a/k/a Lee Woods, was the organizing, controlling and actively directing force in each of the respondent corporations and in New Rapids Furniture Warehouses, Inc., another affiliate, while said corporations existed. All of them together [41] with Kantor in his past and present capacity as an individual businessman, have constituted an integrated family enterprise which Kantor has always dominated and whose acts and practices, including those found here, he has always personally formulated, directed and controlled.

Comment: Although carefully maintaining record denials of virtually all substantive allegations of the complaint throughout this proceeding, respondents in their "Proposed Findings Of Fact And Conclusions Of Law" seem in the end to place almost exclusive reliance on their principal contention, to wit, that respondent Kantor did none of the things charged here in his *individual* capacity and thus presumably cannot be saddled with a cease and desist order properly directed to the corporations for whom he worked. The facts do not support such a conclusion.

In the first place, the last of the corporations involved was dissolved some three years ago, yet respondent Kantor has continued to carry on substantially the same business as in days of yore. His counsel argues (Tr. 142) that under New York law *de facto* corporations have continued to exist after dissolution of the *de jure* ones and that Kantor must be viewed as still a mere corporate employee without liability for these corporations' acts and practices. We do not pause to consider whether such would, in fact, be the result of a proper application of state law, because this case is governed in such matters by the federal law and the law of this Commission in particular. *Spiegel, Inc.*, 86 F.T.C. 425, 445 (1975).

On the question of individual responsibility for the unfair trade practices of corporations in interstate commerce a very considerable body of law has grown up and is dispositive here. The better authorities hold that an individual [42] participant can be held responsible for the acts and practices of a corporation – even a closely held family corporation such as those involved here – merely on the basis of his domination of corporate affairs *generally* ("formulates, controls and directs policies" is the usual phrase). *Tractor Training Service, et al.* v. *FTC*, 227 F.2d 420 (9th Cir. 1955). Other cases hold that there must be a further showing

that such individual actually participated in the challenged acts and practices.[14] *Coro, Inc., et al.* v. *FTC,* 338 F.2d 149, 154 (1 Cir., 1964) cert. den. 380 U.S. 954.

But this distinction is of no import here because respondents did not deny in their Answer that respondent Kantor has dominated each of the respondent corporations both generally and with reference to the specific acts and practices charged here. They could hardly have done otherwise. His general dominance of the respondent corporation and their affiliate, New Rapids Furniture Warehouses, Inc., as well as of the integrated family enterprise which they together made up was clearly established by the evidence here. The corporations were really one and that one was Kantor. Moreover, his central position in virtually everything respondents ever undertook and in all the things they are charged with doing was just as clearly demonstrated. In light of all this evidence respondents' principal if not sole defense – no individual responsibility for corporate acts – cannot be accepted.

[43] 4. While engaged in the offering and sale of carpeting and other household goods at retail out of a small furniture warehouse in the Bronx (New York), respondent Kantor, individually and through the various corporations of the integrated family enterprise he has dominated and controlled, has engaged in unfair methods of competition and unfair acts and practices in commerce, including the following:

(a) He arranged to receive leads from a TV advertisement of a bargain price for carpeting, not to sell the advertised carpeting (which his salesmen immediately disparaged once they could get into customers' homes), but to switch these leads to buying much more costly carpeting, as was, in fact, almost always what happened.

Comment: "Bait and switch" is too common a commercial practice and its unfairness is too well settled to require more than cursory comment. The Commission's "Guides Against Bait Advertising" prohibit it and define it as follows:

> Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something

[14] It is fair to say that while this Commission has continued to align itself in theory with the general domination school the facts on which its decisions have rested, at least since *Coro,* have almost always revealed an individual who participated in the particular acts and practices challenged as well as dominating the corporation more generally. *Coran Bros. Corporation, et al.,* 72 F.T.C. 1 (1967).

else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of a bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised.

No advertisement containing an offer to sell a product should be published when the offer is not a bona fide effort to sell the advertised product. 16 C.F.R. 238.0 - 238.1 (1976).

[44] Recent cases affirming the doctrine include *Tashof* v. *FTC,* 437 F.2d 707 (D.C. Cir., 1970); *Consumers Products of America, Inc.* v. *FTC,* 400 F.2d 930 (3 Cir., 1968), *cert. den.,* 393 U.S. 1088 (1969); and *Carpets "R" Us, Inc.,* D. 8947, Commission's Opinion of 2/26/76.

The only feature of respondent Kantor's "bait and switch" operation which might be considered novel is the fact that neither Kantor nor any of his henchmen actually made the representations contained in the Ideal Design TV commercial (CX 9b). It had, in fact, been running for some time before Kantor agreed to start buying the New Jersey leads. It seems plain, however, that this makes no significant difference in the equities of the situation.

Whether Kantor made his own representations or effectively adopted others' representations, the offense came to the same thing. In both cases he would know equally well consumers were being offered a very "alluring" bargain but an "insincere" one, since his own intentions (as possibly distinguished from those of Ideal) were to abandon and disparage the "bait," in order to "switch" the customer to vastly more profitable business as soon as the initial hurdle of getting a foot in the door could be accomplished.

It is the disparagement of one's own merchandise which largely distinguishes "bait and switch" from lawful "trading up".[15] From that viewpoint it makes no difference whether the pre-disparagement "bait" representations were made or adopted by Kantor. Either way it was the same unfiar business practice. We have no trouble finding that the evidence here amounted to a "bait and switch" operation and was, accordingly, an unfair trade practice.

[45] (b) In the course of the above "bait and switch" operation (but not necessarily part of it) he also managed by various devices to renege on the TV commercial's promise of a free vacuum cleaner or a 9' x 12' rug to buyers of the advertised carpeting.

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[15] Kintner, Earl W., *A Primer On The Law Of Deceptive Practices* (1971), p. 176.

Comment: Insofar as the TV commercial's offer of a gift to be included with purchase of carpeting was merely part of the bigger "bait and switch" operation found here, it's legality would seem to be governed by the same considerations just discussed. *Atlantic Sewing Stores, Inc.*, 54 F.T.C. 174, 179 (1957). Since, however, there was no switch of interest among the disappointed consumers as far as the gift was concerned, we are more inclined to view this as a simple matter of systematic failure to honor a promise broadcast to many small consumers and believed by them but probably not worth litigating in individual cases. It seems, in fact, one of those cases Mr. Justice Brandeis thought peculiarly suited to the mission of this Commission:

> To justify filing a complaint the public interest must be specific and substantial. . . . Sometimes (it is so) because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter one of public consequence, no private suit would be brought to stop the unfair conduct, since the loss to each of the individuals affected is too small to warrant it.

(c) It has been his practice to write up carpeting sales contracts with a guarantee of so many years "wear" that is so vague as to be virtually worthless.

Comment: The deceptively vague guarantees of "6 years wear" or "8 years wear" or "10 years wear" etc. which respondent Kantor's salesmen were sometimes accustomed to write into their installment sales contracts [46] (apparently as the needs of the moment might dictate) fly so clearly in the face of this Commission's "Guides Against Deceptive Advertising of Guarantees" (adopted 4/26/60) that no further reference seems necessary. Those guides specify the standards by which guarantees are to be judged as follows:

> 239.1 *Guarantees in general.*
>
> In general, any guarantee in advertising shall clearly and conspicuously disclose -
>
> (a) The nature and extent of the guarantee. . . .
>
> (b) The manner in which the guarantor will perform. . . .
>
> (c) The identity of the guarantor. . . . 15 C.F.R. 239.1

[A subsequent policy statement by the Commission confirms that the Guides are applicable to both actual warranty documents and advertisements of warranties. 40 F.R. 60 168 (12/31/75)]

Respondents' guarantees clearly do not pass this test and,

accordingly, it is found that they constitute unfair acts and practices in commerce.

(d) His sale contracts have omitted terms important for the buyer to know, including credit price elements, disclosure of which is guaranteed by the Truth in Lending Act, and elementary quantity/unit cost data, knowledge of which might well have rendered Kantor's customers somewhat less susceptable to "bait and switch" and other predatory schemes.

Comment: The Truth in Lending Act and implementing Regulation Z of the Federal Reserve Board are very specific in their requirements regarding disclosure of the terms of consumer credit transactions and there is little if any room for a [47] plea of "substantial" compliance. One either is or is not. *Beauty-Style Modernizers, Inc.,* 83 F.T.C. 1761 (1974). Respondents' contracts are not. It is that simple.

The complaint also charges that respondents' carpeting form sales contracts long had no place for disclosing the quantity of carpeting or its unit (per yard) cost and that even later a new form anticipating a statement of quantity was never filled out in actual practice, while disclosure of unit cost is still not even within the contemplation of the form in use. We have been loathe to find this an unfair practice because it is certainly not the current understanding of the commercial community that disclosure of quantity sold and unit cost is mandatory or even usual in ordinary experience.

However, the mere fact that a trade practice may be lawful under ordinary circumstances, does not necessarily exempt it from proscription in special circumstances. Here we cannot escape the feeling that deliberately keeping consumers ignorant of the quantity and unit cost of the carpeting they were buying contributed something to Kantor's salesmen's striking ability to switch $77 buyers to $400, $500, $600 and even costlier carpeting. Accordingly, it is found that respondents' deliberate policy of keeping consumers as ignorant as possible of what they were really ordering, under the circumstances of this case, constituted an unfair trade practice.

(e) He has frequently sued New Jersey customers for alleged breach of contract or non-payment of the price of purchases in what is for them necessarily an inconvenient forum, the New York City Civil Court, thus denying these consumers a fair chance to litigate their rights under his sale contract or otherwise.

[48] *Comment:* A merchandiser-creditor's systematic abuse of its own state "long arm" venue statute to force its out-of-state consumer-debtors to pay without litigating their own claims or face the crushing burden of distant litigation has only recently been dealt with comprehensively and dispositively by this Commission in *Spiegel, Inc.*, 89 F.T.C. 425 (1975). We do not propose to plow the same ground again so soon. The present case is on all fours with *Spiegel,* except perhaps for the differing size of the merchandise-creditors in the two cases, and we hold that *Spiegel* controls this case.

(f) He has regularly obtained default judgments in disputes with his customers, not only by suing them in an inconvenient forum but by frequently seeing that such customers are not served with process or otherwise notified of his suits against them until it is too late and they have been defaulted.

Comment: This practice, commonly called "sewer service," is routinely condemned as depriving its victims of their fundamental rights to the due process ideal of the Constitution. *United States* v. *Wiseman,* 445 F.2d 792 (2d Cir. 1971), *cert. denied,* 404 U.S. 967; *United States* v. *Barr,* 295 F. Supp. 889 (S.D.N.Y. 1969). While we find no precedent for treating "sewer service" as an unfair trade practice, it would seem to fall well within the ambit and rationale of *Spiegel, Inc.*, 86 F.T.C. 425 (1975) in which, as we have just seen, this Commission assimilated the collection of commercial origin debts to the maintenance of a fair marketplace. We agree that "sewer service" is smelly business.

5. The aforesaid acts and practices of respondent Kanter and each of the corporate components of his integrated family enterprise have constituted deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act and in certain cases in violation of the [49] Truth in Lending Act and all have been to the prejudice and injury of the consuming public and to respondents' competitors. An order for relief from respondents' unfair practices is accordingly found to be in the public interest. [50]

RELIEF

Determination of the proper relief from continuation of the unfair acts and practices found starts with the notice order (hereafter sometimes "N.O.") attached to the complaint, which the Commission thought likely to be appropriate if the facts turned out to be as it had

reason to believe was the case when it issued the complaint. Conversely, divergences from the pleaded facts call for some divergences from the contemplated relief.

In this case, many key provisions of the notice order require little or no attention. N.O. I-2, I-3 and I-4 (now ALJ's I-2, I-3 and I-4) (cease and desist from "bait and switch" sales tactics) are plainly appropriate, with one minor addition. (I-2 has been revised to reach more clearly representations "adopted", as in this case, as well as those expressly "made" by respondent. N.O. I-13 and I-14 (now ALJ's I-6 and I-7) seem appropriate to prevent misrepresentation and/or non-delivery of gifts offered, specifically when employed to sweeten a carpeting or other deal. Similarly, N.O. I-24 (now ALJ's I-17) hopefully solve the problem of deceptively vague guarantees.

The various provisions of Part II lay down quite detailed rules for respondent's use of legal process in suits against customers for alleged non-payment of debts or other deficiencies. We would be loathe to tinker with such a (necessarily) elaborate scheme, even if it seemed less adapted than appears to ending such manifestly unfair practices as respondent's abuse of New York's "long arm" venue statute and "sewer service," both well calculated to deprive consumer-debtors of the most elementary due process of law.

The provisions of Part III of the order are very specific, as befits the very specific requirements of the Truth in Lending Act, as to which the Commission has said there is no such thing as "substantial" performance. A creditor either is or is not in violation of that act and there is accordingly little room for argument about a cease and desist order in case of a violation. There are, of course, various other less important provisions of the order than those we have just singled out which seem entirely proper. We turn now to a number of provisions of the complaint order which we find less satisfactory.

[51] In their proposed order, complaint counsel have already recognized that five sections of the notice order should be dropped in whole or in part because the evidence developed during the trial of the violation issues would not support such relief. We concur in all instances and have deleted the following provisions.

N.O. I-1 (now ALJ's I-1[b]): portion requiring respondent to maintain an adequate supply of advertised product deleted.

N.O. I-5 (now deleted entirely): prohibition against representing carpet is cut to fit area covered when pre-cut before installation.

N.O. I-6 (now deleted entirely): portion prohibiting misrepresentation of respondent's method of measuring-up for carpeting or of determining selling prices on the basis of such measurements.

N.O. I-25 (now deleted entirely): prohibited unilateral substitution of different merchandise for that ordered by purchaser.

N.O. I-26 (now deleted entirely): prohibited unilateral cancellation of purchase orders respondent found he could not or would not supply and ordered refunds of all payments already made.

To these five instances where the complaint counsel have themselves suggested deletion for insufficient proof of violation, the Administrative Law Judge has added eight more, where he is convinced that a provision requires deletion or modification due to failure of proof.

[52] N.O. I-1 (portion now designated I-1[b]): re-written to reflect the proof that the sales leads involved here were actually obtained from an ad agency, not from the advertiser; revised also to give respondent an alternative to meeting the original advertiser's price willy nilly (as complaint counsel would have it) if respondent will immediately disclose his differing identity and differing prices (or other conditions of sale) to all purchaser leads actually approached by him.

N.O. I-6 (now deleted entirely): portion which was not deleted at complaint counsel's suggestion, *i.e.,* prohibition against representing that respondent's carpeting is sold by the unit rather than by the square yard. [Query relevancy even if proved].

N.O. I-7 (now ALJ's 5): originally ordered disclosure that respondent's carpeting is sold by the square yard and reference to price per square yard; revised by Administrative Law Judge to require disclosure in sales contracts of quantity purchased and unit price, in accordance with violation found.

N.O. I-8 (now deleted entirely): ordered disclosure during any sales presentation that selling firm was not the advertiser (if such was the case); proof revealed

almost no confusion of identity to support such finding.

N.O. I-9 (now deleted entirely): these three paragraphs
N.O. I-10 (now deleted entirely): prohibited in various
N.O. I-11 (now deleted entirely): ways advertising "special" prices that were not really "special;" proof showed they were "special."

[53] N.O. I-12 (now deleted entirely): ordered disclosure, where word "free" is used re bonus for purchase of other merchandise, that all conditions of "free" gift must be met; advertisement in question (CX 9b) never used word "free" and issue was respondent's good faith in promising "free" gift in connection with "bait and switch" tactics.

Complaint Counsel have proposed two *additions* to the relief referred to in the notice order, both of which have been adopted by the Administrative Law Judge. The first is the minor addition of a caveat in N.O. I-24 (now ALJ's I-17) that the terms of this order are not intended to relieve respondent of any duties under other laws (having in mind particularly the relatively new Magnuson-Moss Act concerning warranties). Secondly, they have sought a prohibition against Kantor's continued use of the word "Inc." as part of the tradename "New Rapids Furniture Warehouses, Inc." ever since the corporation was dissolved, a fact clearly established by the evidence here. It has been held that such a practice is unfair because it tends to deceive customers who prefer to deal with corporations as being more responsible than individuals, etc., *In the Matter of Kodize Process Corporation, et al.,* 40 F.T.C. 441, 1945 and accordingly, we have added such a provision in N.O. I-1 (now ALJ's I-1(a)).

Finally, complaint counsel have also proposed certain changes in wording throughout the order to conform the relief to the fact that emerged from the trial that all of the respondent corporations (New Rapids Carpet Center, Inc., Charge Account Factors, Inc., Charge Account Credit Corp.) and another affiliate (New Rapids Furniture Warehouses, Inc.) have been dissolved for varying lengths of time, as a result of which complaint counsel now desire that the cease and desist order run only against Lee Kantor, a/k/a Lee Woods, individually and as an officer of each of the constituent corporations of his integrated family enterprise, and as doing business individually under the name "New Rapids Furniture Warehouses, Inc." since dissolution of that corporation. The Administrative Law Judge doubts necessity for the order (as distinguished from the complaint)

to refer to Kantor's former positions in dissolved corporations, particularly since the order expressly binds him, his agents, representatives and employees "directly or through any corporation, subsidiary or other device" (see prefaces to Parts I, II and III). In view, however, of the [54] Commission staff's apparent view that the proposed language will have some practical enforcement value and since retaining complaint counsel's language can hardly have any ill effects, the Administrative Law Judge has retained the proposed language in the several sectional prefaces and has adopted other related minor changes such as substituting "respondent" for "respondents" throughout the order and deleting an unnumbered paragraph in N.O. V (now ALJ's IV) requiring the respondent corporations to notify the Commission of significant changes in their status.

[55] The following order will be issued.

ORDER

I

It is ordered, That respondent Lee Kantor, a/k/a Lee Woods, individually, and as a former General Manager of New Rapids Carpet Center, Inc., and as an individual doing business, as New Rapids Furniture Warehouses, Inc. and respondent's agents, representatives and employees directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of carpets, furniture, appliances and other merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1.(a) Using "Inc." in the trade name used to designate the business operated by him individually, or otherwise representing in any manner that said business is incorporated or operated by a corporation.

(b) Obtaining sales leads or prospects arising out of any advertising other than respondent's own for the purpose of selling or offering to sell the advertised product without selling or offering to sell such product pursuant to all the advertised terms, unless fair notice is given at the time of the first sales approach of (1) the separate identities of the advertiser to seller and (2) any difference in their prices or other conditions of sale of the advertised product.

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

3. Making representations, orally or in writing, directly or by

implication, purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.

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

[56] 5. Failing to disclose clearly and conspicuously in all carpeting sales contracts the quantity sold and the price per square yard for such carpeting.

6. Misrepresenting, orally, visually, in writing or in any other manner, directly or by implication, the nature of any gift and the conditions under which it is given.

7. Failing to make delivery to respondent's customers of any gift or bonus product advertised or offered in connection with the purchase of carpeting or any other merchandise.

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

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

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

10. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, [57] and which shall contain in 10 point boldface type the following information and statements in the same language as that used in the contract:

NOTICE OF CANCELLATION

[*enter date of transaction*]

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

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

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

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

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [*name of seller*], AT [*address of seller's place of business*], NOT LATER THAN MIDNIGHT OF _____.

I HEREBY CANCEL THIS TRANSACTION.

_____

(Date)

_____

(Buyer's signature)

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

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

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

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

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

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

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

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

[60] Nothing in this order shall be construed to relieve respondent of his duty to comply with present and future laws, regulations and rules dealing with warranties or guarantees.

II

It is ordered, That respondent Lee Kantor, a/k/a Lee Woods, individually, and as former General Manager of New Rapids Carpet Center, Inc. and as a former officer of Charge Account Factors, Inc. and as a former officer of Charge Account Credit Corp., all of which corporations are now defunct, and as an individual doing business as New Rapids Furniture Warehouses, Inc., and respondent's agents, representatives and employees, directly or through any corporation, subsidiary, division or other device in connection with the collection of consumer debts, shall forthwith cease and desist from:

Failing to give customer-debtors the opportunity to provide respondents with an affirmative statement as to the reason for any alleged default in payment and to furnish the alleged debtor along with the first notice of an alleged default, a self-addressed stamped postcard allowing customer-debtors to either deny liability completely, or to dispute the amount of the debt, or to indicate any other reason for non-payment of the debt. The form of the postcard shall be as follows:

I have not paid this bill for the following reason:

1- ( ) It's a mistake. I don't owe anything because _____

2- ( ) It's a mistake. The balance should only be $ _____

3- ( ) State any other reason for non-payments:

It is further ordered, That upon receipt of said card indicating the reason for non-payment, all further collection attempts shall be temporarily discontinued and respondent shall designate a responsible individual with respondent's organization who shall make an effort to arrive at a fair and equitable adjustment.

[61] *It is further ordered,* That respondent shall commence legal action against his customers only:

1. Where the debtor does not return the postcard within thirty days after the date of mailing, or

2. Where in the reply the debtor has indicated a dispute over the debt and respondent's representative has made a good faith effort to arrive at a mutually satisfactory resolution of the dispute and such efforts have been unsuccessful.

It is further ordered, That:

1. Where respondent brings suit against a consumer for non-payment of any amount claimed to be due on account of a retail purchase or extension of credit in connection with such purchase or

on account of any contract or security instrument in connection with such purchase, respondents shall notify such consumer of such suit by sending a copy of the summons or other document initiating the action by first class mail with certificate of mailing and "do not forward" and "address correction requested" noted thereupon, to the last known address of such consumer, in addition to any other notification or service required by any other applicable federal, state or local law, rule, practice or custom.

2. Respondent shall send a second notice of suit, in the form and manner described in subparagraph 1 above:

a. To the consumer at a new address when a new address is secured as a result of the first mailing, or

b. To the consumer in care of his place of employment, if known, when the U.S. Postal Service returns the original notice, indicating inability to make delivery and without an address correction noted thereon. Nothing on the outside of any envelope sent care of such place of employment shall indicate the nature of the contents thereof or that it involves a claimed debt; and the envelope shall have as the return address thereon only a post office box address or a vendor's name.

[62] *Provided, however,* that respondents shall not send any notice of suit to a consumer in care of his place of employment unless notice has been attempted under 1 and 2(a) above.

It is further ordered, That where respondents bring suit against any consumer for non-payment of any amount claimed to be due on account of a retail purchase by such consumer or extension of credit in connection with such purchase or on account of any contract or security instrument in connection with such purchase, respondent shall not bring suit except in the county where the defendant:

1. Resides at the commencement of the action, or
2. signed the contract.

This provision shall not preempt any rule of law further limiting choice of forum.

It is further ordered, That when respondents have received satisfaction or partial satisfaction of a judgment, respondents shall within 10 days of the receipt, execute and file a satisfaction piece or partial satisfaction piece with the Clerk of the Court in which the judgment has been obtained.

It is further ordered, That respondents prepare and mail to all customers who have signed retail installment contracts which are not completely paid up, quarterly statements which shall include the previous balance at the beginning of the quarter, the payments made

during the quarter, interest and late charges, if any, and the balance due as the date of mailing.

III

It is ordered, That respondent Lee Kantor, a/k/a Lee Woods, individually and as a former General Manager of New Rapids Carpet Center, Inc., and as an individual doing business as New Rapids Furniture Warehouses, Inc., as a former officer of Charge Account Factors, Inc. and a former officer of Charge Account Credit Corp. and respondent's agents, representatives, and employees, [63] directly or through any corporation, subsidiary, division 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 C.F.R. 226) of the Truth in Lending Act (Pub. Law 90-321, 15 U.S.C. 1601; *et seq.*), do forthwith cease and desist from:

1. Failing to disclose, before the transaction is consummated, as required by Section 226.8(a), the following:

(a) The amount, or method of computing the amount, of any default, delinquency, or similar charges payable in the event of late payments as required by Section 226.8(b)(4) of Regulation Z.

(b) Identification of the method of computing any unearned portion of the finance charge in the event of prepayment of the obligation, and 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.

(c) The amount of the finance charge, as required by Section 226.8(c)(8)(i) of Regulation Z.

(d) The annual percentage rate, computed in accordance with Section 226.5 of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.

2. 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.

[64] 3. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as prescribed by Section 226.8(c)(8)(ii) 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, at the time and in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

IV

It is further understood that nothing contained in this order shall be construed in any way to annul, invalidate, repeal, terminate modify or exempt respondent from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to action instituted by municipal or state regulatory agencies.

Nothing in this order shall be construed to imply that any past or future conduct of respondent is subject to and complies with the Rules and regulations of, or the statutes administered by the Federal Trade Commission.

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

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

Final Order

[1] The administrative law judge filed his initial decision in this matter on January 19, 1977, and service was completed on February 14, 1977. Neither party filed an appeal from the initial decision. However, by letter of February 19, 1977, counsel for respondents requested that the Commission issue an order placing this matter on its own docket for review, pursuant to Section 3.53 of the Commission's Rules of Practice. On February 22, 1977, complaint counsel filed its opposition to respondents' request. By order of March 14, 1977, the Commission stayed the effective date of the initial decision until further order of the Commission.

[2] The ground upon which respondents' counsel bases his request is the assertion that "the Findings of Fact set forth by the Administrative Law Judge do not support the order. . . ." No reasons are provided for this assertion.

The Commission has determined to deny respondents' request that this matter be placed on the Commission's own docket for review. The appropriate method by which respondents should have sought Commission review of the initial decision was by filing an appeal under Section 3.52 of the Commission's Rules. In any event, respondents have furnished no reasons, and the Commission can discern none, why the findings of fact do not support the order. However, the Commission has determined to place this matter on its own docket for review for the limited purposes of correcting technical errors in the initial decision and determining the appropriateness of the order recommended by the administrative law judge, in accordance with Sections 3.51(a) and 3.54 of the Commission's Rules. The Commission has determined that the initial decision should become effective as provided in Section 3.51 of the Commission's Rules, with the following modifications:

(1) In Finding 22, line 5, insert "in" between "only" and "New."

(2) Add Table II, which had been inadvertently omitted from Finding 71 in the printed edition of the initial decision, to that Finding.

[3] (3) In the first paragraph of Part IV of the order, line 6, substitute "municipal" for "minicipal."

(4) In lieu of the last order provision in Part IV pertaining to notification by the individual respondent of changes in his business or employment, substitute:

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

Therefore, it is ordered, That the initial decision and order

contained therein, as modified above, shall become effective on the date of issuance of this order.

IN THE MATTER OF

CAVANAGH COMMUNITIES CORPORATION, ET AL.

Docket 9055. Interlocutory Order, July 26, 1977

Denial of respondents' motion to withdraw matter from adjudication.

ORDER DENYING RESPONDENTS' MOTION TO WITHDRAW MATTER FROM ADJUDICATION

The administrative law judge has certified to the Commission respondents' motion to withdraw this matter from adjudication for settlement purposes, together with his recommendation that the motion be granted. The motion is opposed by complaint counsel.

Although we agree with the ALJ that progress has been made in drafting an order that would obviate the need for litigation, we cannot now find that there is a sufficient "likelihood of settlement," Rules of Practice, Section 3.25(c), to warrant a further delay of the trial. Instead, we urge the parties to continue their negotiations. In the event negotiations are unsuccessful and respondents choose to renew their motion to withdraw, respondents should include in their submission a revised consent agreement that reflects any changes in their position since the original proffered consent was filed. If the ALJ certifies the motion, we would expect to receive more substantial justification in support of the proffered order. In assessing the adequacy of remedial provisions, for example, it would be helpful if any future submission included the appraisal and absorption study now being conducted and respondents' substantiation of the reasonableness of their proposed default limitation.[1]

Respondents' motion is accordingly denied.

It is so ordered.

[1] We do not mean to suggest that there would be a "likelihood of settlement" if the two issues to which these materials relate were satisfactorily resolved.

IN THE MATTER OF

LINDAL CEDAR HOMES, INC., ET AL.

Docket C-2774. Interlocutory Order, July 26, 1977

Denial of corporate respondent's petition for modification of order to cease and desist to provide a waiver of the requirement of furnishing prospective franchisees with extensive, specified information and a copy of the franchise agreement prior to the running of fifteen business days.

ORDER DENYING PETITION FOR MODIFICATION OF ORDER

Respondent, Lindal Cedar Homes, Inc., a firm engaged in the sale of franchises, has filed a petition to modify those portions of an order to cease and desist, issued on January 5, 1976, which requires it to furnish prospective franchisees extensive, specified information concerning its franchises and a copy of the franchise agreement "at least fifteen days prior to the execution by the prospective franchisee of any franchise agreement or any other binding obligation or the payment by the prospective franchisee of any consideration in connection with the sale or proposed sale of a franchise." Respondent requests that the order provisions imposing these requirements be modified by adding thereto the words "unless, however, the prospective franchisee and its attorney execute a written waiver of the fifteen business days requirement." The Bureau of Consumer Protection has filed an answer opposing the requested modification.

As grounds for its petition, respondent contends that there have been "a number of occasions when a prospective franchisee, represented by counsel, has requested a formal franchise agreement be executed prior to the running of fifteen business days" and that it believes that the prospective franchisee's rights will be fully protected since the prospective franchisee will be represented by an attorney who must sign the waiver.

We agree with the Bureau of Consumer Protection that the petition should be denied. Respondent does not allege that changed conditions of fact or law require the proposed modification nor has it made a showing that public interest considerations require such a modification. There is no indication that the order has or will cause undue hardship on respondent or prospective franchisees, and the Commission is not persuaded that legal representation is in all respects an adequate substitute for the required fifteen day waiting period.

Accordingly, *It is ordered,* That respondent's petition for modification of the order to cease and desist be, and it hereby is, denied.

IN THE MATTER OF

PORTER & DIETSCH, INC., ET AL.

Docket 9047. Interlocutory Order, July 28, 1977

Denial of respondent's objection to participation of Chairman Pertschuk and Commissioner Dole, and consolidated motion for expedited decision and hearing.

ORDER DENYING "RESPONDENT'S OBJECTION TO PARTICIPATION OF CHAIRMAN PERTSCHUK AND COMMISSIONER DOLE, AND CONSOLIDATED MOTION FOR EXPEDITED DECISION AND HEARING"

On July 22, 1977, respondents filed a motion for dismissal or, in the alternative, a hearing "in order to demonstrate to the Commission prejudicial delay in rendering a decision in this case sufficient to warrant dismissal . . ." The stated grounds are that: (1) Chairman Pertschuk's participation is unauthorized by Section 3.52(f) of the Commission's Rules, 16 C.F.R. 3.52(f), because he was not a member of the Commission at the time of the oral argument on appeal from the initial decision; (2) Commissioner Dole took a brief leave of absence of eight weeks during which she, also, was absent from the same oral argument; (3) apart from the "impropriety" of Chairman Pertschuk or Commissioner Dole participating, both would have to review and consider the record in this matter, causing the respondents prejudicial delay; and (4) the ten-month delay to date in deciding this matter has forced Kelly Ketting Furth to discontinue its business and has cost Porter & Dietsch lost sales.

As we said in *Retail Credit Co.,* Dkt. 8920, "Order Denying Motion for Reargument," October 26, 1976, a Commissioner who has not heard oral argument can participate in the decision of a case.

> The decision of numerous courts and administrative agencies establish that, even without agreement of the parties, a member of an administrative agency who did not hear oral argument may nevertheless participate in the decision where he has the benefit of the record before him. *Gearhart & Otis, Inc.* v. *SEC,* 348 F.2d 798, 802 (D.C. Cir. 1965) (footnotes omitted).

Respondents' only authority for the contrary proposition is, in the words of the *Gearhart* opinion, the "only case which looks in the opposite direction," *WIBC, Inc.* v. *FCC,* 259 F.2d 941 (D.C. Cir.), *cert. denied, sub nom. Crosley Broadcasting Corp.* v. *FCC,* 358 U.S. 920 (1958), which is "easily distinguishable," in part because oral argument was required by then-existing provisions of the Communications Act, 47 U.S.C. 409(b) (1952). 348 F.2d at 802.

Contrary to respondents' impression, Section 3.52(f) of the Commission's Rules does not apply solely to Commissioners who were members of the Commission at the time oral argument was heard on an appeal from an initial decision. Indeed, Section 3.52(f) contemplates that Commissioners not present at oral argument will participate in the consideration and disposition of an appeal in which oral argument has been stenographically recorded. Oral argument is not required by the Federal Trade Commission Act and the Commission possesses the authority, under Section 3.52(f), to dispense with oral argument on its own motion. Since respondents are "not entitled to present oral argument as a matter of right," neither are they prejudiced by the participation of Commissioners who have not heard oral argument. *Retail Credit, id.*

As for the delay of ten months in deciding this appeal, respondents themselves contend, in objecting to the participation of Chairman Pertschuk and Commissioner Dole, that this matter involves a "voluminous record" which would take an unreasonable amount of time for those ostensibly unacquainted with it to master. Respondents do not contend that this matter has taken longer than usual to dispose of similar proceedings or that the Commission has a "dilatory attitude" in regard to this matter. *FTC* v. *J. Weingarten, Inc.,* 336 F.2d 687 (5th Cir. 1964). Respondents themselves requested a four-month delay in this matter in which to prepare an appeal brief in a motion which was denied on July 22, 1976.

Respondents also renew their objection to the press release announcing issuance of the administrative complaint. That objection has been disposed of and we see no need to disturb our prior orders concerning that issue, 86 F.T.C. 896, 1570 (1975). Accordingly,

It is ordered, That respondents' "Objection to Participation of Chairman Pertschuk and Commissioner Dole, and Consolidated Motion for Expedited Decision and Hearing" be, and it hereby is, denied.