

Complaint

90 F.T.C.

IN THE MATTER OF

NATIONAL HOUSEWARES, INC., ET AL. - DOCKET 8733
EMDEKO INTERNATIONAL, INC., ET AL. - DOCKET 8973

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

Complaints, March 13, 1967, June 21, 1974 — Final Order, Nov. 18, 1977

This order, among other things, requires a Salt Lake City, Utah distributor of household products to cease engaging in package selling, as it is defined in the order, and to cease encouraging, advising or assisting others to engage in package selling. Additionally, the firm is required to maintain prescribed records for a period of five years.

Appearances

For the Commission: *John M. Porter, Gerald E. Wright and Ralph E. Stone.*

For the respondents: *Bierbower & Rockefeller, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that National Housewares, Inc., a corporation, and Easy Pipella, Keith Bigler, David Bigler, Michael Pipella and Edward Gilson, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent National Housewares, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah, with its principal office and place of business located at 1260 East Vine St., Salt Lake City, Utah.

Respondents Easy Pipella, Keith Bigler, David Bigler, Michael Pipella and Edward Gilson are officers of said corporation. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Respondent Michael Pipella's business address is 3645 Tenth Ave. South, Great Falls, Montana. Edward Gilson's address is 1624 West Anaheim, Harbor City, California. The address of the other officers is the same as that of the corporate respondent.

[2] PAR. 2. Respondents are now, and for some time last past have

been, engaged in the advertising, offering for sale, sale and distribution of household appliances, books, tools and other merchandise to dealers who in turn resell such items to the public.

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

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their said products by the consuming public, respondents supply printed sales presentations and promotional sales materials including brochures, form letters, questionnaires, cards, and other oral and printed information, to said dealers for distribution and for their use in making oral sales presentations, all of which they use, in promoting the sale of said products to the consuming public.

Based on the information and suggested representations and other data contained in the aforesaid sale presentations and promotional sales material, said dealers and their salesmen are enabled to represent, and do represent to their prospective customers, among other things:

1. That the dealers selling respondents' merchandise to the public are conducting surveys and that the prospective customers' names will be entered in a drawing or contest to be held in connection with the surveys.

2. That prospective customers have won prizes in the drawing or contest and must make an appointment with one of the dealers' representatives in order to receive such prizes.

3. That customers are especially selected in order to promote the sale of respondents' products handled by said dealers.

- [3] 4. That customers of the aforesaid dealers are receiving reduced prices or a special introductory offer in order to promote the trade names of the merchandise sold by respondents and that savings are thereby afforded to purchasers from respondents' regular prices.

5. That customers making an initial purchase from the aforesaid dealers may thereafter purchase respondents' merchandise at a 50 percent discount from the dealers' regular prices.

6. That when customers purchase one item from the aforesaid

dealers, other items are awarded to such customers as a gift or "at no extra cost" or that they are "free."

PAR. 5. In truth and in fact:

1. The aforesaid dealers are not conducting surveys and the prospective customers' names are not entered in a drawing or contest to be held in connection with said surveys or otherwise. Said dealers are only seeking information about prospective customers' appliance needs and credit ratings which is used as a basis to determine whether an attempt shall be made to sell such customers merchandise.

2. Persons do not win prizes at drawings or any other type of contest but are so notified because such persons appear to be good prospects for the sale of merchandise and this means is used to induce prospective customers to make an appointment with one of the dealers' sales representatives.

3. The aforesaid dealers' customers are not especially selected. On the contrary, said merchandise is available to anyone with the money or credit rating to take advantage of it.

4. Customers of the aforesaid dealers do not receive reduced prices or a special introductory offer but are offered the same prices at which said dealers sold respondents' merchandise in the past and savings are not thereby afforded to such purchasers.

5. Customers making purchases from the aforesaid dealers will not thereafter be able to buy merchandise at a 50 percent or any other substantial discount from dealers' regular prices.

[4] 6. Customers of the aforesaid dealers do not receive merchandise as a gift or "at no extra cost" or "free," but the price of any additional items of merchandise is included in the price that such customers pay for the item sold by said dealers, and the item required to be purchased has never been sold separately in substantial quantities at such prices.

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

PAR. 6. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their merchandise by the consuming public, said respondents supply the dealers who handle their merchandise with leaflets and other data containing retail pricing representations.

Typical and illustrative of the aforesaid representations are the following:

WALTHAM
Sea Fall

Value \$69.50	Picture of the watch
* * *	* * *
Air - way Sanitizer 88 Value \$259.85	Picture of the assembled machine and the separate parts
* * *	* * *
[5] 7 inch HEAVY DUTY POWER SAW	Picture of saw Value \$59.50

PAR. 7. Through the use of the aforesaid representations, and others similar thereto but not specifically set forth herein, and for the purpose of effecting their retail pricing policy, respondents have represented and placed in the hands of said dealers the means and instrumentalities for representing, directly or indirectly, that said stated prices, accompanied by the word "VALUE" are not appreciably in excess of the highest prices at which substantial sales of such merchandise have been made in the recent regular course of business in the trade area where such representations are made.

PAR. 8. In truth and in fact:

The aforesaid stated prices accompanied by the word "VALUE" are appreciably in excess of the highest prices at which substantial sales of such merchandise have been made in the recent regular course of business in the trade area where such representations are made.

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

PAR. 9. By reason of the aforesaid practices respondents place in the hands of others means and instrumentalities by and through which they may mislead and deceive the public as to the prices, methods of sale and other practices followed in offering for sale and in selling their said merchandise.

PAR. 10. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of

products of the same general kind and nature as those sold by respondents.

[6] PAR. 11. The use by the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' appliances, books and other merchandise.

PAR. 12. The aforementioned 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.

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 Emdeko International, Inc., a corporation, and Anthony J. Wanlass, individually and as an officer of said corporation, hereinafter referred to as "respondents," have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Emdeko International, Inc. is a Utah corporation, with its principal office at 1260 East Vine St., Salt Lake City, Utah. Respondent Emdeko International, Inc. wholly owns National Housewares, Inc. (hereinafter referred to as "National"), a Utah corporation, with its principal office at 1260 East Vine St., Salt Lake City, Utah. Emdeko International, Inc. dominates and/or controls the acts and practices of National, and its distributors. Respondent Anthony J. Wanlass is an individual and an officer of said corporation. He formulates, directs, and controls, the acts and practices hereinafter set forth. Respondent Anthony J. Wanlass' address is the same as that of Emdeko International, Inc.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of household appliances, books, tools, firearms, alarm systems, and other products. In the course and conduct of its business, National has entered into oral or written distributor agreements with various firms and individuals (hereinafter referred

to as "distributors") whereby such distributors agree to purchase respondents' "Emdeko" brand products and to sell such products, directly or through representatives they engage, to consumers.

[2] National, directly and through supervisory employees and representatives, and through said distributors [acts and practices of "distributors," referred to hereinafter, include the acts and practices of dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or other representatives engaged by said distributors], places into operation and, through various direct and indirect means and devices, controls, directs, encourages, facilitates and implements the following sales methods:

(a) Consumers are contacted by telephone calls and/or mail, and by means of statements, representations, acts and practices as hereinafter set forth, are induced to visit the places of business of said distributors.

(b) Consumers, while visiting such places of business, by means of statements, representations, acts and practices as hereinafter set forth, are induced to attend sales presentations conducted by said distributors.

(c) Consumers, during said sales presentations, by means of statements, representations, acts and practices as hereinafter set forth, are encouraged and cajoled to sign contracts obligating themselves to spend substantial sums of money to purchase said "Emdeko" brand products which have been purchased by said distributors from National.

National possesses the inherent authority to control the acts, practices and policies of its distributors, and/or does control, encourage, facilitate, implement and furnish the means, instrumentalities, services and facilities for, and condones, approves, and accepts the pecuniary and other benefits flowing from, the acts, practices and policies elsewhere herein set forth, of said distributors, and is thereby responsible for the acts and practices of said distributors.

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

PAR. 4. In the course and conduct of their business as aforesaid,

and for the purpose of inducing consumers to sign sales contracts, National's distributors utilize or display [3] sales promotional materials and utilize sales promotional practices or other means and instrumentalities, controlled and directed, encouraged, furnished, approved, condoned and/or ratified by National. In conjunction therewith, National's distributors have made the following oral and written statements and representations:

(a) That their offers are being made to specially selected persons;
(b) That they are conducting a survey or gathering marketing information;

(c) That a consumer is unqualifiedly entitled to a prize or gift;

(d) That there is a reasonable basis from which to conclude that consumers making an initial purchase from National's distributors will thereafter be able to buy merchandise from such distributor or from other distributors at a substantial discount from such distributor's regular prices;

(e) That there is a reasonable basis from which to conclude that customers of National's distributors are receiving reduced prices in that:

(1) National's distributors are making a special introductory offer;

(2) savings are afforded to purchasers buying more than one product, by comparison with what National's distributors' prices for products would be if purchased singly;

(3) savings are afforded to purchasers by comparison with recent actual selling prices at which products of similar grade and quality were sold by competitors.

PAR. 5. In truth and in fact:

(a) National's distributors' said offers were not being made only to specially selected persons, but to the contrary, were made to numerous members of the general public through frequent solicitations of broad segments thereof.

(b) National's distributors' principal purpose in contacting consumers is not to conduct a survey or gather marketing information. Said distributors' principal purpose is to obtain information about the potential for selling prospective customers products sold by National, and about prospective customers' credit worthiness, which information is used as a basis to determine whether an attempt shall be made to sell such prospective customers products sold by National.

[4] (c) Consumers are not unqualifiedly entitled to a prize or gift; National's distributors frequently do not tender such prize or gift if they do not believe they have a reasonable probability of selling a substantial dollar amount of National's products to a prospective

customer; or, if at the time the prospective customer arrives at National's distributors' place of business to obtain the prize or gift, such consumer does not permit such distributor to make a sales presentation.

(d) National and/or its distributors, have no reasonable basis from which to conclude that consumers making an initial purchase from National's distributors will thereafter be able to buy merchandise from such distributor or from other distributors at a substantial discount from such distributor's regular prices. The only reasonable basis for such representation would be the existence at the time such representation was made, of an operating program whereby prior purchasers may purchase products from National and/or its distributors at a savings or discount, National and/or its distributors having established the validity of such savings or discount representation by competent and reliable statistical evidence obtained prior to making such representation.

(e) National and/or its distributors have no reasonable basis from which to conclude that customers to National's distributors are receiving reduced prices in that:

- (1) National's distributors are making a special introductory offer;
- (2) savings are afforded to purchasers buying more than one product, by comparison with what National's distributors' prices for products would be if purchased singly;
- (3) savings are afforded to purchasers, by comparison with recent actual selling prices at which products of similar grade and quality were sold by competitors.

The only reasonable basis for such representations would be competent and reliable statistical evidence obtained prior to making such representations.

Therefore, the aforesaid statements, representations, acts and practices were, and are, unfair, false, misleading and deceptive.

PAR. 6. For the purpose of inducing consumers to purchase respondents' products, National's distributors induce consumers to visit such distributors' places of business by means of mail and telephone solicitations. Consumers are not clearly [5] informed in such solicitations that the principal purpose of National's distributors in making such solicitation is to arrange a sales presentation. Consumers who visit National's distributors' places of business in response to such solicitations are subjected to lengthy, intense, and emotional sales pressure, including requests by National's distributors that consumers, in connection with an advertising program, make choices among, and state opinions about, National's products. Consumers are not clearly informed, either prior to or during the

body of such sales attempt, that National's distributor's principal purpose in meeting with said consumers and soliciting said choices and opinions is to make a sales presentation. Consumers are insistently urged, cajoled, and coerced to purchase a number of National's products. Consumers are not afforded a reasonable opportunity to consider and comprehend the representations made to them by said distributors, their need for National's products, or the value of National's products in comparison with competing products.

Sales are typically consummated by means of an installment sales contract, involving a minimum downpayment, a cash sales price frequently in excess of \$500.00, and substantial interest and other charges. Consumers frequently do not appreciate the extent of their obligation under said contract, in view of the minimum cash downpayment required, and the relatively low monthly payments they agree to make.

Therefore, the aforesaid statements, representations, acts and practices were, and are, unfair, false, misleading and deceptive.

PAR. 7. Nationals' distributors in a substantial number of instances and in the usual course of their business, sell and transfer their customers' obligations, procured by the aforesaid unfair, false, misleading and deceptive means, to various financial institutions. In subsequent legal actions to collect on such obligations, these financial institutions or other third parties, as a general rule, have available and can interpose various defenses which may cut off certain valid claims customers may have against said distributors for failure to perform or for certain other unfair, false, misleading or deceptive acts and practices, and such facts have not been disclosed to customers.

Therefore, the aforesaid acts and practices, were, and are, unfair and deceptive.

PAR. 8. The use by National and its distributors of the aforesaid unfair and false, misleading and deceptive statements, representations and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of [6] substantial quantities of said products by reason of said erroneous and mistaken beliefs and unfairly into the assumption of debts and obligations and the payment of monies which they might otherwise not have done, and under conditions which are unfair to such persons.

PAR. 9. The aforesaid acts and practices of respondents, as herein

alleged, were, and are, all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Commissioner Thompson dissenting.

INITIAL DECISION BY LEWIS F. PARKER, ADMINISTRATIVE LAW
JUDGE

NOVEMBER 30, 1976

I. PRELIMINARY STATEMENT

A. *History of the Proceedings*

These proceedings began on June 21, 1974 with the issuance of an order directing the respondents National Housewares, Inc. ("National") and Edward Gilson to show cause why the Commission should not reopen the proceeding in Dkt. 8733 and alter and modify a 1968 consent order [2] so that it would read as provided in the form of order contained in an attached proposed modified complaint. National and Mr. Gilson opposed the order to show cause, but in a December 3, 1974 order overruling respondents' opposition, the Commission reopened the proceeding and directed expeditious hearings to determine if its 1968 consent order should be altered or modified to encompass the practices alleged as illegal in the proposed modified complaint and order.

On the day it issued its order to show cause, the Commission also issued a complaint in a related matter, *Emdeko International, Inc., et al.*, Dkt. 8973 ("Emdeko"). Thereafter, complaint counsel asked that the National and Emdeko proceedings be consolidated, but the Commission refused to do so in its December 3 order.

Respondents in the *National* proceeding filed their answer to the order to show cause on August 2, 1974 and denied most of its allegations. Respondents in the *Emdeko* proceeding filed their answer to the complaint on the same date, denying most of its allegations.

I was assigned to both of these proceedings on February 5, 1975 and, on February 19, 1975, issued an order consolidating the *National* and *Emdeko* proceedings for the receipt of evidence. Prehearing conferences were held in the consolidated proceedings on March 18, May 16 and August 6, 1975, and during this time both complaint counsel and respondents were engaged in discovery. Because the Commission ordered the *National* proceeding to be tried expeditiously, hearings for the presentation of evidence by complaint

counsel were scheduled to begin on September 22, 1975, before respondents completed their discovery. It was my intention to require respondents to present their defense after complaint counsel had rested their case and respondents had completed their discovery. However, circumstances forced me to cancel these hearings; instead, hearings for a limited purpose—to permit the introduction into evidence of certain Commission exhibits—were held in Washington, D.C. on October 14, 15 and 16, 1975. Thereafter, respondents completed their discovery and hearings for the reception of complaint counsel's evidence began in San Francisco, California on April 19, 1976 and continued until April 30. There was a short recess and hearings were then held in Washington, D.C. from May 5-7 and on May 10, 1976. After another recess, respondents presented their defense from June 8-10 in Salt Lake City, Utah and from June 22-24 in San Francisco, California.

[3] Complaint counsel asked for rebuttal hearings but in an order dated August 4, 1976, I confirmed an oral ruling made during defense hearings that they could not present rebuttal testimony or documents because such evidence was irrelevant to the scope of the order, the purpose for which complaint counsel would have offered it. I did, however, permit complaint counsel to submit an offer of proof.

The record for the receipt of evidence was closed on August 13, 1976. Complaint counsel and respondents filed their proposed findings of fact and conclusions of law on September 28, 1976; replied were filed on October 19, 1976.

B. *The Allegations of the Complaints*

Aside from descriptions of the respondents and their relationship with one another, the allegations of the proposed modified complaint in *National* and the *Emdeko* complaint are essentially identical. The complaints allege that respondents sell "Emdeko" brand products to distributors who, in turn, sell those products to consumers and that respondents directly through their employees and through their distributors place into operation and, through various direct and indirect means, control, direct, encourage, facilitate and implement a sales method in which consumers are induced to visit the distributors' places of business, to attend sales presentations conducted by the distributors and to spend substantial sums of money to purchase Emdeko brand products which the distributors have purchased from respondents.

The complaints claim that because of respondents' inherent authority to control their distributors, their actual control over the

distributors, their encouragement and approval of the distributors' practices, and their receipt of pecuniary benefits from those practices, respondents are responsible for the following false and misleading representations of distributors:

1. That their offers are being made to specially selected persons.
2. That they are conducting a survey or gathering marketing information.
3. That a consumer is unqualifiedly entitled to a prize or gift. [4]
4. That there is a reasonable basis from which to conclude that consumers making an initial purchase from National's distributors will thereafter be able to buy merchandise from that distributor or other distributors at a substantial discount from that distributor's regular prices.
5. That there is a reasonable basis from which to conclude that customers or respondents' distributors are receiving reduced prices in that:
 - a. Respondents' distributors are making a special introductory offer.
 - b. Savings are afforded to purchasers buying more than one product by comparison with what respondents' distributors' prices for products would be if purchased singly.
 - c. Savings are afforded to purchasers by comparison with recent actual selling prices at which products of similar grade and quality were sold by competitors.

The complaints also allege that distributors' customers are not informed during mail or telephone solicitations or during the body of the sales presentation that the distributors' principal purpose in meeting with consumers is to make a sales presentation, that the sales presentations are lengthy, intense and emotional, that customers do not realize the extent of their monetary obligation when they sign installment sales contracts and are not informed that their obligations are transferred to financial institutions.

The proposed orders would require respondents, either directly or through distributors, to cease and desist from making the representations which the complaints allege are false, misleading and deceptive. In addition, it would require respondents to deliver a copy of the order to its distributors, to conduct a surveillance program to determine whether its distributors are complying with the order and to cease permanently from dealing with any distributor who violates the order two or more times within 180 days.

[5] The following findings of fact, conclusions of law and order are based upon the proposed findings filed by complaint counsel and respondents and the replies thereto. Proposed findings not adopted

herein verbatim or in substance are rejected as not supported by the evidence or as immaterial.

II. FINDINGS OF FACT

A. *Description of the Corporate and Individual Respondents*

1. Respondent Emdeko International, Inc. ("Emdeko") is a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah, with its principal place of business located at 1260 East Vine St., Salt Lake City, Utah (Ans., D. 8973, Par. 2).¹

2. Respondent National Housewares, Inc. ("National") was formerly a corporation organized, existing and doing business under and by virtue of the laws of the State of Utah (CX 1A) and was a wholly-owned subsidiary of Emdeko, which owned 100 percent of the issued and outstanding stock of National (Resp. Adm. No. 40).

3. On December 31, 1969, National was merged into Emdeko, which became the surviving corporation (Resp. Adm. No. 38; Tr. 2136). Since that time, National has operated as an internal division of Emdeko (Ans., D. 8733, Par. 1).

4. Respondent Anthony J. Wanlass has been a vice-president of National since January 16, 1969 (Resp. Adm. No. 34), has been a vice-president of Emdeko since January 1, 1970 and has been a member of its board of directors since February 16, 1972 (Resp. Adm. Nos. 31, 32). He was also a national area director for the western division of National in 1970 and 1971 (Resp. Adm. No. 41), is an officer of a number of Emdeko's subsidiaries, and is a minor owner of Emdeko stock (0.6 percent) (CX's 1, 460B).

[6] 5. Respondent Edward Gilson became a vice-president of Emdeko and a member of its board of directors on February 26, 1970. He is now the president of Emdeko (Resp. Adm. Nos. 27, 28). He is also an officer in several of Emdeko's divisions and subsidiaries (CX 1) and has owned between 13 percent and 17 percent of the stock of National and Emdeko during the past several years (Tr. 2131; CX's 459, and Emdeko during the past several years (Tr. 2131; CX's 459, 460).

¹ Abbreviations used in this decision are:

CX - Commission's exhibits.
RX - Respondents' exhibits.
Tr. - Transcript of testimony.
CPF - Complaint counsel's proposed findings.
RPF - Respondents' proposed findings.
Ans. - Answer.
Adm. - Admissions (CX's 545-550).

B. *The Nature of Respondents' Business*

6. Emdeko, through several divisions and subsidiaries, is engaged in the manufacture, purchase, distribution and financing of consumer products (CX 1):

a. Manufacturing subsidiaries:

<i>Name</i>	<i>Product</i>
Casady Engineering Corp.	Automobile stabilizers, fire alarms, floor polishers, burglar alarms (Tr. 1982).
P. O. Ackley Co.	Firearms (assets liquidated) (Tr. 672).

b. Purchasing subsidiary:

Jet Star Industries (50 percent owned (Tr. 674-75)).	Sewing machines, movie cameras, cameras, radios, gift items (Tr. 675).
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c. Distributing divisions:

National Housewares, Inc.	Sells products ² under the Emdeko label to distributors who resell to consumers.
Appliance Showcase	Sells Emdeko, Speed Queen and Admiral appliances to consumers (Tr. 2319-20).

[7] d. Consumer finance division and subsidiary:

Spartan Acceptance Corp.	Finance company which purchases consumer installment contracts (Tr. 824-25, 881-82, 1629-30); CX's 216, 227).
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² A complete list of which is contained in CX 2A-B. Some of the products sold are: Fire and burglar alarms, movie cameras, china, cookware, lawn mowers, sewing machines, stereos, vacuum cleaners, bicycles, flatware, luggage, power tools, tool kits, cutlery, rifles, and watches.

Olympic Agency, Inc.

Collection agency which handled delinquent accounts referred by Spartan Acceptance. Now inactive (Tr. 583, 2130).

C. *Commerce*

7. In the years 1971 and 1972, National shipped 331,260 product units and 18,692 product cases (CX 3) from its places of business in Utah and other states to distributors (CX's 4-5) located in various States of the United States. Emdeko also sells through Casady Engineering Corp. to J. C. Penney Co., U.S. Safety and Engineering Co., and others who in turn sell to consumers located in various States of the United States (Tr. 1982). National has transmitted contracts, promotional material, and other business papers from its place of business in Utah to distributors located in various States of the United States, and has received contracts, letters, checks and/or other written communications and oral communications from distributors in the several states. (See, *e.g.*, CX's 7, 8, 10, 11, 14 through 25, 345 and 347 through 349, which were disseminated in 1971 and 1972 by National to its distributors (Joint Response to Amended Request for Admissions, dated August 20, 1975; CX 550, CX's 237; 445 at p. 3; 455 at pp. 7 and 19; 518; Tr. 769, 1609, 1952-53, 2056, 2084, 2279); see also, CX's 30, 33, 40, 57, 70, 101, 175, 178) (for examples of correspondence from distributors to National, see CX's 43, 54 and 203)). Officers of National and area directors have personally travelled from their offices in Utah to the business offices of distributors located in the various states (Tr. 500, 777-78, 787, 1455, 1577, 1674, 1849-50, 1859, 1949, 2064, 2067; CX's 31A, 32A, 34, 39) and distributors have travelled to various locations for meetings with officers of National, area directors and distributors (Tr. 1574, 1576-78, 1584-85, 2143-44; CX's 93, 97, 121 and 128). [8]

D. *National's Relationship with Distributors*

(1) Distributors' Use of the Emdeko Trademark

8. Distributors who purchase products from National are permitted to use the Emdeko trademark in their own businesses (Tr. 2255; CX's 4, 5, 364) and do so by displaying it in their offices (Tr. 2255; CX's 447A, 524), by showing motion pictures which describe Emdeko products (Tr. 798, 1058, 1152, 1165, 1180-81, 1201, 1249, 1396, 1472,

1485, 1696, 1728, 1846, 2050), and by selling products with the Emdeko label (Tr. 549).

(2) Ownership or Other Interest in Distributors

9. The relationship between National and distributors is unwritten, informal and is terminable at will by either National or the distributors (Tr. 469-70, 553-55, 593, 699-700, 789, 1456, 1643, 2058).³

10. With the exception of the distributorship of Mr. Jerry Smith (RPF, p. 22), neither National nor any of its principals own the stock of or have any other financial interest in distributors who testified in this proceeding (Tr. 484, 776, 1439, 1664, 1832, 1909). In 1968, Mr. Smith severed his relationship with the respondents by buying out the interests of National's principals in his distributorship (Tr. 560-61).

11. National has no financial interest in distributors' leases for office space (Tr. 484, 782, 1832, 1910), does not own the assets of any distributors (Tr. 776, 901-02, 1439, 1832, 1908-09, 2259), does not hold the mortgage on property owned by distributors (Tr. 782), has not paid any obligations owed by the distributors (Tr. 790, 901-02, 1465, 1677, 1883, 1908-09, 2271) and none of its principals are members of the boards of incorporated distributors (Tr. 776).

[9] 12. After products are sold to a distributor, National retains no title to nor interest in them and distributors cannot return them to National except for the usual repairs covered by warranties (Tr. 1458, 1665, 1860, 1961, 2069; CX 351, p. 16; RX 34B).

(3) Distributors' Purchases from National

13. Although one distributor has made substantial purchases from sources other than National (\$60,784 in 1974, Tr. 432-33, 448) and others do not rely exclusively on National for their inventory (Tr. 1013, 1442, 1648, 1796, 1912-13, 2042, 2260, 2288, 2308), most distributors rely heavily on National for products which they resell to their customers (CX's 495, 511, 521; Tr. 1858, 2084, 2288).

14. In turn, most of National's income depends upon its sales to distributors (Tr. 698). At one time (in 1970), National sold its products to some 200 distributors located throughout the United States. In that year, National's annual sales were approximately \$15,000,000. Since then, the number of distributors to whom

³ Since National is a division of Emdeko, the activities described in this decision are also attributable to Emdeko. Distributors referred to herein, unless that term is otherwise explained, are those who purchase products from National for resale to consumers and who have received advice from National about business operations and selling techniques.

National sells its products has declined dramatically—to 34 in early 1976 (Tr. 557, 698).

(4) Business Advice and Assistance to Distributors

15. At the beginning of its relationship with new distributors, National provides them with several publications which aid them in their future operations. These include distributor information manuals giving detailed advice on leasing and furnishing the sales office, hiring and training office personnel and salesmen, and other matters of interest to an inexperienced distributor, including suggestions on attracting prospects to their showrooms (“lead materials”) (CX’s 350 and 351), and authorized marketing manuals and “Derby Winner” tapes which give detailed advice on sales presentations (CX’s 17-20, 367, 454, 553-56). Two of these (CX’s 367, 454) furnish “scripts” which National recommends that distributors’ salesmen read verbatim during the sales presentation (CX 350, p. 77). These materials were disseminated to distributors (CX 527, which lists them among sales aids available to distributors; CX’s 549-50, 553-56; Tr. 397, 436, 769, 771, 821, 831-32, 955, 1333-35, 1427, 1448, 1609, 1842, 1898, 1952-53, 2056, 2080, 2267-68, 2270). Distributors using the Emdeko label are the only customers to whom National furnishes detailed business advice and assistance. Emdeko’s Casady Engineering division manufactures certain products (smoke and heat detectors, air purifiers, floor care machines and auto stabilizers) which it sells to Emdeko [10] distributors and to private label customers such as U.S. Safety and Engineering (Tr. 588-89, 1982) and J. C. Penney, but Casady provides U.S. Safety only with technical and product information, not suggested lead materials or sales presentations (Tr. 1984-85, 2004, 2026-27).

16. National has had several “area directors” who call on distributors to motivate them to increase their sales and to give them administrative advice (Tr. 1358-59, 1564-67, 2067). National has also conducted national sales conventions and regional workshops at which distributors have exchanged ideas about attracting customers through lead systems and making sales presentations to them (CX’s 236, 538; Tr. 788, 1358-60, 1437-38, 1478-79, 1578-80, 1595, 2061).

17. Area directors do not visit distributors frequently (Tr. 468, 777-78, 1565, 1647, 1852, 2066-67, 2259), but when they do, they report to National the lead systems⁴ used and any problems which distributors might have (Tr. 2093-98). They also listen to distributors’ sales presentations (Tr. 1564-67, 1674, 1689, 2090). Other duties

⁴ See Finding 26.

include assisting distributors to find a financing source (CX 8, p. 1), gathering lead systems from successful distributors and giving them to other distributors (Tr. 454-55; CX 487A), and getting distributors to discuss sales presentations at conventions (Tr. 1358-60).

18. Mr. Wanlass, National's national sales director (Tr. 551), has conducted a series of motivational and instructional "workshops" for distributors (CX 349B). In 1972, workshops for distributors were held in Dallas, Chicago, Atlanta, Philadelphia and San Francisco (CX 349B). Mr. Wanlass participated in these and other meetings where lead systems and suggested sales presentations were discussed (CX's 93, 97, 121, 128, 171, 175, 538; Tr. 788, 1437, 1443-44, 1579-80, 1856, 1894-96, 2061). He also participated in the "Derby Tapes" described below (see Finding 38).

19. Mr. Gilson, president of National (CX 1, Adm. No. 30), also attended regional meetings and conventions at which lead systems and sales presentations were discussed [11] (CX's 93, 97, 121, 128, 175, 344, p. 13, 349B; Tr. 1595, 2144-45). He has assisted distributors in arranging for the purchase of their installment contracts by finance companies (CX's 31A, 32A, 36, 37, 40, 51, 68, 130, 182; Tr. 2140, 2169) and has visited distributors, offering advice about personnel matters, lead systems and sales presentations (CX's 31B, 32A, 39, 46, 48, 69A; Tr. 837, 857, 866-67). He also participated in the "Derby Tapes" which are described below.

20. Although National's area directors and principal officers visit distributors and offer advice and encouragement, they do not participate in or direct the day-to-day business activities of the distributors. They do not help distributors physically set up new offices (Tr. 1675, 1949, 2073), do not make sales presentations to distributors' customers (Tr. 1850, 1949, 2072-73), do not require distributors to use particular lead systems or sales presentations (Tr. 2070-71), do not impose sales quotas on distributors, limit their sales territories or help distributors recruit personnel (Tr. 1638, 1648, 1676).

21. Its distributors do not believe that National has any authority to control their business activities and act accordingly. For example, distributors who sold their businesses did not ask National's permission to do so (Tr. 1564, 1626-27, 1836, 1910-11, 2041) and distributors who opened new offices did not believe they were required to get Emdeko's permission (Tr. 1837). Distributors retain their own accountants and keep their own inventory control records (Tr. 474, 783, 904, 1458, 1673, 1872, 1958, 2269), handle legal problems personally or through their own attorneys (Tr. 475, 783, 904, 1458, 1872, 1958, 2269) and pay for National's products by cash or cashier's

check (Tr. 458, 783, 904, 947-48, 1457, 1665, 1860, 1957, 2052, 2060, 2270; CX 351, p. 16). National does not guarantee or protect the financial obligations of distributors (Tr. 473, 782, 905-06, 1457, 1668, 1861, 1941-42, 2059; RX 41C).

22. On occasion, National's officers have interceded in disputes between distributors and their customers. Sometimes, distributors heed National's pointed suggestions, but not because they feel obliged to do so. Mr. Owens testified concerning a letter from National relating to a complaint (CX 290) that it did not influence him because "I don't need National or anybody else to direct me to what is right or wrong" (Tr. 787). Mr. Smith cleaned [12] his office after Mr. Wanlass complained (CX 133) but he viewed this as a suggestion, not a threat (Tr. 2076). Mr. Merrill testified that he was never threatened by National for failing to follow through on a complaint (Tr. 1460).

23. Although Emdeko's Spartan Acceptance is a potential source of financing for distributors, National does not use it to control distributors' activities. In fact, National has encouraged distributors to develop more than one source of financing (CX 351, p. 19: "Remember this—you can never have too much financing sources") and distributors have not used Spartan to the exclusion of other sources (Tr. 782, 1013, 1452, 1629, 1661).

24. The only testimony which might support the argument that National has exercised some control over distributors' businesses is that of Mr. Earl Pascu who was a distributor in Santa Rosa, California from early 1969 to early 1970 (Tr. 815-16). According to him, he had to mail daily and weekly production reports to National (Tr. 825-28), was required to purchase only Emdeko products (Tr. 829) and was threatened by Mr. Mike Pipella and Mr. Glen Dodd with termination of his distributorship if he did not submit the reports (Tr. 828). Mr. Pascu apparently heeded these warnings. On the other hand, Mr. Pascu did not precisely follow National's suggestions concerning comparative pricing (Tr. 874-75) and conducted much of his business without interference or assistance from National (Tr. 904-08), so that National's alleged control over his business was not as pervasive as complaint counsel claim.

(5) Sales Advice to Distributors

25. The areas in which National has exercised influence over distributors is in the use of so-called "lead systems" to attract customers into their places of business where they are sold "packages" of Emdeko products by the use of suggested selling techniques.

(a) The Lead System

26. National's distributor information manual defines and explains the purpose of the lead system: [13]

WHAT IS A LEAD SYSTEM?

Certainly, the most important function of this business is securing in volume qualified prospects at a reasonable cost. . . . These are the factors that determine the effectiveness of your lead program; the volume of prospects you have to talk to; the buying potential of those prospects and most important of all your lead cost involved in bringing that prospect to your salesman. The success of your lead system is determined by the number and percent of show from the manufactured appointments. (CX 351, p. 8; see also CX 350, p. 36).

27. The record contains examples of the telephone and mail lead systems used by distributors (CX's 374, 375, 376, 377, 378, 382, 394, 407, 408A, 515, 516, 517, 538, 563, 564, 565). While the systems differ from distributor to distributor, they are simply "variations of one standard system" (National's distributor manual, CX 351, p. 8). These lead systems usually contain the following features:

a. A screening of the buying potential of customers (CX 446A). Distributors do not want to waste a salesman's time on a customer who is unlikely to make a purchase, or who cannot pay for a substantial purchase (*i.e.*, is a poor credit risk) (RX 55, item 11). Thus, the lead system is designed to gather sufficient information about the customer to determine whether the prospect should be invited to the distributorship. A manual disseminated by National to distributors in 1973 listed the following classifications of customers who should be rejected during the lead system phase: Widows (not working), Retired, Laid Off, Bachelors, Widowers (CX 350, p. 42; see also CX 446A; Tr. 460, 802, 1601).

b. An inducement to the customers (usually a husband and wife) to come to the distributors' office at an appointed time. The inducement invariably involves a free gift offer, and sometimes includes reference to an opportunity to enter a sweepstakes upon visiting the office (CX 351, p. 33).

c. A pretext for the distributor's invitation to visit his place of business. The lead systems disseminated by National and used by distributors take into account the [14] fact that few customers would respond to the distributor's invitation to visit his office if they knew that the principal purpose of the visit was to be given a sales presentation.⁵ The lead system materials therefore anticipate the

⁵ Mr. Wanlass testified about the testing of a lead system which disclosed that a sales presentation would be made. "The results were a great downturn in the number of responses to the invitation and it made setting an appointment for the receptionist afterwards extremely difficult" (Tr. 2297).

customers' natural suspicions by establishing an alternative purpose for the visit—a pretext. The pretext may appear in letter invitation: “a fine gift coming from our company for being one of the families who helped us with our telephone questionnaire” (CX 350, p. 50), “. . . my company gives away sample products under our own brand name. . .” (CX 350, p. 55); or may be used by the distributor's telephone personnel to allay the suspicions of wary customers: “We are marketing to the ————— area our own brand name of indoor and outdoor products called Emdeko. Because of your help with our telephone questionnaire, you folks are entitled to a gift of your choice. . . .” (CX 350, p. 57).

28. One lead system which is contained in National's distributor information manual is the “questionnaire.” This system provides for an initial screening telephone call followed by a letter offering an inducement to customers who have “passed” the screening, then a second telephone call making an appointment to visit the distributor's place of business to attend a sales presentation and, in some cases, a third “reminder” telephone call.

29. The suggested statements which should be made in the initial screening telephone call are set forth in the manual (CX 350, pp. 55-56):

QUESTIONNAIRING METHOD: Hello, Mrs. —————, this is ————— from —————. We are taking a brief questionnaire on our behalf of brand name products in this area. Is your can opener manual or electric? What brand name vacuum do you have? What brand of sewing machine do you have? Does your husband work for a large or a small company? And how many years have you folks been married? Each week our company gives away sample products to families who have helped us with our questionnaire. If your questionnaire card is approved, you will be notified by a SPECIAL LETTER. Be sure [15] to watch for it, as you will need it to receive your gift.

Indicate exact time card is completed.

OR: The following market questionnaire: Hello, Mrs. —————, this is ————— and I'd like to ask you some brief marketing questions on behalf of —————. When purchasing products, do you consider name or mainly quality? Do you prefer door-to-door salesmen or going to the store to purchase your products? Are you in favor of lower product prices? If you don't mind my asking, what is your husband's occupation? And how many years have you folks been married? Each week my company gives away sample products under our own brand name. If your card is approved, you will receive a SPECIAL LETTER in the mail. Please keep it as you will need it to claim your gift. Thank-you.

The second questionnaire, the marketing questionnaire, is only to be used upon the instruction of the distributor. Otherwise, the first one is to be used.

Indicate the exact time, to the fifteen minutes, that the card is completed.

NOTE: These are our only questionnaires. No others are to be used. *They work.* Don't let your girls vary from them. Girls, “you will be monitored twice a week, to make sure you are saying the right things. So do it right and we'll make more money.” (CX 350, pp. 55, 56).

30. The manual anticipates suspicions that the questions are being asked by a selling organization by providing standardized answers that allay such suspicions:

QUESTIONNAIRE OBJECTIONS AND THEIR ANSWERS:

Questions asked questionnaire girls: What are you doing? What's this all about? What are you up to? What do you need this for? [16]

Answer: We work with 30 different manufacturing companies and right now we are in the process of marketing in this area our own brand name and are finding out the competitive products on the market. And the types of families using them. (CX 350, p. 56).

31. The suggested statements to be made in the inducement phase of the "Questionnaire" lead which follows the telephone screening are set forth in original and follow-up letters illustrated in the manual (CX 350, p. 50):

CONGRATULATIONS:

We are happy to inform you that you have a fine gift coming from our company for being one of the families who helped us with our telephone questionnaire.

Your questionnaire card number listed on the envelope's front has been approved and if you folks will call for an appointment you may come in and select the gift of your choice from many items, such as an electric food warmer, outdoor equipment, cutlery, and many other fine items.

Call our office to arrange a time convenient for you to come in and receive your gift. On weekdays, calls can be made between 9 a.m. and 9 p.m.; Saturdays 9 a.m. to 5 p.m. Please bring this letter with you for verification. Call closest office for your appointment.

* * * * *

Friendly Reminder

This is to inform you we are still holding your generous portion of the more than \$6,000 in gift Emdeko products to be awarded residents of this area for your help with our telephone questionnaire.

We cannot hold this any longer than 4 days from the date of this postmark. Please call Mr. Green (collect) at 838-8160 to arrange a time to pick up your gift(s).

[17] 32. The gift letter of the "Questionnaire" lead method is designed to elicit a telephone call from customers interested in the gift. The manual suggests that the distributor have appointment girls ready with a standardized talk to establish a firm appointment time for the prospect to hear a sales presentation. However, the method does not contemplate reliance on a voluntary response from customers. The manual recommends that cards be filled out by "questionnaire girls" on customers they have screened (CX 350, p. 55) and to whom letters have been mailed (CX 350, p. 59) and suggests (CX 350, p. 59) that three days after the mailout, the

questionnaire cards be turned over to the appointment girls, who re-telephone the prospect (CX 350, pp. 56-57). The manual sets forth a standardized dialogue to be used in setting up the sales presentation:

APPOINTMENT METHOD: Hello, Mrs. _____, this is _____ with _____, and I believe you folks received a special letter in the mail. (Pause briefly, but don't wait for an answer). Well, I was calling to arrange a convenient time for you folks to come in and choose your gift. Does your husband work days or evenings? Would (*tomorrow*) or (*next day*) be best? (After time is set say:) Do you have a pen or pencil handy? (Give address and directions.) Fine, we'll see you and your husband (*day*) at (*time*).

OR: Hello, Mrs. _____ this is _____ with _____ and Mr. _____ my manager left a note on my desk asking me to call and arrange a convenient day for you to come in and choose your gift. Would _____ or _____ be best for you? Fine, at 1:30 or 5:00? (After time is set give directions and have them write time down) Fine, we'll see you and your husband at _____.

OR: Hello, Mrs. _____, this is _____ with _____, and I believe you folks received a letter in the mail from us. (Pause briefly.) Well, we have reserved 3:30 or 5:40 tomorrow for you folks to come in to choose your gift, which would be best? (If there is an objection to this particular one at this point, talk to them and arrange a convenient time by using this type of method.) Well, we could probably work you in at [18] _____. Note: In all cases, after you have the appointment made, say this: Fine, do you folks know where we are located? Good, we will see you and your husband at _____ on Friday. Be sure to mark that on your calendar (CX 350, p. 57).

33. The manual anticipates customer suspicions during the "appointment call" that they are being asked to a sales presentation and provides standardized answers that allay such suspicions:

APPOINTMENT OBJECTIONS AND THEIR ANSWERS:

Questions asked the appointment girls: What are you doing? What is this all about? What are you up to?

Answer: We are marketing to the _____ area our own brand name of indoor and outdoor products called Emdeko. Because of your help with our telephone questionnaire, you folks are entitled to a gift of your choice. Would Friday or Saturday be best?

Question: What are you going to try to sell us?

Answer: We do have products to sell, but as your letter says, the gift is free in every way. But we would like your opinion of our products as compared to others available on the market. Would _____ or _____ be best?

Question: Do we have to set a time?

Answer: Yes, you do. It's better than making you wait. So it is for your own convenience that we do set the appointment time.

Objections: I don't think we would be interested. We don't want to be bothered.

Answer: Oh? Don't you want your gift? (Pause) The gifts are very nice and you are under no obligation. We have openings both during the day and night. Which would be best for you? . . .

[19] What do we have to do? What's the gimmick? What do we have to buy?

Answer: When you folks come in, we like to get your general opinion of our

products, your likes and dislikes, for quality, etc. And for your time you get to make your selection from 5 very nice gifts. (CX 350, pp. 57-58).

The manual recommends that a further call be made to verify that customers will appear at the appointed time for the sales presentation (CX 350, p. 59) and that if they don't show up, that they be recontacted pursuant to the appointment procedures (CX 350, p. 57).

34. Two alternatives are contained in the distributor information manual, a "direct mail" method and a "Gift-O-Gram" which simulates a telegram. These systems will not be described in detail, for while not identical, the suggested statements in them are similar to those in the "questionnaire" method described in Findings 28-33 above.

35. One statement in the manual's illustration of the "direct mail" system should be mentioned, however, for it reveals the central purpose of all of National's lead systems—to attract customers while at the same time avoiding any suggestion that they will be attending a sales presentation. The manual recommends that after customers call, if it is found that they are "undesirable," that is, widows, retired or laid-off persons, bachelors or widowers, that they be discouraged by immediately revealing that which is hidden from desirable customers—*i.e.*, that a very long sales presentation will be made if they come to the distributor's place of business:

POLICY ON REJECTS: What to say:

Answer: Did you read your letter over? O.K. Now what we are doing is selling all those products in your letter and we would like you to buy some of them. Would you be in the market for any of those? (Pause, wait for an answer.) Now, it does take about 2 hours of your time to talk to our salesman when you come in.

If they are not interested, say, "What was the number on your envelope? Fine, thank-you and have a nice day." (CX 350, p. 42).

[20] If the "undesirables" still insist on an appointment even after hearing the unvarnished truth, the manual states:

If they are still interested in coming in, say, "Now, the first opening I have is _____ at _____ (1 month in advance) at (early daytime). What is the number on your envelope? Thank-you for calling." END CONVERSATION (CX 350, p. 42).

(b) The Sales Presentation

36. If the lead system used by a distributor attracts customers to his place of business, they are then given a presentation whose purpose is to sell them a "package" of Emdeko products. This involves the sale of several products, some of high value ("majors") and some of low value ("minors") at one price (Tr. 1622). As early as

1961, the co-founders of National were selling products using the "package" concept (Tr. 544-45, 2132-36). Normally, the total price of the package is substantial and ranges from \$400-\$800 (Tr. 795, 1349, 2286).

37. The expertise which National has gained over the years in package selling is transmitted to distributors in the form of model sales presentations (CX's 367, 454) and National suggests that distributors' salesmen either memorize or read them to prospects (CX 350, pp. 23-24, 77; CX 8, pp. 39-49).

38. The sales presentation is described in four so-called "Derby Tapes" (CX's 17-20). These tapes contain comments on selling technique by five salesmen who won a nationwide contest sponsored by National. They are narrated by Mr. Wanlass, National's director of sales. Mr. Gilson, National's president, also participated in the sessions recorded on these tapes. Respondents argue that these tapes do not represent National's suggestions as to how sales presentations should be conducted (RPF, pp. 71-73) since they were produced only because some distributors made the suggestion that the views of top salesmen would be of interest to others. It is true that Mr. Wanlass testified that he did not subscribe to some of the suggestions made in these tapes and never approved them for use by distributors (Tr. 642, 722); however, these tapes were disseminated to distributors at a national convention in 1970 (Tr. 640-41) and there is no [21] evidence that National ever informed them that it disapproved of any statements in these tapes. Therefore, I conclude that these tapes do represent National's policy with respect to distributors' sales presentations.

39. As described in the tapes, the typical sales presentation is in five parts:

1. *Introduction* (receptionist greeting—view product display and/or view movie—meet salesman—gift presentation)
2. *Initial Product Selection* (introduce products—ascertain needs—sweepstakes selection set aside—select products for concentrated sales effort)
3. *Product Commitment* (sizzle talks on products selected—obtain consumer opinion/commitments regarding need, value, desirability, using worksheet technique)
4. *Letter Presentation* (show testimonial letters—explain letter pretext for offer—obtain consumer commitment to write testimonial letters)
5. *Close* (convert letter authorization commitment to signature on contract—"Surprise" sweepstakes product added to contract—answer objections, using worksheet—obtain credit information) (CX's 18H, 19E).

40. Early in the presentation, customers are told that in return for the free gift which has been offered by the various lead systems described above, the salesman would like them to comment on products which they might prefer, which product factors appeal to

them and what they believe comparable products might cost (CX 18G-H). The salesman has a "work" or "selection" sheet on which he records the customers' questions and comments (CX's 121C, 358, 371, 442, 502). During this part of the sales presentation, customers are encouraged to estimate high prices for the products they select (Tr. 841-42, 1343-44, 1349) and these estimates are totalled. One of the Derby winners explained that the worksheets are used later in the sales presentation to overcome objections to purchasing products: [22]

AL - Well, I ask them: "What's there to think about?" . . . and then I throw my work sheet out, and say: "You did say that you needed that sewing machine," and just use whatever they've told me right there on the work sheet, back against them. "Your wife needs this, your home needs this, every home should have these alarms in it. Don't you agree with that? Don't you? So what is there to think about?" And I just come back and give them back the letter offer. . . "so really, there's nothing to think about, so if you'll just okay that form and let me get the products for you.." (CX 20F; CX's 18D, 18I).

41. Later in the presentation, customers are given testimonial letters from prior purchasers of Emdeko products and are asked whether they will write a similar letter about products which they have selected and commented on and will authorize National's use of their letter (CX 367, pp. 15-17). Distributors often use testimonial letter and authorization forms which are provided by National (CX's 24, 25, 549-50, 527D).

42. The work sheet and the letter program are designed, as explained by Mr. Wanlass in the Derby Tapes, to lead to a close:

These pros feel that from the work sheet part of the presentation on, it is all one big close. . . it just naturally funnels down to an inevitable sale. They're closing all the way through their letter story. They get commitments. . . they bob their heads, they nod. . . they use gestures. . . they make certain that the people understand the importance of the letter program. And let's face it. . . as Lonnie Hill says, "it's the letters that justify the entire deal. Short cut the letters, and the people don't understand it, and they're not gonna buy!" (CX 19A).

43. One of the salesmen explained on the tapes how he used the letters to close the sale: [23]

ERROL - Well I lay out the letter authorization. I lay the pen over there, ask him to give me written permission to use his letters "cause we don't want to get sued by somebody." He understands he's not signing the contract anyway. . . so I wait for him to sign it. He'll usually sign. 90% of the people I have will sign that because of the way I say it. Now I take that back and I lay that over there. "You have a Texas Driver's License?" Naturally, they hear that so much, everything they do. . . anything . . . go in a store to cash a check, somebody asks them. . . so they go like this. . . just impulse. . . and they pull out their wallet before they know what's going on. And I've got the contract on my desk when he reaches for

his pocket, and I just say "What's your age, George? . . . Address?" "Y'all live over here at 1422? . . . Oh, no. . . 1426. . ." I made a mistake intentionally, just to make him start going along with me. Then I say, when I get down to. . . I don't approve credit here, yet though. I fill out, just easy. . . I don't say too much 'cause I want to get the figures in and then I want to say: "Now you want to pay something down on this, right? How much? Fifty?" (I couldn't swing fifty.) . . . "What could you swing? . . . twenty? (Okay. . . twenty)." I just fill it in. . . "Let me show you this. . ." . . . and I turn the contract around and run through all the figures with him. And then I say: "I need your okay right here, and your wife can okay your okay right there. . . okay?" And by golly. . . he'll take and sign it every time, just about. (CX 20G-H).

44. In addition, the salesman may use the customers' prior selection of a product which they would like to win in the "Sweepstakes" during the close to overcome objections:

TONY - Let's make it crystal clear as to exactly what Errol does. On his Sweepstakes entry he steers them to select a product to be one of the fifty second prize winners, as opposed to selecting cash: "And of all the products that were out there, which would you select?" . . . Once that major item is selected, they congratulate them on that choice. They pull that [24] major brochure out of the stack of majors, and set it on the floor, or in a drawer, and they never talk about it again, until they make the surprise close. They then go to their selection of minors, they get three additional majors. They weigh the minors against the majors and wind up with what looks to be, to the consumer, as a three pack. They run the evaluation and work sheet *only on those three items*. They talk about those three items in the letter story; and then, when they're ready to make a close, they present the total offer, they present a product. . . ask for a letter commitment. . . present a second product. . . ask for a letter commitment. . . they present the third product. . . ask for a letter commitment from both husband and wife. . . and then as Errol says: "And I told you I had a surprise for you, didn't I? Well, you also get. . . this sewing machine" or whatever it is. . . That's the only time they've seen it now, since the time of the Sweepstakes. "You get that, too, but we want a letter on it."

It's surprising, it's fun, it erases objections, and it's overwhelming to the people who thought they had your offer all figured out. . . right up 'til the moment of truth. And from that point on, they simply ask him to give them the authorization to write letters. Exciting? You bet! It puts the package concept back into the program. Believe me, when you do it right, as Errol says: "You don't need to pitch that product. . . it's just a total surprise, and they will take it!" (CX 20C-D).

45. While the "Derby Tapes" do not suggest that salesmen flatly deny that they are trying to sell products, they recommend that the salesman avoid answering that question if it is posed by their customers. Two of the salesmen made the following comments:

ERROL - . . . Do you ever have people ask. . . "Before we do anything. . . is this going to cost us anything? . . . Am I selecting something that you want me to buy? . . . You want to buy something? . . . Well, what's your first choice, there?"

[25] I just go ahead and forget it. . . I just never answer his question. I think it's more or less just a matter that you don't answer the question, positively. You just really ignore the question.

JOHN - When they ask that question, right there, is where the customer is going to take control or you're going to take control. If you get defensive, he's got control of you. On the other hand, if you turn it around, and make a joke of it, and let him realize how foolish he sounds, you've got control. But that's a point where new salesmen, I think, will lose a presentation. Because that's what happens to him. . . (CX 18E).

46. Messrs. Gilson and Wanlass asked for other comments on evading this question:

EDDIE GILSON - I'd like to get back to that part about questions, before the presentation gets along, because this is where a lot of new men lost their percentages. So maybe we might labor on that for just a few minutes. Go around the table as to how other people would handle that objection. . . no. . . not the worksheet. . . when they sit down. . . "What's this all about?" You want to answer to: "Do I have to buy anything?" "Are you selling anything?" . . . Why don't we cover that as an objection? It's the first one that a man will get. . .

TONY - It comes up in the selection. . . it doesn't usually come up in the close.

ERROL - And he asks that, you certainly don't want to tell him. . . "Well, no. . . I'm. . . No!" You don't want to say. . . "well, No. . . we're gonna give it to ya free. . ." or anything like that! You want to still keep him, I think a mystery to him.

JIM - Do you ever say: "I'm not going to ask you to buy anything while you're here tonight?"

ERROL - No. [26]

JIM - Have they ever asked that question?

LONNIE - I've had people say: "Do I have to buy anything?" I say: "Mr. Jones, you're under no obligations while you're in my office."

JOHN - I usually turn it into a joke. If he says: "Do I have to buy anything?" I say. . . "well, just \$2,000 worth of merchandise. . . no. . . but. . . no, you don't have to buy anything." And they laugh, and it softens them up and they realize how foolish they sound, too.

LONNIE - If they ask: "Am I selecting this to buy?". . . I answer them like Errol does: "What do you want to buy? You want to buy my tie? My coat?"

JOHN - "They're all for sale. . . you don't have to buy anything."

LONNIE - "No? . . . Well good, now I can tell you about Emdeko". . . and I go right back to Emdeko.

TONY - How do you handle it, Al?

AL - I do mine basically the same. I do tell them that some people do have our products in their home, and that is what they're here for, and I'm going to explain that to them in just a little bit.

(Comments from Group) - That's good.

JOHN - They know they're for sale, and they know that we're selling them. . .

ERROL - If you tell a guy you're going to sell him, he ain't gonna buy. . .that's for sure (CX 171-K).

47. Of course, if a sale is to be made, the prospect must be told the real purpose of the presentation, but even at the close the subject is brought up obliquely. Introducing the subject of the close on the "Derby Tapes," Mr. Wanlass stated: [27]

On this tape, the Derby Division Winners discuss their particular closes. . .why they close the way they do. . .how to handle objections. . .what they expect. . .and above all else. . .how they maintain a positive, commanding attitude with the people. Their close is all basically the same, and it may be surprising to know that they all use a silent close, on the assumption that "whoever talks first, loses." Here we go live, with five individuals who amassed 3,187 combined points in ninety days. . .(CX 20A).

48. One method which was enthusiastically endorsed by National is the surprise close,⁶ explained by one of the salesmen on the Derby tapes:

ERROL - Yeah. Right after I show them the offer there, and say: "Now, this is what we want you to have in that offer". . .and I get rid of this cause I tell it to them now, and I don't want to show them any money. I point there and say: "That's the offer". . .and I don't say "that's the cost," or that's anything else. They know it's the cost. It's nothing down if that's the way they want to do it. And I say: "Now, first of all what you have is this, but would you write a letter on that? If you had it for thirty to ninety days, could you sit down and write your honest opinion about it?" She'll say "Yeah!" And I say: "Would you have any objections for us to use it like I explained to you?" She'll say "No." I say: "Would you have any objections for her to write a letter like that?" He'll say: "No." And I say: "Fine, then we also want *you* to have the item you selected, there, Joe. Would you have any objections to writing your honest opinion about it after thirty to ninety days?" He'll say: "No." I say: "Fine. Then we want you to have that, too." And I say: "But that's not all, cause the more we send you home with, the happier you're going to be, so I also want to include right along with it. . . ." and I go into another one, and I ask her for two, then him, one. I like to ask one then the other, then her, then [28] him, like this. This gets participation all the time. They don't lose interest or anything. Then I go to him and I get another letter, and I say: "Now, and I said to you folks we had a surprise for you, right?" They say "Yeah". . . and I say: "We also want you to have that sewing machine that you wanted, too." That's after I've laid out the other three. This is great.

⁶ In a memo to distributors, Mr. Wanlass stated "In the areas where this presentation has been tested extensively, closing percentages are up significantly" (CX 519).

And I say: "I'm just gonna ask you one more time. Do you have any objections for us to use your letters, though?" And they'll say no, and I say: "The main thing is we want to show your letters to other people, and we won't show anybody's letters without their written permission because we don't want to get sued by someone. . .so I need your okay right now for National Housewares, Joe, to use your letters." Then I just shut up. When he starts writing his name . . .

MIKE - Okay. Now let's say there's nothing happening right at this point, now. . .quiet. Now what happens? Quietness. . .What do you do?

ERROL - What do you mean? When I lay that authorization out, if he don't sign and he's just real quiet?

MIKE - Right. What do you do?

ERROL - I don't say nothing. I'll sit there and wait until he says something. Whoever talks first loses. If you ask him anything, or try to sell him any more, you're gonna just blow the deal. The more you talk, the more you're trying to hide. You got nothing to hide. . .you've asked him to sign the letter authorization, and sometimes if I feel like this is gonna be a tough guy, I'll stand up and reach over there and take his hand and put the pen in it. And then, physically, say: "You sign that thing. . .we'll use your letters."

TONY - I hope every representative listening to Errol Schenk, picked up the word: SURPRISE. This particular close brought the house down in Salt Lake! It's exciting. It's the true package concept of merchandising. It's a twist. . .a little psychological twist that can increase your closing percentage. . .(CX 20A-B).
[29]

E. *Distributors' Adoption of National's Advice*

(1) Introduction

49. Although National has throughout its relationship with distributors given them advice about the lead systems and selling techniques which they should use, there is little evidence that National has the power to impose its wishes upon distributors. In fact, respondents claim that complaint counsel have not even demonstrated that distributors voluntarily follow National's recommendations to any substantial extent (RPF, pp. 76-78). Analysis of distributor and consumer testimony does not support respondents' claim; instead, it reveals that many distributors use or have used lead systems and sales techniques which conform, not in every detail, but in spirit and purpose to the lead systems and sales techniques developed, endorsed and disseminated by National.

(2) Distributor Testimony

(a) Nu-Way Enterprises

50. Nu-Way Enterprises is a Baltimore, Maryland Emdeko distributor⁷ (Tr. 428). Mr. Phillips, its president and owner, testified

⁷ The words "Emdeko distributor" are used to indicate that this distributor and others primarily sell products manufactured or distributed by Emdeko, not that they are owned or controlled by Emdeko.

that Nu-Way at one time or another received from National the distributor information manual, the "smile chart" (a lead system device) and the authorized marketing manual (Tr. 433-34; CX's 350, 367). He also received copies of the Derby Winner tapes from National (Tr. 435-37; CX's 17-20) as well as a document which illustrates various lead systems (Tr. 442; CX 538A-LL).

51. Nu-Way's purchases from National in 1972 were substantial; however, it did not rely exclusively on this company for its merchandise. Purchases of \$60,872 were made in that year from other sources (CX 525A-B).

52. Mr. Phillips' company does not follow all of the advice contained in National documents. The distributor manual is not observed in great detail (Tr. 449) and the canned sales presentation is not followed in every respect; nevertheless, some portions of the suggested presentation, [30] such as product knowledge and the history of the Emdeko brand name, are read to customers (Tr. 452). Although he read the Derby Tapes when he received them, Mr. Phillips denied that he used them in training salesmen (Tr. 452-53). One of the lead letters illustrated in CX 538A-LL which he received from National was developed by Mr. Phillips and was compiled along with many other distributors' lead systems in that document by Mr. Bern Dayley, a National area director (Tr. 453-55).

53. While Nu-Way may not use National's suggested lead systems and selling techniques precisely as recommended, Mr. Phillips' description of a typical sale reveals a definite relationship to the National model. Customers are contacted by telephone and questions are asked which suggest that a survey is being conducted to determine the market potential for Nu-Way's products. The purpose of the questions is actually to determine whether the customers are married and employed—the only persons with whom Nu-Way wants to deal (Tr. 459-60). Desirable customers then receive a letter invitation, containing a gift envelope, to visit Nu-Way's showroom. When they arrive, customers are asked to view a short five-minute film on the Emdeko story and are invited to inspect Emdeko products in the showroom. If at any time customers refuse to participate in the presentation, they are given the gift promised in the letter (Tr. 461-63).

54. If customers decide to stay, they are introduced to a salesman who gives them their gift and enters them into a national contest (Tr. 464). During the sales presentation, which lasts for approximately one hour and fifteen minutes, they are shown other customers' letters and are asked to participate in the letter program.

55. Although Mr. Phillips claimed that his customers know that

Nu-Way is a sales organization because they are aware that they can't get something for nothing he conceded that "I don't stand up and scream it and shout I am going to try to sell them something" (Tr. 472). Furthermore, he commented that the verbatim disclosure provision in the proposed order^a would be very detrimental to his business (Tr. 479-80), an indication that his method of [31] selling depends on concealing the fact that Nu-Way's purpose is to sell products.^a

(b) New Century Enterprises

56. Mr. Kenneth Owens, an employee of Emdeko, is a former Emdeko distributor who operated under the name of New Century Enterprises in Denver, Colorado and Portland, Oregon (Tr. 757-59) from April 1, 1968 to January 1, 1976 (Tr. 775). He invested approximately \$84,000 when he first opened in Denver (Tr. 776). Except for gift items, New Century purchased all of its merchandise from Emdeko in 1974 (CX 511A-B; Tr. 774).

57. During the several years it was in business, New Century received publications from National including a smile telephone sheet, which contains suggested procedures for distributors' telephone personnel (Tr. 759-61; CX 7B), a suggested procedure for sales presentations (Tr. 760-61; CX 367), and a "Gift-O-Gram," a simulated telegram for use as a lead (Tr. 760-62).

58. With the exception of the heading and the witness' name, New Century used a lead system which was identical to one recommended by and received from National (Tr. 762-65; CX's 515A-B, 516A-B, 517).

59. During the time he was a distributor, Mr. Owens also received the Derby Winner tapes (Tr. 768; CX's 17-20) and other instructional material from National (Tr. 768-70; CX's 7, 7B-N, 350, 351, 367, 454). However, he threw the Derby Winner tapes away because he did not agree with the selling method described in them, and he used the information manuals (CX's 350-351) only at the beginning of his business (Tr. 772).

60. Before he became the owner of New Century, Mr. Owens was trained in the package method of merchandising by Mr. Bigler, one of National's principals (Tr. 791-93). National's recommended marketing manual (CX 367), whose advice Mr. Owens described as being close to the method taught him by Mr. Bigler, was used verbatim by some of New Century's salesmen (Tr. 797). Although

^a Paragraph 3, p. 13.

^a In fact, one of Nu-Way's customers, Mr. Ballenger, testified that he was unaware until late in the sales presentation that its purpose was to sell him Emdeko products (Finding 144).

Mr. Owens [32] apparently added some of his own ideas to sales presentations made by him (Tr. 779-80), New Century did adopt as its own the recommended selling techniques contained in CX 367. Furthermore, although Mr. Owens denied that he subscribed to the statement in the Derby Winner tapes, it is noteworthy that Mr. Ron Banuelos, one of the salesmen who participated in the tapes, worked for New Century for about six or seven months (Tr. 791).

(c) Earl Pascu

61. From early 1969 to early 1970, Mr. Earl Pascu operated an Emdeko distributorship in Santa Rosa, California (Tr. 815-16). Mr. Pascu testified that when he began operating, he was furnished a lead system by National which consisted of a mailout offering a free gift and a follow-up telephone call. Neither in the mailouts nor during the telephone calls were customers informed that a sales presentation would be made if they came to his office (Tr. 818-20; CX 7B).

62. Later, after receiving a warning from law enforcement officials about the first lead system which he used, National furnished Mr. Pascu with another (Tr. 823).

63. Mr. Pascu used National's recommended selling techniques up to a point (Tr. 910; CX 454) but some of his presentation was ad-libbed. His presentation included the showing of brochures of major and minor products, the selection by customers of products which they would like to receive,¹⁰ asking them to place a value on the products then selected (Tr. 836), and asking them to write testimonial letters (Tr. 845-46).¹¹

64. Although Mr. Pascu didn't care whether or not customers wrote testimonial letters, he represented that they were a condition which had to be fulfilled before [33] they could take advantage of his offer (Tr. 848), along with another qualification—that they display the products and tell their friends about them (Tr. 849).

65. Mr. Pascu avoided telling his customers that they were attending a sales presentation; instead, he was told by Mr. Pipella, a National principal at the time (Tr. 2029), to say that his company was involved in a promotional campaign (Tr. 849-50).

(d) Century Associates, 20th Century Products

66. Ms. Catherine Maddox, Front Royal, Virginia, applied

¹⁰ In the words of Mr. Pascu:
This purpose was to make these people believe that these products would actually be given to them. (Tr. 833).

¹¹ The testimonial letter form used by Mr. Pascu (CX 362) was furnished by National (Tr. 846-47).

sometime in 1970 for a position as receptionist with Century Associates of Richmond, Virginia, an Emdeko distributor. Her job during the one month that she worked there was to choose between 120 and 140 names from a city directory and mail letters inviting them to call for an appointment to view products in Century's showroom. The letters also listed several products, one of which the customers were informed they had won (Tr. 1328-30).

67. Ms. Maddox was told that when customers called for an appointment, the words "sales" or "sales representatives" were never to be mentioned (Tr. 1330). Although the invitation letter listed several products, Ms. Maddox testified that only two gifts were ever given by her to customers, either perfume or a carving set (Tr. 1331).

68. Later, in 1973, Ms. Maddox answered an ad for a receptionist which was placed by an Emdeko distributor in Winchester, Virginia. She was hired by this distributor, 20th Century Products, as a salesperson and was given a training manual to memorize by Mr. Milnes, its owner (Tr. 1333, 1336; CX 365).

69. After she memorized the training manual and sat in on a sales presentation, Ms. Maddox began selling (Tr. 1355). During a typical sales presentation (which lasted approximately two to two and one-half hours (Tr. 1351-52)), Ms. Maddox told customers who had been attracted to the 20th Century Showroom¹² that she was going to do three things for them—give them a prize, enter them into a sweepstakes contest and give them a chance to participate [34] in the Emdeko letterwriting program (Tr. 1336). During her presentation, Ms. Maddox told customers that the showroom had been opened to introduce National Housewares before a larger store was opened. She also explained the value of word-of-mouth advertising and asked customers to choose minor products (such as drills and electric can openers) and major products which she would "sizzle" by explaining their outstanding features and comparing their prices with those of competing products (Tr. 1337-39).

70. After customers selected major and minor products and were given an opportunity to look at them in the showroom, a worksheet (CX 371) was filled out, supposedly to apprise National of the product features which they liked or disliked; in reality, during the time Ms. Maddox worked for 20th Century, completed worksheets were thrown away (Tr. 1341-43).

71. Ms. Maddox then explained the importance of the letterwriting program and sought customers' participation by requesting

¹² Undesirable customers, such as retired couples, were not given a presentation if they appeared at the showroom (Tr. 1354).

authorization for use of their letters in an advertising program (Tr. 1344-47; CX 362 (letter form)).

72. After explaining the letterwriting program, Ms. Maddox went into her close by computing the cost of the package selected by the customers (Tr. 1348). During the close, Ms. Maddox implied that participation in the letterwriting program would give the customers a better package.¹³

[35] 73. Another feature of the presentation was insistence that customers accept the offer when it was made and use of a superior to intimidate reluctant prospects by suggesting, for example, that they were too stingy to protect their family by buying a fire alarm (Tr. 1353).

74. If she was asked either before or during the presentation if customers had to buy anything, Ms. Maddox was instructed to reply: "You are under no obligation." She was "never allowed to use the word 'buy' or 'sell.'" It was "You are under no obligation. You will receive a free gift today. . ." (Tr. 1356). Another device which was used to avoid discussing the real purpose of the presentation was:

Fast talking. You were constantly kept talking so that they didn't really have a chance to ask anything because they didn't - it was going really fast, the whole sales presentation was just blah, blah, blah, word after word, and the whole time you were distracting them with things like National Housewares and Dream-house and TV shows and advertising and door-to-door salesmen and things like this. You were constantly talking about something. . . (Tr. 1356-57).

75. Mr. Bern Dayley of National Housewares attended an awards banquet for all of National's eastern division, during which salesmen, including Mr. Marty Hampton of 20th Century, presented their pitches for the benefit of the attending distributors. Mr. Dayley never expressed disapproval of the pitch which was used by 20th Century (Tr. 1358-59).

(e) Cades, Ltd.

76. From July 1968 until February 1976, Cades, Ltd. operated several showrooms in the Chicago, Illinois area (Tr. 1422-23, 1438). Purchases of Cades' merchandise were almost exclusively from National (CX 521). Some of the publications which Cades received from National were a description of the 1974 distributors' convention

¹³ Then I would say that that's not all you're going to take home today, if they would write me the letter in 30 days, I would also include—and I would pull out another major product [brochure], say the sewing machine, and they were going "Oh," and I would say, "Now, that really is good, isn't it, Mr. and Mrs. Jones?" and they would say, "Oh, yes," because now they think they're going to get a \$400 sewing machine and a thousand dollar set of fire alarm systems [f]or eight hundred and some dollars of \$704, whatever; and I would say, "That's not all. I will also include," and then I would go whap, whap, whap with some minor products, and by then, they say, "That is really great," you know, only this for all of this. (Tr. 1350-51).

at which 10 lead systems were discussed (CX 524, pp. 12, 16), the distributor information manual (CX 350, Tr. 1427) and the authorized marketing manual containing a suggested sales presentation (CX 367; Tr. 1428).

[36] 77. Basically, with the exception of minor variations, Cades used the sales presentation suggested by National in CX 367 (Tr. 1429-30) as well as an earlier version of the presentation when it was in effect (CX 454; Tr. 1430). Cades also received transcripts of the Derby Winner tapes (CX's 17-20; Tr. 1432) and used lead systems which were collected by Mr. Bern Dayley and disseminated by National (CX 538; Tr. 1432-37).

78. Although some of the techniques which Cades used may have been adopted by National for dissemination to other distributors (for example, Cades was using the lead letters illustrated in CX 538 before it was published (Tr. 1443)), Mr. Merrill, Cades' owner, undoubtedly developed his techniques on the basis of his prior experience as an Emdeko salesman (which he was before he became a distributor (Tr. 1445)) and his knowledge of the basic format and presentation which was developed by the founding distributors, including Emdeko principals (Tr. 1445-46).

(f) Helton Distributors

79. In 1969 Mr. Stevie Joe Helton began working as a salesman for Mr. John Pennington, a distributor of Emdeko products in Birmingham, Alabama. He was trained to sell, as were all salesmen in the organization (Tr. 1559), by reading verbatim from a national sales manual which was similar to CX 367 (Tr. 1555-58).

80. In May of 1970, Mr. Helton opened his own office in Jackson, Mississippi (Tr. 1560).¹⁴ During the time he operated in Jackson, his salesmen were required to read to their customers the sales presentation provided by National (CX 367; Tr. 1561). From November 1972 until December 1973, Mr. Helton was an area director for National. After having been fired by National because of an austerity program, Mr. Helton opened a retail outlet in Bessemer, Alabama for approximately one year (Tr. 1562-63) and then moved to Pensacola, Florida where he presently operates as an Emdeko distributor under the name of Helton Distributors [37] (Tr. 1586). He still requires his salesmen to read the sales presentation manual furnished by National (Tr. 1569).

81. During the past several years, Mr. Helton has used lead systems similar to those disseminated by National—i.e., the “ques-

¹⁴ This is not unusual. Mr. Wanlass testified that most of National's growth has come from sales to distributors who were former salesmen for other Emdeko distributors (Tr. 559).

tionnaire" (CX 538I) and the "Gift-O-Gram" (CX 538N; Tr. 1597-98). He also uses the so-called "Smile Sheet" (CX 7B), disseminated by National, which is a guide for telephone personnel in answering customers' questions (Tr. 1604-05). In connection with the "Smile Sheet," Mr. Helton testified that telephone personnel, unless they are asked, do not inform customers that a sales presentation will be made. If the question is asked, customers are told that Helton is in the sales business, but that they are under no obligation to buy (Tr. 1606).

82. Mr. Helton also used the distributor manual (CX 350) for his initial lead system and to train telephone personnel who make appointments with customers (Tr. 1607-08).

(g) Greater Southwest Market Makers

83. Mr. Guy Brunetti was the owner of Greater Southwest Market Makers, a distributor of Emdeko products which operated in Dallas, Texas from late 1968 to early 1970 and in West Covina, California from late 1970 to sometime in 1972 (Tr. 1832). Sales in Dallas were approximately \$400,000. Sales in West Covina were approximately \$150,000 per year (Tr. 1833).

84. Mr. Brunetti invested \$8,000 in the showrooms in Dallas. He learned the package business by training with Mr. Roger Holton, a distributor of Emdeko products in Colinei, Texas (Tr. 1834-36). The lead system which Mr. Brunetti used at one time in Dallas was similar to one used by Mr. Pennington, another distributor of Emdeko products (Tr. 1840). He also used, as part of the lead system, a "notice card" which was developed by a distributor in Boston (Tr. 1841). The lead system used initially in West Covina informed customers that they had been chosen to receive a free gift and that a "selected few" would receive a free vacation (CX 46B).

85. Mr. Brunetti used the marketing manual disseminated by National in his sales presentation and trained his salesmen to use the "canned" presentation without deviating from [38] it (CX 454; Tr. 1842-43). Two of Mr. Brunetti's salesmen when he operated in Dallas were Errol Schenk and Alan Rhine, who participated in the Derby Tapes. Mr. Brunetti denied that he trained his salesmen to follow the procedures described in the tapes (Tr. 1866-67) yet he conceded that: "There is no salesmen in this world that is going to come right out and - that is making a sales presentation, that is going to tell you this" (Tr. 1869).

(h) Arizona Safety

86. Mr. Dale Coburn has owned distributorships selling Emdeko products in Charlotte, North Carolina and Albuquerque, New Mexico and presently owns Arizona Safety and Appliance in Phoenix, Arizona (Tr. 1908-09). Mr. Coburn first became involved with National in 1961, when he was employed by Mr. Gilson as a door-to-door salesman; later he became a sub-distributor of National in Los Angeles, California (Tr. 1961-64).

87. Mr. Coburn has used several lead systems. In Charlotte he began using one which he had developed in his freezer food business. When he discovered that this system was not particularly successful, he contacted distributors of Emdeko products in his area and began using a modified "Gift-O-Gram" system (Tr. 1915-16). Presently, he is using a lead system he developed without assistance from National which announces that the customer has been chosen to preview products (Tr. 1917; RX 58). This system was adopted by National, disseminated to other distributors and is in use by some (Tr. 1926; CX 538V).

88. At his present location, telephone personnel arrange appointments with customers, who if they ask whether they have to buy anything, are told: "You are not required to buy anything but we sure hope you find something that you like" (Tr. 1922). Mr. Coburn's salesmen give a gift to each prospect before any sales presentation is made (Tr. 1923).

89. Mr. Coburn does not use the marketing manual in his sales presentation, but as described by him it is similar to the presentation developed by National over the years. Gifts are offered and customers are asked to choose two or three products they would like to have; they are then given an opportunity to inspect the products and are informed that the products are sold in a special way—at [39] a package price (Tr. 1933-34). Although it is apparent that Mr. Coburn prefers to offer a package of products, he will sell products individually (Tr. 1943).

(i) Empack

90. Empack is a distributor of Emdeko products which operates in Tukwilla, Washington. The owner of Empack operated another distributorship, New Method Enterprises, in the Seattle, Washington area from 1965 to 1972 (Tr. 2040-41).

91. While Empack and New Method have used lead systems, they were not developed by National; in fact, the system used by Empack, the "Soup-O-Gram," a variation of the "Gift-O-Gram," was devel-

oped by its owner, Mr. Jerry Smith. This lead system has been copied by other distributors (Tr. 2044-47).

92. The telephone questionnaire which he uses and which has been disseminated to other distributors by National was also developed by Mr. Smith (Tr. 2048-49). The recommended sales presentation manual (CX's 367, 454) is followed during Empack's sales presentation but changes to its explanation of Emdeko's business have been made and some of the questions posed to customers as well as the ending have been changed (Tr. 2053). Furthermore, Empack sells products individually as well as in a package (Tr. 2053).

93. Empack received the Derby Winner tapes and Mr. Smith gave them to his sales manager for study. About 10 days later, Mr. Smith heard the tapes and stopped using them because he found their suggestions objectionable (Tr. 2056-57).

94. The reason why Mr. Smith's sales presentation differs from the one suggested by National is apparently not so much due to any disagreement with the fundamental selling concepts endorsed by National but to the fact that he was ordered by the Washington state attorney general to change it (Tr. 2085).

(j) Albert Hughes Enterprises

95. Mr. Albert Hughes has operated Albert Hughes Enterprises, an Emdeko distributor, for approximately 10 years in the Monterey and Salinas, California area (Tr. [40] 2258). Prior to this, he was a salesman for Dan Bigler, a principal of National (Tr. 2273-75). While he has a showroom, he also visits prospects' homes and will sell either a package of products or single ones.

96. For approximately five years, Mr. Hughes used a mailout to secure appointments with prospects. This mailout, which offered a free gift for the privilege of getting to know the prospects, was developed by Mr. Hughes, not National (Tr. 2263-64). Although he has received a compilation of suggested leads from National (CX 538), Mr. Hughes has not used them (Tr. 2264-65).

97. When customers call his company, they are informed that Albert Hughes Enterprises is a sales organization (Tr. 2265). Although he did receive the Derby Winner tapes, Mr. Hughes did not use any of their suggestions in his business because he was not impressed with them (Tr. 2268) and he apparently does not use National's suggested sales presentation even though he used it when he worked as a salesman for Mr. Bigler (Tr. 2280).

(3) Consumer Testimony

(a) Fuller

98. Mr. Steven A. Fuller, Bemidji, Minnesota, was an employee of the Minnesota attorney general's office from 1971-1973 (Tr. 1054). As part of his duties, he was directed to investigate National, Emdeko and Emdeko distributors operating in Minnesota. Using an invitation received from a distributor called New Markets of Minneapolis, Minnesota,¹⁵ Mr. Fuller and an investigator posing as his wife visited two offices operated by New Markets (Tr. 1055-56).

99. At the beginning of the first visit, the Fullers were greeted by a receptionist who invited them to look at several Emdeko products on display. They were then shown a movie narrated by Audie Murphy, which, according to Mr. Fuller, did not disclose that a sales presentation [41] would be made (Tr. 1057-59). Thereafter, a salesman invited the Fullers into his office and gave them a free set of steak knives and then began a sales presentation taken directly from the manual disseminated by National (Tr. 1060-63; CX 562). Included in the presentation was an invitation to participate in an Emdeko bonus contest (Tr. 1065-66; CX 425A).

100. Since he was familiar with the National sales program prior to visiting New Markets, Mr. Fuller knew that the purpose of the invitation was to sell products, but this fact was not explicitly revealed by the salesman until near the end of his presentation (Tr. 1071). During the presentation, Mr. Fuller asked whether he had to participate in the letterwriting program. The salesman responded that his company wanted letters, but that if Mr. Fuller did not write them, the products would still be sold to him (Tr. 1073).

101. At the conclusion of the presentation, Mr. Fuller asked for an opportunity to consider the salesman's offer for two or three days, but was told the offer was only good for that afternoon and evening (Tr. 1074-75). The presentation which Mr. Fuller attended at the other New Markets office was essentially identical to the first (Tr. 1076).

(b) Pritchard

102. In August 1971, Mrs. Janet Pritchard, Janesville, Wisconsin, received a Gift-O-Gram from a local Emdeko distributor, Horizon Unlimited (Tr. 1148-49; CX 565). A few days later, she received a "final notice" to visit the distributor's office and pick up the free gift

¹⁵ The invitation stated: "You and your spouse are invited to attend the showing of our Emdeko brand name product line now ready for the public. For helping us to establish our product line, you are entitled to receive one of three gifts . . ." (Tr. 1094).

which had been offered in the Gift-O-Gram (Tr. 1150; CX's 566, 567A-B).

103. The Pritchards visited Horizon Unlimited's office approximately four days after receiving their gift reminder. They were invited by the receptionist to inspect products on display which, since they had no price tags, Mrs. Pritchard thought were the prizes offered in the "Gift-O-Gram" (Tr. 1152-53). They were then shown the Audie Murphy film (Finding 99) and were introduced to a salesman who took them to his office. After explaining the various gifts which they might choose from, he gave them a set of steak knives (Tr. 1153).

[42] 104. After entering the Pritchards in the Emdeko sweepstakes contest (Tr. 1154; CX 409A), the salesman went into a sales presentation similar to the one recommended by National, adding an emotional pitch, complete with pictures of burned children, about the Emdeko fire alarm (Tr. 1155-59). The presentation lasted about 1 1/2 hours (Tr. 1174).

105. When Mrs. Pritchard received the Gift-O-Gram, she suspected that there was a catch to the gift offer, but she and her husband attended the presentation because of curiosity (Tr. 1164) and the possibility that Horizon Unlimited was opening a new catalog showroom. Neither the letters they received, the receptionist, nor the salesman informed the Pritchards that a sales presentation would be made (Tr. 1173). This only became conclusively evident to Mrs. Pritchard when the salesman began discussing features of the Emdeko products (Tr. 1162).

(c) Butler

106. Jeanette Butler, a speech and drama teacher from Madison, Wisconsin, received a letter inviting her and her husband to New Markets, Incorporated, the local Emdeko distributor. The letter contained a sealed envelope and stated that the Butlers would receive the free gift indicated inside the envelope if they would visit the distributor and view their products. They made an appointment as requested in the letter (Tr. 1179-80).

107. Immediately after arriving at New Markets, the Butlers were shown a movie narrated by Audie Murphy. At the end of the movie, the receptionist told them that a "counselor" would give them their free gift. The salesman designated as their counselor took them to his office and opened the sealed envelope they had received in the mail. They were told they had won a vacation trip or a comparable item. Mr. and Mrs. Butler chose a carving set after the salesman

explained that very few of the total expenses of a vacation trip were paid for by the certificate (Tr. 1180-81).

108. Mr. and Mrs. Butler started to leave after they received the gift but the salesman said he would like to explain some Emdeko products to them. They felt it would have been impolite to leave so they agreed to stay.

109. With the help of brochures, the salesman asked them to sort out the products they could use, told them [43] he was going to give them a quiz and then graded them on statements made by the Butlers as to how they would use the products they had chosen. He also asked them to estimate the cost of the products they had selected and compared their estimates with the alleged actual value of the products (Tr. 1182-84).

110. The salesman showed them testimonial letters from consumers said to be from the Madison area. The Butlers had not yet been told that this was a sales presentation and Mrs. Butler testified that she felt all she had to do to use the products in their own home was to agree to write similar testimonial letters (Tr. 1185-86).

111. The salesman then offered a total price for the package of products they had selected and suggested monthly payment financing arrangements. For each lower and lower monthly payment offered by the salesman, Mr. and Mrs. Butler stated their reluctance to accept the offer. They were told that they had to decide at that time because it was a one-time offer (Tr. 1186).

112. The salesman's supervisor came in and offered them an even lower monthly payment but the Butlers declined and started to leave, whereupon the salesman yelled something and according to Mrs. Butler ". . . this big 350 pound guy came in the door and he closed the door behind him and he stood there with his arms folded." (Tr. 1186-87). Mr. Butler became irate and, after insisting, he and his wife were allowed to leave.

(d) Bonner

113. In July 1971, Kathleen Bonner, of Middleton, Wisconsin, received a mail solicitation containing a sealed envelope from New Markets, Inc. (Tr. 1200). She and her husband were invited to call for an appointment, visit their office, and receive a free gift.

114. After arriving at New Markets, the Bonners were shown a movie describing how and where Emdeko products were made and then looked at displayed products until a salesman introduced himself and invited them into his office. He opened their sealed envelope and told them they had won a vacation or a small item. Mr.

and Mrs. Bonner chose the vacation and were given a certificate (Tr. 1202, 1212).

[44] 115. The salesman explained that the gift offer was made to them for advertising purposes. He said the company did not advertise on television or in magazines but they sent products home with people to establish word-of-mouth advertising (Tr. 1202).

116. The salesman went through a brochure presentation and asked the Bonners to separate the products pictured into groups of needed items. He asked them to estimate the value of each separate product they had chosen and he corrected them if their estimates were lower than what he said similar name brand products would cost (Tr. 1204).

117. The salesman told them they would be tested to determine whether they were qualified to take the products home and said the company needed to know what kinds of statements they would put in testimonial letters which they would have to write before they could take any products home.

118. The salesman then gave them a package price for the products they had selected. Mr. and Mrs. Bonner did not know until this time that this was a sales presentation. Mrs. Bonner testified that she thought they had been chosen as a testing family (Tr. 1205-06). Nonetheless, they felt the offer afforded savings and they signed the installment sales contract.

119. The total obligation and interest were explained to them but they were not told that the contract would be sold to a finance company (Tr. 1206, 1214). After reflection at home, Mr. and Mrs. Bonner decided they were not saving as much as they thought. They called New Markets to cancel the contract and were told it had been sold to a finance company (Tr. 1207). They did not know the contract had not been cancelled as requested until they received a coupon book from the finance company a few days later (Tr. 1208). Mrs. Bonner's employer, an attorney, wrote a letter to New Markets and the contract was eventually cancelled. Mrs. Bonner did not describe the sales presentation (which had not been read) as either emotional or harassing but the salesman had told them they had only one chance to accept his offer (Tr. 1213-15).

(e) Lee

120. Robert H. Lee, Jr., St. Paul, Minnesota, is a writer with the University of Minnesota news service. He [45] received a letter from New Markets, Inc. with a sealed envelope enclosed offering the free gift indicated inside the envelope. He opened the envelope, found a vacation offer and threw it away. The Lees moved and, after

receiving a letter with a gift envelope at their new address, they made an appointment to visit New Markets (Tr. 1220-22). Mr. Lee was not told there would be a sales presentation and assumed that the gift offer and showing of products were part of a market research program (Tr. 1228).

121. They were ushered into the salesman's office soon after they arrived at New Markets. The salesman said he was new at the job and asked if he might read from a looseleaf notebook placed in front of him on his desk.

122. The salesman opened the sealed envelope which contained a vacation offer, explained that not all expenses were paid by the certificate and asked the Lees' choice of several available vacation cities (Tr. 1223).

123. The salesman asked the Lees to rank and rate various products according to which they felt they needed most and they were then shown brochures on the larger products and were asked to estimate values.

124. The salesman himself arrived at a value for the group of products which Mr. and Mrs. Lee had said they could use and offered the products to the Lees at about half that amount if they would agree to write testimonial letters about the products (Tr. 1224-25).

125. Mr. Lee declined the package offer but agreed to buy the automobile stabilizer because of problems he had with his car and because ". . . we felt that would be the one way to get out of there." (Tr. 1225). Mr. Lee told the salesman they did not want the purchase financed but they would pay cash in 90 days (Tr. 1225-26).

126. Mr. Lee testified that they felt emotionally drained after the presentation and asked the salesman to deliver the product later, thinking they might be able to cancel the contract (Tr. 1226).

127. When Mr. Lee received a finance company coupon book in the mail several days later he threw it away. He was angry because he had not been told the contract would [46] be sold and had explicitly asked that it not be. Although he was not certain, he thought the contract had been sold to a company owned by Emdeko (Tr. 1227, 1242). New Markets, Inc. phoned the Lees several times to arrange a delivery date for the stabilizer. Mrs. Lee finally told the distributor that they did not want the product and they did not hear from him or the finance company thereafter (Tr. 1227).

(f) Eberle

128. Raymond Eberle of Santee, California is a painter for San Diego County. In May 1973, Mrs. Eberle received a Soup-O-Gram offering a free case of soup for visiting the offices of National

Products Company, the local Emdeko distributor (CX 407; Tr. 1248-49). They called for an appointment and both Mr. and Mrs. Eberle went to the distributor's offices as requested. They were not told a sales presentation would be given.

129. After they arrived at National Products, the Eberles were shown three movies portraying the quality of and need for Emdeko products (Tr. 1249) and were then taken to a cubicle and shown pictures of different products. A salesman asked them which of the products they were particularly interested in. They were told that the questions were part of a survey to get people's opinions of the products and to solicit letters of recommendation and they were shown testimonial letters from other people (Tr. 1250-67).

130. They did not realize this was a sales presentation until the salesman offered them a chance to buy all the products for which they had expressed a need. They responded that the price was too high and that they had not known they were invited to the offices to buy something. They started to leave when the salesman left to talk to his supervisor and returned with an offer about one-half the cost of the first offer. When this offer was also declined, an even lower price was quoted if the Eberles would agree to write testimonial letters (Tr. 1250-52).

131. The Eberles then signed a contract and made a downpayment. The terms of the contract were explained and there was a notice on the back of the contract that it would be sold to a finance company; however, this notice [47] was not pointed out and Mr. Eberle did not see it until he returned home (Tr. 1253, 1265). They were also not told about the 3-day cooling-off period which the law allowed. The Eberles received their free gift at the end of the sales presentation (Tr. 1256).

132. When Mr. Eberle discovered the contract would be sold he called the consumer affairs bureau. As advised, he immediately sent a letter cancelling the contract and returned the product he had taken home with him (Tr. 1253-54).

133. The sales presentation had not been read and had lasted about one hour and a half including the time spent watching the movies. Mr. Eberle did not feel that they had been harassed but that it was ". . . a job of supersalesmanship." (Tr. 1265-66).

(g) Stro

134. Mr. Jack A. Stro is a junior high school counselor from Bonita, California. Mr. and Mrs. Stro received a Soup-O-Gram (CX 407) offering them a case of canned soup if they would call the

number listed on the bottom of the notice within 24 hours to make an appointment to pick up the soup (Tr. 1395-96).

135. Mr. and Mrs. Stro made an appointment and went to the offices of National Products, an Emdeko distributor in Chula Vista, California. They were asked to watch several movies after which they were to receive their free gift of soup. One movie described how and where Emdeko products were made and extolled the quality of the products. Another movie was narrated by Audie Murphy (Tr. 1397-98).

136. After the movies, Mr. and Mrs. Stro were taken to a cubicle where a saleswoman asked them to view Emdeko products, ostensibly for a survey. She showed them brochures about the products and asked them to select those which they would like to have in their home. She showed them letters from other people complimenting Emdeko products, explained that this was their method of advertising (Tr. 1399) and suggested that the distributor, National Products, was an advertising group working for National Housewares (Tr. 1402). She said she would give them the products they had selected if they would sign a letter release form and promise to write testimonial letters.

[48] 137. A number, 569, was written on the top of the letter authorization form Mr. Stro was asked to sign. He became wary and asked what the 569 meant. The saleswoman told him they were being given that amount of credit. Mr. Stro read the document further and realized it was a sales contract. He confronted the saleswoman and was told the products were free but a small amount must be charged to eliminate gift tax problems. At this time Mr. Stro demanded the free gift and was given a set of steak knives. Mr. and Mrs. Stro left the office and reported the incident to the Chula Vista police department (Tr. 1400).

138. Mr. Stro had previously been involved in a consumer testing program and upon receiving the Soup-O-Gram believed this was similar. He was not told there would be a sales presentation and did not discover this until he read the letter authorization he was asked to sign and found it was a sales contract (Tr. 1402).

139. Mr. and Mrs. Stro spent about 50 minutes at National Products. During the sales presentation, the saleswoman did not read from a prepared script. Mr. Stro testified that he did not feel that the presentation was particularly emotional or high pressure, only that it was a misrepresentation (Tr. 1402, 1409).

(h) Ballenger

140. Howard Ballenger of Laurel, Maryland received a telephone

call at his home in March 1975, inquiring about several products used in his home and asking whether his family would be interested in receiving free merchandise. He was told that people who cooperated with the inquiry would be sent invitations to pick up free gifts. A few days later Mr. Ballenger received such a letter with a sealed envelope enclosed indicating what gift he would receive. This mailout included a list of products which were gift possibilities and information about a \$75,000 sweepstakes. As requested in the letter, Mr. and Mrs. Ballenger set up an appointment with Nu-Way Enterprises, the Emdeko distributor in Landover, Maryland (Tr. 1483-84).

141. After they arrived at Nu-Way, Mr. and Mrs. Ballenger were asked to look at pictures of people allegedly living in the community who had received gifts worth over \$30 and were asked to watch a movie narrated by Audie Murphy. After the movie and a few minutes spent looking at displayed [49] products, the Ballengers were escorted into a salesman's office (Tr. 1485).

142. The salesman opened the sealed envelope the Ballengers brought with them and said they were to receive cordless electric scissors which he immediately gave to Mrs. Ballenger. While the salesman was absent, Mr. and Mrs. Ballenger noticed their conversation was being recorded (Tr. 1486).

143. The salesman entered their name in the \$75,000 contest and asked them their choice of prizes should they win. They were shown brochures about products, were asked to select the products they would like to have in their home and were asked to estimate the value of each selection. The salesman countered each estimate with a statement about the cost of a comparable name brand product (Tr. 1487-88).

144. The salesman then offered them a total price for the package of products they had selected if they would agree to write testimonial letters (CX 24) and they were shown letters written by other people. Until this offer was made Mr. Ballenger did not know they were being given a sales presentation. They had been told the gift program was initiated as a way to advertise products (Tr. 1490).

145. The Ballengers purchased the products and signed the financing agreement which included an insurance charge they were not told about. The total price, the finance charge and monthly payments were explained to them. They were not told the contract would be sold to a finance company but received the impression that Nu-Way did their own financing. The allowance of a 3-day cooling-off period was not made known to the Ballengers. In fact, the section on

the contract which stated they could cancel in three days was stamped "does not apply." (Tr. 1491, 1499, 1500, 1512).

146. The Ballengers received all the merchandise at the time of the sale. After unloading the merchandise, the Ballengers decided they no longer wanted it. Mr. Ballenger called the salesman the following Monday and expressed his dissatisfaction with the quality of the products. A serviceman came to inspect the products and found nothing wrong. Mr. Ballenger again called the salesman and was told to call Mr. Phillips, the distributor. Mr. Phillips refused to cancel the agreement (Tr. 1495-98).

[50] 147. In the meantime, the Ballengers received notification from the finance company to whom the contract had been sold. Mr. Ballenger explained his situation to the finance company and it stopped payment on their check to Nu-Way. About four or five months later, Nu-Way picked up the merchandise held by the Ballengers (Tr. 1499).

148. The Ballengers were not told a sales presentation would be given at Nu-Way and they spent about 2 1/2 hours at the Nu-Way offices. The sales presentation was not read but Mr. Ballenger testified that he felt he was placed under great pressure to buy during the presentation (Tr. 1500-05).

(i) *Jaynes*

149. Floyd Edward Jaynes, Jr., a construction worker from Jackson, Mississippi, received a postcard from Helton Distributors in 1972, telling him that he and his wife had been selected to receive a free gift. Mrs. Jaynes called the number listed on the card and set up an appointment to pick up the gift (Tr. 1516).

150. They arrived at the location described over the phone and found a storefront building displaying Emdeko products. They were ushered into a salesman's office where they inquired about their free gift. The salesman asked if he could speak to them for a few minutes, took out brochures describing various products and asked Mr. and Mrs. Jaynes to select several products they could use in their home. He also asked them to estimate the value of each selected product (Tr. 1517-20).

151. The salesman indicated that the Emdeko brand of products was being introduced into the South and that the company felt the best method of advertisement was to put the products into people's homes and to rely on word of mouth. He then asked Mr. and Mrs. Jaynes if they would write testimonial letters on the products they had selected. When the Jaynes agreed to write letters, the salesman said they could have all the products they had selected for \$600 plus

testimonial letters for each product (Tr. 1519). Until the package price was quoted, Mr. Jaynes did not know this was a sales presentation but felt it was some sort of advertising program (Tr. 1521-22).

152. The salesman had filled out the sales contract during his presentation. The Jaynes asked if they could consider the contract overnight, but they were told it was [51] a one-time offer. They asked if they could be alone to discuss the purchase. The salesman left for five minutes. During that time the Jaynes decided not to accept the offer (Tr. 1520-22).

153. Mr. and Mrs. Jaynes received a hotel accommodations certificate as a gift just before leaving. The Jaynes had spent about one hour at Helton Distributors.

154. Mr. Jaynes felt it was a high pressure "pitch" because the salesman's presentation moved rapidly, after the brochures, to the letters of recommendation and contract. The salesman read from a manuscript during the presentation (Tr. 1524, 1541).

(j) Smith

155. In April 1975, Robert A. Smith of Pensacola, Florida received a "second and final" notice from Helton Distributing Company to pick up a gift within a certain number of days or it would be sent back to the warehouse. Mr. and Mrs. Smith had been recently married, and, although it was not indicated on the postcard, they thought that either the warehouse was holding a wedding present ordered by someone or that the gift offer was part of an advertising program. Mr. Smith called the number listed on the card and inquired about the nature of the gift. The woman who talked to Mr. Smith said she could not determine what the gift was over the phone but scheduled a time the next day for the Smiths to pick up the gift (Tr. 1694-95, 1706).

156. After arriving at the distributor's offices, the Smiths were shown a movie narrated by Audie Murphy and were shown several household products on display. They were then introduced to a salesman and asked to join him in his office (Tr. 1696).

157. The salesman made small talk and explained briefly about Emdeko products. He told them he was required to read to them from a manuscript and said that they were there for three things: to be entered into a bonus contest, to receive a free gift, and to receive a fantastic offer. The salesman gave them a carving set as a gift (Tr. 1697, 1716).

158. The salesman then showed them brochures on several products and asked them to pick the products they could use in their

home. He explained many of the products in detail [52] and displayed pictures of burned children while discussing the fire alarms (Tr. 1699).

159. The Smiths were asked to estimate the value of the products. The salesman corrected them when their estimates did not agree with his. Although not revealed to him, Mr. Smith assumed at this time that the products were for sale. He asked for several days to think over the price which was finally offered for the package and he was told it was a one-time only offer (Tr. 1700).

160. Mrs. Smith was not feeling well and asked to be excused from the room. The salesman then told Mr. Smith that the purchase could be financed but did not go into actual financing arrangements. The salesman kept pushing a letter authorization form at Mr. Smith. He had been told that if he wrote a testimonial letter, such as those previously shown him, a microwave oven would be added to the package offer at no extra cost (Tr. 1701-03).

161. Mr. Smith declined the offer and got up to leave. The salesman said he wanted to talk to Mrs. Smith and approached her as they were leaving. The salesman followed them out into the public hall beyond the door. Mr. Smith attempted to give the gift back but the salesman refused to take it. In the meantime, Mrs. Smith, who was very upset, started to cry. The Smiths' contact with Helton Distributing lasted about an hour (Tr. 1704-06).

(k) Ashman

162. Jay I. Ashman from Richmond, Vermont is an assistant attorney general in the consumer fraud division of the Vermont attorney general's office. During December 1974, Mr. Ashman visited the local Emdeko distributorship, PMA, Inc. (Tr. 1724-25). Mr. and Mrs. Ashman had received a mail solicitation at home inviting them to come to the PMA offices, receive a free gift, and review PMA's line of products. At work the next day, Mr. Ashman inquired about PMA and discovered that there had been one consumer complaint. Out of curiosity, he called PMA and arranged an appointment (Tr. 1726).

163. Mr. Ashman testified that he visited PMA with his wife as an employee in the consumer fraud division and also as a consumer. He tape recorded his conversation with the salesman (Tr. 1727).

[53] 164. Mr. and Mrs. Ashman were shown two movies; the Audie Murphy movie and a film on the fire alarms. After they watched the movies and looked at displayed products they met a salesman and were ushered into his office. After friendly introductory conversation, the salesman gave them a carving set. They were told they were

entitled to enter the bonus contest based on what they would write about Emdeko products and their visit to PMA and were asked to select among several possible prizes for the bonus contest. They were then told that if they qualified they could take some of the products home (Tr. 1728-30).

165. The salesman showed brochures to the Ashmans and asked them to select products from those depicted which they could use in their home. The salesman asked what features they liked about their selections and how they might benefit from them. He showed them clippings and letters about the fire alarms, one of the Ashmans' selections. The salesman showed them a contract for a comparable alarm system to indicate the value and asked them to estimate the cost of all their selections (Tr. 1731-34).

166. The salesman explained the testimonial letter-writing program and claimed that the company advertised by placing products in people's homes. He told them there was a cost to the offer but because it was a special promotional low cost offer it could be made only one time and must be accepted with a promise to write letters (Tr. 1736-38). This was the first time throughout the presentation, which was both read and ad-libbed, that it was mentioned that the products were for sale.

167. The salesman asked the Ashmans to sign the letter authorization form and inquired how they would pay for the purchase. He indicated that most customers financed, but he did not reveal until asked that the contract would be sold to a finance company. The Ashmans also asked about interest charges and were not given a total charge but were told it was included in the monthly payment (Tr. 1739).

168. The Ashmans were told that PMA would eventually open a retail store and that they were presently limiting the number of sales per geographic area. Mr. Ashman asked if they could think about the offer until the next day. The salesman agreed although he said it was against his orders. Mr. Ashman later called and declined the offer (Tr. 1741-42). [54]

(1) Zepfel

169. Ida Zepfel is a housewife from Pittsburgh, Pennsylvania. In the fall of 1970, she was phoned and asked to take part in a survey. She was asked questions about her children and about her husband's occupation. Several weeks later she received a letter thanking her for taking part in the survey and giving her a number to call for a free gift. She called and was told she must be accompanied by her

husband to pick up the gift and that there were "no strings attached" to the offer (Tr. 1779-80).

170. After arriving at Amco, the Emdeko distributor in Pittsburgh, Mr. and Mrs. Zepfel were taken to a salesman's office. They were shown pictures of various products, were asked their opinion of them and were then shown a display of some of the products. The salesman asked them to choose several of the products which they would like in their own home and they were asked to estimate the value of the products they had selected. Mr. and Mrs. Zepfel were then told that as a form of advertising the products were placed in people's homes for a minimal amount and an agreement to write testimonial letters (Tr. 1781-84).

171. The salesman gave the Zepfels a financing agreement which they signed. They were told that the contract would be sold to a finance company but were not told specifically which company (Tr. 1783, 1798).

172. They were in the Amco store for about an hour and left with the merchandise they had purchased. When they were outside the door, they remembered the free gift. Mr. Zepfel went back and asked for it. The salesman gave them a tabletop barbeque grill and a small bottle of perfume (Tr. 1788, 1801-02).

173. Mrs. Zepfel testified that she felt pressure was put on them to buy while they were in the salesman's office and that they were caught by a sales gimmick. They did not write testimonial letters as agreed but were never contacted again by Amco (Tr. 1783, 1788, 1792).

(m) Fidei

174. Frank P. Fidei is a mechanical engineer from Pittsburgh. In June 1970, he and his wife were contacted by Amco, the local Emdeko distributor, and were asked to [55] participate in a survey. They were asked several questions about products they used, about Mr. Fidei's occupation, and about the number of children in their family. They were told that they would receive a letter inviting them to review products and that they would receive a free gift, but they ignored the letter when it came in the mail. They were phoned again and asked if they were going to make an appointment but they declined. Several days later they were again phoned by Amco and it was hinted to them that the gift was a high value household product so they agreed to an appointment (Tr. 1804-06).

175. They went to Amco as scheduled and, after waiting 20 or 30 minutes, were taken to a salesman's office. He read to them from a prepared booklet. The salesman showed them brochures on several

products, elicited their opinions of the products and compared the products to allegedly similar brand name items. The salesman asked them which of the products they would pick as a free gift (Tr. 1807-09).

176. Mr. and Mrs. Fidei selected several products and were taken to another room to look at them. The salesman placed values on the products and gave detailed explanations about the products the Fideis had chosen. They were shown pictures of burned children during the presentation about the fire alarms (Tr. 1809, 1825). The salesman told them they could have two of the products at no extra cost if they bought the fire alarms and if they would agree to write testimonial letters on the products. The salesman had previously shown them letters from other people who had the products the Fideis had selected (Tr. 1810).

177. After Mr. Fidei declined the offer and asked for the free gift, the salesman inferred the Fideis were irresponsible parents for not purchasing the fire alarm system (Tr. 1825).

178. Mr. Fidei asked to speak with the manager and expressed his displeasure regarding the time expended and money spent on a sitter because they had been told they would receive a gift. They were then given a carving set. Until this time, Mr. Fidei was under the impression they would receive one of the products they had selected as their free gift. The Fideis were at Amco for about 1 1/2 hours (Tr. 1812). [56]

F. *Respondents' Connection with Distributors' Representations*

(1) Introduction

179. The complaints allege that the corporate and individual respondents have placed into operation the sales method described above and that they control or encourage distributors' use of that method, a method which, through misrepresentation and concealment, deceives customers into purchasing Emdeko products.

180. There is no evidence that respondents actually control the sales presentations of Emdeko distributors. Rather, the evidence reveals that distributors are free to adopt whatever sales method they desire. For example, Albert Hughes Enterprises makes door-to-door sales, a method which is far removed from the showroom technique used by other distributors (Finding 95). Testimony of other distributors supports my conclusion. Some of them make sales presentations in the precise way that respondents suggest but others have introduced variations of their own. The same is true of the lead

systems in use, and the suggestions in the Derby Winner tapes are not followed by all distributors (Findings 59, 93, 97).

181. The reason for the variations in distributors' sales technique is evident. Respondents have no power to compel obedience to their suggestions because they have no control over Emdeko distributors and because the distributors are not economically dependent upon them (Findings 9-12; 15-23).

182. On the other hand, one cannot ignore the overall similarity between the distributors' sales presentations and the advice which respondents have given them over the years. Distributors use lead systems which offer free gifts to customers (Findings 58, 77, 81, 84, 87, 98, 102, 106, 113, 120, 128, 140, 150, 155, 162, 169) and the basic format of their sales presentations follows respondents' suggestions (Findings 60, 61, 63, 69, 77, 80, 85, 109-11, 116-18, 121-25, 129-30, 135-37, 141-44, 150-53, 156-59, 164-68, 170-71, 175-77). These similarities are not due to coincidence. They are a direct result of respondents' influence and the distributors' enthusiastic adoption of a sales method which encourages deception of customers.

183. Respondents' influence over its distributors began when National's principals taught some the package [57] method (Findings 78, 86). In turn, these distributors trained salesmen, many of whom eventually become Emdeko distributors (Footnote to Finding 80). From the beginning of their relationship with Emdeko distributors to the present time, respondents have advised and encouraged them to use the lead systems and make sales presentations (Findings 15-19, 25-48) which have resulted in the deceptive representations and failures to disclose which are described below.

(2) The Representation that Customers Are Specially Selected

184. Although Emdeko distributors do not seek the trade of certain undesirable categories of potential customers (Finding 35), no other selection of customers is made as long as they are qualified—*i.e.*, are not obvious credit risks. Any further selection would undoubtedly defeat the purpose of lead systems—to contact a large number of potential customers.¹⁶ (See CX 350, p. 36.) In consequence, distributors use city directories and telephone books to contact as many families as possible (Tr. 513, 1891, 1892, 1924; Finding 66).

185. Despite their extensive mail and telephone solicitation of

¹⁶ See CX 351, p. 8 which describes the purpose of a lead system:

Certainly the most important function of this business is securing *in volume* qualified prospects at a reasonable cost (emphasis added.)

many potential customers, Emdeko distributors lead those they contact to believe that they are among a few who have been specially selected. Respondents' distributor information manual illustrates a "GIFTOGRAM" lead method which in the initial message to consumers states: "CONGRATULATIONS. . . Your family has been approved to receive some of the \$12,500.00 in fine products to be given away without obligation" (CX 350, p. 44). The illustrated "GIFTOGRAM" or close variations containing the "has been approved" representation were in fact used by distributors (CX 374—"GIFTOGRAM," Mark III Enterprises, Luray, Va.; CX 375, 20th Century Products, Chula Vista, Calif., *cf.* Tr. 1395-96; and National Products, El Cajon, Calif., *cf.* Tr. 1247).

(3) The Representation that a Survey Is Being Conducted

186. Since the purpose of a lead system is to attract potential customers to a sales presentation without revealing that fact, some other reason must be given for the initial solicitation. One obvious pretext is that the distributor is conducting a survey or gathering marketing information. Respondents' distributor information manual contains scripts to be used by distributors in their "Lead" systems. The script for the initial telephone contact for the "Questionnaire Script" begins:

Hello, Mrs. ————. This is ———— from ————. We are taking a brief questionnaire on our behalf to determine the market potential in this area.

What brand of soap do you use? . . . (CX 351K).

Hello, Mrs. ————, this is ———— from ————. We are taking a brief questionnaire on our behalf of brand name products in this area.

Is your can opener manual or electric? . . . (CX 350Z-38; see also CX 538S).

187. The effect of similar representations by other Emdeko distributors was confirmed by two customers who testified in these proceedings. Mr. Lee assumed that the letter and gift envelope he received from New Markets were part of a market research program (Finding 120) and Mr. Smith believed that Helton Distributors' gift offer was in connection with an advertising program (Finding 155).

188. In fact, Emdeko distributors are not in the business of conducting surveys or gathering marketing information. The purpose of the lead systems which they use is, rather, to filter out undesirable potential customers and to induce desirable ones to visit their places of business (Tr. 458-61).

(4) The Representation that Customers Will Be Given a Gift

189. The typical lead system used by Emedko distributors promises a free gift to customers who visit their [59] showrooms (Findings 27-35, 53, 56, 58, 61, 67, 81, 84, 87, 91, 96, 98, 102, 106, 113, 120, 128, 134, 140, 149, 155, 162, 169, 174).

190. In some cases, customers who visited distributors' places of business were not given free gifts until after sales presentations were made, but it is not clear whether these distributors deliberately withheld the gifts (Findings 131, 137, 153, 172). In most cases, distributors did give their customers free gifts simply for visiting the showroom and viewing a promotional film. They were not required to attend the complete sales presentation (Findings 53, 88, 99, 103, 107, 114, 142, 157).

191. Because of the wording of the gift offers, some customers might have been led to expect gifts of considerable value¹⁷ rather than the modest ones which were in fact given them (see Finding 67); however, there is no evidence that distributors deliberately tried to foster such belief or that a substantial number of customers actually believed that they would receive valuable gifts.

192. Complaint counsel contend that customers are not "unqualifiedly" entitled to a free gift because some who are "undesirables" may be discouraged from attending the sales presentation. The problem with this theory is that the gift offer is not unqualified. For example, the direct mail lead method invites the customer ". . . to attend the showing of our Emdeko brand name products now ready for the public. . ." and indicates that he is ". . . entitled to receive one of the free gifts. . ." (CX 350, p. 38). This invitation could not possibly be misinterpreted: The customer must visit the distributors' showroom to get a gift. Of course, distributors do try to discourage undesirables from visiting their showrooms, but those who choose not to accept the offer (whether because of indifference or because they are discouraged by the distributors) are aware that they will not receive a gift.

193. I conclude, therefore, that the conditions of the distributors' gift offers are clear and that distributors do not deliberately withhold gifts from customers who visit their showrooms. [60]

¹⁷ I am not referring here to the Emdeko sweepstakes which is generally part of the sales presentation, but to the gift offers made in the solicitation letters.

(5) Failure To Disclose that a Sales Presentation Will Be Made

194. The result of National's constant exhortation in the Derby Tapes, the distributor information manuals and authorized marketing manuals has been the creation of a sales technique whose purpose is to deceive consumers into believing that no sales presentation will be made and that they are, instead, being asked to cooperate in some kind of advertising program or market survey.

195. Emdeko distributors do not reveal to their customers that a sales presentation will be made. The lead systems are designed to hide this fact (Findings 26-35) and the deception continues during the sales presentation by suggesting that customers are participating in an advertising program or a market survey (Findings 115, 129, 136, 141, 151, 166, 170, 174).

196. In fact, distributors do not conduct surveys or advertising programs and do not care whether customers participate in schemes like the letterwriting program which are supposedly used to promote Emdeko products (Findings 64, 100).

197. It is apparent that the distributors' lead systems and sales presentations have the capacity to mislead customers into believing that they are not attending a sales presentation. Customers' testimony simply confirms what is obvious. The salesman for New Markets told the Bonners that the gift offer was for advertising purposes, and the Bonners did not become aware of the real reason for the inducement until much later in the sales presentation (Finding 118). Mr. Lee went to New Markets because he believed it was conducting a market research program (Finding 120). The Eberles were told that National Products was engaged in a survey and did not suspect this representation until the salesman made them a package offer (Findings 129-30). Other customers testified to similar misconceptions about the real purpose of the invitations received from Emdeko distributors (Findings 110, 138, 144, 151, 155, 178).

198. It may well be that many potential customers suspect that they will be asked to buy something when they receive their free gift offers; but they may still, as did the Pritchards, go to the distributor's showroom because of the possibility that the invitation might be for some other purpose (Finding 105). [61]

(6) High Pressure Sales

199. Some Emdeko distributors harass, frighten and intimidate their customers during the sales presentation. The most familiar

technique is the use of a fast-talking pitch which does not give the customer a chance to think about the real purpose of the sales presentation or to object to it (Findings 42, 74, 154). Other techniques include insistence that customers accept the offer immediately (Findings 73, 101, 111, 119, 152, 159), presentations which last for more than an hour (Findings 54, 69, 104, 133, 148, 172), physical intimidation (Finding 112), disparagement of customers by suggesting that they are stingy (Finding 73), frightening customers by playing on their fear of fire (Findings 104, 158, 176, 177), and humiliation.¹⁸

200. While it is true that some customers did not feel that the sales presentations they attended were particularly high pressure (Findings 119, 133, 139), others testified that the tactics used by certain distributors put them under pressure to buy (Findings 148, 154, 173).

(7) Other Representations

201. The complaints challenge certain representations made to customers by Emdeko distributors which are not [62] directly attributable to advice given by National, although complaint counsel claim that National is responsible for such representations. These allegations are:

- a. Distributors represent that customers who purchase products will be able to make subsequent purchases at a discount from the distributors' regular price.
- b. Distributors represent that customers who purchase products will save money by buying a product in a package rather than by itself.
- c. Distributors represent that customers can buy Emdeko products cheaper than comparable products sold by competitors.
- d. Customers do not realize the extent of their monetary obligations when they purchase products from distributors.
- e. Customers who purchase products from distributors are not informed that their obligations are transferred to financial institutions.

¹⁸ Ms. Maddox testified about the high pressure tactics used by her employer:

Q. What do you mean by high pressure?

A. Well, if someone says they can't take it, they would make them feel bad by saying, "What do you mean, you don't think enough of your family to protect them with fire alarms?" and what do you mean, you can't afford it, things like that, you know, high-pressure sales. They would argue with them.

Q. Did they—

A. (Interposing) They were under the attitude that if they weren't going to buy them, they were going to humiliate them before they walked out of the office (Tr. 1353).

202. Complaint counsel concede in their proposed findings that while there was some evidence "that distributors made price savings claims. . . The evidence did not clearly establish the falsity of these claims" (CPF, p. 63 n. 70). Therefore, allegations a, b, and c need not be discussed.

203. Complaint counsel's proposed findings in support of the allegation that customers do not realize the extent of their monetary obligations are rejected since I cannot infer this fact simply because distributors use high pressure tactics or because customers make minimum cash downpayments and relatively low monthly payments (CPF, p. 55). The most significant fact, I believe, is that not one customer testified that he was unaware of the extent of his monetary obligation.

204. Most Emdeko distributors arrange for the financing of prospects' purchases and although some customers testified that they were unaware their contract would be assigned to a finance company (Findings 119, 127, 145), there is no evidence that distributors deliberately conceal this fact. [63] Many of the distributors who testified insisted that they explain the contracts to their customers and several customers confirmed that they understood their contracts (Tr. 466-67, 780, 892, 1243, 1265, 1452, 1668-69, 1739, 1798-99, 1863, 1951-52, 2267).

(8) Respondents' Knowledge of Distributor Representations

205. In view of the advice and encouragement which it gives distributors, it is inconceivable that National is unaware that they might make and have made false and misleading representations to and concealed material facts from their customers. National's officers and employees were present at conventions and workshops where lead systems and sales presentations were discussed (Findings 16, 18, 19, 75), participated in the Derby Tapes (Findings 38-48), visited distributors and listened to their sales presentations (Finding 17), and authored and disseminated other publications which encourage distributors to deceive their customers (Findings 15, 26, 37, 38).

206. National is also aware of the deceptive potential of advice it gives distributors because of the legal problems in which several have become involved. National re-established a distributor who was closed down by Wisconsin authorities and Mr. Wanlass and an area director represented him before Oklahoma authorities when his practices were challenged in that state (Tr. 1037-38, 1043-45). Mr. Wanlass interceded on behalf of a distributor having legal problems with Vermont authorities (Tr. 1746-48) and a lawsuit was filed

against a National distributor and National by the State of Minnesota (Tr. 1084-88). Finally, Mr. Wanlass interceded on behalf of a distributor who was being investigated by Washington state authorities (Tr. 2102).

207. It is true that some of the distributors did not follow National's advice to the letter and it is apparent that National did not condone some of the more odious techniques used by them. For example, when Mr. Wanlass was told that a salesman in Ken Owens' Denver distributorship asked whether a customer who could not afford to purchase a fire alarm "could afford to see our 14 month old baby in a casket," he disavowed the use of that kind of tactic (CX 267A, C). National may well have deplored the use of such tactics in other instances (RPF's 106-129), yet at the same time it was distributing and endorsing the Derby Tapes and information manuals, publications [64] which give explicit advice about sales techniques which lead to the deception of customers.

208. I conclude, therefore, that respondents are accountable for most of the representations challenged in the complaint because they developed a sales technique which encourages its practitioners to deceive customers. Respondents encouraged Emdeko distributors to tell customers that they were specially selected or that they were taking part in a survey and respondents encouraged Emdeko distributors to avoid any hint that a sales presentation would be made. It is not surprising, then, that some distributors used high pressure tactics on their customers or used other deceptive tactics, and because of this I reject respondents' denial of responsibility for the distributors' deceptions.

209. On the other hand, respondents did not advise distributors to withhold gifts from their customers (and most distributors did not do so), did not advise them to deceive their customers about the extent of their monetary obligations and did not advise them to hide the fact that their obligations are transferred to financial institutions. I therefore reject complaint counsel's claims with respect to these three allegations.

(9) Commission Approval of Certain Documents

210. On June 17, 1969, the Commission accepted a series of letters received from National as evidencing compliance with the February 12, 1968 order in Dkt. 8733, the order which complaint counsel seek to modify.

211. The materials accepted by the Commission as being in compliance with its order are the Emdeko authorized marketing manual (virtually identical to the marketing manuals containing

canned sales presentations, CX's 367 and 454), a telephone script (RX's 24E-F and 25C-D) and an invitation letter, RX 24D (later revised, RX's 25E-26B). National disseminated these materials to distributors (RX 20A-C) and they are claimed by National to disclose that a sales presentation will be made (RPF's 131, 132, 152). Whether they do or not, National subsequently disseminated other material in which it advised distributors to hide the fact that a sales presentation would be made (CX 350 and the Derby Tapes, described in Findings 23-35 and 38-48).

III. CONCLUSIONS OF LAW

A. *The Distributors' Representations*

The evidence presented by complaint counsel in these proceedings establishes that several Emdeko distributors have adopted respondents' recommended sales techniques and have deceived their customers by:

1. Representing, contrary to the truth, that they are specially selected;
2. Representing, contrary to the truth, that a survey is being conducted;
3. Not disclosing that they will be given a sales presentation; and
4. Selling them products through the use of high pressure tactics.

Respondents' defense of the distributors' conduct requires only a short discussion. Whether the distributors' customers were convinced by the sales presentation to purchase products is not crucial for the Commission can outlaw practices whose tendency to deceive has been established. *Goodman v. FTC*, 244 F.2d 584, 604 (9th Cir. 1957). Thus, although they did so, complaint counsel were not required to show actual deception of the distributors' customers or out-of-pocket loss, see *Charles of the Ritz v. FTC*, 143 F.2d 676 (2d Cir. 1944).

Some customers are undoubtedly satisfied with the Emdeko products they have purchased and some have undoubtedly been able to cancel contracts with Emdeko distributors (RPF 56) but this does not make the distributors' acts any less deceptive, for consumers are entitled to be truthfully informed about the purpose of solicitations to visit the distributors' offices, *Encyclopedia Britannica, Inc.* [1973-76 Transfer Binder] Trade Reg. Rep. ¶ 21,119 (March 9, 1976 [87 F.T.C. 421]) and are entitled to protection from high-pressure tactics when they do attend a sales presentation because these tactics interfere with their right to make an intelligent purchasing decision.

Compare *Beneficial Corp.* [1973-76 Transfer Binder] Trade Reg. Rep. ¶20,959, p. 20,821 (July 15, 1975 [86 F.T.C. 119]). Whether those customers who were deceived should have been more suspicious and should have realized the real purpose of the [66] distributors' solicitation is beside the point. *Charles of the Ritz, supra* at 679. Furthermore, even wary consumers might not realize the true purpose of the distributors' solicitations, for the lead systems disseminated by the respondents are rather sophisticated masquerades which have been developed by knowledgeable merchandisers.

B. *The Order*

(1) The Need for a Modified Order

The consent order in Dkt. 8733 was designed to make certain that customers of Emdeko distributors were informed that they were being solicited for the purpose of attending a sales presentation. The agreed-upon order directed National and certain individual respondents from directly making false representations about the purpose of sales solicitations or from furnishing distributors, retailers or franchisers with any means or instrumentalities which contain such representations.

The record in these proceedings reveals that the purpose of the consent agreement in Dkt. 8733 has not been fulfilled, for Emdeko distributors are deceiving their customers about the purpose of solicitations. There are several reasons for the failure of the consent agreement in Dkt. 8733. First, National has disseminated suggested lead materials to Emdeko distributors which, while perhaps adhering to the letter of the consent agreement, do not satisfy its underlying purpose. Second, other lead materials have clearly violated the language of the orders. Third, although National has urged distributors to abandon some of their more blatantly deceptive sales tactics, the distributors have been free to ignore such advice.

Under the circumstances described above, I believe that modification of the consent agreement is proper, although the Commission might well have instituted contempt proceedings despite its acceptance of National's compliance report.¹⁹ See *Mohr v. FTC*, 272 F.2d 401 (9th Cir. 1959), *cert. denied* 362 U.S. 920 (1960). [67]

(2) The Surveillance Provision

The evidence presented by complaint counsel in these proceedings reveals that the Emdeko distributors, who are not parties, deceive

¹⁹ Complaint counsel point out in their reply findings that the lead letter submitted by respondents in their compliance report "is in stark contrast to lead materials subsequently disseminated by respondents" (pp. 9-10).

their customers whereas the named parties have no customers which they can deceive.²⁰

The Commission apparently chose not to sue those involved in the direct deception of consumers to test the following theory: That those (the named respondents) who provide their customers (the Emdeko distributors) the means of deception are not only responsible for such deception but can be required to police their customers' compliance with the law and can be required to apply sanctions for their customers' noncompliance.

It is axiomatic "[T]hat a person is a wrongdoer who so furnishes another with the means of consummating a fraud. . . ." *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922) and there is little question that I may enter an order which prohibits the respondents from furnishing Emdeko distributors with documents such as the lead systems described above²¹ but complaint counsel say that this does not go far enough. They insist that there must be some way to make certain that not only the named respondents but the Emdeko distributors comply with any order which is entered.

There is, of course, one sure way of doing this: Name as respondents not only National, Emdeko and Messrs. Wanlass and Gilson but also every Emdeko distributor; however, there is an obvious disadvantage to this procedure and complaint counsel urge, instead, the adoption of a surveillance procedure under which drastic sanctions can be applied to the Emdeko distributors without involving the Commission in those difficult problems which arise when one is given his day in court. The scheme is simple enough, but its implications, as discussed below, are disturbing. Under the proposed orders, Emdeko must decide whether a distributor [68] has violated the order and, if it makes such a finding, it must terminate the distributor.²²

²⁰ Emdeko apparently does sell some products at retail but these sales are not involved in the present proceedings.

²¹ The consent agreement in Dkt. 8733 contains such a provision.

²² IT IS FURTHER ORDERED that Respondents. . . .

4. Upon receiving actual knowledge from any source (including but not limited to Respondents' program of surveillance, consumer complaints, or representatives of the Federal Trade Commission) of facts indicating a Violation of any provision of this Order by any Distributor, or by any of such Distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or customers, Respondents shall within 24 hours notify such Distributor by certified mail, return receipt requested, that such violation of this Order has occurred ("Notice"), and that Respondents will permanently discontinue dealing with said Distributor upon receipt by Respondents of actual knowledge of one (1) or more further Violations of this Order by such Distributor, or any of such Distributor's present and future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or customers, within one hundred and eighty (180) days of receipt of said Notice by such Distributor. Respondents shall obtain from such Distributor written acknowledgement of receipt of such Notice, which acknowledgement shall indicate the date of receipt of such Notice.

Upon receiving actual knowledge from any source (including but not limited to Respondents' program of surveillance, consumer complaints or representatives of the Federal Trade Commission) of facts indicating one (1) or more Violations of any provision of this Order, within one hundred eighty (180) days following a

(Continued)

Complaint counsel attempt to justify this procedure by arguing that respondents and the Emdeko distributors are [69] engaged in a "unitary enterprise" (CPF, pp. 25-29). Alternatively, they argue that since respondents have the inherent authority to prevent their customers' deceptive acts and practices and have not done so, they are liable for those acts and practices (CPF, pp. 13-24).

The difficulty is that complaint counsel's "inherent authority" theory relies on a case which is so inapposite that, if anything, it disproves the theory. That case is *P. F. Collier & Son Corp. v. FTC*, 427 F.2d 261 (6th Cir.), cert. denied, 400 U.S. 926 (1970) in which the Commission held that a parent was responsible for the activities of a subsidiary and noted:

The enterprise is clearly a unitary one, regardless of the particular corporate structure adopted at any given time through which to carry out the Crowell-Collier business. 75 F.T.C. 241, 291 (1969).

However, as respondents point out, this statement was made because there was no question that the parent was intimately involved with its subsidiary. Crowell-Collier not only wholly owned its subsidiary, it

interchanged personnel with its subsidiaries and maintained common or overlapping officers and directors; operated through its subsidiaries, which were often created and dissolved for purposes unrelated to the business carried on by the corporate complex; approved the use by its subsidiaries of the parent's name and goodwill in order to develop favorable public associations between the parent and its subsidiaries; and possessed and exercised ultimate control over Collier & Son. *P. F. Collier, supra* at 267.

It has been proved in these proceedings that none of the respondents now own any of the stock of incorporated distributors. The individual respondents do not serve as officers or directors of incorporated distributors and the corporate respondents share no officers or directors with incorporated distributors. The distributors were not created or dissolved by the respondents, and respondents did not possess or exercise ultimate control over Emdeko distributors. Respondents did permit some use of the Emdeko trademark by distributors but to no greater extent than any manufacturer permits its purchasers similar liberties. The factual distinctions between these proceedings and *P. F. Collier* could not be more striking.

[70] The same problem exists when complaint counsel's "unitary enterprise" theory is analyzed, for the cases cited as supporting it

Distributor's receipt of the aforesaid "Notice," by a Distributor, or by any of such Distributor's present or future dealers, franchisees, licensees, employees, salesmen, agents, solicitors, independent contractors, or customers, Respondents shall permanently discontinue dealing with such Distributor.

have no discernible relationship to the theory. For example, complaint counsel argue that seller and buyer are engaged in a unitary enterprise if the seller exercises direction and control over the buyer's nominally independent enterprise, citing, *inter alia* (with a *cf.*), *P. F. Collier*, which did not involve buyer and seller but parent and wholly-owned subsidiary. They also claim that buyer and seller are engaged in a unitary enterprise if the buyer uses the name and reputation of the seller in representing the product's name, but the cases cited (CPF, p. 26 n. 39) do not involve a seller-buyer relationship. For example, *Globe Readers Service, Inc. v. FTC*, 285 F.2d 692 (7th Cir. 1961) was concerned with a transparent attempt by a magazine subscription business to insulate itself from liability for its solicitors' representations by setting them up as independent contractors. The court affirmed a Commission finding that respondent was liable for its solicitors' acts and practices but there was no evidence that the solicitors purchased and resold magazines; instead, they simply took orders on behalf of respondent. It is true that the solicitor used respondent's name when contacting customers, but this was not a basis for liability; indeed, the court noted that respondent referred to the solicitor as "the agent" and "our representative." *Id.* at 695. The same problem exists with respect to all of the cases cited by complaint counsel. None directly support the theory and it requires greater imagination than I have to find a convincing connection between their facts and the facts in these proceedings.

Nevertheless, while I do not accept complaint counsel's legal reasoning, I conclude that respondents are answerable for the distributors' acts and practices since they developed, disseminated and recommended the use of a deceptive sales technique. Furthermore, because of respondents' involvement with the distributors' illegal acts and practices, I will enter an order prohibiting them from engaging directly in such acts or practices or from furnishing the distributors with deceptive lead systems and sales presentations; however, this is nothing new. See *Winsted, supra*.

What I cannot and will not do is enter an order which, in effect, applies legal sanctions to distributors who are not parties to the proceeding and which permits those [71] sanctions to be enforced, not by the Commission or the courts, but by the named respondents.

Complaint counsel wave away this problem: "One of the advantages of the 'bright line' compliance requirements in the order is that they will eliminate uncertainty regarding what practices will result in termination" (CPF, p. 65). In other words, since the order's

language is so clear, we can safely trust respondents with deciding which distributors have violated its terms.²²

Under this doctrine, a singular result would obtain: If the Commission believes, in the future, that the named respondents are violating the order (assuming that one is entered), it will have to institute contempt proceedings and accord respondents all of the benefits of due process. On the other hand, distributors who are *not* parties to these proceedings and who have been given no opportunity to challenge the order could be terminated by respondents for "violations" of the order without being permitted to contest the termination either before the Commission or the courts.

Complaint counsel respond that this is no great hardship since distributors can now be terminated at will but that is not a certainty in view of some of the distributors' substantial investments in their businesses. Furthermore, the distributors might have advanced other arguments to refute the claim that they can be terminated at will if they had been given the opportunity to intervene in these proceedings.

Although the distributors are undoubtedly aware of these proceedings, they are not sophisticated enough to divine that entry of the proposed order could result in their termination and there is no evidence that the Commission informed them of this fact. While the distributors [72] might not be indispensable parties to these proceedings,²³ they certainly had the right to intervene in them and might have attempted to do so if they were informed of the possible effect of the proposed order. See *Pepsico Inc. v. FTC*, 472 F.2d 179, 184 (2d Cir. 1972), *cert. denied*, 414 U.S. 876 (1973) ("If this had been a civil action, intervention by the bottlers would have been not a matter of grace but of right. . ."). The distributors were denied that right by the Commission's inaction.

One final consideration must be mentioned. The testimony presented by complaint counsel establishes that several Emdeko distributors have engaged in some of the practices challenged in the complaints and it might be argued that despite the procedural problems discussed above, the sanction of discontinuance is justified. However, it may be that there are several Emdeko distributors who have not adopted respondents' recommended sales techniques and who are not deceiving their customers. With respect to this class of

²² I do not share complaint counsel's optimistic claim that the proposed order contains no uncertainties. The Commission probably believed that the order it entered against the Colgate Company prohibiting the use of mockups was a model of lucidity, but two Court of Appeals decisions, a clarification of the order by the Commission and Supreme Court review were required before its meaning was finally settled. See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

²³ Compare *National Licorice Co. v. NLRB*, 309 U.S. 350, 365 (1940) with *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 233-34 (1938).

distributors, at least, I believe it is unfair to deny them the right to intervene and show that the sanction of discontinuance should not be imposed.

Thus, because the distributors were not given the right to intervene and challenge the surveillance procedure and because of my misgivings about the fairness of that procedure, I will not enter that part of the order which requires respondents to terminate distributors who violate the order. Because of this, there is no need to resolve the dispute between complaint counsel and respondents over what type of customer should be included in the definition of distributor.²⁴

(3) Holder in Due Course and Cooling Off Disclosure

Respondents did not suggest that distributors withhold from their customers the fact that their obligations might [73] be assigned to a financial institution nor did they encourage distributors to hide from their customers their right to cancel sales contracts within three business days, and including prohibitions against such conduct in the order is not justified. In any event, since statutes and regulations mandate inclusion of holder in due course and cooling off language in all sales contracts, putting identical language in the order is unnecessary. See *Mutual Construction Co.* [1973-76 Transfer Binder] Trade Reg. Rep. ¶ 21,121 (March 30, 1976 [87 F.T.C. 621]).

(4) Savings Representations

Complaint counsel have abandoned their claim that respondents have made false price savings representations and that part of the proposed order relating to this claim will not be entered.

(5) The Verbatim Disclosure

Respondents object to inclusion in the order of a requirement that respondents specifically disclose that they are making a sales presentation. The evidence presented in these proceedings convinces me, however, that the most unequivocal disclosure of the true purpose of the distributors' solicitations and sales presentations, including the 3" x 5" card, is essential; otherwise, distributors will continue successfully to hide that purpose from their customers. See *Encyclopedia Britannica, supra*:

The company-prescribed disguise techniques necessitate inclusion of an order

²⁴ Although the word will be included in the order I enter, respondents cannot dispute the conclusion that they can be prohibited from providing any of their customers (whether they are Emdeko distributors or retailers such as J. C. Penney) with the instrumentalities with which to deceive the ultimate consumer.

provision requiring clear and conspicuous disclosure of the fact that the representative is a salesman and of the true purpose of gaining entry into the home.

I have also added an order provision requiring respondents to encourage certain customers to make the same verbatim disclosures in their (the customers') sales presentations.

(6) Liability of the Individual Respondents

Messrs. Wanlass and Gilson are shareholders in and hold policymaking positions with the corporate respondents and were deeply involved in the development and dissemination of deceptive lead materials and sales presentation techniques. Furthermore, in the Derby Tapes and through their participation in conventions and workshops, they encouraged Emdeko [74] distributors to adopt selling techniques which, without question, were designed to deceive their customers in several respects. Inclusion of Messrs. Wanlass and Gilson in the order is more than justified because of their participation in the illegal practices described above and the possibility that, otherwise, they might evade the order by using the same illegal selling techniques in their individual capacities. See *Steven Rizzi* [1973-76 Transfer Binder] Trade Reg. Rep. ¶ 20,862 (Feb. 25, 1975 [85 F.T.C. 274]); *Travel King, Inc.* [1973-76 Transfer Binder] Trade Reg. Rep. ¶ 21,024 (Sept. 30, 1975 [86 F.T.C. 715]).

C. Summary

1. The Commission has jurisdiction over the acts and practices of all respondents.
2. Several Emdeko distributors have made the following representations:
 - a. That their customers are specially selected.
 - b. That a survey is being conducted.
3. The above representations were not true and were and are deceptive.
4. Several Emdeko distributors have failed to disclose to their customers that a sales presentation would be made.
5. Several Emdeko distributors have used high pressure tactics during sales presentations.
6. The failure to disclose that a sales presentation would be made and the use of high pressure sales tactics was and is deceptive.
7. Respondents have encouraged Emdeko distributors to adopt the deceptive practices described above and have furnished them

with the means and instrumentalities whereby they have deceived their customers as described above.

8. Therefore, respondents have violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1).

9. The public interest requires that the order issued in Dkt. 8733 be, and it hereby is, reopened, altered and modified.

[75] 10. The public interest requires that the following order be, and it hereby is, entered in Dkts. 8733 and 8973.

ORDER

It is ordered. That respondents Emdeko International, Inc., its successors and assigns, and its officers, and Anthony J. Wanlass and Edward J. Gilson, individually and as officers of said corporation (hereinafter referred to collectively as "respondents"), and respondents' agents, representatives, and employees, directly or through National Housewares, Inc., or any other corporation, subsidiary, division or other device, in connection with the offering for sale, sale or distribution of any products in commerce, as "commerce" is defined in the Federal Trade Commission Act, do each forthwith cease and desist from:

1. Representing orally, in writing, or in any other manner, directly or by implication:

a. That prospective customers have been selected, unless the method of and basis for selection is clearly, conspicuously, and truthfully disclosed to prospective customers in immediate conjunction with such representation.

b. That respondents are conducting a survey, gathering marketing information, or would like information about a consumer's [76] financial position, employment, marital status, age, or other personal matters, unless immediately prior to making each such representation, the following disclosure is made *verbatim*:

WE WOULD LIKE TO ASK YOU SOME QUESTIONS SO THAT WE MAY DETERMINE WHETHER TO OFFER YOU AN OPPORTUNITY TO ATTEND A SALES PRESENTATION CONCERNING OUR PRODUCTS.

Each word of such *verbatim* disclosure shall be at least as conspicuous and emphatic as the most conspicuous and emphatic word in said contact.

2. Failing to disclose the following *verbatim* within the first fifty words of all contacts with consumers, orally or in writing, either by mail, telephone, in person, or by any other means:

WE WOULD LIKE TO HAVE THE OPPORTUNITY TO MAKE A SALES PRESENTATION TO YOU CONCERNING OUR PRODUCTS [OPTIONAL ADDITIONAL PHRASE:] PROVIDED THAT YOU MEET OUR CREDIT [AND/OR OTHER TRUTHFULLY STATED] QUALIFICATIONS.

Each word of such verbatim disclosure shall be at least as conspicuous and emphatic as the most conspicuous and emphatic word in the body of such contact.

3. Failing to present a card 3x5 inches in dimension with all words in 10 point boldface type, with the following [77] information *verbatim*, and none others, in the indicated order, to each person whom respondents intend to engage in a sales presentation, immediately upon meeting each such person at the place where respondents or their distributors intend to engage such person in such sales presentation; to direct each such person to read the information contained on such card; and to provide each such person with an adequate opportunity to read the card before engaging such person in any sales solicitation:

- (1) the name and permanent address of the firm;
- (2) the name of the sales person, followed by the term "Sales Representative";
- (3) the terminology: "The purpose of this meeting is to solicit the sale of [applicable product(s)].";
- (4) the terminology: "If you have any questions or dissatisfaction with our methods of doing business, please telephone toll free [respondents' toll-free telephone number], or write to [respondents' address for consumer letters]."

4. Failing to maintain a toll-free telephone number for receipt of consumer complaints, comments, and inquiries concerning respondents' activities or the activities of their distributors, dealers, retailers or franchisees and a specifically designated address for receipt of written consumer [78] complaints, comments, and inquiries. This file shall be made available, at their request and upon reasonable advance notice, to representatives of the Federal Trade Commission during respondents' business hours.

It is further ordered, That respondents do each forthwith cease and desist from furnishing distributors, dealers, retailers or franchisees with any means, instrumentalities, directions, instructions or encouragement whereby the public may be misled or deceived as to any of the matters or things prohibited by this order.

It is further ordered, That respondents shall encourage all present and future Emdeko distributors, and all other distributors, dealers, retailers, or franchisees to whom respondents give advice with

respect to sales techniques, to use, in their sales presentations, the disclosures required of respondents in paragraphs 1b, 2 and 3 of this order.

It is further ordered, That the corporate respondent shall deliver, or cause to be delivered, a copy of this order to its distributors, dealers, retailers or franchisees.

It is further ordered, That the corporate respondent shall notify the Commission at least 30 days prior to any proposed change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence [79] of a successor corporation, the creation or dissolution of subsidiaries or any other change in said corporation which may affect compliance obligations arising out of the order.

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

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

It is further ordered, That 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.

OPINION OF THE COMMISSION

BY COLLIER, *Commissioner*:

[2] Emdeko International, Inc. ("Emdeko"¹) is the survivor corporation to a business that was organized in the early 1960's by (and took its name from) Easy Pipella, Mike Pipella, Dave Bigler, Eddie Gilson,² Keith Bigler, and Owen Bigler (Tr. 549, 2133).³ These

¹ The original corporation was named National Housewares, Inc. (F. 2.) In 1969, National was merged into Emdeko and became a division. (F. 3.) For purposes of this opinion, Emdeko refers to the extant corporation as well as its predecessors, divisions, and subsidiaries. (See F. 6.)

Also for purposes of this opinion, the following abbreviations will be used as needed: Tr. (Transcript), F. (Finding of the Administrative Law Judge), CX (Complaint Counsel's Exhibit), RX (Respondents' Exhibit), CAB (Complaint Counsel's Appeal Brief), and RAB (Respondents' Appeal Brief).

² Edward J. Gilson is also a respondent in this proceeding.

³ Respondents' counsel notes that Easy and Michael Pipella and David and Keith Bigler are no longer affiliated with Emdeko. (RAB 7.) The evidence indicates, however, that they were thus affiliated through the 1960's and into the 1970's. (CX 345, CX 347, CX 455, CX 459, CX 460, Tr. 560-62, 565-66, 568, 2131-32, 2137, 2142, 2153-54.) Both they and Mr. Gilson were parties to the 1968 consent order discussed below at pages 24-26.

founders of Emdeko separately owned and operated three retail establishments in Montana, Utah, and California. (Tr. 2134.) Emdeko was primarily a wholesaler: it purchased household products from manufacturers and resold them to retailers. (F. 6.)⁴ Throughout the relevant period, the great bulk of Emdeko's sales were to its distributors. (F. 14.)

Over the years, Emdeko's retail distribution system grew from three distributors in 1961 to 200 in 1970, but by the time of trial it had receded to 34. (F. 14.) As a general rule, the distributorships were independent businesses in the sense that Emdeko did not own them. (F. 10.) Distributors paid their own expenses and derived their revenues from retail sales of Emdeko products. (F. 14.) At the same time, Emdeko usually selected its distributors from the ranks of salesmen who worked for existing distributors. (Fs. 60, 78, 80, 95, Tr. 2146-2147.) Various directors, officers, and employees of Emdeko owned, operated, or worked for distributorships before, during, or after their affiliation with Emdeko. (*Id.*, Fs. 56, 80.) Emdeko itself owned a distributorship. (Tr. 560-66, 2296.)

[3] The selling techniques of Emdeko distributors are remarkably consistent throughout the country and have been for a substantial period of time.⁵ (Fs. 49, 182.) They ply the so-called in-office "package" sales technique which is at the heart of the case. Its broad outlines, as well as its details, are graphically revealed in the exhaustive testimony of consumers, distributors, and Emdeko personnel and in the multitude of documentary exhibits⁶ that comprise the record. The picture that emerges from the entire record is best viewed from the perspective of the consumer.

Typically, the consumer is first contacted at home either by telephone or by direct mail. (Fs. 27, 28, 32, 34, 53, 66, 78, 81, 84, 87, 91, 92, 98, 102, 106, 113, 120, 128, 134, 140, 149, 155, 162, 169, 174.) Telephone calls are disguised as survey questionnaires: consumers are asked to cooperate in answering a handful of questions about the products they use in their home and a few personal questions about their financial, employment, and marital status. (Fs. 28-30, 53, 92,

⁴ Emdeko's activities include manufacturing some of the products that it wholesales to distributors and others. (F. 6.)

⁵ The ALJ concluded quite correctly that the basic similarity in sales methods gave rise to an inference that Emdeko was responsible for these sales practices. *Cf. Standard Educators, Inc. v. FTC*, 475 F.2d 401, 402 (D.C. Cir. 1973): "The Commission does not engage in speculation when it rejects the conclusion that these similarities occurred purely by coincidence and instead infers that they were the result of direction from above."

⁶ Of particular interest are the numerous documents that Emdeko sent its distributors. These materials included detailed advice on operating a distributorship. Among them are CX 7 (script for telephone personnel); CX 10 (manual for conducting sales meetings); CX 17-20 (transcripts of the "Derby Winner Tapes" containing detailed tips on sales presentations); CX 23-25 (forms of "letter authorizations" used in the sales presentation); CX 350 and 351 (comprehensive manuals containing detailed advice on all aspects of creating and operating a distributorship); CX 367, 454, and 562 (scripts for salesmen). See Fs. 50, 57, 59, 61, 76, 77, 79-82, 84, 87, 92, 93.

140, 169, 174.) They are then told that they will be receiving a gift in gratitude for their cooperation and that they should watch their mail. Within days, the cooperating consumer receives a letter which explains that he is entitled to one of several enumerated gifts (the specific gift is undisclosed) and that to claim it he must call to arrange for an appointment. (Fs. 31, 81, 88, 106, 113, 120, 128, 134, 140, 149, 169, 174.)

[4] The direct mail solicitation alternative skips the telephone questionnaire. The consumer is congratulated by letter on the fact that he is entitled to a free gift. He is informed that he should call to arrange for an appointment to pick it up. (Fs. 31, 32, 66, 81, 84, 87, 98, 106, 113, 120, 149, 155, 162.)

Emdeko and its distributors refer to these telephone and letter contacts as "lead systems." The record contains detailed descriptions of the operation of lead systems that were published and disseminated by Emdeko to its distributors, including verbatim transcripts for "telephone girls" and samples of letters. (Fs. 26-35, 50, 57, 59, 61, 76, 77, 81, 82, 87, 92.)

When the consumer calls for an appointment to pick up his gift,⁷ he is assigned a convenient time, given directions to the distributor's office, and asked to bring his spouse.⁸ If he asks what is involved, he is told that he is entitled to a gift and is under no obligations. If he asks why, he is told that his opinions will be sought and the gift is for his time. (F. 33.) Once again, Emdeko supplied distributors with detailed suggestions for these telephone operations, including verbatim scripts. (See Fs. 15, 29-33.)

When the consumer arrives at the distributor's office he is greeted by a receptionist. (Fs. 39, 99, 103, 107.) He is told that a "supervisor" or "counselor" will be with him shortly (Fs. 67, 107; CX 351, p. 15) and he is invited to browse around a room where samples of Emdeko products are displayed. (Fs. 53, 99, 103, 141, 156, 164.) It is not apparent to the eye that these products are for sale: they do not have price tags or other price markings and they are visible in single units rather than on stocked shelves. (F. 103; CX 350, pp. 5A-5B.) Emdeko, once again, supplied distributors with suggested layouts and floor plans for displaying products. (F. 15; CX 350, p. 3.)

[5] In many cases, consumers were also asked by the receptionist to view one or more movies that touted the qualities of Emdeko products or Emdeko itself.⁹ Among the movies were ones narrated by

⁷ In some cases, calls to arrange appointments are initiated by distributors to persons who have previously received letters but who have not called the distributor. (Fs. 32-33.)

⁸ Consumers who are poor sales prospects are not given appointments. (Fs. 27, 184.)

⁹ The descriptions of Emdeko were apparently vague and did not explain the selling techniques to which the consumer was about to be subjected. Respondents referred to them as "image films." (CX 17.)

Audie Murphy and Art Linkletter. (Fs. 53, 99, 103, 107, 114, 129, 135, 141, 156, 164.)

Minutes later the "supervisor/representative" arrives, greets the consumer, and invites him and his spouse into an office. (Fs. 107, 121, 129, 136, 141, 150, 156, 164, 170, 175.) After introductions and some small talk all are seated and the representative announces that he is going to do several things.

The first is to present the promised — and as yet unidentified — gift. The presentation is often made immediately thereafter; although in some cases, the gift's identity is revealed and the actual presentation is deferred until the representative finishes his oral presentation. (Fs. 54, 88, 99, 103, 107, 122, 131, 142, 150, 157, 164, 172, 175.) The gifts vary from distributor to distributor and from time to time but consist of such items as steak knives (Fs. 99, 103, 137), portable barbeque grills (F. 172), vacations (*i.e.*, hotel accommodations but not transportation) to distant cities (Fs. 107, 114, 122, 153), perfume (Fs. 67, 172), cases of canned soup (Fs. 128, 134), cordless electric scissors (F. 142), or carving sets (Fs. 67, 107, 157, 164, 178.)

The second benefit announced by the representative is to enroll the consumer in a bonus or sweepstakes contest, (Fs. 44, 54, 69, 99, 104, 143, 157, 164.) after which the consumer is asked to select from among a range of potential prizes. (Fs. 39, 143, 164.) He is presented with brochures depicting different products and describing their characteristics. (Fs. 109, 116, 123, 129, 136, 150, 158, 170, 175.) These products, which are the same as those on display outside the representative's office, are then "sizzled," that is, the representative extols their characteristics. (Fs. 39, 69.)

During this product-by-product review the consumer and his spouse are asked several questions: Would they use the product in their home? Which would they each like to have most of all? What do they regard as the most important characteristics of the product? (Fs. 63, 89, 116, 129, 136, 150, 158, 170.) The net effect of these questions is to [6] reinforce the earlier impression that the consumer's advice is being solicited as part of a market research program. (Fs. 65, 87, 115, 120, 129, 136, 151, 166, 170.) Sometimes the inference is made explicit: the consumer is told that a conventional retail store may soon be opened (Fs. 69, 168) or that a consumer attitude survey is being conducted to provide feedback to Emdeko about the products.

During this dialogue, the representative records the consumer's reactions on a printed worksheet. (Fs. 40, 42, 70, 109, 170.) Among the questions are ones that call on the consumer to estimate the prevailing retail prices for comparable products at local stores. (Fs.

40, 63, 109, 116, 123, 143, 150, 159, 170.) These estimates are also recorded on the worksheet unless the guesses are too low. In that case, the representative suggests a higher price and the estimate is "corrected" upward by reference to specific prices at conventional, well-established, retail stores. (Fs. 40, 116, 159.)

Two classes of products are reviewed in this manner: so-called "majors" and "minors." (F. 36.) Major products consist of fire alarm systems, sewing machines, stereo sets, auto stabilizers, and similar items. Minor products consist of small household appliances.

Once again, Emdeko's support to the distributors' conduct is substantial. It supplies the products, the promotion literature, forms of worksheets, and advice on obtaining comparable prices from local retailers. (F. 15.) More importantly, it supplies distributors with verbatim scripts to be read by "supervisors/representatives" (F. 15) and consumers testified that the representatives often read from such scripts word-for-word or recited them from memory. (Fs. 37, 60, 69, 80, 85, 99, 121, 154, 157, 166, 175.)

After the presentation of major and minor products, the consumer is shown copies of testimonial letters written by ostensibly satisfied users of Emdeko products. (F. 41.) The consumer is asked whether he would be willing to write similar letters that would be used in advertising and promoting the products among his neighbors. (Fs. 41, 54, 63, 64, 69, 100, 110, 117, 124, 129, 136, 144, 151, 160, 166, 170, 176.) An affirmative response is followed by a request that the consumer sign a release form. (Fs. 71, 137, 167.) According to the evidence, the release or authorization form serves another less apparent purpose: it breaks down the consumer's resistance to signing his name. (Tr. 1077.)

[7] This tactic is important to what follows: The "close." (Fs. 39, 42-48.) Following an explanation of the testimonial letter program, the consumer is presented with an offer. If he agrees to write letters, he can take home several of the products — both major and minor — not for the total of the prices that had previously been estimated, but for a fraction of that total. Thus, the term "package selling." (Fs. 36, 72, 118, 151.)

The record is replete with the vivid details of these transactions which typically last from one to two hours. (Fs. 54, 69, 104, 133, 139, 148, 153, 161, 178.) There is also ample evidence that the "close" is sometimes attended by high pressure tactics (Fs. 73, 101, 111, 112, 119, 152, 159, 161, 168, 177, 199-200) designed to overcome the consumer's resistance to paying \$400 to \$800 for the products. (F. 36.)

The record also reflects various sporadic actions by Emdeko to caution its distributors against engaging in blatant deceptions.¹⁰ (*E.g.*, F. 207; CX 350, pp. 1, 7, 8, 32, 55; CX 351, p. 23; CX 354.) These occasional warnings to distributors to eschew some unlawful practices either were insufficient to achieve their ostensible purpose or did not comprehend the fundamental illegality of the package method of selling that is revealed on the record.

Emdeko's basic in-office package sales scheme, as revealed by this record, is designed to collar consumers under misleading circumstances, strip their defenses, and cut off their options to search for substitute sources of products to fulfill their newly developed desires. The recommended procedures for selecting prospective consumers complement these objectives.¹¹ Neither Emdeko nor its [8] distributors are significantly constrained by the prospects of consumer dissatisfaction¹²; the capital investment to establish a distributorship is not significant.¹³ Space and furniture can be rented and Emdeko supplies distributors with products, sales aids and printed materials, and technical business assistance.¹⁴

From the initial lead system contact throughout the supervisor/representative *cum* salesman's presentation, and until the close, the consumer is carefully led to believe that he is not the target of a sales pitch. (Fs. 186, 187, 194-197.) References to sales presentations are avoided or evaded until the offer is sprung. (Fs. 31, 33, 35, 45-46, 55, 61, 65, 67, 74, 81, 85, 100, 105, 110, 118, 128, 130, 137, 138, 144, 148, 151, 159, 166, 187.) And until then, the impression is carefully created that the products or some of them would either be given away (*e.g.*, the initial gift and the bonus or sweepstakes contest) or that they would be supplied as part of a research, promotional, or advertising program (*e.g.*, the telephone survey, the worksheets, the testimonial letter program).

¹⁰ Even these admonitions, however, lose their force in the face of the attitude, communicated by "Bulletin #112" to "Distributors" from Mr. Swanson, an area director: "Make sure that all written materials conform to our National Code of Ethics. You may have salesmen make a verbal error occasionally. This is a hard matter to prove. Proof of a wrongdoing is easy to prove when it is in writing." (CX 35.)

¹¹ The one to two hour long sales harangue is costly to both consumers and distributors, so care is recommended in selecting out certain classes of individuals. Distributors were advised to collect information on creditworthiness at the outset to improve the prospects that financing would ultimately be available. (Fs. 35, 184, 188.) In addition, of course, wary individuals insulate themselves from the distributor by declining to be lured by the gift offer.

¹² Emdeko materials reveal concern with "remorses." These are consumers who are so unhappy with the products that they purchased or with the sales experience that they seek to cancel the sales agreement. This reaction may lead to refusals to pay the finance company, eventually jeopardizing the distributor's source of consumer credit. Emdeko advised its distributors: "No remorse customers should ever talk directly to a salesman. The salesman will try to save his deal at any cost and it may cost you as a distributor, financing or worse yet, your entire business. It has happened." (CX 8, p. 16.) Emdeko assisted distributors in obtaining financing. (F. 17.)

¹³ The record reveals that a distributorship may be established for a few thousand dollars. (Tr. 815-818, F. 84.)

¹⁴ The technical assistance consisted of such far ranging activities as visits by area directors, advice on hiring and firing, recommendations on how to lay out an office, suggestions and other assistance on getting financing for consumer sales, and tips on buttering up local better business bureaus. (Fs. 15-17; CX 350.)

[9] We hold that this method of selling by which a consumer is led to believe that he is not the target of a sales presentation when in fact he is, is an unfair and deceptive practice and is prohibited by Section 5 of the Federal Trade Commission Act.

The principal dispute presented by this appeal is not with the findings or conclusions that establish the existence of these sales techniques and their illegality, but rather with complaint counsel's contention that respondents should be held to account for these practices. Emdeko, Gilson, and Wanless all seek refuge behind the independence of Emdeko's distributorships.

The complaint charged that Emdeko possessed the inherent authority to control the acts of its distributors and that it did control those acts. It also charged that Emdeko encouraged, facilitated, implemented and furnished the means, instrumentalities, services and facilities for, and condoned, approved, and accepted the benefits derived from the allegedly illegal practices. The Administrative Law Judge found that Emdeko did not control its distributors. (Fs. 20, 21, 180, 181.) This finding is supported by the unchallenged testimony of numerous distributors and Emdeko personnel. In the face of evidence that Emdeko did not own distributors, did not finance their operations, did not hire or fire their personnel, and did not manage their daily affairs, complaint counsel virtually abandoned the control theory. We therefore do not need to delve further into the question of what kind of showing, if any, would overcome this evidence of lack of control.

The ALJ also declined to hold Emdeko responsible for its distributors' acts solely on the theory of "inherent authority" to control arising out of the supplier-customer relationship. We concur in this conclusion. Complaint counsel cites no direct authority for this theory of per se vicarious liability, and we have found none. Conceding that such a holding would "extend" the law, complaint counsel places great weight on recent developments in the allegedly analogous areas of products liability,¹⁵ Robinson-Patman [10] Act liability,¹⁶ and various consumer protection statutes.¹⁷ We find these arguments unpersuasive.

Complaint counsel's reliance on recent developments in the law of torts extending the zone of liability of a manufacturer of products for the quality and safety of those products is misplaced. These developments in so-called products liability law¹⁸ have proceeded on

¹⁵ See *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) and its progeny.

¹⁶ *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). Cf. *Abbott Laboratories v. Portland Retail Druggists Ass'n.*, 425 U.S. 1 (1976).

¹⁷ *E.g.*, Fair Packaging and Labeling Act, 15 U.S.C. 1451, *et seq.*

¹⁸ Complaint counsel cite *W. Prosser, The Assault Upon the Citadel*, 69 Yale L. J. 1099 (1960).

the reasonable premise that manufacturers are best situated to avert the undue economic and personal risks caused by defective products. Whatever the merits of this assumption, no similar assumption can be made about the risk avoidance capacities of suppliers for the marketing practices of their customers.

Complaint counsel's theory of per se liability of suppliers for the acts of their customers goes well beyond the recognized exceptions to the general rule of law that a person is not liable for the acts of another. Liability, as complaint counsel suggests, is a means of allocating risks of injury to those who are in a position to deal with them efficiently.¹⁹ It is argued in a conclusory fashion that suppliers should bear the risks for the unfair or deceptive acts of their customers because this system of liability would assure maximum compliance with the law. Such a rule would enlist an army of supplier-regulators to police the conduct of countless customers. To an agency charged with enforcing compliance with statutory legal standards, all of this potential assistance is an attractive prospect. It would make our tasks considerably easier. The advantages of such a rule are readily apparent.

The disadvantages, however, could be great. The costs such a rule would impose upon suppliers would ultimately be shouldered by consumers. It is not at all clear that [11] suppliers are universally or even generally in a superior position to minimize the risks of misbehavior toward consumers or to police potential violators.²⁰

While we do not foreclose the possibility that a different rule of liability might be appropriate in another particular context, the questions raised by a per se rule are not adequately addressed on this record and we decline to adopt complaint counsel's theory. Moreover, we have not lost sight of the fact that suppliers and customers may enter contractual agreements that protect the supplier's reputation from the misconduct of his customers. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, — U.S. —, n. 23 (June 25, 1977). But the freedom to enter such contracts without condemnation under the antitrust laws is not a sufficient reason for imposing these obligations on suppliers as a matter of law.²¹

The failure of complaint counsel's per se theory does not end the

¹⁹ R. Posner, *Economic Analysis of Law*, § 4.14 (1972).

²⁰ By contrast, the Commission concluded in connection with its trade regulation rule on Preservation of Consumers' Claims and Defenses, that consumer credit lenders usually possess superior capacity to assess the honesty of sellers with whom they deal frequently than do consumers of those sellers whose dealings are episodic. 40 F.R. 53506, 53509, 53514-15 (Nov. 18, 1975). One basis for this superior vantage point is the lender's experience in attempting to collect on debts of dissatisfied consumers.

²¹ Complaint counsel's reliance on *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968) is misplaced for the same reason. Moreover, Congress has imposed express obligations on suppliers with regard to their marketing activities under the Robinson-Patman Act.

inquiry. The complaint charged that Emdeko encouraged, facilitated, implemented and furnished the means for the illegal conduct and that it shared in the fruits of these practices. That Emdeko's fortunes were linked to the successes or failures of its distributors is inherent in the supplier-customer relationship. But the allegation goes further: it charges Emdeko with active involvement in its distributors' illegal conduct.

The ALJ found that the illegal practices were a direct result of Emdeko's influence and the distributors' enthusiastic adoption of the package sales method which, in turn, encouraged consumer deception. (F. 182.) He found that [12] this influence began with the teachings of Emdeko personnel. (F. 183.) He further found that Emdeko advised and encouraged distributors to use deceptive sales practices. (Id.) Respondents knew of and approved this conduct. (Fs. 15-24, 38, 62, 75, 94, 205, 208.) The ALJ found that Emdeko distributed numerous materials and information which both recommended the method and provided important tools for its use. (Fs. 15, 26-35, 50, 57, 59, 61, 76, 77, 79, 80, 81, 82, 84, 87, 92, 93, 194.)²² Finally he found that Emdeko was responsible for the illegal activities of its distributors because it developed a sales technique which encourages its practitioners to deceive consumers. (F. 208.)

✓ These and other findings squarely supported by the preponderance of the evidence clearly establish Emdeko's liability under Section 5 for the unfair and deceptive treatment that consumers received. The evidence and the ALJ's findings establish that Emdeko developed and refined the package selling scheme (Fs. 36-37); actively and enthusiastically promoted its adoption by distributors (Fs. 38, 205); produced and distributed the written materials that supported its use (F. 15); promoted, encouraged, and subsidized the cross-fertilization of ideas among salesmen and distributors to improve the efficacy of the sales methods (Fs. 16-20, 25, 38); observed occasional sales presentations by distributors' salesmen (F. 17, 75); and paved the way for potential distributors to receive training in these sales methods prior to entering the package business (Fs. 60, 78, 79, 80, 84, 86, 95.)²³

[13] Emdeko's liability under Section 5 is closely akin to the

²² Liability under the FTC Act for supporting an unlawful scheme rests on a well-settled principle. Its familiar formulation has often been repeated by the courts and applied in various analogous contexts: "One who places in the hands of another a means of consummating a fraud or competing unfairly in violation of the Federal Trade Commission Act is himself guilty of a violation of that Act." *Regina Corp. v. FTC*, 322 F.2d 765, 768 (3d Cir. 1963). See, e.g., *FTC v. Winsted Hosiery Co.*, 258 U.S. 483, 494 (1922); *Benrus Watch Co. v. FTC*, 352 F.2d 313, 318 (8th Cir. 1965), cert. denied, 384 U.S. 939 (1966); *Surf Sales Co. v. FTC*, 259 F.2d 744, 746 (7th Cir. 1958); *Goodman v. FTC*, 244 F.2d 584, 591-92 (9th Cir. 1957); *C. Howard Hunt Pen Co. v. FTC*, 197 F.2d 273, 281 (3d Cir. 1952).

²³ New distributors usually were drawn from among the employees of established distributors. In the words of respondent Wanlass, "So, it was monkey see, monkey do." Tr. 2234. See Tr. 1437-1447, 1474-1476.

liability of a contributing tortfeasor. The principle is succinctly stated by the authors of the Restatement: "For harm resulting to a third person from the tortious conduct of another, a person is liable if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." Restatement of Torts, § 876.²⁴ In the context of the FTC Act, respondents must be presumed to know the legal requirements of Section 5, and in any event, there is ample evidence that they were well aware both of their distributors' conduct and of its unlawful character. (Fs. 205-206.)

Emdeko next argues that if its conduct with respect to its distributors is deemed objectionable it should only be ordered to cease and desist from repeating those very same transgressions in the future. Sympathetic to that argument, the ALJ has recommended an order provision to which respondents do not object, prohibiting them from "furnishing distributors . . . with any means, instrumentalities, directions, instructions or encouragement whereby the public may be misled or deceived . . ." and ordering them to "encourage all . . . distributors to whom respondents give advice with respect to sales techniques, to use, in their sales presentations" certain enumerated affirmative disclosures.

Complaint counsel argue that the recommended order is inadequate to protect the public or prevent continuation of the illegal practices. We agree. The ALJ's proposed order would simply inhibit future expansion of Emdeko's deceptive sales methods. It would do nothing to assure that continuing injury to future consumers is prevented.

The Commission is empowered to prevent the use of unfair or deceptive practices by requiring offenders to cease and desist from using them. 15 U.S.C. 45(a)(6), 45(b). Countless decisions, many of which are cited by the parties, set forth the familiar formulations of the scope and limitations on our authority to fashion appropriate relief. The Commission enjoys considerable latitude as long as its order bears a "reasonable relation" to the violations. [14] *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946).²⁵ With this guidance in mind,

²⁴ The general principle of law has been applied in varying contexts. See, e.g., *Warner & Co. v. Lilly & Co.*, 265 U.S. 526, 530-531 (1924); *Keel v. Hainline*, 331 P.2d 397 (Okla. 1958); *Jaffray v. Hill*, 191 N.E.2d 399 (Ill. App. 1963); *Perigoni v. McNiece*, 262 So.2d 407 (La. Ct. App. 1972). See also cases cited in note 22, p. 12 *supra*.

²⁵ There are a host of cases uttering the same fundamental test in varying factual contexts, sometimes affirming our orders and sometimes not. E.g., *FTC v. Colgate Palmolive Co.*, 380 U.S. 374, 392-95 (1965) (order enforced); *FTC v. Broch & Co.*, 368 U.S. 360, 363-68 (1962) (order enforced); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392-93 (1959) (order enforced as modified); *FTC v. National Lead Co.*, 352 U.S. 419 (1957) (order enforced); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952) (order enforced); *FTC v. Cement Institute*, 333 U.S. 683, 726-30 (1948) (order enforced); *Jacob Siegel Co. v. FTC*, 327 U.S. 608 (1946) (remanded); *Warner Lambert Co. v. FTC*, 562 F.2d 749 (D.C. Cir. 1977) (order enforced as modified); *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977) (order enforced as modified); *ITT Continental Baking Co. v. FTC*, 532 F.2d 207 (2d Cir. 1976) (order enforced as modified); *Fedders*

(Continued)

we proceed to the design of an appropriate order grounded in the record of this case.

✓ The major shortcoming of the ALJ's proposed order is that it exonerates respondents from responsibility for the continuing effects of their misconduct.²⁶ Respondents argue that we are without power to order greater relief than the ALJ has recommended, but we are unwilling to concede that we must stand by and helplessly watch respondents continue to support a deceptive and unfair scheme which they developed, promoted, and perfected. As participants in sales practices that have been found to be illegal, respondents will be ordered to cease and desist from further participation in those and similar practices in the future. In short, the order we issue today will assure that respondents do not continue to support these practices to the prejudice of consumers.

[15] We have adopted those parts of the ALJ's recommended order that prohibit respondents from furnishing their customers with the means to mislead consumers, that direct Emdeko to deliver copies of the order to its customers, and that require the submission of specified reports. The order also prohibits respondents from promoting the use of, using, or assisting others in the use of "package selling." This prohibition includes selling products to those who engage in "package selling." The term "package selling" is defined by the order to cover the unlawful practices that are revealed on this record.

These practices include soliciting consumers to attend a sales presentation by telephone, mail, or other direct communication or by offering a gift or a chance to receive a gift unless consumers are expressly and simultaneously told that they will be subjected to a sales presentation and unless they are given an opportunity within three days to cancel the purchase. Package selling also includes the sale of three or more unrelated products for a single price in the absence of the same disclosure and unless an opportunity to cancel the purchase is afforded. The term also includes any sales presentation accompanied by a representation that the consumer is participating in a survey, promotion, advertising program or any sales presentation attended by deceptive or misleading implications regarding the actual sales purpose of the contact. Under the order, respondents may escape liability if within 30 days of learning that

Corp. v. FTC, 529 F.2d 1398 (2d Cir. 1976) (order enforced); *Spiegel, Inc. v. FTC*, 540 F.2d 287 (7th Cir. 1976) (order enforced as modified); *Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976) (remanded); *National Dynamics Corp. v. FTC*, 492 F.2d 1333 (2d Cir.), cert. denied, 419 U.S. 993 (1974) (remanded); *L. G. Balfour Co. v. FTC*, 442 F.2d 1 (7th Cir. 1971) (order enforced as modified); *Windsor Distributing Co. v. FTC*, 437 F.2d 443 (3d Cir. 1971) (order enforced); *Tashof v. FTC*, 437 F.2d 707 (D.C. Cir. 1970) (order enforced).

²⁶ If and to the extent that the effects of respondents' misconduct dissipate with time, so too will their potential liability under the order we are issuing.

their customer has engaged in package selling they discontinue dealing with that customer for one year. To monitor compliance with these provisions we have included an expanded requirement for record retention and reporting of complaints received from consumers or law enforcement agencies.

The order that we are issuing is similar in its effects to both the original notice of contemplated relief and the order that complaint counsel has urged upon this appeal. In particular it prohibits respondents from continuing to supply products to customers who engage in unlawful sales practices. It also requires verbatim affirmative disclosures to consumers and cooling-off periods but only in those situations where consumers are exposed to a sales presentation on the heels of being solicited by a direct communication or with the promise of a gift. The order also requires a cooling-off period in connection with the sale of three or more unrelated products.

Respondents have objected to the requirement for affirmative disclosures to consumers upon each contact with them that the purpose of the contact is to make a sales presentation. The record indicates that Emdeko test-marketed this [16] requirement during the course of the proceeding and found that consumers who were advised that they would be the target of a sales pitch declined to subject themselves to it. (F. 27, Tr. 2297.) Respondent argues on appeal that this result flowed from the unreasonable requirement that the disclosure be made at every contact. But the testimony suggests that the information itself rather than its repetition was the cause of consumer disinterest. (Tr. 2297.)

This inference is buttressed by the statement of Errol Schenk, an Emdeko distributor's salesman who was denominated by Emdeko as a "Derby Winner": "If you tell a guy you're going to sell him, he ain't gonna buy . . . that's for sure." (F. 46.) It is also reinforced by Emdeko's own advice to distributors on how to discourage "rejects"²⁷ from accepting their invitations to pick up their free gifts. Telephone personnel (who are otherwise urged to conceal the purpose of the visit to the distributor's office in the course of arranging appointments) are told to tell rejects: "Did you read your letter over? O.K. Now what we are doing is selling all those products in your letter and we would like you to buy some of them . . . Now, it does take about two hours of your time to talk to our salesman when you come in." (F. 35.)

If the record demonstrates anything, it demonstrates convincingly

²⁷ "Rejects" are those who receive letters offering free gifts but who are not regarded as good sales prospects. This group includes the retired, the laid off, bachelors, widows (not working), and widowers. (Fs. 27, 35.)

that a forthright and succinct statement of the salesman's intentions will be potent medicine for the deception and unfairness that inheres in the package-selling method. There is no question in our opinion that an affirmative disclosure requirement is reasonably related to the illegal practices. The major deceit of these practices was the concealment and misdirection perpetrated on consumers to avoid the inference or implication that a sales presentation would be attempted. Since the respondents' method of package selling possessed this fatal characteristic, we conclude that the affirmative disclosure is necessary to purge its illegality.

The added requirements that the disclosures be made in specified language and at each contact are equally necessary to prevent a recurrence of the illegal practices. Respondents and the distributors have apparently grown accustomed to Emdeko's providing specific scripts for use in package selling. Emdeko's own test marketing program of this [17] language (however unsuccessful from Emdeko's perspective) refutes any suggestion that this condition cannot be met. Similarly, the record fully supports the need for a disclosure at every contact. As promoted by respondents and practiced by their distributors, package selling sometimes involves numerous contacts with a consumer, sometimes several days apart and often attended by a lapse of memory by the consumer regarding the earlier contact. (F. 28, 31, 32, 174.) Repeating the disclosure will simply provide the sort of refresher information that the record indicates is warranted and that respondents themselves implicitly acknowledge is needed to entice the consumer to the local distributor's office.

The cooling-off requirement is manifestly necessary where, among other things, consumers are solicited by direct communication or gift offers or where several unrelated products are sold for a single price. These situations present conditions that are especially conducive to high pressure sales techniques²⁸ and that actually led to the exertion of such pressure on consumers in this case.

We agree with the ALJ that the order should prohibit respondents from engaging in certain enumerated practices in connection with retail sales even though retailing activities by Emdeko were not the subject of this litigation. This coverage is plainly necessary to prevent easy evasion of the primary prohibitions.²⁹ The record reflects the ease with which distributorships can be established. (Fs.

²⁸ Cooling-off relief is an established remedy to combat high pressure selling. See, e.g., *Cooling-Off Period for Door-to-Door Sales*, 37 F.R. 22934 (Oct. 26, 1972), codified at 16 C.F.R. 429.

²⁹ This case is factually distinguishable from those in which no such possibility of evasion was present but where, instead, the Commission's order attempted to reach entirely different kinds of practices than those that were found to be unlawful. See, e.g., *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977); *ITT Continental Baking Co. v. FTC*, 532 F.2d 207 (2d Cir. 1976).

56, 80, 84, 86.) It also reveals instances where Emdeko or its officers owned distributorships. (Tr. 560-566, 2134, 2296-97.) In addition, distributors and their employees graduated to become Emdeko employees. (Fs. 56, 80, Tr. 1555-1563.) Against this background, there is nothing to suggest that respondents could not easily become distributors in the [18] future, particularly if by doing so, the prohibitions of the order would be avoided. It is difficult to imagine a more apt occasion for exercising the Commission's authority to fence in the violator and prevent a recurrence of some variation on the old theme. *FTC v. Colgate Palmolive Co.*, 380 U.S. 374, 395 (1965); *FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 392-93 (1959); *FTC v. National Lead Co.*, 352 U.S. 419, 428-29 (1957); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952).

Respondents raised an additional objection to the order sought by complaint counsel that would appear to be largely mooted by the approach we have adopted. Some portion of Emdeko's products have apparently been sold through a manufacturing subsidiary (Casady Engineering) to conventional, well-established retail stores. Presumably, however, these retailers do not engage in "package selling" as defined by the order. Accordingly, respondents' concerns that these relationships would be adversely affected by the order that we are issuing would appear to be without foundation.

Since this order is directed at terminating the future effects of respondents' misconduct, we have considered limiting portions of its duration to a fixed period of years. It might be argued, for example, that the effects of respondents' previous actions to promote their package sales system will eventually dissipate. A time limit was rejected for several reasons. First, Emdeko's package sales system has exhibited remarkable tenacity since being launched in the early 1960's. Second, the record shows that Emdeko's actions caused consumer injury at the hands of distributors, but it does not show that these effects have a predictable half-life. Finally, the Commission's procedures contain provisions for reopening and modification of final orders in the public interest.³⁰ If respondents can demonstrate at some time in the future that their transgressions have ceased to have their continuing effects, they may petition for appropriate relief.

Another argument made against the order is that the Commission should have proceeded directly against the offending distributors rather than against respondents. Although the principal thrust of this contention is adequately met by our holdings that respondents

³⁰ See below, pages 24-26.

themselves were active participants [19] in the illegal practices and that they are obliged to take the necessary steps to prevent a continuation or recurrence of these practices, we will deal with certain related contentions.

It is argued that the Commission should promulgate a trade regulation rule to check the misconduct of distributors.³¹ Such a rule might serve a salutary purpose. It would expose future offenders to penalties and liability for consumer redress. See 15 U.S.C. 45(m), 57(b). But the trade regulation rule process is a costly and time consuming one. See 15 U.S.C. 57(a). And the Commission is not convinced that the practices engaged in by Emdeko distributors are either widespread among others or going to persist in the wake of the order we are issuing against the respondents whose conduct is the subject of this case.

The Commission has considered yet another means of deterring distributors from using unfair or deceptive practices. If challenged conduct has been found to be unlawful in a final determination of the Commission, then someone who engages in the condemned activity "with actual knowledge that such act or practice is unfair or deceptive and is unlawful under [Section 5]," is himself liable for civil penalties. Under this grant of statutory authority the Commission may choose at some time in the future to proceed for penalties against distributors or others who continue to engage in unlawful package selling.³²

[20] To the extent that respondents would be ordered to avoid business dealings with distributors who engage in unlawful package selling, they argue that these proceedings are flawed by the failure to notify distributors of their pendency. The legal basis for this assertion is not entirely clear. For example, respondents do not and cannot claim that the order issued today would interfere with distributors' property rights.³³ The relationships between Emdeko and its distributors are unwritten, informal, and terminable at will. (F. 9.) Indeed, respondents' newly-discovered concern for their

³¹ Tr. of oral argument, p. 48. Respondents do not argue that the Commission was required to proceed by rulemaking rather than adjudication. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 290-95 (1974). Such a claim could not be made out because a rule governing distributor conduct would not necessarily apply to respondents and because respondents have not established that previous longstanding and well-settled agency decisions condoned their practices causing reasonable reliance and unfair surprise, while subjecting them to sanctions that are not principally prospective in their effects.

³² Such action would answer respondents' otherwise meritless argument that the order would place them at a competitive disadvantage in retaining or recruiting distributors who would take their business to other suppliers. Compare *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Chrysler Corp. v. FTC*, 561 F.2d 357 (D.C. Cir. 1977); *Ford Motor Co. v. FTC*, 547 F.2d 954 (6th Cir. 1976); *Johnson Products Co. v. FTC*, 549 F.2d 35 (7th Cir.), cert. denied, — U.S. — (1977).

³³ Even if such a showing were made, it is doubtful whether the distributors would have been necessary parties to the proceeding. See *National Licorice Co. v. NLRB*, 309 U.S. 350, 365-66 (1940); *Pepsico, Inc. v. FTC*, 472 F.2d 179 (2d Cir. 1972), cert. denied, 414 U.S. 876 (1973).

distributors' interests rings hollowly against this background. Since the distributors were not parties to this proceeding they are not bound by the terms of the order or subject to the statutory sanctions that attend noncompliance with its terms.³⁴

Neither have respondents shown how their own rights were prejudiced by the absence of notice to their distributors. Their liability in this case is based on their own conduct and the natural results of their actions. Moreover, many distributors were witnesses at the hearing, others were aware of these proceedings (see Tr. 17), and nothing prevented respondents from apprising the remainder of this litigation.³⁵

[21] Respondents Gilson and Wanlass object to personal liability. The ALJ found that:

Respondent Anthony J. Wanlass has been a vice-president of National since January 16, 1969 . . . , has been a vice-president of Emdeko since January 1, 1970 and has been a member of its board of directors since February 16, 1972 He was also a national area director for the western division of National in 1970 and 1971, is an officer of a number of Emdeko's subsidiaries, and is a minor owner of Emdeko stock (0.6 percent) (F. 4.)

Respondent Edward Gilson became a vice-president of Emdeko and a member of its board of directors on February 26, 1970. He is now the president of Emdeko He is also an officer in several of Emdeko's divisions and subsidiaries . . . and has owned between 13 percent and 17 percent of the stock of National and Emdeko during the past several years (F. 5.)

Mr. Wanlass, National's national sales director . . . , has conducted a series of motivational and instructional "workshops" for distributors In 1972, workshops for distributors were held in Dallas, Chicago, Atlanta, Philadelphia and San Francisco Mr. Wanlass participated in these and other meetings where lead systems and suggested sales presentations were discussed (F. 18.)

Mr. Gilson, president of National . . . , also attended regional meetings and conventions at which lead systems and sales presentations were discussed He has assisted distributors in arranging for the purchase of their installment contracts by finance companies . . . and has visited distributors, offering advice about personnel matters, lead systems and sales presentations (F. 19.)

(Record references omitted.) In addition, the ALJ noted that Messrs. Gilson and Wanlass participated in the preparation and dissemina-

³⁴ As noted in the preceding paragraph of the text, distributors who continue to engage in certain unlawful sales practices may in the future face consequential penalties. But this potential liability is distinguishable from the liability that arises out of noncompliance with a cease and desist order. Cease and desist orders often contain detailed prohibitions, frequently requiring affirmative actions. Moreover, order compliance is an absolute obligation that does not require a showing of the defendant's state of mind.

³⁵ As a result of previous difficulties with a local law enforcement agency, Emdeko advised distributors of possible termination for engaging in prohibited practices. (CX 351, p. 23.)

tion of the Derby Winner Tapes which contained advice to distributors on perfecting unlawful sales methods. (Fs. 18, 19, 38, 46.)

[22] Court decisions affirming or denying liability under the FTC Act of natural persons for conduct performed in the name of the corporation are plentiful.³⁶ Numerous factors have been considered in individual cases, either separately or in combination.

Both the courts and the Commission³⁷ have looked to the unlawful practices involved,³⁸ the respondent's [23] involvement with the practices,³⁹ the type of corporate entity,⁴⁰ the respondent's ownership interest,⁴¹ the corporate office (if any) held,⁴² and the influence he exercised over corporate affairs.⁴³

While it is unnecessary as a matter of law that a particular case replicate all of the conditions which have led the courts to uphold individual liability, there can be no doubt that respondents Wanlass and Gilson must bear personal responsibility for the unlawful practices that permeate this record. The unlawful practices we have found were widespread,⁴⁴ respondents Wanlass and Gilson were involved in the conception, performance and implementation of

³⁶ *FTC v. Standard Education Society*, 302 U.S. 112 (1937) (individual liability affirmed); *Standard Educators, Inc. v. FTC*, 475 F.2d 401 (D.C. Cir.), cert. denied, 414 U.S. 828 (1973) (individual liability affirmed); *Dlutz v. FTC*, 406 F.2d 227 (3d Cir.), cert. denied, 395 U.S. 936 (1969) (individual liability affirmed); *Fred Meyer, Inc. v. FTC*, 359 F.2d 351, 367-368 (9th Cir.), cert. denied, 308 U.S. 908 (1967) (individual liability affirmed); *Flotill Products, Inc. v. FTC*, 358 F.2d 224, 233 (9th Cir. 1966) (individual liability reversed); *Doyle v. FTC*, 356 F.2d 381 (5th Cir. 1966) (individual liability reversed); *Benrus Watch Co. v. FTC*, 352 F.2d 313, 324-325 (8th Cir. 1965), cert. denied, 384 U.S. 939 (1966) (individual liability affirmed); *Coro, Inc. v. FTC*, 338 F.2d 149 (1st Cir. 1964) (individual liability reversed); *Rayex Corp. v. FTC*, 317 F.2d 290, 295 (2nd Cir. 1963) (liability affirmed as to one individual, reversed as to another); *Pati-Port, Inc. v. FTC*, 313 F.2d 103 (4th Cir. 1963) (individual liability affirmed); *Surf Sales Co. v. FTC*, 259 F.2d 744, 747 (7th Cir. 1958) (individual liability affirmed); *Tractor Training Service v. FTC*, 227 F.2d 420, 425 (9th Cir. 1955) (individual liability affirmed); *Standard Distributors, Inc. v. FTC*, 211 F.2d 7, 13-16 (2nd Cir. 1954) (individual liability affirmed); *Steelco Stainless Steel, Inc. v. FTC*, 187 F.2d 693, 697 (7th Cir. 1951) (individual liability affirmed); *Consumers Home Equipment Co. v. FTC*, 164 F.2d 972, 973 (6th Cir. 1947) (individual liability affirmed); *Gelb v. FTC*, 144 F.2d 580, 581 (2d Cir. 1944) (individual liability affirmed); *Sebrone Co. v. FTC*, 135 F.2d 676, 677-678 (7th Cir. 1943) (individual liability affirmed).

³⁷ See, e.g., *Travel King, Inc.*, 86 F.T.C. 715, 776 (1975); *Steven Rizzi*, 85 F.T.C. 274, 305-306 (1975).

³⁸ E.g., were the practices widespread? See *Standard Educators, Inc.*, supra note 36.

³⁹ E.g., did he conceive, perform, implement, control, supervise, authorize, approve, or know of the challenged conduct? See *Standard Educators, Inc. v. FTC*, supra note 36; *Dlutz v. FTC*, supra note 36; *Fred Meyer, Inc. v. FTC*, supra note 36; *Surf Sales Co. v. FTC*, supra note 36; *Tractor Training Service v. FTC*, supra note 36; *Standard Distributors, Inc. v. FTC*, supra note 36; *Steelco Stainless Steel, Inc. v. FTC*, supra note 36; *Gelb v. FTC*, supra note 36; *Travel King, Inc.*, supra note 37.

⁴⁰ E.g., was it closely held? See *Fred Meyer, Inc. v. FTC*, supra note 36; *Steelco Stainless Steel, Inc. v. FTC*, supra note 36.

⁴¹ See *FTC v. Standard Education Society*, supra note 36; *Standard Educators, Inc. v. FTC*, supra note 36; *Dlutz v. FTC*, supra note 36; *Fred Meyer, Inc. v. FTC*, supra note 36; *Rayex Corp. v. FTC*, supra note 36; *Pati-Port, Inc. v. FTC*, supra note 36; *Tractor Training Service v. FTC*, supra note 36; *Steelco Stainless Steel, Inc. v. FTC*, supra note 36.

⁴² The cases cited in notes 36 and 37 have involved — variously — "principals," presidents, board chairmen, directors, officers, organizers, managers, and employees.

⁴³ E.g., did he direct, control, or formulate policies, either above or in combination with others? See *Benrus Watch Co. v. FTC*, supra note 36; *Coro, Inc. v. FTC*, supra note 36; *Surf Sales Co. v. FTC*, supra note 36; *Steelco Stainless Steel Co. v. FTC*, supra note 36; *Consumers Home Equipment Co. v. FTC*, supra note 36; *Gelb v. FTC*, supra note 36.

⁴⁴ F. 182.

Emdeko's acts, they authorized, approved, and knew of Emdeko's actions,⁴⁵ Emdeko was a closely held company,⁴⁶ [24] respondents possessed ownership in Emdeko, both men were officers and directors of the company,⁴⁷ and each of them directed, controlled, and formulated company policies.⁴⁸

Respondents National Housewares and Edward Gilson object to these entire proceedings on still another theory. These respondents consented to a cease and desist order in 1968. As to them, the instant proceeding was commenced pursuant to 15 U.S.C. 45(b) which provides, in relevant part: "[T]he Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any . . . order . . . issued by it . . . whenever in the opinion of the Commission the public interest shall so require . . ." (Emphasis added.)⁴⁹

The Commission's procedural rules provide for the commencement of a modification proceeding by issuance of an order to show cause. These orders explain the changes proposed in the outstanding cease and desist order. If no objection to the changes is registered the respondent is deemed to have consented to them. But if there are objections and if the pleadings raise "substantial factual issues," adjudicative proceedings are conducted. 16 CFR 3.72(b)(1) and (3). Such an adjudicative proceeding, of course, was conducted here.

When the show cause orders to National and Gilson were first served, these respondents raised numerous objections. Their arguments were rejected in detail by the Commission in a ruling of December 3, 1974, captioned "Order Overruling Respondents' Opposition to Order to Show Cause and Directing Hearings for the Receipt of Evidence."

[25] On this appeal, respondents argue that the adjudication that followed failed to produce allegedly necessary proof that the 1968 consent order inadequately remedied the pre-1968 alleged violations, that the respondents have continued to violate the FTC Act, and that the public interest required reopening, alteration and modification of the 1968 consent order.

We disagree with respondents' argument that the first or last of these issues posed factual disputes that needed to be resolved

⁴⁵ Fs. 18, 19, 38, 44, 46-48, 206, CX 553, 554.

⁴⁶ CX 459.

⁴⁷ Fs. 4, 5.

⁴⁸ See n. 45, *supra*; CX 185a; Tr. 599-601, 2143-44. We reject these respondents' apparent contention that they are absolved of personal liability because other individuals also participated in the preparation of Emdeko sales aids, because they denied in their testimony that they approved of certain unlawful conduct, or because they occasionally intervened on behalf of consumers who were involved in disputes with distributors.

⁴⁹ The Commission may issue an initial complaint if it has "reason to believe" that a violation has occurred and if a proceeding would be "to the interest of the public." 15 U.S.C. 45(b).

separately in the adjudicative proceeding. Of course, respondents' liability for violating the FTC Act had to be proved; and, as we have concluded, it was. The complaint adequately alleged such violations and there was a plenary hearing on those charges. The Commission's determination, however, that the 1968 order was no longer in the "public interest" was not an issue of fact that needed to be independently adjudicated.

The Commission's statutory authority to reopen an order is analagous to its authority to issue a complaint in the first instance. The latter action also requires a determination that the proceeding is in the public interest. But this determination, having once been made, is eventually subsumed by a later determination that a violation occurred and that a particular form of cease and desist order is required.⁵⁰ *FTC v. Klesner*, 280 U.S. 19 (1929); *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *Moretrench Corp. v. FTC*, 127 F.2d 792 (2d Cir. 1942); *Cf. Montgomery Ward & Co. v. FTC*, 379 F.2d 666, 672 (7th Cir. 1967); *Standard Distributors, Inc. v. FTC*, 211 F.2d 7, 13 (2d Cir. 1954); *Ford Motor Co. v. FTC*, 120 F.2d 175, 182 (6th Cir.), *cert. denied*, 314 U.S. 668 (1941). Many of the issues that may bear upon the Commission's determination of what the public interest requires are unsuited for adjudicative resolution. See, e.g., *Bristol-Myers Co.*, 85 F.T.C. 688, 746-747, 752-753 (1975). See generally 2 K. Davis, *Administrative Law Treatise* § 15.03 pp. 353-63 (1958).

Similarly, there was no need to direct the hearing at the policy and legal questions surrounding the "adequacy" of the 1968 order to correct either the allegations about pre-order conduct or respondents' compliance with its commands. It is not apparent what public purpose would be served by [26] such an inquiry or why such a pointless undertaking should be permitted or required by the FTC Act. Implicit in our conclusion that respondents committed unfair and deceptive practices and that a cease and desist order is needed to prevent their recurrence is an ample showing that the 1968 order is inadequate to the extent that it is not coextensive with today's order.

We have concluded that National's objections to the modification proceedings are without merit for an additional reason. National no longer exists as an independent entity; it became a division of Emdeko in 1969. While it is unnecessary to decide whether Emdeko's absorption of National subjected Emdeko to liability under the 1968 consent order,⁵¹ it seems clear that the elimination of National

⁵⁰ Respondents do not and cannot argue that this action was initiated to resolve a private controversy or to challenge a trivial trade practice.

⁵¹ The 1968 order omits the usual language binding successors to the respondents' business. But see *U.S. v. Van Raalte Co.*, 328 F. Supp. 827 (S.D.N.Y. 1971); *ITT Continental Baking Co.*, 84 F.T.C. 1349 (1974). Although

cannot be allowed to create increased immunity from liability. If respondents' were correct in arguing that additional proof were needed to establish liability and support an order under a modification proceeding and if it were also to be held that a successor entity were entitled to the same privilege, the prohibitions of the statute could be evaded simply by acquiring companies that are subject to outdated or ineffective orders. Such an outcome would serve no conceivable statutory objective.

Respondents' objections to the procedures for reopening and modification are without merit.

FINAL ORDER

This matter having been heard by the Commission upon the appeal of respondents and complaint counsel from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the initial decision with certain modifications:

[2] *It is ordered*, That the initial decision of the administrative law judge, pages 1-74, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent modified or otherwise indicated in the accompanying Opinion.

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

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

ORDER

I

For purposes of this order the following definitions shall apply:

A. "Package selling" means:

- (1) soliciting a consumer by telephone, mail, or other means of direct communication to attend a sales presentation; or
- (2) offering a gift, premium, prize, coupon, or a chance to secure any of the above, in connection with a solicitation to attend a sales presentation; or
- (3) representing that a survey or promotion is being undertaken, or that the consumer is invited to participate in an advertising or

respondent Emdeko notes that "National Housewares . . . is now a division of Emdeko and would be covered by any order issued against Emdeko . . ." it has not argued that Emdeko is bound by the 1968 consent order issued against National. (RAB 7.)

promotional program, unless no offer of sale is made to the consumer to whom such representation is made; or

(4) using any artifice or device, to solicit a consumer for the purpose of making a sales presentation, which has a tendency or capacity to lead a consumer to conclude that there is any other reason for the contact with him; or

(5) offering or selling three or more unrelated products for a single price.

Provided, that package selling shall not include the use of any of the above practices by regular multi-line retail establishments, such as department stores. *Provided further*, that use of the practices enumerated in subparagraphs (1), (2), or (5) shall not constitute package selling if each solicitation, offer or sales presentation comprehended by such practices is immediately preceded by a clear and conspicuous disclosure and if a cooling-off period is given in connection with any sale that may follow.

[3] B. "Clear and conspicuous disclosure" means the statement "We would like the opportunity to sell our products to you," in print at least as large and prominent as the largest and most prominent used in any other portion of the written material with which it appears or, in oral presentations, in speech at least as clear and distinct as the most clear and distinct speech used in any other portion of the oral presentation with which it is given.

C. To give a "cooling-off period" means to fulfill all of the obligations established by 16 C.F.R. 429 as if the sale were a door-to-door sale, as defined by that part, whether it is or not.

D. "Encouraging or advising" includes providing sales materials, guidance, advice or other similar assistance.

E. "Assisting" includes providing products by sale, consignment or any other means of transfer.

F. "Sale," in any of its grammatical forms, includes leases and all other transfers of goods and services.

II

It is ordered, That respondents Emdeko International, Inc., a corporation, its successors and assigns, and its officers; Edward J. Gilson, individually and as an officer of said corporation; and Anthony J. Wanlass, individually and as an officer of said corporation; and the agents, representatives and employees of the foregoing respondents, directly or through any corporation, subsidiary, division or other device, in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, shall forthwith cease and desist in any manner from:

- (1) encouraging or advising any other person to engage in package selling; or
- (2) engaging in package selling; or
- (3) assisting any other person to engage in package selling.

Provided, that it shall be a defense to a charge of assisting another in package selling in violation of this paragraph of the order if respondents establish that they ceased doing business for one year with a person engaged in package selling within thirty (30) days of first having knowledge that such person engaged in such conduct. [4]

III

It is further ordered, That the corporate respondent shall deliver, or cause to be delivered, a copy of this order to its divisions, distributors, dealers, retailers, and franchisees.

IV

It is further ordered, That respondents shall, for a period of five (5) years after receipt of consumer, Better Business Bureau, or consumer or law enforcement agency complaints, comments, and inquiries concerning respondents' activities or the activities of their distributors, dealers, retailers, or franchisees, retain records of all such complaints or inquiries, and copies of any written correspondence and complete summaries of telephone conversations relating thereto. These records shall be available, at their request and upon reasonable advance notice, to representatives of the Federal Trade Commission during respondents' regular business hours.

V

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

VI

It is further ordered, That each 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. [5]

VII

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

IN THE MATTER OF
PERPETUAL FEDERAL SAVINGS & LOAN ASSOCIATION

Docket 9083. Interlocutory Order, Nov. 25, 1977

Denial of motion for withdrawal or disqualification of Chairman Pertschuk from participation in the decision of this matter on ground of prejudgment.

ORDER DENYING MOTION TO DISQUALIFY

Respondent Perpetual Federal Savings & Loan Association on July 13, 1977, filed a motion asking alternatively that Chairman Pertschuk withdraw from participation in the decision of this matter or that he be disqualified. Respondent urged, as ground for the motion, that prejudgment of this case is evidenced by a letter sent by the Chairman to the Chairman of the Consumer Subcommittee of the Senate Committee on Commerce, Science and Transportation, in connection with the Subcommittee's consideration of legislation to exclude savings and loan associations from the Commission's jurisdiction.

By memorandum of September 15, 1977, Chairman Pertschuk dealt with the first branch of this motion, declining to withdraw and stating his reasons therefor. We have considered respondent's motion, complaint counsel's opposition, and Chairman Pertschuk's memorandum, and have determined that the motion for disqualification should be denied for the reasons stated by the Chairman.

In particular, none of the authorities cited by respondent stands for the proposition that a pre-existing view on issues of law (as distinct from fact) on the part of a Commissioner, the most that could be made out here, is a ground for disqualification. To adopt this proposition would be not only to require each Commissioner (or, presumably, each judge) to decide any particular issue of law only once in his or her tenure, but to put in question the whole principle of *stare decisis* on the basis of which our judicial system has evolved. If it were true that each litigant is entitled to appear before a decisionmaker devoid of preconceptions as to the law applicable to his case there would be no "law" in the sense that we understand it. That a decisionmaker forms a preconception on a novel issue of law out of an amalgam of rules applicable to analogous cases is no more offensive to this system than is reliance on a decision squarely in point.

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

Modified Order

90 F.T.C.

IN THE MATTER OF

CHRYSLER CORPORATION

MODIFIED ORDER, IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT*Docket 8995. Final Order, Apr. 13, 1976 — Modified Order, Dec. 5, 1977*

This modified order to cease and desist replaces an earlier order issued on April 13, 1976, 41 FR 20653, 87 F.T.C. 719. In accordance with the decision and judgment rendered by the Court of Appeals for the District of Columbia on July 6, 1977, 561 F.2d 357 (1977), this order deletes Paragraphs 2 and 3 of the original order, which pertain to performance tests and results.

Appearances

For the Commission: *H. Robert Field, Carlton C. Eastlake and Richard Bloomfield.*

For the respondent: *Walter B. Maher and Hogan & Hartson, Washington, D. C.*

MODIFIED ORDER TO CEASE AND DESIST

Respondent having filed in the United States Court of Appeals for the District of Columbia on June 30, 1976, a petition to review an order to cease and desist issued on April 13, 1976 [87 F.T.C. 719]; and the Court having rendered its decision and judgment on July 6, 1977, affirming and enforcing the Commission's order with the deletion of Paragraphs 2 and 3, and respondent not having filed a petition for certiorari within the time permitted by law;

Now, therefore, it is hereby ordered, That the aforesaid order to cease and desist be, and it hereby is, modified in accordance with the decision and judgment of the Court to read as follows:

ORDER

It is ordered, That respondent Chrysler Corporation and its officers, representatives, and agents and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of products sold by the respondent in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, by reference to a test or tests, that any of respondent's automobiles are superior with

regard to fuel economy to any other automobiles whether manufactured by respondent or others unless:

a. such superiority has been demonstrated as to the model(s) for which it is claimed by such test or tests with respect to each sample, or the valid average of all identical samples, of each model represented to have been tested; or

b. the valid test results for each sample, or the valid average of all identical samples, of each model so compared, including the advertised model as well as such makes and models to which the advertised model is compared, are clearly and conspicuously disclosed.

For the purpose of this order, "sample" shall mean an actual automobile tested.

2. Misrepresenting in any manner the fuel economy of any automobile or the superiority of any automobile over competing products in terms of fuel economy.

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

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

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