UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

In the Matter of	)	
	)	
POM WONDERFUL LLC and	)	
ROLL GLOBAL, as successor in interest	)	
to Roll International companies and	)	**Docket No. 9344**
	)	**PUBLIC**
	)	
STEWART A. RESNICK,	)	
LYNDA RAE RESNICK, and	)	
MATTHEW TUPPER, individually and	)	
as officers of the companies.	)	
	)	

RESPONDENT MATTHEW TUPPER'S PRETRIAL BRIEF

Kristina M. Diaz, Esq.
Johnny Traboulsi, Esq.
Alicia Mew, Esq.
Paul Rose, Esq.
Brooke Hammond, Esq.
Roll Law Group P.C.
11444 West Olympic Blvd., 10th Floor
Los Angeles, CA, 90064
Tel: 310.966.8775
Fax: 310.966.5758
Email: kdiaz@roll.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

I. MATTHEW TUPPER SHOULD BE DISMISSED AS A RESPONDENT

Matthew Tupper should not be in this case. Complaint Counsel rotely includes Matthew Tupper in this action, but never actually explains or demonstrates why his inclusion is warranted or necessary. While explicitly alleging that POM, its owners and affiliate companies should all be part of any order because they are part of a privately held conglomeration of companies, with the unique control issues entailed, Complaint Counsel then seemingly ignores this distinction and sues Mr. Tupper for the lone reason that he is the President of POM. But as Complaint Counsel is well aware, POM is not a public company where the President is typically in charge. Mr. Tupper is but an employee at POM, admittedly a high-level and loyal employee, but ultimately an employee only--he simply does not have the ultimate decision making authority when it comes to advertising. And Complaint Counsel's trial brief concedes this vital point.

Individual liability is secondary and derivative of corporate liability and can only be imposed if the corporation is found to have disseminated unfair, deceptive or otherwise misleading advertisements. *Federal Trade Commission v. Bay Area Business Council, Inc.*, 423 F. 3d 627 (7th Cir. 2005). Individual liability requires that the individual (1) either directly participated in the challenged advertising or (2) had the ability to control it. *See Rentacolor, Inc.*, 103 F.T.C. 400, 438 (1984); *Thiret v. F.T.C.*, 512 F.2d 176 (10th Cir. 1975).

As explained in *Direct Marketing* and *FTC v. Freecom Comm., Inc.*, 401 F.3d 1192, 1205 (10th Cir. 2005) (and a myriad of other cases), liability focuses primarily on the ability to control or limit the offending advertising and not whether the individual actually did review or edit or approve the advertising at issue. *See also In the Matter of Auslander Decorator Furniture, Inc., Trading As A.D.F., Etc. et al.*, 1974 WL 175916 (F.T.C.) (1974) (finding individual respondents lacked sufficient control or responsibility for liability); *In the Matter of Universal Electronics Corp., et al.*, 1971 WL 128754 (F.T.C.) (1971) (finding FTC liability against President and sole

shareholder as he alone formulated, directed and controlled the acts and practices at issue and without his inclusion there is a possibility the FTC order would be evaded); *F.T.C. v. Swish Marketing et al.*, 2010 WL 653486 (N.D. Cal. Feb. 22, 2010) (finding against liability for CEO because FTC failed to plead sufficient facts showing he had requisite control or ability to control challenged acts); *F.T.C. v. Neovi, Inc. et al.,* 598 F.Supp.2d 1104 (S.D. Cal. 2008) (finding President and Vice President of company liable under the FTC Act because both men had ability to control the offending practices, participated directly, managed corporate affairs, directed employees and had knowledge of the challenged conduct); *F.T.C. v. Direct Marketing Concepts, Inc. et al.,* 624 F.3d 1 (1st Cir. 2010) (finding 50% owner and officer liable because he had the ability to stop the challenged ads).

This standard was developed under the backdrop of individual liability as originally envisioned by the FTC Act: corporate officers may be held individually liable for violations of the FTC Act if the officer "owned, dominated and managed" the company and if naming the officer individually is necessary for the order to be fully effective in preventing the deceptive practices which the Commission had found to exist. *FTC v. Standard Education Society,* 302 U.S. 112 (1937). In theory, individual liability was only to be used to stop owners of closely held corporations from dissolving the offending corporation and beginning a new one to avoid a cease and desist order of the FTC. This later evolved into allowing non-owner officers to be found liable if they met the below described "participation" or "ability to control" tests or otherwise "formulated, directed or controlled any of the acts and practices" at issue. *In re Griffin Systems, Inc. et al.*, 117 F.T.C. 515, 563-564 (1994).

But as to Mr. Tupper none of that applies. He neither owns, dominates, nor ultimately controls POM. He reports directly to Stewart Resnick and has a "dotted line" to Lynda Resnick.

See L. Resnick Tropicana Dep. 22: 5-7; 23:22-24:5 [CX1375]; S. Resnick Welch's Dep. 53:10-18 [CX1367]; M. Tupper Coke Dep. 27:8-28:4; 107:12-24 [CX1364]. Further, Mr. Tupper has no ownership interest or equity shares in POM Wonderful. M. Tupper FTC Dep. 14:14-17 [CX1353]. And in Mr. Resnick's own words, he alone is the "ultimate sole decision-maker on everything", not Mr. Tupper. S. Resnick Welch Dep. 55:10-25 [CX1367]. Additionally, although Mr. Tupper does manage the day to day operations and is involved in several aspects of POM's operations, science, advertisements and general POM theme, none are under his exclusive or even majority control. *See* S. Resnick Coke Dep. 86:19-25 [CX1363]; M. Perdigao FTC Dep. 50:3-14; 60:11-23; 61:11-21 [CX1348]; L. Resnick FTC Dep. 36:1-6 [CX1359]; L. Resnick Coke Dep. 103:23-104:5 [CX1362]. And most importantly, if there were disputes or issues to resolve regarding advertising decisions, the final authority was either Lynda or Stewart Resnick, and not Mr. Tupper. M. Perdigao Coke Dep. 36:17-21; 37:5-13 [CX1365].

In sum, although Mr. Tupper regularly attended the weekly POM meetings and was aware of most of the Challenged Advertisements and sometimes the legal review process, he has never been the ultimate decision maker when it comes to the marketing and advertising part of the business. Unlike the typical President of a public company, his authority is derivative of and subject to private owner individuals above him (the Resnicks)—he is therefore not your typical ultimate decision maker officer subject to liability in FTC cases. His inclusion in any injunctive or related order, therefore, is not necessary to effectuate the cessation of the alleged offending conduct, since he does not ultimately control it.

Moreover, it would be facially unreasonable to issue injunctive relief against Mr. Tupper *in addition* to the other Respondents. Only as a POM employee does he have any connection to the disputed advertising claims, yet the proposed order would affect him professionally for at

least the next 20 years. Complaint Counsel overreaches, without evidentiary justification, in seeking to extend its Notice Order from POM to include Mr. Tupper. Applying a "reasonable relation" standard, he does not pose an independent false-advertising threat that could rationally justify his inclusion as a Respondent.

Further, his inclusion in any order as currently proposed would follow him to any other company he worked. The stigma would be significant. Given his inability to ultimately control the conduct currently at issue, such a penalty would be overly broad, unfair, and constitutionally suspect as it would effectively prevent many job opportunities and limit his ability to earn a living.

For all of the reasons stated above, Matthew Tupper should be dismissed from this action.[1]

Respectfully submitted,

/s/ Kristina Diaz

Attorneys for Respondent:
Kristina M. Diaz, Esq.
Johnny Traboulsi, Esq.
Alicia Mew, Esq.
Paul Rose, Esq.
Brooke Hammond, Esq.
Roll Law Group P.C.
11444 West Olympic Blvd., 10th Floor
Los Angeles, CA, 90064

[1] Respondent Matthew Tupper submits this Pretrial Brief in conjunction with and joins with the concurrently filed Pretrial Brief submitted by all Respondents.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosch
Edith Ramirez
Julie Brill

In the Matter of	)	
	)	
POM WONDERFUL LLC and	)	
ROLL INTERNATIONAL CORP.,	)	
companies, and	)	Docket No. 9344
	)	PUBLIC
	)	
STEWART A. RESNICK,	)	
LYNDA RAE RESNICK, and	)	
MATTHEW TUPPER, individually and	)	
as officers of the companies.	)	

CERTIFICATE OF SERVICE

I hereby certify that this is a true and correct copy of the Respondent **MATT TUPPER'S PUBLIC PRE-TRIAL BRIEF**, and that on this 20th day of May, 2011, I caused the foregoing to be served by hand delivery and FTC E-File on the following:

Donald S. Clark
The Office of the Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Rm. H-159
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Rm. H-110
Washington, DC 20580

I hereby certify that this is a true and correct copy of the Respondent **MATT TUPPER'S PUBLIC PRE-TRIAL BRIEF**, and that on this 20th day of May, 2011, I caused the foregoing to be served by e-mail on the following:

Mary Engle
Associate Director for Advertising Practices
Bureau of Consumer Protection
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, DC 20580

Heather Hippsley
Mary L. Johnson
Tawana Davis
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, DC 20580

/Skye Perryman

John D. Graubert
Skye L. Perryman
COVINGTON & BURLING LLP
1201 Pennsylvania Ave. NW
Washington, DC 20004-2401
Telephone: 202.662.5938
Facsimile: 202.778.5938
E-mail: JGraubert@cov.com
SPerryman@cov.com

Kristina M. Diaz
Alicia Mew
Paul A. Rose
Johnny Traboulsi
Adam P. Zaffos
Roll Law Group P.C.
11444 West Olympic Boulevard
10th Floor
Los Angeles, CA 90064
Telephone: 310.966.8775
E-mail: kdiaz@roll.com

Counsel for Respondents

Bertram Fields
Greenberg Glusker
1900 Avenue of the Stars
21st Floor
Los Angeles, CA 90067
Telephone: 310.201.7454

Counsel for Respondents Stewart Resnick and Lynda Rae Resnick

Dated: May 20, 2011

C

83 F.T.C. 1542, 1974 WL 175916 (F.T.C.)

FEDERAL TRADE COMMISSION (F.T.C.)

*1 IN THE MATTER OF
AUSLANDER DECORATOR FURNITURE, INC., TRADING AS A.D.F., ETC., ET AL.

ORDER, OPINION, ETC., IN REGARD TO THE ALLEGED VIOLATION
OF THE FEDERAL TRADE COMMISSION ACT
Docket 8911.

Complaint, Jan. 30, 1973
Order & Opinion, Apr. 23, 1974

Order requiring a Hanover, Md., seller and distributor of furniture and related products, among other things to cease failing to deliver ordered merchandise; delivering damaged or defective merchandise; failing to repair or replace damaged goods as advertised; misrepresenting the availability of merchandise in stock; misrepresenting prices as being 'sale' prices unless such prices are reduced significantly to afford a meaningful savings over the regular selling prices; and failing to maintain records to substantiate savings claims. Further, respondents are required to refund all monies paid by customers if respondents fail to deliver merchandise within five (5) business days from an agreed-upon date of delivery.

appearances

For the Commission: *James D. Tangires, Michael Mpras* and *Alan Cohen.*

For the respondents: *John S. Yodice* and *Edwin W. Holden, III.* Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Auslander Decorator Furniture, Inc., a corporation, doing business as A.D.F. and A.D.F. Warehouse, and Maxwell Auslander, Sandra Tye, and Linda Decker, 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 Auslander Decorator Furniture, Inc., doing business as A.D.F. and A.D.F. Warehouse, is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 7451 Race Road, Hanover, Md. Its warehouse, shipping and storage facilities are located at 701 Edgewood Street, N.E., and Fourth and Channing Streets, N.E., Wash., D.C., and 7451 Race Road, Hanover, Md. It operates furniture outlets in the States of Maryland and Virginia and in the District of Columbia.

Respondents, Maxwell Auslander, Sandra Tye and Linda Decker are individuals and are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth, and their address is that of said corporation.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of furniture and related products to the public at retail.

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

*2 PAR. 4. In the course and conduct of their aforesaid business and for the purpose of inducing the sale of their merchandise, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by materials disseminated through the mails, and on tags or labels and in signs posted in respondents' stores. Typical and illustrative of the foregoing, but not all-inclusive thereof, are the following:

FREE DELIVERY

LAY-A-WAY * * * 8 MONTHS FREE STORAGE

ADF WAREHOUSE SALE PRICE!!

SAVINGS!!! AT ALL 7 ADF OUTLETS

ADF WAREHOUSE SALE

ADF WAREHOUSE CLEARANCE SALE

BUY NOW AND SAVE

In addition to the aforesaid statements and representations, the respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the terms and conditions under which merchandise will be sold and delivered and services provided by respondents.

PAR. 5. By and through the use of the above-quoted statements and representations in Paragraph Four, and others of similar import and meaning not expressly set out herein, including the aforesaid oral statements and representations made by respondents and their sales representatives, respondents have represented, and are now representing, directly and by implication, that:

1. Respondents will deliver their furniture to customers on or near the dates they have promised those customers for delivery.

2. Respondents maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised delivery dates.

3. Respondents' customers may purchase furniture on the layaway plan, and, while the payments are being made, the furniture will be stored in their warehouse, ready for delivery upon completion of all payments.

4. Respondents are offering furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

PAR. 6. In truth and in fact:

1. Respondents, in many instances do not deliver their furniture to customers on or near the dates they have promised those customers for delivery.

2. Respondents, in many instances, do not maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised delivery dates.

3. Furniture purchased by respondents' customers on the layaway plan is not, in many instances, stored in the warehouse ready for immediate delivery upon completion of all payments, but is sold to other customers, necessitating reordering of the merchandise when the layaway payments are completed, with resultant delays in delivery.

4. Respondents, in many instances, do not offer furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

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

PAR. 7. In the course and conduct of their aforesaid business and for the purpose of inducing the sale of their furniture, respondents have maintained, and are now maintaining, in their salesrooms, floor models and displays of furniture being offered for sale, on the bases of which their customers select and order the furniture they purchase from the respondents. In this connection, respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the quality and durability of the furniture being offered for sale, the terms and conditions under which merchandise will be sold and delivered, and the services that will be provided by the respondents. Moreover, subsequent to making sales and deliveries, respondents and their employees have made, and are now making, numerous oral statements, representations and promises to their customers regarding the time and the manner in which respondents will perform various adjustments, replacements and/or repairs.

PAR. 8. By and through the use of floor models and furniture displays discussed in Paragraph Seven, together with the aforesaid oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, and are now representing, directly or by implication, that:

1. Furniture which is delivered to respondents' customers will be identical to that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays.

2. Furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, will be replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respond-

ents' employees.

3. Furniture which is delivered to respondents' customers will be free from damages and/or defects.

4. Furniture which is delivered to purchasers with damages and/or defects, will be repaired or replaced within a reasonable time.

5. Furniture which is delivered to purchasers with damages and/or defects, will be repaired or replaced to the satisfaction of the purchasers.

6. Furniture which is delivered to purchasers with damages and/or defects, will be repaired or replaced in accordance with promises made to the purchasers by respondents' employees.

PAR. 9. In truth and in fact:

1. Furniture is delivered to customers which, in many instances, is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays.

2. Furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, in many instances, is not replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees.

*4 3. Furniture delivered to purchasers, in many instances, is damaged and/or defective.

4. Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced within a reasonable time.

5. Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced to the satisfaction of the purchasers.

6. Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced in accordance with promises made to the purchasers by respondents' employees.

Therefore, the statements, representations, acts and practices set out in Paragraphs Seven and Eight were, and are, false, misleading and deceptive.

PAR. 10. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by the respondents.

PAR. 11. The respondents' use of the aforesaid false, misleading and deceptive statements, representations, acts and practices, have had, and now have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 12. The acts and practices of the respondents as set forth above were, and are, all to the prejudice and in-

jury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE LAW JUDGE

FEBRUARY 15, 1974

PRELIMINARY STATEMENT

Respondents Auslander Decorator Furniture, Inc., a corporation, doing business as A.D.F. and A.D.F. Warehouse, and Maxwell Auslander, Sandra Tye and Linda Decker, individually, and as officers of said corporation, are charged with violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). The complaint, issued by the Commission on Jan. 30, 1973, alleges that respondents, through advertisements placed in newspapers of interstate circulation, through brochures disseminated through the mails, by the use of tags or labels and in signs posted in respondents retail stores, and by oral representations by respondents and their sales representatives, have represented directly and by implication that:

(1) respondents will deliver furniture to customers on or near the dates they have promised those customers for delivery;

(2) respondents maintain in their warehouse adequate stock to insure that furniture ordered by customers will be available for delivery on the promised delivery dates;

*5 (3) respondents' customers may purchase furniture on the layaway plan, and, while the payments are being made, the furniture will be stored in their warehouse, ready for delivery upon completion of all payments; and

(4) respondents are offering furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

In truth and in fact, the complaint alleges,

(1) respondents, in many instances, do not deliver furniture to customers on or near the dates promised customers for delivery;

(2) respondents, in many instances, do not maintain in their warehouse adequate stock to insure that furniture ordered by customers will be available for delivery on the promised delivery dates;

(3) furniture purchased by respondents' customers on the layaway plan is not, in many instances, stored in the warehouse ready for immediate delivery upon completion of all payments, resulting in delays in delivery; and

(4) respondents, in many instances, do not offer furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonable substantial period of time in the recent, regular course of business.

The complaint further alleges that by and through the use of floor models and furniture displays, together with oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, directly or by implication, that:

(1) furniture which is delivered to respondents' customers will be identical to that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays;

(2) furniture delivered to customers which is different from that which the customers have selected and

ordered on the bases of respondents' floor models and/or furniture displays will be replaced within a reasonable time, to the satisfaction of the customers, in accordance with promises made to the customers by respondents;
(3) furniture which is delivered to respondents' customers will be free from damages and/or defects; and
(4) furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced within a reasonable time to the satisfaction of the purchasers and in accordance with promises made to the purchasers by respondents.

In truth and in fact, the complaint alleges,
(1) furniture is delivered to customers which, in many instances, is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays;
(2) furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, in many instances, is not replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents;
***6** (3) furniture delivered to purchasers, in many instances, is damaged and/or defective, is not repaired or replaced within a reasonable time, is not repaired or replaced to the satisfaction of the purchasers, and is not repaired or replaced in accordance with promises made to the purchasers by respondents.

Therefore, the statements, representations, acts and practices of respondents, as set out hereinbefore, were, and are, false, misleading and deceptive.

Respondents filed an answer to the complaint on Mar. 12, 1973 which consisted of a general denial of all the complaint allegations of unlawful conduct. Thereafter complaint counsel moved to strike respondents' answer on the grounds that it did not conform to the requirements of the Commission's Rules of Practice. Respondents at the same time requested additional time in which to file an amended answer since respondents' attorneys had only recently been retained and needed additional time in which to fully prepare an answer.

Pursuant to permission granted by the undersigned, respondents filed an amended answer on Apr. 6, 1973. The amended answer was in greater detail than the original answer, and respondents generally denied substantially all the allegations of unlawful conduct set forth in the complaint.

Prior to the filing of the aforesaid amended answer, a prehearing conference was held on Apr. 3, 1973. Thereafter, on Apr. 30, 1973 and May 14, 1973, prehearing conferences were held. At the prehearing conference on Apr. 30, 1973, respondents amended their answer in part (P. Tr. 48). On June 11, 1973, respondents filed a motion for permission to further amend their answer, together with a Second Amended Answer. By order filed June 21, 1973, respondents' motion to further amend their answer was granted.

By the Second Amended Answer, respondents Auslander Decorator Furniture, Inc. and Maxwell Auslander admitted the allegations contained in the complaint. Individual respondents Sandra Tye and Linda Decker admitted the allegations of the complaint, except that these respondents denied that (1) they have participated as individuals in any of the acts or practices alleged in the complaint, and (2) denied that they formulate, direct and control the acts and practices of the corporate respondent, Auslander Decorator Furniture, Inc., including the acts and practices set forth in the complaint. All respondents reserved the right to submit proposed findings and conclusions under Section 3.46 of the Rules of Practice, the right to appeal the initial decision herein to the Commission under Section 3.52 of the Rules of Practice, and the right to judicially appeal from any adverse Commission

decision.

On June 20, 1973, the undersigned issued an order limiting the factual issues to be tried in this proceeding in view of respondents' admission answer. The factual issues remaining to be tried were set forth as follows:

(1) Do individual respondents Sandra Tye and Linda Decker formulate, direct and control the acts and practices of the corporate respondent Auslander Decorator Furniture, Inc., and

*7 (2) Have individual respondents Sandra Tye and Linda Decker participated in the acts and practices alleged in the complaint?

By letter dated Aug. 1, 1973, the undersigned was advised by John S. Yodice, counsel for respondents, that he was withdrawing his representation of individual respondents Sandra Tye and Linda Decker, but would remain as counsel for the corporate respondent and individual respondent Maxwell Auslander. Thereafter, by telephone, the undersigned was advised by individual respondents Sandra Tye and Linda Decker that Mr. Yodice was withdrawing as their counsel as they were financially unable to retain counsel to represent them in their individual capacities. Individual respondents Sandra Tye and Linda Decker requested that the undersigned provide them with counsel to represent them in the trial of this matter, because of their financial inability to retain counsel.

On Aug. 15, 1973, the undersigned issued an order requiring individual respondents Sandra Tye and Linda Decker to support their request for assignment of counsel by filing a statement of financial status and other supporting documentation. Individual respondents Sandra Tye and Linda Decker, by telephone, later withdrew their request for assignment of counsel and stated their intention of appearing in person at the trial and representing themselves (see Decker, Tr. 333; Tye, Tr. 365).

Hearings were held on Sept. 10–11, 1973, at which time evidence was received relating to the two issues remaining to be litigated, *i.e.*, the responsibility of Sandra Tye and Linda Decker for the acts and practices of corporate respondent Auslander Decorator Furniture, Inc. and their personal participation in the acts and practices admitted to be unlawful. Complaint counsel called as witnesses the three corporate officials named in the complaint, Maxwell Auslander, Sandra Tye and Linda Decker. Over one hundred (100) exhibits were offered by complaint counsel and received into evidence. Individual respondents Sandra Tye and Linda Decker offered no evidence in defense. Complaint counsel and counsel for corporate respondent Auslander Decorator Furniture, Inc. and individual respondent Maxwell Auslander have submitted proposed findings, conclusions and supporting memoranda. Individual respondents Sandra Tye and Linda Decker have not submitted any memoranda, although they were offered the opportunity to do so if they desired (Tr. 367). On Nov. 28, 1973, the Commission extended the time for filing this initial decision to and including Feb. 18, 1974.

This proceeding is before the undersigned upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by complaint counsel and by counsel for the corporate respondent and individual respondent Maxwell Auslander. These submissions by the parties have been given careful consideration and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not theretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and upon a consideration of the demeanor of the witnesses who gave testimony in this proceeding.

***8** For the convenience of the Commission and the parties, the findings of fact include references to the principal supporting evidentiary items in the record. Such references are intended to serve as convenient guides to the

testimony and exhibits supporting the recommended findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are made in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CX—Commission's Exhibits

CPF—Proposed Findings, Conclusions of Law, And Order of Counsel Supporting the Complaint

RPF—Proposed Findings, Conclusions, And Order of Respondents Auslander Decorator Furniture, Inc. and Maxwell Auslander

CRB—Brief In Reply To Proposed Findings, Conclusions, And Order of Respondents Auslander Decorator Furniture, Inc. and Maxwell Auslander filed by Counsel Supporting the Complaint The transcript of the testimony is referred to with the abbreviation 'Tr.,' and the page number or numbers upon which the testimony appears and the last name of the witness whose testimony is being cited. 'P. Tr.' refers to the transcript of the prehearing conferences.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings, conclusions and briefs submitted by the parties, as well as replies, the administrative law judge makes the following:

FINDINGS OF FACT

1. Respondent Auslander Decorator Furniture, Inc. (hereinafter referred to as 'ADF'), doing business as A.D.F. and A.D.F. Warehouse, is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 7451 Race Road, Hanover, Md. Its warehouse, shipping and storage facility is located at said principal place of business. Prior to September 1972, ADF had warehouse, shipping and storage facilities located at 701 Edgewood Street, N.E., Wash., D.C., and Fourth and Channing Street, N.E., Wash., D.C. Respondent ADF, doing business as A.D.F. and A.D.F. Warehouse, operates furniture outlets in the States of Maryland and Virginia and in the District of Columbia (Admitted Second Amended Answer, P. Tr. 91–92).

2. Respondent Maxwell Auslander is an individual and is president of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint issued herein. His address is the same as that of the corporate respondent (Admitted Second Amended Answer; P. Tr. 60).

3. Respondent Sandra Tye is an individual and is a vice president of corporate respondent ADF (Admitted Second Amended Answer; Tye, P. Tr. 88–89; Tye, Tr. 334; Auslander, Tr. 123–124). Her address is the same as that of the corporate respondent (Admitted Second Amended Answer).

***9** 4. Respondent Linda Decker is an individual and was, from Nov. 1971 until May 31, 1973, a vice president of corporate respondent ADF (Admitted Second Amended Answer; Decker, P. Tr. 94; Decker, Tr. 240; Auslander, Tr. 124). Her present home address is 1418 Kensington Place, Crofton, Maryland (Decker, P. Tr. 94; Decker, Tr. 639). Respondent Linda Decker is no longer employed by corporate respondent ADF (Decker, Tr. 239–241).

5. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of furniture and related products to the public at retail (Admitted Second Amended Answer).

6. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the District of Columbia to purchasers thereof located in various States of the United States and in the District of

Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as 'commerce' is defined in the Federal Trade Commission Act (15 U.S.C. 41–58) (Admitted Second Amended Answer).

7. In the course and conduct of their business as set forth in the complaint and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by the respondents (Admitted Second Amended Answer).

8. In the course and conduct of their business as set forth in the complaint and for the purpose of inducing the sale of their merchandise, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by materials disseminated through the mails, and on tags or labels and in signs posted in respondents' stores.

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

FREE DELIVERY
LAYAWAY * * * 8 MONTHS FREE STORAGE
ADF WAREHOUSE SALE PRICE!!
SAVINGS!!! AT ALL 7 ADF OUTLETS
ADF WAREHOUSE SALE
ADF WAREHOUSE CLEARANCE SALE
BUY NOW AND SAVE

In addition to the aforesaid statements and representations, the respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the terms and conditions under which merchandise will be sold and delivered and services provided by respondents (Admitted Second Amended Answer).

9. By and through the use of the above-quoted statements and representations, as set out in Finding 8 hereinabove, and others of similar import and meaning not expressly set out, including the aforesaid oral statements and representations made by respondents and their sales representatives, respondents have represented, and are now representing, directly and by implication, that:

***10** (1) Respondents will deliver their furniture to customers on or near the dates they have promised those customers for delivery.

(2) Respondents maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised dates.

(3) Respondents' customers may purchase furniture on the layaway plan, and, while the payments are being made, the furniture will be stored in their warehouse, ready for delivery upon completion of all payments.

(4) Respondents are offering furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business (Admitted Second Amended Answer).

10. In truth and in fact:

(1) Respondents, in many instances, do not deliver their furniture to customers on or near the dates they have promised those customers for delivery.

(2) Respondents, in many instances, do not maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised delivery date.

(3) Furniture purchased by respondents' customers on the layaway plan is not, in many instances, stored in the warehouse ready for immediate delivery upon completion of all payments, but is sold to other customers, necessitating reordering of the merchandise when the layaway payments are completed, with

resultant delays in delivery.

(4) Respondents, in many instances, do not offer furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

Therefore, the statements and representations, as set forth in Findings 8 and 9 hereinabove, were, and are, false, misleading and deceptive (Admitted Second Amended Answer).

11. In the course and conduct of their business as set forth in the complaint and for the purpose of inducing the sale of their furniture, respondents have maintained, and are now maintaining, in their salesrooms, floor models and displays of furniture being offered for sale, on the bases of which their customers select and order the furniture they purchase from the respondents. In this connection, respondents and their sales resprepresentatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the quality and durability of the furniture being offered for sale, the terms and conditions under which merchandise will be sold and delivered, and the services that will be provided by the respondents. Moreover, subsequent to making sales and deliveries, respondents and their employees have made, and are now making, numerous oral statements, representations and promises to their customers regarding the time and the manner in which respondents will perform various adjustments, replacements and/or repairs (Admitted Second Amended Answer).

***11** 12. By and through the use of the floor models and furniture displays discussed in Finding 11 hereinabove, together with the aforesaid oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, and are now representing, directly or by implication, that:

(1) Furniture which is delivered to respondents' customers will be identical to that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays.

(3) Furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, will be replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees.

(3) Furniture which is delivered to respondents' customers will be free from damages and/or defects.

(4) Furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced within a reasonable time.

(5) Furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced to the satisfaction of the purchasers.

(6) Furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced in accordance with promises made to the purchasers by respondents' employees (Admitted Second Amended Answer).

13. In truth and in fact:

(1) Furniture is delivered to customers which, in many instances, is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays.

(2) Furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, in many instances, is not replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees.

(3) Furniture delivered to purchasers, in many instances, is damaged and/or defective.

(4) Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced within a reasonable time.

(5) Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced to the satisfaction of the purchasers.

(6) Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced in accordance with promises made to the purchasers by respondents' employees (Admitted Second Amended Answer).

Therefore, the acts, practices, statements and representations, as set forth in Findings 11 and 12 hereinabove, were, and the are, false, misleading and deceptive (Admitted Second Amended Answer).

Individual Respondent Linda Decker

***12** 14. Individual respondent Linda Decker Began her employment with ADF as a sales person in ADF's College Park, Md., store in Jan. 1970 and continued as a sales person until Oct. 1970 (Auslander, Tr. 140; Decker, Tr. 243). In Oct. 1970, she became manager of ADF's Lexington Park, Md., store (Auslander, Tr. 141; Decker, Tr. 243). She returned to the main office in College Park when Mr. Auslander suffered his heart attack in Oct. of 1971 (Auslander, Tr. 133, 141; Decker, Tr. 245). She served as a vice president of ADF from November 11, 1971 until May 31, 1973 (Decker, Tr. 240; Auslander, Tr. 124), and also served as vice president of ADF of Lexington Park, Inc. from June, 1970 until May 31, 1973 (Decker, Tr. 240). The latter corporation was formed to obtain a mortgage loan from a bank (Auslander, Tr. 125). Mrs. Decker left ADF on May 31, 1973 and is now self-employed as Decker and Associates, selling an advertising specialty item (Decker, Tr. 239–242). During her employment with ADF, Mrs. Decker was a salaried employee; she did not receive a commission or percentage of profits, and she did not own any stock in ADF (Decker, Tr. 250, 327–328, 333).

15. As manager of the Lexington Park retail store, Mrs. Decker had authority to hire store personnel (Decker, Tr. 250). She also arranged her own delivery schedules, which was a unique situation among the ADF stores (Auslander, Tr. 148). She trained her employees (Auslander, Tr. 147), and arranged for newspaper and radio advertisements in the Lexington Park area newspapers and radio stations (Auslander, Tr. 167, 168; Decker, Tr. 243, 244). Mrs. Decker also sold on the floor (Decker, Tr. 244), and was responsible for the innovation of having her, as store manager, deal directly with the customers:

Q. Now, when you became store manager of the Lexington Park store, you also were performing some innovations for that particular store that was not being carried out by other retail stores; is that correct?

A. So far as handling the customer directly, I knew that there had been problems as far as getting through to the warehouse to set up delivery at this end, and I asked him to agree to let me handle all of my customers myself, and particularly because they would be calling long distance. I though that it would be better to be done on a local basis.

I am from that area, and could not see having any problems to call long distance; I prefer that myself. So it became kind of a self-contained, you know, everything had to go back to Washington, but I literally did it (Decker, Tr. 244).

16. During her employment with ADF from January, 1970 through May 31, 1973, Mrs. Decker performed various duties other than those already mentioned. She had authority to sign checks, but never did so (Decker, Tr. 250). She had authority to hire and fire store personnel as a store manager [all store managers had this authority] (Decker, Tr. 250, 251). She shopped competition (Decker, Tr. 275); she visited ADF stores and reported back to Mr. Auslander (Decker, Tr. 285); she handled details concerning the construction of new stores and the warehouse (Decker, Tr. 321). Mrs. Decker talked with the manufacturers' representatives and followed purchase orders to determine why there were shipping delays (Auslander, (Tr. 159). Later, as assistant to Mr. Auslander, she fired certain personnel, including a store manager, and she was re-

quested to fire the ADF advertising agency. These latter acts had the specific approval of Mr. Auslander (Decker, Tr. 252, 254, 284).

***13** 17. After firing the ADF advertising agency, Mrs. Decker prepared the advertising copy and placed the advertisements with the newspapers. This work was all approved by Mr. Auslander (Decker, Tr. 253–259). She identified herself as the ADF advertising manager on occasions (Decker, Tr. 266). She used the pseudonym of Decker Advertising, the idea was to form an 'in-house advertising agency' (Decker, Tr. 255) in order to get an agency rebate, which was turned over to ADF (Decker, Tr. 267–268).

18. On Oct. 25, 1971, Mr. Auslander suffered a severe heart attack and was hospitalized for one month (Auslander, Tr. 129, 131; Decker, Tr. 245). Within 24 hours, Mrs. Decker moved to the main ADF office at College Park (Decker, Tr. 245). With the assistance of individual respondent Sandra Tye, Mrs. Decker began 'picking up pieces' and made a sincere effort to continue the day-to-day operations of ADF and 'to bring everything under control' (Decker, Tr. 247). Mr. Auslander, after being hospitalized for one month, thereafter worked a light schedule for several weeks (Auslander, Tr. 131–132). Mrs. Decker and Mrs. Tye carried on the business operations. Mr. Auslander testified:

> Q. So Linda Decker and Sandy Tye sort of held the pieces together until you came back, is that correct?
>
> A. As best as they could, yes.
>
> Q. Did they do a good job?
>
> A. I think they did a great job compared to with suddenly a whole new situation was thrust upon them and consequently, I think under the circumstances, they performed, I think, most admirably (Auslander, Tr. 133).

19. At the time of Mr. Auslander's heart attack, the opening of a Rockville, Md., store was pending. Mrs. Decker, with permission from Mrs. Auslander and with the assistance of Mrs. Tye, went ahead with plans for the Rockville store opening:

> So, the first couple of days we brought the managers together to discuss how we were going to do this, and worked on the Rockville grand opening, and everyone volunteered to work.
>
> We kept the store open to Midnight for the grand opening, and so forth, and the whole idea was to keep the morale up and let the world think we knew what we were doing, whether we did or not (Decker, Tr. 247).

* * *

> You kind of had to pretend it was all going well (Decker, Tr. 331).

20. In June of 1972, Mrs. Decker was given the responsibility for handling consumer complaints for ADF (Auslander, Tr. 141–142; Decker, Tr. 296–298). Pursuant to Mr. Auslander's instructions, Mrs. Decker contacted the various consumer protection groups, including the Federal Trade Commission, and informed them that all consumer complaints were to be directed to her attention (Decker, Tr. 298–299). She testified that she usually took these complaints to Mr. Auslander for instructions, although there were instances where she did not discuss the complaints with him prior to disposition (Decker, Tr. 299). Mrs. Decker also testified that she did not always show Mr. Auslander the letters which she sent out in response to consumer complaints (Decker, Tr. 300).

***14** 21. In May of 1971, ADF was notified of a pending investigation by the Federal Trade Commission (Auslander, Tr. 149). Mr. Auslander testified that he had Mrs. Decker talk with Mr. Klasic, the FTC attorney, in the Lexington Park store because:

> A. At that time, we had the Edgewood Street warehouse, * * * and the Edgewood Street warehouse was just an absolute disaster. You had a bunch of people in a tiny little room; it was not conducive in any

way for any kind of conversation or for any kind of fact finding.

So consequently, this was probably the only area, that it was a reasonably new building, it had a couple of private offices and, of course, she was there and she was a little more knowledgeable than some of the other people in the other stores were so consequently, we chose that area right down there.

Q. Why didn't you talk to the FTC Attorney, you are President of the Company; she is not even an Of- ficer?

A. Okay, good point. But again, she was a little more familiar, again, with dealing with the customers thing. Also in that area, she would have more knowledge as to what would be handled, delivered, what would be selling and so forth, whereas I kind of would not know (Auslander, Tr. 150).

Mrs. Decker stated that she spoke with the FTC attorney because of the Lexington Park location, since Mr. Auslander was busy with other things, and:

* * * I had more time to do this sort of thing from a cost standpoint. It was less costly to have me doing this rather than to pay an attorney. In addition I knew where the information was (Decker, Tr. 269).

Part of Mrs. Decker's interview with Mr. Klasic concerned the sales tag used by ADF at that time (CX 4), and Mrs. Decker relayed to Mr. Auslander Mr. Klasic's concern about its terminology, including the word 'Sale,' used on the sales tag (Decker, Tr. 272). Mrs. Decker testified about CX 5, the sales tag which replaced CX 4:

Q. And you helped in creating this particular sales tag.

A. I relayed the information to Mac, the final sale [sic] on everything.

Q. But didn't you have some input as to what should be said on the tag in view of your conversations with Mr. Classic [sic].

A. Yes (Decker, Tr. 272).

22. The record supports a conclusion that Mrs. Decker participated in the challenged acts and practices of corporate respondent ADF. There is substantial evidence that Mrs. Decker participated in ADF's advertising, both while store manager at the Lexington Park store (Decker, Tr. 243) and while serving as an assistant to Mr. Auslander (Decker, Tr. 255–266). She testified that she was aware that the advertised prices of most merchandise appearing in ADF advertisements were generally the usual selling price, and not reduced (Decker, Tr. 277). She testified that merchandise purchased on layaway would be set aside only if a substantial deposit were paid (Decker, Tr. 290–291). She also testified that she knew that there was a dollar limitation on ADF's advertised 'Free Delivery' policy (Decker, Tr. 294). Mrs. Decker participated in the formulation of the sales tags and invoices (CX 5, 8), which misrepresented 'Free Delivery,' 'Sale,' and 'Layaway' (Decker, Tr. 282).

***15** 23. Mrs. Decker's participation in the admitted unlawful acts and practices of the corporate respondent ADF was, however, that of an employee, and not as an officer of the corporation responsible for corporate policy. Mr. Auslander testified quite emphatically that '* * * the decisions or basic policy was absolutely originating with me, either right or wrong' (Auslander, Tr. 145–146). Mrs. Decker was not even aware of the fact that she was an officer of corporate respondent ADF until the FTC investigation was well under way (Decker, Tr. 240–241, 327).

Mr. Auslander testified that the Rockville store opening was preplanned (Auslander, Tr. 134), that he chose the items of furniture for the advertisements, established the advertised prices, and was the final authority on advertising (Auslander, (Tr. 143, 153, 169). He testified that the established the guidelines for handling customer complaints, he saw many of the complaint letters before they were sent out, and that he actually dictated or wrote other responses to complaints (Auslander, Tr. 144, 189, 203, 217, 222, 227; CX 55). Mr. Auslander determined the selling prices of all merchandise (Auslander, Tr. 167, 171), and he revised the ADF sales invoices and sales tags (Auslander, Tr. 182–185, 195).

Mrs. Decker testified that the advertisements she placed while manager of the Lexington Park store were items 'Max would give me' (Decker, Tr. 243). She received permission from Elaine (Mrs. Auslander) to proceed with the Rockville store opening after Mr. Auslander had his heart attack (Decker, Tr. 247). The advertisements for the Rockville store opening were taken from previous advertisements 'which is the way I have seen Max do it almost two years' (Decker, Tr. 248). After she took over the advertising duties, she made up the advertisements, 'cutting and pasting them together bit by bit' for Mr. Auslander's approval (Decker, Tr. 255–256). She made suggestions for the advertisements, which suggestions were sometimes accepted, sometimes not (Decker, Tr. 257–258). Her participation in the advertising program under the pseudonym 'Decker Advertising' was for the purpose of getting a rebate for ADF (Decker, Tr. 267–268). While Mrs. Decker admitted she had some 'input' on the revised sales tag, Mr. Auslander had the final say on everything (Decker, Tr. 272). In handling customer complaints, she became a detective and talked to everyone involved with the customer and ultimately took it to Mr. Auslander for final resolution (Decker, Tr. 299).

24. In sum, Mrs. Decker was an employee of corporate respondent ADF, certainly a very loyal and hard-working employee, whose duties after Mr. Auslander's heart attack were those of 'a general assistant' to Mr. Auslander (Auslander, Tr. 159). Carrying on the business while Mr. Auslander was disabled was basically a singular occurrence under special circumstances.

25. Neither the duties of Mrs. Decker as a general assistant to Mr. Auslander, nor the conduct of the business while Mr. Auslander was disabled, is sufficient to attribute to Mrs. Decker the responsibility for formulation, direction or control of the acts and practices of corporate respondent ADF.

***16** As. Mrs. Decker stated it, there are two big issues concerning her individual responsibility—advertising and taking over operation of the business while Mr. Auslander was incapacitated. As regards these issues, she testified:

> * * * Under the advertising aspect of it I certainly have no training per se in advertising. I copied 100 percent what I had seen two advertising agencies do, and the only reason I did it was to save the company money. So the mistakes that were made there were made strictly because I was copying somebody else's work. That is all I had to go by.
>
> Regarding my taking-over situation when he was in the hospital I—to say the very least, I am very fond of the man. * * * The whole idea was to keep morale up, and keep sales up, and get rid of many problems before he comes back. * * * I wanted as much as possible for him to think everything was under control. * * * I feel I am being persecuted by the Federal Government because of what was really a humanitarian act. That is what it amounts of (Tr. 329–330).

Individual Respondent Sandra Tye

26. Individual respondent Sandra Tye has been employed by ADF for over nine (9) years (Tye, Tr. 363). She has been vice president of ADF at least since 1970 (Auslander, Tr. 123, 124; Tye, Tr. 334). For the last four years Mrs. Tye has been in charge of ADF's warehouse operation (Tye, Tr. 89, 334). Her duties consist of receiving all the merchandise which comes from the factories, and shipping all merchandise out to customers (Tye, Tr. 89, 338). Mrs. Tye also has worked part-time as a sales person for ADF in addition to her warehouse duties (Tye, Tr. 344). She has, on occasion, trained other ADF employees in sales work (Tye, Tr. 363–364). She has authority to sign payroll checks and to sign checks for freight bills (Tye, Tr. 356–357).

Mrs. Tye is a salaried employee of ADF; she does not participate in any profit sharing arrangement of receive a commission (Tye, Tr. 353, 364), and she does not own any stock in ADF (Tye, Tr. 335).

27. At one time ADF operated three warehouses, located at 701 Edgewood Street, N.E., Wash., D.C., Fourth

and Channing Street, N.E., Wash., D.C., and 7451 Race Road, Hanover, Md. The Channing Street warehouse was used as a storage area (Tye, P. Tr. 91–92; Tye, Tr. 336). In 1972, the Race Road warehouse was completed and opened, enabling ADF to close the other two warehouses (Tye, Tr. 337).

28. Mrs. Tye handled some consumer complaints coming into the warehouse (Tye, Tr. 340–341, 349, 352). These complaints were handled without reference to Mr. Auslander (Tye, Tr. 341).

29. At the time of Mr. Auslander's heart attack, Mrs. Tye 'only did what I have been doing before and anything that the two of us [Mrs. Decker and Mrs. Tye] would try to work out but we didn't do anything differently that was not being—hadn't been done. We tried to piece up things' (Tye, Tr. 354–355). Mrs. Tye worked with Mrs. Decker, mostly by telephone, during Mr. Auslander's absence, since Mrs. Tye had a full schedule operating the warehouses (Tye, Tr. 354, 355; Decker, Tr. 246). Payments due to furniture manufacturers were held until Mr. Auslander returned to work—'the factories were quite understanding' (Tye, Tr. 356).

***17** 30. Mrs. Tye was well-acquainted with the problems of late delivery of merchandise, the failure to lay away merchandise for customers, the delivery of damaged merchandise, and the failure to deliver merchandise identical to the items ordered by a customer (Tye, Tr. 338–339, 343, 347, 348, 350–351, 357–361). As the person in charge of the warehouse, she personally participated in these admittedly unlawful acts and practices of corporate respondent ADF.

31. Testimony by Mrs. Tye indicates that the delivery problems alleged in the complaint—the delayed deliveries, the failure to lay away customers' orders, the delivery of damaged merchandise, and the failure to deliver merchandise identical to that ordered by a customer were due to inadequate warehouse space and incompetent warehouse personnel (Tye, Tr. 341–343, 348, 357; Auslander, Tr. 150, 192–193). Theft was also a serious problem at the warehouse (Tye, Tr. 348). Mr. Auslander was aware of the warehouse conditions, the lack of space and the problems with theft. The Race Road warehouse was constructed to alleviate these problems (Tye, Tr. 342, 357–358; Auslander, Tr. 192).

32. Mr. Auslander testified that he made all policy in the warehouse (Auslander, Tr. 129), and that he set up the inventory and storage controls in the warehouse (Auslander, Tr. 192). Further, he established the guidelines for handling customer complaints (see Finding 23). Mr. Auslander testified that 'basic policy was absolutely originating with me' (Auslander, Tr. 145–146). Since Mr. Auslander was responsible for basic policy, and since he was well aware of the warehouse problems faced by Mrs. Tye, it is concluded that it was his responsibility that the acts and practices of ADF, admitted to be unlawful, occurred.

33. Mrs. Tye was basically an employee of ADF, a hard working employee (Tye, Tr. 342–344). She was not responsible for the formulation, direction or control of the acts and practices of ADF. The fact that she was a corporate vice president is of little significance, as she did not do anything differently than before she was made a corporate official—'it didn't mean anything' (Tye, Tr. 356, 364).

34. Prior to issuance of the complaint herein, respondents signed a consent agreement, not a part of the adjudicative record, wherein individual respondents Linda Decker and Sandra Tye agreed to individual responsibility for the acts and practices of ADF (Decker, Tr. 325). Complaint counsel questioned both Mrs. Decker and Mrs. Tye about their reasons for signing such an agreement and later denying individual responsibility for the complaint allegations.

Mrs. Decker testified:

Q. Why were you two still left in? Who insisted on it?

A. It is hard to explain.

Q. Was it a situation sign or you don't work for ADF anymore?

A. No. I am sure it would not be true. It became a loyalty issue without saying anything.

Q. Loyalty issue?

A. You are either with the company or not.

***18** Q. Sink or swim.

A. I might add that at that point I found it inconceivable that it could go through. * * * (Tr. 326–327).

Mrs. Ty testified:

Q. You signed a Consent Agreement, did you not?

A. Yes, I did.

Q. Would you explain how that came about?

A. Yes. Mr. Auslander had been meeting with the attorneys and one of the attorneys brought the agreement to me to sign and I signed it. I would in no way upset Mr. Auslander. He is a very ill man and I owe a great deal to him.

Q. You signed the agreement without knowing anything about it?

A. That is correct.

Q. Because Mr. Auslander wanted to have it signed?

A. That is correct (Tr. 362).

Mr. Auslander testified that is was his own 'stupidity' which permitted Mrs. Decker and Mrs. Tye to sign the consent agreement which was very injurious to them (Tr. 151–152). He testified:

Q. To your knowledge, nobody ever brought to the attention of the Commission that these two women were not, in fact, responsible for the acts and practices complained about in the complaint?

A. I know, really it is strictly my fault and my stupidity or negligence.

Q. These two women executed an agreement, were they consulted about that, as to what they were sign- ing?

A. At the time, I was so disturbed about this thing, I think that both of them in their aim to possibly pacify me and because of my condition, whatever, I think they probably would have gone along with most anything.

Q. A great sense of loyalty?

A. Yes, even though—exactly even though something was very injurious to themselves (Tr. 151–152).

The events surrounding the execution of the consent agreement shed illumination over the other issues raised by the complaint. The participation of individual respondents Linda Decker and Sandra Tye in the admittedly unlawful acts set forth in the complaint occurred out of employee loyalty, not corporate responsib- ility.

CONCLUSIONS

Corporate respondent Auslander Decorator Furniture, Inc. and individual respondent Maxwell Auslander have, by their Second Amended Answer, admitted all the material allegations of the complaint. This Second Amended Answer was filed with the Commission on June 11, 1973 and accepted for filing in the record herein by order of the undersigned dated June 20, 1973.

Under Section 3.12(b)(2) of the Commission's Rules of Practice, it is provided that the complaint and the admitting answer will provide a record basis on which the administrative law judge shall file an initial decision, including an appropriate order. Accordingly, the undersigned has, in this case, ruled that the complaint allegations and said respondents' Second Amended Answer shall constitute the record basis for this decision regarding said respondents (Order Denying Complaint Counsel's Motion To Reconsider Order Limiting Proof Complaint Counsel May Offer To Corroborate Admitted Complaint Allegations, dated July 13, 1973; Tr. 115). The findings of fact relating to these two respondents are based entirely on their admission answer. Therefore, the only issues remaining as to these respondents are the scope of the remedy and whether the remedy should be made applicable

to Maxwell Auslander in his individual capacity.

***19** Individual Respondent Maxwell Auslander

Respondent Maxwell Auslander, by virtue of the Second Amended Answer filed herein on June 11, 1973, has admitted that he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in the complaint. This answer includes the admission that the acts and practices enumerated in Paragraphs Four, Five, Seven and Eight of the complaint are false, misleading and deceptive, and that respondents' use of the aforesaid false, misleading and deceptive statements, representations, acts and practices have had, and now have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief. Thus, respondent Maxwell Auslander has admitted that he is personally responsible for the unlawful acts and practices of the corporate respondent.

Respondents ADF and Maxwell Auslander argue that individuals have only been included in orders when it appeared that such course was necessary to prevent evasion of the order, referring to the Supreme Court's decision in *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112 (1937) (RPF, p. 17). The record in this case, according to respondents, is devoid of any evidence that respondent Maxwell Auslander must necessarily be individually joined in the order because a possibility of evasion exists.

It is admitted that Maxwell Auslander formulates, directs and controls the acts and practices of corporate respondent ADF, including the acts and practices admitted to be deceptive and therefore unlawful. Thus, individual respondent Maxwell Auslander's dominion and control over corporate respondent ADF is without dispute.

Because of these undisputed facts, it is believed necessary to subject Maxwell Auslander personally to the order. It is not necessary to demonstrate an intent to evade the order, or even a probability of evasion of the order, to hold an individual respondent personally liable. As the Commission stated in *Coran Bros. Corp., et al.*, Docket No. 8697, 73 F.T.C. 1, 25 (July 11, 1967):

> The public interest requires that the Commission take such precautionary measure as may be necessary to close off any wide 'loophole' through which the effectiveness of its orders may be circumvented. Such a 'loophole' is obvious in a case such as this, where the owning and controlling party of an organization may, if he later desires, defeat the purposes of the Commission's action by simply surrendering his corporate charter and forming a new corporation, or continuing the business under a partnership agreement or as an individual proprietorship with complete disregard for the Commission's action against the predecessor organization.

The undersigned is entirely in accord with the above reasoning. Although the record as to Maxwell Auslander does not show his extent of ownership, it does demonstrate his complete dominion over the acts and practices of the corporate respondent. The record does establish that individual respondents Linda Decker and Sandra Tye do not own any stock in ADF. The record further establishes that Maxwell Auslander appoints officers of ADF (Linda Decker was made a vice president) without even informing the individual of this fact. Further, numerous corporate devices are utilized in the operations of ADF, *i.e.*, ADF Lexington Park and ADF Manassas, Va. (Tye, Tr. 335; Auslander, Tr. 125; Decker, Tr. 240). Further, in 1964 the Commission issued a cease and desist order against Maxwell Auslander individually and ADF Warehouse, Inc., apparently a different corporate device than the present corporate respondent (*ADF Warehouse, Inc., et al.*, Docket No. 8645, 66 F.T.C. 1267).

20** By simply surrendering the present corporate charter, and utilizing other existing corporations, any Commission order issued solely against corporate respondent ADF could be evaded. As a simple precautionary measure, such an obvious 'loophole' should be closed. It is well settled that the choice of the remedial order is committed to the discretion of the Commission. *Federal Trade Commission* v. *Mandel Bros.*, 359 U.S. 385, 392–93 (1959); *Niresk Industries, Inc.* v. *Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir. 1960), ***cert. denied, 364 U.S. 883 (1960); *L. G. Balfour Co.* v. *Federal Trade Commission*, 442 F.2d 1 (7th Cir. 1971). Moreover, '* * * once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.' *United States* v. *E. I. du Pont de Nemours & Co., et al.*, 366 U.S. 316, 334 (1961).

Thus, it seems most appropriate here to include individual respondent Maxwell Auslander within the scope of the remedy. As the Fourth Circuit stated in *Pati-Port, Inc., et al.* v. *Federal Trade Commission*, 313 F.2d 103, 105 (1963):

> To the foregoing we might add the comment that it would seem in cases of this sort to be a futile gesture to issue an order directed to the lifeless entity of a corporation while exempting from its operation the living individuals who were responsible for the illegal practices.

Individual Respondents Linda Decker and Sandra Tye

Individual respondents Linda Decker and Sandra Tye, in their Second Amended Answer, admitted the allegations of the complaint, except that said respondents deny that:

> (1) they participate or have participated as individuals in any of the acts or practices alleged in the complaint, and
>
> (2) they formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint.

It is concluded that individual respondents Linda Decker and Sandra Tye did not formulate, direct or control the acts and practices of ADF. The record clearly establishes that 'the decisions or basic policy was absolutely originating with' Maxwell Auslander, the president of ADF (Auslander, Tr. 145–146). Linda Decker and Sandra Tye were essentially employees of ADF, who worked under Mr. Auslander's direction and supervision. They owned no stock in the corporation and received only a salary, with no commission or percentage of profits. The fact that each was a vice president of the corporation is not sufficient to import control over the corporate activities. Linda Decker did not even know when she was made an officer of ADF. She testified:

> * * * I was told after it had been done. I am sure he thought he was being complimentary, and I would enjoy it, although I had said previously that I did not want to (Tr. 241).

Sandra Tye testified as to her designation as vice president of ADF:

> ***21** At that time I thought it was a title because we had so many offices and I didn't do anything differently than I had done before (Tr. 356).

Complaint counsel rely upon several previous decisions as a precedent for including Sandra Tye and Linda Decker individually in a cease and desist order (CPF, pp. 13–17). It is unquestioned that an individual may be personally subjected to a Commission order where the circumstances so warrant. The decisions referenced by complaint counsel all have the element of control or responsibility for the corporate acts. In *Standard Distributors, Inc., et al.* v. *Federal Trade Commission*, 211 F.2d 7, 15 (2d Cir. 1954), the very language quoted by complaint counsel states that an order may include those officers 'in top control of the activities' of the corporation.

In *Cotherman, et al. v. Federal Trade Commission*, 417 F.2d 587 (5th Cir. 1969), a corporate vice president, who was second is command of the corporation and who actively participated in the unlawful practices, was held individually liable. He was also a stockholder and had had previous experience in the industry before joining respondent. *In the Matter of Allenton Mills, Inc., et al.*, 60 F.T.C. 1630, 1641 (1962), the Commission found that the operations of the respondents were conducted strictly as a family arrangement, and that the corporate identities were a fiction. Ownership, direction and control were found to exist with the individual respondents, although each individual looked for guidance to one respondent, Max Furman. In *Surf Sales Company, et al. v. Federal Trade Commission*, 259 F.2d 744 (7th Cir. 1958), the manager of the corporation was named individually in the order, but here again the Court concluded that the individual 'had and did exercise authority, responsibility and direction of the affairs' of the corporation (*Id.* at 747).

Consequently, since the record is devoid of evidence of actual control or responsibility by Sandra Tye and Linda Decker over the affairs of ADF, and since their participation in the unlawful acts and practices of ADF was that of employees working under the direction and supervision of Maxwell Auslander, it is concluded that any remedy entered herein should bind these two respondents only in their corporate capacity, and not as individuals.

The Remedy

Complaint counsel have proposed an order in strict accordance with the order served with the complaint. Complaint counsel argue that the proposed order is well within the periphery of the Federal Trade Commission's authority to issue remedial orders, and has, at the very least, a reasonable relation to the unfair and deceptive acts and practices admitted by respondents' Second Amended Answer.

Respondents have admitted that, in many instances, they (1) do not deliver merchandise to customers on or near the delivery dates promised, (2) do not maintain in their warehouse adequate stock to insure delivery on the promised delivery dates, and (3) do not store layaway items, necessitating reordering of the merchandise with resultant delays in delivery.

***22** Respondents have admitted that, in many instances, they (1) deliver merchandise to customers which is different from that which the customers have selected, and do not replace such merchandise within a reasonable time and in accordance with promises and representations made to respondents' customers, and (2) deliver damaged or defective merchandise, and do not repair or replace such merchandise within a reasonable time, to the satisfaction of the customers, nor in accordance with promises and representations made to respondents' custom- ers.

The order proposed by complaint counsel redresses these unfair and deceptive acts and practices by requiring respondents to inform all customers, orally and in writing on the contracts, of their right to cancel the contracts with a refund within ten (10) days from the date of delivery of defective or damaged merchandise, or merchandise not identical to that ordered, and requiring a refund of all monies to customers who request contract cancellation. The proposed order provides that respondents may, with the written consent of such aggrieved customers, repair or replace such damaged or defective merchandise. These provisions exempt the delivery of merchandise sold 'as is' if such sales are so designated on the sales contracts, and the sale of damaged or defective merchandise is to customers who have knowledge of the damage or defect and have given written consent to purchasing same. The proposed order also requires respondents to maintain adequate records for two years in order to enable the Commission to verify compliance with these provisions of the proposed order.

Respondents have admitted that, in many instances, they have falsely and deceptively represented that mer-

chandise being offered for sale constituted a reduction from the actual bona fide price at which such merchandise was sold or offered for sale by respondents to the public on a regular basis for a reasonably substantial period of time in the recent, regular course of their business. The proposed order prohibits misrepresentations of this type, and provides for the retention of adequate records for a period of two years in order to enable to Commission to verify compliance with this provision.

The proposed order further requires that respondents (1) prominently post the cease and desist order in their salesrooms with notice that customers may receive a copy thereof, (2) deliver a copy of the order to their operating divisions and employees, and (3) notify the Commission of a change in the individual respondent's employment and the nature of his new employment, and any change in the corporate respondent which may affect compliance obligations with the order.

Respondents ADF and Maxwell Auslander object to the proposed order on the grounds that certain provisions go beyond the scope of what the Commission may lawfully require, that certain provisions go beyond what is reasonably necessary to correct admittedly unlawful acts and practices of respondents, and that certain provisions are unsupported by the record (RPF, pp. 11–13). Respondents argue that certain provisions of the order will drastically affect respondents in the lawful conduct of their business; and that, taken as a whole, they are so unreasonable in relation to the record as to be penalizing rather than remedial. Respondents therefore urge that these provisions be stricken from any order issued herein (RPF, p. 41).

***23** Respondents particularly object to the order provision requiring respondents to post in a prominent place a copy of the order and provide any customer or prospective customer with a copy thereof upon demand, as being punitive in nature, and subjecting respondents to humiliation and embarrassment (RPF, pp. 14, 33). Respondents also argue that the admitted unfair, misleading and deceptive acts and practices relate to respondents, statements and promises made orally and in various advertisements, posters and signs. There is nothing in the record to indicate that respondents' written invoices or sales contracts are in any way unfair, misleading or deceptive. By requiring respondents to cease and desist from making any such unfair or deceptive representations, the evils found to have existed will be effectively eliminated. To go beyond this and to require respondents to alter the terms and conditions in their sales contracts violates the Supreme Court's test announced in *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608 (1946), which requires that the remedy must relate to the violation found. Respondents argue that these provisions bestow specific rights upon respondents' customers and saddle respondents with obligations which respondents' competitors are left free to contest.

Respondents also argue that the Commission seeks to confine the use of the words 'sale,' or 'buy now and save,' or any other word or words of similar import or meaning, to situations where the price of such merchandise being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business. This restriction is too narrow in view of the Commission's own guidelines and its interpretation of their meaning.

The undersigned has carefully reviewed the provisions of the proposed order served with the complaint and recommended by complaint counsel. Certain changes have been made by the undersigned in this proposed order. The provisions of the order entered herein do have a reasonable relation to the practices found to be unlawful, and are, in fact, necessary to bring an end to and prevent recurrence of such unlawful practices. *Jacob Siegel Co. v. Federal Trade Commission, supra.*

Commission orders requiring alteration of contracts and providing for similar types of refunds have been upheld by the courts. The Fifth Circuit Court of Appeals has upheld a Commission order requiring respondents to (1) incorporate on their contracts a seven-day cooling off period and (2) limit the amount of their contracts to $1500. *Arthur Murray Studio of Washington, Inc., et al. v. Federal Trade Commission*, 458 F.2d 622 (5th Cir. 1972). The Third Circuit Court of Appeals has upheld Commission authority to order respondents, *inter alia*, to refund all monies to customers who have requested contract cancellation in writing within three days from the execution thereof, or those customers who indicate that they are not satisfied with respondents' products. *Windsor Distributing Company v. Federal Trade Commission*, 437 F.2d 443 (3rd Cir. 1971). Thus, it is clear that the Commission has the power, in its discretion, to direct whatever relief is reasonably necessary, including the alteration of contracts and prohibition of lawful practices, to prevent not only the unlawful practices found to exist but a recurrence of such unlawful practices. *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419 (1958).

***24** The relation between the violation (nondelivery of merchandise or delivery of damaged or defective merchandise and the unlawful retention of customers' monies) and the remedy (establishing dates certain for delivery of merchandise and refunding monies unless respondents deliver on dates promised, repair or replace said merchandise promptly and satisfactorily) is direct, specific, and necessary, and is framed to bring the illegal conduct to an end. By placing these customer rights on order forms, sales contracts and invoices, the customer will be certain to have in writing the understanding between the parties, and compliance with the order will be assured and monitored by customers. By placing such notices in writing, customers will actually be informed in writing of their rights under the order. The posting of the order will thus be unnecessary to protect customers' rights under the order entered herein.

Complaint counsel have only proposed a one-year posting requirement, and it is difficult to see what such a one-year requirement will accomplish over the long haul. If the posting requirement is necessary for one year, which complaint counsel have not demonstrated, it should be necessary indefinitely. Since the order has been some what restructured by the undersigned to require more customer information on documents connected with the sales transactions, the posting provision has been eliminated.

The undersigned has also revised the proposed order to require delivery within five (5) business days of the agreed upon delivery date. Complaint counsel's proposal extended respondents no leeway whatsoever on delivery dates, while respondents proposed an order requiring delivery 'on or near the agreed delivery dates' (RPF, p. 6). The undersigned is of the belief that a specific time frame must be included in the order and that respondents must be given some latitude on delivery for such unforeseen occurrences as weather, equipment failure, work stoppages, or where help unexpectedly fails to report for work. Since severe penalties may attach for each order violation, some leeway is appropriate.

The order provision dealing with use of the words 'sale' or 'buy now and save' is designed to correct the violation of law which has been admitted. Respondents' unlawful advertising claims represent 'savings' claims, not comparative claims. The order, as drafted, does not prohibit comparative advertising, if respondents choose to do such advertising in the future, and if respondents otherwise comply with the Commission's Trade Practice Rules for the Household Furniture Industry (CRB, pp. 12–15).

The remaining provisions of the order entered herein relate to record keeping requirments and reporting requirements. Such provisions have been utilized in numerous Commission orders in the past and are deemed necessary herein to enable the Commission to monitor compliance with the order as entered.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the respondents and this proceeding is in the public interest.

***25** 2. Respondent Auslander Decorator Furniture, Inc., doing business as A.D.F. and A.D.F. Warehouse, is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 7451 Race Road, Hanover, Md.

3. Respondent Maxwell Auslander is an individual and is president of corporate respondent Auslander Decorator Furniture, Inc. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint issued herein. His address in the same as that of the corporate respondent.

4. Respondent Sandra Tye is an individual and is a vice president of corporate respondent Auslander Decorator Furniture, Inc. Her address is the same as that of the corporate respondent.

5. Respondents Linda Decker is an individual and was, from Nov. 1971 until May 31, 1973, a vice president of corporate respondent Auslander Decorator Furniture, Inc. Her present home address is 1418 Kensington Place, Crofton, Md. Respondent Linda Decker is no longer employed by the corporate respondent.

6. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of furniture and related products to the public at retail.

7. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the District of Columbia to purchasers thereof located in various States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as 'commerce' is defined in the Federal Trade Commission Act (15 U.S.C. 41–58).

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

9. In the course and conduct of their business as set forth in the complaint and for the purpose of inducing the sale of their merchandise, respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by materials disseminated through the mails, and on tags or labels and in signs posted in respondents' stores. In addition to the aforesaid statements and representations, respondents and their sales representatives have made, and are now making, numerous oral statements to customers and prospective customers regarding the terms and conditions under which merchandise will be sold and delivered and services provided by respondents. By and through the use of these statements and representations, respondents have represented, and are now representing, directly and by implication, that: (1) respondents will deliver their furniture to customers on or near the dates they have promised those customers for delivery; (2) respondents maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised dates; (3) respondents' customers may purchase furniture on the layaway plan, and, while the payments are being made, the furniture will be stored in

their warehouse, ready for delivery upon completion of all payments; and (4) respondents are offering furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

***26** In truth and in fact: (1) respondents, in many instances, do not deliver their furniture to customers on or near the dates they have promised those customers for delivery; (2) respondents, in many instances, do not maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised delivery date; (3) furniture purchased by respondents' customers on the layaway plan is not, in many instances, stored in the warehouse ready for immediate delivery upon completion of all payments, but is sold to other customers, necessitating reordering of the merchandise when the layaway payments are completed, with resultant delays in delivery; and (4) respondents, in many instances, do not offer furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

The aforesaid statements and representations are false, misleading and deceptive.

10. In the course and conduct of their business as set forth in the complaint and for the purpose of inducing the sale of their merchandise, respondents have maintained, and are now maintaining, in their salesrooms, floor models and displays of furniture being offered for sale, on the bases of which their customers select and order the furniture they purchase from respondents. In this connection, respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the quality and durability of the furniture being offered for sale, the terms and conditions under which merchandise will be sold and delivered, and the services that will be provided by respondents. Moreover, subsequent to making sales and deliveries, respondents and their employees have made, and are now making, numerous oral statements, representations and promises to their customers regarding the time and the manner in which respondents will perform various adjustments, replacements and/or repairs.

By and through the use of floor models and furniture displays, together with the aforesaid oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, and are now representing, directly or by implication, that: (1) furniture which is delivered to respondents' customers will be identical to that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays; (2) furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays will be replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees; (3) furniture which is delivered to respondents' customers will be free from damages and/or defects; (4) furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced within a reasonable time; (5) furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced to the satisfaction of the purchasers; and (6) furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced in accordance with promises made to the purchasers by respondents' employees.

***27** In truth and in fact: (1) furniture is delivered to customers which, in many instances, is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays; (2) furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, in many instances, is not replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the cus-

tomers by respondents' employees; (3) furniture delivered to purchasers, in many instances, is damaged and/or defective; (4) furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced within a reasonable time; (5) furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced to the satisfaction of the purchasers; and (6) furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced in accordance with promises made to the purchasers by respondents' employees.

The aforesaid acts, practices, statements and representations are false, misleading and deceptive.

11. Respondents' use of the aforesaid false, misleading and deceptive statements, representations, acts and practices have had, and now have, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondents' merchandise by reason of such erroneous and mistaken be- lief.

12. The aforesaid acts and practices of respondents, as herein concluded, were, and are, all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair or deceptive acts and practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

ORDER

It is ordered, That respondents Auslander Decorator Furniture, Inc., a corporation, its successors and assigns, and its officers, and Maxwell Auslander, individually and as an officer of Auslander Decorator Furniture, Inc., and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, sale and distribution of furniture and other articles of merchandise, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

(1) Failing to state, in writing, on the face of all order forms and sales contracts executed by customers, and on all invoices covering the sale of merchandise to customers, in conspicuous language likely to be read and understood by the customer, the dates for delivery of such merchandise agreed to by respondents and their customers at the time of the execution of the order or contract or the date of sale, and that respondents will refund all monies paid by such customers in the event such delivery is not made within five (5) business days of the agreed delivery dates, unless such customers agree in writing to extensions of the delivery dates.

***28** (2) Failing to deliver merchandise to customers within five (5) business days of the agreed delivery dates, or failing to refund immediately all monies paid by such customers in the event such delivery dates are not met by respondents, unless the customers agree, in writing, to extensions of the delivery dates.

(3) Misrepresenting orally or in writing, directly or by implication, the availability of merchandise in stock for delivery by specific dates.

(4) Selling merchandise to customers on the layaway plan, unless such merchandise is physically set aside, in storage, for delivery to such customers upon the completion of the layaway payments, in accordance with the provisions of Subparagraphs (1) and (2) hereinabove.

(5) For a period of two (2) years from the effective date of this order, failing to maintain and produce for inspection and copying by the Federal Trade Commission upon ten (10) days' notice, adequate records (a)

which disclose the history of all orders, sales and deliveries; and (b) from which it can be determined whether or not merchandise was available in stock for delivery as of specific dates.

II

(1) Using the words 'sale,' 'sale price,' 'warehouse sale,' 'clearance sale,' 'savings,' or 'buy now and save,' or any other word or words of similar import or meaning, unless the price of such merchandise being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual *bona fide* price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business.

(2) For a period of two (2) years from the effective date of this order, failing to maintain and produce for inspection and copying by the Federal Trade Commission upon ten (10) days' notice, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations of the type described in Subparagraph (1) hereinabove are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

III

It is further ordered, That respondents shall:

(1) Inform, orally, all customers at the time of sale and provide in writing on the face of all order forms and sales contracts executed by customers, and on all invoices covering the sale of merchandise to customers, in conspicuous language likely to be read and understood by the customer, that the customer may cancel the contract with a refund of all monies theretofore paid to respondents by notification to respondents in writing within five (5) days from the date of actual delivery of the merchandise, where the merchandise delivered to a customer is defective or damaged, or is not identical to the merchandise ordered by the customer; *Provided, however*, That the provisions of this subparagraph shall not apply to merchandise sold 'as is,' such sales to be so designated specifically on the order forms, sales contracts and invoices utilized in connection with such sales transactions, nor to sales of merchandise to customers who have knowledge of damage to, or defects in, the particular merchandise and have given written consent to purchasing same in its stated condition.

***29** (2) Refund immediately all monies to customers who have requested contract cancellation in accordance with the provisions of Paragraph III(1) above; *Provided, however*, That, in lieu of making such a refund, respondents may, with the written consent of, and with no additional cost to, the customer, replace or repair defective or damaged merchandise, such replacement or repair to be fully, satisfactorily, and promptly performed. In such a case, the customer who consents to accept replacement or repair in lieu of a refund, may cancel the contract with a refund of all monies by notification to respondents in writing within five (5) days from the date of actual delivery of any replacement or repaired merchandise that is itself defective or damaged.

(3) For a period of two (2) years from the effective date of this order, maintain and produce for inspection and copying by the Federal Trade Commission upon ten (10) days' notice, adequate records to disclose the facts pertaining to the receipt, handling and disposition of each and every communication from a customer, oral or written, requesting contract cancellation, refund, replacement or repair.

IV

(1) *It is further ordered*, That respondents deliver a copy of this order to all present and future employees or oth-

er persons engaged in the preparation and placing of respondents' advertisements, and the offering for sale, or sale, of respondents' products, and secure from each such employee or other person a signed statement acknowledging receipt of said order.

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

(3) *It is further ordered*, That the individual respondent Maxwell Auslander promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include said respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

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

(5) *It is further ordered*, That respondents shall, within sixty (60) days from the effective date of this order, notify the Commission in writing of the manner and form in which each has complied with this order.

(6) *It is further ordered*, That the complaint be, and it hereby is, dismissed as to respondents Sandra Tye and Linda Decker as individuals.

ORDER AND OPINION DENYING MOTION FOR EXTENSION OF TIME FOR FILING OF NOTICE OF INTENTION TO APPEAL AND FOR FILING APPEAL BRIEF AND FINAL ORDER AND DECISION OF THE COMMISSION

***30** This matter is before the Commission on the motion for extension of time for filing of notice of intention to appeal and for filing appeal brief of respondents Auslander Decorator Furniture, Inc. and Maxwell Auslander. Also before the Commission are complaint counsel's opposition to motion for extension of time for filing of notice of intention to appeal and for filing appeal brief, and respondents' answer to opposition of motion for extension of time.

Section 3.52(b), Subpart F, Part 3 of the Commission's Rules of Practice states that a party's right to appeal an initial decision is conditioned upon his filing of a notice of intention to appeal within 10 days after he is served with said initial decision. Movants have failed to do so, conceding that they were served on March 11, 1974, and did not even attempt to appeal or file any notice of such intention until at least April 2, 1974. Notwithstanding this provision of the rules, respondents seek waiver by the Commission of the ten-day requirement.

Section 4.3(b), Part 4, of the Commission's Rules of Practice allows an extension of time limits provided for by the rules 'for good cause shown.' The only showing of cause made by movants is that respondent Maxwell Auslander was busy serving as warehouse manager as well as chief executive officer of respondent Auslander Decorator Furniture, Inc., during the ten-day period provided in Rule Sec. 3.52(b). Respondents do not dispute the fact that counsel was served with the initial decision. The Commission is of the opinion that the filing of a notice of intention to appeal in not so burdensome that movants could not have filed one. The facts presented by respondents in extenuation are not persuasive. Under these circumstances, we do not believe that the failure to so file is excused by good cause. Accordingly,

It is ordered, That respondents' motion for extension of time for filing of notice of intention to appeal and for filing of appeal brief be, and it hereby is, denied.

It is further ordered, That the initial decision and order of the administrative law judge be, and hereby are, adopted as the decision and final order of the Commission.

FTC

83 F.T.C. 1542, 1974 WL 175916 (F.T.C.)

END OF DOCUMENT

H

78 F.T.C. 265, 1971 WL 128754 (F.T.C.)

FEDERAL TRADE COMMISSION (F.T.C.)

*1 IN THE MATTER OF
UNIVERSAL ELECTRONICS CORPORATION, ET AL.

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

Docket 8815.

Complaint, May 26, 1970
Decision, Jan. 28, 1971

Order requiring a St. Louis Mo., distributor of radio and television tube testing devices and franchises for the sale of such products to cease misrepresenting that persons investing in respondents' franchises will receive any stated amount of income or any discounts from respondents on repeat business, that they will obtain profitable locations for their machines or can expect the sale of any certain number of tubes per day, that they will be granted exclusive territories in which to locate their machines, and that respondents will accept the return of, or aid in the resale of, the machines; respondents are also required to place in all franchise contracts a notification that such contracts may be cancelled within three days, and that respondents will refund all monies to customers cancelling contracts within this period.

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 Universal Electronics Corporation, a corporation, and Wendell Coker, 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 Universal Electronics Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 8363 Olive Street Road, in the city of St. Louis, State of Missouri.

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

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in advertising, offering for sale, selling, and distributing radio and television tube testing devices and the tubes, supplies and equipment used in connection therewith, and franchises and dealerships for the sale of such products to the public.

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

*2 PAR. 4. Respondents' usual method of doing business is to insert advertisements in the classified advertisement section of newspapers and periodicals. Persons responding to said classified advertisements are then contacted by respondents or their employees, agents or representatives who display to the prospective purchaser a variety of promotional material and make various oral representations respecting the aforesaid devices and products, and the business opportunities afforded by franchises or dealerships using and selling such devices and products.

PAR. 5. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their tube testing devices, tubes, and other products respondents have made and are making numerous statements and representations concerning said articles of merchandise and the business opportunities afforded through advertising and promotional material furnished by respondents to their employees, agents or representatives, and through advertisements inserted in newspapers and periodicals, and through letters and other advertising literature circulated generally among the purchasing public, and through oral representations made by respondents, their employees, agents or representatives, with respect to earnings, locations of machines, business methods, training, security of investment, territory and qualifications.

Typical and illustrative of the newspaper advertisements used by respondents, but not all inclusive thereof, is the following:

FOR MIAMI AREA

NOT AN AMAZING

OPPORTUNITY NOR A ONCE IN A

LIFETIME GET RICH

PROPOSITION

But: A steady—dependable and proven successful type of business, merchandising famous brand Sylvania radio and TV tubes thru our newest self-service equipment. All accounts fully established and set up for our dealers. No selling or soliciting required. Exceptional profit margin on nationally advertised product selling in the hundreds of millions—annually. You could earn up to $400.00 per month in spare time.

FULL INVESTMENT STARTS AT $1,895.00 UP TO $3,695.00 TO ENTER THIS BUSINESS.

No experience necessary; just four to eight hours a week, car, ambition, and the aggressive desire to be in business for yourself.

For more information and personal interview, write today to: UNI-TEST, 8363 Olive Blvd., Olivette, Mo., 63132. Include phone number.

OUR COMPANY INTEGRITY CAN WITHSTAND

RIGID INVESTIGATION

PAR. 6. Through the use of the statements and representations set forth above, and others similar thereto but not specifically set out herein, and through said statements orally made by respondents, their employees, agents and representatives, respondents have represented and do now represent, directly or by implication to the purchasing public, that:

1. Persons investing from $1,895 up to $3,695 can earn up to $400 per month or more.

2. Respondents' discounts on repeat business assure exceptional and profitable income for their dealers.

*3 3. Purchasers of respondents' tube testing machines and tubes can expect to receive profitable earnings from the sale of one to five tubes per machine per day.

4. Respondents obtain top sales producing locations for the placement of tube testing machines purchased from them.

5. The purchasers of said machines will be trained by the respondents as to the operation of the machines and the methods to be used in servicing them.

6. No selling or soliciting will be required, and no experience is necessary.

7. If the purchaser becomes dissatisfied, or for any reason wishes to go out of the business, the respondents will repurchase the machines or assist the purchaser in reselling them.

8. The purchaser's investment in the tube testing machines and tubes will be returned in nine months or one year.

9. Persons purchasing respondents' machines will have an exclusive territory in which to operate the machines.

PAR. 7. In truth and in fact:

1. Income in the foregoing amount will not be realized by persons investing the sum indicated. In fact, persons purchasing tube testing machines and tubes from respondents generally receive little or no net profit.

2. Respondents' discounts to their dealers on repeat business do not assure an exceptional or profitable income nor are such dealers assured of an exceptional or profitable income for any other reason.

3. Purchasers of respondents' tube testing machines and tubes have not received profitable earnings from the sale of one to five tubes per machine per day and usually have not realized the number of tube sales per machine per day as specified by respondents, their salesmen or agents.

4. Respondents do not obtain top income producing locations, but place most of the machines in retail establishments such as service stations which have very little consumer traffic. The locations secured by respondents are usually undesirable, unsuitable and unprofitable.

5. Respondents do not train the purchasers of the tube testing machines in the operation of the machines or the methods to be used in servicing the locations where the machines are installed.

6. The purchasers of the machines are required to do selling and soliciting and to have experience since it is frequently necessary to place machines in other locations because of the unprofitable nature of the locations selected by the respondents and like any other business venture experience is required.

7. Respondents do not repurchase the machines at a price comparable to the customer's investment and do not assist the purchaser in the resale of the machines regardless of the purchaser's reason for going out of busi- ness.

8. The purchaser's investment in tube testing machines and tubes is not returned within nine months, one vear or within any other period of time.

9. Persons purchasing respondents' machines do not have an exclusive territory in which to operate these machines and respondents will sell the machines to any purchaser, in any location, with the necessary capital.

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

PAR. 8. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of franchises and dealerships for tube testing devices, tube testing machines, radio and television tubes and other products of the same general nature and kind as sold by respondent.

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

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

Mr. Harry G. Shupe and *Mr. John T. Hankins*, for the Commission.

Green & Lander, by *Mr. Martin M. Green*, Clayton, M., for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

NOVEMBER 6, 1970

On May 26, 1970, the Commission issued a complaint (mailed on June 3, 1970) charging the respondents with unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act in connection with the selling of radio and television tube testing devices. Respondents' answer, filed on June 29, 1970, admitted the existence of the corporate respondent, but denied the other allegations of the complaint. On July 1,

1970, complaint counsel and counsel for respondents participated with the hearing examiner in a telephonic conference and an order was issued reciting the results thereof. The order contained a directive to each party to prepare a trial brief setting forth the anticipated issues and disclosing the names of witnesses, together with a statement of the nature of the testimony and the documentary exhibits which the party plans to introduce. The order also set forth the dates and places of hearings agreed upon. Complaint counsel's trial brief was submitted on July 10, 1970, and the respondents' trial brief on August 5, 1970.

Hearings were held at Omaha, Nebraska, on August 10, 11 and 12, 1970, at which time complaint counsel called 14 consumer witnesses and the respondent, Wendell Coker. After the case-in-chief was completed, a motion by respondents' counsel to dismiss was denied by the hearing examiner, and the respondents elected not to offer any evidence in their defense.

***5** The hearing examiner has given full consideration to the proposals submitted and all proposed findings not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact and conclusions:

Respondent Universal Electronics Corporation is a corporation organized (in 1962), existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 8363 Olive Street Road, in the city of St. Louis, State of Missouri (CX 110), and its volume of business over a four-year period is as follows:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

The company operates on a fiscal-year basis, from September 1 to August 31. The figure for 1966 is from September 1, 1965, to August 31, 1966 (Tr. 116; CX 116A).

Respondent Wendell Coker is now and has been, during the entire period of the existence of the corporation, president of, and the sole stockholder of, the corporate respondent. During that period, he has formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices which are the subject of this proceeding, hereinafter set forth. His address is the same as that of the corporate respondent (Tr. 25–28).

Respondents are now, and, since the corporate respondent came into existence, have been, engaged in advertising, offering for sale, selling and distributing radio and television tube testing devices and the tubes, supplies and equipment used in connection therewith, and franchises and dealerships for the sale of such products to the public. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of franchises and dealerships for tube testing devices, tube testing machines, radio and television tubes and other products of the same general nature and kind as sold by respondent (Tr. 313–317).

In the course and conduct of their business as aforesaid, respondents now cause, and, since the corporate respondent came into existence, have caused, their said products, when sold, to be shipped from their place of business in the State of Missouri to purchasers thereof located in various other States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as 'commerce' is defined in the Federal Trade Commission Act.

Respondents' usual method of doing business is to insert advertisements in the classified advertisement section

of newspapers and periodicals. Persons responding to said classified advertisements are then contacted by respondents or their employees, agents or representatives who display to the prospective purchaser a variety of promotional material and make various oral representations respecting the aforesaid devices and products, and the business opportunities afforded by franchises or dealerships using and selling such devices and products.

***6** In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their tube testing devices, tubes, and other products, respondents have made and are making numerous statements and representations concerning said articles of merchandise and the business opportunities afforded through advertising and promotional material furnished by respondents to their employees, agents, newspapers and periodicals, and through letters and other advertising literature circulated generally among the purchasing public, and through oral representations made by respondents, their employees, agents or representatives, with respect to earnings, locations of machines, business methods, training, security of investment, territory and qualifications.

Typical and illustrative of the newspaper advertisements used by respondents, but not all inclusive thereof, is the following which appeared in *The Miami News*, Miami, Florida, on October 22, 1965 (CX 9):

FOR MIAMI AREA
NOT AN AMAZING
OPPORTUNITY
NOR A ONCE IN A
LIFETIME GET RICH
PROPOSITION

But: A steady—dependable and proven successful type of business, merchandising famous brand Sylvania radio and T.V. tubes thru our newest self-service equipment. All accounts fully established and set up for our dealers. No selling or soliciting required. Exceptional profit margin on nationally advertised product selling in the hundreds of millions—annually. You could earn up to $400.00 per month in spare time.

FULL INVESTMENT STARTS AT $1,895.00 UP TO $3,695.00 TO ENTER THIS BUSINESS.

No experience necessary; just four to eight hours a week, car, ambition, and the aggressive desire to be in business for yourself.

For more information and personal interview, write today to: UNI-TEST, 8363 Olive Blvd., Olivette, Mo., 63132. Include phone number.

OUR COMPANY INTEGRITY CAN WITHSTAND RIGID INVESTIGATION.

Also, the following appeared in *The Clearwater Sun*, Clearwater, Florida, on January 9, 1967 (CX 10):

DISTRIBUTOR
For This Area
Recession-Depression Proof Business
Part-Time Work—For Extra Income.

Now! A chance to enter the multi million dollar Electronics Replacement field. No experience required! Merely restock locations with world famous SYLVANIA or RCA radio, TV, and color tubes; sold through our new (1957 Model) self—service tube testers. Company guaranteed discounts in this repeat business assures exceptional and profitable income for our dealers. All accounts contracted for and set up, plus training and operating instructions by Company. Will not interfere with present business or occupation, as accounts can be serviced evenings or weekends! Color TV creating enormous demand and surge in future sales throughout the industry.

Earning potential up to $500.00 per month or more, depending on size of route.

MINIMUM INVESTMENT Required. Also, a good car and 4 to 8 spare hours a week. If you are interested

and meet these requirements; have a genuine desire to be self-sufficient and successful in an ever expanding business of your own, then write us today! UNIVERSAL ELECTRONICS CORP.; 8363 Olive Street Road; St. Louis 32, Mo. Include phone number in resume.

*7 OUR COMPANY INTEGRITY CAN WITHSTAND THOROUGH INVESTIGATION.

For other advertisements of like import, see also CX 11–14, CX 88, and CX 138.

Paragraph Six of the complaint reads:

Through the use of the statements and representations set forth above, and others similar thereto but not specifically set out herein, and through said statements orally made by respondents, their employees, agents and representatives, respondents have represented, and do now represent, directly or by implication to the purchasing public, that:

1. Persons investing from $1,895 up to $3,695 can earn up to $400 per month or more.
2. Respondents' discounts on repeat business assure exceptional and profitable income for their dealers.
3. Purchasers of respondents' tube testing machines and tubes can expect to receive profitable earnings from the sale of one to five tubes per machine per day.
4. Respondents obtain top sales producing locations for the placement of tube testing machines purchased from them.
5. The purchasers of said machines will be trained by the respondents as to the operation of the machines and the methods to be used in servicing them.
6. No selling or soliciting will be required, and no experience is necessary.
7. If the purchaser becomes dissatisfied, or for any reason wishes to go out of the business, the respondents will repurchase the machines or assist the purchaser in reselling them.
8. The purchaser's investment in the tube testing machines and tubes will be returned in nine months or one year.
9. Persons purchasing respondents' machines will have an exclusive territory in which to operate the machines.

Paragraph Seven of the complaint reads:

In truth and in fact:

1. Income in the foregoing amount will not be realized by persons investing the sum indicated. In fact, persons purchasing tube testing machines and tubes from respondents generally receive little or no net profit.
2. Respondents' discounts to their dealers on repeat business do not assure an exceptional or profitable income nor are such dealers assured of an exceptional or profitable income for any other reason.
3. Purchasers of respondents' tube testing machines and tubes have not received profitable earnings from the sale of one to five tubes per machine per day and usually have not realized the number of tube sales per machine per day as specified by respondents, their salesmen or agents.
4. Respondents do not obtain top income producing locations, but place most of the machines in retail establishments such as service stations which have very little consumer traffic. The locations secured by respondents are usually undesirable, unsuitable and unprofitable.
5. Respondents do not train the purchasers of the tube testing machines in the operation of the machines or the methods to be used in servicing the locations where the machines are installed.
6. The purchasers of the machines are required to do selling and soliciting and to have experience since it is frequently necessary to place machines in other locations because of the unprofitable nature of the locations selected by the respondents and like any other business venture experience is required.

***8** 7. Respondents do not repurchase the machines at a price comparable to the customer's investment and do not assist the purchaser in the resale of the machines regardless of the purchaser's reason for going out of business.

8. The purchaser's investment in tube testing machines and tubes is not returned within nine months, one year or within any other period of time.

9. Persons purchasing respondents' machines do not have an exclusive territory in which to operate these machines and respondents will sell the machines to any purchaser, in any location, with the necessary capital.

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

Based upon the evidence hereinafter set forth, it is the opinion and finding of the hearing examiner that all of the charges under Paragraphs Six and Seven of the complaint have been sustained; that the use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' franchises, dealerships and products by reason of such mistaken and erroneous belief; and that the aforesaid acts and practices of respondents as herein alleged were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Respondent WENDELL COKER was called as a witness by complaint counsel and testified at length as follows (Tr. 20–88; 115–146; 313–354): The advertisements run by Universal Electronics Corporation hereinbefore mentioned were composed by him; referring to the figure of $400 earnings used in the Miami, Florida, ad; he said he arrived at this figure from reports he received from places that had tube testers and a report published by Vend Magazine of a survey they conducted which showed the average location sold 30 to 40 tubes a week; regarding the statement of 'Earning potential up to $500 per month' appearing in the *Clearwater Sun*, Clearwater, Florida (CX 10), he said, 'We had two seventy-five, three hundred, four hundred, five hundred. It fluctuated over the years' (Tr. 72); that the $400 figure is not based on actual experience with his dealers, but on 'what we feel they could earn' (Tr. 71); that he was aware that customers responded to the ads containing earning statements (Tr. 343); and he stated (Tr. 353):

> My conclusion has been and is, the average person that sees the ad in the paper, cuts the ad in half. In other words, they see the ad in the paper, I have had them tell me, they only expected to make half of what you generally tell them. They didn't expect to make that much in the first place. And I really felt and believed anybody that worked at this business, kept a machine at the location, could make $200 to $250 a month. But, to compensate for the average person's cutting promotional figures in half and to keep up with the competition advertising at the same time six and seven hundred dollars a month, I said four and five hundred dollars a month. I always try to keep a little lower than my competition.

***9** Mr. Coker testified that, to earn $400 per month, a dealer would have to have five machines costing $3,695, and he would have to sell between 300 and 350 tubes, or in excess of 60 tubes per machine per month, and he did not know how many of his dealers sold on an average of two tubes a machine each day (Tr. 68–69). They advertised in every state except Alaska; the average cost for each ad was around $30, and in the fiscal year ending in August 1966 they ran about 500 ads; during the time they have been in business, they have made sales in 44 or 45 states (Tr. 128–130). Upon the receipt of an inquiry by a person answering one of its ads, Universal, on

one of its letterheads over the signature of Mr. Coker, would answer as follows CX 1):

> We would like to take this opportunity to thank you for the interest you have shown in our advertisement in your local paper.
>
> This is a business that can be handled on a part-time basis to start and expanded to a full-time operation *with unlimited earning potential.* We furnish equipment and locations, plus fully set up the business for our dealers; so, there is no selling or soliciting required of the party we select.
>
> If you have never had an occasion to use a self-service tube tester, may we suggest that you check with a local store which has a tube tester, so you will know radio and television tubes are being sold through these self-service units.
>
> We are placing you on our representative's schedule for an early interview. *Since this is a proven business,* we have many inquiries from people who are sincerely interested in becoming dealers for us and act promptly on appointing the party we feel best qualified. Should you be further interested in our type of business, please feel free to check with the references on the enclosed sheet; so, that in the event we meet each others approval, at the time of our representative's interview, we will both be in a position to consummate a dealership.
>
> *Our representative* will contact you in the immediate future in regard to setting up an interview with you on this opportunity. (Emphasis added.)

Mr. Coker did most of the selling for the company in 1962 and 1963; since that time, he has sold a few machines each year, but the bulk of sales were made by others (Tr. 144); he interviews prospective salesmen and hires them for the company; 'They just come around to see me. * * * they will take a trip and act as an agent for me on the leads that I have' (Tr. 134); '* * * these * * * are what we call professional salesmen. Most of them sold tube testers before I got in the business' (Tr. 135); a salesman was furnished a price list and a certain amount of sales information; part of the literature that the salesmen carried with them when they interviewed customers was the Vend Magazine; the statements concerning earnings that were made by the salesmen were figures taken from the magazine article (Tr. 336–338); when asked if he furnished some information to his salesmen concerning the number of tubes that a machine would sell, Mr. Coker replied: 'I would show him the article in Vend Magazine and let the man make his own conclusions' (Tr. 339); when asked, 'Now, how would they sell a machine to a customer without explaining to him how much the machine would produce as far as sales and earnings are concerned?' he said: 'It seems to me it would be hard to sell if he didn't' (Tr. 341); a salesman in making a sale would obtain the signature of the purchaser, called a 'Dealer,' on a PURCHASE ORDER CONTRACT (CX 4), which provided in part that Universal agreed to furnish the number of 'Tube Testing Machines' ordered; 'Secure initial locations' in a specified area; 'Give Dealer signed location contracts for Tube Tester and Tube Inventory for each location;' and 'Instruct Dealer and Locations on the functions and operation of equipment;' payments thereon were to be made to Universal, and the 'Dealer is to retain full title to all equipment & merchandise.' The contract mailed to the company by the salesman (Tr. 34) was subject to company approval, and would be approved by Mr. Coker (Tr. 49); only in one instance did he reject a contract and that was in 1964 (Tr. 46); a salesman was paid on a commission basis, receiving $900 on a sale of $3,590 (Tr. 84). By letter (CX 24), Universal would notify the purchaser of his acceptance as a dealer, of the approval of the contract, request the money balance due thereon, and state the following: 'We will process your order accordingly and keep you posted of its progress, shipping data, and tenure of our location man.' The machines would not be shipped before they were fully paid for (Tr. 49); shortly after payment, the machines and tubes would be shipped to the dealer; a location man employed by Universal, who is paid $35 or $40 for each tester placed, would contact the dealer, canvass various stores and filling stations in the territory assigned by the contract, and secure the number of places he would need for the machines; the locator sets up the machines with tubes, on a consignment basis, at the places agreed to by the owners, who are paid a commission of 25 percent or 30 percent of the retail price for

each tube sold; if a dealer is not satisfied with the original location, it is up to him to change the location (Tr. 55–58); the reason for relocating a machine was that such location was not proving profitable or for other various reasons (Tr. 61–62); three-fourths of the total number of dealers for Universal have had to relocate at least one of their machines (Tr. 64). Universal does not repurchase the machines from all dealers who become dissatisifed with the business; when asked, 'How do you select those you repurchase and those that you don't?' he answered: 'There are two determining factors actually. One is how great the need is to get out of the business, or liquidate it, and also the financial position of the company, if we can afford to buy them back' (Tr. 125); he stated: 'I generally bought back a machine and tubes on the basis of approximately $300 per machine and tubes' (Tr. 122), which figure represented Universal's cost for a machine and a kit of 200 tubes (Tr. 80–81). The amount of repurchases for the fiscal year ending 1966 totaled $18,437; 1967–$23,344; 1968–$22,880; and 1969–$6,216 (Tr. 77, 117 thru 122; CX 112E, 117A, 118A and 119A). The tube testers consist of a head panel, purchased by Universal from a New York manufacturer at a cost of $70 or $75, and a cabinet designed by Mr. Coker and made by a Missouri firm at a cost of $37. The panels are shipped to the cabinet maker where they are assembled, boxed ready for shipment, and, on orders from Universal, are sent to purchasers (Tr. 43, 44, 80). Sales have been going down in recent years (Tr. 127). He testified (Tr. 128):

> ***10** The main factor of the tubes is being designed out of television sets. In another year or two, there won't be any television sets hardly on the market coming out with tubes in them.

DONALD H. RING, of McFarland, Wisconsin, an automobile body man for 23 years, testified (Tr. 89–115) that, while a resident of Madison, Wisconsin, in 1966, after answering an ad in the local paper, he received a letter from Universal (CX 113) advising that its representative would call upon him. Universal's representative, Mr. George Turner, called upon him, and he gathered that he could make about $1 profit per tube and each machine that he purchased would sell no less than a tube a day or approximately $100 a month for three machines. He was told that the locations were already established by the company and, that, if he subsequently changed his mind, 'they would buy the whole thing back, the tubes and equipment, at a 25 per cent discount; in other words, they would give me three-quarters of the money back' (Tr. 102). He stated that he understood that it was to be a franchise deal of one dealer to a town or area (Tr. 113). On March 31, 1966, he signed a purchase order contract (CX 114), because 'it sounded like I could make some money' (Tr. 99), for three tube testers for the sum of $1,895 to be located in the city of Madison and within a 15-mile radius. The location man and the machines arrived in Madison the same day, which was in the last part of May or the first part of June 1966. Locations had not been previously procured and the location man 'used my phone book and found three locations. It took him two days to do it' (Tr. 100). Locations were secured at a hardware store, grocery store, and variety store. The locations were not profitable. The machine at the grocery store remained there for six months and, although it was the best of the three locations, it was removed for the reason that the grocer said he did not have room for it and that it did not make him enough profit. After about six months he did not call on the locations or service the machines for the reason that he had lost interest because he could not make enough money to cover the route. He did not keep any books but he was sure that he did not gross over $200. Mr. Ring did not attempt to find other locations for the reason that he had become discouraged and lost interest after the first six months. He wrote a letter to Universal about buying back the tube, and equipment and received a letter in return from Universal, signed by Mr. Coker (which has been lost), in which they told him they were very disappointed that he didn't do better, and that they couldn't buy back the machines at that time.

YANO S. FALCONE, of Omaha, Nebraska, 42 years of age, with a tenth grade education, and a manufacturing representative for 22 years, testified (Tr. 148–176) that he answered an ad that appeared in an Omaha newspaper and on March 13, 1967, Mr. Pat O'Brien, Universal's representative, came to see him. Mr. O'Brien said he had

tube testers in various locations in California from which he derived a net income of around a hundred thousand dollars a year. This statement made Mr. Falcone 'a little more enthusiastic about wanting to get into the business' (Tr. 149). Mr. O'Brien had him write down figures (CX 20) which showed that he could realize a minimum profit of $654.00 a month from five machines. The profit on the sale of one tube was $1.09, and the sale of 4 tubes per location each day would give $4.36, or $21.80 a day for five locations, times 30 days would give $654.00 a month; assuming his sales were only half of that, his minimum still would be $327.00 a month and, based on the statistics, it was his (Mr. O'Brien's) opinion that this would not be hard to make (Tr. 153). After hearing the foregoing, Mr. Falcone said he wanted a few days to think it over and to contact his attorney to see what he thought. Mr. O'Brien said he couldn't have that amount of time; 'If I didn't sign that evening, someone else would get the franchise. They had only one franchise available for the Omaha area' (Tr. 154). [Mr. James R. Edmonds, whose testimony follows, was assigned the same area by Mr. O'Brien the day before.] Mr. Falcone was shown a document (CX 22), which was subsequently delivered to him, reading:

***11** Bona Fide

RESALE OPTION AGREEMENT

It is agreed that after ONE YEAR from the date of purchase should the operator for any reason decide to sell his established Tube Testing route at a fair and equitable price over the original cost of equipment and locations, it is agreed the operator has the first 90 day option and shall retain all profits. After the expiration of 90 days the operator agrees to give UNIVERSAL ELECTRONICS or their authorized Representative the EXCLUSIVE SALES OPTION to sell said business for him and he also agrees to allow them 25% OF THE NET PROFIT over the original cost for services rendered.

He stated (Tr. 172): 'My understanding of this was that after one year, if I wasn't satisfied with the profits that I was deriving from the equipment that I could contact Universal Electronics and they would buy these back from me.' Mr. Falcone signed a contract to purchase five testers with tubes to be placed on locations for the sum of $3,690 (CX 21). To finance the transaction, he said, 'Well, I cashed in some of my savings bonds and took a loan out on my insurance policies and borrowed whatever cash I had in the bank' (Tr. 156). Asked why he signed the contract, he replied, 'Supplemental income, I have a large family' (Tr. 156). On June 6 and 7, 1967, Universal's location man placed the units at five gasoline service stations (CX 30, 31, 32, 33 and 34). Four of the machines remained at the locations for about one year, and the fifth for nine months. Mr. Falcone received a total of $50 gross income from all of the machines during that time. He did not attempt to relocate the machines because 'I thought it was a fruitless effort' (Tr. 158). On cross-examination, he testified that, after he became dissatisfied and felt the machines would not produce a sufficient income, he called Mr. Coker twice but could not reach him; he left his phone number with Mr. Coker's secretary, but he did not call back. With reference to the provision in the contract (CX 21), 'No guarantee as to any specific amount of money to be derived from this business,' he believes he remembers reading that before he signed the contract (Tr. 161). As to reading the provision therein, 'No exclusive territories promised,' Mr. Falcone said, 'Evidently not, sir. Here again, I might add, it may not be called for, but I thought Mr. O'Brien was verbally quite persuasive. I basically relied upon his honesty' (Tr. 166). He did not remember seeing the words 'and no verbal agreements are valid' in the contract. He testified (Tr. 173–174):

Q. What he [Mr. O'Brien] did was to spin an almost fantastic tale to you about the profits you could ultimately derive based on statistics and based on the figures that he had you write down on that piece of paper, isn't that a fair statement?

* * *

A. Fantastic or not, sir, I hung my hopes on it.

JAMES R. EDMONDS, of Omaha, Nebraska, a high school graduate, 60 years of age, and a building contractor for 25 or 30 years dealing mostly in small homes and remodeling, testified (Tr. 176–204) that, after he answered an ad in an Omaha paper, he was contacted by Universal's representative, Mr. Patrick O'Brien, and on March 12, 1967 he signed a contract (CX 15) for the purchase of five tube testers and tubes to be located in 'Omaha and Gen Area—25 mile radius' for $3,690. He was told by Mr. O'Brien that he was to be the only person with Universal machines in that area. As to potential earnings, Mr. O'Brien gave him the same set of figures recited in the testimony of Mr. Falcone. (See CX 18, 19 and 20.) Mr. O'Brien said Mr. Edmonds should have his total investment back in nine months and, if the decided to quit the business, he had to give Universal the first chance to buy them back at 25 percent less than the amount paid. Universal's location man arrived the first part of May 1967. Two of the machines were placed in hardware stores, two in drug stores owned by a Mr. Kohl, and the fifth was to be set up in a third drug store also owned by Mr. Kohl. Two days after placement, Mr. Edmonds complied with the request of the owner to remove the testers from the two drug stores and not to place the one in the third drug store for the reason that the machines would not take care of the tubes that the people would bring in to test. By letter, Universal was told of the difficulty, and, in June of 1967, another one of its representatives called on Mr. Edmonds who asked if there was any way of getting his money back. He was informed, 'well, no, outside of waiting, and if I find a buyer who would buy my machines, otherwise he said, just write it off' (Tr. 194). An offer to assist Mr. Edmonds to relocate the testers was refused by him; 'Well, it just seemed like it was a lost cause' (Tr. 200) because of the number of machines that were already on location in the city and the machines would not test some colored TV tubes. Two of the machines remained in location at the hardware stores from May 1967 to December 1968, and the gross therefrom totaled $42. In October 1969, Mr. Edmonds filed suit against Universal, which resulted in a settlement whereby the company paid $1,000 on the return of the machines to it.

***12** ROBERT O. GREBER, of El Paso, Texas, 34 years of age, with two years of college, and a radio repairman, testified (Tr. 205–230) that he answered an ad of Universal, and on May 15, 1967), its representative, Mr. George Turner, contacted him. Mr. Turner explained that a $654 net profit was the average earnings from five machines per month, and on a sheet of paper (CX 123) he wrote down a detailed explanation of how he arrived at this projected profit picture. Mr. Greber said, 'after one year, if I wasn't pleased, that the company would take and try to sell the machines for me, or buy them back with 25 percent of the profit that would go to Universal' (Tr. 212). A contract was signed on May 15, 1967, for the purchase of three units and tubes with locations in the 'Eastern 1/2 of El Paso and Gen Area not to exceed 20 mile radius' (CX 122) for the sum of $2,290. Universal's location man appeared in August 1967 and placed the machines in two grocery stores and a hardware store. The hardware store sold one tube in 90 days so this unit was pulled out, and one of the grocery stores went out of business. Mr. Greber made arrangements with a chain of three stores to place units in each of the stores, so he purchased a fourth machine from Universal. The machines remained at the chain stores for six or eight months and, at the request of the owner, for the reason they were not doing enough business, the three machines were removed and relocated in grocery stores. All the units remain at the locations indicated, and have netted a profit of about $100 a year. Mr. Greber contacted Mr. Coker by telephone, asking that Universal repurchase the machines, and in answer thereto, by letter dated February 17, 1969, Universal stated, 'I hope you can sell the route and thus keep the business intact and working. * * * We are enclosing an ad similar to the one you answered in the paper' (CX 124). He called on the two local newspapers, but they would not accept the ad (CX 125), because it contained a profit potential statement. The ad was placed and ran in a shoppers' paper devoted strictly to advertising, but there were no responses. By letter dated April 17, 1969 (CX 126), Universal submitted another ad (CX 127), which also was refused by the local paper, but was run in the shoppers' paper in the name of, and paid for by, Universal. By letter dated July 21, 1969 (CX 128), Universal informed Mr. Greber they were 'sorry to

say we did not receive one reply to the ads. On the testers, I don't know what to tell you to do about them, unless you would be willing to sell them at a considerable reduction. We have a routeman in St. Louis that would pay $75.00 each for the units, if they were in St. Louis and in reasonably clean condition.' Mr. Greber 'felt that that was not quite enough return on the investment' (Tr. 215). He figured that he had a loss of $2,600 or $2,700 on the transaction. Mr. Greber said that the 'Resale Option Agreement' (CX 22) he received from Universal after signing the purchase order contract was different from what Mr. Turner represented. He testified that 'according to Mr. Turner, if they couldn't sell it, they would repurchase it.' (Tr. 230).

***13** CLIFFORD NOLLEY, of Miles City, Montana, 52 years of age, a high school graduate, and a welder for 20 years, owning his own business for 15 years which he sold in 1966 on account of a heart condition, testified (Tr. 231–254) that he answered an ad appearing in the local paper, and on July 18, 1967, he was contacted by Universal's representative, Mr. Misemer, who told him that in the proper operation of five machines he should realize $500 a month; that the company would furnish the locations, a survey having been made and the locations established, and would instruct him in the operation of the machines; that he would have the exclusive franchise in Miles City; and that it was possible to get his investment back in a year. He signed a contract to purchase five tube testers with tubes to be placed in Miles City for $3,690 (CX 129 and 130). Universal's location man arrived in November of 1967, who informed Mr. Nolley that no locations had been established and that he would have to go out and secure them. He placed four of the units, three in grocery stores and one in a service station, and the fifth was located by Mr. Nolley in a radio repair place at the airport. He received no training as to the operation of the machines for the reason that the location man knew very little about it, himself. The one at the airport was removed when the place was closed for business, and one was removed from a grocery store at the request of the owner. The witness stated, 'I couldn't locate them in the other stores because there were other company machines in these stores' (Tr. 245). Three of the machines remain at the original locations. The gross amount taken from the machines is approximately $500. About two weeks after the machines were installed, Mr. Nolley observed a Universal ad, the same as he had answered, in the Miles City newspaper. On April 11, 1968, Mr. Nolley wrote a letter to Universal (RX 1) in which he stated:

> After six months, it is quite evident now that these machines are not going over in this community. I feel it would be advant[a]g[e]ous to us both if you could take these machines back and place them in some territory where more tubes can be sold.
>
> I am willing to take a loss on these in order to get part of my investment back. As it is, I am not getting enough from them to pay for the car expense of tending them.

In its reply dated April 17, 1968, Universal made no commitment to repurchase the machines, but urged that Mr. Nolley 'try and overcome, persist and prevail over your local problems, difficulties and competition' (RX 2).

C. P. DAVIDSON, of Angelton, Texas, testified (Tr. 255–266) with reference to a purchase order contract that he signed with Universal on October 12, 1966 (CX 31), for the purchase of five tube testers and tubes to be located in the Houston, Texas, area. In the opinion of the hearing examiner, there is nothing in his testimony that has any bearing on the issues herein so it will not be discussed.

***14** HARRY EUGENE WOLKING, of Montrose, Colorado, 47 years of age, a high school graduate, who retired on July 1, 1969, as a Commander of the United States Navy and is now a salesman of greeting cards, testified (Tr. 267–293) that while he was a resident of Arvada, Colorado, he saw an ad of Universal in a Denver, Colorado, newspaper, which he answered. Mr. George Turner, a sales representative of Universal, called on him on June 9, 1966, and gave him detailed figures which showed a net profit of $1.02 for each tube sold and the net profit for one machine would yield $122.00 per month (CX 67). Mr. Wolking said (Tr. 278): 'In our discussion concerning a franchise territory, it was indicated that a territory plus five miles surrounding was what was nor-

mally assigned and normally a population of 50,000 would be given to any one dealer.' Mr. Turner told him (Tr. 279): 'The ideal locations being super markets, drug stores, hardware stores, and variety stores with the initial locations selected open seven days per week, after 6 p.m. open, also. And that 30 to 40 tubes were average per unit per week.' On June 9, 1966, Mr. Wolking signed a contract to purchase five tube testers with tubes to be located in 'Arvada, Boulder, Western 1/2 of Denver and Gen. area not to exceed 30 miles West of Denver' for the sum of $3,590 (CX 65). A personal loan was made to finance the transaction. On August 5, 1966, Universal's location man arrived, and on that day and the following day the units were placed on location. One was placed in a modern hardware store at Boulder, Colorado, where it remained until September 26, 1966, when it was removed at the store owner's request. Two tubes were sold in that period of time. Mr. Wolking tried to relocate the tester, but he could not find a desirable place. A unit placed in a small neighborhood grocery store in Boulder was removed three months later. No tubes were sold and it was not relocated. A unit was placed in a hardware store in Lakewood, Colorado, where it remained for a little over sixteen months, and 80 tubes were sold. About six months later, the tester was placed in a service station where it remained for eighteen months, 15 tubes were sold, and it was not relocated. A unit placed in a small modern pharmacy in Arvada, Colorado, remained until Mr. Wolking retired and moved to Montrose, Colorado, and 29 tubes were sold during the period of two years and eleven months. A unit was placed in an Arvada hardware store where it remained until Mr. Wolking left Arvada; about 45 tubes were sold. Two testers have been on location in Montrose since August, 1969; one unit sold 2 or 3 tubes and the other may have sold 20 tubes. Mr. Wolking stated (Tr. 286): 'I won't try to locate any more. There are already competitive type tube testers there.' There was received in evidence Universal's 'Resale Option Agreement' issued to Mr. Wolking (CX 72). He said the document meant nothing to him; 'It is an agreement, resale option agreement, which I tried to execute, but it had no bearing' (Tr. 279). On October 23, 1967, Mr. Wolking wrote to Universal (CX 82) as follows:

> ***15** Assistance is requested in the liquidation of our tube testing business. Inasmuch as the business has not shown a profit it would be difficult for us to sell on the open market, and therefore we approach you for assistance. Fees and details are requested prior to execution of any liquidation proceedings.

On October 26, 1967, Universal answered in part (CX 83):

> We do not have any ready-made prospects on hand, and therefore could not definitely state whether or not we can sell the route for you or not.
>
> We wish you would re-consider this matter and try to bolster your sales.

* * *

> Hoping for your reconsideration in this matter, and also would like to point out the fact that the route could be hard to sell at this time and even impossible.

On November 14, 1967, Mr. Wolking wrote to Universal (CX 84), wherein he stated:

> We too are interested in bolstering our sales, howevr, the locations in which our units were originally placed leave a lot to be desired. Efforts to improve the locations have not been successful because of competitor units already on location.

He added, 'we still desire to liquidate.' On March 16, 1968, Mr. Wolking wrote to Universal (CX 86), stating: 'I still desire to liquidate my route and any assistance you can provide will be appreciated.'

ELDAN LEONARD, of Baraboo, Wisconsin, employed by an Ordnance Works as a shift supervisor, testified (Tr. 293–312) that he answered a Universal ad in a Milwaukee, Wisconsin, newspaper and was contacted by one of its representatives, Mr. George Turner, on March 29, 1966, who wrote on a Universal letterhead (CX 51) detailed figures of profits to be made in the tube testing business. Mr. Turner wrote that a tube selling for $3.20, after deducting the cost thereof of $1.22 and the commission of 30 percent to be paid to the owner of the loca-

tion in the amount of 96 cents, would yield a net profit of $1.02. Each location would sell 5 tubes each day, netting $4.08 per day, and $122.40 for a month (30 days). Six machines would produce a net of $734.40. Relying on the Representations made to him, Mr. Leonard, on March 29, 1966, signed a contract (CX 53) to purchase six tube testers and tubes to be located in Madison, Wisconsin, and the general area. Universal's location man, when he arrived on July 16, 1966, said it would be much better if the machines were located in Mr. Leonard's immediate area rather than Madison. Two machines were placed in stores in Baraboo, and the other four in stores in Reedsburg, Portage, Sauk City, and Prairie du Sac, Wisconsin (CX 57, 58, 59, 60, 61 and 62). Four of the units still remain on location. One unit has been off of location for two years, and one for one year. After paying the owners of the locations their commissions, Mr. Leonard grossed $177.25 in 1966, $443.55 in 1967, $95.13 in 1968, $301.83 in 1969, and $187.42 for the first six months of 1970. Without taking into consideration his overhead—gas and automobile service—Mr. Leonard estimated that his net profit would be between 30 and 40 percent of the quoted figures.

***16** RICHARD ROSS DAWES, of Evansville, Indiana, age 31, with one year of college, and employed in a bank, testified (Tr. 356–389) that he answered a Universal ad which appeared in an Evansville newspaper on October 18, 1967; that the respondent, Wendell Coker, came to his home, at which time he contracted to purchase three tube testers and tubes to be located in Evansville for $2,260 (CX 106). In regard to profits, Mr. Coker said 'that he felt that I should get my investment back within roughly a year's time.' (Tr. 360); that if sales were not this good, the minimum net return on three machines should be $800 to $1,000 a year; that 'a detailed study would be made of the section of Evansville that I lived in to determine the best location for my machines. A representative would come and place the machines in these locations' (Tr. 361); that the representative 'then would instruct me on the use of these machines and introduce me to each of the store managers' (Tr. 361–362); that no other distributors would be placed in this area. On November 28, 1967, Universal's representative came to town and he found locations at neighborhood grocery stores which Mr. Dawes did not think were the best. The location man 'did not stay long enough to instruct me how to use these machines—* * *—or introduce me to any of the locations' (Tr. 387). One of the machines was removed from the original location in February of 1968 for the reason that it did not sell a tube, except for 5 or 6 tubes purchased by the owner. The second machine was removed about the end of 1968 when the store went out of business, and the third machine was removed about the middle of 1969 at the request of the owner of the store. The first machine removed was relocated in a supermarket on April 1, 1968, where it still remains, by Mr. Dawes who considered it a good location for the reason that it was a 24-hour discount grocery store drawing trade from all over town and not just the immediate neighborhood. About 100 to 150 tubes have been sold at this location. The record does not show whether or not the other machines were relocated, except on cross-examination Mr. Dawes said that, at his request, Universal did send a representative who relocated one of the testers where it was left for three months and did not sell a tube. Mr. Dawes said that his net earnings each year during the three-year period were less than a hundred dollars a year. On cross-examination, Mr. Dawes acknowledged that he read the purchase order contract before he signed it and that it contains the provisions, 'No exclusive territories promised' and 'no verbal agreements are valid,' but he relied on the oral representations made to him at the time of the sale.

KENNETH F. HELMLE, of Mico, Texas, 30 years of age, with two years of college, who has been engaged in the business of floor covering sales during the past ten years, testified (Tr. 390–402) that on January 4, 1966, when he was living in San Antonio, Texas, he answered a Universal ad; that on January 20, 1966, Universal's representative, Mr. P. A. Krane, called on him and, with regard to potential profit from tube testing machines, he gave figures based on half of what the national average was; that a profit of $75 per week income could be made from six machines; that Universal secured locations and set up the machines; that they had taken a survey and

there was an abundance of locations in his locality, and that he would get the pick of the group because he was the first to answer the ad in this area; that 'if we ran into difficulties and the deal didn't go, he would have the company buy back the machines or arrange to sell them for us as an agent' (Tr. 399). After some discussion with Mr. Krane, Mr. Helmle said (Tr. 401): 'I told him I would like to think about it within the next day. He said he had a couple of other people in the area and it had to be now or never.' On January 20, 1966, Mr. Helmle signed a purchase order contract (CX 96) for six tube testers with kits of tubes to be located in San Antonio for a total price of $3,595. The contract was approved by Universal and the company sent him a Resale Option Agreement (CX 97). On February 14, 1966, Universal's location man arrived and Mr. Helmle accompanied him to find places to locate the machines. Three were placed in small community hardware stores with a common owner, and three in small family grocery stores. In about two months, at the request of one of the grocery store owners, Mr. Helmle removed the machine; it was never relocated. He explained (Tr. 396): 'I went to ten different small neighborhood groceries and got a refusal at each one. Most of them had some experience and found it wasn't worth their while to have the machine. It took up too much of their time for the profit involved.' The three machines in the hardware stores were removed after a six-month period at the request of the owner, and an attempt to relocate them was unsuccessful. The remaining two machines were removed after eleven months on location for the reason that they were selling less than a tube a week. The gross sales from the locations were less than $300, which netted Mr. Helmle less than $100. On June 14, 1966, Mrs. Kenneth Helmle wrote to Universal (CX 99) in part:

> ***17** We are very disappointed in our business venture with you. We feel the returns are pitifully small for the investment involved, much smaller than was verbally presented. We would like to know what is involved in you exercising your right to buy back these testers.

On June 24, 1966, Universal wrote to Mrs. Helmle (CX 100), stating in part:

> It would seem that your route and business could stand some improvements by the statements in your letter. We are enclosing a guide line set of suggestions, that should help you in this matter if they are conscientiously applied.

On February 7, 1967, Mrs. Helmle wrote wrote to Universal (CX 102) in part:

> Due to personal financial problems we need to sell our tube testers. * * *
> Five of the machines are out in locations, possibly not too good, as you can tell from our sales. * * *
> Please let us know how you can help us.

On February 17, 1967, Universal wrote to Mrs. Helmle (CX 103) in part:

> I am sorry to hear of your problems with the tube testing business and financial ones also.
> We happen to have too many used machines on hand now, and cannot possibly use anymore than we have. We are presently using a newer model machine with some design changes and much newer head panels, so, it is hard for us to do anything with the older 202 or 203 model testers.

On September 19, 1967, Mrs. Helmle again wrote to Universal (C–104) in part:

> The testers have not worked out in any way like your salesman indicated that they would and it looks as if we have been *taken.* If there is any way that you would or would help us move these testers at 2/3 or even 1/2 of what we paid for them, we would consider it a favor.
> The machines are still complete and full of tubes.

WOODROW W. WILLIAMS, of Hutchinson, Kansas, 58 years of age, with one year of college, who has been employed as a warehouse foreman for the past two years, was a laundry truck driver for two years and prior to that had a cigar route, testified (Tr. 403–424) that he observed a Universal ad (CX 88) in a Hutchinson newspaper on March 5, 1967, which he answered. On March 19, 1967, Universal's representative, Mr. A. C. Dachroeden, came to see him and said that the bare minimum profit would be $1 each day per machine; that Uni-

versal would send out a man to find locations and give instructions on their operation; that he would be given an exclusive territory; and that 'they would buy them back after a year's time, if I wanted, the sales representative said they would discount approximately 20 per cent. We stood to lose no more than the 20 per cent they would discount, if we sold them back at the end of the year; (Tr. 414). Mr. Williams said he would like another day to think it over. 'He informed me he was just in town for the night. Other people were interested in the deal, if I didn't take it right now, I wouldn't have a chance' (Tr. 410). A purchase order was signed for three tube testers with tubes to be located in Hutchinson and the general area not to exceed five miles for the sum of $2,290 (CX 89) The machines were received on April 20, 1967, and about two weeks later Universal's location man arrived and requested Mr. Williams to help him locate the machines. Mr. Williams testified (Tr. 417):

> ***18** * * * I told him that I was working and couldn't take the day off, that would be up to him. The ad stated he would do that. He said he was sorry, a company that big couldn't send a man all over the United States finding locations, I would have to help him find locations. So, I called my boss asking for the day off. We got two machines located that afternoon. He did help me. I hauled them in my car, but he did help me haul them. He said, 'Now, I have got to get out of town tonight. This should be the last time I am in town, I want you to sign this paper that I located the machines.'
>
> By that time, I knew I had been taken, and the quicker to get rid of him, the better. I signed the paper, and he was on his way. * * *

One machine was never put on location; one of the machines was placed in a small grocery store where it remained for fifteen months; and one was placed at a news and book stand where it was for about seven months. Mr. Williams did not relocate the machines, although he attempted to do so. He 'found out that the machines were in practically every desirable outlet in Hutchinson. I decided it was useless * * *' (Tr. 412). The tube testers for the period on location grossed between $90 and $100, netting approximately $30. He did not receive any training on how to operate and take care of the machines. Mr. Williams said he did not receive an exclusive territory; that one of Universal's machines was within ten blocks of his home. On March 8, 1968, Mr. Williams wrote to Mr. Coker, president of Universal, stating (CX 92):

> According to our contract, if after 1 year on placement the tube testing machines proved unsatisfactory, you would re-purchase same from us.
>
> Will you please advise us as to how we are to proceed for your repurchase.

Universal responded on March 11, 1968, in part (CX 93):

> In reference to your letter of March 8th, you, apparently, are referring to the Resale Option Agreement. This instrument means we have the first option to sell your route for you, if after one year of operation, you are dissatisfied and decide to try and dispose of it. This does not mean we repurchase said route.

JERRY L. JOYNER, of Durango, Colorado, 36 years of age, a high school graduate, who until recently was the owner of a package liquor store, testified (Tr. 426–444) that, after answering a Universal ad that appeared in a local newspaper, Universal's representative, Mr. Benny Herwitz, called on him on August 8, 1966; that he could not definitely say that the salesman and he discussed profits, but he imagined they did, and 'out of the Durango Herald advertisement it had from 250 to 350 a month could be realized profit' (Tr. 430). During the conversation, Mr. Herwitz said that, if he did not like the business and wanted out after at least one year, the machines be sold back to the company for $1,000 plus the original purchase price. A purchase order contract was signed on August 8, 1966, for three tube testers and tubes to be located for the sum $1,895 (CX 139). On September 23, 1966, Universal's location man arrived in Durango and he and Mr. Joyner found places to locate the three machines: No. 1 was placed in a Durango Service Station, and on November 17, 1966, it was moved to a Durango Seven-Eleven Store on a 25 percent commission basis where it remained until August 12, 1966 when another

company moved in giving commissions of 50 percent. 'This left the town flooded with T.V. tube testing machines' (Tr. 435). The unit was moved to a place in Bayfield, Colorado, where it was from August 12, 1968, to June 16, 1969. Mr. Joyner attempted to relocate the machine, but was not successful because 'good locations already had machines' (Tr. 436). No 2 was placed in a book and magazine shop in Durango where it remains on location. No. 3 was placed in a Seven-Eleven Store in Cortez, Colorado, and remained there until January 25, 1968, when, because another place could not be found, it was placed in Mr. Joyner's garage. His gross return on sales for the year 1966 were $98.65; for 1967, $664.70; for 1968, $98.44; for 1969, $139.70; and for 1970, $57.55. Mr. Joyner explained that for the year 1967, when his sales totaled $664.70, he paid commissions of $160.67 to the locations and $254.79 for tubes, which would leave a net of $249.24 without taking into consideration his time and automobile expenses in servicing the machines. Mr. Joyner wrote Universal about repurchasing the business and in response received its letter, dated November 16, 1967 (CX 140), saying in part:

***19** In reference to your letter of November 14, 1967 concerning your inquiry about the possibility of selling your machines, we hope you do not have to undertake such action.

We try to assist a dealer to sell his route after 1 years time and if we have any prospects we can approach there for you. However we have no prospects for a route in your area at this time. The best advise we can offer at this time if you wish to sell your route is to advertise it in a few local papers under Business Opportunity section for 2 or 3 days.

On cross-examination, the following exchange took place (Tr. 439):

Q. Now, was it your understanding that after one year from the time you signed the contract, if you wanted to, you could resell this business to Universal at a profit of a thousand dollars?

A. This is what the salesman told me, yes, sir.

Q. So, if that's true, then you had a situation where you could not lose, is that right?

A. Well, this is why I went into it.

Q. I see. Now, would you consider that, you say that's why you went into it?

A. Well, that was one of the reasons. Plus, the other reason was what the advertisement in the paper said of approximately 250 to 350 per month profit.

SAM J. GEANETTA, of Colorado Springs, Colorado, 44 years of age, with two years of college, a salesman by occupation, testified (Tr. 445–469) that his partner, Mr. Thomas T. Skole, answered an ad of Universal in the Wall Street Journal and the two of them were present at the time. Universal's representative, Mr. Arthur Dachroeden, sold them twenty units with tubes to be located in Colorado Springs, Denver, and Pueblo, Colorado, for the sum of $13,210 (see CX 109A–B, Universal's Bill of Sale, dated May 17, 1967). Mr. Dachroeden said each machine would sell four tubes per day at a profit of $1.02 per tube; that the area assigned would be an exclusive territory; and that after one year Universal would, at their request, resell the business for them at a price so they would get all of their money back. In July of 1967, the machines were placed by Universal's location man in the three mentioned cities. In about 30 or 90 days, Mr. Geanetta and Mr. Skole relocated a number of the machines for the reason that they were not making any money. They had to make extensive calls because about 90 out of 100 of the places already had a unit. Ten of the machines are now on location and ten are stored in a garage because they could not get anyone to take them. From July 1967 to date, the amount collected totaled about $2,500 after payment of commissions to the locations and the cost of tubes. This figure does not take into consideration the expense of servicing the machines. Mr. Geanetta observed an advertisement of Universal in a Denver newspaper about three to six months after they purchased the twenty units, but does not know of any other Universal dealer in the three Cities. He wrote a letter direct to Mr. Coker of Universal about reselling the units, but he refused. Mr. Geanetta testified (Tr. 46):

***20** Well, the letter stated, being that we hadn't bought any tubes from him and hadn't helped him any, he

wasn't going to do anything for us. That was basically the letter I received back from Mr. Coker. Of course, the only reason we weren't buying tubes from Universal Electronics is because we were not selling any.

HARRY O. BLOUNT, JR., of Great Falls, Montana, 45 years of age, a college graduate, who is a retired Lieutenant Colonel of the Air Force after 23 years of service, and at present is a Civil Service employee at an Air Force base, testified (Tr. 469–485) that he got in touch with Universal after seeing one of their advertisements in a Great Falls newspaper; that Universal's representative, Mr. Misemer, contacted him on July 20, 1967, and sold him on that day three tube testers with tube kits to be located in Great Falls and the immediate area for the sum of $2,290 (CX 141); the Mr. Misemer gave him an estimate that $100 to $200 a month profit should be realized with three to five machines; that they would do a market research to come up with good locations that would sell; that, after a year, if he was dissatisfied with the operation, Universal would attempt to resell the units at a price so that he would get his full investment back. On November 22, 1967, Universal's location man arrived and obtained locations for the three machines (CX 142, 143 and 144): No. 1 location was a grocery store which Mr. Blount has described as being small in size in the Great Falls slum area which served people who could not afford to purchase a tube; No. 2 location was Texaco Service Station which was described as being small and in complete shambles, with a clientele that would be very unlikely to be searching for tubes; No. 3 location was an Enco Service Station which, Mr. Blount said, was modern and up-to-date and in a good area. Mr. Blount was not satisfied with the locations obtained for him and so informed the location man; but the location man insisted they were good locations and that they would sell. However, he requested the location man to find new locations but he said he could not find any other locations. Mr. Blount said that, after the machines had been on location for about three months, it was obvious to him that he was not going to make anything off of them. He looked around town but could not find a place to relocate them because practically every store in town had machines. The Machine at the grocery store remained on location for six months; the machine at the Texaco Station remained on location for eight to twelve months; and the machine at the Enco Station remained on location for about three or four months. Mr. Blount grossed $30 to $40 from the three machines, which netted him about $16. He said that Mr. Misemer told him at the time he made the sale to him that, after the machines were located, he or someone else would come to see how he was doing and if any improvements could be made, but no one came to assist him. Universal repurchased the machines and tubes for $723.80. He shipped them in April or May 1970, and in June 1970 Universal mailed him a check.

***21** In the proposed findings submitted by the respondents, they do not question the propriety of an entry of an order against the corporate respondent, but contend that the evidence does not warrant the entry of an order against the respondent in his individual capacity, relying primarily for their position on *Coro, Inc., et al. v. F.T.C.*, 338 F. 2d 149 (1st Cir. 1964), wherein the Court said (at p. 154):

> We do think, however, that there is not a sufficient showing to warrant the inclusion of Rosenberger personally in the order. He was Coro's largest stockholder, its president and the chairman of its board of directors. And there is testimony, his own, that he had 'overall corporate responsibility' and 'responsibility for the acts and practices of the corporation' and that he made the decision to put Coro into the catalogue house business. *But there is no showing that he was aware of the pricing practices of catalogue houses or that he personally knew of Coro's participation in those practices.* In short, unlike Theodore R. Hodgkins in Forster Mfg. Co. v. F.T.C., 335 F. 2d 47 (C.A. 1 1964), there is no showing of Rosenberger's active or even actual personal participation in the unlawful practices of the corporation under his overall management and control. In the absence of evidence of personal involvement in Coro's unlawful conduct, we think the hearing examiner was correct in finding no sufficient reason for holding Rosenberger individually responsible and in dismissing the complaint as to him individually. (Emphasis added.)

The respondents also rely upon *Flotill Products, Inc.* v. *F.T.C.*, 358 F. 2d 224 (9th Cir. 1966), *Doyle* v. *F.T.C.*, 356 F. 2d 381 (5th Cir. 1966); and *F.T.C.* v. *Standard Ed. Soc., et al.*, 302 U.S. 112 (1937). Considering the facts in this proceeding, there is nothing in the aforementioned cases that would support the position of the respondents. In the *Standard Education Society* case, *supra*, the Supreme Court said (at p. 120):

> The record in this case discloses closely held corporations owned, dominated and managed by these three individual respondents. In this management these three respondents acted with practically the same freedom as though no corporation existed. So far as corporate action was concerned, these three were the actors. Under the circumstances of this proceeding, the Commission was justified in reaching the conclusion that it was necessary to include respondents Standard, Ward and Greener in each part of its order if it was to be fully effective in preventing the unfair competitive practices which the Commission had found to exist. The court below was in error in excluding these respondents from the operation of the Commission's order.

The Commission in *Coran Bros. Corp., et al.*, Docket No. 8697, July 11, 1967 [¶18,030 CCH Trade Reg. Rep.] [72 F.T.C. 1], had this to say:

> The public interest requires that the Commission take such precautionary measures as may be necessary to close off any wide 'loophole' through which the effectiveness of its orders may be circumvented. Such a 'loophole' is obvious in a case such as this, where the owning and controlling party of an organization may, if he later desires, defeat the purposes of the Commission's action by simply surrendering his corporate charter and forming a new corporation, or continuing the business under a partnership agreement or as an individual proprietorship with complete disregard for the Commission's action against the predecessor organization. * * *

***22** It is the opinion of the hearing examiner, on the facts presented by this record, that not only should an order be entered against the corporation, but also against the respondent, Wendell Coker, in his individual capacity as a party in this proceeding. It is shown and established that he is now, and has been during the entire period of the existence of the corporation, the president and sole stockholder thereof; that he, alone, formulated, directed and controlled the acts and practices of the corporate respondent; and that he was responsible for, familiar with, and personally participated in, the specific acts and practices which are challenged in this proceeding. Furthermore, it is the opinion of the hearing examiner that without including the respondent, Wendell Coker, in his individual capacity, there is a possibility that the order will be evaded.

ORDER

It is ordered, That respondents Universal Electronics Corporation, a corporation, and its officers, and Wendell Coker, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of radio and television tube testing devices and the tubes, supplies or equipment for use in connection therewith, or of any other products or of any franchises or dealerships in connection therewith, in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that:

   (a) Persons investing in respondents' products, franchises or dealerships will receive any stated amount of income or gross or net profits or other earnings.

   (b) Any stated sums of money are past earnings of investors or purchasers of respondents' products unless in fact the past earnings represented are those of a substantial number of purchasers and accurately reflect the average earnings of these purchasers under circumstances similar to those of the purchaser to whom the representaton is made.

(c) Persons investing in respondents' franchises, dealerships or products will receive discounts from respondents on repeat business which assures them of an exceptional or profitable income, or are assured of an exceptional or profitable income from franchises, dealerships or products for any other reason.

(d) Persons, investing in respondents' franchises, dealerships or products can expect an average sale of a certain specified numbr of tubes per day, or any other period of time, for each machine so purchased from respondents unless in fact the average number of tube sales during the time period as represented is that of a substantial number of franchisees, dealers, or purchasers under circumstances similar to those of persons to whom the representation is made.

(e) Respondents, their agents, representatives or employees will obtain satisfactory or profitable locations for the machines purchased from them: *Provided, however*, That nothing herein shall be construed to prohibit respondents from truthfully and non-deceptively representing that they have obtained locations or assisted in obtaining locations if respondents clearly and conspicuously disclose, in immediate conjunction therewith, the average net or gross earnings realized by a substantial number of purchasers from machines in location obtained by respondents or through their assistance under circumstances similar to those of the purchaser to whom the representation is made.

***23** (f) Persons investing in respondents' franchises, dealerships, machines or other products will receive training, or other advice and assistance, in the operation of and the methods to be used in servicing respondents' said machines or any other products unless in fact the respondents afforded training, advice and assistance in the operation of and the methods to be used in servicing respondents' machines or other products to each purchaser to the extent of and in conformity with the representations being made to the investor or purchaser.

(g) Selling, soliciting or experience is not required to establish, operate or maintain a route of respondents' machines, or other products; or misrepresenting in any manner, the amount of selling, soliciting or experience required to establish and operate or maintain the route.

(h) Respondents or their representatives will accept return of, or will obtain or assist in obtaining a purchaser for, or will assist in the resale of machines or other products sold by them.

(i) Persons investing in respondents' franchises, dealerships, machines or other products will receive the return of their investments in nine months, one year or any other specified period of time.

(j) Persons investing in respondents' franchises, dealerships, machines or other products will be granted an exclusive territory in which to locate machines and sell products purchased from respondents unless respondents provide in all contracts or purchase agreements with dealers, franchisees or purchasers of respondents' tube testing machines, tubes and other products, to whom such exclusive territories have been granted, a description of the size and limits of the territories, and a statement that no other investor, dealer, franchisee or purchaser of the same machines or products has been, or will be granted the same territory or any part thereof and respondents in all instances abide by such provisions.

2. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, franchises or dealerships and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

3. Failing, after the acceptance by the Commission of respondents' initial report of compliance, to submit to the Commission on June 1st of each of the succeeding three years a report: (1) describing every complaint involving the acts and practices prohibited by this order received by respondents and their licensees or franchisees from or on behalf of their customers during the 12 months preceding the date of the report; (2) setting forth the facts uncovered by respondents or their licensees or franchisees in connection with the investigation made of each such complaint; and (3) stating the action taken by respondents or their licensees or franchisees with respect to each such complaint.

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

***24** *It is further ordered*, That respondents

a. Inform orally all prospective customers and provide in writing in all contracts that (1) the contract may be cancelled for any reason by notificaton to respondents in writing within three days from the date of execution and (2) that the contract is not final and binding until respondents have completely performed their obligations thereunder by placing the vending machines in locations satisfactory to the customer and said customer has thereafter signed a statement indicating his satisfaction.

b. Refund immediately all monies to (1) customers who have requested contract cancellation in writing within three days from the execution thereof, (2) customers who have refused to sign statements indicating satisfaction with respondents' placement of the machines, and (3) customers showing that respondents' contract, solicitations or performance were attended by or involved violations of any of the provisions of this order.

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

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

FINAL ORDER

By its order of December 29, 1970, the Commission extended until further order the date on which the initial decision of the hearing examiner herein would become the decision of the Commission; and

The Commission having concluded that said initial decision, filed on November 6, 1970, holding that respondents had violated Section 5 of the Federal Trade Commission Act as charged, is appropriate in all respects to dispose of this proceeding:

It is ordered, That the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

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

FTC

78 F.T.C. 265, 1971 WL 128754 (F.T.C.)

END OF DOCUMENT

Slip Copy, 2010 WL 653486 (N.D.Cal.), 2010-1 Trade Cases P 76,918
(Cite as: 2010 WL 653486 (N.D.Cal.))

United States District Court, N.D. California,
San Jose Division.
FEDERAL TRADE COMMISSION, Plaintiff,
v.
SWISH MARKETING, Mark Benning, et al., Defendants.

No. C 09-03814 RS.
Feb. 22, 2010.

West KeySummary**Antitrust and Trade Regulation 29T 358**

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)5 Actions
29Tk356 Pleading
29Tk358 k. Particular Cases. Most Cited Cases

Federal Trade Commission's (FTC) allegation that CEO of company had authority and control over the company's operations failed to tie the CEO to the allegedly fraudulent credit card scheme, and thus, the FTC's claim was dismissed as to the CEO. The FTC alleged that the CEO had the authority to control or participated in the allegedly fraudulent acts and practices of the company. However, the FTC's conclusory assertions of authority, untethered to virtually any supportive facts, did not support an inference of the CEO's involvement. Federal Trade Commission Act, § 5, 15 U.S.C.A. § 45; Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

Lisa Diane Rosenthal, Evan Rose, Kerry O'Brien, Federal Trade Commission, San Francisco, CA, for Plaintiff.

Brian Matthew Grossman, Tesser & Ruttenberg, Michael Aubrey Thurman, Michael Lawrence Mallow, Loeb & Loeb LLP, Los Angeles, CA, Donald P. Gagliardi, Bergeson, LLP, San Jose, CA, for Defendants.

ORDER GRANTING MOTION TO DISMISS WITH LEAVE TO AMEND AND DENYING MOTION TO STRIKE

RICHARD SEEBORG, District Judge.

I. INTRODUCTION

***1** Defendant Mark Benning moves to dismiss the FTC's Complaint pursuant to Rules 8(a)(2), 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure. Defendant Swish Marketing ("Swish") argues this Court is not authorized under section 13(b) of the FTC Act, 15 U.S.C. § 53(b) (1994), to award restitution and moves to strike from the Complaint any reference to ancillary monetary relief.

As to his motion to dismiss, Benning contends that the FTC's allegations "sound in fraud" and therefore must be pleaded with particularity under Rule 9(b). In the alternative, Benning claims that the FTC's pleadings do not even comprise a "short and plain statement ... showing the pleader is entitled to relief" as required by Rule 8(a)(2) and should be dismissed on that separate basis. Because the Commission's averments that Benning participated in and had knowledge of Swish Marketing's material omissions and misrepresentations satisfy neither Rule 8(a)(2) nor 9(b), defendant Benning's motion to dismiss must be granted with leave to amend. As to Swish's motion to strike, to grant it this Court would have to ignore an on-point holding from the Ninth Circuit. In *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir.1982), the Court reasoned that Congress vested the district court with equitable jurisdiction under section 13(b) to award full relief, including restitution. Swish's argument, while interesting and well-presented, does not warrant abandonment by this Court of binding Circuit precedent. The motion to strike therefore must be denied.

II. RELEVANT FACTS

The Federal Trade Commission ("FTC" or

"Commission") alleges that Swish and three of its officers violated section 5 of the FTC Act, 15 U.S.C. § 45 (2006), in connection with the advertisement and sale of financial services over the Internet. Between at least September of 2006 and 2007, Swish operated websites that offered short-term, high-interest loans. The FTC describes how Swish failed to disclose to consumers that, when they applied for a loan advertised on one of Swish's websites, they sometimes also unwittingly agreed to purchase a pre-paid debit card sold by a marketing affiliate, VirtualWorks, LLC. According to the Complaint, Swish transferred bank account information released by consumers to facilitate their loans directly to VirtualWorks. That entity then used the information to deduct sufficient funds to "pay" for the debit cards.

The FTC insists that Swish and VirtualWorks collaborated in the debit card scheme: Swish hosted the websites that advertised the loans, had some control over presentation and accessibility to the public, and earned money each time a consumer accepted the debit card offer. Swish admits it displayed the advertisements on its websites but counters that VirtualWorks prepared all text relating to the debit card offer and denies any monetary remuneration directly from consumers.

III. DISCUSSION

A. *Federal Rule of Civil Procedure 9(b).*

***2** Federal Rule of Civil Procedure 9(b) provides that "[i]n allegations of fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." To satisfy the rule, a plaintiff must allege the "who, what, where, when, and how" of the charged misconduct. *Cooper v. Pickett*, 137 F.3d 616, 627 (9th Cir.1997) . In other words, "the circumstances constituting the alleged fraud must be specific enough to give defendants notice of the particular misconduct so that they can defend against the charge and not just deny that they have done anything wrong." *Vess v. Ciba-Geigy Corp. U.S.A.*, 317 F.3d 1097, 1106 (9th Cir.2003). By contrast, "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed. R. Civ. Pro. 9(b). Where the complaint alleges corporate fraud but ascribes liability to individuals, "the allegations should include the misrepresentations themselves with particularity and, where possible, the roles of the individual defendants in the misrepresentations." *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir.1989).

In the Ninth Circuit, Rule 9(b) applies where a complaint "sounds" or is "grounded" in fraud. *Vess*, 317 F.3d at 1103. This is true where a complaint alleges fraud as an essential element of the claim for relief or where fraud is *not* a necessary element but the plaintiff alleges what amounts to fraudulent conduct. *Id.* at 1103-04 (noting that a complaint sounds in fraud where a plaintiff alleges a "unified" course of fraudulent conduct or, instead, alleges some fraudulent and some non-fraudulent conduct; in the latter case, Rule 9(b) applies only to the fraudulent conduct). While the standard is somewhat difficult to apply, the rationale behind it rests on the preference for substance over form: where a complaint alleges conduct which in effect amounts to fraud, defendants are entitled for policy reasons to the enhanced reliability and notice that accompany more detailed pleadings. *Bly-Magee v. California*, 236 F.3d 1014, 1018 (9th Cir.2001).

Section 5(a) of the FTC Act prohibits "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45 (2006). The FTC argues its Complaint is not subject to Rule 9(b) because "[a] claim that the defendants violated section 5 by engaging in 'deceptive acts and practices' is not a claim of fraud." Fraud, the Commission correctly points out, is not a necessary element under the Act. The Commission further asserts that allegations must actually "add up" or "amount," element by element, to fraud to satisfy the "sounding" standard.

The Commission relies on cases within this Circuit applying Rule 9(b) in the context of the Securities Exchange Act. *See, e.g., In re Charles*

Schwab, 257 F.R.D. 534, 545 (N.D.Cal.2009). Typically, these cases involved fact patterns where a complaint relied on the same facts to prove a violation of section 10(b) (where fraud is a necessary element) and section 11 (where fraud is not). *See, e.g., In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1404-05 (9th Cir.1996); *In re Daou Systs., Inc.*, 411 F.3d 1006, 1027 (9th Cir.2005). The facts, then, did not merely "sound" in fraud; they comprised it. When courts in the securities context have not applied Rule 9(b) to section 11 allegations, the rationale has been that the section holds defendants strictly liable for even innocent or negligent material misrepresentations. Thus, where the SEC *alleges* only an innocent or negligent act, it need not plead with particularity facts that have no resemblance to fraud. *See Charles Schwab*, 257 F.R.D. at 545 (finding 9(b) inapplicable to "pure" section 11 claim).

***3** By contrast, courts in this circuit have required heightened pleading even where a plaintiff neither needed to prove nor alleged all elements of common law fraud. *See, e.g., Asis Internet Services v. Subscriberbase, Inc.*, No. 09-3503, slip op. at *3 (N.D.Cal. Dec. 04, 2009) (acknowledging that plaintiffs could not make out all elements of common law fraud but requiring that they satisfy Rule 9(b)'s heightened requirements where allegations under California's False Advertising Law were nonetheless "grounded in fraud"); *In re Actimmune Mktg.*, No. 08-02376, slip op. at *8 (N.D. Cal. Nov. 6, 2009) (finding that even though plaintiff's fraudulent business practices claim under the UCL did not require a showing of actual fraud, it still "sounded" in it). Similarly, the D.C. Circuit in *United States of America ex rel. Totten v. Bombardier Corporation*, 286 F.3d 542, 551-52 (D.C.Cir.2002) termed the distinction, for Rule 9(b) purposes, between a fraudulent claim and a false one "hairsplitting." Where the False Claims Act, 31 U.S.C. § 3729, made both claims actionable but required proof of scienter only for the former, the plaintiff argued Rule 9(b) did not apply. The Court disagreed:

> The difference between the two claims is simply the degree of scienter involved. But this difference is entirely insignificant in the context of Rule 9(b)'s pleading requirements. Indeed, the rule specifically allows allegations of intent, knowledge, and other condition[s] of the mind to be averred generally. In contrast, the circumstances that must be pleaded with specificity are matters such as the time, place, and contents of the *false* representations, such representations being the *element* of fraud about which the rule is chiefly concerned.

Id. (citations and internal quotation marks omitted) (emphases in original). Here, the Commission's burden of proof resembles one for common law fraud except that it need not demonstrate Benning's subjective intent to defraud. *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1171 (9th Cir.1996). To establish individual liability under the Act, the FTC must prove: (1) misrepresentations or omissions; (2) of material fact; (3) of a kind usually relied upon by reasonably prudent persons; (4) that consumer injury resulted; and (5) that the individual participated directly in the acts or practices or had authority to control them. *Id.* at 1170; *FTC v. Amy Travel Service, Inc.*, 875 F.2d 564, 573 (7th Cir.1989). To recover restitution from an individual, the FTC must also prove "knowledge that the corporation or one of its agents engaged in dishonest or fraudulent conduct." *Publishing Clearing House*, 104 F.3d at 1171 (noting an individual had "knowledge" where he was actually aware of "material representations, was recklessly indifferent to the truth or falsity of a misrepresentation, or had an awareness of a high probability of fraud along with an intentional avoidance of the truth").

***4** As Rule 9(b) particularity is not focused on intent, it would be anomalous to suggest that a section 5 claim is free from Rule 9(b)'s heightened pleading requirement because the FTC need not prove scienter here. The gravamen of the Complaint is that Swish and its agents-motivated by the potential to profit-hoodwinked unwitting loan applicants

by inducing payment for a $50 debit card they neither wanted nor considered. The general applicability of Rule 9(b) to section 5 actions is a real prospect. As noted below, however, in this particular context, the outcome for Benning's motion does not turn on that question. Whether or not a section 5 violation "sounds" in fraud, the Commission's allegations against Benning in particular fail to meet the general pleading standard contained in Federal Rule of Civil Procedure 8(a)(2).

B. *Federal Rule of Civil Procedure 8(a)(2).*

To state a claim for relief, Rule 8(a)(2) demands that a pleading include a "short and plain statement of the claim showing that the pleader is entitled to relief." The Supreme Court has instructed that this mandate does not require "detailed factual allegations," but "demands more than an unadorned, the-defendant-harmed-me accusation" or "naked assertion[s] devoid of further factual enhancement." *Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009) (internal quotation marks omitted). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.' " *Id.* (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). Accordingly, dismissal under Rule 12(b)(6) is appropriate where a complaint lacks "sufficient facts to support a cognizable legal theory." *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir.2008). When considering a motion to dismiss, a court accepts a plaintiff's factual allegations as true and construes the complaint in the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969). This tenet does not apply, however, to bare legal conclusions. *Twombly*, 550 U.S. at 555 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."). Even where the plaintiff alleges something more than a bare legal conclusion, *Twombly* requires a statement of a plausible claim for relief. *Id.* at 544. Weighing a claim's plausibility is ordinarily a task well-suited to the district court but, where the well-pleaded facts do not permit the court to infer more than a mere *possibility* of misconduct, the complaint has not shown the pleader is entitled to relief. *Iqbal*, 129 S.Ct. at 1950.

Benning argues the Complaint-insofar as it implicates him-satisfies neither *Twombly* 's requirement of something more than "threadbare" recitations of elements and legal conclusions nor its demand for a plausible claim for relief. As to *Twombly* 's first principle, the only time Benning's name is expressly mentioned in the Complaint, it is to allege:

> ***5** Defendant Mark Benning was at all times material to this Complaint the CEO for Defendant Swish. At all times material to this Complaint, acting alone or in concert with others, he has formulated, directed, controlled, had the authority to control, or participated in the acts and practices of Swish, including the acts and practices set forth in this Complaint. Defendant Benning resides in this district and, in connection with the matters alleged herein, transacts or has transacted business in this district and throughout the United States.

The FTC uses this exact language to describe the actions of defendants Matthew Patterson and Jason Strober. Throughout the Complaint, the FTC does describe in considerable detail the websites operated by Swish, the relationship between Swish and VirtualWorks, and the circumstances behind the material omission and misrepresentations that comprise Counts I and II. The "factual" allegations alleged against Benning, by contrast, are cursory at best.

Next, even were this Court to accept the Complaint's allegations as well-pleaded, Benning argues it still fails to state a plausible claim for relief. As *Twombly* explains, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 550

U.S. at 556. At the same time, "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.' " *Iqbal*, 129 S.Ct. at 1949 (*quoting Twombly*, 550 U.S. at 556-57). The FTC argues Benning's position as CEO of Swish Marketing makes his involvement in the debit card scheme plausible. For support, the Commission cites to *FTC v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170 (9th Cir.1996), where the Ninth Circuit reviewed the summary judgment of a section 5 violation for deceptive telemarketing. After reciting the elements for individual liability detailed in the foregoing section-proof of corporate liability, plus direct participation in the deceptive acts or authority to control them and some knowledge that the corporation or its agents engaged in deceptive or fraudulent conduct-the Court paused to explain the "authority to control" phrase.

The Court reasoned that "[the defendant's] assumption of the role of president of [the corporation] and her authority to sign documents on behalf of the corporation demonstrate that she had the requisite control." *Id.* The Commission argues that Benning's status as CEO, standing alone, plausibly demonstrates his control over the company (and warrants the inference of involvement in the deception). The Commission ignores that substantial facts were before the Circuit in *Publishing Clearing House* detailing the defendant's relationship not only to the corporation but also to its telemarketing scheme. *Id.* at 1171 ("[Her] activities included obtaining and signing PCH's business license and signing the fund-raising agreement between PCH and [a fraudulent charity whose] application to conduct charitable solicitation identified [her] as the person in 'direct charge of conducting the solicitation.' ").[FN1] The Commission's conclusory assertions of authority-untethered to virtually any supportive facts-do not support an inference of Benning's involvement.

FN1. *See, e.g., FTC v. Freecom Commc'ns, Inc.*, 401 F.3d 1192, 1205 (10th Cir.2005) (finding individual defendant liable where evidence of frequent meeting attendance, final control over all senior hiring and marketing campaigns, and status as controlling shareholder of a closely held corporation supported inference of authority to control corporate defendant); *Amy Travel*, 875 F.2d at 575 (finding "clear" evidence of defendants' authority and involvement where they "were the principal shareholders and officers of the corporations," "created the businesses, opened new ones, wrote telemarketing scripts, and hired personnel" and "controlled the financial affairs of the companies and reviewed the sales reports and other information"); *FTC v. Innovative Mktg., Inc.*, 654 F.Supp.2d 378, 387 (D.Md.2009) (accepting FTC's pleadings against individual where complaint "specifically allege[d]" CEO "personally handled" finances and the $3.3 million spent on fraudulent advertising was directly traceable to his personal credit card).

***6** As to knowledge, the Commission insists that paragraph twenty-four of its Complaint makes Benning's knowledge plausible: "Consumers filed complaints with VirtualWorks, Defendants, the Better Business Bureau, law enforcement agencies, banks and payday lenders during this period." Additional facts such as the number of consumers who complained directly to Benning, or the size and structure of Swish reflecting senior management involvement might render any amended complaint adequate. As *Amy Travel* explained, "the degree of participation in business affairs is probative of knowledge." 875 F.2d at 574. In any event, as currently constituted the complaint presents virtually no facts to tie Benning to the debit card scheme or to suggest his knowledge moves from the conceivable to the plausible. In light of the Commission's broad investigatory power and its ability to obtain discovery prior to the commencement of this litiga-

tion, requiring it to advance some factual connection between Benning and the alleged deceptive acts should not represent an unreasonable or impractical expectation.

C. *Ancillary Monetary Relief.*

Federal Rule of Civil Procedure 12(f) provides that a "court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "[T]he function of a [Rule] 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial ...." *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir.1983). Properly executed, a motion to strike streamlines a judge's inquiry by focusing his or her attention only on the "real issues in the case." *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1528 (9th Cir.1993), *rev'd on other grounds*, 510 U.S. 517, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). It eliminates from consideration that which "can have no possible bearing on the subject matter of the litigation." [FN2] *Naton v. Bank of California*, 72 F.R.D. 550, 552 n. 4 (N.D.Cal.1976).

> FN2. The parties agree that this Court's ability to fashion an equitable remedy under section 13(b) is a "real" issue. Swish reasons that *should* the Court agree that 13(b) does not contemplate monetary relief, the motion to strike would indeed "narrow" the inquiry to whether a permanent injunction is warranted. The Commission insists that Swish's request exceeds the scope of Rule 12(f). The Commission calls Swish's claim "substantive," "disputed" and contrary to "three decades of legal bedrock." *See McArdle v. AT & T Mobility, LLC*, No. 09-1117, 2009 U.S. Dist. LEXIS 89231, at *24-25, 2009 WL 2969463 (N.D.Cal. Sept. 14, 2009) (courts are reluctant to determine disputed or substantial issues of law on a motion to strike affirmative defense).

The FTC seeks a permanent injunction under the Act's section 13(b), 15 U.S.C. § 53(b) (1994), and restitution ancillary to this equitable relief. Swish argues that a district court does not have authority to order restitution under a statute that expressly provides only for a preliminary or permanent injunction and moves to strike from the Complaint any reference to monetary relief. Swish buoys its argument that section 13(b) does not contemplate restitution by reference to another section under the Act that does. Section 19 grants a district court jurisdiction to craft a broad equitable remedy in one of two circumstances: (1) a defendant violates any Commission rule and engages in an unfair or deceptive practice that also violates section 5; or (2) a defendant engages in any unfair or deceptive practice in violation of a Commission cease-and-desist order and the Commission satisfies the Court that a reasonable person under the circumstances would perceive the practice as unfair or deceptive. 15 U.S.C. § 57b(a) (1975). The section then outlines the available remedies:

***7** (b) Nature of relief available

> The court in an action under subsection (a) of this section shall have jurisdiction to grant such relief as the court finds necessary to redress injury to consumers or other persons, partnerships, and corporations resulting from the rule violation or the unfair or deceptive act or practice, as the case may be. Such relief may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of property, the payment of damages, and public notification respecting the rule violation or the unfair or deceptive act or practice, as the case may be; except that nothing in this subsection is intended to authorize the imposition of any exemplary or punitive damages.

Extrapolating from the differences between these two sections, Swish argues that sections 13 and 19 comprise a complete and "elaborate regulatory scheme" whereby section 13 provides only interim relief until the Commission has sufficient

time, first, to complete either the rulemaking or adjudication required by section 19 and, second, to seek a remedy in district court for continuing violations. Where a district court grants a permanent injunction with an ancillary award for restitution or disgorgement, Swish suggests, it takes an impermissible shortcut.

In *FTC v. H.N. Singer, Inc.*, 668 F.2d 1107 (9th Cir.1982), the Ninth Circuit reviewed a district court's preliminary injunction order on the grounds that its award of an accompanying asset freeze was not expressly authorized under the FTC Act. The Court reasoned that there were two jurisdictional bases on which to ground the injunction: sections 13(b) and 19. The Court first likened the asset freeze to the "old equitable remedy" of rescission. *Id.* at 1112. "Because the authority to issue a preliminary injunction rests upon the authority to give final relief," the Court reasoned, "the authority to freeze assets by a preliminary injunction must rest upon the authority to give a form of final relief-[rescission of contract and restitution]-to which the asset freeze is an appropriate provisional remedy." *Id.* The Court further noted that section 13(b) gave the Commission power to fashion complete equitable relief.

In *Singer,* the court relied heavily on two Supreme Court decisions interpreting a district court's remedial power when sitting in equity. In *Porter v. Warner Holding Co.*, 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946), a case reviewing an injunctive provision in the Price Control Act ("EPCA"), [FN3] the Court held that when Congress invokes the district court's equitable jurisdiction in a statute, "all the inherent equitable powers of the district court are available for the proper and complete exercise of that jurisdiction." *Id.* at 398. Moreover, where the statute serves the public interest, "those equitable powers assume an even broader and more flexible character ...." *Id.* If the public interest would be so served, the district court "may act so as to adjust and reconcile competing claims and so as to accord full justice to all the real parties in interest," and "may go beyond the matters immediately underlying its equitable jurisdiction and decide whatever other issues and give whatever other relief may be necessary ...." *Id.*

> FN3. *Porter* analyzed a court's power under the EPCA, 50 U.S.C. § 925(a) (1942), to order restitution of rents collected in excess of permissible maximums. 328 U.S. at 396. The Act provided that the Administrator could, where any person "has engaged in or is about to engage in" a violation of the Act, "make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision ... [and] a permanent or temporary injunction, restraining order, *or other order* shall be granted without bond." § 925(a) (emphasis added).

***8** Comprehensive equitable power resides in the district court, *Porter* reasoned, absent "a clear and valid legislative command." *Id.* Indeed, "[u]nless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." *Id.* More than a decade later, the Court in *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 80 S.Ct. 332, 4 L.Ed.2d 323 (1960), pushed *Porter* 's analysis further. When interpreting the Fair Labor Standards Act ("FLSA"),[FN4] the Court theorized that Congress acts against the backdrop of the district court's equitable power: "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it ... act[s] cognizant of the historic power of equity to provide complete relief in the light of statutory purposes." *Id.* at 291-92.

> FN4. The challenged section gave district courts jurisdiction "for cause shown, to restrain violations of section 15, Provided, That no court shall have jurisdiction, in any action brought by the Secretary of

> Labor to restrain such violations, to order the payment to employees of unpaid minimum wages or unpaid overtime compensation or an equal amount as liquidated damages ...." 29 U.S.C. § 217 (1938). *Mitchell* also insisted that the applicability of the *Porter* principle was "not to be denied ... because ... having set forth the governing inquiry, [*Porter*] went on to find in the language of the statute affirmative confirmation of the power to order reimbursement." *Mitchell,* 361 U.S. at 291.

In *Singer,* the Court reviewed a district court's ability to order restitution under section 13(b), applied the instructions from *Porter* and *Mitchell,* and declared: "We hold that Congress, when it gave the district court authority to grant a permanent injunction ... also gave the district court authority to grant any ancillary relief to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary and inescapable inference." *Singer,* 668 F.2d at 1113. *Singer* rejected Swish's argument that section 19, which explicitly vests the district court with power to award restitution, restricts the injunctive relief provided in section 13(b). The Court cited section 19's savings clause: "Remedies provided in this section are in addition to, and not in lieu of, any other remedy or right of action provided by State or Federal law." *Id.*

Swish asks this Court to limit the applicability of *Singer;* the defendants characterize *Singer* 's 13(b) analysis as dicta and argue that this Court need not follow it here. It is this particular portion of *Singer* 's analysis, though, that the Ninth Circuit has cited with favor-and to which district courts have loyally adhered-for nearly three decades. *See, e.g., FTC v. Pantron I Corp.,* 33 F.3d 1088, 1102 (9th Cir.1994) (citing *Singer* for the proposition that a district court may award monetary relief under section 13(b)); *FTC v. Silueta Distribs., Inc.,* No. 93-4141, 1995 WL 215313, at *7-8 (N.D.Cal. Feb.24, 1995) (citing both *Singer* and *Pantron I* and ordering disgorgement under section 13(b)). This Court is not free to parse or limit *Singer* unless and until so directed by governing appellate authority.

Swish contends that just such intervening authority can be found in *Meghrig v. K.F.C. Western, Inc.,* 516 U.S. 479, 116 S.Ct. 1251, 134 L.Ed.2d 121 (1996). *Meghrig* held that the grant of general equity jurisdiction under the citizen-suit provision of the Resource Conservation and Recovery Act ("RCRA") did not authorize restitution for past toxic cleanup costs.[FN5] *Id.* at 481. Central to the Court's holding was its conclusion that RCRA was not "principally designed to effectuate the cleanup of toxic waste sites or to compensate those who have attended to the remediation of environmental hazards." *Meghrig,* 516 U.S. at 483. Instead, RCRA's primary purpose was to "reduce the generation of hazardous waste" and to ensure proper treatment of existing waste to minimize present and future harm. *Id.* Upon a showing that toxic waste presented an "imminent and substantial" hazard, a private party suing under section 6972(a) could seek only an injunction: (1) ordering a responsible party to "clean up" the waste; or (2) "restraining" a responsible party from any future RCRA violation. *Id.* at 484-85. Neither, the Court insisted, included repayment for *past* (*i.e.,* no longer "imminently" hazardous) cleanups.

> FN5. The provision provided that "[t]he district court shall have jurisdiction ... to restrain any person who has contributed or who is contributing to the past or present handling ... of any solid or hazardous waste ... [or] to order such person to take such other action as may be necessary, or both...." 42 U.S.C. § 6972(a) (1976).

***9** To support its conclusion, *Meghrig* drew a comparison between RCRA's citizen-suit provision and its analogue in the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), an environmental statute aimed at ameliorating, preventing and *compensating* for harm from hazardous wastes. CERCLA differed

from RCRA, the Court reasoned, in its purpose and the remedies it provided. Specifically, CERCLA's citizen-suit provision also tasked Article III courts with remedying violations of CERCLA's provisions but expressly allowed "any person [to] seek contribution from any other person who is liable." 42 U.S.C. § 9613(f)(1). In language now heavily relied upon by Swish, the Court explained: "[w]here Congress has provided 'elaborate enforcement provisions' for remedying the violation of a federal statute, it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute." *Meghrig*, 516 U.S. at 487-88. "It is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Id.* at 488.

Meghrig did not, however, overrule *Porter* and *Mitchell*. Indeed, the Court continues to cite *Porter* with approval. *See, e.g., United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 438, 496 (2001) (relying on *Porter* for the proposition that district courts sitting in equity have discretion to craft a fitting remedy "unless a statute clearly provides otherwise"); *Miller v. French*, 530 U.S. 327, 340-41, 120 S.Ct. 2246, 147 L.Ed.2d 326 (2000) (same). In *United States v. Rx Depot*, 438 F.3d 1052, 1056 (10th Cir.2006), the Tenth Circuit characterized RCRA as "a statute that fit into the exceptions recognized by *Porter* and *Mitchell*" if only because the Court discerned in it a "clear legislative command" precluding restitution. Swish does not dispute that *Porter* and *Mitchell* remain good law but construes from *Meghrig* a working standard for a "clear legislative command." Specifically, Swish argues that the *Meghrig* analysis controls where: (1) Congress provides "elaborate enforcement provisions" in a statutory scheme; and (2) the express statutory remedies it includes are "forward-looking."

In support of the first factor, Swish dedicates much of its argument to demonstrating legislative intent that sections 13(b) and 19 "work *together* as a statutory plan for the protection of the public." Because Congress expressly provided for restitution in section 19, Swish contends that this Court may not "read" it into section 13(b). *Singer* held, however, that Congress *did not* actually intend for sections 13(b) and 19 to operate always in tandem. While section 13(b) may provide temporary relief pending a section 19 action, Congress also expressly provided for permanent relief in lieu of the more cumbersome administrative processes required by section 19. *Singer*, 668 F.2d at 1110.

***10** Swish makes the apt counter that the procedural protections expressly contemplated in section 19 are notably absent in section 13(b). Swish contends that when Congress provides for a monetary remedy, it vests defendants with procedural protection. Only section 19 expressly contemplates "the refund of money or return of property" and the "payment of damages" and includes a three-year statute of limitations. 15 U.S.C. § 57b(b) & (d). In *Meghrig*, Justice O'Connor emphasized that only CERCLA expressly provided for recovery of remediation costs, contained a statute of limitations, and imposed a reasonability requirement on remediation awards. *Meghrig*, 516 U.S. at 486 ("If Congress had intended [section] 6972(a) to function as a cost-recovery mechanism, the absence of these provisions would be striking."). *Cf. United States v. Phillip Morris*, 396 F.3d 1190, 1200-01 (D.C.Cir.2005) (refusing to award disgorgement under civil RICO provision where similar remedy was available in criminal forfeiture provision but accompanied by proof beyond a reasonable doubt burden and five-year statute of limitations). Even so, the existence of procedural protections in combination with express monetary remedies elsewhere in the EPCA did not deter the Court in *Porter*, 328 U.S. at 406.

Second, Swish argues that the FTC Act's language, like RCRA's, is "forward looking" and does not contemplate a "backward looking" remedy like disgorgement or restitution. While the EPCA

(reviewed in *Porter*) directed courts to enjoin any person who *"has engaged* in or is about to engage in" a violation, the FTC Act contemplates the restraining of any person who "is violating or is about to violate" section 5. Section 13(b) speaks only in the present and future tenses. Although the appellate courts do not appear to have published guidance on section 13(b) in light of *Meghrig,* circuit courts that have considered *Meghrig* 's "forward looking" rationale have not consistently treated it as dispositive. *Compare Rx Depot,* 438 F.3d at 1058 (refusing, even where statute's language was "forward-looking," to apply *Meghrig* or to restrict district court's power to order restitution under the FDCA); *with Phillip Morris,* 396 F.3d at 1192 (characterizing civil RICO provision's grant of equity jurisdiction as "forward-looking" and then applying *Meghrig*).

Moreover, *Meghrig* relied on other factors not at issue here. The Court recognized that, structurally, cleanup costs would have worked as an awkward remedy under RCRA. The statute prohibited citizen-suits when either the EPA or the State commenced a separate enforcement action. 42 U.S.C. § 6972(b)(2)(B) & (C). If RCRA provided for restitution under its citizen-suit provision, only those parties whose waste problems were not so severe as to attract the attention of the agency or government could seek compensation. *Meghrig,* 516 U.S. at 486 (terming this possibility "wholly irrational"). Second, *Meghrig* 's holding was narrow: Congress did not intend for *private* citizens to recover past cleanup costs under RCRA's citizen suit provision. *Porter* instructed that the district court's "equitable powers assume an even broader and more flexible character" in enforcement actions designed to serve the public interest. *Porter,* 328 U.S. at 398. Reasonable minds may differ as to whether the FTC Act is more analogous to RCRA / CERCLA or to the EPCA / FLSA. In any event, *Meghrig* does not render *Singer* either unreliable or less binding.

III. CONCLUSION

***11** The FTC's Complaint fails to establish a factual nexus between Benning and the corporate defendant's alleged misrepresentations and omissions and cannot satisfy Rule 8(a)(2)'s requirement of a "short and plain statement showing that the pleader is entitled to relief." The defendant's motion to dismiss is therefore granted with leave to amend. Next, in light of its reading of *Singer* 's instruction that a district court sitting in equity has authority to grant ancillary monetary relief under section 13(b), and the subsequent reliance on *Singer* for this proposition by myriad courts, neither *Meghrig* nor other binding case authority warrant a refusal by this Court to follow Circuit precedent. The defendants' motion to strike therefore is denied.

IT IS SO ORDERED.

N.D.Cal.,2010.
F.T.C. v. Swish Marketing
Slip Copy, 2010 WL 653486 (N.D.Cal.), 2010-1 Trade Cases P 76,918

END OF DOCUMENT