1. Importing or participating in the importation of wool products into the United States except upon filing bond with the Secretary of the Treasury in a sum double the value of said wool products and any duty thereon, conditioned upon compliance with the provisions of the Wool Products Labeling Act of 1939.

It is further ordered, That respondents notify, by registered mail, each of their customers that purchased the wool products which gave rise to this complaint of the fact that such products were misbranded.

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

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

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

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

IN THE MATTER OF

STEVEN RIZZI, ET AL. T/A FREIGHT LIQUIDATORS

ORDER, OPINIONS, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION AND TEXTILE FIBER PRODUCTS IDENTIFICATION ACTS

Docket 8937. Complaint, July 30, 1973 Decision, Feb. 25, 1975*

Order requiring nine individuals operating a group of retail stores under the trade name of Freight Liquidators in the Washington, D.C., and Baltimore, Md., trading areas, among other things to cease misrepresenting the nature of their business; using misleading corporate or trade name; using bait and switch tactics; and violating the Textile Fiber Products Identification Act by failing to

* For the complaint, *see* 83 F.T.C. 1183.

disclose information regarding composition of textile fiber products as required by said Act. The order further dismisses the complaint as to the individual respondent Jerry M. Lytell.

Appearances

For the Commission: *Everette E. Thomas, Richard F. Kelly, Alice C. Kelleher* and *Maureen L. McGill.*

For the respondents: *Albert J. Ahern, Jr.*, Baileys Crossroads, Va., *Jacob A. Stein, Stein, Mitchell & Mezines*, Washington, D.C., *Richard C. Whiteford, Whiteford, Taylor, Preston, Trimble & Johnston*, Towson, Md., *Glen A. Mitchell*, Washington, D.C.

INITIAL DECISION

BY MILES J. BROWN, ADMINISTRATIVE LAW JUDGE

JUNE 27, 1974

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint[1] in this matter on July 30, 1973, charging respondents with 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 (15 U.S.C. §45), as well as with violations of the Textile Fiber Products Identification Act (15 U.S.C. §70).

Answers were duly filed by respondents Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein, Peter W. Galarneau, George Edward Ommert,[2] Gerald Gautcher and Sam Katz, in which they generally denied the substantive allegations of the complaint as well as the partnership relationships alleged therein, and further denied violating the Federal Trade Commission Act or the Textile Fiber Products Identification Act.

Respondents Sam Katz, Jerry M. Lytell and Mike McKeever all applied to the administrative law judge for Commission-appointed counsel on the grounds of indigency. Pursuant to the requirements of the Commission's Policy Statement (Ad. Bull. 71-21) dated Feb. 1, 1971, a "Statement of Financial Status" form was mailed to each of these three respondents. Respondents Sam Katz and Jerry M. Lytell responded and the administrative law judge made findings on the financial inability of these respondents to retain counsel (Katz, Sept. 28, 1973; Lytell, Nov. 28, 1973). Donald H. Hadley, Esq., accepted

[1] The complaint was dismissed as to respondent Steven Rizzi by Summary Initial Decision dated Nov. 13, 1973. The Commission's Final Order of dismissal was entered on Jan. 3, 1974.

[2] Identified in the complaint as George Edward Ommeret.

designation to represent Mr. Katz on a *pro bono* basis, and he participated throughout the adjudicative hearings. No counsel was ever designated by the Commission to represent Mr. Lytell. Mr. McKeever never returned the required "Statement of Financial Status" form. He was not represented by counsel at the adjudicative hearings.

Nine days of adjudicative hearings were held in Wash., D.C. during Dec. 1973 and Feb. 1974. The record in this proceeding was closed for the reception of evidence on Mar. 1, 1974. On Apr. 5, 1974, proposed findings of fact, conclusions of law, and order were filed by counsel supporting the complaint. By Apr. 19, 1974, respondents Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein, Peter W. Galarneau, George Edward Ommert, Gerald Gautcher, and Sam Katz had filed their proposed findings and reply briefs. Complaint counsel filed replies to the papers filed by Gerald Gautcher and Sam Katz. By order dated May 14, 1974, the Commission extended until June 28, 1974, the time in which the initial decision should be filed.

Any motions appearing in the record not heretofore or herein specifically ruled upon either directly or by the necessary effect of the conclusions in the decision are hereby denied.

Respondents Herbert Millstein (Tr. 26), George Edward Ommert (Tr. 28), Peter W. Galarneau (Tr. 29), Sam Katz (Tr. 67) and Joseph W. Green (Tr. 577) were subpoenaed as witnesses by counsel supporting the complaint and each refused to testify, invoking his Constitutional immunity against self-incrimination. Pursuant to authorization of the Attorney General, the administrative law judge ordered Herbert Millstein, Peter W. Galarneau and George Edward Ommert to testify, granting each of them immunity from prosecution under Title 18, Section 6001, *et seq.*, United States Code. No authorization for granting immunity was secured for Joseph W. Green and he did not testify. Respondent Sam Katz was not recalled by counsel supporting the complaint.

Counsel supporting the complaint offered into evidence a transcript of an investigational hearing of Mar. 8, 1972, at which Joseph W. Green gave testimony concerning the issues in this case. The administrative law judge sustained the objection of counsel for the other respondents and rejected this exhibit (CX A2, rejected) (Tr. 778-787). Counsel supporting the complaint were permitted to make an offer of proof which was admitted into the record as CX AA1 by order dated Mar. 1, 1974.

Although counsel supporting the complaint in their proposed findings have made reference to certain matters contained in their offer of proof, the administrative law judge has not relied on any matter contained in this exhibit. While reliance on the past sworn statement of

a witness that refuses to testify may be appropriate where he is the only respondent, in my opinion it would be a denial of due process to permit such evidence as against other individuals who were not present at the investigational hearing and who had no opportunity to cross-examine the witness. Moreover, I do not think the issues in this case are so severable that this evidence could be admitted against one respondent without affecting the rights of the other respondents.

The proposed findings, conclusions and briefs submitted by counsel have been given careful consideration and to the extent not adopted by the decision in the form proposed or in substance are rejected as not supported by the evidence or as immaterial.

This case involves the adjudication of alleged false and misleading advertising and selling practices including the deceptive use of a trade name and certain so-called "bait and switch" tactics by approximately fifteen stores that traded under the name Freight Liquidators in the Washington and Baltimore areas during 1971 and 1972. Respondents' main contentions at this posture of the case go to the responsibility of the several individual respondents for the challenged practices, the sufficiency of the evidence as to their individual conduct with respect to said practices, and the proper form and scope of an order, if any order is deemed appropriate in the circumstances.

Having reviewed the record in this proceeding, and having considered the demeanor of the witnesses as they testified, together with the proposed findings, conclusions and briefs submitted by the parties, I make the following findings as to the facts.

FINDINGS OF FACT

1. Freight Liquidators consisted of a group of retail stores operating under the trade name "Freight Liquidators," that were engaged in the advertising, offering for sale, sale and distribution of rugs, sewing machines, stereo radios and phonographs and various other articles of merchandise to the purchasing public in the Washington, D.C. and Baltimore, Md., trading areas during 1971 and 1972 (See CX series F, L, Q; Millstein, 591-602[3]; Galarneau, 683, 692-693; Ommert, 729, 740).

2. Joseph W. Green, who had been engaged in a sewing machine business in New York, N.Y., moved to the Washington, D.C., area in 1969, and in 1970 he organized several retail stores under the trade name Consumers Buying Service. Shortly thereafter in 1971 the trade

[3] References are to the pages of the transcript of testimony at the adjudicative hearing preceded by the identification of the witness, most of whom were associated with the Freight Liquidators organization. Consumer witnesses have not been designated by name.

name Freight Liquidators was adopted (Silverman, 69-70, 72-77; Galarneau, 684; Millstein, 587, 590, 659).

3. The "Freight Liquidators concept" was that the use of that name was an effective way of advertising (Silverman, 72-73). Through collective purchasing and collective advertising the individual stores would be able to purchase and sell at lower prices (see Rizzi, 224). Newspaper advertisements for certain products were placed under the name "Freight Liquidators" listing the addresses of the individual stores. The advertised products were purchased under the direction and control of Joseph W. Green by his various employees (Silverman, 116-117; Rizzi, 216; Mullinax, 232; Dolinger, 269-270). Mr. Green was also responsible for preparing and placing the advertisements (Dolinger, 280, 281, 283-284, 289-291; Millstein, 588, 591, 597; Galarneau 692, 719).

4. Joseph W. Green was the owner or part owner of each of the individual Freight Liquidators stores. Although the relationships between Joseph W. Green and the individual respondents and others not named in the complaint were informal, it is clear from the record considered as a whole that these arrangements were in the nature of partnerships and that the individuals involved considered themselves as partners of Joseph W. Green (see CX B 3-14; Silverman, 88, 91, 93, 98-99, 102, 103, 107, 148; Rizzi, 210, 219-220; Dolinger, 271-274, 275-276; Galarneau, 717; Gautcher, 763).

5. Prospective "partners" were solicited through classified advertisements and upon making the required investment of anywhere from $3,000 to $25,000, the partner would be set up at his own store location. Some of these individuals were employees of the Freight Liquidators organization and Joseph W. Green before becoming partners (CXF6; Silverman, 74; Rizzi, 200-203; Begun, 240-241; Dolinger, 268; Gautcher, 760).

6. Mr. Green's individual partners were usually the managers of the store (Silverman, 117-118). The partner's original investment in cash was matched by Mr. Green in merchandise. The leases of the store premises were usually in Mr. Green's name, whereas the business license and the store's bank account were in the name of the manager-partner (Millstein, 592-594, 602; Ommert, 732-33; Gautcher, 763-764). The manager-partner, who was in charge of the day-to-day operation of the store, usually received a guaranteed "draw" per week from the profits and the rest of the profits were shared among the individual partner of partners and Mr. Green, according to their respective interests (Silverman, 107-110, 117-118; Begun, 245; Millstein, 590; Galarneau, 686, 718; Ommert, 731-732, 735; Gautcher, 768). Salesmen were employed on a commission basis which constituted 25 percent of

any profit realized from a sale (Silverman, 120; Stefano, 302; Millstein, 651-653; Galarneau, 691-692).

7. Herbert Millstein, one of Mr. Green's earliest partners, also established several Freight Liquidator stores in the Baltimore area. In those arrangements the manager-partners were half owners and Mr. Millstein and Mr. Green each had a 25 percent interest, sharing in the profits accordingly. The merchandise was supplied to these Baltimore stores from Mr. Millstein's Essex, Md., warehouse. The leases on the various store premises in the Baltimore area were in Mr. Green's name (Millstein, 599-600, 604-608; Ommert, 728-729, 732; Gautcher, 762-763).

8. Peter W. Galarneau, also one of Mr. Green's earlier partners, established a branch Freight Liquidator store as part of his main location (Galarneau, 690). This branch store arrangement was also used by Mr. Millstein and Mr. Green (see CX B 12-13; CX Z 15-17; Galarneau, 682-683; Silverman, 105).

9. Each store was required to report its daily sales to Mr. Green's office or to Mr. Silverman, Mr. Green's accountant (see Silverman, 104, 106, 137; Rizzi, 207-208; Stefano, 294, 299; Galarneau, 706). The several stores paid Mr. Green for the merchandise delivered to them (Rizzi, 215; Stefano, 299-300; Galarneau, 700). In addition, Mr. Green's office billed the stores for their share of the advertising costs, this cost originally being divided equally among the stores, but later computed on the volume of business done by each store (Silverman, 111-115, 129; Brunner, 432; Millstein, 626, 631). None of Mr. Green's individual partners had control over the content of these advertisements (*ibid.*).

10. Mr. Millstein was responsible for the advertising for the Baltimore stores and his arrangement for payment of this cost was similar to that used by Mr. Green (Millstein, 589, 623; Ommert, 732-733; Gautcher, 769). None of Mr. Millstein's partners in the Baltimore area stores had control over the content of the Baltimore advertisements (Ommert, 741; Gautcher, 769).

11. Although most of the products handled by the Freight Liquidators stores were procured by Mr. Green and the headquarters personnel and distributed to the various store locations, when necessary the stores exchanged merchandise (Millstein, 595, 609, 611, 615, 620; Galarneau, 691, 697-698, 706). In some instances the individual partners did some purchasing, and Mr. Millstein purchased certain products for his Baltimore area stores (Ommert, 735; Millstein, 591, 618-619, 629).

12. Respondent Joseph W. Green was the main motivation and controlling force behind Freight Liquidators and he had prime responsibility for the management, direction, policy and control of the Freight Liquidators organization (see Findings 2, 3, 4, 5, 6, 7, 9, 11,

supra; Galarneau, 717-718). Herbert Millstein had principal responsibility for the management, direction, policy and control of the Baltimore area stores (see Findings 7, 10, 11, *supra*).

13. Freight Liquidators has caused their merchandise to be shipped across state lines between their various retail stores located in the states of Virginia and Maryland for sale to purchasers thereof located in the states of Virginia and Maryland and the District of Columbia (see Millstein, 620, 625, 649; Galarneau, 683, 700; CX series F, L, Q). Freight Liquidators business was substantial (CX B 14).

14. In the course and conduct of their business of advertising, offering for sale and sale and distribution of rugs, stereos and sewing machines, and other products, respondents have engaged in a substantial course of trade in commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act (15 U.S.C. 44).

15. Freight Liquidators has caused the dissemination of certain advertisements concerning its articles of merchandise in the Washington Post and Washington Star newspapers, each of which has substantial interstate circulation, for the purpose of and which were likely to, induce, directly or indirectly, the purchase of respondents' merchandise (see CXF 2-11; CXF 13-25; CXF 26-30; CXL 1-4; CXQ 1-2; Tr. 578).

16. The following are typical and illustrative of Freight Liquidators' newspaper advertising and circular advertising:

(a)

PUBLIC NOTICE
(4 DAYS ONLY!)
LIQUIDATION SALE

BANKRUPTCY STOCK - FACTORY & MILL CLOSEOUTS
ALL NEW MERCHANDISE - FAMOUS BRAND NAMES.

$1,287,350 WORTH OF PRE-CUT
RUGS AND MILL-END ROLLS,
TELEVISIONS, STEREOS
AND
COMPONENTS & SEWING MACHINES (HUNDREDS OF ITEMS NOT SHOWN BELOW ARE ALSO ON DISPLAY.)

BE EARLY FOR BEST SELECTION

(see CX F2)

* * * * * * *

(b)

STEREO
UNCLAIMED FREIGHT
BANKRUPTCY STOCK FACTORY CLOSEOUTS
TRUCK LOAD LIQUIDATION

All New Merchandise
LAST NOTICE FOR THIS WEEKEND,
FRIDAY, SATURDAY, SUNDAY & MONDAY

ONLY $88
New 1972 (in cartons), 5-piece Stereo Component Units, 40 Watts, AM/FM radio, a deluxe 4 spd. BSR turntable, 4-speaker sound system, equipped for 8 track tape player, tape recorder, etc. Only $88
Only $147
New 5-piece Components 4-speed Deluxe Turn Tbl., 100 watts, AM/FM radio, deluxe 4-spd. turntable w/diamond stylus, 4-speaker air suspension audio system. Equip. for 8-trk. cassette. Orig. $329. Yours for $147

Only $108

New 1972 (in cartons), famous make, 100 watt tuners w/AM/FM multiplex equipped for 8 track or cassette. Only $108

From Only $88
New console stereo, various sizes & finishes. Lge. assortment w/AM/FM radio & deluxe 4 spd. changer.

FREIGHT LIQUIDATORS
DEAL WITH THE STORE NEAR YOU* * *
(see CXF 4, CXF 11 and CXF 13)

* * * * * * *

(c)

RUGS
12 x 9's $19
WAREHOUSE LIQUIDATION
4 DAYS ONLY!
All 100 percent nylon, acrilan, polyester pile. Full sizes 9x12, 12x12, 12x15, 12x21, 6x9, also odd sizes and various size ovals, In gold, green, red, blue, and other exciting colors. Shags, plushes, twists and sculptured. Will give a warm look to your apt.

OVALS — FRINGES $8
WE LIQUIDATE RUGS FOR FAMOUS SOUTHERN MILLS. ALL ARE GUARANTEED PERFECT.

MASTER CHARGE, BANKAMERICARD, TERMS AVAILABLE
FREIGHT LIQUIDATORS WAREHOUSES
(see CXF 17, CXF 20, CXF 21)

* * * * * * *

(d)

FREIGHT LIQUIDATORS
Deal With The Store Near You* * *

BRAND NEW
SEWING
MACHINES $63
You may own a 1971 "Touch N Stitch"
Zig-Zag, new stretch stitch, embroiders,
monograms, appliques, makes buttonholes,
etc., all without attachments; Ordered
for schools, "UNCLAIMED BY THEM." 25-yr.
guarantee and instructions.

(see CXF 12, 14, 15, 19, 22, 26)

17. By and through the use of the name "Freight Liquidators," separately or in connection with other statements or representations in advertising, respondents have represented to customers and prospective customers that the organization was one of liquidators, authorized adjustors or agents engaged in the sale or distribution of bankrupt, salvage, distrained or other transportation company surplus merchandise for the purpose of liquidating, adjusting, paying off or otherwise settling indebtness or claims (see Finding 16, *supra.*).

18. By and through the use of the name "Freight Liquidators" separately or in connection with other statements or representations in advertising, respondents have represented to customers and prospective customers that the merchandise advertised was bankrupt, salvage, distrained, distress or transportation company surplus merchandise, and therefore had a unique or special disposition and thus was being offered for sale at prices below those usually and customarily charged at retail (see CX series F, L, Q; Consumer witnesses, Tr. 308, 381, 459-460, 483-484, 486, 359, 503-504; CXF 4, 28).

19. In their advertisements respondents also represented that purchasers of the advertised products were being afforded savings equal to the differences between Freight Liquidators' advertised prices and those at which the merchandise was usually and customarily sold at retail, that the amount designated as "Orig." was the price at which the merchandise had been sold by Freight Liquidators in the recent regular course of business and that purchasers of the merchandise advertised were afforded savings equal to the difference between the higher and lower prices listed in said statements (see CXF 8, 9, 10, 12, 14, 15, 18, 19, 22, 24, 25, 26).

20. Freight Liquidators was not an organization of liquidators, authorized adjustors or agents engaged in the sale or disposition of bankrupt, salvage, distrained or other distress or transportation

company surplus merchandise for the purpose of liquidating, adjusting, paying off or otherwise settling indebtedness or claims. Instead, Freight Liquidators was in the business of purchasing the advertised merchandise from manufacturers or suppliers and selling it at retail for their own account to the purchasing public (See Mullinax, 235-238; Millstein, 629-630). Merchandise advertised by Freight Liquidators was not bankrupt, salvage, distrained, distress or transportation company surplus merchandise, and therefore, did not have a unique or special disposition. Only a minute quantity of merchandise, if any, could have properly been described as "bankruptcy" merchandise. The advertised merchandise was not being offered at prices below those usually and customarily charged at retail (Millstein, 629-630, 636-640; CXF 2; see Brunner, 431; Galarneau, 708-711).

21. Purchasers of the advertised merchandise were not afforded savings equal to the differences between Freight Liquidators' advertised prices and those at which the same merchandise was usually and customarily sold at retail. Said merchandise had not been customarily and usually sold at retail by Freight Liquidators in the recent, regular course of their business for the amounts set out in the advertisements as "Orig." Purchasers of the merchandise advertised were not afforded savings equal to the differences between the higher and lower prices listed in the statements (see Consumer witnesses, Tr. 312, 314, 315, 321-322, 488-489, 504; Millstein, 641, 712, 743).

22. The representations set forth in Findings 17, 18 and 19, *supra*, were untrue and had the tendency and capacity to mislead prospective customers.

23. By and through their advertisements and the statements and representations contained therein respondents represented that they were making a bona fide offer to sell the advertised merchandise at the price and on the terms and conditions stated in the advertisements. In this connection, respondents represented that they were making a bona fide offer to sell a complete and operable sewing machine for the advertised price (Consumer witnesses Tr. 355, 521-522, 482-484, 513-514).

24. Freight Liquidators was not making a bona fide offer to sell certain of the advertised merchandise at the price and on the terms and conditions stated in the advertisements. Such "offers" were made primarily to obtain "customer leads" in order to sell them more expensive merchandise (see Findings 25, 26, *infra*).

25. Members of the purchasing public who responded to such advertisements were either told by Freight Liquidators' salesmen that the merchandise was not available, or they found that the salesmen were very reluctant to show the merchandise to them (Consumer

witnesses, Tr. 511, 516, 532, 550, 555). Because of the poor appearance and quality or unattractive display of the samples of advertised merchandise, Freight Liquidators' customers were immediately attracted to higher priced, better quality merchandise sold by Freight Liquidators (Consumer witnesses, Tr. 311, 415, 474, 498-500, 515-517, 547-550, 539-542; see Rizzi, 218; Begun, 249, 257-258; Stefano, 296-298). Very few actual sales were made of the advertised products at the price and on the terms set forth in the advertisements (CXX1, 2), and salesmen attempted to sell the better quality, and more expensive merchandise (Consumer witnesses, Tr. 532, 540, 550).

26. Freight Liquidators was not making a bona fide offer to sell a complete sewing machine without attachments for the advertised price. The advertised price was for the sewing machine head and did not include such essentials as a base or stand containing the operating controls and without which the head of the machine was useless (Griffith, 165-170, 195-196; Begun, 247-248, 254-255; Consumer witnesses, Tr. 315, 355, 412, 415-416, 457-460, 482-483, 491, 513-514, 521-522, 533-534). Freight Liquidators sold very few sewing machines at the advertised price of $58 or $63 without also selling attachments necessary for operation for an additional price of $15 or $30 (see Begun, 255-257; CXX 1).

27. The representations set forth in Finding 23, *supra*, were untrue and had the tendency and capacity to mislead prospective customers.

28. By and through their advertisements and the statements and representations contained therein respondents represented that certain of Freight Liquidators' products were unconditionally guaranteed for various periods of time, such as twenty-five years (CXF 8, 12, 14, 15, 19, 22, 24, 26; Consumer witnesses, Tr. 383, 395).

29. Freight Liquidators' products were not unconditionally guaranteed for the period of time as represented in their advertisements or as orally represented by Freight Liquidators' salesmen. The only guarantees for the products sold by Freight Liquidators were that which were provided by the manufacturers thereof, and such guarantees were subject to conditions and limitations not disclosed in Freight Liquidators' representations (Millstein, 642-643; Consumer witnesses, Tr. 396, 465-467).

30. The representations set forth in Finding 28, *supra*, were untrue and had the tendency and capacity to mislead prospective customers.

31. By and through their advertisements and the statements and representations contained therein, respondents represented that the quantities of merchandise and time during which such were available for sale were limited (CXF 11, 13, 16, 17, 20, 21, 23; Consumer witnesses, Tr. 396, 400-401).

32. The quantities of merchandise and the time during which such were purportedly available for sale was not limited but identical merchandise was available at all times relevant herein (Consumer witnesses, Tr. 393-396, 401-402; Millstein, 643-644; Galarneau, 714).

33. The representations set forth in Finding 31, *supra*, were untrue and had the tendency and capacity to mislead prospective customers.

34. In their advertising respondents used the term "Acrilan" to describe certain rugs without stating the true generic name of the fiber content of such rugs. In addition where respondents advertised the fiber content of their rugs they did not disclose that such information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding (CXF 11, 13, 16, 17, 20, 21, 23).

35. During the period of time relevant hereto, there were at least 18 Freight Liquidators stores that operated in the Washington-Baltimore area. These stores were located at the following addresses (CX B2, 12, 13; CXQ 1, 2; CXF 1, 2, 8; CXL 3):

4689 King Street, Arlington, Va.[4]
7849 Eastern Ave., Silver Spring, Md.
1065 Broad Street, Falls Church, Va.
1727 Wilson Blvd., Arlington, Va.
7515 Lee Highway, Merrifield, Va.
912 Center St., Manassas, Va.
127 Cope Street, Woodbridge, Va.
8651 Richmond Hwy., Alexandria, Va.
4801 Suitland Rd., Suitland, Md.
11200 Baltimore Ave., Beltsville, Md.
5459 Annapolis Rd., Bladensburg, Md.
5552 Kenilworth Ave., Riverdale, Md.
14811 Washington Blvd., Laurel, Md.
442 Eastern Blvd., Essex, Md.[5]
1616 N. Ritchie Highway, Glen Burnie, Md.
4706 Hollins Ferry Rd., Baltimore, Md.
716 Reisterstown Rd., Reisterstown, Md.
939 York Rd., Towson, Md.

36. Respondent, Herbert Millstein, who is presently the owner and manager of Herbmar, Inc., a retail carpet store, first became acquainted with Joseph W. Green in 1971, and in April of that year opened the Suitland, Md., store as a partner of Mr. Green. The lease was in Mr. Green's name, the occupancy permit in Mr. Millstein's name (Millstein, 585-594).

[4] This address was sometimes listed as Alexandria, Va. The executive offices of Freight Liquidators also were located at the King Street address.

[5] Herbert Millstein's warehouse for the Baltimore area stores was located at the Essex, Md., location.

37. Sewing machines, stereos and carpets, the advertised products, were supplied by Mr. Green to the Suitland location. Mr. Millstein also handled other products which he purchased (Millstein, 595).

38. In late 1971 Mr. Millstein opened a store in Gaithersburg, Md., which was stocked from the Suitland store. This Freight Liquidators store was closed in the early part of 1972 and apparently was moved to the Reisterstown, Md., location (Millstein, 668-669; Ommert, 728).

39. During the first three months of 1972, Mr. Millstein opened four stores in the Baltimore area, in Essex, Md., in Reisterstown, Glen Burnie and Towson, Md. (Millstein, 604-608; Begun, 242, 244; Ommert, 728; Gautcher 762-767). The Essex store was stocked from Mr. Millstein's Suitland store and the other three from a warehouse located at the Essex store (Millstein, 619). Mr. Green was a part owner in each store as an extension of his partnership with Mr. Millstein, although the shares of ownership varied. Each store lease was in Mr. Green's name. Mr. Millstein made direct purchases from manufacturers for items handled in the Baltimore stores (Millstein, 627-630).

40. Mr. Millstein was responsible for placing the advertising on behalf of the Baltimore stores in the Baltimore News American and the Baltimore Sun (Millstein, 623). He did not formulate or have control over the advertisements run in the Washington, D.C., newspapers which were placed by Joseph W. Green, although he paid the share of the cost of those advertisements applied to his Freight Liquidators stores (Millstein, 631-632). The Baltimore advertising, although not exactly the same as used in Washington, did contain such representations describing the advertised items as "unclaimed freight" and, "bankruptcy stock," and did offer the sewing machine for $63 which required the purchase of a cabinet or case to be operable. At certain times these advertisements represented that there was a limited time for the advertised offering (Millstein, 647-654).

41. Respondent Harold J. Green is Joseph W. Green's son and he was a partner of Mr. Green in the Freight Liquidators stores located at King Street, Arlington, which was opened in Mar. 1971 when the main office of Freight Liquidators was moved from Falls Church. Harold J. Green was also Mr. Green's partner in the Riverdale, Md., store which opened in Oct. 1971 (CXB 8, 10, 12-13; Silverman, 94, 108).

42. Respondent John Green, also the son of Joseph W. Green, was a partner of his father in the Freight Liquidators stores located at Richmond Highway, Alexandria, and Eastern Avenue, Silver Spring. The Silver Spring store was opened in 1970, and the Alexandria store was opened in May 1971. John Green was also a partner in the Bladensburg, Md., store which was opened in Nov. 1971 (CXB 6, 7, 11; Silverman, 97-98, 100; Millstein, 622).

43. Respondent Peter W. Galarneau, owner of Carpet Caravan, a corporation engaged in the retail carpet business, was employed by Joseph W. Green in 1970 in connection with Consumer Buying Service, and this relationship carried over to Freight Liquidators. In July 1971 Mr. Galarneau became Mr. Green's partner in the Wilson Blvd. store, in which he invested $5,000 (CXB 4, 12-13). The lease in this store was in Mr. Green's name. In Dec. 1971, Mr. Galarneau opened the Manassas store as a part of the Wilson Blvd. store. In connection with this branch store Mr. Galarneau did some advertising in the Manassas media. Over 90 percent of the merchandise handled by Mr. Galarneau was supplied by Mr. Green from the King Street warehouse. The Manassas store was closed in the spring of 1972, and Mr. Galarneau went out of business at the Wilson Blvd. location in Sept. 1972 (Galarneau, 683-684, 694, 698, 687, 715).

44. Respondent Jerry M. Lytell was a partner of Joseph W. Green in the Falls Church store of Freight Liquidators, and later was a one-third partner of Sam Katz and Joseph W. Green in the Laurel, Md., store (CX B 9, 12-13; Silverman, 101-102; Rizzi, 214, 219; Dolinger, 272; Stefano, 292; Brunner, 428; Millstein, 610-611).

45. Respondent Sam Katz was a partner of Joseph W. Green and Jerry M. Lytell in the Laurel, Md., store from February 16, 1972 until May 9, 1972 (see Katz Answer to Complaint; Silverman, 102-103; Dolinger, 273; Millstein, 613-615; Galarneau, 702-703).

46. Respondent Mike McKeever was a partner of Joseph W. Green in the Riverdale, Md., store having put up $25,000 for the opportunity (Silverman, 107; Rizzi, 205). He had contacted Freight Liquidators early in 1972 in response to a business-opportunity advertisement (Rizzi, 202, 204). The following language is representative of such an advertisement (CXF 6):

"WANTED! PARTNER!!!!
Instant Money Maker
NAKED TRUTH - BARE FACTS
This is a once in a lifetime opportunity for longevity in success. Successful national company is interested in a working partner to take full charge of outlet store in Northern Virginia or Maryland, generating 1-2 million annual gross through a unique method of Unclaimed Freight Liquidation, disposing of Stereos, TV's, Rugs, etc. If you qualify and can invest $25,000 and are available immediately, for further information call:
Many other areas available

Steven T. Rizzi
FREIGHT LIQUIDATORS"

47. Respondent George Edward Ommert, who is in the retail unfinished furniture and carpet business, was a partner of Joseph W. Green and Herbert Millstein in the Gaithersburg and Reistertown stores (Silverman, 104-105; Ommert, 727-729). Although starting as Mr. Millstein's employee in Suitland, he took over the Gaithersburg store as a partner late in 1971 upon investing $10,000. He moved to Reistertown in Apr. 1972. He ceased doing business as Freight Liquidators in Nov. 1972. Almost all of Mr. Ommert's merchandise was supplied by Mr. Millstein (Ommert, 727-736).

48. Respondent Gerald Gautcher, who owns several retail carpet businesses including Carpet Carryout, Carpet Cleaner and Decor Interiors, contacted Freight Liquidators in Oct. 1971 in response to an advertisement and was referred to Mr. Millstein by Mr. Green. He was established as a partner in the Towson store in Jan. 1972, investing $5,000. His merchandise was supplied by Mr. Millstein from the Essex store. The store lease was in Mr. Green's name. Mr. Gautcher ceased operations as Freight Liquidators in mid-April 1972 (Gautcher, 761-767; see Begun, 264-266; Millstein, 656-658).

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein, Peter W. Galarneau, George Edward Ommert, Gerald Gautcher, Sam Katz, Mike McKeever, and Jerry M. Lytell.

Said respondents have, during all times or part of the time relevant hereto, engaged in interstate commerce within the intent and meaning of Sections 4 and 5 of the Federal Trade Commission Act. There is no doubt on this record that Freight Liquidators advertised in commerce. The newspapers in which such advertisements were placed have interstate circulation. In addition, Freight Liquidators was engaged in a course of trade in commerce. It purchased merchandise from suppliers located outside the District of Columbia, Maryland and Virginia. Merchandise was transferred from the Arlington, Va., King Street, location to the stores in Maryland, and among the various stores in Maryland and Virginia. The individual Freight Liquidators stores attracted and sold to customers from all three jurisdictions. All acts and practices that were part of these transactions were methods of competition in commerce or acts and practices in commerce within the coverage of the Federal Trade Commission Act. *Holland Furnace Co.* v. *Federal Trade Commission*, 269 F.2d 203 (7th Cir. 1959), *cert. denied*,

361 U.S. 932; *Guziak* v. *Federal Trade Commission*, 361 F.2d 700 (8th Cir. 1966); see *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944); *Standard Oil Co.* v. *Federal Trade Commission*, 340 U.S. 231 (1951).

2. The acts and practices of respondents that were challenged in the complaint and in which they were found to be engaged, were and are all to the prejudice and injury of the public and of respondents' competitors and 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.

It is well established that it is an unfair trade practice to make statements in advertising which have the tendency and capacity to deceive the prospective customer. *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F.2d 523 (5th Cir. 1963); see *Spiegel, Inc.* v. *Federal Trade Commission*, 494 F.2d 59 (7th Cir. 1974). It is not essential that the Commission find actual deception to support its complaint when the representations have the capacity to deceive. *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F.2d 676 (2d Cir. 1944); *Regina Corp.* v. *Federal Trade Commission*, 322 F.2d 765 (3d Cir. 1963); *Montgomery Ward & Co.* v. *Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967). The Commission may challenge and prevent true statements if, when considered in the context of all representations made, the advertisement has that tendency and capacity to mislead. *J. B. Williams Co.* v. *Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967).

Furthermore, where the advertisements themselves sufficiently demonstrate their capacity to deceive, the Commission can find the requisite deception or capacity to deceive on a visual examination of the exhibits without evidence that the public was actually deceived. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *Double Eagle Lubricants, Inc.* v. *FTC*, 360 F.2d 268, 270 (10th Cir. 1965); *Mohr* v. *Federal Trade Commission*, 272 F.2d 401, 405 (9th Cir. 1959), *cert. denied*, 362 U.S. 920 (1960). It is no defense to a charge of engaging in unfair trade practices to assert that the customer was advised of the truth or of all material facts before making his choice to purchase. The initial contact, if deceptive, may be prohibited under the Federal Trade Commission Act. *Exposition Press, Inc.* v. *Federal Trade Commission*, 295 F.2d 869, 873 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962); *Carter Products, Inc.* v. *Federal Trade Commission*, 186 F.2d 821, 824 (7th Cir. 1951).

All of the acts and practices challenged in the complaint and in which respondents were found to be engaged had the requisite tendency and capacity to deceive. Moreover, the conclusion that each practice

constitutes an unfair trade practice accords with applicable case law. It is an unfair trade practice to misrepresent the origin and character of one's business or the merchandise offered for sale by the use of a trade name or false advertising claims. *Goodman* v. *Federal Trade Commission*, 244 F.2d 584 (9th Cir. 1957); *Federal Trade Commission* v. *Royal Milling Co.*, 288 U.S. 212, 216 (1933); *Resort Car Rental System, Inc.*, F.T.C. Docket 8862 (July 31, 1973); *New Crosstown Railroad Salvage Co.*, 68 F.T.C. 47 (1965).

It is an unfair trade practice to advertise a product in order to obtain contact with a prospective customer for the purpose of selling another product. *Tashof* v. *Federal Trade Commission*, 437 F.2d 707 (D.C. Cir. 1970); *Pati-Port, Inc.* v. *Federal Trade Commission*, 313 F.2d 103 (3d Cir. 1968). In this respect, the Commission need not show evidence of disparagement of the advertised product. It may infer that customers were "switched" from the advertised product by evidence of the type of advertising used and relatively minimal sales of the advertised products. *Tashof* v. *Federal Trade Commission, supra; Giant Food Inc.* v. *Federal Trade Commission*, 322 F.2d 977 (D.C. Cir. 1963).

It is an unfair trade practice to misrepresent that a price is a "sale" price, if in fact it is the usual and customary price at which the product is sold. *Niresk Industries* v. *Federal Trade Commission*, 278 F.2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883; *Heavenly Creations, Inc.* v. *Federal Trade Commission*, 339 F.2d 7, 8 (2d Cir. 1964), *cert. denied*, 380 U.S. 955 (1965).

It is an unfair trade practice to offer an unconditional guarantee in an advertisement when in fact there are undisclosed conditions on the terms of the actual guarantee. *Benrus Watch Co.* v. *Federal Trade Commission*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Coro, Inc.* v. *Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965); *Montgomery Ward & Co.* v. *Federal Trade Commission, supra.*

It is an unfair trade practice to falsely represent that a price offer is for a limited time only or that quantities of an advertised product are limited. See *ADF Warehouse, Inc.*, 66 F.T.C. 1267 (1954).

Finally, it is a violation of Section 4(c) of the Textile Fiber Products Identification Act and Sections 11 and 41(c) of the rules and regulations promulgated thereunder to describe in advertising the content of any rug product by using its trade name without also stating its generic name and without disclosing that any such information relates only to the face, pile or outer surface of the floor covering, and not to the backing filling or padding, and such conduct constitutes unfair and deceptive acts and practices in commerce and unfair methods of competition in commerce under the Federal Trade Commission Act.

3. Respondents Joseph W. Green and Herbert Millstein were responsible for their own actions as well as for all actions and practices of the Freight Liquidators organization. Between them they exercised complete control of the organization and are liable for all of the deceptive acts and practices in which it was found to be engaged. Joseph W. Green was the motivating and controlling force behind the organization, was responsible for its management, direction, policy and control, and had an interest in all of the individual stores. Herbert Millstein was Mr. Green's close associate and partner, actively participating in the Freight Liquidators scheme, and exercising authority, direction, control and policy of the affairs of the stores in Suitland, Gaithersburg and the Baltimore area. *Guziak* v. *Federal Trade Commission*, 361 F.2d 700 (8th Cir. 1966), *cert. denied*, 385 U.S. 1007; *Benrus Watch Co.* v. *Federal Trade Commission, supra; Bruhn's Freezer Meats of Chicago, Inc.* v. *U.S. Dept. of Agriculture*, 438 F.2d 1332 (8th Cir. 1971); *Cotherman* v. *Federal Trade Commission*, 417 F.2d 587 (5th Cir. 1969); *Surf Sales* v. *Federal Trade Commission*, 259 F.2d 744 (7th Cir. 1958). It is well established that those who place in the hands of others the instrumentality by which unfair and deceptive acts and practices are conducted may be held responsible for said trade practices. *Federal Trade Commission* v. *Winsted Hosiery Co.* 258 U.S. 483, 494 (1922); *Regina Corp.* v. *Federal Trade Commission, supra.*

The other individual respondents, Peter Galarneau, Harold J. Green, John Green, Jerry Lytell, Sam Katz, Mike McKeever, George Edward Ommert and Gerald Gautcher had no control over the content of the advertising that was challenged in this proceeding. Although it is concluded that they were Joseph W. Green's partners, the record shows they were primarily manager-salesmen at the various Freight Liquidators store locations, usually receiving a fixed salary-commission and sharing the profits with Mr. Green and any other partner of that store. And although the consumer testimony clearly establishes the manner in which the Freight Liquidators' method of business was implemented in the stores, such testimony does not identify any of the individual respondents as being engaged in any particular unfair trade practice.

In the briefs filed on behalf of the individual respondents who were represented by counsel, it is argued generally that under the circumstances the Commission has failed to prove that they were engaged in the challenged conduct and that, accordingly, are not responsible for the challenged practices (see Proposed Findings Green; Proposed Findings Millstein).

Counsel supporting the complaint contend on the other hand, that each of these individuals, because of his partnership relationship with Joseph W. Green, was an integral part of the Freight Liquidators

organization and its scheme, that each partner was essential to the implementation of that scheme, and that each one is responsible for all the actions of the organization. In effect, counsel contend that as active partners these individual respondents, having benefited from the Freight Liquidators' operation, ratified the advertising and the deceptive representations therein and the unfair trade practices resulting therefrom, and, accordingly, each and every one was individually responsible therefore.

This case presents what appears to be a unique situation. Although the fact that the individual respondents were partners is clearly established, their respective roles varied, not only with respect to implementing the Freight Liquidators scheme, but also with respect to the point of time and place in which they participated. This presents a situation where individual participation and responsibility was a matter of degree.

It should be emphasized that the Commission has not held officers of corporations, partners, or salesmen vicariously liable for the conduct of the businesses with which they are associated. As I read the cases, there must be some indicia of control, some power to change, alter or influence the course of events involved. In the usual situation all active partners would be presumed to have such power. But this does not appear to be the fact in the instant case.

In my opinion the record clearly demonstrates that Peter Galarneau, Harold J. Green, John Green, and Jerry Lytell were sufficiently involved to be held responsible. I believe that the single fact that is most controlling is that each was involved in more than one store location; each was responsible for furthering the Freight Liquidators scheme for their own benefit. In my opinion this constitutes ratification of the advertising and other elements of the challenged conduct. See *Star Office Supply Co.*, 77 F.T.C. 383, 445 (1970), *aff'd per curiam*, 2d Cir. No. 35066 (1972) (not reported); *Park, Austin & Lipscomb, Inc.* v. *Federal Trade Commission*, 142 F.2d 437 (2d Cir. 1944), *cert. denied*, 323 U.S. 753.

It was not necessary for Commission counsel to prove that each individual respondent personally did the challenged acts and practices or any element of the overall selling scheme. Responsibility, if it exists, may attach from the nature of the individual's involvement in the organization. There is no doubt that all of the above respondents were deeply involved in the organization, participating fully in its operation.

On the other hand Sam Katz, Mike McKeever and Gerald Gautcher were relatively late comers into the organization and were only concerned with single stores for very short periods of time. Not only were they induced into becoming partners by questionable representa-

tions as to the nature of the Freight Liquidators operation, but it appears that their sizeable investments became liabilities and that they actually were victims of the Freight Liquidators organization and the other partners.

Somewhere in between these two groups of respondents stands George Edward Ommert. Employed for a while by Mr. Millstein, Mr. Ommert took over the Gaithersburg store and subsequently the store was moved to Reisterstown, Md. In the general circumstances of this case and in view of Mr. Ommert's demeanor on the stand, I am convinced that he was more of a victim of Freight Liquidators and Mr. Millstein, than an active purveyor of deception. Accordingly, I hold that Mr. Ommert was in the same category as Sam Katz, Mike McKeever and Gerald Gautcher.

Thus consistent with controlling case law, it is concluded that Peter Galarneau, Harold J. Green and John Green and Jerry Lytell are individually responsible for the unfair trade practices engaged in by Freight Liquidators and that the Commission has the power and authority to enter an appropriate order to cease and desist covering their future conduct.

However, as pointed out above, the Commission did not secure counsel for Mr. Lytell even though he had made a timely request therefore, and was found by the administrative law judge to be indigent. Under the authority of the Commission's decision in *American Chinchilla Corp., et al.*, 76 F.T.C. 1016, 1034 (1969), and the policy announced in Ad. Bull. No. 71-21, the administrative law judge must dismiss the complaint without prejudice as to Jerry Lytell.

On the other hand Sam Katz, George Edward Ommert, Mike McKeever and Gerald Gautcher are not individually responsible for the unfair trade practices in which Freight Liquidators, Joseph W. Green and Herbert Millstein and the other respondents were found to have been engaged, and the complaint should be dismissed as to these respondents with prejudice.[6]

THE REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to ensure discontinuance of the unlawful practices found. *Federal Trade Commission* v. *Colgate-Palmolive Co., supra.* The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613

[6] Dismissing the complaint as to Mike McKeever renders moot the additional questions as to whether he was in default or whether the Commission policy announced in *American Chinchilla* should have been pursued even though Mr. McKeever failed to return the required statement to substantiate his claim of indigency.

(1946); *Niresk Industries, Inc.* v. *Federal Trade Commission, supra.* It is well settled that the Commission may require affirmative statements in advertising where failure to make such statements leaves the prospective consumer without all the material facts on which to base his choice as to whether to do business with the advertiser or purchase the product advertised. *Federal Trade Commission* v. *Colgate-Palmolive Co., supra; Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U.S. 67, 78 (1934).

Counsel supporting the complaint have proposed an order which, except for slight modifications, is substantially similar to the notice order which was attached to the complaint.

Respondents contend that there has been no showing that the imposition of any order would be in the public interest, because Freight Liquidators has ceased to exist, the challenged practices have been abandoned, and that there is "nothing in the record to indicate that these respondents will in the future experiment with any of the practices which were the subject of the complaint" (Proposed Findings Green; Proposed Findings Millstein).

Discontinuance or abandonment of unfair trade practices does not render a cease and desist order improper. The statutory scheme contemplates the issuance of an appropriate order to protect the public prospectively from any possible resumption of the unfair trade practices in which respondents were found to be engaged without the statutory sanctions available for future enforcement. *Benrus Watch Co.* v. *Federal Trade Commission, supra; Montgomery Ward & Co.* v. *Federal Trade Commission, supra; Clinton Watch Co.* v. *Federal Trade Commission*, 291 F.2d 838 (7th Cir. 1961); *Doherty, Clifford, Steers & Shenfield* v. *Federal Trade Commission*, 392 F.2d 921 (6th Cir. 1968). In a case such as this where the individual respondents are still engaged in retail businesses the imposition of an order to cease and desist against those who were responsible is fully justified. However, it should be pointed out that it is not up to complaint counsel to prove respondents' present vocations or disposition toward continuing the challenged practices.

The order to cease and desist proposed by complaint counsel would require each respondent to include in any advertisement for at least a year after said order becomes enforceable a so-called consumer warning disclosure stating as follows:

The Federal Trade Commission has found that we engage in bait and switch advertising. That is, the salesmen make it difficult to buy the advertised product and he attempts to switch you to a higher priced item.

Respondents contend that "the Commission has no authority to require respondents to publish in their advertising the black bordered pronouncement setting forth that respondents bait and switch." They

assert that such an advertisement is a declaration of a present intent to "bait & switch" customers and would make it impossible for respondents to earn a living in the retail sales business (Proposed Findings Green; Proposed Findings Millstein).

It is clear that the Commission's power to direct whatever relief is reasonably necessary to prevent recurrence of business practices it has found to be unlawful extends beyond mere prohibitions against the continuation of the illegal practices themselves. The Commission may require affirmative disclosure of any material fact, which if known to the prospective customer, might affect his choice of whether to do business with the particular advertiser. *Federal Trade Commission* v. *Colgate-Palmolive Co., supra.* In my opinion an appropriate consumer warning may be required by the Commission.

The need for such a disclosure in the circumstances of this case is manifest. First, by its very nature, the practice of "bait & switch" as demonstrated in this case can be done so smoothly that few consumers realize, or for that matter will complain, that they were victims of such a scheme. Second, consumers are entitled to know what prohibitions a retailer is operating under. Armed with such knowledge the prospective customer is in a better position to make an independent choice as to the product, if any, he wishes to purchase. Of course the possibility that a prospective consumer is aware of any such prohibition on the retailer will serve as an incentive for compliance with the terms of the order.

The consumer warning proposed by counsel supporting the complaint by its very terms presupposes that respondents will continue to engage in "bait & switch" practices and further infers that respondents are violating the terms of the order. To require any respondent to make such a statement would be quite punitive.

I am also of the opinion that the use of the colloquial term "bait & switch" in the consumer warning is also punitive. There are many variations on the scheme. In fact, the definition which is included in the proposed consumer warning is really only an example. Nor does the term itself appear in the complaint, or any other part of the proposed order. Although this term has a generic meaning to attorneys dealing in consumer protection matters, it is far from a precise concept. At this posture of the case the *order* is the thing. I think that the consumer warning should be keyed to the cease and desist order instead of the past proceeding.

In the circumstances the following affirmative disclosure will be substituted for the proposed consumer warning, it being my opinion that it is truthful, understandable, useful, remedial, and not punitive:

We are subject to the prohibitions of a Federal Trade Commission Order in Docket

8937, that requires us to sell the products which we advertise without attempting to sell you a different item or a higher priced item.

Insofar as respondents' argument that any requirement that they use a consumer warning would make it impossible to earn a living in the retail sales business carries over to the substitute disclosure, it must be rejected. The consumer is entitled to this information, and any adverse result is the price a violator of the Federal Trade Commission Act must be expected to pay if he continues to advertise.

Respondents also object to certain paragraphs of the order contending that Paragraphs 5 and 6 are encompassed in Paragraphs 3(a), (b) and (c) and are unnecessary, and that Paragraphs 5 and 6 are also covered by Paragraph 7. Although the order does appear somewhat redundant, each paragraph clearly apprises respondents of the prohibitions on future conduct, and each is reasonably related to the proven illegal practices.

Paragraphs 4, 9 and 12 of the order are attacked as punitive because, respondents assert, they would be required to keep records "beyond the capabilities of the small retailers which the evidence shows these respondents to be."

Although the exact manner of compliance and the difficulties of bookkeeping would depend entirely on the type of advertisements used by respondents in the future, the requirements of the order in this respect seem reasonable. Compliance with Paragraph 9 should not require much in the way of bookkeeping, merely separate filing of copies of customer contracts relating to such transactions. With respect to establishing "net profits" on such sales, the other relevant information would be the purchase invoices showing the cost. Likewise, keeping track of advertising costs should be neither a difficult nor an unusual procedure.

Compliance with Paragraph 12 is necessary only if respondents choose to advertise in such way. If a supply of a particular product is in fact limited to a respondent, such fact should not be too difficult to establish. Finally, if the savings claim in Paragraph 4 is a claim of savings from respondents' usual selling price, the relevant information would be the invoices from respondents' prior sales of that item. Such information would presumably be kept in the usual course of business. If the savings claim involves comparison with competitors' prices for the same or comparable merchandise, respondents merely have to document the basis for making the representation in the first place. See *Tashof* v. *Federal Trade Commission, supra.*

Paragraph 10 of the proposed order would require respondents to cease and desist from "[a]dvertising or offering merchandise for sale when the advertised merchandise is inadequate for the purposes for

which it is offered." Claiming that the word "inadequate" is peculiarly vague, respondents contend that Paragraph 10 "is an attempt to convert the original sewing machine bait and switch theory into a products liability prosecution." I find nothing in the record in this case which directly supports this paragraph of the order. Presumably, the fact that the $63 sewing machine was incomplete made it inadequate as a sewing machine, or that because the $19 rug was like a "shower curtain" made it inadequate for wall-to-wall carpeting. I agree with respondents that the term "inadequate" as used in Paragraph 10 is unduly vague, and Paragraph 10 will be stricken.

ORDER

It is ordered, That respondents Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein, and Peter W. Galarneau, individually, and/or as copartners, trading and doing business as Freight Liquidators, or under any other trade name or names, and each of respondents' agents, representatives and employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of rugs, sewing machines, stereo radios and phonographs, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "Liquidators," "Freight," "Forwarding," or any other word or words of similar import or meaning in or as part of respondents' corporate or trade name or names; or representing, orally or in writing, directly or by implication, that they are liquidators, authorized adjustors or agents engaged in the sale or disposition of bankrupt, salvage, distrained, distress, or transportation company surplus merchandise; or are engaged in liquidating, adjusting, paying off or otherwise settling indebtedness or claims; or misrepresenting, in any manner, their trade or business status.

2. Representing, directly or indirectly, orally or in writing, that any merchandise offered for sale is bankrupt, salvage, distrained, distress or transportation company surplus merchandise; or misrepresenting, in any manner, the source, character or nature of the merchandise being offered for sale.

3. (a) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such merchandise has been sold or offered for sale in good faith at the former price by respondents for a

reasonably substantial period of time in the recent, regular course of their business.

(b) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise or services in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise at the compared price or some higher price.

(c) Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in their trade area which establishes the validity of said compared price and it is clearly and conspicuously disclosed that the comparison is with merchandise of like grade and quality.

4. Failing to maintain and produce for inspection or copying, for a period of three (3) years following the date on which any savings claims, sales claims, or other similar representations are made, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations as set forth in Paragraph Three of this order is based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

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

6. Making representations, directly or indirectly, orally or in writing, purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise or services but to obtain leads or prospects for the sale of other merchandise at higher prices.

7. Representing, directly or indirectly, orally or in writing, that any merchandise is offered for sale when such offer is not a bona fide offer to sell such merchandise.

8. Discouraging or disparaging, in any manner, the purchase of any merchandise which is advertised or offered for sale.

9. Failing to maintain and produce for inspection and copying for a period of three years following the date of publication of any

advertisement, adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

a. the cost of publishing each advertisement including the preparation and dissemination thereof;

b. the volume of sales made of the advertised product or service at the advertised price; and

c. a computation of the net profit from the sales of each advertised product or service at the advertised price.

10. Representing, directly or indirectly, orally or in writing, that any product is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed; and respondents deliver to each purchaser a written guarantee clearly setting forth all of the terms, conditions and limitations of the guarantee fully equal to the representations, directly or indirectly, orally or in writing, made to each such purchaser, and unless respondents promptly and fully perform all of their obligations and requirements under the terms of each such guarantee.

11. Representing, directly or indirectly, orally or in writing, that the supply of merchandise or the time during which it is available for sale is limited unless respondents establish that their supply of any article of merchandise advertised was not sufficient to meet reasonably anticipated demands therefor, and that their supply could not be replenished through their customary sources.

12. Failing to maintain and produce for inspection or copying for a period of three (3) years, adequate records from which compliance with the prohibition of Paragraph Eleven of this order can be determined.

It is further ordered, That respondents Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein, and Peter W. Galarneau, individually, and/or as copartners, trading and doing business as Freight Liquidators, or under any other trade name or names, and each of respondents' agents, representatives, and employees, successors and assigns, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products,

as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

A. Misbranding textile fiber products by falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

B. Falsely and deceptively advertising textile products by:

1. Making any representations by disclosure or by implication, as to fiber content of any textile fiber product in any written advertisement which is used to aid, promote or assist, directly or indirectly, in the sale, or offering for sale, of such textile fiber product unless the same information required to be shown on the stamp, tag, label or other means of identification under Sections 4(b) (1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

2. Failing to set forth in advertising the fiber content of floor covering containing exempted backings, fillings or paddings, that such disclosure relates only to the face, pile or outer surface of such textile fiber products and not to the exempted backings, fillings or paddings.

3. Using a fiber trade-mark in advertising textile fiber products without a full disclosure of the required fiber content information in at least one instance in said advertisement.

4. Using a fiber trade-mark in advertising textile fiber products containing only one fiber without such fiber trade-mark appearing at least once in the advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type.

It is further ordered, That respondents Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein and Peter W. Galarneau do forthwith cease and desist from disseminating, or causing the dissemination of, any advertisement of merchandise by means of newspapers, or other printed media, television or radio, or by any means in commerce, as "commerce" is defined in the Federal Trade Commission Act, unless respondents clearly and conspicuously disclose in each advertisement the following notice set off from the text of the advertisement by a black border:

We are subject to the prohibitions of a Federal Trade Commission Order in Docket 8937, that requires us to sell the products which we advertise without attempting to sell you a different item or a higher priced item.

One year from the date this order becomes final or any time thereafter, respondents upon showing that they have discontinued the practices prohibited by this order and that the notice provision is no

longer necessary to prevent the continuance of such practices may petition the Commission to waive compliance with this order provision.

It is further ordered, That each of said five respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of merchandise, or utilized in the advertising, promotion or sale of merchandise.

It is further ordered, That each of said respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of merchandise, or to advertise, promote, or sell merchandise, with a copy of the Commission's news release setting forth the terms of this order.

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

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

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

It is further ordered, That the said 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.

It is further ordered, That the complaint in this matter is dismissed as to respondents Sam Katz, George Edward Ommert, Gerald Gautcher and Mike McKeever with prejudice.

It is further ordered, That the complaint in this matter is dismissed as to Jerry M. Lytell without prejudice.

OPINION OF THE COMMISSION

FEBRUARY 25, 1975

BY THOMPSON, *Commissioner:*

The dedication of these respondents to the principles of truthful advertising is not particularly impressive. Indeed, the very name under which they do business- "Freight Liquidators"-misrepresents the nature of their operation and is a key part of the deceptive "concept" on which the organization was founded, namely, convincing consumers-contrary to the fact-that "distress" or surplus merchandise of good quality is being offered at bargain prices.

In an initial decision of June 27, 1974, our administrative law judge found (and respondents do not challenge these findings on appeal) that the business practices of Freight Liquidators have included (1) "bait and switch" tactics (advertising a low-price product as "bait" and then, when the customer tries to buy it, "switching" him to a higher priced item); (2) misrepresenting the sources of their merchandise; (3) misrepresenting the "savings" to be realized by purchasing their merchandise; (4) falsely claiming that their price offers were for a limited time only or that their goods were available in limited quantities only; (5) misrepresenting the nature and extent of the "guarantees" on their merchandise; and (6) failure to make certain disclosures required by the Textile Fiber Products Identification Act, 15 U.S.C. 70. These findings of extensive violations of law not being challenged on appeal, the only issue before us is the scope of the corrective order to be entered, particularly whether certain of the individual "partners" are to be held responsible and thus bound by its terms; whether an order provision dealing with the "adequacy" of the products sold is required; and whether, in respondents' future advertisements, a "warning" provision must be included.

The learned law judge has succinctly summarized the facts of the case in his findings. Joseph W. Green, who had been engaged in the sewing machine business in New York City until 1969, moved to the Washington, D.C. area in that year and began organizing a number of retail stores under the name Consumers Buying Service, a name that was changed to "Freight Liquidators" in 1971. Additional stores were opened from time to time, with Mr. Green as either the sole or part owner. In general, the fifteen (15) or more stores that traded under the Freight Liquidators name in the Washington and Baltimore areas during 1971 and 1972 were managed by one of Green's individual "partners," a part owner (with Green) who had invested a sum ranging from $3,000 to $25,000 in the store and who shared in its profits on the basis of that ownership interest. Mr. Green handled the purchasing end

of the business and was also responsible for the preparation and placement of all advertising for the entire group of stores. Rugs, stereos, sewing machines, and other items were prominently featured in these advertisements, the thrust of which was (a) that respondents were engaged in the business of selling merchandise that was being "liquidated" for the payment of an indebtedness or claim, *i.e.*, bankrupt, salvage, distrained, distress, or transportation-company surplus goods, and (b) that the consumer, thanks to the unique or special character of this offered merchandise, could buy it at an especially low price, one reflecting significant savings from the price at which such goods are commonly sold at retail in the community in question. (See attached advertisements, CXF 4, 11, and 13[appearing at p. 304 herein].)

All of these claims are false. Freight Liquidators is not engaged in the business of selling bankrupt, salvage, distress, or transportation-surplus goods and the prices charged are not lower than those usually and customarily charged at retail. (Initial Decision, Finding 20, pp. 10-11.[p. 282 herein]) Nor were respondents' advertisements *bona fide* offers to sell at the advertised prices. They were designed, instead, primarily for the purpose of obtaining "customer leads," the opportunity to disparage the advertised products and "switch" the inquiring customer to merchandise bearing a significantly higher price than the one stated in the advertisement that had "baited" the customer into the store in the first instance. Respondents' salesmen, being compensated on the basis of a commission plan that was geared to the amount of *profit* realized on the sale (generally 25 percent of the profit made on each deal), typically diverted customers from the low-priced products featured in the advertisements by claiming the item was not available, by refusing to show it to the inquiring customer, or by displaying poor quality or unattractive samples of it. Thus a sewing machine with an advertised price of $58 or $63 turned out, upon inquiry, to include only a sewing machine *head*, omitting "such essentials as a base or stand containing the operating controls and without which the head of the machine was useless * * *." *Id.*, p. 12 [p. 284 herein]. The record is equally clear on the other misrepresentations found by the law judge and the failure to make the disclosures required by the Textile Act. *Id.*, p. 13[p. 284 herein].

The principal issues on appeal have to do, as noted, with (1) whether the order should include a "consumer warning" provision; (2) whether it should include a provision requiring respondents' merchandise to be "adequate" for its advertised purpose; and (3) whether certain individual respondents should be bound by the order as individuals.

STEREO

UNCLAIMED FREIGHT
BANKRUPTCY STOCK FACTORY CLOSEOUTS
TRUCK LOAD LIQUIDATION
All New Merchandise
LAST NOTICE FOR THIS WEEKEND
FRIDAY, SATURDAY, SUNDAY & MONDAY

ONLY $88
New 1972 (in cartons), 5-piece Stereo Component Units, 40 Watts, AM/FM radio, deluxe 4 spd. BSR turntable, 4-speaker sound system, equipped for 8 track tape player, tape recorder, etc. Only $88

Only $147
New 5-piece Components 4-speed Deluxe Turn Tbl., 100 watts, AM/FM radio, deluxe 4-spd. turntable w/diamond stylus, 4-speaker air suspension audio system. Equip. for 8-trk. cassette. Orig. $329. Yours for $147

Only $108

New 1972 (in cartons), famous make, 100 watt turners w/AM/FM multiplex equipped for 8 track or cassette. Only $108

From Only $88
New console stereo, various sizes & finishes. Lge. assortment w/AM/FM radio & deluxe 4 spd. changer.

FREIGHT LIQUIDATORS
DEAL WITH THE STORE NEAR YOU* * *
(see CXF 4, CXF 11 and CXF 13)]

* * * * * * *

On the first of these issues the law judge included in his order a provision that would require respondents to insert the following language in all of their advertisements for a minimum of one (1) year:[1] "We are subject to the prohibitions of a Federal Trade Commission Order in Docket 8937, that requires us to sell the products which we advertise without attempting to sell you a different item or a higher

[1] At the end of a year respondents would be permitted, under the law judge's order here, to petition the Commission for a waiver of further compliance with this provision upon a showing that they have discontinued the practice of "baiting and switching" their customers and hence that the restraint in question is no longer necessary. Initial Decision, p. 36 [p.300, herein].

priced item." Counsel supporting the complaint argue for a more strenuous "consumer warning" provision[2] and respondents maintain that no such provision of any kind should be entered. While we agree that the instant record is insufficient to support an order provision of this kind, we will strike it here without prejudice to the right of the Commission to reopen these proceedings and add such a requirement if respondents' future conduct and/or changed circumstances should indicate that it is then required by the public interest. See *Wilbanks Carpet Specialists et al.*, Docket 8937 (Sept. 24, 1974 [84 F.T.C. 510]).

We agree with the law judge's ruling that there is no need for a provision in his order prohibiting the advertising of merchandise that is "inadequate for the purposes for which it is offered."[3] This proposed provision was aimed chiefly at respondents' advertisements of low-priced "sewing machines" that turned out to be sewing machine *heads*, items that are not usable without the controls and other accessories that respondents charge "extra" for. Whether or not the word "inadequate" is unduly vague as found by the law judge, it is unnecessary. Another provision in his order prohibits any misrepresentation as to "the source, *character* or *nature* of the merchandise being offered for sale."[4] A sewing machine is not a sewing machine without the controls contained in the cabinet any more than an automobile is an automobile without an engine or a steering assembly. To advertise a sewing machine head as a sewing machine would thus be a misrepresentation of the "character or nature" of the product and hence a violation of this latter provision of the order.

The law judge dismissed the complaint as to six (6) of the individual respondents named in the complaint[5] but included five (5) of them in his cease and desist order, namely, Joseph W. Green, Harold J. Green, John W. Green, Herbert Millstein, and Peter W. Galarneau. Two of these individual respondents, Harold Green and John Green, argue on appeal that the order should not apply to them individually. Counsel supporting the complaint, on the other hand, contend that the law judge erred in not also including four (4) of the other individual respondents, Mike McKeever, Sam Katz, George Ommert, and Gerald Gautcher.

There can be no doubt of the deep personal involvement of two of these individual respondents in this deceptive scheme and thus the

[2] The wording proposed by complaint counsel is as follows: "The Federal Trade Commission has found that we engage in bait and switch advertising. That is, the salesman makes it difficult for you to buy the advertised product and he attempts to switch you to a higher priced item."

[3] See complaint counsel's proposed order, first paragraph, subparagraph 10.

[4] Paragraph 2 of the law judge's order. (Emphasis added.) Initial Decision, p. 28 [p.297, herein].

[5] The law judge had previously dismissed the complaint as to respondent Steven Rizzi by Summary Initial Decision, affirmed by the Commission in a final order of dismissal of Jan. 3, 1974. The complaint was dismissed as to give others—Mike McKeever, Jerry W. Lytell, George Edward Ommert (erroneously identified in the complaint and in a number of other pleadings as George Edward Ommeret), and Gerald Gautcher-in the law judge's later Initial Decision.

soundness of the law judge's decision in holding them individually liable. Joseph W. Green and Herbert Millstein were the principals in the organization and exercised authority and control in the setting of its deceptive advertising and sales policies.[6] Four of the others, Harold J. Green, John W. Green (sons of the founder, Joseph W. Green), Peter Galarneau, and Jerry Lytell,[7] exercised no control over the policies of the central Freight Liquidators organization itself (*e.g.*, its advertising policies) but each of them was involved in implementing the illegal scheme at more than one store location and hence was properly held liable by the law judge.

The more difficult issue concerns the individual liability of the four (4) respondents that the law judge declined to hold in his order, Katz, McKeever, Gautcher, and Ommert, all of whom he believed were more victims than perpetrators here primarily because of the questionable representations used to induce their participation in the plan.[8] While we share the law judge's concern with the welfare of those who have been induced to make a substantial investment in an unlawful scheme by false representations, one deception does not justify another. Each of these men managed one of the stores involved in this unlawful sales scheme, running the day-to-day operations of his own store and participating, either as a salesman himself or as a supervisor of salesmen, in the sale of this falsely advertised merchandise. A mere reading of these advertisements, together with knowledge of the true character of the merchandise and the terms on which it was in fact being sold, should be more than sufficient to put a reasonable and prudent businessman on notice that he had been made an active participant in a false and deceptive sales operation. These manager-owners can hardly be heard to deny that they *read* these advertisements for the products they sold and that the representations in these ads could not be squared with the factual situation they presided over in their own individual stores. Perhaps one can *join* the commercial equivalent of Quantrill's Raiders out of an innocent conviction that it is a religious or charitable organization but one cannot *remain* an uninformed member of it for long. These individual respondents were more than temporary guests at Mr. Green's table. They had made themselves members of the family.

The order of the administrative law judge will be modified in accordance with the foregoing and, as so modified, affirmed and adopted as the order of the Commission.

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[6] Initial Decision, p. 20 [p.291, herein].

[7] The law judge dismissed the complaint as to Mr. Lytell on the ground that he was an indigent and had not been furnished with counsel. We affirm that dismissal.

[8] *Id.*, p. 22 [p.293, herein].

CONCURRING OPINION OF COMMISSIONER LEWIS A. ENGMAN

FEBRUARY 25, 1975

BY ENGMAN, *Commissioner:*

I agree with Commissioner Hanford that we have the power to issue a "consumer warning" and that this remedy should not be used indiscriminately. I also agree that in the process of determining whether we should require a consumer warning, we should take into account a respondent's prior violations, as his prior conduct affords some evidence of proclivity to continue to engage in the prohibited practices.

However, I would not rest the decision to require a consumer warning solely on a respondent's proclivity to continue to violate the law. I would, in addition, take into account the Commission's ability to detect violations of the Commission's order under various circumstances. If we can readily monitor respondent's actions and institute compliance proceedings to cure violations, we may be able to provide adequate enforcement without the necessity of a consumer warning.

The instant order contains an effective means for monitoring respondent's conduct. Paragraph Nine requires respondent to retain records of the cost of publishing each advertisement and the sales volume of the advertised product. Thus, the Commission will have the data to determine whether respondent is expending substantial amounts of money advertising products which he rarely sells, usually a sign of bait and switch activity. Accordingly, I find it unnecessary to require a "consumer warning" in this case.

CONCURRING OPINION OF COMMISSIONER M. ELIZABETH HANFORD

FEBRUARY 25, 1975

BY HANFORD, *Commissioner:*

On four occasions in recent months the Commission has stricken a "consumer warning" provision from an order against a bait and switch retailer.[1] In each instance, the Commission indicated that it did not consider such a provision to be appropriate on the facts of the case. The record of this case, however, appears to present facts which differ significantly. These differences, in my view, merit serious consideration.

At oral argument Complaint Counsel alleged that respondent Joseph

[1] Wilbanks Carpet Specialists, et al., Docket 8937 (Sept. 24, 1974 [84 F.T.C. 510]), Tri-State Carpets, Inc., et al., Docket 8945 (Oct. 15, 1974 [84 F.T.C. 1078]), Theodore Stephen Co., Inc., et al., Docket 8944 (Jan. 28, 1975 [85 F.T.C. 152]), Sir Carpet, Inc., et al. Docket 8981 (Feb. 6, 1975 [85 F.T.C. 190]).

W. Green signed an assurance of discontinuance with the State of New York in 1965 and a consent judgment at a later time, both involving bait and switch practices.[2] Counsel for Mr. Green not only confirmed that Green signed these two consent orders, but admitted that he had been criminally prosecuted for bait and switch advertising in the District of Columbia.[3] Thus, it would appear that this is at least the fourth time that legal sanctions have been imposed upon him as a result of alleged bait and switch conduct. In short, were we to accept the statements of counsel at oral argument, we could easily find Mr. Green to be a bait and switch recidivist.

As an adjudicatory body, however, we must proceed cautiously when considering matters not raised until oral argument. Since none of the prior judgments are a part of this record, and since the parties have not been given an opportunity to brief and argue fully the circumstances and effect of the prior judgments, we cannot properly consider these judgments in framing our order. Accordingly, I concur in the judgment of the Commission.

Had the record been more complete, however, I would not have hesitated to support an order including "consumer warning" relief of the kind ordered by the administrative law judge. Requiring a "consumer warning" is clearly within the power of the Commission; it is "reasonably related" to prohibiting further conduct found to have violated our Act.[4] When dealing with an individual who has repeatedly engaged in bait and switch practices, a consumer forewarned will be far less likely to fall victim to such practices.

Such a remedy should not be used indiscriminately. If the other order provisions were obeyed, there would be no need for a "consumer warning." Where dealing with a known recidivist, however, we may infer a significant likelihood that our order would be disobeyed. In such a case, it is my view that a "consumer warning" remedy may well be both appropriate and necessary.

FINAL ORDER

This matter is before us on cross-appeals by respondents, Herbert Millstein, Harold J. Green, John W. Green, Peter W. Galarneau, and Joseph W. Green, and by complaint counsel from the administrative law judge's initial decision filed June 27, 1974. For the reasons stated in the accompanying opinion, the Commission has determined to adopt the initial decision as the decision of the Commission except insofar as it is inconsistent with said opinion and to issue the cease and desist order

[2] Transcript of Oral Argument of Oct. 16, 1974, 18-19.

[3] *Id.* at 33-37.

[4] *Jacob Siegel Co.*, v. *F.T.C.*, 327 U.S. 608 (1946), *National Lead Co., et al.* v. *F.T.C.*, 352 U.S. 419 (1957).

contained therein as the final order of the Commission with the modifications set forth below. Accordingly,

It is ordered, That the law judge's cease and desist order be modified so as to include respondents Mike McKeever, Sam Katz, George Edward Ommert, and Gerald Gautcher in all provisions and that the paragraph dismissing the complaint as to said respondents be stricken;

It is further ordered, That the paragraph requiring respondents to include in their advertisements an affirmative disclosure to the effect that they are subject to a Federal Trade Commission order in Docket 8937 be stricken without prejudice to the Commission's right to reopen this proceeding to consider reinstating of this requirement or other appropriate relief should the future conduct of any of these respondents warrant such action,

It is further ordered, That in all other respects the appeals of respondents and complaint counsel be denied.

IN THE MATTER OF

REDMAN INDUSTRIES, INC., ET AL.

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

Docket C-2640. Complaint, Mar. 3, 1975 - Decision, Mar. 3, 1975

Consent order requiring a Dallas, Tex., manufacturer of mobile homes, among other things to cease unfair and deceptive warranty practices through the establishment of a prompt and effective system to handle warranty-related problems. The order requires respondent to provide warranty repairs or services on still-unrepaired mobile homes manufactured between 1972 and 1974 and to provide future retail purchasers with relief by establishing and maintaining a regular and effective system to handle complaints and service. Under this system, all repairs must be complete within thirty days after notification to the respondent of defects. Where the defects affect safety or habitability of the mobile home, the repairs must be started within three business days and be expeditiously completed.

Appearances

For the Commission: *Walter E. Diercks*, *Robert Weinstock* and *Pamela B. Stuart.*

For the respondents: *Jerry L. Buchmeyer*, *Thompson, Knight, Simmons & Bullion*, Dallas, Tex.