IN THE MATTER OF

CONSUMERS PRODUCTS OF AMERICA, INC., ET AL.

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

Docket 8679. Complaint, Mar. 1, 1966—Decision, Sept. 7, 1967

Order requiring three affiliated Pennsylvania sellers of encyclopedias and other publications to cease using "bait and switch" tactics, using the word "free" deceptively, falsely representing that their offers to sell are limited, and that they are affiliated with established collection agencies or nonprofit educational organizations.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Consumers Products of America, Inc., a corporation, Eastern Guild, Inc., a corporation, Keystone Guild, Inc., a corporation, and Jack Weinstock, Nat Loesberg, Jack Gerstel, and Louis Tafler, individually and as officers of said corporations, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Consumers Products of America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 1315 Vine Street, in the city of Philadelphia, State of Pennsylvania.

Respondent Eastern Guild, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at the above stated address.

Respondent Keystone Guild, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 908 Penn Avenue, in the city of Pittsburgh, State of Pennsylvania.

Respondents Jack Weinstock, Nat Loesberg, Jack Gerstel and Louis Tafler are officers of the corporate respondents. Their office and principal place of business is located at 1315 Vine Street, in the city of Philadelphia, State of Pennsylvania. They formulate,

direct and control the acts and practices of the said corporate respondents, including the acts and practices hereinafter set forth.

In the course and conduct of their business operations, as hereinafter set forth, the respondents adopted and used various trade names. For example, respondents Consumers Products of America, Inc., and Keystone Guild, Inc., trade and do business as Educational Foundation and Consumers Educational Service. Respondent Eastern Guild, Inc., trades and does business as E–G Ltd. Other trade names also were employed.

All of the respondents, both corporate and individual, cooperate and act together in carrying out the acts and practices hereinafter set forth.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of encyclopedias, dictionaries and other books and publications to the public.

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

PAR. 4. The principal items offered for sale and sold by respondents, as aforesaid, are sets of encyclopedias. One set is advertised and sold under the name "World-Wide Encyclopedia." It consists of 10 volumes and sells for $9.95—$1.00 down and $1.00 a week. The other set is sold under the name "New Standard Encyclopedia." It consists of 14 volumes and sells for $159.50 and is described as a 3-in-1 deal. The deal includes the encyclopedia, an information service and a quarterly loose leaf extension service. This encyclopedia or 3-in-1 deal is not advertised.

PAR. 5. In the course and conduct of their aforesaid business and for the purpose of securing leads to prospective purchasers for their higher priced encyclopedia, the New Standard Encyclopedia, the respondents have made and are making numerous statements and representations in advertising inserted in newspapers and various other advertising media of interstate circulation concerning their "World-Wide Encyclopedia."

Among and typical of such advertisements is the following:

FREE

With this sensational offer
This 960-Page "Thumb-Indexed"
WEBSTER'S DICTIONARY

YOURS AS A GIFT
To Introduce you to the New
WORLD-WIDE ENCYCLOPEDIA
(Picture of Set)
( )
( )

YOU'VE ALWAYS WANTED TO OWN A SET OF ENCYCLOPEDIA —NOW YOU CAN AFFORD IT!

Send No Money!
Here's All You Do!
Just fill in and
Mail the coupon at right.
We will immediately send you a set of the WORLD-WIDE ENCYCLOPEDIA, together with the Free Dictionary. Examine them carefully. You and you alone must be fully satisfied. If you are convinced, as we are sure you will be, that this is truly an amazing educational bargain, keep the set and your Free Dictionary, and pay for the same on easy terms of $1.00 in 5 days and the balance in convenient installments of $1.00 a week, a total of only $9.95 (which includes delivery charges). Otherwise simply return the books—YOU ARE NOT OBLIGED TO KEEP THEM. So don't delay. Be sure to take advantage of this limited offer.

(Picture of)
( )
(Dictionary)

ALL 10 VOLUMES
$9.95
$1 Down
$1 Week

PLUS
Webster's New National
Dictionary Free of Charge!

This Offer Expires in 10 days!

VALUABLE GIFT CERTIFICATE

Educational Foundation Dept. J
1315 Vine St., Philadelphia 7, Pa.

Without any obligation to me, please send me immediately, prepaid, for 5 DAYS FREE EXAMINATION, the 10-volume set of the new WORLD-WIDE ENCYCLOPEDIA. After 5 days I will either return the set and owe you nothing, or keep it and send you $1.00 down, and the balance $1.00 a week until the special introductory price of only $9.95 has been paid (no other charges).

FREE GIFT Also send me the Thumb-Indexed WEBSTER'S New National Dictionary as a gift. The Dictionary is mine FREE of charge.

NAME .....

STREET .....

Rural Route ..... Box Number .....

P.O. Box Number .....

City and State ..... Tel No. .....

PAR. 6. By and through the use of the above quoted statements and representations, and others of similar import and meaning

not expressly set out herein, the respondents, directly or by implication, represented and now represent:

1. That they were making a bona fide offer to sell the said World-Wide Encyclopedia at the price and on the terms and conditions therein stated.

2. That said encyclopedia and dictionary will be delivered to prospective purchasers for a five-day free examination without further condition, obligation or requirement.

3. That said offer is limited and expires within ten days.

4. That the dictionary is "free" and is delivered to and may be retained by all prospective purchasers without charge, condition or obligation other than as set forth in said advertisement.

5. That said encyclopedia is comprehensive, complete, authoritative, new and up-to-date.

6. Through the use of the trade name "Educational Foundation," that they operate a nonprofit organization engaged in educational work.

PAR. 7. In truth and in fact:

1. Respondents' offer contained in said advertisement does not constitute a bona fide offer to sell the said World-Wide Encyclopedia at the price and on the terms and conditions therein stated. Said offer was and is made for the purpose of obtaining leads and information as to persons interested in the purchase of an encyclopedia. After obtaining said leads, respondents did not and do not simply mail or deliver said encyclopedia and dictionary to the prospective purchasers on the terms and conditions stated in the advertisement. On the contrary, respondents' salesmen call on said prospective purchasers and proceed to disparage and make numerous derogatory remarks respecting the completeness, quality, suitability, etc., of said World-Wide Encyclopedia. They make every effort to sell to the prospective purchaser respondents' "New Standard Encyclopedia" for the amount of $159.50.

2. Said encyclopedia and dictionary are not delivered to prospective purchasers for a five-day free examination without further condition, obligation or requirement. As hereinabove described, prospective purchasers are subjected to a sales presentation for a wholly different and far more expensive encyclopedia.

3. Said offer is not limited and does not expire within ten days. It is a continuing offer repeatedly advertised by respondents.

4. Said dictionary is not "free" and is not delivered to and may not be retained by all prospective purchasers without charge, condition or obligation.

5. Said World-Wide Encyclopedia is not comprehensive, complete, authoritative, new or up-to-date.

6. Said offer made under the trade name "Educational Foundation" is not an offer made by a nonprofit organization engaged in educational work. Said name is only a trade name employed by respondents for a private enterprise operated for profit.

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

PAR. 8. In the course and conduct of their business as aforesaid, the respondents, for the purpose of servicing and collecting their accounts, adopted and used various fictitious trade names such as Metropolitan Credit Bureau, The First Fidelity Company, and Voght Collection Service. In addition to the use of the aforesaid trade names, respondents wrote letters to the purchasers of their encyclopedias on the stationery of said agencies. For example, on the letterhead of The National Fidelity Company the following letter was sent to said purchasers:

Dear Customer:

We have approved your application for credit in the amount of $159.50 for 23 months for purchase of THE NEW STANDARD ENCYCLOPEDIA as presented to us by E. G. LTD.

We are enclosing your coupon book which you should use when making payments on this transaction. Please read carefully the instructions on the cover of the book and make payments as specified by mail or directly at the time sales office.

In financing your installment purchase through us you are building additional credit for yourself that will be useful in all sorts of future transactions. Prompt payment is important, affixing this measure of character and dependability with your name. Consequently, if any emergency arises that may upset your payment schedule, please call. We may be able to help you avoid a situation that can mar your credit record.

We hope you will find your association with us pleasant and profitable.

Very truly yours,
THE FIRST NATIONAL FIDELITY CO.
/s/ George Marchand
Time Sales Division

Another letter on the letterhead of Metropolitan Credit Bureau sent to delinquent accounts reads in part:

All affiliated members report to this Bureau the names of their customers who have become delinquent in payment of their accounts. Such information is recorded in our files and under proper conditions is available to all credit corporations.

FIRST NATIONAL FIDELITY CO., Re. E.G. INC. informs us that you have failed either to settle or to adjust your account to which your attention was directed in a recent letter.

PAR. 9. By and through the use of the above quoted statements and representations and trade names, and others of similar import and meaning not expressly set out herein, the respondents represented and now represent, directly or by implication:

1. That the First National Fidelity Company is a bona fide, independent financial institution engaged in financing, servicing and collecting installment purchases.

2. That the Metropolitan Credit Bureau is a bona fide, independent credit reporting agency and collection agency engaged in keeping records and reporting on the credit standing or rating of persons, firms or corporations and engaged in the collection of delinquent accounts which have been referred to them by third parties.

PAR. 10. In truth and in fact:

1. The First National Fidelity Company is not a bona fide, independent financial institution engaged in financing, servicing and collecting installment purchases. It is simply a fictitious name used by respondents in their financing and servicing of installment contracts.

2. The Metropolitan Credit Bureau is not a bona fide, independent credit reporting agency and collection agency engaged in keeping records and reporting on the credit standing or rating of persons, firms and corporations and engaged in the collection of delinquent accounts which have been referred to them by third parties. It, too, is simply a fictitious name used by respondents in their efforts to collect money owed to them by purchasers of merchandise on credit.

3. As indicated above, respondents also use various other fictitious names which create the false impression that the referenced organization is a bona fide business engaged in financing, servicing, credit reporting or collections.

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

PAR. 11. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of encyclopedias, dictionaries and other books and publications of the same general kind and nature as those sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, deceptive and misleading statements and representations and practices has had, and now has, the capacity and tendency to mislead and deceive a substantial number of members of the purchasing public

into the erroneous and mistaken belief that such statements and representations were and are true, and to cause substantial numbers of the purchasing public to purchase substantial quantities of respondents' products because of such erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Charles W. O'Connell and *Mr. Fauster Vittone* supporting the complaint.

Goodis, Greenfield, Marin & Mann, Philadelphia, Pa., by *Mr. Theodore R. Mann* for respondents.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

JANUARY 10, 1967

The Federal Trade Commission issued its complaint against respondents on March 1, 1966, charging them with violations of Section 5 of the Federal Trade Commission Act as a result of their advertising, sales methods and procedures used in collecting delinquent accounts in connection with their sale of the World-Wide Encyclopedia and the New Standard Encyclopedia. The respondents filed an answer in which they admitted certain allegations of the complaint but denied that they had violated Section 5 of the Federal Trade Commission Act in any manner.

This matter is before the hearing examiner for final consideration on the complaint, answer, evidence and the proposed findings of fact and conclusions and memoranda and briefs filed by counsel for respondents and counsel supporting the complaint. Consideration has been given to the proposed findings of fact and conclusions and briefs submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected, and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom and issues the following order:

FINDINGS OF FACT

1. Respondent Consumers Products of America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office

and principal place of business located at 1315 Vine Street, Philadelphia, Pennsylvania.

2. Respondent Eastern Guild, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 1315 Vine Street, Philadelphia, Pennsylvania.

3. Respondent Keystone Guild, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business located at 908 Penn Avenue, Pittsburgh, Pennsylvania.

4. Respondents Jack Weinstock, Nat Loesberg and Louis Tafler are officers and stockholders of the corporate respondents. Their office and principal place of business is located at 1315 Vine Street, Philadelphia, Pennsylvania. They formulate, direct and control the acts and practices of the said corporate respondents, including the acts and practices hereinafter set forth (Tr. 422–424).

5. Jack Gerstel was an officer and stockholder of the corporate respondents until September 1965 engaged in teaching and training new salesmen and handling salesmen in the field. His function was that of sales manager (Tr. 422). He is no longer in any way connected with the business activities of the respondents except as a stockholder (Tr. 424).

6. Respondents have adopted and used various trade names, discussed hereinafter, including the names: Educational Guidance Service (CX 15A); Consumers Educational Service (CX 15F); Educational Foundation (CX 4A, CX 16); E. G. Ltd. (CX 22), and E. G. Inc. (CX 23).

7. All of the respondents described above, both corporate and individual, have been active in and are responsible for all of the business activities discussed hereinafter.

8. Respondents are now, and since at least 1960, have been engaged in advertising and selling encyclopedias, dictionaries and other books and publications to the public. In the course and conduct of this business, respondents have caused their products to be advertised, sold and shipped in interstate commerce and have maintained a substantial course of trade in such commerce, as "commerce" is defined in the Federal Trade Commission Act (Resp. Ans., Par. 3; Tr. 418).

9. The principal publications offered for sale and sold by respondents are two sets of encyclopedias: World-Wide Encyclopedia and New Standard Encyclopedia. The World-Wide Encyclopedia consists of ten volumes and sells for $9.95. The New Standard Encyclopedia consists of fourteen volumes and sells for $159.50.

Included with the New Standard Encyclopedia is an information service and a quarterly loose-leaf extension service. The World-Wide Encyclopedia is sold by Consumers Products of America, Inc. (Tr. 415), and the New Standard Encyclopedia is sold by Eastern Guild, Inc. (Tr. 427).

10. Consumers Products advertises World-Wide Encyclopedia primarily through newspaper advertisements, car cards for use in transit systems, TV Guide and television (Tr. 416–417). Consumers Products expends approximately $4,000 a month in advertising World-Wide Encyclopedia (Tr. 425). Eastern Guild, Inc., does no advertising of the New Standard Encyclopedia. No salesmen are employed by Consumers Products in selling World-Wide Encyclopedia (Tr. 516). An average of 12 salesmen per year are employed by Eastern Guild, Inc., to sell the New Standard Encyclopedia (Tr. 426). Respondents' advertising budget for World-Wide is approximately $48,000 a year but sales of World-Wide average approximately $11,000 per year (Tr. 544–545).

11. Typical of the advertisements for the sale of World-Wide Encyclopedia placed by respondents in the newspapers, car cards and TV Guides since 1960 is the following:*

12. Based upon this advertisement and others of a similar nature (CX 15–21), counsel in support of the complaint contend that the respondents have made a number of false and misleading statements. (1) That the ads constitute a bona fide offer to sell World-Wide Encyclopedia at the price and on the terms stated in the ads. (2) That the World-Wide Encyclopedia and the dictionary will be delivered to prospective purchasers with a five-day free examination without any further condition, obligation or requirement. (3) That the offer in the ads is limited and expires within ten days. (4) That the dictionary is "free" and is delivered to and may be retained by all prospective purchasers without charge, condition or obligation other than as set forth in the advertisement. (5) That World-Wide Encyclopedia is comprehensive, complete, authoritative, new and up-to-date. (6) That through use of the trade name "Educational Foundation" that respondents operate a nonprofit organization engaged in educational work.

13. Respondents' advertisements of the World-Wide Encyclopedia are quite clearly made for the purpose of obtaining the names and addresses of people who are interested in the purchase of an encyclopedia principally for the use and education of their children. When the coupon is filled out by a prospective buyer and sent into the respondents' place of business, the encyclopedia is not shipped

* Pictorial exhibit omitted in printing.

prepaid or any other way to the prospective purchaser, nor is the dictionary. Instead, a salesman calls upon the prospective customer, demonstrates at the most one copy of the World-Wide Encyclopedia and quickly introduces the purchaser to the more expensive New Standard Encyclopedia and bends every effort to sell the New Standard Encyclopedia. This is nothing more than an age old bait and switch operation with the advertisement of the World-Wide Encyclopedia being the bait to get the prospective purchaser's name and address and thereafter switch him to the New Standard Encyclopedia. Respondents urge that the evidence of actual disparagement of the World-Wide Encyclopedia is lacking. In the examiner's opinion, it is not necessary that to constitute a successful bait and switch scheme that the disparagement need be any more than is demonstrated by this record. A bait and switch operation, when used by a skillful operator, can be so effective that the victim is practically unaware of what has happened to him until his name is on a contract and the salesman gone and he has some time to reflect upon what has happened to him.

14. A comparison of the annual sales of the two encyclopedias further demonstrates that virtually no attempt is made to sell the World-Wide. Sales from 1962 to 1965 are as follows:

	New Standard	World-Wide
1960	$600,000	$2,680
1962	528,000	8,460
1963	646,400	12,610
1964	631,200	12,060
1965	600,800	18,870 (TR. 541–542; 544–545.)

15. Furthermore, when one compares respondents' total sales of the World-Wide Encyclopedia with its annual advertising expense on the World-Wide of $48,000 per year, it is quite apparent what the plan of operation is. Respondents do no advertising whatsoever of the New Standard Encyclopedia. In addition the fact that respondents employ no salesmen to sell the World-Wide Encyclopedia but do to sell the New Standard is convincing proof that this is simply a bait and switch plan. The salesmen receive no commission or salary for selling or delivering the World-Wide Encyclopedia. Their entire sales commissions are based upon their sales of New Standard Encyclopedia. It appears that their only contact with the World-Wide Encyclopedia is to carry a somewhat worn copy in their brief case to attempt to establish a facade of complying with the terms of the advertisements quoted above, but in

reality, is nothing more than a lead in to the bait and switch operation.

16. The witnesses who appeared and testified in this matter were unanimous that no serious attempt was made to sell them the World-Wide Encyclopedia, that only brief reference was made thereto and the entire sales presentation by respondents' sales organization was directed to selling the New Standard Encyclopedia (Tr. 70, *et seq.;* 86, *et seq.;* 103, *et seq.;* 120, *et seq.;* 134, *et seq.;* 168, *et seq.;* 179, *et seq.;* 206, *et seq.;* 313, *et seq.;* 369, *et seq.;* and 462, *et seq.*). Consequently, it must be concluded that respondents' ads do not constitute bona fide offers to sell the World-Wide Encyclopedia on the terms set forth in the advertisements.

17. The testimony of the witnesses was also unanimous that respondents never mailed or delivered prepaid as the ads state any copies of the World-Wide Encyclopedia for a 5-day free examination. No such opportunity was ever given any of the witnesses who appeared and testified. Instead, a salesman called with one copy of the World-Wide Encyclopedia and immediately began to discourage its purchase and encourage the purchase of the New Standard Encyclopedia.

18. Respondents' advertisements have been run in various newspapers, TV Guides, car cards and television for a number of years. There has been no limitation as to time ever enforced by the respondents. Indeed, in Paragraph 7 of the respondents' answer, respondents admitted that they will deliver the World-Wide Encyclopedia to a prospective customer "even if the response to the advertisement is not mailed within said ten-day period, if its salesmen are still within the community after said ten days has expired."

19. The entire sense of respondents' advertisements is that if anyone mails in the coupon which is a part of the advertisement, he will receive prepaid for a 5-day free examination the World-Wide Encyclopedia and a copy of "Webster's Dictionary." The ads leave no doubt that anyone may keep the Webster's Dictionary even though he may decide after examination not to purchase the World-Wide Encyclopedia. The terms of this advertisement are never carried out since the dictionary is only given to a customer who actually purchases the World-Wide Encyclopedia or the New Standard Encyclopedia. In addition, since the condition is imposed by the respondents that one or the other set of encyclopedias must be purchased before the dictionary is given to anyone, it cannot be considered to be a free gift as the ad asserts. Rather, it is given on

the condition that another purchase be made and is therefore not a free gift.

20. Respondents' claims in their advertising that the World-Wide Encyclopedia is comprehensive, complete, authoritative, new and up-to-date are also false and deceptive. An examination of the World-Wide Encyclopedia makes it quite obvious that it is at best a very cheap set, poorly printed on poor paper. A brief study of some of the entries demonstrates the lack of accurate and complete information. An expert was called by counsel in support of the complaint to criticize the World-Wide Encyclopedia. Her testimony was quite confused but she nevertheless amply demonstrated that the World-Wide Encyclopedia is a very poor set (Tr. 35, *et seq.;* 593, *et seq.*). Respondents' advertising claims cannot be considered to be merely harmless puffing since the claims are so extreme and are distinctly a part of respondents' bait and switch method of sales.

21. In their advertisements, respondents from time to time have used the name "Educational Foundation." The use by respondents of this term constitutes false and deceptive advertising since it clearly imports that the respondents are engaged in some sort of nonprofit operation. The respondents are in no way engaged in an eleemosynary program but are strictly in business for profit. *In the Matter of American Photographic Society, et al.,* 54 F.T.C. 524; see also *In the Matter of Atlantic Research Foundation, Inc., et al.,* 46 F.T.C. 558. Consequently, their use of this term constitutes false and misleading representations.

22. At the time respondents make a sale of the New Standard Encyclopedia through their sales force, the purchaser signs a contract with the Eastern Guild, Inc. (CX 22). Within a very short time the customer receives a payment booklet with a covering letter from The First National Fidelity Co. (CX 23A and B). The letter to the customer advises that The First National Fidelity Co. has approved the customer's application for credit and states that this company is handling the financing of the installment purchase of the New Standard Encyclopedia. In the event a payment is not sent in to The First National Fidelity Co. by the customer, a number of follow-up letters are used on the letterhead of The First National Fidelity Co. (CX 24A–C, 25). The First National Fidelity Co. is a fictitious name used by the respondents for collection purposes. It is not an independent corporation or organization, but is completely owned, operated and controlled by the respondents (Tr. 439, *et seq.*).

23. In the event there are further non-payments of the amounts due for the purchase of a New Standard Encyclopedia, the customer then receives letters from the Metropolitan Credit Bureau soliciting payment of the delinquent account. The import of these letters (CX 26A and B) is that the Metropolitan Credit Bureau is separate and distinct both from The First National Fidelity Co. and from the respondents, corporate and individual. In fact, the Metropolitan Credit Bureau is merely a fictitious name used by respondents in attempting to collect delinquent accounts. The Metropolitan Credit Bureau is owned, operated and controlled completely by the respondents.

24. The next step in attempting to collect delinquent accounts is the use of a number of letters from the Vogt Collection Agency (CX 27A and B, 28A and B). These letters clearly import that the Vogt Collection Agency or Vogt Collection Service is a separate and distinct collection agency from The First National Fidelity Co. and any of the respondents, corporate or individual. The fictitious trade name, Metropolitan Credit Bureau, is also used in connection with the Vogt Collection Agency or Service correspondence. In fact the Vogt Collection Agency is merely a fictitious name used by the respondents to collect delinquent accounts. The Vogt Collection Agency is owned, operated and controlled by the respondents.

25. Through the use of these fictitious names, the respondents have represented that The First National Fidelity Company, the Metropolitan Credit Bureau and the Vogt Collection Agency are independent financial institutions or credit reporting and collecting agencies engaged in the collection of accounts and delinquent accounts which have been referred to them by a separate and distinct third party.

26. The First National Fidelity Co., the Metropolitan Credit Bureau and the Vogt Collection Agency are not bona fide, independent financial institutions engaged in financing, servicing and collecting installment or delinquent accounts. They are simply fictitious names used by the respondents in financing and collecting accounts and delinquent accounts (Tr. 439, *et seq.*). Consequently, their use by respondents constitutes false and misleading representations.

27. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of encyclopedias, dictionaries and other books and publications of the same general kind and nature as those sold by respondents. (Admitted in Resp. Ans., Para. 11.)

28. Counsel for respondents urged that conducting of the hearing in his absence and denial of his request for a 24-hour continuance of hearings violated the Fifth and Sixth Amendments of the Constitution and Section 6 of the Administrative Procedure Act (Resp. Proposed Finding 42, p. 14; Part VI, p. 35, Resp. Br.). This contention by counsel for the respondents is rejected.

29. The hearings in this matter were scheduled to commence September 26, 1966, in Philadelphia, Pennsylvania. The hearing rooms had been reserved and the hearing examiner had issued subpoenas for hearings throughout the week of September 26, 1966, for the case-in-chief. Late on Friday afternoon September 23, 1966, counsel for the respondents contacted the hearing examiner and advised him that he was engaged in a trial before the Philadelphia Common Pleas Court and that the matter would not be completed on the 23rd of September and would be carried over until September 26, 1966. The hearing examiner immediately contacted counsel in support of the complaint who agreed to contact their witnesses subpoenaed and scheduled for Monday, September 26, and cancel the hearing on that day. This was done. On Monday, September 26, 1966, the hearing examiner contacted counsel for respondents who was engaged in trial and was advised by him that the Common Pleas trial would probably continue over until Tuesday September 27. The examiner at that point could neither contact counsel in support of the complaint nor any of the witnesses scheduled for Tuesday and counsel for respondents was advised that the hearings would undoubtedly have to commence on Tuesday and to have another attorney appear at the hearing Tuesday morning. This was done and Mr. Robert K. Greenfield, a member of the respondents' law firm, appeared at the hearing (Tr. 25, *et seq.*). Counsel in support of the complaint were unable at this late date to cancel the witnesses called for that day, the majority of whom came from areas a considerable distance from the City of Philadelphia. The hearing examiner made arrangements on his own motion for procuring a daily copy of the transcript of hearings for the use of counsel for the respondents. No attorney was present representing respondents nor were any of the respondents or their officials nor employees present at the hearing on September 27. On September 28 counsel for respondents was given a copy of the transcript of the preceding day's hearings and was advised that any of the witnesses who appeared and testified on the preceding day would be recalled for cross-examination at the request of counsel for the respondents. Counsel for respondents later requested the right to cross-examine two of the witnesses who had appeared in his ab-

sence. They were recalled and fully cross-examined by counsel for the respondents (Tr. 582, *et seq.;* 593; *et seq.*). Counsel for respondents has made no specific objections to any of the questions or answers appearing in the transcript of hearing for September 27, 1966, but merely moved that the entire hearing for that day be stricken from the record. This motion was denied by the hearing examiner. Under these circumstances and while the examiner is well aware that a respondent can only be represented if his counsel is present, no harm, injury, or prejudice has resulted from the manner in which these hearings were conducted. Counsel for the respondents has failed to demonstrate with any specificity as to how the respondents have possibly been prejudiced by the conduct of these hearings.

CONCLUSIONS

1. The use by respondents of the false, deceptive and misleading statements and representations and practices as set forth in these findings has had, and now has, the capacity and tendency to mislead and deceive a substantial number of members of the purchasing public into the erroneous and mistaken belief that such statements and representations were and are true, and to cause substantial numbers of the purchasing public to purchase substantial quantities of respondents' products because of such erroneous and mistaken belief.

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

ORDER

It is ordered, That respondents Consumers Products of America, Inc., a corporation, and its officers, Eastern Guild, Inc., a corporation, and its officers, Keystone Guild, Inc., a corporation, and its officers, and Jack Weinstock, Nat Loesberg, Jack Gerstel and Louis Tafler, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of encyclopedias, books or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme or device wherein false, misleading or deceptive statements or represen-

tations are made in order to obtain leads or prospects for the sale of merchandise or services.

2. Discouraging the purchase of, or disparaging, any products or services which are advertised or offered for sale.

3. Representing, directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services.

4. Representing, directly or indirectly, that said merchandise will be delivered to prospective purchasers for a five-day free examination or for any other period of time without clearly and conspicuously revealing all of the conditions, obligations or requirements, pertaining to said offer.

5. Representing, directly or indirectly, that any merchandise is "free" or is delivered to or may be retained by purchasers or prospective purchasers without clearly and conspicuously revealing all of the terms, conditions or obligations necessary to the receipt and retention of said merchandise.

6. Representing, directly or indirectly, that respondents' World-Wide Encyclopedia is comprehensive, complete, authoritative, new or up-to-date.

7. Using the trade name "Educational Foundation" in connection with respondents' enterprises or representing, in any other manner, that respondents operate any non-profit organization engaged in educational work.

8. Representing, directly or indirectly, that any offer is limited as to time: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that such time restriction or limitation was actually imposed and in good faith adhered to by respondents.

9. Representing, directly or indirectly, that The First National Fidelity Co., Metropolitan Credit Bureau, or Vogt Collection Agency or any other fictitious name, or trade names owned in whole or in part by respondents or over which respondents exercise any direction or control are independent, bona fide financing, collection or credit reporting agencies; or representing in any other manner that delinquent accounts have been turned over to a bona fide, separate collection agency or to a credit reporting agency for collection or for any other purpose unless respondents in fact have turned such accounts over to an agency of the nature represented.

10. Misrepresenting, in any manner, the kind of offer made to sell merchandise, the terms, limitations or conditions of

any offer, the quality, composition or characteristics of respondents' merchandise, or the nature or status of respondents' business or of their collection operations.

OPINION OF THE COMMISSION

SEPTEMBER 7, 1967

BY DIXON, *Commissioner:*

This case comes before the Commission upon respondents' appeal from the initial decision wherein the hearing examiner found that the evidence supports all of the allegations of the complaint, and issued his order to cease and desist.

The respondents are three corporations and four individuals who are named in their official capacities and individually. At the time complaint issued, these individuals were the officers and stockholders of the corporate respondents. One of these individuals, Jack Gerstel, retired in 1965 but retained his stock ownership. The respondents are charged with engaging in certain unfair and deceptive practices in the sale of encyclopedias in violation of Section 5 of the Federal Trade Commission Act.

As found by the hearing examiner and not disputed on this appeal, respondents are engaged in the sale of two sets of encyclopedias. One set, known as World-Wide Encyclopedia, consists of ten volumes and is sold by respondent Consumers Products of America, Inc., at a price of $9.95. The other set, New Standard Encyclopedia, which, for a price of $159.50, includes fourteen volumes and an information and quarterly extension service, is sold by respondent Eastern Guild, Inc.

Also undisputed are the examiner's findings that Consumers Products spends about $4,000 monthly in advertising World-Wide Encyclopedia through newspaper advertisements, car cards for use in transit systems, TV Guide and television, and that it does not employ any salesmen in selling this encyclopedia. Eastern Guild, Inc., does no advertising of the New Standard Encyclopedia and employs an average of 12 salesmen a year to sell this set.

The complaint charges that through advertisements for the World-Wide Encyclopedia respondents have falsely and deceptively represented (1) that they were making a bona fida offer to sell the World-Wide Encyclopedia at the price and on the terms and conditions stated in the ads, (2) that the World-Wide Encyclopedia and a dictionary would be delivered to prospective purchasers for a five-day free examination without further condition, obligation or requirement, (3) that the offer is limited and expires in ten

days, (4) that a dictionary is given "free" and is delivered to and may be retained by all prospective purchasers without charge, condition or obligation other than as set forth in the ads, (5) that the World-Wide Encyclopedia is comprehensive, complete, authoritative, new and up to date, and (6) that through the use of the trade name "Educational Foundation," they operate a nonprofit organization engaged in educational work. Additionally, the complaint charges respondents with falsely representing that certain trade names under which they operate are bona fide, independent financial and credit reporting institutions.

We consider first respondents' argument that the hearing examiner erred in conducting the first day's hearing in the absence of respondents' counsel. The facts on this issue are likewise not disputed.

In summary, these facts show that hearings in this matter were set to begin on Monday, September 26, 1966, in Philadelphia, Pennsylvania. On Friday, September 23, 1966, respondents' counsel contacted the hearing examiner and advised him that he was engaged in a trial before the Common Pleas Court in Philadelphia, and that the trial would be carried over to September 26. For this reason, the initial hearing set for Monday was cancelled and reset for September 27. On September 26, the examiner learned that respondents' counsel would not be available on September 27, as the Common Pleas Court trial would extend through that date. The examiner states that he could not contact complaint counsel or any of the witnesses scheduled to appear on September 27. He, therefore, told respondents' counsel that hearings would begin as scheduled and to have another attorney appear at the hearing.

A member of respondents' counsel's firm appeared at the initial hearing. He informed the examiner that only respondents' counsel was prepared to proceed, and requested a continuance until the following morning. When this was denied, he left before any witnesses were called.

On the following morning, respondents' counsel was furnished with a transcript of the previous day's hearing and was informed that he had the right to recall for cross-examination any witness who had testified. Subsequently, pursuant to his request, respondents' counsel did fully cross-examine an expert witness and one of five consumer witnesses who testified at the initial hearing.[1]

The hearing examiner states that respondents' counsel made no

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consumer witnesses testified in the absence of respondents' counsel, the testimony of one of these witnesses was stricken on the joint motion of complaint counsel and respondents' counsel.

specific objection to any of the questions or answers appearing in the transcript of the first day's hearing, and concluded that respondents' counsel failed to demonstrate with any specificity as to how respondents have possibly been prejudiced by the conduct of the hearings.

In their appeal on this issue, respondents are particularly concerned with the testimony of the expert witness. While respondents claim to have shown prejudice as a result of this witness' testimony, they argue that even were they not able to do so, the question is usually so impossible to answer in retrospect that provable prejudice cannot be a determinative factor.

During oral argument before the Commission, respondents' counsel stated that a determination as to whether prejudice has been shown, as well as a determination on the motion to strike the evidence, could be made on the basis of the expert's testimony on cross-examination. We have closely reviewed the testimony of the expert witness, both on direct and cross-examination, as well as the testimony of the five consumer witnesses who appeared in the absence of respondents' counsel, and find no substance in respondents' claim of demonstrated prejudice. For example, respondents contend that the expert testified concerning an earlier edition of the World-Wide Encyclopedia and had never seen the edition under attack. The latest edition of this set of encyclopedias was copyrighted in 1962. We have examined the set of encyclopedias (CX 7) upon which the expert based her testimony. Of this set of 10 encyclopedias, only two volumes were not copyrighted in 1962 (Volumes 1 and 8). The expert's testimony concerning the inadequacy of the set is not limited to the two earlier editions but encompasses the entire set.

Also as to the alleged prejudice, respondents state that one of the volumes had been misbound by the binder. We are not convinced from this record that, as respondents contend, the expert's testimony would have been altogether different if the binding error in this volume had been brought to her attention. In any event, the other volumes were properly bound and we fail to see how respondents could possibly be prejudiced by her testimony concerning the other volumes.

Respondents' counsel, during oral argument, took the position that the examiner's findings predicated on the expert's testimony "go to the heart of this case" and therefore the bait and switch charge, which is the principal issue under the complaint, cannot be sustained without those findings. This is clearly in error. The advertising representation to which the expert's testimony is

directed is only a part of the bait aspect of respondents' sales scheme. Other claims were allegedly used to lure persons interested in buying an encyclopedia to respond to respondents' offer. The examiner's findings are not based solely on the testimony of the expert but take into consideration the entire record, including the testimony of consumer witnesses who testified in the presence of respondents' counsel. Although we think that respondents have failed to demonstrate prejudice,[2] we will grant their request and will base our decision exclusively on the testimony of the witnesses who testified after the first day of the hearings.

We turn, therefore, to a consideration of respondents' argument that the weight of the evidence does not support the examiner's finding that their advertisements did not present a bona fide offer to sell the World-Wide Encyclopedia. Specifically, the examiner found that the advertisements were used as bait to get the prospective purchaser's name and address and thereafter switch him to the New Standard Encyclopedia.

Respondents first contend that the representations in their advertising for the World-Wide Encyclopedia are not false or misleading and therefore cannot constitute bait advertising.

The record contains numerous examples of the advertisements used by respondents. All follow the same format. In each newspaper advertisement there is a certificate which a prospective purchaser completes by filling in his name and address, and returns to respondents. The first sentence in this certificate states: "Without any obligation to me, please send me immediately, prepaid, for 5 DAYS FREE EXAMINATION, the 10-volume set of the new WORLD-WIDE ENCYCLOPEDIA." We think the obvious meaning of this sentence is that the set will be *mailed* to the prospective customer to permit him five days to decide if he wants to keep it. While the Commission is entitled to draw upon its own experience to determine what meaning is conveyed to the public by particular advertisements,[3] this interpretation is supported by a preponderance of the evidence. Of the nine consumer witnesses who testified on this point, seven stated that they expected the set to be mailed to them.[4]

[2] In *N.L.R.B.* v. *American Potash & Chemical Corp.*, 98 F. 2d 488 (9th Cir. 1938), respondents attorney's request on the morning of the hearing for a 24 hour continuance, on the ground that he had to be in Federal District Court on another matter, was denied by the Board. As a result, the Board's case went on for about one hour in the absence of any attorney for respondents. The court pointed out that the denial of a motion to postpone the commencement of a hearing may be necessitated by the presence of the assembled witnesses of the Board. The court held that "In the absence of a showing of *prejudicial* error in the exercise of the Board's discretion, we cannot set aside the Board's findings." (Emphasis in original.)

[3] *E. F. Drew & Co.* v. *Federal Trade Commission*, 235 F. 2d 735 (2d Cir. 1956).

[4] Tr. 183, 210, 268, 313, 332; CX 50, pp. 22, 38.

It is undisputed that it is respondents' practice not to mail the set but to have it delivered to a prospective purchaser's residence by a salesman. Moreover, the salesman does not work for Consumers Products of America, Inc., which sells the World-Wide Encyclopedia, but is an employee of Eastern Guild, Inc., which sells the more expensive New Standard Encyclopedia. The salesman receives no commission or salary for selling or delivering the World-Wide Encyclopedia. His sales commission is entirely dependent upon the sale of the expensive encyclopedia. Not only is the prospective customer misled into believing that he will receive the World-Wide set by mail but, as will be later shown, he does not get a five day free examination of the set, as specifically promised in the advertisement. Instead, he is immediately subjected to a sales pitch for the New Standard Encyclopedia.

With further reference to whether respondents' advertisements constitute a bona fide effort to sell World-Wide, the complaint alleges that a dictionary is not given free to prospective purchasers, as represented.

Respondents' advertising for its World-Wide Encyclopedia is always headlined in very large letters with a "FREE!" offer of a Webster's Dictionary. The certificate which the reader is invited to complete and send in, after stating that the set can be returned in five days without obligation, further states: "FREE GIFT. Also send me the Thumb-indexed Webster's New American Dictionary as a gift. The dictionary is mine FREE without charge." Respondents contend that the advertising representations constitute only an offer to give the dictionary without additional charge to any person who actually purchases one of the two sets of encyclopedias. This argument has no merit, as the meaning attributed to the offer by respondents is clearly contrary to the language of the advertising. We think it obvious that the advertisement is meant to convey the impression that the dictionary may be retained without charge regardless of whether the prospective purchaser buys the encyclopedia. This is the interpretation placed on the advertising by five of the six witnesses who testified specifically on this issue.[5] Since the evidence establishes that respondents gave the dictionary only on the condition that a person buys a set of encyclopedia, the advertised offer is deceptive and not bona fide.

Also going to the question of the sincerity of respondents' advertising is the specific allegation in the complaint that respondents falsely represent that the offer of the World-Wide Encyclo-

[5] Tr. 210, 233, 238. CX 50, pp. 24, 37.

pedia for $9.95 with the "free" dictionary is limited and expires within ten days. Each of the numerous advertisements in this record bears the conspicuous representation: "This Offer Expires In 10 Days!" The hearing examiner found this claim to be deceptive, relying in part on the admission in respondents' answer that they will deliver the encyclopedia "even if the response to the advertisement is not mailed within said ten-day period, if its salesmen are still within the community after said ten days has expired."

The record supports the examiner's findings without relying on respondents' answer. Commission Exhibit 15A–J are copies of respondents' newspaper ads published in the Philadelphia Daily News. These ads, each featuring the ten day limited offer, were published in the months of February, March, May, June and November, 1960, and in April, May, July, August and September, 1961. Obviously, this was a continuing offer and respondents' effort to enhance the value thereof by representing that it was limited to ten days is deceptive.

The complaint further alleges that through the use of the trade name "Educational Foundation," respondents have falsely represented that they operate a nonprofit organization engaged in educational work. The hearing examiner, on the undisputed fact that respondents are engaged in business for profit, found that their use of this trade name has a tendency and capacity to mislead the public. We fully agree with this finding.

The complaint also specifically challenges one other advertising representation. It is alleged that the World-Wide Encyclopedia is not comprehensive, complete, authoritative, new and up to date as claimed. Complaint counsel's proof in support of this charge is the testimony of the expert witness who testified in the absence of respondents' counsel. Contrary to respondents' contention, we do not find that this witness told an "entirely different story" on cross-examination. However, since we have decided not to consider the testimony of this witness, we must conclude that there has been a failure of proof as to this charge.

We have found that respondents have falsely represented that the advertised set of World-Wide Encyclopedia would be mailed to a prospective purchaser, that he would be allowed a five-day free examination of the set before deciding whether to purchase, that he would be allowed to retain the dictionary without charge whether or not he purchased a set of encyclopedia, and that the offer was limited to ten days. These findings fully support the

conclusion that respondents were not making a sincere attempt to sell the World-Wide Encyclopedia through their advertising.

Respondents contend that there must be evidence of actual disparagement of or refusal to deliver [6] the advertised product in order to establish the bait and switch scheme found by the examiner.

In making this argument, respondents concede that nine of the witnesses testified that the salesmen disparaged the advertised product. However, they contend that the testimony of nine other witnesses fully supports their own description of their sales technique which they describe as follows: The salesman is taught never to disparage the product and to introduce the New Standard Encyclopedia to the customer only if he is given the customer's permission to do so. The customer is advised that a more expensive encyclopedia is available, and if the customer expresses interest in seeing it, it is shown to him. Respondents contend that this does not constitute bait and switch and that the greater weight of the evidence supports respondents' description of their practices.

We have read the record and it is beyond doubt that the examiner's findings on this issue are supported by the evidence. In fact, the particular means of disparagement generally employed by respondents' salesmen clearly stand out.

Not considering the testimony of the consumer witnesses who appeared in the absence of respondents' counsel,[7] we have in this record the testimony of sixteen witnesses concerning their dealings with respondents' salesmen. Two of these, husband and wife, testified concerning the same transaction. Only four witnesses,[8] whose testimony we will discuss later, did not testify as to actual disparagement by the salesmen.

The most prevalent method of disparagement stems from the repeated reference in respondents' advertising to the educational value of the World-Wide Encyclopedia for children. Thus, respondents' ads contain such claims as "college education in itself" and

[6] Respondents state that 5,470 World-Wide Encyclopedias were sold from 1960 through 1965 as compared to 11,937 New Standard Encyclopedias. (This does not include 1961 for which comparable figures were not available.) In our view, these figures support the bait and switch scheme. However, this record clearly establishes that respondents were aware of the investigation initiated in this matter in 1961 and were fully informed as to their practices under consideration. In the previous year, they had sold 268 World-Wide Encyclopedias as compared to 2,334 New Standard. Under these circumstances, we attach little significance to the subsequent increased sales of the World-Wide Encyclopedia.

[7] To avoid any misunderstanding, the testimony of all of these consumer witnesses fully supports the pattern of disparagement established by the other witnesses.

[8] Mrs. Wajda, Mrs. Barbara Hawkins, Mr. Oros and Mrs. Lee.

"is especially valuable where children of school age use these notable volumes as an aid in their studies."

The following is typical of the testimony of eight consumer witnesses: [9]

Then he [salesman] brought the older books [World-Wide] in and then he told me, he said, you owe it to your child. These books here, I will be truthful with you, these books are outdated. It wouldn't pay for you to buy these books. It won't do your child any good. You can't find the information for what they are teaching in school today. (Tr. 168.)

I told him [salesman] I had two older grandchildren [in high school] and that the $10 set of books, he said, was for lower grade of school. (Tr. 253.)

He [salesman] said, first of all, let me ask you how high are your children in school. I told him the only one I had was one girl that goes to Junior High School. He said, that these we have advertised wouldn't be good for her because she is in Junior High, but I have a set I will show you. (Tr. 463.)

He [salesman] said, "What grade is your son in?" I said, "In the sixth grade," and he said, "Well, apparently this won't do him very much good because it is only good up until the fifth grade, but we have another one." (CX 50, p. 39.)

In this last transaction, the salesman was Jack Gerstel, one of the respondent-owners. He was sales manager and it was his duty to train new salesmen. This would appear to explain the same pattern followed by the salesman involved in the other transactions.

In addition to these eight transactions, two other witnesses testified that the salesmen disparaged the advertised set. In one of these instances, the witness testified that the salesman took one volume of the World-Wide Encyclopedia out of his briefcase "And as he handed it to me, he ruffled through the pages, like you do, and he said, 'As you can see, these books aren't complete.'" (Tr. 314.) In the other case, the salesman didn't even show the advertised set to the prospective customer. This witness stated that "He [salesman] mentioned about it, I believe, for a couple of seconds, but said there was no comparison to this set [New Standard]. He knew I would not want it." (Tr. 337.) It is to be noted that in three other transactions, the prospective purchasers were never shown the World-Wide Encyclopedia by the salesmen.

The complaint charges that respondents were not making a bona fide offer to sell the World-Wide Encyclopedia, that the purpose of the offer was to obtain leads as to persons interested in buying an encyclopedia, that respondents do not deliver the encyclopedia on the terms stated in the advertisement, and that

[9] Mrs. Boyer, Tr. 168; Mrs. Walker, Tr. 206; Mrs. Carhart, Tr. 253; Mrs. Sandelier, Tr. 370; Mrs. Ruth, Tr. 463; Mrs. Buch, CX 50, p. 6; Mrs. Morrow, CX 50, p. 39; Mr. Shire, CX 50, p. 93.

their salesmen disparage the advertised set and make every effort to sell a more expensive set. This is exactly the sales scheme described by ten witnesses in the fourteen transactions documented in this record.[10]

As previously mentioned, there were four consumer witnesses who did not testify as to any oral disparagement of the advertised product by respondents' salesmen. However, the testimony of two of these fully supports the bait and switch scheme found by the examiner.

Both of these witnesses were interested in encyclopedias for their children. One of them stated that the book the salesman showed her was "very handled and rough looking" and when she looked at it she told the salesman "right then" that she was not interested. She further testified "And when I looked at the book, that's when I told him, I don't think that book would do her [child] any justice because it was just like a third grade reader. I said, she's in the fifth grade and I don't think that would do her any good, so I wouldn't be interested in it." [11]

The testimony of another witness is similar. He stated that after the salesman showed him the book "we found that they weren't, you know, books for our child anyway. She was going to high school. And they were a smaller set of books for younger children." [12]

Both of the above witnesses were switched to the more expensive New Standard Encyclopedia. The advertised set was offered to assist children in school without limitation. In our view, respondents' practice of demonstrating a book which in itself discouraged persons from buying for the purpose advertised is sufficient to warrant a finding that respondents' offer was not bona fide.

On this record, we find that the bait and switch charge has been established by substantial evidence, and respondents' appeal on this issue is denied.[13]

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[10] We do not include one transaction, testified to by a husband and wife, since there was no disparagement by the salesman. In that instance, the salesman who called in response to the World-Wide coupon offer, delivered the New Standard set to the husband who did not know what his wife had ordered. The salesman had the husband sign the contract, and refused to take the set back when the wife arrived on the scene.

[11] Tr. 186.

[12] Tr. 360.

[13] We find no substance in respondents' argument that the evidence is not sufficient to support the charge for the reason that complaint counsel called only twenty witnesses out of about 58,000 transactions over a six year period. As stated by the court: "The fact that petitioners had satisfied customers was entirely irrelevant. They cannot be excused for the deceptive practices here shown and found, and be insulated from action by the Commission in respect to them, by showing that others, even in large numbers, were satisfied with the treatment

Respondents have also appealed from the examiner's finding that they have used fictitious names and representations in connection therewith which create the false impression that the named organizations are bona fide businesses engaged in financing, servicing, credit reporting or collection services.

The facts concerning respondents' use of fictitious names are not disputed. A purchaser of a set of New Standard Encyclopedias signs a contract which bears the name of the corporate respondent, Eastern Guild, Inc. Shortly thereafter, the purchaser receives a coupon booklet for installment payments together with a covering letter, each of which bears the name of The First National Fidelity Co. The covering letter contains statements such as "We have approved your application for credit * * *" and "In financing your installment purchases through us * * *."

If a purchaser fails to make a payment, he receives a series of three letters on the letterhead of The First National Fidelity Co. The first of these letters makes reference to "the time we purchased your note."

A purchaser who does not respond to The First National Fidelity Co. letters receives letters from the Metropolitan Credit Bureau. These letters state that Metropolitan is a credit reporting agency, that it has been informed by First National Fidelity Co. that the purchaser has not paid as required and that if the account is not adjusted, the purchaser's credit rating will be recorded in its files.

A purchaser who still fails to pay receives letters from Vogt Collection Service (or Agency). The first of these letters states that "the above-named Creditor [First National] claims that you are indebted to them." It further advises the purchaser that "you have the opportunity to deal direct with the claimant [First National]" for a period of three days.

Obviously, the import of these letters is that each of the named organizations is separate and distinct from the others and from the respondents. The testimony of the consumer witnesses fully supports that finding by the examiner.[14]

The examiner further found, and it is not disputed on this appeal, that The First National Fidelity Co., Metropolitan Credit Bureau and Vogt Collection Agency are all fictitious names used by respondents and that each is fully owned, operated and con-

petitioners accorded them." *Independent Directory Corp.* v. *Federal Trade Commission*, 188 F. 2d 468, 471 (2d Cir. 1951).

[14] Tr. 171, 189, 213, 216, 241, 242, 257, 278, 363, 365, 372, 477; CX 50, pp. 32, 69.

trolled by respondents. He concluded that the use of these names by respondents constitutes false and misleading representations.

Respondents present three arguments in their appeal on this issue. First, they contend that all of the fictitious names are properly registered under Pennsylvania law, and doing business in this fashion is permitted and encouraged in that State. Respondents do not go so far as to argue that a fictitious name registered under state law may be used if it has a capacity to deceive the public. Unfair or deceptive acts or practices in commerce are declared unlawful under Section 5 of the Federal Trade Commission Act. We find no authority for the proposition that compliance with a penal state statute, such as is here involved, constitutes a legal defense in a proceeding under the Federal Trade Commission Act. Accordingly, respondents' first argument on this point is rejected.[15]

Respondents next argue that the use of the three fictitious names served an obvious and legitimate economic purpose. They state that the individual respondents control a number of other business organizations dealing in installment sales of articles having nothing to do with encyclopedias. They further state that it would be wasteful to maintain separate collection departments for each of these enterprises and therefore all three fictitious names served all of respondents' sales enterprises at a considerable saving of money. This argument requires little comment. The test of legality under Section 5 is whether or not the practice is unfair or deceptive. If it is, the practice must be prohibited regardless of the economies accruing to the perpetrator.

Finally, respondents contend that complaint counsel produced no evidence that they have used their fictitious names as shields against claims of consumers. The short answer to this argument is that such evidence is not necessary to establish a violation. As the Commission stated in answer to this same argument in the *Wm. H. Wise* case, *supra*, "The basis of the complaint against respondents is that they falsely represented PPS as being a bona fide independent collection agency, when, in fact, it was not, and that such misrepresentation has the tendency and capacity to deceive. Nothing more need be proved." It is established by the documents themselves and by the testimony of consumer witnesses that purchasers are led to believe that their accounts have been turned over to independent agencies for payment and collection. Proof that respondents actually forestalled claims through use

[15] *In the Matter of Wm. H. Wise Co., Inc.*, 53 F.T.C. 408 (1956).

of such deception is not required to support an order to cease and desist. This argument by respondent is rejected.

Respondents have presented one final argument which we find to be wholly without substance. They state that as part of its investigation, the Commission mailed to respondents' customers a questionnaire containing leading questions. They argue that the use of such a questionnaire to refresh the recollections of witnesses destroys the reliability and probity of those witnesses and that the examiner erred in failing to strike their testimony.

It is not disputed that questionnaires were sent out by the Commission in the course of the investigation. RX 4 is an example of such questionnaire and the sample covering letter is dated in January 1962. However, there is no evidence from which it can be determined how many of the consumer witnesses even received such questionnaire. More importantly, there is not one shred of evidence that complaint counsel used a questionnaire to refresh the recollection of any witness. Complaint counsel expressly stated on the record that he did not use the questionnaire in talking with the witnesses. His statement is fully supported by the testimony of the only witness who was questioned by respondents' counsel concerning the use of the questionnaire. Accordingly, we reject respondents' argument on this issue.

With the exceptions previously noted, we will adopt the hearing examiner's order. However, on the facts of this case, we believe that the examiner's order should be implemented by an additional prohibition to insure enforcement of our findings of a violation.[16]

The evidence establishes that respondents maintain an average of twelve salesmen at any given time. However, in any given year, respondents employ from thirty-five to forty salesmen. Obviously, a strict degree of control is required over these transient employees. Moreover, these persons are employees of Eastern Guild, Inc., which sells the more expensive New Standard Encyclopedia. They receive no commission or salary for selling or delivering the World-Wide Encyclopedia. Their only remuneration is based on sales of the more expensive set. This sales technique requires an affirmative means of assuring that the order will be obeyed. Accordingly, respondents will be required to deliver a copy of our order to all present and future salesmen and to obtain a signed statement from these persons that they agree to refrain from engaging in the practices prohibited by the order and further agreeing that upon failure to do so, they may be dismissed or

[16] *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 (1957).

their commissions, salaries or other remuneration may be withheld.

On the basis of the foregoing, respondents' appeal from the examiner's ruling that the charge set forth in subparagraph 5 of Paragraph Seven of the complaint has been sustained, is granted. In all other respects, respondents' appeal is denied. An appropriate order will be entered.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the initial decision, and the Commission having determined that said appeal should be granted in part and denied in part, and having further determined that the initial decision should be modified to conform with the views expressed in the accompanying opinion:

It is ordered, That the initial decision be modified by striking therefrom finding number 20 on page 544 thereof and substituting the following:

> 20. The complaint alleges that respondents have falsely represented that the World-Wide Encyclopedia is comprehensive, complete, authoritative, new and up to date. The evidence adduced by complaint counsel in support of this allegation is the testimony of an expert witness who testified on the first day of the hearings in the absence of respondents' counsel. Although this witness was subsequently cross-examined by respondents' counsel, the Commission has determined not to consider the testimony of any witness who testified when respondents' counsel was not present. Accordingly, the Commission finds that there is not sufficient evidence to support this allegation of the complaint.

It is further ordered, That the initial decision be modified by striking therefrom the last sentence in finding number 28 on page 546.

It is further ordered, That the order contained in the initial decision be, and it hereby is, modified to read as follows:

> *It is ordered,* That respondents Consumers Products of America, Inc., a corporation, and its officers, Eastern Guild, Inc., a corporation, and its officers, Keystone Guild, Inc., a corporation, and its officers, and Jack Weinstock, Nat Loesberg, Jack Gerstel and Louis Tafler, individually and as officers of said corporations, and respondents' agents, representatives and employees, directly or through any corporate

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

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

2. Discouraging the purchase of, or disparaging, any products or services which are advertised or offered for sale.

3. Representing, directly or by implication, that any products or services are offered for sale when such offer is not a bona fide offer to sell such products or services.

4. Representing, directly or indirectly, that said merchandise will be delivered to prospective purchasers for a five-day free examination or for any other period of time without clearly and conspicuously revealing all of the conditions, obligations or requirements, pertaining to said offer.

5. Representing, directly or indirectly, that any merchandise is "free" or is delivered to or may be retained by purchasers or prospective purchasers without clearly and conspicuously revealing all of the terms, conditions or obligations necessary to the receipt and retention of said merchandise.

6. Representing, directly or indirectly, that any offer is limited as to time: *Provided, however,* That it shall be a defense in any enforcement proceeding instituted hereunder for respondents to establish that such time restriction or limitation was actually imposed and in good faith adhered to by respondents.

7. Representing, directly or indirectly, that The First National Fidelity Co., Metropolitan Credit Bureau, or Vogt Collection Agency or any other fictitious name, or trade names owned in whole or in part by respondents or over which respondents exercise any direction or control, are independent, bona fide financing, collection or credit reporting agencies; or representing in any other manner that delinquent accounts have been turned over to a bona fide, separate collection agency or to a credit reporting agency for collection or for any other purpose, unless respondents in fact have turned such

accounts over to an agency of the nature represented.

8. Using the trade name "Educational Foundation" in connection with respondents' enterprises or representing, in any other manner, that respondents operate any nonprofit organization engaged in educational work.

9. Misrepresenting, in any manner, the kind of offer made to sell merchandise, the terms, limitations or conditions of any offer, or the nature or status of respondents' business or of their collection operations.

10. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of the respondents' products to purchasers; and failing to secure from each such person a signed statement acknowledging receipt of said order and agreeing to abide by the requirements of said order and to refrain from engaging in any of the acts or practices prohibited by said order; and for failure so to do, agreeing to dismissal or to the withholding of commissions, salaries and other remunerations or both to dismissal and to withholding of commissions, salaries and other remunerations.

It is further ordered, That the charge set forth in subparagraph 5 of Paragraph Seven of the complaint be, and it hereby is, dismissed.

It is further ordered, That the hearing examiner's initial decision, as modified and as supplemented by the Commission's opinion, be, and it hereby is, adopted as the decision of the Commission.

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

FEDERATED BUREAU OF INSTALLMENT CREDIT, INC., ET AL.

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

Docket 8700. Complaint, July 29, 1966—Decision, Sept. 7, 1967.

Order requiring a Blue Island, Ill., collection agency to cease misrepresenting its status, place of business, and using legal-appearing documents.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having, reason to believe that Federated Bureau of Installment Credit, Inc., a corporation, and William E. Dykstra, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Federated Bureau of Installment Credit, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 12669 South Western Avenue, Blue Island, Illinois.

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

PAR. 2. Respondents are now, and for some time last past have been, engaged in the business of operating a collection agency, under the name Federated Bureau of Installment Credit, Inc.

Respondents solicit and receive accounts for collection from business and professional people located in Illinois and other States. In carrying out their aforesaid collection business, respondents have engaged, and are now engaged, in extensive commercial intercourse in commerce among and between the various States of the United States, including the transmission and receipt of monies, checks, collection letters, forms, contracts and other written instruments.

In carrying out their aforesaid collection business, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 3. In the course and conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with other corporations, firms and individuals engaged in the business of collecting alleged delinquent accounts.

PAR. 4. Through the use of the word "Federated" as a part of their trade name, said respondents represented and now represent, directly or by implication, that the corporate respondent is an organization having members.

PAR. 5. In truth and in fact, the corporate respondent has no members, but, on the contrary, the sole business of respondents is the operation of a collection agency from a single office located in Blue Island, Illinois.

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

PAR. 6. Respondents, in the course and conduct of their aforesaid business, and for the purpose of inducing individuals, firms and corporations to assign accounts to the respondents for collection, as well as aiding in making collections from debtors, have made certain statements and representations, directly or by implication, with respect to their business. Typical, but not all inclusive of such statements and representations, are the following:

1. Nation-wide collections and corresponding attorneys.
2. Donald N. Adams, Collection Department.
3. P. Lawson, Manager, Collection Department.
4. Copy—Legal Forwarding Department Investigator.
5. P. Nelson, Investigation Department.
6. B. Peters, Collection Department.
7. C. L. Ingrahm, Legal Forwarding Department.
8. C. Roberts, Auditing Department.
9. L. D. Todd, Manager, Legal Forwarding Department.
10. P. Lawson, Pre-Trial Department.
11. Regional Office.

PAR. 7. By and through the use of the aforesaid statements and representations set forth in Paragraph Six hereof, and others of similar import and meaning but not expressly set out herein, respondents represented, and now represent, directly or by implication, that:

1. The business of the respondents is nationwide in scope and that they have nationwide corresponding attorneys and collectors directly affiliated and connected with them.

2. The business of respondents is departmentalized and they employ a large staff of employees.

3. That the corporate respondents' Blue Island office is a regional office of Federated Bureau of Installment Credit, Inc.

PAR. 8. In truth and in fact:

1. The business of the respondents is not nationwide in scope and does not have nationwide corresponding attorneys or collectors directly affiliated and connected with them.

2. The business of the respondents is a small one, with no departments, one office and only a few employees to assist the individual respondent.

3. Respondents' Blue Island office is not a regional office of Federated Bureau of Installment Credit, Inc., and such office is the sole place of business of respondents.

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

PAR. 9. In the course and conduct of their collection business, and for the purpose of inducing the payment of alleged delinquent accounts, respondents transmit and mail, and cause to be transmitted and mailed, to alleged delinquent debtors, various form letters, demands for payment, requests for information, and other printed material.

Typical and illustrative of respondents' forms, but not all inclusive thereof, is the following:*

PAR. 10. By and through the use of the aforesaid form and the statements and representations set forth therein and others of similar import and meaning but not expressly set out herein, respondents represented, and now represent, directly or by implication, that said "Final Demand" document in form and content is an official document duly issued or approved by a court of law.

PAR. 11. In truth and in fact, said "Final Demand" form is not an official document duly issued or approved by a court of law, but on the contrary is wholly private in its origin.

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

*The form "Final Demand Prior to Suit Process" omitted in printing.

PAR. 12. The use by respondents of the foregoing false, misleading and deceptive representations and practices has had, and now has, the tendency and capacity to mislead a substantial number of creditors and debtors into the erroneous and mistaken belief that such representations were, and are, true, and into the assignment of accounts to it for collection and in the collection of monies from debtors because of such mistaken and erroneous belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. John T. Walker, supporting the complaint.

Mr. William A. Cain, of Chicago, Ill., for respondents.

INITIAL DECISION BY JOSEPH W. KAUFMAN, HEARING EXAMINER

APRIL 6, 1967

This is a proceeding under Section 5 of the Federal Trade Commission Act against a collection agency and the officer who formulates, directs, and controls its acts and practices. The complaint alleges unfair methods of competition as well as deceptive acts, in commerce. The alleged misrepresentations fall in three categories, as follows:

Use of the word "Federated" in the corporate name, allegedly implying a federation of members (or affiliates).

Misrepresentations generally, by implication, in letters and notices (mostly to debtors).

Simulation of court forms in Final Demand forms (sent to debtors).

There is a defense of discontinuance as to most of the representations, including those in the Final Demand forms or notices, but not, of course, as to the use of "Federated" in the corporate name.

If the use of the name "Federated" is deceptive there is a question as to whether or not the corporate name can still be lawfully used if supplemented by appropriate qualifications, or otherwise qualified.

Finally, should it be found that any cease and desist order should issue herein, there is the question as to whether the individual respondent officer is to be named individually in the order, or only in his capacity as an officer.

A prehearing conference was held herein and, due to the excellent cooperation of counsel on both sides, stipulations between them of production of documents and free disclosure, it was possible to try this case in a single day.[1] Both sides submitted proposed findings of fact, although respondents' proposed findings are rather brief and not in the usual form. Both sides submitted written discussion on the law or legal argument.

Any pending motion which has not been disposed of in this proceeding is to be deemed disposed of in accordance with and consistently with the present decision.

FINDINGS OF FACT

The following are the findings of fact herein, supplemented by such findings as may be made in the course of the discussion immediately following the present formal findings. All proposed findings of fact not found herein are disallowed.

1. Respondent Federated Bureau of Installment Credit, Inc., is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 12669 South Western Avenue, Blue Island, Illinois.

(Admitted in answer by omission to deny. Further admitted at prehearing conference (R. 4–5).)

Respondent William E. Dykstra is an individual and an officer of the corporate respondent. His address is the same as that of the corporate respondent.

(Admitted in answer by omission to deny.)

He formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. He (with his wife) owns the majority of the corporate stock. He derives most of his personal income through the corporation.

(Admitted at the prehearing conference (R. 5, 7), reserving, however, the question of his individual liability. See discussion under INDIVIDUAL LIABILITY, pp. 579–585, *infra*.)

2. Respondents are now, and for some time last past have been, engaged in the business of operating a collection agency, under the name Federated Bureau of Installment Credit, Inc.

(Admitted in answer by omission to deny. Also admitted by stipulation at the prehearing conference (R. 8).)

3. Respondents solicit and receive accounts for collection from business and professional people located in Illinois and other

[1] The only witness was the respondent officer.

States. In carrying out their aforesaid collection business, respondents have engaged, and are now engaging, in extensive commercial intercourse in commerce among and between the various States of the United States, including the transmission and receipt of monies, checks, collection letters, forms, contracts, and other instruments.

(Admitted in the answer by omission to deny, and by stipulation at the prehearing conference (R. 9–10).)

The other States referred to in the immediately preceding paragraph are a large number of States, including such States as California, Texas, Louisiana, and New York.

(Stipulated by counsel on both sides (R. 9).)

In carrying out their aforesaid collection business, respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in commerce, as "commerce" is defined in the Federal Trade Commission Act.

(Admitted in answer by omission to deny and by stipulation at prehearing conference (R. 9–10).)

4. In the course and conduct of their business, and at all times mentioned herein, respondents have been in substantial competition, in commerce, with other corporations, firms, and individuals engaged in the business of collecting alleged delinquent accounts.

(Admitted in answer by omission to deny and by stipulation at prehearing conference (R. 10).)

"Federated"

5. Through the use of the word "Federated" as part of the trade name of corporate respondents, and so using the word in conducting their business, said respondents represented, and now represent, to a substantial segment of the public,[2] that the corporate respondent is an organization having members, or affiliates constituting members thereof. This is so, although it is also found that the use of the word "Federated" in the corporate name and respondents' business may also mean, to a substantial segment of the public, nothing more than an arbitrary name to distinguish one corporation or business from another.

(This finding is based on the examiner's own reading of the corporate name. There were no witnesses on this question.)

6. In truth and in fact the corporate respondent has no members, or member affiliates, but, on the contrary, the sole business of

[2] The examiner does not regard the use of the name "Federated" as deceptive—that is, substantially deceptive—to debtors, as contrasted with creditors.

respondents is the operation of a collection agency from a single office located in Blue Island, Illinois.

Accordingly, the use of the word "Federated" in the corporate name, as set forth in paragraph 5 hereof, was and is false, misleading, and deceptive. The alternative meaning, of being only an arbitrary name to distinguish one corporation or business from another, serves only to confuse and does not cure the deception. However, it may make possible the continued use of the corporate name with proper qualifications.

(The conclusion in the second paragraph, immediately above, is the examiner's. There were no witnesses on the question. See discussion herein under FEDERATED, p. 585 ff., permitting qualification of "Federated.")

Misrepresentations Generally

7. Respondents, in the course and conduct of their aforesaid business, and for the purpose of promoting their business, have made certain statements and representations, directly or by implication, with respect to their business. Such statements and representations include the following:

1. Nation-wide collections and corresponding attorneys.
2. Donald N. Adams, Collection Department.
3. P. Lawson, Manager, Collection Department.
4. Copy—Legal Forwarding Department Investigator.
5. P. Nelson, Investigation Department.
6. B. Peters, Collection Department.
7. C. L. Ingrahm, Legal Forwarding Department.
8. C. Roberts, Auditing Department.
9. L. D. Todd, Manager, Legal Forwarding Department.
10. P. Lawson, Pre-Trial Department.
11. Regional Office.

(Admitted by stipulation at prehearing conference (R. 16, 18). This is Par. Six of complaint, omitting the alleged purpose.)

The purpose in making the foregoing statements and representations has not been quite as alleged in the complaint, but has been mostly in aiding in obtaining collection from debtors, rather than obtaining accounts from creditors. More specifically the purpose in respect to each of the statements and representations has been as follows:

As to No. 1 ("Nation-wide collections and corresponding attorneys"), this has, indeed, been a representation to creditors, being part of respondents' letterhead, appearing on letters sent to creditors, *i.e.*, clients. (See CX 13, 16, 19, 24, 25, 26.)

As to No. 2 through No. 10 ("Donald N. Adams, Collection Department," etc.), these representations collectively have been for the sole purpose of aiding in collecting accounts from debtors. Each of the representations appears as a signature or subscription on a form obviously intended for a debtor (CX 7, 8, 9, 10, 20, 21, 22). (The examiner, however, does not regard these representations to debtors as being substantial representations or of sufficient consequence or public interest to warrant a cease and desist order.)

An examination of the record shows that three of these representations also appear as signatures or subscriptions to letters or papers sent by respondents to creditors, actually existing clients of theirs. These are No. 2 ("Adams, Collection Department," CX 18), No. 8 ("C. Roberts, Auditing Department," CX 17, 19), and No. 10 ("P. Lawson, Pre-Trial Department," or Pre-Legal, CX 13). This proof of the making of only these few representations to creditor-clients is regarded as nonsubstantial in sustaining the allegation of the complaint that representations No. 2 through No. 10 were made for the purpose of inducing concerns to assign accounts to respondent for collection.

No. 11 ("Regional Office"), indicating respondents' sole office is a regional office, is a representation made to both creditors and debtors, usually appearing as part of a caption. (As to debtors see CX 4, 21, 22, and 23. As to creditors see CX 16, 17, 19, 24, 25, 26.) This representation has been discontinued except for CX 4 to the debtor, which is simply a notice of assignment to respondents of the debt.

The proper names, such as Donald N. Adams, P. Lawson, etc., are concededly fictitious, but complaint counsel has not challenged this practice. (R. 128–29.) Moreover, there is testimony (Dykstra, R. 128–29) that fictitious names are necessary to protect the senders of dunning letters or notices from physical violence by irate debtors or recipients. The same testimony is that fictitious names serve as a coding device to trace answers not setting forth a file number and to make possible an evaluation of the effectiveness of different forms. Complaint counsel recognized the purpose (R. 128, l. 16–18).

8. By and through the use of the aforesaid statements and representations set forth in paragraph 7 hereof, and others of similar import and meaning, respondents have represented, directly or by implication, as follows:

I. The business of the respondents is nationwide in scope and respondents have nationwide corresponding attorneys and collectors. There is no representation, however, that respondents, as

contended by complaint counsel, had "attorneys and collectors directly affiliated and connected with them."

(This relates to No. 1 of the representations and statements set forth above.)

II. The business of respondents is departmentalized—in the sense of containing full-fledged departments as generally and ordinarily understood, and containing all of the various departments above enumerated; and respondents employ a large staff of employees.

(This summarizes the combined meaning of all the statements and representations No. 2 through No. 10 above, made to debtors, as found above.)

III. The corporate respondents' Blue Island office is a regional office of Federated Bureau of Installment Credit, Inc.

(This is representation No. 11, now discontinued except as to one form sent to debtors, as noted above.)

9. The truth and fact may be stated as set forth immediately following:

I. The business of respondents is indeed nationwide in scope, as demonstrated by their undisputed nationwide collections and collection activity (if not by very large dollar volume) and by respondents' full and substantial involvement in interstate commerce, also undisputed.

(The nationwide character of respondents' business is conceded by complaint counsel in an operating sense, by reason of respondents' nationwide collections with the aid of attorneys, collectors, and account solicitors, retained in other States. However, it is not conceded as to business "structure," a term stressed by complaint counsel, by, for instance, having various offices throughout the country instead of only one in a single State, and by directly employing on a permanent basis attorneys, collectors, or business solicitors throughout the country (R. 26, 27). Respondent Dykstra testified that respondents have been doing their business in at least 50 States, and even in foreign countries (R. 131).)

Moreover, respondents do have corresponding attorneys and collectors, as is also conceded. It is true that said attorneys and collectors are not directly affiliated and connected with respondents, but, as already found, there has been no representation that they are directly affiliated and connected.

(The examiner declines to find, as proposed by complaint counsel, that respondents represent that they have "attorneys and collectors directly affiliated and connected with them." This is the representation made essentially to creditor-clients. The examiner rules that the words "corresponding attorneys" mean just what they say, and

no more—as attested to by dictionary definition, by recognized manuals of "corresponding attorneys," and by the understanding of lawyers, creditors, and the public, certainly the commercial public, generally. The examiner rules that the words here imply nothing about direct affiliation or direct connection with respondents' collection agency and its collecting lawyers. If the word "Federated" in the corporate name, used together with "corresponding attorneys," tends to imply anything to the contrary, this may be corrected by qualifying the corporate name.)[3]

II. The business of respondents is a small one[4] having no departments in number and structure justifying respondents' representations herein, and having only a few employees. This lack of departments in a realistic sense may be distinguished from a certain amount of departmentalization, *i.e.*, of collection efforts, as is inevitable in a business of this sort.

(However, as already indicated herein, respondents' representations of having departments, No. 2 through No. 10, are not regarded as substantial misrepresentations (particularly as contrasted with departmentalization) to debtors or presumed debtors, to whom these representations have been essentially addressed.)

(Mr. Dykstra's version of having departments is found in the record (R. 108–113). The list of "departments" with payrolls produced by respondents (CX 1, R. 69) turns up only four "departments"—Collection, Investigating, Legal Forwarding, and Auditing, of which the latter two "departments" appear to be quite minor judging by payroll figures. This contrasts with the full number of departments represented to debtors. But, to repeat, the examiner finds there is no substantial misrepresentation.)

Accordingly, the statements and representations No. 1 through No. 10, as set forth in paragraphs 7 and 8 hereof, are, most of them, not false, misleading, and deceptive. They are false, misleading and deceptive only as follows:

I. No. 1, the representation by respondents of "Nation-wide

[3] See also *Nation-wide Collections, and Corresponding Attorneys*, p. 592, *infra*.

[4] Respondents have in all only one small office location. On one floor there is office space of 21' x 70', on another floor office space of 10' x 14' and 12' x 16' (Dykstra, R. 110). So-called departments such as the Collection Department (R. 110), the Legal Forwarding Department (R. 110), and the Investigation Department (R. 112) do not have a separate room, or separate quarters. In a typical year there were 15 employees, apart from respondent Dykstra, president, and the vice president (CX 1, Dykstra, R. 107). The highest amount, $3,680, was paid to the head of the "Collection Department," with about $2,000 paid to the next highest employee therein. Two employees of the "Investigating Department" each received an average of a little over $2,000. One employee each in the "Auditing Department" and the "Legal Forwarding Department" received a little over $1,000. All other employees received small amounts, some less than $100 each (CX 1). Mr. Dykstra testified that employees moved around from one "department" to another (R. 110).

collections and corresponding attorneys," is *not* a misrepresentation and is not false, misleading, and deceptive.

(Respondents, it may be noted here, no longer use the expression "corresponding attorneys" but, instead have been using the words "attorney forwarding" (CX 6, R. 74,5).)

II. No. 2 through No. 10, the representations by respondents, essentially to debtors, that respondents' business has departments and that they employ a large staff of employees are not misrepresentations of substance in this case, although they are not entirely correct statements.[5] Moreover, they do not in any event warrant, in the public interest, the issuance of a cease and desist order.

(This finding, or conclusion, shall not be deemed to bar any future charges based on representations No. 2 through No. 10 not alleged in the present complaint.)

III. No. 11, the representation that respondents' one and only office—in Blue Island, Illinois—is a regional office is patently a substantial representation, at least as to creditors.

(However, entry of a cease and desist order thereon is subject to the defense of discontinuance.)

"Final Demand" Form

10. In the course and conduct of their business and for the purpose of inducing the payment of alleged delinquent accounts, the respondents in the past have used a certain form entitled, in Old English type, *Final Demand Prior to Suit Process* addressed to the debtor. A copy of one type of this form is made part of the complaint, although somewhat illegible and not offered in evidence. A copy of another type, very similar in all respects except that it is reduced in size and is more smartly printed, was offered and received in evidence as CX 15, and has been treated by counsel on both sides as typical, or as the form, or principal form, here in question.

The following is a facsimile copy of CX 15:

Federated Bureau of Installment Credit

12669 S. Western Ave. PHONE FUlton 8-4550 Blue Island, Ill.

Final Demand Prior to Suit Process

Claim of Creditor:

versus Debtor:

Dated, this ..... day of .....

in the Year of Our Lord, One Thousand

Nine Hundred and .....

To the above named Debtor Take Notice, that the above named Creditor claims

[5] See subheading Departments, pp. 592–593, *infra*.

an indebtedness from you of ..../100 Dollars; payment has been duly demanded, the above amount remaining unpaid and the same is now due and owing.

Unless you SATISFACTORILY EXPLAIN why said claim is unpaid and MAKE ARRANGEMENTS FOR SETTLEMENT thereof, action will be necessary, thereby adding expenses to the amount of said claim in the form of Court Costs, Attorney's Fees and Service Charges.

THIS DEMAND is made for the purpose of giving you a final opportunity to pay and to lay a foundation for action on said claim if the same is not paid.

To Debtor: To settle this matter without further procedure and added expense remit the full amount of this claim direct to this office within Ten Days from above date.

IMPORTANT: Your Account has been assigned to this office for collection. ALL PAYMENTS MUST COME DIRECT TO OUR REGIONAL OFFICE, in the City of Blue Island, County of Cook and State of Illinois. USE THE ENCLOSED ENVELOPE.

Federated Bureau of Installment Credit, Inc.
Per Attorney in Fact.

COPY - LEGAL
FWDNG. DEPT.
INVESTIGATOR
D.F.N.

The reverse side (half of it) is entitled "Final Notice Prior to Suit Process," in Old English type. It has a caption "Matter of ....., Creditor, versus ....., Debtor." At the bottom there is the corporate name and address.

(Respondents, in paragraph 5 of their answer, on page 3, admit, without expressly admitting anything further, that the form annexed to the complaint is or was "typical and illustrative of respondents' forms." The admittedly similar form CX 15 was received in evidence after respondents' counsel admitted that it had been used by respondents, although not for some time (R. 83, l. 15, 16).)

The form "Final Demand Prior to Suit Process" (either type) has not been in use by respondents since about the end of 1964, the use thereof having been discontinued shortly after a visit by a representative of the Federal Trade Commission (Dykstra, R. 118; conceded by complaint counsel's memorandum of March 21, 1967, p. 3).

11. By and through the use of the aforesaid Final Demand "form and the statements and representations set forth therein" (complaint, Par. Ten) respondents did *not* represent (nor, of course, do they now represent) "that said Final Demand document in form and content is an official document duly issued or approved by a court of law" (complaint, Par. Ten). Accordingly, complaint

counsel's Proposed Finding 11, following the wording of the complaint, must be disallowed.

Actually, there is *nothing* in the "content" of the document implying that it is a court document (or a court approved document), which seems to be the gravamen of the charge in the complaint.

(The most that can plausibly be argued as to "form," the other element mentioned in the complaint, is that in general appearance, *i.e.*, without reading the document, it may look something like a court summons or similar process, although, as a matter of fact, it looks much more like a typical law stationer's form, such as is used to satisfy any legal requirement of formal demand prior to suit. As to "content," the other element mentioned in the complaint, or "statements and representations set forth," there is nothing in the text or content of the form, not even considering the Old English type therein, stating or implying that it is "an official document duly issued or approved by a court of law." Moreover, the form does have some possible lawful approval insofar as formal notice may be required before commencing suit, or some public policy sanction to avoid litigation and its expense whenever possible, which might have the general approval of the court. Finally, there is no showing in this case that the form was served personally, which is the usual way of serving a summons or similar process, and which might serve to prove a representation that the form is a court document or court approved.) [6]

12. In truth and in fact, said Final Demand form is, to be sure, not an official document duly issued by a court of law, or approved by a court of law, in the sense contemplated by the complaint, but it is wholly private in its origin. However, this does not mean that the form is without warrant of law or that it is completely outside the approval of courts of law which may be implied from general lawfulness.

(Actually, complaint counsel assumed the burden only of showing that the form was not "issued" by a court, not that it was not "approved" by a court, or not indirectly approved. This is brought out in the record (R. 129, l. 14):

Q. In using the form CX 15, you didn't go to any court to get that issued, you just sent that out yourself, isn't that correct?

A. That is correct.

[6] See discussion under "Final Demand" forms, p. 593, distinguishing *Rushing* v. *F.T.C.*, 320 F. 2d 280, where the there pertinent forms were sent by creditors who did not sue, and not sent by a collection agency.

Accordingly, the statements and representations in respect to respondents' Final Demand form, as set forth in paragraphs 10 and 11 hereof, have not been proved to be false, misleading, and deceptive, as alleged in the complaint.

(The charge that the Final Demand form is deceptive is also, of course, subject to the defense of discontinuance.)

13. Accordingly, the only substantial misrepresentations by respondents found herein are the following two:

Use of the name "Federated."

Use of the description "Regional Office."

The use by respondents of the said false, misleading, and deceptive representations, and practices in making such representations, has had the tendency and capacity to mislead a substantial number of creditors into the erroneous and mistaken belief that the representations have been true, and into the assignment of accounts to respondents for collection because of such mistaken and erroneous belief.

The examiner declines to find, as alleged in Par. Twelve of the complaint and requested in complaint counsel's Proposed Finding 13, that the use of the foregoing representations or misrepresentations—and others—and the practices involved therein, has had an unlawful effect in the collection of monies from debtors. The examiner finds that the said representations and practices have been unsubstantial and inconsequential in respect to debtors, or presumed debtors, as distinguished from creditors who may be induced to retain respondents as a collection agency due to the representations and practices.

(The distinction here made between creditors and debtors does not change the general finding of misrepresentation but simply clarifies the issues. The examiner distinguishes the present case, where a collection agency makes organizational representations, from cases where such representations are made by creditors directly, and the creditors may have no intention to commence action.)

CONCLUSION

The aforesaid acts and practices of respondents,[7] more particularly their use of the word "Federated" in the corporate name, and their use of the representation "Regional Office," as found herein, were, and are, all to the prejudice and injury of the public and of respondents' competitors; and constituted, and now constitute, unfair methods of competition in commerce and unfair

[7] As to respondent Dykstra see INDIVIDUAL LIABILITY, pp. 579–585, *infra*.

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

(Although it appears that the representation "Regional Office" is used now only on one form, and that form is addressed to debtors, not creditors, it is, for one thing, tied up very closely with the representation "Federated" and warrants the same "Conclusion" as here reached on the use of "Federated.")

Discontinuance

As already indicated, respondents have discontinued certain of their representations or misrepresentations, but the legal result is not too significant for the purposes of withholding a cease and desist order covering the discontinued practices.

Toward the end of 1964, or perhaps closer to the middle of that year, respondents discontinued the following representations, as already noted:

Corresponding attorneys. (Not found to be misrepresentation.)
Regional Office. (Except for CX 4, to debtors.)
Final Notice form. (Not found to be misrepresentation.)

Since neither "Corresponding attorneys" or "Final Notice" form have been found to be a misrepresentation, a defense of discontinuance is unnecessary as to these two representations. This leaves over only the "Regional Office" representation.

But since all three representations were discontinued only after a Commission representative called on respondents there is doubt as to whether the defense of discontinuance would be available even if all three were actual misrepresentations.[8] The doubt therefore applies, of course, to "Regional Office," since it has definitely been found to be a misrepresentation.

Moreover, the representation "Regional Office" has not been fully discontinued, since it still is used on CX 4, a notice of assignment. Although CX 4 is addressed to the debtor, and its representation is therefore regarded by the examiner as unsubstantial in respect to the debtor or inconsequential as a matter of public interest, it does evidence a disposition of respondents, carelessly or otherwise, to cling to, or to fall back easily into, general use of the representation of having a regional office, although they have no such thing. It is also too closely tied in with the fully continued use of the name "Federated."

Accordingly, the defense of discontinuance is not sustained.

[8] *In the Matter of Bakers of Washington, Inc.*, F.T.C. Docket No. 8309, Dec. 3, 1964 [66 F.T.C. 1222], citing *Coro, Inc.* v. *F.T.C.*, 338 F. 2d 149 (1st Cir. 1964).

For the purpose of fuller documentation herein, the facts as to discontinuance will be set forth in greater detail as follows:

"Regional Office" and "Corresponding Attorneys."—Both these representations were discontinued, and are no longer in use (Dykstra, R. 116). Instead of "Corresponding Attorneys"—*i.e.*, in "Nation-wide collections and corresponding attorneys"—respondents now use "Attorney Forwarding" (Dykstra, R. 116, 1. 8–10). They also, with one exception (CX 4), no longer use the representation "Regional Office" (Dykstra, R. 116, 1. 1–7). Mr. Dykstra made the decision to discontinue (Dykstra, R. 116, 1. 21). He did so at "Mr. Cain's suggestion that that apparently was what the Commission wanted and at his suggestion" (R. 116, 1. 12), Mr. Cain being respondents' attorney herein.

"Final Demand" Form.—CX 15, the Final Demand form, was similarly discontinued by respondent Dykstra (R. 116–17) on Mr. Cain's suggestion "[r]ight after it was brought to our attention that it might be objectionable" (Dykstra, R. 117, 1. 18). He stated that this was: "Before the end of '64" (R. 118, 1. 5). It was replaced (Dykstra, R. 118) by a form letter (CX 10) eliminating the features of the Final Demand form which have met with objection. Mr. Dykstra reaffirmed that he discontinued the Final Demand form in order to comply again with what he thought the Commission wanted (R. 119, 1. 2–3).

In General.—According to interrogatory statements by Mr. Cain, in which Mr. Dykstra acquiesced, discontinuance took place after a Mr. Nemes of the Chicago Office of the Federal Trade Commission called upon Mr. Dykstra (R. 133, 1. 21) and Mr. Cain discussed the Federal Trade Commission "guide lines" for "collection agencies" with him (R. 133, 1. 9–12).

Individual Liability

It is the examiner's conclusion—particularly in view of the restraint imposed herein on the use of the name "Federated," coupled with the facility with which respondent Dykstra, the dominant figure in the corporation, might change the form of his engaging in the collection business—that said respondent Dykstra should be named individually in the order to cease and desist from using this name "Federated" [9] and also from using the description "Regional Office," which is somewhat closely related.

Joint Liability with Corporation.—Joint liability of respondent Dykstra with the corporate respondent is indicated in all the formal Findings of Fact herein which expressly refer to the

[9] That is, unless properly qualified.

representations and conduct of the "respondents," *i.e.*, both respondent Dykstra individually and the respondent corporation.

Initiation of "Federated" Name by Dykstra.—Respondent Dykstra himself (together with Marian L. Dykstra, presumably his wife, and listed in the papers at the same address as his) initiated the use of "Federated" in the corporate name by signing the corporate papers proposing the corporate name and leading to the creation of the corporation in 1952 (RX 1 B, 1 E). In addition, respondent Dykstra, as president of the corporation (RX 1 L), was the person who filed papers amending the purposes of the corporation in 1955, leaving unamended the Federated name. There is obviously no certification of legality under the Federal Trade Commission Act as to the use of the Federated name by the issuance of the corporate charter by the State of Illinois. Respondents' counsel's argument to the contrary must be rejected.

"Regional Office" Supplements "Federated" Misrepresentation.—So far as concerns the representation "Regional Office," also found to be deceptive herein, this representation is an obvious extension or supplement to the use of the misrepresentation "Federated" in the corporate name, and is therefore one of the acts and practices of the corporate respondent which respondent Dykstra admittedly formulates and controls. Thus, if he is individually responsible for "Federated" he is similarly responsible for "Regional Office."

Individual Control, Etc., Admitted.—As already found herein, respondent Dykstra:

> formulates, directs, and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. He (with his wife) owns the majority of the corporate stock. He derives most of his personal income through the corporation.

(Finding of Fact 1, par. 3 thereof, *supra.* Admitted at the prehearing conference (R. 5, 7) reserving, however, the question of individual liability.)

Dykstra the President.—Respondent Dykstra has been the president of the corporation and, it is reasonably safe to infer, has probably been president from the inception thereof to date. The record shows not only that he started the corporation, but that he was its president at least when the corporate papers were amended in 1955, and the record also shows that he was its president in 1964 (CX 1). Since there is no evidence or suggestion that he has ceased to be president, there is a presumption of continuation

as president, particularly considering that this is a small, closely held corporation, so that it is reasonably safe to conclude that Dykstra is president today. Being president of a corporation is, to be sure, no special evidence of control (which is admitted here in any event) nor, certainly of itself, any warrant for holding the officer individually liable. However, it is part of the entire picture and may be considered with all the other facts in connection with determining individual liability.

Major Source of Dykstra's Income.—The fact that respondent Dykstra (with his wife) owns the majority of the corporate stock and, perhaps more importantly, the fact that Dykstra derives most of his personal income from the corporation, are, as the examiner feels obliged to conclude, in the event that respondent Dykstra finds that he cannot "live" in his collection business without the unrestricted use of the name "Federated," an inducement and temptation to him to change the form of the collection agency enterprise by operating the business individually, or perhaps, through himself or others, even under another corporate name still including "Federated" as part of the name or as a supplement thereto.

Dykstra's Personal Discontinuance.—The fact that respondent Dykstra controls the acts and practices of the corporation, as admitted by respondents, is vividly reinforced and illustrated in respect to discontinuance of certain of the representations in this case. As pointed out by complaint counsel, in their argument, and supplementary memorandum, and as fully documented in the discussion entitled *Discontinuance, supra,* it was respondent Dykstra personally who, after the contact by a Federal Trade Commission representative, discontinued the various representations which, it was thought, the Commission did not like—"Corresponding attorneys," "Regional Office" (except CX 4), and the "Final Notice" form.

Discontinued Only as to Lesser Matters.—The examiner recognizes that respondent Dykstra's acts of discontinuance represent some evidence of good faith in complying with the law or, more accurately, what he testified was thought to be the Commission's desire. But these acts of discontinuance or indicia of good faith never got to such an ultra-basic and truly important issue as excising or severely qualifying "Federated" in the corporate name. (To be sure, there is no evidence or suggestion in the record as to whether this matter was brought to respondents' attention or whether they thought it was a matter the Commission desired to be corrected.)

Moreover, in relation to the somewhat related or somewhat comparable representation of "Regional Office," seeming to imply a number of other offices connected with the represented federated setup, it is significant that there was not full discontinuance, but that the representation is still continued in CX 4, the notice of assignment form sent to the debtor.

Thus it seems fair to state that discontinuance by respondent Dykstra was in respect to relatively lesser representations, not in respect to the major representations in this case, *i.e.*, that respondents represent a federation of collection agencies, and that they have various offices (by reason of representing that they have a regional office). Thus Dykstra's conduct in effectuating what discontinuance there was in this case is not too great an indication that he can be depended on not to try individually to frustrate a cease and desist order directed only against the corporation.

His Discontinuance Was Equivocal.—Moreover, respondent Dykstra, not only discontinued but also added representations. As pointed out by complaint counsel, Dykstra added to respondents' various forms the emblem of what looks like the typical American eagle, sitting atop of a globe, over which is printed the corporate name with its by-line (CX 6, 7, 8, 9, etc.). Although the examiner is not called upon to rule, and definitely does not rule, that this represents that respondents are connected with the United States Government (see Guide 3, of *Guides Against Debt Collection Deception,* 1965), it is not a reassuring factor in respect to Dykstra's dependability as to truly conforming with a Commission order, rather than subverting it directly or indirectly.

"Special Circumstances."—Accordingly, the examiner finds and concludes that there are "special circumstances" in this case, even apart from the nature of this one-man or two-man corporation operating a relatively small business, easily convertible or adaptable to other legal structures, including an individual operation under a trade name. These "special circumstances" warrant a conclusion that there is a reasonable likelihood that respondent Dykstra, if not named individually in the cease and desist order issued herein, which imposes drastic qualifications if the name "Federated" is continued to be used, may in effect circumscribe the provisions of the cease and desist order.

Examiner's Exercise of Judgment.—The examiner bases the above conclusion on what he regards as adequate findings of fact based on evidence and on the provision in his order prohibiting the use of the name "Federated" unless severely qualified. The con-

clusion is also definitely supported by the evaluation and judgment of the examiner—based on the evidence and the order, if not also on the examiner's personal observation at the hearing and study of argument—as to the normal possibilities or probabilities in respect to the future disposition of respondent Dykstra possibly to resort to evasion of the order, particularly by *lawful* means.

Here, for instance, it is obvious from the statements of respondents' counsel [10] in respondents' Proposed Findings, etc. (pp. 4–5), that respondents regard the present complaint as part of an attack by the Commission on collection agencies in general, as tending to deprive creditors of an adequate chance of collecting their debts, since few lawyers allegedly will take collection cases against small debtors, and as favoring the "skip" and the "deadbeat." The examiner refers to this not by way of passing on whether or not respondents have a substantial justification for making the argument, but in order to bring out that this attitude and frame of mind does not auger well as to good faith compliance by Mr. Dykstra with the spirit and terms of the cease and desist order appended hereto imposing drastic restrictions on use of the name "Federated," which he initiated—unless he is named.

Actually, it is the examiner's belief, although it is not necessary for him so to rule, that the problem of whether or not individual liability should be imposed on the officer of a corporation is analogous, if only to a limited extent, to the problem presented to a judge in passing sentence on a guilty defendant. The difference, of course, is that the problem is not punishment or guilt, but simply the likelihood of evasion of a cease and desist order.

The leading case on the individual liability of corporate officers is:

Federal Trade Commission v. *Standard Education Society,* 302 U.S. 112 (1937).

This case upheld an order of the Commission imposing individual liability on corporate officers on a finding that another "corporation was organized by the individual respondents for the purpose of evading any order" (p. 119). The court stated:

> Since *circumstances,* disclosed by the Commission's finding and the testimony, are such that further efforts of these individual respondents to *evade* orders of the Commission *might be* anticipated, it was proper for the Commission to include them in its cease and desist order.[11]

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[10] The name of said counsel also appears on the 1955 papers to amend the corporate name (RX 1 L).

[11] All emphasized words in this legal discussion on "Individual Liability" represent the *examiner's* emphasis.

There are other cases, some of them with a less clear showing, clearly establishing the proposition that the Commission has authority to enter an order to cease and desist against officers, directors, and stockholders of a corporation where necessary for the purpose of effectively prohibiting unfair trade practices and particularly to prevent evasion of a cease and desist order against the corporation:

Coro, Inc. v. *F.T.C.*, 338 F. 2d 149 (1st Cir. 1964), *cert. denied*, 380 U.S. 954 (1965).

Pati-Port, Inc. v. *F.T.C.*, 313 F. 2d 103, 105 (4th Cir. 1963).

Surf Sales Company v. *F.T.C.*, 259 F. 2d 744 (7th Cir. 1958).

Standard Distributors, Inc. v. *F.T.C.*, 211 F. 2d 7, 14–16 (2d Cir. 1954).

Consumer Sales Corp. v. *F.T.C.*, 198 F. 2d 404, 407–08 (2d Cir. 1952), *cert. denied*, 344 U.S. 912 (1953).

As above indicated, the examiner finds ample special circumstances or special reasons for imposing individual liability in the present case, which he regards as being within the established authorities.

In cases decided against the individual liability of corporate officers, the reason is the lack of special circumstances or of special reasons for imposing individual liability. Several of these cases will now be quickly reviewed, with short quotations from each, as well as emphasis on what are regarded by the examiner as some of the key words.

In *Maryland Baking Company*, D. 6237, 52 F.T.C. 1679 (1956), the Federal Trade Commission refused to impose individual liability on a corporate officer, stating that there was "no showing, moreover, of any *special circumstances* which would indicate a likelihood that Joseph Shapiro would consider an evasion of the order against the corporation." (P. 1691.) The Commission also noted "the absence of some *special reason* for naming Joseph Shapiro personally" (p. 1691).

In *Kay Jewelry Stores, Inc.*, D. 6445, 54 F.T.C. 548 (1957), the Commission decided against holding a corporate officer individually liable, stating that "where there is no record evidence showing justification" and where there are " 'no *other circumstances* pointing to the necessity of * * *' " (p. 561) imposing individual liability, none should be imposed.

In *Lovable Company*, D. 8620 (June 29, 1965) [67 F.T.C. 1326], the Commission did not impose individual liability on a corporate officer, stating that "there must be something in the record *sug-*

gesting that he would be likely to engage in these practices in the future as an individual." (67 F.T.C. at 1336.)

There are also some Court of Appeal cases of interest:

In *Bascom Doyle* v. *F.T.C.*, 356 F. 2d 381 (5th Cir. 1966), the Court of Appeals set aside an order imposing individual liability on corporate officers, stating that in Commission cases, as distinguished from criminal or penal cases, "individuals have only been included in the orders, in *almost* all instances, when deemed necessary to *prevent evasion*" (p. 383), and "there seems to be little reason for including corporate officers as individuals in the orders unless there is a *possibility* of evasion." (P. 384.)

In *Flotill Products, Inc.* v. *F.T.C.*, 358 F. 2d 224, 233 (9th Cir. 1966),[12] the court, in denying individual liability and reversing the Commission on this point, relied on the examiner's finding that there was " 'no showing and *no suggestion* of any *special circumstances* which would indicate a likelihood that the individual respondents would consider an *evasion* of any order which may be entered herein against the corporation.' " (P. 233.) The court pointed out that the Commission "relied on no other fact than that the three individuals owned and controlled the corporation" (p. 233), *i.e.*, on the "alter ego" doctrine, as it was referred to by the court (p. 233).

The examiner regards the present case as distinguishable from *Flotill* not merely by reason of the special circumstances or special reasons indicating a substantial possibility, if not probability, of evasion, arising out of the severe restrictions herein placed on the use of the name "Federated" in the present case, but also by the substantial structure and the financial size of the Flotill corporation, making the converting of the business into an individual enterprise, or utilizing some other device, relatively difficult as compared with doing so in the case of the present small corporation.

"Federated"

Although the examiner is loath to strike down a corporate name that has been used quite a few years, nevertheless he must at least find, on his own examination of the corporate name, that the use of the word "Federated" therein is deceptive to a substantial segment of the public involved in the corporate respondents' activities—although not, to be sure, deceptive to all the public. The

[12] Petition for certiorari filed, but not in respect to individual liability, 34 U.S. Law Week 2541 (No. 668). Accordingly, complaint counsel's quotation from the Commission opinion is not relied on herein.

representation "Federated" is particularly deceptive to creditors, *i.e.,* respondents' clients or potential clients.

It is true, as pointed out by respondents' counsel, that there is no independent or separate proof in this case that "Federated" is deceptive, or that anybody was deceived by the word. However, there is no requirement that there be such proof.

It is not necessary for the Commission to call members of the public as witnesses to prove that a misrepresentation is misleading.

Zenith Radio Corporation v. *F.T.C.,* 143 F. 2d 29, 31 (7th Cir. 1944).

Charles of the Ritz Distributors Corporation v. *F.T.C.,* 143 F. 2d 676, 680 (2nd Cir. 1944).

It has long been established that the representations themselves are evidence of their falsity.

Aronberg v. *F.T.C.,* 132 F. 2d 165, 167, 168 (7th Cir. 1942).

Actual deception need not be shown in a Federal Trade Commission proceeding; a showing of capacity to deceive is sufficient.

Perloff v. *F.T.C.,* 150 F. 2d 757, 759 (3rd Cir. 1945).

Reference may also be made to the following cases:

F.T.C. v. *Algoma Lumber Co.,* 291 U.S. 67, 81 (1934).

F.T.C. v. *National Health Aids, Inc.,* 108 F. Supp. 340, 346, 347 (U.S.D.C. Md., 1952).

"Federation" is a familiar word to the American public. Every child in school reads about the Articles of Confederation, connected with the Confederated States of America. There is the American Federation of Labor, steeped both in history and current events. There are various federations encountered in daily life, such as the Federation of Churches, Federation of Philanthropies, and other Federations, all familiar in their fuller titles.

"Federated," accordingly, is an adjective which, as applied to an organization, easily means to an ordinary person that the organization in question is a federation, and that it has member units or affiliates.

The dictionary definitions are clear as to the essential meaning of the related words "federation," "federate," and "federated":

Webster's New International Dictionary, Second Edition, Unabridged, has the following definitions:

federate	United by compact or league.
federate (verb)	To unite in a league or federation.
Federation	A uniting by league or covenant. A union of societies or organizations.

Webster's Third International Dictionary, Unabridged, has the following definitions:

federate (adj.)	united by compact; forming an alliance; FEDERATED
federate (verb)	to unite into a league or alliance or federation
federated church	[defined in accord with above]
federation	a union of societies or organizations

Black's Law Dictionary, Third Edition, contains the following definition:

Federate State	An independent central organism * * * absorbing * * * all the individual states associated together.

The Federal Trade Commission in 1961 decided a case, in respect to the use of the word "Association" in a corporate name, which is strikingly close to the use of the word "Federated" in the corporate name here. The Commission struck down the use of "Association." The case is:

United States Association of Credit Bureaus, Inc., 58 F.T.C. 1044 (1961), D. 7043, slightly modified, as to points not pertinent to the immediate discussion, 299 F. 2d 220 (7th Cir. 1962).

In said *Association of Credit Bureaus* case, the corporation was engaged in the business of collecting delinquent accounts (p. 1045), as is the corporate respondent in the present case. The Commission held explicitly that the name "Association" was deceptive inasmuch as the corporation was only a single business enterprise, not an association of business enterprises. The opinion states (p. 1051):

> It is obvious from this record that respondents are nothing more than a single business enterprise and are not an association as that term is understood, of either credit bureaus or any other business enterprises. Their use of the word "Association" in their name is clearly false and deceptive and the hearing examiner was in error in not so ruling.

It may be that, more strictly, the holding in the case is that the use of the name "Association" was deceptive in connection with the use of the additional wording "Credit Bureaus" in the plural, the use of which was also prohibited by the order. This could conceivably be used to distinguish the case from the one at bar where the pertinent designation is "Federated Bureau," in the singular.

However, the examiner regards the use in the cited case of the word "Bureaus" in the plural, contrasted with the use here of "Bureau" in the singular, as fully compensated for by the broader meaning of "Federated." This is because the word "Federated," as understood generally and as defined in leading dictionaries, as elucidated above, and as used together with "Bureau," conveys a definitely extended meaning. It points to and represents the existence of a federation of member units, held together in a

"Bureau," itself a rather expansive term amply able to fit in easily with this construction of an affiliation of various member units or the like.

There is another Commission case involving the use of the word "Association," but without any reference to "Bureaus" or other constituent organization, which also tends to support this construction. The Commission in that case also struck down the use of the word "Association" in the corporate name. This case is:

In the Matter of United States Retail Credit Association, Inc., 57 F.T.C. 1510 (1960), D. 7488, *aff'd* 300 F. 2d 212 (4th Cir. 1962).

In this *Retail Credit Association* case the corporation was engaged in selling collection forms and assisting in collecting accounts (p. 1518). It represented that the corporation was an association carrying on its business for members, which it was not (pp. 1518–19). To be sure it actively promoted its claim of having members, but respondent corporation here actively used the word "Federated" (p. 1517). The Commission had no hesitancy in striking down the use of the word "Association" (as well as "Credit Association") in the corporate name (p. 1520).

Qualifying Words

Respondents have submitted nothing, even by way of comment, in regard to the proposal in the complaint to prohibit absolutely the use of the word "Federated" in the corporate name, as represented to the public, or in regard to the continued proposal of complaint counsel to the same end.

However, the examiner is unable to agree with complaint counsel's insistence in his brief (pp. 6–7) that the use of the name "Federated" cannot be permitted even with qualification. The name has been found ambiguous by the hearing examiner, with one deceptive meaning, to be sure, but also one neutral meaning as just another corporate name (Finding of Fact 6, *supra*). Accordingly, it appears only reasonable that the ambiguity can be resolved by qualification, and the name "Federated," used by respondents for, presumably, some 15 years (RX 1 A), may continue to be used, *i.e.*, with suitable qualification.

The leading case in point is:

F.T.C. v. *Royal Milling Co.*, 288 U.S. 212, 217 (1933).

In that case the respondent corporation used the name Royal Milling Co., although the corporation was not engaged in manufacturing. The Commission directed it to cease and desist from using the name. The Supreme Court took a more tolerant view. In its opinion, it emphasized that trade names long in use are

"valuable business assets" (p. 217), and it stated that excision or absolute prohibition

should not be ordered if less drastic means will accomplish the same result. (P. 217.)

The case was remanded to be disposed of in conformity with the opinion (p. 218). A similar result is indicated here, in the case of a small business corporation.

Another leading case is:

Jacob Siegel Co. v. *F.T.C.*, 327 U.S. 608, 612, 613 (1946).

There the company used the trade name Alpacuna. The Commission held that this represented that the coats bearing this trade name contained the valuable fur known as vicuna, and it issued an order prohibiting the use of the trade name. The Court of Appeals was of the opinion that the *Royal Milling* case was no longer controlling, in view of the many cases establishing the Commissions' right to empower, although it did express the opinion that it thought excision or prohibition of the name to be too harsh a remedy.

The Supreme Court opinion in *Jacob Siegel Co.*, however, not only cited *Royal Milling* but quoted it to the effect that destruction of trade names "should not be ordered if less drastic means will accomplish the same result" (p. 612), as quoted above. It noted that the Commission had not given consideration to the possibilities of qualifying the corporate name (p. 613). It held that this should have been done, and, after reversing, remanded the case for further proceedings in conformity with the opinion.

It is of interest that the Federal Trade Commission later modified its cease and desist order, as recorded in 43 F.T.C. 256 (1946), D. 3403, so as to permit use of the trade name but only "if in immediate connection and conjunction therewith, wherever used, there appear words clearly and conspicuously designating all the constituent materials or fibers therein contained.

The only case relied on by complaint counsel herein is *Continental Wax Corporation* v. *F.T.C.*, 330 F. 2d 475, 479 (2nd Cir. 1964), which he quotes in part. This case relates to a trade name, to wit, "Continental Six Month Floor Wax." The Commission found that this trade name was a false representation that the wax would last as an effective floor covering for six months. The Commission gave consideration to whether or not the trade name could be qualified, and decided that this was not feasible.

The Court of Appeals, in affirming, fully recognized the authority and applicability of *Jacob Siegel, supra.* It stated that the

"Commission, adhering to the requirement imposed on it by the Supreme Court in *Jacob Siegel Co.* v. *F.T.C.* * * * duly considered the possibility of not destroying petitioner's trade name through the use of qualifying words," but found that "such a remedy would not be feasible in this case" (p. 479).

The Court of Appeals correctly laid down the rule that qualifying words may cure deception caused by ambiguity in the trade name, as contrasted with the "clear and unambiguous false representation" in that case (p. 479). The Court of Appeals stated:

> True, the use of qualifying language may often suffice to render harmless an otherwise deceptive trade name, but the effectiveness of qualifying language is usually limited to situations where the deception sought to be eliminated is created by an ambiguity in the trade name which permits a misleading inference to be drawn favorable to the trade-name product. In such a situation the deception can be conveniently cured by the sensible addition of qualifying words calculated to resolve this ambiguity and thus prevent the misleading interpretation which the trade name would otherwise permit. (P. 479.)

The examiner believes that respondents are entitled to consideration as to some possible lawful use of their corporate and trade name: First, the "Federated" name is definitely ambiguous, as fully pointed out heretofore and found—being deceptive in one respect, but not deceptive in the other—and thus comes within the permissive language of *Continental Wax*. Second, respondents have used the name for some fifteen years. Third, there is no proof whatever that the name "Federated" has been a dominant reason for their apparent success in obtaining clients in their interstate collection work. On the contrary, the presumption is that respondents, small operators, have obtained this success largely by their own efforts and ingenuity, and perhaps as the result of certain advantages, such as flexibility, in a small business operation.

The examiner has given considerable thought to possible methods of resolving the ambiguity in the name of the corporate respondent. In doing so he has been guided, of course, by the cases cited and partially quoted above. He has also been guided by the *Association of Credit Bureaus* case, relating to affiliates (bureaus), and *Retail Credit Association* case relating to claimed members—in both of which, of course, the name "Association" was stricken down.

It is the examiner's conclusion, after due deliberation, that the "Federated" name may be used in conjunction with the qualifying words "No Members or Affiliates," provided that these qualifying words be given reasonably comparable prominence to the "Federated" name.

This means that in the formal captions and subscriptions in respondents' letters and forms, or in other formal presentations of the "Federated" name in any material exposed to the public, the corporate name may properly be used as follows:

Federated Bureau of Installment Credit, Inc.

(No Members or Affiliates)

The stated use of these qualifying words assumes that they will be given emphasis at least equivalent to that indicated in the indentation. The emphasis should be much as if respondents definitely advertise with a degree of pride and independence their small business status. This type of emphasis accords with recognized advertising techniques regarded as being even helpful to a small concern, such as the use of the fairly common slogan, "Not Connected With Any Other Establishment."

It is also contemplated that respondents will use the qualifying words apart from formal presentation, *i.e.*, will use them whenever the "Federated" name, or any contraction thereof, is used. For example they may use the qualifying words in the text of ordinary correspondence or promotional material, to give examples. In such "informal" usage of the "Federated" name, the full presentation may properly be:

Federated Bureau of Installment Credit, Inc. (No Members or Affiliates),

or

Federated Bureau (No Members or Affiliates).

Although respondents may regard the method of qualification provided for herein as a harsh restriction, it seems to be as fair as can be provided for them in order to keep in compliance with the law. Moreover, the method is entirely feasible for them and practical.

The qualifying words can, presumably, be conveniently printed on their present forms and letterheads. If not, changes can be accomplished by new printings and new dies, the cost of which must be weighed against being prohibited from using the corporate name altogether. If the qualifying words are used in the text of correspondence, advertising, etc., their use is largely a matter of proper care or dictation on the part of respondents. The same is true of the words if used in the typed subscription to a letter, to take an example.

In General

A few other matters will be discussed under this heading.

"Nation-wide" Collections, and Corresponding Attorneys

In holding that respondents herein have not misrepresented by using the word "Nation-wide," the examiner disagrees with complaint counsel's citation and quotation of the *Association of Credit Bureaus* case, *supra,* 58 F.T.C. 1044, 1054. In that case the misrepresentation was: "With *our* Nation Wide Associates, Affiliates, Bonded Attorneys, Collectors, Investigators, and Skip-Tracers, directed by *Nationally* Known Leaders * * * ." (P. 1054, our emphasis.) Thus respondents there were advertising about "our" affiliates, associates, and attorneys, directed "nationally," so to speak.

Moreover, on one page of the brochure containing the foregoing representation, there was a United States map (p. 1054), with numerous dots in each of the States, headed by the statement "Points From Which You Can Have Personal Service on Your Accounts Thru Bonded Collectors and Investigators." This was, indeed, a representation of being "Nation-wide." Finally, the front page of the brochure bore a picture of respondents' office building, with the words "HOME OFFICE" in large letters. To compare the present case with that case, on the question of the representation of being "Nation-wide," or having nationwide "Corresponding Attorneys," is, in the examiner's opinion, like comparing black with white.

Secondly, it should be well noted that there is no holding in the *Association of Credit Bureaus* case against the use of the term "Corresponding Attorneys" as such, or any similar appellation as such. The holding the case was directed at the "Nationwide" representation, *i.e.,* embracing associates, affiliates, bonded attorneys, collectors, investigators, etc., as listed in the quotation above. Thus the case is no precedent whatever for holding that the representation of having "Corresponding Attorneys" is false.

Departments

In holding that respondents have not misrepresented anything substantial to debtors by representing that they have a large number of full-fledged departments, the examiner disagrees again with complaint counsel's citation of the *Association of Credit Bureaus* case, *supra,* 58 F.T.C. 1044, 1053.

That case is absolutely explicit, both by statement of fact and conclusion, that the issue as to departments there raised was only in respect to such representations being made to creditors, *i.e.,*

for the purpose of obtaining "the assignment of accounts for collection and the solicitation thereof" (p. 1053). The examiner reiterates his holding that representations of this type make no difference to the debtor and may therefore be regarded as unsubstantial. Only three, apparently, of the alleged departments were included in representations to creditors in the case at bar, and, as heretofore held, by reason of their number and content, cannot be regarded as substantial. Moreover, in the present case, whether the representations as to departments were made to debtors or creditors, it would seem that such representations of having departments, instead of mere departmentalization of effort, should, even if not entirely accurate, not be held to be of sufficient substance so as to constitute unfair methods of competition.

"Final Demand" Forms

In holding that respondents' "Final Demand" forms are not deceptive, the examiner disagrees with complaint counsel's reliance on *Rushing* v. *F.T.C.*, 320 F. 2d 280, 283 (5th Cir. 1963). In that case the respondent creditor (not a collection agency or the like) sent out forms such as one entitled "FINAL NOTICE before GARNISHMENT." As to such forms, the court stated that respondent "has used forms simulating legal pleadings and has threatened garnishment, *although no court action was brought.*" (P. 282; our emphasis.) There was also testimony that debtors "were threatened with legal proceedings when they fell behind in their payments." (P. 282.)

It will be noted that the court did not refer to the garnishee notice as an official document, duly issued or approved by a court of law—which is the representation charged in the case at bar in respect to the "Final Demand" form. Certainly, a garnishee notice, which ordinarily presupposes a judgment against a debtor, is easily classified as purporting to be a legal document or pleading.

However, entirely apart from this, there can be little doubt that so far as concerns the issue of false representation in the *Rushing* case, the court was impressed, and apparently impressed the most, by the factor in that case that no action was ever brought, or apparently ever intended to be brought. Thus the case seems to be the familiar one of misrepresentation by a business concern trying to collect debts by itself and sending out what look like legal papers which threaten suit or garnishment even though the concern never intends to go to court.

1964 a Typical Year

Respondents' counsel, in his argument contained in respondents' Proposed Findings (p. 4), complains that a substantial part, if not most, of the proof is limited to the year 1964, and argues that there is therefore failure of proof. There are several answers to this:

First, respondents' counsel agreed to 1964 as a typical year (R. 107, 1. 22–23; R. 85, 1. 5–20). As appears by these citations, this reflected a plan suggested by the hearing examiner at the prehearing conference, *i.e.*, to select any one recent year as a typical year in order to save time and expense for both sides. Respondents' counsel has apparently forgotten about this, or has misunderstood the purpose of the procedure.

Secondly, misrepresentation by respondents in 1964 would be sufficient proof to warrant the order to cease and desist herein, short of proof of discontinuance, which does not exist as to the practices prohibited.

Thirdly, there is the usual presumption of continuance of a given state of facts to carry the proof beyond 1964.

Public Interest

At the prehearing conference, as well as at the hearing proper, and also by argument in respondents' Proposed Findings, respondents' counsel seems to be suggesting rather strongly the argument that there is a lack of public interest to support the prosecution of the present case—particularly as against a small collection agency whose gross accounts in 1964, for instance, total only $220,000 and whose collections total only $99,000 (R. 115, 1. 2–4). Respondents' counsel also indicated at the hearing that his clients could not afford to order the full transcript of the minutes in this case, and he actually ordered the minutes for only half a day of the hearing.

In view of the violations actually found herein, particularly as to use of the name "Federated," it is difficult to say that there is no public interest.

Apart from this, however, the question as to which business concerns, large or small, will be named as respondents in a Federal Trade Commission complaint is solely one for the discretion of the Commission in its administrative capacity. It may happen, of course, that the Commission does not know in advance the size, or relative size, of a particular concern charged with misrepresentation. Contrariwise, even apart from the known small

size of a concern, the Commission may believe that the issues are important enough to warrant commencement of a proceeding.

ORDER

It is ordered, That the respondents Federated Bureau of Installment Credit, Inc., a corporation, and its officers, and William E. Dykstra, individually and as an officer of said corporation, and respondents' representatives, agents, and employees, directly or through any corporate or other device, in connection with the solicitation of accounts for collection, or the collection of, or attempts to collect accounts, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the word "Federated" or any other word or words of similar import or meaning, in or as part of respondents' trade or corporate name or otherwise representing, directly or by implication, that they are an association having members; or misrepresenting, in any manner, their trade or business status or the nature of respondents' enterprise—except that they may use the word "Federated" as part of the corporate name Federated Bureau of Installment Credit, Inc., or any contraction thereof: *Provided,* That said name or contraction thereof is used in conjunction with the qualification "(No Members or Affiliates)" having reasonably comparable prominence; [13]

2. Representing, directly or by implication, that respondents' Blue Island, Illinois, office is a regional office; or representing in any other manner that respondents have a place of business other than in Blue Island, Illinois.

FINAL ORDER

This matter having come before the Commission on the cross-appeals of counsel for respondents and complaint counsel from the hearing examiner's initial decision, and on briefs and oral argument in support thereof and in opposition thereto; and

Respondents having agreed during the oral argument to be bound by the order proposed by the hearing examiner and an additional prohibition with regard to the use of documents which simulate those approved by a court of law or other official or legally constituted authority; and

The Commission having determined that the initial decision, with the exception of Findings 11 and 12 which have now become

[13] See p. 591 of this decision.

moot in view of respondents' consent, should be adopted as the opinion of the Commission:

It is ordered, That the initial decision of the hearing examiner to the extent it is not inconsistent with this order be and it hereby is adopted as the decision of the Commission with the addition of the following provision in the order:

> "3. Using CX 15 or any similar writing which simulates a legal document or which resembles or is represented to be a document authorized, issued or approved by a court of law or any other official or legally constituted or authorized authority;"

It is further ordered, That the appeals of counsel for respondents and complaint counsel to the extent they are not embodied in the above order, are denied:

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 set forth herein.

IN THE MATTER OF

REXALL DRUG AND CHEMICAL COMPANY

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF SECTION 7 OF THE CLAYTON ACT

Docket C-1252. Complaint, Sept. 11, 1967—Decision, Sept. 11, 1967.

Consent order requiring a major drug and chemical company with headquarters in Los Angeles, to divest itself within two years of all its domestic interests in the plastic bottle operations of a container corporation, and to refrain from acquiring any interest in this field for the next 10 years without prior approval of the Commission.

COMPLAINT

The Federal Trade Commission, having reason to believe that the above-named respondent has violated the provisions of Section 7 of the Clayton Act, 15 U.S.C. § 18, and that a proceeding in respect thereof would be to the interest of the public, issues this complaint stating its charges as follows:

I. Definitions

1. For purposes of this complaint the following definitions apply:

(a) "Plastics" are a class of synthetic materials that contain as an essential ingredient an organic substance of high molecular weight, are solid in their finished state and, at some stage in their manufacture, or in their processing into finished articles, can be shaped by the application of heat and pressure;

(b) "Resins" are a class of solid or semi-solid organic products generally of high molecular weight with no definite melting point. The terms "plastics" and "resins" are used in overlapping senses, but "resins" applies more specifically to the more or less chemically homogeneous polymers used as starting materials in the production of plastics articles while "plastics" signifies the final solid product, which may contain fillers, plasticizers, stabilizers, pigments, and other materials;

(c) "Polymerization" is a chemical reaction in which molecules are linked together to form large molecules whose molecular weight is a multiple of that of the original substance;

(d) "High density (sometimes called 'linear') polyethylene" is a resin formed by the polymerization of ethylene and having a density greater than 0.940;

(e) "Polyvinyl chloride" is a resin formed by the polymerization of vinyl chloride monomer; and

(f) "Polystyrene" is a resin formed by the polymerization of styrene.

II. The Respondent

Rexall Drug and Chemical Company

2. Respondent, Rexall Drug and Chemical Company ("Rexall"), is a corporation organized and existing under the laws of the State of Delaware, with its principal office at 8480 Beverly Boulevard, Los Angeles, California 90054.

3. Rexall is a large manufacturer and distributor of chemical, plastic and drug products both in the United States and abroad. The principal operating divisions of Rexall are: (a) Chemical; (b) Packaging; (c) Tupperware; (d) Ethical Drugs (Riker); (e) Proprietary Drugs (Rexall); and (f) Retail.

4. In 1965, Rexall ranked as the 187th largest industrial corporation in the United States. Rexall's total sales in 1965 amounted to $360,171,000. Its assets, as of December 31, 1965, were $280,202,000.

5. Rexall is engaged in the manufacture of petrochemicals through a joint venture with El Paso Products Company, and through its own wholly owned facilities. The Rexall-El Paso petrochemical operation includes the production of ethylene and poly-

ethylene. Rexall is responsible for the production and marketing of resins produced by this joint operation. Rexall's plastic fabricating operations in packaging film, plastic containers, housewares and related products are major consumers of these resins.

6. Consolidated Thermoplastics Company, jointly owned by Rexall and El Paso Products Company, manufactures and distributes plastic film, bottles and containers. This company is the third ranking producer of plastic containers with approximately 14% of the total United States plastic container market in 1964. Consolidated Thermoplastics' share of the market for plastic containers for certain end uses is considerably higher; for example, its sales accounted for approximately 28% of the market for plastic containers for toiletries and cosmetics in 1964. White Manufacturing Company, a wholly owned subsidiary of Rexall, is a leading producer of collapsible metal tubes for pharmaceutical, cosmetic and other uses.

7. Rexall is and for many years has been extensively engaged in the purchase, sale and shipment across State lines of drugs, chemicals, resins and fabricated plastic products. Rexall is engaged in "commerce" within the meaning of the Clayton Act.

III. The Acquired Firm

Thatcher Glass Manufacturing Company, Inc.

8. Prior to June 30, 1966, Thatcher Glass Manufacturing Company, Inc. ("Thatcher"), was a corporation organized and existing under the laws of the State of New York, with its principal office at 375 Park Avenue, New York, New York. On June 30, 1966, Rexall acquired all of the outstanding stock of Thatcher through the issuance of one share of Rexall convertible preferred stock for each share of Thatcher stock. In accord with the merger agreement, Thatcher was merged into Rexall and Rexall became the surviving corporation. The stock of Thatcher acquired by Rexall had a market value at the time of Rexall's acquisition in excess of $100 million.

9. Thatcher had long been a leading manufacturer of a broad line of glass containers, in various shapes, colors and sizes. In 1965, the year prior to the acquisition, Thatcher had sales of $74,024,984 and assets as of December 31, 1965, of $80,516,435.

10. In 1965, Thatcher was the fourth largest United States manufacturer of glass containers, accounting for over 6% of that market. In sales of certain types of glass containers Thatcher had a larger market share. In 1965 it accounted for nearly 19%

of the total sales of returnable glass beer bottles almost 13% of the sales of nonreturnable glass beer bottles, about 10% of glass bottles for wine and about 19% of glass containers for dairy products. Thatcher had been increasing its market share in the glass container industry steadily over the past 15 years.

11. Thatcher was also a significant producer of plastic tubes and closures. It was the second largest producer of plastic tubes with a substantial share of the total market. Thatcher had considered entry into other phases of the plastics field, including the manufacture of plastic bottles.

12. Thatcher maintained an engineering and research and development facility near Elmira, New York. The company was engaged in research activities concerning development of improved glass containers and plastic tubes and other products.

13. Prior to its acquisition by Rexall, Thatcher was and for many years had been extensively engaged in the purchase, sale and shipment across State lines of glass and plastic packaging products and was engaged in "commerce" within the meaning of the Clayton Act at the time it was acquired by Rexall.

IV. The Nature of Trade and Commerce

A. Glass Containers

14. The manufacture of glass containers is a substantial industry. In 1963, shipments in the United States by the glass container industry totaled 177.9 million gross (144 units per gross) valued at approximately $1 billion. Shipments of glass containers rose to a new peak of 197.6 million gross in 1965, an increase of more than 10% over shipments in 1963.

15. Glass containers are manufactured for a number of end uses, including food, medicinal and health supplies, household and industrial chemicals, toiletries and cosmetics, beverages, beer, liquor, wines, and dairy products.

16. The glass container industry is extremely concentrated. The leading four and eight firms accounted for approximately 65 and 84%, respectively, of total industry sales in 1965.

B. Plastic Containers

17. Plastic containers are becoming increasingly important as containers for a number of products which previously used other types of containers. It has been estimated that the value of shipments of plastic containers in the United States increased from approximately $50 million in 1958 to almost $230 million in 1964.

In 1965, shipments of plastic bottles totaled 2.6 billion units, 15% higher than comparable shipments in 1964.

18. End uses for plastic containers include, food, beverages, household and industrial chemicals, toiletries and cosmetics, medicinal and health supplies, and automotive and marine products. In some end uses the recent growth of plastic containers has been enormous. For example, shipments of bottles for food and beverages almost tripled between 1963 and 1965, and shipments of bottles for packaging medicinal and health products in 1965 increased by 82% over shipments for this end use during the preceding year.

19. The plastic container industry is extremely concentrated. The four leading manufacturers of plastic containers account for an estimated 75% of total industry sales.

20. There is now and for sometime past has been an increasing competitive confrontation between glass and plastic container manufacturers for the patronage of many major end users. In 1965, shipments of glass and plastic containers for the following end uses were:

Product Category	Glass (1000 units)	Plastic (1000 units)
Food and beverage	21,611,376	62,680
Household and industrial chemicals	994,896	1,685,278
Toiletries and cosmetics	2,158,128	576,513
Medicinal and health	3,370,896	259,535

21. Competition between plastic and glass containers is a dynamic phenomenon. There are many areas today where producers of plastic containers are competing with producers of glass containers to gain the consumer's use and acceptance of their products. There has been intense competition in the household detergent and chemical end-use market between plastic and glass containers. The use of plastics for toiletries, cosmetic and similar containers has increased enormously in the last few years. Presently there is a significant shift toward plastic containers in the huge milk container market. The expected development by the plastics industry of a clear polyvinyl chloride or other plastic container suitable for packaging many types of food and beverages will open up another important and large volume market for plastic containers heretofore served by glass. Rexall is significantly involved in each of these fields.

V. Competitive Effect of Merger

22. The effect of the acquisition by Rexall of Thatcher may be substantially to lessen competition and tend to create a monopoly in the United States in the production and sale of: (1) plastic and glass containers generally and particular types of glass and plastic containers including, but not limited to, plastic containers, glass containers and such containers for particular end uses, including, among others, pharmaceutical, cosmetic and similar end uses; and (2) in the production and sale of plastic tubes and collapsible metal tubes generally and particular types of plastic and collapsible metal tubes including, but not limited to, plastic tubes, collapsible metal tubes and such tubes for particular uses including, among others, pharmaceutical, cosmetic and similar end uses. Such effect may occur in the following ways among others:

(a) Elimination of actual and potential competition between Rexall and Thatcher;

(b) Elimination of Thatcher as a substantial independent competitive factor;

(c) Increase in the already dominant position of Rexall to such a point that its advantage over its competitors may become decisive;

(d) Further increases of the existing high levels of concentration in the production and sale of plastic containers and glass containers, and containers generally; and

(e) Limitations on the operation and development of vigorous and independent competitive policies by firms in the plastic and glass container fields.

VI. Violation Charged

23. The effect of the acquisition by Rexall of Thatcher, as alleged in paragraph 8, above, may be substantially to lessen competition or to tend to create a monopoly in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18, as more fully described in the preceding paragraph.

Decision and Order

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereof with violation of Section 7 of the Clayton Act, as amended, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a provision that the agreement shall not become a part of the official record of the proceeding unless and until it is accepted by the Commission and that such acceptance may be withdrawn by the Commission as provided by its Rules, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

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

1. Respondent Rexall is a corporation organized and existing under the laws of the State of Delaware, with its principal office and principal place of business located at 8480 Beverly Boulevard, Los Angeles, California, 90054.

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

ORDER

I

It is ordered, That respondent, Rexall Drug and Chemical Company ("Rexall"), a corporation, within two (2) years from the effective date of this Order, shall cause to be divested, absolutely and in good faith, to a purchaser or purchasers (such purchaser or purchasers being hereinafter called "Purchaser") approved by the Federal Trade Commission ("Commission") all of its interest, direct or indirect, in any assets, properties, rights and privileges, tangible or intangible, including, but not limited to, all plants, equipment, patents, trade names, trademarks, customer lists and goodwill, forming part of the Imco Container Company Division of Consolidated Thermoplastics Company ("Imco") and used in the manufacture or sale in the United States of thermoplastic bottles and thermoplastic accessories to such bottles, such as closure, plugs and overcaps (such assets and other interests set forth above being hereinafter called "the Assets"): *Provided,*

That such divestiture shall be in good faith to a Purchaser who, insofar as Rexall can reasonably determine, will operate such Assets as a going concern engaged in such thermoplastic bottle business: *Provided, further,* That nothing in this Order shall preclude such divestiture to El Paso Products Company: *And provided, further,* That Rexall shall cause to be divested the entire Imco division within the aforesaid two year period if such action is necessary to effectuate the divestiture of its interest in Imco as required by this Order.

II

It is further ordered, That, pending divestiture, Rexall shall not make or permit any deterioration of the Assets which may substantially impair present manufacturing capacity unless such capacity is restored prior to the divestiture: *Provided, however,* That nothing herein shall prevent Rexall, pending divestiture, from the exercise of good faith business judgment with respect to the operation and management of the Assets.

III

If the consideration received for the divestiture required to be made pursuant to this Order is not entirely cash, nothing in this Order shall be deemed to prohibit Rexall or any of its subsidiaries from accepting and enforcing a lien, mortgage, pledge, deed of trust or other security interest for the purpose of securing to Rexall full payment of the price, with interest, received by Rexall in connection with the divestiture; but if after *bona fide* divestiture including any disposal of any of the Assets, in accordance with the provisions of this Order, Rexall, by enforcement of such security interest regains direct or indirect ownership or control of any substantial portion of the Assets, said ownership or control regained shall be redivested subject to the provisions of this Order, within such reasonable period as is granted by the Commission for this purpose.

IV

If complete divestiture pursuant to Paragraph I above shall not have been accomplished as required by said paragraph within the time therein provided or if the grant of license required by Paragraph VII below shall not have been accomplished within the time therein provided or any extension of said periods which the Commission may grant, Rexall, upon its showing of good faith efforts to comply with the requirements of this Order, shall be heard by the Commission before the Commission issues any

further Order other than an Order extending the time for compliance with this Order.

V

It is further ordered, That Rexall shall not be required by this Order to sell, license or in any way convey any rights to its trademarks and trade names "Rexall" and "Rexpak"; nor shall Rexall be required to sell, license, or in any way convey any rights to any of its other trademarks or trade names except rights to trademarks and trade names now used by Imco in the United States.

VI

It is further ordered, That for a period of ten (10) years after the effective date of this Order, Rexall shall cease and desist from acquiring, directly or indirectly, through subsidiaries, joint ventures or otherwise, the whole or any part of the share capital, or assets (other than products, machinery or equipment purchased in the ordinary course of business) of, or any other interest in, any domestic concern, corporate or noncorporate, engaged principally or as one of its major commodity lines at the time of such acquisition, in the United States, in the business of manufacturing glass containers, plastic containers or plastic coated containers, without the prior approval of the Commission. For the purposes of this Order, "containers" shall only include closeable bottles, jars, jugs, vials, cartons for milk and other beverages, and squeeze tubes.

VII

It is further ordered, That Rexall shall grant a license on all of its United States patents, patents pending and related know-how at the time of the granting of such license used in the production of flexible plastic squeeze tubes (hereinafter referred to as "tubes") to a firm approved and/or chosen by the Federal Trade Commission within five (5) years from the effective date of this Order, on terms which are reasonable, and that Rexall shall agree with such licensee to furnish whatever reasonable technical assistance may be required in connection with the startup of production of tubes at a cost to licensee equal to Rexall's out-of-pocket expenses.

VIII

It is further ordered, That (1) Rexall shall, promptly upon service of this Order, initiate *bona fide* efforts and take all neces-

sary steps toward the accomplishment of the devestiture required by this Order, and shall continue such efforts until the divestiture required by this Order has been completed; and (2) within thirty (30) days from the effective date of this Order, and every sixty (60) days thereafter until the divestiture required by Paragraph I of this Order has been completed, Rexall shall submit in writing to the Federal Trade Commission its plans for effecting such divestiture and the action it has taken in implementation thereof, including, in addition to such other information as may be required, (a) the name, address and official capacity of the individual or individuals designated to carry out such divestiture and to negotiate with interested parties, (b) a brochure, presentation or other writing containing all of the essential information necessary to permit an interested party to evaluate the business to be divested, (c) a summary of any efforts made and to be made in advertising and affirmatively announcing the availability of the business to be divested, (d) a summary of any efforts made to locate and interest prospective purchasers not previously engaged in the industry, (e) a summary of contracts and negotiations relating to the sale of facilities ordered to be divested, including the identities of any party or parties expressing interest in the acquisition of the business to be divested, (f) copies of all written communications pertaining to negotiations, solicitations of bids, offers to buy or indications of interest in the acquisition of the whole or any part of the business to be divested, and (g) copies of all agreements and forms of agreement relating directly or indirectly to the proposed sale of the business to be divested. Rexall shall, within thirty (30) days from the effective date of this Order, and annually thereafter until it has fully complied with the provisions of Sections VI and VII of this Order, file with the Commission a report setting forth in detail the manner and form in which it intends to comply, is complying, or has complied with said Sections.

IN THE MATTER OF

RHEUARK BROKERAGE, INC., ET AL.

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

Docket C-1253. Complaint, Sept. 25, 1967—Decision, Sept. 25, 1967

Consent order requiring a Kansas City, Mo., food broker to cease accepting illegal brokerage in connection with the sale of food products.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Rheuark Brokerage, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 400 Atlantic Street, Kansas City, Missouri.

Respondent Jack Rheuark is an individual who is president of Rheuark Brokerage, Inc. His principal office and place of business is the same as that of the corporate respondent.

PAR. 2. The parties respondent are now and for the past several years have been, engaged in business primarily as brokers acting as intermediaries in the sale of food commodities and other products from suppliers to buyers operating hamburger stands in various States other than the State of Missouri. As such, the parties respondent have received commissions, brokerage or other compensations in connection with sales made to the owned and franchised hamburger stands of Griff's of America, Inc., located in Missouri and various other States, through Rigley Distributing Co., a division of Griff's, and Bricc Wholesalers, Inc.

In 1965 respondent Rheuark agreed with Robert L. Fellers, then president of Griff's of America, Inc., to act as a broker in connection with purchases of various products and supplies for use by the hamburger stands owned and franchised by Griff's of America, Inc. As part of the agreement respondent Rheuark agreed to pay over to Robert L. Fellers or to a corporation controlled by Fellers, Rigley Distributing Co., Inc., approximately 90% of all commissions, brokerage or other compensations received by respondents in connection with certain purchases particularly of potatoes and paper products.

PAR. 3. In the course and conduct of their business for the past several years, the parties respondent named herein, directly or indirectly, have caused food commodities and other products, when purchased, to be transported from the State of origin to destinations in other States. Thus, there has been at all times mentioned herein a continuous course of trade and commerce, as "commerce" is defined in the aforesaid Clayton Act, in said

food commodities and other products across State lines between the purchasers and the sellers of said products.

PAR. 4. In the course and conduct of respondents' business for the past several years the parties respondent have been collecting and receiving commissions, brokerage or other compensations paid by suppliers on sales to Griff's owned and franchised stands through Rigley Distributing Co., a division of Griff's and Bricc Wholesalers, Inc., when in fact, the parties respondent have been acting for or on behalf of a party to the transaction other than the suppliers by whom such commissions, brokerage or other compensations were so granted or paid.

During the time specified the parties respondent, pursuant to their agreement with Robert L. Fellers, then president of Griff's of America, Inc., have passed back to Fellers directly or indirectly through Fellers' corporation, Rigley Distributing Co., Inc., approximately 90% of all commissions, brokerage or other compensations, received from suppliers on their sales to Griff's owned or franchised stands through Bricc Wholesalers, Inc., and/or Griff's purchasing division, Rigley Distributing Co.

PAR. 5. The acts and practices of the parties respondent, as above-alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Section 13).

DECISION AND ORDER

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

The respondents and counsel for the Commission having, pursuant to the Commission's 1963 Rules of Practice, executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents

have violated said Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, has accepted said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Rheuark Brokerage, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 400 Atlantic Street, Kansas City, Missouri.

Respondent Jack Rheuark is an individual who is president of said corporation and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents Rheuark Brokerage, Inc., a corporation, and its officers, and Jack Rheuark, individually and as President of Rheuark Brokerage, Inc., and their agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase of food commodities and other products, in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

> Receiving or accepting, directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of food commodities or any other commodity for respondents' own account or where respondents are the agents, representatives or other intermediaries acting for, or in behalf of, or are subject to, the direct or indirect control of, any buyer or any buyer's officer, agent, representative or employee.

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

IN THE MATTER OF

UNITED SALES, INC., ET AL.

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

Docket C-1254. Complaint, Sept. 25, 1967—Decision, Sept. 25, 1967

Consent order requiring a Kansas City, Mo., food broker to cease accepting illegal brokerage in connection with the sale of food products.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent United Sales, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas. Its office and principal place of business was located at 4235 Janesville Street, Wichita, Kansas, until January 3, 1967. The principal place of business is now located at 315 South Gladstone, Kansas City, Missouri.

Respondent Ray Mickle is an individual who is president of United Sales, Inc. His principal office and place of business is the same as that of the corporate respondent. This respondent has operated United Sales, Inc., since its incorporation in 1963, when he and one Robert L. Fellers, then President of Griff's of America, Inc., jointly formed United Sales, Inc., each owning 50% of the stock. Respondent Mickle has since acquired all of the outstanding capital stock of the corporate respondent.

PAR. 2. The parties respondent are now and for the past several years have been engaged in business primarily as brokers acting as intermediaries in the sale of food commodities and other products from suppliers to buyers operating hamburger stands in various States other than the State of Kansas. As such, the parties respondent have received commissions, brokerage or other compensations in connection with sales made to Griff's of America, Inc., franchised and company-owned hamburger stands through Rigley Distributing Co., a division of Griff's and Bricc Wholesalers, Inc.

PAR. 3. In the course and conduct of their business for the past several years, the parties respondent named herein, directly or indirectly, have caused food commodities and other products,

when purchased, to be transported from the State of origin to destinations in other States. Thus, there has been at all times mentioned herein a continuous course of trade and commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, in said food commodities and other products across State lines between the purchasers and the sellers of said products.

PAR. 4. In the course and conduct of respondents' business for the past several years, the parties respondent have been collecting and receiving commissions, brokerage or other compensations paid by suppliers on sales of such products to Griff's of America, Inc., franchised and company-owned hamburger stands through Rigley Distributing Co. and Bricc Wholesalers, Inc., when in fact, the parties respondent have been acting for or on behalf of a party to the transaction other than the suppliers by whom such commissions, brokerage or other compensations were granted or paid.

It is further alleged, that the parties respondent, for several years last past, have passed on approximately 90% of such commissions, brokerage or other compensations, to Griff's of America, Inc., and directly to Robert L. Fellers, or indirectly to Fellers through Rigley Distributing Co., Inc., the purchasers of such products on which such commissions, brokerage or other compensations were paid by suppliers.

PAR. 5. The acts and practices of the parties respondent, as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Section 13).

DECISION AND ORDER

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

The respondents and counsel for the Commission having, pursuant to the Commission's 1963 Rules of Practice, executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission

by the respondents that the law has been violated as alleged in such complaint, and waivers and provisions as required by the Commission's rules; and

The Commission, having reason to believe that the respondents have violated subsection (c) of Section 2 of the Clayton Act, as amended, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, has accepted said agreement, makes the following jurisdictional findings and enters the following order:

1. Respondent United Sales, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas. Its office and principal place of business was located at 4235 Janesville Street, Wichita, Kansas until January 3, 1967. Its principal place of business is now located at 315 S. Gladstone, Kansas City, Missouri.

Respondent Ray Mickle is an individual who is president of United Sales, Inc., and his address is the same as that of said corporation.

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

ORDER

It is ordered, That respondents United Sales, Inc., a corporation, and its officers and Ray Mickle, individually and as President of United Sales, Inc., and their agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase of food commodities and other products, in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

> Receiving or accepting, directly or indirectly from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of food commodities or any other commodity for respondents' own account or where respondents are the agents, representatives or other intermediaries acting for, or in behalf of, or are subject to, the direct or indirect control of, any buyer or any buyer's officer, agent, representative or employee.

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

IN THE MATTER OF

RIGLEY DISTRIBUTING CO., INC., ET AL.

CONSENT ORDER, IN REGARD TO THE ALLEGED VIOLATION OF SECTION 2(c) OF THE CLAYTON ACT

Docket C-1255. Complaint, Sept. 25, 1967—Decision, Sept. 25, 1967

Consent order requiring a Lawrence, Kansas, food broker to cease accepting illegal brokerage in connection with the sale of food products.

COMPLAINT

The Federal Trade Commission, having reason to believe that the parties respondent named in the caption hereof, and hereinafter more particularly described, have been and are now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Rigley Distributing Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its office and principal place of business located at 901 Kentucky Street, Lawrence, Kansas.

Respondent James Shirley is an individual who is president of Rigley Distributing Co., Inc. His principal office and place of business is the same as that of the corporate respondent. This respondent has operated Rigley Distributing Co., Inc., since 1964 and holds all shares of stock in personal "trust" for respondent Robert L. Fellers, former president of Griff's of America, Inc., which company operates its own hamburger stands and also franchises independently owned hamburger stands in approximately twenty (20) States located primarily in the Midwestern States.

Respondent Robert L. Fellers is an individual and an officer of respondent Rigley Distributing Co., Inc. For the past several years until November 30, 1966, he was also an officer and general manager of Griff's of America, Inc., and as such owned 49% of the stock in Griff's of America, Inc. Respondent Fellers' principal place of business is 901 Kentucky Street, Lawrence, Kansas.

PAR. 2. Respondent Rigley has operated as an agent or representative of respondent Fellers in his individual capacity.

Respondent Rigley has received commissions, brokerage or other compensations, in connection with the purchase of food commodities and other products for resale or use by Griff's of America, Inc., through its own and franchised hamburger stands.

Respondents Fellers and Shirley have arranged for the purchase and delivery of such products as aforesaid, and have received commissions, brokerage and other compensations paid or allowed by suppliers on sales resulting from such arrangements.

The various food products and other items used or resold by Griff's of America, Inc., are drop-shipped by the suppliers thereof to the individual hamburger stands, both company-owned and those independently owned and franchised units.

In addition to respondent Rigley Distributing Co., Inc., the company known as Griff's of America, Inc., operated a division called Rigley Distributing Company, under which name various food commodities and other products were purchased, from time to time during the past several years, for use of, and resale to, the hamburger stands, both franchised and company-owned. Similarly Griff's of America, Inc., also purchased indirectly through a wholesale house, Bricc Wholesalers, Inc., a Kansas corporation located in Iola, Kansas. Bricc Wholesalers, Inc., in fact, acted as agent.

PAR. 3. About the year 1963 respondent Fellers together with one Ray Mickle, an individual, caused a corporation by the name of United Sales, Inc., to be organized under Kansas laws for the purpose of operating a brokerage business, which would handle all sales of food commodities and other products to Griff's of America, Inc. Respondent Fellers and Ray Mickle each held 50% of the outstanding capital stock of United Sales, Inc.

All monies received by the said United Sales, Inc., as commissions or brokerage were to be divided between respondent Fellers and Mickle with 10% retained by Mickle and the remainder to either respondent Rigley or respondent Fellers direct.

The total annual sales to respondent Rigley, handled by United Sales, Inc., amounted to approximately $300,000.

Some time during the year 1965, respondent Fellers sold his stock interest in United Sales, Inc., to Ray Mickle and thereafter entered into an arrangement with one Jack Rheuark, sole owner of a brokerage business known as Rheuark Brokerage, Inc., a Missouri corporation, located in Kansas City, Missouri.

Among the items used by Griff's of America, Inc., in large quantities were potatoes and paper products. Respondent Fellers agreed with Jack Rheuark that the Rheuark Brokerage, Inc., would handle all purchases of the above products by Griff's of America, Inc., provided that a portion of brokerage commissions would be rebated either to respondent Rigley or respondent Fellers. Thus, the arrangement was that with respect to brokerage on potatoes respondent Fellers was to receive an amount of approximately $200

every two weeks from Rheuark. As to the purchase of paper products Rheuark was to receive the brokerage of 12½% and did rebate 90% of the resulting amount to either respondent Rigley or respondent Fellers direct. The remaining 10% of brokerage received by Rheuark was retained by that company. The dollar amounts involved have been substantial.

PAR. 4. In the course and conduct of their business for the past several years, the parties respondent named herein, directly or indirectly, have caused food commodities and other products, when purchased to be transported from the State of origin to destinations in other States. Thus, there has been at all times mentioned herein a continuous course of trade in commerce, as "commerce" is defined in the aforesaid Clayton Act, as amended, in said products across State lines between said respondents or Griff's Burger Bars and the sellers of said products.

PAR. 5. In the course and conduct of respondents' business for the past several years, the parties respondent have been collecting and receiving, directly or indirectly, commissions, brokerage or other compensations paid by suppliers on sales of products to Griff's of America, Inc., and company-operated and franchised hamburger stands. During the past several years the parties respondent have been acting for or on behalf of Griff's of America, Inc., and its franchised dealers, the purchasers, while receiving such commissions, brokerage and other compensations, directly or indirectly from suppliers.

It is further alleged, that the individual parties respondent have retained for their own use some of such commissions, brokerage or other compensations paid directly or indirectly by suppliers.

PAR. 6. The acts and practices of the parties respondent as above alleged and described, are in violation of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title 15, Section 13).

DECISION AND ORDER

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

The respondents and counsel for the Commission having, pursuant to the Commission's 1963 Rules of Practice, executed an

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

The Commission, having reason to believe that the respondents have violated said Act, and having determined that complaint should issue stating its charges in that respect, hereby issues its complaint, has accepted said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Rigley Distributing Co., Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Kansas, with its office and principal place of business located at 901 Kentucky Street, Lawrence, Kansas.

Respondents James Shirley and Robert L. Fellers are officers of Rigley Distributing Co., Inc. The principal office and place of business of respondent James Shirley is the same as that of said corporation and the principal place of business of respondent Robert L. Fellers is 901 Kentucky Street, Lawrence, Kansas.

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

ORDER

It is ordered, That respondents Rigley Distributing Co., Inc., a corporation, and its officers, agents, representatives and employees; James Shirley, individually and as an officer of Rigley Distributing Co., Inc.; and Robert L. Fellers, individually and as an officer of Rigley Distributing Co., Inc.; and their agents, representatives and employees, directly or through any corporate or other device, in connection with the purchase of food commodities and other products, in commerce, as "commerce" is defined in the amended Clayton Act, do forthwith cease and desist from:

> Receiving or accepting directly or indirectly, from any seller, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, upon or in connection with any purchase of any of such products for respondents' own account or where respondents are the agents, representatives or other intermediaries acting for, or in behalf of, or are subject to, the direct or indirect control of, any buyer.

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

IN THE MATTER OF

GRIFF'S OF AMERICA, INC.

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

Docket C-1256. Complaint, Sept. 25, 1967—Decision, Sept. 25, 1967

Consent order requiring a Dallas, Texas, corporation which operates and franchises hamburger stands to cease engaging in illegal brokerage activities in the sale of food products.

COMPLAINT

The Federal Trade Commission, having reason to believe that the respondent named in the caption hereof, and hereinafter more particularly described, has been and is now violating the provisions of subsection (c) of Section 2 of the Clayton Act, as amended (U.S.C., Title, 15, Section 13), hereby issues its complaint, stating its charges with respect thereto as follows:

PARAGRAPH 1. Respondent Griff's of America, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its office and principal place of business located at 700 Tower Petroleum Building, Dallas, Texas.

PAR. 2. The respondent is now and for the past several years has been, engaged in the business of operating and franchising hamburger stands in the Middle West portion of the United States, known as Griff's Burger Bars. The respondent operates its own hamburger stands in the States of Kansas, Missouri, Oklahoma, Louisiana, Texas and New Mexico. Its franchised operations are located in more than 20 States, some of which are Kansas, Iowa, Texas, Missouri, Minnesota, Colorado and Kentucky. Respondent's total annual volume of sales including its franchised units, is in excess of $20,000,000.

PAR. 3. In the course and conduct of its business for the past several years, the respondent named herein, directly or indirectly, has caused food commodities and other products, when purchased, to be transported from the State of origin to destinations in other