

IN THE MATTER OF
GEORGE'S RADIO AND TELEVISION COMPANY, INC.
ET AL.

CONSENT SETTLEMENT, IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6140. Complaint, Nov. 4, 1953—Decision, Dec. 22, 1953

Where a corporation and its two officers, engaged in the District of Columbia in the sale of electrical appliances including home freezers and television sets in selling their said freezers in connection with arrangements whereby purchasers were enrolled in a food distributing organization operated by a concern unaffiliated with them and under which members were entitled to purchase certain food items in bulk quantities—

- (a) Represented through radio broadcasts and other means of advertising that participants in said plan could buy food at wholesale prices or from a wholesaler; when in fact said organization was not a wholesaler and the prices at which participants purchased were not wholesale prices;
- (b) Represented that participants therein could effect overall monetary savings through the general use of frozen foods in place of corresponding foods in other forms;

The facts being, in the main, frozen foods thus purchased would cost more per edible pound than corresponding foods in other available forms normally consumed by the public; and no overall saving in food costs would be accomplished by the general substitution of frozen foods, thus available for corresponding foods in other forms;

- (c) Represented that substantial overall reductions in food costs would be effected by participation in said plan; the facts being that, in the main, food plan prices were considerably in excess of usual retail prices of corresponding foods in other forms, and were close to and in some instances identical with usual retail prices of similar frozen foods; and no substantial overall reductions in food costs would thereby be effected; and
- (d) Represented that net monetary savings could be effected by all who purchased and used their home freezers;

The facts being that in a substantial number of instances increase in expense directly attributable to the purchase and use of a home freezer including cost of financing where credit is used, and cost of operation, maintenance, and depreciation would eliminate savings, if any, which might be effected through the purchase of food in bulk quantities and in such instances purchase and use of such a product would not result in net monetary savings; and

Where said corporation and individuals in thus advertising their television sets —

- (e) Represented through such statements as "brand new", that the particular sets offered were sets of the current year's models when in fact many of said sets were not such when advertised;
- (f) Represented that higher prices shown for their "Mirrortone" sets in advertisements in which they were offered at a lower figure represented the usual price at which they were customarily offered for sale and sold in the recent regular course of their business;

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When in fact said higher price greatly exceeded the usual price at which said sets were customarily thus offered and sold by them;

(g) Falsely represented that the price at which such sets were offered and sold was lower by 50% than the usual price at which they were thus customarily offered and sold by them; and

(h) Represented that they were making bona fide offers to sell such sets for \$99 and various other prices stated from time to time;

When in fact such advertised prices were not genuine or bona fide offers, but were made to induce persons to visit their stores or to obtain leads as to persons interested in the purchase of television sets in order that they might be solicited in said person's home by their salesman; and they and their salesmen in many instances displayed great reluctance or refused to demonstrate or improperly demonstrated such sets or disparaged the design, workmanship, and performance thereof and attempted to demonstrate and sell different and more expensive sets than those advertised:

Held, That such acts and practices, under the circumstances set forth, were all to the prejudice and injury of the public and constituted unfair and deceptive acts and practices in commerce.

Before *Mr. William L. Pack*, hearing examiner.

Mr. Ames W. Williams and *Mr. John J. McNally* for the Commission.

Grossberg, Yochelson & Brill, of Washington, D. C., for respondents.

CONSENT SETTLEMENT¹

Pursuant to the provisions of the Federal Trade Commission Act, the Federal Trade Commission on November 4, 1953, issued its complaint, which was duly served on the respondents named in the caption hereof, charging them with the use of unfair and deceptive acts and practices in violation of the provisions of said Act.

The respondents, desiring that this proceeding be disposed of by the consent settlement procedure provided in Rule V of the Commission's Rules of Practice, solely for the purpose of this proceeding, any review thereof and the enforcement of the order consented to, and conditioned upon the Commission's acceptance of the consent settlement hereinafter set forth and in lieu of answer to said complaint, hereby:

1. Admit all the jurisdictional allegations set forth in the complaint.
2. Consent that the Commission may enter the matters hereinafter set forth as its findings as to the facts, conclusion and order to cease

¹ The Commission's "Notice" announcing and promulgating the consent settlement as published herewith, follows:

The consent settlement tendered by the parties in this proceeding, a copy of which is served herewith, was accepted by the Commission on December 22, 1953 and ordered entered of record as the Commission's findings as to the facts, conclusion, and order in disposition of this proceeding.

The time for filing report of compliance pursuant to the aforesaid order runs from the date of service hereof.

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and desist. It is understood that the respondents in consenting to the Commission's entry of said findings as to the facts, conclusion and order to cease and desist, specifically refrain from admitting or denying that they have engaged in any of the acts or practices stated therein to be in violation of law.

3. Agree that this consent settlement may be set aside in whole or in part under the conditions and in the manner provided in paragraph (f) of Rule V of the Commission's Rules of Practice.

The admitted jurisdictional facts, the statement of the acts and practices which the Commission had reason to believe were unlawful, the conclusion based thereon, and the order to cease and desist, all of which the respondents consent may be entered herein in final disposition of this proceeding, are as follows:

PARAGRAPH 1. George's Radio and Television Company, Inc., is a corporation, organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 816 F Street NW., Washington, D. C. George Wasserman is president and treasurer, and Philip Keller is general manager of the corporate respondent George's Radio and Television Co., Inc. These individual respondents formulated, controlled and directed the affairs and policies of the corporate respondent at the time the acts and practices hereinafter set forth transpired. Said individual respondents have their offices at the same place as corporate respondent.

Individual respondents George Wasserman and Phillip Keller have executed affidavits dated November 24, 1953, which state that individual respondents Leopold Freudberg and Solomon Grossberg are officers for convenience purposes only, and during their tenure of office as Vice President and Secretary, respectively, have had no voice whatever in the formulation, control or direction of the affairs, policies or advertising practices of respondent George's Radio and Television Company, Inc.

By reason of the matters set forth in said affidavits, the Commission finds that the complaint herein, insofar as it relates to the respondents Leopold Freudberg and Solomon Grossberg as individuals, should be dismissed, and accordingly, the term respondents, as hereinafter used, shall refer to respondents George's Radio and Television Company, Inc., and George Wasserman and Phillip Keller, individuals.

PAR. 2. Respondents are now, and for more than one year last past have been, engaged in the sale of electrical appliances, including home freezers and television sets. Respondents have made arrangements whereby purchasers of said home freezers are enrolled in a food distributing organization operated by a concern unaffiliated with re-

spondents, which entitles members to purchase certain food items in bulk quantities.

PAR. 3. In the course and conduct of their business, respondents caused their home freezers, television sets and other electrical appliances, when sold, to be transported to the purchasers thereof at their places of residence in the District of Columbia and in the States adjacent thereto, and at all times material herein have maintained a course of trade in said home freezers, television sets and other electrical appliances in commerce in the District of Columbia and adjacent States. Respondents maintain, and at all times mentioned herein have maintained, a course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, respondents, through the use of radio broadcasts and other means of advertising, have made certain statements and representations of which the following are typical:

Continuity broadcast over Station WARL, Arlington, Virginia, on June 7, 1952.

* * * Friends, if you've been doing without—if you've been denying yourself big necessities and little luxuries because you just can't see where the money's coming from: this revolutionary plan may alter your whole life. Now George's makes it possible for you to buy food the way your grocer does—buy it packaged the way you want—meats cut the way you want—buy it at tremendous savings—buy it at George's Food Chest Plan Way. Call George's at RE 7420 now for all the details at no obligation. Find out what the Food Chest way can mean to your standard of living now that prices are going up again in foods * * *

A plan that will save you hundreds of dollars and still let your family eat better than before. Has the cost of living got you down? Are you constantly worried about how you can make your budget stretch? Friends, savings on your food bill can be the difference between poverty and plenty. George's has gotten together with nationally famous food distributors and now you can buy direct with fantastic savings * * * Call RE 7420 now to see how you can buy as your grocer buys, direct, and save hundreds of dollars * * *

* * * If you've ever been worried about money—if you're seriously concerned about how your salary can stretch—or how your husband's salary can meet ever-increasing expenses—a simple phone call can open up a whole new way of running your household."

Continuity broadcast over Station WTTG, Washington, D. C., June 7, 1952.

* * * I'm going to tell you how you can eat better than you've ever eaten, and spend less. How you can put money in the bank, not for one month, not for one year, but for the rest of your life! George's * * * Washington's great appliance dealer and the nation's famous food distributors have gotten together. Famous brands like Snow Crop, Armour, Swift, dozens more. They've cooked up a fantastic plan to let you buy direct with incredible savings. You actually buy as your grocer himself buys, with foods packaged and meat cut the way

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you specify. You buy direct, and save hundreds of dollars, with no money down, for your food, and convenient installments * * * This revolutionary new way to eat better and actually save money is as close as your telephone * * * Call George's and ask about the fantastic Food Chest Food Plan, to save you hundreds of dollars * * * it's money in the bank, tremendous lifetime savings * * *

Continuity broadcast over Station WARL, Arlington, Virginia, on June 12, 1952.

Republic 7420—that's the number to call now for the fantastic George's Food Plan—the food plan that's sweeping the whole country—the food chest you've heard so many incredible things about. Yes, it's an amazing new idea—and here's the lowdown on how you can save hundreds of dollars * * * Because now with a Food Chest not only can you buy food in season, not only can you buy it in quantity, but you can actually buy it with a big quantity discount! Yes, because of a special new arrangement with the big national distributors, you get the benefit of buying with a discount that saves you an incredible percentage of your whole food budget and you pay no money down for your food. Imagine being able to buy meats, fish, fruits, and vegetables, at actual discount that will mean fantastic savings for you and your family * * *

Continuity broadcast over Station WTOP, Washington, D. C., on June 13, 1952.

Now for years people have been buying food chests and saving money every year by having the facilities to buy in quantity. When beef is low they buy 100 pounds of beef. In the summer they buy strawberries and eat them all year around. And now something sensational has been added, because now with a Food Chest not only can you buy food in season, not only can you buy it in quantity, but you can actually buy it with a big quantity discount * * *

PAR. 5. Through the use of the foregoing statements and representations and others of the same import, but not specifically set out herein, respondents represented, directly or by implication:

1. That participants in said plan can buy food at wholesale prices or from a wholesaler.
2. That participants in said food plan can effect over-all monetary savings through the general use of frozen foods in place of corresponding foods in other forms.
3. That substantial over-all reductions in food costs will be effected through participation in said food plan.
4. That net monetary savings can be effected by all who purchase and use respondents' home freezers.

PAR. 6. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

1. The food distributing organization from which participants in said plan purchase is not a wholesaler and the prices at which participants purchase are not wholesale prices.
2. In the main, frozen foods, purchased through said plan, will cost more per edible pound than corresponding foods in other available

forms normally consumed by the public. No over-all saving in food costs will be accomplished by the general substitution of frozen foods, available under said plan, for corresponding foods in other forms.

3. In the main, food plan prices are considerably in excess of usual retail prices of corresponding foods in other forms, and are close to, and in some instances identical with, usual retail prices of similar frozen foods. As a consequence, substantial over-all reductions in food costs will not be effected through participation in said food plan.

4. In a substantial number of instances, the purchase and use of a home freezer will not result in net monetary savings. In such instances the increase in expenses directly attributable to the purchase and use of a home freezer will eliminate savings, if any, which may be effected through the purchase of food in bulk quantities. Among the expenses which will be thus incurred are the costs of financing where credit is used, and the costs of operation, maintenance and depreciation of the home freezer.

PAR. 7. In the course and conduct of their business, respondents, through the use of radio broadcasts, newspaper advertisements, and other means of advertising, have made certain statements with respect to their television sets. Among and typical, but not all inclusive, of said statements, are the following:

In the Washington, D. C., "Evening Star," issue of April 11, 1952.

Brand-New \$309.95 MAJESTIC 20" CONSOLE TELEVISION. Fully guaranteed—on sale at all stores. \$188.

Brand-New \$279.95 MAJESTIC 20" TABLE MODEL TELEVISION. Fully guaranteed—on sale at all stores. \$134.

New 1952 \$259.95 MIRRORTONE 20 In. TV Fully guaranteed—on sale at all stores. \$99.

Brand-New \$299.95 CBS COLUMBIA 20 In. TV. In full supply at all stores. \$149.

In the Washington, D. C., "Evening Star" issue of April 18, 1952.

* * * We may be stepping on toes but for once and for all let's get the record straight. George's has served the Washington area for over a quarter century. We've grown and prospered with your patronage and we did it by honest, straight-forward selling. The record proves it! Over a million satisfied customers. Satisfied with Bargains NOT BAIT! When George's advertises such Specials as appear on this page you can be sure of quality and value. A Quarter-Century of Successful business proves it!

BRAND-NEW 1952 MIRRORTONE TV REG. \$249.95. \$99.95

In the Washington, D. C., "Times Herald" issue of April 25, 1952.

50%

OFF!

Brand-New

Famous Make Television

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Brand-New \$459.95 EMERSON 19" Console. This merchandise on sale at all stores. \$229.98

Brand-New \$525 ADMIRAL 20" Console. This merchandise on sale at all stores. \$262.50

Brand-New \$369.95 PHILCO 17" Console. This merchandise on sale at all stores. \$184.98

Brand-New \$299.95 MOTOROLA 20" Ensemble. \$149.98

Brand-New \$299 CBS-COLUMBIA 20" table model. This merchandise on sale at all stores. \$149.98

Brand-New \$279.95 HALLICRAFTERS 20" Table model. \$139.98, Base extra.

Brand-New \$249.95 1952 MIRRORTONE 20" table model. This merchandise on sale at all stores. \$99

Brand-New \$299.95 1952 MIRRORTONE 20" TV Console. This merchandise on sale at all stores. \$129

Continuity Broadcast by Station WRC, Washington, D. C., on June 29, 1952.

* * * Georges, makes a special offer of 20-inch table model television for just 99 dollars plus tax and warranty. A fabulous price and a great value you can't afford to miss. A 99 dollar price tag on any television is going some—but when its a 20 inch television from George's its the buy of a lifetime! George's invites you to look this set over at no cost, no obligation. Right now special operators are waiting to take your calls at RE-7420. We'll rush a 20-inch television to your home this very afternoon for a free look. * * *

PAR. 8. Through the use of the foregoing statements and others of the same import, but not specifically set out herein, respondents represented, directly or by implication:

1. That their television sets which are described as brand new, are sets of the current year's model.

2. That the higher price for "Mirrortone" sets shown in said advertisements, represents the usual price at which said sets were customarily offered for sale and sold by respondents in the recent regular course of their business.

3. That the price at which said "Mirrortone" sets are offered is lower by 50% than the usual price at which they were customarily offered for sale and sold by respondents in the recent regular course of their business.

4. That respondents were making bona fide offers to sell "Mirrortone" television sets for \$99 and various other prices stated from time to time.

PAR. 9. The aforesaid statements and representations are false, misleading and deceptive. In truth and in fact:

1. Many of the television sets described as brand new were not current models at the time the said advertisements were published.

2. The higher price for "Mirrortone" sets shown in said advertisements does not represent, but on the contrary greatly exceeds, the usual

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price at which said sets were customarily offered for sale and sold by respondents in the recent regular course of their business.

3. The price at which said "Mirrortone" sets are offered is not 50% less than the usual price at which said sets were customarily offered for sale and sold by respondents in the recent regular course of their business.

4. Respondents' offers to sell "Mirrortone" television sets at the various advertised prices were not genuine or bona fide offers to sell such sets. On the contrary, said offers were made for the purpose of inducing persons to visit respondents' stores or to obtain leads as to persons interested in the purchase of television sets in order that they could be solicited in their homes by respondents' salesmen.

Respondents and their salesmen, at their places of business and in calling upon persons at their homes, in many instances displayed great reluctance or refused to demonstrate or gave an improper demonstration of said television sets, or disparaged the design, workmanship and performance of said sets and attempted to demonstrate and sell different and more expensive sets than those advertised.

PAR. 10. The use by respondents of the said false and misleading statements and representations, had the capacity and tendency to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that the statements and representations contained therein were true and to induce the purchase of substantial quantities of respondents' freezers and television sets by reason of such erroneous and mistaken belief.

CONCLUSION

The aforesaid acts and practices of respondents, George's Radio and Television Co., Inc., and George Wasserman and Phillip Keller, individually, as herein found, are all to the prejudice and injury of the public and constitute unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

ORDER TO CEASE AND DESIST

It is ordered, That respondents, George's Radio and Television Company, Inc., a corporation, and its officers, and George Wasserman and Phillip Keller, individually, and respondents' representatives, agents and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution of home freezers and television sets in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing directly or by implication:

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1. That participants in a food purchasing plan can buy food at wholesale prices or from a wholesaler, contrary to the fact.
 2. That overall monetary savings can be effected through the general use of frozen foods in place of corresponding foods in other forms.
 3. That substantial overall reductions in food costs will be effected through participation in a food purchasing plan.
 4. That net monetary savings, however expressed, can be effected through the use of freezers purchased from respondents, unless the costs of operation, maintenance and depreciation and, in the event that the freezer is purchased on credit, the costs of such credit, are taken into account.
 5. That television sets which are not of the current year's model are new, through the use of such terms as "Brand-New" or any other terms which describe said sets as new, unless the year in which said sets were current models is disclosed.
 6. As the usual price of television sets, any price or value which is in excess of the price at which said sets were customarily offered for sale and sold by respondents in the recent regular course of their business.
 7. That the price at which respondents' television sets are offered is lower by 50% or any other designated percentage, than the usual price at which said sets were customarily offered for sale and sold by respondents in the recent regular course of their business.
 8. That television sets are being offered for sale when such offer is not a genuine and bona fide offer to sell the sets so offered.
- It is further ordered,* That respondents, George's Radio and Television Company, Inc., and George Wasserman and Phillip Keller, individually, 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 therewith.
- It is further ordered,* That the complaint be, and it hereby is, dismissed as to the respondents Leopold Freudberg and Solomon Grossberg, individually.

George's Radio and Television
Company, Inc.

By (Sgd) George Wasserman,
George Wasserman, President and
Treasurer.

By (Sgd) George Wasserman,
George Wasserman, individually.

(Sgd) Phillip P. Keller,
Phillip Keller, individually.

Date: December 4, 1953.

The foregoing consent settlement is hereby accepted by the Federal Trade Commission and ordered entered of record on this the 22nd day of December 1953.

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IN THE MATTER OF
CHAIN INSTITUTE, INC. ET AL.

Docket. 4878. Order and opinions, Dec. 28, 1953

Before *Mr. Webster Ballinger*, hearing examiner.

Mr. Everette MacIntyre and *Mr. Karl E. Steinhauer* for the Commission.

Kittelle & Lamb, of Washington, D. C., for respondents generally, and along with—

Mr. Clarence M. Dinkins, of Washington, D. C., for Chain Institute, Inc. and George J. Campbell, Jr.;

Mr. Frederick S. Duncan, of New York City, for American Chain & Cable Co., Inc., St. Pierre Chain Corp. and Wm. D. Kirkpatrick;

Alvord & Alvord, of Washington, D. C., and *Reed, Smith, Shaw & McClay*, of Pittsburgh, Pa., for The McKay Co. and Frank A. Bond;

Ganger & Ganger, of Cleveland, Ohio, for Bridgeport Chain & Manufacturing Co., Cleveland Chain & Manufacturing Co., Round California Chain Co. and Seattle Chain & Mfg. Co.;

Thompson, Hine & Flory, of Cleveland, Ohio, for Hodell Chain Co.;

Mr. Charles R. Fay, of Worcester, Mass., for St. Pierre Chain Corp.;

Sidley, Austin, Burgess & Smith, of Chicago, Ill., for S. G. Taylor Chain Co.;

Finck & Huber, of Buffalo, N. Y., for Columbus McKinnon Chain Corp.;

Mr. Frederick B. Gerber, of York, Pa., for Campbell Chain Co.;

Lawrence, Goldberg, Lawrence & Lewin, of Chicago, Ill., for Nixdorff-Krein Manufacturing Co., Peerless Chain Co. and Dennis A. Merriman;

Marsh, Day & Calhoun, of Bridgeport, Conn., for John M. Russell Manufacturing Co., Inc. and Turner & Seymour Manufacturing Co.

ORDER DISPOSING OF MOTIONS FOR MODIFICATION OR SETTING ASIDE OF FINDINGS AS TO THE FACTS, CONCLUSION, AND ORDER TO CEASE AND DESIST;¹ MODIFYING ORDER TO CEASE AND DESIST AND DISMISSING COMPLAINT AS TO RESPONDENT FRANK A. BOND

This matter came on to be heard by the Commission upon the application and motion, with supporting affidavits and memorandum, for modification or setting aside of the findings as to the facts conclusion, and order to cease and desist, filed by respondents Chain Institute,

¹ Reported in 49 F. T. C. 1041.

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Inc., American Chain & Cable Company, Inc., The Bridgeport Chain & Manufacturing Company, The McKay Company, Hodell Chain Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Cleveland Chain & Manufacturing Company, Campbell Chain Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Round California Chain Company, The John M. Russell Manufacturing Company, Inc., Seattle Chain & Mfg. Company, Turner & Seymour Manufacturing Company, Western Chain Products Company, Woodhouse Chain Works, Dennis A. Merriman, Wm. D. Kirkpatrick, and George J. Campbell, Jr.; the motion, with supporting affidavit, to vacate or modify the findings as to the facts, conclusion, and order to cease and desist, filed by respondent Columbus McKinnon Chain Corporation; answer to said motions filed by counsel supporting the complaint; and reply to said answer filed by certain of the respondents.

The Commission having duly considered the motions filed by certain of the respondents herein for the setting aside or modification of the findings as to the facts, conclusion, and order to cease and desist, and the requests for permission to file briefs and to be heard in oral argument on such motions, answer of counsel supporting the complaint, reply by certain of the respondents, and pertinent portions of the record, and being of the opinion, for the reasons appearing in the accompanying opinion of the Commission, that said motions and requests are without merit except for the request that the complaint be dismissed as to respondent Frank A. Bond:

It is ordered, That the application and motion for modification or setting aside of the findings as to the facts, conclusion, and order to cease and desist, filed by respondents Chain Institute, Inc., American Chain & Cable Company, Inc., The Bridgeport Chain & Manufacturing Company, The McKay Company, Hodell Chain Company, St. Pierre Chain Corporation, S. G. Taylor Chain Company, Cleveland Chain & Manufacturing Company, Campbell Chain Company, Nixdorff-Krein Manufacturing Company, Peerless Chain Company, Round California Chain Company, The John M. Russell Manufacturing Company, Inc., Seattle Chain & Mfg. Company, Turner & Seymour Manufacturing Company, Western Chain Products Company, Woodhouse Chain Works, Dennis A. Merriman, Wm. D. Kirkpatrick, and George J. Campbell, Jr., and the motion to vacate or modify the findings as to the facts, conclusion, and order to cease and desist, filed by respondent Columbus McKinnon Chain Corporation, and the requests for permission to file briefs and to be heard in oral argument on said motions, be, and they hereby are, denied except for

the request that the complaint be dismissed as to respondent Frank A. Bond.

It is further ordered, That the order to cease and desist heretofore entered in this matter be, and it hereby is, modified by striking therefrom Frank A. Bond as a respondent against whom said order was directed.

It is further ordered, That the amended complaint herein be, and it hereby is, dismissed as to respondent Frank A. Bond.

Commissioner CARRETTA dissenting in part and concurring in part.

Chairman HOWREY delivered the Opinion of the Commission.

This is one of a number of motions, filed in recent months, to reopen and reconsider matters, previously adjudicated, upon the ground that there have been changes in the membership of the Commission.

This particular case was decided during February 1953, when the Commission was comprised of Commissioners Mead, Mason, Carson, Spingarn and Carretta, and is now pending before the United States Court of Appeals for the Eighth Circuit. Of the present Commission, Commissioner Mead is the only member who voted with the majority when the case was adjudicated on the merits. Commissioner Mason dissented. Commissioner Carretta did not participate for the reason that oral argument was heard before he became a member. Chairman Howrey and Commissioner Gwynne have not, of course, participated in any phase of the proceeding.¹

The complaint was issued on December 22, 1942. Lengthy hearings were held before a hearing examiner and concluded in August 1948. The examiner issued a recommended decision on September 25, 1948, and an amended decision at a later date. Thereafter, an appeal was taken to the full Commission, and oral argument was heard on April 7, 1949. The case was re-argued before the Commission on September 24, 1950.

On April 20, 1953, respondents filed their petition for review with the court of appeals. However, prior to the time the record was certified to that court and following the aforementioned changes in the membership of the Commission, respondents filed the present motion asking us to reopen and reconsider a number of enumerated questions.

It appears to us that the controlling ground offered by respondents in support of the motion is this change in membership.

We are not disposed to grant a motion predicated principally upon such a ground. The Commission is an independent and continuing statutory body. The terms of its members were arranged by Congress

¹ Chairman Howrey became a member of the Commission on April 1, 1953, and Commissioner Gwynne on September 27, 1953.

in a manner to prevent any abrupt dislocations in the discharge of its responsibilities.

More importantly, the Commission, like the courts, operates prospectively, not retroactively. This principle is fundamental, we believe, to our system of law, both administrative and judicial. While the views of individual commissioners may differ, each is like a member of the judiciary in the sense that he customarily makes decisions on upcoming issues on a case-by-case basis. A judge appointed to fill a vacancy on the bench does not set about to reopen and retry previously adjudicated cases simply because he is a new member.

The machinery of the quasi-judicial agency, like the courts, contemplates a continuing process; it looks to current litigation, not past litigation. If our procedures were otherwise, delay and inaction would surround enforcement of the statutes committed to the Commission's jurisdiction. To grant the present motion would be to require a third review of a voluminous record made many years ago.

The principal question presented by the motion, as we see it, is whether the Commission, in prescribing a remedy in a conspiracy case, can require respondents not only to cease and desist their alleged conspiratorial activity but also to stop the individual use of certain delivered pricing methods. This is an important question and if it were not for the overriding considerations already stated, the motion might be well grounded. However, since the question of the remedy is one of law, the respondents will not be prejudiced. They will, we are certain, receive a full hearing on this question in the court of appeals.

SEPARATE AND CONCURRING OPINION OF COMMISSIONER MEAD

The Commission, on February 16, 1953, made its findings as to the facts and conclusion based thereon and issued its order to cease and desist in this matter. All of the respondents against whom the order to cease and desist is directed, except Frank A. Bond (who died subsequent to the time the case was originally presented to the Commission) and Pyrene Manufacturing Company, have filed motions requesting that the findings as to the facts, conclusion, and order to cease and desist be vacated or set aside or, in the alternative, that the findings and order be modified in material respects. Permission to file briefs and to be heard in oral argument on the motions was requested.

The Commission has denied the motions and the requests for permission to file briefs and to be heard in oral argument for the reason that the respondents have presented no matters which were not before the Commission at the time it made its decision, and an order to that

effect is being entered herewith. I am in entire agreement with the Commission's action in denying the motions for the reasons stated. The respondents in their motions have raised questions as to the validity of and necessity for the provision in the order to cease and desist which prohibits each of the respondent manufacturers from using any one of the three delivered pricing methods they have heretofore used as a part of their conspiracy "for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." I was a member of the Commission at the time the original decision was made. I deem it in the public interest to issue this opinion setting forth some of the considerations which led me to conclude then and to conclude now that the inclusion of such prohibition in the order to cease and desist was not only valid but necessary for effective relief from the conspiracy in which the respondents have engaged. In this opinion I am speaking only for myself.

The validity of and necessity for a prohibition such as that here under consideration in a situation where, as here, the maintenance of and adherence to a delivered pricing method or system constituted the very heart of the conspiracy found are fully discussed in the opinion of the Commission in the matter of *National Lead Company, et al*, Docket 5253, January 12, 1953. The reasons there set forth for including such a prohibition in the order to cease and desist in that case are applicable to this case.

The Commission, having found that the respondents had engaged in a conspiracy to restrain and suppress competition in the sale of chain and chain products, had the duty to determine the remedy necessary to suppress and insure against a revival of the trade-restraining conspiracy. In making such determination we considered a number of factors, including the fact that each of the respondent manufacturers quoted and sold chain and chain products at prices calculated pursuant to and in accordance with the particular method or system of computing delivered prices applicable to the products it sold with the knowledge that all other respondent manufacturers selling the same products were simultaneously doing likewise. The various cooperative and collective activities which the evidence clearly shows that the respondents engaged in would not have brought about the results desired in the absence of an understanding between all of the respondents that each of the respondent manufacturers would continue to use the particular delivered pricing method applicable to the products it sold. The use of the different delivered pricing methods

or systems thus constituted an integral part of the over-all conspiracy among and between the respondents. A majority of the Commission was of the opinion that an effective order in this case must not only prohibit the respondents from "entering into, continuing, cooperating in, or carrying out any planned common course of action, understanding, agreement, combination, or conspiracy" to engage in the particular practices by which the conspiracy had been effectuated, but must also prohibit the individual use of a particular delivered pricing system or method "for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." Such a prohibition was necessary not because it is unlawful in all circumstances for an individual seller, acting independently, to sell its products on a delivered-price basis, but to make the order fully effective against the trade-restraining conspiracy in which each of the respondents participated.

There were three different kinds of chain involved in this proceeding, namely, welded chain, weldless chain, and tire chain. As shown in the Commission's findings, welded chain was generally quoted and sold on a "Pittsburgh plus" or single basing point delivered-price method or system. Weldless chain was generally quoted and sold on a freight equalization delivered-price method or system. Tire chain was generally quoted and sold on a single zone, or as respondents prefer to call it, a universal delivered-price method or system. All of the respondent manufacturers did not manufacture all three types of chain, but some of them did. Each of them used the particular delivered pricing method or system applicable to the products it sold.

The maintenance of the different delivered pricing systems constituted the very cornerstone of the conspiracy among and between the respondents. The adherence to the applicable system by each of the respondent manufacturers was necessary to make the conspiracy effective. The matching of delivered prices was one of the objectives of the conspiracy and this was accomplished through the use of the different delivered pricing systems. Unless and until each of the respondent manufacturers is prohibited from so adhering to a particular delivered pricing system, the evils springing from the conspiracy, one of which is to eliminate price competition, may well continue indefinitely. Unless the respondent manufacturers, representing practically the entire economic power of the industry, are deprived of the device which made the combination effective, an order merely prohibiting the combination may well be a useless gesture.

If the usual type of conspiracy order had been entered in this case, the respondents would have been prohibited from agreeing to fix prices and from agreeing to do a number of other specified things they had been doing as a part of their conspiracy. The respondent manufacturers would not have been prohibited from continuing to use, without any agreement between them, the same delivered pricing systems they had been using and thus continuing to enjoy the fruits of their conspiracy. The effects of the conspiracy, one of which was the elimination of price competition, might continue for some time unless effective measures to break it up were taken. That is the purpose of the prohibition in the order to cease and desist directed against each of the respondent manufacturers individually. In my opinion, the effect of the order to cease and desist will be to restore a condition of sharp and healthy competition in the chain industry. I realize that in such competition the weak may be hurt, but social security is not the province of the Commission. The only way to have competition is to compete. If, after competition is restored in the industry, any of the respondents can make a proper showing that this prohibition or any other prohibition in the order is no longer necessary or desirable, the Commission, of course, will at that time take such action as may be appropriate in the light of the facts and the law.

In my opinion the Commission has the power to take the steps necessary to correct the evils found to exist in this industry. The courts in addition to recognizing the power of the Commission to stop any method of competition, even though individually pursued, if it has a dangerous tendency unduly to hinder competition or create a monopoly, have also clearly indicated the extent to which the Commission may go in an effort to make its orders effective and to prevent evasion. In the case of *Hershey Chocolate Corporation v. Federal Trade Commission*, for example, the Court of Appeals for the Third Circuit, in upholding the Commission's order notwithstanding attack on the ground that it went beyond the scope of the complaint, said:

"* * * the Commission's power would be limited indeed if it were restricted to enjoin unfair acts of competitors only as evidenced in the past. To be of any value the order must proscribe the method of unfair competition as well as the specific acts by which it has been manifested. In no other way could the Commission fulfill its remedial function." (121 F. 2d 968, 971-972.)

In the case of *Local 167 v. United States*, 291 U. S. 293, 299, involving conspiracy among a number of defendants, the defendants sought to eliminate from the injunction certain provisions enjoining conduct which they contended had not been proved to be a part of the conspiracy. The Court held—

"The United States is entitled to effective relief. To that end the decree should enjoin acts of the sort that are shown by the evidence to have been done or threatened in furtherance of the conspiracy. It should be broad enough to prevent evasion. In framing its provisions doubts should be resolved in favor of the Government and against conspirators."

In *National Labor Relations Board v. Express Publishing Company*, 312 U. S. 426, 435-437, the Supreme Court said—

"A federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past.

"It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts.

"Having found the acts which constitute the unfair labor practice the Board is free to restrain the practice and other like or related unlawful acts. * * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts * * * found to have been committed * * * in the past."

In the case of *Haskelite Mfg. Corporation v. Federal Trade Commission*, the Court of Appeals for the Seventh Circuit accepted and applied the same principle and held that the Commission could prescribe reasonable requirements and "guarantees against a recurrence of the past unfair and deceptive acts" and which "were calculated to aid in dispelling for the future the unfair and deceptive practices of the past" (127 F. 2d 765, 766).

Nor is the relief to which the Commission is entitled limited to the performance of "other related unlawful acts," referred to by the Court in the *Express Publishing Company* case. Even acts lawful in themselves may be prohibited when they cannot be separated from the unlawful scheme of which they are a part. The applicable law has been settled by the Supreme Court. In the *Ethyl Gasoline* case (*Ethyl Gasoline Corporation, et al v. United States*, 309 U. S. 436), the Supreme Court disposed of a contention that the decree should not extend to the prohibition of a device that could be lawfully used, as follows:

"Since the unlawful control over the jobbers was established and maintained by resort to the licensing device, the decree rightfully suppressed it even though it had been or might continue to be used for some lawful purposes. The court was bound to frame its decree so as

to suppress the unlawful practices and to take such reasonable measures as would preclude their revival." (P. 461.) Two years later, in the case of *United States v. Univis Lens Company, Inc., et al.*, 316 U. S. 241, the Court again applied the same rule. It said that even assuming the validity of certain licensing restrictions, "these features are so interwoven with and identified with the price restrictions which are the core of the licensing system that the case is an appropriate one for the suppression of the entire licensing scheme even though some of its features, independently established, might have been used for lawful purposes." (P. 254.)

Under all the circumstances, in the light of the entire record, including the motions now before the Commission, I am of the opinion that the prohibition in the order against the persistent, continuing, and intended matching of prices through the use by each of the respondents of one or more delivered pricing systems was particularly appropriate.

OPINION OF ALBERT A. CARRETTA

DISSENTING IN PART AND CONCURRING IN PART

WITH THE ORDER OF THE COMMISSION

This matter is before the Commission upon an "Application and Motion for Modification or Setting Aside of Findings as to the Facts, Conclusion and Order to Cease and Desist" filed in behalf of Chain Institute, Inc., and 19 other corporate and individual respondents. Included in said application was also a motion to the effect that the Order to Cease and Desist herein be modified by including therein a provision dismissing the amended complaint against respondent Frank A. Bond, for the reason that said respondent died on July 3, 1950.

There is also before the Commission a "Motion of Respondent Columbus McKinnon Chain Corporation to Vacate or Modify Findings as to the Facts, Conclusion and Order to Cease and Desist." This motion is somewhat similar to the Application and Motion filed in behalf of Chain Institute, Inc., and others, and it includes the additional request that the proceedings be dismissed as to respondent Columbus McKinnon Chain Corporation.

In the two motions which have been filed, permission was requested to file briefs and to be heard in oral argument.

The Commission, by order, has denied both motions except insofar as the first motion requested dismissal of the proceedings as to respondent Frank A. Bond. While I concur in the decision of the Commission to the extent that the proceeding herein should be dis-

missed as to respondent Frank A. Bond, I disagree with the conclusion reached by my colleagues in denying respondents the opportunity to be heard orally upon their motions.

Because the above-mentioned separate motions are somewhat similar, I shall limit my discussion to the contents of the Application and Motion filed in behalf of Chain Institute, Inc., and others. However, my comments and my conclusion apply with equal force to the motion filed in behalf of respondent Columbus McKinnon Chain Corporation.

This dissent is being filed with full knowledge and appreciation of the fact that the original complaint in this matter was issued by the Federal Trade Commission on December 22, 1942—more than 11 years ago. It is also realized that the granting of respondents' motions would necessitate a further delay in the final disposition of this case. However, the Federal Trade Commission, when acting in its quasi-judicial capacity, must be more concerned with due process and with equity than with speed in arriving at its decisions.

In its Application and Motion for Modification or Setting Aside of Findings as to the Facts, Conclusion and Order to Cease and Desist, the respondents Chain Institute, Inc. and others, prayed for the following relief:

1. That the Findings as to the Facts, Conclusion and Order to Cease and Desist issued by the Commission in said proceeding on February 16, 1953, be set aside in their entirety by the Commission, and that the Commission, in lieu thereof, issue Findings as to the Facts to the effect that the allegations of the amended complaint in said proceeding have not been established by the evidence in said proceeding, and a Conclusion to the effect that the respondents in said proceeding have not violated either of the statutes mentioned in said amended complaint, and an Order to the effect that said amended complaint be dismissed with prejudice; *or in the alternative*

2. That said Findings as to the Facts issued by the Commission in such proceeding on February 16, 1953, be modified in certain enumerated respects.

3. That said Order to Cease and Desist issued by the Commission in said proceeding on February 16, 1953, be modified in the following respects:

- (a) That there be deleted in its entirety from said Order to Cease and Desist the subparagraph numbered "(6)" which appears as one of a series of numbered subparagraphs under a main paragraph which begins with the words "*It is ordered*" and

(b) That there be deleted in its entirety from said Order to Cease and Desist the paragraph thereof which begins with the words "*It is further ordered*, That each of the corporate respondents" and ends with the words "one or more sellers as against another."

In an affidavit submitted by counsel representing the respondents Chain Institute, Inc. and others, various grounds were therein set forth in support of the application and motion, and in support of respondents' request for permission to argue orally before the Commission. For the majority of the Commission to have reached its conclusion that respondents' application and motion should be denied (except insofar as it applied to the dismissal of the proceeding against Frank A. Bond), it was necessary for the Commission to conclude that *each and every ground* cited by respondents was without merit. I cannot reach the same conclusion as the majority of the Commission did because I feel that at least one ground cited by the respondents entitles them to the privilege of being heard in oral argument before the Commission. That particular ground is stated in Paragraph 6 (a) (6) on Pages 5 and 6 of the "Affidavit of Sumner S. Kittelle in Support of Application and Motion of Respondents for Modification or Setting Aside of Findings as to the Facts, Conclusion and Order to Cease and Desist." That particular ground refers to the Paragraph in the Order of the Commission to Cease and Desist dated February 16, 1953, which reads as follows:

"*It is further ordered*, That each of the corporate respondents (the various respondents are then named), its officers, representatives, agents, and employees, in or in connection with the offering for sale, sale, and distribution of chain or chain products in commerce, as 'commerce' is defined in the Federal Trade Commission Act, do forthwith cease and desist from quoting or selling chain or chain products at prices calculated or determined pursuant to or in accordance with a single basing point delivered-price system, a freight equalization delivered-price system, or a zone delivered-price system, for the purpose or with the effect of systematically matching the delivered-price quotations or the delivered prices of other sellers of chain or chain products and thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." With respect to the foregoing quoted paragraph, the respondents state:

"Respondents had no opportunity to argue the merits or demerits of the paragraph of the Order to Cease and Desist herein which, in substance, prevents any respondent, individually and noncollusively, from using any of the delivered pricing methods to meet competition

regularly or systematically. No such paragraph was incorporated in the proposed order to cease and desist filed by the Trial Examiner in this proceeding, nor was there anything in the record, briefs or arguments to indicate that any such drastic and far-reaching paragraph was contemplated. No provision like said paragraph was ever inserted by the Commission in any of its orders in any contested proceeding prior to the *National Lead Company* case, Docket No. 5253, and both the majority and dissenting opinions in said case demonstrate that said paragraph was and is a highly novel and controversial one. The Order in the *National Lead* case was issued January 12, 1953, only about a month before the Order in this proceeding."

Without passing upon the question as to whether a paragraph of this nature is proper or improper in an order of the Commission, it is my opinion that the respondents herein should have been afforded the opportunity to submit arguments to the Commission *against* the inclusion of such a paragraph. Of course, counsel in support of the complaint should also have been heard *in support of* the inclusion of such a paragraph in an order of the Commission. This opportunity not having been afforded to the respondents and to counsel in support of the complaint by the then existing Commission, it appears to me imperative that the existing Commission should correct such defect in the proceedings. This position I would hold whether or not any change in the personnel of the Commission had occurred between the date of the Order of the Commission and the date of filing of the motion for review. It cannot be denied that this paragraph enjoins the respondents from *individually* engaging in certain practices which they may not engage in in concert with others, I do not want it to be understood that I would not, myself, vote for the inclusion of such a paragraph in an order of the Commission after being fully advised of the best arguments which could be presented by both sides.

It is to be noted that in this proceeding, the Trial Examiner, under date of September 23, 1948, filed his "Recommended Decision" which was also included as part thereof a "Recommended Order." It was that Order which was briefed by both sides, and it was that Order which was argued orally before the Commission. An examination of that Order will disclose that the subject paragraph was not contained in the Recommended Order of the Trial Examiner. However, after twice hearing oral argument upon the Recommended Decision of the Trial Examiner, the Commission, out of a clear sky, decided to impose the restrictions contained in the above-quoted paragraph.

How consistent is the Commission in guaranteeing "due process"¹ to respondents before the Commission? At the present time, and I

¹ Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property, *in its most comprehensive sense*; to be heard, by *testimony or otherwise*, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved.

understand that the following has been the practice for more than three years, when a Hearing Examiner completes a case, he files with the Secretary of the Commission an "Initial Decision" which includes a form of Order to Cease and Desist which becomes the Order of the Commission unless (1) either side files an appeal with the Commission; or (2) the Commission, by order, stays the effective date of the decision; or (3) the Commission, upon its own initiative, issues an order placing the case on its own docket for review. When the Commission places the case on its own docket for review, it considers the record therein, and if, for any reason, the Commission is of the opinion that the Findings or Order to Cease and Desist should be modified in any respect, it serves upon the respondent and upon counsel in support of the complaint a "Tentative Decision of the Commission." This "Tentative Decision of the Commission" includes modified Findings as to the Facts, Conclusion and Order to Cease and Desist. These papers apprise the respondent and counsel in support of the complaint of the changes which the Commission intends to make in the findings and order as submitted by the Hearing Examiner. Each side is then offered an opportunity to file, within 20 days, an appropriate memorandum or brief setting forth any objections which they may have to the changes contemplated by the Commission in the Hearing Examiner's Initial Decision. Further, after such objections, if any, are filed, each side is afforded the opportunity to reply to the objections of the other party within a period of 10 days after the filing of such objections.

If the foregoing is the current practice, why should not the parties in the subject case be afforded the same opportunity to argue either for or against the changes which the Commission made in the order as recommended by the Trial Examiner?

To say that the respondents herein have a remedy in the courts is for the Commission to pass its burden upon the already overcrowded dockets of the courts. It is our duty to be fully advised in all matters upon which we sit as judges, and we cannot shirk our duty by saying that parties have an adequate remedy in the courts.

Consequently, it is my opinion that both motions filed herein should have been granted by the Commission, *but only* to the extent that both counsel for the respondents and counsel in support of the complaint should have been afforded the opportunity to file briefs and to argue orally before the Commission upon any provisions contained in the Order to Cease and Desist issued by the Commission which were at variance with the provisions in the "Recommended Order" contained in the "Recommended Decision" filed by the Trial Examiner herein. This same opportunity should be afforded all respondents whenever

the Commission intends to make a "change of substance" in any recommended order of a Hearing Examiner. If the change contemplated by the Commission is "de minimis," then I might hold that denial of an opportunity to be heard would not deprive the respondent of "due process."

Because the opinion of the Commission in this matter, as prepared by Chairman Howrey, discusses at some length the matter of reopening previously adjudicated cases upon the ground that there have been changes in the membership of the Commission, I should like to state that I concur in the reasoning of the majority of the Commission in concluding that, *standing alone*, a change in the membership of the Commission is without merit to support a petition of a respondent for an opportunity to argue orally before the Commission upon a matter already decided.

I also concur with the majority of the Commission in concluding that the Order to Cease and Desist heretofore entered in this matter be modified by striking therefrom Frank A. Bond as a respondent against whom said order was directed, and in concluding that the amended complaint herein be dismissed as to him.

Syllabus

IN THE MATTER OF
RAY R. GOLDIE AND DAVID BACHMAN DOING BUSINESS
AS MERCURY VACUUM STORES AND MERCURY VAC-
UUM CLEANER STORES

CONSENT SETTLEMENT IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 6064. Complaint, Nov. 24, 1952—Decision, Jan. 14, 1954

Where two parties engaged in the competitive interstate sale and distribution of new and rebuilt sewing machines and vacuum cleaners through retail stores in California, Washington, and Oregon, to purchasers in various other states and in Alaska, including among the former products several brands made in Japan, upon the back of the vertical arm of which machines the word "Japan", when sold to members of the purchasing public, became covered by the motor and upon which the word "Japan" as displayed in some instances upon a medallion on the front of the vertical arm was so small and indistinct as not to constitute adequate notice that the heads were imported—

- (a) Offered and sold such machines without placing any other mark thereon or otherwise informing the public that the heads thereof were of foreign origin ;
- (b) Represented falsely, directly or by implication, that one of the sewing machines sold by them was manufactured by or connected in some manner with the well and favorably known American firm or firms with which the word "Universal" had long been associated through use of said word as a trade or brand name for said product and conspicuous display thereof on its front horizontal arm and use thereof in their advertising matter; and through use of such trade or brand names enhanced the belief on the part of the public that their said machines were of domestic origin ;
- (c) Frequently advertised rebuilt sewing machines and vacuum cleaners at extremely low prices through their retail stores ;

When in fact such advertisements were not genuine or bona fide offers to sell the articles advertised but were run to obtain the names of persons who were interested in the purchase of such products ; while their salesmen, when responses were obtained, demonstrated said products, their sole purpose was to sell new and much higher priced machines and cleaners ; and products in question were not intended to do satisfactory work and very few of them were sold ;

- (d) Made use in the advertising of their rebuilt vacuum cleaners of such terms as "complete with attachments", "3 days only", and "2-year guarantee" ;

When in fact attachments were frequently not furnished ; offers were continuous, the only changes being slight variations in the prices charged ; no guarantee was given without payment of a substantial sum therefor in addition to the purchase price of the machine ; and use of the word "guarantee" without a statement of the terms and conditions and the manner in which the guarantor would perform was misleading and confusing and constituted a misleading and deceptive practice ;