

Complaint

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IN THE MATTER OF

UNIVERSAL INTERCHANGE, INC., ET AL.

ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE FEDERAL
TRADE COMMISSION ACT*Docket 6938. Complaint, Nov. 8, 1957—Decision, Aug. 2, 1963*

Order requiring eight corporations—with respective offices in Los Angeles, Chicago, Dallas, New York, Boston, Seattle and Denver—jointly engaged in selling advertising in the "U.S. Buyers Digest", published by the first named respondent, and other advertising media, and other services in connection with the sale and purchase of farm and business properties, to cease—in soliciting and collecting substantial sums of money as fees for, the listing of property for sale and advertisements therefor to be published in said bulletin—making false representations concerning clients' opportunities for sales and profits, services afforded, affiliates, success, refunds, terms, etc., as in the order below set out.

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 the corporations and individuals named in the caption hereof, 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. Universal Interchange, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 4477 Hollywood Boulevard, Los Angeles, California. Respondent Theodore M. Bernardi, whose address is 114 East 32nd Street, New York, New York, is president; respondent Maurice Salomon, whose address is 8556 Trumbull Street, Skokie, Illinois, is vice president, and respondent Paul M. Guyer, whose address is 2412 N. Commonwealth, Los Angeles, California, is secretary-treasurer of respondent corporation Universal Interchange, Inc.; respondent United Interchange, Inc., of Illinois is a corporation organized, existing and doing business under and by virtue of the laws of Illinois with its office and principal place of business located at 1 North LaSalle Street, Chicago, Illinois; respondent United Interchange, Inc., of Texas is a corporation, organized, existing and doing business under and by virtue of the laws of Texas, with its office and principal place of business located at 4232 Herschel Avenue,

Dallas, Texas. Respondents Maurice Salomon and Lillian Salomon are individuals and officers of said corporate respondents United Interchange, Inc., of Illinois and United Interchange, Inc., of Texas. Their address is 8556 Trumbull Street, Skokie, Illinois.

Respondent United Interchange, Inc., of New York is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal place of business located at 114 E. 32nd Street in the city of New York, New York.

Respondent United Interchange, Inc., of Massachusetts, is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Massachusetts with its office and principal place of business located at 80 Boylston Street, Boston Massachusetts.

Respondents Theodore M. Bernardi and Pauline B. Bernardi are individuals and officers of said New York and Massachusetts corporations. Their address is 114 E. 32nd Street, New York, New York.

Respondent Union Interchange, Inc., of Washington is a corporation organized, existing and doing business under and by virtue of the State of Washington with its office and principal place of business located at 821 Securities Building in the city of Seattle, Washington.

Respondent Union Interchange, Inc., of California is a corporation organized, existing and doing business under and by virtue of the laws of the State of California with its office and principal place of business located at 4477 Hollywood Boulevard in the city of Los Angeles, California.

Respondent Union Interchange, Inc., of Colorado is a corporation organized, existing and doing business under and by virtue of the laws of the State of Colorado with its office and principal place of business located at Guaranty Bank Building in the city of Denver, Colorado.

Respondents Paul M. Guyer and Francelene A. Guyer are individuals and officers of the aforesaid Washington, California and Colorado corporations. Their address is 2412 North Commonwealth, Los Angeles 27, California.

The individuals named as officers of the aforesaid corporations formulate, direct and control the acts and practices of the corporations of which they are officers. All of the respondents have cooperated and acted together in the performance of the acts and practices hereinafter set forth.

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PAR. 2. Respondents are now and for more than one year last past have jointly been engaged in the operation in commerce of business enterprises which offer advertising for sale in bulletins published by Universal Interchange, Inc., and other advertising media and other services and facilities in connection with the offering for sale, selling, buying and exchanging of farm and business properties. In connection therewith, the respondents have been and are now transmitting and receiving through the United States mail, and otherwise disseminating in commerce, advertising matter, pamphlets, circulars, letters, contracts, checks, money orders, and other printed or written instruments which are sent and received between respondents' places of business in the States of California, Colorado, Washington, Texas, Illinois, New York and Massachusetts, and sent to and received from persons, firms and corporations located in various States of the United States, thereby engaging in extensive commercial intercourse in commerce, as "commerce" is defined in the Federal Trade Commission Act.

The volume of the aforesaid business conducted by respondents has been and is substantial.

PAR. 3. Respondents' said business enterprise is conducted in the following manner: Universal Interchange, Inc., publishes and distributes, at intervals, a publication designated as "U.I. Buyers Digest," in which various properties are listed for sale. The other corporate respondents act as soliciting agents for Universal Interchange, Inc., and solicit the sale of advertising and the listing of property owned by others in said publication. They pay a portion of the cost of publishing and distributing said publication.

PAR. 4. In the course and conduct of their business, respondents, through post cards, circulars, contract forms and other written instrumentalities, and through oral representations made by their salesmen, solicitors, or representatives for the purpose of obtaining listings of property for sale and advertisements of such to be published in "U.I. Buyers Digest," and collecting substantial sums of money as fees for the listing and advertising of property, have represented, directly and by implication, to persons who had property for sale, that they have available prospective buyers who are interested in the purchase of their specific properties; that the property is underpriced and the price should be increased; that the listing will result in the sale of the property within 30 to 90 days or a short time, or else the fee will be refunded, or the customer will not be charged for the service; that the property will be nationally advertised in newspapers and periodicals; that they maintain a list of prospective buyers of such property; that others who have used

their listing sold their property within a short time as a result of said listing; that over 1,000 real estate brokers are affiliated with respondents; that State and other officials endorse respondents' activities and publication; and that if the listed property were sold through their listing, the payment of broker's commission would be avoided

PAR. 5. The aforesaid representations were and are false, misleading and deceptive. In truth and in fact, respondents do not and have not had prospective buyers interested in and available to purchase the specific properties listed. The purpose and effect of increasing the owner's asking price for the property was not that it was undervalued, but, on the contrary, to increase the fee to be collected by respondents. Respondents do not and have not refunded any fees collected from the property owners when the property is not sold within 30 to 90 days or at any other time; on the contrary, respondents attempt to collect any unpaid balance claimed from the property owners for their service whether or not the property is sold. Respondents do not and have not used national advertising to sell the specific listed property. Respondents do not maintain or circulate a list of prospective buyers of listed or other property. Purchasers of respondents' services have not generally or usually sold their property in a short time and the great majority of such purchasers have not been able to sell their property by purchasing respondents' advertising. Respondents are not affiliated with 1,000 or any other number of real estate brokers. Respondents' activities and publications are not and have not been endorsed by state or other officials. Purchasers of respondents' advertising or services do not avoid payment of real estate broker's commissions when the property is sold through a broker.

PAR. 6. The use by respondents of the aforesaid unfair and deceptive acts and practices in connection with the conduct of their aforesaid business, has had and now has the capacity and tendency to mislead and deceive a substantial portion of the public and to induce many owners of property, because of said false, deceptive and misleading representations, to enter into contracts respecting the sale of their properties, and to pay substantial sums of money to respondents.

PAR. 7. The acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and constituted, and now constitute, unfair and deceptive acts and practices in commerce within the intent and meaning of the Federal Trade Commission Act.

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Mr. John W. Brookfield, Jr., and Mr. Berryman Davis for the Commission.

Mr. Arthur Litz, of New York, N.Y., for respondents United Interchange, Inc., of New York, United Interchange, Inc., of Massachusetts, and *Mr. Theodore M. Bernardi*, individually, as an officer of said corporations, and as an officer of Universal Interchange, Inc., and *Mrs. Pauline M. Bernardi*, individually and as an officer of United Interchange, Inc., of New York, and United Interchange, Inc., of Massachusetts.

Mr. Alvin G. Greenwald of Los Angeles, Calif., for all other respondents.

INITIAL DECISION BY ROBERT L. PIPER, HEARING EXAMINER

PRELIMINARY STATEMENT

On November 8, 1957, the Federal Trade Commission issued its complaint against Universal Interchange, Inc., a corporation (hereinafter called Universal), Theodore M. Bernardi, Maurice Salomon, and Paul M. Guyer, individually and as officers of Universal; United Interchange, Inc., of Illinois, a corporation, United Interchange, Inc., of Texas, a corporation, Maurice and Lillian Salomon, individually and as officers of said corporations; United Interchange, Inc., of New York, a corporation, United Interchange, Inc., of Massachusetts, a corporation, Theodore M. and Pauline B. Bernardi, individually and as officers of said corporations; Union Interchange, Inc., of Washington, a corporation, Union Interchange, Inc., of Colorado, a corporation, Union Interchange, Inc., of California, a corporation, and Paul M. and Francelene A. Guyer, individually and as officers of said corporations (all of said corporations except Universal being hereinafter collectively called the selling corporations; and all of said corporations and individuals being hereinafter collectively called respondents). The complaint charges respondents with false, misleading and deceptive representations constituting unfair and deceptive acts and practices in commerce in violation of § 5 of the Federal Trade Commission Act (hereinafter called the Act), 15 U.S.C. 41, *et seq.* Copies of said complaint together with a notice of hearing were duly served on respondents.

Respondents appeared by counsel and filed answers admitting the corporate and commerce allegations of the complaint, denying all of the representations alleged therein, and in some instances admitting, and in others denying, that such alleged representations were not true in fact. Pursuant to notice, hearings were thereafter held

at various times and places from March 3, 1958 to October 1, 1958, before Hearing Examiner Joseph Callaway, since deceased. On April 7, 1959, because of Mr. Callaway's physical incapacity and because additional extensive hearings had already been scheduled, the undersigned was designated by the Commission to succeed Mr. Callaway. Thereafter hearings were held at various times and places from April 21, 1959 to December 2, 1960, before the undersigned. In general, Mr. Callaway heard all of the witnesses called in support of the complaint against the Western respondents: Universal, the various Unions, and their respective officers and individuals, and the Eastern respondents: United of New York, United of Massachusetts and their respective officers and individuals. The undersigned heard all of the witnesses called in support of the complaint against the Midwestern respondents: United of Illinois, United of Texas and their respective officers and individuals, and all of the defense proffered by all of the respondents.¹ During the hearings before the undersigned, a minor amendment to the third sentence of paragraph 5 of the complaint was granted by the undersigned.

All parties were represented by counsel, participated in the hearings, and afforded full opportunity to be heard, to examine and cross-examine the witnesses, to introduce evidence pertinent to the issues, to argue orally upon the record, and to file proposed findings of fact, conclusions of law, and orders together with reasons in support thereof and replies thereto. All parties filed such proposed findings of fact, conclusions of law, and orders, together with reasons in support thereof and replies thereto. All such findings of fact and conclusions of law proposed by the parties respectively not hereinafter specifically found or concluded are herewith specifically rejected.² All motions to dismiss, not ruled upon on the record, are disposed of herein by the following findings of fact and conclusions of law.

Upon the entire record in the case and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. Corporate Organization

Universal is a corporation organized, existing and doing business under and by virtue of the laws of the State of California, with its office and principal place of business located at 4477 Hollywood Boulevard, Los Angeles, California. Respondents Theodore M. Ber-

¹ The record herein consists of over 8,300 pages of testimony and 736 exhibits. Mr. Callaway heard the first 2,216 pages of testimony and the undersigned the remainder.

² 5 U.S.C. § 1007(b).

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nardi, Maurice Salomon, and Paul M. Guyer are the sole stockholders and president, vice president and secretary-treasurer, respectively, of Universal. The aforesaid individuals, acting in cooperation with each other, formulate, direct and control the policies, acts and practices of Universal.

United of Illinois and United of Texas are corporations organized, existing and doing business under and by virtue of the laws of Illinois and Texas, respectively, with their offices and principal places of business located in Chicago, Illinois, and Dallas, Texas, respectively. Respondents Maurice Salomon and Lillian Salomon are officers, and Maurice Salomon, a director and stockholder, of said corporations. Respondent Maurice Salomon as an individual actively manages and formulates, directs and controls the policies, acts, and practices of United of Illinois and United of Texas.

United of New York and United of Massachusetts are corporations organized, existing, and doing business under and by virtue of the laws of New York and Massachusetts, respectively, with their offices and principal places of business located in New York City and Boston, Massachusetts, respectively. Respondents Theodore M. Bernardi and Pauline B. Bernardi are officers, and Theodore M. Bernardi, a director and stockholder, of said corporations. Respondent Theodore M. Bernardi as an individual actively manages and formulates, directs and controls the policies, acts and practices of United of New York and United of Massachusetts.

Union of California, Union of Washington, and Union of Colorado are corporations organized, existing and doing business under and by virtue of the laws of California, Washington, and Colorado, respectively, with their offices and principal places of business located in Los Angeles, California, Seattle, Washington, and Denver, Colorado, respectively. Respondents Paul M. Guyer and Francelene A. Guyer are officers, and Paul M. Guyer, a director and stockholder, of said corporations. Respondent Paul M. Guyer as an individual actively manages and formulates, directs and controls the policies, acts, and practices of Union of California, Union of Washington, and Union of Colorado.

Motions to dismiss Mrs. Salomon, Mrs. Bernardi and Mrs. Guyer as individuals were granted. The record established that they did not, as individuals, formulate, direct or control the policies, acts, and practices of the respective corporations of which they were officers. A motion to dismiss the allegations of the complaint that the selling corporations and their officers and individuals were jointly liable for the activities of each other was granted. There is no sub-

stantial proof in the record that any one selling corporation was liable or responsible for the activities of any other selling corporation. This does not apply to Universal.

II. Corporate Business

Universal is engaged in the publishing business and publishes and distributes, among other things, a monthly periodical or catalogue, known as the "U.I. Buyers Digest," and a "Brokers Bulletin." The Buyers Digest is comprised of approximately 30 percent editorial matter and 70 percent advertisements of real estate and business properties for sale, lease or exchange, not including non-income-producing real property such as homes and lots. The Buyers Digest is published in three editions, Eastern States, Central States, and Western States, and is distributed throughout the United States.

The Buyers Digest is a limited or controlled, rather than paid, circulation publication, in that it is distributed free to "qualified" applicants. Universal advertises the Digest nationally in newspapers, magazines and radio broadcasts, describing it and requesting persons interested in purchasing a business or property to write for the Digest. A person who does so, stating the kind of business or property and general location desired, is "qualified as a potential buyer" and is sent the appropriate current regional Digest. In addition to such applicants, the Digest is also sent, on a request basis only, to banks, libraries, and chambers of commerce. Necessarily such circulation, while national, is quite limited in number. The Brokers Bulletin is published six or more times a month, and is a pamphlet containing advance releases of the advertisements to be published in the Buyers Digest. The Brokers Bulletin is distributed free of charge to more than 1,000 real estate and business opportunity brokers throughout the United States, who have subscribed in writing therefor and agreed to present the advertised information to their prospective buyer clients.

Prior to 1955, Universal solicited all of the advertisements published in the Buyers Digest and the Brokers Bulletin. Since 1955, the other corporate respondents act as soliciting or selling agents for Universal, and are engaged in the business of selling such advertisements in said publications at fixed rates, dependent upon the amount of space in the Buyers Digest contracted for by the advertiser. The selling corporations pay to Universal the cost of the respective advertisements supplied by them and published by Universal. In general, Union of California, Union of Washington, and Union of Colorado engage in such business in the Western States,

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United of Illinois and United of Texas in the Central States; and United of New York and United of Massachusetts in the Eastern States.

Leads to prospective purchasers of advertisements in the Digest are secured by the mailing of "lead" cards throughout the nation, by all of the selling corporations, inquiring of the recipient if he is interested in selling his business or property, advising him that the sender has many inquiries from prospective buyers, and requesting the return of an attached postage-prepaid card if interested. Salesmen of the respective selling corporations subsequently call upon all who mail in such cards. If a sale is made, a written contract is signed, subject to acceptance by the selling corporation. The salesmen work on straight commission. No advance fee or payment is collected. The contract specifies the amount of advertising space and its cost and an attachment recites the general advertising copy.

After receipt of the signed contracts, the selling corporations send the signer a letter of acceptance, accompanied by a return card which includes a form of request for copies of the published advertisements, if desired, as well as question boxes concerning the performance of the salesman. Universal then publishes the advertisement once in the next Brokers Bulletin and Buyers Digest. If the property remains unsold, it is again published in the Buyers Digest.

Under the contract, the amount specified is payable in 90 days or when the property is sold, whichever occurs first. A "guarantee" in the contract form further provides for an additional three months of publication in the Buyers Digest at no extra charge if the property remains unsold. The corporate respondents carried out the advertising requirements of all contracts. From time-to-time Universal sends its advertisers names and addresses of persons who write for the Digest and express an interest in property of the type and general location advertised by them. After the 90-day period, the selling corporations demand payment and if not forthcoming, institute local collection suits on the contracts.

Universal furnishes some leads, the contract and lead forms, and other advertising and promotional literature used by the selling corporations. All such material is subject to the approval and regulation of Universal and its officers. At times all of the selling corporations used the same promotional pieces. All of the advertisements secured by the salesmen of the selling corporations are edited and reviewed by Universal before publication. The advertising copy in the Brokers Bulletin is prepared by Universal.

III. Interstate Commerce

In the course and conduct of such businesses, the corporate respondents have been and are now transmitting and receiving through the United States mails, and otherwise disseminating in commerce, advertising matter, pamphlets, circulars, letters, contracts, checks, money orders, said publications, and other printed or written instruments which are sent and received between respondents' places of business in the States of California, Colorado, Washington, Texas, Illinois, New York and Massachusetts, and sent to and received from persons, firms, and corporations located in various States of the United States, thereby engaging in interstate commerce within the intent and meaning of the Act. The volume of business conducted by the corporate respondents has been and is substantial.

IV. The Unlawful Practices

A. *The Issues*

The complaint contains nine representations, alleged to have been made both orally through salesmen and by means of written instrumentalities, and further alleged to be false, misleading and deceptive. Respondents denied making any of the alleged representations, and as to some, if made, admitted they were not true, and as to others, if made, alleged that they were in fact true. In addition to these basic issues, an additional issue was raised by reason of the fact that a substantial number of the witnesses called in support of the complaint were heard by the prior hearing examiner. The undersigned heard the testimony proffered by the respondents, which in general denied and refuted the testimony of those witnesses heard by the prior hearing examiner. Both sides concede that as a result substantial issues of credibility are raised. The Court of Appeals and the Commission have passed upon this problem in other cases, which will be considered hereinafter in more detail.

B. *The False Representations*

The nine oral and written representations alleged to be false, misleading and deceptive are:

1. Respondents have available prospective buyers who are interested in the purchase of the advertiser's specific property;
2. The property is underpriced and the price should be increased;
3. The "listing" will result in the sale of the property within thirty to ninety days or a short time, or the fee will be refunded or the customer will not be charged for the service;

4. The property will be nationally advertised in newspapers and periodicals;
5. Respondents maintain a list of prospective buyers of such property;
6. Others who have used respondents' "listing" sold their property within a short time as a result of said "listing";
7. Over 1,000 real estate brokers are affiliated with respondents;
8. State and other officials endorse respondents' activities and publication; and
9. If the "listed" property were sold through respondents' "listing," the payment of a broker's commission would be avoided.

The evidence in support of the complaint consisted primarily of the testimony of numerous customers and prospects called upon by respondents' salesmen, and the various written instrumentalities used by respondents, including, *inter alia*, their lead pieces, contract forms, advertising circulars, the Buyers Digest and Brokers Bulletin, and various brochures. In the interest of clarity, the proof concerning the written representations is considered separately from that concerning the oral representations. There is no dispute with respect to the authenticity and authorship of the written instrumentalities, and hence there is no credibility problem with respect thereto because of the substitution of hearing examiners.

At the conclusion of the case-in-chief, motions by respondents to dismiss the complaint for want of proof were granted with respect to five of the alleged written representations, and denied as to the other four alleged written representations and as to all of the alleged oral representations. Specifically, such motions were granted with respect to written representations 2, 3, 5, 6, and 9 set forth above, because there was no proof in the record that respondents had made such alleged representations by means of any written instrumentalities. In addition, as will be developed more fully hereinafter, the record establishes that representations 6 and 9, even if made, were in fact true and correct.

All of the alleged representations are considered *seriatim*:

1. Respondents have available prospective buyers who are interested in the purchase of the advertiser's specific property.

- a. Written Instrumentalities.

A number of written instrumentalities used by respondents in connection with the sale of their advertising to customers reveal that many such customers and prospects could have been led to believe that respondents were engaged in the business of selling property, rather than advertising, and had numerous prospective buyers in-

terested in the purchase of the customer's property. The lead pieces used by respondents in their initial contact with prospective customers referred only to a sale of property and the availability of many prospective buyers, and made no reference to the fact that respondents were engaged only in the business of advertising. It is, of course, well established that if the initial contact is secured by deception, such deception is not overcome by subsequent truthful disclosures and the Commission may prevent it.

The lead pieces in general asked the recipient if he was interested in selling his property, advised him that the sender had available numerous persons interested in the purchase of such property, and requested the return of a postage prepaid reply card if the recipient was interested. To indicate the need for speed and urgency, such lead pieces were frequently printed on yellow paper in the general format of a telegram. In this manner, respondents secured the names of owners interested in selling their businesses. Respondents then dispatched their salesmen to call upon such persons. In addition to the obvious deceptiveness of such lead pieces, the record contains the testimony of many witnesses who answered such initial inquiries, that they were not interested in respondents' proposition after they ascertained that the service was advertising only, establishing beyond dispute that they were misled by the original inquiry.

In addition to the lead pieces, Commission's Exhibit 90, an advertising circular used by respondents, is composed in a manner indicating past sales rather than advertisements, is couched in terms of selling rather than advertising and, among other things, in the largest print used, asks the recipient: "What would you spend to put your place in the hands of a buyer?"

b. Orally.

The testimony of many customers and prospects called in support of the complaint, as well as witnesses called by respondents themselves, establishes that such a representation frequently was made by salesmen in their oral presentation to their prospects. As noted above, the undersigned heard such testimony with respect to the Illinois and Texas corporations. In addition, the undersigned also heard a portion of such testimony with respect to the Colorado corporation, and it is undisputed that Mr. Guyer operated the Colorado, Washington, and California selling corporations in the same manner. While the undersigned did not hear any of the testimony in support of the complaint with respect to the Eastern selling corporations, one of the Eastern salesmen, Pollard, who was heard by the undersigned, in effect admitted making such a repre-

sentation to his prospects. Accordingly, although most of the testimony with respect to the oral representations made by the salesmen of the Eastern and Western corporations was not heard by the undersigned, the foregoing, plus the above proof concerning the written representation, is sufficient to obviate the credibility problem.

In addition, Commission Exhibit 51, concerning which there is no creditability problem, consists of a set of instructions to salesmen used by respondents. While this was not shown to prospects, it demonstrates the type of representations and statements respondents instructed their salesmen to make. They were instructed to emphasize to prospects that the company had "inquiries on hand now" for the purchase of such a business. This was the first subject the salesman was to take up after introducing himself. Respondents did not in fact have inquiries on hand for the purchase of any particular property, but only requests for the Digest. Coupled with the lead pieces, this approach definitely would lead prospects to believe respondents had persons available interested in the purchase of their businesses. Numerous witnesses testified that some salesmen actually told them that they had available one or more purchasers desirous of purchasing exactly the type of business involved. The salesmen also were instructed to advise the prospects that the company had contacts with about 1,000 brokers, many of whom had immediate prospects for their type of business, when in fact the company had no way of knowing whether this was true.

Respondents admitted that the aforesaid representation, if made, was not true in fact and that they did not have available prospective buyers interested in the purchase of the customer's property. In fact, all that respondents ever had was inquiries from the public for copies of the Buyers Digest, stating an interest in the purchase of a given type of property in a given locality. Such inquirers may or may not actually be interested in the purchase of anything. In addition, the circumstances and interest of all but the most current of such inquirers might change substantially with the passage of time, and as a result they could hardly be characterized as prospective buyers. It is concluded and found that respondents, by means of written instrumentalities and oral statements of salesmen, made the aforesaid representation, and that said representation was false, misleading, and deceptive.

Inasmuch as exactly the same order would be issued whether the representation were made orally or in writing, because such orders prohibit the proven false representation in any manner,

proof of such a misrepresentation in either form is sufficient. This, of course, applies to all of the other alleged misrepresentations as well. Nevertheless, the written and oral proof with respect to each alleged representation will be considered separately.

2. The property is underpriced and the price should be increased.

As noted above, this allegation with respect to written instrumentalities was dismissed for want of proof. However, the record establishes that such representations were made by the salesmen orally. Numerous prospects and customers called in support of the complaint testified before the undersigned that such a representation was made to them by salesmen of the Illinois and Texas selling corporations. In addition, several such witnesses testified before the undersigned with respect to the Colorado and Washington selling corporations.

The undersigned heard no such proof with respect to the Eastern corporations. Respondents called all of the salesmen concerned, with the exception of a few who were unavailable because of death or could not be located. In general, such salesmen uniformly denied making any such representation. Thus, with respect to the Eastern corporations, the credibility problem to be considered hereinafter is present. However, it makes little or no practical difference in this case because Universal is responsible for the activities of its agents, the selling corporations, and in turn for the activities of their salesmen, and the individuals who own and control all of the selling corporations are responsible for the activities of Universal, because they formulate, direct and control them. Hence any order to be issued will run against them in their individual capacities and thus prevent such misrepresentations by means of the selling corporations which they respectively control individually.

Respondents admitted that if such a representation was made it was not true in fact. Respondents conceded that their salesmen were not qualified as appraisers. The record contains considerable evidence pro and con concerning the purpose of such a representation, if made, which purpose is immaterial inasmuch as the representation was in fact false. It is concluded and found that all of the respondents, except United of New York and United of Massachusetts and their officers, made the aforesaid representation by means of oral statements of salesmen, and that said representation was false, misleading, and deceptive.

3. The "listing" will result in the sale of the property within 30 to 90 days or a short time, or else the fee will be refunded or the customer will not be charged for the service.

In their proposed findings counsel supporting the complaint eliminate the phrase "or the fee will be refunded" from the aforesaid representation. The record establishes that respondents did not charge or collect advance fees and hence nothing could be refunded. With respect to the terms "list" and "listing" used in the complaint, it was agreed at the hearings that the terms "advertising" and "advertisement" should be substituted, inasmuch as the terms "list" and "listing" connote a brokerage function and do not accurately describe the service sold by respondents, which was advertising. This resulted in expedition of the basic issues instead of begging the question and prolonging the hearings by litigation of a collateral issue. Thus, in effect the alleged representation is: "the advertisement will result in the sale of the property within a short time or the customer will not be charged for the service." Fundamentally, the representation was that the customer did not have to pay unless and until the property was sold, just as in the case of a brokerage arrangement.

This allegation with respect to written instrumentalities was dismissed for want of proof. However, the record establishes through numerous witnesses that such a representation was made orally by some of the salesmen. Again the undersigned heard none of such proof with respect to the Eastern corporations and only a small portion with respect to the Colorado corporation, and on the contrary heard the denials thereof by the salesmen of all of the selling corporations. However, as was the case with respect to the first representation considered above, Commission's Exhibit 51 (the set of instructions to salesmen concerning which there is no credibility problem) reveals that respondents instructed their salesmen to make representations to such general effect. The salesmen were instructed to emphasize the brokerage coverage provided by respondents, which would necessarily lead many people to believe that they would not have to pay the fee unless the property was sold, a standard practice with respect to brokers. The salesmen were also instructed, when a prospect said that he did not want to pay unless his business was sold, to meet this objection by firstly, referring to the "six months close," which had reference to the additional three months of advertising provided without charge in the event the property was not sold after the first three months, secondly, emphasizing the assurance of coverage, and thirdly, changing the subject by digression and then using any of the "closes." It will be noted that none of these recommendations include advising the prospect that he would have to pay after ninety days whether or not his business was sold.

Again, in addition to the self-evident deceptiveness of such representations and statements, the record contains the testimony of numerous customers that they were of the belief that they were contracting for a selling service and not advertising, and hence would not have to pay unless the property was sold.

Respondents admitted that the aforesaid representation, if made, was not true in fact. Respondents conceded that they always charged the fee or price set forth in the contract whether or not the property was sold. This clearly was provided by the terms of the contract itself. It is concluded and found that respondents made the aforesaid representation by means of oral statements of their salesmen, and that said representation was false, misleading, and deceptive.

4. The property will be nationally advertised in newspapers and periodicals.

a. Written Instrumentalities.

As hereinabove found, respondents' method of operation was to advertise the Digest nationally in newspapers, magazines, and radio broadcasts, but the advertisements purchased by customers were published in the Digest and were not nationally advertised in newspapers and periodicals. Several of the written instrumentalities employed by respondents might well lead a prospective customer to believe that his property was going to be advertised nationally in such manner. The form of contract used by respondents consisted of four pages, of which the first or front page actually was the contract executed by the customer, the two inside pages contained representations and explanations of the service offered as well as a form of guarantee, and the fourth or back page was used to list data concerning the business for sale which would result in the advertising copy. The inside pages contained in bold print four boxes, one of which was headed "National Advertising." Only a careful reading of the smaller print would indicate that the national advertising was of the Digest and not the property for sale.

More significantly, Commission's Exhibit 26, an advertising brochure employed by respondents, entitled: "The Most Complete Advertising Coverage of its Kind," contained a list of the newspapers, magazines, and radio stations used by respondents throughout the United States and Canada. A legend on its cover stated that it contained the names of newspapers, magazines and radio stations used to advertise the Buyers Digest to prospective buyers. Inside in large print it contained the legend: "Advertising from coast to coast reaching an audience of 90 million potential buyers everywhere seeking all types of businesses." It is clear that this

pamphlet, unless very carefully analyzed, might well lead a prospect to believe that his business was going to be advertised nationally in newspapers and periodicals.

In addition, Commission's Exhibit 63, a letter of acceptance used by all respondents to notify the customer that his contract was accepted, easily could lead the customer to believe that his property was going to be nationally advertised in media other than the Buyers Digest. The second paragraph thereof reads as follows:

Our entire facilities are now at your command. The processing and distribution of your sales information has already begun. It is being sent to hundreds of brokers and will also be made available to the thousands of potential buyers reached through *nationwide advertising campaigns*. Your copy has been prepared for publication in both the "U.I. Brokers Bulletin" and the "U.I. Buyers Digest." (Emphasis supplied.)

Commission's Exhibit 90, a sales brochure used by respondents, previously referred to, also advised prospects as follows: "We'd like you to see for yourself how you can reach hundreds of qualified potential buyers through a unique but tested network of newspapers, radio, and magazines."

b. Orally.

In addition to the aforesaid written instrumentalities, the testimony of many customers and prospects called in support of the complaint, as well as witnesses called by respondents, established that such a representation frequently was made by salesmen in their oral presentation. Such testimony was heard by the undersigned with respect to the Illinois, Texas, Colorado, California, and Washington selling corporations, but none with respect to the Eastern corporations. Inasmuch as this representation also has been established by means of written instrumentalities, concerning which there is, of course, no creditability problem, the failure to hear any of the Eastern witnesses would in no event alter or obviate an appropriate order.

Respondents admitted that the aforesaid representation, if made, was not true in fact. It is undisputed that respondents did not nationally advertise the customer's property in newspapers and periodicals. It is concluded and found that respondents, by means of written instrumentalities and oral statements of salesmen, made the aforesaid representation and that said representation was false, misleading and deceptive.

5. Respondents maintain a list of prospective buyers of such property.

As noted above, this allegation with respect to written instrumentalities was dismissed for want of proof. However, the record

establishes that such representation was made orally by the salesmen. Numerous prospects and customers called in support of the complaint testified that such a representation was made to them by salesmen. Such testimony was heard by the undersigned with respect to the Illinois, Texas and Colorado selling corporations but none with respect to the Eastern corporations.

Respondents admitted that the aforesaid representation, if made, was not true in fact, because they do not maintain any lists of prospective buyers of such property. It is concluded and found that all respondents, except United of New York, United of Massachusetts, and their officers, made the aforesaid representation by means of oral statements of salesmen, and that said representation was false, misleading, and deceptive.

6. Others who have used respondents' "listing" sold their property within a short time as a result of said "listing."

As noted above, the term "advertisement" was substituted for the term "listing" to obviate collateral litigation, and this allegation with respect to written instrumentalities was dismissed for want of proof. The record establishes that such a representation was made orally by respondents' salesmen, but it also establishes that it was in fact true. There is substantial, reliable and probative evidence in the record, unrefuted, that some persons who used respondents' advertising did in fact sell their property within a "short" time as a result thereof. Accordingly, it is concluded and found that such representation was not false, misleading, or deceptive.

7. Over 1,000 real estate brokers are affiliated with respondents.

a. Written Instrumentalities.

Several different written instrumentalities used by respondents and their salesmen clearly reveal that many prospects and customers could have been led to believe that over 1,000 or a large number of real estate brokers were affiliated with respondents and would handle and attempt to sell the customer's business. In nearly all, if not all, instances the salesman used a copy of the Buyers Digest in conjunction with his sales presentation. Commission's Exhibit 1 is such a Buyers Digest. On pages 49 to 58 thereof, after preceding editorial matter, appears a long list of brokers entitled "Brokers Roster," with the following subcaption appearing on each page: "The following nation-wide Brokers Roster contains licensed brokerage firms who may be of service in selecting the types of businesses and property in which you are interested." Each Digest contained such a roster. This list, coupled with the oral presentation here-

inafter considered, could well have led a prospect to believe that such brokers were actually affiliated with respondents and would handle the sale of the property. Of course, as noted above, such a representation would enhance the prospect's belief that he would not have to pay any charge unless his business was sold. In fact however, as found above, such brokers merely subscribed in writing to receive the Brokers Bulletin free of charge, and agreed to present the advertised information to any clients who might be interested. It will be noted that throughout the Brokers Roster no reference is made to the fact that they are merely subscribers to the Brokers Bulletin.

The contract forms and letters of acceptance further enhanced this representation. Commission's Exhibit 5, a typical form of contract, contains a large block on the inside pages captioned "Brokerage Coverage Throughout America." The legend thereafter contains no indication that such brokers are not affiliated with respondents. All letters of acceptance, of which Commission's Exhibit 63 is typical, contain the following: "The processing and distribution of your sales information has already begun. *It is being sent to hundreds of brokers* and will also be made available to the thousands of potential buyers reached in nationwide advertising campaigns." (Emphasis added.) Commission's Exhibit 88, a form of lead piece used by respondents, states: "Hundreds of independent brokers who are themselves in touch with a great number of prospective buyers can have the information on your business *placed in their hands*." (Emphasis added.)

b. Orally.

In addition to the foregoing, numerous prospects and customers testified that the salesmen made such a representation orally. The undersigned heard such testimony with respect to the Illinois, Texas, Colorado and Massachusetts selling corporations. In addition, Commission's Exhibit 51, the respondents' instructions to salesmen, advises them to tell prospects that "something" (whether or not it is the business or the advertisement is not designated) will be: "placed in [the] hands of nearly 1,000 brokers throughout the nation," and further: "No exclusives." Such statements clearly carry a connotation of handling by brokers, since there is no element of exclusivity about an advertisement. The same instructions advise the salesmen to meet prospects' objections by telling them: "Advantage of U. I., Inc.: 1,000 brokers. Many with prospects right now for businesses of your type," and also: "Ads alone won't sell your business."

Because of Commission's Exhibit 51 and the making of this representation by means of written instrumentalities, as found above, there is no credibility problem with respect to this representation. Respondents admitted that no real estate brokers were "affiliated" with them and hence that if such a representation was made it was not true. In addition, the Commission's decisions in *Trans-Continental* and *Nichols & Associates*³ establish that such subscribing brokers are not "affiliated or associated" brokers.

It is concluded and found that respondents, by means of written instrumentalities and oral statements of salesmen, made the afore-said representation and that said representation was false, misleading, and deceptive.

8. State and other officials endorse respondents' activities and publication.

a. Written Instrumentalities.

There is no reliable, probative and substantial evidence in the record that respondents made any such representation by means of written instrumentalities. In the forepart of the editorial section of each Buyers Digest appears a special feature concerning the advantages, desirabilities, etc., of a particular State, accompanied by a letter of endorsement of the article by the Governor of the State. There is no dispute concerning the authenticity and accuracy of such material. In addition, the record contains evidence of letters of commendation and awards presented to Universal or the Buyers Digest by governors of other States. In the manner published, it would appear and is found that State officials have endorsed such activities and publications of respondents.

b. Orally.

Counsel supporting the complaint cite no testimony that such a representation was made orally by the salesmen. However, to some extent it appears that a few of the salesmen occasionally made reference to such articles and reproduced letters in the Buyers Digest. As found above, such a limited representation or use, if made, was in fact true. It is concluded and found that such representation was not false, misleading or deceptive.

9. If the "listed" property were sold through respondents' "listing," the payment of a broker's commission would be avoided.

As noted above, "advertised" and "advertisement" were substituted for the terms "listed" and "listing," and this representation was dismissed for want of proof with respect to written instrumentali-

³ *Trans-Continental Clearing House, Inc., et al.*, 56 F.T.C. 390 (1959); and *Nichols & Associates, Inc., et al.*, 56 F.T.C. 426 (1959).

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ties. There is no dispute that such a representation was made by some of respondents' salesmen and that it was in fact true. As clearly set forth in respondents' contracts, and as is evident from the nature of the arrangement and the testimony in the record, if a customer's property was sold as a result of the advertising, the payment of a broker's commission was avoided. The advertising fee set forth in the contract was the only fee charged any customer. It is concluded and found that while such representation was made by respondents, it was in fact true and was not false, misleading or deceptive.

C. *The Credibility Problem*

As previously indicated, the prior hearing examiner, since deceased, heard substantially all of the case-in-chief against the Eastern and Western selling corporations, while the undersigned heard the case-in-chief against the Midwestern respondents, a small part of the case against the Western respondents, and all of the defense. The parties concede that substantial issues of credibility are involved because the alleged oral representations of salesmen were refuted and denied by them before the undersigned. Section 5 (c) of the Administrative Procedure Act provides as follows:

Separation of Functions.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency * * * .

Because of the circumstances present herein, this Section would appear clearly applicable.

However, the Court of Appeals and the Commission have held that where credibility is involved, due process requires that the same hearing examiner see and hear the conflicting witnesses in order to properly evaluate their credibility. In the *Gamble-Skogmo* case,⁴ where the Commission substituted another hearing examiner for one who had been retired compulsorily, and the substituted hearing examiner did not see or hear the witnesses, the Court of Appeals held that the Commission's order could not stand where a credibility evaluation was necessary unless the substitute examiner had been given the opportunity of seeing and hearing the conflicting witnesses testify. The Court described the presence of such a credibility conflict in the following manner:

If, in arriving at some material fact or facts, either as a matter of direct determination or predicated inference, it is necessary to choose, or a choice is

⁴ *Gamble-Skogmo v. FTC*, 211 F.2d 106 (8th Cir. 1954) [5 S. & D. 603].

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undertaken to be made, on a personal basis, between things, which some witnesses assert and other witnesses deny, neither of which is inherently incredible, and such a choice is acceptingly or rejectingly capable of affecting the result, proper credibility evaluation is inescapably involved as a salient processive factor.

As indicated, exactly this situation is present herein, to the extent that it has not been obviated with respect to certain of the representations, as found above.

Substantially the same views were expressed by the Commission in three subsequently decided cases: *McKibben*, *Browning King* and *Art National Manufacturers Distributing Co.*⁵ The Commission held that when credibility evaluation is a material factor the substitute hearing examiner must have seen and heard such witnesses testify. In conformity with these holdings, no finding has been made herein based upon the testimony of witnesses not seen and heard by the undersigned, which testimony was refuted and contradicted by witnesses heard by the undersigned. However, as noted above, it makes little if any practical difference in the outcome because of the responsibility of Universal for the activities of all of its agents, including the selling corporations and their salesmen, the concomitant responsibility of respondents Guyer, Bernardi and Salomon because of their individual formulation, direction and control of the policies, acts and practices of Universal, and the fact that each of them operates and controls his respective selling corporations.

D. Respondents' Other Contentions

Respondents' contention that as a matter of law their subscribing brokers might be considered as "affiliated" has previously been considered and found to be without merit. Respondents also contend that Universal is not liable for any misrepresentations of the salesmen of the selling corporations. It is undisputed that the selling corporations were the sales agents of Universal and hence this contention is without merit. Respondents raise the question of responsibility of the selling corporations for the misrepresentations of their salesmen, because it is undisputed that their written contracts prohibited any misrepresentation and provided penalties therefor. It is well settled that even under such circumstances the employing corporation is responsible for such misrepresentations.⁶

⁵ *George McKibben & Son*, 56 F.T.C. 1645 (1959); *Browning King & Company, Inc.*, 59 F.T.C. 155, Docket No. 7060 (August 2, 1961); and *Art National Manufacturers Distributing Co., Inc.*, 58 F.T.C. 719, Docket No. 7286 (May 10, 1961).

⁶ *International Art Co. v. FTC*, 109 F.2d 393 (7th Cir. 1940) [3 S. & D. 188]; *Standard Distributors, Inc. v. FTC*, 211 F.2d 7 (2nd Cir. 1954) [5 S. & D. 619]; and *National Trade Publications Service, Inc. v. FTC*, 300 F.2d 790 (8th Cir., March 29, 1962), [7 S. & D. 455].

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As was stated by the Court of Appeals for the Second Circuit in the *Standard Distributors* case:

Thus there is presented a situation where the salesmen did include sales, to the extent and effect as found, by misrepresentations which were made in violation of their instructions and despite honest efforts by the petitioners which were well calculated to prevent that.

They were nevertheless the authorized agents of the corporate petitioner, though not of petitioner Bimstein, to sell the books. The misrepresentations they made were at least within the apparent scope of their authority and part of the inducement by which were made sales that inured to the benefit of the corporate petitioner. Unsuccessful efforts by the principal to prevent such misrepresentations by agents will not put the principal beyond the reach of the Federal Trade Commission Act * * * . (Citations omitted.)

Respondents also question the responsibility of the individual respondents for the activities of the corporate respondents and their salesmen, but where such individuals actively control, formulate, manage and direct the policies, acts, and practices of such corporations, the contrary is too well established to require extended discussion.⁷

E. *The Effect of the Unlawful Practices*

The acts and practices of respondents, as hereinabove found, have had and now have the tendency and capacity to mislead and deceive a substantial portion of the purchasing public with respect to such representations and thereby induce the purchase in commerce of a substantial quantity of respondents' services.

CONCLUSIONS OF LAW

1. Respondents are engaged in commerce and engaged in the above-found acts and practices in the course and conduct of their business in commerce, as "commerce" is defined in the Act.
2. The acts and practices of respondents hereinabove 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 Act.
3. This proceeding is in the public interest and an order to cease and desist the above-found unlawful practices should issue against respondents.

ORDER

It is ordered, That respondents Universal Interchange, Inc., a corporation, its officers, Theodore M. Bernardi, Maurice Salomon,

⁷ *FTC v. Standard Education Society*, 302 U.S. 112 (1937) [2 S. & D. 429]; *Standard Distributors, Inc. v. FTC*, 211 F.2d 7 (2nd Cir. 1954) [5 S. & D. 619]; and *Trans-Continental Clearing House, Inc.*, 56 F.T.C. 390 (1959); and cases cited therein.

and Paul M. Guyer, individually and as officers of said corporation; United Interchange, Inc., of Illinois and United Interchange, Inc., of Texas, corporations, their officers, Maurice Salomon, individually and as an officer of said corporations, and Lillian Salomon as an officer of said corporations; United Interchange, Inc., of New York and United Interchange, Inc., of Massachusetts, corporations, their officers, Theodore M. Bernardi, individually and as an officer of said corporations, and Pauline B. Bernardi as an officer of said corporations; Union Interchange, Inc., of Washington, Union Interchange, Inc., of Colorado, and Union Interchange, Inc., of California, corporations, their officers, Paul M. Guyer, individually and as an officer of said corporations, and Francelene A. Guyer as an officer of said corporations, and their agents, representatives, and employees, directly or through any corporate or other device, in connection with the solicitation, offering for sale or sale of the advertising of business or other properties, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. Respondents have available prospective buyers who are interested in the purchase of specific properties;
2. The customer will not be charged for the service unless the advertising results in the sale of the property;
3. Property sought to be advertised will be nationally advertised in newspapers, radio broadcasts, or periodicals or publications other than respondents' own; and
4. Over 1,000 or any other number of real estate brokers are affiliated with respondents.

It is further ordered, That respondents Universal Interchange, Inc., a corporation, its officers, Theodore M. Bernardi, Maurice Salomon, and Paul M. Guyer, individually and as officers of said corporation; United Interchange, Inc., of Illinois and United Interchange, Inc., of Texas, corporations, their officers, Maurice Salomon, individually and as an officer of said corporations, and Lillian Salomon as an officer of said corporations; Union Interchange, Inc., of Washington, Union Interchange, Inc., of Colorado, and Union Interchange, Inc., of California, corporations, their officers, Paul M. Guyer, individually and as an officer of said corporations, and Francelene A. Guyer as an officer of said corporations, and their agents, representatives, and employees, directly or through any corporate or other device, in connection with the solicitation, offer-

ing for sale, or sale of the advertising of business or other properties, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from representing, directly or by implication, that:

1. Property sought to be advertised is underpriced and the asking price should be increased; and
2. Respondents maintain a list of prospective buyers of such property.

It is further ordered, That the allegations of the complaint with respect to representations 6, 8, and 9 set forth hereinabove be and hereby are dismissed.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF
COMPLIANCE

This matter having been heard by the Commission upon respondents' appeal from the initial decision and upon briefs in support thereof and in opposition thereto; and

The Commission having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

It is ordered, That respondents' appeal be, and it hereby is, denied.

It is further ordered, That the hearing examiner's initial decision filed July 31, 1962, 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.