

Complaint

IN THE MATTER OF

FINGERHUT MANUFACTURING COMPANY ET AL.

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

Docket 8565. Complaint, Apr. 17, 1963—Decision, May 27, 1964

Order requiring Minneapolis mail order sellers of automobile seat covers to cease representing falsely, in form letters, brochures and circulars mailed to prospects, that there was no extra charge when their seat covers were purchased on the installment plan and that their products carried a "written lifetime guarantee" when the guarantee had undisclosed limitations.

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 Fingerhut Manufacturing Company, a corporation, and Manny Fingerhut, Herman Schwartz, Stanley H. Nemer, and William Fingerhut, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereto would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Fingerhut Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office and place of business located at 3104 West Lake Street in the city of Minneapolis, State of Minnesota.

Respondents Manny Fingerhut, Herman Schwartz, Stanley H. Nemer, and William Fingerhut are officers of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the offering for sale and sale of automobile seat covers to the public by mail order.

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

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PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their said products, respondents have made certain statements in form letters, brochures and circulars distributed through the mails directly to prospective customers. Typical, but not all inclusive, of such statements are the following:

Front & Rear \$14.95 3 payments of \$5.31 (postage incl.)
 Front only \$9.95 3 payments of \$3.64 (postage incl.)

* * * * *

3 month payment plan at no extra charge

Written lifetime guarantee

3 MONTHS TO PAY WITH NO CARRYING CHARGE.

YOU GET A LIFETIME GUARANTEE

STARDUST COVERS are *so good*, we can give you LIFETIME GUARANTEE! We're the *only* seat cover manufacturer with enough confidence to make this unconditional guarantee. If you ever damage them, we'll replace the damaged section for just the cost of postage and handling.

* * * 6 equal monthly payments with no carrying charges.

Complete set for Front & Rear seats 6 payments of \$4.66 (postage and handling included) \$24.95

PAR. 5. Through the use of the aforesaid statements respondents have represented, directly or by implication:

1. That there are no charges in addition to the advertised purchased price of their seat covers when purchased on the installment plan.
2. That their products are unconditionally guaranteed for life.

PAR. 6. In truth and in fact:

1. Respondents make an extra charge over and above the regular advertised price of their products if the products are purchased on the installment plan.
2. Respondents' guarantee is not unconditional but has limitations and conditions not disclosed in their initial advertising.

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

PAR. 7. Respondents in using the words "Lifetime Guarantee" fail to clearly and conspicuously disclose that the life referred to is that of the automobile of the purchaser.

PAR. 8. Through use of samples of material sent to prospective purchasers, respondents represent that their "Stardust" brand seat cover is manufactured entirely of clear plastic of the same thickness and weight as the sample.

PAR. 9. In truth and in fact, a substantial portion of respondent's "Stardust" brand seat cover is manufactured of a plastic material which is of a thinner, lighter material than the said samples and therefore is less serviceable and less desirable to a substantial number of purchasers than a seat cover made entirely of the thicker, heavier material represented by the sample. Therefore, the representations and

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practices as set forth in Paragraph Eight hereof were false, misleading, and deceptive.

PAR. 10. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of seat covers of the same general kind and nature as those sold by respondents.

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

PAR. 12. The aforesaid acts and practices of respondents, as herein alleged, were, and are, all to the prejudice of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices, in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. William A. Somers supporting the complaint.

Mr. Charles S. Rhyne and *Mr. Thomas P. Brown, III, Rhyne & Rhyne*, Washington, D.C., for respondents.

INITIAL DECISION BY DONALD R. MOORE, HEARING EXAMINER

December 16, 1963

The complaint in this matter was issued by the Federal Trade Commission on April 17, 1963, and was duly served on all respondents. It charges misrepresentation in the sale of automobile seat covers. Specifically, it alleges misrepresentation of the guarantee covering respondents' products, the price of the products when purchased on the installment plan and the quality or composition of the products. Violation of Section 5 of the Federal Trade Commission Act is alleged.

After being served with the complaint, respondents appeared by counsel and filed answer making certain admissions but denying generally any violation of law. They also filed a motion to dismiss on the ground that the issues in the proceeding were moot because respondents had abandoned, prior to the filing of the complaint, the advertising upon which the complaint is based.

Hearing Examiner John Lewis, to whom the proceeding was originally assigned, denied the motion to dismiss as "premature" on June 14, 1963, but without prejudice to its renewal at a later stage.

Respondents have renewed their motion to dismiss, and it is disposed of in the course of this initial decision.

A prehearing conference was held in Washington, D.C., July 15, 1963, with Hearing Examiner Lewis presiding.

Subsequently, on September 3, 1963, the matter was assigned to the present hearing examiner, who, on September 9, 1963, adopted and ratified the prehearing order entered by Hearing Examiner Lewis August 5, 1963.

As a result of the narrowing of the issues by means of the pleadings and the prehearing proceedings, and thanks to the cooperation of counsel in stipulating many of the facts and the authenticity of documents, presentation of the evidence in support of, and in opposition to, the allegations of the complaint required only one day, with the hearing being held in Chicago, Illinois, on September 17, 1963. At that hearing, testimony and other evidence were offered in support of, and in opposition to, the allegations of the complaint, and this testimony and evidence were duly recorded and filed in the office of the Commission.

Both sides were represented by counsel, participated in the hearing, and were afforded full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence bearing on the issues.

After the conclusion of all the evidence, proposed findings of fact and conclusions of law, accompanied by a proposed form of order, were filed by counsel supporting the complaint and by counsel for respondents. Each party also filed a reply to the proposals made by the other.

Proposed findings not adopted, either in the form proposed or in substance, are rejected as not supported by the evidence or as involving immaterial matters.

After carefully reviewing the entire record in this proceeding, together with the proposals and exceptions filed by both parties, the hearing examiner finds that this proceeding is in the interest of the public and, on the basis of the entire record and his observation of the witnesses, makes the following findings of fact and conclusions drawn therefrom, and issues the following order:

FINDINGS OF FACT

I. The Business of Respondents.

The facts concerning the organization of Fingerhut Manufacturing Company and the nature of its business are not in dispute. By admis-

sions in respondents' answer and by stipulation (Tr. 100¹ *et seq.*), the following facts have been established:

1. Respondent Fingerhut Manufacturing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Minnesota, with its principal office and place of business at 3104 West Lake Street in the city of Minneapolis, State of Minnesota.
2. Respondents Manny Fingerhut, Herman Schwartz, Stanley H. Nemer, and William Fingerhut are officers of the corporate respondent.
3. Respondents are now, and for at least several years have been, engaged in offering for sale and selling automobile seat covers to the public by mail order. Respondents' annual gross sales of seat covers for each of the fiscal years 1961, 1962, and 1963 have been in excess of \$15,000,000.
4. In the course and conduct of their business, respondents now cause, and for several years have caused, their automobile seat covers, when sold, to be transported from their place of business in the State of Minnesota to purchasers in various other States of the United States. They have maintained a course of trade in such products, in commerce, as "commerce" is defined in the Federal Trade Commission Act.
5. In the course and conduct of their business, the respondents have been and are in substantial competition in commerce with corporations, firms and individuals in the sale of seat covers of the same general kind and nature as those sold by respondents.
6. Respondents are engaged in the mail order sale of seat covers for automobiles and trucks. Through a direct mail operation they have sent sales letters and other advertising material to millions of car and truck owners. Customarily, the promotional package sent to prospective customers for the purpose of inducing the purchase of seat covers contains a printed sales letter, a brochure depicting the seat covers in color, a specimen guarantee, a post-paid business reply envelope, a free inspection request form under which seat covers will be sent for 30-days free trial, a swatch of material demonstrating the appearance of the seat covers, and a brochure or similar flyer offering and describing so-called "free gifts" available to buyers who send in orders for seat covers.

II. The Representations Made by Respondents.

The record is replete with examples of the sales letters and other advertising material that admittedly have been disseminated by the respondents.

7. Many of the sales letters in evidence are samples of "test mailings" that had limited distribution, ranging from 1,000 copies to 15,000

¹ The transcript of hearing is abbreviated herein as "Tr."

copies (Tr. 100-102), and respondents seek, in effect, to eliminate them from consideration (Respondents' Proposed Findings, pages 6-7). However, it was stipulated (Tr. 102) that the content of the test mailings "is not substantially different from the type of format used by Respondents in [their] larger scale mailings on the matters questioned by the complaint." In any event, the findings and conclusions here made are not dependent on the so-called test mailings.

8. On the basis of his examination of all the advertising received in evidence, the examiner has concluded that a sales letter, CX 5² together with other material (RX 2 A-G²), may be taken as typical of the advertising and promotion practices of the respondents in recent years. Although it was stipulated (Tr. 101) that CX 5 was one of the test mailings, involving distribution of 10,000 copies on January 14, 1960, it was also stipulated (Tr. 100) that CX 5 was among the advertising material "used extensively by Respondents", with "millions of copies" mailed to prospective customers.

[CX 5 also has the virtue of being among the sales letters as to which the record contains the accompanying advertising material. Respondents insist (Proposed Findings, page 5) that "the entire contents of a mailing must be read as a whole." Although not necessarily agreeing with that contention, the examiner has considered the representations in that light.]

9. Pertinent extracts from the sales letter, CX 5, are as follows:

* * * The enclosed folder describes this wonderful cover, our 30 day FREE inspection offer, and our special 3 PAY PLAN, but here's the story in a nutshell * * *

Front & rear * * * \$18.88; 3 payments of \$6.66 (postage incl.)

Front only * * * \$10.95; 3 payments of \$3.98 (postage incl.)

* * * 30 day FREE inspection with no obligation * * * 3 month payment plan at no extra charge³ * * * written lifetime guarantee

10. It was stipulated (Tr. 142-143) that CX 5 was accompanied by certain enclosures, in evidence as RX 2A-G. Relevant extracts are quoted below.

11. RX 2C has a headline stating that "Now your car interior can look this lovely—*for life!*" Beneath the trade name "Stardust" on RX 2C appears the legend "Guaranteed For The Life Of Your Car." Also, the last two lines of RX 2C read as follows:

and STARDUST Vina-Glass covers are guaranteed for the life of your car—so that you can be sure your car interior will always look as beautiful as new!⁴

² Commission Exhibits are designated CX; Respondents' Exhibits as RX.

³ Emphasis in original unless otherwise noted.

⁴ These same representations are found in CX 14 and 15A, and RX 1B, 3C, 4H, 5D.

12. RX 2D contains these representations:

THREE MONTHS TO PAY—You can pay for your covers in 3 equal monthly payments (30, 60, 90 days) with no carrying charges.

LIFETIME GUARANTEE—You will never have to buy another set of covers for your car because we give you a written guarantee that we will repair or replace your covers if, for any reason, they are ever damaged.⁵

13. The "Free Inspection Request Form" (RX 2F) quotes prices of \$18.88 and \$10.95. The preamble states: "Please send me a set of Stardust seat covers for a FREE 30 day inspection. If I am satisfied with the seat covers I agree to pay for them in 3 payments (30, 60, 90 days)."

14. RX 2G is the text of a "LIFETIME GUARANTEE." As shown by RX2G (a copy of which is appended as Appendix A), the so-called Lifetime Guarantee states:

YOU WILL NEVER HAVE TO BUY
ANOTHER SET OF COVERS FOR YOUR CAR

because we are the only seat cover manufacturer that gives you a

LIFETIME GUARANTEE

The guarantee then sets forth:

If you purchase a set of Stardust covers and if for ANY REASON IN THE WORLD you accidentally damage them, return the cover to us and we will replace any damaged section (front back, front cushion, rear back, rear cushion) for only 98¢ postage and handling charge per section.

RX 2G also states:

Remember—this guarantee applies for as many years as you own the car and regardless of what caused the damage!

15. Other sales letters and related advertising material contained variations in detail, both as to the guarantee and the price, including the number and amount of installment payments. However, these variations are of such a nature that they afford no reason to consider CX 5 and RX 2A-G as other than typical of the representations that have been made by respondents.

16. By way of illustration, reference is made to CX 11, a sales letter of which 10,009 copies were produced and "presumably mailed" in December 1959 (Tr. 101-102). CX 11 includes these representations:

LIFETIME GUARANTEE, TOO!

STARDUST covers are so good, they carry a lifetime guarantee. If you ever damage them, we'll replace the damaged section for just the cost of postage and handling. That means *you will never have to buy another set of covers for your car!*

⁵ This same representation is found in CX 14 and 15A, and RX 1H, 3A, 4F, 5C; see also CX 13.

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3 MONTHS TO PAY WITH NO CARRYING CHARGES!

STARDUST is our own exclusive pattern. It can't be purchased any place else in the country * * * and at such easy terms:

Front and rear * * * \$19.95; 3 payments of \$6.98 (postage incl.)

Front only * * * \$11.95; 3 payments of \$4.31 (postage incl.)

17. It was stipulated (Tr. 142-143) that CX 11 was accompanied by other advertising and promotional material, in the record as RX 5A-G. RX 5C includes the same representations as RX 2D; see Paragraph 12, *supra*. RX 5D is identical to RX 2C; see Paragraph 11, *supra*. RX 5E is the guarantee form. It is identical to RX 2G; see Paragraph 14, *supra*; also Appendix A.

18. The "Free Inspection Request Form" (RX 5G) includes this language:

Please send me a set of Stardust seat covers for a FREE 30 day inspection. If I am satisfied with the seat covers I agree to pay for them in 3 payments (30, 60, 90 days). * * *

COMPLETE SET, FRONT & REAR: ----- \$19.95

BUSINESS COUPE OR FRONTS ONLY: ----- \$11.95

19. There is another sales letter (CX 17) promoting a purported special offer whereby the customer "can save \$5.00 off our regular price * * * and up to \$20.00 off the price of comparable covers elsewhere." It includes these representations:

* * * The enclosed folder, describes this wonderful cover, our 30 day FREE inspection offer, and our special 3 PAY PLAN, but here's the story in a nutshell * * *

Front & rear . . . \$14.95; 3 payments of \$5.64 (postage, handling incl.)

Front only . . . \$9.95; 3 payments of \$3.97 (postage, handling incl.)

. . . 30 day FREE inspection with no obligation . . . 3 month payment plan at no extra charge . . . written lifetime guarantee

20. CX 17 is another of the advertising pieces "used extensively" and involving the circulation of "millions of copies." (Tr. 100)

21. The record does not contain any specific information as to the brochures and other material that may have accompanied CX 17. It was stipulated (Tr. 100-101), however, that "it is a standard requirement that a specimen guarantee form is included with each mailing."

22. Regarding the cash price and installment plan price, variations of the representations quoted above include these:

Front & rear . . . \$19.95; 3 payments of \$6.98 (postage included)

Front only . . . \$11.95; 3 payments of \$4.31 (postage included)

(CX 1, 2, 7, 11 and 12)

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Front & rear . . . \$18.88; 4 payments of \$4.99 (postage incl.)

Front only . . . \$10.95; 4 payments of \$2.98 (postage incl.)

(CX 4)

* * * * *

Front & rear . . . \$16.95; 3 monthly payments of \$5.98, handling incl.

Front only . . . \$9.95; 3 monthly payments of \$3.65, handling incl.

(CX 6)

* * * * *

Ensemble with front & rear covers . . . \$22.90; 3 payments of \$7.99

Ensemble with front covers only . . . \$14.90; 3 payments of \$5.30 (postage included)

(CX 10)

* * * * *

STARDUST covers . . . \$14.95; 3 payments of \$5.31 (postage incl.)

(CX 9^a)

23. Further variations include examples placed in evidence by respondents (RX 9 and 10):

Front & rear . . . \$19.95; 6 payments of \$3.86 (postage, handling incl.)

Front only . . . \$11.95; 6 payments of \$2.43 (postage, handling incl.)

24. The price representations in the sales letters were accompanied, in close proximity, by such representations as these:

3 month payment plan at *no extra charge* (CX 2, 9, 10)4 month payment plan at *no extra charge* (CX 4)

3 month payment plan with no carrying charge (CX 6)

3 months to pay at no extra charge (CX 7)

3 MONTHS TO PAY WITH NO CARRYING CHARGES! (CX 11)

3 months to pay. No carrying charges. (CX 12)

6 month-payment plan at *no extra charge* (RX 10)6 month-payment plan with *no carrying charges* (RX 9)

25. In addition, as shown by respondents' own exhibits, the brochures that were enclosed with the sales letters likewise repeated the claim of "no carrying charges." (RX 1H, 2D, 3A, 4F and 5C; see also CX 13, 14, 15A, 15B and 16.)

26. Regarding the guarantee, in addition to the representations quoted, *supra*, from CX 5, 11 and 17, other sales letters made such statements as these:

YOU GET A LIFETIME GUARANTEE

STARDUST COVERS are *so good* we can give you a LIFETIME GUARANTEE! We're the *only* seat cover manufacturer with enough confidence to make this unconditional guarantee. If you ever damage them, we'll replace the damaged section for just the cost of postage and handling. (CX 1)

* * * * *

^a For trucks.

THE ONLY COVERS GUARANTEED FOR LIFE

* * * the only seat covers with a LIFETIME GUARANTEE! We're the only seat cover manufacturer who dares to make this claim. You'll never have to buy another set while you're driving your present car! (CX 2)

27. Whether or not the sales letters carried a narrative statement regarding the guarantee, such as quoted above, each referred to a "written lifetime guarantee" as one of the inducements to purchase.

28. It is believed that the guarantee claims and the text of the guarantee quoted above are sufficient for purposes of this decision. They are typical of the representations made by respondents. As in the case of the price representations, there were some variations, but they were not of such a nature as to require setting them out *in extenso*. Some of the specimen guarantees in the record specify a postage and handling charge of \$1.98, instead of the 98¢ referred to in RX 2G and 5E. (See CX 14 and RX 1C, 3D, 4E, 7 and 8.)

29. Regarding the charge of misrepresenting the quality or composition of the seat covers, the complaint does not challenge any published advertisement but alleges that the misrepresentation results from the use of samples thicker and heavier than much of the plastic used in the seat covers. This matter is considered *infra*.

The typical statements made by the respondents having been set forth, we turn now to a consideration of each of the charges contained in the complaint concerning those statements.

III. The charge of misrepresenting the installment plan price.

30. In considering the question whether respondents have engaged in actionable misrepresentation concerning their installment sales of seat covers, we start out with these undisputed facts:

(1) Respondents have represented that purchases may be made on the installment plan "with no carrying charge" or "at no extra charge."

(2) The price line in the sales letters shows a total price, followed by the number and amount of the monthly payments. It also carries a legend indicating "postage included" or "handling included" or, sometimes, "postage and handling included." This representation—usually in parentheses but sometimes set off by a comma—follows immediately after the reference to the monthly payment plan. For example (CX 5):

Front & rear . . . \$18.88; 3 payments of \$6.66 (postage incl.)

Front only . . . \$10.95; 3 payments of \$3.98 (postage incl.)

The total installment plan purchase price is not disclosed in the sales letters or elsewhere.

(3) Respondents do make a charge over and above the regular advertised price of their products if the products are purchased on the

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installment plan. When the monthly payment is multiplied by the specified number of payments, the total installment plan purchase price is a higher amount than the price initially quoted in the letter and repeated in the "Free Inspection Request Form." The differential ranges from approximately \$1 to approximately \$3, as shown by the following tabulation:

<i>Exhibit No.</i>	<i>Advertised Price</i>	<i>Installment Plan Price</i>	<i>Difference</i>
CX 1, 2, 7, 11, 12	\$19. 95	\$20. 94	\$0. 99
	11. 95	12. 93	. 98
CX 4	18. 88	19. 96	1. 08
	10. 95	11. 92	. 97
CX 5	18. 88	19. 98	1. 10
	10. 95	11. 94	. 99
CX 6	16. 95	17. 94	. 99
	9. 95	10. 95	1. 00
CX 9	14. 95	15. 93	. 98
CX 10	22. 90	23. 97	1. 07
	14. 90	15. 90	1. 00
CX 17	14. 95	16. 92	1. 97
	9. 95	11. 91	1. 96
RX 9, 10	19. 95	22. 98	3. 03
	11. 95	14. 58	2. 63

31. Other than the statement in the sales letters themselves, there is no evidence as to the purpose or nature of the additional amount included in the installment plan purchase price.

As to whether the postage and/or handling charges represented as being "included" in the installment plan price were for postage and handling connected with the shipment of the seat covers, or for postage and handling connected only with the credit purchase, the record is silent.⁷

No evidence was presented on this point by either side. However, at the prehearing conference, respondents' counsel indicated that the additional amount over and above the cash price was for postage and handling costs incurred by virtue of the installment arrangements (Tr. 26-27, 44) but he still insisted it was not a "carrying charge."

32. Since the record thus establishes that when seat covers are purchased on the installment plan, there *are* charges in addition to the advertised purchase price, the basic question to be resolved is whether respondents have represented that such is not the fact.

The issue, then, is the interpretation to be placed on the claims, "no extra charge" and "no carrying charges."

33. There is no evidence as to the understanding of the public respecting either term, but as discussed *infra*, there is no necessity for such evidence.

⁷ Although not determinative, the varying differential for installment plan purchases may be compared with the *per se* "postage and handling charge" imposed by respondents under their guarantee: 98¢ (RX 2G) or \$1.98 (RX 7, 8). To compound the confusion, it was stipulated (Tr. 103) that "The shipping and handling cost is less than \$1.98."

34. When, in an advertisement, a legend such as "postage & handling included" is placed at the end of a price line that shows both the cash price (e.g., \$19.95) and an installment arrangement (e.g., 6 payments of \$3.83), the plain meaning is that there is no extra charge for postage and handling, whether the customer pays cash or pays in installments, because that charge is included in the price.

Then, when in close proximity, the same advertisement proclaims "no carrying charges" or "no extra charge" for a "6-month payment plan", the plain meaning is that there is no additional charge for an installment plan purchase; that a credit customer pays the same price as a cash customer.

35. Yet, in the example given (see RX 9 and 10), the multiplication of \$3.83 by 6 yields a total of \$22.98 that the credit customer must pay—\$3.03 more than the cash customer.

36. Whether that \$3.03 is called "postage and handling" or something else, its existence exposes the falsity of respondents' advertised claim of installment plan purchases "at no extra charge" or "with no carrying charges."

37. It is difficult to understand how respondents can seriously contend that those sales letters that promote an installment plan "at no extra charge" can be interpreted as meaning anything other than that there are no charges in addition to the advertised price. Such a representation—that there is "no extra charge"—is clearly false.

38. In their Proposed Findings and Reply, respondents place emphasis on the alternative representation that there are "no carrying charges." They seek to give the term "carrying charges" a technical, restricted meaning. They insist that the additional charge included in the installment plan price is, as shown by the advertising, a charge for postage or handling, or both, and that there is no proof that this constitutes a carrying charge.

39. Even if we were to rely on a technical definition of "carrying charge", that would not aid respondents.

In *Webster's New International Dictionary of the English Language*, 2nd Edition, Unabridged (1947), "carrying charge" is defined as "a charge made for carrying a debtor."

And that is just what the respondents' so-called postage and/or handling charge amounts to.

40. More significantly, *The Dictionary of Business and Industry* (ed. by Robert J. Schwartz, 1954) defines "carrying charge" this way:

Amount which the retail buyer pays or contracts to pay the retail seller for the privilege of paying the principal balance in installments over a period of time in addition to the finance charge for the same privilege. (Emphasis added.)

Thus, in fact that respondents call their credit price differential a charge for postage and/or handling, and not an interest or finance charge, is not inconsistent with that definition of "carrying charge."

41. Regardless of any restricted meaning that the term "carrying charges" might have in law or in business parlance—and no such evidence was offered—there can be no real doubt that the purport and the import of the representation of "no carrying charges" is that the installment plan price is the same as the cash price. Reading the representation as it would be read by those to whom it is addressed, *Aronberg v. F.T.C.*, 132 F. 2d 165 (7th Cir. 1942), the examiner so finds.

The public does not interpret "carrying charge" in any technical sense. To the average person, or at least to a substantial number of consumers (including automobile owners), a claim of "no carrying charge" simply means that nothing extra is charged the installment purchaser. The consumer does not draw any fine distinction between a "carrying charge" and an *extra* charge for postage and/or handling.

The examiner recognizes that a statement "may be deceptive even if the constituent words can be literally or technically construed so as not to constitute a misrepresentation." The buying public does not weigh each word in an advertisement or a representation. The impression that is likely to be created upon the prospective purchaser is controlling. *Kalwaitys v. F.T.C.*, 237 F. 2d 654 (7th Cir. 1956).

Similarly, to tell less than the whole truth is a well-known method of deception. He who deceives by resorting to such a method cannot excuse the deception by relying upon the truthfulness *per se* of the partial truth by which it has been accomplished. Thus, in determining whether or not advertising is false and misleading within the meaning of the Federal Trade Commission Act, regard must be had, not to fine-spun distinctions and arguments that may be made in excuse, but to the effect which it might reasonably be expected to have upon the general public. *P. Lorillard Co. v. F.T.C.*, 186 F. 2d 52 (4th Cir 1950).

So here, even assuming that "carrying charge" technically meant a "finance charge" or "interest", and assuming further that respondents' extra charge for credit purchases was limited to postage and/or handling, these assumed facts⁸ would not cure the vice inherent in the representation. At the most, the term is ambiguous, and it is well-settled that where one of two meanings conveyed by an advertisement is false, the advertisement is misleading. *Rhodes Pharmacal Company Inc. v. F.T.C.*, 208 F. 2d 382 (7th Cir. 1953), *reversed on other grounds*, 348 US. 940 (1955).

⁸ Which have no support in the record.

42. The examiner accordingly rejects respondents' defense that the additional charge is not a carrying charge but a charge for postage or handling, or both. The fact that references to the monthly payment plan are accompanied by a statement that postage or handling charges, or both, are included does not overcome the falsity of the claim that there is "no extra charge" or "no carrying charge."

43. Respondents argue further that the "extra charge" that the complaint alleges (Paragraph Six) they charge over and above the regular advertised price, was "never identified" as a carrying charge or otherwise.

There was no necessity for any additional evidence on this point. The advertisements speak for themselves. It is simply a matter of taking respondents' own advertising statements and doing a little simple arithmetic.

44. The "reasonableness of these additions as postage or as handling charges" (Respondents' Proposed Findings, page 8) is not the issue. The issue is whether or not installment plan purchasers pay an extra charge or a carrying charge.

Respondents contend:

It is a most reasonable act for a seller of seat covers to pay the postage and handling himself if cash is paid and to tell the buyer that those items must be paid by the buyer if the buyer chooses to pay on an installment basis.

However, the fact is that here, the seller not only *failed* "to tell the buyer" that he must pay an extra charge for postage and handling if he "chooses to pay on an installment basis", but actually told him he didn't.

45. It does not require evidence of "any peculiarly unusual terminology or interpretation of words" to translate charges for postage and handling into extra or carrying charges. The respondents have chosen to claim that they make no extra charges or no carrying charges for installment plan purchases, and the examiner and the Commission are qualified to determine what that language means to the general public.

46. Respondents profess to believe that their representations regarding the installment sales price are being challenged only because the sales letters do not disclose the total price paid when purchases are made on the installment plan. It is obvious, however, that what is being challenged is the affirmative representation that there are no extra or additional charges when purchases are made on the installment plan.

47. The failure to show the total installment plan price simply aggravates the deception resulting from the representation of "no

extra charge" or "no carrying charges." The affirmative representations of respondents have the capacity and tendency to lull a prospective customer into the belief that the total installment plan price is the same as the cash price. Simple arithmetic would disclose the discrepancy, but this provides no defense for respondents. Having made a claim open to the interpretation that the cash and installment prices are the same, they cannot be heard to say that prospective customers should take pencil and paper in order to learn the falsity of that claim.

"The fact that a false statement may be obviously false to those who are trained and experienced does not change its character nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception." *F.T.C. v. Standard Education Society*, 302 U.S. 112, 116 (1937). One dealing with another in business has the right to rely upon representation of facts as the truth. *Goodman v. F.T.C.*, 244 F. 2d 584 (9th Cir. 1957).

48. Nevertheless, even if the total installment plan price were disclosed in the advertising material, that would not cure the deception involved in the affirmative claim of no additional charges, be they "extra" or "carrying" charges. It simply would result in a contradiction or at least an ambiguity. As a practical matter, of course, it would make it almost impossible for respondents to claim that customers may purchase on the installment plan at no extra cost. They could not afford thus to disclose their own duplicity.

49. This case is analogous to *General Motors Corp. v. F.T.C.*, 114 F. 2d 43 (2nd Cir. 1940), *cert. denied*, 312 U.S. 682 (1941).⁹

General Motors advertised a "6% plan" for the installment purchase of automobiles. The 6% was figured on the unpaid balance due at the time of sale. Actually, the credit charge amounted to nearly 12% simple interest per annum upon the deferred and unpaid balance, as *diminished by the installment payments made*.

Disclosure was made in the advertising that the credit charge was "not 6% interest, but simply a convenient multiplier anyone can use and understand."

⁹ See also *Ford Motor Company v. F.T.C.*, 120 F. 2d 175 (6th Cir.), *cert. denied* 314 U.S. 668 (1941).

The Court held the advertising was "likely to cause the purchaser of a car to believe that he was paying an interest rate of 6% per annum upon his deferred installments * * *."

The Court specifically ruled that the disclaimer was not sufficient to overcome the impression created by the advertisement as a whole.

50. Respondents lay great stress on the fact that although five consumer witnesses were called by counsel supporting the complaint, none of them was asked his interpretation of respondents' representations that there were no carrying charges or extra charges in connection with installment plan purchases. They seek to have the examiner draw an adverse inference from the failure of counsel supporting the complaint to produce testimony through these witnesses concerning public understanding of respondents' representations concerning installment plan purchases.

Respondents rely not only on general principles governing the failure of the proponent of a factual proposition to produce evidence available to him in support of the proposition claimed; they also point to the prehearing order of Hearing Examiner Lewis dated August 5, 1963, reciting that at the prehearing conference of July 15, 1963, it was agreed that "Complaint counsel will call five customer-type witnesses to testify as to their understanding concerning any additional charges for purchases on the installment plan, and the thickness of the seat covers." (Paragraph 1, page 2.)

51. Counsel supporting the complaint did indeed express such an intention (Tr. 28-30). But, in context (Tr. 27-30, 33), his position was that he was going to rely upon the advertisements; that the advertisements speak for themselves; that the examiner and the Commission can find, from the brochures and letters themselves, what representation is actually being made with respect to whether there is or is not a carrying charge; that he was not relying primarily on consumer-type testimony but on Commission expertise; and that the matter was sufficiently clear so that he really didn't have to have consumer-type witnesses, but since he was going to call them on another matter, he also intended to interrogate them in that regard.

52. The failure of counsel supporting the complaint to produce consumer testimony concerning the meaning of respondents' representations, in the light of his stated intention to do so, might be of greater importance if the matter were more doubtful than it is. But this examiner agrees with the basic position taken by counsel supporting the complaint that the examiner and the Commission can find from the brochures and letters themselves what representation is actually being made with respect to whether there is or is not an extra or a carrying charge.

The Commission is not required to sample public opinion to determine what an advertiser is representing to the public. The Commission has a right to look at the advertisements in question, consider the relevant evidence in the record that would aid in interpreting the advertisement and then decide for itself whether the practices are unfair or deceptive. *Zenith Radio Corp. v. F.T.C.*, 143 F. 2d 29 (7th Cir. 1944).

The meaning of representations to the public and their tendency or capacity to mislead or deceive are questions of fact to be determined by the Commission. *Kalwajtys v. F.T.C.*, 237 F. 2d 654 (7th Cir. 1956).

53. Most of the references have been to the sales letters. But perusal of the accompanying material discloses nothing to explain or mitigate the misrepresentation found.

If anything, the deception is heightened by the other material included in the mailings. For example, the "Free Inspection Request Form" (RX 2F) has the customer agreeing to pay in 3 payments, and the price shown is the cash price (\$18.88 and \$10.95) rather than the installment price (\$19.98 and \$11.94).

54. Accordingly, it is found that:

(1) Through their use, in sales letters and other advertising material, of these expressions:

- 3 month payment plan at no extra charge
- 3 equal monthly payments with no carrying charges
- 3 months to pay with no carrying charges
- 3 months to pay at no extra charge

and other similar statements, respondents have represented that there are no charges in addition to the advertised purchase price of their seat covers when purchased on the installment plan.

(2) In truth and in fact, respondents make an extra charge over and above the regular advertised price of their products if the products are purchased on the installment plan.

55. There has been no change in respondents' practices with regard to the alleged misrepresentation that there are no extra charges or carrying charges involved in installment plan purchases. RX 8 and 9 attest to their persistence in the practices challenged by the complaint. Indeed, respondents, in renewing their motions to dismiss in their Proposed Findings (page 3), frankly state:

No change was made in the statement of prices, including the installment price and its inclusion of postage or handling, as this is stated so clearly as to prevent any possible misunderstanding.

56. The advertisements are deceptive and misleading in a material respect, and the public interest requires an order terminating the practice.

IV. The Charge of Misrepresenting the Guarantee.

57. It is found that the guarantee form formerly used by respondents makes the disclosures required by controlling case law. It sets forth clearly and conspicuously the nature and extent of the guarantee and the manner in which the guarantor will perform, including the amount of the service charge imposed, and also discloses clearly and conspicuously the life referred to through the use of the term "Lifetime Guarantee."¹⁰

58. The fact that a copy of the guarantee is included in every mailing sent out by respondents (Tr. 102) does not, however, provide a defense to the charges in the complaint that their advertising of the guarantee has been false, misleading and deceptive.

Respondents themselves recognize and concede (Proposed Findings, page 11) that there are some 13 references to the guarantee in an ordinary mailing. Most, if not all, of these references do not disclose adequately, if at all, the limitations, including especially the charge of 98¢ or \$1.98 per section.

Some brochures disclose that the guarantee is for the life of the purchaser's car; others, particularly the sales letters, do not, merely proclaiming the existence of a "written lifetime guarantee." It is only by reference to the guarantee itself that a purchaser learns of the per-section charge of 98¢ or \$1.98 in case replacement is necessary.

59. Having unqualifiedly represented in their sales letters and other advertising materials, that their seat covers carry a "lifetime guarantee" or are "guaranteed for the life of your car," etc.,—thus implying an unconditional guarantee—respondents cannot be heard to say that the public must look further—albeit in the same mailing—to discover the existence of material limitations and conditions.

60. Even though all of the representations "taken together make crystal clear what is represented as to the guarantee," the law does not permit respondents to proclaim an unconditional guarantee in one part of their advertising materials and contradict themselves in another part.

61. The leading case on the matter of guarantees is *Parker Pen Co. v. F.T.C.* 159 F. 2d, 509 (7th Cir. 1946). Its holding is fatal to respondents' contentions.

¹⁰ The complaint did not charge any deficiency in identifying the guarantor. It is noted that some of the guarantees (CX 14, 15B) bore only the signature "M. Fingerhut;" others bore that signature plus the printed name, "Fingerhut Mfg. Co." The guarantee currently in use (RX 8) includes also the corporate address.

In *Parker*, the disclosure of limitations on a lifetime guarantee was in the *very same advertisement* where the term "Guaranteed for Life" was featured. The Court noted that Parker advertisements gave prominence to the term "Guaranteed for Life" and at the same time, in a less prominent place in the advertisement, usually at the bottom of the page and in smaller, light print, there appeared the disclosure that there was a service charge in connection with the guarantee.

The Court concluded that the advertisements were objectionable because "the limiting words of the guarantee appear in small print," and at "some distance from the words of the guarantee."

Accordingly, the modified order approved and enforced by the Court prohibited a guaranteed for life" representation if a charge was imposed unless the terms of limitation were placed close to such words as "guaranteed for life", and in print of the same size as the other regular printed matter in the advertisement.

62. Accordingly, it must be held that the use of the term "Lifetime Guarantee", or any similar representation of an unconditional guarantee, unaccompanied by a conspicuous and adequate disclosure of the limitations of the guarantee, in close conjunction therewith, constitutes an unfair and deceptive practice.

It is not sufficient that perusal of all the literature enclosed in respondents' mailing would apprise the careful reader of all he needed to know about the guarantee.

63. Strictly speaking, of course, respondents' guarantee is not a "Lifetime Guarantee." The guarantee is for neither the life of the purchaser nor for simply the life of the car in which the seat covers are installed. The duration of the guarantee, by its terms, is for the life of the car *for as long as the purchaser owns the car*.

64. However, that is not an issue raised by the complaint. With the guarantee before it, disclosing that further limitation, the Commission limited its challenge to a charge that respondents, in advertising their "Lifetime Guarantee", fail to disclose adequately "that the life referred to is that of the automobile of the purchaser" (Complaint, Paragraph Seven).

That charge recognizes, implicitly if not explicitly, the validity of the term despite the technical deficiency stated. Presumably, the Commission has determined that the further requirement of the purchaser's continued ownership is not such a material limitation that the public interest requires disclosure.¹¹

¹¹ Cf. the Commission's Guides against Deceptive Advertising of Guarantees (April 26, 1960) Section IV. In the example there given "'A' advertised that his carburetor was guaranteed for life, whereas his guarantee ran for the life of the car in which the carburetor was originally installed. The advertisement is ambiguous and deceptive and should be modified to disclose the 'life' referred to."

65. Aside from these considerations, the record shows (RX 6AB, 8) that respondents have abandoned the term "Lifetime" as applied to their guarantee and now refer to it as an "All-Inclusive Guarantee."

66. Thus, in the opinion of the examiner, it is not necessary to make a determination whether the term "Lifetime", as formerly used by respondents in connection with their guarantee, is deceptive because it is for neither the life of the purchaser nor for the entire life of the car. Conceivably, its use could be rationalized as meaning that the seat covers are guaranteed to the original purchaser for the life, under his ownership, of the car in which they are installed.

67. In his Eleventh Proposed Finding (page 9), counsel supporting the complaint raises, for the first time, a challenge to the representation that the charge of \$1.98 per seat cover section is for postage and handling. Contending that this representation is false, counsel points to the stipulated fact (Tr. 103) that "The shipping and handling cost is less than \$1.98."

68. Counsel supporting the complaint argues further that by charging \$1.98 per section, respondents "are recovering their entire cost of replacement per section as each section only costs them \$1.92."

This argument is based on the stipulated fact (Tr. 103) that "During the period August 1, 1960, to April 1, 1962, Respondents' costs for all sections of the Stardust seat covers front and back were \$7.60 plus Federal excise tax." Since a complete set of seat covers consists of four sections, counsel supporting the complaint has divided the sum of \$7.60 by four to arrive at his per-section cost (which is \$1.90 rather than \$1.92).

69. Nevertheless, the examiner declines to make any findings, conclusions or order on this set of circumstances. Indeed, the order proposed by counsel supporting the complaint would not reach the practice here apparently challenged.

70. One reason that the proposed findings in this connection must be rejected is that the subject is outside of the scope of the complaint, and respondents were not properly put on notice that this matter was in issue.

The amount of the shipping and handling charge in connection with the guarantee was not even among the advertising statements cited as "typical" in Paragraph Four of the complaint. The challenge in the complaint concerning the guarantee is two-fold:

(1) That respondents have represented that their products are unconditionally guaranteed for life (Paragraph Five) whereas the guarantee is not unconditional but has limitations and conditions not disclosed in their initial advertising (Paragraph Six).

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(2) In using the words "Lifetime Guarantee", respondents "fail to clearly and conspicuously disclose that the life referred to is that of the automobile of the purchaser." (Paragraph Seven)

(See also the Pre-Hearing Order and the statement of the issues filed by counsel supporting the complaint June 20, 1963).

71. Although respondents stipulated with counsel supporting the complaint that the shipping and handling cost is less than \$1.98 and, in effect, that the manufacturing cost of each section of the seat covers was \$1.90, those facts, standing alone, do not provide a substantial basis for a finding that respondents' representations concerning the shipping and handling charge constitute unfair or deceptive acts or practices, or unfair methods of competition. Accordingly, this belated attempt to inject a new element in the case must be rejected.

72. The change in the guarantee form—primarily a change in title from "Lifetime Guarantee" to "All-Inclusive Guarantee"—was made, technically, before this complaint was served on respondents. However, the record (Tr. 159 *et seq.*) makes clear that respondents had knowledge of the pendency of a Commission proceeding involving its guarantee claims and other practices.

73. It is found that the changes made by respondents were not, in substance or in timing, of such a nature to warrant dismissal of the complaint on the ground of mootness. Neither are the circumstances such as to warrant dismissal as a matter of sound discretion.

74. Actually, the mere change in title of the guarantee does not meet the objections raised by the complaint. Advertising of the "All-Inclusive Guarantee", without qualification, as in RX 9, still constitutes a representation of an unconditional guarantee, whereas the guarantee itself (RX 8) still imposes a postage and handling charge.

75. Accordingly, it is found that:

(1) Through their use without qualification, in sales letters and other advertising material, of these expressions:

Written lifetime guarantee

Guaranteed for the Life of Your Car

LIFETIME GUARANTEE. You will never have to buy another set of covers for your car because we give you a written guarantee that we will repair or replace your covers if, for any reason, they are ever damaged.

THE ONLY COVERS GUARANTEED FOR LIFE

* * * the only seat covers with a LIFETIME GUARANTEE! We're the only seat cover manufacturer who dares to make this claim. You'll never have to buy another set while you're driving your present car!

and other similar statements, respondents have represented that their products are unconditionally guaranteed for life.

(2) In truth and in fact, respondents' guarantee is not unconditional but has limitations and conditions not disclosed in their initial advertising.

(3) Respondents in using the words "Lifetime Guarantee" fail to clearly and conspicuously disclose that the life referred to is that of the automobile of the purchaser.

V. The Charge of Misrepresentation by Sample.

76. In each of their mailings, respondents enclose a sample of the seat cover material. Such samples have a gauge or thickness of .013 of an inch (RX 6B). There has been no direct statement in the advertising either that the seat covers are made entirely of the same material as the sample or made entirely of vinyl .013 of an inch thick. However, there have been references to the sample in the advertising material:

Feel how pliable the swatch is, too, yet how strong. (CX 2)

See for yourself how strong and thick the enclosed sample is. (CX 12)

But the complaint says only that the misrepresentation is accomplished through the use of samples.

77. In actuality, only the portion of the front seat cover receiving the most wear, *i.e.*, that which is sat upon and at the seams, is manufactured from 13-gauge material. The balance of the seat covers is manufactured from 11-gauge material which is two gauges—or two one-thousandths of an inch—thinner than the sample sent with mailings (RX 6B). As an example, the front cover for a 1962 4-door Chevrolet contains 2,295 square inches of 13-gauge material and 3,441 square inches of the lighter 11-gauge material. (Tr. 103)

78. There was no disclosure of the fact that the larger portion of respondents' seat cover, as stated above, was manufactured from 11-gauge material.

79. The 11-gauge material used in the Stardust seat covers is made from the same plastic materials as the 13-gauge material, but is less expensive because it is thinner and therefore will give less wear if used at the same places as 13-gauge material is now used. (Tr. 103-A)

80. There is no evidence to support the claim of counsel supporting the complaint (Fifteenth Proposed Finding) that the greater portion of respondents' seat covers is made "of a lesser grade of material."

81. On the basis of the evidence, it is found, as alleged in Paragraph Eight of the complaint, that "Through use of samples of materials sent to prospective purchasers, respondents represent that their 'Stardust' brand seat cover is manufactured entirely of clear plastic of the same thickness and weight as the sample."

82. It is further found, as alleged in Paragraph Nine of the complaint, that "In truth and in fact, a substantial portion of respondent's

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'Stardust' brand seat cover is manufactured of a plastic material which is of a thinner, lighter material than the said samples * * *."

83. However, the record does not support the further allegation in Paragraph Nine that the portion of the seat cover made of the thinner, lighter material "therefore is less serviceable and less desirable to a substantial number of purchasers than a seat cover made entirely of the thicker, heavier material represented by the sample."

84. In view of the test of materiality set up by the complaint itself, a finding of illegality cannot be predicated simply on the proposition that "the customer is entitled to get what he is led to believe he will get, whether he is right or wrong in thinking it makes a difference." *Colgate-Palmolive Co. v. F.T.C.*, 310 F. 2d 89, 94 (1st Cir. 1962); see case before Commission: Order and Opinion of December 29, 1961; Opinion on Remand (February 18, 1963); Memorandum Accompanying Final Order (May 7, 1963); and cases there cited.

85. That principle would be applicable only if the charge were simply that the seat covers were not made wholly of the same gauge material as the sample. Such a case is not before us, and the examiner intimates no opinion on that hypothesis.

86. In the absence of any evidence that the difference of two-thousandths of an inch in the thickness of part of the seat cover, compared with the sample, resulted in an unsatisfactory or inferior product, or one otherwise less serviceable or less desirable, the variance is not actionable under the complaint as drawn.

87. Here, the allegation that the enclosure of the sample constituted a "false, misleading and deceptive" practice is based specifically on the proposition that the partial substitution of the 11-gauge material made the seat covers "less serviceable and less desirable to a substantial number of purchasers * * *."

88. Concerning this aspect of the case, five witnesses were called by counsel supporting the complaint. It is not surprising that the consensus of their testimony was to the effect that they expected or presumed that the seat covers would be like the sample.

The witness Stelzer expected the seat cover "to be like the sample" he received. (Tr. 108) The witness Griffin "presumed from receiving the sample, this was the sample of the actual seat covers that would be delivered." (Tr. 117) The witness Pedrosky "assumed that the seat covers would be made from the same material" as the sample. (Tr. 131) The witness Wilkins "just assumed that whatever would be ordered, would be the same as the sample." (Tr. 136) The witness Schumann "just naturally assumed" on the basis of the sample that the seat covers would be of "[like] kind and quality." (Tr. 138)

89. Of course, as respondents point out, the representation inferred by each of these witnesses was not *wholly* false. The seat covers *were* made of the same material as the sample, albeit only in part. There is a certain speciousness in respondents' arguments on this point, but it is not necessary to belabor this aspect of the matter. The decision of the hearing examiner does not turn on any such technicalities.

90. In the opinion of the examiner, the crucial element missing here is any record support for the complaint's allegation that the variance between the sample and a substantial portion of the seat covers made them "less serviceable and less desirable to a substantial number of purchasers."

91. The five consumer witnesses shed little light on the subject. Indeed, counsel supporting the complaint, on direct examination, questioned only one witness regarding his preference. He asked the witness Wilkins: "Would you have any preference whether or not your material would be made out of the lighter or the same gauge of material?" Wilkins replied: "None whatever", explaining that he had not given any serious consideration to ordering the seat covers. In fact, Wilkins had not bought the seat covers, had never seen them and didn't know what they were made of. (Tr. 136-137)

92. On cross-examination, the witness Stelzer said he "personally wouldn't" complain about the thickness of the seat covers. (Tr. 112) He agreed that he was not buying any particular thickness of seat covers, as long as they were satisfactory, and that it was reasonable to use a heavier plastic in places where the most wear occurred. He did not feel that he had been hurt by the fact that part of the seat cover was made of thinner material. (Tr. 114)

On redirect examination, he did indicate that he would "prefer" to have a heavier plastic but qualified this by adding:

It's just a feeling. I don't know. I don't think it matters too much, though, but I would prefer to have a little heavier seat covers. (Tr. 115)

Stelzer installed the seat covers in the fall of 1962, probably in September, and at the time of hearing, about a year later, was still using them. He had not complained to the company, and he knows of nothing wrong with the seat covers. (Tr. 109-110)

93. As far as Pedrosky was concerned, he had made no complaint to the manufacturer because the seat covers had proved satisfactory. He has had the seat covers in his car for more than a year, "and they have held up very good." (Tr. 131-132)

94. Of the remaining two witnesses, neither Griffin or Schumann was questioned about his preference. Neither had ordered the seat covers. (Tr. 117, 138) Each had furnished the advertising material and sample received from Fingerhut to the F.T.C. at the request of

a personal friend employed in the Chicago branch office of the Commission. (Tr. 122-124, 139)

95. Thus, while certain factual allegations in Paragraph Eight and Nine of the complaint were established by the evidence, the charge that the practices were false, misleading and deceptive must fail for failure of proof.

In the opinion of the examiner, the theory underlying the charges respecting the sample distributed by respondents was predicated on the proposition that the variance between the sample and the actual seat cover was material because the difference in thickness made the seat cover "less serviceable and less desirable to a substantial number of purchasers."

There being no reliable, probative and substantial evidence to support this element of the charge, it has not been established that respondents' practices in this regard constitute unfair or deceptive acts and practices or unfair methods of competition.

96. Although the findings above are thus dispositive of this aspect of the case, it may be noted that respondents now disclose as "a standard part" of each mailing that the seat covers are made in part of 11-gauge material. (RX 6B, 9)

VI. Miscellaneous Matters.

97. The examiner specifically finds that the sales letters and other advertisements contained in the record are typical of respondents' advertising and provide a valid basis for an evaluation of the legality of the representations here in issue. The challenged representations have been considered both separately and in the context of all the material contained in any particular mailing. In weighing these matters, the hearing examiner has borne in mind the principle that advertisements must be considered in their entirety, and as they would be read by those to whom they appeal, *Aronberg v. F.T.C.* 132 F. 2d 165 (7th Cir. 1942).

98. The examiner rejects the respondents' suggestion (Proposed Findings, page 6; Reply, pages 1-2) that it was a major problem "to understand the charges against them."

Respondents point to the fact that four of the statements quoted in Paragraph Four of the complaint as typical of their advertising do not even appear in the evidence introduced at the hearing in support of the complaint. This is technically true and, at first blush, would appear to be a rather remarkable oversight on the part of counsel supporting the complaint.

99. The fact is, however, that respondents admitted making the statements in question. They *had* entered a denial in their answer, but at the prehearing conference, the counsel, in effect, withdrew that

denial and objected only that the statements were quoted "out of context". (Tr. 3-4, 17, 22; see also Paragraph 4 of Pre-Hearing Order.)

100. Moreover, the substance of each statement cited as being without record support is found in the record; see CX 9 and 17 and RX 9 and 10, the variations being only matters of inconsequential detail.

101. In any event, comparison of the statements quoted in the complaint with evidence in the record demonstrates that even if there were a technical deficiency, it cannot be viewed as prejudicial to respondents. The statements cited in the complaint, together with the allegations of Paragraph Five, obviously put respondents on notice of the nature of the charges they were required to meet.

102. Respondents appear to rely heavily on the fact that the record contains no evidence of actual deception, of customer complaints or of competitive injury. But actual deception of the public need not be shown to support a Federal Trade Commission order; representations merely having a capacity to deceive are unlawful, *Charles of the Ritz Distributors Corp. v. F.T.C.*, 143 F. 2d 676 (2nd Cir. 1944). See also *Goodman v. F.T.C.*, 244 F. 2d 584 (9th Cir. 1957).

As long ago as 1919, it was held that the Commission is "not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived." *Sears, Roebuck & Co. v. F.T.C.*, 258 Fed. 307, 311 (7th Cir. 1919).

103. In connection with their Fifteenth Proposed Finding (at page 19) respondents state:

As a matter of fact, the Stardust seat covers aren't even manufactured any more.

A similar statement is made at page 15 of respondents' Reply to the Proposed Findings of counsel supporting the complaint. Respondents cite no record reference to support their statements to that effect, and the examiner finds that there is no record support for such claim.

Even if this had been proved, the mere fact that manufacture of a product under a specific trade name had been discontinued would provide no bar to issuance of an order based on findings that there had been misrepresentation in the sale of such product.

104. The motion to dismiss the complaint on the ground of mootness is denied. The matter is not moot, and an order to cease and desist is required in the public interest.

CONCLUSIONS OF LAW

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

2. The complaint herein states a cause of action, and this proceeding is in the public interest.

3. The statements and representations of respondents regarding their installment plan purchase price and their guarantee, as found herein, were and are false, misleading and deceptive in material respects.

4. The acts and practices of respondents, as found herein, have had and may have the capacity and tendency to mislead and deceive members of the purchasing public with respect to the installment plan purchase price of respondents and with respect to their guarantee, and into the purchase of substantial quantities of respondents' products as a result. As a consequence, trade has been or may be unfairly diverted to respondents from their competitors, and substantial injury thereby has been or may be done to competition in commerce.

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

6. The evidence does not support the charge in Paragraph Nine of the complaint that respondents' use of samples constituted false, misleading and deceptive representations. That charge must be dismissed for failure of proof.

7. With the exception of Paragraph 3, dealing with the charge that has been dismissed, the examiner has adopted the order attached to the complaint as that which the Commission had "reason to believe should issue" if the facts were found to be as alleged in the complaint.

ORDER

It is ordered, That respondents Fingerhut Manufacturing Company, a corporation, and its officers, and Manny Fingerhut, Herman Schwartz, Stanley H. Nemer and William Fingerhut, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of automobile seat covers or any other product, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That there are no charges in addition to the purchase price of their products when purchased on the installment plan.

(b) That their products are unconditionally guaranteed where there are any conditions or limitations to such guarantee.

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(c) That their products are guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously set forth.

2. Using the word "Lifetime" or other term of the same import in referring to the duration of a guarantee of a product without clearly and conspicuously disclosing the life to which such reference is made; or misrepresenting in any manner the duration of a guarantee.

It is further ordered, That the charges of Paragraph Nine of the complaint, alleging respondents' use of samples to constitute false, misleading and deceptive representations, be, and they hereby are, dismissed.

APPENDIX A

You may think we're crazy
but we promise you that if you buy a set of our custom-tailored auto seat covers
You will never have to buy another set of covers for your car because we are the
only seat cover manufacturer that gives you a

LIFETIME GUARANTEE

If you purchase a set of Stardust covers and if for any reason in the world you accidentally damage them, return the cover to us and we will replace any damaged section (front back, front cushion, rear back, rear cushion) for only 98¢ postage and handling charge per section.

It's hard to believe, isn't it? But it's absolutely true and we back it up in writing with a guarantee in every set of Stardust covers.

Remember—this guarantee applies for as many years as you own the car and regardless of what caused the damage!

Our reason for this guarantee is simple: a satisfied customer is our very best business asset.

We feel certain you will be more than satisfied with Stardust custom-tailored covers even if you never have to take advantage of the guarantee because Stardust is the very finest 100% transparent seat cover.

It is the finest for good reasons, too. Stardust is the very thickest and heaviest-weight transparent material used by any major seat cover manufacturer! It also contains much more chemical plasticising ingredient than ordinary seat cover materials of this type. This important plasticiser makes Stardust absolutely transparent instead of "almost transparent" like similar covers; makes Stardust smooth and flexible instead of bulky and uncomfortable like other covers; and helps give Stardust extra rugged, supple strength.

Stardust is exclusive with us because we have it made to our specifications at the mill, especially for our use in custom-made seat covers.

Fingerhut Mfg. Co.

OPINION OF COMMISSIONER REILLY DISSENTING IN PART

MAY 27, 1964

I disagree with the majority's adoption of the hearing examiner's ruling dismissing the allegation that respondents had made false and deceptive representations concerning the material from which certain of their seat covers were made.

This allegation is worded as follows:

PAR. 8: Through use of samples of material sent to prospective purchasers, respondents represent that their "Stardust" brand seat cover is manufactured entirely of clear plastic of the same thickness and weight as the sample.

PAR. 9: In truth and in fact, a substantial portion of respondent's "Stardust" brand seat cover is manufactured of a plastic material which is of a thinner, lighter material than the said samples and therefore is less serviceable and less desirable to a substantial number of purchasers than a seat cover made entirely of the thicker, heavier material represented by the sample. Therefore, the representations and practices as set forth in Paragraph Eight hereof were false, misleading and deceptive.

The record shows, and the hearing examiner has found, that the sample of plastic enclosed with respondents' advertising was .013 inch in thickness, or 13-gauge, whereas the seat covers were made in substantial part of plastic of .011 inch thickness.¹ The hearing examiner also found that the 11-gauge material "is made from the same plastic materials as the 13-gauge material, but is less expensive because it is thinner and therefore will give less wear if used at the same places 13-gauge material is now used."

In holding that the allegation had not been sustained the examiner expressed the opinion that "the theory underlying the charges respecting the sample distributed by respondents was predicated on the proposition that the variance between the sample and the actual seat cover was material because the difference in thickness made the seat cover 'less serviceable and less desirable to a substantial number of purchasers' ". Having found that counsel supporting the complaint had failed to prove these elements of the charge, *i.e.*, serviceability and desirability of the substituted material, he ruled that "it has not been established that respondents' practices in this regard constitute unfair or deceptive acts and practices or unfair methods of competition".

It is difficult for me to understand why the examiner considered the gravamen of the charge to be that seat covers made from the substituted material were inferior to the sample or would be considered by the purchaser to be inferior and therefore less desirable. These elements of the allegation are wholly irrelevant to a determination of

¹ For example, the front cover for a 1962 4-door Chevrolet contains 2,295 square inches of 13-gauge material and 3,441 square inches of 11-gauge material.

whether the practice of shipping merchandise which does not conform to sample is unfair or deceptive. It is enough if there is a showing of a significant difference between the weight and thickness of the sample and the substituted material and, in this case, such showing is amply made by evidence that 11-gauge plastic "is less expensive because it is thinner and therefore will give less wear if used at the same places as 13-gauge material is now used." As was said by the Supreme Court in *Federal Trade Commission v. Algoma Lumber Company*, 291 U.S. 67, 77-78 (1934): "We have yet to make it plain that the substitution would be unfair though equivalence were shown * * * The consumer is prejudiced if upon giving an order for one thing, he is supplied with something else."

Respondents in this case have affirmatively represented that their seat covers are made entirely of a certain type of material. Their customers have given orders for such seat covers but have been supplied with something else. This should be sufficient to establish that respondents have engaged in an unfair trade practice.

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF
COMPLIANCE

This matter has been heard by the Commission upon the cross-appeals of respondents and counsel in support of the complaint from the hearing examiner's initial decision. The Commission has considered the entire record, including the briefs and oral argument of respondents and counsel supporting the complaint, and has determined that the order contained in the initial decision should be modified and that the appeals of both parties should be denied. Accordingly,

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

It is ordered, That Respondents Fingerhut Manufacturing Company, a corporation, and its officers, and Manny Fingerhut, Herman Schwartz, Stanley H. Nemer and William Fingerhut, individually, and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale or distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of automobile seat covers or any other product, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That there are no charges in addition to the purchase price of their products when purchased on the installment plan.

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(b) That their products are unconditionally guaranteed where there are any conditions or limitations to such guarantee.

(c) That their products are guaranteed, unless the nature and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously set forth in immediate conjunction with such representation.

2. Using the word "Lifetime" or other term of the same import in referring to the duration of a guarantee of a product without clearly and conspicuously disclosing in immediate conjunction therewith the life to which such reference is made; or misrepresenting in any manner the duration of a guarantee.

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

It is further ordered, That Fingerhut Manufacturing Company, a corporation, and Manny Fingerhut, Herman Schwartz, Stanley H. Nemer and William Fingerhut 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.

Commissioner Reilly dissenting in part.

IN THE MATTER OF

BUDGET COUNSELLORS, INC., ET AL.

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

Docket C-748. Complaint, May 27, 1964—Decision, May 27, 1964

Consent order requiring Washington, D.C., sellers of a service whereby, for a fee, they would distribute a portion of a client's income to his creditors, to cease representing falsely in newspaper and direct mail advertising that they would consolidate their clients' debts, assist financially in payment thereof, and assure clients of restraint or other forbearance on the part of creditors in effecting collection of debts.

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 Budget Counsellors, Inc., a corporation, and Benjamin H. Feldman, Herbert F. Feldman

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and Henryette G. Feldman, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Budget Counsellors, 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 635 F Street, NW. in the city of Washington, District of Columbia.

Respondents Benjamin H. Feldman, Herbert F. Feldman and Henryette G. Feldman are officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent. All of said respondents have cooperated and acted together in the performance of the acts and practices hereinafter alleged.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale and sale to the public of a service whereby respondents distribute a portion of the income of their clients to their clients' creditors for a fee or service charge.

PAR. 3. In the course and conduct of their business, respondents now sell, and for some time last past have sold, their said service to purchasers thereof located in the District of Columbia, and various States of the United States, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said service in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business and for the purpose of inducing the purchase of their service, respondents have made certain statements and representations with respect thereto in advertisements inserted in newspapers and in direct mail advertising.

Typical and illustrative of such statements and representations, but not all inclusive thereof, are the following:

LET US PAY YOUR BILLS

GET OUT OF DEBT TODAY!

ARRANGE REPAYMENT OF YOUR UNPAID BILLS ON WHAT YOU CAN
AFFORD EACH WEEK

ACT NOW! CONSOLIDATE ALL YOUR BILLS

Payments Low as \$10.00 week or less

We can get you out of debt no matter what amount whether current or delinquent. Bring in your past due bills, and we will arrange to satisfy your creditors' demands and get you out of debt with payments you can afford.

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ONE PAYMENT & ONE PLACE TO PAY.

No credit investigation

No security, no co-signers

No problem too great

AVOID GARNISHMENT, LOSS OF JOB & REPOSSESSIONS.

PROTECT YOUR CREDIT

NOT A LOAN COMPANY

PAR. 5. By and through the use of the aforementioned statements and representations, and others of similar import and meaning not specifically set out herein, respondents represent directly or by implication, that:

(a) Respondents will consolidate the debt of their clients to their clients' creditors, or financially assist or arrange for financial assistance in the payment of such debts; and that

(b) Respondents' clients will be assured of delay, restraint or other forbearance on the part of all the creditors of said clients in effecting, or attempting to effect, collection of debts owed them by said clients.

PAR. 6. In truth and in fact:

(a) Respondents did not and do not consolidate the debts of their clients to their clients' creditors, or financially assist or arrange for financial assistance in the payment of such debts. Respondents furnish no money themselves but act solely as an agent distributing such monies as their clients may supply for which service respondents collect a fee.

(b) Respondents' clients have not been and are not assured of delay, restraint or other forbearance on the part of all the creditors of said clients in effecting, or attempting to effect, collection of debts owed them by said clients. In a significant number of cases respondents are unable to and do not provide for or obtain delay, restraint or other forbearance on the part of all the creditors of said clients in effecting, or attempting to effect, collection of debts owed them by said clients.

Therefore, the statements and representations referred to in Paragraphs Four and Five were and are exaggerated, false, misleading and deceptive.

PAR. 7. In the conduct of their business, at all times mentioned herein, respondents have been in substantial competition, in commerce, with corporations, firms and individuals in the sale of service of the same general kind and nature as that sold by respondents.

PAR. 8. The use by respondents of the aforesaid exaggerated, false, misleading and deceptive statements and representations has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of respondents' service by reason of said erroneous and mistaken belief.

PAR. 9. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

DECISION AND ORDER

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereof with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

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

The Commission, having considered the agreement, hereby accepts same, issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Budget Counsellors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 635 F Street, NW., in the city of Washington, District of Columbia.

Respondents Benjamin H. Feldman, Herbert F. Feldman and Henryette G. Feldman are officers of said corporation, and their address is the same as that of said corporation.

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

ORDER

It is ordered. That respondents Budget Counsellors, Inc., a corporation, and its officers, and Benjamin H. Feldman, Herbert F. Feldman and Henryette G. Feldman, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly

or through any corporate or other device, in connection with the conduct of any business for the assisting of debtors, or any other business, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, that they will consolidate the debts of their clients to their clients' creditors, or financially assist or arrange for financial assistance in the payment of such debts.

2. Representing, directly or by implication, that their clients will be assured of delay, restraint or other forbearance on the part of all the creditors of said clients in effecting, or attempting to effect, collection of debts owed them by said clients, or misrepresenting, directly or by implication, their efficacy in providing for, or obtaining delay, restraint or other forbearance on the part of the creditors of their clients in effecting, or attempting to effect, collection of debts owed them by said clients.

3. Misrepresenting in any manner the kind or character of the services they render.

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