

file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
MARLO FURNITURE CO. TRADING AS MARLO'S FURNITURE
WORLD, ET AL.

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

Docket 8745. Complaint, Sept. 27, 1967—Decision, Jan. 16, 1969

Order terminating a proceeding which charged a Washington, D.C., furniture and home furnishing store with using deceptive selling practices.

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 Marlo Furniture Company, a corporation, trading as Marlo's Furniture World, and Louis Glickfield, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Marlo Furniture Company, trading as Marlo's Furniture World, is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 901 7th Street, NW., in the city of Washington, District of Columbia.

Respondent Louis Glickfield is an officer of the corporate respondent. He formulates, directs and controls the acts and prac-

tices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are now and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of furniture, home furnishings, and other merchandise at retail to members of the public.

PAR. 3. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the District of Columbia to purchasers thereof located in various States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise 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 merchandise, respondents have made numerous statements in display advertisements inserted in newspapers with respect to variously designated sale events wherein a varying number of items were depicted, described and offered for sale.

Typical and illustrative of such statements are those made in connection with certain of respondents' sales events during which, among other items, identical 84" modern style sofas were depicted, described, and offered for sale, as follows:

<i>Publication</i>	<i>Date</i>	<i>Designation of event</i>	<i>Statement</i>
The Washington Post	Jan. 6, 1966	REMNANT SALE	(depiction) . . . All Remnants are reduced for immediate quick sale . . . NOW \$98.
The Washington Post	Jan. 17, 1966	\$100 DAY SALE	(depiction) . . . NOW \$100.
The Washington Post	Jan. 26, 1966	\$50 & \$100 DAY SALE	(depiction) . . . Fantastic price reduction . . . NOW \$100.
The Washington Post	Feb. 14, 1966	\$100 DAY SALE	(depiction) . . . Fantastic Price Reduction . . . NOW \$100.
The Washington Daily News	Mar. 29, 1966	9-HOUR CLEAR- ANCE SALE	(depiction) . . . NOW \$97.

PAR. 5. By and through the statements in their advertisements, as set out in Paragraph Four hereof, and others similar thereto but not specifically referred to herein, respondents represented, directly or indirectly, that each such advertised event was a sale in which all of the items depicted, described or offered therein, including the aforesaid sofas, were reduced substantially in price for the special reason designated therein.

PAR. 6. In truth and in fact, respondents' advertised events, as referred to in Paragraphs Four and Five above, were not sales in which all of the items depicted, described or offered therein, including the aforesaid sofas, were reduced substantially in price for the special reason designated therein. To the contrary, respondents' regular method of conducting business includes, among other practices, constant and repeated representations that their regularly advertised offers, however designated, are special sales events, as aforesaid.

Therefore, the statements and representations set forth or referred to in Paragraphs Four and Five hereof were and are false, misleading and deceptive.

PAR. 7. Typical and illustrative of other statements made by respondents in the course and conduct of their business, are those set forth in various classified advertisement columns of newspapers, including the following:

In "The Washington Post," issue of November 3, 1965:

FURN.—moved to Calif. Single girl has a modern apt. full of furniture. Cost \$627, sacrifice for \$268 if responsible party is interested in entire apt. I take back 2-year note. Call Mrs. Dillon, 638-4049.

In "The Washington Post," issue of November 13, 1965:

FURNITURE—I have 3 Rooms of Quality Used Furniture . . . orig. cost over \$500. Will take \$120 for everything. To make arrangements, call Miss Coleman, 638-5042 until 6:00 P.M.

PAR. 8. By and through the statements in their advertisements, as set out in Paragraph Seven above, and others similar thereto but not specifically referred to herein, respondents represented, directly or indirectly, that such were offers by private individuals attempting to dispose of personal belongings at prices substantially below the prices paid therefor by the advertiser.

PAR. 9. In truth and in fact, respondents' advertisements, as referred to in Paragraphs Seven and Eight above, were not offers by private individuals to dispose of personal belongings, or at prices substantially below the prices paid therefor by respondents. To the contrary, they were offers by respondents who

are operators of a commercial establishment for profit. Such offers were made pursuant to respondents' regular method of doing business, involving among other practices, constant and repeated representations that advertised furniture is being offered for sale by private individuals.

Therefore, the statements and representations set forth or referred to in Paragraphs Seven and Eight hereof, were and are, false, misleading and deceptive.

PAR. 10. Typical and illustrative of other statements made by respondents in the course and conduct of their business, are those set forth in display advertisements inserted in newspapers describing their products, including the following:

In "The Evening Star" issue of May 7, 1966:

. . . no-mar protected Extension Table, rich Walnut finish. . . .

Master Bedroom Suite, Nutmeg Maple Finish

By means of the aforesaid statements, and others similar thereto but not set forth specifically herein, respondents misrepresented the components and/or construction of such products by failing to disclose that in truth and in fact:

a. Products described as "no-mar protected" and by other similar statements describing protective or resistant characteristics or qualities, had exposed surfaces composed of plastic or other materials not possessing natural wood growth structure.

b. The term "rich walnut finish," "nutmeg maple finish," and other similar statements containing the name of a wood, were used to describe the grain design, color, stain, or other simulated finish of products, the exposed surfaces of which were composed of something other than the wood named.

Therefore, the statements and representations of respondents, by failing to disclose such material facts, as aforesaid, were and are false, misleading and deceptive.

PAR. 11. In the course and conduct of their business as aforesaid, respondents offer to extend credit to prospective purchasers of their merchandise. In a substantial number of instances, they require the deposit of a portion of the purchase price as down payment, and defer delivery pending their approval of the credit application. The purchase agreement signed by application. The purchase agreement signed by applicants for credit contains the following statement "* * * No verbal changes will be accepted. No cancellations accepted on this order. Deposits are not refundable * * * ."

In a substantial number of instances, after the purchaser has signed a purchase agreement, respondents have rejected the purchaser's credit application, or have failed to perform according to the agreement by failing to deliver within the agreed upon time or by substituting different merchandise from that which was ordered. In such cases, respondents have refused to refund the purchaser's deposit; instead they have offered the purchaser a credit allowance equal to the amount of the deposit.

In some instances, despite the statement in the agreement that deposits are not refundable, respondents' salesmen have orally represented to prospective purchasers that deposits were refundable. In a substantial number of instances where respondents' salesmen made such representations, respondents nevertheless refused to refund the deposit and instead offered the purchaser a credit allowance.

PAR. 12. By failing to disclose both orally and in writing that deposits were not refundable, or by orally misrepresenting that deposits were refundable, respondents have led purchasers to believe that deposits would be refunded if the credit applications were rejected or if respondents failed to perform according to the terms of the agreement. Therefore, respondents' failure to disclose orally as well as in writing that deposits are not refundable in such cases is false, misleading and deceptive and constitutes an unfair or deceptive act or practice.

PAR. 13. In the course and conduct of their business as aforesaid, respondents have failed to disclose to purchasers that, at respondents' option, conditional sales contracts, promissory notes, or other instrument of indebtedness executed by such purchasers in connection with their credit purchase agreements may be, and in a substantial number of instances have been, discounted, negotiated or assigned to a finance company or other third party to whom the purchaser is thereby indebted.

Therefore, respondents' failure to disclose such material fact, as aforesaid, was and is false, misleading and deceptive, and constituted, and now constitutes an unfair or deceptive act or practice.

PAR. 14. 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 furniture, home furnishings and other merchandise of the same general kind and nature as that sold by respondents.

PAR. 15. The use by respondents of the aforesaid false, mislead-

ing and deceptive statements, representations and practices and unfair or deceptive acts or 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, and by reason of said unfair and deceptive acts or practices.

PAR. 16. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

Mr. Sheldon Feldman and *Mr. William E. Barr* supporting the complaint.

Mr. Jacob A. Stein and *Mr. Glenn A. Mitchell* for respondents.

INITIAL DECISION BY EDGAR A. BUTTLE, HEARING EXAMINER

JULY 5, 1968

PRELIMINARY STATEMENT

On September 27, 1967, the Commission issued its complaint in this matter charging the respondents with violating Section 5 of the Federal Trade Commission Act by engaging in unfair methods of competition and unfair and deceptive acts in commerce. Specifically, the complaint can be described as involving five separate charges: (1) deceptive or fictitious pricing (Complaint, pars. 4-6); (2) deceptive classified ads (Complaint, pars. 7-9); (3) misrepresentation of the finish or composition of products (Complaint, par. 10); (4) misrepresentations concerning deposits (Complaint, pars. 11-12); and (5) failure to disclose that conditional sales contracts may be negotiated to lending institutions (Complaint, par. 13).

On October 13, 1967, counsel for the respondents filed a motion for a more definite statement. An answer in opposition was filed on October 25, 1967. The hearing examiner held a prehearing conference on October 30, 1967, at which time respondents were assured that full discovery would be permitted so as to obviate the need of a bill of particulars (Tr. 3-6). Subsequently, the hearing examiner entered an order dated October 31, 1967,

denying respondents' motion, but assured respondents that "complete discovery would be permitted before the commencement of hearings."

On November 6, 1967, respondents' answer was filed generally denying the allegations of the complaint. More particularly, respondents denied that the Commission "has reason to believe" that certain provisions of the Act were violated (Ans. par. 1). Further, that respondent Louis Glickfield did not direct the corporate respondents or the acts and practices set forth in the complaint (Ans. par. 3).

Prehearing conferences led to the clarification of many of the issues raised in the complaint and resulted in certain agreed procedures that facilitated and disposition of this matter. On November 15, 1967, the hearing examiner issued an order requiring both parties to give notification of documents and witnesses whose testimony was to be offered in evidence and the categorical purpose thereof.

Prior to the commencement of the hearings, complaint counsel took advantage of the Commission's Rules as they relate to discovery. On December 1, 1967, complaint counsel filed a request for admission of facts. Some of these requested admissions concerned advertisements published by the respondents. These were admitted. Others sought admission of conclusions of fact charged in the complaint. These were denied (see Respondents' Ans. dated Dec. 11 and 27, 1967). On December 18, 1967, complaint counsel filed a "Request for Admission of Genuineness of Documents and Supplemental Requests for Admission of Facts." Briefly, this request covered additional advertisements of the respondents and also sought an admission that respondents falsely represented that the advertised price was a sales price. Respondents filed an answer on January 15, 1968, objecting to the request on the grounds that complaint counsel were investigatively "fishing" for information in order to prepare their pre-trial submission as directed by the hearing examiner. At a prehearing conference held on January 23, 1968, the hearing examiner ordered respondents to answer specifically the supplemental request of complaint counsel. Thereafter, respondents admitted the authenticity and genuineness of the documents marked Commission's Exhibits 1 A-B through 72, denied certain material facts involved in this proceeding, and reserved the right to object to the introduction of certain documents in evidence on various grounds.

On January 15, 1968, complaint counsel filed a motion for an

extension of time in which to prepare its trial brief as ordered by the hearing examiner on November 15, 1967. The hearing examiner entered an order on January 16, 1968, giving complaint counsel until February 6, 1968, to file a brief allocating the evidence, furnishing a list of witnesses, and a description of documents.

Thereafter, complaint counsel sought further discovery by filing an application for an "order requiring access" under date of February 2, 1968, four days before their trial brief was due. In their application complaint counsel admit that "the staff did not seek the records" necessary to prove their case. They further stated that since they "had no way of knowing whether respondents would seek to confess and avoid, or deny the allegations concerning pricing" this order for access became necessary. Respondents filed a motion to quash the order on February 12, 1968, because it was believed that this constituted a comprehensive post-complaint investigation.

Complaint counsel filed the "Allocation of Evidence in Support of the Complaint" on February 15, 1968. Under the heading "B. Regular Selling Prices of Products Advertised" (p. 4), complaint counsel state that this issue will be proved after access is obtained to the records of respondents as ordered by the hearing examiner on February 2, 1968.

Thereafter, complaint counsel, on February 16, 1968, filed their third request for admissions seeking the genuineness of documents, including correspondence between respondents' counsel and an attorney investigator of the Commission (CX 4-8). On February 20, 1968, respondents objected to this third request and questioned the propriety of Commission counsel placing in evidence letters from counsel that were sent with a view to effecting an informal nonadjudicatory settlement of this matter. Respondents filed a motion to exclude on February 20, 1968, again pointing out that litigants are entitled to settle without having their overtures used as evidence (p. 2). On the same date, counsel for respondents filed an answer to this request contending that the request does not relate to relevant documents as required under Section 3.31 of the Commission Rules.

On February 27, 1968, the hearing examiner denied respondents' motion to quash the order of access. Respondents filed an appeal with the Commission which was subsequently denied (Order Denying Motion to Dismiss and Appeal from Hearing Examiner's Order, March 28, 1968 [73 F.T.C. 1250]).

Hearings for the receipt of complaint counsel's case-in-chief were held in Washington, D.C., on March 18, 1968, through April 5, 1968, at which time complaint counsel rested their case (Tr. 850). Defense hearings commenced on April 8, 1968, and ended on April 10, 1968. On April 10, 1968, the hearing examiner ordered the record closed for the receipt of evidence and directed that proposed findings of fact and conclusions of law be filed by May 27, 1968, and replies thereto by June 3, 1968 (Tr. 996).

The hearing examiner has carefully considered the proposed findings of fact and conclusions supplemented by briefs and reply briefs of complaint counsel and counsel for respondents. Such proposed findings and conclusions if not herein adopted, either in the form proposed or in substance, are rejected as not supported by the record or as involving immaterial matters.

FINDINGS OF FACT

1. Respondent Marlo Furniture Company, trading as Marlo's Furniture World, is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia with its principal office and place of business located at 901 7th Street, NW., in the city of Washington, District of Columbia.¹

2. Respondent Louis Glickfield is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint. His address is the same as that of the corporate respondent.²

3. Respondents are now and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of furniture, home furnishings, and other merchandise at retail to members of the public.³

4. In the course and conduct of their business, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the District of Columbia to purchasers thereof located in various states of the United States and in the District of Columbia, and maintain, and have maintained, a substantial

¹ Admitted, see Answer to Par. 1 of Complaint.

² Admissions 1 and 2; CXs 82-83; Tr. 212-62, 281-85, 415-18, 475-76, 888-903.

³ Admitted, see Answer to Par. 2 of Complaint.

course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.⁴

5. In the course and conduct of their business, and for the purpose of inducing the purchase of their merchandise, respondents have made numerous statements in display advertisements inserted in newspapers with respect to variously designated sale events wherein a varying number of items were depicted, described and offered for sale.⁵

6. Illustrative of respondents' statements in newspaper advertisements are those made in connection with certain of respondents' sales events during which, among other items, identical 84-inch modern style sofas were depicted, described, and offered for sale, as follows:⁶

<i>Publication</i>	<i>Date</i>	<i>Designation of event</i>	<i>Statement</i>
The Washington Post	Jan. 6, 1966	REMNANT SALE	(depiction) . . . All Remnants are reduced for immediate quick sale . . . NOW \$98.
The Washington Post	Jan. 17, 1966	\$100 DAY SALE	(depiction) . . . NOW \$100.
The Washington Post	Jan. 26, 1966	\$50 & \$100 DAY SALE	(depiction) . . . Fantastic price reduction . . . NOW \$100.
The Washington Post	Feb. 14, 1966	\$100 DAY SALE	(depiction) . . . Fantastic Price Reduction . . . NOW \$100.
The Washington Post	Mar. 29, 1966	9-HOUR CLEAR- ANCE SALE	(depiction) . . . NOW \$97.

7. By and through the statements in their advertisements as set out in Paragraph 6 hereof, and others similar thereto, respondents represented, directly or indirectly, that each such advertised event was a sale in which all of the items depicted, described or offered therein, including the aforesaid sofas, were reduced substantially in price for the special reason designated therein.⁷

8. As averred by complaint counsel, at pages 17-22 of their Proposed Findings, the following prices, which respondents re-

⁴ Tr. 272-74; see also Answer to Par. 3 of Complaint.

⁵ Admissions 7, 11, 14-18, 22; CXs 57, 66, 69-A, 70, 82-85, 87.

⁶ Admissions 8-17, 23, 25, 27; CXs 6, 56, 63-64, 66, 69-A, 72, 82-85, 87; Tr. 462-64.

⁷ Admissions 2-18; CXs 82-85, 87; Tr. 241-255, 422-39, 445-460.

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presented as "sale" prices, are the only prices of record before the examiner from which he may determine the prices at which the products listed were sold: ⁸

84-inch modern style sofa:

January 6, 1966	\$98	April 17, 1966	100
January 7, 1966	98	April 22, 1966	96
January 17, 1966	100	April 23, 1966	96
January 18, 1966	100	April 24, 1966	96
January 26, 1966	100	May 7, 1966	100
January 27, 1966	100	May 8, 1966	100
February 14, 1966	100	May 9, 1966	100
February 15, 1966	100	July 30, 1966	97
February 20, 1966	94	July 31, 1966	97
February 21, 1966	94	August 1, 1966	97
March 29, 1966	97	August 12, 1966	100
March 30, 1966	97	August 13, 1966	100
April 15, 1966	100	October 31, 1966	100
April 16, 1966	100	November 1, 1966	100

Italian provincial sofa:

March 14, 1966	168	July 30, 1966	168
March 15, 1966	168	July 31, 1966	168
April 2, 1966	168	August 1, 1966	168
April 3, 1966	168	August 8, 1966	168
April 26, 1966	168	August 9, 1966	168
April 27, 1966	168	August 10, 1966	168
April 28, 1966	168		

French provincial sofa:

January 6, 1966	97	March 29, 1966	97
January 7, 1966	97	March 30, 1966	97
January 17, 1966	100	April 15, 1966	100
January 18, 1966	100	April 16, 1966	100
January 26, 1966	100	April 17, 1966	100
January 27, 1966	100	April 22, 1966	112
February 14, 1966	100	April 23, 1966	112
February 15, 1966	100	April 24, 1966	112
February 20, 1966	96	May 7, 1966	100
February 21, 1966	96	May 8, 1966	100
March 5, 1966	98	May 9, 1966	100
March 6, 1966	98		

Three-piece Danish sofa:

January 17, 1966	100	February 15, 1966	100
January 18, 1966	100	March 14, 1966	97
January 26, 1966	100	March 15, 1966	97
January 27, 1966	100	April 2, 1966	96
February 14, 1966	100	April 3, 1966	96

⁸ *Id.*, see also footnotes re findings 5, 6, 7 and 9.

April 15, 1966	100	April 27, 1966	96
April 16, 1966	100	April 28, 1966	96
April 17, 1966	100	May 7, 1966	100
April 23, 1966	98	May 8, 1966	100
April 24, 1966	98	May 9, 1966	100
April 25, 1966	98	October 31, 1966	100
April 26, 1966	96	November 1, 1966	100
Early American sofa:			
January 6, 1966	97	April 15, 1966	100
January 7, 1966	97	April 16, 1966	100
January 17, 1966	100	April 17, 1966	100
January 18, 1966	100	April 18, 1966	100
January 26, 1966	100	April 26, 1966	98
January 27, 1966	100	April 27, 1966	98
February 14, 1966	100	April 28, 1966	98
February 15, 1966	100	May 7, 1966	100
February 20, 1966	94	May 8, 1966	100
February 21, 1966	94	May 9, 1966	100
March 30, 1966	98	October 31, 1966	100
April 2, 1966	98	November 1, 1966	100
School master's desk.			
January 26, 1966	50	April 23, 1966	48
January 27, 1966	50	April 24, 1966	48
February 20, 1966	46	April 25, 1966	47
February 21, 1966	46	May 7, 1966	50
February 28, 1966	47	May 8, 1966	50
March 1, 1966	47	May 9, 1966	50
April 22, 1966	48		

9. The foregoing evidence, which is based on advertised sales exclusively and devoid of nonsale regular-price comparisons or a continuous daily pattern of materially identical prices, fails to establish that respondents' advertised events—referred to in Paragraphs 5, 6, 7 and 8 hereof—were not sales or not substantial reductions of the items depicted in such advertising.⁹

10. There is no evidence of record that any product of respondents sold at a higher price than that which respondents represented to be a sale price except as represented by respondents in their sales advertising (see pages 17-22 of complaint counsel's Proposed Findings). The pattern evidenced merely reflects that in a normal 25 business-day month, including Saturdays, sales were advertised one to six days per month. There is no evidence as to prices the remaining 19 to 24 business days per month. The absence of required prima facie proof does not

⁹ CXs 6, 50, 61, 64, 66-73, 87; Tr. 237, 241-55, 422-39, 445-60, 746.

impose upon respondents the need of going forward with the evidence. Furthermore, regardless of respondents' failure to produce, or grant access to, sales vouchers, the price pattern evidenced by complaint counsel's proof insufficiently establishes a basis for inferring that the unproduced vouchers would be unfavorable in the sense of supporting complaint counsel's prima facie case of sales price deception, which is unestablished.* Additionally, complaint counsel have waived their right to appropriate relief as to the desired sales vouchers on resting their case without reservation.¹⁰

11. Typical and illustrative of other statements made by respondents in the course and conduct of their business, are those set forth in various classified advertisement columns of newspapers, including the following:¹¹

In "The Washington Post," issue of November 3, 1965:

FURN.—moved to Calif. Single girl has a modern apt. full of furniture. Cost \$627, sacrifice for \$268 if responsible party is interested in entire apt. I take back 2-year note. Call Mrs. Dillon, 638-4049.

In "The Washington Post," issue of November 13, 1965:

FURNITURE—I have 3 Rooms of Quality Used Furniture . . . orig. cost over \$500. Will take \$120 for everything. To make arrangements, call Miss Coleman, 638-5042 until 6:00 P.M.

12. By and through the statements in their advertisements, as set forth in the Eleventh Finding, and others similar thereto, respondents represented, directly or indirectly, that such were offers by private individuals attempting to dispose of personal belongings at prices substantially below the prices paid therefor by the advertiser.¹²

13. In truth and in fact, respondents' advertisements, as referred to in the Eleventh and Twelfth Findings, were not offers by private individuals to dispose of personal belongings, presumably at prices substantially below the prices paid therefor by such private individuals. To the contrary, they were offers by respondents who are operators of a commercial establishment for profit. Such offers were made pursuant to respondents' regular method of doing business, involving among other practices, con-

*Complaint counsel appear to recognize the concept that an unfavorable inference may only be drawn if a prima facie case is established (see p. 30 of complaint counsel's Proposed Findings).

¹⁰ Id.

¹¹ Admissions 20, 21; CXs 1-A, 2, 3, 82-83, 85, 87; Tr. 298-301.

¹² See Tr. 298-308.

stant and repeated representations that advertised furniture is being offered for sale by private individuals.¹³

14. Typical and illustrative of other statements made by respondents in the course and conduct of their business, are those set forth in display advertisements inserted in newspapers describing their products, including the following:¹⁴

In "The Evening Star," issue of May 7, 1966:

. . . no-mar protected Extension Table, rich Walnut finish. . . .
Master Bedroom Suite, Nutmeg Maple Finish. . . .

15. By means of the aforesaid statements, and others similar thereto, respondents misrepresented the components and/or construction of their furniture by failing to disclose that in truth and in fact:

a. Products described as "no-mar protected" and by other similar statements describing protective or resistant characteristics or qualities, had exposed surfaces composed of plastic or other materials not possessing natural wood growth structure.

b. The term "rich walnut finish," "nutmeg maple finish," and other similar statements containing the name of a wood, were used to describe the grain design, color, stain, or other simulated finish of products, the exposed surfaces of which were composed of something other than the wood named.¹⁵

¹³ Tr. 172-73, 297, 309-16, 320-23, 480-83, 557-58, 822-25.

¹⁴ Admission 22; CXs 6, 50-64, 66-73, 82-83.

¹⁵ The Commission's "Trade Practice Rules for the Household Furniture Industry," promulgated Dec. 18, 1963, of which the examiner takes official notice provide in part:

"RULE 2—WOOD AND WOOD IMITATIONS.

"In connection with the sale of furniture having exposed parts or surfaces which are wood, or which are not wood but have the appearance of wood, members of the industry shall not use any direct or indirect representation or sales method which is:

"(1) False. Examples would include:

(a) Describing as 'maple', furniture which is constructed of birch wood;

(b) Use of the term 'solid mahogany' or the word 'mahogany' unqualifiedly to describe a mahogany veneered table;

"(3) Likely to deceive by failure to adequately disclose facts concerning the composition . . . or of simulated finishes of wood or wood imitations. Examples would include failure to disclose when an item of furniture or part thereof:

(a) Has an exposed surface of plastic . . . or other material not possessing a natural wood growth structure but has the appearance of being wood . . .

(b) Which is wood finished by means of decalcomania, printing or other process so as to have the appearance of a different kind of wood which it resembles . . ."

"RULE 3—DECEPTIVE USE OF WOOD NAMES.

"Industry members shall not use any direct or indirect representation concerning the identity of the wood in items of furniture which is false or which is likely to mislead purchasers as to the actual wood composition of furniture."

Subsequently, on March 21, 1966, the Commission published its interpretation of Rule 2(3) (b) and the first paragraph of Rule 3 of the "Trade Practice Rules for the Household Furniture Industry", which states in part:

". . . when a wood name is used in advertising or labeling to describe the grain design

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16. In the course and conduct of their business, respondents offer to extend credit to prospective purchasers of their merchandise. In some instances they require the deposit of a portion of the purchase price as down payment, and defer delivery pending their approval of the credit application. The purchase agreement signed by applicants for credit contains the following statement: "* * * No verbal changes will be accepted. No cancellations accepted on this order. Deposits are not refundable * * * ." ¹⁶

17. In a substantial number of instances after the purchaser has signed the purchase agreement respondents have rejected the purchaser's credit application or have failed to perform according to the agreement by failing to deliver within the agreed-upon time or by substituting different merchandise from that which was ordered. In some instances respondents have unreasonably delayed and refused to refund the purchaser's deposit upon the purchaser's request. Instead, they have offered the purchaser a credit allowance equal to the amount of the deposit.

In other instances, despite the statement in the agreement that deposits are not refundable, respondents' salesmen have orally represented to prospective purchasers that deposits were refundable. Where respondents' salesmen made such representations respondents nevertheless refused to refund the deposit and instead offered the purchaser a credit allowance.

By failing to adequately disclose, either orally or in writing, with reasonable clarity so that a purchaser is realistically on notice that deposits were not refundable, as reflected obscurely in certain purchase agreements, or by orally misrepresenting that deposits were refundable, respondents have led purchasers to believe that deposits would be refunded if the credit applications were rejected or if respondents failed to perform according to the terms of the agreement.¹⁷

18. In the course and conduct of their business, respondents have failed to disclose adequately to purchasers the material

and/or color of a stain finish or other type of simulated finish which has been applied to a surface composed of something other than solid wood of the type named, it must be made clear that the wood name used is merely descriptive of the grain design and/or color or other simulated finish.

"Under this interpretation, unqualified phrases such as 'walnut finish' will not satisfy this requirement. But statements such as 'walnut grained plastic top', 'walnut color', 'walnut stain', 'maple stained finish', 'mahogany finish on gum' and 'walnut finished hardwoods' (or 'softwoods', as the case may be) will satisfy this requirement if such statements are factually correct and appear in contexts which are otherwise nondeceptive."

¹⁶ CXs 25, 29-48, 77, 89, 82-83, 84, 92; Tr. 54-55, 57, 267, 272, 285-86, 401-21, 871-73.

¹⁷ Tr. 234, 413-18, 476-79, 495-96, 629-86, 691-708, 753-73, 775-85, 821-39, 841-45, 919, 976-86.

fact that, at respondents' option, conditional sales contracts, promissory notes, or other instruments of indebtedness executed by such purchasers in connection with their credit purchase agreements may be, and, in a substantial number of instances have been, discounted, negotiated or assigned to a finance company or other third party to whom the purchaser is thereafter indebted.

A clearly apparent and unobscure disclosure, reflective of the possibility of negotiation or assignment of such instruments to third parties, is material to a customer since such an assignment or negotiation does not place the customer in a position of being able to question or refute the need for payment in the event of the nonperformance of the seller in making delivery contrary to the purchase agreement.¹⁸

19. 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 furniture, home furnishings, and other merchandise of the same general kind and nature as that sold by respondents.

CONCLUSIONS

1. The use by respondents of statements and representations relative to the advertised sales events, enumerated in Findings 5 through 9 hereof, do not constitute unfair or deceptive acts or practices having the capacity and tendency to mislead members of the purchasing public since it is unestablished by the evidence that the reduced prices advertised are not, in fact, reductions or sales prices. (See Findings 9-10 setting forth rationale.)

2. The use of respondents of the aforesaid false, misleading and deceptive statements, representations and practices and unfair or deceptive acts or practices, enumerated in Findings 11 through 18, 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, and by reason of said unfair and deceptive acts or practices.

3. The aforesaid acts and practices of respondents, as herein

¹⁸ CXs 29, 32-34, 37, 40, 43, 46; RXs 34-36; Tr. 13-14, 267-71, 285-87, 421, 591-97, 607-10, 709, 714, 744, 788, 790, 795, 871, 983-85.

alleged, enumerated in Findings 11 through 18, 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. Accordingly,

ORDER

It is ordered, That respondents Marlo Furniture Company, a corporation, trading as Marlo's Furniture World, or under any other name or names, and its officers, and Louis Glickfield, individually and as an officer 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 and distribution of furniture, home furnishings, or other merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Setting forth the names: "Mrs. Dillon," "Miss Coleman," or the name of any other real or fictitious person or persons, in any advertisement which does not also set forth respondents' identity as the offerer or seller of such products in immediate conjunction therewith; or representing by any other means, directly or indirectly, that an advertisement of respondents constitutes an offer to sell personal goods by a private individual, or that the advertiser is other than a commercial establishment operating for profit.
2. Using the term "no-mar protected," or representing by any other means that such products have protective or resistant characteristics or qualities, where the exposed surfaces or such products are composed of plastic or other materials not possessing natural wood growth structure, unless such composition is clearly and conspicuously disclosed in close conjunction therewith.
3. Using the term "rich walnut finish," "nutmeg maple finish," or any other terms or descriptions containing the name of wood, to describe a surface composed of something other than wood of the type named, without clearly and conspicuously disclosing in close conjunction therewith that said wood name is merely descriptive of the grain design, color, stain or other simulated finish.

4. Misrepresenting, by means of oral statements or any other means, directly or indirectly, that down payments or deposits made on credit purchase contracts or agreements, or on applications for credit, will be refunded in the event of cancellation of any such contract.

5. Failing to adequately disclose the unavailability of refunds of deposits or down payments on a purchase or on an agreement to purchase where respondents:

(a) Refuse to extend credit for a portion of the purchase price;

(b) Fail to deliver the merchandise within the time agreed upon;

(c) Fail to deliver the ordered merchandise without unauthorized substitutions; or

(d) Fail to perform for any other reason.

6. Failing to orally disclose prior to the time of sale, and in writing on any conditional sales contract, promissory note or other instrument of indebtedness executed by a purchaser, and with such conspicuousness and clarity as is likely to be observed and read by such purchaser, that:

Any such instrument, at respondents' option and without notice to the purchaser, may be discounted, negotiated or assigned to a finance company or other third party to which the purchaser will thereafter be indebted and against which the purchaser's claims or defenses may not be available; and

It is further ordered, That the allegations of the complaint numbered Four through Six, and referred to in Findings Five through Ten hereof, are herein and hereby dismissed.

DISSENTING OPINION

JANUARY 16, 1969

BY MACINTYRE, *Commissioner*:

I dissent from the Commission's action terminating this proceeding without an order to cease and desist. The nature of the practices involved should have convinced the majority that it should do no less than issue an order surely preventing their resumption in the future. The hearing examiner in his initial decision filed herein on July 5, 1968, concluded that there should be an order to cease and desist covering at least some of the practices alleged illegal by the complaint. One of these was respondents' deceptive advertising of furniture as special offers

by unfortunate individuals in the classified section of Washington, D.C., newspapers as follows:

FURN.—moved to Calif. Single girl has a modern apt. full of furniture. Cost \$627, sacrifice for \$268 if responsible party is interested in entire apt. I take back 2-year note. Call Mrs. Dillon, 638-4049.

and

FURNITURE—I have 3 Rooms of Quality Used Furniture . . . orig. cost over \$500. Will take \$120 for everything. To make arrangements, call Miss Coleman, 638-5042 until 6:00 P.M. (See Initial Decision, Finding Eleven.)

The hearing examiner not only found that this advertising was typical and illustrative of other statements made by respondents in the course and conduct of their business, but also noted that his findings were based on admissions of respondents to that effect. This is undisputed by the majority.

The examiner's decision to enter an order including provisions specifically aimed at these practices which can only be described as willfully misleading and indeed verging on fraud, was inescapable in the light of this record. Nevertheless, the Commission has elected to terminate this case on the basis of an assurance of voluntary compliance. This constitutes a misuse of the Commission's informal procedures. Section 2.21 of the Commission's Rules of Practice specifically states that a proceeding is to be terminated on this basis only on a determination that the public interest will be fully safeguarded through such informal administrative action after consideration of the nature and gravity of the alleged violation as well as the prior record and good faith of the parties. Clearly here the Commission has failed to abide by the rule. Had it given proper weight to the nature and gravity of the offenses documented by this record, in my view it would not have agreed to a termination of this proceeding on an informal basis. Ironically, this action is contemporaneous with this agency's Consumer Protection Hearings. Indeed, I consider this action a sad commentary on those Consumer Hearings.

More disturbing, however, are the long range implications of this dismissal in the context of other actions taken by the Commission in the past few years. Informal procedures, to be sure, have their place among the law enforcement measures open to the Commission. They may appropriately be utilized when the violation is neither serious nor willful and before the Commission has expended substantial funds in investigating the matter and subsequent trial of the case. Once substantial Government funds

have been expended, the public is entitled to the maximum of protection afforded—namely, an order to cease and desist rather than a promise which is patently unenforceable. Moreover, the Federal Trade Commission Act, the Commission's basic statute, provides that when a violation of the law has been documented on an adjudicative record, a cease and desist order is to be entered. The failure to employ the enforcement procedures specified by the statute in cases of this nature and in other instances is symptomatic of a trend indicating a steady erosion of the Commission's adjudicative processes provided by Congress.

ORDER TERMINATING PROCEEDING

The hearing examiner filed his initial decision in this matter on July 5, 1968, and, on October 30, 1968, the Commission heard oral argument on the cross-appeals of respondents and counsel supporting the complaint.

Subsequent to the oral argument, counsel for respondents forwarded a letter to each of the Commissioners in which he referred to the fact that during the course of this proceeding he had tendered an assurance of voluntary compliance. He again requested that this proceeding be terminated on the basis of such assurance.

On January 3, 1969, respondents submitted the assurance of voluntary compliance contained in the appendix of this order. Therein, respondents assure the Commission that in the future they will cease and desist from engaging in all of the practices alleged in the complaint. Also, respondents agree to submit compliance reports every six months for three years, and guarantee access to the records of respondent corporation during that period.

In view of these circumstances, the Commission does not believe it to be necessary to proceed further in this matter. The proceeding will be reopened, however, if and when it should appear that respondents are not in full compliance with the assurance of voluntary compliance. Accordingly,

It is ordered, That this proceeding be, and it hereby is, terminated.

Commissioner MacIntyre dissented and filed a statement.

Complaint

75 F.T.C.

IN THE MATTER OF

MINK RANCH DISTRIBUTORS, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND THE FUR PRODUCTS LABELING ACTS

Docket C-1478. Complaint, Jan. 17, 1969—Decision, Jan. 17, 1969

Consent order requiring a Philadelphia, Pa., retail furrier to cease falsely advertising, deceptively invoicing and using bait tactics in the sale of its fur products.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Fur Products Labeling Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Mink Ranch Distributors, Inc., a corporation, and Bernard Kirschner and Seymour Himmel, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts and the Rules and Regulations promulgated under the Fur Products Labeling 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:

PAR. 1. Respondent Mink Ranch Distributors, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania. Respondents Bernard Kirschner and Seymour Himmel are officers of the corporate respondent. They formulate, direct and control the acts, practices and policies of the said corporate respondent including those hereinafter set forth.

Respondents are retailers of fur products with their office and principal place of business located at 1211 Chestnut Street, Philadelphia, Pennsylvania.

PAR. 2. Respondents are now and for some time last past have been engaged in the introduction into commerce, and in the sale, advertising, and offering for sale in commerce, and in the transportation and distribution in commerce, of fur products; and have sold, advertised, offered for sale, transported and distributed fur products which have been made in whole or in part of furs which have been shipped and received in commerce, as