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Modified Order to Cease and Desist

with the favored beauty salon customer in the rendering of hair care services and the use of respondent's hair care products.

IN THE MATTER OF
HOUSEHOLD SEWING MACHINE CO., INC., ET AL.

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

*Docket 8761. Complaint, Apr. 30, 1968—Decision, Aug. 6, 1969 **

Order requiring an Arlington, Va., marketer of sewing machines to cease using bait and switch tactics, misrepresenting the age, model or identity of any machine, making false savings claims, using deceptive names as means to collect bills, falsely guaranteeing any of its products, using prizes or awards deceptively, failing to disclose that its sales contracts may be sold to a finance company, and failing to notify signers of sales contracts and promissory notes that such instruments may be rescinded within 3 days.

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 Household Sewing Machine Co., Inc., a corporation, and William R. Clark, individually and as an officer of said corporation, and William R. Seeger, individually and as a former 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 Household Sewing Machine Co., Inc., 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 formerly located at 910 Ninth Street, N.W., Washington, D.C., and presently located at 2420 Wilson Boulevard, Arlington, Virginia.

* Modified by Commission's order of Sept. 1, 1970, by adding paragraph 17 to Part I which forbids respondents from failing to maintain adequate records upon which its prices and savings to customers are based.

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Respondent William R. Clark is an officer of the said corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

Respondent William R. Seeger formerly was an officer and was the manager of said corporate respondent. Along with respondent Clark, he formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His business address was the same as that of the corporate respondent, and currently is 910 Ninth Street, NW., Washington, D.C., where he sells sewing machines for another company.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, and distribution of sewing machines to the public.

PAR. 3. In the course and conduct of their business, respondents maintained their place of business wholly within the geographical confines of the District of Columbia and for some time last past caused their said products, when sold, to be shipped from their said place of business in the District of Columbia to purchasers thereof located within the District of Columbia and in various States of the United States, and respondents still maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made various statements and representations in classified advertisements in newspapers of general circulation and in direct mail literature, of which the following are typical and illustrative, but not all inclusive thereof:

SEW MACH.—Elna Supermatic, repo.

Bal. \$74.10. \$6 per mo.

Dealer. Call Credit Dept., EX 3-0540
aft. 6, CH 8-4484.

* * * * *
SEW MACH.—Singer port. '66 w/zig-zag attach., left in layaway. Bal.
\$22.50. free home demo. Dealer, EX 3-0540; aft. 6, 248-4484.

* * * * *
SEW MACH.—Singer 66. Zig-zag & button hole, left in layaway. Bal.
\$27.10. Dealer. Call for free home demo. EX 3-0540 aft. 6, 248-4484.

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SEW MACH.—Singer port., w/zig-zag attach., left in layaway. Bal. \$24.88.
Call Household Credit Dept. 393-4693 aft. 6, 248-4484.

* * * * *
ALL MACHINES ARE GUARANTEED AND SERVICED BY YOUR
LOCAL FACTORY AUTHORIZED DISTRIBUTOR: HOUSEHOLD SEW-
ING MACHINE CO., INC.

PAR. 5. By and through the use of the aforesaid statements and representations, and others of similar import and meaning not specifically set out herein, separately and in connection with the oral statements and representations of their salesmen, respondents have represented, directly or by implication:

1. That respondents are making bona fide offers to sell the advertised sewing machines on the terms and conditions stated.

2. Through the use of the figures "'66" and words or statements of similar import, that the said sewing machines are models which have been manufactured in the year 1966.

3. Through the use of the words or abbreviations "left in layaway," "repo." and "Bal.," and words or statements of similar import, that sewing machines which were partially paid for by a previous purchaser are being offered for the unpaid balance of the purchase price, affording savings in the amount paid on the merchandise by the previous purchaser.

4. Through the use of the names "Credit Dept." and "Household Credit Dept.," that their principal business is that of lending money and settling and collecting accounts.

5. That said products are unconditionally guaranteed by respondents.

PAR. 6. In truth and in fact:

1. Respondents were not making bona fide offers to sell the advertised sewing machines on the terms and conditions stated. Said offers were made for the purpose of obtaining leads as to persons interested in the purchase of sewing machines. After obtaining such leads through response to said advertisements, respondents or their salesmen called upon such persons but made no effort to sell the advertised sewing machines. Instead, they exhibited what they represented to be the advertised sewing machines which, because of their poor appearance and condition, were usually rejected on sight by the prospective purchaser. Concurrently a higher priced machine of superior appearance and condition was presented, which by comparison disparaged and demeaned the advertised product. By these and other tactics purchase of the advertised machine was discouraged, and re-

spondents through their salesmen attempted to and frequently did sell the higher priced machine.

2. The said machines were not models manufactured in the year 1966. Some of them were manufactured more than twenty years ago.

3. Said sewing machines were not partially paid for by a previous purchaser, were not being offered for the unpaid balance of the purchase price, and the represented savings were not afforded to purchasers.

4. Respondents' principal business was not that of lending money or settling or collecting accounts.

5. Said products were not unconditionally guaranteed by respondents. Such guarantee as may have been provided was subject to numerous terms, conditions and limitations which were not disclosed in the advertisements.

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

PAR. 7. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents held ostensible "drawings" in which persons were invited to register their names and addresses for the chance to win a free sewing machine and other prizes. The participants in said "drawings" later received further promotional material by mail. Typical but not all inclusive of the statements and representations made in said promotional material are the following:

CONGRATULATIONS! YOUR NAME WAS SELECTED FROM THE TICKETS TAKEN AT THE RECENT SEWING MACHINE DRAWING TO RECEIVE ONE OF THE SECOND PRIZE AWARDS. YOU HAVE WON A \$50.00 DISCOUNT CERTIFICATE.

THIS CERTIFICATE ENTITLES YOU TO A BRAND NEW 1966 NEW HOME SEWING MACHINE, MODEL #103. THIS MACHINE IS NATIONALLY ADVERTISED FOR \$89.95, SO WITH YOUR CERTIFICATE ALL YOU PAY IS \$39.95! THIS IS AN ADVERTISING PROMOTION. ALL WE ASK IS TELL YOUR FRIENDS ABOUT YOUR NEW HOME SEWING MACHINE.

PAR. 8. By and through the use of the statements and representations set out in Paragraph Seven, by oral statements of respondents or their salesmen, and by other written statements of similar import and meaning not specifically set out herein, respondents have represented, directly or by implication, that they conduct bona fide drawings and that recipients of said merchan-

dise certificates have won a valuable prize entitling them to a discount in the amount stated on the certificate, which constituted a reduction from the price at which such products were usually and customarily sold.

PAR. 9. In truth and in fact, respondents did not conduct bona fide drawings. Their purpose in having persons register for drawings was to obtain leads to prospective purchasers of sewing machines. The recipients of such certificates did not receive a valuable prize since the amount of the award certificate was deducted not from the usual and customary price of the product but from a higher price, and consequently the prize was illusory.

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

PAR. 10. In the course and conduct of their business, respondents have failed to disclose certain material facts to purchasers, including, but not limited to the fact that, at respondents' option, conditional sale contracts, promissory notes, or other instruments of indebtedness executed by such purchasers in connection with their credit purchase agreements may be discounted, negotiated, or assigned to a finance company or other third party to whom the purchaser is thereafter indebted and against whom defenses may not be available.

Therefore, respondents' failure to disclose such material facts, both orally and in writing prior to the time of sale, was and is false, misleading and deceptive, and constituted and now constitutes an unfair or deceptive act or practice.

PAR. 11. In the conduct of their business, at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of sewing machines of the same general kind and nature as those sold by respondents.

PAR. 12. 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. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now

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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 E. Barr and Mr. Dwight H. Oglesby supporting the complaint.

Feldman, Cole and Walsh by *Mr. J. Robert Walsh* for Household Sewing Machine Co., Inc., and *Mr. William R. Clark* and *Mr. John W. Norwood* for *Mr. William R. Seeger*, Washington, D.C.

INITIAL DECISION BY WILLIAM K. JACKSON, HEARING EXAMINER
DECEMBER 20, 1968

This proceeding was commenced by the issuance of a complaint on April 30, 1968, charging the corporate respondent and the two named individual respondents, individually and as officers of said corporation, with unfair and deceptive acts and practices and unfair methods of competition in commerce, in violation of Section 5 of the Federal Trade Commission Act by making false and misleading representations in the sale of sewing machines. In particular, it is alleged that respondents violated Section 5 by (1) deceptive advertising of their products; (2) misrepresenting the terms and conditions of their guarantee; (3) engaging in bait and switch practices; (4) conducting bogus drawings; (5) and through failing to disclose that conditional sale contracts might be negotiated to a finance company or other third party.

After being served with the said complaint, the corporate respondent and William R. Clark filed separate answers admitting a number of the specific allegations in the complaint, but denying generally any violation of law. Respondent Clark specifically denied that he "formulated, directed or controlled the acts and practices of the corporate respondent complained of in the complaint." Respondent William R. Seeger also filed an answer admitting all the material allegations of the complaint, but denying that he formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint.

A prehearing conference was held on July 9, 1968, at Washington, D.C., to discuss the date and place of the hearing, the exchange of lists of witnesses and documents, requests for admission and the simplification and clarification of the issues. Responses to requests for admissions of fact served upon the re-

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spondents by counsel in support of the complaint served to substantially narrow the factual issues in this matter. These requests and the admissions thereto were received in evidence as probative of the factual allegations. The request for admissions of fact upon respondents Household Sewing Machine Co., Inc., and William R. Clark was received in evidence as CX 35 and their responses thereto were received in evidence as CX 36 and CX 37. The request for admissions of fact upon respondent William R. Seeger was received in evidence as CX 38 and his response thereto was received as CX 39.

Hearings were held at Washington, D.C., on September 10, 12, 16, 17, 18 and 24, 1968, at which complaint counsel adduced evidence in support of the complaint. Respondents elected not to put in any defense (Tr. 508). Proposed findings of fact, conclusions of law and briefs have been submitted by complaint counsel, the corporate respondent and William R. Clark. No submissions were received from William R. Seeger. All these proposals have been considered and those proposed findings not herein adopted, either in form or in substance, are rejected as not being supported by the record or as not being necessary; and the hearing examiner having considered the entire record, makes the following findings of fact, conclusions drawn therefrom, and order.

FINDINGS OF FACT

1. Respondent Household Sewing Machine Co., Inc., 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 formerly located at 910 9th Street, Northwest, Washington, D.C., and presently located at 2420 Wilson Boulevard, Arlington, Virginia (Ans. par. 1). The corporate respondent was organized by respondent William R. Clark on January 3, 1966, for the purpose of selling sewing machines at retail (Adm. 1, 2, 5, 28; CX 35 and CX 36; Tr. 15, 112, 122, 142, 177).

The capital of the corporation was provided by respondent William R. Clark (Tr. 112, 142, 177). The officers of the corporation at the time of its formation were William R. Clark, president and treasurer, William R. Seeger, vice president, Mary E. Clark, wife of William R. Clark, secretary (Adm. 8, 9, 10; CX 35 and CX 36). The corporation commenced business at a store located at 910 9th Street, Northwest, Washington, D.C. (Tr. 14, 113).

Prior to January 3, 1966, the predecessor corporation Household Sewing Machine Co., Inc., incorporated under the laws of the State of Delaware, was engaged in the sale of sewing machines to the public from the same store at 910 9th Street, Northwest, Washington, D.C. (Tr. 12, 140). This business, however, was dissolved prior to the incorporation of the corporate respondent in this matter. Upon dissolution of the predecessor company, the respondent corporation purchased its assets including the good will, furniture, fixtures and inventory, and assumed the corporate name (Tr. 122, 139). The employees, but not the principals of the predecessor Household Sewing Machine Co., Inc., joined the respondent corporation upon its incorporation (Tr. 140). Among those employees of the predecessor company who joined the respondent corporation, was individual respondent herein William R. Seeger, who had been the general manager of the predecessor company and who assumed the same position in the respondent corporation (Tr. 10, 12-14).

The business of the respondent corporation from the time of its incorporation to the present, has been the selling of new and used sewing machines to the public (Adm. 28, 31; CX 35, CX 36). In the year 1967, respondent corporation sold a total of 414 sewing machines of which 297 were new machines and 117 were used machines (Adm. 34; CX 35, CX 37). The respondent corporation sells sewing machines principally through salesmen who demonstrate the sewing machines in the homes of prospective customers (Adm. 29; CX 35, CX 36). These salesmen have sold sewing machines to residents of Virginia, Maryland and the District of Columbia (Adm. 30; CX 35, CX 36). Prospective customers are solicited by advertisements placed by the corporate respondent in the classified sections of the three metropolitan newspapers (Adm. 40-45; CX 35, CX 36). The names of the prospective customers responding to the classified advertisements are turned over to salesmen of the corporate respondent who contact the prospective customers in their homes (Tr. 49, 50, 187).

The corporate respondent maintained its principal place of business at 910 9th Street, Northwest, Washington, D.C., from January 3, 1966, to December 1, 1967, when it relocated at 2420 Wilson Boulevard, Arlington, Virginia (Tr. 143, 144).

2. The individual respondent William R. Seeger participated in the daily business of the respondent corporation from the time of its incorporation in January 1966 until March 1967 (Tr. 11).

During the period of January through October 1966 he acted as general manager of respondent corporation (Tr. 11). In November 1966, he was relieved of his position as general manager by the president of respondent corporation, William R. Clark (Tr. 18, 118). Thereafter until March 1967, respondent Seeger continued in the employment of Household as a salesman (Tr. 11). Respondent Seeger was also vice president of respondent corporation from the time of its incorporation until November 1966 at which time he relinquished that title (Tr. 18, 22). Seeger at no time owned any stock of the corporate respondent although it appears that he did have an option to purchase 24 percent of the corporation stock, which he also relinquished in November 1966 (Tr. 24, 25, 118). After leaving the respondent corporation Seeger joined United Appliances, a business also engaged in the sale of sewing machines to the public, where he is now employed as general manager (Tr. 9, 10). The principal place of business of United Appliances is the former place of business of the respondent corporation at 910 9th Street, Northwest, Washington, D.C. (Tr. 10).

3. From the time of Household's incorporation in January 1966 until the relocation of its store to 2420 Wilson Boulevard, Arlington, Virginia, on December 1, 1967, the individual respondent William R. Clark did not maintain an office at Household's place of business at 910 9th Street, Northwest, Washington, D.C. (Tr. 21). Clark maintained his office at 2420 Wilson Boulevard, Arlington, Virginia, where he operated a business titled WRC Enterprises (Tr. 145, 159). After December 1, 1967, both the respondent corporation and WRC Enterprises occupied the same premises (Tr. 144-145, 153). From January 1966 until December 1967, while Household's store was located in the District of Columbia, respondent Clark participated in the conduct of Household's business through frequent visits to the store, daily telephone contacts and other activities as will be hereinafter discussed (Tr. 46, 52).

William R. Clark has continued as president and treasurer of the corporate respondent and his wife, Mary E. Clark, has continued as secretary of the corporate respondent since its incorporation (Adm. 8, 9, 10; CX 35, CX 36). Mr. Clark and his wife have been the only corporate officers of Household since William R. Seeger relinquished his position as vice president in November 1966 (Tr. 115). Mr. Clark owned 76 percent of the stock of respondent corporation from the time of its incorporation until November 1966 and now holds 80 percent of its stock (Tr. 22, 24,

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118). Although Mrs. Clark has been secretary of the corporate respondent since its inception (Adm. 10; CX 35, CX 36), she has held that position in name only and has never participated in the conduct of the corporation's business in any way (Tr. 170-179). Actually no individual other than respondent William R. Clark has ever acted in the capacity of a corporate officer (Tr. 17-19, 124, 126-128, 170-179).

4. Respondent William R. Clark, in addition to being the organizer, principal stockholder, and president and treasurer of the corporate respondent, as found above, also participated directly in its management and operation. From January 1966 through November 1966, Clark regularly visited the premises of Household's store at 910 9th Street, N.W. several times a week (Tr. 46). Clark maintained daily contact with the general manager of Household by telephone (Tr. 42, 52). During these regular visits to the 9th Street store of Household, Clark conferred with respondent Seeger, the general manager, on credit, sales, promotional and advertising policies (Adm. 22, 23, 26, 27; CX 35, 36; Tr. 36-38, 53). During these visits Clark inventoried Household's sewing machines (Tr. 47), examined and routed conditional sales contracts (Tr. 46), examined invoices and bills (Tr. 46, 47), co-signed payroll checks and checks for expenses (Adm. 24; CX 35, CX 36; Tr. 46, 137, 138), disseminated information and instructions to the general manager and salesmen (Tr. 46, 48), and discussed advertising (Tr. 46). In addition, Clark maintained extensive records in the nature of sales slips, ledger books and records of leads obtained from newspaper advertisements in order to keep abreast of the daily business of Household (Tr. 51).

During his daily telephone conversations with Seeger, Clark discussed sales and financing, but the emphasis was placed upon the daily advertising (Tr. 52). Clark read each advertisement placed by respondents when it appeared in the newspapers and contacted the general manager for reports as to the number of leads obtained through specific advertisements and how many of these leads had resulted in sales (Tr. 52). Clark and Seeger composed the text of the advertisements which respondents published and all advertisements had to be approved by Clark before their publication (Tr. 53). Clark also hired, fired and demoted employees and established their salaries and rates of commission (Tr. 22, 51, 136, 137, 185).

After the corporate reorganization of Household in January 1966, Clark arranged a change in finance companies so that the

same finance company which accepted conditional sales contracts executed by WRC Enterprises, thereafter handled conditional sales contracts for Household (Tr. 38, 39). Clark also originated the "Singer '66" advertisements, hereinafter discussed, over the objection of respondent Seeger (Tr. 36-38). Clark initiated, after his takeover of the company, the sales practice of providing a gift such as Regalware, stereo sets, or sterling silver in closing a sale. The Regalware used by Household was obtained from WRC Enterprises and transported to Household's store in Clark's car (Tr. 39-40). Clark likewise implemented other sales techniques and practices in the conduct of Household's business which were common to WRC Enterprises (Tr. 42-45).

Clark devoted equal attention to routine policies of the corporate respondent, such as terms and conditions of the guarantee and special promotions, such as drawings, hereinafter discussed. In this regard, Clark proposed to limit the duration of the guarantee and imposed a service charge as an additional consideration (Tr. 45). Clark approved the drawings conducted by Household and in fact he organized the drawing conducted at Rockville, Maryland. Clark together with Seeger prepared the purported gift certificates which were sent to the participants to these drawings (Tr. 75, 80, 81; CX 2).

Clark, who is 41 years of age (Tr. 164), has been engaged in the sale of products to the public since September 1964 when he organized WRC Enterprises as a sole proprietorship upon receiving a franchise to sell Kirby vacuum cleaners (Tr. 145, 163). The method of selling Kirby vacuum cleaners utilized by WRC Enterprises through home demonstrations is remarkably similar to that employed by Household in the sale of sewing machines. Conditional sales contracts are utilized, WRC salesmen are paid on a commission basis, promotional gifts are provided customers of WRC (Tr. 159-164), and presently both Household and WRC are located at the same address and the operations of the two companies to a large degree are commingled and conducted by the same personnel (Tr. 145, 152-158). On the basis of the foregoing evidence, it is concluded that respondent William R. Clark formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter discussed and that in order to be effective any order which will issue against the corporate respondent herein must also include the individual respondent William R. Clark.

5. As hereinabove found, respondent William R. Seeger was an

officer and manager of the corporate respondent along with respondent Clark. He participated in the formulation, direction and control of the acts and practices of the corporate respondent, including the acts and practices hereinafter discussed. Seeger admitted that he participated in the organization of Household and during 1966 participated in the formulation of sales, promotion, and publicity policies of Household. As general manager, Seeger conferred regularly with Clark concerning daily business practices, advertising, credit and promotional policies of Household (Adm. 4, 7, 8, 10-13; CX 38, CX 39). Seeger, in his position as manager, instructed salesmen on sales practices and in conjunction with respondent Clark determined the selling price of sewing machines, discounts that salesmen were to allow and the commissions that salesmen were to receive (Tr. 41, 42, 48, 87-89). Respondent Seeger was primarily responsible for all of the drawings conducted by the respondent corporation and together with Clark prepared the purported gift certificates (Tr. 78, 80, 81; CX 2). Finally, the record shows that Seeger has been continually engaged in the business of selling sewing machines to the public in the capacity of either a salesman or manager of a store from 1952 to date (Tr. 10-14). As previously indicated, he is presently the manager of United Appliances which is located at the former business address of Household and engaged in the sale of sewing machines (Tr. 9, 10). In these circumstances, it is concluded that any order which will issue must also include respondent Seeger.

6. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of sewing machines to the public (Respondent Household's Ans. par. 2; see also Findings Nos. 4 and 5, *supra*; Respondent Seeger's Ans. par. 2).

7. In the course and conduct of their business, respondents from January 3, 1966, to December 1, 1967, maintained their place of business wholly within the geographic confines of the District of Columbia and during that period caused their products, when sold, to be shipped from their place of business in the District of Columbia to purchasers thereof located within the District of Columbia and in various States of the United States, and respondents still maintain and at all times mentioned herein have maintained, a substantial course of trade in their products in commerce, as "commerce" is defined in the Federal Trade Com-

mission Act (Respondent Household's Ans. par. 3). Although the corporate respondent admitted the allegations of Paragraph Three of the complaint, it denied however that it maintained a "substantial course of trade in commerce." During 1966, the respondent corporation had gross sales of \$50,000 to \$64,000 (Tr. 26) and sold approximately 414 sewing machines (Adm. 34; CX 35, CX 37) to residents of Virginia, Maryland and the District of Columbia (Adm. 30; CX 35, CX 36). Gross sales in 1967 were approximately \$60,000 (Tr. 166). It is concluded that the foregoing establishes that the respondents have maintained a substantial course of trade in commerce as "commerce" is defined in the Act. (*Surrey Sleep Products, Inc.*, Docket No. 8695, April 3, 1968 [73 F.T.C. 523], in which sales of \$5,000 per year in interstate commerce were held sufficient.)

8. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made various statements and representations in classified advertisements in newspapers of general circulation, of which the following are typical and illustrative (Household's Ans. par. 4; see Admissions 66, 67, 68, 69; CX 35, CX 36) :

SEW MACH.—Elna Supermatic, repo. Bal. \$74.10. \$6 per mo. Dealer. Call Credit Dept., EX 3-0540 aft. 6, CH 8-4484.

* * * * *
SEW MACH.—Singer port. '66 w/Zig-zag attach., left in layaway. Bal. \$22.50. Free home demo. Dealer, EX 3-0540; aft. 6, 248-4484.

* * * * *
SEW MACH.—Singer 66. Zig-zag & button hole, left in layaway. Bal. \$27.10. Dealer. Call for free home demo. EX 3-0540 aft. 6, 248-4484.

* * * * *
SEW MACH.—Singer port., w/zig-zag attach., left in layaway. Bal. \$24.88. Call Household Credit Dept. 393-4693 aft. 6, 248-4484.

In addition to the advertisements set forth above, respondents have admitted placing the following advertisements, among others, in newspapers of general circulation during the first six months of 1966:

SEW. MACH.—Singer '66 walnut console w/zig-zag. Bal. \$27. Free home demo. Dealer, EX 3-0540; aft. 6, 248-4484. (Admission 70, CX 35, CX 36.)

* * * * *
SEW. MACH.—Singer port. '66 w/zig-zag attach., left in layaway. Bal. \$24.88. Free home demo. Dealer, EX 3-0540; aft. 6, 248-4484. (Admission 71, CX 35, CX 36.)

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SEW. MACH.—Singer '66 wal cons w/zig-zag. Bal. \$26. Free home demo. Dealer, EX 3-0540; aft. 6, 248-4484. (Admission 72, CX 35, CX 36.)

* * * * *

SEW. MACH.—Singer '66 wal cons w/ZZ; Bal. \$27. Free home demo. Dealer, EX 3-0540; aft. 6, 248-4484. (Admission 73, CX 35, CX 36.)

* * * * *

SEW. MACH.—Singer port. '66 w/zig-zag attach., left in layaway, Bal. \$22.50. Free home demo. Dealer, 393-0541; aft. 6, CH 8-4484. (Admission 74, CX 35, CX 36.)

* * * * *

SEW. MACH.—Singer '66 wal. cons. w/ZZ; bal. \$26. Dealer. Free home demo. EX 3-0540; aft. 6, 248-4484. (Admission 75, CX 35, CX 36.)

* * * * *

SEW. MACH.—Singer port. '66 w/zigzag attach. left in layaway. Bal. \$24.88. Dealer. Free home demo. 393-0541; aft. 6, CH 8-4484. (Admission 76, CX 35, CX 36.)

* * * * *

SEW. MACH.—Singer port. '66 w/zig-zag attach., left in, dealer, layaway. Bal. \$22.50. Free home demo. EX 3-0540 aft. 6, 248-4484. (Admission 77, CX 35, CX 36.)

* * * * *

SEW. MACH.—'66 Singer zig-zag auto., bal. \$51.10. Call Credit Dept., EX 3-0540 aft. 6, CH 8-4484. (Admission 78, CX 35, CX 36.)

* * * * *

SEW. MACH.—'66 Singer zig-zag auto., bal. \$51.10. Call Credit Dept., Dealer, EX 3-0540; aft. 6, CH 8-4484. (Admission 79, CX 35, CX 36.)

* * * * *

SEW. MACH.—'66 Singer. Walnut console. Left in layaway. Bal. \$38.10. Dealer Credit Dept. EX 3-0540; aft. 6, CH 8-4484. (Admission 80, CX 35, CX 36.)

* * * * *

SEW. MACH. SINGER—'66 zig-zag, left in layaway. Bal. \$56.40. \$7 per mo. Also 1966 cabinet model, left in layaway, Bal. \$47.40. Call Credit Dept. Free home demo. 393-4693 or aft. 6, CH 8-4484. (Admission 81, CX 35, CX 36.)

* * * * *

SEW. MACH.—'66 zig-zag machine. Buttonhole and fancy stitch, no attachment needed. Bal. \$62.95, \$8 per mo. Call Credit Dept. 393-0540 aft. 6, 248-4484. (Admission 82, CX 35, CX 36.)

* * * * *

SEW. MACH.—Singer, '66 zig-zag, left in layaway. Bal. \$54.10. \$7 per mo. Call Credit Dept., 393-4693 or aft. 6, CH 8-4484. (Admission 83, CX 35, CX 36.)

9. By and through the use of the statements and representations as set forth in Finding No. 8, and others of similar import and meaning, separately and in connection with the oral statements and representations of their salesmen, respondents have represented, directly or by implication, that they are making bona fide offers to sell the advertised sewing machines on the terms and conditions stated (Household's Ans. par. 5, subparagraph 1, as charged by respondents' counsel at prehearing conference; record of prehearing conference, Tr. p. 14).

10. As previously found, respondents' principal method of doing business is through home demonstrations of sewing machines by salesmen from leads phoned into respondents' store in response to the aforesaid classified ads (Tr. 50, 51, 187, 188). Six consumer witnesses¹ were called, all of whose testimony followed a similar, if not almost identical, pattern. In short, these six witnesses testified that they each saw one of respondents' classified advertisement in a newspaper. However, only one of these witnesses, Rogene Jones, was able to identify the text of the specific ad to which she responded (Adm. 67; CX 35, CX 36; Tr. 409-410). The other five could only remember the price of the sewing machine in the ad or some other aspect of the ad such as, the name of the company. But none of these five could recall the entire ad or specifically identify the text of the ad from the exhibits in evidence. In the case of all six witnesses they called the telephone number listed in the ad and as a result thereof one of respondents' salesmen came to their home in a day or so and brought with him into the house the sewing machine which had been advertised. Upon the basis of this testimony, the hearing examiner finds a sufficient nexus between the advertisement set forth in Finding No. 8 above and the testimony of the six witnesses. Moreover, inasmuch as the text of their classified advertisements was stipulated, it was not incumbent upon complaint counsel to produce the physical newsprint version of the ads or to show actual injury. Capacity to deceive as well as potential injury to consumers or competitors is sufficient. *F.T.C. v. Raladam Co.*, 316 U.S. 149 (1942). The hearing examiner therefore finds respondents' objection to his refusal to strike the advertisements to be without merit.

¹ Ella May Austin, Tr. 327-335; Leroy O. Hobson, Tr. 395-403; Rogene Jones, Tr. 405-414; Mrs. William J. Murchison, Tr. 444-451; Susie L. Stanfield, Tr. 453-459; Mrs. Helen Anger, Tr. 463-472.

Each of the witnesses testified that they were attracted by the low price of the machine set forth in the advertisement and did not expect, because of the low price, a new machine (Tr. 338). However, almost without exception each of the six witnesses testified that the advertised machine appeared to be 15 or 20 years old, but that the machine "was in about as good a condition as you would expect from a machine that age" (Tr. 399). Generally the machine was a black Singer model. Some witnesses testified that the "machine was clean but it was quite old and had a few marks and scratches on it." (Tr. 399.) Another witness stated that "it was pretty well beaten up." (Tr. 410.) Another witness testified that the machine looked all right but "didn't have a cover" and that she wasn't interested in a machine without a cover (Tr. 456-457). But in all cases it appears that the machines would perform the functions detailed in the advertisements.² In all but one case, the witnesses unequivocally and almost immediately upon viewing it rejected the advertised machine. The one witness, Mrs. William J. Murchison who was interested in the advertised machine, however, did not actually make a definite offer to purchase it. Mrs. Murchison testified:

Well, after I saw it, I still was interested. I was gonna buy it, but he kept talking, and he said that he had something new model. I could get one of the new model ones.

I told him I would not be able to; I was not working, and I would have to see what my husband would say about it. (Tr. 448.)

Although the salesman mentioned the fact that he had a new model machine, he did not bring it into the house that day and the witness did not actually see it. The visit that day terminated on this note, as testified to by Mrs. Murchison:

Well, after he brought the old one; first, and he told me that he has some new model one, and how they could zig-zag and sew and all that, so he said that he would bring me one of those out.

I told him not to bring them out, because I wasn't working; and I would have to talk to my husband before I would be interested in getting anything. (Tr. 449.)

² Brockelbank, a former salesman of respondents, testified (Tr. 192):

Q. When you showed the Singer 66 sewing machine to your leads what was their initial reaction to it generally speaking?

A. Well, they wanted to see it sew, and this was done.

Q. What did they think about it generally?

A. The ones—some bought them. The ones that didn't buy them were actually looking for a newer machine.

It appears from her testimony that the salesman returned the next day with the new model machine and Mrs. Murchison purchased it at that time.

In the case of the other five witnesses, after they had unequivocally rejected the first machine, the salesman would then offer to show a new New Home machine to the customer and after they agreed, he would go to his car and bring the machine in (Tr. 330, 399, 410, 456-57, 466-67). These were new machines and the witnesses almost invariably purchased them and testified on cross-examination that they were satisfied with their purchases.

On the basis of this testimony, the hearing examiner finds that no witness made a clear-cut offer to buy the advertised used machine; that no salesman made any actual or implied disparaging remarks with regard to the old used machine; and that no salesman refused to sell any of the witnesses the used machines nor is there any indication that had there been such an offer it would have been refused. As a matter of fact, as hereinabove found, respondent corporation sold 117 used sewing machines in 1967 out of a total of 414 machines or roughly 30 percent of its sales were used machines.³ The hearing examiner further finds that no new machine was demonstrated or brought into the customer's house until the witness had first expressed in clear and unambiguous terms that they did not want to purchase the advertised used machine.

It appears that respondents' salesmen received either no commission (Brockelbank, Tr. 193) or only 10 percent (Seeger, Tr. 60) on the sale of a used sewing machine, but received an average commission of 20 percent on the sale of a new New Home Sewing Machine (Tr. 59, 194). In the absence of some showing that respondents' salesmen refused to sell a used machine whenever possible or that the number of used machines sold was insubstantial, the fact that respondents' salesmen received a smaller commission on used machines is inconclusive. Likewise, the fact that respondents did not regularly advertise new New Home Sewing Machines (Adms. 57, 59, 61-65; CX 35, CX 36; Tr. 35), but did advertise used sewing machines on a daily basis (Tr. 33), is of little significance, in the absence of a similar showing of refusal to sell or that the number of used machines sold was insubstantial.

³ There is some testimony in the record that "most of the used sewing machines were sold in the stores rather than through home demonstrations," although no precise figures are given (Tr. 27).

In a recent opinion involving a comparable factual situation, Chairman Dixon speaking for the Commission stated:

It is the opinion of the Commission that respondent's practice closely resembles the classic "bait and switch" technique, [citations deleted] but that there are certain deficiencies in the evidence which prevent an affirmance of the examiner's finding of a violation. In past cases, we have always found that the advertisement in question did not present a bona fide offer of sale of the product therein described. The evidence in this case fails to establish that respondent was not making a genuine effort to sell the old Singer machines. To the contrary, the evidence is consistent with the theory that the respondent was making a bona fide offer to sell these machines and that only when it became apparent that no sale of one of them could be consummated was an attempt made to demonstrate other models. There was positive testimony that respondent was in the business of selling, *inter alia*, used Singer machines. There is nothing in the record to show that respondent did not sell these machines whenever possible or that the number sold was insubstantial. Further, the evidence is silent on the question of whether or not these old machines had, as represented in the advertisements, been repossessed. Since it affirmatively appears that these machines had been reconditioned and would perform the functions detailed in the classified advertisements, there has been no showing that the advertisements were not literally correct. Although the advertisements failed to disclose a fact which might be considered material—the age of the machines—this omission standing alone is not a sufficient predicate for a finding that the offer to sell the old machines was not genuine. Moreover, as respondent points out, its salesmen did not disparage or downgrade the old machines in an attempt to "switch" the customer's interest to other models and in fact did not even offer to demonstrate other machines until after the witnesses had voluntarily expressed their displeasure with the older machines." (*In the Matter of Clarence Soles, an individual, trading and doing business as Midwest Sewing Center*, Docket No. 8602, December 3, 1964, page 3 [66 F.T.C. 1234, 1249-1250]; *Cf. In the Matter of Leon A. Tashof, trading as New York Jewelry Company*, Docket No. 8714, Dec. 2, 1968, p. 12, footnote 2 [74 F.T.C. 1388, n. 12], citing the *Midwest* case as authority for "the Commission finding illegal bait and switch".)

Accordingly, the hearing examiner finds that the allegations of subparagraph 1 of Paragraph Five of the complaint alleging that respondents were not making a bona fide offer to sell the advertised sewing machines has not been sustained and must be dismissed.

11. We now turn to subparagraphs 2, 3 and 4 of Paragraph Five of the complaint alleging specific misrepresentations affirmatively made in respondents' advertisements set forth in Finding No. 8, above.

(a) Through the use of the figures "66" and words and statements of similar import (Admissions 67, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83; CX 35, CX 36), it is found that respondents have represented that the advertised sewing machines are

models which were manufactured in the year 1966. Although it is clear that the hearing examiner and the Commission in their expertise are capable of examining a written advertisement and determining what a reader might understand from its terms (*Zenith Radio Corporation v. F.T.C.*, 143 F.2d 29, 31 (7 Cir. 1944)), testimony of Mrs. Rogene Jones, a consumer witness, amply demonstrates that the use of the term "Singer '66" conveys the impression that the respondents were advertising a 1966 model Singer sewing machine (Tr. 46). In truth and in fact some of the models advertised and designated as "Singer '66" were not manufactured in the year 1966 and the use of the figures "'66" had nothing to do with the year of manufacture, but said machines were actually manufactured 15 or 20 years ago (see testimony of consumer witnesses cited in footnote 1, page 221, *supra*; see also testimony of respondent Seeger, Tr. 37, 38, and Brockelbank, Tr. 190). As indicated above, respondent Seeger opposed respondent Clark's use of this type of misleading advertising and testified as follows (Tr. 37-38) :

Q. Why were you against running this particular ad?

A. It was very misleading.

Q. In what way?

A. It gives the impression that the sewing machine was a 1966 model.

Q. Were these in fact 1966 models?

A. No.

Q. What models were they?

A. Model No. 66 Singers.

Q. When were they manufactured?

A. Anywhere from 10 to 40 years ago.

(b) Through the use of the words or abbreviations "Left in layaway" (Adms. 67, 68, 69, 71, 74, 76, 77, 80, 81, 83; CX 35, CX 36), "Repo." (Adm. 66; CX 35, CX 36), "Bal." (Adms. 66-83; CX 35, CX 36) and words or statements of similar import, it is found that respondents represented that the sewing machines so advertised were partially paid for by a previous purchaser and were being offered for the unpaid balance of the purchase price thereby affording savings in the amount paid on the merchandise by the previous purchaser. In truth and in fact the merchandise so advertised by respondents had not been "Left in layaway," "Reposessed" and were not being sold for the "unpaid balance" due thereon. The investigating attorney in this matter, William S. Sanger, Jr., was called and testified that in June 1966 he interviewed respondent William R. Seeger, who was manager of Household at that time, after failing to obtain an interview with

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respondent Clark (Tr. 24, 230-231). Prior to that interview, Sanger prepared typewritten copies of respondents' classified advertisements placing each ad on a single sheet of paper together with the notation of the date the advertisement ran (Tr. 270-272). As he questioned Seeger with respect to each and every one of these advertisements, he made handwritten notes of Seeger's responses (Tr. 271, 308-310, 346). At the hearing, complaint counsel originally commenced to question Sanger concerning his investigation by handing him a copy of his "Summary of Report of Interview with Mr. Seeger," a rather lengthy document (Tr. 231). Objection by respondents' counsel was made to this procedure and upon inspection of the Report of Interview by the hearing examiner it was ascertained that the Report of Interview merely contained broad general summaries in Sanger's own words of his interview with no specifics concerning the individual ads. Actually, attachments to his Report identified as Sanger Exhibit 1, pp. 1 through 88, were the sheets containing the advertisements. However, these exhibits were not included with the Report when he took the witness stand. The hearing examiner sustained the objection, but ordered the attachments to the Report of Interview *i.e.*, Sanger Exhibit 1, pp. 1 through 88, to be produced for his inspection (Tr. 288-290).

While the hearing examiner was inspecting Sanger Exhibit 1, pp. 1 through 88, which were typed copies of Sanger's original notes, Sanger produced from his briefcase the original sheets upon which were his handwritten notes (Tr. 286-287). After examining the sheets with the handwritten notes, the hearing examiner permitted Sanger to refer to these documents in order to refresh his memory while testifying.⁴ In addition, the hearing examiner briefly questioned Mr. Sanger to determine the procedure he followed in interviewing Mr. Seeger. Mr. Sanger testified that at the outset of the interview he asked Mr. Seeger to produce all books and records of respondent corporation pertaining to "layaways," "repossession," and any material showing "balance due" on such merchandise (Tr. 349, 350). Sanger further testified that he received and examined the active layaway file and what purported to be the inactive layaway file (Tr. 350). He also testified that respondents did not have a repossession file as such, and that the only way you could tell that a machine had been repossessed was if they had entered it on a sales slip. Furthermore,

⁴In the hearing examiner's judgment these notes were reliable and probative and since they were made contemporaneously with his interview were accurate.

it was Mr. Sanger's testimony that Seeger told him that respondents very rarely repossessed any machines (Tr. 351; see also testimony of Seeger, Tr. 55, 56). It therefore was developed by the hearing examiner that before Mr. Sanger commenced questioning Mr. Seeger with respect to the specific ads he had placed on the sheets he brought with him, all of respondents' "layaway" and "repossession" records, if any, were on the table in front of him and Mr. Seeger (Tr. 351), and as he questioned Mr. Seeger concerning a specific ad all of the records in existence were readily available on the table for Mr. Seeger's use (Tr. 352).⁵ To summarize, Mr. Sanger testified as follows:

By Hearing Examiner Jackson:

Q. Well, you asked him if he had his records?

A. Right, he had his records.

Q. He said all his records were there?

A. That is correct, sir.

Q. So that if there was no record he couldn't point to a record. Then we must assume that he had no such record. Is that correct?

A. That is correct, sir (Tr. 350-354).

Upon further questioning by complaint counsel, Mr. Sanger testified that the advertisement set forth in Adm. 78; CX 35, CX 36, did not in fact have a balance due of \$51.10 but had been received as a trade-in (Tr. 355). Similarly, Mr. Sanger was questioned concerning the terminology used in the other advertisements run by the respondents and after consulting his sheets of paper and handwritten notes made at the time of the interview, testified concerning the use of various terms such as "layaway," "balance due," etc., contained in these ads. It is clear from Mr. Sanger's testimony that in most instances Mr. Seeger could locate no records to support the terminology "left in layaway," "repossessed" or "balance due" set forth in the various advertisements run by respondents (Tr. 362-373; see also testimony of Mr. Seeger, Tr. 55-58 corroborating the foregoing). It must be inferred that the machines so described were not in truth and fact "left in layaway," "repossessed" or had a "balance due."

(c) Through the use of the terms "Credit Department," and "Household Credit Department" (Adms. 66, 69, 78, 79, 80, 81, 82, 83, 103; CX 35, CX 36), it is found that respondents represented

⁵ The hearing examiner's findings are primarily based on the fact at the time of Sanger's interview, Mr. Seeger could produce no records in support of most of the specific ads in question. Since respondents chose to put in no defense, it must be assumed that no such records exist.

in their advertisements that they operated a credit department and they they were in the business of lending money and settling and collecting accounts. In truth and in fact respondents did not maintain a "Credit Department," and were not principally engaged in the lending of money and settling and collecting accounts. Seeger testified as follows:

Q. Did Household actually have a formal credit department?

A. No.

Q. Would you explain your answer, please?

A. Well, I worked out the applications for the finance company, called them in to the finance company, etc. I had to do with credit dealings in the store. We did not have a credit department as such (Tr. 56).

It is clear from the foregoing that through the use of the terms "Credit Department" and "Household Credit Department" in their classified advertisements in the context of their advertisements and in conjunction with the terms "left in layaway," "repossessed," and "balance due," respondents represented that the sewing machines advertised were being offered at a specially reduced price because of the circumstances described.

Accordingly, the hearing examiner finds that the statements and representations contained in Paragraph Five, subparagraphs 2, 3 and 4 of the complaint, were and are false, misleading and deceptive and should be prohibited.

12. In the course and conduct of their business and for the purpose of inducing the purchase of their products, respondents have made various statements and representations in direct mail literature, of which the following is typical and illustrative:

ALL MACHINES ARE GUARANTEED AND SERVICED BY YOUR LOCAL FACTORY AUTHORIZED DISTRIBUTOR: HOUSEHOLD SEWING MACHINE CO., INC. (Ans. par. 4; Adm. 97; CX 35, CX 36, CX 2).

The above-quoted statement is made in CX 2 which is an advertising promotional scheme designed to promote the sale of respondents' sewing machines and which were sent to participants in the drawings conducted by respondents, which will hereinafter be discussed, as second place gift certificates (Adms. 86, 95-96, 97; CX 35, CX 36).

The guarantee which respondents actually provided purchasers of their products is in evidence as CX 3A-B and is the usual manufacturer's guarantee, in this instance, New Home Sewing Machine Co., Los Angeles, California (CX 3A-B; Adms. 98-99;

CX 35, CX 36; Tr. 85, 419). Seeger testified that CX 3A-B accompanied the delivery of each new New Home sewing machine sold by the respondents (Tr. 85).⁶ Mr. Seeger further testified with respect to CX 3A-B as follows:

By Hearing Examiner Jackson:

Q. This is the guarantee?

A. Right, yes.

Q. That goes with the machine?

A. Yes.

Q. There is no other guarantee?

A. No. (Tr. 85-86.)

Although New Home Sewing Machine carries the Good House-keeping Seal of Approval as represented by respondents, the record contains no evidence of any guarantee by respondents. Under these circumstances respondents have falsely represented that they were the guarantor when in truth and in fact they were not. In addition, an examination of CX 3A-B reveals that it contains numerous conditions and limitations. Inasmuch as the manufacturer's guarantee provided by respondents was subject to numerous terms, conditions and limitations which were not disclosed in respondents' advertisements, respondents have misrepresented the nature and extent of the guarantee. It is found therefore that the failure of respondents in their advertisements to correctly disclose the identity of the guarantor and the conditions and limitations upon the guarantee, constitutes false, misleading and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act and must be prohibited.

13. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents held "drawings" in which persons were invited to register their names and addresses for the chance to win a free sewing machine and other prizes (Tr. 78). The participants in said "drawings" later received further promotional material by mail. Typical and illustrative of the statements and representations made in such promotional material are the following:

CONGRATULATIONS!

YOUR NAME WAS SELECTED FROM THE TICKETS TAKEN AT THE RECENT SEWING MACHINE DRAWING TO RECEIVE ONE OF THE SECOND PRIZE AWARDS. YOU HAVE WON A \$50.00 DISCOUNT CERTIFICATE.

⁶ See testimony of Ann D. Latimer, a consumer witness, to the same effect (Tr. 419-420).

THIS CERTIFICATE ENTITLES YOU TO A BRAND NEW 1966 NEW HOME SEWING MACHINE, MODEL # 103. THIS MACHINE IS NATIONALLY ADVERTISED FOR \$89.95, SO WITH YOUR CERTIFICATE ALL YOU PAY IS \$39.95! THIS IS AN ADVERTISING PROMOTION. ALL WE ASK IS TELL YOUR FRIENDS ABOUT YOUR NEW HOME SEWING MACHINE. (CX 2.)

By and through the use of the statements and representations quoted above and by oral statements of respondents of similar import and meaning, respondents have represented, directly or by implication, that they conduct bona fide drawings and that recipients of their merchandise certificates have won a valuable prize entitling them to a discount in the amount stated on the certificate, which constituted a reduction from the price at which such products were usually and customarily sold.

In truth and in fact, respondents did not conduct bona fide drawings. Their purpose in having persons register for drawings was to obtain leads to prospective purchasers of sewing machines. The recipients of such certificates did not receive a valuable prize since the amount of the award certificate was deducted not from the usual and customary price of the product, but from a higher fictitious price, and consequently the prize was illusory.

Respondent Seeger testified that the drawings were conducted by setting up a sewing machine and an entry box in a supermarket. One such drawing was set up at Earl's Supermarket (Adm. 86; CX 35, CX 36; Tr. 86-89), Frederick, Maryland, on or about June 11, 1966. Another such drawing was conducted at By-Pass Market, Warrenton, Virginia, in May 1966 (Adm. 94; CX 35, CX 36). Additional drawings were conducted in Rockville and Waldorf, Maryland, in 1966 (Tr. 75-79, 374, 375). Entry forms were dropped into the box and subsequently a drawing was held and the winner was awarded a sewing machine (Tr. 78). Generally, the manager of the supermarket drew the winning entry out of the box (Tr. 79). Seeger then testified that the second prize winners were selected by him and that "practically all of the entries were sent second prizes" which consisted of CX 2 (Tr. 79-81, 374-375).

Examination of the second prize gift certificate CX 2, the text of which is set forth above, reveals that the respondents represented that the New Home Model #103 was nationally advertised at a selling price of \$89.95 (CX 2; Adm. 90; CX 35, CX 36). Respondents admit that to their knowledge Model #103 was not ad-

vertised at a price of \$89.95 in any publication of interstate or national circulation other than publications prepared by the New Home Sewing Machine Company during 1966 (Adm. 91; CX 35, CX 36). Respondents also admit that they did not regularly sell the New Home Sewing Machine Model #103 for \$89.95 during 1966 (Adm. 92; CX 35, CX 36). Moreover, the evidence establishes that respondents in the regular course of their business generally sold the New Home Model #103 Sewing Machine for \$39.95 throughout 1966 to persons without gift certificates as well as to persons with gift certificates (see CXs 3, 6, 7, 8, 9, 11, 12, 13, 15, 16, 17, 18, 19, 20, 23, 24). Where the machine included a cabinet, respondents' usual and customary price was \$69.50 (see CXs 4, 5).

From the foregoing it is clear that the drawings and gift certificates were no more than a device to obtain leads to prospective purchasers and the "gift certificate" afforded no saving. The hearing examiner finds the aforesaid practice to be false and deceptive and in violation of Section 5 of the Federal Trade Commission Act and must be prohibited.

14. Paragraph Ten of the complaint alleges that:

In the course and conduct of their business respondents have failed to disclose certain material facts to purchasers, including, but not limited to the fact that at respondents' option, conditional sale contracts, promissory notes, or other instruments of indebtedness executed by such purchasers in connection with their credit purchase agreements may be discounted, negotiated, or assigned to a finance company or other third party to whom the purchaser is thereafter indebted and against whom defenses may not be available.

Conditional sales contracts or promissory notes executed between respondent Household Sewing Machine Co., Inc., and its customers were regularly negotiated or assigned to a third party during the period January 3, 1966, through April 30, 1968 (Adm. 102; CX 35, CX 36; Tr. 55). Employees of Household Sewing Machine Co., Inc., did not, as a matter of practice, orally advise customers prior to the execution of conditional sales contracts that such contracts might be negotiated or assigned to a finance company or other third party (Adm. 105; CX 35, CX 36) and that the purchaser would be indebted to a third party (Adm. 106; CX 35, CX 36).

Although respondents and their salesmen did not generally volunteer this information, they would disclose this information if

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asked. Respondents' salesman Brockelbank testified as follows (Tr. 198) :

Q. When you sold a sewing machine, did you volunteer to the purchasers of a sewing machine that they would be making their payments to a finance company or another third party? Did you volunteer this information to them?

A. Not all the time. If they asked I would tell them.

Respondent Seeger similarly testified as follows (Tr. 88-89) :

Q. Did you while you were sales manager instruct the door-to-door salesmen with regard to disclosures to the customer executing conditional sales contracts that those contracts might be negotiated or assigned to a finance company or other third party?

A. If they were asked?

Q. Would you explain that, please?

A. If the customer asked if this contract was to be sold or financed by another company, then the salesmen were instructed to tell them yes, it would be.

The foregoing is corroborated by the testimony of Helen Celia Anger, a consumer witness, who testified as follows (Tr. 468) :

Q. Now, at that time you filled in your contract and signed the contract, did the salesman tell you that you would be making your payments to a finance company?

A. I wasn't aware of this; I wasn't aware of this until later.

I thought I was going to make the payments to the Household Sewing Machine Company, but when he came and said that this is the way it was to be done, I accepted it.

Q. Now, when who came and said this?

A. When the salesman explained this to me.

Q. When did he explain it to you? Was this before or after you signed the contract that he explained it to you?

A. Repeat that again.

Q. Before or after? Did the salesman to the best of your recollection, did the salesman inform you prior to your signing the contract that you would be making the payments to a finance company? Did he to the best of your recollection, did he inform you of that fact prior to your signing the contract?

A. Yes, I believe so.

An examination of respondents' Conditional Sales Agreements (CXs 25, 26, 27, 28 and 29) reveal that on the second page thereof (CXs 25b, 26b, 27b, 28b, 29b) under the heading "CONDITIONS" appearing in large print at the top of the page, the first sentence reads as follows:

Purchaser agrees promptly and faithfully to pay to Seller or to Seller's successors or assigns, the full amount of the TIME BALANCE herein set forth in the installments as herein provided.

On the lower half of the page also appearing in large bold print is the following:

DEALER'S NON-RECOURSE ASSIGNMENT

together with a lengthy paragraph commencing with,

We hereby sell, assign, transfer, convey and set over to _____ the contract on the reverse hereof; etc.

Below that again in large bold print appears the following:

ASSIGNMENT WITH RECOURSE

together with a short paragraph commencing with,

For Value Received, the within Agreement, and all right and title of undersigned in the goods therein described, are hereby sold and assigned to the _____, etc.

Each of the respondents' customers signs an acknowledgment "that he received, at the time of execution of the above contract, an exact copy thereof, completely filled in." (CXs 25a, 26a, 27a, 28a, 29a).

Accordingly, the hearing examiner finds that all of respondents' customers receive adequate notice that the conditional sales contract may be negotiated or assigned to a finance company or other third party, that respondents' salesmen are instructed to explain this aspect of the conditional sales contract to customers if asked and in fact when so asked they do so explain these terms and conditions, and there is no evidence that oral representations to the contrary have ever been made by respondents or their salesmen.

The hearing examiner also finds, based upon the testimony of Mrs. Ella Austin (Tr. 333), and Mr. Leroy Hobson (Tr. 401-402), that generally consumers do not read thoroughly what they sign and as a result many persons are unaware of the assignment provisions contained in conditional sales contracts. However, unfortunate as this may be, in the absence of some affirmative misrepresentation, deliberate omission of a material fact, or failure to put the purchaser on notice through customary provisions contained in the contract, the hearing examiner is not prepared to rule that these respondents have a greater burden of explaining these provisions than is customary on any other contract or negotiable instrument. Moreover, in this record, there is no showing that respondents after assigning their contracts refuse to service or otherwise to satisfy a customer's complaint.

Complaint counsel in their proposals have cited nine prior decisions of the Commission as authority for their position. Of these

nine, seven were either orders obtained by default, stipulation or consent and one decision by a hearing examiner is on appeal. Only one case cited, *Lifetime, Inc.*, 59 F.T.C. 1231 (1961) was a contested matter decided by the Commission and that involved affirmative misrepresentations about financing including the signing of a hidden promissory note. That case is obviously distinguishable on the facts. Complaint counsel, however, have omitted any reference to *School Services, Inc., et al.*, Docket 8729, decided October 10, 1968 [74 F.T.C. 920, at 1016-17]), in which the Commission stated:

We must presume that a prospective student is capable of reading this very short contract. It may well be that a prospective student does not grasp the full import of the provisions contained therein; based on this record, however, we are not prepared to rule that respondents have a greater burden of explaining these provisions than is customary. The significant contract provisions appear to be adequately disclosed and in the absence of oral representations to the contrary do not warrant further consideration. (Opinion, p. 26.)

In light of the foregoing, the hearing examiner finds that the allegations of Paragraph Ten of the complaint have not been sustained and must be dismissed.

15. In the conduct of their business, at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of sewing machines of the same general kind and nature as those sold by respondents (Ans. par. 11; see also Finding 7, *supra*).

16. 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.

CONCLUSIONS

1. The aforesaid acts and practices of respondents, as herein found, were and are, all to the prejudice and injury 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.

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

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

Based upon his findings and conclusions, the hearing examiner deems the following order appropriate.

ORDER

It is ordered, That respondents Household Sewing Machine Co., Inc., a corporation, and its officers, and William R. Clark, individually and as an officer of said corporation, and William R. Seeger, individually and as a former officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of sewing machines, or any other products, 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 any product has been manufactured or designed to be sold in any stated year, unless such product was in fact manufactured or designed to be sold in the year represented.

2. Misrepresenting in any manner the model year, the year of manufacture or design, or the age of any product.

3. Representing, directly or by implication, that any product was left in layaway, was repossessed, or that it is being offered for the balance of the purchase price which was unpaid by a previous purchaser, unless the specific product in each instance was left in layaway, was repossessed or is offered for the balance of the unpaid purchase price, as represented.

4. Misrepresenting in any manner the status, kind, quality or price of the products being offered.

5. Representing, directly or by implication, that purchasers save the paid-in amount on repossessed or unclaimed layaway products unless in each instance purchasers save the amount represented.

6. Misrepresenting in any manner the savings afforded to purchasers of respondents' products.

7. Using the names "Credit Dept." or "Household Credit Dept." or other names of similar import or meaning; or otherwise representing, directly or by implication, that respondents' principal business is that of lending money or settling or collecting accounts; or misrepresenting in any manner the nature or status of respondents' business.

8. Representing, directly or by implication, that products are guaranteed, unless the nature, conditions and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

9. Representing, directly or by implication, that names of winners are selected or obtained through "drawings" or by chance when all of the names selected are not chosen by lot; or misrepresenting in any manner the method by which names are selected in any drawing or contest.

10. Representing, directly or by implication, that certificates, awards or prizes are of a certain value or worth when recipients thereof are not in fact benefited by or do not save the amount of the represented value of such certificates, prizes or awards.

11. Representing, directly or by implication, that any savings, discount or allowance is given purchasers from respondents' selling price for specified products unless said selling price is the amount at which such product has been sold or offered for sale in good faith by respondents for a reasonably substantial period of time in the recent regular course of their business.

12. Using any advertising, sales plan or promotional scheme involving the use of false, misleading or deceptive statements or representations to obtain leads or prospects for the sale of any product.

13. Failing to deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

OPINION OF THE COMMISSION

AUGUST 6, 1969

BY NICHOLSON, *Commissioner*:

I

The Commission issued its complaint in this proceeding on April 30, 1968, charging that respondents had violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by engaging in unfair and deceptive practices and unfair methods of competition in the advertising and sale of sewing machines. Specifically, respondents were charged with—(1) using bait and switch tactics; (2) misrepresenting the year when their sewing machines were manufactured; (3) misrepresenting sewing machines as partially paid for by a previous purchaser and that the current purchase price was merely the unpaid balance; (4) misrepresenting their principal business as lending money or settling or collecting accounts; (5) misrepresenting the terms and conditions of a guarantee; (6) conducting a bogus drawing; and (7) failing to disclose to purchasers, prior to sale, that conditional sales contracts might be negotiated to a finance company or another third party.

Respondent William R. Seeger filed an answer admitting all the material allegations of the complaint but denying he formulated, directed, or controlled the acts and practices of the corporate respondent, including the acts and practices alleged in the complaint. Respondent William R. Clark and the corporate respondent, Household Sewing Machine Co., Inc., filed separate answers admitting certain specific allegations in the complaint but denying generally any violation of law.

Hearings were held on the complaint, respondents electing not to put in a defense. The hearing examiner issued his initial decision on December 20, 1968, upholding all charges of the complaint (including the responsibility of the individual respondents) except for the allegations relating to the use of bait and switch and failure to disclose that conditional sales contracts might be assigned by respondents.

Complaint counsel has appealed from the initial decision contending the examiner erred in his conclusion that the burden of proof had not been sustained on the two charges which were dismissed. Respondents concede these are the only issues presented for review. No appeal has been taken by respondents from any

portion of the findings of facts, conclusions, or order, and respondents urge the Commission to adopt the examiner's initial decision. To the extent that the examiner's findings are not inconsistent with the findings of this opinion, these findings are hereby adopted as those of the Commission.

II

There is no dispute on the facts. Respondent Household Sewing Machine Co., Inc. (hereinafter Household), is a corporation, organized and doing business under the laws of the District of Columbia with its principal place of business presently located at 2420 Wilson Boulevard, Arlington, Virginia.¹ Household is in the business of selling sewing machines to consumers in the metropolitan Washington, D.C., area through advertisements in the classified advertising section of Washington's three major newspapers.²

Respondents' basic advertising format is to represent that used sewing machines are available at a reduced price, and to couple this price reduction with representations that respondents' "Dealer Credit Department" has reclaimed partially paid for used machines which have been left in "lay away."³ The reader of respondents' advertising is invited to call a telephone number for more information. The calls are taken in respondents' store and salesmen make an appointment to give these prospective customers a home demonstration.⁴

The machines, which had been represented in respondents' advertisements to be comparatively new and selling at a reduced price, were described by customers as "very old and rusty looking"⁵ and "pretty well beaten up."⁶ The examiner found that in almost all cases customers "unequivocally and almost immediately" rejected the advertised machines,⁷ and respondents conceded that 80% of all "leads" did not buy the used machines.⁸ These used machines, however, did serve one purpose: after rejecting the advertised machines the salesmen would announce that he just happened to have a new (and a much more expen-

¹ Until December 1, 1967, respondents' business was located at 910 9th Street, N.W., Washington, D.C. (Tr. 143, 144).

² Tr. 32, 52.

³ Admissions 67 and 80; CX 35, CX 36.

⁴ Demonstrations and sales were made in customers' homes located in Washington, D.C., Virginia and Maryland (Adm. 30; CX 35, CX 36).

⁵ Tr. 329.

⁶ Tr. 410. See also Tr. 327-340; 395-405; 444-452; 453-459; 463-472.

⁷ Initial Decision, p. 223.

⁸ Respondents Household and Clark's Proposed Findings of Facts Before the Examiner, Finding No. 4.

sive) machine in his car. When the new machine was shown the contrast between old and new was effective—almost invariably the new machine was sold.⁹

It was alleged in the complaint that respondents' advertisements for used machines are not bona fide offers but merely a "come-on" (or bait) to develop leads which are then "switched" during the home demonstration to expensive merchandise. The examiner dismissed this allegation and in concluding that the facts recited above do not constitute unlawful bait and switch tactics, he relied unduly upon some considerations and omitted others which are relevant. First, the examiner found (1) no clear-cut offer by any purchaser to buy a used machine; (2) no refusal by respondent to sell a used machine; and (3) no evidence that a clear-cut offer to buy would have been refused.¹⁰ The examiner seemed to be saying that since no one "took" the "bait," no one was "switched."

To define bait and switch in terms of offers or refusals of offers misconceives the essential nature of the practice. Our decisions relating to bait and switch are grounded on a factual determination that the advertised product is not an offer which the seller seriously intends the buyer to accept, but a "come-on" which will lead to the sale of a higher priced product.¹¹ Whether the bait is actually taken or not is of no moment. On the contrary and as the record of this case plainly shows, the assumption of the bait and switch perpetrator is that the bait will probably *not* be "taken" (or at least not swallowed) but will serve as an opening gambit to get the salesman over the doorstep. Insofar as the examiner required proof of actual offers to buy the used machines, and subsequent refusals by respondents to sell, he erred—these factors are not material in establishing an illegal "bait and switch" scheme.

Next, the examiner attaches significance to the sale of some used machines by respondents. The Commission has long made it clear that actual sales of advertised merchandise do not preclude the existence of a bait and switch scheme.¹² Our decision in *Soles*,¹³ which the examiner cites, did not turn merely upon sales of the advertised product. In *Soles* the Commission said that

⁹ Initial Decision, p. 223. See also Tr. 410.

¹⁰ Initial Decision, p. 223.

¹¹ *In the Matter of Leon A. Tashof t/a New York Jewelry Company*, F.T.C. Docket No. 8714 (December 14, 1968), 74 F.T.C. 1361; *In the Matter of All-State Industries of North Carolina, Inc.*, F.T.C. Docket No. 8738 (April 1, 1969), 75 F.T.C. 465.

¹² See *Guides Against Bait Advertising*, 2 CCH Trade Reg. Rep. ¶7893 (November 24, 1959). *In the Matter of Consumer Products of America, Inc.*, F.T.C. Docket No. 8679, 72 F.T.C. 533 (September 7, 1967), *aff'd*, 401 F. 2d 930 (3rd Cir. 1968).

¹³ *In the Matter of Clarence Soles*, F.T.C. Docket No. 8602 (December 3, 1964), 66 F.T.C. 1234.

where there was positive evidence that respondent was actually in the business of selling used Singers, and the record did not show sufficient evidence that the advertised offer was insincere, we would not condemn the scheme as bait and switch. We are dealing here with entirely different facts.

The entire record here proves that respondents' method of operation consists of (1) representing used machines as fairly new models; (2) demonstrating used machines of ancient vintage; and (3) then switching consumers to brand new machines. Respondents Clark and Seeger conceded that respondents' principal business was selling new machines.¹⁴ In any event, there is evidence that whatever sales there were of used machines, these were made in respondents' store, not in the home.¹⁵ But our only concern here is with what happened *in the home* after respondents' salesmen developed a lead through the advertised used machines: *there* new machines were being sold.

The relative unimportance of the used machines to respondents' overall business is further proven by respondents' own sales figures. On sales of 297 new machines and 117 used machines (all used machines apparently sold in respondents' store) Household's gross sales were approximately \$60,000.¹⁶ The new machines sold for between \$199 and \$249¹⁷ while the used machines sold for less than \$40.¹⁸ Thus respondents' sales of the used machines accounted for approximately \$4,680 or less than 8 percent of their total sales volume. Yet in order to obtain \$4,680 worth of business respondents were willing to spend between \$5,000 and \$6,000 a year in advertising used machines.¹⁹ Seldom, if ever, did they place an advertisement for the new machines which were the heart of their business.²⁰ It is clear to us that respondents' objective in placing these advertisements was not to sell used machines but to develop "leads" for new machines. Surely this is the most persuasive and the only economically rational justification for their behavior.²¹

¹⁴ Tr. 23, 142-143.

¹⁵ Tr. 27. Total store sales accounted for a negligible portion of respondents' business. Tr. 27, 59, 143-144.

¹⁶ Tr. 166.

¹⁷ Tr. 72.

¹⁸ Tr. 24, 73.

¹⁹ Tr. 33.

²⁰ Tr. 35.

²¹ See *Bond Sewing Stores*, 51 F.T.C. 470 (1954); *Household Sewing Machine Company* [not respondents herein], 52 F.T.C. 250 (1955).

The examiner also found that no salesman made "actual or implied disparaging remarks with regard to the old used machine."²² The Commission, however, has held that oral disparagement of the product is not an essential element of bait and switch.²³ Because of the age and condition of the machines exhibited to prospective purchasers, no oral embellishments were necessary: the used machines gave a graphic and persuasive demonstration of their undesirability.

The examiner also erred in declining to give proper consideration to other evidence further substantiating the existence of a bait and switch scheme, especially the incentives respondents provided to encourage their salesmen to sell new machines. The salesmen received either no commission²⁴ or only 10 percent commission on the advertised used machine. Since the average sale price of the used machine was \$40, a salesman who sold the advertised machine could look forward to no commission, or at most (and only on rare occasions) \$4.²⁵ If he sold the unadvertised new machine (at a price between \$199 to \$249, he was paid a commission of 20 percent²⁶ or between \$40 to \$50 for each sale. On the basis of these incentives, there can be little doubt the salesmen were only interested in selling new machines once the leads were developed.²⁷

Respondents' advertising, when read in its entirety, also reflects upon the sincerity of the used machine offer. We find the used machines being advertised with the aid of a classic collection of deceptions. During 1966 respondents were advertising "66" Singers which were not made in 1966—they were Model 66 made 15 to 20 years earlier. And contrary to respondents' representations, the used machines had not been "repossessed"; they had not been "left in lay away"; they were not being sold for "unpaid balances" and respondents were not in the business of lending money and setting or collecting accounts.²⁸ Respondents have taken no appeal from the examiner's ruling on the illegality of any of these claims.

²² Initial Decision, p. 223.

²³ See *Leon A. Tashof t/a New York Jewelry Company*, note 11 *supra*, slip opinion, p. 11, 74 F.T.C. 1388-89. Accord, *Household Sewing Machine Co.*, note 21 *supra*; *Consumer Products of America, Inc.*, note 12 *supra*.

²⁴ Tr. 186, 193.

²⁵ Tr. 59, 60. There was no commission on sales of used Singers, and almost all of respondents' ads were for the sale of used Singers.

²⁶ Tr. 59.

²⁷ The treatment of sales commissions by respondents is relevant in determining the sincerity of the used machine offer. *Consumer Products of America, Inc.*, note 12 *supra*.

²⁸ Initial Decision, pp. 224-231.

We said in *Soles* the truth of the advertised claim will be considered in determining whether a bona fide offer or a "come-on" was involved.²⁹ In *Soles* there was no proof of misrepresentation of age, or any other material fact. Here the misrepresentations are so extravagant that the entire ad can only be read as a ruse to attract the interest of customers who could be developed as profitable "leads" by respondents' salesmen. Indeed, it is likely that respondents anticipated that the difference between what was advertised and what was shown would result in immediate rejection (as in fact it was in all cases), thereby setting up the consumer for the execution of a switch.

In sum, the record clearly supports a finding that respondents have engaged in a bait and switch scheme.

III

We next consider the question of an appropriate order that will eliminate the use of highly deceptive advertising as "bait" to develop leads, and the subsequent switching of these "leads" to expensive items. In fashioning this order we are cognizant of the fact that moderate or low-income consumers may be especially susceptible to the blandishments of a deceptive come-on that misrepresents the age of used machines and emphasizes their low prices.³⁰ On the basis of these representations the salesman gains a foothold in the home where the demonstration of the advertised used machines almost immediately causes disappointment—a disappointment, however, which can be profitably exploited. For it has been our experience, based on the record herein and countless other proceedings in bait and switch cases³¹ that once the consumer's appetite has been whetted, the display of a new machine has the psychological impact of breaking down resistance to careful deliberation, and a spur of the moment decision may be made to purchase a machine which the consumer may either not afford, or which may be bought cheaper if she shops around. Moreover, the consumer is likely to be taken in by respondents' particular varia-

²⁹ *Clarence Soles*, note 13 *supra*, slip opinion, pp. 3-4, 66 F.T.C. 1234, 1249-1251.

³⁰ Tr. 328-330, 397.

³¹ See, e.g., *Better Living, Inc.*, 54 F.T.C. 648 (1957) *aff'd per curiam*, 259 F. 2d 271 (3rd Cir. 1958); *Pati-Port, Inc.*, 60 F.T.C. 35 (1962), *aff'd*, 313 F. 2d 103 (4th Cir 1963); *Luxury Industries*, 59 F.T.C. 442 (1961); *Atlas Sewing Centers, Inc.*, 57 F.T.C. 974 (1960); *Clean-Rite Vacuum Stores, Inc.*, 51 F.T.C. 887 (1955); *Bond Sewing Stores*, 51 F.T.C. 470 (1954); *Lifetime, Inc.*, 59 F.T.C. 1231 (1961). The Supreme Court stated in *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 614 (1946), that "The Commission is entitled not only appraise the facts of the particular case and the dangers of the marketing methods employed * * * but to draw from its generalized experience."

tion of the bait and switch technique because they use demonstrations in the home where the non-commercial atmosphere may lower resistance to the sales pitch.

Having used an illegal bait and switch scheme, respondents should be effectively prevented by our order from engaging in misrepresentations for the purpose of making initial contact with a consumer, as well as deceptive manipulation of the consumer thereafter: both practices violate Section 5 of the Federal Trade Commission Act.³²

An order limited merely to a prohibition against repetition of deceptive advertisements or a generalized ban against bait and switch tactics is not adequate protection for the consumer. What is required is an order that will dissipate the effects of deceptive invasions of the privacy of the home where high-pressure tactics may result in the ill-advised purchase of expensive merchandise which would not be bought upon careful reflection. The most effective protection is that which the consumer can provide for herself by taking a second look at the product to reconsider whether she can really afford it, or to discuss the purchase with her husband, all free from the influence of deceptive sales techniques.

Accordingly, the order will require respondents to allow a three-day period of grace during which all contracts negotiated in the consumer's home may be rescinded by the purchaser. This will serve as a cooling-off period during which any consumer, who may be subjected to the unfair pressures resulting from the deceptions we have discussed or similar deceits, may reevaluate

³² The Commission's authority to prohibit misrepresentations that do not directly involve the inherent qualities of a product but rather concern ancillary factors, such as the products' origin, the identity of its manufacturer, or the circumstance of its sale is well established. *Federal Trade Commission v. Royal Milling Co.*, 288 U.S. 212 (1933); *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67 (1934); *Kerran v. Federal Trade Commission*, 265 F. 2d 246 (10th Cir. 1959), *cert. denied*, 361 U.S. 818 (1959); *Mohawk Ref. Corp. v. Federal Trade Commission*, 263 F. 2d 818 (3rd Cir. 1959), *cert. denied*, 361 U.S. 814 (1959). Thus in addition to actions against bait advertising (note 31 *supra*), the Commission's rule against sales through deceptive "first contact" has been applied to a scheme to gain entrance to a home by purporting to conduct a survey (*Kalvajtys v. Federal Trade Commission*, 237 F. 2d 654 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957)) and to the use of deceptive mock-ups to break through viewer's skepticism about television advertising. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

The Commission has also forbidden the use of deceptive sales schemes involving purchases induced through consumer mistake about whether goods had been ordered (*Norman Co.*, 40 F.T.C. 296 (1945)), or consumer fear of a lawsuit (*Dorfman v. Federal Trade Commission*, 144 F. 2d 737 (8th Cir. 1944)), or consumer vanity over being declared a contest "winner" (*Clark H. Geppert, et al.*, 57 F.T.C. 832 (1960); *Arthur Murray Inc.*, 57 F.T.C. 306 (1960)), or consumer "pride" over being one of a few "carefully selected" individuals to be contacted by respondent (*Federal Trade Commission v. Standard Educ. Soc'y*, 86 F. 2d 692 (2nd Cir. 1936), *modified*, 302 U.S. 112 (1937)).

and cancel her purchase. Our order will require the notice of the cooling-off period to be clearly printed in a conspicuous place on the contracts and will also require that respondents provide a separate, simple and clearly understandable cancellation form.³³ In the light of respondents' proclivity for the use of deception in both advertising and in the home, this is appropriate and necessary relief. *Federal Trade Commission v. National Lead Co.*, 352 U.S. 173 (1944); *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

It should be added here that in ordering the cessation of these deceptive practices and in fashioning effective relief to prevent their resumption, we do not in any way condemn honest door-to-door selling. On the contrary, businesses relying on this method of sales will themselves be protected from unfair competition and will not be required by competitive pressure to resort to deceptive practices. See *Federal Trade Commission v. R. F. Keppel & Bro.*, 291 U.S. 304 (1934).

IV

We turn now to the allegations of the complaint respecting conditional sales contracts. Many of the sales described in Part II herein, were credit purchases. The complaint charges a violation of Section 5 of the Federal Trade Commission Act by reason of respondents' failure to disclose that instruments of indebtedness executed by consumers in connection with their credit purchase agreements may be transferred to third parties to whom respondents' customer would thereafter be indebted and against whom defenses on the contract may not be available. Complaint counsel appeal from the examiner's dismissal of this charge of the complaint.

The examiner found that the conditional sales contracts and promissory notes executed between Household and its customers were regularly negotiated or assigned to a third party. He found

³³ Several States have passed "Cooling-Off Laws" to provide a period during which the buyer can reconsider the purchase. *E.g.*, Ga. Code Ann. §96-906 (Supp. 1968); Ill. Ann. Stat. ch. 121 1/2 §262B (Smith-Hurd Supp. 1969); Mass. Ann. Laws ch. 255D, §14 (1968); Wash. Rev. Code Ann. §63.14.040(2)(e) (Supp. 1968). Sections 2.502-2.505 of the proposed Uniform Consumer Credit Code give the buyer a three-day period for rescinding a consumer credit purchase made in the home. A Federal "Door-to-Door Sales Act" (S. 1599 and H.R. 10904) had been introduced in the 90th Congress, 1st Session. The jurisdictions in which respondents currently do business have not yet enacted the same or similar "cooling-off" legislation. If they do, the relief required herein may create the impression among purchasers that their rights are in fact less well protected than they would be under state or federal "cooling-off" legislation. Therefore, the order will be drawn in anticipation of the possibility that the jurisdictions in which the respondents do business may adopt such legislation.

that Household's salesmen did not as a matter of practice undertake to inform customers of this circumstance—although the salesmen would disclose this information if asked for it.³⁴ The examiner further found that the contracts and notes contained the following sentence in large print at the top of the page:

Purchaser agrees promptly and faithfully to pay to Seller or to Seller's successors or assignees, the full amount of the TIME BALANCE herein set forth in the installments as herein provided.

Also appearing on the page in large bold print were the words "DEALER'S NON-RECOURSE ASSIGNMENT," together with words reciting the transfer of the contract to a third party. Below those words appeared "ASSIGNMENT WITH RECOURSE" followed by more words describing the assignment.³⁵ These findings are supported by the record evidence.

The examiner concluded that these words constituted sufficient notice and that in the absence of affirmative misrepresentation, deliberate omission of a material fact, or failure to include customary notice, respondents had no greater burden of explanation than is customary in any other contract or negotiable instrument. We disagree.

Subsequent to the issuance of the initial decision on August 14, 1968, the Commission held in *All-State* that assignment of a purchaser's note to a holder in due course may materially alter the nature of the purchaser's rights and liabilities, and that where a seller customarily assigns instruments of indebtedness to third parties without disclosing to the purchaser that this may be done, the purchaser is deceived and such deception is prohibited by Section 5 of the Federal Trade Commission Act.³⁶

As we said in *All-State*, when a seller knows, but the buyer does not know, that the debt contracted by the buyer will be assigned to a third party, the buyer may be entering into a transaction quite different from the one he believes he is entering. If the instrument of indebtedness is transferred to a holder in due course, the buyer may be indebted to the assignee notwithstanding any defense or claim the buyer may have against the seller on the original contract such as defective merchandise or failure of

³⁴ Initial Decision, p. 231.

³⁵ *Id.* at 232-3.

³⁶ *In the Matter of All-State Industries of North Carolina, Inc.*, F.T.C. Docket No. 8738 (April 1, 1969), slip opinion, p. 10, 75 F.T.C. 465, at 490.

the seller to perform servicing functions as may be required in the contract.

That the *contractual* obligation of the seller to the buyer may not be relieved by the transfer of the instrument of indebtedness is of no consequence. Effective assertion of strictly contractual rights is severely curtailed by the financial condition and educational level of a substantial number of unsophisticated consumers who buy on such credit arrangements. Nor does it matter that purchasers may not have been injured by the seller's assignments. The practice must be judged by its capacity to deceive or its unfairness and not on the basis of demonstrated injury to purchasers.³⁷

The buyer assumes, in the absence of adequate notice to the contrary, that if the product does not live up to its express or implied representations he will be able to obtain reasonable satisfaction by withholding payment for the product. The buyer not unreasonably regards his indebtedness as a form of leverage to insure that the seller will stand behind his product. This expectation is realistically an integral part of the consideration flowing to the buyer. The buyer must be made to understand—*before* the sale is consummated—that a demand for payment from a third party assignee may not be defeated even if the product turns out to be defective or worthless, even if the seller fails to perform contractual obligations—and even if the seller goes out of business.

The question of *sufficiency* of disclosure remains. The Commission held in *All-State* that the seller must make affirmative disclosure.³⁸ This means the purchaser must be made to understand how he is being affected. Indeed, the remedy in *All-State* requires that the disclosure be made with such conspicuousness *and clarity* as is likely to be observed and read by the purchaser.

We hold that the disclosure in the instant case does not meet the standard. It requires no elaborate analysis to demonstrate that the number of consumers buying sewing machines on credit who comprehend the implications of "Dealer's Non-Recourse Assignment" and "Assignment with Recourse," may be less than

³⁷ See *Montgomery Ward & Co. v. Federal Trade Commission*, 379 F. 2d 666 (7th Cir. 1967); *Charles of the Ritz Distributors Corp. v. Federal Trade Commission*, 143 F. 2d 676 (2d Cir. 1944); *All-State Industries of North Carolina, Inc.*, note 36 *supra*.

³⁸ *All-State Industries of North Carolina, Inc.*, note 36 *supra*, final order paragraph 13.

overwhelming.³⁹ Adequate disclosure means that the purchaser must be told in simple everyday language precisely how the assignment will affect him and our order will so require.⁴⁰

As we said above, the need for disclosure is not conditioned upon a showing that the seller has in fact used the assignment as a device to avoid his contractual and warranty obligations to the buyer. It is enough that the assignment may confer upon the seller the ability to do this. There is no showing in this record—and it was not charged in this complaint—that respondents sought to avoid their obligations to buyers after assigning the contracts. A showing that a seller systematically uses assignments in such manner might well necessitate relief broader than that ordered here. A regular business practice of non-disclosure coupled with avoidance may very well require that the holder in due course himself be placed on notice that he is taking the instrument subject to all of the purchaser's original defenses and claims.

Since our order also provides for a three-day "cooling-off" period, part III, *supra*, respondents will be prohibited from transferring any instrument of indebtedness until two days after expiration of this three-day period. If respondents are allowed to negotiate the instrument of indebtedness during the consumer's cancellation period, the buyer's right to cancel may be of negligible value. A five-day restraint on negotiation of the instrument gives the respondents time to receive a notice of cancellation mailed within the three-day period. The order will so issue.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of counsel supporting the complaint from the hearing examiner's initial decision. The Commission having determined that said appeal should be granted in full hereby adopts the findings of the

³⁹ *Black's Law Dictionary*, Fourth Edition, defines assignment as "A transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein * * *. It includes transfer of all kinds of property * * *. But is ordinarily limited to transfers of choses in action and to rights in or connected with property, as distinguished from the particular item of property * * *. It is generally appropriate to the transfer of equitable interests." (Citations omitted.)

The phrase "Without Recourse" is defined as "* * * used in making a qualified indorsement of a negotiable instrument, signifies that the indorser means to save himself from liability to subsequent holders, and is a notification that, if payment is refused by the parties primarily liable, recourse cannot be had to him."

⁴⁰ As in the case of the "cooling-off" prohibition, note 33 *supra*, our order will be drawn in anticipation of legislative change. Two States, Vermont and Massachusetts, have already abolished the holder-in-due course doctrine for consumer paper. Mass. Gen. Laws ch. 255, §12c (1966 Supp.); Vt. Stat. Ann. Title 9, §2455 (1967 Supp.).

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hearing examiner to the extent they are consistent with the opinion accompanying this order. Other findings of facts and conclusions of law made by the Commission are contained in that opinion. For the reasons contained in that opinion the order entered by the hearing examiner is modified and, as modified, adopted and issued by the Commission as its final order. Accordingly,

I

It is ordered, That respondents Household Sewing Machine Co., Inc., a corporation, and its officers, and William R. Clark, individually and as an officer of said corporation, and William R. Seeger, individually and as a former officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of sewing machines, or any other products, 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 any products or services are offered for sale when such offer is not a bona fide offer to sell said products or services.
2. Using any advertising, sales plan or promotional scheme involving the use of false, misleading or deceptive statements or representations to obtain leads or prospects for the sale of any product.
3. Making representations purporting to offer merchandise for sale when the purpose of the representation is not to sell the offered merchandise but to obtain leads or prospects for the sale of other merchandise at higher prices.
4. Disparaging, in any manner, or discouraging the purchase of any product advertised.
5. Representing, directly or by implication, that any product has been manufactured or designed to be sold in any stated year, unless such product was in fact manufactured or designed to be sold in the year represented.
6. Misrepresenting in any manner the model year, the year of manufacture or design, or the age of any product.
7. Representing, directly or by implication, that any product was left in lay away, was repossessed, or that it is being offered for the balance of the purchase price which was unpaid by a previous purchaser, unless the specific product in each instance was left in lay away, was repossessed or is of-

ferred for the balance of the unpaid purchase price, as represented.

8. Misrepresenting in any manner the status, kind, quality or price of the product being offered.

9. Representing, directly or by implication, that purchasers save the paid-in amount on repossessed or unclaimed lay away products, unless in each instance purchasers save the amount represented.

10. Misrepresenting in any manner the savings afforded to purchasers of respondents' products.

11. Using the names "Credit Dept." or "Household Credit Dept.," or other names of similar import or meaning; or otherwise representing, directly or by implication, that respondents' principal business is that of lending money or settling or collecting accounts; or misrepresenting in any manner the nature or status of respondents' business.

12. Representing, directly or by implication, that products are guaranteed, unless the nature, conditions and extent of the guarantee and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed.

13. Representing, directly or by implication, that names of winners are selected or obtained through "drawings" or by chance when all of the names selected are not chosen by lot; or misrepresenting in any manner the method by which names are selected in any drawing or contest.

14. Representing, directly or by implication, that certificates, awards or prizes are of a certain value or worth when recipients thereof are not in fact benefited by or do not save the amount of the represented value of such certificates, prizes or awards.

15. Representing, directly or by implication, that any savings, discount or allowance is given purchasers from respondents' selling price for specified products, unless said selling price is the amount at which such products has been sold or offered for sale in good faith by respondents for a reasonably substantial period of time in the recent regular course of their business.

16. Failing to disclose, orally prior to the time of sale and in writing on any trade acceptance, conditional sales con-

tract, promissory note, or other instrument of indebtedness executed by the purchaser, with such conspicuousness and clarity as is likely to be observed and read by such purchaser:

(a) The disclosures, if any, required by federal law or the law of the state in which the instrument is executed;

(b) Where negotiations of the instrument to any third party is prohibited or otherwise limited under the law of the state in which the instrument is executed, that the negotiation or assignment of the trade acceptance, conditional sales contract, promissory note or other instrument of indebtedness to a finance company or other third party will not rescind or diminish any rights or defenses the purchaser may have under the contract;

(c) Where negotiation of the instrument to a third party is not prohibited by the law of the state in which the instrument is executed, that the trade acceptance, conditional sales contract, promissory note or other instrument may, at the option of the seller and without notice to the purchaser, be negotiated or assigned to a finance company or other third party; and

(d) Where the law of the State in which the instrument is executed does not preserve as against any holder of the instrument all the legal and equitable defenses the purchaser may assert against the seller, that in the event the instrument is negotiated or assigned to a finance company or other third party, the purchaser may have to pay such finance company or other third party the full amount due under his contract whether or not he has claims against the seller's merchandise as defective; the seller refuses to service the merchandise; or the seller is no longer in business, or other like claims.

II

It is further ordered, That the respondents herein shall, in connection with the offering for sale, the sale, or distribution of sewing machines or any other products, when the offer for sale or

sale is made in the buyer's home, forthwith cease and desist from:

(1) Contracting for any sale whether in the form of trade acceptance, conditional sales contract, promissory note, or otherwise which shall become binding on the buyer prior to midnight of the third day, excluding Sundays and legal holidays, after date of execution.

(2) Failing to disclose, orally prior to the time of sale and in writing on any trade acceptance, conditional sales contract, promissory note or other instrument executed by the buyer with such conspicuousness and clarity as likely to be observed and read by such buyer, that the buyer may rescind or cancel the sale by directing or mailing a notice of cancellation to respondents' address prior to midnight of the third day, excluding Sundays and legal holidays, after the date of the sale. Upon such cancellation the burden shall be on respondents to collect any goods left in buyer's home and to return any payments received from the buyer. Nothing contained in this right-to-cancel provision shall relieve buyers of the responsibility for taking reasonable care of the goods prior to cancellation and during a reasonable period following cancellation.

(3) Failing to provide a separate and clearly understandable form which the buyer may use as a notice of cancellation.

(4) Negotiating any trade acceptance, conditional sales contract, promissory note, or other instrument of indebtedness to a finance company or other third party prior to midnight of the fifth day, excluding Sundays and legal holidays, after the date of execution by the buyer.

(5) *Provided, however,* That nothing contained in part II of this order shall relieve respondents of any additional obligations respecting contracts made in the home required by federal law or the law of the state in which the contract is made. When such obligations are inconsistent respondents can apply to the Commission for relief from this provision with respect to contracts executed in the state in which such different obligations are required. The Commission, upon proper showing, shall make such modifications as may be warranted in the premises.

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III

It is further ordered, That the respondents herein shall forthwith deliver a copy of this order to cease and desist to all present and future salesmen or other persons engaged in the sale of respondents' products or services, and shall secure from each such salesman or other person a signed statement acknowledging receipt of said order.

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 of their compliance with this order.
