

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

*Docket 8815. Complaint, May 26, 1970—Decision, Jan. 28, 1971*

Order requiring a St. Louis Mo., distributor of radio and television tube testing devices and franchises for the sale of such products to cease misrepresenting that persons investing in respondents' franchises will receive any stated amount of income or any discounts from respondents on repeat business, that they will obtain profitable locations for their machines or can expect the sale of any certain number of tubes per day, that they will be granted exclusive territories in which to locate their machines, and that respondents will accept the return of, or aid in the resale of, the machines; respondents are also required to place in all franchise contracts a notification that such contracts may be cancelled within three days, and that respondents will refund all monies to customers cancelling contracts within this period.

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## 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 Universal Electronics Corporation, a corporation, and Wendell Coker, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Universal Electronics Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 8363 Olive Street Road, in the city of St. Louis, State of Missouri.

Respondent Wendell Coker is an individual and is an officer of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR 2. Respondents are now, and for more than one year last past have been, engaged in advertising, offering for sale, selling, and distributing radio and television tube testing devices and the tubes, supplies and equipment used in connection therewith, and franchises and dealerships for the sale of such products to the public.

PAR. 3. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said products, when sold, to be shipped from their place of business in the State of Missouri to purchasers thereof located in various other States of the United States, and 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. Respondents' usual method of doing business is to insert advertisements in the classified advertisement section of newspapers and periodicals. Persons responding to said classified advertisements are then contacted by respondents or their employees, agents or representatives who display to the prospective purchaser a variety of promotional material and make various oral representations respecting the aforesaid devices and products, and the business opportunities afforded by franchises or dealerships using and selling such devices and products.

PAR. 5. In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their tube testing devices, tubes, and other products respondents have made and are making numerous statements and representations concerning said articles of merchandise and the business opportunities afforded through advertising and promotional material furnished by respondents to their employees, agents or representatives, and through advertisements inserted in newspapers and periodicals, and through letters and other advertising literature circulated generally among the purchasing public, and through oral representations made by respondents, their employees, agents or representatives, with respect to earnings, locations of machines, business methods, training, security of investment, territory and qualifications.

Typical and illustrative of the newspaper advertisements used by respondents, but not all inclusive thereof, is the following:

FOR MIAMI AREA  
NOT AN AMAZING  
OPPORTUNITY NOR A ONCE IN A  
LIFETIME GET RICH  
PROPOSITION

But: A steady—dependable and proven successful type of business, merchandising famous brand Sylvania radio and TV tubes thru our newest self-service equipment. All accounts fully established and set up for our dealers. No selling or soliciting required. Exceptional profit margin on nationally advertised product selling in the hundreds of millions—annually. You could earn up to \$400.00 per month in spare time.

FULL INVESTMENT STARTS AT \$1,895.00 UP TO \$3,695.00 TO ENTER THIS BUSINESS.

No experience necessary; just four to eight hours a week, car, ambition, and the aggressive desire to be in business for yourself.

For more information and personal interview, write today to: UNI-TEST, 8363 Olive Blvd., Olivette, Mo., 63132. Include phone number.

OUR COMPANY INTEGRITY CAN WITHSTAND  
RIGID INVESTIGATION

PAR. 6. Through the use of the statements and representations set forth above, and others similar thereto but not specifically set out herein, and through said statements orally made by respondents, their employees, agents and representatives, respondents have represented and do now represent, directly or by implication to the purchasing public, that:

1. Persons investing from \$1,895 up to \$3,695 can earn up to \$400 per month or more.
2. Respondents' discounts on repeat business assure exceptional and profitable income for their dealers.

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3. Purchasers of respondents' tube testing machines and tubes can expect to receive profitable earnings from the sale of one to five tubes per machine per day.

4. Respondents obtain top sales producing locations for the placement of tube testing machines purchased from them.

5. The purchasers of said machines will be trained by the respondents as to the operation of the machines and the methods to be used in servicing them.

6. No selling or soliciting will be required, and no experience is necessary.

7. If the purchaser becomes dissatisfied, or for any reason wishes to go out of the business, the respondents will repurchase the machines or assist the purchaser in reselling them.

8. The purchaser's investment in the tube testing machines and tubes will be returned in nine months or one year.

9. Persons purchasing respondents' machines will have an exclusive territory in which to operate the machines.

PAR. 7. In truth and in fact:

1. Income in the foregoing amount will not be realized by persons investing the sum indicated. In fact, persons purchasing tube testing machines and tubes from respondents generally receive little or no net profit.

2. Respondents' discounts to their dealers on repeat business do not assure an exceptional or profitable income nor are such dealers assured of an exceptional or profitable income for any other reason.

3. Purchasers of respondents' tube testing machines and tubes have not received profitable earnings from the sale of one to five tubes per machine per day and usually have not realized the number of tube sales per machine per day as specified by respondents, their salesmen or agents.

4. Respondents do not obtain top income producing locations, but place most of the machines in retail establishments such as service stations which have very little consumer traffic. The locations secured by respondents are usually undesirable, unsuitable and unprofitable.

5. Respondents do not train the purchasers of the tube testing machines in the operation of the machines or the methods to be used in servicing the locations where the machines are installed.

6. The purchasers of the machines are required to do selling and soliciting and to have experience since it is frequently necessary to place machines in other locations because of the unprofitable nature of the locations selected by the respondents and like any other business venture experience is required.

7. Respondents do not repurchase the machines at a price comparable to the customer's investment and do not assist the purchaser in the resale of the machines regardless of the purchaser's reason for going out of business.

8. The purchaser's investment in tube testing machines and tubes is not returned within nine months, one year or within any other period of time.

9. Persons purchasing respondents' machines do not have an exclusive territory in which to operate these machines and respondents will sell the machines to any purchaser, in any location, with the necessary capital.

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

PAR. 8. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of franchises and dealerships for tube testing devices, tube testing machines, radio and television tubes and other products of the same general nature and kind as sold by respondent.

PAR. 9. 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' franchises, dealerships and products by reason of such mistaken and erroneous belief.

PAR. 10. The aforesaid acts and practices of respondents as herein alleged were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

*Mr. Harry G. Shupe and Mr. John T. Hankins*, for the Commission.

*Green & Lander*, by *Mr. Martin M. Green*, Clayton, M., for respondents.

INITIAL DECISION BY WALTER R. JOHNSON, HEARING EXAMINER

NOVEMBER 6, 1970

On May 26, 1970, the Commission issued a complaint (mailed on June 3, 1970) charging the respondents with unfair and deceptive

acts and practices in violation of Section 5 of the Federal Trade Commission Act in connection with the selling of radio and television tube testing devices. Respondents' answer, filed on June 29, 1970, admitted the existence of the corporate respondent, but denied the other allegations of the complaint. On July 1, 1970, complaint counsel and counsel for respondents participated with the hearing examiner in a telephonic conference and an order was issued reciting the results thereof. The order contained a directive to each party to prepare a trial brief setting forth the anticipated issues and disclosing the names of witnesses, together with a statement of the nature of the testimony and the documentary exhibits which the party plans to introduce. The order also set forth the dates and places of hearings agreed upon. Complaint counsel's trial brief was submitted on July 10, 1970, and the respondents' trial brief on August 5, 1970.

Hearings were held at Omaha, Nebraska, on August 10, 11 and 12, 1970, at which time complaint counsel called 14 consumer witnesses and the respondent, Wendell Coker. After the case-in-chief was completed, a motion by respondents' counsel to dismiss was denied by the hearing examiner, and the respondents elected not to offer any evidence in their defense.

The hearing examiner has given full consideration to the proposals submitted and all proposed findings not hereinafter specifically found or concluded are herewith rejected. Upon consideration of the entire record herein, the hearing examiner makes the following findings of fact and conclusions:

Respondent Universal Electronics Corporation is a corporation organized (in 1962), existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 8363 Olive Street Road, in the city of St. Louis, State of Missouri (CX 110), and its volume of business over a four-year period is as follows:

|           |                    |
|-----------|--------------------|
| 1966..... | 297, 215 (CX 116A) |
| 1967..... | 375, 219 (CX 117A) |
| 1968..... | 320, 181 (CX 118A) |
| 1969..... | 212, 655 (CX 119A) |

The company operates on a fiscal-year basis, from September 1 to August 31. The figure for 1966 is from September 1, 1965, to August 31, 1966 (Tr. 116; CX 116A).

Respondent Wendell Coker is now and has been, during the entire period of the existence of the corporation, president of, and the sole stockholder of, the corporate respondent. During that period, he has

formulated, directed and controlled the acts and practices of the corporate respondent, including the acts and practices which are the subject of this proceeding, hereinafter set forth. His address is the same as that of the corporate respondent (Tr. 25-28).

Respondents are now, and, since the corporate respondent came into existence, have been, engaged in advertising, offering for sale, selling and distributing radio and television tube testing devices and the tubes, supplies and equipment used in connection therewith, and franchises and dealerships for the sale of such products to the public. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been in substantial competition in commerce, with corporations, firms and individuals in the sale of franchises and dealerships for tube testing devices, tube testing machines, radio and television tubes and other products of the same general nature and kind as sold by respondent (Tr. 313-317).

In the course and conduct of their business as aforesaid, respondents now cause, and, since the corporate respondent came into existence, have caused, their said products, when sold, to be shipped from their place of business in the State of Missouri to purchasers thereof located in various other States of the United States, and 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.

Respondents' usual method of doing business is to insert advertisements in the classified advertisement section of newspapers and periodicals. Persons responding to said classified advertisements are then contacted by respondents or their employees, agents or representatives who display to the prospective purchaser a variety of promotional material and make various oral representations respecting the aforesaid devices and products, and the business opportunities afforded by franchises or dealerships using and selling such devices and products.

In the course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their tube testing devices, tubes, and other products, respondents have made and are making numerous statements and representations concerning said articles of merchandise and the business opportunities afforded through advertising and promotional material furnished by respondents to their employees, agents, newspapers and periodicals, and through letters and other advertising literature circulated generally among the purchasing public, and through oral representations made by respondents, their employees, agents or representatives, with respect to earn-

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ings, locations of machines, business methods, training, security of investment, territory and qualifications.

Typical and illustrative of the newspaper advertisements used by respondents, but not all inclusive thereof, is the following which appeared in *The Miami News*, Miami, Florida, on October 22, 1965 (CX 9):

FOR MIAMI AREA  
NOT AN AMAZING  
OPPORTUNITY  
NOR A ONCE IN A  
LIFETIME GET RICH  
PROPOSITION

But: A steady—dependable and proven successful type of business, merchandising famous brand Sylvania radio and T.V. tubes thru our newest self-service equipment. All accounts fully established and set up for our dealers. No selling or soliciting required. Exceptional profit margin on nationally advertised product selling in the hundreds of millions—annually. You could earn up to \$400.00 per month in spare time.

FULL INVESTMENT STARTS AT \$1,895.00 UP TO \$3,695.00 TO ENTER THIS BUSINESS.

No experience necessary; just four to eight hours a week, car, ambition, and the aggressive desire to be in business for yourself.

For more information and personal interview, write today to: UNI-TEST, 8363 Olive Blvd., Olivette, Mo., 63132. Include phone number.

OUR COMPANY INTEGRITY CAN WITHSTAND  
RIGID INVESTIGATION.

Also, the following appeared in *The Clearwater Sun*, Clearwater, Florida, on January 9, 1967 (CX 10):

DISTRIBUTOR

For This Area

Recession-Depression Proof Business

Part-Time Work—For Extra Income.

Now! A chance to enter the multi million dollar Electronics Replacement field. No experience required! Merely restock locations with world famous SYLVANIA or RCA radio, TV, and color tubes; sold through our new (1957 Model) self—service tube testers. Company guaranteed discounts in this repeat business assures exceptional and profitable income for our dealers. All accounts contracted for and set up, plus training and operating instructions by Company. Will not interfere with present business or occupation, as accounts can be serviced evenings or weekends! Color TV creating enormous demand and surge in future sales throughout the industry.

Earning potential up to \$500.00 per month or more, depending on size of route.

MINIMUM INVESTMENT Required. Also, a good car and 4 to 8 spare hours a week. If you are interested and meet these requirements; have a genuine desire to be self-sufficient and successful in an ever expanding business of your own, then write us today! UNIVERSAL ELECTRONICS CORP.; 8363 Olive Street Road; St. Louis 32, Mo. Include phone number in resume.

OUR COMPANY INTEGRITY CAN WITHSTAND  
THOROUGH INVESTIGATION.

For other advertisements of like import, see also CX 11-14, CX 88, and CX 138.

Paragraph Six of the complaint reads:

Through the use of the statements and representations set forth above, and others similar thereto but not specifically set out herein, and through said statements orally made by respondents, their employees, agents and representatives, respondents have represented, and do now represent, directly or by implication to the purchasing public, that:

1. Persons investing from \$1,895 up to \$3,695 can earn up to \$400 per month or more.
2. Respondents' discounts on repeat business assure exceptional and profitable income for their dealers.
3. Purchasers of respondents' tube testing machines and tubes can expect to receive profitable earnings from the sale of one to five tubes per machine per day.
4. Respondents obtain top sales producing locations for the placement of tube testing machines purchased from them.
5. The purchasers of said machines will be trained by the respondents as to the operation of the machines and the methods to be used in servicing them.
6. No selling or soliciting will be required, and no experience is necessary.
7. If the purchaser becomes dissatisfied, or for any reason wishes to go out of the business, the respondents will repurchase the machines or assist the purchaser in reselling them.
8. The purchaser's investment in the tube testing machines and tubes will be returned in nine months or one year.
9. Persons purchasing respondents' machines will have an exclusive territory in which to operate the machines.

Paragraph Seven of the complaint reads:

In truth and in fact:

1. Income in the foregoing amount will not be realized by persons investing the sum indicated. In fact, persons purchasing tube testing machines and tubes from respondents generally receive little or no net profit.
2. Respondents' discounts to their dealers on repeat business do not assure an exceptional or profitable income nor are such dealers assured of an exceptional or profitable income for any other reason.
3. Purchasers of respondents' tube testing machines and tubes have not received profitable earnings from the sale of one to five tubes per machine per day and usually have not realized the number of tube sales per machine per day as specified by respondents, their salesmen or agents.
4. Respondents do not obtain top income producing locations, but place most of the machines in retail establishments such as service stations which have very little consumer traffic. The locations secured by respondents are usually undesirable, unsuitable and unprofitable.
5. Respondents do not train the purchasers of the tube testing machines in the operation of the machines or the methods to be used in servicing the locations where the machines are installed.

6. The purchasers of the machines are required to do selling and soliciting and to have experience since it is frequently necessary to place machines in other locations because of the unprofitable nature of the locations selected by the respondents and like any other business venture experience is required.

7. Respondents do not repurchase the machines at a price comparable to the customer's investment and do not assist the purchaser in the resale of the machines regardless of the purchaser's reason for going out of business.

8. The purchaser's investment in tube testing machines and tubes is not returned within nine months, one year or within any other period of time.

9. Persons purchasing respondents' machines do not have an exclusive territory in which to operate these machines and respondents will sell the machines to any purchaser, in any location, with the necessary capital.

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

Based upon the evidence hereinafter set forth, it is the opinion and finding of the hearing examiner that all of the charges under Paragraphs Six and Seven of the complaint have been sustained; that 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' franchises, dealerships and products by reason of such mistaken and erroneous belief; and that the aforesaid acts and practices of respondents as herein alleged were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

Respondent WENDELL COKER was called as a witness by complaint counsel and testified at length as follows (Tr. 20-88; 115-146; 313-354): The advertisements run by Universal Electronics Corporation hereinbefore mentioned were composed by him; referring to the figure of \$400 earnings used in the Miami, Florida, ad, he said he arrived at this figure from reports he received from places that had tube testers and a report published by Vend Magazine of a survey they conducted which showed the average location sold 30 to 40 tubes a week; regarding the statement of "Earning potential up to \$500 per month" appearing in the *Clearwater Sun*, Clearwater, Florida (CX 10), he said, "We had two seventy-five, three hundred, four hundred, five hundred. It fluctuated over the years" (Tr. 72); that the \$400 figure is not based on actual experience with his dealers, but on "what we feel they could earn" (Tr. 71); that he was aware

that customers responded to the ads containing earning statements (Tr. 343); and he stated (Tr. 343):

My conclusion has been and is, the average person that sees the ad in the paper, cuts the ad in half. In other words, they see the ad in the paper, I have had them tell me, they only expected to make half of what you generally tell them. They didn't expect to make that much in the first place. And I really felt and believed anybody that worked at this business, kept a machine at the location, could make \$200 to \$250 a month. But, to compensate for the average person's cutting promotional figures in half and to keep up with the competition advertising at the same time six and seven hundred dollars a month, I said four and five hundred dollars a month. I always try to keep a little lower than my competition.

Mr. Coker testified that, to earn \$400 per month, a dealer would have to have five machines costing \$3,695, and he would have to sell between 300 and 350 tubes, or in excess of 60 tubes per machine per month, and he did not know how many of his dealers sold on an average of two tubes a machine each day (Tr. 68-69). They advertised in every state except Alaska; the average cost for each ad was around \$30, and in the fiscal year ending in August 1966 they ran about 500 ads; during the time they have been in business, they have made sales in 44 or 45 states (Tr. 128-130). Upon the receipt of an inquiry by a person answering one of its ads, Universal, on one of its letterheads over the signature of Mr. Coker, would answer as follows CX 1):

We would like to take this opportunity to thank you for the interest you have shown in our advertisement in your local paper.

This is a business that can be handled on a part-time basis to start and expanded to a full-time operation *with unlimited earning potential*. We furnish equipment and locations, plus fully set up the business for our dealers; so, there is no selling or soliciting required of the party we select.

If you have never had an occasion to use a self-service tube tester, may we suggest that you check with a local store which has a tube tester, so you will know radio and television tubes are being sold through these self-service units.

We are placing you on our representative's schedule for an early interview. *Since this is a proven business*, we have many inquiries from people who are sincerely interested in becoming dealers for us and act promptly on appointing the party we feel best qualified. Should you be further interested in our type of business, please feel free to check with the references on the enclosed sheet; so, that in the event we meet each others approval, at the time of our representative's interview, we will both be in a position to consummate a dealership.

*Our representative* will contact you in the immediate future in regard to setting up an interview with you on this opportunity. (Emphasis added.)

Mr. Coker did most of the selling for the company in 1962 and 1963; since that time, he has sold a few machines each year, but the

bulk of sales were made by others (Tr. 144); he interviews prospective salesmen and hires them for the company; "They just come around to see me. \* \* \* they will take a trip and act as an agent for me on the leads that I have" (Tr. 134); "\* \* \* these \* \* \* are what we call professional salesmen. Most of them sold tube testers before I got in the business" (Tr. 135); a salesman was furnished a price list and a certain amount of sales information; part of the literature that the salesmen carried with them when they interviewed customers was the Vend Magazine; the statements concerning earnings that were made by the salesmen were figures taken from the magazine article (Tr. 336-338); when asked if he furnished some information to his salesmen concerning the number of tubes that a machine would sell, Mr. Coker replied: "I would show him the article in Vend Magazine and let the man make his own conclusions" (Tr. 339); when asked, "Now, how would they sell a machine to a customer without explaining to him how much the machine would produce as far as sales and earnings are concerned?" he said: "It seems to me it would be hard to sell if he didn't" (Tr. 341); a salesman in making a sale would obtain the signature of the purchaser, called a "Dealer," on a PURCHASE ORDER CONTRACT (CX 4), which provided in part that Universal agreed to furnish the number of "Tube Testing Machines" ordered; "Secure initial locations" in a specified area; "Give Dealer signed location contracts for Tube Tester and Tube Inventory for each location;" and "Instruct Dealer and Locations on the functions and operation of equipment;" payments thereon were to be made to Universal, and the "Dealer is to retain full title to all equipment & merchandise." The contract mailed to the company by the salesman (Tr. 34) was subject to company approval, and would be approved by Mr. Coker (Tr. 49); only in one instance did he reject a contract and that was in 1964 (Tr. 46); a salesman was paid on a commission basis, receiving \$900 on a sale of \$3,590 (Tr. 84). By letter (CX 24), Universal would notify the purchaser of his acceptance as a dealer, of the approval of the contract, request the money balance due thereon, and state the following: "We will process your order accordingly and keep you posted of its progress, shipping data, and tenure of our location man." The machines would not be shipped before they were fully paid for (Tr. 49); shortly after payment, the machines and tubes would be shipped to the dealer; a location man employed by Universal, who is paid \$35 or \$40 for each tester placed, would contact the dealer, canvass various stores and filling stations in the territory assigned by the contract, and secure the number of places he would need for the

machines; the locator sets up the machines with tubes, on a consignment basis, at the places agreed to by the owners, who are paid a commission of 25 percent or 30 percent of the retail price for each tube sold; if a dealer is not satisfied with the original location, it is up to him to change the location (Tr. 55-58); the reason for relocating a machine was that such location was not proving profitable or for other various reasons (Tr. 61-62); three-fourths of the total number of dealers for Universal have had to relocate at least one of their machines (Tr. 64). Universal does not repurchase the machines from all dealers who become dissatisfied with the business; when asked, "How do you select those you repurchase and those that you don't?" he answered: "There are two determining factors actually. One is how great the need is to get out of the business, or liquidate it, and also the financial position of the company, if we can afford to buy them back" (Tr. 125); he stated: "I generally bought back a machine and tubes on the basis of approximately \$300 per machine and tubes" (Tr. 122), which figure represented Universal's cost for a machine and a kit of 200 tubes (Tr. 80-81). The amount of repurchases for the fiscal year ending 1966 totaled \$18,437; 1967—\$23,344; 1968—\$22,880; and 1969—\$6,216 (Tr. 77, 117 thru 122; CX 112E, 117A, 118A and 119A). The tube testers consist of a head panel, purchased by Universal from a New York manufacturer at a cost of \$70 or \$75, and a cabinet designed by Mr. Coker and made by a Missouri firm at a cost of \$37. The panels are shipped to the cabinet maker where they are assembled, boxed ready for shipment, and, on orders from Universal, are sent to purchasers (Tr. 43, 44, 80). Sales have been going down in recent years (Tr. 127). He testified (Tr. 128):

The main factor of the tubes is being designed out of television sets. In another year or two, there won't be any television sets hardly on the market coming out with tubes in them.

DONALD H. RING, of McFarland, Wisconsin, an automobile body man for 23 years, testified (Tr. 89-115) that, while a resident of Madison, Wisconsin, in 1966, after answering an ad in the local paper, he received a letter from Universal (CX 113) advising that its representative would call upon him. Universal's representative, Mr. George Turner, called upon him, and he gathered that he could make about \$1 profit per tube and each machine that he purchased would sell no less than a tube a day or approximately \$100 a month for three machines. He was told that the locations were already established by the company and, that, if he subsequently changed his mind, "they would buy the whole thing back, the tubes and equip-

ment, at a 25 per cent discount; in other words, they would give me three-quarters of the money back" (Tr. 102). He stated that he understood that it was to be a franchise deal of one dealer to a town or area (Tr. 113). On March 31, 1966, he signed a purchase order contract (CX 114), because "it sounded like I could make some money" (Tr. 99), for three tube testers for the sum of \$1,895 to be located in the city of Madison and within a 15-mile radius. The location man and the machines arrived in Madison the same day, which was in the last part of May or the first part of June 1966. Locations had not been previously procured and the location man "used my phone book and found three locations. It took him two days to do it" (Tr. 100). Locations were secured at a hardware store, grocery store, and variety store. The locations were not profitable. The machine at the grocery store remained there for six months and, although it was the best of the three locations, it was removed for the reason that the grocer said he did not have room for it and that it did not make him enough profit. After about six months he did not call on the locations or service the machines for the reason that he had lost interest because he could not make enough money to cover the route. He did not keep any books but he was sure that he did not gross over \$200. Mr. Ring did not attempt to find other locations for the reason that he had become discouraged and lost interest after the first six months. He wrote a letter to Universal about buying back the tubes and equipment and received a letter in return from Universal, signed by Mr. Coker (which has been lost), in which they told him they were very disappointed that he didn't do better, and that they couldn't buy back the machines at that time.

YANÓ S. FALCONE, of Omaha, Nebraska, 42 years of age, with a tenth grade education, and a manufacturing representative for 22 years, testified (Tr. 148-176) that he answered an ad that appeared in an Omaha newspaper and on March 13, 1967, Mr. Pat O'Brien, Universal's representative, came to see him. Mr. O'Brien said he had tube testers in various locations in California from which he derived a net income of around a hundred thousand dollars a year. This statement made Mr. Falcone "a little more enthusiastic about wanting to get into the business" (Tr. 149). Mr. O'Brien had him write down figures (CX 20) which showed that he could realize a minimum profit of \$654.00 a month from five machines. The profit on the sale of one tube was \$1.09, and the sale of 4 tubes per location each day would give \$4.36, or \$21.80 a day for five locations, times 30 days would give \$654.00 a month; assuming his sales were only half of that, his minimum still would be \$327.00 a month and, based on

the statistics, it was his (Mr. O'Brien's) opinion that this would not be hard to make (Tr. 153). After hearing the foregoing, Mr. Falcone said he wanted a few days to think it over and to contact his attorney to see what he thought. Mr. O'Brien said he couldn't have that amount of time; "If I didn't sign that evening, someone else would get the franchise. They had only one franchise available for the Omaha area" (Tr. 154). [Mr. James R. Edmonds, whose testimony follows, was assigned the same area by Mr. O'Brien the day before.] Mr. Falcone was shown a document (CX 22), which was subsequently delivered to him, reading:

Bona Fide

RESALE OPTION AGREEMENT

It is agreed that after ONE YEAR from the date of purchase should the operator for any reason decide to sell his established Tube Testing route at a fair and equitable price over the original cost of equipment and locations, it is agreed the operator has the first 90 day option and shall retain all profits. After the expiration of 90 days the operator agrees to give UNIVERSAL ELECTRONICS or their authorized Representative the EXCLUSIVE SALES OPTION to sell said business for him and he also agrees to allow them 25% OF THE NET PROFIT over the original cost for services rendered.

He stated (Tr. 172): "My understanding of this was that after one year, if I wasn't satisfied with the profits that I was deriving from the equipment that I could contact Universal Electronics and they would buy these back from me." Mr. Falcone signed a contract to purchase five testers with tubes to be placed on locations for the sum of \$3,690 (CX 21). To finance the transaction, he said, "Well, I cashed in some of my savings bonds and took a loan out on my insurance policies and borrowed whatever cash I had in the bank" (Tr. 156). Asked why he signed the contract, he replied, "Supplemental income, I have a large family" (Tr. 156). On June 6 and 7, 1967, Universal's location man placed the units at five gasoline service stations (CX 30, 31, 32, 33 and 34). Four of the machines remained at the locations for about one year, and the fifth for nine months. Mr. Falcone received a total of \$50 gross income from all of the machines during that time. He did not attempt to relocate the machines because "I thought it was a fruitless effort" (Tr. 158). On cross-examination, he testified that, after he became dissatisfied and felt the machines would not produce a sufficient income, he called Mr. Coker twice but could not reach him; he left his phone number with Mr. Coker's secretary, but he did not call back. With reference to the provision in the contract (CX 21), "No guarantee as to any specific amount of money to be derived from this business," he believes he remembers reading that before he signed the contract (Tr.

161). As to reading the provision therein, "No exclusive territories promised," Mr. Falcone said, "Evidently not, sir. Here again, I might add, it may not be called for, but I thought Mr. O'Brien was verbally quite persuasive. I basically relied upon his honesty" (Tr. 166). He did not remember seeing the words "and no verbal agreements are valid" in the contract. He testified (Tr. 173-174):

Q. What he [Mr. O'Brien] did was to spin an almost fantastic tale to you about the profits you could ultimately derive based on statistics and based on the figures that he had you write down on that piece of paper, isn't that a fair statement?

\* \* \* \* \*

A. Fantastic or not, sir, I hung my hopes on it.

JAMES R. EDMONDS, of Omaha, Nebraska, a high school graduate, 60 years of age, and a building contractor for 25 or 30 years dealing mostly in small homes and remodeling, testified (Tr. 176-204) that, after he answered an ad in an Omaha paper, he was contacted by Universal's representative, Mr. Patrick O'Brien, and on March 12, 1967 he signed a contract (CX 15) for the purchase of five tube testers and tubes to be located in "Omaha and Gen Area—25 mile radius" for \$3,690. He was told by Mr. O'Brien that he was to be the only person with Universal machines in that area. As to potential earnings, Mr. O'Brien gave him the same set of figures recited in the testimony of Mr. Falcone. (See CX 18, 19 and 20.) Mr. O'Brien said Mr. Edmonds should have his total investment back in nine months and, if he decided to quit the business, he had to give Universal the first chance to buy them back at 25 percent less than the amount paid. Universal's location man arrived the first part of May 1967. Two of the machines were placed in hardware stores, two in drug stores owned by a Mr. Kohl, and the fifth was to be set up in a third drug store also owned by Mr. Kohl. Two days after placement, Mr. Edmonds complied with the request of the owner to remove the testers from the two drug stores and not to place the one in the third drug store for the reason that the machines would not take care of the tubes that the people would bring in to test. By letter, Universal was told of the difficulty, and, in June of 1967, another one of its representatives called on Mr. Edmonds who asked if there was any way of getting his money back. He was informed, "well, no, outside of waiting, and if I find a buyer who would buy my machines, otherwise he said, just write it off" (Tr. 194). An offer to assist Mr. Edmonds to relocate the testers was refused by him; "Well, it just seemed like it was a lost cause" (Tr. 200) because of the number of machines that were already on location in the city and the machines

would not test some colored TV tubes. Two of the machines remained in location at the hardware stores from May 1967 to December 1968, and the gross therefrom totaled \$42. In October 1969, Mr. Edmonds filed suit against Universal, which resulted in a settlement whereby the company paid \$1,000 on the return of the machines to it.

ROBERT O. GREBER, of El Paso, Texas, 34 years of age, with two years of college, and a radio repairman, testified (Tr. 205-230) that he answered an ad of Universal, and on May 15, 1967, its representative, Mr. George Turner, contacted him. Mr. Turner explained that a \$654 net profit was the average earnings from five machines per month, and on a sheet of paper (CX 123) he wrote down a detailed explanation of how he arrived at this projected profit picture. Mr. Greber said, "after one year, if I wasn't pleased, that the company would take and try to sell the machines for me, or buy them back with 25 percent of the profit that would go to Universal" (Tr. 212). A contract was signed on May 15, 1967, for the purchase of three units and tubes with locations in the "Eastern 1/2 of El Paso and Gen Area not to exceed 20 mile radius" (CX 122) for the sum of \$2,290. Universal's location man appeared in August 1967 and placed the machines in two grocery stores and a hardware store. The hardware store sold one tube in 90 days so this unit was pulled out, and one of the grocery stores went out of business. Mr. Greber made arrangements with a chain of three stores to place units in each of the stores, so he purchased a fourth machine from Universal. The machines remained at the chain stores for six or eight months and, at the request of the owner, for the reason they were not doing enough business, the three machines were removed and relocated in grocery stores. All the units remain at the locations indicated, and have netted a profit of about \$100 a year. Mr. Greber contacted Mr. Coker by telephone, asking that Universal repurchase the machines, and in answer thereto, by letter dated February 17, 1969, Universal stated, "I hope you can sell the route and thus keep the business intact and working. \* \* \* We are enclosing an ad similar to the one you answered in the paper" (CX 124). He called on the two local newspapers, but they would not accept the ad (CX 125), because it contained a profit potential statement. The ad was placed and ran in a shoppers' paper devoted strictly to advertising, but there were no responses. By letter dated April 17, 1969 (CX 126), Universal submitted another ad (CX 127), which also was refused by the local paper, but was run in the shoppers' paper in the name of, and paid for by, Universal. By letter dated July 21, 1969 (CX 128), Universal informed Mr. Greber they were "sorry to say we did not receive one

reply to the ads. On the testers, I don't know what to tell you to do about them, unless you would be willing to sell them at a considerable reduction. We have a routeman in St. Louis that would pay \$75.00 each for the units, if they were in St. Louis and in reasonably clean condition." Mr. Greber "felt that that was not quite enough return on the investment" (Tr. 215). He figured that he had a loss of \$2,600 or \$2,700 on the transaction. Mr. Greber said that the "Resale Option Agreement" (CX 22) he received from Universal after signing the purchase order contract was different from what Mr. Turner represented. He testified that "according to Mr. Turner, if they couldn't sell it, they would repurchase it" (Tr. 230).

CLIFFORD NOLLEY, of Miles City, Montana, 52 years of age, a high school graduate, and a welder for 20 years, owning his own business for 15 years which he sold in 1966 on account of a heart condition, testified (Tr. 231-254) that he answered an ad appearing in the local paper, and on July 18, 1967, he was contacted by Universal's representative, Mr. Misemer, who told him that in the proper operation of five machines he should realize \$500 a month; that the company would furnish the locations, a survey having been made and the locations established, and would instruct him in the operation of the machines; that he would have the exclusive franchise in Miles City; and that it was possible to get his investment back in a year. He signed a contract to purchase five tube testers with tubes to be placed in Miles City for \$3,690 (CX 129 and 130). Universal's location man arrived in November of 1967, who informed Mr. Nolley that no locations had been established and that he would have to go out and secure them. He placed four of the units, three in grocery stores and one in a service station, and the fifth was located by Mr. Nolley in a radio repair place at the airport. He received no training as to the operation of the machines for the reason that the location man knew very little about it, himself. The one at the airport was removed when the place was closed for business, and one was removed from a grocery store at the request of the owner. The witness stated, "I couldn't locate them in the other stores because there were other company machines in these stores" (Tr. 245). Three of the machines remain at the original locations. The gross amount taken from the machines is approximately \$500. About two weeks after the machines were installed, Mr. Nolley observed a Universal ad, the same as he had answered, in the Miles City newspaper. On April 11, 1968, Mr. Nolley wrote a letter to Universal (RX 1) in which he stated:

After six months, it is quite evident now that these machines are not going over in this community. I feel it would be advant[a]g[e]ous to us both if you

could take these machines back and place them in some territory where more tubes can be sold.

I am willing to take a loss on these in order to get part of my investment back. As it is, I am not getting enough from them to pay for the car expense of tending them.

In its reply dated April 17, 1968, Universal made no commitment to repurchase the machines, but urged that Mr. Nolley "try and overcome, persist and prevail over your local problems, difficulties and competition" (RX 2).

C. P. DAVIDSON, of Angelton, Texas, testified (Tr. 255-266) with reference to a purchase order contract that he signed with Universal on October 12, 1966 (CX 31), for the purchase of five tube testers and tubes to be located in the Houston, Texas, area. In the opinion of the hearing examiner, there is nothing in his testimony that has any bearing on the issues herein so it will not be discussed.

HARRY EUGENE WOLKING, of Montrose, Colorado, 47 years of age, a high school graduate, who retired on July 1, 1969, as a Commander of the United States Navy and is now a salesman of greeting cards, testified (Tr. 267-293) that while he was a resident of Arvada, Colorado, he saw an ad of Universal in a Denver, Colorado, newspaper, which he answered. Mr. George Turner, a sales representative of Universal, called on him on June 9, 1966, and gave him detailed figures which showed a net profit of \$1.02 for each tube sold and the net profit for one machine would yield \$122.00 per month (CX 67). Mr. Wolking said (Tr. 278): "In our discussion concerning a franchise territory, it was indicated that a territory plus five miles surrounding was what was normally assigned and normally a population of 50,000 would be given to any one dealer." Mr. Turner told him (Tr. 279): "The ideal locations being super markets, drug stores, hardware stores, and variety stores with the initial locations selected open seven days per week, after 6 p.m. open, also. And that 30 to 40 tubes were average per unit per week." On June 9, 1966, Mr. Wolking signed a contract to purchase five tube testers with tubes to be located in "Arvada, Boulder, Western 1/2 of Denver and Gen. area not to exceed 30 miles West of Denver" for the sum of \$3,590 (CX 65). A personal loan was made to finance the transaction. On August 5, 1966, Universal's location man arrived, and on that day and the following day the units were placed on location. One was placed in a modern hardware store at Boulder, Colorado, where it remained until September 26, 1966, when it was removed at the store owner's request. Two tubes were sold in that period of time. Mr. Wolking tried to relocate the tester, but he could not find a de-

sirable place. A unit placed in a small neighborhood grocery store in Boulder was removed three months later. No tubes were sold and it was not relocated. A unit was placed in a hardware store in Lakewood, Colorado, where it remained for a little over sixteen months, and 80 tubes were sold. About six months later, the tester was placed in a service station where it remained for eighteen months, 15 tubes were sold, and it was not relocated. A unit placed in a small modern pharmacy in Arvada, Colorado, remained until Mr. Wolking retired and moved to Montrose, Colorado, and 29 tubes were sold during the period of two years and eleven months. A unit was placed in an Arvada hardware store where it remained until Mr. Wolking left Arvada; about 45 tubes were sold. Two testers have been on location in Montrose since August, 1969; one unit sold 2 or 3 tubes and the other may have sold 20 tubes. Mr. Wolking stated (Tr. 286): "I won't try to locate any more. There are already competitive type tube testers there." There was received in evidence Universal's "Resale Option Agreement" issued to Mr. Wolking (CX 72). He said the document meant nothing to him; "It is an agreement, resale option agreement, which I tried to execute, but it had no bearing" (Tr. 279). On October 23, 1967, Mr. Wolking wrote to Universal (CX 82) as follows:

Assistance is requested in the liquidation of our tube testing business. Inasmuch as the business has not shown a profit it would be difficult for us to sell on the open market, and therefore we approach you for assistance. Fees and details are requested prior to execution of any liquidation proceedings.

On October 26, 1967, Universal answered in part (CX 83):

We do not have any ready-made prospects on hand, and therefore could not definitely state whether or not we can sell the route for you or not. We wish you would re-consider this matter and try to bolster your sales.

\* \* \* \* \*

Hoping for your reconsideration in this matter, and also would like to point out the fact that the route could be hard to sell at this time and even impossible.

On November 14, 1967, Mr. Wolking wrote to Universal (CX 84), wherein he stated:

We too are interested in bolstering our sales, however, the locations in which our units were originally placed leave a lot to be desired. Efforts to improve the locations have not been successful because of competitor units already on location.

He added, "we still desire to liquidate." On March 16, 1968, Mr. Wolking wrote to Universal (CX 86), stating: "I still desire to liquidate my route and any assistance you can provide will be appreciated."

ELDAN LEONARD, of Baraboo, Wisconsin, employed by an Ordnance Works as a shift supervisor, testified (Tr. 293-312) that he answered a Universal ad in a Milwaukee, Wisconsin, newspaper and was contacted by one of its representatives, Mr. George Turner, on March 29, 1966, who wrote on a Universal letterhead (CX 51) detailed figures of profits to be made in the tube testing business. Mr. Turner wrote that a tube selling for \$3.20, after deducting the cost thereof of \$1.22 and the commission of 30 percent to be paid to the owner of the location in the amount of 96 cents, would yield a net profit of \$1.02. Each location would sell 5 tubes each day, netting \$4.08 per day, and \$122.40 for a month (30 days). Six machines would produce a net of \$734.40. Relying on the Representations made to him, Mr. Leonard, on March 29, 1966, signed a contract (CX 53) to purchase six tube testers and tubes to be located in Madison, Wisconsin, and the general area. Universal's location man, when he arrived on July 16, 1966, said it would be much better if the machines were located in Mr. Leonard's immediate area rather than Madison. Two machines were placed in stores in Baraboo, and the other four in stores in Reedsburg, Portage, Sauk City, and Prairie du Sac, Wisconsin (CX 57, 58, 59, 60, 61 and 62). Four of the units still remain on location. One unit has been off of location for two years, and one for one year. After paying the owners of the locations their commissions, Mr. Leonard grossed \$177.25 in 1966, \$443.55 in 1967, \$95.13 in 1968, \$301.83 in 1969, and \$187.42 for the first six months of 1970. Without taking into consideration his overhead—gas and automobile service—Mr. Leonard estimated that his net profit would be between 30 and 40 percent of the quoted figures.

RICHARD ROSS DAWES, of Evansville, Indiana, age 31, with one year of college, and employed in a bank, testified (Tr. 356-389) that he answered a Universal ad which appeared in an Evansville newspaper on October 18, 1967; that the respondent, Wendell Coker, came to his home, at which time he contracted to purchase three tube testers and tubes to be located in Evansville for \$2,260 (CX 106). In regard to profits, Mr. Coker said "that he felt that I should get my investment back within roughly a year's time" (Tr. 360); that if sales were not this good, the minimum net return on three machines should be \$800 to \$1,000 a year; that "a detailed study would be made of the section of Evansville that I lived in to determine the best location for my machines. A representative would come and place the machines in these locations" (Tr. 361); that the representative "then would instruct me on the use of these machines and introduce me to each of the store managers" (Tr. 361-362); that no other

distributors would be placed in this area. On November 28, 1967, Universal's representative came to town and he found locations at neighborhood grocery stores which Mr. Dawes did not think were the best. The location man "did not stay long enough to instruct me how to use these machines—\* \* \*—or introduce me to any of the locations" (Tr. 387). One of the machines was removed from the original location in February of 1968 for the reason that it did not sell a tube, except for 5 or 6 tubes purchased by the owner. The second machine was removed about the end of 1968 when the store went out of business, and the third machine was removed about the middle of 1969 at the request of the owner of the store. The first machine removed was relocated in a supermarket on April 1, 1968, where it still remains, by Mr. Dawes who considered it a good location for the reason that it was a 24-hour discount grocery store drawing trade from all over town and not just the immediate neighborhood. About 100 to 150 tubes have been sold at this location. The record does not show whether or not the other machines were relocated, except on cross-examination Mr. Dawes said that, at his request, Universal did send a representative who relocated one of the testers where it was left for three months and did not sell a tube. Mr. Dawes said that his net earnings each year during the three-year period were less than a hundred dollars a year. On cross-examination, Mr. Dawes acknowledged that he read the purchase order contract before he signed it and that it contains the provisions, "No exclusive territories promised" and "no verbal agreements are valid," but he relied on the oral representations made to him at the time of the sale.

KENNETH F. HELMLE, of Mico, Texas, 30 years of age, with two years of college, who has been engaged in the business of floor covering sales during the past ten years, testified (Tr. 390-402) that on January 4, 1966, when he was living in San Antonio, Texas, he answered a Universal ad; that on January 20, 1966, Universal's representative, Mr. P. A. Krane, called on him and, with regard to potential profit from tube testing machines, he gave figures based on half of what the national average was; that a profit of \$75 per week income could be made from six machines; that Universal secured locations and set up the machines; that they had taken a survey and there was an abundance of locations in his locality, and that he would get the pick of the group because he was the first to answer the ad in this area; that "if we ran into difficulties and the deal didn't go, he would have the company buy back the machines or arrange to sell them for us as an agent" (Tr. 399). After some discussion with Mr. Krane, Mr. Helmle said (Tr. 401): "I told him I

would like to think about it within the next day. He said he had a couple of other people in the area and it had to be now or never." On January 20, 1966, Mr. Helmle signed a purchase order contract (CX 96) for six tube testers with kits of tubes to be located in San Antonio for a total price of \$3,595. The contract was approved by Universal and the company sent him a Resale Option Agreement (CX 97). On February 14, 1966, Universal's location man arrived and Mr. Helmle accompanied him to find places to locate the machines. Three were placed in small community hardware stores with a common owner, and three in small family grocery stores. In about two months, at the request of one of the grocery store owners, Mr. Helmle removed the machine; it was never relocated. He explained (Tr. 396): "I went to ten different small neighborhood groceries and got a refusal at each one. Most of them had some experience and found it wasn't worth their while to have the machine. It took up too much of their time for the profit involved." The three machines in the hardware stores were removed after a six-month period at the request of the owner, and an attempt to relocate them was unsuccessful. The remaining two machines were removed after eleven months on location for the reason that they were selling less than a tube a week. The gross sales from the locations were less than \$300, which netted Mr. Helmle less than \$100. On June 14, 1966, Mrs. Kenneth Helmle wrote to Universal (CX 99) in part:

We are very disappointed in our business venture with you. We feel the returns are pitifully small for the investment involved, much smaller than was verbally presented. We would like to know what is involved in you exercising your right to buy back these testers.

On June 24, 1966, Universal wrote to Mrs. Helmle (CX 100), stating in part:

It would seem that your route and business could stand some improvements by the statements in your letter. We are enclosing a guide line set of suggestions, that should help you in this matter if they are conscientiously applied.

On February 7, 1967, Mrs. Helmle wrote to Universal (CX 102) in part:

Due to personal financial problems we need to sell our tube testers. \* \* \*  
Five of the machines are out in locations, possibly not too good, as you can tell from our sales. \* \* \*  
Please let us know how you can help us.

On February 17, 1967, Universal wrote to Mrs. Helmle (CX 103) in part:

I am sorry to hear of your problems with the tube testing business and financial ones also.

## Initial Decision

78 F.T.C.

We happen to have too many used machines on hand now, and cannot possibly use anymore than we have. We are presently using a newer model machine with some design changes and much newer head panels, so, it is hard for us to do anything with the older 202 or 203 model testers.

On September 19, 1967, Mrs. Helmle again wrote to Universal (C-104) in part:

The testers have not worked out in any way like your salesman indicated that they would and it looks as if we have been *taken*. If there is any way that you would or would help us move these testers at  $\frac{2}{3}$  or even  $\frac{1}{2}$  of what we paid for them, we would consider it a favor.

The machines are still complete and full of tubes.

WOODROW W. WILLIAMS, of Hutchinson, Kansas, 58 years of age, with one year of college, who has been employed as a warehouse foreman for the past two years, was a laundry truck driver for two years and prior to that had a cigar route, testified (Tr. 403-424) that he observed a Universal ad (CX 88) in a Hutchinson newspaper on March 5, 1967, which he answered. On March 19, 1967, Universal's representative, Mr. A. C. Dachroeden, came to see him and said that the bare minimum profit would be \$1 each day per machine; that Universal would send out a man to find locations and give instructions on their operation; that he would be given an exclusive territory; and that "they would buy them back after a year's time, if I wanted, the sales representative said they would discount approximately 20 per cent. We stood to lose no more than the 20 per cent they would discount, if we sold them back at the end of the year" (Tr. 414). Mr. Williams said he would like another day to think it over. "He informed me he was just in town for the night. Other people were interested in the deal, if I didn't take it right now, I wouldn't have a chance" (Tr. 410). A purchase order was signed for three tube testers with tubes to be located in Hutchinson and the general area not to exceed five miles for the sum of \$2,290 (CX 89). The machines were received on April 20, 1967, and about two weeks later Universal's location man arrived and requested Mr. Williams to help him locate the machines. Mr. Williams testified (Tr. 417):

\* \* \* I told him that I was working and couldn't take the day off, that would be up to him. The ad stated he would do that. He said he was sorry, a company that big couldn't send a man all over the United States finding locations, I would have to help him find locations. So, I called my boss asking for the day off. We got two machines located that afternoon. He did help me. I hauled them in my car, but he did help me haul them.

He said, "Now, I have got to get out of town tonight. This should be the last time I am in town, I want you to sign this paper that I located the machines."

By that time, I knew I had been taken, and the quicker to get rid of him, the better. I signed the paper, and he was on his way. \* \* \*

One machine was never put on location; one of the machines was placed in a small grocery store where it remained for fifteen months; and one was placed at a news and book stand where it was for about seven months. Mr. Williams did not relocate the machines, although he attempted to do so. He "found out that the machines were in practically every desirable outlet in Hutchinson. I decided it was useless \* \* \* " (Tr. 412). The tube testers for the period on location grossed between \$90 and \$100, netting approximately \$30. He did not receive any training on how to operate and take care of the machines. Mr. Williams said he did not receive an exclusive territory; that one of Universal's machines was within ten blocks of his home. On March 8, 1968, Mr. Williams wrote to Mr. Coker, president of Universal, stating (CX 92) :

According to our contract, if after 1 year on placement the tube testing machines proved unsatisfactory, you would re-purchase same from us. Will you please advise us as to how we are to proceed for your repurchase.

Universal responded on March 11, 1968, in part (CX 93) :

In reference to your letter of March 8th, you, apparently, are referring to the Resale Option Agreement. This instrument means we have the first option to sell your route for you, if after one year of operation, you are dissatisfied and decide to try and dispose of it. This does not mean we repurchase said route.

JERRY L. JOYNER, of Durango, Colorado, 36 years of age, a high school graduate, who until recently was the owner of a package liquor store, testified (Tr. 426-444) that, after answering a Universal ad that appeared in a local newspaper, Universal's representative, Mr. Benny Herwitz, called on him on August 8, 1966; that he could not definitely say that the salesman and he discussed profits, but he imagined they did, and "out of the Durango Herald advertisement it had from 250 to 350 a month could be realized profit" (Tr. 430). During the conversation, Mr. Herwitz said that, if he did not like the business and wanted out after at least one year, the machines be sold back to the company for \$1,000 plus the original purchase price. A purchase order contract was signed on August 8, 1966, for three tube testers and tubes to be located for the sum \$1,895 (CX 139). On September 23, 1966, Universal's location man arrived in Durango and he and Mr. Joyner found places to locate the three machines: No. 1 was placed in a Durango Service Station, and on November 17, 1966, it was moved to a Durango Seven-Eleven Store on a 25 percent commission basis where it remained until August 12, 1966 when another company moved in giving commissions of 50 percent. "This left the town flooded with T.V. tube testing machines" (Tr.

435). The unit was moved to a place in Bayfield, Colorado, where it was from August 12, 1968, to June 16, 1969. Mr. Joyner attempted to relocate the machine, but was not successful because "good locations already had machines" (Tr. 436). No. 2 was placed in a book and magazine shop in Durango where it remains on location. No. 3 was placed in a Seven-Eleven Store in Cortez, Colorado, and remained there until January 25, 1968, when, because another place could not be found, it was placed in Mr. Joyner's garage. His gross return on sales for the year 1966 were \$98.65; for 1967, \$664.70; for 1968, \$98.44; for 1969, \$139.70; and for 1970, \$57.55. Mr. Joyner explained that for the year 1967, when his sales totaled \$664.70, he paid commissions of \$160.67 to the locations and \$254.79 for tubes, which would leave a net of \$249.24 without taking into consideration his time and automobile expenses in servicing the machines. Mr. Joyner wrote Universal about repurchasing the business and in response received its letter, dated November 16, 1967 (CX 140), saying in part:

In reference to your letter of November 14, 1967 concerning your inquiry about the possibility of selling your machines, we hope you do not have to undertake such action.

We try to assist a dealer to sell his route after 1 years time and if we have any prospects we can approach there for you. However we have no prospects for a route in your area at this time. The best advise we can offer at this time if you wish to sell your route is to advertise it in a few local papers under Business Opportunity section for 2 or 3 days.

On cross-examination, the following exchange took place (Tr. 439):

Q. Now, was it your understanding that after one year from the time you signed the contract, if you wanted to, you could resell this business to Universal at a profit of a thousand dollars?

A. This is what the salesman told me, yes, sir.

Q. So, if that's true, then you had a situation where you could not lose, is that right?

A. Well, this is why I went into it.

Q. I see. Now, would you consider that, you say that's why you went into it?

A. Well, that was one of the reasons. Plus, the other reason was what the advertisement in the paper said of approximately 250 to 350 per month profit.

SAM J. GEANETTA, of Colorado Springs, Colorado, 44 years of age, with two years of college, a salesman by occupation, testified (Tr. 445-469) that his partner, Mr. Thomas T. Skole, answered an ad of Universal in the Wall Street Journal and the two of them were present at the time. Universal's representative, Mr. Arthur Dachroeden, sold them twenty units with tubes to be located in Colorado

Springs, Denver, and Pueblo, Colorado, for the sum of \$13,210 (see CX 109A-B, Universal's Bill of Sale, dated May 17, 1967). Mr. Dachroeden said each machine would sell four tubes per day at a profit of \$1.02 per tube; that the area assigned would be an exclusive territory; and that after one year Universal would, at their request, resell the business for them at a price so they would get all of their money back. In July of 1967, the machines were placed by Universal's location man in the three mentioned cities. In about 30 or 90 days, Mr. Geanetta and Mr. Skole relocated a number of the machines for the reason that they were not making any money. They had to make extensive calls because about 90 out of 100 of the places already had a unit. Ten of the machines are now on location and ten are stored in a garage because they could not get anyone to take them. From July 1967 to date, the amount collected totaled about \$2,500 after payment of commissions to the locations and the cost of tubes. This figure does not take into consideration the expense of servicing the machines. Mr. Geanetta observed an advertisement of Universal in a Denver newspaper about three to six months after they purchased the twenty units, but does not know of any other Universal dealer in the three Cities. He wrote a letter direct to Mr. Coker of Universal about reselling the units, but he refused. Mr. Geanetta testified (Tr. 464):

Well, the letter stated, being that we hadn't bought any tubes from him and hadn't helped him any, he wasn't going to do anything for us. That was basically the letter I received back from Mr. Coker. Of course, the only reason we weren't buying tubes from Universal Electronics is because we were not selling any.

HARRY O. BLOUNT, JR., of Great Falls, Montana, 45 years of age, a college graduate, who is a retired Lieutenant Colonel of the Air Force after 23 years of service, and at present is a Civil Service employee at an Air Force base, testified (Tr. 469-485) that he got in touch with Universal after seeing one of their advertisements in a Great Falls newspaper; that Universal's representative, Mr. Misemer, contacted him on July 20, 1967, and sold him on that day three tube testers with tube kits to be located in Great Falls and the immediate area for the sum of \$2,290 (CX 141); the Mr. Misemer gave him an estimate that \$100 to \$200 a month profit should be realized with three to five machines; that they would do a market research to come up with good locations that would sell; that, after a year, if he was dissatisfied with the operation, Universal would attempt to resell the units at a price so that he would get his full investment

back. On November 22, 1967, Universal's location man arrived and obtained locations for the three machines (CX 142, 143 and 144): No. 1 location was a grocery store which Mr. Blount has described as being small in size in the Great Falls slum area which served people who could not afford to purchase a tube; No. 2 location was Texaco Service Station which was described as being small and in complete shambles, with a clientele that would be very unlikely to be searching for tubes; No. 3 location was an Enco Service Station which, Mr. Blount said, was modern and up-to-date and in a good area. Mr. Blount was not satisfied with the locations obtained for him and so informed the location man; but the location man insisted they were good locations and that they would sell. However, he requested the location man to find new locations but he said he could not find any other locations. Mr. Blount said that, after the machines had been on location for about three months, it was obvious to him that he was not going to make anything off of them. He looked around town but could not find a place to relocate them because practically every store in town had machines. The Machine at the grocery store remained on location for six months; the machine at the Texaco Station remained on location for eight to twelve months; and the machine at the Enco Station remained on location for about three or four months. Mr. Blount grossed \$30 to \$40 from the three machines, which netted him about \$16. He said that Mr. Misemer told him at the time he made the sale to him that, after the machines were located, he or someone else would come to see how he was doing and if any improvements could be made, but no one came to assist him. Universal repurchased the machines and tubes for \$723.80. He shipped them in April or May 1970, and in June 1970 Universal mailed him a check.

In the proposed findings submitted by the respondents, they do not question the propriety of an entry of an order against the corporate respondent, but contend that the evidence does not warrant the entry of an order against the respondent in his individual capacity, relying primarily for their position on *Coro, Inc., et al. v. F.T.C.*, 338 F. 2d 149 (1st Cir. 1964), wherein the Court said (at p. 154):

We do think, however, that there is not a sufficient showing to warrant the inclusion of Rosenberger personally in the order. He was Coro's largest stockholder, its president and the chairman of its board of directors. And there is testimony, his own, that he had "overall corporate responsibility" and "responsibility for the acts and practices of the corporation" and that he made the decision to put Coro into the catalogue house business. *But there is no showing that he was aware of the pricing practices of catalogue houses or that he personally knew of Coro's participation in those practices.* In short, unlike Theo-

dore R. Hodgkins in *Forster Mfg. Co. v. F.T.C.*, 335 F. 2d 47 (C.A. 1 1964), there is no showing of Rosenberger's active or even actual personal participation in the unlawful practices of the corporation under his overall management and control. In the absence of evidence of personal involvement in Coro's unlawful conduct, we think the hearing examiner was correct in finding no sufficient reason for holding Rosenberger individually responsible and in dismissing the complaint as to him individually. (Emphasis added.)

The respondents also rely upon *Flotill Products, Inc. v. F.T.C.*, 358 F. 2d 224 (9th Cir. 1966); *Doyle v. F.T.C.*, 356 F. 2d 381 (5th Cir. 1966); and *F.T.C. v. Standard Ed. Soc., et al.*, 302 U.S. 112 (1937). Considering the facts in this proceeding, there is nothing in the aforementioned cases that would support the position of the respondents. In the *Standard Education Society* case, *supra*, the Supreme Court said (at p. 120):

The record in this case discloses closely held corporations owned, dominated and managed by these three individual respondents. In this management these three respondents acted with practically the same freedom as though no corporation existed. So far as corporate action was concerned, these three were the actors. Under the circumstances of this proceeding, the Commission was justified in reaching the conclusion that it was necessary to include respondents Standard, Ward and Greener in each part of its order if it was to be fully effective in preventing the unfair competitive practices which the Commission had found to exist. The court below was in error in excluding these respondents from the operation of the Commission's order.

The Commission in *Coran Bros. Corp., et al.*, Docket No. 8697, July 11, 1967 [¶18,030 CCH Trade Reg. Rep.] [72 F.T.C. 1], had this to say:

The public interest requires that the Commission take such precautionary measures as may be necessary to close off any wide "loophole" through which the effectiveness of its orders may be circumvented. Such a "loophole" is obvious in a case such as this, where the owning and controlling party of an organization may, if he later desires, defeat the purposes of the Commission's action by simply surrendering his corporate charter and forming a new corporation, or continuing the business under a partnership agreement or as an individual proprietorship with complete disregard for the Commission's action against the predecessor organization. \* \* \*

It is the opinion of the hearing examiner, on the facts presented by this record, that not only should an order be entered against the corporation, but also against the respondent, Wendell Coker, in his individual capacity as a party in this proceeding. It is shown and established that he is now, and has been during the entire period of the existence of the corporation, the president and sole stockholder thereof; that he, alone, formulated, directed and controlled the acts and practices of the corporate respondent; and that he was responsi-

ble for, familiar with, and personally participated in, the specific acts and practices which are challenged in this proceeding. Furthermore, it is the opinion of the hearing examiner that without including the respondent, Wendell Coker, in his individual capacity, there is a possibility that the order will be evaded.

#### ORDER

*It is ordered,* That respondents Universal Electronics Corporation, a corporation, and its officers, and Wendell Coker, individually and as an officer of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of radio and television tube testing devices and the tubes, supplies or equipment for use in connection therewith, or of any other products or of any franchises or dealerships in connection therewith, 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:

(a) Persons investing in respondents' products, franchises or dealerships will receive any stated amount of income or gross or net profits or other earnings.

(b) Any stated sums of money are past earnings of investors or purchasers of respondents' products unless in fact the past earnings represented are those of a substantial number of purchasers and accurately reflect the average earnings of these purchasers under circumstances similar to those of the purchaser to whom the representation is made.

(c) Persons investing in respondents' franchises, dealerships or products will receive discounts from respondents on repeat business which assures them of an exceptional or profitable income, or are assured of an exceptional or profitable income from franchises, dealerships or products for any other reason.

(d) Persons, investing in respondents' franchises, dealerships or products can expect an average sale of a certain specified number of tubes per day, or any other period of time, for each machine so purchased from respondents unless in fact the average number of tube sales during the time period as represented is that of a substantial number of franchisees, dealers, or purchas-

ers under circumstances similar to those of persons to whom the representation is made.

(e) Respondents, their agents, representatives or employees will obtain satisfactory or profitable locations for the machines purchased from them: *Provided, however,* That nothing herein shall be construed to prohibit respondents from truthfully and non-deceptively representing that they have obtained locations or assisted in obtaining locations if respondents clearly and conspicuously disclose, in immediate conjunction therewith, the average net or gross earnings realized by a substantial number of purchasers from machines in location obtained by respondents or through their assistance under circumstances similar to those of the purchaser to whom the representation is made.

(f) Persons investing in respondents' franchises, dealerships, machines or other products will receive training, or other advice and assistance, in the operation of and the methods to be used in servicing respondents' said machines or any other products unless in fact the respondents afforded training, advice and assistance in the operation of and the methods to be used in servicing respondents' machines or other products to each purchaser to the extent of and in conformity with the representations being made to the investor or purchaser.

(g) Selling, soliciting or experience is not required to establish, operate or maintain a route of respondents' machines, or other products; or misrepresenting in any manner, the amount of selling, soliciting or experience required to establish and operate or maintain the route.

(h) Respondents or their representatives will accept return of, or will obtain or assist in obtaining a purchaser for, or will assist in the resale of machines or other products sold by them.

(i) Persons investing in respondents' franchises, dealerships, machines or other products will receive the return of their investments in nine months, one year or any other specified period of time.

(j) Persons investing in respondents' franchises, dealerships, machines or other products will be granted an exclusive territory in which to locate machines and sell products purchased from respondents unless respondents provide in all contracts or purchase agreements with dealers, franchi-

sees or purchasers of respondents' tube testing machines, tubes and other products, to whom such exclusive territories have been granted, a description of the size and limits of the territories, and a statement that no other investor, dealer, franchisee or purchaser of the same machines or products has been, or will be granted the same territory or any part thereof and respondents in all instances abide by such provisions.

2. 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 or services, franchises or dealerships and failing to secure from each such salesman or other person a signed statement acknowledging receipt of said order.

3. Failing, after the acceptance by the Commission of respondents' initial report of compliance, to submit to the Commission on June 1st of each of the succeeding three years a report: (1) describing every complaint involving the acts and practices prohibited by this order received by respondents and their licensees or franchisees from or on behalf of their customers during the 12 months preceding the date of the report; (2) setting forth the facts uncovered by respondents or their licensees or franchisees in connection with the investigation made of each such complaint; and (3) stating the action taken by respondents or their licensees or franchisees with respect to each such complaint.

*It is further ordered,* That the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

*It is further ordered,* That respondents

a. Inform orally all prospective customers and provide in writing in all contracts that (1) the contract may be cancelled for any reason by notification to respondents in writing within three days from the date of execution and (2) that the contract is not final and binding until respondents have completely performed their obligations thereunder by placing the vending machines in locations satisfactory to the customer and said customer has thereafter signed a statement indicating his satisfaction.

b. Refund immediately all monies to (1) customers who have requested contract cancellation in writing within three days from the execution thereof, (2) customers who have refused to sign statements indicating satisfaction with respondents' place-

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## Final Order

ment of the machines, and (3) customers showing that respondents' contract, solicitations or performance were attended by or involved violations of any of the provisions of this order.

*It is further ordered,* That respondents notify the Commission at least thirty (30) days prior to any proposed change in the corporate respondent such as dissolution, assignment or sale resulting in the emergence of successor corporations, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of the 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 in which they have complied with this order.

## FINAL ORDER

By its order of December 29, 1970, the Commission extended until further order the date on which the initial decision of the hearing examiner herein would become the decision of the Commission; and

The Commission having concluded that said initial decision, filed on November 6, 1970, holding that respondents had violated Section 5 of the Federal Trade Commission Act as charged, is appropriate in all respects to dispose of this proceeding:

*It is ordered,* That the initial decision of the hearing examiner be, and it hereby is, adopted as the decision of the Commission.

*It is further ordered,* That respondents, Universal Electronics Corporation and Wendell Coker, individually and as an officer of said corporation, shall, within sixty (60) days after service of this order upon them, file with the Commission a report, in writing, signed by such respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.

## IN THE MATTER OF

## FINE ARTS STERLING SILVER COMPANY, ET AL.

CONSENT ORDER, ETC., IN REGARD TO THE ALLEGED VIOLATION OF  
THE TRUTH IN LENDING AND THE FEDERAL TRADE COMMISSION ACTS

*Docket C-1858. Complaint, Feb. 1, 1971—Decision, Feb. 1, 1971*

Consent order requiring a Jenkintown, Pennsylvania, seller and distributor of sterling silver tableware to cease violating the Truth in Lending Act by failing to print more conspicuously the terms "annual percentage rate"