

Complaint

IN THE MATTER OF

SKYLARK ORIGINALS, INC., ET AL.

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

*Docket 8771. Complaint, Nov. 27, 1968—Decision, March 9, 1972 **

Order requiring an Asbury Park, N.J., corporation selling ladies' clothing and wigs to cease misrepresenting the prices at which their merchandise has been sold and the savings available to purchasers, failing to make refunds on merchandise guaranteed, failing to maintain an adequate supply of merchandise advertised, and failing to make deliveries of products within time specified by respondents.

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

PARAGRAPH 1. Respondent Skylark Originals, Inc., is a corporation, organized, existing and doing business under, and by virtue of, the laws of the State of New York, with its principal office and place of business located at 806 Munroe Avenue, Asbury Park, New Jersey. Respondent Skylark Originals, Inc., also does business under the name Patti Fashions.

Respondents Daniel L. Freedman and Beverly Freedman are individuals and officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past, have been engaged in the advertising, offering for sale, sale and distribution of ladies' clothing, wigs and other 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,

* Petition for Review filed by respondent May 1, 1972 with U.S.C.A. 3rd Cir.

Complaint

80 F.T.C.

their said business products, when sold, to be shipped from their place of business in the State of New Jersey 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. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their products, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers and in their catalogs which are disseminated by and through the United States mails to prospective purchasers located in various states other than the State of New Jersey with respect to the prices, guarantees, refunds, style, color and availability of said products.

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

Skylark Knock-out Knits
(dresses)

Style 339—Reg. \$8.95—\$5.95

Style 355—Reg. \$8.95—\$5.98

Style 752—Reg. \$8.98—\$5.98

Order these superb values by mail * * * f-a-s-t service * * * money back guarantee! ! Return garment in 10 days, if not satisfied. 3 Easy Ways To Order Assures you prompt, pleasing service.

GUARANTEE

Your every SKYLARK purchase is guaranteed *unconditionally!* You must be completely satisfied with it or you may return it for exchange or full refund. No questions * * * no arguing * * * no delay! *You get your money back right away!*

YOU ARE THE SOLE JUDGE. YOU DECIDE! This is an important confidence-building feature of Skylark *extra-special* service!

WE'LL REFUND YOUR MONEY IN FULL

Skylark guarantees unconditionally to return your money on request, *at once*, if you're not absolutely satisfied.

GLAMOR WIGS in a choice of beautiful Colors and Styles. Selection of 5 Styles and 10 Attractive Colors.

ONLY \$4.95—Worth Much More

Inventory Clearance Sale for a Limited Time Only

PAR. 5. By and through the use of the above quoted statements and representations and others of similar import and meaning but not expressly set out herein, the respondents have represented, and now are representing directly or by implication:

1. That the aforesaid prices designated by the abbreviation "Reg.," for regular, are the actual bona fide prices at which the dresses referred to have been openly and actively offered for sale in good faith for a reasonably substantial period of time in the recent regular course of respondents' business and that purchasers save the difference between respondents' advertised selling prices and the corresponding higher price amounts.

2. That respondents unconditionally guarantee the return of the purchaser's money in full and at once on request of the purchaser.

3. That the advertised wigs are being offered by respondents,

- (a) in five styles and in ten colors,
- (b) at a reduced price,
- (c) from a limited supply and
- (d) for a limited time.

PAR. 6. In truth and in fact:

1. The aforesaid prices designated by the abbreviation "Reg.," for regular, are not the actual bona fide prices at which the dresses have been openly and actively offered for sale in good faith for a reasonably substantial period of time in the recent regular course of respondents' business but at a remote period in the past if at all. Moreover, purchasers do not save the difference between respondents' selling prices and the corresponding higher price amounts since the higher price amounts are fictitious and the savings based thereon are likewise fictitious.

2. A substantial number of purchasers who return merchandise to respondents for refund do not receive payments at once but only after numerous requests and long delays if at all. Nor do respondents repay in full the money paid by purchasers, failing many times to include postage and other charges, and in some instances New York sales taxes. Moreover, the guarantee is subject to terms, conditions and limitations which are not set forth in the advertising.

3. The advertised wigs offered by respondents;

- (a) are available in two styles, not five, and in nine colors instead of ten,
- (b) are not being sold at a reduced price but at their regular price,
- (c) are not from a limited supply, and
- (d) are not limited in point of time.

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

Initial Decision

80 F.T.C.

PAR. 7. In a substantial number of instances, respondents have engaged in the practice of failing to deliver merchandise in accordance with the promise in their advertisements of "fast service" and prompt delivery. Purchasers in many instances have been required to wait weeks, sometimes months, for delivery of their orders and in some instances only after they have had the Better Business Bureau intervene in their behalf.

Therefore, the aforesaid act and practice was and is unfair, false, misleading and deceptive.

PAR. 8. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of ladies' clothing and wigs of the same general kind and nature as that sold by respondents.

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' products by reason of said erroneous and mistaken 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. Charles W. O'Connell supporting the complaint.

Mr. Robert Ullman, Bass & Ullman, New York, New York for respondents.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

JULY 19, 1971

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint against respondents on November 27, 1968, charging them with engaging in false and deceptive practices in violation of Section 5 of the Federal Trade Commission Act. The respondents filed an answer by their counsel in which they admitted certain allegations of the complaint but denied that they had violated Section 5 of the Federal Trade Commission Act as charged in the complaint.

A stipulation of facts with an agreed upon order was entered into by counsel in support of the complaint and counsel for the respondents which was later submitted to the Commission and rejected by the Commission on September 25, 1970. On April 19, 1971, counsel in support of the complaint and counsel for the respondents submitted a stipulation of facts (CX 17) which included a number of exhibits. The stipulation and attached exhibits were made a part of the record in lieu of testimony and evidence in support and in opposition to the charges in the complaint. It was further stipulated that the stipulation with attached exhibits shall constitute the entire record and that further hearings for the reception of evidence were waived. Thereafter, counsel in support of the complaint filed proposed findings of fact and counsel for the respondents filed a memorandum objecting to certain of the provisions in the proposed order originally attached to the complaint.

This matter is before the hearing examiner for final consideration on the complaint, answer, evidence, the findings of fact and conclusions and briefs filed by counsel for respondents and counsel supporting the complaint. Consideration has been given to the proposed findings of fact and conclusions and briefs submitted by both parties, and all proposed findings of fact and conclusions not hereinafter specifically found or concluded are rejected; and the hearing examiner, having considered the entire record herein, makes the following findings of fact, conclusions drawn therefrom and issues the following order:

FINDINGS OF FACT

1. Respondent Skylark Originals, Inc., (Skylark) is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 806 Munroe Avenue, Ashbury Park, New Jersey (CX 17).

2. Skylark has also done business under the trade name Patti Fashions for the purpose of advertising in the New York, New York metropolitan area, using various New York City addresses, including 80 Nassau Street and 120 West 57th Street.

Orders sent to Patti Fashions were forwarded to and filled by Skylark's headquarters in New Jersey. Respondents had no retail outlets and since 1950 they have advertised and sold merchandise as hereinafter described (CX 17).

3. Respondent Daniel L. Freedman is president and Beverly Freedman is secretary of the corporate respondent and they are

members of its board of directors. Mr. Freedman is sole stockholder of the corporation. These individuals have formulated, directed and controlled the acts and practices hereinafter referred to. Their address is the same as that of the corporate respondent (CX 17).

4. Respondents Skylark Originals, Inc., Daniel L. Freedman and Beverly Freedman are not presently engaged in the business described herein. Skylark mailed its last catalog in April 1969, discontinued shipments of merchandise around October 1969, and closed its premises in September 1970 (CX 17).

5. Respondents have been engaged in the advertising, offering for sale, sale and distribution of ladies' clothing, wigs, and other products to the public.

The principal items of merchandise offered were dresses. The price range of Skylark dresses were \$3.98 to \$30 with the majority of sales in the \$8 to \$12 category (CX 17).

6. Skylark has been a mail order house selling through its catalog by means of advertisements in New York, New York newspapers and in other newspapers throughout the country, as well as in magazines of national circulation. Commission Exhibit 1 is typical of Skylark catalogs. Commission Exhibits 2 through 10 are examples of Skylark advertisements.

The Skylark catalog was distributed three times a year: in January, April and September for the spring, summer and fall seasons, respectively. Approximately 1¼ million catalogs were sent each season.

Skylark's advertising budget for fiscal November 1, 1965 to October 31, 1966 was \$773,814, with 20 percent thereof expended for publication of the catalog and 80 percent for national advertising in newspapers and magazines (CX 17).

7. In addition to its own products, Skylark's catalog has advertised products of other firms, such as wigs, girdles, artificial flowers, false eyelashes, teeth whitener and chin straps under its own name. Customers purchase such merchandise by means of order coupons bearing the name and address of Skylark Originals, Inc. Orders for these products were received by Skylark and forwarded to such firms who shipped direct to the purchaser. Skylark received, in lieu of payment for such advertisements, a commission on each resulting sale. Skylark earned approximately \$30,000 to \$40,000 in commissions annually from advertising outside products. Commission Exhibit 11 shows wigs offered in this manner (CX 17).

8. In the course and conduct of their business as aforesaid, respondents for some time last past have caused their said products,

when sold, to be shipped from their place of business in the State of New Jersey to purchasers thereof located in various other States of the United States and maintained, 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.

Skylark's gross sales in 1965 and 1966 were respectively \$3,611,180.80 and \$3,853,391.72 and for the first four months in 1967 were \$1,398,152 (CX 17).

9. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, the respondents have made numerous statements and representations in advertisements inserted in newspapers and in their catalogs disseminated by and through the United States mails to prospective purchasers located in various states other than the State of New Jersey with respect to the prices, guarantees, refunds, style, color and availability of said products (CX 17).

10. Respondents from time to time have advertised products with a designated "reg." (for regular) price and a lower selling price in juxtaposition (CX 12 A-T, 17).

11. Through the use of abbreviation "reg." for "regular," respondents represented that said prices were the actual bona fide prices at which the dresses and girdles referred to in the Tenth Finding have been openly and actively offered for sale in good faith for a reasonably substantial period of time in the recent, regular course of respondents' business and that purchasers save the difference between respondents' advertised selling prices and the corresponding higher price amounts. *Spiegel, Inc. v. F.T.C.*, 411 F. 2d 481 (7th Cir., 1969); *Arnold Constable Corp.*, D. 7657, 58 F.T.C. 49 (1961).

12. The aforesaid prices designated by the abbreviation "reg." for regular, are not the actual bona fide prices at which the dresses and girdles have been openly and actively offered for sale for a reasonably substantial period of time in the recent, regular course of respondents' business but at a remote period in the past, if at all. Moreover, purchasers do not save the difference between respondents' selling prices and the corresponding higher price amounts referred to in the Tenth Finding since the higher price amounts are fictitious and the savings based thereon are likewise fictitious (CX 12 A-T, CX 17).

13. Respondents unconditionally guarantee the return of the purchaser's money in full and at once on request of the purchaser (CXs

Initial Decision

80 F.T.C.

1, p. 43; 12 A, p. 23; 12 C, pp. 10, 23, 32, 45; 12 G, p. 45; 12 H, pp. 1, 41; 12 I, pp. 1, 45; 12 J, pp. 1, 43; 13; 17, p. 4).

14. The guarantee is not unconditional. It is subject to terms, conditions and limitations which are not set forth in the advertising. Commission Exhibit 14 is a form which was to be filled out by the purchaser and enclosed in the package when merchandise was returned to Skylark for exchange or refund pursuant to Skylark's advertised guarantees. This form states in part: "We can guarantee no refund unless you insure your return parcel" and "all returns must be made within 48 hours of receipt of package." (CX 17, pp. 4-5).

15. A substantial number of purchasers who returned merchandise to respondents for refund did not receive refunds at once as represented but only after numerous requests and long delays and after intervention of the Better Business Bureau. Nor did respondents repay in full the money paid by purchasers, failing many times to include postage and other charges, and in some instances New York sales taxes (CXs 16 A1 through 16 J2; 17, pp. 5 and 6).

16. Respondents represented that wigs advertised in their catalogs were being offered:

- (a) in five styles and ten colors,
- (b) at a reduced price,
- (c) from a limited supply, and
- (d) for a limited time (CX 11).

17. The said wigs advertised by Skylark—

- (a) were available only in two styles, not five, and in nine colors, instead of ten;
- (b) were not being sold at a reduced price but at their regular price;
- (c) were not from a limited supply; and
- (d) were not being offered for a limited time.

The advertised wigs were available in only two basic styles. The wig styles are identified in the advertisement as 109, 114, 112, 102 and 108. If the customer ordered either 112 or 108, the wig with the shorter hair style, 108 would be sent. If the customer ordered either 109, 112 or 102, the longer haired wig, style 109 would be sent. The basic style 108 could be converted into style 112 while basic style 109 could be converted into styles 114 or 102 although the advertisement did not so state (CX 17, p. 6).

The advertisement lists ten hair colors; namely, black, off black, dark brown, brown, dark blonde, light blonde, auburn, platinum,

pink and mixed grey, whereas off black and dark brown were the same color used interchangeably (CXs 11, 17, p. 6).

The wigs were offered at the same price of \$4.95 over more than a four-year period, therefore, the price of \$4.95 was the customary and usual price, not a reduced price (CX 17, p. 6).

That the wigs are not from a limited supply or are not offered for a limited time is clear from the repeated offering of the same style wigs year after year (CX 17, p. 6).

18. The wigs herein referred to were advertised in the name of Skylark Originals, Inc., and sold under the arrangement hereinbefore described for Imperial Fashions, 378 South Franklin Street, Hempstead, L.I., New York. Skylark received \$1 from Imperial for each wig sold through its catalog. From 1963 through February 1967, 43,680 of such wigs were sold through the Skylark catalogs for which Skylark received commissions of \$43,117.26. The copy for the wig advertisement was furnished by Imperial Fashions (CX 17, p. 5).

19. Skylark had numerous customer complaints, some relating to styling, during the time the wig advertisement was run in its catalog (CX 17, p. 6).

20. In its advertisements, the respondents have emphasized that they give "f-a-s-t service," "F-a-s-t delivery," "Superior service" and "prompt service" (CXs 5, p. 3; 7; 10; 12 D; 12 M, p. 5; 12 E, pp. 2, 14; 12 F, pp. 33, 43). However, in a substantial number of instances, respondents have failed to deliver merchandise in accordance with the promise in their advertisements of fast service and prompt delivery. Purchasers have been required to wait weeks, sometimes months, for delivery of their orders and in some instances only after they have had the Better Business Bureau intervene in their behalf have they received delivery (CX 15 A through J, CX 17, p. 5).

21. 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 ladies' clothing and wigs of the same general kind and nature as that sold by respondents.

CONCLUSIONS

1. The use by respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had the capacity and tendency to mislead members of the purchasing public

into the erroneous and mistaken belief that said statements and representations were true and into the purchase of substantial quantities of respondents' products and products of others advertised by respondents by reason of said erroneous and mistaken belief.

2. The aforesaid 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 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.

3. In its memorandum in opposition to the form of order annexed to the Commission's complaint, respondents object to certain provisions of the original order and to the final paragraph of the order contained in this initial decision. Respondents assert that the provisions of Paragraph 3 of the order are unreasonable in that they include a requirement that respondents refund not only the price of the merchandise returned but also all charges paid by purchasers, and further, that to require that the refund be made within 30 days is unreasonable. These contentions are without any merit since it appears reasonable that a purchaser be repaid completely for all costs resulting from responding to respondents' advertisements. Likewise there is nothing unreasonable in requiring respondents to make refunds within 30 days of the receipt of returned merchandise.

4. Respondents also object to apparent duplication between Paragraphs 4 and 5 of the order. This contention is also without merit.

5. Respondents also object to the requirements in Paragraphs 6 and 9 of the order which require respondents to have on hand in advance all advertised products in sufficient quantity to fill all orders and to fill all orders in the time specified in the ads, or a reasonable time, if no time is specified. These contentions are likewise without merit since it cannot be said to be unreasonable to require a seller to have on hand the products which he advertises or to fill orders for such products within a reasonable time.

6. Respondents also move to dismiss subparagraph 3(a) of Paragraph 5 and Paragraph 6 of the complaint on the ground that the allegations are picayune and *de minimus*. This contention is likewise without merit in view of the findings heretofore made.

7. Respondents also object to being required to give the Commission at least 30 days notice prior to making any change in the corporate respondent. Respondents do not object to giving the required notice promptly after any change in the status of the corporate respondent, but object to being required to give 30 days notice prior to

such change. This appears to be a reasonable provision in the order so that the Commission may be informed at all times as to the actual status of all corporations whom it has found to have violated the provisions of the Federal Trade Commission Act. Consequently, this contention is likewise without merit.

ORDER

It is ordered, That respondents Skylark Originals, Inc., a corporation, and its officers, trading under its own name or under the name Patti Fashions or any other trade names or names, and Daniel L. Freedman and Beverly Freedman, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of ladies' clothing, wigs or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the abbreviation "Reg." or the word "regular" or any other abbreviation, word, term or expression of similar import or meaning to refer to any amount which is in excess of the price at which such merchandise has been sold or offered for sale in good faith by the respondents for a reasonably substantial period of time in the recent, regular course of their business; or misrepresenting, in any manner, the price at which such merchandise has been sold or offered for sale by the respondents.

2. Falsely representing, in any manner, that savings are available to purchasers or prospective purchasers of respondents' merchandise; or misrepresenting, in any manner, the savings or amount of savings available to purchasers or prospective purchasers of respondents' merchandise.

3. Failing to maintain adequate records (a) which disclose the facts upon which any savings claims, including representations as to former prices and similar representations of the type described in Paragraphs 1 and 2 of this order are based, and (b) from which the validity of such claims and representations can be determined.

4. Failing, when requested, pursuant to a guarantee of satisfaction or of full refund, to refund the purchase price of merchandise together with all charges paid by purchasers in connection with such purchase voluntarily and within the time speci-

Opinion of the Commission

80 F.T.C.

fied in respondents' advertisements, or if no time is specified, within a reasonable time not to exceed 30 days.

5. Failing to fulfill promptly all of respondents' obligations and requirements under the terms set forth in, or represented directly or by implication to be contained in, any guarantee in connection with the sale of said products.

6. Representing, directly or by implication, that any product or service is guaranteed, unless:

(1) the nature and extent of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed, and

(2) the guarantor does in fact perform all of the actual and represented obligations under the terms of the guarantee.

7. Advertising for sale merchandise of a stated style, model, material or color or of other stated features or characteristics unless such merchandise as so represented and described is in fact on hand and available to fill orders.

8. Representing, directly or by implication, that any offer is limited in time or in any other manner unless any represented limitation or restriction is actually imposed and in good faith adhered to.

9. Failing to make deliveries of products within the period of time specified by respondents, or if no time is specified, within a reasonable time.

It is 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 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 a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

OPINION OF THE COMMISSION

By DIXON, *Commissioner*:

This matter is before the Commission on the appeal of respondents from an initial decision of the hearing examiner holding that respondents had violated Section 5 of the Federal Trade Commis-

sion Act and ordering respondents to cease and desist from the practices found to be unlawful.

Respondent Skylark Originals, Inc., has been a mail order house selling through its catalog by means of advertisements in New York City newspapers and in other newspapers throughout the country, as well as in magazines of national circulation. The complaint charges that respondent Skylark violated and the individual respondents violated the Federal Trade Commission Act by engaging in false and misleading advertising of ladies' clothing and wigs by advertising fictitious prices at which their products were claimed to have been sold; falsely advertising that they unconditionally guarantee the return of the purchaser's money on request; falsely advertising that their wigs were available in five styles and ten colors at reduced prices from a limited supply for a limited time; and falsely advertising that their merchandise that their merchandise would be delivered promptly.

Several attempts were made by counsel to dispose of the matter on the basis of a consent or an agreed order to cease and desist, but in each instance the order agreed to by counsel was rejected by the Commission. Thereafter, counsel entered into a stipulation as to the facts with the agreement that such stipulation and attached exhibits would be made a part of the record in lieu of testimony and evidence in support of and in opposition to the charges in the complaint. The hearing examiner then entered his initial decision based on the complaint, answer and stipulated facts, including therein an order to cease and desist which is very similar to the notice order which had originally been issued with the complaint.

Respondents' principal arguments on appeal are directed at the order to cease and desist. They take exception first of all to Paragraph 4 which prohibits them from "Failing, when requested, pursuant to a guarantee of satisfaction or full refund, to refund the purchase price of merchandise together with all charges paid by purchasers in connection with such purchase voluntarily and within the time specified in respondents' advertisements, or if no time is specified, within a reasonable time not to exceed 30 days."

Two different aspects of this provision are challenged. The first concerns the requirement that refunds made by respondents pursuant to a guarantee of satisfaction or of full refund should include all charges paid by the purchaser in connection with the purchase. Respondents claim, in this connection, that they should not be required to return "postage and other charges" to the purchaser.

We find little merit to this argument. Respondents emphasize throughout their sales literature that the merchandise featured therein is offered subject to an unconditional money-back guarantee. The prospective purchaser is informed that "With Skylark's money-back guarantee you risk nothing." She is also encouraged to send the "complete payment" with her order.¹ And she is told "Don't Think of it as 'Spending.' It's a gilt-edged investment. You can't possibly lose * * * Skylark's money-back guarantee assures you complete satisfaction."

The main issue raised by the pleadings on this point is whether the prospective purchaser may reasonably interpret respondents' guarantee, especially in light of the above representations, to mean that she will receive a refund of all the money she has spent. We have no doubt that she would. Certainly, in the absence of a clear disclosure to the contrary she would have no reason to believe that she would receive less than a full refund of her expenditures. Respondents' full refund guarantee takes on added importance when we consider that they deceptively advertised the product characteristics of several items offered for sale. In these circumstances, we consider it an unfair practice for the seller not to abide by the broadest interpretation of the guarantee.

Respondents nevertheless make the argument that the requirement that "postage and other charges" be refunded is without precedent and goes beyond the generally understood and accepted industry practice. There is nothing in the record to support this contention, however, and respondents so concede. They have attempted to fill this evidentiary gap by asking the Commission, after oral argument had been heard, to take notice of the following paragraph in its Guides Against Deceptive Advertising of Guarantees:

III. "Satisfaction or Your Money Back" representations

(a) "Satisfaction or Your Money Back," "10 Day Free Trial," or similar representations will be construed as a guarantee that the full purchase price will be refunded at the option of the purchaser.

The Commission will, of course, take official notice of its own guides and respondents' request is granted. We fail to see, however, how the language of the guide helps respondents' case. In the absence of an indication that something more than the purchase price is involved, a "money-back" guarantee would of course refer only to

¹ Complete payment includes a charge in addition to the cost of the merchandise. The purchaser is told "Add only 40c to the cost of each garment. Skylark pays all Post Office and handling charges."

the purchase price. The guide in question does not purport to go beyond this point. Where as here, however, the purchaser's cost necessarily includes charges in addition to the price of the merchandise, the purchaser could reasonably interpret a promise of full refund to refer to her total payment and not merely to the purchase price.

If respondents wish to offer less than a full refund of the purchase price plus other charges, including postage, it would be a simple matter for them to do so. All that would be required would be a truthful disclosure in their advertising of the extent of the obligation they wish to assume under their guarantee.

Respondents next take exception to that part of Paragraph 4 would require them to make refunds within 30 days when no time period is specified in their advertising. They claim that the imposition of such a limitation is unreasonable since in many instances it would not be possible to make the refund within such a short period of time. According to respondents, such an absolute requirement would force them to make refunds even if their records indicated that a refund had already been made, or even if the merchandise had not been returned. Moreover, they claim that this period may not be adequate because situations could arise where there would be genuine disputes over the amount of the refund or because of some unanticipated contingency or because the mail may be delayed or lost. They also insist that they should not be denied the right to make good certain inquiry into requests for refunds which they have good reason to question.

These arguments are not persuasive. The record reveals that respondents' customers have been forced to wait up to six months for refunds and have finally received them only after the Better Business Bureau had intervened on their behalf. Respondents do not suggest that delays were occasioned by any of the factors mentioned above, and, in fact, give no explanation for their failure in these instances to make refunds promptly.

It is noted, in this connection, that respondents send to purchasers a form to be used when returning merchandise for exchange or refund with the instructions that the form must be enclosed with the returned merchandise. Under these circumstances, if the customer complies with the terms of the refund guarantee, it is difficult to understand why respondents would need more than 30 days to return the purchaser's money. Since respondents guarantee satisfaction there would be no basis for making inquiry into the purchaser's reason for requesting a refund and if they mailed the refund by the

30th day after receipt of the request and the returned merchandise they would be in compliance with the order.

So that there may be no doubt as to the meaning of the order, we will redraft the paragraph in question to make clear that respondents are obligated to make the refund within the 30-day period when the request by the purchaser is made in accordance with the terms of the guarantee² and that the 30-day period will not begin until the merchandise has been received. As so drafted, the paragraph will read:

Failing, when request is made pursuant to a guarantee of satisfaction or of full refund and in accordance with the terms of such guarantee, to refund the purchase price of merchandise together with all charges paid by purchasers in connection with such purchase voluntarily and within the time specified in respondents' advertisements, or if no time is specified, within a reasonable time not to exceed 30 days from the date of receipt of the returned merchandise.

Respondents next take exception to Paragraph 7 of the order which would prohibit them from "Advertising for sale merchandise of a stated style, model, material or color or other stated features or characteristics unless such merchandise as so represented and described is in fact on hand and available to fill orders." They contend that this provision would impose upon them an absolute liability to have on hand, in advance, all advertised merchandise in sufficient quantity to fill all orders which they may receive. They further argue that the prohibition as drafted is unreasonable since it fails to take into account that respondents may have legitimate reasons for being unable to promptly fill all orders. They point out, in this connection, that it was stipulated by counsel that respondents could not always predict with complete accuracy which items in their catalogs would be in demand and the quantum of such demands.

We agree that respondents should not be held liable for failing to have goods on hand when the shortage is caused by demand which could not reasonably have been foreseen. Hence, Paragraph 7 of the order will be revised to read:

Advertising for sale merchandise of a stated style, model, material or color or other stated features or characteristics unless respondents have made arrangements to obtain, and to maintain, sufficient merchandise as so represented and described to fill all reasonably anticipated orders of such merchandise.

² These terms must, of course, be spelled out in the advertising. See Par. 6(1) of the order, p. 356 herein.

Similar objection is made with respect to Paragraph 9 of the order which would prohibit respondents from "Failing to make deliveries of products within the period of time specified by respondents, or if no time is specified, within a reasonable time." Respondents claim that in some instances it may be impossible, for reasons beyond their control, to make deliveries within the time specified or within "a reasonable time" and that under such circumstances they should not be held responsible for failure to make timely deliveries, but should instead be permitted to notify the prospective purchaser that there will be a delay and give her the option of an immediate refund of the purchase price. We believe that the requirement that respondents offer the purchaser an immediate refund will afford ample protection to the public in those instances in which an order for merchandise can not be filled immediately for reasons beyond respondents' control. Accordingly, the paragraph will be redrafted to read:

Failing to make deliveries of products within the period of time specified by respondents or, if no time is specified, within a reasonable time, not to exceed 30 days from the date of receipt of the order: *Provided, however,* That where an order for merchandise cannot be immediately filled for reasons beyond respondents' control, respondents shall promptly notify the prospective purchaser of such fact, stating the anticipated date of delivery and giving him the option of an immediate refund.

Respondents also argue that subparagraph (2) of Paragraph 6 of the hearing examiner's order substantially duplicates Paragraph 5.³ We do not agree. Unlike subparagraph (2) of Paragraph 6, Paragraph 5 is applicable whether or not the guarantee is advertised. Also, Paragraph 5 applies only to respondents' obligation under a guarantee whereas subparagraph (2) of Paragraph 6 applies regardless of whether respondents or some other person is the guarantor.

Respondents also contend that the evidence fails to sustain the allegation in Paragraphs Five and Six of the complaint that respondents falsely represented that their advertised wigs are available in five styles and ten colors. Respondents point out that their two basic style wigs can be converted into five different hair styles and that, although the wigs come in only nine different colors, one

³ Paragraph 5 prohibits respondents from "Failing to fulfill promptly all of respondents' obligations and requirements under the terms set forth in, or represented directly or by implication to be contained in, any guarantee in connection with the sale of said products." Subparagraph (2) of Paragraph 6 prohibits respondents from "Representing, directly or by implication, that any product or service is guaranteed, unless * * * the guarantor does in fact perform all of the actual and represented obligations under the terms of the guarantee."

of the colors may be used interchangeably as off-black and dark brown. We find no error in the hearing examiner's holding on this point. Since respondents had only two basic styles of wigs the claim that they had five styles was at best misleading. Their advertising should properly have informed prospective purchasers that the two wigs (a long-hair wig and a short-hair wig) could be converted into other styles. Also, we believe the designation of one color by different names has the capacity to mislead or deceive.

The last exception to the order concerns the provision requiring respondents to notify the Commission at least 30 days prior to any proposed change in the corporate respondent. While conceding that for enforcement purposes the Commission should be notified of change in the status of the corporation, respondents contend that the requirement that notice be given 30 days before the change is unduly burdensome and unnecessary. We agree that in this case advance notice is unnecessary. The order will be modified to require appropriate notification within 30 days after any change has occurred.

Respondents finally contend that the practices challenged by the complaint have been terminated and that the public interest does not require or warrant the issuance of an order to cease and desist. In support of this contention respondents rely on the showing that Skylark discontinued shipments of merchandise in October 1969 and on the absence of any evidence that respondents had engaged in any of the practices alleged in the complaint after 1967. Thus, according to respondents, there is no evidence by which to conclude that the practices alleged in the complaint would either be continued or renewed by respondents.

Contrary to this argument, however, the fact that illegal conduct has been discontinued does not render a controversy moot, *Carter Products, Inc. v. Federal Trade Commission*, 323 F. 2d 523 (5th Cir., 1963); *Clinton Watch Company v. Federal Trade Commission*, 291 F. 2d 838 (7th Cir., 1961), nor does it cast upon complaint counsel the burden of proving that the practices will be resumed, as respondents appear to believe. As the court held in *P. F. Collier & Son Corp., v. Federal Trade Commission*, 427 F. 2d 261 (6th Cir., 1970) "Where an illegal trade practice is once proved against an enterprise, and is capable of being perpetuated or being resumed, it may be presumed to have continued, and an order may issue to prevent it, even upon a showing that it has been discontinued or abandoned."

The Commission is vested with a broad discretion in the determination of whether an unlawful practice has been surely stopped and

337

Final Order

whether an order to cease and desist is required. It is incumbent upon a person who claims abandonment to show to the Commission's satisfaction that the practice will not be resumed. Respondents herein have failed to make such a showing. We have no reason to believe that they will not go back into the same business and engage in the same practices. The appeal on this point is therefore denied.

To the extent indicated herein, respondents' appeal is granted and in all other respects it is denied. The initial decision of the hearing examiner, modified to conform with this opinion, will be adopted as the decision of the Commission.

FINAL ORDER

This matter having been heard by the Commission upon respondents' appeal from the hearing examiner's initial decision, and upon briefs and oral argument in support thereof and in opposition thereto; and the Commission having rendered its decision granting in part and denying in part the appeal and directing modification of the initial decision:

It is ordered, That the following order be, and it hereby is, substituted for the order contained in the initial decision:

It is ordered, That respondents Skylark Originals, Inc., a corporation, and its officers, trading under its own name or under the name Patti Fashions or any other trade name or names, and Daniel L. Freedman and Beverly Freedman, individually and as officers of said corporation, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the advertising, offering for sale, sale or distribution of ladies' clothing, wigs or other products, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the abbreviation "Reg." or the word "regular" or any other abbreviation, word, term or expression of similar import or meaning to refer to any amount which is in excess of the price at which such merchandise has been sold or offered for sale in good faith by the respondents for a reasonably substantial period of time in the recent, regular course of their business; or misrepresenting, in any manner, the price at which such merchandise has been sold or offered for sale by the respondents.

Final Order

80 F.T.C.

2. Falsely representing, in any manner, that savings are available to purchasers or prospective purchasers or respondents' merchandise; or misrepresenting, in any manner, the savings or amount of savings available to purchasers or prospective purchasers of respondents' merchandise.

3. Failing to maintain adequate records (a) which disclose the facts upon which any savings claims, including representations as to former prices and similar representations of the type described in Paragraphs 1 and 2 of this order are based, and (b) from which the validity of such claims and representations can be determined.

4. Failing, when request is made pursuant to a guarantee of satisfaction or of full refund and in accordance with the terms of such guarantee, to refund the purchase price of merchandise together with all charges paid by purchasers in connection with such purchase voluntarily and within the time specified in respondents' advertisements, or if no time is specified, within a reasonable time not to exceed 30 days from the date of receipt of the returned merchandise.

5. Failing to fulfill promptly all of respondents' obligations and requirements under the terms set forth in, or represented directly or by implication to be contained in, any guarantee in connection with the sale of said products.

6. Representing, directly or by implication, that any product or service is guaranteed unless:

(1) the nature and extent of the guarantee, the identity of the guarantor and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed, and

(2) the guarantor does in fact perform all of the actual and represented obligations under the terms of guarantee.

7. Advertising, for sale merchandise of a stated style, model, material or color or other stated features or characteristics unless respondents have made arrangements to obtain, and to maintain, sufficient merchandise as so represented and described to fill all reasonably anticipated orders of such merchandise.

8. Representing, directly or by implication, that any offer is limited in time or in any other manner unless any repre-

sented limitation or restriction is actually imposed and in good faith adhered to.

9. Failing to make deliveries of products within the period of time specified by respondents or, if no time is specified, within a reasonable time, not to exceed 30 days from the date of receipt of the order; *Provided, however,* That where an order for merchandise cannot be immediately filled for reasons beyond respondents' control, respondents shall promptly notify the prospective purchaser of such fact, stating the anticipated date of delivery and giving him the option of an immediate refund.

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 notify the Commission within thirty (30) days after any change in the corporate respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other change in the corporation which may affect compliance obligations arising out of this order.

It is further ordered, That the hearing examiner's initial decision as modified herein be, and it hereby is, adopted as the decision of the Commission.

It is further ordered, That respondents shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

IN THE MATTER OF

CAREER SEARCH INTERNATIONAL, INC., ET AL.

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