

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

Chairman Kirkpatrick not participating.

IN THE MATTER OF

D. L. BLAIR CORPORATION, ET AL.*

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

Docket 8837. Complaint, Feb. 22, 1971—Order and Opinion, Jan. 22, 1973.

Order adopting administrative law judge's initial decision and order dismissing complaint as to respondents.

Mr. Thomas J. Grady and Mr. Garland S. Ferguson, supporting the complaint.

Mr. Felix H. Kent of Lawler, Sterling & Kent, New York, New York, for respondents.

INITIAL DECISION BY ANDREW C. GOODHOPE, HEARING EXAMINER

MAY 1, 1972

PRELIMINARY STATEMENT

On February 22, 1971, the Commission issued its complaint against the D. L. Blair Corporation, eight of D. L. Blair Corporation's wholly-owned subsidiary corporations and Cy Draddy, as an officer of D. L. Blair Corporation (Blair) and each of its wholly-owned subsidiary corporations charging them with violations of the provisions of Section 5 of the Federal Trade Commission Act in connection with a promotion of the McDonald's Corporation, called the McDonald's \$500,000 Sweepstakes.

The complaint also included two McDonald's corporations and the McDonald's advertising company, D'Arcy Advertising Company, as respondents. On April 12, 1971, the Commission issued its order against the McDonald's Corporations [78 F.T.C. 606]

*For complaint in this case see companion cases *In the Matters of McDonald's Corporation, et al. and D'Arcy Advertising Company*, Docket Nos. C-1897 and C-1898, 78 F.T.C. 606, 616.

and the D'Arcy Advertising Company [78 F.T.C. 616] based upon a consent agreement entered into by those companies with the Commission (FTC Docket Nos. C-1897 and C-1898). The respondent Blair, its subsidiaries and Cy Draddy filed an answer to the complaint in which they admitted certain of the allegations of the complaint but denied that they had been engaged in unfair and deceptive practices in violation of Section 5 of the Federal Trade Commission Act.

Thereafter, hearings were held in Buffalo and New York, New York, at which time testimony and documents were incorporated into the record in support of and in opposition to the complaint. Counsel in support of the complaint and counsel for respondents filed proposed findings of fact and briefs in support thereof. Any proposed findings of fact or conclusions not found or concluded herein either specifically or by implication are rejected and the hearing examiner, having considered the entire record, including proposed findings of fact and conclusions and briefs filed by both parties, makes the following findings of fact:

FINDINGS OF FACT

1. Respondent D. L. Blair Corporation 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 575 Lexington Avenue, New York, New York.
2. Respondents D. L. Blair Sales Company, Inc., D. L. Blair Service Corporation, D. L. Blair Visuals, Ltd., and D. L. Blair Contest Corporation, the Stock Game, Inc., corporations, have been dissolved pursuant to the laws of the state in which they were organized and doing business, and said corporations are no longer in business. (RX 71-75.)
3. Respondents Audit Bureau of Mailing, Inc., Incentive Consultants, Inc., and Promotion Audit Corporation are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their principal offices and places of business located at 575 Lexington Avenue, New York, New York. They are wholly-owned subsidiaries of respondent D. L. Blair Corporation.
4. Respondent Cy Draddy is an individual and an officer of respondents D. L. Blair Corporation, Audit Bureau of Mailing,

Inc., Incentive Consultants, Inc., and Promotion Audit Corporation. He formulates, directs and controls the acts and practices of the corporate respondents of which he is an officer, including the acts and practices herein set forth. His address is the same as that of respondent D. L. Blair Corporation. (Tr. 443-454, 624.)

There is no evidence in the record connecting any of these corporations other than the D. L. Blair Corporation with the McDonald's \$500,000 Sweepstakes, or showing that they were active in any way with this promotion.

5. In the course and conduct of their businesses, and at all times mentioned herein, respondents, Blair and Cy Draddy, cause their respective products and services to be sold, placed and distributed throughout the United States. Respondents at all times mentioned herein have maintained a substantial course of trade in commerce as "commerce" is defined in the Federal Trade Commission Act. (Complaint Para. Four, Answer Para. 5.)

6. In the course and conduct of their businesses, and at all times mentioned herein, respondents have been and are now in substantial competition in commerce with corporations, firms and individuals in the sale and distribution of their products and services. (Complaint Para. Three; Answer Para. 4) During the year 1968 Blair conducted about 75 sweepstakes promotions of various kinds for its clients. (Tr. 640.)

7. Blair is a consultant and administrator for marketing promotions, contests and sweepstakes. It is not an advertising agency and does not prepare or place advertising. Chiefly, it provides the following services to its clients: designs the prize structure to be offered in a promotion; devises the rules for participation in the promotion; receives mailed entries from participants; procures the prizes; distributes facsimile sheets; authenticates entries; awards prizes; and generally advises clients as to the operations of sweepstakes promotions. (Tr. 496-497.)

8. McDonald's Corporation (McDonald's) and its advertising agency, D'Arcy Advertising Company (D'Arcy) prepared and purchased a 24-page advertising insert for the June 1968 issue of Reader's Digest. As part of the insert, D'Arcy and McDonald's decided to use a sweepstakes promotion. They engaged Blair to administer the sweepstakes for a fee of \$25,000. (Tr. 501-504; 555-556.)

9. A sweepstakes is a prize promotion based upon chance and

not containing the element of consideration. One type of sweepstakes is a "preselected" winner sweepstakes in which winning and losing numbers or symbols are distributed to the public. No drawing is conducted but the individual must either go to a central location to check his number or symbol against a list to determine whether he has a winning number or symbol or he must send his number to the administrator of the sweepstakes to determine this. (Tr. 638-643.) The McDonald's Sweepstakes was a preselected winner sweepstakes in which the individual was required to go to a McDonald's restaurant to determine whether he had a winning number or he could secure the list of winning numbers from Blair to determine this. (Tr. 455.)

10. "McDonald's \$500,000 Sweepstakes" was prepared and operated in the following manner:

Approximately 18,900,000 copies of an advertising insert entitled "Mini-Trips for Maxi-Fun" were printed and inserted into the June 1968 issue of Reader's Digest magazine. (CX 1, insert following p. 146.) On the last two pages of each insert was a coupon bearing one of 11 different numbers. (See App. A, attached hereto and made a part hereof [p. 246 *infra*].) Five of these numbers were selected and designated as winning numbers and were printed on 15,610 of the coupons. The other six numbers were selected and designated as losing numbers and were printed repeatedly on the remaining millions of coupons. (CX 91.) Purchasers of Reader's Digest who wished to enter the Sweepstakes were instructed to compare the number on the coupon with a list of winning numbers on display in restaurants operated by McDonald's Corporation and its lessees and franchisees or by writing D. L. Blair for a facsimile of the display. If the numbers matched a winning number, the holder of the coupon was entitled to one of the 15,610 prizes. As provided by the Sweepstakes rules, the contestant was then to sign the coupon if it were a winning entry and send it along with his name and address via registered mail to Blair in order to receive his prize.

11. Blair, prior to the publication of the sweepstakes in Reader's Digest, reviewed the sweepstakes coupon, devised the rules for the promotion and suggested that the word "reserved" be used in connection with the list of prizes and that the body copy specifically state that the prizes not claimed would never be given away. (Tr. 556-561; 625-629; CX 29, 49.) These sug-

gestions by Blair were adopted by D'Arcy and McDonald's. The reason for using the word "reserved" in connection with the prizes was because the Post Office Department through its General Counsel's Office had approved the use of the word "reserved" for mailing purposes in connection with preselected winner sweepstakes. (Tr. 625-629; CX 49.)

12. The June 1968 issue of Reader's Digest consisted of about 18,900,000 copies distributed in the United States. The five winning numbers were to be printed on 15,610 of the Sweepstakes coupons and mailed out in that number of copies of Reader's Digest. The remaining copies of Reader's Digest all contained coupons with the six losing numbers. The winning numbers were seeded into the June 1968 issue under careful supervision on the premises of the J. W. Clement Co. (subsequently known as Arcata Graphic Corporation, Tr. 243) in Buffalo, New York, who was the printer of the June 1968 issue of Reader's Digest. (CX 144 A-D.)

13. After the publication of the Sweepstakes in the June 1968 edition of the Reader's Digest, the respondents Blair and Cy Draddy awarded 227 prizes (CX 181; RX 33) at a cost to Blair of about \$12,000. As was provided by the rules, Blair handled all the entries submitted by entrants and all correspondence and other work in connection with the entries, including checking the eligibility of the winning entrants into the Sweepstakes. The Sweepstakes ended on September 2, 1968, and all entries had to be postmarked on or before that date.

14. As a result of the publication of this Sweepstakes and problems which arose during the course of the Sweepstakes in the Buffalo, New York area (discussed hereafter), counsel in support of the complaint insist that the respondents have engaged in acts and practices, all of which are false, deceptive and misleading by representing, directly or by implication, that:

(a) 15,610 prizes worth \$500,000 at retail, consisting of 10 Ford Country Squire Station Wagons, 100 Magnavox 23" color television sets, 1,500 Kodak Mini-Super 8 Hawkeye Instamatic movie cameras with Super 8 Instamatic projector, 4,000 Aurora Mini-Electric trains and 10,000 Tensor Mini-High Intensity lamps were to be awarded to individuals who held winning coupons in "McDonald's \$500,000 Sweepstakes."

(b) Individuals who submitted coupons bearing winning numbers in accordance with the rules stated on the back of the coupon would be awarded a prize and had only to sign such winning

coupon and mail it to respondent D. L. Blair Corporation by registered mail in order to claim and obtain a prize.

(c) Individuals participating in "McDonald's \$500,000 Sweepstakes" were afforded a reasonable opportunity to win the represented prizes.

(d) Respondents distributed 15,610 winning coupons to individuals eligible to participate in and win prizes in "McDonald's \$500,000 Sweepstakes."

(e) 15,610 prizes had been purchased or "reserved" for individuals who held winning coupons in respondents' "McDonald's \$500,000 Sweepstakes." (See complaint counsel's Seventh Prop. Find.; also Para. Six of Comp.) These allegations will be considered *seriatim*.

15. First, counsel in support of the complaint assert that respondents misrepresented that 15,610 prizes would be given in the Sweepstakes rather than the 227 which were actually given. They state that this misrepresentation must be gleaned directly from the statements made in the Sweepstakes coupon and its accompanying advertisements. This is true since there is no other evidence in the record either documentary or testimonial to support such a claim. This contention must be rejected. The ad pertaining to the Sweepstakes is quite short and easy to understand. There is nothing in the ad which states that all of the prizes will be awarded; in fact, it is specifically stated "remember these prizes are reserved for 15,610 Lucky Winners. You may be one but you will never know if you do not claim your prize. All prizes not claimed will never be given away, so hurry! Sweepstakes closes September 2, 1968." The clear implication of this is that the prizes not claimed will not be given away. There is no way that the language used can be construed by a consumer or anyone else, directly or indirectly, that all the prizes will be given away when the direct opposite is indicated. All a consumer or subscriber to Reader's Digest had to do was compare the number at a McDonald's display or obtain a facsimile of the display to determine if he were a winner or a loser. Respondents cannot be required to force holders of winning numbers to claim their prizes which in effect is what is being urged by complaint counsel. Respondents, as a result of their experience and the fact that their fee was only \$25,000, undoubtedly knew that a small percentage of the prizes would be claimed. Possibly they should have stated that only a few of the prizes would be given away, but this defi-

ciency is not the charge in the complaint nor is it urged by complaint counsel.

16. The second claim of misrepresentation is that respondents did not carry out their offer that all an individual with a winning coupon had to do to obtain his prize was to sign the coupon and submit it to Blair in accordance with Part 3 of the rules printed on the coupon. In the case of the great majority of the prizes awarded, this was apparently true. Counsel in support of the complaint claim that at least seven persons who submitted winning coupons were unjustly denied their prizes by Blair. These were all from the Buffalo, New York, area. Counsel also contend that certain holders of winning coupons were required to sign affidavits in order to receive their prizes, which affidavits gave McDonald's the right to use the entrant's name, photo and any statements made about McDonald's. (CX 89, 102-112.) In addition, counsel state the winners were subjected to interviews by private detectives prior to being awarded their prizes. (Eighth Prop. Find., pp. 32-56.)

17. After the Sweepstakes started, the respondents became suspicious because they were receiving what appeared to them to be an inordinate number of winners from the Buffalo, New York, area as compared with other areas of the country. For example, respondents received 11 winning entries from Buffalo, New York, proper and a total of six from New York City proper, whereas the Reader's Digest circulation in Buffalo was only about one-tenth of the New York City circulation. (CX 124, 143.)

18. Four entries bearing Cornell Aeronautical Laboratories located in Buffalo, New York, as the return address were obtained by Miss Diane Dudek (now known by her married name, Majchrzak) from an employee of J. W. Clement Co. and given by her to Maureen O'Brien, Dolores Falter Ryan and Evelyn Wickens, all employees of Cornell Aeronautical Laboratories. (Tr. 236-238.) Three of these four coupons bore winning numbers. The employee of J. W. Clement Co., a Daniel Redlein, told Diane Majchrzak that he had obtained the coupons at work. (Tr. 238.)

19. The entries submitted by Diane Majchrzak, Maureen O'Brien, Dolores Falter Ryan and Evelyn Wickens were not obtained legitimately from Reader's Digest magazine, as required by Rule 3 of the McDonald's Sweepstakes Rules, but in fact, had apparently been stolen by an employee of J. W. Clement

Co. (Tr. 253.) Further, such entrants did not comply with Rule 1 or 2 of the Sweepstakes Rules requiring them to first ascertain whether they were winners. (Tr. 84-90.) They sent their coupons in without even bothering to check if they were winners.

In the examiner's opinion, respondents were justified in refusing to award these three prizes under the circumstances.

20. Two other holders of winning coupons from the Buffalo area appeared and testified, Mrs. Phillip Buscemi (Tr. 69, *et seq.*) and Mr. Richard Schnier (Tr. 37, *et seq.*). Counsel in support of the complaint urge that these two were entitled to prizes and should have received them. This contention must be rejected since both entrants failed to comply with the contest rules; Mrs. Buscemi failed to sign her entry (Tr. 76-77) as required and Mr. Schnier's entry was postmarked after September 2, 1968, when the contest closed. Counsel in support of the complaint argue that respondents somehow waived the rules in these two cases and should have awarded them prizes. This contention is rejected.

21. Mr. Frank Carberry of Buffalo, New York, also submitted a winning coupon but was not awarded a prize. He was subpoenaed to appear at the hearing in Buffalo, New York, but failed to appear. Several attempts were made by counsel in support of the complaint to contact Mr. Carberry but he never appeared. No consideration is given to this person's entry since his subsequent refusal to appear and explain his entry at least casts doubt upon his entry. Nor does the testimony of his friend, Mr. Schnier, correct this deficiency. (Tr. 58-59.)

22. Mr. John K. Courter testified at the hearing in Buffalo, New York, that he submitted a winning entry (Tr. 133, *et seq.*), but only received his prize after complaining to McDonald's, Reader's Digest, the Better Business Bureau and the local newspaper. Thereafter, he was contacted by a representative of Reader's Digest and after some delay received an affidavit from Blair to be signed, which he did, and received his prize. Obviously this man should have received his prize much sooner than he did and without having to go to the trouble he did to get it. However, he finally received it. The suspicions and investigation of the Buffalo entrants undoubtedly led to this problem and a finding of deception cannot be based upon respondents' delay in this instance.

23. Mr. Frank H. MacFarland submitted a coupon in the

McDonald's Sweepstakes postmarked August 21, 1968. Mr. MacFarland's entry was received late in the promotion like most of the other suspected entries from the Buffalo area (CX 138) and was turned over to Reader's Digest for investigation. Mrs. Spelts, a Blair employee, testified that she sent affidavits to all entrants from Buffalo to whom prizes had not been awarded although coupons bearing winning numbers were submitted by such people. (Tr. 585.) Mr. MacFarland may not have received the affidavit or may not have returned it. Since the affidavit form was not returned to Blair by MacFarland and since neither Reader's Digest nor D'Arcy instructed Blair to award a prize to MacFarland subsequent to Reader's Digest's investigation, Blair did not award the prize. Mr. MacFarland at no time wrote to Blair or to any other party of not having received his prize. (Tr. 34.) It is apparent that Mr. MacFarland should have been awarded his prize. However, this is the only instance in the record where respondents failed in this regard. The examiner does not feel that this single instance is sufficient to establish that the respondents engaged in a practice of unjustifiably refusing to award prizes to eligible winners. This is particularly true in view of the situation which developed in Buffalo, New York, where apparently some winning numbers were removed from the J. W. Clement Co., the printer of the June issue of Reader's Digest.

24. Counsel in support of the complaint also rely on the fact that respondents obtained affidavits from at least some of the winners and had private investigators conduct interviews with some of the entrants before awarding the prizes. During the course of the Sweepstakes and prior to the investigation in this matter, the respondents revised the affidavit forms used to remove therefrom the provisions giving McDonald's the right to use the participant's name, photograph or any statement he might make about McDonald's. (CX 89.) The examiner can find nothing false or misleading in requiring the winning entrant to swear that he was not guilty of fraud and that he was not an employee of anyone affiliated with the Sweepstakes. The rules of the Sweepstakes eliminated such persons and there can be nothing wrong in the respondents assuring themselves that the winners were legitimate winners.

25. In subparagraph (b) of Commission's Proposed Eighth Finding, several pages are devoted to argument on detective interviews. The record shows that the first prize winner, Mr.

Howard M. Cohagan, was visited by an investigator before he received his first prize, a new automobile. The Commission did not choose to produce Mr. Cohagan as a witness and in fact Mr. Cohagan wrote to the Commission in a most complimentary manner about Blair's handling of the awarding of the first prize. (CX 114.) Counsel in support of the complaint argue that an interview was a condition to the awarding of a prize. No evidence was produced by counsel in support of the complaint to that effect. Consequently, this contention is rejected.

26. Thirdly, counsel in support of the complaint assert that there is "an implied representation inherent in the offer itself" that participants "were afforded a reasonable opportunity to win the represented prizes." Counsel argue that the claims by respondents that there were 15,610 available prizes would lead the consumer to believe that he had a reasonable chance to win a prize. In fact, they assert that he would be led to the conclusion that his chance was not only "reasonable" but "good." The holder of one of the 15,610 winning numbers had a 100 percent chance of winning his prize if he complied with the rules. The cover of Reader's Digest states that there are over 28 million copies of the magazine printed monthly in 13 languages. (CX 1.) Here again the examiner is unable to see how any misrepresentation of any substance is made. There is no evidence that any consumers' expectations were aroused only to be let down when he determined that he did not have a winning number. This contention by counsel in support of the complaint must likewise be rejected.

27. Fourth, counsel in support of the complaint contend that statements in the coupons represented that respondents had distributed the winning coupons to persons who were eligible to win a prize and *only* to such persons. In support of this contention counsel point out that Reader's Digest was distributed in Nebraska and Wisconsin and that in all probability some prize winning coupons went into these states. The rules of the Sweepstakes specifically exclude persons living in Nebraska and Wisconsin from the possibility of winning a prize, even if they held winning numbers. Furthermore, counsel contend that the Sweepstakes rules excluded employees of McDonald's, its operators, advertising agencies, firms publishing the advertisement, their respective production agents and Blair and such employees' families. Counsel then speculate that some of such employees or their

families may have received a winning coupon but would be ineligible under the Sweepstakes rules. There is no proof in the record that anyone in Nebraska or Wisconsin or any of the employees or their families tried to collect a prize or even received a coupon with a winning number. To conclude from this that respondents stated in their coupons that they would be distributed *only* to persons who were eligible to collect the prizes would be based upon pure speculation. This the examiner refused to do. Consequently, this contention is rejected.

28. Lastly, counsel in support of the complaint urge that respondents have represented that they had *purchased* the prize at the time of the Sweepstakes, and apparently had all 15,610 of them stored somewhere awaiting the winners to claim them. Counsel in support of the complaint rely on the use of the word "reserved" at several places in the coupon. Counsel in support of the complaint assert "Consumers reading these statements could take them to mean that the represented prizes had been purchased at the time the statements were made." (Seventh Prop. Find., p. 27.) Respondents readily admit that they never purchased all of the prizes prior to the Sweepstakes. They concede that Blair was only paid \$25,000 to supply the prizes and other services involved. However, there is no evidence that Blair or McDonald's would not have supplied all the prizes to all legitimate prize winners even had the cost exceeded \$25,000. Nor is there any evidence that prizes as listed were not easily available on the market to be purchased by Blair for prize winners. Respondents apparently had no trouble securing the 227 prizes, including a 1969 Ford Country Squire station wagon which was not even available on the market in June of 1968. (CX 114.) To the hearing examiner, the word "reserved" means something less than purchased and stored away for distribution as counsel in support of the complaint contend. This was also the thinking of the Post Office Department who approved the use of the word "reserved" in connection with matching Sweepstakes when all prizes are not given away for mailing purposes. Under the circumstances, the examiner feels that respondents were justified in using the word "reserved" in its copy and that its use was not misleading or deceptive. How a consumer could be deceived by receiving a prize which was newly purchased and not previously purchased and stored away ("reserved") is hard to conceive.

CONCLUSIONS

1. There is no evidence connecting any of the corporate respondents other than D. L. Blair Corporation in any way to the acts and practices alleged in the complaint. Five of the corporate respondents have been dissolved pursuant to their incorporating state laws as found in the second finding above. Consequently, none of these corporate respondents can be held liable for the charges in the complaint.

2. The evidence in the record fails to establish that the remaining respondents, D. L. Blair Corporation and Cy Draddy, engaged in the false, misleading and deceptive acts and practices charged in the complaint.

3. The record fails to establish that the respondents misled anyone, directly or indirectly, into believing in connection with McDonald's \$500,000 Sweepstakes that:

- a) 15,610 prizes worth \$500,000 at retail would be given away.
- b) anyone submitting a winning coupon would receive his prize without complying with the rules of the Sweepstakes.
- c) anyone participating in the Sweepstakes was afforded a reasonable opportunity to win a prize.
- d) 15,610 winning coupons were distributed to eligible individuals during the course of the Sweepstakes.
- e) 15,610 prizes had been purchased and were in storage for distribution during the course of the Sweepstakes.

ORDER

It is ordered, That the complaint herein be dismissed.

DISSENTING STATEMENT

BY DIXON, *Commissioner*:

This matter, on appeal by complaint counsel from the administrative law judge's initial decision, centers around a so-called "\$500,000 sweepstakes contest" instituted by respondents through one advertisement placed in the June 1968 edition of the Reader's Digest. In bold-faced headlines, the advertisement began, "MAYBE YOU'RE ALREADY A WINNER IN MCDONALD'S \$500,000 SWEEPSTAKES." Then, in the same size bold-face: "15,610 PRIZES RESERVED!"

The Commission complaint alleges that the "promotion was

Maybe you're already a winner in McDonald's. \$500,000 Sweepstakes.

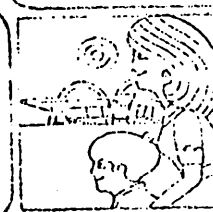
15,610 prizes reserved!

- 10 Ford Country Squire Station Wagons
- 100 Magnavox 23" Color TVs (with stand)
- 1,500 Kodak Mini-Super 8 Hawkeye Instamatic Movie Cameras with Super 8 Instamatic Projector
- 4,000 Aurora Mini-Electric Trains (1/160 Scale)
- 10,000 Tenso Mini-High Intensity Lamps

No purchase necessary. Here's all you do: Take the coupon below to your nearest McDonald's Family Restaurant (Or see Rule 2). Check it with the display you will find there. You're a winner if the number shown on coupon below matches one of the numbers shown on the official display card. Remember these prizes are reserved for 15,610 Lucky Winners. You may be one but you will never know if you don't claim your prize. All prizes not claimed will never be given away, so hurry! Sweepstakes closes September 2, 1968.

McDonald's is your kind of place.

McDonald's



This may be your
winning number:

1996

(see other side for Official Rules)

McDonald's

McDonald's is your kind of place.

\$500,000 SWEEPSTAKES (SEE OTHER SIDE.)

Official Rules:
No Purchase Required! Here's All You Do!

1. Take this official "Winning Meal" Sweepstakes coupon to your nearest McDonald's for see Rule 2.
2. You are a prize winner if the number shown on your coupon matches one of the numbers appearing on the official display.
3. You may obtain a facsimile of the official display, by sending a stamped, self-addressed envelope to: Ronald McDonald, Box 397, New York, N.Y. 10016.
4. Sign your winning entry, and send it along with your name and address, via registered mail, to: D. L. Blair Corporation, 25 East 26th St., New York, N.Y. 10010.

Winning claims must be postmarked by September 2, 1968, and received by September 9, 1968. Upon verification by the judges that yours is one of the 15,610 valid winning coupons appearing in Reader's Digest all across the country, you will receive your prize. Decisions of the judges are final. Winners will be notified by mail. One prize to a family. No substitutions for prizes.

4. Sweepstakes open to residents of the U.S. except employees and their families of McDonald's Corporation, its operators, advertising agencies, firms publishing this advertisement, their respective production agents, and the D. L. Blair Corporation. Sweepstakes void in Wisconsin, Nebraska, and wherever prohibited by law, and subject to all federal, state and local regulations.

(Front)

(Back)

false, misleading and deceptive" because, *inter alia*, it represented, falsely, that \$500,000 worth of prizes would be awarded, and that participating individuals were afforded a reasonable opportunity to win the prizes which are listed in the advertisement. It is uncontested that 227 prizes, worth only \$12,000, were ultimately awarded, and that respondents, when they initiated the contest, knew that nowhere near \$500,000 worth of prizes would be given. Respondent D. L. Blair accepted \$25,000 as a fee for running the contest, out of which it was obliged to pay for *all* prizes.

The threshold question is whether or not the subject promotion had the capacity to lead the consumer into believing that 15,610 prizes, worth \$500,000, were to be awarded. The administrative law judge's principal finding in this regard, that "There is nothing in the ad which states that all the prizes will be awarded," very clearly begs the question. For consumers to be led to believe that \$500,000 worth of prizes would be awarded, it was not necessary that the advertisement come flat out and state that all of the prizes would be given away. I am persuaded that the subject advertisement, taken in its entirety, conveyed the impression that all of the prizes listed would be awarded. To look at it somewhat differently, consumers exposed to the subject advertisement would have been startled if informed, after having entered into the contest, that, of the 15,610 prizes listed, only 227 would ever be awarded, for the clear implication of the advertisement was that \$500,000 worth of prizes would be given away.

Significantly, the administrative law judge relies more upon a so-called "disclaimer" ("Remember these prizes are reserved for 15,610 Lucky Winners. You may be one but you will never know if you don't claim your prize. All prizes not claimed will never be given away, so hurry!") than his finding that nothing in the advertisement stated that all prizes would be awarded. The "disclaimer," however, was clearly ineffective, as it was obscured both by its ambiguous language and its submergence in the small print of the advertising copy. Adding to its obscuration is the fact that any consumer, interested in participating in the promotion, could determine all the necessary aspects of the contest without reading the paragraph containing the "disclaimer." The broad scope of the promotion is described in the headlines. The prizes and the rules of the contest are in para-

graphs separate from the "disclaimer" paragraph, which was itself unmarked.

As to the ambiguity of the "disclaimer," it could be interpreted to mean that although all prizes not claimed would never be given away, there are a sufficient number of outstanding coupons to result in redemption of \$500,000 worth of prizes. A careful analysis by an intelligent reader of the advertisement, I recognize, should lead to the interpretation urged by the administrative law judge. The form such analysis would take is significant. It would require that the consumer understand that 15,610 winning coupons represented the 15,610 prizes, and that the 15,610 prizes have a value of \$500,000. Then, because each time one of the 15,610 winning tickets is not redeemed, the total number of winners is lessened by one, and, if the consumer understands that very few of these winning numbers are redeemed, he should conclude that the advertised \$500,000 is nothing more than a starting figure from which a rough estimate of the real value of prizes to be awarded can be estimated. Unquestionably, the consumer should not be required to employ this kind of analysis in order to refute the direct implications of the advertisement.

I, therefore, dissent from the majority's rejection of the allegation in the complaint that respondents misrepresented the dollar worth of the prizes to be awarded by the \$500,000 sweepstakes contest.

It is established in this record that, on the basis of previous experience with this type of contest, Blair was well aware that a very small percentage of the contestants with winning numbers, as low as 1.5 percent, would attempt to redeem their winning coupons. This contest was designed by Blair as a traffic-builder for McDonald's stores. Since McDonald's paid only \$25,000 for this promotion, the \$500,000 prize offered was obviously an attempt to attract customers for McDonald's, with the full knowledge that there was no possibility that the represented amount in prizes would be awarded.

The majority opinion brushes aside these facts of record with the assertion that there "is no question, however, that respondent was prepared to award * * * every prize claimed." This is an obstinate refusal to recognize the deception alleged in the complaint. The allegation is that respondents falsely represented that \$500,000 in prizes would be awarded. As above stated, the obvious purpose was to induce customers to buy at McDonald's

on the assumption that the contest was established with the intention of awarding such customers with prizes amounting to \$500,000. There was no such intention, and for that reason the representation is deceptive. The mere fact that this contest promoter "was prepared" to award prizes in a certain amount, when it knew from experience that prizes in such amount would never be claimed, is no defense to the alleged misrepresentation.

I note the majority's assertion that after summoning up all the "expertise" at its disposal, it concludes that it is not likely that many participants could be led to think that the advertisement represented that all prizes would in fact be given away. From the best that I can determine from the majority opinion, the "'expertise' at its disposal" is embodied in its assumption that there were two groups of consumers: those who merely glanced at the advertisement and did not participate in the sweepstakes contest and those who did participate and necessarily read the entire advertisement.

I do not believe these assumptions are sound. In the first place, there is no reason to assume that those who did not thoroughly read the advertisement would not participate in the contest. Surely all participants in a contest are not assiduous readers of an entire ad which contains the rules of the contest. In the second place, it seems unreasonable to assume that those who did participate thoroughly read and *understood* the advertisement and the so-called disclaimer. The ad itself, which is appended to the majority opinion, contains all the information necessary for a person to participate in this contest in paragraphs separate and apart from the disclaimer relied upon by the majority.

Whatever the majority means by its reference to "persons who merely glanced at the ad," it is obvious that a person could determine all the necessary facts for participation without ever getting to the statement relied upon by the majority. Even assuming that this statement relieves the deception, which I do not, I am convinced that a substantial number of persons would concentrate on only that part of the ad which gave details as to participation, that they did participate, and thereby increased the number of McDonald's customers. I believe that the ad was purposely so designed. Moreover, the majority's assertion in footnote 4 [p. 257 herein] that it was not to McDonald's interest to have a high rate of consumer indifference, is irrelevant.

McDonald's interest was to have enough people believe that all prizes would be awarded so as to increase business in its stores sufficiently to more than recoup the \$25,000 it paid for the contest. In addition, respondents' motivation has absolutely no bearing on what consumers were led to believe.

The obviously inadequate disclosures relied upon by the administrative law judge does not relieve the deception. In addition to the fact that the "disclosure" was buried in the text of the advertisement, after the contestants were assured of "\$500,000 Sweepstakes" prizes in bold headlines, the disclosure only said that all prizes not claimed would never be given away. This is respondents' attempt to circumvent the fact that only a small percentage of the offered prizes would be awarded. Respondents should be required to cease representing a total value for prizes, in an effort to induce customers for their client, when they know that prizes of such total value will not be awarded.

* * * * *

The administrative law judge almost summarily disposes of the further allegation in the complaint that consumers were led to believe that contest participants would be "afforded a reasonable opportunity to win the represented prizes," whereas, in fact, the odds of winning (one chance in 1.9 million of winning a first prize, and one in 1800 of winning a fifth prize) were not reasonable. The administrative law judge's rejection of the allegation seems to be based principally¹ on his finding that a holder of a winning ticket has a 100 percent chance of winning. The complaint, of course, does not allege that the holder of a *winning* ticket had no reasonable chance of winning, and so this finding is not only completely irrelevant, it borders on the frivolous.

The administrative law judge failed to confront the relevant questions: did the advertisement imply that the odds of winning the contest were reasonable, and, if so, were the odds reasonable?

The subject advertisement declares in its headlines that "the consumer may already be a winner," and that there are 15,610

¹ In addition, the administrative law judge noted that each edition of the Reader's Digest disclosed the number of copies circulated. The only possible relevance of this fact is that a terribly curious contestant could determine the odds of winning if he knew (and there is no reason to expect that he would) that most of the copies of the magazine contained the promotion. But this hardly constitutes a meaningful disclosure.

prizes, a figure which in absolute (although not in relative) terms seems considerable. Thus, the promotion, by emphasizing the opportunity of winning significant prizes, implied that the odds of winning were reasonable.

Moreover, it is implicit in every contest, even absent the kind of language referred to above, that it would not be essentially a meaningless gesture for the consumer to enter the contest. The consumer, in short, expects that there is a reasonable chance of winning unless informed otherwise. This was recognized by the Commission in its Trade Regulation Rule for Games of Chance where the Commission found that the odds of winning most contests are slim (in four games considered, the odds of winning a major prize were 1.2 in one million) *and assumed that the consumer expects the contrary to be the case*. Having recognized this, the Commission determined that it was necessary to issue a rule requiring the disclosure of odds. It should be noted, in this connection, that while the subject trade regulation rule is directed in large part to contests where the odds of winning change periodically (a point made much of by the majority of the Commission), the rule also applies to contests of a shorter duration (less than 30 days), where any change in the odds is of no significance. Specifically, the rule provides that the odds be disclosed at the inception of the contest and at no other time when the contest lasts no longer than 30 days. Thus the rule recognizes the need for disclosures as to the odds of winning in *any* contest.

Finally, I do not think that it can be seriously contended that by any standard there was a reasonable chance of the contestant winning a major prize in the subject contest. Consider the fact that \$12,000 worth of prizes was spread among 18 million potential contestants, that only one first prize was awarded among these 18 million potential contestants, and that if every first prize had been awarded (only one was) the odds of winning were one in 1.8 million.

Hence, I find that consumers were led to believe, by respondents' promotion, that the chances of winning a prize were reasonable, whereas, in fact, they were not. I, therefore, dissent from the Commission order for the further reason that the initial decision it has adopted erred in dismissing the subject allegation of the complaint. In summary, I would reverse the administrative law judge and sustain the complaint as to the two allegations discussed above, and issue an appropriate order.

SEPARATE DISSENTING STATEMENT

BY JONES, *Commissioner*:

I associate myself fully with Commissioner Dixon's dissent. Additionally, I believe the majority opinion is in error because in my view the challenged promotion of this contest was deliberately calculated to mislead consumers as respects their chances of winning one of the advertised prizes. Unless the \$500,000 figure was designed to exaggerate the consumer's perceptions of his chances of winning, I cannot understand why the advertiser would elect to use that total figure when he was fully aware that no such amount would ever be given away as is apparent from the fact that the cost of administering this \$500,000 contest was a mere \$25,000! Moreover, I believe the Commission's decision is contrary to the spirit and underlying premises of our Trade Regulation Rule For Games Of Chance which requires any promoter of a game of chance to disclose the odds of each such game so as to ensure that consumers' will not be misled as to their chances of winning. Contrary to the statements contained in the majority opinion the basis for the required disclosure of the odds in games of chance promotions in no sense rested solely on the fact that these odds change during the course of the game. Unless the disclosure of odds was important in and of itself, any changes in these odds would be of little interest. Moreover, if the Commission was concerned with the fact that some advertised prizes would no longer be available to win, then it would have been more appropriate to handle that issue directly rather than as the majority would have us believe—and I believe contrary to the fact—to handle it through required disclosure of the odds.

I believe the Commission's action in dismissing this complaint is inconsistent with its games of chance trade regulation rule and that it is contrary to the evidence and the law developed and applicable in this case.

OPINION OF THE COMMISSION

BY DENNISON, *Commissioner*:

The complaint in this matter alleged that the promotion of McDonald's \$500,000 sweepstakes was false, misleading and deceptive. A principal charge in the complaint was that the promotion advertised the availability of 15,610 prizes worth \$500,000

but the ultimate redemption rate resulted in the awarding of only 227 prizes worth about \$12,000. There is no question, however, that respondent was prepared to award, based on a winning number, every prize claimed. Furthermore, we are in agreement with the administrative law judge that respondents' advertisement made it adequately clear that the total number and worth of prizes that would ultimately be given out would depend on the extent to which the individual holders of the 15,610 winning numbers claimed their prizes prior to a certain date. Although it is without dispute that only 227 prizes, worth only \$12,000, were ultimately awarded, that fact is essentially irrelevant to the situation of each individual contestant; as to him the possibility of being able to claim a prize was exactly as advertised. Accordingly, and for the reasons set forth more fully below, the Commission affirms the dismissal of this part of the complaint as well as other charges dismissed by the administrative law judge.

To begin with, it should be kept clear just what issues are presented to us in this case and what issues are not. The complaint and the subsequent hearings raised only the question of whether the advertisement for the McDonald's sweepstakes promotion was deceptive, the principal charges being that the advertisement for the sweepstakes represented that persons had a "reasonable opportunity" of winning prizes and that all prizes described in the ad would in fact be awarded. As complaint counsel state: "This is a case of false advertising. The representations of the advertisement are crucial." (Appeal brief p. 14.)

The Commission does not have before it any issues of whether, for instance, the sweepstakes might be condemned as an unlawful lottery, *Federal Trade Commission v. R. F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934),¹ or whether respondents' utilization of a sweepstakes promotion in which few of the advertised prizes are in fact awarded might be attacked under a theory of "unfair"

¹ Many "pre-selected winner" sweepstakes involve the distribution of number-bearing coupons to numerous people with the direction that to learn if they have won they need only return the number through the mail (with the suggestion that they also include an order for merchandise). The aim of the McDonald's sweepstakes, however, was to help build traffic in its restaurants. The recipient was told he could learn if his number was a winner by going to a McDonald's outlet where a list of preselected winning numbers was on display. Some state courts have held that the requirement of going to a store constitutes "consideration" and that such traffic-builders are illegal under state anti-lottery laws. Recently the Supreme Court of the State of Washington held that a preselected sweepstakes offer sent through the mail constitutes a lottery device and an unfair method of competition under the state's "little FTC Act." *State of Washington v. Reader's Digest Assn.*, (Wash. 1972, No. 42252).

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business practice, as distinguished from whether it was deceptively advertised. Cf. *Federal Trade Commission v. Sperry & Hutchinson*, 405 U.S. 233 (1972).

Also, of course, dismissal of this case does not in any way imply that other sweepstakes promotions may not have been promoted by various and specific deceptive advertisements. Compare descriptions of the advertisement and practices alleged in the complaints in the consent settlements *Longines-Wittnauer, Inc., et al.*, Docket C-2120 [79 F.T.C. 964]; *The Procter & Gamble Company*, Docket C-2059 [79 F.T.C. 589]; *The Reader's Digest Association, Inc.*, Docket C-2075 [79 F.T.C. 696]; and *Reuben H. Donnelly Corporation*, Docket C-2060 [79 F.T.C. 599]. See also the Report of the Subcommittee No. 4 to the Select Committee on Small Business, House of Representatives, entitled "Investigation of Preselected Winners' Sweepstake Promotions" (H.R. Rep. No. 91-1162, 91st Cong., 2d Sess.).

Finally, dismissal of this case does not foreclose the possibility that the Commission might at some future time find it necessary by rulemaking to impose certain uniform requirements for sweepstakes just as it has regulated certain "games of chance" in its Trade Regulation Rule for Games of Chance in the Food Retailing and Gasoline Industries.² Disposition by adjudication of charges in a single case would not prevent regulation by way of rule-making where unfair or deceptive practices are found to be prevalent in the same industry. See the Trade Regulation Rule on Door-to-Door Sales and the Commission's Interlocutory Opinion in *Hearst Corp.*, Docket 8832, May 26, 1971 [78 F.T.C. 1588].

Turning then to the issues of deceptive advertising in this case, the record shows that McDonald's Corporation and its advertising agency (D'Arcy Advertising Company) prepared and purchased a 24-page advertising insert for the June 1968 issue of Reader's Digest magazine. As part of the insert they decided to use a sweepstakes promotion as a traffic-builder and engaged respondent D. L. Blair Corporation to administer the sweep-

² It has been the position of the Commission that sweepstakes, whether or not operated by food and gasoline retailers, are not covered by that Trade Regulation Rule. See statement of Commissioner Dixon, then Chairman, before the House Subcommittee on Activities of Regulatory Agencies Relating to Small Business, Hearings on "Preselected Winners' Sweepstakes Promotions," Vol. 1, p. 808 (November 1969):

"[I]n general, the sweepstake drawing is a 'one-shot' affair. This one-shot characteristic of sweepstakes might assist us in distinguishing them from games of chance which approach the typical drawing situation but where participants, during the course of the game, can visit the retail outlet many times in their effort to obtain the winning game piece."

stakes. The Blair Corporation is a promoter and administrator of contests and sweepstakes and it devises rules for such promotions, receives mailed entries, authenticates entries and distributes prizes.

In this case McDonald's decided to promote a "preselected winner" type sweepstakes called "McDonald's \$500,000 Sweepstakes." A copy of the page of the ad is attached as an appendix to this opinion [p. 246, herein].

The significance of a preselected winner sweepstakes is that instead of having a raffle-type drawing after all chances or winning numbers have been distributed, the sponsor first prints a number of coupons bearing predetermined "winning" numbers, the total of which correspond to the number of prizes offered. The coupons are then mixed or seeded at random with a much larger quantity of non-winning numbers. All are then distributed. In this case a total of 15,610 winning numbers, each matching one of the 15,610 prizes advertised, were seeded among non-winners in some 18,900,000 copies of the June 1968 issue of Reader's Digest.

Members of the public to whom that issue of Reader's Digest was sold or delivered then had the opportunity to match his or her number with a list of the winning numbers. Although one could send for a list through the mail, the aim of the promotion was to get readers to go to a McDonald's restaurant where such a list was displayed. Obviously, whether a participant ultimately was entitled to a prize depended on two things: (1) whether he in fact received a winning coupon, and (2) whether he acted to find out whether his number was a "winner" and then took the right steps (described in the advertisement) to claim his prize before a certain date. If a participant, after checking his number, learned it was not a winner, he was not instructed to do anything. In other words, he was not to send in his "losing" coupon and there was no apparent opportunity for further drawing to win prizes that might have gone by default.

Complaint counsel's first contention is that the McDonald advertisement was deceptive because it represented that all prizes would in fact be given away to participants. Complaint counsel ask us on the basis of our "expertise" as Trade Commissioners to make this determination from the ad.

Speaking for a majority of the Commission, and summoning up all the "expertise" at our disposal, we simply cannot conclude

that it is likely that many participants could be led to think this. Perhaps some persons who merely glanced at the ad but did not participate, *i.e.*, did not bother to match their numbers with a master list, may have had such an impression. But surely, if this agency is to concern itself with meaningful deceptive advertising cases, we should not be concerned with this type of contingency. Unless a person chose to participate in the sweepstakes he could not have been deceived to his detriment.

Putting ourselves in the position of a person who decided to participate in the contest, we fail to see how he could avoid reading the remaining part of the front side of the ad. He would necessarily have to read that passage to learn what to do with his numbered coupon—and by what date. This passage includes the statement that all prizes not claimed will never be given away:

Remember these prizes are reserved for 15,610 Lucky Winners. You may be one but you will never know if you don't claim your prize. All prizes not claimed will never be given away, so hurry! Sweepstakes closes September 2, 1968.

Implicit in much of complaint counsel's argument is the notion that regardless of the rules of a particular sweepstake or contest the law should require that a sponsor award in some manner all the prizes mentioned. It is argued it is unconscionable for a company to suggest that it is running a "\$500,000 sweepstake" when it knows in advance from past experience that, because of the size of the population covered and the advertising medium, the redemption rate of winning numbers will undoubtedly be below 10 percent. In this case D. L. Blair agreed to run the sweepstakes for a fee of \$25,000 from which it obligated to pay for all the prizes awarded. The 227 prizes finally awarded were worth about \$12,000 (at retail value).

Perhaps on general equitable grounds of fairness there is a public policy argument in favor of requiring that all prizes mentioned in ads should be awarded.³ But we find no basis to say that the "\$500,000-15,610 prizes" was a "fictitious" figure.

Admittedly, the disparity between the amount advertised and the amount given away in this case is surprising to most people

³ It might be noted in passing, however, that in its Trade Regulation Rule for Games of Chance in the Food Retailing and Gasoline Industries, the Commission did not require that all advertised prizes had to be awarded even though the Bureau of Economics investigation disclosed that the redemption rate of winning game pieces was as low as 35 percent. *Economic Report on the Use of Games of Chance in Food and Gasoline Retailing*, p. 467 (1968).

not familiar with this aspect of the advertising trade. But the disparity is due mainly to consumer indifference to the sweepstakes, not to anything false and deceptive in the ad. There was nothing here that lured persons to purchase something that turned out to be of less value than it was touted to be. No holder of a coupon in the sweepstakes had his chances for winning *reduced* by the fact that over 90 percent of the populace did not even bother to enter the contest.

The "\$500,000-15,610 prizes" figure did not exaggerate whatever chances he had to win. It accurately stated the total number of prizes available. In calculating the odds that a person might hold a winning coupon, complaint counsel themselves use the 15,610 prize figure. (Had the total amount advertised been reduced as they suggest, this would have reduced any individual's chances of winning.)

In other words, a participant's "chance" of winning one of the 15,610 advertised prizes remained the same whether another participant holding a winning number claimed his prize or not. The fact that respondents were aware of the high rate of consumer indifference to the sweepstakes (and hence the low anticipated rate of prize redemption) did not make the offer deceptive in any material sense.⁴

The second principal charge made is that the McDonald's sweepstakes offer expressly or impliedly represented that participants were afforded a "reasonable opportunity" to win a prize. Complaint counsel do not define what they conceive to be "reasonable" odds of winning in such a contest, although they do characterize the odds against winning prizes in this sweepstakes as "staggering." (They emphasize that the odds of winning one of the 10 automobiles were 1 out of 1,900,000. However, the odds of winning any of the 15,610 prizes were about 1 out of 1,200).⁵

⁴ It should be noted also that it was not to McDonald's interest to have a high rate of consumer indifference to the ad since it was attempting to increase traffic in its restaurants. It is somewhat ironic for complaint counsel to emphasize the great disparity between prizes offered and those actually awarded. The greater the disparity, the less successful the ad would have been in luring customers into participating in the sweepstakes. On the other hand, had the "deceptive" ad been 100 percent effective in drawing consumer response (an impossible figure where large numbers of people are concerned, of course) all the prizes would have been redeemed. But had this happened, complaint counsel's argument of deception insofar as it is based on disparity would have vanished, there being no disparity.

⁵ It has been calculated that the odds in favor of winning even one of the lesser cash prizes in the New York State Lottery are 1 in 4,167. *U.S. News & World Report*, August 28, 1967, pp. 80-81. Also, it is widely appreciated that the odds against a large cash prize in such legalized lotteries, including the Irish Sweepstakes, are astronomical. Yet, obviously, people are willing to participate simply out of a gambling spirit, despite the fact that they cannot expect to have a good chance of winning.

Complaint counsel argue that people would read such a representation into the advertising or would assume that their chances of winning were good. Again, complaint counsel ask us to make these findings based on our expertise. However, we think it is just as logical to believe the people participated in this sweepstake with the attitude that regardless of the odds there was nothing to lose by so doing but considerable reward if they happened to win.⁶ Indeed, complaint counsel suggest that many people "wishfully hope for miracles" to come their way and this may be what draws people to participate in sweepstakes. It is argued that to counterbalance this gambling instinct respondents had a *duty* when making their offer to inform prospective participants of the odds of winning. In support of this counsel cite the odds-disclosure requirement in the Commission's Trade Regulation Rule for Games of Chance in the Food Retailing and Gasoline Industries, 16 C.F.R. 419.1 (1969).

But the sweepstakes promotion before us pre-dated that Trade Regulation Rule, and that rule was specifically limited to cover particular promotions of "games of chance," not sweepstakes of the type here. See footnote 2 [p. 254], *supra*. To rely on that rule as the sole justification for holding that respondents violated the law in 1968 for having failed to disclose the mathematical odds for winning the various prizes would be equivalent to broadening the scope of the rule and then applying it retroactively—all without going through required rulemaking procedures. *NLRB v. Wyman-Gordon*, 394 U.S. 759 (1969). Any determination of the legality or illegality of respondents' actions must be based on the record in this proceeding.

Furthermore, that rule was predicated on advertising practices that are distinguishable from those involved here. Games of chance in the retail grocery and gasoline industries that were prevalent in the 1960's in many cities involved games that were continually advertised over periods of several weeks and the ads often suggested (contrary to fact) that the odds of winning had

⁶ In holding that we believe it is unlikely that many consumers would read the McDonald's advertising in the manner argued by complaint counsel, we realize that we may not be infallible in judging how consumers perceived such advertising. Our decision here would not, of course, prevent the staff in another proceeding involving similar issues from presenting evidence if it exists, such as a consumer survey, to support their views. The majority simply believes that, on the record of this case, and unaided with such evidence, it is unreasonable to believe that consumers read into this advertising the representations asserted by complaint counsel or that consumers would expect that their chances of winning were necessarily good.

not changed. Consumers were encouraged to continue to shop at certain establishments by participating in the games even though many or all of the available prizes may have been redeemed. Also, the Commission's Statement of Basis and Purpose in that proceeding indicated that the record before the Commission showed a practice by many sponsors of the games to use local newspaper ads to imply that the chances of winning large prizes were very good. Large-prize awards were headlined with the same names of winners listed week after week as though awards of large prizes were constantly being made available. The geographic area involved in some games was not made clear and consumers were led to believe that games were localized when often they were not.⁷ The Commission concluded that "advertising *which repeatedly emphasizes the opportunity to win large prizes, when the chances of winning those prizes is often very remote* is, we conclude, inherently deceptive. Such deception can be cured only by a disclosure of the actual prize structure and odds for games." Statement of Basis and Purpose, p. 26.

Here, in contrast, the McDonald's promotion was a "one-shot" advertisement in an issue of a nationwide magazine. There was no subsequent intensive advertising that falsely implied that new prizes were being added. There is no reason to think that participants erroneously thought the McDonald's sweepstakes was local to their area and that therefore the odds of winning were great. Indeed, the rest of the 24-page McDonald's advertising insert was entitled "Mini-trips for maxi-fun" and described scenic tours in all parts of the United States with a 5-page listing of all the cities and towns in which there was a McDonald's restaurant. Although the ad did not disclose the number of coupons distributed, *i.e.*, the number of Reader's Digests distributed that month, surely the average reader was acquainted with the fact that the Reader's Digest is a widely-selling magazine with probably millions of readers. This should have dispelled any notion, we would think, that the participant had been "selected out" to receive an

⁷ In the *Economic Report on Games of Chance* the staff set forth the following additional examples of deceptive advertising of odds: (1) actually overstating the odds of winning, (2) advertising a large number of prizes being available (*e.g.*, 428,790) without giving any information on the breakdown of prizes (98 percent worth between 10 and 20 cents), (3) running a game program which encompassed several separate and distinct markets but advertising in each market the total number of dollar value of prizes available in all markets, and (4) running the names of \$1,000 winners without giving their addresses so that consumers in a given market may believe these individuals are from their market area. *Ibid.* 460-467.

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entry coupon or that the sweepstakes was confined to a small geographical area.

In short, we fail to find any persuasive basis in the record of this particular case to conclude that participants were deceived by McDonald's Sweepstakes advertisement to believe that they had a "reasonable opportunity" to win any one of the prizes, whatever that term may mean.

As to the other charges in the complaint, we agree that the administrative law judge's dismissal of them was correct for the reasons set forth in his initial decision. An appropriate order accompanies this opinion.

FINAL ORDER

This matter is before the Commission on the appeal of complaint counsel from the initial decision of the administrative law judge issued May 1, 1972, dismissing the complaint. Upon examination of the record, complaint counsel's appeal brief, respondents' answering brief and the initial decision, and after full consideration of the issues of fact and law presented the Commission has concluded, for the reasons set forth in the accompanying opinion, that the initial decision of the administrative law judge should be adopted and issued as the decision of the Commission. Accordingly,

It is ordered, That complaint counsel's appeal from the initial decision of the administrative law judge be, and it hereby is, denied.

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

It is further ordered, That the complaint in the captioned matter be, and it hereby is, dismissed.

Commissioners Dixon and Jones dissented and submitted dissenting statements.

IN THE MATTER OF

KOSCOT INTERPLANETARY, INC., ET AL.

Docket 8888. Interlocutory Order, Jan. 22, 1973.

Order denying motions of certain respondents for a stay of the proceeding or dismissal of the complaint.