

they have complied with this order.

IN THE MATTER OF
AUSLANDER DECORATOR FURNITURE, INC., TRADING AS
A.D.F., ETC., ET AL.

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

Docket 8911. Complaint, Jan. 30, 1973—Order & Opinion, Apr. 23, 1974

Order requiring a Hanover, Md., seller and distributor of furniture and related products, among other things to cease failing to deliver ordered merchandise; delivering damaged or defective merchandise; failing to repair or replace damaged goods as advertised; misrepresenting the availability of merchandise in stock; misrepresenting prices as being "sale" prices unless such prices are reduced significantly to afford a meaningful savings over the regular selling prices; and failing to maintain records to substantiate savings claims. Further, respondents are required to refund all monies paid by customers if respondents fail to deliver merchandise within five (5) business days from an agreed-upon date of delivery.

Appearances

For the Commission: *James D. Tangires, Michael Mpras and Alan Cohen.*

For the respondents: *John S. Yodice and Edwin W. Holden, III.*
Wash., D.C.

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 Auslander Decorator Furniture, Inc., a corporation, doing business as A.D.F. and A.D.F. Warehouse, and Maxwell Auslander, Sandra Tye, and Linda Decker,

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 Auslander Decorator Furniture, Inc., doing business as A.D.F. and A.D.F. Warehouse, is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 7451 Race Road, Hanover, Md. Its warehouse, shipping and storage facilities are located at 701 Edgewood Street, N.E., and Fourth and Channing Streets, N.E., Wash., D.C., and 7451 Race Road, Hanover, Md. It operates furniture outlets in the States of Maryland and Virginia and in the District of Columbia.

Respondents, Maxwell Auslander, Sandra Tye and Linda Decker are individuals and are 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, and their address is that of said corporation.

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

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

PAR. 4. In the course and conduct of their aforesaid business and for the purpose of inducing the sale of their merchandise, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by materials disseminated through the mails, and on tags or labels and in signs posted in respondents' stores. Typical and illustrative of the foregoing, but not all-inclusive thereof, are the following:

FREE DELIVERY
LAY-A-WAY * * * 8 MONTHS FREE STORAGE
ADF WAREHOUSE SALE PRICE!!
SAVINGS!!! AT ALL 7 ADF OUTLETS
ADF WAREHOUSE SALE

ADF WAREHOUSE CLEARANCE SALE
BUY NOW AND SAVE

In addition to the aforesaid statements and representations, the respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the terms and conditions under which merchandise will be sold and delivered and services provided by respondents.

PAR. 5. By and through the use of the above-quoted statements and representations in Paragraph Four, and others of similar import and meaning not expressly set out herein, including the aforesaid oral statements and representations made by respondents and their sales representatives, respondents have represented, and are now representing, directly and by implication, that:

1. Respondents will deliver their furniture to customers on or near the dates they have promised those customers for delivery.
2. Respondents maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised delivery dates.
3. Respondents' customers may purchase furniture on the layaway plan, and, while the payments are being made, the furniture will be stored in their warehouse, ready for delivery upon completion of all payments.
4. Respondents are offering furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

PAR. 6. In truth and in fact:

1. Respondents, in many instances do not deliver their furniture to customers on or near the dates they have promised those customers for delivery.
2. Respondents, in many instances, do not maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised delivery dates.
3. Furniture purchased by respondents' customers on the layaway plan is not, in many instances, stored in the warehouse ready for immediate delivery upon completion of all payments, but is sold to other customers, necessitating reordering of the merchandise when the layaway payments are completed, with resultant delays in delivery.
4. Respondents, in many instances, do not offer furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

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

PAR. 7. In the course and conduct of their aforesaid business and for the purpose of inducing the sale of their furniture, respondents have maintained, and are now maintaining, in their salesrooms, floor models and displays of furniture being offered for sale, on the bases of which their customers select and order the furniture they purchase from the respondents. In this connection, respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the quality and durability of the furniture being offered for sale, the terms and conditions under which merchandise will be sold and delivered, and the services that will be provided by the respondents. Moreover, subsequent to making sales and deliveries, respondents and their employees have made, and are now making, numerous oral statements, representations and promises to their customers regarding the time and the manner in which respondents will perform various adjustments, replacements and/or repairs.

PAR. 8. By and through the use of floor models and furniture displays discussed in Paragraph Seven, together with the aforesaid oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, and are now representing, directly or by implication, that:

1. Furniture which is delivered to respondents' customers will be identical to that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays.
2. Furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, will be replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees.
3. Furniture which is delivered to respondents' customers will be free from damages and/or defects.
4. Furniture which is delivered to purchasers with damages and/or defects, will be repaired or replaced within a reasonable time.
5. Furniture which is delivered to purchasers with damages and/or defects, will be repaired or replaced to the satisfaction of the purchasers.
6. Furniture which is delivered to purchasers with damages and/or defects, will be repaired or replaced in accordance with promises made to the purchasers by respondents' employees.

PAR. 9. In truth and in fact:

1. Furniture is delivered to customers which, in many instances, is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays.

2. Furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, in many instances, is not replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees.

3. Furniture delivered to purchasers, in many instances, is damaged and/or defective.

4. Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced within a reasonable time.

5. Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced to the satisfaction of the purchasers.

6. Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced in accordance with promises made to the purchasers by respondents' employees.

Therefore, the statements, representations, acts and practices set out in Paragraphs Seven and Eight were, and are, false, misleading and deceptive.

PAR. 10. 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 engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by the respondents.

PAR. 11. The respondents' use of the aforesaid false, misleading and deceptive statements, representations, acts and practices, have had, and now have, 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 complete, and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief.

PAR. 12. The acts and practices of the respondents as set forth above 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.

INITIAL DECISION BY ERNEST G. BARNES,
ADMINISTRATIVE LAW JUDGE

FEBRUARY 15, 1974

PRELIMINARY STATEMENT

Respondents Auslander Decorator Furniture, Inc., a corporation, doing business as A.D.F. and A.D.F. Warehouse, and Maxwell Auslander, Sandra Tye and Linda Decker, individually, and as officers of said corporation, are charged with violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45). The complaint, issued by the Commission on Jan. 30, 1973, alleges that respondents, through advertisements placed in newspapers of interstate circulation, through brochures disseminated through the mails, by the use of tags or labels and in signs posted in respondents' retail stores, and by oral representations by respondents and their sales representatives, have represented directly and by implication that:

(1) respondents will deliver furniture to customers on or near the dates they have promised those customers for delivery;

(2) respondents maintain in their warehouse adequate stock to insure that furniture ordered by customers will be available for delivery on the promised delivery dates;

(3) respondents' customers may purchase furniture on the layaway plan, and, while the payments are being made, the furniture will be stored in their warehouse, ready for delivery upon completion of all payments; and

(4) respondents are offering furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

In truth and in fact, the complaint alleges,

(1) respondents, in many instances, do not deliver furniture to customers on or near the dates promised customers for delivery;

(2) respondents, in many instances, do not maintain in their warehouse adequate stock to insure that furniture ordered by customers will be available for delivery on the promised delivery dates;

(3) furniture purchased by respondents' customers on the layaway plan is not, in many instances, stored in the warehouse ready for immediate delivery upon completion of all payments, resulting in delays in delivery; and

(4) respondents, in many instances, do not offer furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

The complaint further alleges that by and through the use of floor models and furniture displays, together with oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, directly or by implication, that:

(1) furniture which is delivered to respondents' customers will be identical to that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays;

(2) furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays will be replaced within a reasonable time, to the satisfaction of the customers, in accordance with promises made to the customers by respondents;

(3) furniture which is delivered to respondents' customers will be free from damages and/or defects; and

(4) furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced within a reasonable time to the satisfaction of the purchasers and in accordance with promises made to the purchasers by respondents.

In truth and in fact, the complaint alleges,

(1) furniture is delivered to customers which, in many instances, is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays;

(2) furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, in many instances, is not replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents;

(3) furniture delivered to purchasers, in many instances, is damaged and/or defective, is not repaired or replaced within a reasonable time, is not repaired or replaced to the satisfaction of the purchasers, and is not repaired or replaced in accordance with promises made to the purchasers by respondents.

Therefore, the statements, representations, acts and practices of respondents, as set out hereinbefore, were, and are, false, misleading and deceptive.

Respondents filed an answer to the complaint on Mar. 12, 1973 which consisted of a general denial of all the complaint allegations of unlawful conduct. Thereafter complaint counsel moved to strike respondents' answer on the grounds that it did not conform to the requirements of the Commission's Rules of Practice. Respondents at the same time requested additional time in which to file an amended answer since re-

spondents' attorneys had only recently been retained and needed additional time in which to fully prepare an answer.

Pursuant to permission granted by the undersigned, respondents filed an amended answer on Apr. 6, 1973. The amended answer was in greater detail than the original answer, and respondents generally denied substantially all the allegations of unlawful conduct set forth in the complaint.

Prior to the filing of the aforesaid amended answer, a prehearing conference was held on Apr. 3, 1973. Thereafter, on Apr. 30, 1973 and May 14, 1973, prehearing conferences were held. At the prehearing conference on Apr. 30, 1973, respondents amended their answer in part (P. Tr. 48). On June 11, 1973, respondents filed a motion for permission to further amend their answer, together with a Second Amended Answer. By order filed June 21, 1973, respondents' motion to further amend their answer was granted.

By the Second Amended Answer, respondents Auslander Decorator Furniture, Inc. and Maxwell Auslander admitted the allegations contained in the complaint. Individual respondents Sandra Tye and Linda Decker admitted the allegations of the complaint, except that these respondents denied that (1) they have participated as individuals in any of the acts or practices alleged in the complaint, and (2) denied that they formulate, direct and control the acts and practices of the corporate respondent, Auslander Decorator Furniture, Inc., including the acts and practices set forth in the complaint. All respondents reserved the right to submit proposed findings and conclusions under Section 3.46 of the Rules of Practice, the right to appeal the initial decision herein to the Commission under Section 3.52 of the Rules of Practice, and the right to judicially appeal from any adverse Commission decision.

On June 20, 1973, the undersigned issued an order limiting the factual issues to be tried in this proceeding in view of respondents' admission answer. The factual issues remaining to be tried were set forth as follows:

(1) Do individual respondents Sandra Tye and Linda Decker formulate, direct and control the acts and practices of the corporate respondent Auslander Decorator Furniture, Inc., and

(2) Have individual respondents Sandra Tye and Linda Decker participated in the acts and practices alleged in the complaint?

By letter dated Aug. 1, 1973, the undersigned was advised by John S. Yodice, counsel for respondents, that he was withdrawing his representation of individual respondents Sandra Tye and Linda Decker, but would remain as counsel for the corporate respondent and individual respondent Maxwell Auslander. Thereafter, by telephone, the undersigned was advised by individual respondents Sandra Tye and Linda

Decker that Mr. Yodice was withdrawing as their counsel as they were financially unable to retain counsel to represent them in their individual capacities. Individual respondents Sandra Tye and Linda Decker requested that the undersigned provide them with counsel to represent them in the trial of this matter, because of their financial inability to retain counsel.

On Aug. 15, 1973, the undersigned issued an order requiring individual respondents Sandra Tye and Linda Decker to support their request for assignment of counsel by filing a statement of financial status and other supporting documentation. Individual respondents Sandra Tye and Linda Decker, by telephone, later withdrew their request for assignment of counsel and stated their intention of appearing in person at the trial and representing themselves (see Decker, Tr. 333; Tye, Tr. 365).

Hearings were held on Sept. 10-11, 1973, at which time evidence was received relating to the two issues remaining to be litigated, *i.e.*, the responsibility of Sandra Tye and Linda Decker for the acts and practices of corporate respondent Auslander Decorator Furniture, Inc. and their personal participation in the acts and practices admitted to be unlawful. Complaint counsel called as witnesses the three corporate officials named in the complaint, Maxwell Auslander, Sandra Tye and Linda Decker. Over one hundred (100) exhibits were offered by complaint counsel and received into evidence. Individual respondents Sandra Tye and Linda Decker offered no evidence in defense. Complaint counsel and counsel for corporate respondent Auslander Decorator Furniture, Inc. and individual respondent Maxwell Auslander have submitted proposed findings, conclusions and supporting memoranda. Individual respondents Sandra Tye and Linda Decker have not submitted any memoranda, although they were offered the opportunity to do so if they desired (Tr. 367). On Nov. 28, 1973, the Commission extended the time for filing this initial decision to and including Feb. 18, 1974.

This proceeding is before the undersigned upon the complaint, answer, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by complaint counsel and by counsel for the corporate respondent and individual respondent Maxwell Auslander. These submissions by the parties have been given careful consideration and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and upon a consideration of the demeanor of the witnesses who gave testimony in this proceeding.

For the convenience of the Commission and the parties, the findings of fact include references to the principal supporting evidentiary items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the recommended findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

References to the record are made in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CX—Commission's Exhibits

CPF—Proposed Findings, Conclusions of Law, And Order of Counsel Supporting the Complaint

RPF—Proposed Findings, Conclusions, And Order of Respondents Auslander Decorator Furniture, Inc. and Maxwell Auslander

CRB—Brief In Reply To Proposed Findings, Conclusions, And Order of Respondents Auslander Decorator Furniture, Inc. and Maxwell Auslander filed by Counsel Supporting the Complaint

The transcript of the testimony is referred to with the abbreviation "Tr.," and the page number or numbers upon which the testimony appears and the last name of the witness whose testimony is being cited. "P. Tr." refers to the transcript of the prehearing conferences.

Having heard and observed the witnesses and after having carefully reviewed the entire record in this proceeding, together with the proposed findings, conclusions and briefs submitted by the parties, as well as replies, the administrative law judge makes the following:

FINDINGS OF FACT

1. Respondent Auslander Decorator Furniture, Inc. (hereinafter referred to as "ADF"), doing business as A.D.F. and A.D.F. Warehouse, is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 7451 Race Road, Hanover, Md. Its warehouse, shipping and storage facility is located at said principal place of business. Prior to September 1972, ADF had warehouse, shipping and storage facilities located at 701 Edgewood Street, N.E., Wash., D.C., and Fourth and Channing Street, N.E., Wash., D.C. Respondent ADF, doing business as A.D.F. and A.D.F. Warehouse, operates furniture outlets in the States of Maryland and Virginia and in the District of Columbia (Admitted Second Amended Answer; P. Tr. 91-92).

2. Respondent Maxwell Auslander is an individual and is president of the corporate respondent. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and prac-

tices set forth in the complaint issued herein. His address is the same as that of the corporate respondent (Admitted Second Amended Answer; P. Tr. 60).

3. Respondent Sandra Tye is an individual and is a vice president of corporate respondent ADF (Admitted Second Amended Answer; Tye, P. Tr. 88-89; Tye, Tr. 334; Auslander, Tr. 123-124). Her address is the same as that of the corporate respondent (Admitted Second Amended Answer).

4. Respondent Linda Decker is an individual and was, from Nov. 1971 until May 31, 1973, a vice president of corporate respondent ADF (Admitted Second Amended Answer; Decker, P. Tr. 94; Decker, Tr. 240; Auslander, Tr. 124). Her present home address is 1418 Kensington Place, Crofton, Maryland (Decker, P. Tr. 94; Decker, Tr. 639). Respondent Linda Decker is no longer employed by corporate respondent ADF (Decker, Tr. 239-241).

5. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of furniture and related products to the public at retail (Admitted Second Amended Answer).

6. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the District of Columbia to purchasers thereof located in various States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act (15 U.S.C. 41-58) (Admitted Second Amended Answer).

7. In the course and conduct of their business as set forth in the complaint and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by the respondents (Admitted Second Amended Answer).

8. In the course and conduct of their business as set forth in the complaint and for the purpose of inducing the sale of their merchandise, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by materials disseminated through the mails, and on tags or labels and in signs posted in respondents' stores.

Typical and illustrative of the foregoing, but not all-inclusive thereof, are the following:

FREE DELIVERY
LAYAWAY * * * 8 MONTHS FREE STORAGE
ADF WAREHOUSE SALE PRICE!!
SAVINGS!!! AT ALL 7 ADF OUTLETS
ADF WAREHOUSE SALE
ADF WAREHOUSE CLEARANCE SALE
BUY NOW AND SAVE

In addition to the aforesaid statements and representations, the respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the terms and conditions under which merchandise will be sold and delivered and services provided by respondents (Admitted Second Amended Answer).

9. By and through the use of the above-quoted statements and representations, as set out in Finding 8 hereinabove, and others of similar import and meaning not expressly set out, including the aforesaid oral statements and representations made by respondents and their sales representatives, respondents have represented, and are now representing, directly and by implication, that:

(1) Respondents will deliver their furniture to customers on or near the dates they have promised those customers for delivery.

(2) Respondents maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised dates.

(3) Respondents' customers may purchase furniture on the layaway plan, and, while the payments are being made, the furniture will be stored in their warehouse, ready for delivery upon completion of all payments.

(4) Respondents are offering furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business (Admitted Second Amended Answer).

10. In truth and in fact:

(1) Respondents, in many instances, do not deliver their furniture to customers on or near the dates they have promised those customers for delivery.

(2) Respondents, in many instances, do not maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised delivery date.

(3) Furniture purchased by respondents' customers on the layaway plan is not, in many instances, stored in the warehouse ready for immediate delivery upon completion of all payments, but is sold to other customers, necessitating reordering of the merchandise when the layaway payments are completed, with resultant delays in delivery.

(4) Respondents, in many instances, do not offer furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

Therefore, the statements and representations, as set forth in Findings 8 and 9 hereinabove, were, and are, false, misleading and deceptive (Admitted Second Amended Answer).

11. In the course and conduct of their business as set forth in the complaint and for the purpose of inducing the sale of their furniture, respondents have maintained, and are now maintaining, in their sales-rooms, floor models and displays of furniture being offered for sale, on the bases of which their customers select and order the furniture they purchase from the respondents. In this connection, respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the quality and durability of the furniture being offered for sale, the terms and conditions under which merchandise will be sold and delivered, and the services that will be provided by the respondents. Moreover, subsequent to making sales and deliveries, respondents and their employees have made, and are now making, numerous oral statements, representations and promises to their customers regarding the time and the manner in which respondents will perform various adjustments, replacements and/or repairs (Admitted Second Amended Answer).

12. By and through the use of the floor models and furniture displays discussed in Finding 11 hereinabove, together with the aforesaid oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, and are now representing, directly or by implication, that:

(1) Furniture which is delivered to respondents' customers will be identical to that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays.

(2) Furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, will be replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees.

(3) Furniture which is delivered to respondents' customers will be free from damages and/or defects.

(4) Furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced within a reasonable time.

(5) Furniture which is delivered to purchasers with damages and/or

defects will be repaired or replaced to the satisfaction of the purchasers.

(6) Furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced in accordance with promises made to the purchasers by respondents' employees (Admitted Second Amended Answer).

13. In truth and in fact:

(1) Furniture is delivered to customers which, in many instances, is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays.

(2) Furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, in many instances, is not replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees.

(3) Furniture delivered to purchasers, in many instances, is damaged and/or defective.

(4) Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced within a reasonable time.

(5) Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced to the satisfaction of the purchasers.

(6) Furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced in accordance with promises made to the purchasers by respondents' employees (Admitted Second Amended Answer).

Therefore, the acts, practices, statements and representations, as set forth in Findings 11 and 12 hereinabove, were, and are, false, misleading and deceptive (Admitted Second Amended Answer).

Individual Respondent Linda Decker

14. Individual respondent Linda Decker began her employment with ADF as a sales person in ADF's College Park, Md., store in Jan. 1970 and continued as a sales person until Oct. 1970 (Auslander, Tr. 140; Decker, Tr. 243). In Oct. 1970, she became manager of ADF's Lexington Park, Md., store (Auslander, Tr. 141; Decker, Tr. 243). She returned to the main office in College Park when Mr. Auslander suffered his heart attack in Oct. of 1971 (Auslander, Tr. 133, 141; Decker, Tr. 245). She served as a vice president of ADF from November 11, 1971 until May 31, 1973 (Decker, Tr. 240; Auslander, Tr. 124), and also served as vice president of ADF of Lexington Park, Inc. from June, 1970 until May 31, 1973 (Decker, Tr. 240). The latter corporation was

formed to obtain a mortgage loan from a bank (Auslander, Tr. 125). Mrs. Decker left ADF on May 31, 1973 and is now self-employed as Decker and Associates, selling an advertising specialty item (Decker, Tr. 239-242). During her employment with ADF, Mrs. Decker was a salaried employee; she did not receive a commission or percentage of profits, and she did not own any stock in ADF (Decker, Tr. 250, 327-328, 333).

15. As manager of the Lexington Park retail store, Mrs. Decker had authority to hire store personnel (Decker, Tr. 250). She also arranged her own delivery schedules, which was a unique situation among the ADF stores (Auslander, Tr. 148). She trained her employees (Auslander, Tr. 147), and arranged for newspaper and radio advertisements in the Lexington Park area newspapers and radio stations (Auslander, Tr. 167, 168; Decker, Tr. 243, 244). Mrs. Decker also sold on the floor (Decker, Tr. 244), and was responsible for the innovation of having her, as store manager, deal directly with the customers:

Q. Now, when you became store manager of the Lexington Park store, you also were performing some innovations for that particular store that was not being carried out by other retail stores; is that correct?

A. So far as handling the customer directly, I knew that there had been problems as far as getting through to the warehouse to set up delivery at this end, and I asked him to agree to let me handle all of my customers myself, and particularly because they would be calling long distance. I thought that it would be better to be done on a local basis.

I am from that area, and could not see having any problems to call long distance; I prefer that myself. So it became kind of a self-contained, you know, everything had to go back to Washington, but I literally did it (Decker, Tr. 244).

16. During her employment with ADF from January, 1970 through May 31, 1973, Mrs. Decker performed various duties other than those already mentioned. She had authority to sign checks, but never did so (Decker, Tr. 250). She had authority to hire and fire store personnel as a store manager [all store managers had this authority] (Decker, Tr. 250, 251). She shopped competition (Decker, Tr. 275); she visited ADF stores and reported back to Mr. Auslander (Decker, Tr. 285); she handled details concerning the construction of new stores and the warehouse (Decker, Tr. 321). Mrs. Decker talked with the manufacturers' representatives and followed purchase orders to determine why there were shipping delays (Auslander, Tr. 159). Later, as assistant to Mr. Auslander, she fired certain personnel, including a store manager, and she was requested to fire the ADF advertising agency. These latter acts had the specific approval of Mr. Auslander (Decker, Tr. 252, 254, 284).

17. After firing the ADF advertising agency, Mrs. Decker prepared the advertising copy and placed the advertisements with the newspapers. This work was all approved by Mr. Auslander (Decker, Tr. 253-

259). She identified herself as the ADF advertising manager on occasions (Decker, Tr. 266). She used the pseudonym of Decker Advertising; the idea was to form an "in-house advertising agency" (Decker, Tr. 255) in order to get an agency rebate, which was turned over to ADF (Decker, Tr. 267-268).

18. On Oct. 25, 1971, Mr. Auslander suffered a severe heart attack and was hospitalized for one month (Auslander, Tr. 129, 131; Decker, Tr. 245). Within 24 hours, Mrs. Decker moved to the main ADF office at College Park (Decker, Tr. 245). With the assistance of individual respondent Sandra Tye, Mrs. Decker began "picking up pieces" and made a sincere effort to continue the day-to-day operations of ADF and "to bring everything under control" (Decker, Tr. 247). Mr. Auslander, after being hospitalized for one month, thereafter worked a light schedule for several weeks (Auslander, Tr. 131-132). Mrs. Decker and Mrs. Tye carried on the business operations. Mr. Auslander testified:

Q. So Linda Decker and Sandy Tye sort of held the pieces together until you came back, is that correct?

A. As best as they could, yes.

Q. Did they do a good job?

A. I think they did a great job compared to with suddenly a whole new situation was thrust upon them and consequently, I think under the circumstances, they performed, I think, most admirably (Auslander, Tr. 133).

19. At the time of Mr. Auslander's heart attack, the opening of a Rockville, Md., store was pending. Mrs. Decker, with permission from Mrs. Auslander and with the assistance of Mrs. Tye, went ahead with plans for the Rockville store opening:

So, the first couple of days we brought the managers together to discuss how we were going to do this, and worked on the Rockville grand opening, and everyone volunteered to work.

We kept the store open to Midnight for the grand opening, and so forth, and the whole idea was to keep the morale up and let the world think we knew what we were doing, whether we did or not (Decker, Tr. 247).

* * * * *

You kind of had to pretend it was all going well (Decker, Tr. 331).

20. In June of 1972, Mrs. Decker was given the responsibility for handling consumer complaints for ADF (Auslander, Tr. 141-142; Decker, Tr. 296-298). Pursuant to Mr. Auslander's instructions, Mrs. Decker contacted the various consumer protection groups, including the Federal Trade Commission, and informed them that all consumer complaints were to be directed to her attention (Decker, Tr. 298-299). She testified that she usually took these complaints to Mr. Auslander for instructions, although there were instances where she did not discuss

the complaints with him prior to disposition (Decker, Tr. 299). Mrs. Decker also testified that she did not always show Mr. Auslander the letters which she sent out in response to consumer complaints (Decker, Tr. 300).

21. In May of 1971, ADF was notified of a pending investigation by the Federal Trade Commission (Auslander, Tr. 149). Mr. Auslander testified that he had Mrs. Decker talk with Mr. Klasic, the FTC attorney, in the Lexington Park store because:

A. At that time, we had the Edgewood Street warehouse, * * * and the Edgewood Street warehouse was just an absolute disaster. You had a bunch of people in a tiny little room; it was not conducive in any way for any kind of conversation or for any kind of fact finding.

So consequently, this was probably the only area, that it was a reasonably new building, it had a couple of private offices and, of course, she was there and she was a little more knowledgeable than some of the other people in the other stores were so consequently, we chose that area right down there.

Q. Why didn't you talk to the FTC Attorney, you are President of the Company; she is not even an Officer?

A. Okay, good point. But again, she was a little more familiar, again, with dealing with the customers thing. Also in that area, she would have more knowledge as to what would be handled, delivered, what would be selling and so forth, whereas I kind of would not know (Auslander, Tr. 150).

Mrs. Decker stated that she spoke with the FTC attorney because of the Lexington Park location, since Mr. Auslander was busy with other things, and:

* * * I had more time to do this sort of thing from a cost standpoint. It was less costly to have me doing this rather than to pay an attorney. In addition I knew where the information was (Decker, Tr. 269).

Part of Mrs. Decker's interview with Mr. Klasic concerned the sales tag used by ADF at that time (CX 4), and Mrs. Decker relayed to Mr. Auslander Mr. Klasic's concern about its terminology, including the word "Sale," used on the sales tag (Decker, Tr. 272). Mrs. Decker testified about CX 5, the sales tag which replaced CX 4:

Q. And you helped in creating this particular sales tag.

A. I relayed the information to Mac, the final sale [sic] on everything.

Q. But didn't you have some input as to what should be said on the tag in view of your conversations with Mr. Classic [sic].

A. Yes (Decker, Tr. 272).

22. The record supports a conclusion that Mrs. Decker participated in the challenged acts and practices of corporate respondent ADF. There is substantial evidence that Mrs. Decker participated in ADF's advertising, both while store manager at the Lexington Park store (Decker, Tr. 243) and while serving as an assistant to Mr. Auslander (Decker, Tr.

255-266). She testified that she was aware that the advertised prices of most merchandise appearing in ADF advertisements were generally the usual selling price, and not reduced (Decker, Tr. 277). She testified that merchandise purchased on layaway would be set aside only if a substantial deposit were paid (Decker, Tr. 290-291). She also testified that she knew that there was a dollar limitation on ADF's advertised "Free Delivery" policy (Decker, Tr. 294). Mrs. Decker participated in the formulation of the sales tags and invoices (CX 5, 8), which misrepresented "Free Delivery," "Sale," and "Layaway" (Decker, Tr. 282).

23. Mrs. Decker's participation in the admitted unlawful acts and practices of the corporate respondent ADF was, however, that of an employee, and not as an officer of the corporation responsible for corporate policy. Mr. Auslander testified quite emphatically that "* * * the decisions or basic policy was absolutely originating with me, either right or wrong" (Auslander, Tr. 145-146). Mrs. Decker was not even aware of the fact that she was an officer of corporate respondent ADF until the FTC investigation was well under way (Decker, Tr. 240-241, 327).

Mr. Auslander testified that the Rockville store opening was pre-planned (Auslander, Tr. 134), that he chose the items of furniture for the advertisements, established the advertised prices, and was the final authority on advertising (Auslander, Tr. 143, 153, 169). He testified that he established the guidelines for handling customer complaints, he saw many of the complaint letters before they were sent out, and that he actually dictated or wrote other responses to complaints (Auslander, Tr. 144, 189, 203, 217, 222, 227; CX 55). Mr. Auslander determined the selling prices of all merchandise (Auslander, Tr. 167, 171), and he revised the ADF sales invoices and sales tags (Auslander, Tr. 182-185, 195).

Mrs. Decker testified that the advertisements she placed while manager of the Lexington Park store were items "Max would give me" (Decker, Tr. 243). She received permission from Elaine (Mrs. Auslander) to proceed with the Rockville store opening after Mr. Auslander had his heart attack (Decker, Tr. 247). The advertisements for the Rockville store opening were taken from previous advertisements "which is the way I have seen Max do it almost two years" (Decker, Tr. 248). After she took over the advertising duties, she made up the advertisements, "cutting and pasting them together bit by bit" for Mr. Auslander's approval (Decker, Tr. 255-256). She made suggestions for the advertisements, which suggestions were sometimes accepted, sometimes not (Decker, Tr. 257-258). Her participation in the advertising program under the pseudonym "Decker Advertising" was for the purpose of getting a rebate for ADF (Decker, Tr. 267-268). While Mrs. Decker admitted she had some "input" on the revised sales tag, Mr.

Auslander had the final say on everything (Decker, Tr. 272). In handling customer complaints, she became a detective and talked to everyone involved with the customer and ultimately took it to Mr. Auslander for final resolution (Decker, Tr. 299).

24. In sum, Mrs. Decker was an employee of corporate respondent ADF, certainly a very loyal and hardworking employee, whose duties after Mr. Auslander's heart attack were those of "a general assistant" to Mr. Auslander (Auslander, Tr. 159). Carrying on the business while Mr. Auslander was disabled was basically a singular occurrence under special circumstances.

25. Neither the duties of Mrs. Decker as a general assistant to Mr. Auslander, nor the conduct of the business while Mr. Auslander was disabled, is sufficient to attribute to Mrs. Decker the responsibility for formulation, direction or control of the acts and practices of corporate respondent ADF.

As Mrs. Decker stated it, there are two big issues concerning her individual responsibility—advertising and taking over operation of the business while Mr. Auslander was incapacitated. As regards these issues, she testified:

* * * Under the advertising aspect of it I certainly have no training per se in advertising. I copied 100 percent what I had seen two advertising agencies do, and the only reason I did it was to save the company money. So the mistakes that were made there were made strictly because I was copying somebody else's work. That is all I had to go by.

Regarding my taking-over situation when he was in the hospital I—to say the very least, I am very fond of the man. * * * The whole idea was to keep morale up, and keep sales up, and get rid of many problems before he comes back. * * * I wanted as much as possible for him to think everything was under control. * * * I feel I am being persecuted by the Federal Government because of what was really a humanitarian act. That is what it amounts to (Tr. 329-330).

Individual Respondent Sandra Tye

26. Individual respondent Sandra Tye has been employed by ADF for over nine (9) years (Tye, Tr. 363). She has been vice president of ADF at least since 1970 (Auslander, Tr. 123, 124; Tye, Tr. 334). For the last four years Mrs. Tye has been in charge of ADF's warehouse operation (Tye, Tr. 89, 334). Her duties consist of receiving all the merchandise which comes from the factories, and shipping all merchandise out to customers (Tye, Tr. 89, 338). Mrs. Tye also has worked part-time as a sales person for ADF in addition to her warehouse duties (Tye, Tr. 344). She has, on occasion, trained other ADF employees in sales work (Tye, Tr. 363-364). She has authority to sign payroll checks and to sign checks for freight bills (Tye, Tr. 356-357).

Mrs. Tye is a salaried employee of ADF; she does not participate in any profit sharing arrangement or receive a commission (Tye, Tr. 353, 364), and she does not own any stock in ADF (Tye, Tr. 335).

27. At one time ADF operated three warehouses, located at 701 Edgewood Street, N.E., Wash., D.C., Fourth and Channing Street, N.E., Wash., D.C., and 7451 Race Road, Hanover, Md. The Channing Street warehouse was used as a storage area (Tye, P. Tr. 91-92; Tye, Tr. 336). In 1972, the Race Road warehouse was completed and opened, enabling ADF to close the other two warehouses (Tye, Tr. 337).

28. Mrs. Tye handled some consumer complaints coming into the warehouse (Tye, Tr. 340-341, 349, 352). These complaints were handled without reference to Mr. Auslander (Tye, Tr. 341).

29. At the time of Mr. Auslander's heart attack, Mrs. Tye "only did what I have been doing before and anything that the two of us [Mrs. Decker and Mrs. Tye] would try to work out but we didn't do anything differently that was not being—hadn't been done. We tried to piece up things" (Tye, Tr. 354-355). Mrs. Tye worked with Mrs. Decker, mostly by telephone, during Mr. Auslander's absence, since Mrs. Tye had a full schedule operating the warehouses (Tye, Tr. 354, 355; Decker, Tr. 246). Payments due to furniture manufacturers were held until Mr. Auslander returned to work—"the factories were quite understanding" (Tye, Tr. 356).

30. Mrs. Tye was well-acquainted with the problems of late delivery of merchandise, the failure to lay away merchandise for customers, the delivery of damaged merchandise, and the failure to deliver merchandise identical to the items ordered by a customer (Tye, Tr. 338-339, 343, 347, 348, 350-351, 357-361). As the person in charge of the warehouse, she personally participated in these admittedly unlawful acts and practices of corporate respondent ADF.

31. Testimony by Mrs. Tye indicates that the delivery problems alleged in the complaint—the delayed deliveries, the failure to lay away customers' orders, the delivery of damaged merchandise, and the failure to deliver merchandise identical to that ordered by a customer were due to inadequate warehouse space and incompetent warehouse personnel (Tye, Tr. 341-343, 348, 357; Auslander, Tr. 150, 192-193). Theft was also a serious problem at the warehouse (Tye, Tr. 348). Mr. Auslander was aware of the warehouse conditions, the lack of space and the problems with theft. The Race Road warehouse was constructed to alleviate these problems (Tye, Tr. 342, 357-358; Auslander, Tr. 192).

32. Mr. Auslander testified that he made all policy in the warehouse (Auslander, Tr. 129), and that he set up the inventory and storage controls in the warehouse (Auslander, Tr. 192). Further, he established the guidelines for handling customer complaints (see Finding 23). Mr. Auslander testified that "basic policy was absolutely originating with me" (Auslander, Tr. 145-146). Since Mr. Auslander was responsible for basic policy, and since he was well aware of the warehouse problems

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faced by Mrs. Tye, it is concluded that it was his responsibility that the acts and practices of ADF, admitted to be unlawful, occurred.

33. Mrs. Tye was basically an employee of ADF, a hard working employee (Tye, Tr. 342-344). She was not responsible for the formulation, direction or control of the acts and practices of ADF. The fact that she was a corporate vice president is of little significance, as she did not do anything differently than before she was made a corporate official—"it didn't mean anything" (Tye, Tr. 356, 364).

34. Prior to issuance of the complaint herein, respondents signed a consent agreement, not a part of the adjudicative record, wherein individual respondents Linda Decker and Sandra Tye agreed to individual responsibility for the acts and practices of ADF (Decker, Tr. 325). Complaint counsel questioned both Mrs. Decker and Mrs. Tye about their reasons for signing such an agreement and later denying individual responsibility for the complaint allegations.

Mrs. Decker testified:

Q. Why were you two still left in? Who insisted on it?

A. It is hard to explain.

Q. Was it a situation sign or you don't work for ADF anymore?

A. No. I am sure it would not be true. It became a loyalty issue without saying anything.

Q. Loyalty issue?

A. You are either with the company or not.

Q. Sink or swim.

A. I might add that at that point I found it inconceivable that it could go through.

* * * (Tr. 326-327).

Mrs. Tye testified:

Q. You signed a Consent Agreement, did you not?

A. Yes, I did.

Q. Would you explain how that came about?

A. Yes. Mr Auslander had been meeting with the attorneys and one of the attorneys brought the agreement to me to sign and I signed it. I would in no way upset Mr. Auslander. He is a very ill man and I owe a great deal to him.

Q. You signed the agreement without knowing anything about it?

A. That is correct.

Q. Because Mr. Auslander wanted to have it signed?

A. That is correct (Tr 362).

Mr. Auslander testified that it was his own "stupidity" which permitted Mrs. Decker and Mrs. Tye to sign the consent agreement which was very injurious to them (Tr. 151-152). He testified:

Q. To your knowledge, nobody ever brought to the attention of the Commission that these two women were not, in fact, responsible for the acts and practices complained about in the complaint?

A. I know, really it is strictly my fault and my stupidity or negligence.

Q. These two women executed an agreement, were they consulted about that, as to what they were signing?

A. At the time, I was so disturbed about this thing, I think that both of them in their aim to possibly pacify me and because of my condition, whatever, I think they probably would have gone along with most anything.

Q. A great sense of loyalty?

A. Yes, even though—exactly even though something was very injurious to themselves (Tr. 151-152).

The events surrounding the execution of the consent agreement shed illumination over the other issues raised by the complaint. The participation of individual respondents Linda Decker and Sandra Tye in the admittedly unlawful acts set forth in the complaint occurred out of employee loyalty, not corporate responsibility.

CONCLUSIONS

Corporate respondent Auslander Decorator Furniture, Inc. and individual respondent Maxwell Auslander have, by their Second Amended Answer, admitted all the material allegations of the complaint. This Second Amended Answer was filed with the Commission on June 11, 1973 and accepted for filing in the record herein by order of the undersigned dated June 20, 1973.

Under Section 3.12(b)(2) of the Commission's Rules of Practice, it is provided that the complaint and the admitting answer will provide a record basis on which the administrative law judge shall file an initial decision, including an appropriate order. Accordingly, the undersigned has, in this case, ruled that the complaint allegations and said respondents' Second Amended Answer shall constitute the record basis for this decision regarding said respondents (Order Denying Complaint Counsel's Motion To Reconsider Order Limiting Proof Complaint Counsel May Offer To Corroborate Admitted Complaint Allegations, dated July 13, 1973; Tr. 115). The findings of fact relating to these two respondents are based entirely on their admission answer. Therefore, the only issues remaining as to these respondents are the scope of the remedy and whether the remedy should be made applicable to Maxwell Auslander in his individual capacity.

Individual Respondent Maxwell Auslander

Respondent Maxwell Auslander, by virtue of the Second Amended Answer filed herein on June 11, 1973, has admitted that he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices alleged in the complaint. This answer includes the admission that the acts and practices enumerated in Paragraphs Four, Five, Seven and Eight of the complaint are false, misleading and deceptive, and that respondents' use of the aforesaid false,

misleading and deceptive statements, representations, acts and practices have had, and now have, 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 complete, and into the purchase of substantial quantities of respondents' merchandise by reason of said erroneous and mistaken belief. Thus, respondent Maxwell Auslander has admitted that he is personally responsible for the unlawful acts and practices of the corporate respondent.

Respondents ADF and Maxwell Auslander argue that individuals have only been included in orders when it appeared that such course was necessary to prevent evasion of the order, referring to the Supreme Court's decision in *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112 (1937) (RPF, p. 17). The record in this case, according to respondents, is devoid of any evidence that respondent Maxwell Auslander must necessarily be individually joined in the order because a possibility of evasion exists.

It is admitted that Maxwell Auslander formulates, directs and controls the acts and practices of corporate respondent ADF, including the acts and practices admitted to be deceptive and therefore unlawful. Thus, individual respondent Maxwell Auslander's dominion and control over corporate respondent ADF is without dispute.

Because of these undisputed facts, it is believed necessary to subject Maxwell Auslander personally to the order. It is not necessary to demonstrate an intent to evade the order, or even a probability of evasion of the order, to hold an individual respondent personally liable. As the Commission stated in *Coran Bros. Corp., et al.*, Docket No. 8697, 72 F.T.C. 1, 25 (July 11, 1967):

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

The undersigned is entirely in accord with the above reasoning. Although the record as to Maxwell Auslander does not show his extent of ownership, it does demonstrate his complete dominion over the acts and practices of the corporate respondent. The record does establish that individual respondents Linda Decker and Sandra Tye do not own any stock in ADF. The record further establishes that Maxwell Auslander appoints officers of ADF (Linda Decker was made a vice president)

without even informing the individual of this fact. Further, numerous corporate devices are utilized in the operations of ADF, *i.e.*, ADF Lexington Park and ADF Manassas, Va. (Tye, Tr. 335; Auslander, Tr. 125; Decker, Tr. 240). Further, in 1964 the Commission issued a cease and desist order against Maxwell Auslander individually and ADF Warehouse, Inc., apparently a different corporate device than the present corporate respondent (*ADF Warehouse, Inc., et al.*, Docket No. 8645, 66 F.T.C. 1267).

By simply surrendering the present corporate charter, and utilizing other existing corporations, any Commission order issued solely against corporate respondent ADF could be evaded. As a simple precautionary measure, such an obvious "loophole" should be closed. It is well settled that the choice of the remedial order is committed to the discretion of the Commission. *Federal Trade Commission v. Mandel Bros.*, 359 U.S. 385, 392-93 (1959); *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883 (1960); *L. G. Balfour Co. v. Federal Trade Commission*, 442 F.2d 1 (7th Cir. 1971). Moreover, " * * * once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States v. E. I. du Pont de Nemours & Co., et al.*, 366 U.S. 316, 334 (1961).

Thus, it seems most appropriate here to include individual respondent Maxwell Auslander within the scope of the remedy. As the Fourth Circuit stated in *Pati-Port, Inc., et al. v. Federal Trade Commission*, 313 F.2d 103, 105 (1963):

To the foregoing we might add the comment that it would seem in cases of this sort to be a futile gesture to issue an order directed to the lifeless entity of a corporation while exempting from its operation the living individuals who were responsible for the illegal practices.

Individual Respondents Linda Decker and Sandra Tye

Individual respondents Linda Decker and Sandra Tye, in their Second Amended Answer, admitted the allegations of the complaint, except that said respondents deny that:

- (1) they participate or have participated as individuals in any of the acts or practices alleged in the complaint, and
- (2) they formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint.

It is concluded that individual respondents Linda Decker and Sandra Tye did not formulate, direct or control the acts and practices of ADF. The record clearly establishes that "the decisions or basic policy was absolutely originating with" Maxwell Auslander, the president of ADF (Auslander, Tr. 145-146). Linda Decker and Sandra Tye were essen-

tially employees of ADF, who worked under Mr. Auslander's direction and supervision. They owned no stock in the corporation and received only a salary, with no commission or percentage of profits. The fact that each was a vice president of the corporation is not sufficient to import control over the corporate activities. Linda Decker did not even know when she was made an officer of ADF. She testified:

* * * I was told after it had been done. I am sure he thought he was being complimentary, and I would enjoy it, although I had said previously that I did not want to (Tr. 241).

Sandra Tye testified as to her designation as vice president of ADF:

At that time I thought it was a title because we had so many offices and I didn't do anything differently than I had done before (Tr. 356).

Complaint counsel rely upon several previous decisions as a precedent for including Sandra Tye and Linda Decker individually in a cease and desist order (CPF, pp. 13-17). It is unquestioned that an individual may be personally subjected to a Commission order where the circumstances so warrant. The decisions referenced by complaint counsel all have the element of control or responsibility for the corporate acts. In *Standard Distributors, Inc., et al. v. Federal Trade Commission*, 211 F.2d 7, 15 (2d Cir. 1954), the very language quoted by complaint counsel states that an order may include those officers "in top control of the activities" of the corporation. In *Cotherman, et al. v. Federal Trade Commission*, 417 F.2d 587 (5th Cir. 1969), a corporate vice president, who was second in command of the corporation and who actively participated in the unlawful practices, was held individually liable. He was also a stockholder and had had previous experience in the industry before joining respondent. In *the Matter of Allenton Mills, Inc., et al.*, 60 F.T.C. 1630, 1641 (1962), the Commission found that the operations of the respondents were conducted strictly as a family arrangement, and that the corporate identities were a fiction. Ownership, direction and control were found to exist with the individual respondents, although each individual looked for guidance to one respondent, Max Furman. In *Surf Sales Company, et al. v. Federal Trade Commission*, 259 F.2d 744 (7th Cir. 1958), the manager of the corporation was named individually in the order, but here again the Court concluded that the individual "had and did exercise authority, responsibility and direction of the affairs" of the corporation (*Id.* at 747).

Consequently, since the record is devoid of evidence of actual control or responsibility by Sandra Tye and Linda Decker over the affairs of ADF, and since their participation in the unlawful acts and practices of ADF was that of employees working under the direction and supervision of Maxwell Auslander, it is concluded that any remedy entered

herein should bind these two respondents only in their corporate capacity, and not as individuals.

The Remedy

Complaint counsel have proposed an order in strict accordance with the order served with the complaint. Complaint counsel argue that the proposed order is well within the periphery of the Federal Trade Commission's authority to issue remedial orders, and has, at the very least, a reasonable relation to the unfair and deceptive acts and practices admitted by respondents' Second Amended Answer.

Respondents have admitted that, in many instances, they (1) do not deliver merchandise to customers on or near the delivery dates promised, (2) do not maintain in their warehouse adequate stock to insure delivery on the promised delivery dates, and (3) do not store layaway items, necessitating reordering of the merchandise with resultant delays in delivery.

Respondents have admitted that, in many instances, they (1) deliver merchandise to customers which is different from that which the customers have selected, and do not replace such merchandise within a reasonable time and in accordance with promises and representations made to respondents' customers, and (2) deliver damaged or defective merchandise, and do not repair or replace such merchandise within a reasonable time, to the satisfaction of the customers, nor in accordance with promises and representations made to respondents' customers.

The order proposed by complaint counsel redresses these unfair and deceptive acts and practices by requiring respondents to inform all customers, orally and in writing on the contracts, of their right to cancel the contracts with a refund within ten (10) days from the date of delivery of defective or damaged merchandise, or merchandise not identical to that ordered, and requiring a refund of all monies to customers who request contract cancellation. The proposed order provides that respondents may, with the written consent of such aggrieved customers, repair or replace such damaged or defective merchandise. These provisions exempt the delivery of merchandise sold "as is" if such sales are so designated on the sales contracts, and the sale of damaged or defective merchandise is to customers who have knowledge of the damage or defect and have given written consent to purchasing same. The proposed order also requires respondents to maintain adequate records for two years in order to enable the Commission to verify compliance with these provisions of the proposed order.

Respondents have admitted that, in many instances, they have falsely and deceptively represented that merchandise being offered for sale constituted a reduction from the actual bona fide price at which such

merchandise was sold or offered for sale by respondents to the public on a regular basis for a reasonably substantial period of time in the recent, regular course of their business. The proposed order prohibits misrepresentations of this type, and provides for the retention of adequate records for a period of two years in order to enable the Commission to verify compliance with this provision.

The proposed order further requires that respondents (1) prominently post the cease and desist order in their salesrooms with notice that customers may receive a copy thereof, (2) deliver a copy of the order to their operating divisions and employees, and (3) notify the Commission of a change in the individual respondent's employment and the nature of his new employment, and any change in the corporate respondent which may affect compliance obligations with the order.

Respondents ADF and Maxwell Auslander object to the proposed order on the grounds that certain provisions go beyond the scope of what the Commission may lawfully require, that certain provisions go beyond what is reasonably necessary to correct admittedly unlawful acts and practices of respondents, and that certain provisions are unsupported by the record (RPF, pp. 11-13). Respondents argue that certain provisions of the order will drastically affect respondents in the lawful conduct of their business; and that, taken as a whole, they are so unreasonable in relation to the record as to be penalizing rather than remedial. Respondents therefore urge that these provisions be stricken from any order issued herein (RPF, p. 41).

Respondents particularly object to the order provision requiring respondents to post in a prominent place a copy of the order and provide any customer or prospective customer with a copy thereof upon demand, as being punitive in nature, and subjecting respondents to humiliation and embarrassment (RPF, pp. 14, 33). Respondents also argue that the admitted unfair, misleading and deceptive acts and practices relate to representations, statements and promises made orally and in various advertisements, posters and signs. There is nothing in the record to indicate that respondents' written invoices or sales contracts are in any way unfair, misleading or deceptive. By requiring respondents to cease and desist from making any such unfair or deceptive representations, the evils found to have existed will be effectively eliminated. To go beyond this and to require respondents to alter the terms and conditions in their sales contracts violates the Supreme Court's test announced in *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608 (1946), which requires that the remedy must relate to the violation found. Respondents argue that these provisions bestow specific rights upon respondents' customers and saddle respondents with obligations which respondents' competitors are left free to contest.

Respondents also argue that the Commission seeks to confine the use of the words "sale," or "buy now and save," or any other word or words of similar import or meaning, to situations where the price of such merchandise being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business. This restriction is too narrow in view of the Commission's own guidelines and its interpretation of their meaning.

The undersigned has carefully reviewed the provisions of the proposed order served with the complaint and recommended by complaint counsel. Certain changes have been made by the undersigned in this proposed order. The provisions of the order entered herein do have a reasonable relation to the practices found to be unlawful, and are, in fact, necessary to bring an end to and prevent recurrence of such unlawful practices. *Jacob Siegel Co. v. Federal Trade Commission*, *supra*.

Commission orders requiring alteration of contracts and providing for similar types of refunds have been upheld by the courts. The Fifth Circuit Court of Appeals has upheld a Commission order requiring respondents to (1) incorporate on their contracts a seven-day cooling off period and (2) limit the amount of their contracts to \$1500. *Arthur Murray Studio of Washington, Inc., et al. v. Federal Trade Commission*, 458 F.2d 622 (5th Cir. 1972). The Third Circuit Court of Appeals has upheld Commission authority to order respondents, *inter alia*, to refund all monies to customers who have requested contract cancellation in writing within three days from the execution thereof, or those customers who indicate that they are not satisfied with respondents' products. *Windsor Distributing Company v. Federal Trade Commission*, 437 F.2d 443 (3rd Cir. 1971). Thus, it is clear that the Commission has the power, in its discretion, to direct whatever relief is reasonably necessary, including the alteration of contracts and prohibition of lawful practices, to prevent not only the unlawful practices found to exist but a recurrence of such unlawful practices. *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419 (1958).

The relation between the violation (nondelivery of merchandise or delivery of damaged or defective merchandise and the unlawful retention of customers' monies) and the remedy (establishing dates certain for delivery of merchandise and refunding monies unless respondents deliver on dates promised, repair or replace said merchandise promptly and satisfactorily) is direct, specific, and necessary, and is framed to bring the illegal conduct to an end. By placing these customer rights on

order forms, sales contracts and invoices, the customer will be certain to have in writing the understanding between the parties, and compliance with the order will be assured and monitored by customers. By placing such notices in writing, customers will actually be informed in writing of their rights under the order. The posting of the order will thus be unnecessary to protect customers' rights under the order entered herein.

Complaint counsel have only proposed a one-year posting requirement, and it is difficult to see what such a one-year requirement will accomplish over the long haul. If the posting requirement is necessary for one year, which complaint counsel have not demonstrated, it should be necessary indefinitely. Since the order has been somewhat restructured by the undersigned to require more customer information on documents connected with the sales transactions, the posting provision has been eliminated.

The undersigned has also revised the proposed order to require delivery within five (5) business days of the agreed upon delivery date. Complaint counsel's proposal extended respondents no leeway whatsoever on delivery dates, while respondents proposed an order requiring delivery "on or near the agreed delivery dates" (RPF, p. 6). The undersigned is of the belief that a specific time frame must be included in the order and that respondents must be given some latitude on delivery for such unforeseen occurrences as weather, equipment failure, work stoppages, or where help unexpectedly fails to report for work. Since severe penalties may attach for each order violation, some leeway is appropriate.

The order provision dealing with use of the words "sale" or "buy now and save" is designed to correct the violation of law which has been admitted. Respondents' unlawful advertising claims represent "savings" claims, not comparative claims. The order, as drafted, does not prohibit comparative advertising, if respondents choose to do such advertising in the future, and if respondents otherwise comply with the Commission's Trade Practice Rules for the Household Furniture Industry (CRB, pp. 12-15).

The remaining provisions of the order entered herein relate to record keeping requirements and reporting requirements. Such provisions have been utilized in numerous Commission orders in the past and are deemed necessary herein to enable the Commission to monitor compliance with the order as entered.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction over the respondents and this proceeding is in the public interest.

2. Respondent Auslander Decorator Furniture, Inc., doing business as A.D.F. and A.D.F. Warehouse, is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 7451 Race Road, Hanover, Md.

3. Respondent Maxwell Auslander is an individual and is president of corporate respondent Auslander Decorator Furniture, Inc. He formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices set forth in the complaint issued herein. His address is the same as that of the corporate respondent.

4. Respondent Sandra Tye is an individual and is a vice president of corporate respondent Auslander Decorator Furniture, Inc. Her address is the same as that of the corporate respondent.

5. Respondent Linda Decker is an individual and was, from Nov. 1971 until May 31, 1973, a vice president of corporate respondent Auslander Decorator Furniture, Inc. Her present home address is 1418 Kensington Place, Crofton, Md. Respondent Linda Decker is no longer employed by the corporate respondent.

6. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution of furniture and related products to the public at retail.

7. In the course and conduct of their business as aforesaid, respondents now cause, and for some time last past have caused, their said merchandise, when sold, to be shipped from their place of business in the District of Columbia to purchasers thereof located in various States of the United States and in the District of Columbia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act (15 U.S.C. 41-58).

8. In the course and conduct of their business as set forth in the complaint and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals engaged in the sale of merchandise of the same general kind and nature as the aforesaid merchandise sold by the respondents.

9. In the course and conduct of their business as set forth in the complaint and for the purpose of inducing the sale of their merchandise, respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by materials disseminated through the mails, and on tags or labels and in signs posted in respondents' stores. In addition to the aforesaid statements and representations, respondents

and their sales representatives have made, and are now making, numerous oral statements to customers and prospective customers regarding the terms and conditions under which merchandise will be sold and delivered and services provided by respondents. By and through the use of these statements and representations, respondents have represented, and are now representing, directly and by implication, that: (1) respondents will deliver their furniture to customers on or near the dates they have promised those customers for delivery; (2) respondents maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised dates; (3) respondents' customers may purchase furniture on the layaway plan, and, while the payments are being made, the furniture will be stored in their warehouse, ready for delivery upon completion of all payments; and (4) respondents are offering furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

In truth and in fact: (1) respondents, in many instances, do not deliver their furniture to customers on or near the dates they have promised those customers for delivery; (2) respondents, in many instances, do not maintain in their warehouse stock which is adequate to insure that furniture ordered by customers will be available for delivery on the promised delivery date; (3) furniture purchased by respondents' customers on the layaway plan is not, in many instances, stored in the warehouse ready for immediate delivery upon completion of all payments, but is sold to other customers, necessitating reordering of the merchandise when the layaway payments are completed, with resultant delays in delivery; and (4) respondents, in many instances, do not offer furniture at prices which are a reduction from the prices at which respondents have sold said merchandise on a regular basis for a reasonably substantial period of time in the recent, regular course of business.

The aforesaid statements and representations are false, misleading and deceptive.

10. In the course and conduct of their business as set forth in the complaint and for the purpose of inducing the sale of their merchandise, respondents have maintained, and are now maintaining, in their salesrooms, floor models and displays of furniture being offered for sale, on the bases of which their customers select and order the furniture they purchase from respondents. In this connection, respondents and their sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the quality and durability of the furniture being offered for sale, the terms and conditions under which merchandise will

be sold and delivered, and the services that will be provided by respondents. Moreover, subsequent to making sales and deliveries, respondents and their employees have made, and are now making, numerous oral statements, representations and promises to their customers regarding the time and the manner in which respondents will perform various adjustments, replacements and/or repairs.

By and through the use of floor models and furniture displays, together with the aforesaid oral statements, representations and promises made by respondents, their sales representatives and other employees, respondents have represented, and are now representing, directly or by implication, that: (1) furniture which is delivered to respondents' customers will be identical to that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays; (2) furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays will be replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees; (3) furniture which is delivered to respondents' customers will be free from damages and/or defects; (4) furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced within a reasonable time; (5) furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced to the satisfaction of the purchasers; and (6) furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced in accordance with promises made to the purchasers by respondents' employees.

In truth and in fact: (1) furniture is delivered to customers which, in many instances, is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays; (2) furniture delivered to customers which is different from that which the customers have selected and ordered on the bases of respondents' floor models and/or furniture displays, in many instances, is not replaced within a reasonable time, to the satisfaction of the customers, and in accordance with promises made to the customers by respondents' employees; (3) furniture delivered to purchasers, in many instances, is damaged and/or defective; (4) furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced within a reasonable time; (5) furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced to the satisfaction of the purchasers; and (6) furniture which is delivered to purchasers with damages and/or defects, in many instances, is not repaired or replaced

in accordance with promises made to the purchasers by respondents' employees.

The aforesaid acts, practices, statements and representations are false, misleading and deceptive.

11. Respondents' use of the aforesaid false, misleading and deceptive statements, representations, acts and practices have had, and now have, 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 complete, and into the purchase of substantial quantities of respondents' merchandise by reason of such erroneous and mistaken belief.

12. The aforesaid acts and practices of respondents, as herein concluded, were, and are, all to the prejudice and injury of the public and of respondents' competitors, and constitute unfair or deceptive acts and practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45).

ORDER

It is ordered, That respondents Auslander Decorator Furniture, Inc., a corporation, its successors and assigns, and its officers, and Maxwell Auslander, individually and as an officer of Auslander Decorator Furniture, Inc., and respondents' agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the advertising, offering for sale, sale and distribution of furniture and other articles of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

(1) Failing to state, in writing, on the face of all order forms and sales contracts executed by customers, and on all invoices covering the sale of merchandise to customers, in conspicuous language likely to be read and understood by the customer, the dates for delivery of such merchandise agreed to by respondents and their customers at the time of the execution of the order or contract or the date of sale, and that respondents will refund all monies paid by such customers in the event such delivery is not made within five (5) business days of the agreed delivery dates, unless such customers agree in writing to extensions of the delivery dates.

(2) Failing to deliver merchandise to customers within five (5) business days of the agreed delivery dates, or failing to refund immediately all monies paid by such customers in the event such

delivery dates are not met by respondents, unless the customers agree, in writing, to extensions of the delivery dates.

(3) Misrepresenting orally or in writing, directly or by implication, the availability of merchandise in stock for delivery by specific dates.

(4) Selling merchandise to customers on the layaway plan, unless such merchandise is physically set aside, in storage, for delivery to such customers upon the completion of the layaway payments, in accordance with the provisions of Subparagraphs (1) and (2) hereinabove.

(5) For a period of two (2) years from the effective date of this order, failing to maintain and produce for inspection and copying by the Federal Trade Commission upon ten (10) days' notice, adequate records (a) which disclose the history of all orders, sales and deliveries; and (b) from which it can be determined whether or not merchandise was available in stock for delivery as of specific dates.

II

(1) Using the words "sale," "sale price," "warehouse sale," "clearance sale," "savings," or "buy now and save," or any other word or words of similar import or meaning, unless the price of such merchandise being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual *bona fide* price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business.

(2) For a period of two (2) years from the effective date of this order, failing to maintain and produce for inspection and copying by the Federal Trade Commission upon ten (10) days' notice, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations of the type described in Subparagraph (1) hereinabove are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

III

It is further ordered, That respondents shall:

(1) Inform, orally, all customers at the time of sale and provide in writing on the face of all order forms and sales contracts executed by customers, and on all invoices covering the sale of merchandise to customers, in conspicuous language likely to be read and under-

stood by the customer, that the customer may cancel the contract with a refund of all monies theretofore paid to respondents by notification to respondents in writing within five (5) days from the date of actual delivery of the merchandise, where the merchandise delivered to a customer is defective or damaged, or is not identical to the merchandise ordered by the customer; *Provided, however,* That the provisions of this subparagraph shall not apply to merchandise sold "as is," such sales to be so designated specifically on the order forms, sales contracts and invoices utilized in connection with such sales transactions, nor to sales of merchandise to customers who have knowledge of damage to, or defects in, the particular merchandise and have given written consent to purchasing same in its stated condition.

(2) Refund immediately all monies to customers who have requested contract cancellation in accordance with the provisions of Paragraph III(1) above; *Provided, however,* That, in lieu of making such a refund, respondents may, with the written consent of, and with no additional cost to, the customer, replace or repair defective or damaged merchandise, such replacement or repair to be fully, satisfactorily, and promptly performed. In such a case, the customer who consents to accept replacement or repair in lieu of a refund, may cancel the contract with a refund of all monies by notification to respondents in writing within five (5) days from the date of actual delivery of any replacement or repaired merchandise that is itself defective or damaged.

(3) For a period of two (2) years from the effective date of this order, maintain and produce for inspection and copying by the Federal Trade Commission upon ten (10) days' notice, adequate records to disclose the facts pertaining to the receipt, handling and disposition of each and every communication from a customer, oral or written, requesting contract cancellation, refund, replacement or repair.

IV

(1) *It is further ordered,* That respondents deliver a copy of this order to all present and future employees or other persons engaged in the preparation and placing of respondents' advertisements, and the offering for sale, or sale, of respondents' products, and secure from each such employee or other person a signed statement acknowledging receipt of said order.

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

(3) *It is further ordered,* That the individual respondent Maxwell

Auslander promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include said respondent's current business address and a statement as to the nature of the business or employment in which he is engaged as well as a description of his duties and responsibilities.

(4) *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.

(5) *It is further ordered*, That respondents shall, within sixty (60) days from the effective date of this order, notify the Commission in writing of the manner and form in which each has complied with this order.

(6) *It is further ordered*, That the complaint be, and it hereby is, dismissed as to respondents Sandra Tye and Linda Decker as individuals.

ORDER AND OPINION DENYING MOTION FOR EXTENSION OF
TIME FOR FILING OF NOTICE OF INTENTION TO APPEAL
AND FOR FILING APPEAL BRIEF

AND

FINAL ORDER AND DECISION OF THE COMMISSION

This matter is before the Commission on the motion for extension of time for filing of notice of intention to appeal and for filing appeal brief of respondents Auslander Decorator Furniture, Inc. and Maxwell Auslander. Also before the Commission are complaint counsel's opposition to motion for extension of time for filing of notice of intention to appeal and for filing appeal brief, and respondents' answer to opposition of motion for extension of time.

Section 3.52(b), Subpart F, Part 3 of the Commission's Rules of Practice states that a party's right to appeal an initial decision is conditioned upon his filing of a notice of intention to appeal within 10 days after he is served with said initial decision. Movants have failed to do so, conceding that they were served on March 11, 1974, and did not even attempt to appeal or file any notice of such intention until at least April 2, 1974. Notwithstanding this provision of the rules, respondents seek waiver by the Commission of the ten-day requirement.

Section 4.3(b), Part 4, of the Commission's Rules of Practice allows an extension of time limits provided for by the rules "for good cause

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shown." The only showing of cause made by movants is that respondent Maxwell Auslander was busy serving as warehouse manager as well as chief executive officer of respondent Auslander Decorator Furniture, Inc., during the ten-day period provided by Rule Sec. 3.52(b). Respondents do not dispute the fact that counsel was served with the initial decision. The Commission is of the opinion that the filing of a notice of intention to appeal is not so burdensome that movants could not have filed one. The facts presented by respondents in extenuation are not persuasive. Under these circumstances, we do not believe that the failure to so file is excused by good cause. Accordingly,

It is ordered, That respondents' motion for extension of time for filing of notice of intention to appeal and for filing of appeal brief be, and it hereby is, denied.

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

IN THE MATTER OF

FOOD FAIR STORES, INC., ET AL.