

IN THE MATTER OF

TRI-STATE CARPETS, INC., ET AL.

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

Docket 8945. Complaint, Dec. 7, 1973—Decision, Oct. 15, 1974

Order requiring a College Park, Md., carpeting retailer, among other things to cease using bait and switch tactics and deceptive sales plans; disparaging merchandise; misrepresenting terms and conditions, guarantees, and limited or special offers; and in connection with the extension of consumer credit, to cease violating the Truth in Lending Act by failing to make such disclosures as required by Regulation Z of the said Act.

Appearances

For the Commission: *Everette E. Thomas, Richard F. Kelly & Michael E. K. Mpras.*

For the respondents: *Ronald S. Goldberg, Silver Spring, Md.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Tri-State Carpets, Inc., a corporation, and Michael J. Lightman and William R. Lightman, individually and as officers of said corporation, and Matthew Mintz, individually and as manager of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts,

and the implementing regulation promulgated under the Truth in Lending 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 Tri-State Carpets, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business at 10011 Rhode Island Avenue, College Park, Md.

Respondents Michael J. Lightman and William R. Lightman are individuals and officers of the corporate respondent. Respondent Matthew Mintz is an individual and sales manager of the corporate respondent. Together they formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent.

All of the aforementioned respondents cooperated and acted together in the carrying out of the acts and practices hereinafter set forth.

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

COUNT I

Alleging violation of Section 5 of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count I as if fully set forth verbatim.

PAR. 3. In the course of conduct of their business as aforesaid, respondents have caused, and now cause, the dissemination of certain advertisements concerning the aforesaid carpeting and floor coverings, by various means in commerce, as "commerce" is defined in the Federal Trade Commission Act, including television broadcasts transmitted by television stations located in the District of Columbia, having sufficient power to carry such broadcasts across state lines, for the purpose of inducing and which were likely to induce, directly or indirectly, the purchase of respondents' said merchandise.

In the further 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 located in the State of Maryland, to purchasers thereof located in the Commonwealth of Virginia and the District of Columbia. Thus respondents 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.

Complaint

84 F.T.C.

PAR. 4. In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their carpeting and floor coverings, the respondents have made, and are now making, numerous statements and representations in advertisements by means of television broadcasts transmitted by television stations located in the District of Columbia, having sufficient power to carry such broadcasts across state lines and by means of oral and written statements and representations of their salesman to prospective purchasers with respect to their products and services.

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

Imagine three full rooms of this beautiful nylon pile carpeting — up to three hundred square feet—for only \$129—and that *does* include the padding and 48 hour installation!

* * * * *

To prove that *nobody* can beat our prices, call in the next five minutes and we'll knock off *another* 10 per cent, bringing your cost down to \$116.

* * * * *

When you purchase our Dupont 501 nylon carpeting you'll get this deluxe Hoover vacuum cleaner with all attachments for cleaning the *deepest* shag.

* * * * *

Free Vacuum Cleaner

* * * * *

Special Price - No Gifts

* * * * *

10 Year Guarantee

PAR. 5. By and through the use of the above-quoted statements and representations, and others of similar import and meaning but not expressly set out herein, separately and in connection with the oral and written statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing, directly or by implication, that:

1. Respondents are making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements.

2. By and through the use of the words "and that *does* include the padding and 48 hour installation" and other words of similar import and meaning, not set out specifically herein, that all of the carpeting mentioned in such advertisements is installed with separate padding included at the advertised price.

3. Purchasers of 501 Nylon carpeting, and certain other styles of carpet, receive a free vacuum cleaner.

4. Certain of respondents' products are unconditionally guaranteed for various periods of time, such as ten (10) years.

PAR. 6. In truth and in fact:

1. Respondents' offers are not bona fide offers to sell said carpeting and floor coverings at the price and on the terms and conditions stated in the advertisements. To the contrary, said offers are made for the purpose of obtaining leads to persons interested in the purchase of carpeting. Members of the purchasing public who respond to said advertisements are called upon in their homes by respondents or their salesmen, who make little or no effort to sell to the prospective customer the advertised carpeting. Instead, they exhibit what they represent to be the advertised carpeting which, because of its poor appearance and condition, is frequently rejected on sight by the prospective customer. Higher priced carpeting or floor coverings of superior quality and texture are thereupon exhibited, which by comparison disparages and demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents, through their salesmen, attempt to sell the higher priced carpeting.

2. A substantial portion of the carpeting advertised by the respondents is not installed with separate padding which is included in the advertised price. To the contrary, a substantial portion of the advertised carpeting has rubberized backing which is bonded to the carpeting.

3. Purchasers of the said 501 Nylon carpeting, and certain other styles of carpet, do not receive a free vacuum cleaner. To the contrary, the cost of the "free" gift is added to and regularly included in the selling price of the merchandise sold to the customer.

4. Respondents' carpeting and floor coverings are not unconditionally guaranteed. To the contrary, such guarantees as are available are subject to numerous substantial conditions and limitations.

PAR. 7. By and through the use of respondents' television advertisements containing the aforesaid statements and representations, and others of similar import and meaning but not expressly set forth herein, respondents offer three rooms of nylon pile carpeting (up to 270 sq. ft.) for \$129. An additional 10 percent reduction in price is offered to purchasers of such carpeting who telephone respondents within five minutes after the commercial is aired. As a further inducement, respondents' advertisements offer a "free" vacuum cleaner to purchasers of certain nylon pile carpeting. By the audio and visual manner in which the "free" gift is presented in immediate conjunction with the offer of the featured low price carpeting, respondents have represented, and are now representing, directly or by implication, that purchasers of the low price carpeting are entitled to the "free" gift.

Complaint

84 F.T.C.

PAR. 8. In truth and in fact, the offer of the "free" gift does not apply to the purchase of the low price carpeting. To the contrary, the "free" gift applies only to the purchase of a much higher price carpeting to which the television advertisement makes only an inconspicuous and misleading reference.

Therefore, the acts and practices as set forth in Paragraph Seven hereof were and are false, misleading and deceptive.

PAR. 9. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents use the term "up to 270 sq. ft." to indicate the quantity of carpeting available at the advertised price.

PAR. 10. The unit of measurement usually and customarily employed in the retail advertising of carpeting is square yards. Consumers are accustomed to comparing the price of carpeting in terms of price per square yard, therefore respondents' use of the square foot unit of measurement confuses consumers who compare respondents' prices with competitors' prices advertised on a square yard basis.

Furthermore, respondents use of square foot measurements exaggerates the size or quantity of carpeting being offered, and therefore has the capacity and tendency to mislead consumers into the mistaken belief they are being offered a greater quantity of carpeting than is the fact.

Therefore, the acts and practices as set forth in Paragraph Nine hereof were and are unfair, false, misleading and deceptive.

PAR. 11. In the further course and conduct of their business, and in furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents and their salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

In a substantial number of instances, through the use of the false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Six, above, respondents or their representatives have been able to induce customers into signing a contract upon initial contact without giving the customer sufficient time to carefully consider the purchase and consequences thereof.

PAR. 12. In the further course and conduct of their aforesaid business, and in connection with the representations set forth in Paragraph Four above, respondents offer carpet with padding and installation included at a price based upon specified areas of coverage. In making such offer, respondents have failed to disclose the material fact that the prices stated for such specified areas of coverage are not applied at the same rate for additional quantities of carpet needed, but are priced substantially higher.

The aforesaid failure of the respondents to disclose said material facts to purchasers has the tendency and capacity to lead and induce a substantial number of such persons into the understanding and belief that the prices charged for quantities of carpet needed in excess of the specified areas of coverage will not be substantially higher than the rate indicated by the initial offer.

Therefore, respondents' failure to disclose such material facts was, and is, unfair, false, misleading and deceptive.

PAR. 13. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and service of the same general kind and nature as those sold by respondents.

PAR. 14. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices, and their failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete, and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 15. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Truth in Lending Act and the implementing Regulation promulgated thereunder, and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count II as if fully set forth verbatim.

PAR. 16. In the ordinary course and conduct of their business, as aforesaid, respondents regularly extend consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 17. Respondents, in the ordinary course of business as aforesaid, and in connection with their credit sales, as "credit sale" is defined in

Regulation Z, have caused, and are causing, customers to execute binding retail installment contracts, hereinafter referred to as the "contract."

PAR. 18. By and through the use of the contract respondents, in a number of instances:

1. Sold credit life insurance to be written in connection with its credit sales without obtaining a specific dated and separately signed affirmative written indication of the customer's desire for such insurance. Failing to provide for authorization pursuant to Section 226.4(a)(5) of Regulation Z, respondent was required to include the cost of such insurance in the amount of the finance charge, and by failing to do so, respondent failed to disclose accurately the "amount financed" and the "finance charge" as required by Sections 226.8(c)(7) and 226.8(c)(8)(i) respectively, of Regulation Z, and thereby also failed to state the "annual percentage rate" accurately, as required by Section 226.7(b)(6) of Regulation Z.

2. Failed to disclose the annual percentage rate accurately to the nearest quarter of one percent computed in accordance with Section 226.5(b)(1) of Regulation Z, as required by Section 226.8(b)(2), by reason of either understating the "annual percentage rate" by amounts ranging from .5 percent to .8 percent or by leaving the space provided therefor blank.

3. Failed to disclose due dates scheduled for the repayment of the customer's indebtedness as required by Section 226.8(b)(3) of Regulation Z by leaving the space provided therefor blank.

4. Failed to use the term "amount financed" to describe the amount of credit of which the customer has the actual use, as required by Section 226.8(c)(7) of Regulation Z.

5. Failed to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.

6. Failed to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z.

PAR. 19. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

INITIAL DECISION BY DANIEL H. HANSCOM,
ADMINISTRATIVE LAW JUDGE

JULY 8, 1974

PRELIMINARY STATEMENT

By its complaint issued Dec. 7, 1973, the Federal Trade Commission charged respondents under Count I with unfair and deceptive acts and practices in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings in violation of Section 5 of the Federal Trade Commission Act. Under Count II the complaint charged respondents with violations of the Truth in Lending Act through practices utilized to aid and promote credit sales.

Count I of the complaint alleged in substance that respondents' television advertising, which offered "three full rooms" of "beautiful nylon pile carpeting" up to "three hundred square feet" "for only \$129," and offered a 10 percent reduction if viewers telephoned respondents within 5 minutes after the commercial was aired, was not a *bona fide* offer to sell but was merely a device to obtain leads to persons interested in the purchase of carpeting who were then called on in their homes and subjected to "bait and switch" sales tactics. Count I of the complaint further alleged:

That the statement in respondents' advertising "and that does include the padding and 48 hour installation" meant that the advertised carpeting was installed with separate padding at the advertised price, whereas in truth and fact the advertised carpeting did not have separate padding but came with rubber backing attached to the carpet.

That the "free" vacuum offered with the purchase of duPont 501 Nylon carpeting was not a free "gift" but in reality was added to the selling price of that carpet.

That the "free" vacuum offered with the purchase of duPont 501 Nylon carpeting was made in the audio and visual portion of respondents' commercial in "immediate conjunction with the offer of the featured low price carpeting" so as to represent in a false, misleading and deceptive manner that purchasers of the "three full rooms" of nylon pile carpeting "for only \$129" would get a free vacuum cleaner.

That respondents' advertising represented that the carpet offered was unconditionally guaranteed whereas in truth and fact respondents' guarantees were subject to numerous and substantial conditions and limitations.

The complaint further alleged that the unit of measurement customarily employed in the retail advertising of carpeting was square yards; that consumers were accustomed to comparing the price of carpeting in terms of square yards; and that respondents' use of the square foot unit of measurement was confusing, and led consumers to compare respondents' prices by the square *foot* with competitors' prices by the square *yard*. According to the complaint, this advertising stratagem exaggerated the size or quantity of carpeting offered by respondents, and had

Initial Decision

84 F.T.C.

the tendency and capacity to mislead members of the public into the mistaken belief that they were being offered a greater quantity of carpet than was the fact.

Respondents were also charged with failing to disclose in their television advertising, and through salesmen and representatives calling on the public, that the prices charged for carpet over and above the advertised area of coverage were substantially higher than for the area advertised. In other words, according to the complaint, persons responding to the advertising, and thereafter in communication with respondents' salesmen and representatives, were not advised that if they needed more carpeting than the "three hundred square feet" advertised, the additional carpet was priced at a substantially higher rate than the advertised price.

Under Count II respondents were charged with violation of the Truth in Lending Act and its implementing regulation by:

Selling credit life insurance without obtaining a specific dated and separately signed affirmative written indication of the customer's desire for such insurance, and failing to include the cost thereof in the finance charge, and in this manner failing to disclose accurately the "amount financed" and the "finance charge."

Failing to disclose the annual percentage rate accurately by understating that amount or by leaving the space provided therefor blank.

Failing to disclose due dates scheduled for the repayment of the customer's indebtedness by leaving the space provided therefor blank.

Failing to use the term "amount financed" to describe the amount of credit of which the customer had the actual use.

Failing to use the term "total of payments" to describe the sum of payments scheduled to repay the indebtedness.

Failing to disclose the sum of the cash price, all charges included in the amount financed but not part thereof, and the finance charge, and to describe that sum as the "deferred payment price."

Answer

Respondents Tri-State Carpets, Inc., Michael J. Lightman, and William R. Lightman answered denying all material allegations of the complaint and demanding "strict proof" thereof. The answer further alleged that individual respondent William R. Lightman, although serving as an officer of respondent corporation, was "never active in the business," and never played "any role in the promotion, advertising, or resale of carpets, or other floor coverings" by respondent corporation. William R. Lightman denied that he was "given any responsible work" which called for "decision making on any responsible level" in the management of Tri-State.

Individual respondent Matthew Mintz, although served with the complaint, failed to file an answer, did not attend any of the hearings

although he had notice of them, and was ruled in default by the undersigned.

By order of May 2, 1974, the Commission authorized the filing of an initial decision with respect to Matthew Mintz at the same time as the initial decision was filed with respect to the other respondents.

Proceedings

A prehearing conference was held on Feb. 14, 1974, and hearings on the merits were commenced on Apr. 2, 1974. The were concluded on Apr. 5, 1974. Complaint counsel subpoenaed individual respondents Michael J. Lightman and William R. Lightman, the director of the Washington area Better Business Bureau, an expert in the marketing of carpet, the proprietor of respondents' advertising agency, a former salesman of respondents and a substantial number of members of the public who had answered respondents' advertising. A large number of documents were also offered and received in evidence. Respondents offered certain documentary material during the case in chief, but, when the time came to present the case in defense, counsel for respondents stated that the defense would "submit on the record" (Tr. 417). Although given an opportunity to submit proposed findings and a memorandum in support, and provided an extension of time until June 5, 1974, to reply to complaint counsel's proposed findings and supporting authority, nothing was filed by respondents or their counsel by that date.

Basis of Decision

This initial decision is based on the record as a whole and on the observation by the undersigned of the witnesses and their demeanor. Proposed findings of fact and conclusions of law submitted and not included herein in substance, or in the language proposed, are rejected as erroneous or not in accord with the evidence, or immaterial or irrelevant. The following findings of fact and conclusions of law are made:

FINDINGS OF FACT

Respondents and Their Business

1. Respondent Tri-State Carpets, Inc. (Tri-State) is a corporation which was organized and did business under the laws of the State of Maryland. Tri-State is a "close" corporation and an affiliate of Classic Carpet Center, Inc. (Classic Carpet) which did business as "Carpeteria" (Tr. 7, 51). Both Tri-State and Classic Carpet were "family" firms (Tr. 82, 98), being owned and operated by the Lightmans, William R. Lightman, his wife, and son, Michael J. Lightman. All of the stock of both corporations was held by one or another of the foregoing family mem-

bers, who also served as officers of both firms. Although Tri-State is now "inoperative" it has not been dissolved (Tr. 7).¹ Individual respondents Michael J. Lightman, William R. Lightman and Matthew Mintz formulated, directed, and controlled the acts and practices of corporate respondent Tri-State.

2. Both Tri-State and its affiliate Classic Carpet were engaged in the retail sale of "wall-to-wall" carpet for home installation. The Tri-State method of operation was to obtain names of persons interested in such carpet by television advertising. Thereafter salesmen of Tri-State would call upon such prospective customers in their homes and attempt to sell them carpet.

3. Classic Carpet Center, Inc. ("Carpeteria"), was operated primarily by William R. Lightman and had been in business for several years before Tri-State was formed. Tri-State was started as an off-shoot so as to engage in the retail carpet business under another name "to make more money" (Tr. 15). As respondent Michael J. Lightman put it, "if you change your name, you can sometimes capitalize because of—people dissatisfied with the previous company may buy from a new company" (Tr. 15).

4. Tri-State's office was in the family's Classic Carpet Center, Inc. warehouse in Fairfax, Va. and its retail outlet was located in College Park, Md. (Tr. 80). Classic Carpet Center, Inc. ("Carpeteria") and Tri-State were both operated out of the same office, William R. Lightman and Michael J. Lightman having adjoining desks (Tr. 111). Inasmuch as the business operations of Classic Carpet and Tri-State were conducted from the same office, customer folders were differentiated by different colors, one being used for Classic Carpet's customers and a different color for Tri-State's customers. The contents of the folders, however, were "made up identical" (Tr. 86).

5. Michael J. Lightman was president of Tri-State and his father was secretary-treasurer (Tr. 83-88). William R. Lightman oversaw the "expedition of all sold merchandise" for Tri-State, and arranged "for the purchase of all products for resale" by Tri-State (Tr. 75). He also acted as a trouble shooter handling "backlashes" from Tri-State customers who were dissatisfied or had problems (Tr. 84-85). Contrary to the answer, as secretary-treasurer William R. Lightman was a decision-maker for Tri-State, as the following demonstrates (Tr. 83-84).

Q. So you did carry out these responsibilities as Secretary-Treasurer?

A. Yes. Let's put it this way—the buck stops here because there has to be a boss over

¹ Michael J. Lightman and William R. Lightman, at the time they testified herein, had become affiliated with TransAmericard, a firm understood to be engaged in the discounting of notes and instruments obtained by companies dealing with consumers (Tr. 3, 82, 103-104).

1078

Initial Decision

someone * * * if anything went array [sic], the carpet wasn't there, people weren't there, whatever backlash, I would get into it * * *

And further (Tr. 87-88):

Q. It was your decision whether the customer would get carpet installed, and this is a customer of Tri-State Carpets?

A. Yes, sir.

In essence, as already indicated, the operation of Tri-State and Classic Carpet constituted a family business (Tr. 98):

Q. During this period of time you were Secretary-Treasurer with Tri-State, you also held an office in Classic Carpets?

* * * * *

A. * * * I was Vice-President. * * * It is all in the family. * * *

Q. You viewed Classic Carpets as a family corporation?

A. Yes.

Q. Did you view Tri-State as a family corporation?

A. Yes.

6. Respondent Matthew Mintz managed the retail outlet of Tri-State located in College Park, Md. (Tr. 15-16, 79-81), having been recruited at the time Tri-State was formed by the Lightmans (Tr. 17). Mr. Mintz had previously been a carpet salesman. After being hired by Tri-State, he and Michael J. Lightman supervised the selling operations and salesmen of Tri-State (Tr. 32-33). Shortly before Tri-State ceased business operations (apparently because of the Commission's investigation) respondent Matthew Mintz briefly functioned as president of Tri-State (Tr. 12).

7. Classic Carpet supplied the carpet sold by Tri-State (Tr. 83) and handled all installations in customers' homes of all carpeting sold by Tri-State. Such installations were accomplished through subcontractors (Tr. 31). All labor and materials used by Tri-State were supplied by Classic Carpet, the cost thereof being billed as a bookkeeping matter to Tri-State (Tr. 31).

8. The sales volume of Tri-State at all times mentioned herein has been substantial, amounting to between \$12,000 and \$18,000 per week which is between \$624,000 and \$936,000 annually (Tr. 43). At all relevant times mentioned herein respondents have been engaged in "commerce" as commerce is defined in the Federal Trade Commission Act. Respondents have sold and shipped carpet to customers residing in Maryland, Virginia and the District of Columbia (CX 17-173).

Bait and Switch

9. Respondents advertised heavily over television stations located in the metropolitan Washington, D.C., area. A local advertising agency

known as Weitzman & Associates was utilized (Tr. 17, CX 5). The principal television station employed was WDCA-TV, Channel 20, although Mr. Michael J. Lightman testified that "at one time or another, we used all of the television stations that were presently in the Washington metropolitan area" (Tr. 44).

10. The contracts between Weitzman & Associates and Milton Grant, WDCA-TV's vice-president and general manager, were for relatively large sums of money. For example, advertising during the period May 13, 1972 and Sept. 1, 1972 was at the rate of \$2,025 per week for a total of \$32,400 for the period (CX 7).

11. The advertisements of respondents consisted principally of "spot" commercials costing \$40 each over WDCA-TV (CX 6(a)). They were broadcast with considerable frequency, twenty of them being aired for example in the two day period of Apr. 8 and 9, 1972 (CX 6(a)). Exposure of the public to the commercials in the Washington metropolitan area including suburban Virginia and Maryland, as well as the District of Columbia, was substantial.

12. The nature of the commercials of respondents was typical "hard sell" and their full flavor can only be appreciated from a viewing of the tape of the commercial which is in the record (CX 208). The commercial featured an announcer or salesman standing beside a rack or "waterfall" of carpet samples centered in a showroom with rolls of carpet against the walls. The entire setting resembled the "wall-to-wall" carpet and rug showroom of a department store or substantial retail outlet. The rack of carpet beside which the salesman stood consisted of what appeared on the television commercial to be high quality, if not luxurious, sections or samples of various types of carpet commonly used in the home for "wall-to-wall" installation, shags, tip shears, plush piles, and so forth. During the commercial the announcer or salesman repeatedly put his hand on the top of the rack of samples indicating that the "three full rooms" of carpet being offered "for only \$129" was contained in the carpet displayed in the rack, or was equal to it in quality and appearance. Although the audio portion of the commercial does not reveal the full impact of the representations and messages conveyed to the public, it is reproduced herein and reads as follows (CX 191, 205):

Can you believe three rooms of carpeting for \$129? Yes, if its *Tri-State*, because we and our affiliates have installed over 5 million square feet of brand name carpeting and it's because of *volume* that we can give you quality shags, tip shears and plush pile carpeting at discount prices. Imagine three full rooms of this beautiful nylon pile carpeting—up to three hundred square feet—for only \$129—and that *does* include the padding and 48 hour installation! When you purchase our Dupont 501 nylon carpeting, you'll get this deluxe Hoover vacuum cleaner with *all* attachments for cleaning the deepest shag. To prove that *nobody* can beat our prices, call in the next five minutes and we'll knock off *another* 10 percent, bringing your cost down to \$116. Three rooms, up to 300 square feet, convenient

shop-at-home service, all for \$116. So call 345-4500 right now. Convenient budget terms available, so call 345-4500 *now*. [Emphasis in original]

13. Respondents also used testimonials from alleged satisfied customers of Tri-State. The audio portion of one of these is the following (CX 180):

Hi, I'm sitting here today with 2 of Tri-State Carpet Co.'s many satisfied customers.

Mrs. Berard, what do you think of Tri-State Carpet?

"The price on TV was so low we could hardly believe it—but our carpeting is beautiful and we're more than satisfied."

Well, thank you.

Mrs. Pierce, what do you think of Tri-State? "They're great people to deal with. It was a pleasure to be able to shop in our own home and the budget terms they had made buying it so easy."

Thank you.

You too can have 3 full rooms of this beautiful nylon pile carpeting—installed with padding—up to 300 square feet, for only \$129. Who else could bring you such volume savings! And as a special bonus, if you call within 5 minutes you'll get another 10% discount—bringing the price down to an incredible \$116 for 3 rooms of this beautiful carpeting. Or if you prefer to purchase our Dupont 501 nylon pile carpeting, you also get this deluxe Hoover vacuum with *all* the attachments! So call 345-4500 right now! That's 345-4500 right now!

14. Neither Mrs. Berard nor Mrs. Pierce, however, had purchased the low priced carpet advertised in the foregoing commercial, although respondents' commercial conveyed the impression that they had purchased such carpet—"you too can have 3 full rooms of this beautiful nylon pile carpeting * * *" Both had purchased entirely different and much higher priced carpet paying \$212.16 and \$900 for such carpet respectively (Tr. 215, 221).

15. A sample of the carpet taken by Tri-State's salesmen to the homes of members of the public responding to the foregoing television commercials, and shown to them as the carpet advertised, is in the record (CX 213). It bears no resemblance whatever to the attractive carpet pictured and suggested in respondents' television commercials (CX 208). On the contrary, it is cheap and flimsy carpet of poor appearance and transparently low quality which none of the witnesses who testified in this proceeding desired to have installed in their homes or apartments. The pile was skimpy and attached to a thin layer of rubber backing which served as "padding." The mere exhibition of CX 208 to a prospective customer who answered respondents' television advertisements hoping to obtain "three full rooms" of carpeting like that shown by the commercials over WDCA-TV "for only \$129" was likely to be sufficient to dissuade such customer from any further interest in it.

16. Complaint counsel subpoenaed thirteen (13) members of the public who had responded to the Tri-State's commercials and had tele-

phoned the number advertised. Without exception, these witnesses appeared to be responsible and sincere persons, who were motivated to answer the commercials by the attractive carpet shown and seemingly being offered by respondents, and the low prices featured.

17. Although the experience of those who answered the commercials varied, in general events took the following pattern: the person would telephone the number advertised in the commercial and would give his or her name and address. In due time one of respondents' salesmen would visit the customer. The customer would ask about the "three full rooms" of carpet advertised "for only \$129." At this point, display of the flimsy, low quality sample (CX 213) would usually be enough to discourage the prospective customer from any further interest in it. If not, overt or subtle disparagement was resorted to by respondents' salesmen. Sometimes salesmen would avoid even showing CX 213, telling the customer that their homes were too nice for the advertised carpet, or that they would not be interested in the advertised carpet. Regardless of the manner in which it was done, respondents' salesmen "switched" the householder's interest to higher priced carpet, and often succeeded in selling such higher priced carpet to those who had responded to the television commercials seeking "three full rooms" of carpeting "for only \$129." Many such persons, instead of obtaining carpet for \$129, obligated themselves to the extent of hundreds of dollars for much higher priced carpet.

18. The specific experiences of a number of witnesses who answered respondents' commercials are summarized in the following paragraphs:

Witness saw respondents' advertisement on WDCA-TV, Channel 20, in Apr. 1972 featuring 300 square feet of carpet for \$129. Witness thought the price featured very attractive and felt that 300 square feet would cover the areas he wished to cover. Witness made an appointment immediately to have a salesman come to his home. After the salesman arrived and laid out samples, witness and wife asked to see the advertised carpet. They didn't like it at all. It was "very cheap construction" and the "quality was terrible." Respondents' salesman agreed that the advertised carpeting was inferior, and that it wouldn't last in witness' home. Witness and his wife ultimately bought much higher priced carpet, spending far more than they had intended. They purchased the higher priced carpet after the salesman stressed its virtues and told them that they had to decide right away or they wouldn't get the free vacuum cleaner. Although they were told the carpet carried a guarantee, no terms or conditions thereof were specified or discussed. The contract was financed (Tr. 264-278, CX 214).

Witness saw respondents' advertisement on WDCA-TV, Channel 20, in Oct. or Nov. 1972. Witness stated that the commercial offered 300

square feet which would cover 3 rooms for approximately (as witness remembered) \$120 or \$115. Witness was attracted by the advertisement because she "thought it was a lot of carpet" and also got the impression that she would receive a free vacuum cleaner if she bought the carpet. Witness telephoned the number given, made an appointment and one of respondents' salesmen came to her home. He first showed her more expensive carpet than that advertised saying that the advertised carpet would not fit her home. After witness asked, she was shown the advertised carpet. Witness thought it "wasn't worth it," that it looked "like the type you would buy at the 5 & 10," and that it didn't look like the carpet she had seen on television. The salesman told her that the advertised carpet "wouldn't last" and that if she wanted it she would have to wait since they did not have it in stock. Witness ultimately bought the best carpet respondents sold for \$1600 financing the transaction (Tr. 285-291).

Witness saw respondents' advertisement on WDCA-TV, Channel 20, in Mar. or Apr. of 1972 featuring 3 rooms up to 300 square feet of carpeting for \$129 or \$116, plus (witness thought) a free vacuum cleaner. Witness made an appointment and one of respondents' salesmen came to his home. Witness inquired about the advertised carpet and the salesman said he didn't think witness would want the advertised carpet, that witness had a much nicer home than the advertised carpet would be useful for. Salesman suggested that he might have some carpet at a good price which was left over from an "Embassy job" they had just done. He then quoted witness a price far more than witness could "even think about" at that time. Ultimately, however, salesman sold witness the better carpet, but for a smaller area than witness had originally intended to cover. The price was \$965 including financing. Witness and his wife then reconsidered, and told the salesman they couldn't afford the purchase. The salesman told them that if they would forego the vacuum cleaner he could get them 10 percent off. They agreed and the salesman wrote the contract for such lower price. They were told there was a guarantee, but the salesman discussed it only "vaguely." "10 yr. guarantee" was put on the contract (Tr. 291-300, CX 62(f)).

Witness saw respondents' advertisement on WDCA-TV, Channel 20, in Apr. 1972. Witness recalled that the advertisement featured 3 rooms of carpet for approximately \$115. Witness telephoned for an appointment and one of respondents' salesmen called at her home. He first started showing the duPont 501, but witness asked to see the advertised carpeting. The salesman said that it wasn't really very good. Upon looking at a sample of the advertised carpet, it did not appeal to the witness at all. Witness found it "flimsy," "thin" and "didn't look like it was worth \$119." Ultimately witness purchased duPont 501 for approxi-

mately \$600. Witness was told that the contract could be financed if she put \$29 down. The salesman told her there was a ten year guarantee on the carpet, and that the guarantee was in the contract. No guarantee was in the contract, however. Witness was later told that the guarantee was on the back of the carpet. When witness inquired about the "free" vacuum cleaner the salesman said she would have to call the company. She did so and was told that she would not receive a vacuum cleaner because she had been given a reduced price. After two months of calling regarding the guarantee without satisfaction, witness contacted the Federal Trade Commission. Witness received a written guarantee after contacting the Commission (Tr. 300-309, CX 24(a)).

Witness saw respondents' advertisement on WTTG, Channel 5, in Apr. 1972. In his recollection the advertisement offered 3 rooms of carpeting for approximately \$116 including installation and padding. A vacuum cleaner was to "go along with" the carpeting. Witness was attracted by the commercial because he had planned to carpet 3 rooms and "figured what they said, 3 rooms, would cover what I had planned to cover." He called for an appointment and one of respondents' salesmen came to his house. The salesman showed him the advertised carpeting. Witness immediately said that it wouldn't do for what he wanted it for, and that it didn't look to him like what he had seen advertised. Witness "wouldn't have bought it at any price." The salesman then showed him other samples. Witness finally bought carpet for one bedroom for \$312. He was told that the free vacuum cleaner came only with the "advertised" carpet (Tr. 312-321).

Witness saw respondents' advertisement on WTTG, Channel 5, in 1972, featuring 3 rooms of carpeting for \$116 including installation and padding. Witness received the impression that a customer would receive a free vacuum cleaner with the carpeting. Witness was attracted by the fact that she "could get the carpet I wanted for what I needed, for such a low rate." She thought the carpet advertised would cover the area she had in mind. She called for an appointment and two of respondents' salesmen came to her home. The salesmen first showed her carpet different from that advertised. She asked to see the advertised carpet, and the salesmen told her she would not be interested in this type for her home. Witness' husband mentioned that the advertised carpet "didn't look like anything, nor did it look like anything that was on T.V." After seeing other samples witness was attracted to duPont 501, and the salesmen stressed its quality. She purchased the 501 for \$500, financing through *Household Finance*. Witness had been told she would receive a guarantee. The salesmen wrote on the contract that she would receive a written guarantee, but she did not. Witness inquired about the

vacuum cleaner. The salesmen told her that that would require an extra charge. She contacted the manager, and finally received the vacuum cleaner after the carpet had been installed (Tr. 322-339, CX 215).

Witness saw respondents' advertisement on WTTG, Channel 5. The advertisement featured 300 square feet or 3 rooms of carpeting for \$129, with a 10 percent reduction from that price if a customer were to call within 5 minutes. The witness was "mostly induced by the price and it seemed like a good bargain" to call the company. He thought he could carpet the 3 areas he had in mind with the amount advertised. One of respondents' salesmen came to the witness' home. Witness asked to see the advertised carpeting. He decided against it immediately, thinking it "looked like maybe a good quality bath towel." Witness looked at more expensive carpet and was quoted a price of \$500. He thought that price too high and requested either a reduction or a vacuum cleaner. The salesman said he would give witness a vacuum cleaner. The salesman said a written 15-year guarantee would be mailed to the witness, and wrote on the contract of sale to that effect. However, the customer never received a guarantee (Tr. 341-349, CX 216-218).

Witness saw respondents' advertisement on WDCA-TV, Channel 20 in the summer of 1972, offering 300 square feet or 3 rooms of carpeting for around \$129, with (witness thought) a free vacuum cleaner to come with the carpeting. The witness thought the offer was for 3 rooms of duPont 501 carpeting. According to witness' recollection, there was to be a further 10 percent reduction if a customer would telephone within 10 minutes [sic]. The witness did so. One of respondents' salesmen came to her house, measured the area the witness had in mind, and told her the advertised carpet would not cover it. Witness inspected the advertised carpet, and found it "very cheap, low-quality carpeting." It did not look to her like the carpeting advertised on television. The television carpeting looked like the better grade carpeting the salesman showed her. Witness looked at other samples and ultimately signed a contract for duPont 501. No guarantee was mentioned. The next day, witness changed her mind and tried to cancel the contract. After telephoning respondents' office several times she was eventually told by the "manager" that she could not cancel. Witness insisted on cancellation and Tri-State sued. Although apparently the suit was dismissed, witness' credit rating was hurt because of the transaction (Tr. 350-358).

Witness saw respondents' advertisement on WDCA-TV, Channel 20, offering 3 rooms of carpeting for \$116, including padding and installation and (witness believed) a free vacuum cleaner. Witness telephoned the company and one of respondents' salesmen came to his home.

Witness asked to see the advertised carpeting and was disappointed; he thought the carpet shown on television was better and did not think the carpet he was shown was the same as the carpet advertised. The salesman told him he could pick out a better carpet. Witness ultimately bought carpet for \$850 (Tr. 358-364, CX 219).

Witness saw respondents' advertisement on WDCA-TV, Channel 20, in Apr. of 1972. It featured 3 rooms of carpeting for \$129, with a reduction if one were to call immediately. When respondents' salesman first arrived at witness' apartment, he showed her the duPont 501. When witness asked about the advertised carpet, the salesman told her it wasn't very good quality, was not for her type of person, that it had no padding, and anyway would cost her more than the advertised price because the areas she wanted covered were too large. When witness saw the advertised carpet she thought it looked "cheap," "real thin," and did not look like what was advertised on television. She did not want it even at the low advertised price. She ultimately decided on duPont 501 carpeting, for which she signed a contract for \$826. The salesman told her the carpet was guaranteed for 10 years. He also told her, in response to her question, that she could cancel the contract if her roommate did not agree on the transaction. Her roommate did not agree and witness tried vainly by telephone and letter to cancel the contract within the 3 days she had been told she could cancel. She was told the carpet had been cut for her apartment, and was told she would be taken to court. She then agreed to go through with the deal (Tr. 365-373).

Witness saw respondents' advertisement on WDCA-TV, Channel 20. It featured 3 rooms of carpeting for \$119 or \$129, and in witness' recollection represented that, if one called within five minutes, one would receive a discount and a free vacuum cleaner. The witness described the salesman as a "con man." When the witness asked to see the advertised carpet, "he showed me a piece of carpet I don't believe anybody would want." It did not appear to him to be the carpet he had seen advertised on television. The salesman said it was not worth putting down. Witness ultimately bought other carpet from Tri-State for one room for \$170. He was told he had a 10-or 15-year "wear and tear" guarantee, but he never received it. He was also told that a vacuum cleaner would be sent to him, but he never received one (Tr. 375-380).

Witness saw respondents' advertisement on WDCA-TV, Channel 20. The advertisement featured 3 rooms (witness thought) of duPont 501 carpet for \$129. The price would be reduced to \$116 for a customer calling immediately. The witness thought the advertised carpet would cover the 3 small rooms she planned to carpet, and was attracted by the low price and the additional offer, in her understanding, of a free

vacuum cleaner. She called for an appointment. One of respondents' salesmen then called at her home. When he showed her the advertised carpet she noted that it was different from what she had seen advertised. The salesman stated "I did not think you would want this," and told her the advertised carpet would not cover her 3 rooms. Witness finally chose duPont 501 carpeting for \$707 and signed a contract. The salesman told her that there was a guarantee on the carpet, but witness does not remember his telling her any of its terms and conditions (Tr. 380-285).

Witness saw respondents' advertisement on WDCA-TV, Channel 20, in Sept. of 1972. In witness' recollection, the advertisement featured 3 rooms of duPont nylon carpeting at a low price plus a free vacuum cleaner. She made an appointment and one of respondents' salesmen called at her home. Witness was shown the advertised carpeting and did not like it at all. She described it as "not good carpeting at all * * * very fuzzy, very skimpy." The salesman then said he had other samples. The witness picked one she liked and was quoted a price of \$9 per square yard. She thought this price was too high. Discussion brought the price down to \$8.50 per square yard. A contract was written up and witness made a \$100 cash deposit which the salesman told her was necessary. The salesman told her there was a 10-year guarantee on the carpet, and the witness made him write that on the contract. The witness believed the salesman said that the written contract would come in the mail, but she never received one. The salesman never explained the terms and conditions of the guarantee. The witness had forgotten to ask the salesman about the vacuum cleaner which she had supposed was free. She called respondents' company and was told that the vacuum cleaner came only with the "advertised" carpeting. The carpet was not delivered on the day promised. When it was delivered, customer found it was not the same quality carpeting as that she had picked, and she refused delivery. Respondents refused to return her deposit (Tr. 411-416).

19. As one of respondents' salesmen succinctly testified, the cheap and flimsy sample of carpet shown to prospects as the advertised carpet helped sell carpet because (Tr. 238-39):

It is a piece of carpet to come off of to a better piece of carpet.

In selling respondents' carpet some salesmen used an alias (Tr. 247).

20. Respondents' television commercials were false, misleading and deceptive in that they conveyed to the viewing public the impression that "three full rooms" up to "three hundred square feet" of attractive "beautiful nylon pile," high quality carpet consisting of "quality shags, tip shears and plush piles" were being offered "for only \$129" whereas the carpet exhibited to persons responding to respondents' commercials

was not like that shown on television, but was cheap, flimsy and of poor quality and appearance.

21. Respondents' television commercials were false, misleading and deceptive in that they held out to the public the offer of attractive quality carpet at bargain prices not in truth available.

22. Respondents' advertising was false, misleading and deceptive in that it was not a *bona fide* offer to sell carpet at the price and on the terms and conditions stated, but was utilized for the purpose of luring members of the public into making appointments with respondents' salesmen, so that such members of the public could be sold other carpeting than that advertised, at prices higher than those advertised. Between Apr. 7, 1972 and May 23, 1972, over 96 percent of respondents' customer contracts represented sales of higher priced carpeting than that advertised (CX 17-173).

23. Respondents' advertising and selling practices constituted an unfair and deceptive scheme by which members of the public, on being visited in their homes by respondents' salesmen, were shown a sample of carpeting which was cheap, flimsy and unattractive in appearance, were told that such sample was the advertised carpet, although it bore little or no resemblance to that shown over television by respondents, such carpet was openly or subtly disparaged and, when prospective customers indicated disinterest in the exhibited carpet, attempts were made to sell them carpet much higher in price.

Separate Padding

24. As quoted earlier herein respondents' television advertising stated:

Imagine three full rooms of this beautiful nylon pile carpeting—up to three hundred square feet—for only \$129—and that does include the padding and 48 hour installation! (CX 10, 191, 208; emphasis added).

You too can have 3 full rooms of this beautiful nylon pile carpeting—installed with padding—up to 300 square feet, for only \$129 (CX 180; emphasis added).

By and through the use of these statements, respondents represented that the carpeting advertised would be installed with separate padding included at the advertised price.

25. In truth and in fact, the advertised carpeting did not come with separate padding but was manufactured with a thin foam rubber backing which was bonded to the fabric (CX 213, M. Lightman, Tr. 54; Dunlap, Tr. 368). Respondents' advertisements therefore were false, misleading and deceptive in this respect.

"Free" Vacuum Cleaner

26. Through the advertisements set out in Findings 12 and 13, and through oral and written statements of respondents' salesmen to customers and prospective customers, respondents represented that purchasers of "DuPont 501 nylon carpeting" would receive a "free" vacuum cleaner. Respondents' commercial, which was broadcast repeatedly over television, stated (CX 10, 180, 191, 208):

When you purchase our DuPont 501 nylon carpeting, you'll get this deluxe Hoover vacuum cleaner with *all* attachments for cleaning the deepest shag.

Or if you prefer to purchase our DuPont 501 nylon pile carpeting, you also get this deluxe Hoover vacuum with *all* the attachments!

27. By the audio and visual manner in which the "free" vacuum cleaner was presented by respondents' commercials in immediate conjunction with the offer of the featured low priced carpeting, respondents also represented that purchasers of the low priced carpeting were likewise entitled to the "free" vacuum cleaner (see tape, CX 208). The commercial features a salesman with "rapid-fire" delivery. The reference to the "free" vacuum cleaner and to "DuPont 501" as a specific type of carpeting is preceded and followed by references to the advertised low priced \$129 carpet. There is no break in the delivery of the advertisement between the discussion of the \$129 carpet, the mention of DuPont 501, the offer of a vacuum cleaner, and the offer of a 10 percent discount on the \$129 carpet. The salesman states, "Imagine three full rooms of this beautiful nylon pile carpeting * * * for only \$129 * * *," and goes on immediately to tell the public that "when" you purchase our "DuPont 501 nylon carpeting," you'll get this "deluxe Hoover vacuum cleaner" (CX 208, 10). The impression conveyed is that the reference to "DuPont 501 nylon carpeting" refers back to the \$129 carpet. There is no question whatever that viewers of the television broadcast would derive this impression concluding that all carpet references were to the same product, that DuPont 501 was the low priced featured carpet, and that the vacuum cleaner was included with it. The undersigned has viewed the tape of the commercial (CX 208) and finds that the commercial conveys the net impression that a free vacuum cleaner is offered with the purchase of the \$129 carpet. This finding is verified by the statements of consumer witnesses in this proceeding. Eleven out of thirteen of these members of the public were clearly under the impression that the free vacuum cleaner came with the advertised low price carpet. The following are examples:

At the time, they stated, in the commercial, if you called within 10 or 15 minutes to call for an appointment, they would offer a vacuum cleaner free as a bonus gift, if you would call within a certain period of time, so we tried to call * * * [Tr. 258-259].

* * * * *

Initial Decision

84 F.T.C.

The vacuum, I was under the impression, came with the purchase of carpet and at the same time they were talking about the advertised carpet and the vacuum, so the two sort of went together [Tr. 324].

* * * * *

Q. Will you describe it [the commercial].

A. Advertised three rooms of carpeting for a very low price, around \$129 I think, and a free vacuum cleaner with the carpeting [Tr. 351].

* * * * *

*** I can describe what I seen. This fellow came out and said—he had his hand pointing to a carpet—“Three rooms of carpeting for 119” or “129”—now I can’t get that right. If I call within the next five minutes I would get a vacuum cleaner free. So I called *** [Tr. 376].

* * * * *

Well, by the way they explained it, I thought the carpet I was looking at was 501, all of this seemed like a lot for \$116. This is the thing that made me call; the amount of the money and the vacuum cleaner being thrown in along with it [Tr. 384].

* * * * *

They were advertising carpet for three rooms for about \$160.00 [sic]. I think it was 100 percent DuPont nylon, and they also said if you purchased carpeting, you were entitled to a Hoover Vacuum Cleaner (Tr. 412).

28. A free vacuum cleaner was not given with the purchase of the \$129 carpeting. The president of the company, Michael J. Lightman, admitted this as follows (Tr. 66):

Persons that purchased the carpet advertised for \$116 or \$129, respectfully [sic], did not receive a vacuum cleaner.

Virtually no one was ever sold respondents’ low priced carpeting advertised “for only \$129” in any event (CX 17-173; see Finding 22, *supra*). Not all purchasers, even of the duPont 501 carpeting, however, received a “free” vacuum cleaner. Some purchasers of duPont 501 were told that the vacuum cleaner was included only with the low priced carpeting (Tr. 305, 319-320, 414). Those who did receive a Hoover vacuum cleaner, moreover, did not in fact receive it “free.” In truth, no “free” vacuum cleaner or “free gift” of any kind was included in the purchase of *any* of respondents’ carpeting, notwithstanding the representations in respondents’ advertising. Although a customer who obtained a vacuum cleaner from respondents may have thought that he or she was receiving the vacuum “free,” under the “par” system¹ used by respondents such

¹ Under the “par” system, for each type of carpet sold by Tri-State salesmen there was set a minimum sale price per square foot, the “par,” which a salesman would have to reach before he could obtain his minimum percentage rate of commission. The commission rate would increase on sales above the “par” price. When a vacuum cleaner was to be included with the carpet, the total cost of the vacuum cleaner would be divided by the number of square feet sold in that particular job, and the “par” or minimum price per square foot would be increased by that proportional amount of the vacuum cleaner’s cost. Therefore, respondents’ salesmen to draw their commissions would increase the price of the carpet accordingly, charging a higher price than they would have, had the vacuum cleaner not been included (Tr. 60-64).

1078

Initial Decision

vacuum cleaner was included by respondents' salesmen in the price the customer paid for the duPont 501 carpet. There was not, of course, even a pretense on the part of respondents or their salesmen (aside from the deception in their commercials) that a vacuum cleaner or "gift" of any kind came with the carpeting advertised "for only \$129" (Lightman, Tr. 34, 63-64, 67-68; Robinson, Tr. 252).

29. Respondents' advertising was false, misleading and deceptive in that it had the tendency and capacity to mislead, and misled, members of the purchasing public into believing that they would receive a "free" vacuum cleaner or "free" gift with the purchase of respondents' carpeting when such was not the case.

Guarantees

30. Respondents, through oral and written representations of their salesmen to customers and prospective customers, represented that their carpet was unconditionally guaranteed. Consumer witnesses in this proceeding testified to the fact that respondents' salesmen represented that the carpeting was guaranteed, without informing the prospective customer of conditions or limitations:

A. He [the salesman] mentioned the fact that there was a 15 year guarantee on the carpeting and made a strong point stressing the wearability of it as far as the traffic I would have *and it would not snag* and things of this nature—that it would be very durable carpeting for our particular needs.

Q. Did he tell you the terms and conditions of the guarantee?

A. Not in any detail no [Tr. 264-265; emphasis added].

* * * * *

Q. Were you given a guarantee on the carpeting that you did buy from Tri-State?

A. Yes. On my contract it is a 10 year guarantee.

Q. Were the terms and conditions of that guarantee explained to you by the salesman?

A. Vaguely. I would say he made some discussion about it but I couldn't quote anything that he said related to that guarantee * * * I didn't find anything in the contract other than 10 year guarantee. The conditions, it didn't specify [Tr. 298-299].

* * * * *

Q. Did they [the salesmen] make any comments with respect to the other samples of carpeting?

A. He told me the one I was buying was DuPont 501, and he did stress the fact we did not have a basement and our living room and dining room area required a lot of wear, that I would get a ten year wear warranty, guarantee from DuPont [Tr. 327-328].

* * * * *

Q. Was the carpeting that you were buying, guaranteed?

A. Yes, we asked the salesman was it guaranteed, and he said, yes. * * *

Q. Did he write anything on the contract about the guarantee?

A. No, we asked him about the guarantee and he said it was in the contract. * * * But after reading the contract, I didn't see any guarantee [Tr. 304].

* * * * *

Initial Decision

84 F.T.C.

Q. Was there any discussion between you and the salesman as to the guarantee on the carpet you were purchasing?

A. Yes, he said there was a 15-year guarantee and it would be mailed to me. * * * *

Q. Did Mr. Miller [the salesman] explain the terms and conditions of the guarantee?

A. He mentioned if ever I moved, the carpet would be moved and installed at the new address [Tr. 345].

* * * * *

Q. Did the salesman say anything about a guarantee?

A. Yes, * * * on the one I got, the duPont 501, it was going to be ten years for a guarantee, and he said if the carpet I decided to get, if I ever moved or anything like that, they would come in and take it up and, if I was still in the area, *they would reinstall it for free* [Tr. 369; emphasis added].

* * * * *

* * * We have a large family, ten children, and a lot of feet running around, so I wanted something pretty strong and tough. I made him write that down in the contract that it would last ten years.

Q. Did he explain terms and conditions of the guarantee?

A. No (Tr. 413-414).

By stating simply that their products were "guaranteed," without disclosing any conditions or limitations, respondents through their salesmen were representing that the merchandise was guaranteed without condition or limitation. See *Montgomery Ward & Co., Inc.*, 70 F.T.C 52 (1966), *aff'd* 379 F.2d 666 (7th Cir. 1967).

31. Such representations were false and misleading in that none of respondents' carpeting was unconditionally guaranteed for any period of time. On the contrary, such guarantees were subject to a number of conditions and limitations not disclosed in respondents' guarantee representations (see CX 11). For example, the guarantee did not cover carpeting on stairways or other non-flat surfaces. Also, Tri-State could at its election repair or replace carpet found by Tri-State to be worn out, and in such case a purchaser only received credit prorated on the price originally paid. Further, the guarantee did not apply to damage due to snagged pile of carpet or pile crushing. The guarantee, moreover, did not apply when carpet was not laid over carpet padding. (As found above, Tri-State carpeting did not come with separate padding.) The warranty subject to the foregoing conditions and limitations, furthermore, excluded "all implied warranties."

32. As testified to by the president of Tri-State and one of Tri-State's salesmen, it was the practice not to disclose any conditions and limitations on their guarantees, unless the customer pressed the salesman for a written copy (Lightman, Tr. 74; Robertson, Tr. 245-246).

Use of "Square Feet" in Advertisements as a Means of Deception

33. In the advertising of their products, respondents used the term "up to three hundred square feet" to indicate the quantity of carpet available at the advertised price (CX 10, 180, 191, 208). Square yards were not disclosed.

34. Over the years the retail carpet industry has sold "wall-to-wall" carpet by the square yard, and members of the purchasing public have become accustomed to evaluate prices and areas of coverage in terms of square yards. An expert in the field of retail carpet advertising, the editor of one of the industry's leading trade publications, *Floor Covering Weekly*, testified that the standard unit of measurement used in the retail carpet industry to advertise quantities of carpet has been, and is, the square yard (Tr. 121). As he stated (Tr. 128):

If you were to go into the carpet business tomorrow, you would buy carpet and sell it by the square yard. I say that without reservation. Everyone, every honest man in this country would do that * * *. That is the way it is.

In his expert opinion, in view of the industry's historic practice of offering carpet by the square yard, and the consuming public's familiarity with that unit of measurement in the sale of "wall-to-wall" carpet, use of "square feet" in lieu of square yards had the tendency to deceive. He testified (Tr. 122):

* * * The only reason you could use square footage would be to deceive. If you had no other motive, I imagine you would sell carpet like every other legitimate retailer, by the square yard * * *. If you advertise it by the square foot—unless somebody could show me a good plausible economic reason for doing that, and honest one, of course, I see no purpose except to deceive somebody. Square foot must be divided by nine to get the square yard. The average person does not attempt to do that * * *.

He further stated that to give both the square footage and the square yardage would be "incredibly honest" (Tr. 128).

35. Respondents' use of square feet as the only unit of measurement in their advertisements had the tendency and capacity to mislead consumers into the mistaken belief that they were being offered a greater quantity of carpeting than was the fact. This is supported by statements of consumer witnesses in this proceeding who, on viewing the advertisements, were almost invariably under the impression that they would receive a "lot of carpet" that would certainly cover three rooms:

At the time of the advertisement, they said 300 square feet, 3 rooms of carpeting—I assumed, at that time, that that would be enough to probably cover what we were figuring on covering, but, now, as I look back on it, I realize that 300 square feet is not the same as what he came up with, as 70 square yards, when he measured my apartment. At the time, I didn't see the difference * * * [Tr. 271].

* * * * *

Initial Decision

84 F.T.C.

Q. Did you think that the 3 rooms you saw advertised would cover these areas?

A. Yes, I did * * * When they said 300 and some carpet, I thought it was a lot of carpet, you know [Tr. 287].

* * * * *

* * * I figured what they said, 3 rooms, would cover what I had planned to cover [Tr. 313].

* * * * *

I am in a town-house. * * * But from the way he was saying it on television, I assumed this would cover three bedrooms. (Tr. 382).

See also Tr. 276, 325, 343.

Failure to Disclose Higher Rates for Greater Carpet Quantities than Advertised

36. In their advertising, respondents offered carpet with padding and installation included at a price based upon specified areas of coverage, i.e., "three full rooms," "up to 300 square feet" for \$129 (CX 10, 180, 191, 208).

37. In making this offer, respondents failed to disclose that the prices stated for the specified areas of coverage were not applied at the same rate for any additional quantities of carpet needed, but such was priced substantially higher. For example, whereas the "beautiful nylon pile" carpet priced at 300 square feet for \$129 cost the customer \$3.87 per square yard for the first 300 square feet, or about \$3.50 per square yard if the price were \$116; for anything exceeding 300 square feet, respondents charged the customer a minimum of \$7.02 per square yard, an almost 90 percent increase in cost per square yard (M. Lightman, Tr. 52-53; CX 190 "Par Sheet").

38. That members of the public would have to pay almost 90 percent more per square yard for carpet needed in excess of the 300 square feet (33 1/3 square yards) advertised is a fact highly material to the decision of members of the public to answer respondents' commercials. Had respondents disclosed the foregoing facts in their advertisements, members of the public who telephoned respondents in answer to the advertisements might not have done so. Anyone viewing respondents' commercials would reasonably conclude that additional carpet in excess of the 300 square feet offered for \$129, or for \$116 if a call were placed within 5 minutes, could be purchased at an equivalent low rate. There was no reason to believe otherwise, and the failure of respondents to disclose the contrary was materially deceptive and misleading.

Pressuring Customers to Sign Contracts in Haste

39. Through the use of the false, misleading and deceptive statements, representations and practices, respondents and their representa-

tives induced customers to sign contracts upon initial contact without giving them time to consider carefully the purchase and the consequences thereof. All but one of the consumer witnesses who testified in these proceedings signed a contract on the initial visit of respondents' salesman. The high pressure techniques employed by respondents' salesmen are illustrated by the following testimony (Tr. 262):

We asked him [the salesman] if there was a possibility of us talking it over and checking some more prices before we made up our minds whether to buy or not buy the carpet. At that time he said, well, I have to know today. This struck me funny. I said, what is the reason you have to know today? He said * * * if you tell me yes or no today, then I can give you this vacuum cleaner. If you don't give me the order today, then I can't guarantee the vacuum cleaner will be thrown in on the deal.

Furthermore, customers who, after signing a contract, reconsidered and decided to cancel their order within three days were subject to frustration and further pressure by respondents as illustrated by the following testimony (Tr. 356-357):

* * * The very next day I called and wanted to cancel; I talked to this girl * * * and she said we could cancel it. And I asked her her name and she wouldn't give me her name, said I did not need it, and she hung up on me.

* * * * *

I called back and asked to speak to the manager. * * * They said it would be Mr. Schwartz, he was in the warehouse and can't talk to me right now.

Q. Were you successful in canceling your order?

A. No, they took me to court because I canceled my order. We did not put any money down. Mr. Schwartz called and said the credit went through and they would go ahead and lay the carpeting * * * Mr. Schwartz said we couldn't cancel the order * * * Then two months later we get a summons in the mail because they were suing us * * *

We went to court * * * and they just let us go; * * * but our credit is ruined now.

Another consumer testified to a similar experience (Tr. 370-371):

I have a room-mate—I said if she decided not to go through with the deal, could I get the contract canceled? He [the salesman] said I could, just call him.

My room-mate was on leave. When she came back * * * she did not want it.

So I wrote the letter that night because he said you have three days to cancel it. Then I called the next morning and asked to speak to Mr. Floyd. He was not in. I kept calling, he was never there.

The next day I went out there * * * I talked to some other man * * * He went on to tell me how good the carpet was and they could make other financial arrangements if she did not want to buy the carpet.

* * * I did not want the carpet * * * He still wouldn't let me out of the deal. We went through a little argument. * * *

He said he would call the next day and said he had found another way to finance it and they would take me to court if I did not go through with the deal. I decided to go through with it. * * *

He said they couldn't let me out of the deal because the carpet had been cut for my apartment. * * * They did not deliver the carpeting for about two weeks.

Such testimony, in conjunction with proof that contracts were typically signed on the initial contact with respondents' salesmen, that customers uniformly purchased far more expensive carpet and spent far more money than they had originally intended, and that inducements were offered to make them purchase, reinforces the testimony quoted earlier that high-pressure tactics were used to cause prospects to sign contracts in haste.

Truth in Lending

40. The record of this proceeding establishes that respondents in the offering for sale and sale of carpeting and floor coverings regularly arranged for "consumer credit" as defined in Regulation Z, the implementing regulation of the Truth in Lending Act duly promulgated by the Board of Governors of the Federal Reserve System (M. Lightman, Tr. 48-49; W. Lightman, Tr. 103-105; CX-189(a), 189(b), 189(c); see also Commission Exhibits cited in Findings 42 and 43 below).

41. In the ordinary course of business and in connection with their credit sales, as "credit sale" is defined in Regulation Z, respondents have caused customers to execute binding retail installment contracts (see Commission Exhibits cited in Findings 42 and 43 below).

42. In the drawing up of the aforesaid contracts, respondents have failed to obtain, as required by Section 226.4(a)(5) of Regulation Z, a specific dated and separately signed affirmative written indication of the customer's desire for credit life insurance to be written in connection with its credit sales. Failing to provide for authorization pursuant to Section 226.4(a)(5) of Regulation Z, respondents were required to include the cost of such insurance in the amount of the finance charge, and by failing to do so, respondents failed to disclose accurately the "amount financed" and the "finance charge" as required by Sections 226.8(c)(7) and 226.8(c)(8)(i), respectively, of Regulation Z, and thereby also failed to state the "annual percentage rate" accurately, as required by Section 226.7(b)(6) of Regulation Z (CX 28(d), 25(c), CX 20(f), 36(f), 70(c), 137(f), 117(e), 215).

43. In the drawing up of the aforesaid contracts respondents have failed, as required by the foregoing Act and regulation (1) to disclose the annual percentage rate accurately in accordance with Section 226.5(b)(1) of Regulation Z, as required by Section 226.8(b)(2), by reason of either understating the "annual percentage rate" by amounts from 5 percent and more or by leaving the space provided therefor blank (CX 20(c), 32(j), 43(d), 53(c), 54(d), 62(i), 68(c), 69(c), 69(g), 90(d), 91(e), 92(d), 95(h), 117(e), 126(e), 127(c), 128(d), 142(e), 147(f), 515(c), 153(e), 168(d), 214, 215; (2) to disclose the due date(s) scheduled for the repayment of the customer's indebtedness as required by Section 226.8(b)(3) of Regulation Z, by leaving the space provided therefore blank (CX 23(d), 24(e),

26(e), 27(e), 28(d), 29(h), 30(d), 40(c), 43(d), 47(f), 53(g), 54(d), 55(g), 60(c), 62(i), 68(c), 69(c), 74(d), 75(f), 76(e), 78(d), 95(h), 97(f), 109(h), 117(e), 123(c), 125(f), 126(e), 129(e), 130(d), 139(e), 147(f), 150(d), 153(e), 215, 217; (3) to use the term "amount financed" to describe the amount of credit of which the customer has the actual use, as required by Section 226.8(c)(7) of Regulation Z (CX 32(e), 32(f), 53(c), 69(g), 69(h), 113(d), 127(c); (4) to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z (CX 32(e), 32(f), 53(c), 69(g), 69(h), 113(d), 127(c); (5) to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price," as required by Section 226.8(c)(8)(ii) of Regulation Z (CX 20(f), 43(d), 68(c), 69(c), 84(c), 95(h), 117(e), 137(f), 145(f), 147(f), 168(d), 171(e), 215.

44. Pursuant to Section 103(q) of the Truth in Lending Act, respondents' aforesaid failures to comply with the provisions of Regulation Z constitute violations of that Act, and, pursuant to Section 108 thereof, respondents have thereby violated the Federal Trade Commission Act.

CONCLUSIONS

1. The Federal Trade Commission has, and has had, jurisdiction over respondents, and the acts and practices charged in the complaint, and involved herein, took place in commerce, as "commerce" is defined in the Federal Trade Commission Act.

2. Respondents, as demonstrated in the findings of fact set out earlier, engaged in false, misleading and deceptive advertising, and utilized unfair and deceptive acts and practices in the offering for sale, sale and distribution of carpeting and floor coverings.

3. Such false, misleading and deceptive advertising, and such unfair and deceptive acts and practices, had the tendency and capacity to mislead, and in fact misled, members of the purchasing public into the purchase of substantial quantities of respondents' carpeting and floor coverings, and were to the prejudice and injury of the public and of respondents' competitors, and constituted violations of Section 5 of the Federal Trade Commission Act.

4. In the course and conduct of their business, respondents have failed to comply with Regulation Z duly promulgated by the Board of Governors of the Federal Reserve System and, pursuant to Section 103(q) of the Truth in Lending Act, such failure constitutes a violation of the Federal Trade Commission Act.

Initial Decision

84 F.T.C.

DISCUSSION

The Individual Respondent

It is argued that the order, if any is to be issued in this case, should not be applicable to respondent William R. Lightman, individually. The contention made is that William R. Lightman, though a corporate officer, was "never active in the business," never played "any role in the promotion, advertising, or resale of carpets or other floor covering," had "no responsibility for the promotion or sale of carpets," and did not engage in "decision making on any responsible level" in the management of Tri-State Carpets, Inc.

These contentions are unsubstantiated on the record as a whole and are rejected. William R. Lightman was intimately involved in the activities of Tri-State Carpets, Inc. Indeed, Tri-State itself was essentially an expansion of Classic Carpet Center, Inc., which William R. Lightman founded and had operated for the previous five years. Both were "family" corporations, owned and operated by the Lightman family. William R. Lightman was an officer of both firms. In fact, Classic Carpet Center, Inc., and Tri-State were family businesses to such an extent that William R. Lightman was even confused as to his technical position with each, as follows (Tr. 98):

I believe I was Secretary-Treasurer there. No, I was Vice-President. I got confused with Tri-State. I thought it was mentioned I was Vice-President, but as I say, it is immaterial. It is all in the family.

After Tri-State was established as an expansion of Classic Carpet Center, Inc., "to make more money" as Michael Lightman put it (Tr. 15), William Lightman served at various times as vice-president or secretary-treasurer of Tri-State, Inc. He oversaw the expedition of all merchandise sold for Tri-State, and arranged for the purchase of all products for resale. He was a general "trouble shooter", handling all customer "backlash" problems, *i.e.*, customer complaints that arose from Tri-State's operation. In these areas his was the final decision; as he put it, the "buck stops here" (Tr. 75, 83-84, 90). It was he who initiated a meeting with salesmen to settle the question of how and when the "free" vacuum cleaners were to be distributed by Tri-State (Tr. 93-95). Similarly, he made decisions as to whether a customer would receive a guarantee on his purchase of carpet from Tri-State (Tr. 92). More generally, he personally handled serious problems involving Tri-State as they arose. For example, when a problem arose involving the finance company, TransAmericard (Tr. 104), with whom Tri-State dealt, William

R. Lightman took over, and was successful in recovering funds allegedly owed Tri-State (Tr. 103-105). Further, although William R. Lightman claimed that he had nothing to do with advertising it was Michael Lightman's recollection that William R. Lightman was present at the initial meeting with Tri-State's advertising agency, when the Tri-State commercials were "brain stormed" (Tr. 24, 110). On that occasion, William R. Lightman participated in the discussion and evaluation of the commercials (Tr. 24-25). The two Lightmans shared the very same office in the Classic Carpet Center, Inc., warehouse; in fact, they had adjoining desks. Significantly, it was William R. Lightman who took over full management of Tri-State in Michael Lightman's absence (Tr. 76-77).

From these facts, it is clear that William R. Lightman exercised substantial responsibility and control over Tri-State, was properly named as an individual respondent in the complaint, and must be bound personally and individually by the terms of the order issued herein. Furthermore, apart from his control over Tri-State's operations, William R. Lightman as proprietor of Classic Carpet Center, Inc., was essential to and supported the Tri-State operation. William R. Lightman, using Classic Carpet Center, Inc., was not only supplier of carpet (Tr. 83), but handled all installation of carpet sold by Tri-State (Tr. 31). Installation orders for Tri-State customers were written on Classic Carpet Center, Inc., *i.e.*, "Carpeteria," forms (Tr. 86). The very advertising of Tri-State leaned to a degree on Classic Carpet Center, Inc., in that it referred to Tri-State and its *affiliates* as having "installed over 5,000,000 square feet of brand name carpeting" (CX 208, Tr. 50).

For any order in this case to be effective, it must be applied to William R. Lightman individually, and the undersigned has so found. Were it not, its purpose could be easily frustrated. William R. Lightman not only founded the business of which Tri-State was an offshoot but, indeed, founded Tri-State, as stated. He has been long involved in retail carpet operations. Without an order binding him, there would be nothing to prevent him from carrying on the same type of business as Tri-State under a new name, or through a newly formed or already established corporation, and continuing the false, misleading, deceptive and unfair acts and practices proven in the record and prohibited herein. As the Commission stated in *Coran Bros. Corp.*, 72 F.T.C. 1, 25 (1967):

The public interest requires that the Commission take such precautionary measures as may be necessary to close off any wide "loophole" through which the effectiveness of its orders may be circumvented.

In *Coran* the Commission found that the individual respondent could have formed a new corporation and continued the business with "com-

plete disregard for the Commission's action against the predecessor organization." 72 F.T.C. at 25. Considerations of public interest require similar precautionary measures in this case to ensure that its order will have its full intended effect. The authority of the Commission to name officers, directors and sole stockholders of corporate respondents to prevent evasion of its orders has long been established. *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112 (1937); *Rayex Corporation v. Federal Trade Commission*, 317 F.2d 290 (2nd Cir. 1963); *Standard Distributors v. Federal Trade Commission*, 211 F.2d 7 (2nd Cir. 1954).

Deceptive and Unfair Acts and Practices

"Bait and switch" sales tactics have long been held to violate Section 5 of the Federal Trade Commission Act. Advertising a "phony" bargain in order to obtain contact with a prospective customer for the purpose of selling another product at a much higher price is an ancient practice, but one of continuing effectiveness. It is oppressive and exploitive of the public, is deceptive and unfair, and has been repeatedly condemned. *Tashof v. Federal Trade Commission*, 437 F.2d 707 (D.C. Cir. 1970); *Consumers Products of America, Inc. v. Federal Trade Commission*, 400 F.2d 930 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1088 (1969); *Guides Against Bait Advertising*, 16 C.F.R. §238 (1974). The "gimmick" utilized by respondents in this case consisted of cheap and flimsy carpet, far different in appearance from that shown over television, which was shown to prospects whose names had been obtained by respondents' commercials. Exhibition of this carpet was typically sufficient to switch prospects to higher priced carpet. Actual verbal disparagement of the advertised carpet is not essential to a finding of bait and switch sales tactics, *Tashof v. Federal Trade Commission*, *supra*, and was not often necessary, although were required that tactic was resorted to by respondents, as described.

With respect to the "free" vacuum cleaner, it is plainly deceptive to represent that something is "free," if the cost of the "free" item, unknown to the purchaser, is added to what would otherwise have been the price of the merchandise advertised. *Sunshine Art Studios, Inc., v. Federal Trade Commission*, 481 F.2d 1171 (1st Cir. 1973); *Federal Trade Commission v. Mary Carter Paint Co.*, 382 U.S. 46 (1965); see also *Guide Concerning the Use of the Word "Free" and Similar Representations*, 16 C.F.R. 251 (1974). Moreover, there was not even a pretense of giving a "free" vacuum cleaner to the few who did purchase the advertised carpet for \$129 or \$116, although respondents' commercials

led viewers to believe that a "free" vacuum cleaner would be provided with such purchase.

Respondents and their salesmen consistently represented that their carpet was "guaranteed" without advising customers of applicable limitations or conditions. Representation that a product is guaranteed without saying more constitutes a representation that it is unconditionally guaranteed. *Montgomery Ward & Company, Inc.*, 70 F.T.C. 52 (1966), *aff'd.*, 379 F.2d 666 (7th Cir. 1967). It is an unfair practice to offer an unconditional guarantee when in reality there are undisclosed conditions in the terms of the actual guarantee. *Benrus Watch Co., v. Federal Trade Commission*, 352 F.2d 313 (8th Cir. 1965), *cert. denied*, 384 U.S. 939 (1966); *Parker Pen Co., v. Federal Trade Commission*, 159 F.2d 509 (7th Cir. 1946).

Expert testimony introduced by complaint counsel established that the retail carpet industry has over the years consistently sold carpet exclusively by the square yard. Under circumstances where members of the public have long been accustomed to an industry practice which advertises carpet in commercials by the "square yard," use of the "square foot" measure, without also stating the square yards offered, tends to create the impression that a larger quantity of carpet is being offered at the price quoted than is the case. Under such circumstances use of square feet to denote the quantity of carpet offered, without stating square yards, has the tendency and capacity to mislead and deceive, and is an unfair trade practice. Actual deception of the public is not necessary for a violation, a tendency and capacity to deceive being sufficient. *Feil v. Federal Trade Commission*, 285 F.2d 879 (9th Cir. 1960). The Federal Trade Commission Act was not intended to protect "sophisticates," *Giant Food Inc. v. Federal Trade Commission*, 322 F.2d 977 (D.C. Cir. 1963), but the unthinking and credulous who do not stop to analyze but are governed by general impressions. *Helbros Watch Company, Inc. v. Federal Trade Commission*, 310 F.2d 868 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963).

Where the price for additional carpeting beyond the quantity advertised is substantially higher per square yard than the advertised carpet, such increased price is a fact material to the advertised offer. It is therefore unfair and deceptive not to disclose such fact in the advertisements. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

It is, furthermore, an unfair trade practice to manipulate a prospective customer by high pressure tactics. *Household Sewing Machine Co., Inc.*, 76 F.T.C. 207, 242-243 (1969); see also Trade Regulation Rule, *Cooling—Off Period for Door-to-Door Sales*, 16 C.F.R. 429 (1974). And,

Initial Decision

84 F.T.C.

it is obviously deceptive and misleading to advertise carpet in such a manner as to convey the impression that "separate padding" is included (CX 10, 180, 191, 208) when the "padding" consists of thin rubber backing affixed to the rear side of the carpet.

The Remedy

In the "Notice Order" attached to the complaint, and in the order issued herein, there is included a provision requiring respondents to disclose clearly and conspicuously, by means of a blackbordered notice in all their advertisements, the fact that they have been found to "engage in bait and switch advertising." This provision is necessary to end with certainty the deceptive and oppressive practices disclosed by this record, and to prevent their resumption at some other time, either in the sale of carpet or floor coverings or of some other product or service. Respondents' violation of Section 5 of the Act was flagrant. The use of bait and switch was an integral part of their misleading and unfair selling operation, which was harsh, deliberate and sophisticated. Thirteen consumer witnesses testified that they were uniformly "taken in" by respondents' deceptive advertising and selling techniques. Clearly there were hundreds more who were similarly bilked by respondents' methods, but who did not appear in this proceeding.

The consumer warning provision therefore is not punitive. Rather, it is designed to prevent the recurrence of the unfair practices that respondents utilized. It is no longer open to question that the Commission, as part of its remedial powers, has the authority to require respondents to take affirmative action. *American Cyanamid v. Federal Trade Commission*, 401 F.2d 574 (1968), *cert. denied*, 394 U.S. 920 (1969). An order requiring disclosures and disclaimers that detracted greatly from the "image" of the advertiser was recently upheld in *La Salle Extension University*, 78 F.T.C. 1272 (1971), *aff'd.* No. 71-1648, 7th Cir., Oct. 23, 1973 (unreported). The only qualification on the Commission's broad discretion in framing an order is that the remedy be reasonably related to the unlawful practices found. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952). In the opinion of the undersigned, the provision in question clearly meets this qualification. By its very nature the practice of bait and switch can be done so skillfully that few customers, especially the unsophisticated and trusting, realize at the time what is happening to them. The proposed warning is the only effective means of alerting members of the public that such unfair practices may be perpetrated on them in their own homes. Such a warning arms prospective customers in advance. Aware of such prac-

tices, the member of the public will be in position to recognize bait and switch tactics if utilized and to end the sales presentation. Additionally, the provision serves as an incentive to respondents as well as to their salesmen to abide by the terms of the order. It is true that the requirement for inclusion of this warning provision may detract somewhat from the effectiveness of respondents' advertising. However, even if that is the necessary result of the order, such detriment to the respondents must be balanced against the benefit to the public in being protected by such a warning. In the opinion of the undersigned, the public interest in being protected from the deceptive and oppressive sales tactics of respondents clearly outweighs any hardship to respondents, if such there is. The Commission has rejected the argument that an otherwise necessary and proper order cannot issue because its effect would be to hinder respondent in the conduct of its business. *S. Dean Slough v. F.T.C.* 396 F.2d 870, 872, *cert. denied*, 393 U.S. 980 (1968).

As a consequence of the foregoing, and of the findings of fact set out earlier herein, the following order is entered:

ORDER

I

It is ordered, That respondents Tri-State Carpets, Inc., a corporation, its successors and assigns, and its officers, and Michael J. Lightman and William R. Lightman, individually and as officers of said corporation, and Matthew Mintz, individually and as a manager of said corporation, and their agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, or as an official or employee of any firm or corporation, in connection with the advertising, offering for sale, sale or distribution of carpeting and floor coverings, or of any other product, merchandise or service of whatever nature or description, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from, and do forthwith cease and desist from contributing to, or aiding or abetting in any manner whatever, any firm or corporation in:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of carpeting or of other product, merchandise or service.
2. Making representations, directly or by implication, orally or in writing, purporting to offer any product, merchandise or service for sale when the purpose of the representation is not to sell the offered product, merchandise or service but to obtain leads or

prospects for the sale of another product, or merchandise or service, at higher prices.

3. Disparaging in any manner, or discouraging the purchase of any product, merchandise or service which is advertised or offered for sale.

4. Representing, directly or by implication, orally or in writing, that any product, merchandise or service is offered for sale when such offer is not a bona fide offer to sell such product, merchandise or service.

5. Failing to maintain and produce for inspection and copying, on demand by the Federal Trade Commission or its representatives, adequate records which reveal for every advertisement published in print or broadcast media, for three years from the date of its publication:

a. the volume of sales made of the advertised product, merchandise or service at the advertised price; and

b. the net profit from the sale of each advertised product, merchandise or service at the advertised price.

6. Representing, directly or by implication, orally or in writing, that a stated price for carpeting or floor coverings includes the cost of separate padding and the installation of such padding, unless in every instance where it is so represented the stated price for floor coverings does, in fact, include the cost of such separate padding and installation.

7. Misrepresenting in any manner, the prices, terms or conditions under which separate padding and installation is provided in connection with the sale of carpet and floor coverings.

8. Representing, directly or by implication, orally or in writing, that the purchaser of any advertised product, merchandise or service will receive a "free" vacuum cleaner or any other "free" merchandise, gift, service, prize or award unless all conditions, obligations, or other prerequisites to the receipt and retention of such merchandise, service, gift, prize or award are clearly and conspicuously disclosed at the outset in close conjunction with the word "free" wherever it first appears in any advertisement or offer.

9. Representing, directly or by implication, orally or in writing, that any merchandise or service is furnished "free" or at no cost to the purchaser of any advertised product, merchandise or service, when, in fact, the cost of such merchandise or service is added to what would otherwise have been the selling price of the advertised product, merchandise or service.

Initial Decision

1078

10. Representing, directly or by implication, orally or in writing, that a "free" offer is being made in connection with the introduction of any new product, merchandise or service offered for sale at a specified price unless it is planned, in good faith, to discontinue the offer after a limited time and to commence selling such product, merchandise or service separately at the same price at which it was sold with a "free" offer.

11. Representing, directly or by implication, orally or in writing, that any product, merchandise or service is being offered "free" with the sale of a product, merchandise or service which is usually sold at a price arrived at through bargaining, rather than at a regular, previously established and published price, or where there may be a regular, previously established, and published price, but where other material factors such as quantity, quality, or size are arrived at through bargaining.

12. Representing, directly or by implication, orally or in writing, that a "free" offer is available in a trade area for more than six (6) months in any twelve (12) month period. *Note:* After one "free" offer is made, at least thirty (30) days shall elapse before another such "free" offer is made in the same trade area. No more than three such "free" offers shall be made in the same area in any twelve (12) month period. In such period, sales of respondents, or any of them, in that area of the product or service in the amount, size or quality promoted with the "free" offer shall not exceed 50 percent of the total volume of sales of the product or service, in the same amount, size or quality, in the area.

13. Representing, directly or by implication, orally or in writing, that any product, merchandise or service is being given "free" in connection with the purchase of any other product, merchandise or service, unless the stated price of the product, merchandise or service required to be purchased in order to obtain said "free" product, merchandise or service is the same or less than the regular price at which the same product, merchandise or service required to be purchased has been sold separately, for a substantial period of time in the recent and regular course of business of respondents, or any of them, in the geographic market or trade area in which the "free" offer is made.

14. Representing, directly or by implication, orally or in writing, that a product or service is being offered as a "gift," "without charge," "bonus," or by other words or terms which tend to convey the impression to the consuming public that the article of merchan-

dise or service is free, when the use of the term "free" in relation thereto is prohibited by the provisions of this order.

15. Representing, orally or in writing, directly or by implication, that any product or service is guaranteed unless the nature and extent of the guarantee, the identity of the guarantor, and the manner in which the guarantor will perform thereunder are clearly and conspicuously disclosed, and unless there is delivered to each purchaser, prior to the signing of the sale contract, a written guarantee clearly setting forth all of the terms, conditions and limitations of the guarantee fully equal to the representations, orally or in writing, directly or by implication, made to each such purchaser, and unless all obligations and requirements under the terms of each such guarantee are promptly and fully performed.

16. Advertising any carpeting or floor covering using any unit of measurement not usually and customarily employed in the retail advertising of such products unless the unit of measurement usually and customarily employed in the retail advertising of such products is also given.

17. Advertising any carpeting or floor covering using any unit of measurement which tends to mislead or deceive by exaggerating the size or quantity of carpeting or floor covering offered at the advertised price.

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

19. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language as that principally used in the oral sales presentation, and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt, if a contract is not used, and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

YOU, THE BUYER, MAY CANCEL THIS TRANSACTION AT ANY TIME PRIOR TO MIDNIGHT OF THE THIRD BUSINESS DAY AFTER THE DATE OF THIS TRANSACTION. SEE THE ATTACHED NOTICE OF CANCELLATION FORM FOR AN EXPLANATION OF THIS RIGHT.

1078

Initial Decision

20. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point bold face type the following information and statements in the same language as that used in the contract:

NOTICE OF CANCELLATION

[enter date of transaction]
(Date)

YOU MAY CANCEL THIS TRANSACTION, WITHOUT ANY PENALTY OR OBLIGATION, WITHIN THREE BUSINESS DAYS FROM THE ABOVE DATE.

IF YOU CANCEL, ANY PROPERTY TRADED IN, ANY PAYMENTS MADE BY YOU UNDER THE CONTRACT OR SALE, AND ANY NEGOTIABLE INSTRUMENT EXECUTED BY YOU WILL BE RETURNED WITHIN 10 BUSINESS DAYS FOLLOWING RECEIPT BY THE SELLER OF YOUR CANCELLATION NOTICE, AND ANY SECURITY INTEREST ARISING OUT OF THE TRANSACTION WILL BE CANCELLED.

IF YOU CANCEL, YOU MUST MAKE AVAILABLE TO THE SELLER AT YOUR RESIDENCE, IN SUBSTANTIALLY AS GOOD CONDITION AS WHEN RECEIVED, ANY GOODS DELIVERED TO YOU UNDER THIS CONTRACT OR SALE; OR YOU MAY IF YOU WISH, COMPLY WITH THE INSTRUCTIONS OF THE SELLER REGARDING THE RETURN SHIPMENT OF THE GOODS AT THE SELLER'S EXPENSE AND RISK.

IF YOU DO MAKE THE GOODS AVAILABLE TO THE SELLER AND THE SELLER DOES NOT PICK THEM UP WITHIN 20 DAYS OF THE DATE OF YOUR NOTICE OF CANCELLATION, YOU MAY RETAIN OR DISPOSE OF THE GOODS WITHOUT ANY FURTHER OBLIGATION. IF YOU FAIL TO MAKE THE GOODS AVAILABLE TO THE SELLER, OR IF YOU AGREE TO RETURN THE GOODS TO THE SELLER AND FAIL TO DO SO, THEN YOU REMAIN LIABLE FOR PERFORMANCE OF ALL OBLIGATIONS UNDER THE CONTRACT.

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO [Name of seller], AT [address of seller's place of business], NOT LATER THAN MIDNIGHT OF _____
(Date)

I HEREBY CANCEL THIS TRANSACTION.

(Date)

(Buyer's signature)

21. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller, the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

22. Including in any sales contract or receipt any confession of judgment or any waiver of any of the rights to which the buyer is entitled under this order including specifically his right to cancel the sale in accordance with the provisions of this order.

23. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.

24. Misrepresenting, directly or by implication, orally or in writing, the buyer's right to cancel.

25. Failing or refusing to honor any valid notice of cancellation by a buyer and within 10 business days after the receipt of such notice, to (i) refund all payments made under the contract or sale; (ii) return any goods or property traded in, in substantially as good condition as when received by the seller; (iii) cancel and return any negotiable instrument executed by the buyer in connection with the contract or sale and take any action necessary or appropriate to terminate promptly any security interest created in the transaction.

26. Negotiating, transferring, selling, or assigning any note or other evidence of indebtedness to a finance company or other third party prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.

27. Failing, within 10 business days of receipt of the buyer's notice of cancellation, to notify him whether the seller intends to repossess or to abandon any shipped or delivered goods.

28. Advertising the price of carpet, either separately or with padding and installation included, for specified areas of coverage without disclosing in immediate conjunction and with equal prominence the square yard price for additional quantities of such carpet with padding and installation needed.

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

II

It is further ordered, That respondent Tri-State Carpets, Inc., a corporation, its successors and assigns, and its officers, and Michael J. Lightman and William R. Lightman, individually and as officers of said corporation, and Matthew Mintz, individually and as manager of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, or as an official or employee of any firm or corporation, in connection with any extension of consumer credit or advertisement to aid, promote, or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 C.F.R. 226) of the Truth in Lending Act (Pub. L. 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from, and do forthwith cease and desist from contributing to, or aiding or abetting in any manner whatever, any firm or corporation in:

1. Failing, in any credit transaction, to include and to itemize the amount of premiums for credit life and disability insurance as part of the finance charge, unless the amount of such premiums is excluded from the finance charge because of appropriate exercise of the option available pursuant to Section 226.4(a) (5) of Regulation Z.
2. Failing to disclose accurately the "amount financed," and the "finance charge," as required by Sections 226.8(c)(7), and 226.8(c)(8)(i), respectively, of Regulation Z.
3. Failing to disclose the "annual percentage rate" accurately to the nearest quarter of one percent, computed in accordance with the provisions of Section 226.5(b)(1) of Regulation Z, as required by Section 226.8(b)(2) of Regulation Z.
4. Failing to disclose the number, amount and due dates or period of payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.
5. Failing to use the term "amount financed" to describe the amount of credit extended as required by Section 226.8(c)(7) of Regulation Z.
6. Failing to use the term "total of payments" to describe the sum of the payments scheduled to repay the indebtedness, as required by Section 226.8(b)(3) of Regulation Z.
7. Failing to disclose the sum of the cash price, all charges which are included in the amount financed but which are not part of the finance charge, and the finance charge, and to describe that sum as the "deferred payment price" as required by Section 226.8(c)(8)(ii) of Regulation Z.

8. Failing in any consumer credit transaction or advertisement to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z at the time and in the manner, form and amount required by Sections 226.6, 226.8 and 226.10 of Regulation Z.

It is further ordered, That each of respondents forthwith cease and desist from disseminating, or causing or contributing to the dissemination, or aiding or abetting the dissemination of, any advertisement or solicitation for any product, merchandise or service, by means of newspapers or other printed media, or by television or radio, or by letter or communication, or by any other means in commerce, as "commerce" is defined in the Federal Trade Commission Act, unless such respondent clearly and conspicuously discloses in each advertisement or solicitation the following notice set off from the text of the advertisement or solicitation by a black border:

The Federal Trade Commission has found that we engage in bait and switch advertising; that is, the salesman or representative makes it difficult for you to buy the advertised product, merchandise or service and he attempts to switch you to a higher priced item or service.

One year from the date this order becomes final or at any time thereafter, unless at the time this order becomes final respondents, or any of them, have ceased engaging in the offering for sale, sale or distribution of carpeting or floor coverings, or of any other product, merchandise or service, in which circumstance one year from the date such respondent or respondents, again engage[s], directly or indirectly, in such business, such respondent or respondents, upon showing that the practices prohibited by this order have been discontinued and that the notice provision is no longer necessary to prevent the continuance of such practices, may petition the Commission to waive compliance with this order provision.

It is further ordered, That each of respondents shall maintain for a period of one (1) year following the date this order becomes final, unless at the time this order becomes final such respondent has ceased engaging in the offering for sale, sale or distribution of carpeting or floor coverings, or of any other product, merchandise or service, in which circumstance one year from the date such respondent again engages, directly or indirectly, in such business, copies of all newspaper, radio and television advertisements and solicitations, direct mail and in-store advertisements and solicitations, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or of any other product, merchandise or service, or utilized in the advertising, promotion or sale of carpeting or floor coverings, or of any other product, merchandise or service.

It is further ordered, That each of respondents shall provide, for a period of one (1) year from the date this order becomes final, unless at the time this order becomes final such respondent has ceased engaging in the offering for sale, sale or distribution of carpeting or floor coverings, of any other product, merchandise or service, in which circumstance for a period of one (1) year from the date such respondent again engages, directly or indirectly in such business, each advertising agency utilized by such respondent and each newspaper publishing company, television or radio station, or other advertising medium, which is utilized by such respondent to obtain leads for the sale of carpeting or floor coverings and of any other product, merchandise or service, with a copy of the Commission's news release setting forth the terms of this order.

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

It is further ordered, That respondents shall forthwith distribute a copy of this order to each of their operating divisions.

It is further ordered, That each of respondents deliver a copy of this order to cease and desist to all their present and future employees or personnel, engaged in the offering for sale, sale or distribution of any product, consummation of any extension of consumer credit, or in any aspect of the preparation, creation, or placing of advertising, and that each of respondents secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That each individual respondent named herein shall promptly notify the Commission of his present business or employment, of the discontinuance of such business or employment, and of his affiliation with any new business or employment. Such notice shall include each individual 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.

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

FINAL ORDER

This matter has come before the Commission on its own motion, for consideration of the question whether the consumer warning provision ordered by the administrative law judge should be adopted as part of

Complaint

84 F.T.C.

the Commission's cease and desist order. The Commission has determined that this matter is indistinguishable from the matter of *Wilbanks Carpet Specialists, Inc., et al.*, Docket 8933, inasmuch as the record presents insufficient evidence that a consumer warning is a necessary or appropriate means for the termination of the acts or practices complained of or for the prevention of their recurrence. Having declined to order a consumer warning in the *Wilbanks* matter, the Commission has concluded that the same disposition is warranted herein.

Accordingly, the initial decision issued by the judge should be modified in accordance with the foregoing views of the Commission, and, as so modified, adopted as the decision of the Commission:

It is ordered, That the initial decision issued by the administrative law judge be modified by striking therefrom the following:

Those portions of the conclusions of law which concern "consumer warning" relief (at pp. 45-47 [pp. 1112-1113 herein], *sub nom.* "THE REMEDY"); and the second "FURTHER ORDERED" paragraph of the order to cease and desist issued by the judge (at p. 57) [p. 1120 herein].

As so modified, the initial decision is hereby adopted.

IN THE MATTER OF

LAWRY'S FOODS, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECTION 2(d) OF THE CLAYTON ACT

Docket C-2575. Complaint, Oct. 16, 1974—Decision, Oct. 16, 1974

Consent order requiring a Los Angeles, Calif. manufacturer and distributor of salad