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Complaint

report in writing setting forth in detail the manner and form in which it has complied with this order.

IN THE MATTER OF

LIBRARY MARKETING SERVICE, INC., ET AL.

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

Docket C-2673. Complaint, June 6, 1975—Decision, June 6, 1975.

Consent order requiring an Orlando, Fla., seller of magazine subscriptions and other publications through the use of "mail-in" or "two-payment" purchase plans, among other things to cease using deceptive means to sell magazine subscriptions to the public and to recruit sales agents.

Appearances

For the Commission: *Lawrence L. Langer.*

For the respondents; *Jon D. Rosenberg & Marvin E. Newman,*
Orlando, Fla.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Library Marketing Service, Inc., a corporation, and W. Michael Nace, individually and as an officer of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Library Marketing Service, Inc., is a corporation organized existing and doing business under and by virtue of the laws of the State of Florida, with its principal office and place of business located at LMS Building, 1320 44th Street, Orlando, Fla.

Respondent W. Michael Nace is the president of the corporate respondent. As such, he formulates, directs and controls the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. His address is the same as that of the corporate respondent.

PAR. 2. Respondents are engaged in the sale of magazine subscriptions and other publications to the purchasing public by a method which

is commonly referred to as the "two-payment" or "mail-in" purchase plan.

Respondents enter into business arrangements with certain publishers or distributors of magazines and other publications whereby the publishers or distributors agree to accept and fill orders for designated magazines or other publications sold by respondents. The publishers or distributors generally require that the magazines or other publications be sold for a designated amount and that respondents forward an agreed upon amount to the publisher or distributor thereof.

Pursuant to such arrangements, the respondents solicit and sell to the purchasing public subscriptions to such magazines or other publications.

PAR. 3. In the course and conduct of their business of selling magazine subscriptions pursuant to subscription contracts, as aforesaid, respondents have entered into contractual arrangements with publishers or distributors of magazines whereby respondents are authorized to sell certain magazine subscriptions at designated selling prices and to pay designated amounts to said publishers or distributors as payment for said subscriptions. Respondents are thereby given authority to sell subscriptions to some but not all magazines and other publications.

PAR. 4. In the course and conduct of their business, as aforesaid, respondents enter, and have entered, into agreements with individuals known as "crew managers" who in turn employ or hire "sale agents," "solicitors," or other representatives to sell said magazines or other publications.

Acting through their said crew managers and solicitors, respondents place into operation and, through various direct and indirect means and devices, control, direct, supervise, recommend and otherwise implement sale methods whereby members of the general public are contacted by door-to-door solicitations, and by means of statements, representations, acts and practices as hereinafter set forth, are induced to sign subscription contracts with respondents which provide for the purchase of magazines or other publications and payment thereof usually on a subscription order with the appropriate publishers and distributors for magazines and other publications respondents are authorized to sell.

In the manner aforesaid, respondents, directly or indirectly, through said crew managers control, furnish the means, instrumentalities, services and facilities for, condone, approve and accept the pecuniary benefits flowing from the acts, practices and policies hereinafter set forth, of said crew managers and sales solicitors, hereinafter collectively referred to as respondents' representatives or solicitors.

PAR. 5. In the course and conduct of their business and in the manner

aforesaid, respondents through their representatives or solicitors, who travel from one area to another, solicit subscriptions for magazines and other publications in various States of the United States. Respondents transmit and receive in commerce various printed materials used in the solicitation and sale of magazine subscriptions and other publications. Said respondents or solicitors cause subscription contracts and money to be sent from various states to respondents' place of business in Florida by instructing members of the purchasing public to so mail in their orders. These contracts are then forwarded by respondents to various publishers or distributors, many of whom are located in states other than the State of Florida. Respondents thereby maintain, and at all times mentioned herein have maintained, a substantial course of trade in the sale of magazine subscriptions in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 6. Respondents and respondents' crew managers in the course and conduct of their business as aforesaid, have disseminated, and now disseminate or cause to be disseminated, classified advertisements in newspapers of general and interstate circulation and in newspapers throughout the United States and have made statements and representations respecting pay and working conditions, designed and intended to induce individuals to apply as representatives or solicitors to sell magazine subscriptions on the behalf of respondents.

Among and typical of such statements and representations, but not all inclusive thereof, are the following:

1. Visit major cities and resort areas with transportation furnished and return guaranteed.
2. Above average salary plus company bonus after training * * * \$520 monthly to start* * *
3. * * * immediate cash draw * * * expenses and transportation provided* * *
4. New car transportation furnished* * *

In the aforesaid manner, the respondents have represented, and are now representing directly or by implication, that:

1. Persons who answer respondents' advertisements and who become representatives or solicitors for respondents will travel on a planned itinerary exclusively to major cities and resort areas and that return free transportation is guaranteed at any time.
2. Persons who answer respondents' advertisements and who become representatives or solicitors for respondents will earn a salary, as for example, \$520 monthly.
3. Respondents will pay the expenses of persons who answer respondents' advertisements and who become representatives or solicitors for respondents.
4. Persons who answer respondents' advertisements and who

become representatives or solicitors for respondents will be furnished a new car while traveling for or on the behalf of respondents.

PAR. 7. In truth and in fact:

1. Persons who answer respondents' advertisements and who become representatives or solicitors for respondents do not travel on a planned itinerary exclusively to major cities and/or resort areas with an unconditional guaranteed return.

2. Persons who answer respondents' advertisements and who become representatives or solicitors for respondents do not earn a salary but are commissioned sales agents.

3. Respondents do not pay expenses of persons who answer respondents' advertisements and who become representatives or solicitors for respondents.

4. Persons who answer respondents' advertisements and who become representatives or solicitors are not furnished new cars while traveling for or on behalf of respondents.

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

PAR. 8. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their magazine subscriptions, respondents and respondents' representatives or solicitors have represented, and now represent, directly or by implication, that:

1. Respondents are authorized to sell subscriptions for and are able to deliver or cause the delivery of all magazines for which they sell subscriptions and accept payments.

2. Respondents' representatives or solicitors are participants in a "contest" working for prizes and awards and are not solicitors working for money compensation.

3. Respondents' representatives or solicitors are employed by or affiliated with programs designed to provide assistance to underprivileged or disadvantaged groups or persons, including but not limited to, racial and religious minorities.

4. Respondents' representatives or solicitors are competing for college scholarship awards.

5. Respondents' representatives or solicitors are college students working their way through school.

6. Respondents' representatives or solicitors are nursing school students competing for nursing school scholarships or awards.

7. Magazines purchased by subscribers will be distributed to various hospitals as gifts or contributions.

8. Respondents' representatives or solicitors are foreign exchange students or otherwise foreigners whose ability to remain in this country is related to the sale of magazine subscriptions.

9. Respondents' representatives or solicitors are veterans of the armed forces whose magazine sales will benefit other veterans or veterans organizations.

PAR. 9. In truth and in fact:

1. Respondents are not authorized to sell subscriptions for and are not able to deliver or to cause the delivery of all magazines for which their representatives or solicitors sell subscriptions and accept payments. In certain instances, respondents' representatives or solicitors sell subscriptions for magazines which respondents are not authorized by the publisher or distributor thereof to sell, and consequently, respondents are unable to deliver or to cause the delivery of these magazines for which they have accepted payments from subscribers.

2. Respondents' representatives or solicitors work for money compensation and are not primarily participants in a "contest" working for prizes and awards; such contest awards are designed to motivate sales efforts and increased earnings. The excessive use by respondents and their representatives or solicitors of credentials, oral representations and promotional materials, identifying such representatives or solicitors as participants in a contest constitutes a spurious tactic designed to enable their representatives or solicitors to utilize a personal sympathy appeal in the sale of subscriptions.

3. Respondents' representatives or solicitors are not employed by or affiliated with programs designed to provide assistance to underprivileged or disadvantaged groups or persons. The use by respondents' representatives or solicitors of such representations is likewise a spurious device to gain personal sympathy in the sale of subscriptions.

4. Respondents' representatives or solicitors are not competing for college scholarship awards but are merely commissioned sales agents.

5. In a substantial number of instances, respondents' representatives or solicitors are not college students working their way through college, but are merely commissioned sales agents.

6. Respondents' representatives or solicitors are not competing for nursing school scholarships or awards but are merely commissioned sales agents.

7. Magazines purchased by subscribers are not distributed to various hospitals as gifts or contributions.

8. In a substantial number of instances, respondents' representatives or solicitors are not foreign exchange students nor are those solicitors able to remain in this country only by continuing activities related to magazine sales.

9. Respondents' representatives or solicitors are not employed for the benefit of veterans or any veterans association but are merely

commissioned sales agents. Moreover, references to their status as veterans are, in many instances, a spurious device for appealing to a prospective purchaser's personal sympathy or patriotism.

Therefore, the aforesaid acts and practices were, and are, unfair practices and are false, misleading and deceptive.

PAR. 10. In the further course and conduct of their business as aforesaid, where respondents have received payment for subscriptions to magazines they are in fact authorized to sell and are able to deliver or cause to be delivered, they have, in many instances, failed to deliver or cause to be delivered such magazines within a reasonable period of time.

Therefore, the aforesaid acts and practices were, and are, unfair practices and are false, misleading and deceptive.

PAR. 11. In addition to the foregoing statements, representations, acts and practices, respondents have engaged in door-to-door solicitations of the aforesaid subscriptions, either without prior invitation to solicit such sales from prospective purchasers or by using one or more of the deceptive means and methods aforesaid to gain access to prospective purchasers at times and under circumstances when such prospective purchasers were not otherwise considering the purchase of magazines or other publications, and without either:

1. affirmatively stating and affording such purchasers the right to cancel any resulting subscription contracts for a period of not less than three (3) business days following such solicitations; or

2. by refusing to honor any such right purportedly given either orally or in writing, or thwarting the exercise of any right so given.

The solicitation of subscription sales without permitting cancellation within a reasonable period of time constitutes an unfair, false, misleading and deceptive practice where such sale includes two payments on the part of the subscriber and where it is made under the conditions and circumstances herein alleged.

PAR. 12. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition, in commerce, with corporations, firms and individuals in the sale of magazine subscriptions.

PAR. 13. By and through the use of the aforesaid acts and practices, respondents place in the hands of the crew managers, sales agents, representatives and others the means and instrumentalities by and through which they may mislead and deceive the public in the manner and as to the things hereinabove alleged.

PAR. 14. The use by respondents of the aforesaid false, misleading, deceptive and unfair representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the

purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and into the purchase of a substantial number of magazine subscriptions from respondents.

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.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondents named in the caption hereof, and the respondents having been furnished thereafter with a copy of a draft of complaint which the Atlanta Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission would charge respondents with violation of the Federal Trade Commission Act; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondents of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondents have violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in § 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Library Marketing Service, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Florida, with its office and principal place of business located at LMS Building, 1320 44th Street, Orlando, Fla.

Respondent W. Michael Nace, is the president of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his address is the same as that of said corporation.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

It is ordered, That respondents Library Marketing Service, Inc., a corporation, its successors and assigns, and W. Michael Nace, individually and as an officer of said corporation, and respondents' officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of magazines, magazine subscriptions or any other publication, merchandise or service, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, directly or by implication, to prospective representatives or solicitors that they will travel on a planned itinerary exclusively to large cities and resort areas throughout the United States and foreign countries; or misrepresenting, in any manner, the travel opportunities available to their representatives or solicitors.

2. Representing, directly or by implication, to prospective representatives or solicitors that they will earn or receive \$520 per month or any other stated or gross amount; or representing, in any manner, the past earnings of respondents' representatives or solicitors, unless in fact the past earnings represented have actually been received by a substantial number of respondents' representatives or solicitors and accurately reflect the average earnings of such representatives or solicitors, or misrepresenting in any manner, the terms, conditions, or nature of such employment, or the manner or amount of payment for such employment.

3. Representing, directly or by implication, to prospective representatives or solicitors, that respondents will pay all, or any part of, the expenses of such solicitors except during a limited training period, or misrepresenting in any manner the terms or conditions of employment as a representative or solicitor for respondents.

4. Soliciting or accepting subscriptions for magazines or other publications which respondents have no authority to sell or which respondents cannot promptly deliver or cause to be delivered.

5. Representing, directly or by implication, that respondents' representatives or solicitors are participants in a contest working for prize awards and are not solicitors working for money compensation; or misrepresenting, in any manner, the status of their sales agents or representatives or the manner or amount of compensation they receive.

6. Representing, directly or by implication, that respondents'

representatives or solicitors are employed by or affiliated with programs designed to provide assistance or promote the welfare of underprivileged or disadvantaged groups or persons.

7. Representing, directly or by implication, that respondents' representatives or solicitors are competing for college scholarship awards.

8. Representing, directly or by implication, that respondents' representatives or solicitors are college students working their way through school, unless such is the fact.

9. Representing, directly or by implication, that respondents' sales agents or representatives are competing for nursing school or trade school awards or scholarships.

10. Representing, directly or by implication, that magazines, books or other publications purchased by subscribers will be distributed to various hospitals, veterans associations, schools and institutions as gifts or contributions.

11. Representing, directly or by implication, that respondents' representatives or solicitors are veterans; unless such is the fact; or representing, directly or by implication that the sale of magazines, books or other publications is or will be beneficial to veterans or veterans organizations.

12. Utilizing any sympathy appeal to induce the purchase of subscriptions, including but not limited to: illness, disease, handicap, race, financial need, eligibility for benefits offered by respondents, or other personal status of the solicitor, past, present or future; or representing that earnings from subscription sales will benefit certain groups of persons such as students or the underprivileged, or will help charitable or civic groups, organizations or institutions.

13. Failing clearly and conspicuously without any qualification, orally and in writing, to reveal at the initial contact or solicitation of a purchaser or prospective purchaser, whether directly or indirectly, or by written or printed communications, or person-to-person, that the purpose of such contact or solicitation is to sell products or services as the case may be, which shall be identified with particularity at the time of such contact or solicitation.

14. Failing within thirty (30) days from the date of the receipt of the final payment to enter subscriptions for each magazine, book or other publication with publishers which respondents are authorized by the publisher or distributor thereof to sell.

15. Misrepresenting the number and name(s) of publications being subscribed for, the number of issues and duration of each subscription and the total price for each and all such publications.

16. Failing to give clear and conspicuous oral and written notice to

each subscriber that upon written request said subscriber will be entitled to a refund of all monies paid if he does not have his order cleared to the publisher within 30 days of the entry of the final payment.

17. Failing to refund all monies to subscribers who have not had their orders to magazines, books or other publications, subscribed for through respondents entered within 30 days from the date of the final payment thereof or to offer the subscribers the right to substitute one or more publications or the extension of the subscription period for a publication already selected, at the option of the subscribers, upon written request by such subscribers.

18. Failing to furnish to each subscriber at the time of sale of any subscription a duplicate original of the contract, order or receipt form showing the date signed by the customer and the name of the sales representative or solicitor together with the name and mailing address of the marketing broker or crew manager together with the respondents' corporate name and address showing on the same side of the page the exact number and name(s) of the publications being subscribed for, the number of issues and duration of each subscription and the total price for each and all such publications.

19. Furnishing, or otherwise placing in the hands of others, the means or instrumentalities by or through which the public may be misled or deceived in the manner or as to the things prohibited by this order.

It is further ordered, That respondents do forthwith cease and desist from:

1. 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, *e.g.*, Spanish, 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 respondent, 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.

2. Failing to furnish each buyer, at the time he signs the door-to-door sales contract or otherwise agrees to buy consumer goods or services from the respondents, 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 10

point bold face type the following information and statements in the same language, *e.g.*, Spanish, 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 (3) business days from the above date.

If you cancel, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within ten (10) business days following receipt by the seller of your cancellation notice, and the transaction will be canceled.

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 business)

not later than midnight of _____

(date)

I hereby cancel this transaction.

(date)

(buyer's signature)

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 respondents shall:

1. Provide each of their present and future crew managers, and other supervisory personnel engaged in the sale or supervision of persons engaged in the sale of respondents' products or services, written instructions with respect to the provisions of this order which are applicable to the functions of each such person.

2. Require each person so described in Paragraph 1 above to clearly and fully explain the applicable provisions of this order to all sales agents, representatives and other persons engaged in the sale of the respondents' products or services.

3. Provide each person so described in Paragraph 1 above with a form returnable to the respondents clearly stating his intention to be bound by and to conform his business practices to the applicable provisions of this order; retain said statement during the period said person is so engaged and make said statement available to the Commission's staff for inspection and copying upon request.

4. Inform each person described in Paragraph 1 above that respondents shall not use any third party, or the services of any third

party, if such third party will not agree to so file and does file notice with the respondents that he or she will be bound by the applicable provisions of this order.

5. If such third party will not agree to so file notice with respondents and be bound by the applicable provisions of the order, respondents shall discontinue utilizing the services of or accepting orders from such third party.

6. Inform the persons described in Paragraph 1 above that respondents are obligated by this order to discontinue dealing with those persons who continue on their own the deceptive acts or practices prohibited by this order.

7. Institute a program of continuing surveillance to reveal whether the business operations of each said person described in Paragraph 1 above conform to the applicable provisions of this order.

8. Discontinue dealing with the persons so engaged, revealed by the aforesaid program of surveillance, who continue on their own the deceptive acts or practices prohibited by the applicable provisions of this order.

9. Upon receiving information or knowledge from any source concerning two or more bona fide complaints prohibited by the applicable provisions of this order against any marketing broker, sales agents or representatives during any one-month period, forthwith be responsible for either ending said practices or securing the termination of the employment of the offending sales agents or representatives.

10. Submit to the Commission a detailed report every six (6) months for a period of three (3) years from the effective date of this order demonstrating the effectiveness of the steps or actions taken with regard to the aforesaid surveillance program.

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 the order.

It is further ordered, That the individual respondent named herein promptly notify the Commission of the discontinuance of his present business or employment and of his affiliation with a new business or employment. Such notice shall include a reference to respondents' new business or employment and a description of his duties and responsibilities.

It is further ordered, That the respondents herein shall within sixty (60) days after service upon them of this order, file with the

Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

IN THE MATTER OF
ASH GROVE CEMENT COMPANY

Docket 8785. Order, June 10, 1975

Denial of respondent's motions to stay a final decision in this matter, reopen the record for the reception of evidence, or dismiss the complaint.

Appearances

For the Commission: *Thomas F. McNerney, Paul N. Kane and Nancy P. Rosenfeld.*

For the respondent: *David McKean and Robert Williams, McKean, Whitehead & Wilson, Wash., D.C.*

ORDER DENYING RESPONDENT'S MOTION TO STAY A FINAL DECISION IN THIS MATTER, REOPEN THE RECORD FOR THE RECEPTION OF EVIDENCE, OR DISMISS THE COMPLAINT.

By Motions filed Feb. 10, 1975 and Apr. 3, 1975, respondent in the above-captioned matter requests: (a) a stay of any final order, other than a dismissal of the complaint, pending the judicial outcome of the first of respondent's two separate attempts to obtain Commission documents under the Freedom of Information Act, 5 U.S.C. §551, *et seq.*; (b) a reopening of the adjudicative record until such time as respondent obtains, and offers into evidence, documents sought under both of its Freedom of Information Act requests; or, in the alternative (c) a final order dismissing the complaint.

The first and second request each seek essentially the same relief. Each would have the Commission hold in abeyance any final order in this matter until after the resolution of respondent's pending attempts to obtain documentation. Such documentation as might be forthcoming, it is urged, could be probative with respect to certain affirmative defenses raised in the course of this adjudication. The request for dismissal is grounded on the argument that because the Commission recently elected to close an investigation of certain acquisitions allegedly similar to those of respondent, it would be an abuse of discretion to continue the current case against respondent.

With respect to the request for dismissal, it is the Commission's view that it is well within its discretion to continue this proceeding, despite having elected to close the investigation referenced in respondent's