

IN THE MATTER OF
MARK ENTERPRISES, INC., ET AL.

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

Docket 8984. Complaint, July 29, 1974--Decision, June 17, 1975

Consent order requiring a Kansas City, Mo., seller and installer of residential, above-the-ground swimming pools and other home improvement products, among other things to cease using bait and switch tactics and other deceptive selling practices.

Appearances

For the Commission: *F. Kelly Smith, Jr.*

For the respondents: *William B. Miller*, Kansas City, Mo., and
Peabody, Revlin, Lambert & Dennison, Wash., D.C.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Mark Enterprises, Inc., a corporation, also doing business as Marc Enterprises, Inc., and Paul K. Cassidy, individually and as an officer of said corporation, hereinafter sometimes 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 Mark Enterprises, Inc., also doing business as Marc Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with its principal office and place of business located at 3025 Main in the city of Kansas City, State of Mo.

Respondent Paul K. Cassidy is an individual and officer of said corporate respondent. He formulates, directs and controls the acts and practices hereinafter set forth. His business address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale and distribution to the public of products including, but not limited to, residential above ground swimming pools, and in the installation thereof.

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

PAR. 4. In the course and conduct of their business and for the purpose of inducing the purchase and installation of their residential above ground swimming pools, respondents and their salesmen or representatives have made, and are now making, numerous statements and representations in advertising and promotional material and

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through oral statements and representations with respect to the nature and limitations of their offers, their prices and their purchasers' savings.

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

MARC SAYS:
BRING THE COUNTRY
CLUB HOME
Big Pool — Big Savings!
SUN., MON., TUES.
ONLY
OFFER LIMITED
CALL NOW

* * * * *

NOW ONLY,
\$649
Installed

* * * * *

SAVE an
extra \$50
Now!

* * * * *

"THE RIVERIA" (sic)
31 feet x 16 feet Outside
Dimensions
15 feet x 24 feet Swim Area
4 feet Deep

PAR. 5. By and through the use of the aforesaid statements and representations and others of similar import and meaning, but not specifically set out herein, separately and in connection with oral statements and representations of their salesmen or representatives, respondents have represented, and are now representing, directly or by implication, that:

1. The offers set out in their advertisements are bona fide offers to sell swimming pools and their installations of the kind therein described at the prices and on the terms stated.
2. Their offer of a 31' x 16' outside dimension swimming pool for \$649 is for a limited period of only three days.
3. Their swimming pools and installations are being offered for sale at special or reduced prices, and savings are thereby afforded to their purchasers because of reductions from respondents' regular selling price.

4. Installation of their swimming pools is complete for the advertised price and no other installation work needs to be done.

5. After the installation of their product is complete, the homes of their purchasers will be used for demonstration and advertising purposes by respondents and, as a result of allowing their homes to be used as models, purchasers will be granted reduced prices or will receive allowances or discounts.

PAR. 6. In truth and in fact:

1. The offers set out in respondents' advertisements are not bona fide offers to sell swimming pools and their installations of the kind therein described at the prices or on the terms and conditions stated but are made for purpose of obtaining leads to persons interested in the purchase thereof. After obtaining such leads, respondents' salesmen or representatives call upon such persons and disparage respondents' advertised swimming pools and their installations and otherwise discourage the purchase thereof and attempt to sell and frequently do sell different and more expensive swimming pools and installations.

2. Respondents' advertised offer of a 31' x 16' outside dimension swimming pool for \$649 is not made for a limited period of time. Said product is regularly advertised for the represented price or at another so called reduced price over a period of time greater than the represented limitations.

3. Respondents' swimming pools and installations are not being offered for sale at special or reduced prices, and savings are not thereby afforded to their purchasers because of reductions from respondents' regular selling prices. In fact, respondents do not have regular selling prices for particular advertised swimming pools, but the prices at which said swimming pools are offered for sale vary from purchaser to purchaser and from month to month.

4. Installation of respondents' swimming pools is not complete for the advertised price. In fact, purchasers are often required to provide some steps in the installation process themselves.

5. After installation of respondents' swimming pools is completed, the homes of respondents' purchasers will not, in most instances, be used for demonstration or advertising purposes by respondents and as a result of allowing, or agreeing to allow their homes to be used as models, purchasers are not granted reduced prices, nor do they receive allowances or discounts of any type.

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

PAR. 7. In the course and conduct of their aforesaid business, and 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 residential above ground swimming pools of the same general kind and nature as those sold by respondents.

PAR. 8. The use of the respondents of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of respondents' swimming pools and installations by reason of said erroneous and mistaken belief.

PAR. 9. 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 issued its complaint against the respondents named in the caption hereof, and the respondents having been served with notice of the Commission's complaint charging them with violation of Section 5 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 decided to withdraw the matter from adjudication, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 2.34(b) of its rules, now in further conformity with the procedure prescribed in Section 2.34(b) of its rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following order:

1. Respondent Mark Enterprises, Inc., also doing business as Marc Enterprises, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Missouri, with

its office and principal place of business located at 3025 Main, City of Kansas City, State of Missouri.

Respondent Paul K. Cassidy is an officer of said corporation. He formulates, directs and controls the policies, acts and practices of said corporation, and his principal office and place of business is located at the above stated address.

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 Mark Enterprises, Inc., a corporation, also doing business as Marc Enterprises, Inc., or under any other name, its successors and assigns, and Paul K. Cassidy, 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, distribution or installation of residential above-ground swimming pools, or any other home improvement products and services at retail in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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 other products, installations or services.

2. Making representations purporting to offer home improvement products, installations or services at retail when the purpose of such representations are not to sell the offered products, installations or services but to obtain leads or prospects for the sale of other such products, installations or services at higher prices.

3. Discouraging the purchase of any swimming pool or other home improvement product, installation or service at retail by failing to deliver as contractually obligated or disparaging any product, installation or service which is advertised or offered for sale by respondents.

4. Representing, directly or by implication, that any home improvement product, installation or service at retail is offered for sale by respondents when such offer is not a bona fide offer to sell such product, installation or service.

5. Representing, directly or by implication, that any of respondents' offers to sell home improvement products, installations or services at retail are limited as to time or restricted or limited in any other manner, unless such represented limitations or restrictions are actually in force and in good faith adhered to.

6. Representing, directly or by implication, that any price for respondents' home improvement products, installations or services at retail is a special or reduced price, unless such price constitutes a significant reduction from an established selling price at which such products, installations or services have been sold in substantial quantities by respondents in the recent regular course of their business; or misrepresenting in any manner their prices or the savings available to their purchasers.

7. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement of swimming pools or other home improvement products was run and for a period of six weeks after the termination of its publication in press or broadcast media:

- a. the cost of publishing each advertisement including the preparation and dissemination thereof;
- b. the volume of sales made of the advertised product or service at the advertised price;
- c. the wholesale cost to the respondents of each advertised product or service; and
- d. the retail price charged each customer of respondents for the advertised product or service.

8. Using the word "Sale," or any other word or words of similar import or meaning not set forth specifically herein unless the price of said merchandise being offered for sale constitutes a significant reduction from the actual bona fide price at which such merchandise was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent, regular course of their business.

9. (a) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise at retail, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price, unless such merchandise has been sold or offered for sale in good faith at the former price by respondents for a reasonably substantial period of time in the recent, regular course of their business.

(b) Representing, orally or in writing, directly or by implication, that by purchasing any of said merchandise at retail, customers are afforded savings amounting to the difference between respondents' stated price and a compared price for said merchandise in respondents' trade area unless a substantial number of the principal retail outlets in the trade area regularly sell said merchandise at the compared price or some higher price.

(c) Representing, orally or in writing, directly or by implication, that

by purchasing any of said merchandise at retail, customers are afforded savings amounting to the difference between respondents' stated price and a compared value price for comparable merchandise, unless substantial sales of merchandise of like grade and quality are being made in the trade area at the compared price or a higher price, and unless respondents have in good faith conducted a market survey or obtained a similar representative sample of prices in their trade area which establishes the validity of said compared price, and it is clearly and conspicuously disclosed that the comparison is with merchandise of like grade and quality.

10. Representing, directly or by implication, that installation of respondents' swimming pools or other home improvement products is included in an advertised or represented price, unless such represented price does actually include such installation.

11. Misrepresenting, orally or in writing, directly or by implication, the efficiency, durability, quality or limitations of said products, services and installations.

12. Representing, directly or by implication, that the home of any of respondents' purchasers or prospective purchasers will be used for any type of advertising or demonstration purpose or as a model home or that as a result of such use, respondents' purchasers or prospective purchasers will be granted reduced prices or will receive discounts or allowances of any type; unless in every instance, the parties to whom such representations are made are offered merchandise or services at a price:

(a) that is significantly less than the price at which identical merchandise or services are offered to those to whom such representations have not been made; and

(b) which constitutes a significant reduction from the price established by sales of a reasonably substantial number of identical items of merchandise or services by the respondents in their recent, regular course of business.

It is further ordered, That respondents shall forthwith deliver a copy of this order to cease and desist to all present and future personnel of respondents engaged in the offering for sale or sale of respondents' products, installations or services at retail or in any aspect of preparation, creation or placing of advertising, and that respondents secure a signed statement acknowledging the receipt of said order from each such person.

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

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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 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 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