

(e) 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

HOLLYWOOD CARPETS, INC., ET AL.

OPINION, ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION AND TEXTILE FIBER
PRODUCTS IDENTIFICATION ACTS

Docket 8983. Complaint, July 8, 1974—Decision, Sept. 30, 1975

Order requiring a Beltsville, Md., seller and distributor of carpeting and floor coverings, among other things to cease misrepresenting the word "sale," and the savings afforded purchasers of respondent's products; failing to maintain adequate records; and misusing the term "warehouse." Further, the order proscribes respondent's from violating the Textile Fiber Products Identification Act by misbranding and falsely advertising its textile fiber products.

Appearances

For the Commission: *Everette E. Thomas, Richard C. Donohue and Thomas J. Keary.*

For the respondents: *Ben Paul Noble, Noble & Lorsen, Wash., D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hollywood Carpets, Inc., a corporation, and Charles Snyder, Florence H. Snyder and Dale E. Snyder, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Acts, and the rules and regulations promulgated under the Textile Fiber Products Identification 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 Hollywood Carpets, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the District of Columbia, with its principal office and place of business located at 10212 Southard Dr., Beltsville, Md.

Respondents Charles Snyder, Florence H. Snyder and Dale E. Snyder are individuals and are the principal officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts and practices hereinafter set forth. Their business address is the same as that of the corporate respondent. All of the aforementioned respondents cooperate and act 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 and 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, but not limited to, advertisements inserted in newspapers of interstate circulation 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 have caused, and now cause, their said merchandise, when sold, to be shipped from their places 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 commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor coverings, respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, and by oral statements and representations of their salesmen 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:

WAREHOUSE SALE

at

Complaint

86 F.T.C.

HOLLYWOOD CARPETS, INC.

SATURDAY, Dec. 13

8 a.m. to 6 p.m.

Free Coffee and Donuts for the Early Birds!

WAREHOUSE ONLY

SAVE 50 to 75%

* * * * *

WAREHOUSE SALE 1st Quality BROADLOOM REMNANTS and RUGS
From PHILADELPHIA CARPETS, INC.

Yes, we bought more than 15 Tons of beautiful carpeting way, way under book prices, from this great mill. All large sizes — it took two large trailers to deliver them. Choose from Wools, Acrylics, Polyesters, Nylon Deep Plush Piles, Hi-ho's, Twists. Quality you dream about and now at these lower than ever prices everyone can afford the best.

* * * * *

HOTTEST
CARPET
WAREHOUSE
SALE
IN TOWN

NOBODY BEATS OUR LOW PRICES

* * * * *

15x15' SALE \$98

Compare \$238 to \$264 Value

12x18' SALE \$96

Compare \$184 to \$235 Value

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 statements and representations of respondents' salesmen to customers and prospective customers, respondents have represented, and are now representing, directly or by implication, that:

1. By and through the use of the word "SALE," and other words of similar import and meaning not set out specifically herein, that said carpeting and floor coverings may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices.

2. Purchasers of respondents' carpet remnants are afforded savings of 50 to 75 percent off the prices at which such carpet remnants are usually and customarily sold at retail.

3. By and through the use of the words "Compare \$238 to \$264 Value" and other words of similar import and meaning not set out

specifically herein, that said comparative value is the price at which the same carpet remnants are being offered for sale by a substantial number of the principal outlets in respondents' trade area.

4. By and through the use of the words "WAREHOUSE SALE," separately or in conjunction with the words "LOW PRICES," and other words of similar import or meaning, not set out specifically herein, that the facility at which respondents' merchandise is being offered for sale or sold is used primarily for the storage of merchandise used by respondents' retail business, and that respondents' merchandise is being offered for sale or sold out of such facility at prices substantially below those charged for the same or similar merchandise by a substantial number of the principal outlets in respondents' trade area.

PAR. 6. In truth and in fact:

1. Respondents' merchandise is not being offered for sale at special or reduced prices. To the contrary, the price respondents regularly advertise and their so-called advertised "sale" price are identical and are used to mislead prospective customers into believing there is a saving from a bona fide regular selling price.

2. Purchasers of respondents' carpet remnants are not afforded savings of 50 to 75 percent off the prices at which such carpet remnants are usually and customarily sold at retail. To the contrary, the percentage price comparison is based on prices for quantities of carpeting required for wall-to-wall installation rather than the advertised carpet remnants or rugs which are usually sold for less than wall-to-wall prices.

3. The same carpet remnants are not offered for sale at the comparative price by a principal number of the principal outlets in respondents' trade area.

4. The facility at which said merchandise is being offered for sale or sold is not used primarily for the storage of merchandise used by respondents' retail business. Instead, such facility is regularly used for the display and retail sales of merchandise at prices not substantially below those charged for the same or similar merchandise by a substantial number of the principal outlets in respondents' trade area.

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 and distribution of rugs, carpeting, floor coverings services of the same general kind and nature as those sold by respondents.

PAR. 8. The use by respondents of the aforesaid false, misleading and deceptive statements, 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 complete, and into the purchase of substantial quantities of respondents' products and services 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.

COUNT II

Alleging violation of the Textile Fiber Products Identification Act and the implementing rules and regulations 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. 10. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products including carpeting and floor covering and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, which have been advertised or offered for sale in commerce; and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 11. Certain of said textile fiber products were misbranded by respondents within the intent and meaning of Section 4(a) of the Textile Fiber Products Identification Act and of the rules and regulations promulgated thereunder, in that they were falsely and deceptively advertised, or otherwise identified as to the name or amount of constituent fibers contained therein.

PAR. 12. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and to assist, directly or

indirectly, in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the rules and regulations promulgated under said Act.

PAR. 13. Among such textile fiber products, but not limited thereto, was carpeting which was falsely and deceptively advertised in the Washington Post newspaper published in the District of Columbia, and having a wide circulation in the District of Columbia and various States of the United States, in that said carpeting was described by such fiber connoting terms among which, but not limited thereto, was "Acrilan," and the true generic name of the fiber contained in such carpeting was not set forth.

PAR. 14. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder in the following respects:

1. In disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer surface of the floor covering and not to the backing, filling or padding, in violation of Rule 11 of the aforesaid rules and regulations.

2. A fiber trademark was used in advertising textile fiber products, without a full disclosure of the fiber content information required by said Act, and the regulations promulgated thereunder, in at least one instance in said advertisement, in violation of Rule 41(a) of the aforesaid rules and regulations.

3. A fiber trademark was used in advertising textile fiber products, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of Rule 41(c) of the aforesaid rules and regulations.

PAR. 15. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, and unfair methods of competition, in commerce, under the Federal Trade Commission Act.

Initial Decision

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INITIAL DECISION BY MILES J. BROWN, ADMINISTRATIVE LAW
JUDGE

MARCH 18, 1975

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this matter on July 8, 1974 (mailed July 17, 1974), charging respondents with 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 (15 U.S.C. §45), as well as with violation of the Textile Fiber Products Identification Act (15 U.S.C. §70) and the rules and regulations promulgated thereunder. By answer duly filed respondents denied summarily many of the substantive allegations of the complaint, although they did admit making certain representations alleged in the complaint. Respondents also denied that their practices were "in commerce," and denied that they had violated the Federal Trade Commission Act or the Textile Fiber Products Identification Act. Respondents also asserted numerous defenses including the Commission's lack of jurisdiction, "laches," no showing of public interest, and "de minimis."

Adjudicative hearings were held in Wash., D.C. on Nov. 6, 7, 11, 12 and 26, 1974. The record in this proceeding was closed on Dec. 19, 1974, although the record was thereafter reopened by order of Jan. 3, 1975, for the sole purpose of receiving CX 62 into evidence (see Tr. 416-417, 522). In addition certain corrections in the official transcript were ordered on Jan. 3, 1975.

In support of the allegations of the complaint, Commission counsel adduced the testimony of respondents Charles Snyder, Florence Snyder and Dale Snyder; two consumer witnesses Verna Dickerson and Howard Beard; Harold Reznick, executive vice-president and general manager of Diener's, Inc., a carpet retailer; Lindsay Stott, Jr., an ex-employee of Hollywood; and Martin Adem, owner of Marty's Floor Covering, Alexandria, Va. Counsel's exhibits included copies of respondents' newspaper advertising (CXs 1-48), several so-called installment sales agreements (CXs 61, 123) and numerous invoices covering Hollywood's purchases of carpeting from certain suppliers (CXs 154-772).

In support of the defense, respondents adduced the testimony of Charles and Dale Snyder; John Bowen, assistant classified advertising manager, Washington Post; Mark Teaney, Wash., D.C. area sales representative of Philadelphia Carpet Co., a carpet manufacturer; Curt Brandland, representative of Barwick Mills, a carpet manufacturer; and

Steven Wexler, salesman for Coronet Carpets, a carpet manufacturer. Respondents' exhibits include pictures of its facility in Beltsville, Md. (RX 1-17); pricelists of various carpet manufacturers (RX 18, 20, 27); an advertisement respondents placed in the Washington Post on Dec. 15, 1973 (RX 41); documents relating to respondents' complaint to the Washington Post about the use of the word "Acrilan" in RX 41 (RX 42, 43, 45; CX 62); copies of advertising of other retailers (RX 44, 51); pictures of other retail establishments (RX 46-50); numerous sales invoices (RX 36, 39, 40, 52-72); and an analysis of respondents' retail sales by type of carpeting in each of its store locations (RX 73b, d).

On Feb. 5, 1975, counsel supporting the complaint filed their proposed findings of fact, conclusions of law, and proposed order. On Feb. 14, 1975, respondents filed their counter-proposed findings of fact, conclusions of law, and proposed order along with their memorandum brief in support thereof. Respondents' counsel advised the administrative law judge that failure to file proposed findings on the scheduled day of Feb. 5, 1975, was due to certain internal office problems. Complaint counsel have not objected to this late filing and have advised the administrative law judge that they did not intend to file a reply.

Any motions appearing on the record not heretofore or herein specifically ruled upon either directly or by the necessary effect of the conclusions in this initial decision are hereby denied.

The proposed findings and conclusions submitted by counsel have been given careful consideration and to the extent not adopted by this decision in the form proposed or in substance are rejected as not supported by the evidence or as immaterial.

Some of the abbreviations used in this decision are as follows: CX - Commission's exhibits; RX - respondents' exhibits; Tr. - transcript of testimony; CPF - Commission counsel's proposed findings; RPF - respondents' proposed findings; Comp. - complaint; Ans. - respondents' answer to the complaint.

At this posture of the case there appears to be little dispute over the evidentiary facts. Respondents' main contentions appear to be that the allegations of the complaint and complaint counsel's proposed findings relating to the meaning of the terms "SALE" and "WAREHOUSE," either considered separately or in conjunction with each other, do not constitute a violation of the Federal Trade Commission Act. In addition, respondents assert that their representations as to certain savings relating to remnants are in fact true. It is significant to point out that the evidence concerning respondents' alleged unfair trade practices presented by counsel supporting the complaint relate mainly to a period of time from Nov. 15, 1970, through June 1972, at which time

respondents operated certain retail stores in addition to their so-called "warehouse."

Having reviewed the record in this proceeding, and having considered the demeanor of the witnesses as they testified, together with the proposed findings, counter-proposed findings, conclusions and arguments submitted by the parties, I make the following findings of fact based on the record considered as a whole:

FINDINGS OF FACT

1. Respondent Hollywood Carpets, Inc. ("Hollywood"),¹ is a District of Columbia corporation with its principal office and place of business located at 10212 Southard Dr., Beltsville, Md. (Comp.; Ans. Par. One). Incorporated in 1962, Hollywood has operated retail stores at Prince Georges Plaza, Md., Bladensburg, Md., and Bailey's Crossroads, Va. (Tr. 7, 16, 217, 419; see CX 39). In addition, since 1969 Hollywood has had a retail store and storage and cutting facility at its Beltsville location (Tr. 17, 420). The Virginia store was closed in late 1969 (Tr. 24) and the Prince Georges Plaza and Bladensburg stores were closed by the end of 1972 (Tr. 16, 218; see CX 45). Since 1972 Hollywood has done business only from its Beltsville facility (Tr. 17). In the period from November 1970 through November 1971 Hollywood's dollar volume of sales was approximately \$610,000 (Tr. 519). In 1974 Hollywood's annual retail sales were approximately \$400,000 (Tr. 23).

2. Respondent Charles Snyder was president and the chief executive officer of Hollywood from 1962 until 1971 (Tr. 7-8). Since 1971, he has served the corporation in the capacity of a director and consultant. His main duties have been "advising for advertising and purchases and different duties because of his past experience" (Tr. 13, 15). Mr. Snyder owns 51 percent of the outstanding shares of stock in Hollywood (Tr. 14). He has been connected with the carpet business in some capacity since 1949 (Tr. 92).

3. Respondent Florence H. Snyder, wife of Charles Snyder, has been a director and officer of Hollywood throughout its corporate existence (Tr. 8, 109). In 1972 she assumed the office of president and is also treasurer (Tr. 12-13, 109). She is an owner of shares of stock in Hollywood (Tr. 14-15).

4. Respondent Dale E. Snyder, son of Charles and Florence Snyder, has been actively employed by Hollywood since 1962 (Tr. 119, 120, 452). Before Nov. 15, 1971, he cooperated and acted with Charles Snyder in carrying out the acts and practices of the corporate respondent, and since that time has been instrumental in carrying out the acts and

¹ Most of the time hereinafter "Hollywood" refers to all of the respondents.

practices of the corporation (Tr. 114, 120). He is presently vice-president and secretary of Hollywood and is an owner of shares of stock in that corporation (Tr. 15, 109).

5. The individual respondents Charles, Florence and Dale Snyder, formulate, direct and control the acts and practices of the corporation, and all of these respondents cooperate and act together in carrying out the acts and practices of the corporation as such acts and practices are pertinent and relevant to this proceeding (findings 2, 3, 4, *supra*; see Ans. Par. One; see also Tr. 15, 111-112, 113, 115).

6. At all times relevant herein, respondents have been engaged in the advertising, offering for sale and distribution and installation of carpeting and floor covering to the public at retail (see Ans. Par. Two).² During the period from Nov. 15, 1970, through Nov. 15, 1971, and subsequently, respondents advertised regularly in the classified section of the Washington Post Newspaper, a few times in the Evening Star, and occasionally on a radio station, all of which have circulation or transmission across State boundaries (Tr. 22, 28-31; see CXs 1-48). In the course and conduct of their business respondents have caused their said carpet merchandise, much of which had been purchased from suppliers located outside the State of Maryland (CXs 275-772) to be shipped from their place of business located in Maryland to purchasers located in the Commonwealth of Virginia and the District of Columbia (Tr. 24, 25). Hollywood is in competition with other retail carpet stores in the metropolitan Wash., D. C. area (Tr. 25). The acts and practices and the methods of competition challenged in this proceeding are acts and practices "in commerce" and methods of competition "in commerce" as "commerce" is defined in the Federal Trade Commission Act (15 U.S.C. §41).

7. Certain of respondents' newspaper advertisements contained the following statements and representations:

WAREHOUSE SALE
at
HOLLYWOOD CARPETS, INC.
SATURDAY, DEC 13
8 a.m. to 6 p.m.
Free Coffee and Do-nuts for the Early Birds!
WAREHOUSE ONLY
Save 50 to 75%
3000 sq. Yds. Cabin Craft — Thick Plush Nylon Pile
Broadloom — Full Rolls 9 Colors
Will Cut to Any Size \$3.33 sq. yd.

² During the period November 1970 to November 1971, Hollywood also sold drapery and dinette sets (Tr. 17).

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1000 Broadloom Remnants \$9.99 to 99.99 each
Room Sizes Included

100 sq. yds. Jute Padding Remnants
Short Ends-of-Rolls 25 sq. yd.

Thousands of Square Yards of Shags — Plush — HiLo Loops
at Low, Low Prices Full Rolls

ALL PRICES F.O.B. WAREHOUSE
ALL 1ST QUALITY - WE NEVER SELL 2NDS

HOLLYWOOD CARPETS, INC.
10212 Southard Drive
Beltsville, Maryland
Rear of New Hess Gas Station
1 mile north of Beltway on Rte. 1

(CX 34; Exhibit received by Commission, Nov. 15, 1971)

* * * * *

HOTTEST
CARPET
WAREHOUSE
SALE
IN TOWN

Nobody Beats Our Low Prices
Sale Days
Friday - Saturday - Monday
Daily 9 to 9; Saturday 9 to 6.

Always First Quality. We never sell seconds.
We boast the cleanest warehouse anywhere

Alexander Smith Shag Scatter Rugs
\$1 each
9x12 Rug Cushions
\$9.99 each
Wall to wall Bath Sets
\$11.99 set
8'6" x 11'6" Room Size Shag Rugs
\$22.99 each
Indoor/Outdoor Carpeting
\$1.55 sq. yd.
Cabin Craft Shag, Plush, or Hilo Pile Broadloom
\$2.99 sq. yd.

Initial Decision

More than 800 Nylon, Wool, Acrilan, all brand name beautiful quality remnants. From hall sizes to big room wall to wall sizes. And if we don't have your size, we'll cut it.

You Save 50 to 70%
3-Day Special Drapery Sale
Any Pair in Stock
1/3 OFF from our reg. Stock
Call 345-5595 for directions
on sale at all 3 locations

HOLLYWOOD
Carpets, Inc.
Warehouse Locations
10212 Southard Dr. Beltsville, Md.
1 Mi. N. off Beltway on RT. 1
Rear of Hess Gas Station
Call for directions, 345-5595

* * * * *

PRINCE GEORGES PLAZA
Opposite Big Boy Restaurant
779-5151
West Hyattsville, Md.

5426 ANNAPOLIS ROAD
Opposite Cheverly Theater
864-5945
Bladensburg, Md.

All prices F.O.B. Store or Warehouse
Credit Terms Available

(CX 6 Apr. 23, 1971).

* * * * *

HOLLYWOOD
Carpets, Inc.
BELTSVILLE WAREHOUSE
SALE
TODAY, FRIDAY-SATURDAY-MONDAY
Daily 9 to 9; Saturday 9 to 6

BROADLOOM REMNANTS SALE

More than 1000 in stock to choose from. All first quality, never sell seconds. From America's finest mills.
MOHAWK - LEES - CABIN CRAFT - BARWICK - CORONET-
PHILADELPHIA CARPET

More Mills Means Better Selection
Choose from 501 Nylon, Acrylic, Wools
Shags, Plushes and Hilo Designs

Initial Decision

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15x15', SALE \$98
 Compare \$238 to \$264 Value
 12x18', SALE \$96
 Compare \$184 to \$235 Value

12x15', SALE \$78
 Compare \$138 to \$192 Value
 12x12' SALE \$68
 Compare \$104 to \$156 Value
 9x15', SALE \$58
 Compare \$97 to \$138 Value
 9x12', SALE \$48
 Compare \$69 to \$124 Value

ALSO 20,000 SQ. YDS. OF BROADLOOM
 FROM \$3.99 to \$6.88 sq. yd.
 Call 345-5595 For Directions

HOLLYWOOD

Carpets, Inc.

10212 Southard Dr., Beltsville, Md.
 1 MI. N. OFF Beltway on RTE 1, Rear of Hess
 Gas Station Right Side Heading North
 All Sales F.O.B. Warehouse; All items subject to
 prior sales Credit Terms Available
 345-5595

(CX 15 (July 9, 1971; July 16, 1971; July 23, 1971)).

* * * * *

HOLLYWOOD CARPETS
 WAREHOUSE SALE

1ST QUALITY BROADLOOM REMNANTS AND RUGS FROM
 PHILADELPHIA CARPETS, INC.

Yes, we bought more than 15 TONS of beautiful carpeting, way, way under
 book prices, from this great mill. All large sizes - it took two large trailers
 to deliver them. Choose from Wools, Acrylics, Polyesters, Nylon Deep Plush
 Piles, Shags, Hi-Lo's, Twists. Quality you dream about and now at these
 lower than ever prices everyone can afford the best.

STARTS TODAY SAT. 9 to 6

All prices FOB Warehouse. Check the listed Qualities and sizes and hurry to our beautiful warehouse and see hundreds more not listed.

100% Wool Pile

12x13'	RESPLENDANT	FROSTED GOLD	SHAG	\$139
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100% Acrylic Pile						
Size	Quality Name	Color	Style		Price	
10x15	Jarmain	Royal Blue	Plush		\$118	
*	*	*	*	*	*	*
100% Nylon Pile						
12x16'11"	LaPrado	Gold	Shag		\$119	
*	*	*	*	*	*	*
100% Polyester Pile						
12x14'9"	Happy Talk	White Wine	Shag		\$149	
*	*	*	*	*	*	*

HOLLYWOOD CARPETS

On SALE ONLY AT OUR BELTSVILLE WAREHOUSE

CALL 937-5595 for DIRECTIONS

1 mile North of

Beltway Exit 27 on RT. 1

Rear Gas Station,

Next to Furniture City"

(CX 43, Saturday, Apr. 15, 1972)

8. In addition to the four advertisements detailed in finding 7, *supra*, (the advertisements apparently relied on by counsel supporting the complaint in drafting the specifications of the complaint), the record contains 45 other advertisements. Commission Exhibit 1 through CX 40 were published in the Washington Post during the period Nov. 15, 1970, through Nov. 15, 1971, the latter date being the day on which respondent Charles Snyder made return on a subpoena at the investigational hearing in this matter. Dates of publication are noted on CX 1 through CX 28. CX 29 through 40 appear to be substantially similar in content, but because the date of publication is not known, these advertisements are of little relative additional value.³ CX 41 through 48 are Hollywood advertisements published from Feb. 2, 1972, through Dec. 2, 1972, and RX 41 was disseminated on Dec. 15, 1973 (Tr. 369). A review of CXs 1-28 and CXs 41-48 demonstrates that from about May 1971 until March 1972, respondents have often represented that they are conducting a "WAREHOUSE SALE," and that in many instances the sale is being conducted at their stores as well as at the

³ It appears that some of the undated advertisements are duplications of other exhibits.

warehouse (see CXs 1-6, 10-12, 24, 27, 42). Indeed until August 1971, respondents listed their stores as well as the Beltsville facility under the general heading "WAREHOUSE LOCATIONS" (see CXs 1-8, 12-14). Also respondents used such other sale descriptions as "LABOR DAY WAREHOUSE SALE" (CX 21), "ANNIVERSARY SPECIALS" (CX 22), and "WAREHOUSE AND STORE-WIDE END-OF-THE-MONTH SALE" (CX 27).

Most of Hollywood's advertising was placed in the classified section of the Washington Post. Several display advertisements that would appear in other sections of the paper, are CXs 28 and 43. (see Tr. 28-31)

In a few instances respondents used comparative pricing representations relating to remnants (see CXs 15, 16, 18, 19), and on at least two occasions used comparative pricing for carpet products other than remnants (see CXs 18, 19).

On several occasions respondents represented savings as percentages (50 to 70 percent - CX 34; 40 percent to 70 percent - CX 35; 20 percent - CXs 41, 48). However, usually respondents merely stated a price for a particular rug or groups of rugs, remnant or group of remnants (*e.g.* from \$11 each up - see CXs 5, 9, 11) or for carpeting, quoted per square yard.

Also a review of the dated exhibits demonstrates that in 14 instances the term "acrylic" was used (CXs 7, 12, 15, 17, 18, 19, 20, 27, 28, 42, 43, 44, 46, 47) whereas in only 5 instances was the term "acrilan" used (CXs 1, 6, 21, 23, 24). In some instances respondents noted that certain carpeting had "foam backing" (CX 29) or "double jute back" (see CX 25).

9. There are three general price levels at which respondents (and for that matter any retailer) purchase carpeting from a manufacturer: the price for a full roll of carpeting, the price for a particular size of carpeting, and the price for remnants (Tr. 112). The principal price is called the "roll price," that is the base price at which carpeting may be bought in a complete roll (Tr. 294). This price is quoted in terms of yards, meaning square yards. A roll usually consists of carpeting in a standard width of 12 or 15 feet (4 or 5 yards) and in lengths varying from 50 feet to 400 feet (Tr. 59). The differences in length are controlled by the variances in the manufacturing process usually relating to the amount of material available from the same dye lot or lots (Tr. 42, 61, 88). Manufacturers afforded quantity discounts on large purchases of rolls (Tr. 96, 280, 293-294).

When respondents purchased a roll of carpeting they either sold to the customer from a display sample located in the retail stores or from

the customer's observation of the roll itself which was stored at the Beltsville facility (Tr. 104-105).⁴ The retail price for such carpeting is usually based on a 40 to 42 percent markup above respondents' cost for said carpeting (Tr. 53, 55, 118; but see Tr. 313-316).

10. In those circumstances where respondents do not have a roll of the particular color or style of carpeting desired by the consumer they may, selling from samples, order a designated quantity (less than a roll) from the manufacturer (Tr. 41-42). This order is called a "cut order" (Tr. 42, 294). Usually the manufacturer's "cut order" price to respondent (or any other retailer) is 18 to 20 percent higher than the roll price for the same carpeting (Tr. 57, 91A, 256, 305). Manufacturers generally state their "cut order" and roll price in their published price lists (see RXs 18-22; Tr. 95). Respondents' retail price for carpeting ordered on a cut order basis is usually based on the 40 to 42 percent markup above its cost ("cut order" price) for said carpeting (Tr. 21, 53, 55, 118; but see Tr. 313).

11. When a manufacturer uses a roll for "cut orders" or when a retailer uses a roll to fill customers' orders, the end of the roll which is too small for general use in filling wall-to-wall carpet orders becomes a "remnant" (Tr. 41-42, 56, 294). This so-called remnant, which is unbound, and which may vary in length from a few feet to 30 feet (usually under 20 feet)⁵ is sold at a substantially lower price than the same carpeting sold at a roll price or the higher cut order price (see Tr. 483). The manufacturer usually sells remnants at from 40 to 50 percent lower than the roll price (Tr. 42, 254-255, 295, 306). Retailers usually purchase remnants in groups or packages consisting of a large number of assorted styles, patterns and colors (Tr. 118-119, 294). When respondents purchase remnants from manufacturers they add the usual 40 to 42 percent markup to their cost to arrive at their retail price (see Tr. 18, 53, 55, 118; but see Tr. 313-316). When respondents create a remnant in the course of their business they reduce the price from their usual roll price (Tr. 57-61).

12. Remnants are usually purchased for use as area rugs (Tr. 117). To create an area rug in the size desired by the customer the carpeting (whether a remnant or a cut from a roll) is cut to size and bound, the binding being done at respondents' Beltsville facility for a charge (Tr. 56). In addition, area rugs of certain standard sizes may be created by the manufacturer or by respondents before being ordered by a particular customer and are offered for sale as "rugs" (Tr. 18, 19-20).

⁴ When the prospective purchaser went to the Beltsville facility she would buy looking at the roll itself not a sample (see Tr. 88).

⁵ Remnants are light enough to be moved without the aid of machinery and are usually displayed by standing the roll along a wall (Tr. 483, 502-503).

Moreover, remnants may also be created by cutting rolls into sizes of 20 feet or under (Tr. 514).

13. Remnants are of the same quality as carpeting of the same style and patterns that are obtainable in rolls or by cut order. Hollywood purchases carpeting as remnants in many cases substantially similar or identical in quality and pattern to carpeting it already carried in inventory as rolls (Tr. 58, 454). If the style, patterns and grade of carpeting desired by a customer are not available in a remnant, that customer would have to pay a roll price (if a retailer carried a roll of that carpeting) or the "cut order" price if no roll was stocked. Respondents do not handle "seconds" (Tr. 62, 295, 325, 356, 506).

14. During the period from November 1970 through November 1971 and at other times when respondents operated more than one retail location, their regular "roll price" at the stores were higher than the "roll price" for the same product at the Beltsville location, the difference being reflected in the cost to them of "free" delivery from the Beltsville location, i.e., 11 cents per square yard. No deliveries were made at that time on products purchased at the Beltsville location (Tr. 105, 212, 219, 226, 233, 242, 448-449).

15. Generally, when respondents advertised a "SALE" the items specifically referred to therein were priced lower than the prices at which those items had been offered for sale by respondents in the past or the "cut order" list price therefor (Tr. 106, 122). With respect to remnants, respondents' lower price was usually compared to the price at which the same or substantially comparable carpeting could be purchased from respondents or a competing retailer at a "cut order" price (Tr. 72, 107, 123, 304). When remnants were purchased from a manufacturer they were added to the remnant lines of respondents and included in the remnant sale (Tr. 50, 118, 122). If a special purchase is made from the manufacturer "* * * you go in and buy it naturally you are going to have a sale * * * based on [those] reduced prices * * * and you can reduce some of your own inventory and put it all together and have a sale and profitably do so" (Tr. 52). Hollywood had sales "Whenever it seemed necessary." "There are certain times bills must be paid and we have to reduce items, or when we buy something that is not moving we have to sell it out. Or if we buy special purchase of remnants on things like we used to stock. These sort of things" (Tr. 131-132).

16. When respondents specifically advertised remnants at "50 - 70 percent off" the higher price reference is to the regular cut order list price for the same carpeting (Tr. 56, 63, 122). The higher discount was for smaller pieces that sell for halls or runners (Tr. 63-64). "This is the value of the remnant. This is the end of the roll. This is the end of the

roll that we sold for \$10 a yard and there are four yards left on the end of it. We sell it for 50 percent of our prices which is \$5 a yard. That is a 50 percent sale. That is how we determine that comparison, the percentage" (Tr. 57).

17. Respondents admitted in their answer that by and through the use of the word "SALE" and through other words of similar import and meaning, they have represented that the carpeting and floor covering which they offer for sale may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondents' regular selling prices (see CXs 1-48; Ans. Par. Five (1)).

18. Respondents' representation is true (see findings 14, 15, *supra*).

19. Respondents admitted in their answer that they have represented in their advertising that purchasers of respondents' carpet remnants are afforded savings of 50 to 75 percent off the prices at which such carpet remnants are usually and customarily sold at retail (see CXs 1-48; Ans. Par. Five (2)).

20. In truth and fact the higher price on which respondents base their comparisons is the price at which the same grade and quality of carpeting as the advertised remnant usually and customarily sold at retail (see findings 13, 15, 16, *supra*).

21. Respondents also admitted in their answer that by and through the use of the words "Compare \$238 to \$264 Value" they have represented that said comparative value is the price at which the said carpet remnants are being offered for sale by a substantial number of the principal outlets in respondents' trade area (Ans. Par. Five (3)).

22. In fact, respondents represented by use of the words "Compare \$238 to \$264 Value" that said comparative value is the price at which carpeting of the same grade and quality as the advertised remnant is being offered for sale by a substantial number of the principal outlets in respondents' trade area (see findings 9, 10, 11, 12, *supra*; see CXs 15, 16, 18, 19).

23. Respondents representation as to the comparative value of advertised remnants (see finding 22, *supra*) was in fact true (see findings 9, 10, 11, 12; see also conclusion, *infra* pp. 23-25) [pp. 808-810 herein].

24. Respondents' Beltsville facility which was opened in late 1969 (Tr. 17), is "located in a district that is adjacent to commercial warehouses" (Tr. 406). It is a portion of a larger building with three roll-type-overhead-door entrances at the front, which could be described generally as a loading bay (see Tr. 90, 178; RX 1 - frames 34A-36). A walk-in door entrance is located to the left of the overhead door entrances (see RX 1-frames 34A-36, RX 5).

This walk-in door leads into a small enclosed area described as "a

sample show room perhaps 12 by 36 feet" (Tr. 75, 420; see RXs 2, 4, 5). In this area respondents display samples used in its "cut order" business, *i.e.*, the ordering directly from the manufacturer of specific quantities of carpeting (Tr. 88). The remaining portion of this facility, consisting of a floor area of approximately 11,000 square feet, contains the rolls of carpeting and remnants and other merchandise which Hollywood maintains as stock (see RXs 2, 3, 6, 7, 8, 9). The remnants (rolled up) are usually stacked standing up along the right and left walls of this large room (Tr. 84), whereas the rolls of carpeting are placed horizontally in pyramid fashion on the floor in piles with walk space between the remnant display and roll display (Tr. 84; RXs 2, 3, 6, 7, 8, 9, 10, 11, 12, 13). The middle of the floor area in the large room is used as a cutting area (Tr. 86; see RX 6). A three ton fork-lift truck ("hyster" Tr. 84-85) is used to move the rolls from the various piles to the cutting area (see RX 1, frame 33A-34). Certain office space is located over the sample room with access by stairs from the large storage-work area (see RXs 2, 8; Tr. 82).

Until late in 1972, Hollywood stored most of its rolls of carpeting in this facility, customers being able to either order this merchandise from its other store locations from samples taken from the rolls on stock at Beltsville or by ordering directly by observation of the actual roll at Beltsville (Tr. 75-76). The facility at Beltsville is open to the public (except the office area) and Hollywood has a "retail license and occupancy permit for retail sales" at this location (Tr. 77). Before opening its Beltsville facility Hollywood stored its on-hand merchandise (rolls and remnants) in the back room of its Bailey Crossroads store or the basement of its Bladensburg store (Tr. 217-218, 223).

25. During the times relevant to this proceeding Hollywood referred to its Beltsville facility as its "WAREHOUSE" or "WAREHOUSE LOCATION" (Tr. 111-116; see CXs 1-48). "We don't call it a store, we call it a warehouse. That is what it is" (Tr. 111).

26. By and through the use of the words "WAREHOUSE SALE" separately and in conjunction with the word "LOW PRICES" and other words of similar import or meaning, the respondents have represented that said facility was used primarily for the storage of merchandise sold by respondents at retail and that the merchandise offered for sale or sold was available for sale or sold out of such facility at substantial savings to consumers from the prices charged for the same or similar merchandise by a substantial number of the principal outlets in respondents' trade area (Tr. 44-70, 301-302, 306, 340, 350; see CX 1-40; RPF 13).

27. The Beltsville facility is in fact a WAREHOUSE and respondents' representation that said facility was used primarily for the

storage of merchandise used by respondents' retail business was true (see findings 14, 25, *supra*). The additional fact that this facility was also a retail store or a "showroom and warehouse combined" and that the public had everyday access thereto does not, on this record, alter the fact that the facility was a "WAREHOUSE" (*ibid.*).

28. A "WAREHOUSE SALE" implies that a retailer, who has a warehouse used primarily for storage, is having a rare sale, one usually held to move merchandise quickly and in a short period of time said merchandise being that which it was not able to sell at retail during the regular course of its business. Such a sale implies substantial savings because it has been priced for quick sale and/or the goods have been stored at the facility without incurring the overhead costs of the traditional retail store (see Tr. 140, 163, 178, 182, 195-196).

Mrs. Verna Dickerson, a consumer witness and customer of Hollywood, testified that when she saw the term "WAREHOUSE SALE" she thought she would be getting a "saving at a warehouse price" (Tr. 140, see also Tr. 153). Mr. Howard Beard, also a consumer witness and customer of Hollywood, testified that when he saw a Hollywood "WAREHOUSE SALE" advertisement, he thought the sale would be "out of the ordinary" (Tr. 178). Significantly, neither Mrs. Dickerson nor Mr. Beard purchased carpeting at any particular price stated in the advertisements (see Tr. 153, 188-189). These witnesses were attracted to respondents' premises by the representation of the "WAREHOUSE SALE" (Tr. 161-162, 177, 193).

29. Actually, respondents conducted their retail business at the Beltsville warehouse and the "sales" they advertised as "Warehouse Sales" were not out of the ordinary, but were conducted almost on a weekly basis during the period November 1970 through December 1972. In addition, respondents' products were not priced to afford substantial savings over and above usual price reductions for its retail "sales." Respondents' use of the term "WAREHOUSE SALE" 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' products and services by reason of said erroneous and mistaken belief all to the prejudice and injury of the purchasing public and respondents' competitors.

30. The information to be contained in advertisements appearing in the classified section is usually supplied by telephone (Tr. 372, 373-375, 390). No practical opportunity exists for the advertiser (*e.g.* respondents) to actually proofread the copy before it is published and disseminated (see Tr. 396-398). The importance of the distinction

between the words "acrilan" and "acrylic" is generally misunderstood (Tr. 370, 375, 385, 387, 397-398). It is possible that the receiver of the information at the Washington Post mistakenly wrote the word "Acrilan" whereas respondents had specified "Acrylic" (see Tr. 371-375, 384-385, 389; see RX 43).

31. 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, floor coverings, and services of the same general kind and nature as those sold by respondents.

CONCLUSIONS OF LAW

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Hollywood, Charles Snyder, Florence Snyder and Dale Snyder.

Said respondents have at all times relevant hereto engaged in interstate commerce within the intent and meaning of Section 4 and 5 of the Federal Trade Commission Act. The Washington Post newspaper, in which most of their advertisements were placed, has interstate circulation. In addition, Hollywood has purchased carpeting from suppliers located outside the State of Maryland and has delivered carpeting to customers located in Virginia and/or the District of Columbia. The acts and practices which are challenged in this proceeding relate to respondents' interstate advertising and are "in commerce" within the coverage of the Federal Trade Commission Act. See *Guziak v. Federal Trade Commission*, 361 F.2d 700 (8th Cir. 1966); *Ford Motor Co. v. Federal Trade Commission*, 120 F.2d 175 (6th Cir. 1941); *United States v. South-Eastern Underwriters Ass'n.*, 322 U.S. 533 (1944); *Standard Oil Co. v. Federal Trade Commission*, 340 U.S. 231 (1951).

Respondents contend that the activities complained about were so small compared to its overall business and, at the time of the complaint and adjudicative hearing the investigation was so old, that the public interest would hardly be served by sustaining the complaint. I do not agree.

In its complaint the Commission made the determination that this proceeding is in the public interest. There is nothing in this record which demonstrates that that determination was in error. This proceeding is in the public interest insofar as that determination is essential to the Commission's assertion of jurisdiction. See *Koch v. Federal Trade Commission*, 206 F.2d 311, 319 (6th Cir. 1953);

American Airlines, Inc. v. North American Airlines, Inc. 351 U.S. 79, 83 (1956).

So-called "laches," viz., the failure to act expeditiously to enforce a claim or right, does not apply to proceedings brought in the public interest pursuant to Section 5 of the Federal Trade Commission Act, where deception of public is asserted. *Federal Trade Commission v. Algoma Lumber Co.*, 291 U.S. 67, 80 (1934). Moreover, the record shows that respondents' advertising contained the type of representations which were the subject of this proceeding at least until late in 1973 (see RX 41). This is not a situation for application of the *de minimis* rule.

2. Respondent Charles Snyder was president of Hollywood until 1971 and since then has been engaged as an advisor and consultant of Hollywood. He is the majority stockholder in the corporation. Florence Snyder has been president of Hollywood since 1971, and at all times during the corporation's existence has been actively engaged in its affairs. Dale Snyder is presently an officer and the operating manager of Hollywood. All of these individual respondents have cooperated and acted together in formulating, directing and controlling the acts and practices of the corporation, including the placing of the challenged advertising, and they are individually responsible for the content of said advertisement and the acts and practices of Hollywood. See *Federal Trade Commission v. Standard Education Society*, 302 U.S. 112, 120 (1937); *Sunshine Art Studios, Inc. v. Federal Trade Commission*, 481 F.2d 1171 (1st Cir. 1973).

3A. It was alleged in the complaint and respondents admitted in their answer that they represented in their advertisements by and through the use of the word "SALE" that carpeting and floor coverings may be purchased at special or reduced prices, and that purchasers are thereby afforded savings from respondents' regular prices.

It is the contention of complaint counsel that such a representation is not true, and accordingly false and misleading, because the advertised prices were not special or reduced prices from respondents' regular prices or, if certain items were reduced in price, such reductions were not significant reductions from respondents' regular prices. In support of their contention that respondents' use of the word "SALE" constitutes an unfair trade practice violative of Section 5 of the Federal Trade Commission Act, complaint counsel cite only the Commission's "Guides Against Deceptive Pricing," quoting a portion of Guide I(e) thereof. That section reads as follows:

If the former price is set forth in the advertisement, whether accompanied or not by descriptive terminology such as "Regularly," "Usually," "Formerly," etc., the advertiser should make certain that the former price is not a fictitious one. If the former price, or the amount or percentage of reduction, is not stated in the advertisement, as when the ad merely states, "SALE," the advertiser must take care that the amount of reduction is not

so insignificant as to be meaningless. It should be sufficiently large that the consumer, if he knew what it was, would believe that a genuine bargain or saving was being offered. An advertiser who claims that an item has been "Reduced to \$9.99," when the former price was \$10, is misleading the consumer, who will understand the claim to mean that a much greater, and not merely nominal, reduction was being offered. [16 C.F.R. §233.1(e) (1974).]

Almost all of respondents' advertisements of record in this proceeding use the word "SALE" and contain price quotations without reference to a former price or the amount or percentage of reduction involved (see CXs 1-15, 17, 19, 21-28, 42-44, 46, 47).⁶

The record shows that although respondents did reduce certain items for its various "SALES", in most instances they were relying generally on the fact that carpeting that was sold off rolls that they had in stock were offered at a significantly lower price than the same grade and quality carpeting that they offered for sale in the regular course of business at the "cut order" price, *i.e.*, the price at which a purchaser would pay if said carpeting was purchased directly from the manufacturer.

For example, respondents' regular price in its retail stores (other than the Warehouse location) for Philadelphia Carpets' Casa Real was \$4.99 per square yard (Tr. 429-430; RXs 53-55). It was usually sold at the warehouse location for \$4.88 per square yard (this 11% reduction reflecting a saving to respondents in delivery charges). The same carpeting if ordered on a "cut order" basis would retail at \$5.99 per square yard (Tr. 429-442). This carpeting was advertised as a "SALE" item at \$4.88 a square yard in CXs 1, 5, 7, 9, 13, 15, 21, 25, 27, 28 and 35, and probably was the carpeting referred to in CXs 10, 11, 12 and 14 (Tr. 212-214). During the relevant period Casa Real was advertised at prices other than \$4.88 in only four advertisements: CX 14 and CX 23 - \$4.99; CX 22 and CX 32 - \$4.44.

The question presented is whether the \$4.99 or \$4.88 price is in fact a "SALE" price, *i.e.*, does it represent a significant reduction from respondents' regular price. The only authoritative help that I can find appears also in the Commission's "Guides Against Deceptive Pricing" where at Guide I(b), it states:

A former price is not necessarily fictitious merely because no sales at the advertised price were made. The advertiser should be especially careful, however, in such a case, *that the price is one at which the product was openly and actively offered for sale*, for a reasonably substantial period of time, in the recent, regular course of his business, honestly and in good faith — and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based. * * * [16 C.F.R. 233.1(b)(1974); Emphasis added.]

Although this section is speaking to the situation where the higher price is stated in the advertisements, but no sales were actually made

⁶ See also undated advertisements: CXs 29, 31-36, 39, 40.

at the higher price, it would appear only reasonable that the same principles would apply in establishing the regular price where it is not set forth in the advertisement of the "SALE" but where actual sales are made at the higher price, i.e., the higher price "is one at which the product was openly and actively offered for sale." Because of the methods in which carpeting is retailed (purchases on "cut order," rolls and remnants), it is my opinion that the \$5.99 "cut order" price is a legitimate regular price and that offering it for "SALE" at \$4.99, \$4.88 or \$4.44 accords with the permissible guidelines promulgated by the Commission.

The same rationale that was applied to the "SALE" of Casa Real applies to all other advertised prices relating to carpeting sold per square yard. Although the specific details as to the particular regular prices have not been developed on this record as to other carpeting the general approach taken by respondents appears to have been applied to all such representations.

The present guides, promulgated in 1964, superseded the 1958 guides which had clearly and specifically spelled out conduct which was deemed to be violative of the Federal Trade Commission Act. In comparison the 1964 guides appear to be general statements of policy and a foundation for developing on a case-by-case basis the do's and don't's of pricing (see Kintner: A Primer on the Law of Deceptive Practices, pp. 155-57 (Macmillan 1971)): Accordingly, the result reached here is based on the record in this case (1970-1972 advertising), and might not necessarily control a similar issue directed to the advertising by any other retailer or even to Hollywood today. Significantly during the 1970-1972 period Hollywood had retail stores as well as the warehouse location and had not an insubstantial amount of "cut order" business. There was testimony to the effect that the carpet retailing business was fast changing over to the "warehouse" type of operation with retailers concentrating on sales of carpeting cut from "rolls" in stock and in remnants. Dale Snyder testified that Hollywood's records showed the following change in its "cut order" business from 1968 to 1974 (RX 73(b)).

1968	553	
1969	444	
1970	237	
1971	134	
1972	128	
1973	63	
1974	78	(through Nov. 22, 1974)

The ultimate question, however, is whether the consumer would in fact realize a saving as represented in the advertisement as to the products mentioned in the "SALE." I find that the purchaser would in

fact realize a saving by purchasing the "SALE" items and that the representation attributed to respondents' use of the word "SALE" as set forth in the complaint was not false or misleading.

B. It was alleged in the complaint and respondents admitted in their answer that they represented in their advertisements that purchasers of their carpet remnants are afforded savings of 50 to 75 percent off the prices at which such carpet remnants are usually and customarily sold at retail.

This meaning is found in several of respondents' advertisements as contained in the record. CX 6 states in part: "More than 800 Nylon, Wool, Acrilan, all brand name beautiful quality remnants. From hall sizes to big room wall-to-wall sizes. And if we don't have your size, we'll cut it. YOU SAVE 50 to 70%."

CX 34 states in pertinent part: "Save 50 to 75% * * * 1000 Broadloom Remnants \$9.99 to 99.99, each Room Sizes Included."

CX 33 states in pertinent part: "Greatest name brand carpeting. First Quality Remnants * * * Save 40 to 70% * * *."

The record shows that respondents' basis for their representations on "percent-off" relating to remnants was the price at which that particular carpeting would retail for at the "roll" or "cut order" price. It is not disputed that remnants purchased as such from manufacturers cost respondents 50 to 70 percent less than the same carpeting would cost on a "cut order." Respondents, operating on a constant markup, would pass the same difference on to the purchaser at retail. The record is clear that respondents did not actually reduce their retail price of any particular remnant by 50 to 70 percent, although the retail price of remnants created by their own sales from "rolls" would generally be 50 percent less than the so-called roll price.

There is no doubt on this record that if a purchaser can find a remnant that suits her carpet needs including adequate size, color and quality that she would probably save 50 percent or more off the retail price for the same grade and quality of carpeting that she would pay if she had to order from a "roll" in stock or on a "cut order" basis.

However, it appears that the unsophisticated prospective purchasers of carpet do not know the manner in which carpeting is retailed and that the bare "50-70% off" representation might have the tendency and capacity to mislead the consuming public as to the nature of the savings represented. Accordingly, respondents should have specified exactly what higher price base they are using, *e.g.* 50-70 percent off "roll" or "cut order" price.

It is concluded that failure to state the higher price base, was a failure to state a material fact constituting a violation of the Federal Trade Commission Act. See *J.B. Williams Co. v. Federal Trade*

Commission, 381 F.2d 884 (6th Cir. 1967); *Haskelite Mfg. Corp. v. Federal Trade Commission*, 127 F.2d 765 (7th Cir. 1942).

C. It was also alleged in the complaint and respondents admitted that by and through the use of such words as "Compare \$238 to \$264 Value" they represented that said comparative value was the price at which the same carpet remnants are being offered for sale by a substantial number of the principal outlets in respondents' trade area.

As with respect to the "percentage off" representations, respondents' basis for the higher price on the advertised remnants, and accordingly the savings to be afforded the purchaser thereof, was the "cut order" price for the identical carpeting. Such comparison representations relating to remnants were contained in only a few of the respondents' advertisements contained in the record of this proceeding (CXs 15, 16, 18, 19, 20).

The only evidence concerning the actual prices relating to these comparison representations were for the six items listed on CX 15. Charles Snyder testified and it was stipulated that the carpeting referred to in the last five items was Westernaire by Mohawk or Barwick Mills and that he had derived the higher price from Diener's price for the same carpeting (Tr. 68-74). Harold Resnick, executive vice president and general manager of Diener's testified that Diener's "regular price" for carpeting in the Westernaire line was \$5.95 per square yard (Tr. 164-165). Respondents' point out, and correctly so, that Mr. Resnick did not specify whether the \$5.95 price was Diener's roll price or the "cut order" price, and that Mr. Snyder used the "cut order" price for his comparison. Using the sizes and prices given and considering that the "cut order" price would be 20 percent higher than the \$5.95 price the following mathematical comparisons are possible:

Item ¹	Size	Sq. Yards	Diener's Reg. Price	Plus 20 %	Hollywood's Compare..Value
2.	12X18'	24	\$142.80	\$171.36	\$184 to \$235
3.	12X15'	20	119.00	142.80	138 to 192
4.	12X12'	16	95.20	114.24	104 to 156
5.	9X15'	15	89.25	107.10	97 to 138
6.	9X12'	12	71.40	71.40	69 to 124

On the basis of the record and the resulting computations it appears that respondents' comparisons are in the ball park, and that respondents' advertised higher prices were not fictitious or misleading.

It is not disputed however, that the same grade and quality of carpeting if sold by Diener's as remnants would be 40 to 50 percent lower than their regular price for the same carpeting. Respondents

¹ Charles Snyder testified that the first item on CX 15 was a Philadelphia Carpet wool carpet that retailed for \$10.95 per square yard on a "cut order" (Tr. 72). The computed price for 15 square yards would be \$273.75. Hollywood's representation was "Compare \$238 to \$264." (CX 15)

have admitted that their remnant advertising represented a comparison with their competitor's remnant price. In view of the testimony, respondents' admission as to the meaning attributable to their advertising must be disregarded, in that such meaning is too limiting and it would be a gross miscarriage of justice to lock respondents to this admission. It is concluded that respondents' representation as to the comparative values related to the "cut order" price and that such representations were not false or misleading.

D. It was alleged in the complaint that by and through the use of the words "WAREHOUSE SALE" as set forth in their advertisements, respondents represented (1) that the facility at which their merchandise is being offered for sale is used primarily for the storage of merchandise used by their retail business, and (2) that respondents' merchandise is being offered for sale or sold out of such facility at prices substantially below those charged for the same or similar merchandise by a substantial number of the principal outlets in respondents' trade area. Although respondents denied in their answer that they have "advertised WAREHOUSE SALE in the manner complained of at any time material here," or that the meaning of said advertisements was as alleged (see Ans. Par. 4, 5(4)), they made the following counter-proposed finding of fact:

13. By and through the use of the words "WAREHOUSE SALE" separately and in conjunction with the words "Low Prices" and other words of similar import or meaning, the respondents did in fact convey that the merchandise offered for sale or sold was available for sale or sold out of such facility at a substantial savings to consumers from the prices charged for the same or similar merchandise by a substantial number of the principal outlets in respondents' trade area. (Tr. 44-70, 301-302, 306, 340, 350) [RPF #13.]

It is concluded that respondents did make the representations charged in the complaint. Although respondents' Beltsville facility has been found to be a "WAREHOUSE" in the general meaning of that term, and that respondents did in fact afford certain savings from the "cut order" price or "roll" price generally prevailing in the trade area to justify its using the term "SALE," it is the further conclusion of the administrative law judge that on the basis of the testimony and the exhibits of record that in most instances respondents did not afford substantial savings to consumers from the prices charged for the same or similar merchandise by its competitors.

The term "WAREHOUSE SALE" has a distinct meaning. It relates to a special or unusual event at which time the advertiser has generally reduced all or most of its merchandise in its storage facility for fast sale. In fact most of the time pertinent to these proceedings

respondents were not conducting such a "warehouse sale" and the representations that they were had the tendency and capacity to mislead members of the purchasing public.

It is well established that it is an unfair trade practice to make statements in advertising which have the tendency and capacity to deceive the prospective customer. *Carter Products, Inc. v. Federal Trade Commission*, 323 F.2d 523 (5th Cir. 1963). Where the advertisements themselves sufficiently demonstrate their capacity to deceive, the Commission can find the requisite deception or capacity to deceive on a visual examination of the exhibits without evidence the public was actually deceived. *Double Eagle Lubricants, Inc. v. Federal Trade Commission*, 360 F.2d 268, 270 (10th Cir. 1965). Moreover, the initial contact, if deceptive, may be prohibited under the Federal Trade Commission Act. *Exposition Press, Inc. v. Federal Trade Commission*, 295 F.2d 869, 873 (2d Cir. 1961) *cert. denied*, 370 U.S. 917 (1962); *Carter Products, Inc. v. Federal Trade Commission*, 186 F.2d 821, 824 (7th Cir. 1951).

In determining the impression created by an advertisement, the Commission need not look to the technical interpretation of each phrase but must look to the overall impression likely to be made on the consuming public. *Murray Space Shoe Corp. v. Federal Trade Commission*, 304 F.2d 270 (2d Cir. 1962); *National Bakers Services, Inc. v. Federal Trade Commission*, 329 F.2d 365 (7th Cir. 1964).

4. The Commission's charge that respondents have violated the Textile Fiber Product Identification Act is based in part on the fact that the trade name "Acrilan" appeared in certain of respondents' advertisements. The proper generic name for this man made fiber is "Acrylic" and it is required that this name be used in such advertising.

Respondents contend that the use of the term "Acrilan" was due to a misunderstanding or miscommunication in setting up the advertisements with the classified advertising section of the Washington Post. The record shows that this type of classified advertising is usually telephoned to the newspaper early in the week and that no opportunity exists for a review of the advertisement before publication. Respondents testified that they have complained from time to time about such errors and the record shows that in 1973 the Washington Post admitted that the use of the term "Acrilan" was probably the paper's mistake.

It is significant that in a large number of respondents' advertisements spanning the time period relevant here the proper term "Acrylic" was used. It appears that the use of "Acrilan" was completely inadvertent and not intentional. Under the circumstances responsibility for the violations of the requirements of the Act may not have been respondents.

Finally, the Commission has also alleged that respondents have not made proper disclosures relating to the exempted backings, filling or paddings as required by rule 11 of the rules and regulations (16 C.F.R. §303.11). Commission counsel have merely referred to certain exhibits of record as supporting their claim without further discussion or explanation. No further evidence or testimony of record relates to this alleged violation. Upon reading rule 11 and the cited advertisements I can not determine what information required by rule 11 was not included. In this respect I can discern no difference between the advertisements cited and those which were not cited. Compare CX 7 with CX 8.

Accordingly, not being able to describe the violation alleged I can make no finding that it in fact occurred (see Tr. 272).

THE REMEDY

The two violations of the Federal Trade Commission Act found in this proceeding were respondents' use in their advertising of the term "WAREHOUSE SALE"⁸ and their failure to state the nature of the higher price on which their "percentage-off" claims were based. Significantly, the initial contact a prospective purchaser might have with respondents is at the point of reading such advertising. Although the true nature of respondents' promotion, including the fact that respondents might offer the best bargains in town, would appear obvious to any customer upon inspection of respondents' retail premises, the initial contact, if possessing the requisite tendency and capacity to deceive, may be prohibited outright.

Accordingly, in my opinion, requiring respondents to cease and desist from using the words "Warehouse Sale" or any combination of those words or other words that state or imply that respondents are conducting business anywhere else than at their retail establishment is appropriate under the circumstances and is reasonably related to the violation of law found.

Such a prohibition is clearly within the Commission's power, for it is vested with broad discretion in determining the type of order necessary to ensure discontinuance of the unlawful practices found. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613

⁸ It should be noted that the record shows that respondents did use a large sign mounted on top of a station wagon or truck that read "WAREHOUSE SALE TODAY." This sign was displayed at the side of the road in front of respondents' Beltsville facility. Although this would constitute an unfair trade practice, that act and practice is not "in commerce" and is not within the coverage of the Federal Trade Commission Act (see RX 1, frames 34A-36; Tr. 140).

(1946); *Niresk Industries, Inc. v. Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883. The Commission is not limited to prohibiting the illegal practices in the exact form in which they were found to have been employed in the past. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952).

Respondents should be required, when they use "percentage off" claims, to state the nature of the higher price upon which the claim is based. The Commission's power to require affirmative disclosure is well established. See *Federal Trade Commission v. Colgate-Palmolive Co.*, *supra*.

ORDER

It is ordered, That respondents Hollywood Carpets, Inc., a corporation, its successors and assigns, and its officers, and Charles Snyder, Florence H. Snyder and Dale E. Snyder, individually, and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of carpeting and floor coverings, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using the words "WAREHOUSE SALE" or any combination of those words or other words of similar import and meaning that represent that respondents are conducting any business other than their regular retail business.

2. Representing that a sale price is a "percentage off" without disclosing in a clear and conspicuous manner the nature of the higher price upon which the claim is made.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor coverings and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of carpeting or floor coverings and other merchandise, 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 the 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 respondents deliver a copy of this order to all present and future personnel of respondents engaged in the sale, or the offering for sale, of any product, or in any aspect of preparation, creation, or placing of advertising, and secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That each of the individual respondents named herein promptly notify the Commission of the discontinuance of his or her present business or employment and of his or her affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which he or she is engaged as well as a description of his or her duties and responsibilities.

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

The complaint in this matter was issued on July 8, 1974, charging respondents with a variety of unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) as well as with violation of the Textile Fiber Products Identification Act (15 U.S.C. 70) and rules and regulations thereof, all in connection with the retail sale of carpeting. Hearings were held before Administrative Law Judge Miles J. Brown, who rendered his initial decision on Mar. 18, 1975. The administrative law judge found that respondents, a carpet retailer and its controlling officers, had made misleading use of the term "Warehouse Sale," and had falsely advertised large percentage reductions on their merchandise (I.D. pp. 23, 26 [pp. 808, 810-811 herein]).¹ In all other respects the judge rejected the allegations of the complaint, and provisions of the notice order. Complaint counsel have appealed from the initial decision, urging that the provisions of the notice order be adopted in their entirety.

¹ The following abbreviations are used herein:

I.D. p. - Initial Decision (Page No.)

I.D. - Initial Decision (Finding No.)

Tr. - Transcript of testimony (Page No.)

CX - Complaint Counsel's Exhibit

RX - Respondents' Exhibit

In reviewing the record of this case, the administrative law judge was no doubt impressed, as are we, that the named parties here are not among the more heinous male-factors to be haled before this tribunal. In a Rogues' Gallery of Commission Respondents they would find their place beneath the cobwebs of a back room. Nonetheless, proof of evil intent is not necessary in a Section 5 case, and good character does not excuse false advertising, nor lessen its capacity to harm consumers. For whatever reason, we believe that the administrative law judge dealt too gently with the practices set before him, finding truth where deception lay. Our job being not to punish, but only to prevent the recurrence of past violations, we believe that modification of the law judge's conclusions, and expansion of his order is necessary in several respects, all as set forth below:

I. FICTITIOUS "SALE" ADVERTISEMENTS

The initial controversy involves respondents' use of the word "sale" to characterize their offering of the same carpeting over a one-year period, November 1970 to November 1971. The administrative law judge found that there are three basic prices at which carpets and floor coverings are sold: (1) The retailer may purchase a full roll of carpeting from the manufacturer and sell various lengths from the roll. The price charged under this method is the "full roll" price (I.D. 9). (2) If the retailer cannot satisfy demand from stock he or she may place a special order with the manufacturer, which cuts off the required amount from its roll and ships it. As might be expected, a higher price is charged in such circumstances, referred to as the "cut order" price (I.D. 10). (3) A "remnant" is the portion at the end of a roll which is too small for general use in filling wall-to-wall orders. Remnants are sold by the manufacturer at 40-50 percent or more below roll price to the retailer and generally resold by retailers at similarly hefty discounts from full roll and cut order prices (I.D. 11).

The record indicates that during a year-long period under investigation respondents advertised as being on "sale" a brand of carpeting called "Casa Real" by Philadelphia Carpets at a price of \$4.99 (or \$4.88)² per square yard. Under questioning, respondent Dale Snyder conceded that \$4.99 (or \$4.88) was the "regular store price" established for Casa Real (Tr. 429-30). The administrative law judge concluded that respondents had not misused the term "sale" because during the period in question respondents did make some sales of Casa Real at \$5.99, the cut order price. These, however, were instances in which respondents did not have in stock the particular color or pattern of Casa Real

² The lower price was apparently charged at respondents' large Beltsville facility, the higher price at its smaller retail showrooms, the difference in price reflecting the cost of shipping from Beltsville.

desired by the consumer (Tr. 430). The record indicates, moreover, that cut order sales of Casa Real at a price higher than \$4.99 constituted only a tiny and declining fraction of all sales of the product (RX 73b; Tr. 496).

Under these circumstances we believe that the continuous representation by respondents that \$4.99 (or \$4.88) was a "sale price" for Casa Real was deceptive. Conceivably respondents intended by their advertising to reflect the fact that at the time the "sale" began they had begun to stock Casa Real in large quantities, thereby enabling them to provide roll prices for most colors and patterns, as opposed to the higher cut prices previously in force. If so, it was incumbent upon them to make this clear, as, for example, by announcing that they had changed their regular method of operation and could now offer lower prices on a wider range of merchandise. Unqualified, the term "sale," combined with citation of particular prices, clearly implies that a merchant has departed in significant measure from pricing patterns previously observed (and likely to be observed in the future) in the regular course of the merchant's business. It suggests to the consumer the advisability of taking *immediate* advantage of the unusual prices being offered, and, to the extent that the claim is believed, it may significantly influence buying behavior.³ It is clearly an abuse of "sale" to apply it over a prolonged period of time to characterize what have become the everyday prices at which a merchant sells.

We will enter order language prohibiting deceptive use of the term "sale" (order Par. I(1)), and prohibiting representations of savings based on use of a fictitious regular price (Par. I(2)).

II. MISLEADING COMPARISON PRICES

The second assignment of error relates to the law judge's finding that respondents had not advertised falsely by using the cut order price of carpeting as a comparison price in the advertising of remnants, to wit:

15x15', SALE \$98
Compare \$238 to \$264 Value

12x18', SALE \$96
Compare \$184 to \$235 Value (CX 15)

The carpets described were remnants, and the prices at which they

³ If consumers possessed perfect knowledge of all competitive alternatives no harm might flow from misrepresentations of the sort involved here. A consumer could readily determine how the advertised price compared to market alternatives (taking into account quality and service as well) and would simply ignore the merchant's own characterization of his price. Lacking such perfect knowledge, however, a consumer is likely to infer that if a merchant has succeeded in selling a substantial quantity of product at some "regular" price, that price must be a competitively viable charge. When the vendor offers a "sale," therefore, the consumer will infer that the new price is, in fact, cheap relative to competitive alternatives, which will, of course, be false if the "sale" includes only regular-priced items.

were offered were respondents' regular per-unit prices for *remnants*. The comparison prices were those at which the same size carpeting might be sold had it been cut ordered from the manufacturer. Respondents themselves conceded in their answer that advertising such as the above would be construed as a comparison of their remnant prices with their competitors' *remnant* prices.⁴ Despite respondents' admission, the administrative law judge concluded that it would be "a gross miscarriage of justice to lock respondents to this admission." (I.D., p. 25 [p. 809, herein]). To the contrary, we believe the admission mirrored the truth. A consumer not familiar with the carpeting industry might well assume that the comparison prices did indeed represent those at which others would sell identical merchandise, *i.e.*, *remnants*. In fact, it appears that the prices respondents advertised were not only those at which they regularly sold remnants, but in the same general range as prices at which competitors sold remnants. The use of comparison prices 100-150 percent higher with no indication that such comparison prices were based on the prices of cut order merchandise could only deceive and mislead.

The administrative law judge himself recognized that respondents were remiss in failing to qualify representations that remnants were being sold at savings of "50-70%." He concluded that absent qualification consumers would be likely to assume that they would realize savings of 50-70 percent from what they would pay for comparable *remnants* elsewhere (I.D. p. 23 [p. 808, herein]). The same reasoning is equally applicable to respondents' use of unqualified comparison prices. The potential injury resulting from such misrepresentations is obvious. Respondents' unqualified comparison clearly suggests that the advertiser is providing a product at only a fraction of what the same product would cost elsewhere. The consumer who relies on the representation may, therefore, be induced to purchase the advertised product, assuming the quoted per-unit price cannot be matched, when in fact a more desirable remnant might be obtainable from a competitor at a comparable per-unit price.

There is, of course, nothing wrong (and much right) in pointing out to consumers that by purchasing remnants they can realize huge savings over costs incurred by buying the identical product cut from a roll. The additional order provision we shall enter respecting this violation will require simply that the nature of comparison prices be made clear in respondents' advertising (Par. I(3)).

⁴ Use of the word "Sale" might also tend to suggest that the advertised prices were below per-unit remnant prices charged by respondents themselves, and, therefore, that the "compare" prices were respondents' own former prices.

III. BAN ON UNQUALIFIED REPRESENTATION OF DOLLAR AMOUNT SAVINGS

Complaint counsel contend thirdly that the administrative law judge erred in modifying section I, paragraph 4 of the notice order to forbid only unqualified representations of percentage savings and not unqualified representations of dollar amount savings. While the complaint alleged, and the administrative law judge found that respondents had made only deceptively unqualified representations of percentage savings, we believe that the order in this matter should forbid unqualified representations of dollar amount savings in order to prevent respondents from repeating in a different guise the same violations which gave rise to the order. It would be absurd, if, being estopped from claiming without qualification "Save 50-75%," respondents were able to say, no less deceptively, "Save \$70-\$100." It is well established that the Commission in fashioning an order need not limit it to the most narrow formulation of the violation found. *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 473 (1952). The prohibition on unqualified dollar savings claims is clearly related reasonably to the unlawful practices found, which were in essence misrepresentations of available *savings*.

IV. USE OF "WAREHOUSE"

Complaint counsel further contest the administrative law judge's limitation of the language of Section I, paragraph 6 of the Notice Order to forbid only use of the words "Warehouse Sale" or any combination of other words of similar meaning. Complaint counsel urge a prohibition on any use of the word "warehouse."

The administrative law judge found that respondents' Beltsville facility could indeed be termed a "warehouse." As he concluded (citations omitted):

It is a portion of a larger building with three roll-type-overhead-door entrances at the front, which could be described generally as a loading bay * * *. A walk-in door entrance is located to the left of the overhead door entrances * * *.

This walk-in door leads into a small enclosed area described as a "sample show room perhaps 12 by 36 feet" * * *. In this area respondents display samples used in its "cut order" business * * *. The remaining portion of this facility, consisting of a floor area of approximately 11,000 square feet, contains the rolls of carpeting and remnants and other merchandise which Hollywood maintains as stock * * *. The remnants (rolled up) are usually stacked standing up along the right and left walls of this large room * * *, whereas the rolls of carpeting are placed horizontally in pyramid fashion on the floor in piles with walk space between the remnant display and roll display * * *. The middle of the floor area in the large room is used as a cutting area * * *. A three ton fork-lift truck * * * is used to move the rolls from the various piles to the cutting area * * *. Certain office space is located over the sample room with access by stairs from the large storage-work area * * *. (I.D. 24.)

The administrative law judge, finding that a warehouse sale "relates to a special or unusual event at which time the advertiser has generally reduced all or most of its merchandise in its storage facility for fast sale" concluded that respondents had used the term deceptively (I.D. p. 26 [p. 810, herein].) We have no quarrel with this finding (nor do respondents, who did not appeal) since it appears that respondents employed the term on a regular basis to characterize their normal course of business. Indeed, given that respondents now operate from only one location, it is doubtful that they could under any circumstances conduct what consumers would generally construe to be a "warehouse sale." Therefore, a prohibition on any use of that term (and functional equivalents) seems clearly warranted.

Complaint counsel raise the further question of whether the order should forbid any use of the term "warehouse," as for example, "visit our warehouse location," another common advertising theme of respondents. The underlying question we believe is whether use of the term "warehouse" in an advertisement is likely to convey a misleading impression to consumers regarding the available range of products and prices they will encounter if they patronize the facility. While the physical attributes of a building might satisfy Noah Webster that it is a warehouse, the issue for Section 5 purposes is whether the building functions in the commercial setting in the way consumers will be led to expect by virtue of reference to it in an advertisement designed to sell carpeting. This is no more than a restatement of the well established proposition that the literal truth employed in a particular context may be used to deceive *Bockenstette v. F.T.C.*, 134 F. 2d 369 (10th Cir. 1943). On that point the evidence in the record is inconclusive. While it does not appear that respondents ever provided the significant savings generally associated with a legitimate warehouse sale, it does appear that by virtue of doing business from a large storage facility they were able to stock a wide range of carpeting at prices that at least sometimes compared favorably with those of competitors. Thus we conclude that complaint counsel have not sustained the burden of proof necessary to warrant an absolute prohibition on respondents' use of the term "warehouse" to characterize a part of their sales facility.

By the same token, respondents must not be allowed to misrepresent the situation. A statement such as "Visit our Warehouse Location" is likely to convey a misleading impression when in fact respondents have only one location consisting of a warehouse attached to a showroom. We think that on balance respondents should be permitted to employ the term "warehouse" provided that they make clear that it refers to a location at which they conduct their retail business in its regular course. We have fashioned an appropriate order. Paragraph I(6) is the

administrative law judge's prohibition on use of "Warehouse Sale." Paragraph I(7) forbids the use of warehouse unless it is disclosed that the term refers to a facility at which retail selling is regularly conducted, *e.g.*, "Visit our warehouse-showroom." Paragraph I(8) prohibits other misrepresentations of the nature of respondents' physical facilities, a provision contained in Paragraph I(6) of the notice order and warranted as a reasonably related generic description of the violation occurring here.

V. TEXTILE FIBER PRODUCTS IDENTIFICATION ACT VIOLATIONS

Exhibits introduced by complaint counsel indicated that advertisements for respondents' products run in the Washington Post employed the term "Acrilan" when in fact the proper generic term for the fiber in question is "acrylic" and use of that term is required by the Textile Fiber Products Identification Act, 15 U.S.C. §§70, 70b. The exhibits upon which complaint counsel rely consist of advertising from 1971 (CX 1, 6, 21, 23, 33). Respondents introduced evidence to suggest that a single false advertisement which occurred in 1973, after the Commission's investigation, may have been the fault of an employee of the Washington Post who accepted instructions for the advertisement over the telephone (RX 41, 42, 45). No similar testimony was adduced for the 1971 advertisements, but the administrative law judge apparently reasoned, though he did not explicitly so find, that inasmuch as some advertisements during the 1971 period did employ the term "acrylic," the uses of "acrilan" may similarly have been due to repeated errors in transcription by Post employees. The administrative law judge thus omitted an order, finding that responsibility for the improper advertisements "may not have been respondents." (I.D. p. 27 [p. 811 herein].)

We would certainly agree that where, through no fault of an advertiser, a newspaper makes an error which results in deception, the advertiser is not liable, provided he or she takes prompt action to rectify the mistake which has occurred, and does not acquiesce in it or permit it to continue. In the instant case it appears that during the initial 1971 period respondents took no action to remedy repeated misuses of the term "acrilan." Thus, assuming, *arguendo*, that the improper advertisements were in fact due to errors in transcription by the Washington Post⁵, it was nevertheless incumbent upon respondents, after the initial mistake had occurred, to take action to prevent its recurrence, which they did not do. The Commission is obliged to prevent negligent violations of the law as well as those that flow from

⁵ The presumption, of course, should be to the contrary. Whether it was adequately rebutted here is a matter we need not consider.

more blameworthy motives, for in either case the result is the same. We, therefore, conclude that the administrative law judge erred in omitting an order provision with respect to the Textile Fiber Products Identification Act.⁶

Similarly, we believe complaint counsel are correct in pointing out that respondents ran afoul of the Act by characterizing carpets for sale as being composed of various fibers (wool, nylon, polyester) without disclosing that the fiber descriptions referred only to the face or pile of the carpet and not to other portions, as required by rule 11, 16 C.F.R. §303.11, promulgated by the Commission pursuant to the Textile Fiber Products Identification Act. (CX 1, 6, 7, 24, 30, 42, 46, 47) For the foregoing reasons we shall enter the notice order language requiring compliance with the provisions violated.

An appropriate order is appended.

FINAL ORDER

This matter having been considered by the Commission upon the appeal of complaint counsel from the initial decision, and the Commission for the reasons stated in the accompanying opinion, having granted the appeal in part:

It is ordered, That the following portions of the initial decision of the administrative law judge be, and they hereby are, adopted as the findings of fact and conclusions of law of the Commission: Pages 1-13 [pp. 790-800, herein] (except for finding 15, sentence 1, page 13 [p. 800, herein]); page 14 [p. 800-801 herein] (except for findings 18 and 20); page 15 [p. 801-802, herein] (except for findings 22-23); pages 16-18 [p. 802-804, herein] (except for finding 27, page 16 [p. 802, herein]); pages 19-20 [p. 805-806, herein]; page 21 [p. 806, herein], first sentence; [beginning with "The question presented * * *"]; page 22 [p. 807, herein], Sec. "B"; pages 23-24 (except for last textual sentence, p. 24) [pp. 808-809 herein, and textual sentence beginning "On the basis of the record * * *"]; page 25, first two sentences, [p. 809 herein, beginning with "It is not disputed however, * * *], and Sec. "D" [p. 810, herein]; page 26 (except for last two sentences) [pp. 810-811 herein, sentences beginning with "4". The Commission's charge that respondents have violated * * *]; page 28, second full paragraph [p. 812 herein, beginning with "Such a prohibition is clearly within * * *].

Other findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

⁶ Use of the fiber trademark "acrilan" without use of the generic term acrylic is also contrary to the requirements of rules 41(a) and 41(c) [16 C.F.R. §303.41(a), (c)] of the TFP1A.

Final Order

86 F.T.C.

ORDER

I

It is ordered, That respondents Hollywood Carpets, Inc., a corporation, its successors and assigns, and its officers and Charles Snyder, Florence H. Snyder and Dale E. Snyder, individually, and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporate subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of carpeting and floor coverings, or any other article of merchandise, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

2. Representing, directly or indirectly, orally or in writing, that by purchasing any of said merchandise or services, customers are afforded savings amounting to the difference between respondents' stated price and respondents' former price unless such merchandise or services have 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.

3. Advertising or otherwise representing a compared value price for carpet remnants or rugs (a) unless the carpet remnants or rugs being advertised are of the same grade and quality as the carpets with which such advertised prices are compared; and (b) without disclosing in immediate conjunction therewith that the carpet remnants or rugs are usually sold for less than wall-to-wall prices, and that the compared value is based on the wall-to-wall price of carpeting of the same grade and quality (unless the compared value is in fact based on the price of remnants of the same grade and quality).

4. Representing, directly or by implication, orally or in writing, that purchasers of respondents' merchandise will save any stated dollar or percentage amount without fully and conspicuously disclosing, in immediate conjunction therewith, the basis for such savings representations.

5. Failing to maintain and produce for inspection or copying for a period of three (3) years, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar represen-

tations as set forth in Paragraphs One, Two, and Four of this order are based, and (b) from which the validity of any savings claims, sale claims and similar representations can be determined.

6. Using the words "Warehouse Sale" or any combination of those words or other words of similar import and meaning that represent that respondents are conducting any business other than their regular retail business.

7. Using the word "warehouse" or any other word or words of similar import to describe respondents' physical facilities, without also disclosing clearly and conspicuously that the word "warehouse" or other word or words of similar import describe a facility at which respondents regularly engage in the retail sale of carpeting, *e.g.*, "Visit our warehouse-showroom facility."

8. Misrepresenting in any manner the size, description or classification of any of respondents' physical facilities.

II

It is further ordered, That respondents Hollywood Carpets, Inc., a corporation, its successors and assigns, and its officers, and Charles Snyder, Florence H. Snyder and Dale E. Snyder, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

1. Misbranding textile fiber products by falsely or deceptively stamping, tagging, labeling, invoicing, advertising or otherwise identifying such products as to the name or amount of the constituent fibers contained therein.

2. Falsely and deceptively advertising textile fiber products by:

(a) Making any representations by disclosure or by implication, as to fiber content of any textile fiber product in any written advertisement which is used to aid, promote or assist, directly or indirectly, in the sale, or offering for sale, of such textile fiber product unless the same

information required to be shown on the stamp, tag, label or other means of identification under Section 4(b)(1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

(b) Failing to set forth in advertising the fiber content of floor covering containing exempted backings, fillings or paddings, that such disclosure relates only to the face, pile or outer surface of such textile fiber products and not to the exempted backings, fillings or paddings.

(c) Using a fiber trademark in advertising textile fiber products without a full disclosure of the required fiber content information in at least one instance in said advertisement.

(d) Using a fiber trademark in advertising textile fiber products containing only one fiber without such fiber trademark appearing at least once in the advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type.

It is further ordered, That respondents shall maintain for at least a one (1) year period, following the effective date of this order, copies of all advertisements, including newspaper, radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor coverings and other merchandise.

It is further ordered, That respondents, for a period of one (1) year from the effective date of this order, shall provide each advertising agency utilized by respondents and each newspaper publishing company, television or radio station or other advertising media which is utilized by the respondents to obtain leads for the sale of carpeting or floor coverings and other merchandise, with a copy 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 the 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 respondents deliver a copy of this order to all present and future personnel of respondents engaged in the sale, or the offering for sale, of any product, in the consummation of any extension of consumer credit or in any aspect of preparation, creation,

or placing of advertising, and secure a signed statement acknowledging receipt of said order from each such person.

It is further ordered, That each of the individual respondents named herein promptly notify the Commission of the discontinuance of his or her present business or employment and of his or her 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 or she is engaged as well as a description of his or her duties and responsibilities.

It is further ordered, That respondents shall, within sixty (60) days after the effective date of the order served upon it, file with the Commission a report, in writing, signed by respondents, setting forth in detail the manner and form of their compliance with the order to cease and desist.
