

counsel's Opposition to Motion for Leave to Lodge be, and it hereby is, granted.

It is further ordered, That the motion of respondent The Great Atlantic & Pacific Tea Company, Inc., for leave to lodge certain documents into the record of this case be, and it hereby is, granted.

IN THE MATTER OF
PEACOCK BUICK, INC., ET AL.

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

Docket 8976. Complaint, July 1, 1974—Final Order, Dec. 19, 1975

Order requiring a Falls Church, Va., new and used car dealer, among other things to cease misrepresenting used vehicles as new; failing to disclose previous use and advertising used as new; misrepresenting terms and conditions of purchase; and failing to disclose specific handling and service charges.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Peacock Buick, Inc., a corporation, and Dr. Norman Bernstein and Michael B. Peacock, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Peacock Buick, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its principal office and place of business located at 1001 W. Broad St., in the city of Falls Church, Commonwealth of Virginia.

Respondents Dr. Norman Bernstein and Michael B. Peacock are individuals and officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including those hereinafter set forth. Their business address is the same as that of the corporate respondent.

The respondents cooperate and act together in carrying out 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, and sale to the public of new and used motor vehicles and in the servicing and repair thereof.

PAR. 3. In the course and conduct of their aforesaid business, respondents now cause, and for some time last past have caused, their said motor vehicles to be sold to purchasers thereof located in various States of the United States and the District of Columbia, including the Commonwealth of Virginia, and maintain, and at all times mentioned herein have maintained, a substantial course of trade in said motor vehicles in commerce, as "commerce" is defined in the Federal Trade Commission Act. Also in the course and conduct of their business, respondents have caused, and now cause, customers' notes, contracts, payments, checks, credit reports, title registrations, correspondence and other documents relating to payment of the purchase price for respondents' motor vehicles to be transmitted by various means, including but not limited to, the United States mails, in commerce, as "commerce" is defined in the Federal Trade Commission Act.

In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their motor vehicles, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by other means in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Typical and illustrative of the statements and representations in said advertisements, published in August and September of 1970, disseminated as aforesaid, but not all inclusive thereof, are the following:

* * * SAVE EVEN MORE NEW '70 OPELS BIG SELECTION AT CLOSE-OUT
DISCOUNTS \$200-\$600 OFF! * * *

* * * 1970 BUICKS SAVE UP TO \$1600 OFF! * * *

* * * PEACOCK the NUMBER 1 OPEL DEALER IN THE U.S.A * * *

PAR. 5. By and through the use of the above-quoted statements and others of similar import and meaning but not expressly set out herein, the respondents have represented, and are now representing, directly or by implication:

1. That the motor vehicles described or referred to in said advertisements are new;
2. Peacock Buick, Inc. sells more Opel motor vehicles than any other Opel dealer in the U.S.A.

PAR. 6. In truth and in fact:

1. The motor vehicles described or referred to in said advertisements, in many instances, are not new. To the contrary, they have been

driven substantially in excess of the limited use necessary in moving or road testing a new vehicle prior to its delivery to the ultimate purchaser.

2. At the time of the advertisement, Peacock Buick, Inc. did not sell more Opel motor vehicles than any other dealer and, therefore, was not the Number I Opel Dealer in the U.S.A.

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

PAR. 7. In the further course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their said motor vehicles, respondents, directly or through their representatives and employees, have engaged in other deceptive acts and practices. Typical and illustrative, but not all inclusive, of such deceptive acts and practices are the following:

1. Respondents represented to customers that driver education motor vehicles used in high schools in the Metropolitan Washington, D.C. Area were new and/or factory official motor vehicles; by such representations, respondents misled and deceived purchasers as to the actual prior use of said driver-education motor vehicles.

2. Respondents represented to customers that preferred financial institutions have rejected their applications for credit. In many instances, the preferred financial institutions had not rejected customers' applications for credit, and in some instances, had no record of said applications being offered.

3. Respondents represented to customers that area banks would not accept customers' applications for credit unless credit life or credit accident and health insurance was first obtained. In most instances, area banks do not require that customers obtain credit life or credit accident and health insurance as a prerequisite for accepting the customers' applications for credit.

Therefore, respondents' statements and representations, and their failure to reveal in their advertisements and during their sales presentations, the material facts as to the nature and extent of such previous use of said motor vehicles, are unfair, false, misleading and deceptive.

PAR. 8. In the further course and conduct of their aforesaid business, respondents have engaged in the following acts and practices in connection with the sale of their said motor vehicles:

1. A \$25 dealer handling and service charge is added to the price of respondents' used motor vehicles; the first indication that such a charge is being made, in many instances, occurs at the time the buyer receives a copy of the sales invoice and the conditional sales contract. The

purchaser, in many said instances, believes that the motor vehicle will be delivered in satisfactory condition and appearance without the imposition of additional charges. The dealer handling and service charge becomes an undisclosed cost that should have been made known prior to the consummation of the sale.

2. Respondents have repaired or repainted, or have caused to be repaired or repainted, damaged cars; said repairs or repainting hide damage that may adversely affect a vehicle's performance and life expectancy. Respondents have failed to disclose to prospective purchasers and purchasers of respondents' motor vehicles that said damage has been hidden by repairs or repainting.

Therefore, respondents' failure to disclose such material facts, prior to the time of sale, was, and is, unfair, false, misleading and deceptive.

PAR. 9. In the course and conduct of their aforesaid business and at all times mentioned herein, respondents have been, and are now, in substantial competition, in commerce, with corporations, firms and individuals in the sale, service and repair of new and used motor vehicles of the same general kind and nature as that sold, serviced and repaired by respondents.

PAR. 10. The use by the respondents of the aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices and the failure to disclose material facts, as aforesaid, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete and into the purchase of substantial quantities of respondents' motor vehicles and services by reason of said erroneous and mistaken belief. Respondents' aforesaid acts and practices unfairly cause the purchasing public to assume debts and obligations and to make payments of money which they might otherwise not have incurred.

PAR. 11. The acts and practices of the 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 or deceptive acts and practices in commerce, in violation of Section 5 of the Federal Trade Commission Act.

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INITIAL DECISION BY JOSEPH P. DUFRESNE, ADMINISTRATIVE
LAW JUDGE

JULY 8, 1975

Appearances

For the Commission: *Jerry W. Boykin, Michael E. K. Mpras, Michael Dershowitz and Frank H. Addonizio.*

For the respondents: *Basil J. Mezines and Gerard E. Mitchell, Stein, Mitchell & Mezines, Wash., D.C.*

PRELIMINARY STATEMENT

On July 1, 1974, the Commission issued a complaint charging the respondents, Peacock Buick, Inc. (Peacock), a corporation, and Dr. Norman Bernstein and Michael B. Peacock, individually and as officers of the corporation with having violated Section 5 of the Federal Trade Commission Act (15 U.S.C. §45).

The charges, in summary, were that the respondents had advertised or represented unfairly, falsely, misleadingly and deceptively:

- (1) That "not new" cars were new;
- (2) in that they had failed to disclose material facts regarding used cars they advertised and sold;
- (3) that Peacock was the "Number 1" Opel dealer in the USA when it was not;
- (4) that, contrary to fact, autos used in high school driver education training were new or factory official motor vehicles;
- (5) that preferred financial institutions had rejected auto purchasers' applications for credit when they had not;
- (6) that area banks would not accept auto purchasers' applications for credit unless credit life or credit accident and health insurance was obtained but that banks had no such requirement;
- (7) that without a proper disclosure having been made, a \$25 handling or service charge was and is added to the amount the customer agreed to pay for the vehicle purchased; and
- (8) that vehicles had been repaired or repainted (a) to hide damage that might affect their performance and life expectancy, and (b) to influence the buyers' decision to make the purchase without disclosing that repairs had been made and repainting done.

On Nov. 5, 1974, respondents' motion for a more definite statement was denied and an answer dated December 1974, was filed. In the answer, respondents admitted that they are in commerce in competition with corporations, firms and individuals in the sale, servicing, and repair of new and used motor vehicles (Peacock Answer, p. 5, par. 9).

Respondents denied engaging in the practices charged to be violative of Section 5 of the F.T.C. Act.

Pursuant to Rule 3.31, counsel supporting the complaint filed, on Dec. 9, 1974, a request for admissions. Respondents filed an answer to the request on Dec. 19, 1974. By way of discovery, respondents moved, pursuant to the Commission's rules, for a subpoena calling for the production of all writings received by the Federal Trade Commission in response to questionnaires sent by representatives of the Commission to customers of the respondents. The request sought all exculpatory statements, written or oral, which were given by customers of the respondents to the Federal Trade Commission in response to its questionnaire. I denied the request by order dated Jan. 6, 1975, and respondents sought Commission review of that order pursuant to Commission Rule 3.23. An "Order Denying Application for Review of Ruling" was entered on Jan. 20, 1975.

The adjudicative hearings were held in Washington, D.C., from Mar. 17 thru 20, 1975. The record was closed for the reception of evidence on Apr. 15, 1975, after additional unsuccessful efforts were made, at my suggestion, to reach an agreed upon settlement and counsel decided they would not request oral argument on the terms of the order which was proposed when the complaint issued (Tr. 695).

Proposed findings, conclusions and orders together with briefs supporting their proposals were filed by counsel for both sides on May 15, 1975. Replies by each were filed on May 30, 1975.

The findings of fact made herein are based on a review of the allegations made in the complaint, respondents' answers, stipulations entered by counsel, written admissions by respondents, the evidentiary record and upon a reading of the transcript record of the testimony and consideration of the demeanor of the witnesses at the hearings. In addition, the proposed findings of fact, conclusions and orders, together with reasons and briefs in support thereof filed by both sides have been given careful consideration. To the extent not adopted by this decision in the form proposed or in substance, they are rejected as not supported by the record or as immaterial.

For the convenience of the Commission and other readers of this initial decision, the findings of fact include references to supporting evidentiary items in the record. Such references are intended to serve as guides to the testimony, evidence and exhibits supporting the findings of fact. They do not necessarily represent complete summaries of the evidence considered in arriving at such findings. The following abbreviations have been used for this purpose:

CCPF—Complaint Counsel's Proposed Findings of Fact, Conclusions of Law and Order.

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RPF—Respondents' Proposed Findings of Fact, Conclusions of Law and Order.

CX—Commission's Exhibit, followed by number of exhibit being referenced.

RX—Respondents' Exhibit, followed by number of exhibit being referenced.

Tr.—Transcript preceded by the name of the witness and followed by the page number.

FINDINGS OF FACT

RESPONDENTS' IDENTITIES

Peacock Buick, Inc. is a corporation organized under the laws of the Commonwealth of Virginia, engaged in the sale of Buick and Opel automobiles. Its principal office and place of business is located at 8590 Leesburg Pike, McLean, Va. (Admitted, Peacock Answer, p. 1).

Dr. Norman Bernstein and Mr. Michael B. Peacock, Dr. Bernstein's son (Bernstein, Tr. 687), are officers of the corporate respondent, *i.e.*, president and vice-president, respectively (Peacock, Tr. 52; RPF p. 6, par. 9). Dr. Bernstein and Mr. Peacock formulate, direct and control the acts and practices of the corporate respondent (Admitted as to Dr. Bernstein, Peacock Answer, p. 2; as to Mr. Peacock, Peacock Admissions Nos. 30 and 32; Criste, Tr. 47-48; Gould, Tr. 303; Bernstein, Tr. 688).

RESPONDENTS' BUSINESS

Respondents are now, and for approximately thirteen years have been, engaged in the advertising, offering for sale and sale to the public of new and used motor vehicles and in their servicing and repair (Admitted, Peacock Answer, p. 2; RPF p. 5, par. 6).

Respondents sell approximately 2,000 new cars and 400 to 500 used cars each year. Generally the company retails the best of these or about 20 percent of the used cars it takes in trade for new cars. The balance are sold at wholesale (Bernstein, Tr. 168).

Respondents sell the motor vehicles from their place of business in McLean, Va., to purchasers located in various States of the United States, the District of Columbia, and the Commonwealth of Virginia. They maintain and at all times relevant hereto have maintained a substantial course of trade in the motor vehicles they sell and repair, in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted, Answer, p. 2). Also in the course and conduct of their business, respondents have caused, and continue to cause, customers' notes, contracts, payments, checks, credit reports, title registrations,

correspondence and other documents relating to payment of the purchase price of respondents' motor vehicles to be transmitted by various means, including but not limited to, the United States mails, in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted, Answer, p. 2).

RESPONDENTS' ADVERTISING AND REPRESENTATIONS

In the course and conduct of their business, as aforesaid, and for the purpose of inducing the purchase of their motor vehicles, the respondents have made, and are now making, numerous statements and representations in advertisements inserted in newspapers of general interstate circulation, and by other means in commerce, as "commerce" is defined in the Federal Trade Commission Act (Admitted, Answer, p. 2).

1. New and Used Cars

Typical and illustrative of statements and representations in Peacock's advertisements in 1970 and 1971 are the following:

* * * SAVE EVEN MORE NEW '70 OPELS BIG SELECTIONS AT CLOSE-OUT DISCOUNTS \$200-\$600 OFF! * * * (CXs 11-13).

* * * 1970 BUICKS SAVE UP TO \$1600 OFF! * * * (CX 4)

* * * PEACOCK THE NUMBER 1 OPEL DEALER IN THE USA * * * (CX 17-18)

Respondents did not falsely represent used cars to be new when they were sold to retail purchasers (Harris, Tr. 196-198; Dace, Tr. 649). One witness, a college graduate with a master's degree, testified to the contrary; but documentary evidence of the transaction, signed by her, clearly shows that the auto was used (Schmidt, Tr. 249-250; RXs 35, 36). In purchasing an automobile, customers were not pressured to hurry through the transaction (Schmidt, Tr. 260).

If the vehicle was not new, *e.g.*, a company official car, demonstrator, or if it was a used vehicle such as a trade-in, it was and is respondents' policy that such fact would be disclosed (Peacock, Tr. 106; Garrison, Tr. 289; Montgomery, Tr. 326; Graber, Tr. 362; McKay, Tr. 382).

The purchaser of a car that was not "new" invariably signed documents both at the time the order was placed and prior to taking delivery, which reflected that the vehicle had been used (RX 35 and 36); however, material facts as to the nature of the prior use were not always disclosed, *e.g.*, car rental not disclosed (Montgomery, Tr. 325; Funkhauser, Tr. 412).

Respondents did not represent to customers that driver education

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motor vehicles used in high schools in the Metropolitan Washington, D.C. Area were new or factory official motor vehicles; however, they did not always disclose to customers that some of the vehicles they sold had been used in a driver education program (Huntley, Tr. 335; Bernstein, Tr. 181; Meador, Tr. 392). On occasion such a disclosure was made (Chandley, Tr. 349; Splendorio, Tr. 418). Records of the sales of such vehicles reflect that they were sold as "used" automobiles (CX 27A, 27B; RX 35, RX 36; CX 83A; CX 38D; CX 100). If an unused portion of a manufacturer's warranty remained, it was provided to the buyer (Huntley, Tr. 333; Graber, Tr. 362).

2. Discounts

Respondents' representations in advertisements, such as those described above, that the motor vehicles offered were new and that discounts of from \$200 to \$1600 off the list price were available, were true (Answer, p. 3; Peacock, Tr. 59; Gould, Tr. 305; Bernstein, Tr. 154, 692; Dace, Tr. 649).

3. No. 1 Opel Dealer

The challenged representation by Peacock "* * * Number 1 Opel Dealer in the USA" (Complaint, par. 6, p. 2) had a reasonable basis in fact. Amongst the top twenty dealers, Peacock sold the largest number of Opels in the U.S. in July 1970 (RX 14) and in the first quarter of 1971 (Peacock, Tr. 93; CX 86; RXs 32 and 33). The representation was discontinued when respondents learned that they no longer were No. 1 (Peacock, Tr. 135; Bernstein, Tr. 675, 676). Respondents have not advertised their standing in Opel sales for approximately four years because they are no longer among the top ten Opel dealers (Bernstein, Tr. 676).

4. Financing of Autos

Respondents did not and do not make false representations to customers regarding acceptance or rejection of the customers' applications for credit by lending institutions. They did and do make a judgment as to which lending institutions probably would extend credit (Peacock, Tr. 112) and apprise customers as to the identity of those institutions to whom formal applications for credit are submitted and of the result (Spear, Tr. 520-521; RX 11).

They also, to avoid establishment of a record that a formal application by the individual had been rejected, made and make informal inquiries of lending institutions without disclosing the potential borrower's identity in order to ascertain the lender's attitude

toward a loan to the individual on the basis of general information as to his or her credit worthiness (Spear, Tr. 514-516).

Respondents did and do attempt to arrange customers' financing of the motor vehicles sold but did not and do not disclose the material fact to the customers that it is in Peacock's financial interest to arrange for the financing with lending institutions (Peacock, Tr. 111; Mathis, Tr. 315).

There is inadequate evidence in the record to establish what constitutes a "preferred" financial institution (Complaint, par. 7, p. 2). One witness who said that she preferred to finance with General Motors Acceptance Corporation (GMAC) testified a salesman for an auto dealership in Baltimore, Md., with which she cancelled her order, had told her GMAC had approved her credit application (Schmidt, Tr. 269). The manager of the GMAC office serving Peacock Buick, however, testified he had no written record of an application on file (Latta, Tr. 286-287; CX 22L). Respondents' credit manager testified that the witness was a marginal credit risk due to her scant credit experience and newness to the Metropolitan Washington, D.C. Area and to her job and that he ascertained by telephone call that submittal of an application for credit to GMAC for a person with that credit background would be a useless act (Spear, Tr. 519, 523-524).

5. Credit Accident, Health and Life Insurance

Respondents' salesmen did represent orally that area banks would not accept customers' applications for credit unless credit life or credit accident and health insurance were first obtained (Lanpher, Tr. 366-367); however, the standard installment sales contract issued to each customer reflected and reflects that credit life or credit accident and health insurance was and is optional (RX 37; Spear, Tr. 516; Bernstein, Tr. 683).

Respondents did attempt to sell credit life, accident and health insurance to customers who financed their motor vehicles through Peacock (Peacock, Tr. 70, 109; Mathis, Tr. 314; Graber, Tr. 360). They had customers sign a form acknowledging that it was optional (Peacock, Tr. 70, CX 80E). Respondents did not and do not disclose to auto buyers the material fact that it was or is in Peacock's financial interest to include the sale of such insurance in the financing arrangements made with lending institutions (Peacock, Tr. 111).

6. Handling and Service Charge

Respondents did not disclose the material fact to customers at the time they contracted to purchase the motor vehicle that there would be

a handling and service charge (usually \$25) added to the purchase price of used motor vehicles (Peacock Admissions 50 and 51). The \$25 or lesser charge was and is added to the sales invoice (CX 24A) and conditional sales contract which the customer receives when he arrives at respondents' place of business to take delivery of the motor vehicle (Peacock Admission 51; Peacock, Tr. 74; Lanpher, Tr. 365; Glasser, Tr. 668).

Peacock salesmen and representatives do not orally disclose the dealer handling and service charge, usually \$25, during the sales negotiations. It is only after the consummation of the transaction, when delivery is taken and various documents received that written notice of such charge is given to purchasers. Even at that point, the charge is not pointed out and if by chance a purchaser does notice it, there is little opportunity to either eliminate it or to reconsider the purchase (CCPF, 52-53).

7. Damaged and Repaired Autos

Respondents have not repaired or repainted damaged cars which repairs and repainting "* * * hide damage that may affect a vehicle's performance and life expectancy" (complaint, par. 8 p. 2, first sentence.). Cars requiring such extensive repairs are not sold at retail by respondents (Peacock, Tr. 67; Bernstein, Tr. 161, 162, 168, 170, 172, 684-686).

Although several witnesses testified they had mechanical difficulties with their cars (Meador, Tr. 395; Splendorio, Tr. 421), the connection between those difficulties and the prior use of the car and whether the damage affected its performance and life expectancy was not convincingly established.

Patrick Goss, complaint counsel's expert witness, testified that the cars purchased by four customers suffered damage which affected their life expectancy and performance (Goss, Tr. 438, 442-445). However, Mr. Goss himself had no opportunity to observe the condition of these cars either before or after repairs were made (RPF, p. 30). Mr. Goss' conclusion that the repairs were improperly done was based on his assumption that there were obvious indications that repairs had been done (Goss, Tr. 466). According to Mr. Goss himself, if repair work is not visible and it has been done by a good repair shop, such work should not affect a car's life expectancy or performance (Goss, Tr. 474) (RPF, pp. 30-31). Men who supervised the repairs and saw the vehicles testified that the cars had suffered superficial damage only and that the repairing and repainting was done to new car standards (Lamb, Tr. 580-588; Bannister, Tr. 604-614).

Respondents have not disclosed and do not disclose the material fact

to prospective purchasers or actual purchasers that damage has been repaired or that repainting has been done (Garrison, Tr. 294; Chandley, Tr. 349; Meador, Tr. 392-393; Bernstein, Tr. 158, 161, 685, 686). In the instances regarding which evidence was adduced, the damage was not convincingly shown to be so severe that it probably would adversely affect the vehicle's performance and life expectancy even though the repair invoice for the most severe damage indicated that it cost more than \$350 to repair. The face amounts on the invoices related to the repair of such vehicles, varied from a low of \$19.20 (RX 38) to a high of \$368.50 (RX 42) with most of them costing less than \$150 (RXs 39-41, 44-46).

VIOLATIONS OF SECTION 5 OF THE F.T.C. ACT

The use by the respondents' salesmen-employees of the unfair, false, misleading and deceptive statements, representations, acts and practices regarding the need for credit life or accident and health insurance before credit could be obtained and the failure to disclose material facts in timely fashion, *e.g.*, the \$25 or less handling and service charge, as aforesaid, has had and now has the capacity and tendency to mislead members of the purchasing public (1) into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and (2) into the purchase of substantial quantities of respondents' motor vehicles and services by reason of said erroneous and mistaken belief.

Respondents failed to disclose the material facts adequately in some instances or at all in other instances, that:

(1) It was and is in Peacock's financial interest to arrange for the financing of purchasers' automobiles.

(2) It was and is in Peacock's financial interest to include the sale of credit life, accident and health insurance to purchasers who finance their motor vehicles through Peacock.

(3) A handling or service charge, usually \$25, would be added to the purchase price of used motor vehicles.

(4) Damaged automobiles have been repaired and repainted prior to sale to the purchaser.

Respondents' aforesaid unfair, false, misleading and deceptive statements, representations, acts and practices regarding the need for credit life or accident and health insurance before credit could be obtained and the failure to disclose material facts as indicated, unfairly cause the purchasing public to assume debts and obligations and to make payments of money which they might otherwise not have incurred (CCPF, pp. 53-54).

Respondents at all times pertinent hereto have been, and are now, in

substantial competition, in commerce, with corporations, firms and individuals in the sale, servicing and repair of new and used motor vehicles of the same general kind and nature as are sold, serviced and repaired by respondents (Admitted, Answer p. 5). As a result, the aforesaid activities unfairly deprive respondents' competitors of trade they might have enjoyed or enjoy but for respondents' violations of Section 5 of the Federal Trade Commission Act. The competitor is prejudiced when business that would have come to him is diverted to another whose methods are less scrupulous in the conduct of his business. *Federal Trade Commission v. Algoma Lumber Co., et al.*, 291 U.S. 67, 78 (1934).

DISCUSSION

COMMISSION JURISDICTION

Respondents have at all times relevant hereto been engaged in interstate commerce within the intent and meaning of Sections 4 and 5 of the Federal Trade Commission Act. There is ample evidence in the admissions by the respondents in the record that they advertised and otherwise engaged in commerce as that term is defined in the Federal Trade Commission Act.

INDIVIDUAL ACCOUNTABILITY OF DR. BERNSTEIN AND MR. PEACOCK

In appropriate circumstances the individual respondents, Dr. Norman Bernstein and Mr. Michael B. Peacock, could be held individually responsible and subject to a cease and desist order for the improper corporate acts and practices of the corporate respondent Peacock Buick, Inc. The Commission's authority in this respect is clear. It is well settled that the Commission may properly name officers, directors, and sole stockholders of corporate respondents in their official as well as their individual capacities in order to prevent the evasion of F.T.C. orders. *Federal Trade Commission v. Standard Education Society, et al.*, 86 F.2d 692 (2d Cir. 1936) *reversed on other grounds*, 302 U.S. 112, 120 (1937); *Rayex Corporation v. Federal Trade Commission*, 317 F.2d 290, 295 (2d Cir. 1963); *Abel Allan Goodman v. Federal Trade Commission*, 244 F.2d 584, 585 (9th Cir. 1957); *Standard Distributors, Inc., et al. v. Federal Trade Commission*, 211 F.2d 7, 14-15 (2d Cir. 1954) (CCPF, p. 8). As the individuals ultimately responsible for every aspect of the firm's operations, both Dr. Bernstein and Mr. Peacock are accountable for the illegal acts and practices found herein. In *John A. Guziak v. Federal Trade Commission*, 361 F.2d 700, 704 (8th Cir. 1966), the court held that an individual who was the motivating and

controlling force behind the corporation was responsible for its activities and that he should be enjoined from engaging in similar activities in the future.

Since Peacock Buick is a relatively small, family owned and operated business and corrective action (Bernstein, Tr. 148-149, 153-154, 174-177) was taken when purchasers' complaints were called to their attention, I do not believe subjecting them to a Federal Trade Commission order to cease and desist as individuals or in their capacity as corporate officials is called for in this case. To subject them to such an order would be a good example of "administrative over-kill." I do not wish to create any such example in this case or to stigmatize them on the basis of the evidentiary record in this matter. Their testimony at the hearings was straightforward, not evasive and not contrary to fact. See *Pati-Port, Inc., et al. v. Federal Trade Commission*, 313 F.2d 103, 104 (4th Cir. 1963).

ORAL MISREPRESENTATIONS

Oral misrepresentations made by a respondent's agents or representatives, i.e., the auto salesmen here, have long been held to be in violation of the Federal Trade Commission Act. *International Art Company v. Federal Trade Commission*, 109 F.2d 393 (1940); *Perma-Maid Co., Inc. v. Federal Trade Commission*, 121 F.2d 282 (1941); *Parke, Austin & Lipscomb, Inc., et al. v. Federal Trade Commission*, 142 F.2d 437 (1944); *Consumers Home Equipment Co., et al. v. Federal Trade Commission*, 164 F.2d 972 (1947); *National Trade Publications Service, Inc., et al. v. Federal Trade Commission*, 300 F.2d 790 (1962) (CCPF, p. 41).

FAILURE TO DISCLOSE MATERIAL FACTS

It is an unfair, false, misleading and deceptive act and practice to fail to disclose, prior to the time of sale, relevant and material facts where such information might be important to the prospective customer in making his choice as to whether to make a purchase. *Federal Trade Commission v. Colgate-Palmolive Co., et al.*, 380 U.S. 374 (1965); *Spiegel, Inc. v. Federal Trade Commission*, 494 F.2d 59, 62 (7th Cir. 1974). See also, *In the Matter of Main Line Lumber and Millwork Company, et al.*, 56 F.T.C. 17 (1959), where the Commission prohibited respondent from stating prices for certain appliances, when there were, in fact, extra costs that purchasers would be required to pay separately and at a later date (CCPF, p. 52).

Both Congress and the courts have clearly established a policy calling for disclosure of information so that consumers can be better informed

and compare the costs of competing products (*e.g.*, Fair Packaging and Labeling Act, 80 Stat. 1296, 15 U.S.C. §1451, *et seq.*, Truth in Lending Act, Pub. Law 90-321, 15 U.S.C. §1601, *et seq.*, *Leon A. Tashof v. Federal Trade Commission*, 437 F.2d 707 (D.C. Cir. 1970); *Montgomery Ward & Co., Inc. v. Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967); *Spiegel, Inc.*, *supra*) (CCPF, p. 52).

The Commission has the authority to require disclosure of material facts when a respondent advertises misleadingly due to a failure to reveal facts material in the light of the representations made. *All-State Industries of North Carolina, Inc., et al. v. Federal Trade Commission*, 423 F.2d 423 (4th Cir. 1970); *Joseph L. Portwood Co., et al. v. Federal Trade Commission*, 418 F.2d 419, 424 (10th Cir. 1969); *Leon A. Tashof v. Federal Trade Commission*, *supra*, n. 37 (D.C. Cir. 1970); *Ward Laboratories, Inc., et al. v. Federal Trade Commission*, 276 F.2d 952, 954 (2d Cir. 1960), *cert. denied*, 364 U.S. 827.

There is ample precedent for the proposition that the Commission may require affirmative disclosures where necessary to prevent deception. Thus, the failure to disclose material facts, which if known to prospective purchasers would influence their decision as to whether to purchase, is an unfair trade practice in violation of Section 5. *Haskelite Mfg. Corporation v. Federal Trade Commission*, 127 F.2d 765 (7th Cir. 1942); *L. Heller & Son, Inc., et al. v. Federal Trade Commission*, 191 F.2d 954 (7th Cir. 1951); *Federal Trade Commission v. Colgate-Palmolive Co., et al.*, *supra*; *The J. B. Williams Company, Inc., et al. v. Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967); *S.S.S. Company, Inc., et al. v. Federal Trade Commission*, 416 F.2d 226, 231 (6th Cir., 1969). The Commission may utilize its accumulated expertise to determine what facts are material to consumers and whether such information has been withheld. *Pfizer Inc.*, F.T.C. Dkt. 8819, 81 F.T.C. 23 (1972). In my view, purchasers should be specifically informed when a seller of an auto gains financially, *i.e.*, receives a "kickback," when he arranges for the financing of the auto or sells credit health, life or accident insurance.

It is not a violation of a respondent's First Amendment rights to require affirmative disclosure of material facts. They are free to advertise; but they are prohibited from making false and misleading statements—*e.g.*, failing to disclose material facts—which they have no constitutional right to disseminate. *The Regina Corporation v. Federal Trade Commission*, 322 F.2d 765, 770 (3d Cir. 1963); *S.S.S. Company, Inc., et al. v. Federal Trade Commission*, *supra*.

CONCLUSIONS

The Federal Trade Commission has jurisdiction over the subject matter of this proceeding and over the respondents.

The respondents at all times relevant hereto have been engaged in interstate commerce within the intent and meaning of Sections 4 and 5 of the Federal Trade Commission Act.

The complaint in this matter sets forth a cause of action which is in the public interest to pursue.

The acts and practices of the respondent as found above under the caption "Violations of Section 5 of the F.T.C. Act" (pp. 11-13) were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair or deceptive acts and practices in or affecting commerce, and unfair methods of competition in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended.

THE REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to insure discontinuance of the unlawful practices found and may require affirmative disclosure of any material facts, which if known to the prospective customer, might affect his choice of whether to do business with a respondent. The Commission is not limited to the exact nature of the specific violations in devising suitable order provisions to protect the public interest. *Federal Trade Commission v. Colgate-Palmolive Co., et al.*, 380 U.S. 374, 392 (1965); *Federal Trade Commission v. National Lead Co., et al.*, 352 U.S. 419, 428-430 (1957); *Federal Trade Commission v. Rubberoid Co.*, 343 U.S. 470, 473 (1952).

The Commission's broad discretion only is limited by the requirement that the remedy must be reasonably related to the unlawful practices found. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613 (1946); *Niresk Industries, Inc., et al. v. Federal Trade Commission*, 278 F.2d 337 (7th Cir. 1960), *cert. denied*, 364 U.S. 883.

The Commission may order both affirmative acts and affirmative disclosures by respondent in order to bring an end to and to prevent a recurrence of illegal acts and practices. *Federal Trade Commission v. Colgate-Palmolive, supra*; *American Cyanamid Company v. Federal Trade Commission* 363 F.2d 757 (6th Cir. 1966), 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969).

The central purpose of Section 5 of the Federal Trade Commission Act is to abolish the rule of *caveat emptor*, i.e., let the buyer beware, which for a great many years had governed business transactions

between vendors and purchasers. *Federal Trade Commission v. Sterling Drug, Inc., et al.*, 317 F.2d 669, 674 (2d Cir. 1963).

The Commission's duty, as eloquently expressed by Judge Learned Hand, is to "discover and make explicit those unexpressed standards of fair dealing which the conscience of the community may progressively develop." *Federal Trade Commission v. Standard Education Society*, 86 F.2d 692, 696 (2d Cir. 1936), *reversed on other grounds*, 302 U.S. 112 (1937).

It is well established that the Commission's authority in issuing cease and desist orders is not limited to issuing prohibitory injunctions, but extends to orders in the nature of mandatory injunctions compelling the performance of specific acts. Several examples of such orders upheld by the courts are those requiring affirmative disclosures in advertising. *The J. B. Williams Co., Inc., et al. v. Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967); requiring licensing of a patent used illegally, *American Cyanamid Co. v. Federal Trade Commission, supra*; and requiring divestiture in antitrust cases grounded solely upon Section 5 of the Federal Trade Commission Act rather than Section 7 of the Clayton Act; *L. G. Balfour Co., et al. v. Federal Trade Commission*, 442 F.2d 1 (7th Cir. 1971); *Golden Grain Macaroni Company v. Federal Trade Commission*, 472 F.2d 882 (9th Cir. 1972), *cert. denied*, 412 U.S. 467 (1973), (CCPF, p. 55).

An indication of the scope of the Commission's authority in fashioning appropriate orders is found in *All-State Industries of North Carolina, Inc., et al. v. Federal Trade Commission*, 423 F.2d 423 (4th Cir. 1970), *cert. denied*, 400 U.S. 828 (1970). There, the Court of Appeals upheld a Commission order requiring petitioners to disclose orally prior to sale, and in writing on any instrument of indebtedness, that such instrument, at the company's option and without notice, could be assigned to a finance company against whom purchasers' claims or defenses might not be available. And, in *Arthur Murray Studio of Washington, Inc., et al. v. Federal Trade Commission*, 458 F.2d 622 (5th Cir. 1972), the Fifth Circuit Court of Appeals upheld a Commission order requiring petitioners to post in a prominent place in each place of business a copy of the cease and desist order, with the notice that any customer or prospective customer may receive a copy on request (CCPF, pp. 55-56).

THE ORDER HERE

In fashioning the order in this proceeding, which varies from the "Notice of Order"* contained in the complaint, I have taken into account (1) the violations of law which the record establishes, consisting of conduct which the Commission has declared over the years to be unlawful, (2) the fact that this order must be designed to protect the public which includes the unthinking, the inadequately educated and the credulous (see *Charles of the Ritz Dist. Corporation v. Federal Trade Commission*, 143 F.2d 676, 679 (2d Cir. 1944)), and (3) subject to the reasonable-relationship-of-remedy-to-unlawful-practices-found precept adverted to above, the fact that "* * * once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." *United States v. E. I. du Pont de Nemours & Co., et al.*, 366 U.S. 316, 334 (1961).

The order now calls for disclosure of material facts which might influence a purchaser's decision to buy and also calls for a report to the Commission only when the corporate respondent leaves or enters the field of auto retailing. These provisions have been added to the "Notice Order" attached to the complaint as issued.

In connection with the differences between the "Notice Order" of the complaint and the order in this initial decision, the last paragraph of the Notice (p. 7) reads, in pertinent part, as follows:

If however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions as to Peacock Buick, Inc., a corporation, and Dr. Norman Bernstein and Michael B. Peacock, individually and as officers of said corporation might be inadequate to fully protect the consuming public, or to protect competitive conditions within the motor vehicle retailing industry, the Commission may order such other relief as it finds necessary or appropriate.

I believe some other relief to be appropriate. To this end, provisions calling for disclosure of the nature of known prior use were extended. Also, (1) the fact that repairs costing more than \$50 have been made to cars offered for sale, and (2) the fact that it is in Peacock's financial interest to arrange financing, and credit life, health and accident insurance are to be affirmatively disclosed. The "Notice Order" provision (p. 11, par. (e)) applicable to Dr. Bernstein and Mr. Peacock in their corporate and individual capacities has been deleted.

ORDER

It is ordered, That respondent Peacock Buick, Inc., a corporation, its successors and assigns and its officers, agents, representatives and

* Not published in the F.T.C. Volumes of Decisions.

employees directly or through any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution, service and repair of new and used motor vehicles, or any other products or services, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to disclose orally, and in print on any purchase order the customer signs, in a type size at least the same as that comprising the bulk of the text, the nature or extent of previous use or condition of any new or used vehicle displayed, offered for sale or sold, which previous use or condition resulted from a sale or lease of the vehicle respondent negotiated or of which he has knowledge, *e.g.*, student driver training, auto rental, personal use.
2. Offering for sale or selling any motor vehicle of the current or previous model year which has been damaged and repaired at a dealer's cost in excess of \$50.00 without disclosing, both orally and on any purchase order the customer signs in type size at least the same as that comprising the bulk of the text, the nature of the damage sustained by the vehicle and the dealer cost to repair it.
3. Representing, contrary to fact, orally or in writing, directly or by implication, that customers, as a prerequisite for obtaining customer credit, must obtain credit life or credit accident and health insurance before a particular lending institution will extend credit; or misrepresenting, in any manner, the conditions or restrictions under which consumer credit will be extended.
4. Failing to disclose, orally and on the application for financing, in a type size at least the same size as that comprising the bulk of the text, that area lending institutions which finance customers' purchases compensate respondent for loans it arranges for such purchasers.
5. Failing to disclose, both orally and on the application the customer signs for credit life and/or credit accident and health insurance coverage, in a type size at least the same size as that comprising the bulk of the text, that such insurance is optional and that, if purchased through the respondent that the insurer compensates the respondent.
6. Failing to disclose, both orally and on any purchase order the customer signs, in a type size at least the same size as that comprising the bulk of the text, the precise amount of handling and service charges which will be added to the cost of respondent's used motor vehicles.

It is further ordered:

- (a) That respondent shall forthwith distribute a copy of this order to each of its operating divisions;
- (b) That respondent shall deliver a copy of this order to cease and

desist to all present and future personnel engaged in the offering for sale, or sale, of any motor vehicle, and in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondent secure a signed statement acknowledging receipt of said order from each such person; and

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

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

OPINION OF THE COMMISSION

BY DIXON, *Commissioner*:

Complaint in this matter was issued July 1, 1974, charging respondents Peacock Buick, Dr. Norman Bernstein, and Michael B. Peacock with unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) in connection with the sale of new and used automobiles. Among the charges were that respondents (1) advertised used cars as new; (2) represented to customers that automobiles previously used for driver education were in fact new or had been used only by factory officials; (3) misrepresented that credit life insurance was required in order to obtain automobile financing; (4) misrepresented that area lending institutions had rejected applications for credit when such was not the case; (5) failed to disclose to prospective purchasers that automobiles had been materially damaged and repaired prior to purchase; (6) failed to disclose the existence of a \$25 service charge on the purchase of used cars when quoting the price of those cars; and (7) represented that Peacock Buick was the "No. 1 Opel Dealer in the United States" when such was not the case.

Hearings were held before an administrative law judge (ALJ) who prepared an initial decision which dismissed certain counts and sustained others including, in respondents' view, some which were not in the complaint to begin with. The ALJ recommended an order diverging in significant respects from the notice order originally proposed by the Commission. As the law judge himself foresaw (Tr. 693-94), his solomonic approach has placated neither side, both of whom

have filed appeals challenging each conclusion of the initial decision which favors the other. While it is tempting to conclude that a result which displeases two antagonists so thoroughly must have much to commend it, our own review of the record reveals the need for substantial modification of the ALJ's conclusions. Slavish, unreasoned adherence to a notice order is not a virtue, and we applaud, as a general matter, the law judge's independent analysis of the appropriate relief. We have concluded, however, that certain of his recommendations are inappropriate in light of the facts before us. In addition, the Commission would have benefited from a more extensive analysis by the judge of the record evidence which he considered in drawing his conclusions. Our own review and disposition of contested issues follows:

I. ADVERTISING USED CARS AS NEW

The complaint charged that respondents had employed media advertising which represented that new cars were for sale at various discounts, when in fact the cars to which those advertisements referred were in some cases used. Illustrative of the challenged advertisements were: 1970 Opels; Close-Out Sale; \$200-\$600 Off! (CX 7)¹ Save Even More! New '70 Opels At Final Close-Out; Discounts! \$200-\$600 Off (CX 13) 1970 Buicks Save Up to \$1600 Off! (CX 4; I.D. p. 6[p. 1539, herein])

Both sides recognize that the above advertisements, run during the latter part of 1970, should be construed to offer *new* cars at the indicated discounts. This is self-evident with respect to advertisements that refer explicitly to "new" cars. With respect to those that advertised merely "1970" cars, at a time when 1971 model year cars had come on the market, the reasonable expectation of many consumers would be that 1970 cars not advertised as "used" were in fact "new"² and thus an advertisement for late model used cars should include an affirmative designation that they are used.

The record reflects some confusion on the part of counsel as to what proof was necessary to prove or disprove the complaint allegations. In our view, an advertisement such as "1970 Opels; \$200-\$600 Off" represents that the consumer upon going to the dealer will find there a significant number of new, 1970 Opels, including some at discounts of

¹ The following abbreviations are used herein: I.D. p.—Initial Decision (Page No.) Tr.—Transcript of Testimony (Page No.) CX—Complaint Counsel's Exhibit (No.) RX—Respondents' Exhibit (No.) RA—Respondents' Answer to Requests for Admissions (No.)

² The complaint defined a car as no longer being new once it has been "used in any manner other than the limited use necessary in moving or road testing a new vehicle prior to delivery of such vehicle to the customer."

\$600. The fact that the dealer may also have available late model used cars at similar discounts from new list price³ does not render the advertising false, assuming no effort is made to convince the consumer upon arrival that the late model used cars are in fact the new cars promised in the advertisement, and assuming that the new cars are, in fact, not being used merely as "bait" to induce the purchase of a larger number of more plentiful or attractive used cars.

At trial, respondent Peacock testified that the advertisements challenged referred solely to new cars (Tr. 59), and respondent Bernstein averred that when those advertisements were run respondents did have available for sale new cars at the indicated discounts (Tr. 680-82).

Complaint counsel relied entirely for their case upon a response to an order to file a Special Report, served upon respondents by the Commission. Question 13 of that report read:

State for each year whether your firm utilized price reduction figures in the advertising of its automobiles; for example, advertising automobiles from \$200 to \$2000 Off. If so, were current model used cars offered for sale under such advertisements? If so, did the larger of the two price reduction figures, *i.e.*, \$2000 Off, refer to current model used cars? (CX 1(c))

The response of Peacock Buick, filed by its secretary under oath was:

Yes, our firm has used price reduction figures in our advertising of automobiles, and current model used cars were offered for sale at these times, and the larger of the price reduction figures did refer to current model used cars. (CX 2)

Obviously, this response should give pause. Clearly it is false and misleading to offer "1970 Opels, \$200-\$600 Off" or "Buicks Up to \$1600 Off" when, in fact, those Opels at \$600 off or those Buicks at \$1600 off are not new. As noted before, however, individual respondents in sworn testimony asserted that in fact new cars were available for sale at the higher advertised discounts, and the law judge believed them.

If it were respondents' burden to show by a preponderance of the evidence that they did not advertise falsely, their response to the 6(b) questionnaire might well lead us to conclude they had failed to carry it. Here, however, it was complaint counsel's burden to prove the falsity of specific challenged claims. In the face of a clear conflict in testimony, we believe it was incumbent upon counsel to go further in their proof than mere reliance on the 6(b) questionnaire, which did not after all refer by its terms to the particular claims challenged in the complaint. Some further evidence as to whether or not respondents did, in fact,

³ During the period covered by the complaint allegations it appears that some kinds of Opels were in short supply, and thus respondents were able to sell certain late model used cars for the same discount from list price as they offered on some new cars.

have new cars available at the higher advertised discounts would have been germane. So would be evidence to indicate that customers drawn by the new car ads to the Peacock lots were immediately shown those used cars to which the ads allegedly referred. The record, however, is barren of evidence which would help to resolve the conflict between testimony and questionnaire. Instead, complaint counsel appear willing to concede that Peacock may indeed have had available for sale new cars at the advertised discounts, but argue only that the ads also "referred" to used cars. Under the circumstances we must conclude that the available evidence preponderates in neither direction and the ALJ's dismissal of the false advertising count is affirmed.

II. ORAL MISREPRESENTATIONS

While we do not conclude that respondents represented used cars as new in their media advertising, we believe that complaint counsel have demonstrated by a preponderance of the evidence that in some instances respondents' sales representatives did expressly misrepresent, and failed to disclose, prior use of late model used cars in oral presentations to consumers.⁴

Mr. James Huntley testified that he was shown an Opel 1900 Coupe bearing a new car sticker (CX 99) and was told by a salesman that it had previously been used by a factory official. (Tr. 330-31) Mr. Huntley testified that he received the impression that the car was a "new car that had been used by the company during that period of time." (Tr. 332) Mr. Huntley's testimony was uncontradicted, and we find no reason to disbelieve it.⁵ In fact, the car he was shown had been previously used for driver education by the Fairfax County School Board (Tr. 334; CX 33-A).

Mrs. Violet Funkhauser testified that her salesman informed her that a car she sought to purchase was a "demonstrator." The car had in fact been used as a rental car by Budget Rent-A-Car prior to sale by Peacock. (Tr. 411; CX 37A) The salesman who had sold the car to Mrs. Funkhauser denied that he would have made the misrepresentation to

⁴ The ALJ concluded that respondents had failed to disclose the prior status of late model used cars, but that there had been no affirmative misrepresentations of prior status. (I.D. p. 71 p. 1539, herein) Unfortunately, the initial decision contains almost no evaluation of consumer testimony relating directly to affirmative misrepresentations. The facts that it was not respondents' general policy to misrepresent, and that in many cases there may have been no misrepresentations, do not in themselves negate direct testimony that in particular cases misrepresentations did occur. See *Basic Books, Inc. v. Federal Trade Commission*, 276 F.2d 718, 720-21 (7th Cir. 1960). Our evaluation of this testimony leads us to differ with the ALJ.

⁵ Respondents point out that the financing agreement which Mr. Huntley signed indicated that his car was "used," as did agreements signed by other witnesses. Obviously this subsequent disclosure, to which witnesses did not always pay particular attention, could not cure prior misrepresentation. Moreover, the simple disclosure, even if observed by a customer, would not be sufficient to dispel a misrepresentation as to the particular prior use, e.g., factory official vs. driver education.

which she testified, however he had no specific recollection of the transaction (Tr. 659-60; see also Tr. 322-23).

Mr. James F. Garrison testified that his salesman informed him that a car, in fact previously used as a demonstrator, had been used by a company official, or factory representative (Tr. 288-89). This testimony was uncontradicted.

Mr. Edward Meador testified that he was informed by a salesman that an automobile, in fact previously used for driver education, had been owned by a senior engineer with the Fairfax County Water Authority (Tr. 390). The salesman was called by respondents. While he denied that he had ever misrepresented the prior status of automobiles, his testimony does not reflect anywhere near the same detailed recollection of the transaction in question as did Mr. Meador's (Tr. 624, 626; 388-391).

Our review of the foregoing evidence eliminates the need for us to determine whether express misrepresentations occurred in the case of Diana Kaste Schmidt, who testified that she was led to believe that a driver education car which she purchased was in fact new (Tr. 234-40, 243, 278-280). The record indicates that the witness arrived at the dealership seeking a new car. When an appropriate model proved unavailable, she was shown a driver education car, located on the new car lot.

There is dispute in the record between the consumer and the salesman as to what the consumer was told regarding this car. The salesman testified that he informed the purchaser that the car was used, and did not represent that the car was "new." (Tr. 549) Whatever representations were made, it is apparent in viewing the testimony as a whole that the transaction was less than a model of candor and clarity, and the customer clearly left the dealership entirely unaware that she had purchased a car used for driver education. We believe the testimony of Ms. Schmidt and Mr. Dubin does illustrate how, absent a clear and early disclosure of the prior use of a late model car, deception can result from the setting in which a sale is made and the expectations of the buyer—whether intent to deceive exists or not.

Respondents object to the introduction by complaint counsel of evidence which they contend did not conform to the boundaries of the complaint. They also protest the law judge's finding that Peacock violated the law by failing to disclose the prior use of its late model used cars. Respondents contend that the complaint alleged only a very specific form of affirmative misrepresentation, and that findings relating to other misrepresentations, or to deceptive failure to disclose are unwarranted. We cannot agree. Paragraph Seven of the complaint read in relevant part:

In the further course and conduct of their business as aforesaid, and for the purpose of inducing the purchase of their said motor vehicles, respondents, directly or through their representatives and employees, have engaged in other deceptive acts and practices. Typical and illustrative, but not all inclusive, of such deceptive acts and practices are the following:

1. Respondents represented to customers that driver education motor vehicles used in high schools in the Metropolitan Washington, D.C. Area were new and/or factory official motor vehicles; by such representations, respondents misled and deceived purchasers as to the actual prior use of said driver-education motor vehicles.

* * * * *

Therefore, respondents' statements and representations, and their failure to reveal in their advertisements and during their sales presentations, the material facts as to the nature and extent of such previous use of said motor vehicles, are unfair, false, misleading and deceptive.

At the very least, we believe the complaint clearly placed respondents on notice that they were charged with violations in misrepresenting the prior use of driver education cars, and in failing to disclose affirmatively the prior use of those cars. The testimony of at least two of the witnesses described hereinabove, Messrs. Huntley and Meador, falls clearly within the confines of this most narrow construction of the complaint.⁶ With respect to the evidence introduced regarding respondents' misrepresentations of the prior status of rental automobiles and demonstrators we believe this is clearly relevant to a showing that the misrepresentation and nondisclosure of prior use alleged by the complaint was not an isolated occurrence, and that an order provision would be appropriate. While the complaint language clearly obligated complaint counsel to introduce evidence with respect to misrepresentation or nondisclosure of the status of driver education cars, which they did, we think that read in conjunction with the notice order it adequately apprised respondents that other evidence might be introduced bearing on the general issue of nondisclosure or misrepresentation of prior use. Certainly respondents have shown no way in which they were injured by the introduction of testimony concerning rental cars and demonstrators; to the extent possible they cross-examined tenaciously and introduced rebuttal witnesses.

In sum, while we think that record evidence relating only to driver education cars was sufficient to sustain the allegations of the complaint, and to justify the order provisions, we do not believe it was improper for the administrative law judge or the Commission to rely on evidence

⁶ While Mr. Meador testified that he was informed that his car had been previously used by a Fairfax County official (as opposed to the example of a factory official used in the complaint), we cannot see any significance in this variance, particularly inasmuch as respondents had every opportunity to rebut Mr. Meador's testimony, and introduced a witness in an effort to do so.

pertaining to rental cars and demonstrators in reaching conclusions as to the necessity for an order.

We have entered order language basically paralleling paragraphs 1-4 and 6 of the notice order (paragraphs I(1)-I(5) of the order herein). These prohibit misrepresentations that used cars are new, and misrepresentations of the prior use of used cars. The order provisions also require affirmative disclosure in advertising and on the lot of the prior use of late model used cars, *e.g.*, driver education car, rental car, demonstrator. Such affirmative disclosure is necessary for two reasons: (1) to prevent any recurrence of past misrepresentation of the prior use of automobiles, and (2) to remedy the deceptive failure to disclose prior use of late model used cars.

Much of the deception and confusion which resulted in the cases of some consumers could have been readily cured had respondents simply made a clear affirmative disclosure of the prior use of their used cars, rather than waiting for consumers to guess or ask the right question. A sales agent may be under general instructions not to misrepresent, or, indeed, to disclose affirmatively the prior use of vehicles, but such general directives have a way of paling in the face of a hesitant buyer or a shortage of popular models. There is no chance for a salesperson to take liberties with the facts when they are clearly spelled out at the point of initial buyer contact with the car. Conspicuous designation of cars as "driver education," "rental," and the like is necessary to avoid the deception that has occurred here, and it is well established that the Commission may require the relief necessary to ensure that past violations are not repeated, *e.g.*, *Federal Trade Commission v. Cement Institute*, 333 U.S. 683, 708 (1948); *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608 (1946); *Haskelite Mfg. Co. v. Federal Trade Commission*, 127 F.2d 765 (7th Cir. 1942).

In addition, we think it is clear that even in the absence of affirmative misrepresentations, it is misleading for the seller of late model used cars to fail to reveal the particularized uses to which they have been put. The record indicates beyond doubt that many consumers have a strong aversion to automobiles which have been used in certain ways, for example, driver education and multidriver rental. Rightly or wrongly, some consumers believe that such prior use substantially impairs the value of a car, perhaps by heightening the chances that it has been driven abusively. As one witness replied when asked his reaction to the discovery that his car had been used for driver education, "The image that conjures up in my mind is one of gears being stripped * * *." (Tr. 392; see also Tr. 248, 325, 335, 412).

When a late model used car is sold at close to list price, as were those involved here, the assumption likely to be made by some purchasers is

that, absent disclosure to the contrary, such car has *not* previously been used in a way that might substantially impair its value. In such circumstances, failure to disclose a disfavored prior use may tend to mislead, and is, therefore, prohibited by Section 5. See, e.g., *Brite Mfg. Co. v. Federal Trade Commission*, 347 F.2d 477 (D.C. Cir. 1965); *Kerran v. Federal Trade Commission*, 265 F.2d 246, 248 (10th Cir. 1959), *cert. denied* sub nom.; *Double Eagle Refining Co. v. Federal Trade Commission*, 361 U.S. 818; *L. Heller and Son, Inc. v. Federal Trade Commission*, 191 F.2d 954, 956, (7th Cir. 1951). For this reason as well, we believe that an order requiring disclosure of the prior use of late model used cars is appropriate.⁷

III. REPRESENTATIONS THAT CREDIT LIFE INSURANCE IS MANDATORY

The complaint alleged that respondents represented to their customers that area lending institutions required the customers to accept credit life insurance, when, in fact, they did not. The effect of such a misrepresentation may be that a consumer ends up paying \$150 or more for a product he or she would not choose to purchase in the absence of the misrepresentation. The administrative law judge found that the complaint allegations had been sustained, and we agree.

It was respondents' practice to present consumers with a filled-in contract, ready for signature. At times this contract might include a charge for credit life insurance entered without the customer's knowledge or prior approval (Tr. 69, 517). While individual respondents testified that it was not their policy to force consumers to accept credit life insurance, or to misrepresent the necessity for it, customer testimony does indicate that in some instances consumers were told by respondents' salesmen that they would have difficulty obtaining, or could not obtain, financing without accepting credit life insurance (Tr. 360-61, 367, 375). In other cases there was apparently no explicit misrepresentation, however considerable pressure was placed upon customers to accept credit life insurance (Tr. 315-19). Credit life insurance was in fact not required by area lending institutions as a prerequisite for financing (RA 48).

Respondents argue that the contracts which consumers signed indicated that credit life insurance was not required for financing, and this disclosure obviated the possibility of any deception. We disagree. It is clear from consumer testimony that oral deception was employed in

⁷ Respondents claim that they already make such disclosures, as illustrated by RX 29, showing a car in the showroom with a large sign proclaiming "Rental Car" on top. This form of conspicuous disclosure is certainly commendable, however, in view of lapses which led to the complaint, we believe that an order requiring affirmative disclosure in all cases is required.

some instances to cause consumers to ignore the warning on their sales agreement and accept credit insurance, despite a preference to avoid it. The fact that in certain instances consumers were able, after considerable exertion, to obtain deletion of the credit life requirement is also not a defense to the prior deception and high pressure selling which occurred and which led to the necessity for a battle in the first place.⁸

In addition to the general relief prescribed by the notice order, the administrative law judge recommended an order provision which would require respondents to disclose the fact that they profit from the sale of credit life insurance. Testimony indicated that Peacock Buick received 50 percent of the premiums from credit life insurance sold to customers (Tr. 530). The administrative law judge appears to have concluded that respondents committed a separate violation by failing to disclose this fact. We do not agree that, standing by itself, respondents' failure to disclose their pecuniary interest in the sale of credit life insurance was deceptive. Moreover, it was not alleged as a violation in the complaint. Under the circumstances we will omit this portion of the law judge's recommended order.⁹

IV. MISREPRESENTATION THAT CREDIT APPLICATION HAS BEEN REJECTED BY PREFERRED LENDING INSTITUTION

The complaint alleged that respondents misrepresented to individuals that area lending institutions had rejected credit applications for automobile financing. The harm in such a practice is that it may enable a vendor to divert a customer from the customer's preferred lender to a more expensive source of funds. A vendor's motive for engaging in this practice may be that he can earn an extra profit if he is allowed to arrange financing with a lender with whom he deals customarily, instead of one preferred by the borrower.

At trial complaint counsel introduced a witness who testified that she sought financing from GMAC and was informed that her application for credit had been turned down (Tr. 242). Thereafter she agreed to

⁸ We also reject respondents' argument that the Commission lacks jurisdiction to regulate their misrepresentations regarding the necessity of credit life insurance because of the *McCarran-Ferguson Act*, 15 U.S.C. §§1011-1015. A statement by a seller regarding the need for insurance in order to obtain financing is not part of the "business of insurance" as that term is used in the Act. Moreover, the practice in question is apparently not subject to regulation by the Commonwealth of Virginia, in which respondents do business, 15 U.S.C. §1012.

⁹ There may well be circumstances in which the disclosure of financial interest is a necessary element of relief for related misrepresentations. For instance, in the case at bar it appears that when salesmen did not flatly misrepresent the need for credit life insurance they did advocate its purchase with a zeal borne in part no doubt by the profit to be made. The precise point at which zealous advocacy becomes unacceptable pressure and deception is often hard to determine, and the best way to solve the problem may well be simply to arm consumers with the information necessary to evaluate a sales pitch with the requisite skepticism. This may involve disclosure that the vendor has a financial interest, something that might not be apparent to the consumer in the case of credit insurance. On the record before us, however, we believe that a prohibition of explicit and implicit misrepresentations, as well as oral and written disclosure of the non-necessity of insurance should be sufficient to prevent recurrence of the violation.

financing with a bank suggested by respondents at an annual percentage rate of 13.94 percent. A witness from GMAC testified that the company had received no formal credit application on behalf of the consumer (Tr. 286-87). In defense, respondents introduced testimony to demonstrate that it was their practice on occasion to solicit informal credit opinions from lenders, by providing the details of a prospective borrower's financial status without giving the borrower's name (Tr. 515-16). Respondents' witness testified that he had followed this practice in the case of complaint counsel's witness. The judge apparently believed this testimony and rejected the complaint charge.

Complaint counsel argue that respondents' position is inherently contradictory, and not credible. Respondents' witness sought to explain Peacock's practice of seeking formal credit checks in terms of solicitude for the borrower's credit record, which respondents professed to fear might be damaged if a formal application was rejected. We agree with complaint counsel that this justification is suspect in view of the fact that respondents did submit formal credit applications to some area lenders, without an advance check, and some of these applications were rejected. On the other hand, it nonetheless seems quite plausible to us that an automobile dealer would follow the procedures outlined by respondents' finance manager, that is, seeking informal advice in some instances merely because it may be cheaper and faster to make a telephone check of some lenders when a number are to be contacted.

Of course, respondents' procedure is subject to abuse. Facts conveyed orally may be presented selectively to a customer's preferred lender to elicit a rejection, and the entire process may thereby be biased in favor of the selection of the seller's favored loan institution. There was, however, no pattern of this sort suggested by complaint counsel's evidence, which involved the experience of only one consumer. On balance we must conclude that this allegation of the complaint was not proven by a preponderance of the evidence.¹⁰ We have deleted that portion of the ALJ's recommended order which would require respondents to disclose their pecuniary interest in financing arrangements, for the same reasons noted in Section III of this opinion, *infra*.

V. FAILURE TO DISCLOSE DAMAGE TO USED AUTOMOBILES

The complaint alleged that respondents repaired or repainted damaged cars to hide damage that might adversely affect a vehicle's

¹⁰ We note, however, that it would seem a sound practice for respondents to inform consumers in instances in which "rejection" of a credit application has been based merely on a telephone check. As is evident from the record, some consumers might well prefer to have a formal application submitted in such cases, and allowing this option would prevent the appearance of deception which was created by the procedures here.

performance and life expectancy, and that respondents did not disclose such damage to prospective purchasers. The complaint clearly alleged a violation of law, but the violation alleged was not proven at trial.

Complaint counsel called an automotive expert who testified that in his opinion respondents may indeed have sold used cars which had been previously damaged in a way that could affect future performance or durability. (Tr. 439) Complaint counsel's witness, however, relied entirely on inferences drawn from repair invoices. In defense, respondents introduced witnesses from the body shops which had repaired the automobiles in question (Tr. 586, 601). They testified that the repairs had been performed to new car specifications and that the damage repaired would not affect the performance or life expectancy of the cars. Further testimony indicated that it was respondents' practice to wholesale a substantial fraction of used cars which came into their possession, including those cars that were damaged in ways that could impair performance or life expectancy (I.D. p. 10[p. 1542, herein]). The administrative law judge weighed the conflicting testimony and concluded that complaint counsel had failed to prove that respondents sold cars previously damaged in ways that might impair performance or life expectancy. Complaint counsel do not appear to challenge this finding of the administrative law judge on appeal, and we see no reason to disturb it.

Despite the foregoing, the administrative law judge ordered respondents to disclose to consumers any damage in excess of \$50 to an automobile which respondents had caused to be repaired, or of which they were otherwise aware. The judge concluded that failure to disclose prior damage to an automobile, even if it did not affect performance, constituted a violation of Section 5.

We agree with the law judge that there are circumstances in which the failure to disclose prior damage to an automobile may be deceptive, even when it does not impair performance or life expectancy, but we do not believe that the judge's proposed remedy is appropriate given the facts of this case. It is clear from the record that consumers do care about the prior repair record of an automobile they are purchasing. Even damage which does not, in the view of experts, affect the performance or life expectancy of an automobile, may nonetheless affect the willingness of a consumer to buy the automobile which has sustained it. Indeed, several witnesses in the instant case testified that their own purchasing decisions would have been altered had they been aware of damage sustained by the used cars they were purchasing (Tr. 392-93, 294, 335, 351, 381, 420). To the extent that consumers may believe, or expect, that automobile dealers will not sell them late model low mileage used cars without disclosing that they have incurred

substantial damage, the failure to do so is obviously misleading, and in violation of Section 5.

At the same time, it is also clear that some sorts of minor repairs made to automobiles may well not prove material to consumer purchasing decisions, disclosure of them is not expected, and, therefore, nondisclosure is not a deception. It is also clear that a resolution of this issue has substantial implications for the sale of new cars. Respondent Peacock testified that due to mishaps during delivery, it was necessary for respondents to make minor repairs to perhaps 50 percent of the new cars they received (Tr. 573). The order proposed by the ALJ would presumably cover these cars, to the extent that damage exceeded \$50, as well as the late model used cars which were the subject of the trial.

While we share the law judge's concern for a very genuine industrywide problem, we do not believe that evidence presented at this trial is sufficient to permit a precise definition of the deceptive practice or the formulation of an appropriate remedy. Moreover, the violation which the law judge proposes to remedy was not clearly pleaded in the complaint. Under these circumstances we believe that a resolution should await a more comprehensive record, generated with the aid of respondents who are on more precise notice as to the nature of the violation under attack.¹¹

VI. FAILURE TO DISCLOSE SERVICE CHARGE

It was respondents' practice to add a handling and service charge, usually \$25, to the purchase price of used motor vehicles. (R.A. 50-51; CX 19-27) This charge was not disclosed to purchasers during sales negotiations over the price of the used car. (Tr. 74-75) Generally the service charge would simply appear on the sales invoice and conditional sales contract which the customer received when he or she arrived at respondents' place of business to take delivery of the vehicle (I.D. p. 10[p. 1542, herein]).

The ALJ found this practice in violation of Section 5. We entirely agree. Price is perhaps the most material factor in a consumer's decision to purchase a car, new or used. Failure to disclose a "service charge" when a price is quoted is in essence a misrepresentation of the price. The fact that the service charge is eventually disclosed, at the time the consumer arrives to finalize the deal, does not eliminate the harmful effects of the prior deception. It is a matter of common sense and experience that having engaged in an initial round of bargaining

¹¹ It should be noted that the language contained in the notice order issued with the complaint, and the language contained in the consent order in *Lustine Chevrolet*, Dkt. 8974 (Nov. 25, 1975 [86 F.T.C. 1196]) would merely require disclosure of damage to the extent it affects performance or life expectancy. This order provision could not be justified on the record before us.

over the purchase of an automobile, having reached a tentative agreement, and having returned to the dealership for the final signing of papers, many consumers will find themselves reluctant to back out, even if certain material changes are made in the terms which might have affected purchasing decisions had they been known earlier. Addition of a "service charge" at this late stage in a deal has the effect, whatever respondents may have intended, of exploiting this vulnerable position of a buyer who has already invested considerable effort in a transaction and for that reason is not likely to change his or her mind, even when the price ends up somewhat higher than expected. The practice is clearly deceptive and injurious.¹²

Complaint counsel object to the order entered by the administrative law judge, which required oral and written disclosure of the service charge but omitted the notice order's requirements that such disclosure occur prior to the signing of the completed retail order for a used car, and its requirement that such disclosure occur in all advertising of used cars. We agree with respondents that the notice order is unduly broad to the extent it may be construed to require mention of the service charge in advertisements for used cars which do not quote prices. We have modified the order language to require written and oral notification of service charges prior to the signing of a completed retail order, and in all advertisements for automobiles which mention price.¹³ We note that nothing in this provision prevents respondents from including the overhead costs covered by their "service charge" in the total retail price they quote to consumers for their cars, just as all other components of overhead are included in the quoted price.

VII. "NO. 1 OPEL DEALER IN THE UNITED STATES"

Respondents agreed that Peacock's claim of "No. 1 Opel Dealer in the United States" should be construed to represent that Peacock had sold more Opels than any other dealer during the applicable period. (Tr. 63) A claim of this sort may be a powerful selling tool, since some consumers believe they can obtain better selection of cars, better prices, or better service at the largest dealer. (Tr. 125-26, 235-36) The record indicates that respondents advertised in September 1971 that

¹² Respondent Peacock testified that if a customer protested, the service charge would be dropped. (Tr. 73) If true, this obviously does not excuse the prior deception, or eliminate its harm, since some consumers under the circumstances are not likely to protest, while others may not even notice the addition. (Tr. 365-66) Respondents also argue that this practice was common among area car dealers at the time of complaint. This clearly is no defense. Moreover, the Commission has obtained consent orders from several automobile dealers in the Washington, D.C. Metropolitan area proscribing the post-bargain addition of undisclosed service charges; e.g., *Lustine Chevrolet*, Dkt. 8974 (Nov. 25, 1975 [86 F.T.C. 1196]), and *Rosenthal Chevrolet*, Dkt. 8975 (Sept. 30, 1975 [86 F.T.C. 777]).

¹³ We have broadened the order to apply to the sale of new cars as well as used. There can be no justification for "low-balling" in the sale of any car, and this broadening is necessary to prevent recurrence of the practice in a different guise.

Peacock Buick was the No. 1 Opel Dealer in the United States. (CX 17, 18) At the time of the advertisement the claim was untrue, since the last month in which Peacock had been first in sales was March 1971. (CX 84-95; Tr. 213-14)

Testimony further indicated that sales figures were compiled monthly by the Buick Motor Division, indicating the top 20 Opel dealer rankings. These documents were available to any Opel dealer upon request. (Tr. 130) Respondents apparently did not check monthly to determine whether they retained their ranking, but instead waited for notification from Buick. In September 1971 they were notified by the Buick Motor Division that the Federal Trade Commission was investigating their advertising claims, and that they were not number 1. (Tr. 675-76, 689) Thereafter they ceased this claim.

The ALJ found no violation, reasoning that respondents had believed in good faith that they were number 1 up until the time they ceased their false advertising.

We do not agree with the judge's conclusion. Respondents publicized a claim which was untrue and deceptive at the time it was made. This alone constituted a violation even though respondents may have had no intention to mislead. *Gimbel Brothers, Inc. v. FTC*, 116 F.2d 578, 579 (2nd Cir. 1941). The ALJ appears to have concluded that respondents had a "reasonable basis" for their advertisements, and that their falsity was thereby excused. As a matter of law this is simply incorrect. *National Dynamics Corp., et al.*, 82 F.T.C. 488, 553 (1973), *aff'd*, *remanded as to order*, 492 F.2d 1333 (2nd Cir.), *cert. denied*, 419 U.S. 993 (1974).

Moreover, with respect to the reasonableness of respondents' continued reliance on the March dealer rankings, we cannot view the matter quite so charitably as the ALJ. It was obvious from respondents' own experience prior to March 1971 that relative dealer rankings were subject to periodic change. They further knew, or should have known, that new rankings were compiled approximately once each month, and that the truth of their September 1971 claims could, therefore, have been easily verified by a call to the Buick Motor Division (Tr. 130-31). It is the duty of each advertiser, and not the Federal Trade Commission, to ensure that advertising claims are truthful when they are made. In this case we believe it was respondents' obligation to seek the most recent reasonably available evidence bearing on their claim before they continued to make it. To allow advertisers to rely, for a reasonable basis, on outmoded data can

only encourage deception. We will enter the notice order provision pertaining to misrepresentations of dealer size (Par. I(9) of order).¹⁴

VIII. LIABILITY OF INDIVIDUAL RESPONDENTS

The administrative law judge excluded the individual respondents from the coverage of his recommended order. Peacock is a small family owned business and it is not contested that the individual respondents, president and vice-president of the corporation, formulated, directed, and controlled the acts and practices of the corporation during the time covered by the complaint (I.D. p. 5[p. 1538 herein]; RA 30-32; Tr. 47-48, 303).

With respect to the particular violations found by the Commission, the individual respondents clearly played a significant role. They were fully responsible for Peacock's advertising and for its policies with respect to imposition of a service charge on used cars. While it appears that Messrs. Peacock and Bernstein instructed their sales personnel not to misrepresent the prior use of used cars, they did acquiesce in the non-disclosure of prior use which occurred in a number of cases.

The administrative law judge recommended no order against individual respondents because in his view their testimony was "straightforward" and "not evasive" and they had attempted to settle complaints when presented with them. The law judge concluded it would be inappropriate to "stigmatize" the individuals with liability and refused to commit what he deemed "administrative over-kill." (I.D. p. 14[p. 1545, herein])

In reaching his conclusions we believe the ALJ gave too great weight to factors that are of slight relevance, while neglecting considerations of greater import. Respondents may take pride in those portions of the record which reflect favorably upon their character and business practices. In evaluating the propriety of individual liability, however, the Commission's duty is not to determine whether respondents are "good guys" or "bad guys" and act on that basis. What is relevant is whether individual liability may be necessary to prevent recurrence of the particular violations for which named individuals have been responsible. Here, the corporate respondent is small and under total control of the individuals. Were they to constitute a new dealership that did not qualify technically as a "successor corporation" to Peacock, an order against Peacock alone would be of no effect. Under these circumstances we believe that imposition of individual liability is

¹⁴ Respondents point out that the complaint challenged their misrepresentation of status in September 1970, rather than September 1971, the year to which the proof related. The complaint did, however, allege a continuing misrepresentation and respondents were apprised some months before the commencement of hearings that proof would be introduced relating to representations in September 1971. They had every opportunity to defend the charges with respect to September 1971, and we can detect no injury whatsoever from this mechanical defect in the complaint.

necessary and in accord with extensive prior precedent and Commission practice, e.g., *Standard Educators, Inc., et al. v. Federal Trade Commission*, 475 F.2d 401 (D.C. Cir. 1973); *Standard Distributors, Inc., et al. v. Federal Trade Commission*, 211 F.2d 7, 14-15 (2nd Cir. 1954); *Coran Bros. Corp., et al.*, 72 F.T.C. 1, 24-25 (1957).

An appropriate order is appended.

FINAL ORDER

This matter having been heard by the Commission upon the cross-appeals of complaint counsel and respondents' counsel from the initial decision and upon briefs and oral argument in support thereof and opposition thereto, and the Commission, for the reasons stated in the accompanying opinion, having granted in part and denied in part both appeals:

It is ordered, That the initial decision of the administrative law judge be, and it hereby is, adopted as the Findings of Fact and Conclusions of Law of the Commission to the extent not inconsistent with the accompanying Opinion.

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:

ORDER

It is ordered, That respondents Peacock Buick, Inc., a corporation, its successors and assigns and its officers, and Dr. Norman Bernstein and Michael B. Peacock, 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 advertising, offering for sale, sale or distribution, service and repair of new and used motor vehicles, or any other products or services, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

I

1. Representing, orally or in writing, directly or by implication, that any vehicle is new when it has been used in any manner, other than the limited use necessary in moving or road testing a new vehicle prior to delivery of such vehicle to the customer.

2. Offering for sale or selling any vehicle of the current or previous model year, which has been used in any manner, other than the limited

use referred to in paragraph 1 above, without orally disclosing, prior to any sales presentation, the nature of such previous use of said vehicle, *e.g.*, "student driver training car, rental car, demonstrator."

3. Advertising any vehicle of the current or previous model year which has been used in any manner, other than the limited use referred to in paragraph 1 above, without clearly and conspicuously disclosing in any and all advertising thereof the nature of such previous use of said vehicle, *e.g.*, "student driver training car, rental car, demonstrator."

4. Displaying, offering for sale or selling any vehicle of the current or the previous model year which has been used in any manner, other than the limited use referred to in paragraph 1 above, without clearly and conspicuously disclosing by decal or sticker affixed to the inside of the side window containing the manufacturer's suggested retail price or "Monroney sticker," or if space is not available thereon, in close proximity thereto, so as to be clearly visible, the nature of such previous use of said vehicle. Said decal or sticker shall also contain the following statement: "FOR EXACT MILEAGE, SEE ODOMETER." If no "Monroney sticker" is affixed to a vehicle subject to this paragraph, the prescribed decal or sticker shall be affixed to the right rear window.

5. Misrepresenting, orally or in writing, directly or by implication, the nature or extent of previous use or condition of any vehicle displayed, offered for sale or sold.

6. Representing, orally or in writing, directly or by implication, that customers, as a prerequisite for obtaining consumer credit, must obtain credit life or credit accident and health insurance; misrepresenting, in any manner, the conditions or restrictions under which consumer credit will be extended.

7. Failing to disclose orally prior to the time of the signing of any authorization for insurance coverage, and before the cost of credit life and/or credit accident and health insurance is computed and included within any disclosure statement or retail motor vehicle installment contract, that such insurance is optional; failing to disclose in writing, on the application each customer signs for credit life and/or credit accident and health insurance coverage, in a type size at least the same size as that comprising the bulk of the text, that such insurance is optional.

8. Failing to disclose, both orally and in writing, prior to the signing of the completed retail order for a motor vehicle, and in any and all advertising of such vehicles which mentions the price of a vehicle, the precise amount of any handling and service charges which will be added to the cost of the motor vehicle.

9. Representing, orally or in writing, directly or by implication, that respondent Peacock Buick, Inc., is the number 1 Opel dealer in the

United States, or using words of similar import, unless it does occupy such sales position as of the date referred to in such representation, or if no date is stated, at the time of the aforesaid representation as verified by the most recently prepared manufacturer's delivery records; misrepresenting in any manner the size, status or sales position of respondents' dealership.

II

It is further ordered:

1. That respondents forthwith distribute a copy of this order to each of their operating divisions;
2. That respondents deliver a copy of this order to cease and desist to all present and future personnel engaged in the offering for sale, or sale of any motor vehicle, and in the consummation of any extension of consumer credit or in any aspect of preparation, creation, or placing of advertising, and that respondents secure a signed statement acknowledging receipt of said order from each such person;
3. 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;
4. That each individual respondent promptly notify the Commission of each change in his business or employment status, including discontinuance of his present business or employment, and each affiliation with a new business or employment for a period of ten (10) years after the effective date of this order. Such notice shall include the address of the business or employment with which each respondent is newly affiliated and a description of the business or employment, as well as a description of the respondent's duties and responsibilities in that business or employment.

It is further ordered, That respondents shall, within sixty (60) days after the effective date of the order served upon them, 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.

IN THE MATTER OF
SIMEON MANAGEMENT CORPORATION, ET AL.

Docket 8996. Order, Dec. 19, 1975

Affidavit of respondent Darrel P. Simpson treated as motion to reopen default decision, and matter remanded to administrative law judge for a hearing and determination of the motion.

Appearances

For the Commission: *Alfred Lindeman and Paul D. Hodge.*

For the respondents: *Marvin Gross, Grayson & Gross, Inc.,* Los Angeles, Calif. for Simeon Management Corporation and Simeons Weight Clinics Foundation. *Pro se* for Medical Weight Loss, Inc. *Robert M. Aran* for Darrel P. Simpson. *David L. Cunningham,* Sausalito, Calif. for Bariatric Medical Clinics Management Corporation. *Leo Shaw,* San Diego, Calif. for Harvey J. Lobelson. *Josef D. Cooper, Cooper and Scarpulla,* San Francisco, Calif. for C.M. Norcal, Inc., HCG Weight Clinics Foundation, Peter J. Marengo, III and Joseph Costa.

ORDER REMANDING MATTER TO ADMINISTRATIVE LAW JUDGE
AS TO ONE RESPONDENT

On Jan. 7, 1975, the administrative law judge filed an initial decision as to three respondents, J. William Byrd, Medical Weight Loss, Inc., and Darrel P. Simpson. The decision was predicated on their failure to answer the complaint.¹ By letters to Charles A. Tobin dated Feb. 25, 1975, and Mar. 13, 1975, counsel for respondent Simpson asserted that Mr. Simpson had not been served with the complaint and that, at the time he was served with the Jan. 7, 1975 initial decision, he was unaware of the contents of the complaint.

On Oct. 7, 1975, the Commission denied Mr. Simpson's request without prejudice to the submission of a motion supported by an affidavit by Mr. Simpson. Mr. Simpson has now filed an affidavit and upon consideration of the affidavits of Mr. Simpson and Alfred Lindeman, Esq., complaint counsel,

It is ordered, That the aforesaid affidavit of Darrel P. Simpson be treated as a motion to reopen the default decision entered in this matter;

It is further ordered, That this matter be remanded to the administrative law judge as to respondent Simpson for a hearing and determination of the aforesaid motion.

¹ The law judge filed an initial decision as to the remaining respondents on June 18, 1975. The Commission heard oral argument on respondents' and complaint counsel's cross-appeals on Oct. 9, 1975.