

IN THE MATTER OF
CARPETS "R" US, INC., ET AL.

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

Docket 8947. Complaint, Dec. 7, 1973—Final Order, Feb. 26, 1976

Order requiring a Lanham, Md., distributor and installer of carpeting and floor coverings, among other things to cease using bait and switch tactics; misrepresenting free goods and services; misrepresenting exaggerated prices as regular and customary; misrepresenting the amount of carpeting offered for sale, *i.e.*, square feet vs. square yards; failing to disclose to customers their right to a three-day cooling-off period during which they may cancel their sales contract with full refund of monies paid; and misbranding and falsely invoicing their textile fiber products in violation of the Textile Fiber Products Identification Act.

Appearances

For the Commission: *Everette E. Thomas, Alice C. Kelleher, and Allen R. Caskie.*

For the respondents: *Ephraim Jacobs, Foley, Lardner, Hollabaugh & Jacobs, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Textile Fiber Products Identification Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Carpets "R" Us, Inc., a corporation, and Paul W. Ferrone and Homer Bandy, individually and as officers of said corporation, hereinafter referred to as respondents, have violated the provisions of said Acts, and the rules and regulations promulgated under the Textile Fiber Products Identification Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Carpets "R" Us, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 9035 Lanham Severn Rd., Lanham, Maryland.

Respondents Paul W. Ferrone and Homer Bandy are individuals and officers of the corporate respondent. They formulate, direct and control the acts and practices of the corporate respondent, including the acts

and practices hereinafter set forth. Their business address is the same as that of the corporate respondent.

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

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

COUNT I

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

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

PAR. 4. In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of their carpeting and floor coverings, the respondents have made, and are now making, numerous statements and representations by repeated advertisements inserted in newspapers of interstate circulation, by advertisements transmitted over television, and by oral statements and representations of their salesmen to prospective purchasers with respect to their products and services.

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

SPECTACULAR
DUPONT 501
\$159 up to 270 sq. ft.
continuous nylon
CARPET SALE
FREE
PADDING & LABOR
3 ROOMS — WALL-TO-WALL
- Living Room
- Dining Room
- Hall & Steps

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Complaint

Also Available: Acrilon (sic),
Polyester, Tip Sheers, Shags, etc. * * *

* * * * *

3 Rooms
DUPONT 501
\$189 * * *

* * * * *

* * * - No Extras
- No Free Gifts
Just Down to Earth
Low Prices * * *

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

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

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

3. Purchasers of the said Dupont 501 Carpet receive "free" padding and installation labor.

PAR. 6. In truth and in fact:

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

demeans the advertised carpeting. By these and other tactics, purchase of the advertised carpeting is discouraged, and respondents, through their salesmen, attempt to sell and frequently do sell the higher priced carpeting.

2. Respondents' products are not being offered for sale at special or reduced prices. To the contrary, the price respondents regularly advertise and their so-called advertised "sale" price are identical and are used to mislead prospective customers into believing there is a saving from a bona fide regular selling price. In fact, seldom, if ever, are the advertised items sold, because the offer is designed to act as the inducement for the practices set forth in Paragraph Six 1. hereof.

3. Purchasers of respondents' Dupont 501 Carpet do not receive free padding and installation labor. To the contrary, the cost of the padding and labor is added to and regularly included in the selling price of the merchandise sold to the customer.

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

PAR. 7. In the further course and conduct of their business, and in the furtherance of a sales program for inducing the purchase of their carpeting and floor coverings, respondents and their salesmen or representatives have engaged in the following additional unfair, false, misleading and deceptive acts and practices:

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

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

PAR. 8. In the further course and conduct of their aforesaid business, and in connection with the representations set forth in Paragraph Four above, respondents offer carpet with padding and installation included at a price based upon specified areas of coverage. In making such offer, respondents have failed to disclose the material fact that the prices stated for such specified areas of coverage are not applied at the same rate for additional quantities of carpet needed, but are priced substantially higher.

The aforesaid failure of the respondents to disclose said material facts to purchasers has the tendency and capacity to lead and induce a substantial number of such persons into the understanding and belief

that the prices charged for quantities of carpet needed in excess of the specified areas of coverage will not be substantially higher than the rate indicated by the initial offer.

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

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

PAR. 10. The unit of measurement usually and customarily employed in the retail advertising of carpet is square yards. Consumers are accustomed to comparing the price of carpet in terms of price per square yard, therefore respondents' use of the square foot unit of measurement confuses consumers who compare respondents' prices with competitors' prices advertised on a square yard basis. Furthermore, respondents' use of square foot measurements exaggerates the size or quantity of carpeting being offered, and therefore has the capacity and tendency to mislead consumers into the mistaken belief they are being offered a greater quantity of carpet than is the fact.

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

PAR. 11. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents have been, and now are, in substantial competition in commerce, with corporations, firms and individuals in the sale and distribution of rugs, carpeting and floor coverings and services of the same general kind and nature as those sold by respondents.

PAR. 12. The use by respondents of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and complete and into the purchase of substantial quantities of respondents' products and services by reason of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted, and now constitute, unfair methods of competition in commerce and unfair and deceptive acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

Alleging violation of the Textile Fiber Products Identification Act

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

PAR. 14. Respondents are now, and for some time last past have been, engaged in the introduction, delivery for introduction, sale, advertising, and offering for sale, in commerce, and in the transportation or causing to be transported in commerce, of textile fiber products including carpeting and floor covering and have sold, offered for sale, advertised, delivered, transported and caused to be transported, after shipment in commerce, textile fiber products, either in their original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act.

PAR. 15. Certain of said textile fiber products were falsely and deceptively advertised in that respondents in making disclosures or implications as to the fiber content of such textile fiber products in written advertisements used to aid, promote, and to assist, directly or indirectly, in the sale or offering for sale of said products, failed to set forth the required information as to fiber content as specified by Section 4(c) of the Textile Fiber Products Identification Act, and in the manner and form prescribed by the rules and regulations promulgated under said Act.

PAR. 16. Among such textile fiber products, but not limited thereto, was carpeting which was falsely and deceptively advertised in *The Washington Daily News* and *The Evening Star*, newspapers published in the District of Columbia, and having a wide circulation in the District of Columbia and various other States of the United States, in that said carpeting was described by such fiber connoting terms among which, but not limited thereto, was "Acrilon" (sic), and the true generic name of the fiber contained in such carpeting was not set forth.

PAR. 17. By means of the aforesaid advertisements and others of similar import and meaning not specifically referred to herein, respondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act in that said textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder in the following respects:

1. In disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer surface of the floor

covering and not to the backing, filling or padding, in violation of Rule 11 of the aforesaid rules and regulations.

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

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

PAR. 18. The acts and practices of respondents as set forth above were, and are, in violation of the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder, and constituted, and now constitute, unfair and deceptive acts and practices, in commerce, and unfair methods of competition, in commerce, under the Federal Trade Commission Act.

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE
LAW JUDGE

JANUARY 15, 1975

PRELIMINARY STATEMENT

[1] The Federal Trade Commission issued its complaint in this proceeding on December 7, 1973, charging respondents Carpets "R" Us, Inc., a corporation, and Paul W. Ferrone and Homer Bandy, individually and as officers of said corporation, with violation of Section 5 of the Federal Trade Commission Act, and of the Textile Fiber Products Identification Act and the implementing rules and regulations promulgated thereunder. The complaint issued in this proceeding has two parts. Count I thereof alleges the violation by respondents of Section 5 of the Federal Trade Commission Act. Count II thereof alleges [2] the violation by respondents of the Textile Fiber Products Identification Act and the implementing rules and regulations promulgated thereunder.

Respondents filed an answer to the complaint on February 12, 1974, admitting in part and denying in part the allegations of the complaint. Thereafter, prehearing conferences were held on February 28, 1974 and on April 26, 1974. Respondents' motions to dismiss the complaint as to respondent Paul W. Ferrone and to dismiss Paragraphs Seven and

Eight of the complaint were denied by order of the administrative law judge on May 24, 1974. Adjudicative hearings were held in Washington, D.C., on July 8, 1974 through July 12, 1974, and on July 29, 1974. The record was closed for the reception of evidence on August 12, 1974. Thereafter, proposed findings were filed by the parties on September 11, 1974, and replies thereto on September 26, 1974.

On October 30, 1974, the undersigned filed a request for extension of time until January 15, 1975 within which to file his initial decision in this proceeding. On November 1, 1974, the Commission issued its order extending the time to and including January 15, 1975 in which to file the initial decision in this matter.

This proceeding is before the undersigned upon the complaint, answers, testimony and other evidence, proposed findings of fact and conclusions and briefs filed by complaint counsel and by counsel for respondents. These submissions by the parties have been given careful consideration and, to the extent not adopted by this decision in the form proposed or in substance, are rejected as not supported by the record or as immaterial. Any motions not heretofore or herein specifically ruled upon, either directly or by the necessary effect of the conclusions in this decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and upon a consideration of the demeanor of the witnesses who gave testimony in this proceeding.

For the convenience of the Commission and the parties, the findings of fact made hereinafter include references to the principal supporting evidentiary items in the record. Such references are intended to serve as convenient guides to the testimony and exhibits supporting the findings of fact, but do not necessarily represent complete summaries of the evidence considered in arriving at such findings.

[3] References to the record are set forth in parentheses, and certain abbreviations, as hereinafter set forth, are used:

CCPF — Proposed Findings of Fact, Conclusions of Law and Order submitted by complaint counsel, followed by the Proposed Finding being referenced.

RPF — Proposed Findings of Fact, Conclusions of Law and Order submitted by respondents, followed by the Proposed Finding being referenced.

CCRB — Reply Brief submitted by complaint counsel, followed by page or pages being referenced.

RRB — Reply Brief submitted by respondents, followed by page or pages being referenced.

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

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

Tr. — Official transcript of the formal hearings, followed by the page number being referenced and preceded by the name of the witness whose testimony is being referenced.

FINDINGS OF FACT

1. Respondent Carpets "R" Us, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Maryland, with its principal office and place of business located at 9035 Lanham Severn Rd., Lanham, Maryland (respondents' Answer, Par. One; CX 1-4; Bandy, Tr. 7-12).

[4] 2. Respondent Homer Bandy is an individual and an officer of corporate respondent Carpets "R" Us, Inc. Mr. Bandy, together with respondent Paul Ferrone, during the period in which Mr. Ferrone was associated with the corporation, formulated, directed, and controlled the acts and practices of corporate respondent Carpets "R" Us, Inc. Mr. Bandy currently owns all the stock of the corporation, is its President, and oversees the entire operation of the corporation, including the training of sales personnel. His address is 324 Windy Way, Glen Burnie, Maryland (respondents' Answer, Par. One; Bandy, Tr. 7, 9, 15, 27, 45; CX 1-4).

3. Respondent Paul Ferrone is an individual and a former officer of corporate respondent Carpets "R" Us, Inc. His address is 3733 McTavish Ave., Baltimore, Maryland. Mr. Ferrone, together with respondent Homer Bandy, formulated, directed and controlled the acts and practices of corporate respondent Carpets "R" Us, Inc. from February 1972 to September 1973 (respondents' Answer to Request for Admissions, Nos. 1-18). Mr. Ferrone, with respondent Homer Bandy and Claude Goldsmith, formed the corporation, Carpets "R" Us, Inc., in February 1972, each owning one-third of the stock (Bandy, Tr. 10; Ferrone, Tr. 92). Shortly after incorporation, respondents Paul Ferrone and Homer Bandy became sole owners of Carpets "R" Us, Inc. by purchasing Mr. Goldsmith's interest. Thereafter they were jointly responsible for the operation of the company throughout the entire period Mr. Ferrone was associated with Carpets "R" Us, Inc. Both respondents were members of the board of directors. Respondent Paul Ferrone was President of the corporation from the date of its incorporation in February 1972 until he sold his interest to respondent Homer Bandy in September 1973 (Ferrone, Tr. 82, 84, 93, 94; CX 1).

4. Prior to association with corporate respondent Carpets "R" Us, Inc. in early 1972, respondent Paul Ferrone was employed by several carpet companies (Tr. 89). After leaving Carpets "R" Us, Inc. in

September 1973, Mr. Ferrone, in December 1973, commenced employment with a carpet company located in Laurel, Maryland, which operates several carpet stores. At the time of hearings in this matter, Mr. Ferrone had been made manager of this company. His duties, *inter alia*, include supervising and training salesmen. Mr. Ferrone's present employer is primarily engaged in the sale of carpets in stores, as opposed to in-home sales of carpet (Ferrone, Tr. 80-81, 89-90, 95).

[5] 5. Respondents are now, and for some time last past have been, engaged in the advertising, offering for sale, sale, distribution and installation of carpeting and floor coverings to the public (respondents' Answer, Par. Two). Their sales volume has been substantial, amounting to approximately \$200,000 in the calendar year 1973 (Bandy, Tr. 24). At all relevant times mentioned herein, respondents have been engaged in commerce as "commerce" is defined in the Federal Trade Commission Act. Respondents have sold and shipped carpet from their places of business located in the State of Maryland to purchasers located in Maryland, Virginia, and the District of Columbia (respondents' Answer, Par. Three). Respondents are also engaged "in commerce" by virtue of their advertising in newspapers which circulate in interstate commerce, and on television stations whose broadcast range is in interstate commerce (respondents' Answer to Request for Admissions, Nos. 5, 14-18, 23-25; Bandy, Tr. 27-30).

6. During the period from February 1972 (date of incorporation of respondent corporation; Bandy, Tr. 9) to July 14, 1972 (date of the investigational hearing in this proceeding; Bandy, Tr. 18), respondents advertised heavily in newspapers and over television for the purpose of promoting the sale of their carpeting and floor covering. There are four exhibits in the record which respondents admit are typical and illustrative of their advertising during the relevant time period (respondents' Answer to Request for Admissions, Nos. 11-18; CX 461-463, 300).

7. CX 461 is a newspaper advertisement that ran on Feb. 14, 1972 in *The Washington Daily News* (respondents' Answer to Request for Admissions, No. 12). It read as follows:

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Initial Decision

A VERY SPECIAL SALE! WALL-TO-WALL CARPET \$139.00.

LIVING ROOM — DINING ROOM — HALL & STEPS.

FREE!	up to 270
PADDING!	sq. ft. of
LABOR!	continuous Nylon
	NO EXTRAS
	Terms Available
	NO FREE GIFTS
	Just down to earth prices

[6] 8. Cx 462 is a newspaper advertisement that ran in *The Washington Daily News* on March 8, 9, 13, 15, 16, 20, 22, 23, 24, April 3, 6, 10, 11, 13, 26, 28, June 19, 20, 26, 27, 1972 (respondents' Answer to Request for Admissions, No. 14). It read as follows:

3 ROOMS

DU PONT

501

N

\$189

WALL-TO-WALL	FREE
LIVING ROOM	PADDING &
DINING ROOM	LABOR
HALL & STEPS	NO EXTRA'S
	NO FREE GIFTS
Also Available: Acrilon,	Just Down To Earth
Polyester, Tip sheers,	Low Prices
Shags, etc.	Terms Available!

9. CX 463 ran in *The Washington Daily News* on May 1, 3, 4, 5, 8, 10, 12, 15, 17, 18, 19, 23, 24, 1972 (respondents' Answer to Request for Admissions, No. 16). It read:

SPECTACULAR DU PONT 501 N \$159 Up to 270 Sq. Ft. Continuous
Nylon.

FREE PADDING & LABOR

CARPET SALE

3 ROOMS — WALL-TO-WALL

LIVING ROOM	NO EXTRAS
DINING ROOM	
HALL & STEPS	NO FREE GIFTS
Also Available: Acrilon,	Just Down To Earth
Polyester, Tip sheers,	Low Prices
Shags, etc.	Terms Available!

[7] 10. CX 300 is the text of a television commercial that ran from June 5, 1972 to September 1, 1972 (CX 104(d)). It read:

IT'S IN PROGRESS NOW * * * EXTRA SAVINGS ARE YOURS TODAY * * * DURING THIS SENSATIONAL CASH SAVING CARPET CARNIVAL AT CARPETS 'R' US

THINK OF IT * * * FOR JUST \$189.00 YOU CAN CARPET THREE FULL ROOMS WALL TO WALL * * * IN RUGGED RESILIENT RICHLY BEAUTIFUL DUPONT 501 NYLON * * * NOT JUST NYLON * * * BUT DUPONT 501 NYLON * * * COMPLETELY INSTALLED * * * FREE OF CHARGE * * * OVER QUALITY FOAM RUBBER PADDING [Overlay reads "Up to 270 Sq. Ft." at this point]

* * * * *

PLUSHES * * * TIP SHEERS * * * ACRILANS * * * POLYESTERS * * * WOOLS * * * IN ALL COLORS AND PATTERNS * * *

11. By and through the use of the above-quoted statements and representations (Findings 7-10, *supra*), respondents represented that they were making a bona fide offer to sell the advertised carpeting and floor coverings at the price and on the terms and conditions stated in their advertisements. Consumers were in fact attracted by respondents' advertisements for what appeared to be low-priced, good quality carpeting (Byrd, Tr. 127; Thomas, Tr. 183; Barnes, Tr. 197; Banks, Tr. 216; Copeland, Tr. 230; Neff, Tr. 247; Black, Tr. 271; Satar, Tr. 285; Fuimaono, Tr. 298; Johnson, Tr. 306).

12. In truth and in fact, respondents' advertisements did not constitute bona fide offers to sell the advertised carpeting, but were used primarily to obtain "customer leads" in order to sell such persons more expensive carpeting (Findings 13-15, *infra*).

13. Consumers who responded to respondents' advertisements were called upon in their homes by respondents or their salesmen. The salesmen would exhibit what was represented to be the advertised carpeting. This carpet was of such poor quality and unattractive appearance that it was self-disparaging, and prospective customers almost uniformly rejected it on sight (Gilbert, Tr. 129; Morrill, Tr. 144; [8] Ortiz, Tr. 163; Thomas, Tr. 184; Barnes, Tr. 200, 215; Banks, Tr. 218; Copeland, Tr. 233; Neff, Tr. 248, 257; Krebs, Tr. 263; Black, Tr. 273; Satar, Tr. 286; Fuimaono, Tr. 299; Washington, Tr. 322).

14. Not only was the appearance of the advertised carpet poor, but in some instances respondents' salesmen openly disparaged it and compared it unfavorably with other, more expensive types of carpeting. For example, consumer witness Ortiz testified as follows (Tr. 163):

Q. Did he show you a sample of the advertised carpet?

A. Then he downgraded it immediately. He said, "This is not anything you would

want. This is something for people who tend to stay in apartments maybe six months to a year at the most." (*See also*, Miller, Tr. 105, 113; Gilbert, Tr. 116; Carpenter, Tr. 129, 130; Thomas, Tr. 184, 195; Barnes, Tr. 201; Krebs, Tr. 263; Black, Tr. 273, 274; Johnson, Tr. 309, 318; Washington, Tr. 324.)

The salesman would then exhibit higher-priced carpeting or floor covering of superior quality which by comparison further demeaned and disparaged the advertised carpeting.

15. Respondents made very few actual sales of the advertised carpeting at the price and on the terms set forth in the advertisements. During the relevant period from February, 1972 to July 14, 1972, respondents entered into one hundred and seventy-three (173) contracts for the sale of floor coverings (CX 105-278). Of these, three contracts were for the sale of padding without carpeting (CX 214, 230, 236). Of the remaining contracts, only sixteen (16) were for the sale of carpeting identified by respondent Homer Bandy as being the "advertised" carpeting (Bandy, Tr. 70-73; CX 124, 126, 127, 129, 131, 132, 134, 137, 139, 144, 147, 179, 254, 275, 251, 252), and of those only two contracts were at a price equal to or less than the advertised price of \$189.00 (CX 126, 252).

16. The representations set forth in Findings 7-10, *supra*, were false, misleading and deceptive (Findings 12-15, [9] *supra*), and had the tendency and capacity to deceive members of the consuming public.

17. For each price at which respondents have advertised their carpeting, *i.e.*, \$139, \$159 and \$189, they have also directly represented, through use of the word "sale" — or implied — through use of such phrases as "A VERY SPECIAL SALE," "SPECTACULAR * * * CARPET SALE," AND "EXTRA SAVINGS ARE YOURS TODAY * * * DURING THIS SENSATIONAL CASH SAVING CARPET CARNIVAL * * *" — that such prices constituted a temporary reduction from their regularly established selling price, thereby affording customers substantial savings from respondents' regular selling price (Findings 7-10, *supra*). In truth and in fact, respondents never established a "regular" selling price for their advertised carpet and therefore none of the prices at which that carpet was advertised was a "reduced," or "sale," price (Findings 18-19, *infra*).

18. The first advertisement that appeared after the incorporation of Carpets "R" Us, Inc. was CX 461, featuring "A VERY SPECIAL SALE" of carpet at \$139 (Finding 7, *supra*). Obviously no "regular" price had been established at the time this advertisement appeared, and no claim was made in the advertisement that this was an "introductory" price to be favorably compared with a later "regular" price.

19. As found above, during the relevant period from February 1972 to July 14, 1972, only two sales of carpet were made at a price equal to

or less than the advertised price of \$189.00 (Finding 15, *supra*), which respondents contend is the "regular" selling price of such carpet. Such sales were not sufficient to establish a "regular" selling price for respondents' advertised carpet. CX 300, the T.V. commercial, states that the price of \$189 represents "* * * EXTRA SAVINGS ARE YOURS TODAY * * * DURING THIS SENSATIONAL CASH SAVING CARPET CARNIVAL * * *" In fact, respondents did not regularly sell the advertised carpeting, but used it to obtain "customer leads" in order to sell such persons more expensive carpeting (Finding 12, *supra*). Therefore, respondents' representations set forth in Finding 17, *supra*, were false, misleading and had the tendency and capacity to deceive members of the consuming public.

20. Respondents' advertisements (Findings 7-10, *supra*) uniformly represent that padding and installation are "free" to purchasers of their advertised carpet. As found above [10] (Findings 18-19, *supra*), respondents have never established a regular selling price for their advertised carpet. By always offering "free" padding and installation, respondents have also failed to establish a regular selling price which excludes padding and installation, and against which a "free" offer could be measured. Moreover, the cost of padding and installation was included by respondents in calculating the sale price of the advertised carpet. Respondent Homer Bandy testified concerning the "par" system used by Carpets "R" Us, Inc. He stated that the cost of padding and installation is included in each "par" figure — the minimum price at which a carpet must be sold in order for the salesman to receive his commission (Bandy, Tr. 19-21).

21. Purchasers of respondents' advertised carpeting do not in fact receive free padding and installation labor; rather, the cost of padding and labor is added to and included in the selling price of each carpet (Finding 20, *supra*). Respondents' representations are therefore unfair, misleading and deceptive, and have the tendency and capacity to deceive the consuming public.

22. During the period February 1972 to July 14, 1972, respondents advertised carpeting in terms of square feet only (CX 461, 462, 463, 300; Findings 7-10, *supra*).

23. Respondents, themselves, were billed for carpet installation in terms of square yards (CX 5-103), and respondents' customer contracts often indicated the amount of carpet sold in terms of both square feet and square yards (see, for example, CX 109, 111, 112, 113, 115, 116, 117(a), 117(b), 118, 125, 126, 127, 134, 135, 136, 137, 141, 142, 146, 149, 151, 154, 155, 156, 158, 159, 160, 161, 162, 163, 165, 166, 167, 168, 170, 171, 177, 181, 199, 207, 251).

24. Albert Wahnnon was called by complaint counsel as an expert

witness on the retail advertising of floor coverings. He is the editor of *Floor Covering Weekly*, a leading publication in the trade, which reviews advertisements in the retail carpet industry and offers guidance to carpet retailers in the merchandising, promotion, and display of carpets and floor coverings. Mr. Wahnnon is well qualified to testify concerning advertising practices in the retail carpet trade. He testified that between 90 and 95 percent of carpet retailers use square yards as the [11] unit of measurement in their advertisements; that the square yard is "almost a standard" in the industry (Wahnnon, Tr. 358-359). He further stated that his publication has taken the position that the use of "square feet" in a carpet advertisement is deceptive, misleading and deliberately harmful to the consumer (Wahnnon, Tr. 360-361).

25. There is substantial evidence in the record in the form of consumer testimony that members of the public were in fact misled by respondents' advertisements which utilized square feet; they received from them the impression that they were being offered a greater quantity of carpet than was the fact, and that the amount offered at the "special" price would fill their needs (three rooms), when in fact they required far more carpeting. These consumers received these mistaken impressions even though they were able to figure in square feet (Miller, Tr. 103; Byrd, Tr. 128; CX 146; Morrill, Tr. 142, 156; CX 215; Mrs. Robert L. Barnes, Tr. 198, 199; CX 205; Johnson, Tr. 306).

26. The unit of measurement usually and customarily employed in the retail advertising of carpets is the square yard, and therefore consumers are accustomed to compare prices of carpeting in terms of price per square yard. Respondents' use of "square feet" in their advertisements tends to exaggerate the amount of carpet being offered and thus has the tendency and capacity to mislead and deceive consumers into believing they are getting more carpeting for their money than is a fact (Findings 24-25, *supra*). This deception is heightened by other representations in the advertisements that the carpeting is sufficient for three rooms wall-to-wall — living room, dining room, and hall and steps.

27. Respondents advertised their featured carpet at, variously, \$139, \$159, or \$189 for up to 270 square feet, that is, at a range of \$4.63 to \$6.30 per square yard. The advertisements did not disclose the material fact that additional quantities of this advertised carpet, above 270 square feet, would cost the customer \$9 per square yard (CX 461, 462, 463, 300; Bandy, Tr. 73). Respondents' failure to disclose such material fact has the tendency and capacity to deceive consumers into believing that prices charged for quantities of carpeting in excess of

the featured area will be at a rate identical to, or substantially identical to, that indicated for the featured area.

[12] 28. Through the use of the false, misleading and deceptive statements, representations, and practices found above (Findings 6-27, *supra*), respondents and their salesmen have been able to induce customers into signing contracts upon initial contact, without giving them time to consider carefully the purchase and the consequences thereof. All but one of the consumer witnesses who testified in these proceedings signed a contract on the initial visit of respondents' salesmen. Some of the high pressure techniques employed by respondents' salesmen are illustrated by the following testimony:

Q. Did you contract to purchase the carpet on the first — that night when the salesman was there, or did you buy it later?

A. No, that night. As far as I remember, we didn't have time to think about it because he said that the amount he gave us for the carpet wouldn't, you know, last the next day. We had to sign right then. [Byrd, Tr. 132.]

* * * * *

A. * * * I told him I was looking for a pattern, and he told me that he had half a roll, or so much left on a roll, that he would sell that to me at a bargain price, but I had to take it right away because they may get calls and sell it to someone else.

* * * * *

Q. * * * At the price that he offered this special roll of carpet to you, did you have any time to decide on whether or not to purchase it?

A. No. We didn't have time because he stated, you know, we take it then because if he goes to another customer, it wouldn't be there because he couldn't guarantee me it would be there tomorrow. [Barnes, Tr. 201.]

* * * * *

[13] Q. Did the salesman indicate to you that there would be any limitation on the time this offer would be available for this gold carpeting?

A. Yes; that was something else. At the time I told him, I says, "I will call you back in a couple of days." I wanted to get some other prices some other place. And he said, well, he would have to know then if I was interested because in a couple days the carpeting might be that much less that they have on hand and I would have to pay the full amount for it. So I said, "Okay, then, go ahead and measure it. * * *" [Krebs, Tr. 263-264.]

29. In their advertising, respondents used the term "Acrilon"¹ to describe certain carpeting they were offering without stating the true generic name of the fiber content of such carpeting. In addition, where respondents advertised the fiber content of their carpeting, they did not disclose that such information related only to the face, pile or outer

¹ In CX 300, respondents refer to "Acrilans."

surface of the floor covering, or padding (CX 462, 463, 300; Findings 7-10, *supra*; respondents' Answer, Pars. 15-16).

30. By means of such advertisements, respondents have falsely and deceptively advertised textile fiber products in violation of the Textile Fiber Products Identification Act (15 U.S.C. §70) in that such textile fiber products were not advertised in accordance with the rules and regulations promulgated thereunder in the following respects:

1. In disclosing the fiber content information as to floor coverings containing exempted backings, fillings, or paddings, such disclosure was not made in such a manner as to indicate that such fiber content information related only to the face, pile or outer [14] surface of the floor covering and not to the backing, filling or padding, in violation of Rule 11 of the aforesaid rules and regulations.

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

3. A fiber trademark was used in advertising textile fiber products, containing only one fiber and such fiber trademark did not appear, at least once in the said advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type, in violation of Rule 41(c) of the aforesaid rules and regulations. (respondents' Answer, Par. 17; CX 461, 462, 463.)

CONCLUSIONS

INDIVIDUAL LIABILITY OF RESPONDENT PAUL W. FERRONE

It is argued that the order, if any is to be issued in this case, should not be applicable to respondent Paul W. Ferrone, individually. The contention is that since Mr. Ferrone sold out his half interest in the corporation to Mr. Bandy in September 1973, has no present association with Carpets "R" Us, Inc., and is now employed by a largely in-store retail carpet business, any order entered against him "would serve no useful purpose, and would be in the nature of a punitive action" (RPF, p. 43).

This argument has little merit. It is admitted that, while he was associated with Carpets "R" Us, Inc., Mr. Ferrone shared with respondent Homer Bandy the complete control over all aspects of the company's operation. It is settled that the Federal Trade Commission has the authority to name, individually, officers, directors, and sole stockholders of corporate respondents when they have participated in or controlled the challenged acts and practices, to prevent erosion of its

orders. *Federal Trade Commission v. Standard Education Society, et al.*, 302 U.S. 112 (1937); *Rayex Corporation v. Federal Trade Commission*, 317 F.2d 290 (2d Cir. 1963); *Standard Distributors, Inc., et al. v. Federal Trade [15] Commission*, 211 F.2d 7 (2d Cir. 1954). This authority extends to naming individuals who, prior to, but not at the time of the order, directed and controlled the challenged acts and practices, if such an order is necessary to close off any wide "loophole" through which the order might be evaded. *Benrus Watch Co. v. Federal Trade Commission*, 352 F.2d 313 (8th Cir. 1965); *Coran Bros. Corp.*, 72 F.T.C. 1 (1967); *Consumer Sales Corp. v. Federal Trade Commission*, 198 F.2d 404 (2d Cir. 1952). Failure to name Mr. Ferrone would result in such a loophole, and public interest requires that the Commission take the precautionary measure of including him in its order. Proof that he intends to evade the order is not necessary, *Coran Bros., supra*; the opportunity to evade is the loophole that must be closed. This opportunity is present since Mr. Ferrone has been engaged in the retail carpet business for several years, and is presently very much involved in the retail carpet business where his duties include the training of salesmen, the receiving of inventory, and the general supervision of a store. That his current employment involves a business retailing carpeting largely "in store" is of no consequence. "Bait and switch" tactics can be used just as easily in the store as in the customer's home.

THE UNFAIR AND DECEPTIVE ACTS AND PRACTICES

"Bait and Switch"

"Bait and switch" sales tactics have long been held to violate Section 5 of the Federal Trade Commission Act. The use of deceptive advertising to obtain leads to customers for the purpose of selling them other, higher priced goods is deceptive and unfair and has been repeatedly condemned by the Commission. *Tashof v. Federal Trade Commission*, 437 F.2d 707 (D.C. Cir. 1970); *Consumers Products of America, Inc. v. Federal Trade Commission*, 400 F.2d 930 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1088 (1969); *Guides Against Bait Advertising*, 16 C.F.R. §238 (1974). The "bait" here is poor quality carpet, advertised in such a way as to make it appear to be a tremendous bargain. Exhibition of this carpet was generally sufficient to switch the prospective customer to higher priced carpeting (Finding 13, *supra*; see also, *Guides Against Bait Advertising*, 16 C.F.R. §238.3(e)). It is not essential to show evidence of actual disparagement of the advertised product to find "bait and switch," though [16] respondents' salesmen did in fact resort to disparagement when necessary (Finding 14, *supra*). The Commission may infer that

customers were "switched" from the advertised product by evidence of bait advertising and minimal sales of the advertised product. *Tashof v. Federal Trade Commission*, *supra*, at 709-710; *see also*, *National Lead Co. v. Federal Trade Commission*, 227 F.2d 825, 832 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957). It is highly inconceivable that respondents would have engaged in substantial newspaper and television advertising for the few sales of featured carpeting that were made. There were obviously other business incentives involved.

Although the consumer testimony in these proceedings did not make it clear which of respondents' advertisements provided the "bait" for which customers, it is obvious that customers obtained respondents' telephone number from *some* advertisement, and the testimony showed that they were attracted by prices and descriptions of carpet similar to those in respondents' advertisements in the record. Moreover, sales of the advertised carpet were, in fact, minimal (Finding 15, *supra*). These facts, in combination with the poor appearance of the product and disparagement by respondents' salesmen, provide ample evidence of a "bait and switch" sales scheme.

Respondents make a strong argument that they did not refuse to show, demonstrate or sell the advertised carpeting (RPF, pp. 3-14), and the record does establish that some witnesses decided to buy carpeting on the basis of comparing the more expensive goods to the advertised goods (RPF, p. 6). The undisputed fact remains, however, that the appearance of the advertised carpeting was sufficient in and of itself to "switch" the prospective customer to the more expensive carpeting. An integral part of respondents' business operation, therefore, consisted of "baiting" consumers by means of advertising inexpensive items and subsequently inducing customers, through demonstration of the advertised inexpensive items in comparison with the more expensive carpeting, to purchase the more expensive and profitable items. Thus, respondents' purpose was accomplished, although perhaps not as egregious as in other "bait and switch" schemes where flagrant disparagement [17] and refusals to sell the advertised items have been exposed.²

USE OF "SALE"

Respondents' use of the word "sale" and words of similar import in their advertisements is unfair, misleading, and deceptive in the same way that the advertisement of a "sale" price in connection with a

² Respondents also argue (RPF, p. 18) that, during the period February through July 1972, salesmen were compensated on a straight salary basis; thus, the method of compensation being used did not discourage sales of the advertised carpeting. This argument ignores the fact that during this period most sales were made by Mr. Bandy and Mr. Ferrone who were the owners of the corporate respondent, and thus shared in the profits realized from sales of the more expensive goods (Bandy, Tr. 14).

fictitious "regular" price has been found to be unfair. *Giant Food, Inc. v. Federal Trade Commission*, 332 F.2d 977 (D.C. Cir. 1963). In each case, because there is no actual, established regular price, there can be no "sale" price, and therefore no "savings" to the consumer; representations to the contrary are grossly unfair. See also the Commission's *Guides Against Deceptive Pricing*, 16 C.F.R. §233.1(e)(1974).

Respondents argue that \$189 was the regular price of the advertised carpeting during the February — July 1972 period, and that the word "sale" was not used in the \$189 advertisements (RPF, pp. 19-22). Without conceding that \$189 was a bona fide regular selling price, it is observed that the T.V. commercial used during the relevant period represented that at the \$189 price "EXTRA SAVINGS" could be realized during what was stated to be a "* * * SENSATIONAL CASH SAVING CARPET CARNIVAL" (CX 300).

"FREE" PADDING AND INSTALLATION

To represent that merchandise or services are offered "free" in connection with the sale of other merchandise or services, there must have been an established regular price on which to base the "free" offer. *Federal Trade Commission v. [18] Mary Carter Paint Co., et al.*, 382 U.S. 46 (1965). It is plainly deceptive to represent that padding and installation are "free" if their cost, unknown to the purchaser, is included in the price of the advertised merchandise as was done here (Finding 20, *supra*). *Sunshine Art Studios, Inc. v. Federal Trade Commission*, 481 F.2d 1171 (1st Cir. 1973); *Mary Carter Paint Co., et al., supra*; see also *Guide Concerning Use of the Word "Free" and Similar Representations*, 16 C.F.R. §251 (1974).

USE OF "SQUARE FEET"

Respondents' practices of advertising carpet in terms of square feet only, and of failing to disclose in their ads the higher rates charged for quantities of carpeting beyond the advertised amounts, are unfair and have the tendency and capacity to deceive the public. The deceptiveness of these representations was enhanced by respondents' reference in the advertisements to three rooms of wall to wall carpeting in conjunction with the use of square feet. It is of no matter that customers were informed of the true facts concerning respondents' offers before they made their purchases. The harm was done on initial contact, in that these practices served to enhance the "bait" quality of respondents' advertisements. *Exposition Press, Inc. v. Federal Trade Commission*, 295 F.2d 869, 873 (2d Cir. 1961), *cert. denied*, 370 U.S. 917

(1962); *Carter Products, Inc. v. Federal Trade Commission*, 186 F.2d 821, 824 (7th Cir. 1951).

Actual deception of the public is not necessary to a finding of violation, a tendency and capacity to deceive being sufficient. *Feil v. Federal Trade Commission*, 285 F.2d 879 (9th Cir. 1960); *Montgomery Ward & Co. v. Federal Trade Commission*, 379 F.2d 666 (7th Cir. 1967). The Federal Trade Commission Act was not intended to protect "sophisticates," *Giant Food, Inc. v. Federal Trade Commission*, *supra*, but the unthinking and credulous who do not stop to analyze but are governed by general impressions. *Helbros Watch Company, Inc. v. Federal Trade Commission*, 310 F.2d 868 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 976 (1963). It is therefore concluded that, in the context of all representations made, the use of square feet has the tendency and capacity to deceive the consumer. *J. B. Williams Co. v. Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967). [19]

OTHER PRACTICES

It is an unfair trade practice to manipulate a prospective customer by high pressure tactics which preclude a careful consideration of the entire transaction, free from the influence of deceptive sales technique. There is substantial evidence in this record that respondents used such tactics on occasion to induce customers to sign a purchase contract on the initial contact (Finding 28, *supra*). *Household Sewing Machine Co., Inc.*, 76 F.T.C. 207, 242-243 (1969); *Federal Trade Commission v. National Lead Co.*, 352 U.S. 173 (1944); see Trade Regulation Rule, *Cooling Off Period for Door-to-Door Sales*, 16 C.F.R. §429 (1974).

THE REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to insure the discontinuance of the unlawful practice found. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965). The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 613 (1946); *Federal Trade Commission v. Ruberoid Co.*, 343 U.S. 470 (1952). It is settled that the Commission, as part of its remedial powers, has the authority to require respondents to take affirmative action, or make affirmative statements in advertising. *Federal Trade Commission v. Colgate-Palmolive*, *supra*; *American Cyanamid Co. v. Federal Trade Commission*, 401 F.2d 574 (6th Cir. 1968), *cert. denied*, 394 U.S. 920 (1969). An order going so far as to require disclosures and disclaimers that detracted greatly from the image of the advertiser was

upheld in *LaSalle Extension University*, 78 F.T.C. 1272 (1971), *aff'd*. No. 71-1648, 7th Cir., Oct. 23, 1973 (unreported).

In the "Notice Order"* attached to the complaint, and in their proposed order, complaint counsel have included a provision requiring respondents to disclose clearly and conspicuously, by means of a black-bordered notice in all their advertisements, the fact that they have been found to "engage in bait and switch advertising."

Granted the wide leeway given the Commission in framing orders, nevertheless the undersigned will not adopt in this [20] case complaint counsel's proposal for a black-bordered "consumer warning" provision in respondents' future advertising (CPF, pp. 47, 51-52). In two recent cases, *Wilbanks Carpet Specialists*, Dkt. No. 8933 [84 F.T.C. 510], and *Tri-State Carpets, Inc.*, Dkt. No. 8945 [84 F.T.C. 1078], the Commission has struck similar warning provisions from orders issued in the initial decisions. The facts in those two cases are very similar to those in the case at hand. Therefore the undersigned sees no reason for incorporating the proposed warning provision in the order to be entered in this case.

The remaining provisions of the order entered herewith are reasonably related to the violations of law which the record discloses, and are necessary to correct such violations and to prevent evasion of the order.

CONCLUSIONS OF LAW

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

2. Respondents have engaged in false, misleading and deceptive advertising, and used unfair and deceptive acts and practices in the offering for sale, sale and distribution of carpeting and floor coverings.

3. The aforesaid acts and practices of respondents were to the prejudice and injury of the public and of respondents' competitors and constituted deceptive acts or practices and unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act.

4. In the course and conduct of their business, respondents have failed to comply with the Textile Fiber Products Identification Act and the rules and regulations promulgated thereunder and, pursuant to Section 7(a) and (b) of the Textile Fiber Products Identification Act, such failure constitutes a violation of the Federal Trade Commission Act. [21]

* Not reproduced herein.

ORDER

I

It is ordered, That respondents Carpets "R" Us, Inc., a corporation, its successors and assigns, and its officers, and Paul W. Ferrone and Homer Bandy, 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 of carpeting and floor coverings, or any other article of merchandise, in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of carpeting or other merchandise or services.

2. Making representations, directly or indirectly, orally or in writing, purporting to offer merchandise or services for sale when the purpose [22] of the representation is not to sell the offered merchandise or services but to obtain leads or prospects for the sale of other merchandise or services at higher prices.

3. Disparaging in any manner, or discouraging the purchase of any merchandise or services which are advertised or offered for sale.

4. Representing, directly or indirectly, orally or in writing, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Failing to maintain and produce for inspection and copying, for a period of three (3) years following the date of publication of any advertisement, adequate records to document for the entire period during which each advertisement was run and for a period of six (6) weeks after the termination of its publication in press or broadcast media:

(a) the cost of publishing each advertisement including the preparation and dissemination thereof;

(b) the volume of sales made of the advertised product or service at the advertised price; and

[23] (c) a computation of the net profit from the sales of each advertised product or service at the advertised price.

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

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

8. Representing, directly or indirectly, orally or in writing, that any amount is respondents' regular price for any article of merchandise or service unless said amount is the price at which such merchandise or service has been sold or [24] offered for sale by respondents for a reasonably substantial period of time in the recent regular course of their business and not for the purpose of establishing fictitious higher prices upon which a deceptive comparison or a "free" or similar offer might be based.

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

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

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

12. Failing to maintain and produce for inspection or copying, for a period of three (3) years following the date on which any savings

claims, sales claims, or other similar representations are made, adequate records (a) which disclose the facts upon which any savings claims, sale claims, price or value claims and other similar [26] representations as set forth in Paragraphs 7, 8, 9, 10 and 11 of this order are based, and (b) from which the validity of any such representations can be determined.

13. Representing, directly or indirectly, orally or in writing, that any merchandise or service is furnished "free" or at no cost to the purchaser when, in fact, the cost of such merchandise or service is regularly included in the selling price of the merchandise or service.

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

15. Representing, directly or indirectly, orally or in writing, that a "free" offer is available in a trade area for more than six (6) months in any twelve (12) month period. At least thirty (30) days shall elapse before another such "free" offer is made in the same trade area. No more than [27] three (3) such "free" offers shall be made in the same area in any twelve (12) month period. In such period, respondents' sales in that area of the product or service in the amount, size or quality promoted with the "free" offer shall not exceed fifty percent (50%) of the total volume of its sales of the product or service, in the same amount, size or quality, in the area.

16. Advertising any carpeting or floor covering using as the unit of measurement square feet, unless the unit of measurement square yards is also employed in immediate conjunction therewith and with equal prominence, or using any term or terms, such as "three rooms," which tend to exaggerate the size or quantity of carpeting being offered at the advertised price.

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

[28] 18. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract is not used, and in

boldface type of a minimum size of ten points, a statement in substantially the following form:

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

19. Failing to furnish each buyer, at the time he signs the sales contract or otherwise agrees to buy consumer goods or services from the seller, a completed form in duplicate, captioned "NOTICE OF CANCELLATION," which shall be attached to the contract or receipt and easily detachable, and which shall contain in ten point boldface type the following information and statements in the [29] same language, *e.g.*, Spanish, as that used in the contract:

NOTICE OF CANCELLATION

[enter date of transaction]

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

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

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

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

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM, TO *[Name of seller]*, AT[30] *[address of seller's place of business]*, NOT LATER THAN MIDNIGHT OF *[date]*.

I HEREBY CANCEL THIS TRANSACTION.

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Initial Decision

[Date]

[Buyer's signature]

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

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

22. Failing to inform each buyer orally, at the time he signs the contract or purchases the goods or [31] services, of his right to cancel.

23. Misrepresenting, directly or indirectly, orally or in writing, the buyer's right to cancel.

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

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

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

[32] *Provided, however*, That nothing contained in Part I of this order shall relieve respondents of any additional obligations respecting contracts required by Federal law or the law of the State in which the contract is made. When such obligations are inconsistent with the provisions of this order, the Commission, upon proper showing, shall make such modifications as may be warranted in the premises.

II

It is further ordered, That respondents Carpets "R" Us, Inc., a corporation, its successors and assigns, and its officers, and Paul W. Ferrone and Homer Bandy, individually and as officers of said corporation, and respondents' agents, representatives, and employees,

directly or through any corporation, subsidiary, division or other device, in connection with the introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, [33] of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

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

B. Falsely and deceptively advertising textile products by:

1. Making any representations, by disclosure or by implication, as to fiber content of any textile fiber product in any written advertisement which is used to aid, promote or assist, directly or indirectly, in the sale, or offering for sale, of such textile fiber product unless the same information required to be shown on the stamp, tag, label or other means of identification under Sections 4(b)(1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, [34] except that the percentages of the fibers present in the textile fiber product need not be stated.

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

3. Using a fiber trademark in advertising textile fiber products without a full disclosure of the required fiber content information in at least one instance in said advertisements.

4. Using a fiber trademark in advertising textile fiber products containing only one fiber without such fiber trademark appearing at least once in the advertisement, in immediate proximity and conjunction with the generic name of the fiber, in plainly legible and conspicuous type. [35]

III

It is further ordered, That respondents shall maintain, for at least a one (1) year period, copies of all advertisements, including newspaper,

radio and television advertisements, direct mail and in-store solicitation literature, and any other such promotional material utilized for the purpose of obtaining leads for the sale of carpeting or floor coverings, or utilized in the advertising, promotion or sale of carpeting or floor coverings and other merchandise, and make such materials available to the Commission staff for inspection and copying upon reasonable notice.

It is further ordered, That respondents shall provide each advertising agency utilized by respondents to obtain leads for the sale of carpeting or floor coverings, or to advertise, promote, or sell carpeting or floor coverings and other merchandise, with a copy of this order.

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

It is further ordered, That respondents deliver a copy of this order to all present and future personnel of respondents engaged in the offering for sale, sale of any product, consummation of any extension of consumer credit [36] 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.

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

It is further ordered, That the individual respondents, Paul W. Ferrone and Homer Bandy, promptly notify the Commission of the discontinuance of their present business or employment and of their affiliations with a new business or employment. Such notice shall include respondents' current business addresses and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

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

OPINION OF THE COMMISSION

BY NYE, *Commissioner*:

[1] The complaint in this matter was issued on December 7, 1973. It charged respondents Carpets "R" Us, Inc., Paul W. Ferrone, and Homer Bandy, individually and as officers of Carpets "R" Us, with a

variety of unfair and deceptive acts and practices in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. §45) and with violation of the Textile Fiber Products Identification Act and the implementing rules and regulations promulgated thereunder. Hearings were held before Administrative Law Judge Ernest G. Barnes and an initial decision was rendered on January 15, 1975. Judge Barnes found that respondents had engaged in illegal "bait-[2]and-switch" tactics; had used the word "free" and words such as "sale" in misleading and deceptive ways; had engaged in unfair high-pressure tactics, and had advertised carpet in terms of "square feet" only, which was unfair and had the tendency and capacity to deceive the public.

Respondents have appealed from the initial decision on several procedural and substantive grounds, and ask that the case be dismissed. In the alternative, respondents propose substantial modifications of the order entered by the administrative law judge. Oral argument was waived.

The decision of Judge Barnes is, except as noted herein, affirmed. Except as qualified or changed by this opinion, we adopt his findings and conclusions and his order.

Respondents and counsel supporting the complaint have conveniently organized the issues in their appeal briefs:

I. ALLEGED FAILURE OF THE COMMISSION STAFF TO ADHERE TO PROCEDURAL REQUIREMENTS.

Respondents allege that they were prejudiced by two violations of the Commission's Rules of Practice. They claim they were deprived of an opportunity to negotiate a settlement before issuance of a complaint because they did not receive formal notification from the Bureau of Consumer Protection before the complaint was issued. They also claim their opportunity to negotiate was prejudiced because the complaint issued contained two paragraphs that were not present in the complaint as originally proposed.

[3] On May 24, 1974, the administrative law judge issued an order denying respondents' motion to dismiss those two paragraphs from the complaint. In his order, Judge Barnes discussed both of the alleged errors and correctly concluded that respondents had suffered no substantial prejudice. We adopt his conclusions and his analysis. In addition, with regard to the first claimed error — that notification from the Bureau of Consumer Protection was not received — we note that

respondents received actual notification by means of a phone call from the Regional Office.¹ Respondents deny the adequacy of this notice because it was not transmitted directly from the Bureau. Their conclusion is based on an erroneous interpretation of the rule in question. That rule stated:

* * * [I]f at any time it appears to the operating Bureau in which the matter is then pending that the execution of a satisfactory agreement is unlikely, such Bureau, after notification to the proposed respondents of its intention to do so, shall submit the matter to the Commission, * * *. Procedures and Rules of Practice, Section 2.34(c) (now superseded).

The rule only specifies "such Bureau, after *notification* to the proposed respondents" (emphasis added), *not* "after *notifying* the proposed respondents," as it would read if the intent was that only notification directly from the operating Bureau would suffice. Therefore, there has not only been no prejudice to respondents, but no violation of the rule has been shown. [4]

II. RESPONDENTS USE OF "BAIT-AND-SWITCH" TACTICS.

Respondents claim there is not "reliable, probative and substantial evidence" to support Judge Barnes' findings of the use of "bait-and-switch" tactics. Respondents have urged that we consider "all the evidence," and not just that most favorable to one side. We have considered all the evidence, and think the initial decision's finding of "bait-and-switch" tactics was clearly correct.²

Although, as Judge Barnes correctly ruled,³ proof of actual written or verbal disparagement is not essential to a finding of "bait and switch,"⁴ the record in fact contains several clear examples of disparagement by salesmen.⁵ [5] Such disparagement by salesmen is not surprising because the salesmen directly benefited from sales of the more profitable merchandise — as complaint counsel correctly point out, two

¹ Order Denying Respondents' Motion to Dismiss Paragraphs Seven and Eight of the Complaint at 1-2.

² While one must consider all the evidence, and not only that favorable to complaint counsel, one is not required to ignore all but the one or two statements favorable to respondents. While saying that we should consider "all the evidence," respondents suggest several *parts* of the evidence for our attention. For instance, as proof that there was no disparagement of the advertised carpet, respondents offer the testimony of Mrs. Satar: When asked whether the salesman made any remarks about the advertised carpeting, she said: "No. I don't think so * * *." Respondents' Appeal Brief at 12. They omit the sentence that follows: "I really have forgotten now. It has been over two years." (Tr. 287) They also cite Mrs. Copeland's statement that "the salesman didn't say too much about the advertised carpet." Respondents' Appeal Brief at 12. They carefully omit the first part of her answer to the question of what statements were made about the advertised carpet: "Oh, well, he did mention that he had a better grade, you know, grade of carpet, and I believe he went out to the car to get it, but he didn't say too much about the advertised carpet." (Tr. 233)

³ Initial decision p. 15.

⁴ *Tashof v. F.T.C.*, 437 F.2d 707, 709-10 (D.C. Cir. 1970).

⁵ *E.g.*, Tr. 105, 113, 163, 184-95, 201.

of the three salesmen during the period in question were officers and owners of Carpets "R" Us.⁶ Both disparagement by salesmen and a sales plan that discourages sales of the advertised product are indicia of bait-and-switch tactics.⁷ Further evidence is found in the minimal sales of the advertised carpeting.⁸

Respondents make much of the fact that two parties said the carpet shown them looked like the sample displayed in their television advertisements.⁹ On the other hand, three witnesses said the carpet did not look like the advertised sample.¹⁰ But, as even (unquoted) testimony of the three [6] witnesses quoted by respondents regarding the advertised sample makes clear, the question is not simply whether the offered carpet happened to look like the advertised one looked on television. The question is whether the advertising presentation created a false impression.¹¹ Respondents' own examples are evidence that customers had been given the false impression that good quality carpeting was available at bargain prices.¹² It is the falsity of the total impression, not merely the similarity of surface appearances, [7] that is

⁶ Tr. 14 (Bandy).

⁷ See Guides Against Bait Advertising, 16 C.F.R. §238 (1975).

⁸ *Tashof v. Federal Trade Commission*, 437 F.2d 707 (D.C. Cir. 1970). During the relevant period, only 16 of the 170 contracts entered into for carpeting were for the sale carpeting (and only two of those were at or below the sale price). (I.D. p. 8) Respondents claim this gives a misleading impression because some of the 170 sales were for less than wall-to-wall carpeting. But advertising wall-to-wall carpeting "bargains" in order to obtain leads to exploit for the sale of standard size carpets does not insulate a merchant's conduct from challenge. The type of merchandise is still basically the same. See Guides Against Bait Advertising, 16 C.F.R. §238.0 (1975).

⁹ Respondents' Appeal Brief at 14-15.

¹⁰ Tr. 233, 263, 322.

¹¹ Guides Against Bait Advertising, 16 C.F.R. §238.2 (1975).

¹² When Mrs. Gilbert, for instance, was asked whether the carpet shown her looked like the carpet on television, she said it did. But when asked what it looked like (two questions earlier), she'd said "It was real thin" (Tr. 115), and she purchased the more expensive carpeting instead. Now, it is not clear why she phoned Carpets "R" Us, but presumably it was *not* to get carpeting that was "real thin."

The other two witnesses cited by respondents are even better examples of the problem. Mr. Fuimaono was asked what the carpet looked like, and he said it looked "the same that I saw on television." But he continued: "Then, both my wife and I were present at the time. We touched the material. * * * ["And what did you think of the texture and the quality of the carpeting?"] "The first appearance to both of us, and especially me, I think right away I don't want it that quality." [Question] "It was kind of very light and it is not heavy enough for the kind of place that I want to be carpeted." (Tr. 299) In other words, even though it "looked like" the advertised carpet, upon feeling it they found it was not adequate to their needs — and, presumably, not what they had expected.

Finally, respondents cite Mrs. Norman Byrd's testimony that she and her husband had planned to take the advertised carpet. Respondents' Appeal Brief at 15. But what Mrs. Byrd actually said was that they had decided they couldn't afford anything more than the advertised price, and were therefore planning to buy the advertised carpet. How did the carpet appear? "Well, it wasn't much, you know. But, then he told us about the other carpet and compared it." ["Did you think that the advertised carpet was adequate? Were you planning on buying that carpet or did you not plan on buying it after seeing it?"] "We *had* planned on buying it, yes." (Emphasis added). ["What did the salesman do at that point?"] "Well, he said that it would only last for a couple of years. Then he showed us the other carpet. We compared the two." [Question] "Yes, there was no comparison." Respondents apparently read the above exchange as saying that Mrs. Byrd and her husband carefully examined the advertised carpet, decided to buy it, and then realized that even though they could afford nothing more they would spend a great deal more anyway. We read the above exchange as saying that they had decided to spend no more than the advertised carpet cost but were "switched" by being shown the cheap carpet, having it compared with a more expensive carpet, and being told the cheap one would not last long.

determinative. That one is switched only after closely examining or perhaps handling the bait makes the switching no more acceptable.¹³

Finally, there is evidence of bait-and-switch tactics that is not emphasized in the briefs or in the initial decision. The "bait" in this case was (what appeared to be) good quality carpeting complete with free installation and a free pad. Yet even among those customers too poor to afford anything better than the advertised carpeting, almost no one was willing to accept the advertised "free" pad. Respondents [8] say this was a "separate strong rubber pad."¹⁴ But they admit that a "heavier, more expensive padding, 'King Midas' " was available and, "if customers decided on the heavier padding, they were charged accordingly."¹⁵ They quote Mrs. Miller: "I did not like the padding that they had with the advertised carpet," and so, instead of spending \$189 and getting "free" padding, she spent \$219.¹⁶ Mrs. Miller was not alone. Using respondents' list of sales of the advertised carpet,¹⁷ of the 17 sales only *one* customer ordered a plain "rubber" pad.¹⁸ One can only infer that even the customers with the lowest standards and the least to spend found the "free" pad so self-disparaging or so disparaged that they would not take it. This, by itself, is "bait and switch." The bait is carpeting with a free pad; the customer is then switched from the "free" pad that attracted him in the first place to an (obviously) much more expensive pad. [9]

III. RESPONDENTS' USE OF THE WORDS "SALE," "SAVINGS TODAY," AND WORDS OF SIMILAR IMPORT.

Respondents suggest that "The word (sic) 'savings' and 'sale' are not synonymous and have entirely different connotations." They argue that since the word "sale" was reserved for prices below \$189, and only the word "savings" was used with that price, the word "sale" was properly used.¹⁹ The flaw in this line of reasoning is that respondents in their television advertisement did not just say "Save at Carpets 'R' Us." They said:

IT'S IN PROGRESS NOW * * * EXTRA SAVINGS ARE YOURS TODAY * * *
DURING THIS SENSATIONAL CASH SAVING CARPET CARNIVAL * * *

¹³ Respondents profess to be "amazed" at Judge Barnes' finding that the advertised carpet was self-disparaging. We are not. One can easily conclude that carpet is self-disparaging without having seen it. This is not, after all, a pornography case. Numerous witnesses testified to the obvious undesirability of the carpet, and neither respondents' amazement nor the fact that a few customers could afford nothing better is proof that his conclusion was erroneous.

¹⁴ Respondents' Appeal Brief at 15.

¹⁵ *Id.* at 9.

¹⁶ *Id.* at 10.

¹⁷ *Id.* at 14.

¹⁸ Twelve customers purchased "King Midas," one purchased a "Mark 4" pad, one used his own, one ordered a "foam rubber" pad, and there is no notation on one order. (CX 117, 126, 127, 129, 132, 134, 147, 149, 144, 145, 147, 251, 252, 124, 131, 275, 254.)

¹⁹ Respondents' Appeal Brief at 20.

Now, what is the purpose and hoped for effect of a sale? Is not the essence of a sale that the merchant has temporarily significantly departed from prior and expected future pricing patterns? A sale "suggests to the consumer the advisability of taking *immediate* advantage of the unusual prices being offered * * *."²⁰ In short, the *definition* in the consumer's mind of the word "sale" is "savings today," and that is precisely the message respondents conveyed. That they falsely and misleadingly used the definition instead of the word is immaterial either in terms of the harm done or the [10] legal wrong.²¹

IV. THE FINDING OF INDUCEMENT WITHOUT ADEQUATE TIME TO CONSIDER THE PURCHASE AND THE CONSEQUENCES THEREOF.

This finding is clearly supported by the evidence. Once again, even the witnesses cited by respondents offer evidence against them.²² Respondents suggest that these [11] and similar transgressions are excused because some of the customers retained a right of cancellation.²³ Even if each customer knew he had an enforceable right to cancel his order, initial pressure of the kind found here would not be excused. The power of inertia is a fact in both physics and human affairs. An unexercised right of cancellation does not excuse the harm caused by unfair sales pressures.²⁴

V. RESPONDENT FERRONE

The Commission has decided not to exercise its discretion and

²⁰ *Hollywood Carpets, Inc., et al.*, Dkt. 8983 (Sept. 22, 1975), *Slip Op.*, p. 3 [86 F.T.C. 784 at 816].

²¹ There is one aspect of the initial decision that might be misinterpreted. Finding 18 suggests that a merchant can never open business with a sale because, by definition, on the first day of business there can be no "regular" established price from which a reduction can be made. That is not the case. A merchant may open business with a sale if he expects, in good faith, to establish a bona fide regular (higher) price when the temporary period of the opening sale is ended. *Cf.* Guide Concerning Use of the Word "Free" and Similar Representations, 16 C.F.R. §251.1(f) (1975). This has little effect on respondents now that they have established their businesses, but the order should provide that if respondents go into a new line of business they would be allowed to open with a sale.

²² While Mrs. Copeland, for instance, did say that the salesman didn't "twist her arm," she also said "but he kind of stayed on me, you know, until we signed the contract." (Tr. 244-5) One of the more egregious cases is that of Mr. Washington, whom respondents cite as saying he wanted "quick service" because he had some house guests coming. (Respondents' Appeal Brief at 24; Tr. 325) Mr. Washington also said that after he had picked out a desirable carpet from the expensive collection the salesman "said it was a good selection because he had just finished carpeting his daughter's house with this particular carpet and that he just had enough to carpet downstairs from the living room, dining room and the hallway." (Tr. 324)

That sort of sales pitch was not unusual. For instance, Mrs. Byrd said: "[W]e didn't have time to think about it because he said that the amount he gave us for the carpet wouldn't, you know, last the next day. We had to sign right then." (Tr. 132) When Elizabeth Morrill had picked out an expensive carpet but, when told the price, had said "I just couldn't pay that much," the salesman said, "Well, I think I have a partial bolt of this very carpeting in the warehouse, and it will be the right amount to cover the area that you have here." (Tr. 146) Witness Barnes was told that the advertised carpet wouldn't go with her furniture "anyway, and we have this, so much left, and I will sell it to you at a price. If you don't buy it today, I wouldn't guarantee to you that it would be there tomorrow. Somebody else might buy it." (Tr. 215).

²³ Respondents' Appeal Brief at 22-4.

²⁴ *Cf. Exposition Press, Inc. v. F.T.C.*, 295 F.2d 869 (2d Cir. 1961), *cert. denied*, 370 U.S. 917 (1962).

dismiss the complaint against respondent Ferrone. His allegedly poor health has not kept him from being gainfully employed in the carpet business and there is no reason to think it would keep him from repeating the violations we have found him and "Carpets 'R' Us" liable for. Nor are we moved by his claim that his following our order will work [12] financial hardship. That the amount of "hardship" is great is doubtful; that he has committed violations requiring a check against reoccurrence is not.²⁵

VI. DISCUSSION OF THE PROPOSED ORDER

Respondents suggest several reasons why the order in this case should be less comprehensive than in other bait-and-switch cases we have considered. Respondents argue, for instance, that they did not originate bait-and-switch advertising.²⁶ But if the Commission only issued remedial and preventive orders against the original sinners, there would be few orders indeed.²⁷ Nor is the argument that respondents have no intention to sell products other than carpets and floor coverings a persuasive reason to limit the order's applicability to those products.²⁸ If respondents never sell any other products, a broader order will be of no additional burden; if respondents do sell other products, it is important that they be prevented from using the easily transferable technique of bait and switch. Finally, respondents argue that no finding has been made that consumers were misled or deceived by the illegal use of the term "continuous [13] nylon."²⁹ The Textile Fiber Products Identification Act is phrased neither in terms of intent nor in terms of result, however, but rather is an absolute bar to certain misuses of textile identifications.

In short, we are not persuaded that the order in this case should be substantially less comprehensive than in other bait-and-switch cases we have considered. Regardless of how honorable respondents' intentions may have been, when clear violations of the Federal Trade Commission Act have occurred the Commission would be remiss in its duties if it did not reduce the temptation offered by similar illegal business methods by to some extent fencing respondents in. The courts have recognized the importance of this role of the Commission, and we have been

²⁵ In keeping with the Commission's recent practice, however, we have limited the reporting requirements to ten years. See pp. 13-14 *infra*.

²⁶ Respondents' Appeal Brief at 30.

²⁷ Cf. Genesis 3.

²⁸ Respondents' Appeal Brief at 29.

²⁹ *Id.* at 30.

granted a wide discretion to choose a remedy that will cope with the unlawful practices found.³⁰ The remedy chosen in this case is necessary to do so.

There is one reduction in the severity of the administrative law judge's order that we do deem appropriate. This concerns the reporting requirements of the order. While we do not necessarily believe the ALJ's provision would make the obtaining of future employment more difficult, as suggested by respondents,³¹ we do think it unreasonably burdensome [14] that only death can release respondents from the requirement of reporting employment changes to the Federal Trade Commission. Surely a period lasting a decade provides sufficient supervision.

An appropriate order is appended.

FINAL ORDER

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

It is ordered, That the following portions of the initial decision of the administrative law judge be, and they hereby are, adopted as the Findings of Fact and Conclusions of Law of the Commission: pp. 3-9 (except for finding 18, p. 9); pp. 9-17 (except for the second full sentence on p. 17); pp. 17-20 (except for the last full paragraph on p. 19 and the carryover paragraph, pp. 19-20).

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

I

It is ordered, That respondents Carpets "R" Us, Inc., a corporation, its successors and assigns, and its officers, and Paul W. Ferrone and Homer Bandy, 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 of carpeting and floor coverings, or any other article of merchandise, in

³⁰ *Fedders v. F.T.C.*, Civil No. 75-4051 (2d Cir., filed 1/21/76).

³¹ Respondents' Appeal Brief at 32.

commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Using, in any manner, a sales plan, scheme, or device wherein false, misleading, or deceptive statements or representations are made in order to obtain leads or prospects for the sale of carpeting or other merchandise or services.

2. Making representations, directly or indirectly, orally or in writing, purporting to offer merchandise or services for sale when the purpose of the representation is not to sell the offered merchandise or services but to obtain leads or prospects for the sale of other merchandise or services at higher prices.

3. Disparaging in any manner, or discouraging the purchase of any merchandise or services which are advertised or offered for sale.

4. Representing, directly or indirectly, orally or in writing, that any merchandise or services are offered for sale when such offer is not a bona fide offer to sell such merchandise or services.

5. Failing to maintain and produce for inspection and copying, for a period of three (3) years following the date of publication of any advertisement, adequate records to document for the entire period during which each advertisement was run and for a period of six (6) weeks after the termination of its publication in press or broadcast media:

- (a) the cost of publishing each advertisement including the preparation and dissemination thereof;

- (b) the volume of sales made of the advertised product or service at the advertised price; and

- (c) a computation of the net profit from the sales of each advertised product or service at the advertised price.

6. Advertising the price of carpet, either separately or with padding and installation included, for specified areas of coverage without disclosing in immediate conjunction and with equal prominence the price for additional quantities of such carpet under the same conditions.

7. Using the words "Sale," "Savings Now," "Clearance," or any other word or words of similar import or meaning not set forth specifically herein, unless the price of such merchandise or service being offered for sale constitutes a reduction, in an amount not so insignificant as to be meaningless, from the actual bona fide price at which such merchandise or service was sold or offered for sale to the public on a regular basis by respondents for a reasonably substantial period of time in the recent regular course of their business or, if the merchandise or service is being newly introduced, from the actual bona fide price respondents in good faith plan to establish when the temporary period of the opening sale is ended.

8. Representing, directly or indirectly, orally or in writing, that any amount is respondents' regular price for any article of merchandise or service unless said amount is the price at which such merchandise or service has been sold or offered for sale by respondents for a reasonably substantial period of time in the recent regular course of their business and not for the purpose of establishing fictitious higher prices upon which a deceptive comparison or a "free" or similar offer might be based.

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

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

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

12. Failing to maintain and produce for inspection or copying, for a period of three (3) years following the date on which any savings claims, sales claims, or other similar representations are made, adequate records (a) which disclose the facts upon which any savings claims, sale claims, price or value claims and other similar representations as set forth in Paragraphs 7, 8, 9, 10, and 11 of this order are based, and (b) from which the validity of any such representations can be determined.

13. Representing, directly or indirectly, orally or in writing, that any merchandise or service is furnished "free" or at no cost to the

purchaser of advertised merchandise or services when, in fact, the cost of such merchandise or service is regularly included in the selling price of the advertised merchandise or service.

14. Representing, directly or indirectly, orally or in writing, that merchandise or service is being offered "free" with the sale of merchandise or service which is usually sold at a price arrived at through bargaining (rather than at a regular price) or where, although there may be a regular price, but other material factors such as quantity, quality, or size are arrived at through bargaining.

15. Representing, directly or indirectly, orally or in writing, that a "free" offer is available in a trade area for more than six (6) months in any twelve (12) month period. At least thirty (30) days shall elapse before another such "free" offer is made in the same trade area. No more than three (3) such "free" offers shall be made in the same area in any twelve (12) month period. In such period, respondents' sales in that area of the product or service in the amount, size, or quality promoted with the "free" offer shall not exceed fifty percent (50%) of the total volume of its sales in that area of the product or service in the same amount, size, or quality.

16. Advertising any carpeting or floor covering using as the unit of measurement square feet, unless the unit of measurement square yards is also employed in immediate conjunction therewith and with equal prominence, or using any spatially descriptive term or terms, such as "three rooms," if those terms tend to exaggerate the size or quantity of carpeting being offered at the advertised price.

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

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

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

Final Order

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

NOTICE OF CANCELLATION

[*enter date of transaction*]

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

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

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

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

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

I HEREBY CANCEL THIS TRANSACTION.

[*Date*]

[*Buyer's signature*]

20. Failing, before furnishing copies of the "Notice of Cancellation" to the buyer, to complete both copies by entering the name of the seller,

the address of the seller's place of business, the date of the transaction, and the date, not earlier than the third business day following the date of the transaction, by which the buyer may give notice of cancellation.

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

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

23. Misrepresenting, directly or indirectly, orally or in writing, the buyer's right to cancel.

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

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

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

Provided, however, That nothing contained in Part I of this order shall relieve respondents of any additional obligations respecting contracts required by Federal law or the law of the State in which the contract is made. When such obligations are inconsistent with the provisions of this order, the Commission, upon proper showing, shall make such modifications as may be warranted.

II

It is further ordered, That respondents Carpets "R" Us, Inc., a corporation, its successors and assigns, and its officers, and Paul W. Ferrone and Homer Bandy, individually and as officers of said corporation, and respondents' agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the introduction, sale, advertising, or offering for sale, in commerce, or the transportation or causing to be transported in commerce of any textile fiber product; or in connection with the sale, offering for sale, advertising, delivery, transportation or

causing to be transported, of any textile fiber product which has been advertised or offered for sale, in commerce; or in connection with the sale, offering for sale, advertising, delivery, transportation, or causing to be transported, after shipment in commerce, of any textile fiber product, whether in its original state or contained in other textile fiber products, as the terms "commerce" and "textile fiber product" are defined in the Textile Fiber Products Identification Act, do forthwith cease and desist from:

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

B. Falsely and deceptively advertising textile products by:

1. Making any representations, by disclosure or by implication, as to fiber content of any textile fiber product in any written advertisement which is used to aid, promote or assist, directly or indirectly, in the sale, or offering for sale, of such textile fiber product unless the same information required to be shown on the stamp, tag, label or other means of identification under Sections 4(b)(1) and (2) of the Textile Fiber Products Identification Act is contained in the said advertisement, except that the percentages of the fibers present in the textile fiber product need not be stated.

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

3. Using a fiber trademark in advertising textile fiber products without a full disclosure of the required fiber content information in at least one instance in said advertisements.

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

III

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

the Commission staff for inspection and copying upon reasonable notice.

It is further ordered, That respondents shall provide each advertising agency utilized by respondents to obtain leads for the sale of carpeting or floor coverings, or to advertise, promote, or sell carpeting or floor coverings and other merchandise, with a copy of this order.

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

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

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

It is further ordered, That, for ten years following the effective date of this order, each individual respondent named herein promptly notify the Commission of every discontinuance of the respondent's business or employment and of every affiliation with a new business or employment. Each such notice shall include the respondents' new business address and a statement as to the nature of the business or employment in which the respondent is newly engaged as well as a description of respondent's duties and responsibilities in connection with that business or employment.

Order

87 F.T.C.

IN THE MATTERS OF

NATIONAL HOUSEWARES, INC., ET AL.—Docket 8733

EMDEKO INTERNATIONAL, INC., ET AL.—Docket 8973

Order, Feb. 26, 1976

Respondents' motion for an order that complaint counsel furnish them copies of three memoranda prepared by members of Commission's staff remanded to administrative law judge for decision and determination whether an immediate appeal would be appropriate.

Appearances

For the Commission: *Ralph E. Stone, Gerald E. Wright and John M. Porter.*

For the respondents: *Edwin S. Rockefeller and Alan M. Frey, Bierbower & Rockefeller, Washington, D.C.*

ORDER REMANDING MOTION TO ADMINISTRATIVE LAW JUDGE

Respondents have moved for an order that complaint counsel furnish them copies of three memoranda prepared by members of the Commission's staff. The administrative law judge had previously denied respondents' application for discovery of these documents on the grounds that they were not relevant to any of the issues in these cases and they were privileged. Respondents now claim that the question of the discoverability of the documents has been resolved because they were included in a file respondents were permitted to inspect.

The administrative law judge has certified the motion to the Commission on the ground that "only the Commission has the authority to direct complaint counsel to disregard [his] order * * *." Certification of Respondents' Motion for Appropriate Relief, February 3, 1976, p. 2. However, the original application for the staff memoranda was clearly within the law judge's authority to decide, as is the instant motion. See Rules of Practice Section 3.36. Interlocutory review of a law judge's denial of such motions is available only upon a determination by the judge "in writing with justification in support thereof, that the ruling involves a controlling question of law or policy as to which there is substantial ground for difference of opinion and that an immediate appeal from the ruling may materially advance the ultimate termination of the litigation or subsequent review will be an inadequate remedy." Rules of Practice, Section 3.23(b). The law judge should, therefore, decide the instant motion and then determine whether an