

IN THE MATTER OF
SEARS, ROEBUCK AND CO.

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

Docket 8993. Complaint, Sept. 17, 1974 --- Decision, Apr. 11, 1977

Consent order requiring a Chicago, Ill., merchandising organization, among other things, to cease using bait and switch tactics and other unfair or deceptive strategies in the advertising and sale of major home appliances. The order further requires the firm to conspicuously post copies of advertisements in the proper departments of stores, and to have sufficient quantities of the advertised items available to meet reasonably anticipated demand.

Appearances

For the Commission: *James S. Teborek, James F. Drzewiecki, Robert C. Goldberg, Blanche Stein, and Thomas D. Massie.*

For the respondent: *Richard P. Robinson, Chicago, Ill., Lloyd S. McClelland, Chicago, Ill., Burton Y. Witzenfeld, Arnstein, Bluck, Witzenfeld & Minow, Chicago, Ill.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Sears, Roebuck and Co., a corporation, has violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Sears, Roebuck and Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York with its principal office and place of business located at 925 South Homan Ave., Chicago, Illinois.

PAR. 2. Respondent is the largest merchandising organization in the United States. Respondent is now, and has been for some time last past, engaged in the advertising, offering for sale, sale and distribution of a wide variety of consumer products, including sewing machines, washers and dryers, and other major home appliances throughout the United States. The term "major home appliance" is defined herein as any home appliance in which there are two or more models in the product line and the most expensive model has a retail price in excess of (\$50.00) fifty dollars. Said respondent conducts said business by mail and telephone sales from catalogs and through its

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retail department stores located in each State of the United States. Sales by respondent's retail department stores are its most important source of sales. This complaint concerns respondent's sales of products through its retail department stores.

PAR. 3. In the course and conduct of its business as aforesaid, respondent ships, and causes to be shipped, sewing machines, washers and dryers, and other major home appliances to said retail department stores for sale to the purchasing public. Advertising and promotional material is prepared or caused to be prepared by respondent in Chicago, Illinois, and transmitted to respondent's retail department stores for their use. In the course and conduct of its business as aforesaid, respondent now causes and for some time last past has caused, the publication of said advertising, concerning sewing machines, washers and dryers, and other major home appliances in newspapers of general circulation. Respondent further engages in business, in commerce, consisting of the transmission and receipt of letters, invoices, reports, contracts and other documents of a commercial nature between respondent's headquarters and its retail department stores in the various states, and at all times mentioned herein has maintained, a substantial course of trade in said merchandise in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Typical and illustrative, but not all inclusive, of the major home appliances advertised and the statements made in such advertisements are the following:

Sewing Machine Sale

ZIG ZAG

Portable * * *

Sews zig zag or straight stitches to make fashion clothing or to do everyday mending * * * Sews buttonholes, sews on buttons, monograms.

Your Choice

\$58

Cabinet Model

Sews straight stitches forward and reverse, even over seams! * * *

* * * * *

Portable Zig Zag Sewing Machine From Sears * * * \$58

Sews on buttons, sews buttonholes; Does zig-zag or straight stitching

Mongrams, appliques, other fancy work For household linens, gifts

Sews forward and reverse for her convenience

PAR. 5. Through the use of the aforesaid statements and others not specifically set out herein, respondent has represented, directly and by implication, that the offers set forth in said advertisements are bona fide offers to sell the advertised sewing machines, washers and dryers, and other major home appliances at the prices mentioned in said advertisements.

PAR. 6. In truth and in fact, said offers were not, and are not bona fide offers to sell respondent's sewing machines, washers and dryers, and other major home appliances at the advertised prices, but, to the contrary were, and are, made to induce prospective purchasers to visit respondent's retail department stores.

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

PAR. 7. When prospective purchasers visit respondent's retail department stores in response to respondent's aforesaid advertisements and attempt to purchase the advertised sewing machines, washers and dryers, and other major home appliances at the advertised prices, respondent's salesmen make no effort to sell the advertised major home appliances, but, in fact, disparage the advertised sewing machines, washers and dryers, and other major home appliances in a manner calculated to discourage the purchase thereof, and attempt to, and often do, sell other sewing machines, washers and dryers, and other major home appliances to said prospective purchasers at higher prices. By way of disparaging said major home appliances, respondent's salesmen point out certain features that the advertised major home appliances are lacking without disclosing the absence of these features in respondent's aforesaid advertising. Among and typical, but not all inclusive of the disparaging statements and representations made by respondent's salesmen are the following:

1. The advertised sewing machines are noisy and not quiet running;
2. Certain of the aforesaid sewing machines will not sew straight stitch, zig zag stitch, or in reverse;
3. The advertised sewing machines do not have respondent's standard sewing machine guarantee and are not guaranteed for as long a period of time as respondent's more expensive sewing machine models;
4. Prospective purchasers will find it difficult to adjust the

advertised sewing machines to sew over seams in material on different thicknesses of material;

5. The advertised sewing machine will not sew buttonholes;

6. None of the advertised sewing machines are available for sale; and if the advertised machines are ordered, there will be long delays in delivery.

PAR. 8. In truth and in fact, the aforesaid disparaging statements and representations made by respondent's salesmen have the effect of discouraging prospective purchasers from purchasing the advertised sewing machines, washers and dryers, and other major home appliances and inducing said prospective purchasers to purchase other sewing machines, washers and dryers, and other major home appliances at higher prices.

PAR. 9. Respondent has advertised certain of its lower priced models of sewing machines, washers and dryers, and other major home appliances with the intention that respondent's salesmen will be able to make misleading comparisons between the lower priced models and higher priced models of said appliances.

PAR. 10. Respondent uses a method of compensating its salesmen of sewing machines, washers and dryers, and other major home appliances that rewards said salesmen for selling higher priced sewing machines, washers and dryers, and other major home appliances. At the same time respondent deters said salesmen from selling the advertised sewing machines, washers and dryers, and other major home appliances. This combination of circumstances has forced or encouraged respondent's salesmen of sewing machines, washers and dryers, and other major home appliances to use bait and switch sales tactics such as those described in Paragraphs Seven, Eight and Nine.

PAR. 11. In the course and conduct of their aforesaid business, and at all times mentioned herein, respondent has been, and now is, in substantial competition in commerce, with corporations, firms and individuals, engaged in the sale and distribution of sewing machines, washers and dryers, and other major home appliances of the same general kind and nature as those sold by respondent.

PAR. 12. The use by respondent of the aforesaid false, misleading and deceptive statements, representations, acts and practices has had, and now has the tendency and capacity to mislead and deceive a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true, and to induce a substantial number thereof to purchase respondent's said sewing machines, washers and dryers, and other major home appliances at higher prices than said members of the

purchasing public had intended to pay by reasons of said erroneous and mistaken belief.

PAR. 13. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors, 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.

Commissioner Thompson dissenting.

DISSENTING STATEMENT OF COMMISSIONER THOMPSON

Commissioner Thompson believes that, since no effort has been made in this matter to address the question of whether the products the customer is being "switched" to are themselves good buys or bad ones in relation to comparable items offered by competing outlets, there has been no showing of probable consumer injury here. In the absence of such a showing, he cannot find, as Section 5(b) of the FTC Act requires, that the "proceeding" instituted by the filing of this complaint "would be to the interest of the public. * * *" 15 U.S.C. 45(b). Given a limited budget, an expenditure of resources to stop what the staff apparently concedes is a "victimless crime" necessarily means a comparable reduction in the number of cases this agency can bring that, unlike this one, involve real economic injury to the consuming public.

SEPARATE STATEMENT OF CHAIRMAN ENGMAN

Concurred in by Commissioner Hanford

In contrast to Commissioner Thompson's characterization of the violation alleged in this case, I do not believe, nor do I think the staff concedes, that a blatant bait-and-switch advertising scheme constitutes a "victimless crime." I would consider this to be true even if there were a showing that the products which customers are switched to are comparable in price and quality to those offered by competing sellers.

Numerous prior Commission orders and the Commission's *Bait Advertising Guide* make it clear that Section 5 of the Federal Trade Commission Act is violated when a retailer advertises a low priced product to entice customers into his place of business and then, according to a preconceived selling plan, disparages the low priced item in an attempt to push a higher priced product on the customer. Such selling tactics are often accompanied by unreasonably low inventories of advertised items, high pressure sales methods once the customer is in the store, misrepresentations about the real value of

the advertised items, and, as alleged in this instance, employee discipline and compensation systems which discriminate unfairly against the sale of low priced, advertised merchandise.

The customer is victimized in bait-and-switch schemes because he or she makes the initial choice to patronize the advertiser's store rather than his competitors on the assumption that advertisements of low priced items have been made in good faith. In actuality, of course, the bait-and-switch advertiser has used the advertising as a deceptive gimmick to get the customer in his store first and thus to gain unfair advantage over his competitors. If the allegations of large scale bait-and-switch advertising in this complaint are proved through the adjudicative process, I would consider entry of an appropriate order very much in the public interest.

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondent with violation of Section 5 of the Federal Trade Commission Act, and the respondent having been served with a copy of the complaint; and

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

The Commission having withdrawn the matter from adjudication for the purpose of considering the agreement containing consent order; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter pursuant to Section 3.25 of its Rules, now in further conformity with the procedure prescribed in Section 3.25(d) of its Rules, the Commission hereby makes the following jurisdictional findings, and enters the following order:

1. Respondent Sears, Roebuck and Co. is a New York corporation with its office and principal place of business located at Sears Tower, Chicago, Illinois.
2. The Federal Trade Commission has jurisdiction of the subject

matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I

For purposes of this consent order, the following definition shall apply:

A. The term "major home appliance" includes (but is not limited to) home appliances within the following product lines sold by respondents: automatic laundry (washers and dryers); sewing machines; vacuum cleaners and sweepers; refrigeration products (refrigerators and chest or upright freezers); stoves, ranges and ovens; room air conditioners; humidifiers and dehumidifiers; televisions; dishwashers; floor polishers; and home audio electronic equipment.

II

It is ordered, That respondent Sears, Roebuck and Co., a corporation, its successors and assigns, and respondent's employees, agents, representatives, including sales representatives, directly or through any corporation subsidiary, division, or other device, in connection with the advertising, offering for sale, sale and distribution of sewing machines, washers and dryers and other major home appliances, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Making representations directly or indirectly, orally or in writing, that any major home appliances are offered for sale when such representation is not a bona fide offer to sell such major home appliances.
2. Offering for sale any major home appliance when such offer is not a bona fide offer to sell such major home appliance.
3. Disparaging, in any manner, any major home appliance which is advertised or offered for sale.
4. Utilizing demonstrations or displays of any advertised major home appliance in which said appliance is made to appear defective for the purpose of discouraging its purchase.
5. Making, directly or by implication, orally or in writing, any false, misleading or deceptive comparisons between the advertised major home appliances and other home appliances of the same product line.
6. Failing to have available at each store to which the advertise-

ment applies, or at a warehouse facility serving each such store, quantities of advertised major home appliances sufficient to meet reasonably anticipated demands for such appliances, or failing to take orders for such reasonably anticipated demands from customers desiring to purchase advertised major home appliances or failing to deliver such ordered merchandise within a reasonable period of time after purchase by customers.

It is further ordered, That respondent maintain and produce for inspection and copying by a representative of the Federal Trade Commission for a period of three years following the date of publication of any local advertisement of sewing machines, washers and dryers and other major home appliances adequate records to document for the entire period during which each advertisement was run:

- a. the total volume of sales in units of advertised major home appliances at the advertised price by each store to which the advertisement applies;
- b. monthly inventory statements for each store to which the advertisement applies of the units of major home appliances featured in each advertisement;
- c. the total volume of sales in units of major home appliances by stock or model number within the advertised product line by each store to which the advertisement applies.

The recordkeeping provision of this order shall be limited to major home appliances which have two or more models in the product line with a retail cost of \$100 or more, *provided, however*, no records need be created or maintained for any major home appliances sold at a retail price of \$35 or less each.

It is further ordered, That respondent shall forthwith cease and desist from disseminating, or causing the dissemination of any printed advertisement which represents that major home appliances are available for sale at a stated price at any of its stores, unless respondent clearly and conspicuously sets forth in each such advertisement:

Each of these advertised items is readily available for sale as advertised.

It is further ordered, That respondent shall post a copy of such advertisement, including a copy of the notice referred to in the previous paragraph, at a conspicuous place in the major home appliance department or departments of each store to which such advertisement applies, throughout the period to which the advertisement applies.

It is further ordered, if the respondent advertises by radio and television and does not advertise in print advertisements during any given period, that major home appliances are available for sale at a stated price at any of its stores, respondent shall post at a conspicuous place in the major home appliance department or departments of each store to which such advertisement applies, throughout the period to which the advertisement applies, a sign not less than 11" by 14", which shall include the full text of said advertisement, together with the legend:

Each of these advertised items is readily available for sale as advertised.

It is further ordered, That respondent after showing a customer, responding to an advertisement, the advertised model in a reasonable manner and making a bona fide offer to take an order for such advertised major home appliance, may offer to, and if the customer so desires, may show the customer other models of major home appliances within the same product line. This paragraph shall not be construed or interpreted to limit or modify any other paragraph of this order.

It is further ordered, That respondent shall deliver a copy of this order to all present and future managerial personnel and salespersons engaged in the sale of major home appliances or in any aspect of the preparation, creation, or placing of advertisements of such products and secure from each such person a signed statement acknowledging receipt of said order.

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

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

IN THE MATTER OF

CENTURY 21 COMMODORE PLAZA, INC., ET AL.

Docket 9088. Interlocutory Order, Apr. 20, 1977

Denial of complaint counsel's motion to amend complaint by adding a new theory; and remand of remainder of motion to ALJ as being within his authority on which to act.

ORDER

Complaint counsel move to amend paragraphs 14a and 15a of the complaint. These paragraphs now provide in part as follows:

14. In print advertising and elsewhere, respondents, directly or by implication, make and have made numerous representations to prospective purchasers with respect to the facilities and services associated with the purchase of respondents' condominium units, including but not limited to representations that:

a. The water of Morgan Bay was safe and healthy for swimming at the time such representations were made.

15. In truth and in fact:

a. Respondents knew or had reason to know that Morgan Bay was not safe and healthy for swimming.

Complaint counsel request that the following language be substituted:

14. * * *

a.(1) Morgan Bay was, is, and will be safe, healthy, and suitable for swimming and bathing.

(2) At the time of the first dissemination of the representations challenged herein and thereafter, the respondents had and relied upon a reasonable basis for the claim that Morgan Bay was, is, and will be safe, healthy, and suitable for swimming and bathing.

15. * * *

a. (1) Morgan Bay was not, is not, and will not be safe, healthy, and suitable for swimming and bathing.

(2) At the time of the first dissemination of representations challenged herein and thereafter, Respondents did not have and did not rely upon a reasonable basis for the claim that Morgan Bay was, is, and will be safe, healthy, and suitable for swimming and bathing.

According to complaint counsel, the proposed amendments would simply make it clear that the complaint, as it originally issued, alleged that (1) respondents had represented to consumers not only that the water of Morgan Bay was "safe and healthy" for swimming as of the time the representations were made, but also that the bay