

IN THE MATTER OF

GENESCO INCORPORATED

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket 9019. Complaint, March 11, 1975 — Decision, May 17, 1977*

This order, among other things, requires a Nashville, Tenn., operator of a retail clothing chain to cease writing off credit balances; failing to furnish statements advising customers of credit balances and their right to request and receive refunds. The order further requires the firm to refund monies due customers from January 1, 1972 to date and maintain prescribed information for a period of three years.

Appearances

For the Commission: *Alan D. Reffkin, Justin Dingfelder and John F. LeFevre.*

For the respondent: *Sanford M. Litvack, Kenneth E. Newman and Melanie S. Cutler, Donovan, Leisure, Newton & Irvine, New York City.*

COMPLAINT

[1] 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 Genesco Incorporated, 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 Genesco Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business located at 111 7th Ave. North, Nashville, Tennessee. Respondent Genesco Incorporated formulates, controls and directs the policies, acts and practices, including those hereinafter set forth, of its retail apparel and footwear divisions, including its division, Bonwit Teller.

Bonwit Teller is a division of Genesco Incorporated. Its principal office and place of business is located at 56th St. and Fifth Ave., New York, New York.

PAR. 2. Respondent Genesco Incorporated, through its operating division, Bonwit Teller, operates a number of retail specialty clothing

stores in a number of states. Respondent also operates numerous other retail divisions for the retail sale of shoes and wearing apparel.

PAR. 3. Respondent sells and distributes merchandise in commerce by operating and controlling numerous retail specialty apparel and footwear stores in a number of states and by causing merchandise to be shipped from its warehouses and from the places of business of its various suppliers to its warehouses and retail specialty apparel [2] and footwear stores for distribution to and purchase by the general public located in states other than those from which such shipments originate. By these and other acts and practices, respondent maintains, and at all times mentioned herein has maintained, a substantial course of trade in merchandise and services in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. In the ordinary course and conduct of its aforesaid business, respondent permits customers of many of its retail divisions, including its Bonwit Teller division, who qualify for credit to charge purchases. On occasion a customer's charge account balance reflects a credit on the customer's account which represents an amount of money owed to the customer by respondent, rather than an amount of money owed to respondent by the customer. This credit balance is the result of, among other things, overpayments by the customer or credits for returned merchandise.

PAR. 5. Typical and illustrative of respondent's practices in the handling of customer accounts are the following: Respondent customarily provides to each customer of Bonwit Teller having a charge account credit balance a monthly statement setting forth the amount of the credit balance. This statement is usually mailed at the end of the billing cycle during which the credit balance is created and at the end of each subsequent billing cycle during which the credit balance has not been cleared from the customer's account and a transaction on the customer's account occurs. No such statement is provided for any billing cycle during which the customer transacts no business on his charge account.

If a customer with a credit balance on his charge account does not specifically request that respondent pay him the amount of his credit balance but purchases merchandise or services on his charge account, respondent for a limited time only applies the amount of the credit balance to reduce or eliminate the customer's obligation created by the purchase of merchandise or services.

If the customer neither requests a refund in cash of the amount of the credit balance nor makes a purchase within a period of time allowed by respondent for activity to occur on the customer's account,

respondent, through bookkeeping entries, clears the amount of the credit balance from the customer's charge account. No cash payment is made to the customer at the time of the clearing of his credit balance from his charge account. Subsequent [3] periodic statements are not mailed until a later purchase is made. The outstanding credit balance that was previously reflected on a periodic billing statement is not applied to any purchase occurring after the credit balance has been cleared from the customer's account.

At no time is the customer informed of his right to request and receive a cash refund nor does respondent voluntarily refund cash representing outstanding credit balances without a specific customer request. Respondent has through such acts and practices eliminated substantial dollar amounts of credit balances as aforesaid from customer accounts in a substantial number of instances.

PAR. 6. By failing to notify customers with charge account credit balances that they have the right to request and receive cash payment of the amounts of their credit balances; by failing to furnish customers with statements reflecting the amount of their credit balances; by deleting credit balances from customers' accounts without refunding such amounts and by providing billing statements for subsequent purchases which do not reflect such credit balances, respondent has caused a substantial number of its charge account customers to be deprived of substantial sums of money rightfully theirs. Therefore, the acts and practices described in Paragraph Five above were and are unfair.

PAR. 7. The acts and practices of respondent set forth in Paragraphs Five and Six above were and are to the prejudice and injury of the public and constitute unfair acts and practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY ERNEST G. BARNES, ADMINISTRATIVE
LAW JUDGE

DECEMBER 20, 1976

PRELIMINARY STATEMENT

[1] On March 11, 1975, the Commission issued its complaint in this matter charging that respondent Genesco Incorporated (hereinafter "Genesco"), through unfair acts and practices in connection with the handling of credit balances on charge accounts of its retail divisions' customers, has violated Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45) (Complaint, ¶ 7).

Specifically, the complaint alleges that Genesco formulates, con-

trols and directs the policies, acts and practices of its retail apparel and footwear divisions [2] (Complaint, ¶ 1). The complaint further alleges that, through such divisions, respondent has caused a substantial number of its retail charge account customers to be deprived of substantial sums of money rightfully theirs by:

(1) failing to notify customers with charge account balances that they have the right to request and receive cash payment of the amounts of their credit balances;

(2) failing to furnish customers with statements reflecting the amount of their credit balances for billing cycles during which no business is transacted on their charge accounts;

(3) deleting credit balances from customers' accounts after a limited time of inactivity without refunding such amounts; and

(4) providing billing statements for purchases made subsequent to such deletions which do not reflect such credit balances (Complaint, ¶¶ 5 and 6).

On May 14, 1975, in response to Genesco's Motion for a More Definite Statement, complaint counsel clarified the scope of the complaint by: (1) specifying that the time period to which the acts and practices alleged in the complaint relate is approximately January 1, 1972 to the present, and (2) limiting the alleged violative acts and practices to those charge account plans administered directly by Genesco or its divisions (Answer to Motion for a More Definite Statement, p. 1).

Thereafter, on July 14, 1975, respondent answered the complaint, denying the substantive allegations and asserting as affirmative defenses that the complaint failed to state a claim upon which relief could be granted, did not set forth facts which, if proved, would constitute a violation of the Federal Trade Commission Act, that the complaint and proceedings commenced thereby were not in the public interest, and that the issues presented by the complaint and this proceeding were moot.

Prehearing conferences were held on November 12, 1975, January 8, 1976, and May 13, 1976. At the November 12th and May 13th proceedings, deposition testimony was given by Mr. Larry B. Shelton, Vice Chairman and Chief Administrative [3] Officer of Genesco. Stipulations of fact (CX 89A-H) were entered into on July 2, 1976.

Hearings on complaint counsel's case-in-chief were held in Washington, D.C., on July 12-15 and July 22, 1976. On July 22, 1976, respondent commenced defense hearings which were held through July 23, 1976. Rebuttal hearings were held on August 4th and 18th, 1976. The record was closed for the reception of evidence by order dated August 23, 1976.

Complaint counsel called 9 witnesses during their case-in-chief and the stipulated testimony of a tenth witness was read into the record. Nine of complaint counsel's direct witnesses testified as to customer transactions with three Genesco divisions — Bonwit Teller (5 witnesses), Henri Bendel (2 witnesses), and Roos/Atkins (2 witnesses). The tenth direct witness called by complaint counsel was a staff accountant of the Federal Trade Commission. During rebuttal, complaint counsel called three additional witnesses, all Assistant General Credit Managers of respondent's competitors.

Respondent called four witnesses during defense hearings — an officer of Genesco, an officer of the Bonwit Teller division, the Manager of Customer Service and Bill Adjustment of the Bonwit Teller division and the Director of Accounting of the General Shoe Division of Genesco.

There were eight days of formal hearings and 142 exhibits, many multi-paged, received in evidence during the hearings.

Proposed findings of fact and supporting memoranda were filed by complaint counsel on October 6, 1976, and by respondent by October 7, 1976. Reply briefs were filed by complaint counsel on October 21, 1976, and by respondent on October 22, 1976.

This proceeding is before the undersigned upon the complaint, answer, testimony and other evidence of record, proposed findings of fact, conclusions and supporting memoranda filed by the parties. These submissions have been given careful consideration and, to the extent not adopted by this Initial 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 [4] specifically ruled upon, either directly or by the necessary effect of the conclusions in this Initial Decision, are hereby denied. The findings of fact made herein are based on a review of the entire record and upon the demeanor of the witnesses who gave testimony in this proceeding.

The findings of fact made herein 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.

FINDINGS OF FACT

I. IDENTITY AND BUSINESS OF RESPONDENT

1. Genesco is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee, with its

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principal office and place of business at 111 - 7th Ave., North, Nashville, Tennessee (Answer, ¶ 1). In addition to the manufacture of footwear, apparel, and materials and components thereof, Genesco sells and distributes merchandise in commerce and, through its divisions, operates retail specialty apparel and footwear stores in a number of states (Answer, ¶ 3; CX 1E).

2. During 1972 to 1974, Genesco was "engaged in commerce", as defined in the Federal Trade Commission Act (CX 89A).

3. Sales and earnings by Genesco's retail operations for the years 1972 through 1974 are reflected in the following chart:

	<i>NET SALES</i>	<i>PRETAX EARNINGS</i>
1972	\$429,445,000	\$9,102,000
1973	\$438,488,000	\$12,458,000
1974	\$441,319,000	\$11,113,000

[5] Genesco's retail operations in 1974 accounted for 30.9 percent of net sales and 27.5 percent of pretax earnings (CX 3A¹).

4. During the period 1972 to 1974, eighteen (18) divisions of Genesco maintained charge account plans whereby customers who qualified were permitted to charge their purchases (CX 89B; Answer, ¶ 4). These divisions were Baron's, Bonwit Teller ("Bonwit"), Burkhardt-Davidson's, Burkhardt's, Gidding-Jenny, Gilbert's, Graves-Cox, Hall-Brown, Henri Bendel ("Bendel"), I. Miller, Interstate Shoe ("Interstate"), L. Strauss, McFarlin's, Plymouth, R.A.M., Roos/Atkins ("Roos"), Tate-Brown, and Valmart. Two of these divisions, I. Miller and L. Strauss, discontinued their credit plans during 1974 (CX 89B, C). Charge account plans within the scope of the complaint encompass retail consumer open end credit or other retail consumer charge accounts, including, but not necessarily limited to, thirty (30) day charge accounts, created incident to the business of selling consumer merchandise and services at retail (Complaint, Notice Order; Complaint Counsel's Proposed Finding 20).

5. The total number of customer charge accounts, by divisions, believed to have been in effect during 1972-1974 were: [6]

Year

¹ These percentage figures are in relation to respondent's continuing business operations only. Such business falls into five major areas of operations: retailing, footwear men's apparel, women's apparel, and international operations (CX 2D, 3A).

	1972	1973	1974
Baron's	27,000	27,878	29,471
Bonwit Teller	1,037,931	1,107,104	1,154,236
Burkhardt-			
Davidson's	9,320	8,234	9,351
Burkhardt's	26,344	25,414	24,875
Gidding-Jenny*	40,000	40,000	35,000
Gilbert's	25,000*	19,652	28,316
Graves-Cox*	20,000	20,000	20,000
Hall-Brown*	12,000*	12,000*	16,748
Henri Bendel*	33,000	33,000	33,000
I. Miller*	68,000	64,000	credit plan discontinued
Interstate Shoe*	35,000	35,000	30,000
L. Strauss	32,737	35,503	credit plan discontinued
McFarlin's*	35,000	35,000	41,500
Plymouth*	200,000	200,000	130,000
R.A.M.*	43,500	38,390	44,469
Roos/Atkins	406,690	375,550	358,941
Tate-Brown*	16,300	16,300	16,300
Valmart*	2,000	2,000	1,500
Total	2,069,822	2,095,025	1,973,707

* Numbers indicated are approximations.

(CX 89B, C.)

6. At all times relevant to this action, Genesco had the authority to formulate, control and direct the policies, acts and practices regarding the handling of credit balances of its retail divisions (CX 89A; Respondent's Post-Trial Memorandum, fn., p. 10).

II. CREATION AND HANDLING OF CREDIT BALANCES

7. The term "credit balance" means an amount reflected as owing to a customer in connection with a retail consumer charge account of the type covered by the complaint. A credit balance can be created by, among other things, a [7] return of merchandise or an overpayment (Answer, ¶ 4; CX 89A).¹

8. On occasion, the balance on customer charge accounts administered by Genesco's retail divisions reflected credit balances which represented an amount of money owed by respondent to the customer (Answer, ¶ 4; CX 89D, E, F). Prior to 1974, the method of handling

¹ An invalid credit balance may also be created by double crediting of a payment or other accounting errors. Such invalid credit balances are not within the scope of acts and practices challenged in the complaint.

these credit balances was left to the sole discretion of each division's local management (CX 89D).²

9. From 1972 to 1974, charge customers were notified of the existence of a credit balance by a billing statement sent by respondent's retail divisions at the end of the billing period in which the credit balance was created and for each subsequent billing period in which there was activity on the account (CX 89F-G). In some divisions, *e.g.*, Interstate, billing statements were sent on accounts in which a credit balance existed regardless of whether or not there had been activity on the account (CX 89G).

10. Billing statements used by respondent's retail divisions during the 1972 calendar year indicated the existence of a credit balance by placing a dash (-) (CX 9, 88C) or the letters "CR" (CX 4A, 5A, 7A, 11A, 13, 76A) immediately to the right of the figure appearing in the "Balance," "New Balance," "Present Balance" or "Now Due" column of the statement. On some 1972 statements, this was the sole indication of the existence of a credit balance (CX 4A, 7A, 11A, 88C). Other 1972 statements contained [8] the additional notation "CREDIT BALANCE" (CX 5A); "DO NOT PAY CREDIT BALANCE DUE YOU" (CX 9); "DO NOT PAY THIS BILL. THE FINAL RED FIGURE indicates a credit balance, against which future purchases may be charged" (CX 13);³ or statements of similar import (CX 76A).

11. Billing statements used by respondent's retail divisions during the 1973 calendar year indicated the existence of a credit balance by placing a dash (-) (CX 12A, 31D) or the letters "CR" (CX 7B, 11B, 38B, 78A) immediately to the right of the figure appearing in the "New Balance" or "Now Due" column of the statement. On some 1973 statements, this was the sole indication of the existence of a credit balance (CX 4B, 7B, 12A, 38B, 78A). Other 1973 statements contained the additional notation "THIS IS A CREDIT BALANCE PLEASE DO NOT PAY" (CX 11B) or "YOU HAVE A CREDIT BALANCE" (CX 31D).

12. Billing statements used by respondent's retail divisions during the 1974 calendar year indicated the existence of a credit balance by placing a dash (-) (CX 4C, 10, 12B, 30A, 34, 36A; RX 2A, 3A, 6A), asterisk (*) (CX 8) or the letters "CR" (CX 6A, 7C, 11C, 66A, 67) immediately to the right of the figure appearing in the "Balance," "New Balance," "Now Due" or "Balance Due" column of the

² Evidence was not received as to the nuances of each division's credit balance practices. However, it is not a prerequisite to the issuance of a cease and desist order that all divisions of respondent be in violation of Section 5. For purposes of this proceeding, the evidence is sufficient if a finding of violation can be made based on the acts and practices of some of Genesco's retail divisions.

³ Due to the method used in reproducing exhibits received in evidence, it is impossible to discern whether the existence of a credit balance was also indicated by red, or a similarly distinct, color of ink. The reference in CX 13 would indicate that this method of indicating a credit balance was used by some divisions but the prevalence of this practice cannot be determined from the exhibits. (See also CX 66A.)

statement. On some 1974 statements, this was the sole indication of the existence of a credit balance (CX 6A, 7C, 12B, 66A, 67). Other 1974 statements contained the additional notation "YOU HAVE A CREDIT BALANCE" (CX 4C, 30A, 34, 36A; RX 2A, 3A, 6A) or "CREDIT BALANCE DUE YOU * * *" (CX 8).

13. Billing statements similar to those described in Findings 10-12 were used by respondent's retail divisions during the 1975 calendar year (CX 5B, 6C, 35A, 37A, 39, 40B, 41A).

[9] 14. A few billing statements used in late 1974 and 1975, which were received into evidence, apparently reflect the mid-1974 change in corporate policy regarding the handling of credit balances (see *infra*, Finding 37). CX 6B, dated October 20, 1974, contains the notation "THIS CREDIT BALANCE WILL BE REFUNDED TO YOU AT YOUR REQUEST." Some billing statements used during November of 1974 contained the following notations regarding credit balances:

THIS IS A CREDIT BALANCE PLEASE DO NOT PAY IF YOU WISH A
REFUND OF THIS AMOUNT, PLEASE ADVISE. THANK YOU

[CX 11C.]

YOU MAY REQUEST A REFUND OF THE NEW BALANCE BELOW AT
ANYTIME OR YOU MAY LEAVE THE BALANCE ON YOUR ACCOUNT
TO REDUCE THE AMOUNT DUE ON FUTURE PURCHASES

[CX 10.]

Some billing statements used in 1975 contained the following notation:

* * NO PAYMENT IS REQUIRED * *

YOUR NEW BALANCE IS MONEY WE OWE YOU. YOU MAY
REQUEST A REFUND BY RETURNING THIS FORM TO OUR STORE
IN PERSON OR BY MAIL. IF YOU DO NOT CHARGE AGAINST THIS
CREDIT OR REQUEST A REFUND, A CHECK WILL BE MAILED TO
YOU AFTER 6 MONTHS. [CX 4E; RX 33.]

(See also, CX 6D and 7D which notify customer that existing credit balance will be refunded upon request.)

15. Prior to the 1974 corporate policy change, there was no policy or practice to notify charge account customers formally of their right to request and receive cash refunds of an outstanding credit balance (CX 89G).

16. During the period prior to Genesco's adoption of a centralized corporate policy for handling credit balances, certain divisions routinely transferred credit [10] balances from customer accounts where there had been no activity on the account for varying periods

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of time. Activity on the account, as used herein, includes, among other things, purchases, returns or payments (CX 89D).

17. The evidence offered by complaint counsel at trial focused on the pre-1974 practices of four Genesco divisions — Bonwit, Bendel, Interstate and Roos. The periods of time of inactivity during which credit balances were retained on these divisions' individual customer charge accounts prior to transfer were as follows:

	<i>Minimum</i>	<i>Maximum</i>
Bonwit	6 Months	17 Months
Bendel	18 Months	20 Months
Interstate	6 Months	
Roos	6 Months	11 Months

[CX 89F, G.]

18. Although the individual divisions established minimum periods of inactivity prior to deletion of credit balances, witnesses called by complaint counsel testified that the Bendel division during pre-1974 failed to follow its official policy in this regard requiring a minimum of 18 months inactivity and deleted credit balances in periods of two to five months (Sixsmith, Tr. 207-216; Steiner, Tr. 371-384; Lewis, Tr. 560-63). Respondent admits that an employee of Bendel failed to follow company policy by prematurely transferring credit balances (see Finding 41, *infra*), but asserts that such isolated deviations do not negate the existence of the stipulated company policy.

19. The total dollar amounts of customer credit balances (and number of accounts affected, where available) transferred from customer accounts by Genesco divisions during the periods shown were: [11]

Dollar Amounts and No. of Accounts
(in parentheses where available) per year

<i>Division</i>	<i>1972</i>	<i>1973</i>	<i>1974</i>	<i>1975</i> <i>(to 3/31/75)</i>
Baron's	\$ 0 (0)	\$ 0 (0)	\$ 4,038.78 (134)	\$ 0 (0)
Bonwit Teller	158,939.19	151,501.20	103,198.42	0
Burkhardt-Davidson's	0 (0)	0 (0)	1,340.19 (198)	0 (0)
Burkhardt's	3,520.32	86	364.14	0
Gidding-Jenny	0 (0)	0 (0)	3,113.17 (130)	0 (0)
Gilbert's	0 (0)	747.19 (271)	6,011.36 (698)	76.29 (30)
Graves-Cox	0	0	0	0

	(0)	(0)	(0)	(0)
Hall-Brown	\$ N/A	\$ N/A	\$ 2,327.74	\$ 0
			(183)	
Henri Bendel	35,226.31	32,896.09	26,413.54	182.29
	(1,059)	(1,189)	(871)	(3)
I. Miller	0	0	0	0
	(0)	(0)	(0)	(0)
Interstate Shoe	18,253.17	12,381.73	2,824.66	0
	(3,968)	(2,588)	(710)	(0)
L. Strauss	0	0	24,760.75	0
	(0)	(0)	(1,120)	(0)
McFarlin's	3,722.91	3,614.02	5,574.91	88.51
Plymouth	651.00	51,520.20	8,739.47	54.47
R.A.M.	N/A	N/A	6,450.82	0
Roos/Atkins	48,145.46	54,429.40	48,927.62	0
	(2,982)	(3,672)	(2,254)	(0)
Tate-Brown	0	0	2,722.00	0
Valmart	9.45	65.69	36.95	18.15
	(1)	(64)	(18)	(15)
		(CX 89D, E.)		

[12] The amounts set forth above include credit balances which were valid as well as invalid. Some of these credit balances set forth above were subsequently reinstated on the customer's account or refunded to the customer (CX 89F).

20. When a credit balance was transferred from charge accounts, an accounting entry was made debiting the customer's account (Shelton, Tr. 41-42; Rowe, Tr. 588; Owen, Tr. 686; CX 15A-B, 16A-K, 17A-Z(3), 18A-U, 20A-U, 22A-E, 23, 24, 25A-I, 26A-F, 28A-K, 29A-Z(102)). As the chart reproduced in Finding 19 demonstrates, the total debits made to customer accounts from 1972-1974 were substantial, i.e.:

	Total Amount Debited by Genesco Retail Divisions*
1972	268,467.81
1973	308,017.65
1974	246,844.52
	823,329.98

21. Prior to Genesco's adoption in mid-1974 of a corporate policy regarding the handling of credit balances, there was no policy or practice in any of the divisions to notify charge account customers that credit balances routinely would be transferred out of accounts in which no activity occurred during specified periods of time (CX 89G).

* Debits included some invalid credits on customer accounts as well as amounts subsequently reinstated on an account or refunded to customers.

22. Prior to Genesco's adoption in mid-1974 of a corporate policy regarding the handling of credit balances, credit balances which were transferred were not thereafter automatically reinstated on the customer's account, offset against future purchases or refunded without a request from the customer (CX 89G). [13]

III. REFUND POLICY

23. In general, prior to the 1974 corporate policy, requests for refunds or for reinstatement of valid credit balances, or that such balances be applied against future purchases, were to be honored (CX 89G).

24. As evidenced by the billing statements used by respondent's retail divisions, charge account customers were not explicitly advised of their right to make such requests (see Findings 10-12 and CX 89G).

25. Although the existence of the refund policy set forth in Finding 23 was not challenged, three charge customers of the Bonwit division called by complaint counsel testified they had experienced difficulties in obtaining reinstatement of credit balances transferred from their accounts. These customers testified that two to four months elapsed between their initial requests and reinstatement of their credit balances and that a series of written and verbal requests were required to effectuate such reinstatement (Stauffer, Tr. 278-317; Goldberg, Tr. 342-46; Taub, Tr. 527-539).

26. Under Bonwit's current system for handling customer requests for refund of credit balances, approximately 90 percent of these requests are processed within two days and the remainder are processed within five days. If no request is received within six months, a refund is automatically sent to the charge customer (Lempfert, Tr. 656). An aging system has been established within Bonwit's Customer Service and Bill Adjustment Department so that, after one week has elapsed, the handling of any inquiry or complaint, especially dealing with a credit balance, is given immediate priority (Lempfert, Tr. 656-57).

IV. ACCOUNTING PROCEDURE UTILIZED FOR TRANSFER OF CREDIT BALANCES

27. As noted above, in order to effectuate a transfer of a credit balance, a customer's charge account would be debited and a corresponding credit would be entered in a corporate account such as the "Due Customers" or "Reserve [14] for Bad Debts" accounts (Shelton, Tr. 41-42; Rowe, Tr. 588; Owen, Tr. 675-76, 686). The actual effect, if any, of these bookkeeping entries on divisional or corporate income cannot be conclusively determined from the expert testimony

received. It is unnecessary to demonstrate a positive effect on income, however, since the issue in this proceeding is the effect of such transfers on consumers, rather than on Genesco's corporate income.

28. Ronald Rowe, a Commission staff accountant, testified that in his opinion, based on generally accepted accounting principles which are the standards of the accounting profession, transferring credit balances to a "reserve for bad debts" account would eventually be reflected in a division's income as of the close of that division's accounting period (Tr. 587-88, 591). Mr. Rowe further testified that closing entries would have to be made for such effect to occur, but stated that corporate auditors would normally require that such entries be made, unless the amounts under consideration were immaterial, to avoid accumulating a larger offset against accounts receivable than needed (Tr. 595-96, 723-25).

According to Mr. Rowe, if a transfer was made to a "due customers" account rather than a "reserve," no effect on the profit and loss statement of the division would occur (Tr. 599-600). Such transfer would, however, be an unusual bookkeeping entry since both affected entries are liability accounts (Tr. 600).

Mr. Rowe's testimony was based entirely on his knowledge of accounting principles and the prior testimony of Mr. Shelton (Tr. 591).

29. Larry Shelton, Vice Chairman and Chief Administrative Officer of Genesco, testified that, prior to 1974, the accounting entries made by retail divisions to transfer credit balances from customer accounts varied, but that such credits would generally have been transferred to a balance sheet account which would not have had any impact on the individual division's income or profit and loss statement (Tr. 135-36, 747). The balance sheet account used would have been a suspense account or the "reserve for bad debts" account (Tr. 135-36). Transfers to suspense accounts would, in all likelihood, eventually end up in the "reserve for bad debt" accounts. Mr. Shelton further [15] testified that at some point in a company's history an adjustment would be made to transfer excess amounts out of "reserve for bad debts" accounts (Tr. 139-140). To Mr. Shelton's knowledge, credit balance transfers during 1972-1974 were never put into a division's income (Tr. 141).

30. Robert Green, the Senior Vice President and Chief Financial Officer of Bonwit, testified that, during 1972 to 1974, Bonwit transferred credit balances from customer accounts to a "reserve for bad debts" account. Amounts so transferred remained in the reserve account and were never used in any way which would affect Bonwit's income (Tr. 696-97). It is Mr. Green's understanding, based on a

review of Bonwit's accounting practices, that no adjustment was made in Bonwit's "reserve" due to the accumulation of credit balance transfers (Tr. 706).

31. Ted Owen, the executive in charge of Interstate's accounting matters, testified that, prior to mid-1974, credit balances on Interstate's customer charge accounts were transferred to a "Due Customer" account (Tr. 675-77), 685-86). Such transfers would have had no effect on Interstate's income, according to Mr. Owen (Tr. 682).

In discussing the "reserve for bad debts" account used by the Bonwit division, Mr. Owen testified that, if transferred credit balances were not considered in arriving at the required reserve balance, such transfers would not affect company income (Tr. 677-78). Mr. Owen stated that, based on generally accepted accounting principles, there is no limitation on the length of time transfers can be retained in the reserve account (Tr. 677-79).

V. ADOPTION OF CORPORATE POLICY FOR HANDLING CREDIT BALANCES

32. A major consolidation and restructuring of Genesco was undertaken in March 1973 (CX 2B). According to the 1973 Annual Report, "new internal controls designed to strengthen the financial reporting of decentralized operations" were instituted in February 1973. Elaborating on these changes, Mr. F. M. Jarman, then Chairman and Chief Executive Officer of Genesco, stated:

[16] New procedures and reporting relationships have been established in both accounting and auditing. One significant change was to make operating company controllers accountable to the chief accounting officer of the corporation. This gives us greater centralized control for a more effective performance reporting system. At the same time, the internal audit department is being significantly expanded to provide thorough follow-up on the accuracy of operating company financial reporting and compliance with central accounting policies. [CX 2C.]

Genesco's 1974 Annual Report under the heading "New Organization" advised stockholders that "the installation of a new organization structure designed to more clearly establish responsibility and accountability," which had previously been announced, was "completely implemented" and "working smoothly at every level" (CX 3C).

33. Mr. Shelton, Chief Administrative Officer of Genesco, testified that in 1973, as part of this reorganization effort, he instructed Mr. White, Genesco's Chief Accounting Officer, to develop a structure that would make the divisional accountants' reporting more manageable. Mr. White was also assigned the task, once control in the field had been developed, of meeting with Genesco's internal auditors and

thereafter issuing, subject to Mr. Shelton's approval, policy directives to bring about a degree of standardization in accounting practices used by the divisions (Shelton, Tr. 737-39).

34. CX 62A-B, a letter dated April 11, 1974, from an Assistant Director for Special Statutes, Bureau of Consumer Protection, addressed to the former President of Bonwit, a division of Genesco, was received to establish the date of initial contact by the Federal Trade Commission with Genesco regarding the violation alleged in this proceeding (Tr. 480). This letter states, in part:

It has come to our attention that certain retail stores * * * as a matter of policy, delete unused credit balances * * * from open end credit accounts or other charge accounts * * * when the account remains dormant for a period of time.

* * * * *

[17] We are interested in the nature and extent of this practice. Therefore, we request that you furnish to this office details of how your business handles an unused account which reflects a credit balance over a period of time.

Thirteen items or areas of information requested are thereafter specified and Bonwit was requested to furnish such information within 30 days from receipt of the Commission's request.

35. Respondent, citing the Memoranda Initiating Investigation dated June 28, 1974 in Commission files Nos. 742 3313 (Associated Dry Goods, et. al.); 742 3314 (Genesco Inc.); 742 3315 (Gimble Bros., Inc.); 742 3317 (McRory Corp., et al.); 742 3318 (Carter Hawley Hale Stores, Inc., et al.), maintains that no investigation of credit balance practices was commenced until some time after April 1974. A Memorandum Initiating Investigation is filed only after "it has been determined by preliminary investigation or otherwise, that a detailed investigation is needed or that complaint should issue, or an attempt should be made to obtain a consent order * * *" (FTC Operating Manual, Chapter 3.1). The June 28th date cited by respondent, therefore, is not relevant to reaching a determination of when respondent was apprised of the Commission's investigation of the handling of credit balances by retail stores.

36. Mr. Shelton testified that, in the late spring of 1974, Genesco's Chief Accounting Officer proposed that a corporate policy regarding the handling of credit balances by all respondent's retail operating divisions be adopted (Tr. 740). Respondent maintains this proposal was a part of the reorganization effort discussed in Finding 32 and totally unrelated to the Commission's letter of April 11, 1974.

37. After consultation with its internal auditors and the legal department, in approximately the summer of 1974, Genesco adopted

a corporate-wide policy for handling credit balances by its retail divisions (CX 89G; Shelton, Tr. 740-41). This policy provides:

Each charge customer having a credit balance of One Dollar (\$1) or more will, so long as it remains outstanding, receive a statement showing [18] credit balance for each of the six (6) immediately succeeding billing cycles. Each such statement will also notify the customer that he may request and receive a refund at anytime. If no request is made and the credit balance remains at the time the next (7th) statement would normally go out, then a check for the balance should be forwarded to the customer at that time. The check should reflect the fact that it represents payment of the credit balance or a notice should be enclosed with the check to that effect. If the size of the credit balance does not warrant six notices, the refund may be made sooner.

[RX 11.]

38. As is apparent from the above cited summary of Genesco's corporate policy for handling credit balances, no provision was or has been made to notify retail customers whose credit balances were transferred from their charge accounts prior to full implementation of the current policy of their continuing right to request and receive a full refund or reinstatement of such credit balances (RX 11; Finding 21).

VI. COMPLIANCE WITH CURRENT POLICY

39. Compliance on the part of all Genesco retailing divisions with the corporate policy for handling credit balances adopted in mid-1974 was and is mandatory (CX 89G).

40. In order to insure that Genesco's current policy for handling credit balances is fully implemented by all retail divisions, internal auditors, during their auditing of individual companies, check for compliance with this policy. Any non-compliance with centrally-directed accounting procedures, such as the handling of credit balances, would be included in their audit report. To date, no deviations from this particular policy have been reported (Shelton, Tr. 749-750).

41. During the investigation incident to this proceeding, respondent became aware that an employee of the Bendel division had violated the corporate policy adopted in mid-1974 by transferring credit balances [19] from customer accounts, and had also ignored Bendel's prior policy regarding the handling of such balances. When the failure to comply with the current policy was discovered, the unidentified employee was dismissed (Shelton, Tr. 745-46, 752-53).

42. Despite Genesco's adoption of an official corporate policy in mid-1974 requiring that statements sent to customers whose accounts show a credit balance bear a legend that such credit balance exists

and that the customer may request and receive a refund of such balance at any time, billing statements used by the Bonwit division from mid-1974 through March 1975 failed to notify charge customers with an existing credit balance of this right (CX 34, 35A, 37A, 39, 40B, 41; RX 3A, 6A). Some billing statements used by the Bendel, Plymouth, Gidding/Jenny and Interstate (Guarantee) divisions, after adoption of the current policy, also failed to notify charge customers of their right to request and receive refunds of existing credit balances (CX 5B, 6A, 6B, 6C, 7C, 11C).

VII. INDUSTRY PRACTICE

43. During and prior to the early 1970's, the practice of transferring customer credit balances out of inactive accounts was widespread in the retail industry. Letters received by the Federal Trade Commission from other members of the retail industry during the preliminary investigation of credit balance practices describe practices similar to Genesco's, which were followed by many members of the industry (CX 104; RX 14-23, 26-28). Complaints issued against other members of the retail industry, and consent agreements entered as a result thereof attest to the prevalence of such credit balance practices (CX 96-103). In addition, industry witnesses called during rebuttal testified that, prior to 1971 or 1972, similar credit balance practices were followed by the companies for which they worked (Pike, Tr. 815; Drew, Tr. 852, 854; *see also*, Green, Tr. 693, and Drew, Tr. 858-861).

[20] CONCLUSIONS

A. FACTUAL SUMMARY

The complaint charges Genesco, a Tennessee corporation, with unfair acts and practices in connection with its retail divisions' handling of credit balances existing in customer charge accounts. These practices, it is alleged, caused a substantial number of Genesco's charge account customers to be deprived of substantial sums of money rightfully theirs (Complaint, ¶¶ 5, 6). Genesco had the authority to establish and monitor the allegedly unfair acts and practices of its retail divisions throughout the relevant time period, although it did not choose to exercise this authority until mid-1974 (Findings 6, 36-37).

Genesco, in addition to its other corporate endeavors, operates retail specialty apparel and footwear stores in a number of states (Finding 1). As an adjunct to such retail operations, respondent's retail divisions permit qualifying customers to charge purchases on charge account plans maintained by Genesco (Finding 4).

Occasionally these charge accounts, through return of merchandise, overpayment, or other transactions, reflected credit balances which represented an amount of money owed by respondent to its customers (Finding 8). Some such credit balances resulted from accounting errors; however, the handling of these credit balances is not challenged in the complaint (Fn., Finding 7). Likewise, credit balances subsequently credited against customer purchases or refunded are not encompassed within the category of credit balances under consideration in this proceeding.

When a credit balance was created, billing statements reflecting such balance were sent to customers by some of Genesco's retail divisions only for the billing period during which the credit balance was created and for subsequent billing periods in which activity on the account occurred (Finding 9). However, other divisions also sent billing statements to customers whose accounts reflected a credit balance during billing periods in which no activity occurred.

[21] Various notations were made on billing statements used by Genesco's retail divisions to indicate the existence of a credit balance. These notations ranged from a cryptic dash (-) or "CR" next to the account balance figure to a stamped or printed legend notifying the customer that a credit balance existed (Findings 10-13).

Prior to mid-1974, all requests for the refund of credit balances were honored (Finding 23). However, all of the billing statements used by Genesco's retail divisions during 1972-1973, and many such statements used during 1974-1975, failed to advise customers of their right to request and receive a refund of their credit balances. Additionally, these statements failed to advise charge customers that, if they took no action, such credit balances ultimately would be transferred from their account without notification to, or authorization by, the customer (Findings 15, 21).

Commencing in late 1974, some billing statements used by Genesco's retail divisions informed customers that credit balances reflected on their accounts would be refunded upon request or that such balances could be left on their accounts to reduce the amount due on future purchases. A few billing statements received in evidence which were used by respondent during 1975 also advised retail charge customers that, after a prescribed time period (e.g., 6 months), outstanding credit balances would be refunded automatically (Finding 14).

Prior to the adoption in mid-1974 of a corporate policy regarding the handling of credit balances, several of Genesco's retail divisions routinely transferred such balances from customer accounts after a set period of inactivity on the account of from 6 to 18 months

(Findings 16-17). During the period 1972-1974, a total of \$823,329.98 in credit balances was transferred from customer charge accounts (Finding 20). In order to accomplish transfer of a credit balance from a customer's charge account, bookkeeping entries were made by the retail divisions debiting the customer's account and crediting a corporate account with the amount of the credit balance (Finding 27). Once such transfer had been effectuated, no attempt was made to refund or reinstate such credit balances unless a specific request to do so was received from the customer (Finding 22).

[22] Variations in divisional handling of credit balances and deviations from established divisional policy occurred during the time period under consideration (Findings 17-18, 25). Such aberrational occurrences are not, however, of major significance in the context of the overall divisional practices challenged as unfair in the complaint. Also, the fact that all divisions did not transfer credit balances in the same manner or throughout the relevant time period does not preclude a determination that the handling of credit balances in the manner described by some retail divisions of Genesco constituted an unfair act or practice violative of Section 5 of the Federal Trade Commission Act.

In mid-1974, as part of a major consolidation and restructuring of Genesco, a corporate policy for the handling of credit balances of customer charge accounts for all retail divisions was adopted (Findings 36-37). This corporate policy was adopted subsequent to the receipt by Genesco of a letter from the Federal Trade Commission seeking information about the credit balance handling practices of Genesco's Bonwit division (Findings 32-37).

While the current corporate policy provides for automatic refund of all credit balances in excess of \$1.00, no provision was made at the time the policy was instituted to inform customers, whose credit balances in the past had been transferred, that, by making a request, they could still obtain full refunds or reinstatement of credit balances which had been transferred from their accounts (Findings 21, 37-38).

Although compliance with the mid-1974 corporate policy was made mandatory, evidence was received indicating that some retail divisions violated such policy during 1974 and 1975 (Findings 39-42). The mid-1974 policy ostensibly followed by all Genesco divisions is not, however, in issue in the instant proceeding. At most, the current method employed by Genesco in handling credit balances and the degree of compliance therewith bear on the question of what remedy is necessary to effectively eradicate any violations found to exist.

Other members of the retail industry followed practices in respect to charge customers' credit balances similar to the practices followed

by Genesco in the pre-1974 period (Finding 43). This fact, however, does not preclude a determination that Genesco's practices were unlawful. [23]

B. RESPONDENT'S CREDIT BALANCE ACTS AND PRACTICES WERE
PROHIBITED BY SECTION 5 OF THE FEDERAL TRADE COMMISSION
ACT

As a consequence of stipulations as to the credit balance practices followed by many of Genesco's retail divisions prior to 1974, and receipt into evidence of numerous billing statements used by respondent which demonstrate the form of notice provided charge customers with credit balances, no controlling factual issues are in dispute. Respondent has conceded that, in many of its retail divisions' normal course of dealing with charge customers, substantial sums of money in the form of credit balances were transferred from customers' accounts to corporate accounts without notice to or authorization by the customer.

Respondent does not dispute facts showing that its retail divisions failed to send charge customers with credit balances periodic billing statements apprising them of the existence of such balances, failed to inform such customers of their continuing right to request and receive a refund before or after transfer of a credit balance from their charge account had been effected, and failed to advise charge customers that credit balances, without notice, would be routinely transferred from charge accounts after periods of inactivity.

Given this factual consensus, the critical determination necessary to decide if a violation has occurred is whether respondent's conduct constitutes an unfair act or practice in commerce prohibited by Section 5 of the Federal Trade Commission Act. As has repeatedly been noted in judicial opinions addressing the question of "fairness," Congress intentionally refrained from explicitly deliniating the acts or practices prohibited, choosing instead to delegate to the Commission the power to "give definition and content to the term 'unfair practices.' " *Pfizer Inc.*, 81 F.T.C. 23, 60 (1972); *see also, Federal Trade Commission v. Standard Education Society*, 86 F.2d 692, 696 (2d Cir. 1936), *rev'd on other grounds*, 302 U.S. 112 (1937); *Federal Trade Commission v. Brown Shoe Co.*, 384 U.S. 316, 320-21 (1966).

[24] While the concept of fairness enunciated in Section 5 may be elusive, the Commission has enumerated the factors which should be considered in determining whether a practice not otherwise prohibited as deceptive or violative of antitrust laws is nonetheless unfair. These criteria were repeated in a footnote to the Supreme Court's

opinion in *Federal Trade Commission v. Sperry and Hutchinson Co.*, 405 U.S. 233, 244-245 (1972), as follows:

(1) whether the practices, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive or unscrupulous, (3) whether it causes substantial injury to consumers (or competitors or other businessmen). “Statement of Basis and Purposes of Trade Regulation Rule 408 [Unfair or Deceptive Advertising and Labelling of Cigarettes in Relation to the Health Hazards of Smoking].” 29 Fed. Reg. 8324, 8355 (1964).

Although initially some question as to the scope of Congress’ delegation existed, it is now clear that the Commission’s jurisdiction in dealing with unfair commercial practices is not limited to activities which violate the common law or other criminal or antitrust statutes. The Commission, in the exercise of its delegated authority under Section 5, may, in the public interest, prohibit as “unfair” acts or practices which have severe adverse effects on consumers despite their seemingly technical legality. *Spiegel, Inc. v. Federal Trade Commission*, [Trade Reg. Rep. ¶ 61,006, at 69,450 (1976-2 Trade Cases)]; *Federal Trade Commission v. Sperry and Hutchinson Co.*, *supra*, at 239; *All-State Industries of North Carolina*, 75 F.T.C. 465, 490-494 (1969), *aff’d*, 423 F.2d 423 (4th Cir. 1970), *cert denied*, 400 U.S. 828 (1970).

A recent Commission decision, *Beneficial Corp.*, CCH [1973-1976 Transfer Binder] Trade Reg. Rep. ¶ 20,959, at 20,820 [86 F.T.C. 119], *enforced in part and vacated and remanded as to scope of order*, No. 75-2102 (3rd Cir. Sept. 8, 1976), summarized the fairness issues properly within the scope of Section 5 as follows: [25]

There is no doubt at this point that the Commission may adapt the substance of Section 5 to changing forms of commercial unfairness, and is not limited to vicariously enforcing other law.
* * * [T]hose who engage in commercial conduct which is contrary to a generally recognized public value are violating the Federal Trade Commission Act, notwithstanding that no other specific statutory strictures apply.

See also, Federal Trade Commission v. R. F. Keppel & Bro., Inc., 291

U.S. 304, 313 (1934); *Federal Trade Commission v. Sperry and Hutchinson Co.*, *supra*; *Pfizer Inc.*, *supra*.

No attempt was made, either in the complaint or during adjudication, to bring respondent's credit balance practices within any specific common law or statutory prohibition. This, however, does not preclude a determination that Genesco's activities were unlawful. The Commission, in fulfilling its responsibility to develop a progressive and evolutionary definition of "unfairness" under Section 5, may hold that respondent's credit balance practices were "contrary to a generally recognized public value" resulting in substantial harm to consumers and were, therefore, unfair acts and practices within the prohibition of this Section.

Applying the broad standard set forth in *Sperry and Hutchinson Co.*, *supra*, in analyzing respondent's credit balance practices, the conclusion that such practices are unfair, and thus unlawful, is inevitable. To unilaterally deprive charge customers of credit balances due them without any prior or contemporaneous notice of respondent's transfer practices is abhorrent to all generally recognized concepts of marketplace fairness. The fact that such balances might subsequently be refunded upon request does not serve to purge this practice of its inherent unfairness since the likelihood that subsequent requests for refunds will be made is diminished, if not eliminated, by respondent's failure to send periodic notices of credit balances to charge customers and its failure to disclose their continuing right to request and receive refunds of such balances.

Absent a clear notification and understanding to the contrary, respondent's charge customers were entitled to expect that their credit balances would be retained [26] in their accounts to be offset against future purchases, or ultimately refunded to them. Respondent's practices of transferring out credit balances without notice preyed on the vulnerability of its charge customers. This omission of material facts not only makes respondent's credit balance practices palpably unfair, but also deceptive.

Respondent clearly has a general commercial duty to disclose to its charge customers all material facts relating to the handling of credit balances which may exist in their accounts. *Beneficial Corp.*, *supra*, at 20,821. The "general commercial duty to disclose material facts" noted in the *Beneficial* decision is not unique. By analogy, the rationale requiring full disclosure of material facts in advertising and contract cases also supports the conclusion that Genesco had an affirmative duty to fully disclose all aspects of its credit balance

practices to its charge customers. *Pfizer Inc.*, *supra*, at 60-63; *All-State Industries of North Carolina, Inc.*, *supra*, at 489-490.⁵

Official recognition of the importance of full disclosure of material facts in credit transactions was taken by Congress in its enactment in 1968 of the Consumer Credit Protection Act (Pub. Law 90-321, 90th Cong., May 29, 1968). Regulations promulgated under this Act and amended through October 28, 1975 (12 C.F.R. 226) have reiterated the necessity of such disclosure in credit transactions. The stated purpose of a part of these regulations is "to assist the customer to resolve credit billing disputes in a fair and timely manner, to regulate certain billing and credit card practices, and to strengthen the legal rights of consumers." (12 C.F.R. 226, 226.1; see also, Sections 226.6-226.7.)

[27] Respondent has advanced no persuasive commercial or other justification which would lessen its duty to fully inform charge customers of its credit balance practices. The fact that other members of the retail industry employed similar practices does not exonerate respondent of its failure to make full disclosure to its charge customers. *Peacock Buick, Inc.*, CCH [1973-1976 Transfer Binder] Trade Reg. Rep. ¶ 21,083, at fn. 12, p. 20,951 [86 F.T.C. 1532 at 1563]. Whether or not credit balance transfers had an immediate impact on respondent's income also does not, as respondent maintains, mitigate the unfairness inherent in the failure to disclose to charge customers Genesco's credit balance practices.

The final criteria cited by the Commission for consideration in determining whether a given trade practice is unfair — *i.e.*, substantial injury to consumers — is the unavoidable consequence of respondent's credit balance practices. Over three-quarters of a million dollars were transferred from charge customers' accounts by Genesco's retail divisions during 1972-1974. Although an unspecified portion of this amount could reflect credit balances which were never actually due the customer or which were subsequently refunded, the fact remains that a significant number of charge customers were deprived of substantial funds rightly theirs as a direct result of Genesco's credit balance practices.

Since respondent's credit balance practices were unfair, deceptive and caused substantial harm to consumers, it must be concluded that a violation of Section 5 of the Federal Trade Commission Act has occurred.

⁵ "The law appears to be working toward the ultimate conclusion that full disclosure of all material facts must be made whenever elementary fair conduct demands it." W. Prosser, *Law of Torts* 698 (4th Ed. 1971). See also, *Affiliated Ute Citizens of Utah, et al. v. United States*, 406 U.S. 128, 153-154 (1972).

C. RESPONDENT'S ADOPTION OF A CORPORATE POLICY FOR
HANDLING CREDIT BALANCES DOES NOT RENDER THIS
ADJUDICATION MOOT

Respondent, in asserting that this matter is moot, maintains that the corporate policy voluntarily adopted in mid-1974, mandating automatic refunds of credit balances after a prescribed period of inactivity and providing for monthly billing statements to charge customers with existing credit balances, comports fully with the [28] requirements of Section 5 of the Act and the major provisions of the proposed order. Respondent argues that, given this change in business policy, no legitimate purpose will be served by entering a cease and desist order.

In assessing the importance of respondent's discontinuance of the challenged credit balance practices, the voluntariness of such discontinuance must be determined. Commission decisions have repeatedly noted that:

It is well established * * * that discontinuance of an offending practice, particularly after initiation of governmental investigation, and in circumstances where resumption is possible, does not obviate the need for, or propriety of, an order. *Spiegel, Inc.*, CCH [1973-1976 Transfer Binder] Trade Reg. Rep. § 20,985, at 20,841 (FTC 1975).

See also, *Libby-Owens Ford Glass Co. v. Federal Trade Commission*, 352 F.2d 415, 418 (6th Cir. 1965); *Cotherman v. Federal Trade Commission*, 417 F.2d 587, 594-595 (5th Cir. 1969); *Coro, Inc. v. Federal Trade Commission*, 338 F.2d 149 (1st Cir. 1964), *Cert. denied*, 380 U.S. 954 (1965).

Reviewing the chronology of events leading up to respondent's adoption of its 1974 corporate policy, the most reasonable conclusion is that the Commission's initiation of an investigation of the handling of credit balance practices by respondent and other members of the retail industry was the precipitating factor in respondent's adoption of its current corporate policy.

Respondent points to the change in corporate management which commenced in March of 1973 and maintains that the eventual change in corporate policy with respect to the handling of customers' credit balances was part of the corporate reorganization initiated by this management. No evidence was received which indicates the degree of management changes which occurred in 1973. The testimony of Mr. Shelton, Genesco's Vice-Chairman and Chief Administrative Officer, [29] however, revealed that the management change was essentially a redistribution of corporate power to a segment of management already existing within the organizational structure. Although the

philosophy of this management group may have differed from the controlling management group it replaced, its impact on Genesco apparently had been felt prior to March 1973. The 1973 management change, arguably, was neither as extensive nor as radical as respondent's characterization of it implies. In this regard, it should be noted that no definite steps had been taken to reform the retail divisions' practices concerning the handling of credit balances until the late spring of 1974.

Genesco's current corporate policy concerning the handling of credit balances was first recommended to top management in the late spring of 1974 and officially adopted later that year. One of respondent's retail divisions received a Commission letter of inquiry concerning credit balance practices in April 1974. It is reasonable to conclude that Genesco's top management was immediately made aware of the Federal Trade Commission's investigation by this retail division.

Given this sequence of events, the most logical assessment of the underlying motivation for adoption of the 1974 corporate policy is that "Respondent stopped violating the law when it learned that the law's hand was already on its shoulder." *Coro, Inc.*, 63 F.T.C. 1164, 1201. Certainly, Genesco's change of corporate policy cannot be viewed as being born of spontaneous recognition of the error of its ways. Since Genesco's discontinuance of the challenged practices was not entirely voluntary or self-initiated, a cease and desist order may properly be entered. *Galter v. Federal Trade Commission*, 186 F.2d 810, 812-813 (7th Cir. 1951), *cert. denied*, 342 U.S. 818 (1951); *Coro, Inc. v. Federal Trade Commission*, *supra*; *Beneficial Corp.*, *supra*, at 20,822.

Respondent, relying on *Eugene Dietzgen Co. v. Federal Trade Commission*, 142 F.2d 321, 331 (7th Cir. 1944), *cert. denied*, 323 U.S. 730 (1944) and subsequent Commission decisions, asserts that, even if discontinuance was not entirely voluntary, Genesco's current policy concerning credit balances fully comports with the requirements of Section 5 of the Federal Trade Commission Act and, therefore, no purpose will be served by entering a cease and desist order at this juncture.

[30] As discussed in the previous Section of this opinion, respondent's current corporate policy provides prospectively for automatic refunds of credit balances and periodic notices to customers of the existence of such balances. This policy, however, makes no provision for notification to charge customers who, unknowingly, already have had credit balances transferred from their accounts. Respondent claims an abiding intention to refund the full amount of any credit

balance previously transferred from a customer account if a request to do so is received from the customer, but denies that there exists any necessity to notify customers of this intention. Respondent's continuing violation, which the current corporate policy does not remedy, is the failure to inform charge customers that credit balances have been transferred from their accounts and that such balances will be refunded on request. In order to insure that charge customers are fully advised of respondent's willingness to refund any credit balance which has been transferred from their accounts, a cease and desist order must issue.

Since the mid-1974 change in corporate policy, some Genesco divisions failed to adhere to, or abide by, said policy. At a minimum, the record shows that some of respondent's divisions were very dilatory, or careless, in implementing the policy. A cease and desist order must also be entered to ensure the avowed corporate policy is fully implemented by all retail divisions.

As a corollary to respondent's argument that the current corporate policy comports fully with Section 5 of the Federal Trade Commission Act and this adjudication is therefore moot, respondent cites a recent change in prevailing industry practices and the enactment since 1975 of several state laws and federal regulations which would make resumption of the violative practices unlikely. In arguing that the instant proceeding is moot, respondent bears the heavy burden of demonstrating that "there is no reasonable expectation that the wrong will be repeated." *United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (2d Cir. 1945); *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953); *Rubbermaid, Inc.*, CCH [1973-1976 Transfer Binder] ¶ 21,131 at 20,986 (FTC 1976). Respondent has not met this burden.

[31] Just as similar credit practices by members of the retail industry would not exonerate respondent of its violation of Section 5 (*Peacock Buick, Inc.*, *supra*, at 20,951), recent changes in industry practices concerning the handling of customer credit balances does not prevent respondent from persisting in its failure to give adequate notice of its refund policy to charge customers who have already had balances transferred from their accounts. Likewise, practices followed by competitors would not preclude respondent from a resumption of their violative practices.

The recent enactment of state laws and federal regulations cited by respondent as evidence that violative practices will not be resumed is also unpersuasive. Although such enactments reach some activities challenged in this proceeding, *e.g.*, failure to send periodic billing statements to charge customers with credit balances, other activities,

e.g., transfer of credit balances, would remain unrestrained if an order is not entered.

Based on the discussion set forth above, no basis exists for holding this adjudication moot.

D. THE ORDER ENTERED HEREIN IS WITHIN THE COMMISSION'S
AUTHORITY AND IS NECESSARY TO FULLY REMEDY THE
VIOLATIONS FOUND

Having determined that respondent has violated, and is violating, Section 5 of the Federal Trade Commission Act in handling credit balances of charge customers, the Commission has wide discretion in fashioning whatever order is necessary to insure the cessation of such unfair acts and practices. *Federal Trade Commission v. National Lead Co.*, 352 U.S. 419, 428-430 (1957); *Jacob Siegel Co. v. Federal Trade Commission*, 327 U.S. 608, 611 (1946); *Viviano Macaroni Co. v. Federal Trade Commission*, 411 F.2d 255, 260 (3d Cir. 1969). In addition to prohibiting future violative acts, the Commission may, where necessary, impose affirmative duties upon a respondent if such duties are an integral part of the remedy needed to fully remedy the violations found or their continuing effects. *Federal Trade Commission v. National Lead Co.*, *supra*, at 430; *Windsor Distribution Co. v. Federal Trade Commission*, 437 F.2d 443, 444 (3d Cir. 1971). Courts will not interfere [32] with such orders so long as a reasonable relationship between the remedy and the unlawful practice is found to exist. *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 394-95 (1965); *Federal Trade Commission v. National Lead Co.*, *supra*, at 429; *Federal Trade Commission v. Rubbermaid Co.*, 343 U.S. 470, 475 (1952).

Paragraph I of the order is, substantially, a formalization of what respondent asserts is its current policy. Periodic billing statements are ordered to be sent to all charge customers with credit balances in their accounts, informing such customers of the amounts of such balances and of their right to receive an immediate refund upon request or an automatic refund, without request, after six months. Respondent has insisted throughout this proceeding that the provisions included within Paragraph I are unnecessary since the 1974 corporate policy provides identical consumer treatment. However, billing statements used by some of Genesco's retail divisions after adoption of the corporate policy did not contain the disclosures mandated by said policy. The clarification provided by the order will serve to eradicate such non-conformity in the future.

Additionally, the order provides that charge customers must be informed of the manner in which a request for an immediate refund

may be made, *i.e.*, by returning the statement reflecting a credit balance to the store in person or by mail. The corporate policy does not prescribe such a method nor does it require notification of such method to charge customers.

In order to cure respondent's continuing failure to notify charge customers of their continuing right to request and receive a refund of credit balances which have been transferred from their accounts, Paragraph IIA of the order requires that notice be sent to all charge customers who had credit balances transferred from their accounts during the period January 1, 1972 to March 11, 1975 (the date the complaint herein issued), and who have not received a refund or reinstatement of such balance of their continuing right to request and receive a cash refund. Paragraph IIB provides that all refund requests generated by the required notice are to be treated in accord with respondent's current credit balance policy. Respondent, however, is given [33] the option by this provision of making either cash or credit certificate refunds.

Respondent has taken the position that any order provision requiring the refund of credit balances transferred prior to March 11, 1975 would be improper. Relying on *Heater v. Federal Trade Commission*, 503 F.2d 321 (9th Cir. 1974), respondent maintains that the Commission lacks the power to order restitution in the form of a refund of previously transferred credit balances in the instant proceeding.

Since the order entered in this proceeding does not order restitution, it is unnecessary to resolve the issue of the Commission's restitutionary powers. It should be noted, however, that the Commission is not totally devoid of such power.* As the Senate Committee on Commerce Report on the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act noted,

* * * there is no intent on the part of the Committee to disturb the Commission's power to compel restitution by its own order when such restitution is necessary to terminate a continuing violation of section 5 of the Federal Trade Commission Act.

S. Rep. No. 93-151, 93d Cong., 1st Sess. 28 (1973) (conference report).

This comment supports the position that, given the continuing violation present in the instant proceeding, the Commission, in fashioning an effective order, could order restitution.

A thorough reading of the order entered herewith discloses that restitution, although proper, has not been ordered. Respondent has insisted that the credit balances in issue were transferred to

* The Commission has specifically stated that it does not agree with the holding of the *Heater* decision. *Holiday Magic, Inc.*, 85 F.T.C. 90 (1975).

corporate accounts, which had no effect on income, where they are held for ultimate refund should such a request be received. (Respondent's Proposed Findings 22, 39, 45-48; Respondent's [34] Post-Trial Memorandum, pp. 15, 20; Respondent's Post-Trial Reply Memorandum, p. 13.) Additionally, it has always been respondent's asserted policy to honor all valid requests for reinstatement or refund of transferred credit balances. (CX 89G; Respondent's Proposed Findings 23, 40; Respondent's Post-Trial Memorandum, p. 19.) The order provision dealing with transferred credit balances requires only that charge customers be advised of their credit balance and of respondent's continuing refund policy and the form a request for such refund should take.

Respondent insists that this notification requirement is oppressive and burdensome due to the difficulty inherent in compiling lists of affected charge customers from the retail divisions' accounting records. Lists of affected charge customers for some retail divisions were received into evidence during the course of this adjudication (CX 14, 28). Although some difficulty might be encountered in compiling the additional lists necessary to comply with the order, such difficulty does not relieve respondent of its duty to comply with the law, i.e., to provide adequate notice to charge customers of their continuing right to request and to receive refunds of credit balances rightfully due them but unilaterally transferred from their accounts and now held by respondent.

Finally, Paragraph VI mandates that respondent maintain, for a period of three (3) years, records of customers who receive an automatic refund of a credit balance and of customers who request and are refused a credit balance refund, together with the reason for such refusal. The additional burden imposed by this provision will be slight indeed; at most, it will be an accumulation of records which must be created in complying with other provisions of the order. The Commission has for several years included record-keeping provisions in its orders to enable compliance checks to be made, and a three (3) year period is a reasonable requirement (see *Carpets "R" Us, Inc.*, Dkt. 8947, Initial Decision January 10, 1975; Commission Opinion February 26, 1976, CCH [1973-1976 Transfer Binder] Trade Reg. Rep. ¶ 21,108, at 20,969 [87 F.T.C. 303]).

All provisions of the order entered herewith are directed at, and reasonably related to, acts and [35] practices found to be unlawful and are necessary to prevent such violations in the future and to insure compliance therewith. Accordingly, the order is well within the authority of the Commission and is therefore an appropriate remedy in this proceeding.

CONCLUSIONS OF LAW

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

2. Respondent Genesco Incorporated is a corporation organized, existing and doing business under and by virtue of the laws of the State of Tennessee with its principal office and place of business at 111 - 7th Ave., North, Nashville, Tennessee. Respondent Genesco Incorporated sells and distributes merchandise in commerce and, through its retail divisions, operates retail specialty apparel and footwear stores in a number of states.

3. At all times relevant hereto, Genesco Incorporated has had authority to control the policies, acts and practices of its retail divisions in the handling of customer charge accounts.

4. The challenged acts and practices of respondent in connection with the handling of credit balances on charge accounts of its retail divisions' customers were, and are, unfair and deceptive. They had and now have the capacity and tendency to cause a substantial number of respondent's charge account customers to be deprived of substantial sums of money rightfully theirs.

5. These acts and practices of respondent were and are to the prejudice and injury of the public and constituted, and now constitute, unfair acts and practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act.

6. The order entered herewith is proper in scope and is reasonably related to the violations charged in the complaint.

[36] ORDER

I

It is ordered, That respondent Genesco Incorporated, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer open and credit accounts or other retail consumer charge accounts created incident to the business of selling consumer merchandise and services at retail, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall:

A. Mail or deliver to each charge account customer having a credit balance in excess of one dollar (\$1.00) created after the date of service of this order a periodic statement each billing period following the creation of the credit balance, clearly setting forth such

credit balance; *provided, however*, that no periodic statement need be sent once a credit balance is refunded or a fully offsetting purchase is made.

[37] B. Notify each charge account customer having a credit balance created after the date of service of this order of the customer's right to request and receive a cash refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph IA and accompanied by a return envelope, if it is the customary practice of the division or unit to accompany periodic billing statements with return envelopes. Such first disclosure shall in all material respects be consistent with, but need not be identical to, the following:

NO PAYMENT REQUIRED

The Credit Balance shown on the enclosed statement represents money we owe you. You may obtain a refund by presenting (your) (this) statement at our store or by returning it in the enclosed envelope. If you do not charge against [38] this credit or request a refund, a check will be mailed to you within six (6) months. A credit balance of \$1 or less will not be refunded unless specifically requested, and it will not be credited against future purchases after expiration of a six (6) month period.

Each subsequent periodic statement issued thereafter shall be identical in all respects to the first such statement except that each must show the time in months remaining before the refund or a credit against future purchases will be made. *Provided, however*, if respondent refunds without request credit balances of one dollar (\$1.00) or less, and credit amounts under one dollar (\$1.00) against future purchases, the disclosure may be amended to accurately reflect this practice.

The disclosure furnished in compliance with this paragraph shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the periodic statement, or entirely on the reverse side of the periodic statement, or entirely on one side of a separate page. In the event such disclosure [39] is not on the face of the periodic statement, then the periodic statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see (enclosed instructions) OR (reverse side)."

C. Refund to each charge account customer with a credit balance of more than one dollar (\$1.00) created after the date of service of this order the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive month during which a

credit balance exists and the customer neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the customer.

II

It is further ordered, That respondent shall:

A. Within ninety (90) days after service [40] of this order notify each charge account customer whose credit balance was transferred from the customer's account at any time within the period January 1, 1972 to the issuance of the complaint herein on March 11, 1975, which credit balance has not been refunded to the customer as of the date of service of this order or the customer has not made a fully offsetting purchase as of the date of service of this order, of the amount of the credit balance that was transferred and of the customer's right to request and receive a cash refund in the amount of such credit balance, unless such credit balance is not in fact owed to the customer.

B. Refund to each charge account customer required to be notified by respondent of a credit balance pursuant to Paragraph IIA, who requests a refund, the full amount of such credit balance; [41] *provided, however,* that nothing contained herein shall prevent respondent from making such refund by giving a credit certificate(s), in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s) or an accompanying notice attached to the certificate, shall clearly and conspicuously disclose that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption. Respondent shall comply with the provisions of this paragraph no later than thirty (30) days after receipt of a request for a refund from a customer.

III

It is further ordered, That each refund required to be made by this order shall be given to the customer either in person or by mailing a check (or credit [42] certificate(s) in the case of credit balances existing prior to the issuance of the complaint herein) payable to the order of the customer, to the last known address shown in respondent's records for said customer. Each periodic statement sent pursuant to the terms of this order shall be mailed to the customer at the last known address shown in respondent's records for said customer. In the event that any such statement or check is returned to respondent with a notification to the effect that the customer to

whom it was mailed is not located at the address to which it was sent, respondent shall remail the check or statement (or credit certificate) with an address correction request to the Post Office. For each check or statement (or credit certificate) in an amount of twenty-five dollars (\$25.00) or more which has been remailed and is returned to respondent, respondent shall then obtain from a credit bureau the most current address available for the customer by means of an in-file report or other report on information then existing in the credit bureau's file. If a new address is obtained, respondent shall remail the check or statement (or credit certificate) to the customer at such address. For all customers whose credit balances were created prior to issuance [43] of the complaint herein, and have not been located by any of the preceding methods, respondent shall have no further obligation under this order. For all customers whose credit balances have been created after service of this order, and have not been located by any of the preceding methods, respondent shall retain or reinstate the full amount of the credit balance on the customer's account, to remain thereon for one year from the date on which the remailed check or statement was returned so that offsetting purchases can be made, and respondent shall be relieved of any further obligation to send any additional notice and/or any refund with respect to the credit balance in question. *Provided, however,* that, in the event said customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph IIB.

IV

It is further ordered, That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit [44] balance is changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such charge shall automatically be terminated and replaced by its obligations under this order with respect to the new credit balance created by said change.

V

It is further ordered, That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on

accounts administered by third parties or to transactions arising out of lay-away plans or installment sales contracts.

VI

It is further ordered, That respondent shall maintain a list for each of its retail operating divisions which contains the following data: name and address of each customer who received an automatic refund of a credit balance; the date the credit balance was created and the date it was refunded; and the amount of the credit balance. Respondent shall also maintain for each such division a separate list which contains the following data: the names and addresses of all customers who [45] requested in person or by mail a refund of a credit balance but whose request was refused; the date the request was made; the date a refusal was sent to the customer; the amount of the credit balance; a copy of any written explanation of reason for the refusal sent to the customer; and, if no written explanation for the refusal was made, a statement of the reasons for the refusal.

VII

It is further ordered, That respondent shall retain the records required to be maintained by Paragraph VI of this order for a period of three (3) years and, upon request, produce said records for the purpose of examination and copying by representatives of the Federal Trade Commission.

VIII

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its retail operating divisions.

IX

It is further ordered, That respondent notify the [46] 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.

X

It is further ordered, That respondent shall, within one hundred twenty (120) days after entry 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.

[1] FINAL ORDER

Both complaint counsel and respondent filed notices of an intention to appeal the initial decision, but filed a "Joint Motion to Withdraw Notices of Appeal" on February 7, 1977, while requesting the Commission to stay further proceedings pending consideration of a proposed order jointly submitted by the parties in lieu of the order recommended by the administrative law judge. The Commission has elected to treat this matter as an unappealed initial decision, and has placed this matter on its own docket for review of the limited question of the appropriateness of the order recommended by the administrative law judge, in conformity with Sections 3.51(a) and 3.54 of its Rules.

In response to the Commission's request for clarification of the parties' intentions, the respondent in a letter of March 3, 1977, advised us that it

would have no objection to * * * the Commission adopting the proposed order submitted by the parties and, in the event findings of fact and conclusions of law were deemed necessary and appropriate, adopting those set forth by the Administrative Law Judge in his initial decision.

[2] Such findings and conclusions are indeed necessary and appropriate under the Commission's Rules. We therefore accept respondent's offer and, pursuant to Section 3.51(a) of our Rules, "the initial decision shall become the decision of the Commission."

We also accept and hereby enter the jointly proposed order, which differs from the law judge's proposed order in several respects. These differences are described in complaint counsel's memorandum of February 7, 1977, in support of the "Joint Motion to Withdraw Notices of Appeal." We attach that memorandum as an appendix to this Final Order, since there is no need to repeat that analysis here.

This matter having been docketed for review by the Commission for the limited purpose of considering the appropriateness of the order recommended by the administrative law judge in his initial decision, and the Commission having considered the modifications of that order proposed by respondent and complaint counsel in their "Joint Motion to Withdraw Notices of Appeal" from the initial decision, and the Commission having concluded that the proposed modifications would be in the public interest:

It is ordered, That pages 1-35 of the initial decision be, and they

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hereby are, the Findings of Fact and Conclusions of Law of the Commission.¹

It is further ordered, That the following Final Order to cease and desist be entered, to become effective on the date of service.

ORDER

I

It is ordered, That respondent Genesco Incorporated, a corporation, its successors and assigns, and its officers, representatives, agents and employees, directly or through any corporation, subsidiary, division or other device, in connection with the handling of credit balances on retail consumer open end credit accounts or other retail consumer charge accounts created incident to the business of selling consumer merchandise and services at retail, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall:

[3] A. Mail or deliver to each charge account customer having a credit balance in excess of one dollar (\$1.00) created after or existing as of the date of service of this order a periodic statement each billing period following the creation of the credit balance, clearly setting forth such credit balance; *provided, however*, that no periodic statement need be sent once a credit balance is refunded or a fully offsetting purchase is made.

B. Notify each charge account customer having a credit balance created after the date of service of this order of the customer's right to request and receive a refund in the amount of such credit balance, such notice to be accomplished by a clear and conspicuous disclosure on or enclosed with each periodic statement required by Paragraph IA and accompanied by a return envelope, if it is the customary practice of the division or unit to accompany periodic billing statements with return envelopes. Such first disclosure shall in all material respects be consistent with, but need not be identical to, the following:

NO PAYMENT REQUIRED

The Credit Balance shown on the enclosed statement represents money we owe you. You may obtain a refund by presenting (your) (this) statement at our store or by returning it in the enclosed envelope. If you do not charge against this credit or request a refund, a check will be mailed to you within six (6)

¹ With the proviso that "Tennessee" be modified to read "Tennessee" in the third line of the law judge's second "Conclusion of Law." [p. 35]

months. A credit balance of \$1 or less will not be refunded unless specifically requested, and it will not be credited against future purchases after expiration of a six (6) month period.

Each subsequent periodic statement issued thereafter shall be identical in all respects to the first such statement except that each must show the time in months remaining before the refund or a credit against future purchases will be made. *Provided, however*, if respondent refunds without request credit balances of [4] one dollar (\$1.00) or less, and credit amounts under one dollar (\$1.00) against future purchases, the disclosure may be amended to accurately reflect this practice.

The disclosure furnished in compliance with this paragraph shall not provide any additional information relating to credit balances, shall be set forth separately from any other written matter, and shall be made either entirely on the face of the periodic statement, or entirely on the reverse side of the periodic statement, or entirely on one side of a separate page. In the event such disclosure is not on the face of the periodic statement, then the periodic statement shall state clearly and conspicuously on its face: "Credit balance. Do not pay. For refund see (enclosed instructions) OR (reverse side)."

C. Refund to each charge account customer with a credit balance of more than one dollar (\$1.00) created after the date of service of this order the full amount of said credit balance no later than thirty-one (31) days from the end of the sixth consecutive month during which a credit balance exists and the customer neither transacts any business on the account nor requests a refund, unless such credit balance is not in fact owed to the customer; *provided, however*, that nothing contained in this paragraph shall prevent such a refund being made by giving a credit certificate(s) in the full amount of the credit balance which shall be redeemable, at the customer's option, in merchandise or cash. Such a certificate(s) or an accompanying notice attached to the certificate shall clearly and conspicuously disclose that it is redeemable for cash if the customer so requests in person or if the customer returns the certificate(s) by mail with a request for cash redemption.

D. Refrain from writing off or deleting or transferring any credit balance of more than one dollar (\$1.00) created after the date of service of this order from a customer's account before a refund has [5] been made or the customer has made a fully offsetting purchase, unless such credit balance is not in fact owed to the customer or unless there has been compliance with Section III of this order.

II

It is further ordered, That respondent shall:

A. * Within one hundred and twenty days (120) after entry of this order notify each charge account customer from whose account a credit balance of more than one dollar (\$1.00) was transferred at any time within the period January 1, 1972 to the date of service of this order which credit balance has not been refunded to the customer as of the date of service of this order or the customer has not made a fully offsetting purchase as of the date of service of this order, of the amount of the credit balance that was transferred and of the customer's right to request and receive a refund in the amount of such credit balance, unless such credit balance is not in fact owed to the customer. Such notice shall contain language, which is consistent with, but not necessarily identical to, the following:

NO PAYMENT REQUIRED

The amount shown is a credit balance in your favor as a result of a past transaction. You may obtain a refund of this balance by signing the notice and returning it in the enclosed envelope. If you do not request a reinstatement or a refund it will not be placed on your account for use against future purchases.

The notice furnished in compliance with this paragraph shall be clear and conspicuous and shall be set forth separately from any other written matter except that it should be in close conjunction with [6] the amount of such credit balance as disclosed therein. Such notice shall be accompanied by a return envelope.

B. Refund to each charge account customer, required to be notified by respondent of a credit balance pursuant to Paragraph IIA, who requests a refund, the full amount of such credit balance by check or credit certificate.

III

A. *It is further ordered, That each refund required to be made by this order shall be given to the customer either in person or by mailing a check or credit certificate(s) payable to the order of the customer. Each check or periodic statement sent pursuant to the terms of this order and each notice sent pursuant to Paragraph IIA of this order shall be mailed to the customer at the last known address shown in respondent's records for said customer with the notation "Address Correction Requested" appropriately placed on the envelope. In the event that any such statement, check or notice reflecting a credit in the amount of ten dollars (\$10.00) or more is returned to respondent by reason of the fact that the customer to whom it was*

mailed is not located at the address to which it was sent, respondent shall then obtain from a credit bureau the most current address available for the customer by means of an in-file report or other report on information then existing in the credit bureau's file. If a new address is obtained, respondent shall remail the check, statement, notice or credit certificate to the customer at such address. For all customers whose credit balances were created prior to the date of service of the order herein, and have not been located by any of the preceding methods, respondent shall have no further obligation under this order. For all customers whose credit balances have been created after service of this order, and have not been located by any of the preceding methods, respondent shall retain or reinstate the full amount of the credit balance on the [7] customer's account, to remain thereon for one year from the date on which the remailed check or statement was returned so that offsetting purchases can be made, and respondent shall be relieved of any further obligation to send any additional notice and/or any refund with respect to the credit balance in question. *Provided, however,* that, in the event said customer should subsequently request a refund of any such credit balance, respondent shall treat such request in the manner provided in Paragraph IIIB.

B. When a customer requests, in person or by mail, a refund of a credit balance in any amount which had been reflected at any time on such customer's account, respondent shall, within thirty (30) days from receipt of such request, either refund the entire amount requested, if owed, or furnish the customer with an individualized written explanation, with supporting documentation, when requested and available, of the reason(s) for refusing to refund the amount requested.

IV

It is further ordered, That a credit balance shall be deemed to be created at the end of the billing cycle in which the credit balance is first recorded on a customer's account and at the end of the billing cycle in which the recorded amount of an existing credit balance is changed due to a customer's use of the account. Whenever the recorded amount of an existing credit balance is changed, respondent's obligations under this order with respect to the credit balance existing prior to such charge shall automatically be terminated and replaced by its obligations under this order with respect to the new credit balance created by said change.

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V

It is further ordered, That, notwithstanding the foregoing, the provisions of this order shall not be applicable to credit balances on accounts administered by third parties or to transactions arising out of lay-away plans or installment sales contracts.

[8] VI

It is further ordered, That respondent shall maintain a list for each of its retail operating divisions which contains the following data: name and address of each customer who received an automatic refund of a credit balance; the date the credit balance was created and the date it was refunded; and the amount of the credit balance. Respondent shall also maintain for each such division a separate list which contains the following data: the names and addresses of all customers who requested in person or by mail a refund of a credit balance but whose request was refused; the date the request was made; the date a refusal was sent to the customer; the amount of the credit balance; a copy of any written explanation of reason for the refusal sent to the customer; and, if no written explanation for the refusal was made, a statement of the reasons for the refusal.

VII

It is further ordered, That respondent shall retain the records required to be maintained by Paragraph VI of this order for a period of three (3) years and, upon request, produce said records for the purpose of examination and copying by representatives of the Federal Trade Commission.

VIII

It is further ordered, That respondent shall forthwith distribute a copy of this order to each of its retail operating divisions.

IX

It is further ordered, That respondent 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.

[9] x

It is further ordered, That respondent shall, within one hundred twenty (120) days after entry 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.

Complaint

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IN THE MATTER OF

AMERICAN CONSUMER SERVICE, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
THE FEDERAL TRADE COMMISSION ACT*Docket C-2887. Complaint, May 23, 1977 — Decision, May 23, 1977*

This consent order, among other things, requires a Carmel, Ind., buying club to cease misrepresenting and/or failing to disclose relevant information regarding benefits, shopping assistance, and savings experienced by club members; misrepresenting, in sales personnel recruitment, the size and true nature of their business, types of jobs offered, and potential earnings of sales personnel. The order further requires the firm to maintain specific files and to furnish prospective customers a 120-day cancellation period in membership agreements.

Appearances

For the Commission: *Peggy H. Summers.*

For the respondents: *Elroy H. Wolff, Sidley & Austin, Washington, D.C.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that American Consumer Service, Inc., a corporation, and Mark F. Thorne and Thomas P. Sheehan, individually and as officers of said corporation, hereinafter sometimes referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent American Consumer Service, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Indiana, with its principal office and place of business located at 101 East Carmel, Carmel, Indiana.

Respondents Mark F. Thorne and Thomas P. Sheehan 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 address is the same as that of the corporate respondent.

PAR. 2. Respondents are now, and for some time last past have been engaged in the buying and in the door-to-door offering for sale, sale and distribution of memberships in a shopping service. The shopping