

Complaint

IN THE MATTER OF

HIKEN FURNITURE COMPANY

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION AND TRUTH IN LENDING ACTS

Docket C-2923. Complaint, June 12, 1978 — Decision, June 12, 1978

This consent order, among other things, requires a Belleville, Ill. furniture retailer to cease employing bait and switch tactics, and misrepresenting or failing to make relevant disclosures regarding prices, products and service, cooling-off periods, cancellation and refund rights, and the availability of arbitration to resolve consumer disputes. The order further prohibits the use of unfair or deceptive means to induce payment from allegedly delinquent debtors, and requires respondent to provide, in the extension of credit, those materials and disclosures required by Federal Reserve regulations. Additionally, respondent is required to furnish its advertising media with copies of Commission's press release setting forth the terms of the order.

Appearances

For the Commission: *Richard A. Palewicz.*

For the respondent: *Neil N. Bernstein, St. Louis, Mo.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and of the Truth in Lending Act and the implementing regulation promulgated thereunder, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Hiken Furniture Company, a corporation, hereinafter sometimes referred to as respondent, has violated the provisions of said Acts, and the implementing regulation promulgated under the Truth in Lending 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 Hiken Furniture Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its principal office and place of business located at 218 West Main St., Belleville, Illinois.

PAR. 2. Respondent is now, and for some time last past has been engaged in the advertising, offering for sale, sale and distribution of household furniture and appliances, and services in connection therewith to the general public.

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COUNT I

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

PAR. 3. In the course and conduct of its aforesaid business, respondent has disseminated and caused the dissemination of certain advertisements concerning said products and services by various means in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, including, but not limited to, advertisements inserted in newspapers of interstate circulation, and in radio and television broadcasts of interstate circulation, for the purpose of inducing, and which was likely to induce, directly or indirectly, the purchase of said products and services; additionally, respondent owns, operates and controls a total of two (2) retail furniture stores located in the States of Illinois and Missouri.

PAR. 4. In the course and conduct of respondent's business and for the purpose of inducing the sale of its household furniture, appliances and services in connection therewith, respondent has made numerous statements and representations in newspaper advertisements, radio and television commercials and oral statements by salesmen to prospective customers.

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

HIKEN WAREHOUSE SALE

3 DAY RIOT SALE

HIKEN 2 DAY SALE

IF YOU WANT TO SAVE \$100 \$200 \$300 \$400 BUY NOW . . .

SAVE UP TO 50% AND MORE

EXTRA EXTRA SAVINGS
SAVE 20% to 60% & MORE

2-PIECE SPANISH STYLE
LIVING ROOM Reg. \$399.00
\$199

HUGE SELECTION

WE BOUGHT CARLOADS OF MERCHANDISE . . .

IMMEDIATE
AVAILABILITY

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. . . GIANT FURNITURE VALUES. . .

GIGANTIC VALUE!

NAMES YOU TRUST

. . . ALL ARE GUARANTEED

THIS WEEK ONLY

TUESDAY

TOMORROW ONLY 10' til 4'

SPANISH

DANISH

French

WALNUT SET

. . . Soft Pecan

Built of Select Woods

EASY TERMS

Instant Credit

FREE BONUS GIFT

. . . Free Delivery

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

1. Respondent is making a bona fide offer to sell the advertised merchandise at the prices and on the terms and conditions stated in the advertisements.

2. By and through the use of the words, "SALE," "SAVE," "EXTRA SAVINGS," and other words of similar import and meaning not set out specifically herein, respondent's merchandise may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondent's regular selling price.

3. The regular selling prices quoted in respondent's advertisements are the amounts at which the advertised merchandise has been sold or offered for sale by respondent for a substantial period of time in the recent, regular course of its business.

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4. By and through the use of the words, "Huge Selection," "WE BOUGHT CARLOADS OF MERCHANDISE," and other words of similar import and meaning not set out specifically herein, the advertised merchandise is available in several different sets from which the prospective purchaser may choose.

5. By and through the use of the words, "IMMEDIATE AVAILABILITY," "NO WAITING," and other words of similar import and meaning not set out specifically herein, the advertised merchandise is readily available for sale in quantities sufficient to meet reasonably anticipated demands.

6. There are no charges in addition to the advertised purchase price of respondent's merchandise.

7. By and through the use of the words "GIANT FURNITURE VALUES," "GIGANTIC VALUE!," "NAMES YOU TRUST," and other words of similar import and meaning not specifically set out herein, the durability of the advertised merchandise exceeds reasonable requirements for normal everyday use for a reasonable period of time.

8. The advertised merchandise was guaranteed in every respect without conditions or limitations and would be continually serviced without charge for an unlimited period of time after the delivery of the advertised merchandise to the homes of purchasers.

9. The advertised offer was being made only for a limited period of time.

10. Purchasers of the advertised merchandise are afforded savings of \$100 and more off the prices at which such merchandise is usually and customarily sold at retail.

11. By and through the use of the words, "DANISH," "French," "SPANISH," and other words of similar import and meaning not set out specifically herein, furniture sold by respondent is of a foreign origin.

12. By and through the use of the words, "Walnut Set," "Soft Pecan," "Built of select woods," and other words of similar import and meaning not set out specifically herein, furniture sold by respondent is of solid wood construction.

13. By and through the use of the words, "Instant Credit" and "Easy Terms," purchasers of respondent's merchandise are never refused credit and are granted easy credit terms without regard to their financial status or ability to pay.

14. Free merchandise and services will be given to all purchasers of respondent's advertised products.

PAR. 6. In truth and in fact:

1. The offers set out in respondent's advertisements are not bona fide offers to sell the advertised merchandise.

terms or conditions stated but are made for the purpose of obtaining leads to prospective purchasers.

2. Respondent's merchandise is not being offered for sale at special or reduced prices, and savings are not thereby afforded to their purchasers because of reductions from respondent's regular selling prices. In fact, respondent does not have regular selling prices, but the prices at which respondent's merchandise is sold vary from purchaser to purchaser.

3. The regular selling prices quoted in respondent's advertisements are not the respondent's regular selling prices but constitute fictitious higher prices upon which a deceptive sale comparison or similar offer may be based.

4. The advertised merchandise is not available in several different sets from which the prospective purchaser may choose. To the contrary, respondent has available only a very limited number of selections of the advertised merchandise.

5. All advertised merchandise is not readily available for sale in quantities sufficient to meet reasonably anticipated demands.

6. Respondent makes extra charges as applicable, such as service, finance and life insurance charges over and above the regular advertised price of their merchandise.

7. The advertised merchandise is not of a high quality or durability that exceeds reasonable requirements for normal everyday use for a reasonable period of time. In many instances, respondent sells advertised merchandise only under the express condition that such merchandise is not warranted for any particular use.

8. The advertised merchandise is not guaranteed by respondent and is not continuously serviced without charge for an unlimited period of time.

9. Respondent's advertised offer is not made for a limited period of time. The advertised merchandise is regularly advertised for the represented price or at another so-called reduced price over a period of time greater than the represented limitations.

10. Purchasers of respondent's merchandise advertised in conjunction with the phrase "Save Up To \$100 and More," or terms of similar comparable import or meaning, did not realize savings of the stated percentage amount from the actual prices at which the merchandise so advertised was sold or offered for sale in good faith for a reasonably substantial period of time in the recent regular course of respondent's business.

11. Merchandise advertised in conjunction with the words, "DANISH," "French," or "SPANISH," or terms of comparable import or

meaning, is not of a foreign origin. The advertised merchandise is produced by domestic manufacturers.

12. Merchandise advertised in conjunction with the use of the phrases, "walnut set," "soft Pecan," "Built of select woods," or terms of similar comparable import or meaning, was not of solid wood construction. To the contrary, said phrases merely described the color of a stain finish applied to the exposed surfaces of the merchandise.

13. Purchasers of respondent's merchandise are not granted instant credit or easy credit terms by respondent, without regard to their financial status or ability to pay.

14. Respondent does not give free merchandise and services to all purchasers of its advertised products in accordance with its promises or offers. In many cases, respondent marks up the price of advertised products to include the cost of such gifts or services and frequently advertised merchandise is only given to purchasers who specifically request them when purchasing advertised products.

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

PAR. 7. In the course and conduct of its business and for the purpose of inducing the sale of its household furniture, respondent through the use of pictorial representations in various publications and T.V. commercials, represented directly or by implication that:

1. All of the furniture illustrated in the pictorial representation is being offered for sale at the advertised price.

2. All of the furniture illustrated in the pictorial representation is available for sale in unlimited quantities as a group.

3. Furniture illustrated in the pictorial representation may be purchased at special or reduced prices, and purchasers are thereby afforded savings from respondent's regular selling price.

PAR. 8. In truth and in fact:

1. Respondent offers only part of the furniture in the pictorial representation at the advertised price and makes extra charges as applicable for remaining furniture items in the pictorial representation.

2. All of the furniture in the pictorial representation is not available for sale in unlimited quantities as a group. To the contrary, respondent has available only a very limited number of the advertised groups of furniture.

3. Furniture illustrated in the pictorial representation is not being offered for sale at special or reduced prices, and savings are not afforded to purchasers because of reductions from respondent's

prices, but the prices at which respondent's merchandise is sold vary from purchaser to purchaser.

Therefore, the representations set forth in Paragraph Seven hereinbefore, were, and are, false, misleading and deceptive.

PAR. 9. In the course and conduct of its business and for the purpose of inducing the sale of its furniture, respondent has maintained, and is now maintaining, in its salesrooms, floor models and displays of furniture being offered for sale, on the basis of which its customers select and order the furniture they purchase from respondent.

In this connection, respondent and its sales representatives have made, and are now making, numerous oral statements and representations to customers and prospective customers regarding the quality and durability of the furniture being offered for sale, the terms and conditions under which merchandise will be sold and delivered, and the services that will be provided by respondent.

Moreover, subsequent to making sales and deliveries, respondent and its employees have made, and are now making, numerous oral statements, representations and promises to their customers regarding the time and manner in which respondent will perform various adjustments, replacements and/or repairs.

PAR. 10. By and through the use of the floor models and furniture displays, together with the aforesaid oral statements, representations and promises made by respondent, its sales representatives and other employees, respondent has represented, and is now representing, directly or by implication, that:

1. Furniture sold by respondent will be delivered to the customer free from damages and defects.
2. Furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced within a reasonable time.
3. Furniture which is delivered with damages and/or defects will be repaired or replaced to the satisfaction of the purchasers.
4. Furniture which is delivered to purchasers with damages and/or defects will be repaired or replaced in accordance with promises made to the purchasers by respondent.

PAR. 11. In truth and in fact:

1. In many instances, furniture sold by respondent is delivered to purchasers with damages and/or defects.
2. In many instances, furniture which is delivered to purchasers with damages and/or defects is not repaired or replaced within a reasonable time.
3. In many instances, furniture which is delivered to purchasers with damages and/or defects is not repaired or replaced to the satisfaction of the purchasers.

4. In many instances, furniture which is delivered to purchasers with damages and/or defects is not repaired or replaced in accordance with promises made to the purchasers by respondent's employees.

Therefore, the aforesaid acts, practices, statements and representations regarding respondent's merchandise and service as set forth in Paragraphs Nine and Ten were, and are, false, misleading and deceptive.

PAR. 12. In the further course and conduct of its aforesaid business, and in connection with the representations set forth in Paragraphs, Four, Five, Seven, Nine and Ten above, respondent in offering its furniture for sale has failed to disclose material facts relating to the veneered construction or to the use of plastics with simulated wood appearance in the manufacture of its merchandise.

The aforesaid failure to disclose such material facts to purchasers has the tendency and capacity to mislead or deceive such persons with respect to the utility, construction, composition, durability, design and grade of household furniture sold by respondent.

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

PAR 13. In the further course and conduct of its business, and in furtherance of a sales program for inducing the purchase of its furniture and appliances, respondent's salesmen or representatives have in many instances engaged in the following additional unfair, false, misleading and deceptive acts and practices:

1. They have obtained purchasers' signature on blank retail installment contracts and other instruments by making false and misleading representations and deceptive statements, including false and deceptive representations with respect to the nature and effect thereof, to induce purchasers to sign such instruments.

2. Through the use of false, misleading and deceptive statements, representations and practices set forth in Paragraphs Four through Twelve above, respondent or its representatives have been able to induce their customers into signing a contract upon initial contact without giving the customers sufficient time to carefully consider the purchase and consequence thereof.

3. They have failed to disclose certain material facts to purchasers, including but not limited to the fact that, at respondent's option, conditional sales contracts, promissory notes or other instruments of indebtedness executed by such purchasers in connection with their credit purchase agreements may be discounted, negotiated or assigned to a finance company or other third party to whom the purchaser is thereafter indebted and against whom defenses may not be available.

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

PAR. 14. In the course and conduct of its aforesaid business, and at all times mentioned herein, respondent has been, and is, in substantial competition, in commerce, with corporations, firms and individuals in the sale of merchandise of the same general kind and nature as that sold by respondent.

PAR. 15. The use by respondent of the aforesaid false, misleading and deceptive statements, representations, and acts and practices, has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were, and are, true and complete, and into the purchase of substantial quantities of respondent's products by reason of said erroneous and mistaken belief.

PAR. 16. The aforesaid acts and practices of respondent, as herein alleged, were and are all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

COUNT II

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

PAR. 17. In the course and conduct of its business, as aforesaid, respondent is engaging, and for some time last past has engaged, in the collection of debts allegedly due and owing to Hiken Furniture Company pursuant to contracts or other agreements relating to the purchase of respondent's merchandise.

PAR. 18. In attempting to induce payments of purportedly due or delinquent accounts, respondent and its representatives or agents have sent through the United States mail dunning letters, notices and similar instruments which contain false and misleading statements and representations.

Typical, but not all inclusive of such statements and representations are the following:

Unless we receive a payment within 5 days, we will be forced to file suit immediately thereafter. You will be charged all court costs and collection fees.

This is the final notice.

PAR. 19. By and through the use of the above-quoted statements and

representations, and others of similar import and meaning but not specifically set forth herein, respondent has represented, directly or by implication, that:

1. Respondent has referred, is referring or will refer delinquent accounts to attorneys.
2. Failure to pay the amount claimed as owing within a stated period of time will result in immediate legal action.
3. Once judgment is entered against a debtor, it is impossible for the debtor to avoid payment thereof.
4. Respondent's organization has or maintains a separate legal department with qualified employees serving in this department.

PAR. 20. In truth and in fact:

1. Failure of an alleged debtor to remit money to respondent within time period(s) indicated does not in most instances result in the immediate reference of such matters to attorneys.
2. Failure of an alleged debtor to remit money to respondent within time period(s) indicated does not in most instances result in the immediate institution of legal action to effect payment.
3. It is possible to avoid payment of a judgment, once such is entered, in a matter involving a debt. For instance, resort to bankruptcy proceedings will often avoid the payment of at least part of a judgment. Also, the restrictions and exemptions placed on the collection of judgments make it possible in some instances to avoid the payment of at least part of a judgment.
4. Respondent does not have a separate legal department with qualified employees serving in this department.

Therefore, the statements and representations set forth in Paragraphs Nineteen and Twenty hereof were and are false, misleading and deceptive.

PAR. 21. The use by the respondent of the aforesaid false, misleading and deceptive statements, representations and practices has had, and now has, the tendency and capacity to mislead and deceive members of the public into the erroneous and mistaken belief that said statements and representations were, and are, true and to induce recipients thereof into the payment of alleged delinquent accounts by reason of the said erroneous and mistaken belief.

PAR. 22. The aforesaid acts and practices of respondent as herein alleged were, and are, all to the prejudice and injury of the public and respondent's competitors and constituted, and now constitute, unfair methods of competition in or affecting commerce, and unfair and deceptive acts and practices in or affecting commerce, in violation of Section 5 of the Federal Trade Commission Act.

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COUNT III

Alleging violations of the Truth in Lending Act and the implementing regulation promulgated thereunder and of the Federal Trade Commission Act, the allegations of Paragraphs One and Two hereof are incorporated by reference in Count III as if fully set forth verbatim.

PAR. 23. In the ordinary course and conduct of its business, as aforesaid, respondent regularly extends, and for some time last past has regularly extended consumer credit, as "consumer credit" is defined in Regulation Z, the implementing regulation of the Truth in Lending Act, duly promulgated by the Board of Governors of the Federal Reserve System.

PAR. 24. Subsequent to July 1, 1969, in the ordinary course of business as aforesaid, and in connection with its credit sales, as "credit sale" is defined in Regulation Z, respondent has caused and is causing customers to execute a binding "Retail Installment Contract" hereinafter referred to as the "Installment Contract." Respondent does not provide these customers with any other credit cost disclosures.

By and through the use of the Installment Contracts, respondent:

1. Induced certain customers to sign installment contracts in blank form. Respondent has subsequently filled in the blank spaces and frequently failed to give those customers a completed copy, thereby failing to furnish those customers any cost or credit disclosures prior to the consummation of the contract as required by Section 226.8(a) of Regulation Z in the manner and form prescribed by Sections 226.8(b) and (c) of Regulation Z.

2. Failed to meet the requirements of Section 226.8(b)(7) of Regulation Z as the contract provides for the right of payment of the full amount due and "under certain conditions" to obtain a partial refund of the finance charge, without further disclosing the "certain conditions" under which prepayment could be made and a partial refund of the finance charge be obtained.

3. Failed to accurately disclose the date on which the finance charge begins to accrue as prescribed by Section 226.8(b)(1) of Regulation Z.

4. Failed to accurately state the "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

5. Failed to disclose the total of payments as prescribed by Section 226.8(b)(3) of Regulation Z.

6. Failed to accurately disclose the number, amount and due dates, or periods of payments, scheduled to repay the indebtedness, as prescribed by Section 226.8(b)(3) of Regulation Z.

7. Failed to state the "unpaid balance of cash price," as prescribed by Section 226.8(c)(3) of Regulation Z.

8. Failed to disclose the amount financed, as required by Section 226.8(c)(7) of Regulation Z.

9. Failed to disclose the "deferred payment price," as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

10. Failed to include in the finance charge, charges or premiums for fire risk of loss insurance, written in connection with credit transactions when the customer was not given a clear, conspicuous, and specific written statement setting forth the cost of the insurance if obtained from or through respondent and stating that the customer may choose the person through which the insurance is to be obtained as prescribed by Section 226.4(a)(6) of Regulation Z.

11. Failed to include in the finance charge, charges or premiums for credit life, accident, health or loss of income insurance, written in connection with credit transactions when the customer has not given a specific dated and separately signed affirmative written indication of his desire for such coverage as prescribed by Section 226.4(a)(5)(ii) of Regulation Z.

PAR. 25. Pursuant to Section 103(q) of the Truth in Lending Act, respondent's aforesaid failures to comply with the provisions of Regulation Z constituted violations of that Act and, pursuant to Section 108 thereof, respondent has thereby violated the Federal Trade Commission Act.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Chicago Regional Office proposed to present to the Commission for its consideration, and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

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

The Commission having thereafter considered the matter and having

violated the said Act, and that complaint should issue stating its charges in that respect, and having thereupon accepted and executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings, and enters the following orders:

1. Respondent Hiken Furniture Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, with its office and principal place of business located at 218 West Main St., Belleville, Illinois.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER I

It Is ordered, That respondent Hiken Furniture Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device in connection with the purchasing, advertising, offering for sale, sale and distribution of furniture and appliances, or any other products, in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

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

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

3. Discouraging in any manner the purchase of any merchandise or services which are advertised or offered for sale as part of a scheme to sell other merchandise.

4. Failing to maintain and produce for inspection and copying for a period of three years adequate records to document for the entire period during which each advertisement was run and for a period of six weeks after the termination of its publication in press or broadcast media:

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

b. the volume of sales made of the advertised product or service at the advertised price;

c. a computation of the net profit from the sales of each advertised product or service at the advertised price, based upon respondent's normal method of computation.

5. Using the words "Sale," or "Save," "Extra Savings," or any other words of similar import or meaning not set forth specifically herein, unless the immediately preceding price at which bonafide sales have been made of the merchandise being offered for sale is disclosed or can be readily ascertained by disclosure of the stated dollar or percentage price and the price of said merchandise constitutes a recent reduction, in an amount not so insignificant as to be meaningless, from the immediately preceding price or unless a disclosure is made that such merchandise was offered for sale at the immediately preceding price in the recent regular course of respondent's business, and that no sales were made at that price or any other price in the recent past.

6. (a) Representing, directly or indirectly, orally or in writing, that by purchasing any of respondent's merchandise, customers are afforded savings amounting to the difference between respondent's stated price and respondent's former price unless the former price is respondent's immediately preceding price for the advertised merchandise and bona fide sales have been made by respondent at that price in the recent past or unless a disclosure is made that said merchandise was offered for sale at the former price for a reasonably substantial period of time in the recent regular course of respondent's business and that no sales were made at that price or at any other price in the recent past.

(b) Representing, directly or indirectly, orally or in writing that by purchasing any of the respondent's merchandise, customers are afforded savings between respondent's stated price and a compared price for said merchandise in respondent's trade area unless respondent's merchandise and the nature of the compared price are explicitly identified in advertising and at the point of sale through the use of shelf tags or similar means and such merchandise is generally available in principal retail outlets in the trade area at the compared price or some higher price.

(c) Representing, directly or indirectly, orally or in writing, that by purchasing any of respondent's merchandise, customers are afforded savings amounting to the difference between respondent's stated price and a compared value price for comparable merchandise unless the compared value price is explicitly identified in advertising and at the point of sale through the use of shelf tags or similar means and respondent has in good faith conducted a market survey or obtained a

similar representative sample of prices for comparable merchandise of like grade and quality in its trade area to establish that the principal retail outlets in the trade area regularly sell comparable merchandise of like grade and quality at the compared value price in the regular course of their business.

7. Failing to maintain and produce for inspection or copying, for a period of three years, adequate records (a) which disclose the facts upon which any savings claims, sale claims and other similar representations are set forth in Paragraphs Five and Six of this order are based, and (b) from which the validity of any savings claims, sale claims, and similar representations can be determined.

8. Representing, directly or indirectly, orally or in writing, that respondent has a "Huge Selection," "Carloads," or any given number of furniture suites unless respondent has the stated huge selection or number of furniture suites available for immediate sale and delivery; or misrepresenting in any manner the colors, style, kind or quantity of furniture in stock and available for sale or delivery.

9. Representing, directly or indirectly, orally or in writing, the immediate availability of any merchandise for sale when such merchandise is not in stock and available in quantities sufficient to meet reasonably anticipated demands for sale to the public at or below the advertised price for the period in which the prices are advertised to be effective.

10. Failing to make full disclosure either in its advertising or at the time of sale and prior to consummation of the sale that in addition to the price quoted in respondent's advertising, certain other charges, as applicable, are made, such as, delivery, set-up or assembly, service, and warranty charges.

11. Failing to disclose clearly and conspicuously within each advertisement for an advertised product each reservation, if any, as to suitability or durability of such advertised product for reasonable usage by the customers who may buy such product or service.

12. Representing, directly or by implication, that any of respondent's offers to sell merchandise are limited as to time or restricted or limited in any other manner, unless such represented limitations or restrictions are actually in force and in good faith adhered to.

13. Using the terms "Danish," "French," or "Spanish," or any other unqualified terms of similar import or meaning not set forth specifically herein, orally or in writing, to describe respondent's furniture when such furniture is of domestic origin, unless a clear and conspicuous disclosure is made in advertising and on the furniture that such furniture was manufactured in the United States by means of

such statements as "Made In U.S.A." or "manufactured by" followed by the name and address of the domestic manufacturer.

14. Representing, directly or indirectly, orally or in writing, that the respondent's merchandise is "soft pecan," "walnut," or using any other terms of comparable import or meaning not set forth specifically herein, to describe respondent's furniture, unless a clear and conspicuous disclosure is made in advertising and on furniture that such terms are merely descriptive of the color and/or grain design or other simulated finish that is applied to the exposed surfaces of such furniture.

15. Using any wood names or any names that suggest wood, orally or in writing, to describe any materials simulating wood in respondent's furniture, unless a clear and conspicuous disclosure is made in advertising and on the furniture that such wood names are merely descriptive of the color and/or grain design or other simulated finish that is applied to the exposed surfaces of such furniture.

16. Representing, directly or indirectly, orally or in writing, that purchasers of respondent's merchandise are granted easy or instant credit terms, by respondent; or misrepresenting in any manner, the amount, type, extent of any other facet of the credit terms respondent arranges or may arrange for its purchasers.

17. Using the word "free" or any other word or words of similar import or meaning in connection with the sale, offering for sale or distribution of respondent's merchandise or services in advertisements or other offers to the public, as descriptive of an article of merchandise or service:

(a) When all the conditions, obligations, or other prerequisites to the receipt and retention of the "free" article of merchandise or service offered are not clearly and conspicuously set forth at the outset so as to leave no reasonable probability that the terms of the offer might be misunderstood.

(b) When, with respect to any article of merchandise or service required to be purchased in order to obtain the "free" article or service, the offerer either (i) increases the ordinary and usual price of such merchandise or service or (ii) reduces the quality or (iii) reduces the quantity or size thereof.

18. Offering gift merchandise to persons complying with certain conditions unless, in every instance, such merchandise is given to the persons complying with such conditions.

19. Using pictorial representations of two or more items of furniture in conjunction with a stated price when all of the furniture in the pictorial representations is not being offered at the stated price,

prominence that all of the illustrated furniture is not being offered at the stated price and that an additional charge is made for certain items that are clearly identified in the illustrations.

20. Offering merchandise for sale by means of any form of pictorial advertisement when such merchandise is not in stock and available in quantities sufficient to meet reasonably anticipated demands for sale to the public at or below the advertised price for the period in which the prices are advertised.

21. Failing to make a clear and conspicuous disclosure on furniture, or on a tag or label prominently attached thereto, that veneers, plastics or other materials having the appearance of wood, leather, slate or marble have been used in the manufacture of such merchandise; or failing to make a clear and conspicuous disclosure of any material facts relating to the true composition of furniture where materials or products that simulate other materials or products are used in the manufacture of such furniture.

22. Failing to inform, orally, all customers at the time of sale and provide in writing on the fact of all order forms, sales contracts and invoices executed by customers with such conspicuousness and clarity as is likely to be read and understood, that, if furniture and/or appliances are delivered in a defective or damaged condition, the customer has the right to have such merchandise replaced or repaired with no additional cost to the customer by notifying respondent, in writing, within ten (10) days of the receipt of such damaged or defective merchandise and to cancel the contract and obtain a refund of all monies where respondent refuses or fails to make such replacement or repairs; *provided, however*, that the provisions of Paragraphs 22 and 23 of the order shall not apply to merchandise sold "as is," conspicuously designated as such on order forms, sales contracts and invoices executed by the customers who have knowledge of damage to, or defects in particular merchandise and have given written consent to purchasing same in its stated form.

23. Failing to replace or repair merchandise delivered in a defective or damaged condition with no additional cost to customers who have requested replacement or repair in writing within ten (10) days from the date of actual delivery of such merchandise, such replacement or repair to be fully, satisfactorily and promptly performed in accordance with Paragraph 24 of this Order I; *provided, however*, that in lieu of replacement and repair of defective or damaged merchandise, respondent may cancel the contract with immediate refund of all monies to customers who have requested such replacement or repair in writing. In cases where replacement or repairs have been made by respondent, the customer may cancel the contract with a refund of all

monies by notification to respondent in writing within ten (10) days from the date of actual delivery or redelivery of any replacement or repaired merchandise that is itself defective or damaged.

24. Failing on receipt of a written notice of defective or damaged merchandise to investigate such complaints forthwith and complete all repairs within three (3) weeks from the date of such notice or to make full replacements within forty (40) days of the receipt of such notice. In all other cases of actual delivery or redelivery or any replacement or repaired merchandise that is itself defective or damaged, respondent shall refund immediately all monies to customers who have requested contract cancellation in writing, as provided for in this order, or obtain the voluntary written consent of the customer for replacement or repair within one (1) week of the receipt of the customer's request for cancellation; shall complete all repairs pursuant to a written consent for repairs, within two (2) weeks from the date of such written consent and shall make full replacements, pursuant to a written consent for replacement, within thirty (30) days from the date of such written consent.

25. Failing to notify the customer, orally and in writing, and at least five (5) business days prior to the scheduled completion date, that respondent is unable to complete repairs or replacement within the time specified by this order and to cancel the contract with a full refund of all monies to the customer within one week, or in lieu thereof and at the option of the customer, to obtain the customer's voluntary written consent for an extension of the date set for completion, which shall be a date by which respondent actually expects to complete performance.

26. Failing to maintain and produce for inspection or copying, for a period of two (2) years, adequate records which disclose the facts pertaining to the receipt, handling and disposition of each and every written communication from a customer requesting contract cancellation, refund, replacement or repair.

27. Failing, if the respondent and a customer are unable to agree upon a settlement of any controversy involving the delivery or repair of any damaged or defective furniture, appliances, or other merchandise, or the failure to replace or repair such damaged or defective merchandise or to make cancellations with refunds with respect thereto, then, at the option of the customer, such customer shall have the right to submit the issue to an impartial arbitration procedure entailing no mandatory administrative cost or filing fee to the consumer, which shall be conducted in accordance with the arbitration

for arbitration adopted in Appendix "A" are to be considered as incorporated within the terms of this order.

28. Failing to comply with and abide by any award or decision rendered pursuant to the arbitration procedures of Paragraph 27.

29. Preventing arbitration pursuant to any provision of this order by reason of having obtained a default judgment against any customer in an action for money allegedly due the respondent or its assignees.

30. Failing to provide adequate notification to customers of their right to submit such controversy to arbitration or failing to incorporate the following statement on the face of all sales contracts with such conspicuousness and clarity as is likely to be read and understood by customers.

NOTICE

Any controversy arising out of or relating to this contract involving the delivery or repair of any damaged or defective furniture, appliances or other merchandise, or the failure to replace or repair such damaged or defective merchandise or to make cancellations with refunds with respect thereto shall be settled, at the option of the customer, by arbitration. Such arbitration shall be conducted in accordance with Arbitration Rules of the Arbitration Tribunal of the Better Business Bureau of Greater St. Louis, Inc., whose offices are located at 915 Olive Street, Fourth Floor, St. Louis, Missouri 63101, telephone (314)241-3100. Under Missouri and Illinois law, arbitration, if undertaken, is legally binding and final.

31. Failing to change the instructions, contained in the Notice set forth in Order I, Paragraph 30 as to how to secure arbitration if circumstances require.

32. Inducing or causing purchasers or prospective purchasers of respondent's products, installations or services to sign blank or partially filled in completion certificates or other legal instruments or documents; or misrepresenting, in any manner, the true nature or effect of such legal instruments or documents.

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

34. Failing to furnish the buyer with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, *e.g.*, Spanish, as that principally used in the oral sales presentation and which shows the date of the transaction and contains the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer or on the front page of the receipt if a contract

is not used and in bold face type of a minimum size of 10 points, a statement in substantially the following form:

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

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

NOTICE OF CANCELLATION

(enter date of transaction)
(date)

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

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

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

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

TO CANCEL THIS TRANSACTION, MAIL OR DELIVER A SIGNED AND DATED COPY OF THIS CANCELLATION NOTICE OR ANY OTHER WRITTEN NOTICE, OR SEND A TELEGRAM TO _____, AT (address of seller's place of business); NOT LATER THAN MIDNIGHT OF (Date).

I HEREBY CANCEL THIS TRANSACTION

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(Date)

(Buyer's Signature)

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

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

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

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

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

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

ORDER II

It is further ordered, That respondent Hiken Furniture Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or any other device, in connection with the collection of, or attempt to collect, accounts in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Representing, or causing to be represented by any means, directly or indirectly, that respondent has instructed, is instructing, or will instruct an attorney to file suit against an alleged debtor unless the alleged debt is immediately paid in full or a specified amount is

paid thereon unless the respondent has already instituted the aforesaid suit, or do so in fact, if the alleged debt is not immediately paid in full or the specified amount is not paid thereon.

2. Representing by any means, directly or indirectly, that:

(a) legal action has been taken against the debtor; or

(b) legal action is being taken against the debtor; or

(c) legal action will be taken against the debtor unless the respondent has already instituted said legal action, or does so in fact, if the alleged debt is not immediately paid in full or the specified amount is not paid thereon.

3. Informing a debtor of a creditor's right after judgment without disclosing at the same time that no judgment may be entered against the debtor unless the debtor has first been given notice and an opportunity to appear and defend himself in a court of law.

4. Representing, directly or indirectly, by any means to a debtor that it is impossible to escape a judgment.

5. Failing to give notification of a commencement of legal action by respondent against customer by mailing a summons and complaint to such customer's last known address, and failing to obtain from the post office a certificate of such mailing. Such notice shall be in addition to any other notification or service required by law, practice or custom. Such summons and complaint to be sent by first class mail by respondent or its attorney with instructions on the face of the envelope "Do not forward. Address Correction Requested". In the event that such mail is returned as undeliverable by the Post Office or if the residence address of the defendant is unknown, the summons is to be mailed to the customer, care of the employer or place of employment of the customer if known, in a sealed envelope not indicating on the outside thereof, directly or indirectly by the return address or otherwise, that the communication is from an attorney or concerns an alleged debt.

ORDER III

It is further ordered, That respondent Hiken Furniture Company, a corporation, its successors and assigns, and its officers, agents, representatives and employees, directly or through any corporation, subsidiary, division or other device, in connection with any extension of consumer credit, or any advertisement to aid, promote or assist directly or indirectly any extension of consumer credit, as "consumer credit" and "advertisement" are defined in Regulation Z (12 CFR 226) of the Truth in Lending Act (Pub. Law 90-321, 15 U.S.C. 1601, *et seq.*), do forthwith cease and desist from:

1. Failing to furnish to the customer before the transaction is

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consummated, a duplicate of the instrument or other statement containing the disclosures required by Section 226.8 of Regulation Z, as required by Section 226.8(a) of Regulation Z.

2. Failing to disclose the conditions entitling a customer to a partial refund of the finance charge as required by Section 226.8(b)(7) of Regulation Z.

3. Failing to accurately disclose the date on which the finance charge begins to accrue, as prescribed by Section 226.8(b)(1) of Regulation Z.

4. Failing to accurately state the "annual percentage rate," as prescribed by Section 226.8(b)(2) of Regulation Z.

5. Failing to disclose the "total of payments," as prescribed by Section 226.8(b)(3) of Regulation Z.

6. Failing to accurately disclose the number, amount, and due dates, or periods of payment, scheduled to repay the indebtedness, as prescribed by Section 226.8(b)(3) of Regulation Z.

7. Failing to state the "unpaid balance of cash price," as prescribed by Section 226.8(c)(3) of Regulation Z.

8. Failing to disclose the "amount financed," as prescribed by Section 226.8(c)(7) of Regulation Z.

9. Failing to disclose the "deferred payment price," as prescribed by Section 226.8(c)(8)(ii) of Regulation Z.

10. Failing to itemize and include in the finance charge for purposes of disclosure of the finance charge and computation of the annual percentage rate, any and all charges for risk of loss insurance unless the customer was given a clear, conspicuous and specific written indication of the cost of such insurance coverage from respondent and stating that the customer may choose the source through which the insurance is to be obtained as prescribed by Section 226.4(a) (6) of Regulation Z.

11. Failing to itemize and include in the finance charge, for purposes of disclosure of the finance charge and computation of the annual percentage rate, any and all charges or premiums for credit life, accident, or health insurance unless respondent has obtained a specific dated and separately signed affirmative written indication of the customer's desire for such insurance coverage as prescribed by Section 226.4(a) (5)(ii) of Regulation Z.

12. Failing, in any consumer credit transaction or advertisement, to make all disclosures determined in accordance with Sections 226.4 and 226.5 of Regulation Z, in the manner, form and amount required by Sections 226.6, 226.7, 226.8, 226.9 and 226.10 of Regulation Z.

It is further ordered, That respondent shall forthwith cease and

desist from representing, orally, directly or by implication that respondent offers a guarantee or warranty of any kind and from offering a warranty of any kind in writing that does not conform to all the requirements of the Magnuson-Moss Warranty — Federal Trade Commission Improvement Act of 1975, 15 USC 2301.

It is further ordered, That for a period of one year respondent post in a prominent place in each salesroom or other area wherein respondent sells furniture or other products and services a copy of this cease and desist order with a notice that any customer or prospective customer may receive a copy on demand.

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

It is further ordered, That respondent prominently display the following notice in two or more locations in that portion of respondent's business premises most frequented by prospective customers, and in each location where customers normally sign consumer credit documents or other binding instruments. Such notice shall be considered prominently displayed only if so positioned as to be easily observed and read by the intended individuals:

NOTICE TO CREDIT CUSTOMERS

IF THE DEALER IS FINANCING OR ARRANGING THE FINANCING OF YOUR PURCHASE, YOU ARE ENTITLED TO CONSUMER CREDIT COST DISCLOSURES AS REQUIRED BY THE FEDERAL TRUTH IN LENDING ACT. THESE MUST BE PROVIDED TO YOU IN WRITING BEFORE YOU ARE ASKED TO SIGN ANY DOCUMENT OR OTHER PAPERS WHICH WOULD BIND YOU TO SUCH A PURCHASE.

This notice required by order of the Federal Trade Commission.

It is further ordered, That no provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondent from complying with agreements, orders or directives of any kind obtained by any other agency or acts as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of the respondent complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

It is further ordered, That respondent deliver a copy of this order to cease and desist to all present and future personnel of respondent engaged in the consummation of any consumer credit transaction or in any aspect of preparation, creation or placing of advertising, and to all personnel of respondent responsible for the sale or offering of

all products covered by this order, and that respondent secure a signed statement acknowledging receipt of said order from each person.

It is further ordered, That respondent, for a period of one year from the effective date of this order, shall furnish each newspaper or other advertising medium which is utilized by the respondent to obtain leads for the sale of merchandise, or to advertise, promote, or sell merchandise, with a copy of the Commission's News Release setting forth the terms of this order.

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

It is further ordered, That in the event respondent merges with another corporation or transfers all or a substantial part of its business or assets to any other corporation or to any other person, said respondent shall require such successor or transferee to file promptly with the Commission a written agreement to be bound by the terms of this order; provided that if said respondent wishes to present to the Commission any reasons why said order should not apply in its present form to said successor or transferee, it shall submit to the Commission a written statement setting forth said reasons prior to the consummation of said successions or transfer.

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

APPENDIX "A"

CONSUMER ARBITRATION RULES

DEFINITIONS

A. *Arbitration* is the process by which two or more parties select and authorize an impartial party or panel to resolve their dispute.

B. *Consumer disputes* are any disagreements between respondent and his customer involving the delivery or repair of any damaged or defective furniture, appliances, or other merchandise, or the failure to replace or repair such damaged or defective merchandise or to make cancellations with refunds with respect thereto. If during the course of any proceeding conducted pursuant these Rules, it appears to the Arbitrator that the issues before him do not coincide with this definition, he is authorized to suspend the hearing permanently, narrow the issues to those which fall within this definition, or take whatever other action is deemed necessary.

C. *Administrator* refers to the Better Business Bureau of Greater St. Louis, Inc.

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D. *Parties* to arbitration are those persons necessary to resolve a dispute, usually the businessman and his customer.

E. *Arbitrator* is the individual or panel which makes the final decision or award

APPLICATION OF RULES

These Rules shall apply to consumer disputes submitted to the Administrator for settlement by arbitration. The Parties shall be deemed to have adopted these Rules whenever they have agreed in writing to arbitrate their dispute. These rules and any amendment thereof shall apply to the form obtaining at the time the arbitration is initiated.

INITIATING ARBITRATION

If it appears that efforts to resolve a dispute informally have been exhausted, the Bureau may suggest or the Parties may request that the dispute be arbitrated. The Administrator will then prepare an Arbitration Agreement, on which the issues in dispute are listed, and transmit an identical Agreement to both Parties. If the Parties agree with the listed issues and further agree to be bound by arbitration, they will sign the Agreement and return it to the Administrator within five (5) days after receipt. If either Party disagrees with the issues presented, he shall return a corrected version of the issues to the Administrator. The Administrator shall resolve any conflict of issues and, if necessary, send amended Arbitration Agreements for signature by the Parties. Failure to return a signed Arbitration Agreement will be considered as a rejection of arbitration. Upon receipt of signed Agreements from the Parties, the Administrator shall commence procedures to arbitrate a dispute pursuant to these Rules.

The Administrator may require the posting of a nominal performance bond by either of the Parties to assure their presence at the hearing. Such a bond, if posted, shall be returned to the Party when he presents himself at the hearing.

SELECTION OF ARBITRATOR

The Administrator shall maintain a pool of volunteers from which the Arbitrator shall be selected. This pool of volunteers should reflect membership of the total community. The following methods of selection Arbitrators may be used:

A. The Single Arbitrator

A single Arbitrator shall be used in all cases where the Arbitrator has been selected and agreed upon by the Parties from the established pool of Arbitrators. Upon receipt of written Agreements to binding arbitration by the Parties, the Administrator shall provide the Parties with an identical list of five Arbitrators chosen from the pool, together with brief biographies of each. Each Party shall have five (5) days after receipt of this list to cross off names of those deemed unacceptable to him and rank the remaining names in descending order of preference, placing #1 after name of first choice, etc. The Administrator shall select an Arbitrator from the top three choices of the Parties. If preferences of the Parties do not overlap, the Administrator may either send the Parties a new list of Arbitrators or set up a panel, described in Section B., below.

B. Three-Man Panel

Upon demand of either Party to a dispute involving amounts exceeding \$1,000.00 or when the Parties cannot agree upon a single Arbitrator, each Party selects from the pool

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from the pool a third Arbitrator who has not been previously rejected by either Party. The person so selected shall serve as chairman and convenor of the panel.

FACILITIES AND COSTS

Facilities for the holding of hearings and maintenance of records shall be provided by the Administrator. Cost of stenographic services, record of proceedings and individual witness fees shall be borne by the respondent. The Administrator will endeavor to provide a panel of expert witnesses and testing laboratories willing to donate services.

COMMUNICATION AND SERVING OF NOTICES

All correspondence should be sent by mail to the Administrator. There shall be no direct communication between the Parties and the Arbitrator regarding the dispute, except at the hearing and in the presence of the other Party, or with the other Party's written permission. All correspondence from the Parties to the Arbitrator and vice versa shall be sent through the Administrator. Any Party agreeing to arbitration pursuant to those Rules shall be deemed to have consented that any notices or other communication relevant to arbitration proceedings may be served by mail addressed to the Party or his attorney at his last known address. The Administrator shall notify the Parties of the date, time and place of the arbitration hearing and shall forward to the Parties a copy of the Award by registered mail, return receipt requested.

NOTICE OF APPOINTMENT

Notice of Appointment shall be mailed to the Arbitrator by the Administrator along with a copy of these Rules. The signed appointment form together with disclosures of any relationships to Parties shall be filed with the Administrator prior to the opening of the first hearing.

DISCLOSURE BY ARBITRATORS: FILLING VACANCIES

Any person selected to serve as an Arbitrator shall divulge, in his signed acceptance of appointment any financial, competitive, professional, family, or social relationship, however remote, with the Parties to the dispute or disputes he is assigned to arbitrate. All doubts should be resolved in favor of disclosure. Any such disclosures shall be transmitted to the Administrator who shall provide them to the Parties with a waiver/objection form. If a Party objects or if an Arbitrator is unable or unwilling to serve, the Administrator shall assist the Parties, pursuant to Section 5 of these Rules, in selecting or appointing a replacement.

REPRESENTATION BY COUNSEL

A Party may (but need not) be represented by counsel. A corporation may be represented by any officer or employee designated by the corporation. The Administrator and the opposing Party shall be furnished the name and address of any attorney for any Party at least five (5) days prior to the date of the hearing set before the Arbitrator.

HEARING DATES; NOTICES; WAIVER OF NOTICE

Upon acceptance of an Arbitrator, the Administrator shall, within three days, establish a date, time and place for the oral hearing, with due regard for the convenience of the Parties and with the agreement of the Arbitrator. Once determined, this information shall be communicated to the Parties at least seven days in advance of the

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date set for the hearing, utilizing the Notice of Hearing Form. Parties objecting to the date, time or location designated should promptly notify orally and in writing the Administrator or otherwise be deemed to have waived such objections. Appearance of the Party at hearings shall automatically constitute waiver of notice.

WAIVER OF ORAL HEARINGS

The Parties may agree in writing to waive oral hearings and to permit arbitration based on submission of written arguments and documentary evidence. Where oral hearings are waived, the Arbitrator shall determine the deadlines for submitting evidence. In such instances, the date for the Award shall be fixed at 10 days after receipt of all evidence.

INSPECTION BY ARBITRATOR

At the initiation of arbitration, either Party may request an inspection or a hearing at a site appropriate for inspection. The Arbitrator has the absolute discretion to inspect the product or premises involved. If the inspection is to be conducted separately from the hearing, the Administrator shall provide notice to the Parties and invite their presence. The Administrator shall also arrange for the presence of a technical expert at the inspection at the discretion of the Arbitrator. If possible, inspections should be conducted prior to the hearing.

ATTENDANCE AT PROCEEDINGS

Unless otherwise agreed by the Parties in writing only those persons party to or having a direct interest in the dispute are entitled to attend hearings. The Arbitrator shall have the discretion to require any witness to absent himself from the hearing room when the Arbitrator deems his presence to be unnecessary or undesirable.

ABSENCE OF A PARTY

Arbitration hearings may proceed in the absence of any Party who, after due notice of the hearing, fails to appear, but such absence shall not be the basis for a default judgment. Rather, the attending Party shall submit evidence and the Arbitrator may render an Award based thereon.

TRANSCRIPT OF HEARING

The Administrator shall provide stenographic services or otherwise record the proceedings upon the request of any Party, provided, however, that the cost of such services be borne by the requesting Party and that all Parties be provided access to such record. In all cases, the Arbitrator shall see that a Record of Hearing Form is completed at the close of each hearing.

INTERPRETERS

The Administrator shall provide without cost an Interpreter when any Party expresses the need for such and when the Arbitrator deems it necessary.

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ORDER OF PROCEEDINGS AT THE HEARING

A. After the oaths are administered, the Customer shall summarize his position of the dispute, stating briefly what relief he is seeking. The Businessman shall then present a summary of his position and relief sought.

B. The Customer shall next present his claim, evidence and witnesses, if any, and submit to questions from the Arbitrator. The Businessman shall then do likewise. Parties may cross-examine.

C. Following the presentation of evidence, each Party shall briefly summarize his position, relating his claims to the proofs and testimony presented.

D. The order of proceedings may vary at the discretion of the Arbitrator in order to assure that full opportunity is given each Party to present all evidence necessary for a decision.

E. The Arbitrator shall declare the hearings closed if no Party has further evidence to offer or witnesses to present.

ADMISSION OF EVIDENCE

The Arbitrator shall judge the relevancy of the evidence and may request additional evidence from either Party. He may refuse to admit evidence deemed irrelevant, stating reasons therefor.

ADDITIONAL PARTIES

In resolving any consumer dispute where someone other than the Businessman and Customer are necessary to resolve all issues, and where such person has agreed to the issues presented and to be bound by arbitration, the Arbitrator shall name him a Party to the dispute and have complete discretion to include such Party in the proceedings.

ADJOURNMENTS

The Arbitrator may adjourn the proceedings upon the request of a Party or his own motion.

METHOD OF DECISION

All matters of concern submitted to an arbitration panel shall be settled by a majority vote, including procedural questions and issues relating to the Award. The decision of the majority shall be deemed to be the decision of all members of the panel, and no dissenting opinion shall be issued.

REOPENING OF HEARING

At the discretion of the Arbitrator, a hearing may be reopened upon his motion or the motion of a Party. If a hearing is reopened, the time within which an Award must be made is measured from the closing of the last hearing. No hearing shall be reopened after an Award has been made except as provided by state law.

CONSERVATION OF PROPERTY

The Arbitrator may issue such orders as necessary to safeguard property which is the subject matter of arbitration or the position of the Parties.

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SUBPOENA POWERS; DEPOSITIONS

The Arbitrator in Missouri and Illinois may compel the attendance of witnesses and the production of relevant documents according to procedures established by state law. The Arbitrator may authorize the taking of depositions of witnesses who are unable to attend the hearing.

AFFIDAVITS

Written affidavits if properly sworn to and notarized will be admissible in lieu of oral testimony, at the discretion of the Arbitrator, and if not objected to by the other Party.

WAIVER OF RULES

Any Party who proceeds after knowledge that a provision of these Rules has not been complied with and who fails to object thereto in writing prior to the time within which the Award is to be made shall be deemed to have waived his right to object.

EXTENSION OF TIME

The Parties may modify any period of time specified in these Rules by mutual agreement and the approval of the Arbitrator. The Arbitrator may extend any time period in these Rules except the period established for making an Award. The Administrator shall notify the Parties of any time extension.

THE AWARD

A. Time

The Arbitrator shall render a signed Award notarized if required by law, no later than ten days from the date on which the final hearing is closed. If additional materials are to be submitted beyond the final hearing date, the time for an Award shall be ten days from the receipt of such materials. If oral hearing is waived and the Arbitrator requires the submission of necessary written documents, the time for an Award shall be ten days from the receipt of such documents.

B. Scope

The Arbitrator may grant any relief or remedy within the scope of the Arbitration Agreement deemed just and equitable and allowable under state law.

C. Modification of Award

If there is a mistake of fact or miscalculation of figure on the face of the Award, the Administrator shall bring this to the attention of the Arbitrator, at whose discretion the appropriate modification will be effected. The Administrator shall transmit any such modifications to the Parties immediately upon receipt and posting.

D. Settlement

If the Parties settle the dispute prior to the rendering of the Award, the Administrator, upon written notice and verification of such settlement, shall terminate the proceedings and so notify the Arbitrator. Upon request of the Parties, the Arbitrator may, at his

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E. Form and Filing

The Award shall be recorded on the Award Form and transmitted to the Administrator. The Administrator shall forward copies of the Award to the Parties and assist with filing the Award in the proper court where such is required under state law. Public disclosure of any Award may not be made unless all Parties agree in writing.

INTERPRETATION OF RULES

The Arbitrator shall interpret these Rules insofar as they relate to his powers and duties. Questions beyond the knowledge or expertise of the Arbitrator shall be referred by the Administrator to the Director, Consumer Arbitration, Council of Better Business Bureaus, Inc.

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IN THE MATTER OF

KROGER COMPANY

Docket 9102. Interlocutory Order, June 14, 1978

Order denying respondent's application for review of ALJ's orders of October 18 and November 15, 1977.

ORDER DENYING APPLICATION FOR INTERLOCUTORY REVIEW

Respondent the Kroger Company has applied for review, under Rule Section 3.23(b), of the administrative law judge's orders of October 18 and November 15, 1977, which resulted in the striking of Kroger's Second Affirmative Defense from its Answer and denial of leave to amend that defense. Authorization to apply for review was granted by the administrative law judge's order of January 9, 1978.¹

The defense at issue is the version of Kroger's Second Affirmative Defense set forth in its Motion for Leave to Amend Answer:

Second Affirmative Defense

The Complaint is an arbitrary and capricious exercise of the Commission's enforcement discretion and an abuse of that discretion. Respondent's Price Patrol advertising constituted responsible and good faith comparative price advertising. That advertising was based upon surveys of Respondent's and its competitors' prices. This followed the procedure directed by the Commission for supporting comparative price advertising. Other advertisers, including other retail food outlets, have made and are making more sweeping pricing claims with a less adequate or no basis therefor. The Commission is aware of the advertising of Respondent's competitors, having complained in public documents of the widespread use by retail food outlets of claims such as "lowest prices" and "discount prices." In these circumstances, the Commission's decision to proceed solely against Respondent, and not to proceed against other retail food outlets, will unlawfully preclude Respondent from forms of price advertising permitted to others and will place Respondent at a substantial disadvantage against its competitors. Furthermore, to proceed solely against Respondent violates the Commission's policy which requires that it take corrective action on an industry-wide basis where it perceives that several members of an industry are engaged in the same type of practice. Based upon the foregoing, the Complaint also deprives Respondent of equal protection of the laws in that the Commission is engaging in intentional and purposeful discrimination against Respondent in its enforcement of the Federal Trade Commission Act.

Commission review of interlocutory orders, including those applica-

¹ This is a vastly simplified history of the pleadings and rulings relating to the substantive issue of the striking of Kroger's Second Affirmative Defense, but it seems adequate to the task at hand. Had complaint counsel raised the question whether application for review was timely filed under Rule Section 3.23 (b), it would have been necessary to determine with more precision from which of the administrative law judge's several orders, including his ruling on the motion for reconsideration, appeal was sought. Under the circumstances, however, the Commission's decision to proceed solely against Respondent, and not to proceed against other retail food outlets, will unlawfully preclude Respondent from forms of price advertising permitted to others and will place Respondent at a substantial disadvantage against its competitors.