

Modifying Order

IN THE MATTER OF

JAY NORRIS CORP., ET AL.

MODIFYING ORDER IN REGARD TO ALLEGED VIOLATION OF THE
FEDERAL TRADE COMMISSION ACT

Docket 9054. Decision, May 2, 1978 — Modifying Order, Sept. 10, 1979

This order conforms an order issued on May 2, 1978, 91 F.T.C. 751, 43 FR 33900, to court-approved modifications by revising Part I of the original order to reflect that the term "full purchase price," as used in Paragraph 2, excludes postage incurred in placing an order or requesting a refund; deleting Paragraph 6; and by changing the notification period for corporate changes in Paragraph 2 of Part III of the order from the 30 days originally provided to five days.

ORDER CONFORMING PREVIOUS FINAL ORDER TO COURT
APPROVED MODIFICATIONS

After the Commission issued a cease and desist order in this matter on May 2, 1978, the respondents named in the order filed a petition for review of the order in the United States Court of Appeals for the Second Circuit. By motion dated February 21, 1979, the parties jointly requested the Court to modify Part I, Paragraph 2 and Part III, Paragraph 2 of the Commission's order and affirm the Commission's order as so modified (with the exception of Part I, Paragraph 6 of the order, which respondents continued to contest in the court proceeding). By consenting to the modified order the respondents agreed to severance of Part I, Paragraph 6 for purposes of finality so that the balance of the order would become immediately final and enforceable upon approval by the Court of the stipulated modifications. The "agreement" submitted to the Court with the joint motion also provided that "[u]pon entry of the Court's Order affirming the stipulation the Commission will enter a new Administrative Order in conformity with said Order."

On May 1, 1979, the Court of Appeals, *inter alia*, approved the stipulated modifications.¹ Accordingly, the Commission hereby enters the following order incorporating the modifications agreed to by the parties and approved by the Court.

¹ The Court also rejected respondents' challenges to Part I, Paragraph 6, of the Commission's order, although it ordered changes in the wording of the language for purposes of clarification. That provision is not final as respondents have received from Mr. Justice Marshall of the United States Supreme Court an extension of time until September 14, 1979, for the filing of a petition for writ of certiorari. Part I, Paragraph 6 will be the subject of a separate administrative order if and when it becomes final in accordance with 15 U.S.C. 45(g).

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ORDER

I

It is ordered, That Jay Norris Corp., a corporation, its successors and assigns, and Joel Jacobs and Mortimer Williams, individually and as officers of said corporation, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, trade style, or other device, in connection with the advertising, offering for sale, sale and distribution of general mail-order merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to refund the amount required by Paragraph 2, in connection with the return of merchandise purchased from respondents, within the time specified in respondents' advertisements. If no time is specified, such refund must be made within the time specified in Paragraph 5(E)(4) of this part.

2. Failing to refund the full purchase price of merchandise including postage, insurance, handling, shipping, or any other fee or charge paid by the purchaser any time a refund is made to such purchaser, unless respondents clearly state in their advertisement the exact nature of the refund including any items of the purchaser's expense that will not be refunded; *provided*, that the term full purchase price as used herein shall exclude postage incurred in ordering an item from respondents or in requesting a refund thereof.

3. (A) Soliciting any order for the sale of merchandise to be ordered by the buyer through the mail unless, at the time of the solicitation, respondents have a reasonable basis to expect that they will be able to ship any ordered merchandise to the buyer: (1) within the time clearly and conspicuously stated in any such solicitation, or (2) if no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer; and

(B) Providing any buyer with any revised shipping date, as provided in Paragraph 4 of this part unless, at the time any such revised shipping date is provided, respondents have a reasonable basis for making such representation regarding a definite revised shipping date; or

(C) Informing any buyer that they are unable to make any representation regarding the length of any delay unless (1) respondents have a reasonable basis for so informing the buyer and (2) respondents inform the buyer of the reason or reasons for the delay.

For purposes of this order, the failure of respondents to have records or other documentary proof establishing their use of systems

and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time set forth in this order will create a rebuttable presumption that the respondents lacked a reasonable basis for any expectation of shipment within said applicable time.

4. (A) Where respondents are unable to ship merchandise within the applicable time set forth in Paragraph 3(A) above, failing to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel his order and receive a prompt refund. Said offer shall be made within a reasonable time after respondents first become aware of their inability to ship within the applicable time set forth in Paragraph 3(A), but in no event later than said applicable time.

(1) Any offer to the buyer of such an option shall fully inform the buyer regarding his right to cancel the order and to obtain a prompt refund and shall provide a definite revised shipping date, but where respondents lack a reasonable basis for providing a definite revised shipping date the notice shall inform the buyer that respondents are unable to make any representation regarding the length of the delay.

(2) Where respondents have provided a definite revised shipping date which is thirty (30) days or less later than the applicable time set forth in Paragraph 3(A), the offer of said option shall expressly inform the buyer that, unless respondents receive, prior to shipment and prior to expiration of the definite revised shipping date, a response from the buyer rejecting the delay and cancelling the order, the buyer will be deemed to have consented to a delayed shipment on or before the definite revised shipping date.

(3) Where the respondents have provided a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in Paragraph 3(A), or where the respondents are unable to provide a definite revised shipping date and therefore inform the buyer that they are unable to make any representation regarding the length of the delay, the offer of said option shall also expressly inform the buyer that his order will automatically be deemed to have been cancelled unless (a) respondents have shipped the merchandise within thirty (30) days of the applicable time set forth in Paragraph 3(A) above, and have received no cancellation prior to such shipment, or (b) respondents have received from the buyer within thirty (30) days of said applicable time, a response specifically consenting to said shipping delay. Where the respondents inform the buyer that they are unable to make any representation regarding the length of the delay, the

buyer shall be expressly informed that, should he consent to an indefinite delay, he will have a continuing right to cancel his order at any time after the applicable time set forth in Paragraph 3(A) by so notifying respondents prior to actual shipment.

(4) Nothing in this paragraph shall prohibit respondents when they furnish a definite revised shipping date to Paragraph 4(A)(1) above, from requesting, simultaneously with or at any time subsequent to the offer of an option pursuant to Paragraph 4(A), the buyer's express consent to a further unanticipated delay beyond the definite revised shipping date. *Provided, however,* that where respondents solicit consent to an unanticipated indefinite delay the solicitation shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the definite revised shipping date by so notifying respondents prior to actual shipment.

(B) Where respondents are unable to ship merchandise on or before the definite revised shipping date provided under Paragraph 4(A)(1), and consented to by the buyer pursuant to Paragraphs 4(A)(2) and 4(A)(3), failing to offer to the buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to a further delay or to cancel the order and to receive a prompt refund. Said offer shall be made within a reasonable time after respondents first become aware of their inability to ship before the said definite revised date, but in no event later than the expiration of the definite revised shipping date. *Provided, however,* that where respondents previously have obtained the buyer's express consent to an unanticipated delay until a specific date beyond the definite shipping date, pursuant to Paragraph 4(A)(4) or to a further delay until a specific date beyond the definite revised shipping date pursuant to Paragraph 4(B), that date to which the buyer has expressly consented shall supersede the definite revised shipping date for purposes of Paragraph 4(B).

(1) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where respondents lack a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that respondents are unable to make any representation regarding the length of the further delay.

(2) The offer of a renewed option shall expressly inform the buyer that, unless respondents receive, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer specifical-

ly consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if respondents are in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date. *Provided, however*, that where respondents offer the buyer the option to consent to an indefinite delay the offer shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the old definite revised shipping date or any date superseding the old definite revised shipping date.

(3) Paragraph 4(B) shall not apply to any situation where respondents, pursuant to the provisions of Paragraph 4(A)(4), have previously obtained consent from the buyer to an indefinite extension beyond the first revised shipping date.

(C) Whenever a buyer has the right to exercise any option under this order or to cancel an order by so notifying respondents prior to shipment, failing to furnish the buyer with adequate means, at respondents' expense, to exercise such option or to notify respondents regarding cancellation. For the purposes of this order, the failure of respondents:

(1) To provide any offer, notice or action required by this order in writing and by first class mail will create a rebuttable presumption that the respondents failed to offer a clear and conspicuous offer, notice or option;

(2) To provide the buyer with the means in writing (by business reply mail or with postage prepaid by respondents) to exercise any option or to notify respondents regarding a decision to cancel, will create a rebuttable presumption that the respondents did not provide the buyer with adequate means pursuant to this Paragraph 4(C).

Nothing in Paragraph 4 of this part shall prevent respondents where they are unable to make shipment within the time set forth in Paragraph 3(A) or within a delay period consented to by the buyer, from deciding to consider the order cancelled and providing the buyer with notice of said decision within a reasonable time after they become aware of said inability to ship, together with a prompt refund.

5. Failing to deem an order cancelled and to make a prompt refund to the buyer whenever:

(A) Respondents receive, prior to the time of shipment, notification from the buyer cancelling the order pursuant to any option, renewed option or continuing option under this order;

(B) Respondents have pursuant to Paragraph 4(A)(3), provided the buyer with a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in Paragraph 3(A) or have notified the buyer that respondents are unable to make any representation regarding the length of the delay and respondents (1) have not shipped the merchandise within thirty (30) days of the applicable time set forth in Paragraph 3(A), and (2) have not received the buyer's express consent to said shipping delay within said thirty (30) days;

(C) Respondents are unable to ship within the applicable time set forth in Paragraph 4(B) and have not received, within the said applicable time, the buyer's consent to any further delay;

(D) Respondents have notified the buyer of their inability to make shipment and have indicated their decision not to ship the merchandise; or

(E) Respondents fail to offer the option prescribed in Paragraph 4(A) and have not shipped the merchandise within the applicable time set forth in Paragraph 3(A).

For purposes of this Part:

(1) "Shipment" shall mean the act by which the merchandise is physically placed in the possession of the carrier.

(2) "Receipt of a properly completed order" shall mean the time at which respondents receive an order from the buyer containing all the information requested by respondents and accompanied, where required, by the proper amount of money in the form of cash, check or money order. *Provided, however*, that where respondents receive notice that the check or money order tendered by the buyer has been dishonored or that the buyer does not qualify for a credit sale, "receipt of a properly completed order" shall mean the time at which (a) respondents receive notice that a check or money order for the proper amount tendered by the buyer has been honored, (b) the buyer tenders cash in the proper amount or (c) the seller receives notice that the buyer qualifies for a credit sale.

(3) "Refund" shall mean:

(a) Where the buyer tendered full payment for the unshipped merchandise in the form of cash, check or money order, a return of the full amount tendered in the form of cash, check, or money order;

(b) Where there is a credit sale:

(i) and the seller is a creditor, a copy of a credit memorandum or the like or an account statement reflecting the removal or absence of any remaining charge incurred as a result of the sale from the buyer's account;

(ii) and a third party is the creditor, a copy of an appropriate credit

memorandum or the like to the third party creditor which will remove the charge from the buyer's account or a statement from the seller acknowledging the cancellation of the order and representation that he has not taken any action regarding the order which will result in a charge to the buyer's account with the third party;

(iii) and the buyer tendered partial payment for the unshipped merchandise in the form of cash, check or money order, a return of the amount tendered in the form of cash, check or money order.

(4) "Prompt refund" shall mean:

(a) Where a refund is made pursuant to definition (3)(a) or (3)(b)(iii) a refund sent to the buyer by first class mail within seven (7) working days of the date on which the buyer's right to a refund vests under the provisions of this order.

(5) The "time of solicitation" of an order shall mean that time when respondents have:

(a) Mailed or otherwise disseminated solicitation to a prospective purchaser;

(b) Made arrangements for an advertisement containing the solicitation to appear in a newspaper, magazine or the like or on radio or television which cannot be changed or cancelled without incurring substantial expense; or

(c) Made arrangements for the printing of a catalog, brochure or the like which cannot be changed without incurring substantial expense, in which the solicitation in question forms an insubstantial part.

6. [Severed from this order for purposes of finality.]

7. Misrepresenting that the nondelivery of merchandise ordered and paid for by a customer is caused by loss of the merchandise by the United States Postal Service.

8. Misrepresenting, directly or indirectly, the time or manner in which respondents' flame gun, or any other product used for the removal of snow or ice, will perform in the removal of snow or ice.

9. Misrepresenting, directly or indirectly, the time in which or the manner by which respondents' roach powder, or any other pesticide product, will kill or eliminate roaches.

10. Making any representation as to the safety of respondents' roach powder or other pesticide product without failing to clearly and conspicuously include the following statement in all advertisements and other promotional material for said products: "To use this product safely, you must follow the instructions on the label."

11. Misrepresenting, directly or indirectly, that respondents' TV antenna or any TV antenna will bring in sharp and clear reception and is superior to any other antenna.

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12. Making any representation as to the life expectancy of flashlights or other battery operated product without failing to disclose, clearly and conspicuously in all advertisements and other promotional material for such products (a) the expected "on" life of the product; and (b) any limitations on the warranty of such product.

13. Representing, directly or indirectly, that the Lincoln-Kennedy penny was minted by the United States Treasury Department.

14. Representing, directly or indirectly, that the Lincoln-Kennedy penny is a coin of historical and numismatic significance which is likely to increase in value.

15. Representing, directly or indirectly, in connection with the sale of any product that another product is given "free" or as a gift without cost or charge in connection with:

a. any offer which runs for an indefinite term or continuously for a period in excess of one (1) year; or

b. any offer not covered by (a) above excluding introductory offers, unless as to such limited offer:

(1) a regular bona fide retail price is established for the product without the "free" product;

(2) a regular bona fide retail price is established for the "free" product, or in the absence of such price a determination is made of the cost to respondents of such other product; and

(3) the price of the product is reduced at least as much as the price or cost of the "free" product.

II

It is further ordered. That Jay Norris Corp. and Pan Am Car Distributors Corp., corporations, their successors and assigns, and Joel Jacobs, Mortimer Williams and Kenneth Mann, individually and as officers of said corporations, and respondents' officers, agents; representatives and employees directly or through any corporation, subsidiary, division, trade style, or other device, in connection with the advertising, offering for sale, sale and distribution of used motor vehicles by mail-order in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting, directly or by implication, the ease or profit with which purchasers can resell respondents' motor vehicles;

2. Misrepresenting the mechanical and physical condition of said motor vehicles;

3. Misrepresenting that said motor vehicles are in safe mechanical and operating condition;

4. Misrepresenting the extent to which said motor vehicles have been inspected and repaired in preparation for sale and delivery to customers;

5. Misrepresenting that said motor vehicles are in sound condition and repair and will render normal, adequate and satisfactory service; and

6. Representing the safety or performance of said motor vehicles unless such claims are fully and completely substantiated by a reasonable basis which shall consist of competent and objective material available in written form.

III

It is further ordered, That:

1. Respondents shall maintain records of all consumer complaints for a period of three (3) years after such complaint is received, including but not limited to the following information:

- a. Name and address of the consumer;
- b. Date of receipt of the complaint;
- c. Transaction about which complaint is received;
- d. Nature of the complaint; and
- e. Date and disposition of the complaint.

2. Respondents shall notify the Commission within five (5) days of changes 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 changes in the corporation which may affect compliance obligations arising out of the order.

3. The individual respondents named herein, shall promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

4. Respondents shall deliver a copy of this order to cease and desist to all personnel or agents of respondents responsible for the preparation, creation, production or publication of the advertising of all products covered by this order.

5. No provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind

obtained by any other agency or act 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 respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

6. Respondents herein shall, within sixty (60) days after service of this order, and annually for five (5) years thereafter, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order. The expiration of the obligation to file such reports shall not affect any other obligations arising under this order.

IV

It is further ordered, That the allegations of the complaint are dismissed as to FEDERATED NATIONWIDE WHOLESALERS SERVICE, GARYDEAN CORP., t/a Nationwide Wholesalers Service, and P-N PUBLISHING COMPANY, INC.

IN THE MATTER OF
BENEFICIAL CORPORATION, ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket 8922. Complaint, Apr. 10, 1973 — Decision, Sept. 12, 1979*

This consent order requires, among other things, that two sellers of personal income tax preparation services, located respectively in Wilmington, Del. and Morristown, N.J., cease, in connection with the preparation of income tax preparation services or the extension of credit, from using the terms "Instant Tax Refund" or "Immediate Tax Refund;" and misrepresenting the terms and conditions of guarantees; and the competence and ability of their tax preparing staff. The order further prohibits respondents from misusing confidential information obtained from their customers.

Appearances

For the Commission: *David C. Fix, Robert D. Friedman and R. Galler.*

For the respondent: *Edgar T. Higgins, Morristown, N.J., Timothy J. Bloomfield and George W. Wise, Hogan & Hartson, Washington, D.C. and E. Norman Veasey, Richards, Layton & Finger, Wilmington, Del.*

DECISION AND ORDER

The Commission having heretofore issued its complaint charging the respondents named in the caption hereof with violation of Section 5 of the Federal Trade Commission Act, as amended, and the respondents having been served with a copy of that complaint, together with a notice of contemplated relief; and

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

The Secretary of the Commission having thereafter withdrawn this matter from adjudication in accordance with Section 3.25(c) of its Rules; and

The Commission having considered the matter and having thereupon accepted the executed consent agreement and placed such

*Complaint previously published at 86 F.T.C. 119.